

S290840

**IN THE
SUPREME COURT OF CALIFORNIA**

BRING BACK THE KERN et al.,
Plaintiffs and Respondents,

v.

CITY OF BAKERSFIELD,
Defendant and Respondent.

NORTH KERN WATER STORAGE DISTRICT et al.,
Real Parties in Interest and Appellants.

[And five other cases.]*

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT • CASE NO. F087487 (LEAD)
CONSOLIDATED WITH F087503/F087549/F087558/F087560/F08770
KERN COUNTY SUPERIOR COURT • GREGORY PULSKAMP, JUDGE
CASE NO. BCV-22-103220

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ANSWER BRIEF ON THE MERITS

INTRODUCTION

Water is a scarce and precious resource in California with many competing uses, including domestic, agricultural, municipal, environmental, and industrial. These demands must be balanced under the state Constitution's dictate that all water uses be both "beneficial" and "reasonable." (Cal. Const., [art. X, § 2](#) (1928 amendment).) To meet this constitutional duty, the Legislature and courts have developed a rigorous framework for considering the facts of each stream system and the competing uses for its water. Plaintiffs seek to scrap this framework for a "strict liability" rule that would categorically elevate fish maintenance above every other water use statewide. This Court should not embrace this fundamental rewrite of California water law.

This case comes to the Court after the Court of Appeal reversed a preliminary injunction against defendant City of Bakersfield. Based on Fish and Game Code [section 5937](#),¹ the injunction required the City to provide an *unspecified* amount of water from the Kern River to maintain *unidentified* fish without *any* consideration of impacts to other water uses. The trial court issued that injunction after concluding, at plaintiffs' urging, it had "no jurisdiction" to decide whether the requested injunction was constitutionally "reasonable." The Court of Appeal held,

¹ Further statutory references are to the Fish and Game Code unless otherwise specified.

without prejudging the merits of any potential injunction, that the trial court *can* conduct judicial review and remanded for it to do so in the first instance. This Court should affirm.

In holding that court orders must meet the Constitution’s reasonableness requirement, the Court of Appeal followed this Court’s extensive precedent on the 1928 amendment. Abandoning their extreme position from the trial court, plaintiffs now concede *some* judicial review over proposed water uses is required.

No longer disputing *that* courts must engage in reasonableness review, plaintiffs pivot to *how*—arguing about who bears the burden on the reasonableness question and how much, if any, deference is due to the Legislature. But the Court of Appeal never reached those questions—indeed, it couldn’t have, since the trial court conducted *no review*. This Court should either dismiss review as improvidently granted because plaintiffs attack a phantom opinion or affirm the Court of Appeal’s narrow decision on the merits.

But if this Court decides to reach beyond the issues the Court of Appeal determined, it should hold that plaintiffs cannot establish the likelihood of success on the merits that’s required for a preliminary injunction.

First, while plaintiffs insist that section 5937 was a legislative determination of reasonableness, the text and legislative history confirm it is not. Indeed, section 5937 mostly predated the 1928 constitutional amendment.

Second, plaintiffs contend section 5937 imposes a mandatory duty on all dam owners. It does not. It’s simply one

part of a broader statutory framework that vests state agencies with the authority to order dam owners to take one of three fish-maintenance actions, where necessary. The agencies have ordered nothing for the Kern River. Thus, there's no present duty for plaintiffs to enforce by writ.

Third, section 5937 as misread by plaintiffs would be facially unconstitutional. This Court has repeatedly held that constitutional reasonableness under the 1928 amendment requires a fact-specific analysis of a stream system. But plaintiffs' interpretation of section 5937 would have the Legislature prescribing a rule of reasonableness statewide, without regard for the facts of any stream system. This Court has rejected such categorical rules as violating the 1928 amendment. Given the mismatch between plaintiffs' reading of section 5937 and the express policy of the 1928 amendment, no deference to the Legislature would be appropriate here. What's more, the 1928 amendment applies to all water uses, meaning the reasonableness of a requested injunction is an element of plaintiffs' case that they bear the burden of proving.

Finally, no matter how this Court rules on the issues plaintiffs present, it cannot reinstate the injunction. The Court of Appeal reversed the injunction and implementation order on other grounds that plaintiffs do not challenge before this Court.

STATEMENT OF THE CASE

I. Legal Background

A. Three Sources of Water Law

California water law has three main sources: (1) a water-rights system that governs the diversion of water for out-of-stream purposes like household, agricultural, and industrial use; (2) a common law “public trust” doctrine that requires consideration of instream uses like habitat preservation, recreation, and ecological study; and (3) a constitutional rule that all beneficial uses—“including public trust uses”—be reasonable. (*National Audubon Society v. Superior Court* (1983) [33 Cal.3d 419, 433–444](#) (*National Audubon*).)

1. Water Rights

Water rights are property rights in the reasonable beneficial use of water. (*National Audubon, supra*, [33 Cal.3d at p. 441](#).) California recognizes two main types of surface-water rights. Owners of land “contiguous to a watercourse” have a “riparian” right for use on that land, and those who divert water from a watercourse for nonriparian purposes have “appropriative rights” to divert and use water. (*People v. Shirokow* (1980) [26 Cal.3d 301, 307](#) (*Shirokow*).) Both are vested property rights that “cannot be infringed by others or taken by governmental action without due process and just compensation.” (*United States v. State Water Resources Control Bd.* (1986) [182 Cal.App.3d 82, 101](#) (*State Water Board*).)

2. Public Trust Doctrine

The public trust doctrine is a common law doctrine that “developed independently” of the water-rights system. (*National Audubon, supra*, 33 Cal.3d at p. 445.) It decrees that the state as sovereign owns “all of its navigable waterways and the lands lying beneath them “as trustee of a public trust for the benefit of the people.” ’ ” (*Id. at p. 434.*) This doctrine protects, “so far as feasible,” instream uses like fishing, recreation, habitat preservation, and ecological study. (*Id. at pp. 426, 434–435, 446.*) The public trust is not an absolute rule but a principle that the state must “take the public trust into account” when allocating water and protect public trust uses when “feasible.” (*Id. at pp. 446, 447, fn. 30* [“neither domestic and municipal uses nor instream uses can claim an absolute priority”].)

3. Constitutional Rule of Reasonable Use

The 1928 amendment states that, “because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable.” (Cal. Const., art. X, § 2.) To that end, it requires that all water uses must be “reasonable” and “beneficial” and expressly protects vested water rights to the extent of their reasonable and beneficial use. (*Ibid;* see *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1242 (*City of Barstow*) [“the amendment carefully preserves [water] rights”].) “All uses of water, including public trust uses, must now conform to the standard of reasonable use.” (*National Audubon, supra*, 33 Cal.3d at p. 443.) This constitutional rule is

central to the task of reconciling the “two competing systems of thought” reflected in the water-rights system and public trust doctrine. (*Id.* at p. 452.)

B. The Role of the State Agencies

1. State Water Resources Control Board

The 1928 amendment declares itself “self-executing,” but it provides that “the Legislature may also enact laws in the furtherance of the policy in this section contained.” (Cal. Const., [art. X, § 2.](#)) Under this “in-furtherance clause,” the Legislature has crafted a comprehensive regulatory system. (Wat. Code, [§ 1050](#) [Division 2 of the Water Code is in furtherance of the policy of the 1928 amendment].)

That comprehensive system is administered primarily by the State Water Resources Control Board (Water Board), which “provide[s] for the orderly and efficient administration of the [State’s] water resources.” (Wat. Code, [§ 174.](#)) It does so by issuing permits and licenses for new appropriative rights after 1914² (Wat. Code, [§ 1250](#)), policing unlawful diversions of water (Wat. Code, [§ 1831](#)), preventing unreasonable uses of water (Wat. Code, [§ 275](#)), conducting statutory adjudications of stream systems (Wat. Code, [§ 2500](#) et seq.), resolving issues referred to it by courts (Wat. Code, §§ 2000–2076), and administering a

² The water rights on the Kern River vested prior to adoption of this procedure. (*North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) [147 Cal.App.4th 555, 559, fn. 1.](#)) Such pre-1914 rights are also protected by the 1928 amendment. (*Shirokow, supra*, [26 Cal.3d at p. 309.](#))

reporting system for water diversions and uses (Wat. Code, § 5100 et seq.). In carrying out its statutory duties, the Water Board “pursues at the same time those broad policy expressions and directives contained in” the 1928 amendment. (*Bank of America v. State Water Resources Control Bd.* (1974) 42 Cal.App.3d 198, 206–207.)

2. Wildlife Agencies

The management of California’s wildlife is primarily committed to two agencies: the Fish and Game Commission and the Department of Fish and Wildlife, which work together to enforce the Fish and Game Code. (Fish & G. Code, §§ 700, 702; Cal. Const., art. IV, § 20.) These wildlife agencies have several roles in overseeing public trust water uses. For instance, the Department formulates “proposed streamflow requirements” for fish maintenance where needed. (Pub. Resources Code, §§ 10001–10005.) The Water Board must then consider those proposed requirements in acting on applications to appropriate water. (Wat. Code, § 1257.5.)

Most relevant here, the Department “shall, from time to time, examine all dams in all rivers and streams in this State naturally frequented by fish.” (§ 5930.) After that periodic examination, the wildlife agencies have discretion—if they deem it “necessary” and “practicable”—to order a dam owner to take one of three actions:

- Option 1: They may “order in writing” a dam owner to build a fishway or otherwise allow sufficient water to pass over or

around the dam to keep fish in good condition. (§§ 5931–5937.)

- Option 2: They may, “in lieu of” option 1, order a dam owner to construct and equip a fish hatchery. (§§ 5938–5941.)
- Option 3: They may, “in lieu of” options 1 or 2, order a dam owner to plant fish under the supervision of the Department. (§ 5942.)

II. Factual and Procedural Background

A. The Kern River is highly variable, with lower portions drying out in drought years.

The Kern River originates in the Sierra Nevada Mountains, and its north and south forks join at Isabella Dam and Reservoir, after which the river flows about 33 miles into the City of Bakersfield. (11 AA 2356.) In the lower portions of the river, the City operates six diversion weirs³ and related facilities to divert water on behalf of itself and the five public water agencies that are real parties in interest in this case.⁴ (11 AA 2356–2360, 2395; OBOM 16.)

³ The weirs are structures used to divert water. (11 AA 2395–2396.)

⁴ North Kern Water Storage District, Kern Delta Water District, Buena Vista Water Storage District, Kern County Water Agency, and Rosedale-Rio Bravo Water Storage District.

The annual, natural flow of the Kern River varies widely, ranging from a high of nearly 2.5 million acre-feet⁵ (1983) to a low of about 139,000 acre-feet (2015). (11 AA 2357.) The Kern’s flows also vary monthly—with flows highest during the spring snowmelt and lowest during the fall and early winter. (*Ibid.*) This variability results in severe flooding in wet years and portions of the lower river drying back in drought years. (11 AA 2394.)

B. The Kern River’s water serves a variety of beneficial uses.

The Kern River is administered daily according to a complex and long-established local custom based on water rights, court judgments and decrees, agreements, policies, and procedures known as the “Law of the River.” (*Bring Back the Kern v. City of Bakersfield* (2025) [110 Cal.App.5th 322, 335–338](#) (*BBTK*); 6 AA 1339–1341; 7 AA 1387–1441, 1443–1465, 1520–1547; 11 AA 2358–2360.) Under the Law of the River, flows are regulated for flood control and storage purposes and water is diverted to efficiently serve many beneficial uses, including irrigation, domestic, municipal, recreational, and industrial. (6 AA 1341–1349; 8 AA 1836; 9 AA 2002, 2014; 10 AA 2035, 2134, 2302–2306; 11 AA 2315–2317, 2321–2324, 2328–2335, 2344–2352.)

⁵ An acre-foot of water is approximately 325,851 gallons of water. (*San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) [12 Cal.App.5th 1124, 1134, fn. 3.](#))

C. Plaintiffs file a petition for writ of mandate and seek a preliminary injunction under Fish and Game Code section 5937.

Plaintiffs filed a complaint and petition for writ of mandate alleging the City violated a purported duty under section 5937 by not allowing sufficient water past the weirs⁶ to “keep in good condition any fish.” (1 AA 21, 32–37; 14 AA 3234, 3254–3257.) Plaintiffs then moved for a preliminary injunction, based solely on this [section 5937](#) claim,⁷ citing 2023’s wet conditions as a “status quo” that must be maintained.⁸ (2 AA 308–324.)

Real parties opposed, arguing that action by the wildlife agencies was required to impose any duty to release water under section 5937 and, in any event, plaintiffs’ requested injunction would violate the 1928 amendment. (6 AA 1362–1366, 1375–1377.) Real parties submitted extensive evidence about their water rights and contractual interests, the “Law of the River,” and the significant harm that the injunction would cause. (See 7 AA 1382–1661; 8 AA 1666–1945; 9 AA 1950–2014; 10 AA 2300–

⁶ Whether these diversion weirs are “dam[s]” under section 5937 is not developed in the record or before this Court, and real parties do not concede the issue.

⁷ Plaintiffs’ operative petition also includes claims under the public trust doctrine, [section 5901](#), and the 1928 amendment. (14 AA 3234, 3254–3259.) Those claims weren’t at issue in the motion for preliminary injunction and are not directly on review here.

⁸ In 2023, Kern River flows were abnormally high—nearly 300% of the historic mean and nearly 400% of the historic median. (See 11 AA 2360–2362.) Flows were so high that the United States Army Corps of Engineers took control of Isabella Dam to safely manage the extraordinary snowpack and avoid potential rain-flood events. (11 AA 2362.)

2306; 11 AA 2313–2368.) They also argued that plaintiffs’ requested injunction—which did not specify how much water was required to pass downstream or which fish were at issue—was impermissibly vague. (6 AA 1349–1352.)

Plaintiffs did not contest real parties’ evidence of harm; instead, they maintained that they were “emphatically not concerned” with whether the injunction would harm existing uses or the public or was in any sense objectively reasonable. (11 AA 2484.) They argued that section 5937 is a “strict liability statute” exempt from constitutional scrutiny. (11 AA 2484, 2488, 2510–2512; Augmented RT 14.)

D. The trial court issues a preliminary injunction and “implementation order.”

The trial court granted plaintiffs’ motion. (12 AA 2768–2790.) Rather than address real parties’ argument that section 5937 placed no mandatory duty on the City absent state agency action, the trial court held the public generally has standing to enforce public trust values. (12 AA 2808.) The trial court next found that it had “no jurisdiction” to determine whether plaintiffs’ requested relief was constitutionally reasonable. (12 AA 2815.) And the trial court determined that the requested injunction was sufficiently definite because it could “guide . . . discussions.” (12 AA 2818.) It repeated the language of section 5937 and instructed plaintiffs and the City to determine the “flow rates necessary for compliance with this order.” (12 AA 2818.)

Plaintiffs and the City, without input from real parties, agreed to an “implementation order” that included an arbitrary

flow requirement and a provision effectively giving the City first priority rights to additional water in violation of the Law of the River. (13 AA 2908–2915.) The trial court signed that order without a hearing. (13 AA 2863–2866.) The injunction and implementation order substantially disrupted real parties’ existing beneficial uses of water. (13 AA 2925–3087; 14 AA 3093–3151.)

Real parties sought reconsideration of the injunction and implementation order, which resulted in immaterial changes to the injunction and a stay of the implementation order. (13 AA 2896–2924; 14 AA 3123–3141, 3224–3232; 16 AA 3735–3746.) Real parties then appealed both orders. (16 AA 3766, 3813; 17 AA 3864, 3912, 3960.) Concerned that plaintiffs’ injunction sought to maintain 2023’s atypical high-flow conditions, The J.G. Boswell Company intervened as a real party in interest and appealed to protect against its risk of damages from flooding of the Kern River. (*BBTK, supra*, 110 Cal.App.5th at p. 334, fn. 1.)

E. The Court of Appeal reverses the injunction and implementation order, and this Court grants review.

The Court of Appeal reversed the injunction on several grounds—most notably, that this Court’s precedent rejects the trial court’s holding that it had “no jurisdiction”—and remanded for the trial court to analyze the requested injunction under the Constitution. (*BBTK, supra*, 110 Cal.App.5th at pp. 350–366.) This Court granted plaintiffs’ petition for review.

LEGAL ARGUMENT

I. Given plaintiffs’ concession that some judicial review for reasonableness is required, this Court should either dismiss review as improvidently granted or affirm the narrow holding of the Court of Appeal.

A. This Court can dismiss review in light of supervening events.

The Supreme Court “may dismiss review for a variety of . . . reasons,” including “when a supervening event renders the case moot for any reason.” ([Advisory Com. com., 23 pt. 4 West’s Ann. Codes, Rules \(2017 ed.\) foll. rule 8.528\(b\), p. 304.](#)) Dismissal may also be warranted where, for any reason, “the court decided it was satisfied with the [C]ourt of [A]ppeal opinion.” ([Eisenberg, Cal. Practice Guide: Civil Appeals and Writs \(The Rutter Group 2019\) ¶ 13:190.1, p. 13-55.](#))

As we explain, given plaintiffs’ concession that some level of reasonableness review is required and given that no such review has occurred, the best course is to dismiss review and permit the trial court to conduct this analysis in the first instance. Once the trial court rules, any party can appeal and this Court can decide whether it wishes to review the resulting Court of Appeal opinion on a full record where reasonableness review actually occurred.

B. The Court of Appeal applied this Court’s precedent to issue a narrow opinion providing that reasonableness review should occur and remanding for the trial court to do so.

Plaintiffs’ description of what the Court of Appeal did is not consistent with the text of the opinion. Plaintiffs assert that the Court of Appeal declared section 5937 a “presumptively unconstitutional” “second-class statute” (PFR 11, 24, 27–28) in an “overbroad” and “extreme and unprecedented” opinion that was “unsupported by decisional law or the text, history, and purpose of [the 1928 amendment]” (OBOM 14). None of that is true.

The Court of Appeal issued two main holdings. First, it rejected the trial court’s conclusion, adopted at plaintiffs’ urging, that courts have “no jurisdiction” to consider whether a proposed injunction under section 5937 violates the 1928 amendment’s reasonableness requirement based on the facts of a particular river system. It then remanded for the trial court to conduct that analysis in the first instance. (*BBTK, supra*, [110 Cal.App.5th at pp. 350–357.](#)) Second, the Court of Appeal held that a plaintiff must specify and explain the amount of a river’s water it is seeking to redirect and show that it is entitled to a preliminary injunction. (*Id.* [at pp. 357–359.](#))

Plaintiff cannot show error in these two narrow and straightforward holdings.

The Court of Appeal’s first holding—that the trial court must conduct judicial review on remand—is dictated both by the 1928 amendment’s text and *this Court’s* precedent.

The 1928 amendment is “self-executing.” (Cal. Const., [art. X, § 2](#).) As this Court held in its first case interpreting the amendment, “courts are bound to enforce” it, even absent legislation, and it “supersede[s] all state laws inconsistent therewith.” (*Gin S. Chow v. City of Santa Barbara* (1933) [217 Cal. 673, 700](#) (*Gin Chow*)). In *Gin Chow*, this Court held that the common law of riparian rights, which was unconstrained by a reasonable-use limitation, was trumped by the 1928 amendment. (*Id.* at pp. [703–705](#).) As a constitutional rule, it also supersedes legislation that is inconsistent with its terms, and plaintiffs are incorrect that “no case” in “the ninety-two years since this Court decided *Gin S. Chow*” has ever declined to “defer to legislative rules.” (OBOM 56.)

In *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) [3 Cal.2d 489](#) (*Tulare*), this Court declared a statutory provision unconstitutional because it was “contrary to the letter and spirit of the 1928 constitutional amendment.” (*Id.* at p. [531](#).) And in *In re Waters of Long Valley Creek Stream System* (1979) [25 Cal.3d 339](#) (*Long Valley*), this Court assessed whether the challenged statute was “consistent with the mandate of the amendment,” concluded that it was, but cautioned that a broader, more categorical rule would raise “a serious constitutional issue.” (*Id.* at pp. [353, 357–358](#).)

Plaintiffs now concede this point, backtracking from their prior extreme position and acknowledging that a statute *can* violate the 1928 amendment in certain circumstances—they even

opine on the standards for such judicial review. (OBOM 11, 14–15, 63–64, 68–72.)⁹

C. The Court of Appeal properly held that constitutional reasonableness requires a fact-specific, totality-of-the-circumstances inquiry.

Because the trial court conducted *no* reasonableness review, the Court of Appeal did not specify in detail what the inquiry entails.

The Court of Appeal merely held reasonableness is “‘case-specific’” and considers “the totality of the circumstances” of a particular stream system. (*BBTK*, *supra*, 110 Cal.App.5th at pp. 348, 356.) In doing so, the Court of Appeal applied this Court’s rule from *Gin Chow*. (See *id.* at pp. 351–352, citing *Gin Chow*, *supra*, 217 Cal. at p. 700.)

This Court repeatedly reaffirmed *Gin Chow* in the years after the 1928 amendment:

- *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 369 (*Peabody*): Reasonableness “must be dealt with in connection with each case as it arises.”
- *Tulare*, *supra*, 3 Cal.2d at page 567: Reasonableness is fact-specific because conditions vary across the state—what is reasonable “where water is present in excess of all needs,

⁹ Rather than make water-use statutes “second-class” (PFR 27), judicial review makes them ordinary. Courts review legislation promulgated under countless other constitutional provisions—including ones that look similar to the 1928 amendment. (See Cal. Const., art. XX, § 22 [alcoholic beverage control], art. XXXIV, § 2 [public housing projects law]; *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171, 177; *Coors Brewing Co. v. Stroh* (2001) 86 Cal.App.4th 768, 773–774.)

would not be a reasonable beneficial use in an area of great scarcity and great need.” Similarly, what is reasonable “at one time may, because of changed conditions, become a waste of water at a later time.” (*Ibid.*) Reasonableness therefore requires a comparison to other uses and “the general custom of the locality” at issue. (*Id.* at p. 547.)

- *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 558 (*Rancho Santa Margarita*): “[I]n ascertaining whether [the facts] warrant an injunction, the trial court should take into consideration all of the water available to either party from the river, and then determine, considering the entire supply, the needs of the parties, their methods of use and methods of diversion and other necessary factors.”
- *Meridian, Ltd., v. San Francisco* (1939) 13 Cal.2d 424, 447: Reasonableness is “necessarily relative,” requiring a comparison among competing uses.

And this Court continues to reiterate the rule established in these early cases: “[I]t is well established that what is a reasonable use of water varies with the facts and circumstances of the particular case.” (*Long Valley, supra*, 25 Cal.3d at p. 354; see *City of Barstow, supra*, 23 Cal.4th at p. 1242; *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 139.) The Court of Appeal simply applied this precedent.¹⁰ It also correctly noted that this analysis “involves multiple factors,” including other statutory directives not yet considered by the trial court. (*BBTK*,

¹⁰ As the Court of Appeal has before. (See, e.g., *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1479, 1488 (*Light*); *Imperial Irrigation Dist. v. State Wat. Resources Control Bd.* (1990) 225 Cal.App.3d 548, 570; *State Water Board, supra*, 182 Cal.App.3d at pp. 129–130.)

supra, 110 Cal.App.5th at p. 348, citing Wat. Code, § 100.5, among others.)¹¹

Plaintiffs now concede consideration of a case’s facts is appropriate—acknowledging that the circumstances of a river could make a water use requested under a statute constitutionally unreasonable. (See OBOM 63–64, 68–72; PFR 28 [positing “hypothetical facts” where statutorily ordered water use would be unconstitutional].) Plaintiffs contend the Kern doesn’t present the facts and circumstances needed to meet their preferred standard for reasonableness. But neither the trial court nor the Court of Appeal has determined what reasonableness review should entail here or what result it will produce.¹² Because the trial court concluded it had “no jurisdiction” to assess reasonableness, the trial court never considered the facts of the Kern River. Thus, there is nothing for this Court to review on this point at this early stage of the litigation.

¹¹ One of those statutes provides that local custom, such as the Law of the River, “*shall* be considered as a factor to be weighed in the determination of the reasonableness of the use . . . within the meaning of Section 2 of Article X.” (Wat. Code, § 100.5, emphasis added.) This provision implemented a recommendation of the Governor’s Commission to Review California Water Rights Law concluding that reasonableness “should continue to be left for treatment by the *courts* on a case-by-case basis. Reasonable beneficial use varies substantially depending upon the region of use and hydrologic conditions. Therefore, any reasonable beneficial use standards adopted by the Legislature would be *overly rigid*.” (3 MJN 706, 711, emphasis added.)

¹² For several reasons explained below, plaintiffs’ proffered “manifestly unreasonable” (OBOM 15) standard should not apply on remand. (See sections II.A, II.B–D, III.A, III.B, III.C, *post*.)

D. The Court of Appeal properly held that plaintiffs must estimate the amount of water their injunction would require and show that they are entitled to an injunction.

The Court of Appeal also held that, on remand, plaintiffs must show “how much water is required to keep fish in good condition” and “show . . . that they are entitled to a preliminary injunction.” (*BBTK, supra*, 110 Cal.App.5th at p. 357 & fn. 20.)

The Court of Appeal concluded that an injunction ordering a water use without saying “*how much* water” would be an impermissible “ “obey the law” ” injunction. (*BBTK, supra*, 110 Cal.App.5th at pp. 357–358, emphasis original.) Such injunctions are improper, because they provide insufficient notice of what would violate the injunction and expose the defendant to potential contempt. (*Ibid.* [collecting cases].) Plaintiffs do not dispute any of this but assert the injunction would be “tailored to the requirements of the statute.” (OBOM 66.) In other words, it says “obey section 5937,” which violates the law and gives no guidance to the City or real parties.

The Court of Appeal also explained, citing this Court’s precedent, that the party seeking an injunction bears the burden of justifying its scope—that is, to “formulate the nature of the remedy sought.” (*BBTK, supra*, 110 Cal.App.5th at p. 357, citing *O’Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.) Plaintiffs do not dispute this.

The Court of Appeal noted quantification of the necessary flow is required by the very nature of the reasonableness analysis, which is fact-specific and includes considering how a

court-ordered use would impact existing and competing water uses. (*BBTK, supra*, 110 Cal.App.5th at pp. 358–359.) Despite conceding that court-ordered water uses may be found unreasonable under the Constitution (*ante*, sections I.B–I.C), plaintiffs never explain how that reasonableness analysis could proceed in the abstract without any estimate of the amounts at issue. Nor could they.

So plaintiffs pivot to raising issues that the Court of Appeal never reached. Plaintiffs ask this Court to find error “to the extent” (OBOM 64; PFR 40) that the Court of Appeal’s opinion “can be read” (OBOM 68) as “suggesting” (OBOM 26, 63; PFR 11, 23–24) that plaintiffs bear the burden of showing that section 5937 “is constitutional as applied in each specific instance.” (OBOM 26).¹³ That is a mischaracterization. The court held that plaintiffs on remand have the burden to “formulate the nature of the remedy sought” (i.e., provide an estimate of the amount of water they’re demanding), and show that they are entitled to injunctive relief. (*BBTK, supra*, 110 Cal.App.5th at p. 357.) That holding was commonsense and backed by black-letter law.

Plaintiffs’ argument on this point is also academic: plaintiffs presented no evidence on reasonableness and instead persuaded the trial court it lacked the jurisdiction to assess reasonableness. (*Ante*, pp. 27–28.) Neither the trial court nor the

¹³ By focusing on stray language rather than actual holdings, plaintiffs violate this Court’s repeated guidance. (See, e.g., *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680 [“ ‘It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court.’ ”].)

Court of Appeal considered who bears the ultimate burden on reasonableness review—because plaintiffs’ “strict liability” argument stopped any review from occurring. This Court should not entertain plaintiffs’ attack on strawmen of their own making.¹⁴

E. Given the mismatch between what the Court of Appeal held and the issues plaintiffs raise, this Court has several remedial options, including dismissing review.

The Court of Appeal’s opinion is narrow and applies long-settled holdings of this Court. (*Ante*, sections I.B–D.) This Court should affirm the Court of Appeal if it reaches the merits. Alternatively, it should dismiss review as improvidently granted.

“The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this [C]ourt.” (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912 (*Lynch*)). But that’s what plaintiffs seek. Plaintiffs concede the Court of Appeal correctly rejected the trial court’s refusal of all judicial review. (*Ante*, section I.B.) Plaintiffs concede that constitutional reasonableness requires consideration of a river’s facts and circumstances. (*Ante*, section I.C.) Plaintiffs offer hardly any response to the commonsense holding that they must define the amount of water they are seeking to redirect. (*Ante*, section I.D.) And they leave unchallenged the Court of Appeal’s multiple other bases for reversing and remanding. (Section IV, *post*.)

¹⁴ Even if this Court were to reach this issue, the burden to prove reasonableness is properly placed on the party seeking a court-ordered water use. (Section III.B, *post*.)

Plaintiffs instead fixate on issues not addressed below: what deference is owed to legislation purportedly “in the furtherance” of the 1928 amendment, who bears the burden in a constitutional-reasonableness inquiry, and whether a trial court must raise reasonableness sua sponte. (See OBOM 52–53, 60–72.) But should this Court decide these unripe issues, it would not affect the disposition below. That’s the definition of an “advisory opinion.” (*Lynch, supra*, 1 Cal.3d at p. 912.)

II. If this Court goes beyond the issues decided by the Court of Appeal, it should hold that plaintiffs cannot show a likelihood of success on the merits.

A. Section 5937 was not an attempt by the Legislature to act “in the furtherance” of the 1928 constitutional amendment.

Plaintiffs argue that little to no scrutiny can be given to injunctions sought under section 5937 because that statute is purportedly “an exercise of the express legislative authority granted” by the 1928 amendment. (OBOM 13; see OBOM 35, 49–54; see Cal. Const., [art. X, § 2](#) [“the Legislature may also enact laws in the furtherance of the policy in this section contained”].) But nothing supports plaintiffs’ premise that section 5937 was an attempt by the Legislature to make a rule in furtherance of the 1928 amendment to the Constitution.

1. Section 5937’s text shows no intent to legislate under the 1928 amendment to the Constitution.

Section 5937’s text does not mention the 1928 amendment at all, nor use any of its terminology. That contrasts with how the

Legislature has historically invoked its in-furtherance clause authority—usually expressly stating it was legislating “in furtherance of the policy declared in [Section 2 of Article X](#)” (Wat. Code, [§§ 380, 1050](#)) or by expressly declaring that certain water uses under certain circumstances are “a waste or an unreasonable use of the water within the meaning of [Section 2](#) of Article X of the California Constitution,” as in the examples cited by plaintiffs (Wat. Code, [§§ 13550, 13553](#); OBOM 61).

The Legislature has also declared a host of uses (including fish maintenance) to be “beneficial”—the other, easier-satisfied requirement under the 1928 amendment. (Wat. Code, [§§ 106, 1242–1243, 1257](#).) It’s not plausible that the Legislature would expressly declare water uses to meet this lesser requirement but then make a far more consequential reasonableness determination surreptitiously.

The lack of any textual support for plaintiffs’ position is reason enough to reject it. (See, e.g., [Rojo v. Kliger](#) (1990) [52 Cal.3d 65, 79](#).) But other interpretive tools also undermine plaintiffs’ interpretation.

2. Section 5937’s legislative history discloses no intent to make a categorical reasonableness determination.

There’s nothing in the legislative history showing that the Legislature was attempting to legislate “in the furtherance” of the 1928 amendment. That’s for good reason. Section 5937 traces its roots back to 1870 and has existed in nearly its current form since 1917. (See 1 MJN 190–191, 230–231; [section II.C.3, post](#).)

The Legislature couldn't have possibly meant to invoke constitutional authority that didn't yet exist.

Plaintiffs' only response is that, after the 1928 constitutional amendment, the statute was modestly amended in 1937 and has been recodified.¹⁵ As we explain below, there is no indication the Legislature was doing anything significant in the 1937 amendment—much less that it was making a constitutionally binding, statewide reasonableness determination. (Section II.C.5, *post.*) Indeed, there's no reference at all in that 1937 bill's legislative history to the 1928 amendment. (See 2 MJN 409–453.)

This again differs from the Legislature's practice. Just two years after the 1937 amendment to now-Fish and Game Code section 5937, the Legislature enacted Water Code section 100, which largely parrots the 1928 amendment's text. (3 MJN 700–701.) In uncodified language, the 1939 statute “declared [itself] to be in furtherance of the policy contained in [the 1928 amendment].” (*Ibid.*) The Legislature knew how to invoke the 1928 amendment when it so intended.

¹⁵ Plaintiffs read much into the codification and recodification of the text into the Fish and Game Code in 1933 and 1957. (OBOM 35–36, 38, 51; see 2 MJN 352, 376–377; 3 MJN 614–618.) Codification of a statute does not alter its meaning. (*People v. Drake* (1912) 162 Cal. 248, 249; see section II.C.4, *post.*) Nor does transplanting a statute from code to code. (*Webster v. Zevin* (1947) 77 Cal.App.2d 855, 858.) Both codifications here also contain language specifically disclaiming any intent to revise the meaning of reenacted sections. (2 MJN 352; 3 MJN 614.)

What’s more, as late as 1959, the Legislature felt the need, at the request of the Director of Fish and Game, to enact Water Code [section 1243](#) (4 MJN 773) to clarify existing statutes and “remove any doubt which may exist now or in the future concerning the *beneficial use status of water for fish* and wildlife” and state that “use of water for recreation and the preservation and enhancement of fish and wildlife resources is a *beneficial* use of water.” (4 MJN 771, emphasis added.) If the Legislature had determined, in 1937, that fish maintenance was not only a beneficial use but categorically the “a priori” most reasonable use, no such statute would have been necessary.

3. The *Cal Trout* cases, which interpret a materially different statute, do not help plaintiffs.

Unable to point to section 5937’s text or history to support their argument, plaintiffs rely on *California Trout, Inc. v. State Water Resources Control Bd.* (1989) [207 Cal.App.3d 585](#) (*Cal Trout I*), a case interpreting a materially *different* statute—[section 5946](#). The Legislature passed [section 5946](#) after multiple hearings, a report, and extensive debate considering the specific streams and resources involved. (*Cal Trout I*, at pp. 596–597, 601–602 & fn. 7.) As the bill’s sponsor explained to the Governor, “nearly 75 percent of the income” in the covered areas was “derived . . . from recreational fishing”; Los Angeles was seeking water diversions that would threaten the area’s fish populations; and the bill, including a provision that delayed its effective date, ensured that Los Angeles could obtain “ample alternative supply

of water.” (2 MJN 539–541; see 2 MJN 454.) In short, the Legislature considered conditions on a specific river system and “develop[ed] a standard of reasonableness on the facts of the case.” (*Cal Trout I*, at p. 624.)¹⁶

Section 5946’s geographically-limited weighing of facts is therefore materially different from the categorical statewide rule plaintiffs contend section 5937 is. Yet plaintiffs persist in conflating the two statutes despite the clear statement in *Cal Trout I* that it “[did] not reach the question of the application of section 5937.” (*Cal Trout I*, *supra*, 207 Cal.App.3d at p. 601, emphasis added.) This distinction between sections 5946 and 5937 was noted by the Court of Appeal. (*BBTK*, *supra*, 110 Cal.App.5th at pp. 355–356.)¹⁷

¹⁶ There’s even reason to doubt whether the Legislature enacted section 5946 “in the furtherance” of the 1928 amendment. The Legislative Counsel did not contend it was in his letter to the Governor. (2 MJN 553–554.) Instead, he concluded that “there might be *some conflict* between the provisions of the bill and the requirements” of the 1928 amendment. (2 MJN 554, emphasis added.) But this Court need not reach that question, because section 5946 is still distinguishable from section 5937 at issue here. (Compare sections II.B–D.1 with II.D.2, *post*.)

¹⁷ Recently, the Ninth Circuit similarly held: “The state court’s interpretation of . . . section 5946 cannot be mapped onto section 5937 based on the *California Trout* cases.” (*San Luis Obispo Coastkeeper v. County of San Luis Obispo* (9th Cir. 2025) 161 F.4th 590, 602.)

4. This Court should avoid plaintiffs’ interpretation of section 5937, which would render the statute unconstitutional.

It is unambiguous that section 5937 was not passed under the in-furtherance clause or intended to be a statewide “blanket” rule of the kind this Court has condemned. (*Long Valley, supra*, 25 Cal.3d at p. 358.) But even if there were some ambiguity, this Court should construe that ambiguity against plaintiffs to avoid the constitutional issues it would create. (*Id.* at pp. 349–350 [applying canon of avoidance to interpret statute to be consistent with the 1928 amendment].)

B. Section 5937 does not impose a mandatory duty on all dam owners but is part of a three-option framework that provides discretion to the wildlife agencies to address individual dams.

Plaintiffs’ case depends on a still more fundamental misreading of section 5937. To obtain a writ of mandate, plaintiffs must identify a source of law that imposes a “mandatory” duty on a public entity. (*In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 689.) Plaintiffs read section 5937 to impose a “straightforward” duty on all dam owners—regardless of whether the state’s wildlife agencies have exercised their discretion to require action from a given dam owner. (OBOM 39.) But that’s not what section 5937 does. It is instead a single provision in a broader regulatory framework that vests two agencies with the discretion to order a dam owner to take one of several actions, where necessary and practicable. Because the agencies have not ordered the City to take *any* action, plaintiffs

have not identified a duty held by “the specific public entity sought to be held liable.” (*Groundwater Cases*, at p. 689.)

If this Court were to go beyond the issues decided by the Court of Appeal and more broadly consider the relationship between section 5937 and the 1928 amendment, it should first consider this antecedent question. Whether plaintiffs can even sue under section 5937 absent agency action is “fairly included” in the issue presented of what a plaintiff must show “to obtain preliminary injunctive relief” under “section 5937.” (Cal. Rules of Court, rules 8.516, 8.520; PFR 7–8.)

Real parties and the City made this argument in the trial court. (See 1 AA 46, 67–68, 107–108, 111–112; 6 AA 1359–1360, 1362–1366; 11 AA 2386–2387.) And while real parties did not raise it in the Court of Appeal proceedings, which focused on the trial court’s “no jurisdiction” holding and sought a remand on other issues, it remains a fatal flaw in plaintiffs’ theory of the case. What’s more, considering this argument would allow this Court to “avoid resolving constitutional questions” when “narrower grounds” exist. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1102.) This Court can diffuse the purported tension between section 5937 and the 1928 amendment by recognizing that section 5937 does not do what plaintiffs contend.

Section 5937 is only one of nearly 20 provisions in division 6, part 1, chapter 3, article 2 of the Fish and Game Code, addressing “Dams and Obstructions.” Plaintiffs’ interpretation depends on plucking one sentence from that entire article out of context. The Court should instead adopt an interpretation of

section 5937 that “harmonize[s] the statute internally and with related statutes.” (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 871.)

The first section of article 2 gives a clear directive, not to dam owners, but to the Department: “The department shall, from time to time, examine all dams in all rivers and streams in this State naturally frequented by fish.” (§ 5930.) The rest of article 2 sets out three regulatory actions the wildlife agencies may take when they find, in their discretion, that action is necessary and practicable to maintain fish.

1. Option 1: The wildlife agencies may require a fishway.

Sections 5931 through 5937 all relate to the first option of requiring a fishway, which is a “device or structure that facilitates the movement of fish over or around a dam.” (*Water Audit California v. Merced Irrigation Dist.* (2025) 111 Cal.App.5th 1147, 1155.) Imposing this option requires the “opinion of the commission” and an “order in writing” from the Department specifying the fishway’s details. (§§ 5930, 5931.) The Commission must also be notified of applications to build or modify new dams, so it can assess whether the “construction of a fishway over such a dam” is “necessary” and “practicable.” (§ 5933.) If the Commission makes that finding, it holds an evidentiary hearing and issues an order confirming or rejecting its initial finding—with judicial review available. (*Ibid.*; see Code Civ. Proc., § 1094.5.)

Section 5937 states one obligation of a dam owner subject to a fishway order: it must allow “sufficient water” to pass

downstream “to keep in good condition” the fish population below the dam. It also contains language (“in the absence of a fishway”) that allows a dam owner to comply with a fishway order by achieving its intended result (downstream flows) without the expense of building a fishway.¹⁸ Plaintiffs read this language out of context, insisting it applies absent any agency action and, seemingly, even if the agencies have exercised their discretion to order a different option. (E.g., OBOM 40 [“all dam owners”].)

2. Option 2: The wildlife agencies may require a hatchery.

Sections 5938 through 5941 lay out another action the wildlife agencies can order “in lieu of” a fishway where a fishway would be “impracticable.” (§ 5938.) They may order a dam owner to construct and equip a fish hatchery, with “plans and specifications” set by the department based on specific fish-maintenance needs and the location “mutually agreed upon.” (§§ 5838–5839.) Once constructed, the hatchery is generally operated by the Department “without further expense to the owner of the dam.” (§§ 5938, 5940–5941.)

3. Option 3: The wildlife agencies may require fish to be planted.

Section 5942 provides a third regulatory option: “The commission may, in lieu of a fishway” or “hatchery station,” order the dam owner “to plant” fish “under the supervision of the

¹⁸ The Legislature’s addition of this language is discussed more fully below. (Part II.C.5, *post.*)

department,” “at such times, in such places, and in such numbers as the commission may order.” (§ 5942.)

C. The legislative history of article 2 confirms that section 5937 is meant to operate within this three-option framework managed by the wildlife agencies, not stand apart and be privately enforced.

1. Pre-1915: The Legislature enacts section 5937’s predecessor statute.

The fishway provisions of [sections 5931](#) through 5937 derive in substantially their current form from the 1917 version of former Penal Code [section 637](#), which was recodified when the Legislature created the Fish and Game Code in 1933. They also derive, however, from earlier statutes. In 1870, the Legislature vested the Commission with discretion to “require, *as far as practicable*, all persons” operating a dam “to construct and keep in repair fish ways.” (1 MJN 190–191, emphasis added; accord, [§§ 5930](#) [the “department shall”], 5933 [whether “such fishway is practicable”], 5938 [alternative if fishway is “impracticable”].) This statute was codified in 1872 as former Penal Code [section 637](#). (1 MJN 194–195, 198.) Like article 2 today, any obligation on the part of a dam owner to build and operate a fishway arose only *after* an order from the Commission. (1 MJN 198 [misdemeanor to, “after being requested by the [Commission] so to do, fail[] to construct and keep in repair sufficient fishways or ladders”].)

2. 1915: The Legislature adds the “sufficient water” language to now-section 5937.

In 1915, the Legislature added the “sufficient water” clause in now-section 5937’s first sentence and also added now-section 5937’s second sentence. (1 MJN 221–222.)

Like the 1870 original, the 1915 version was directed at the Commission—requiring it “to examine, from time to time, all dams.” (1 MJN 221.) And as with the 1870 version, an order by the Commission was a prerequisite to any obligation to construct a fishway. (See *ibid.* [Commission “notif[ies] the owners . . . to provide” a fishway, and owners must build fishways “where the [Commission] require[s] such fishways to be provided”].)

In that context, now-section 5937’s language originated: “where the [Commission] require[s] such fishways to be provided” the owner must keep them clear and in good repair and “shall allow sufficient water at all times to pass through *such* fishway to keep in good condition any fish that may be planted or exist below said dam.” (1 MJN 221, emphasis added.) This addition was practical. If the Commission has determined that constructing a fishway is both necessary and practicable, the dam owner must allow sufficient water to make that fishway order effectual.

The 1915 enactment also added language closely resembling now-section 5937’s second sentence:

[D]uring the minimum flow of water in any river or stream[,] permission may be granted . . . to allow sufficient water to pass *through a culvert, waste gate, or over*

or around the dam, to keep in good condition any fish that may be planted or exist below said dam or artificial obstruction, when in the judgment of the [Commission] it is impracticable to pass the water through the fishway to the detriment of the owner or occupant [of the dam].

(1 MJN 221, emphasis added.)

This addition was also a practical one. When there are alternative means for meeting the “sufficient flow” requirement during dry spells, there’s no good reason to insist on using the fishway as the mechanism for how the water passes a dam subject to a fishway order.

3. 1917: The Legislature designs the three-option framework.

In 1917, the Legislature gave article 2 its current three-option structure. The 1917 version provided the Commission may “order in writing” that a dam owner construct a fishway, and the dam owner “shall allow sufficient water” to pass “through *such* fishway.” (1 MJN 230–231, emphasis added.) It also provides the Commission may “in lieu of said fishway,” order a dam owner to build and equip a hatchery. (1 MJN 230.) Finally, it allows that “in lieu of said fishway” or “hatchery station,” the Commission may order a dam owner to plant fish “under the supervision of the . . . commission.” (*Ibid.*) It also provided that the Commission, after making any of these three possible orders, must on request

hold a hearing on the “necessity” of its order, the result of which was subject to judicial review. (1 MJN 231.)

Nothing in this history suggests that the language of now-section 5937 instituted a universal requirement for fish flows regardless of circumstances, benefits, and consequences and without any action by the wildlife agencies. In fact, after the 1915 and 1917 amendments, the Commission repeatedly asked the Legislature to enact a universal requirement for fish flows. (*State of Cal. Fish & Game Comm’n, Twenty-Sixth Biennial Report for the Years 1918–1920* (1920) p. 86; *State of Cal. Fish & Game Comm’n, Twenty-Eighth Biennial Report for the Years 1922–1924* (1924) p. 13.) These requests confirm no such universal flow requirement was imposed in 1915 or 1917.¹⁹

4. **1933: The statute is codified into the Fish and Game Code.**

The 1917 version of the statute was still codified as former Penal Code [section 637](#). (1 MJN 230.) In 1929, the Legislature created the California Code Commission, which was tasked with

¹⁹ Scholarly advocates of plaintiffs’ interpretation admit that the wildlife agencies “have never enforced 5937 in a way that is consistent with” their interpretation. (Börk, et al., *The Rebirth of California Fish & Game Code Section 5937: Water for Fish* (2012) [45 U.C. Davis L.Rev. 809, 814](#).) Professors Börk and Moyle, two of the authors of this article, are members of the advisory board of plaintiff Water Audit California. (16 AA 3663; see Water Audit California, *Advisory Board* (2026) <https://tinyurl.com/wup83njw> [as of Feb. 7, 2026].) Courts appropriately give “little weight” to “advocacy-based law review articles.” (*People v. Bocanegra* (2023) [90 Cal.App.5th 1236, 1254, fn. 6](#).) But this admission adverse to plaintiffs’ case is telling.

reorganizing California’s statutory law into a larger number of subject-specific codes. (Stats. 1929, ch. 750, p. 1427.) In 1931, it specifically instructed the Code Commission to create a Fish and Game Code. (Assem. Conc. Res. No. 21, Stats. 1931 (1931 Reg. Sess.) res. ch. 66, p. 3118; see 1 MJN 233.)

The same year, it also clarified that any substantive amendments proposed by the commission should be expressly set forth in an exhibit to its report. (Stats. 1929, ch. 750, p. 1428.) But “[e]arly in its history, . . . the Code Commission adopted the policy of offering to the legislature proposed codes in which it made no substantive change in the statutes to be revised. This policy was basic to the entire project and was faithfully followed throughout the Commission’s existence, with a few notable exceptions.” (Kleps, *The Revision and Codification of California Statutes 1849–1953* (1954) 42 Cal.L.Rev. 766, 800.) The Fish and Game Code was no exception, and the Code Commission expressly disclaimed any intent to propose substantive changes to the laws recodified in the Fish and Game Code. (2 MJN 296.)

The proposed code was adopted in 1933 (2 MJN 352), and it split former Penal Code section 637 into several sections. Most of the substantive provisions became then-Fish and Game Code sections 521 through 534. (2 MJN 376–377.) Other provisions related to similar subjects were added to the same article, and the procedural language about hearings and orders became then-Fish and Game Code sections 541 through 548. (2 MJN 378.) In dividing the one section into many, the phrase “*such* fishway” in the 1917 language (1 MJN 230, emphasis added) that has become

now-section 5937 became “a fishway.” (1 MJN 376, emphasis added [former-section 525 of Fish and Game Code].) This change of language, as discussed above, was nonsubstantive. It must be read, like the 1917 statute, to require only a dam owner that has been ordered to provide a fishway to provide flow through “such fishway.”

5. 1937: The Legislature adds the “in the absence of a fishway” language, on which plaintiffs’ argument relies.

Two decades after giving article 2 its current three-option shape, the Legislature added the language to now-section 5937 that is the sole basis for plaintiffs’ argument. (See OBOM 36–37.) The 1937 bill tweaked now-section 5937’s first sentence as follows: “The owner of any dam shall allow sufficient water at all times to pass through a fishway, *or in the absence of a fishway, allow sufficient water to pass over, around or through the dam*, to keep in good condition any fish that may be planted or exist below the dam.” (2 MJN 409–411, emphasis added; see § 5937.) As discussed above, the flow requirement only applies to dams subject to a fishway order under Option 1, and this language must be read consistent with that meaning.

And a meaning readily suggests itself: if the Commission issues a fishway order but determines that its purpose can be accomplished by releasing flows through some other means (culverts, etc.), the Commission need not require a separate fishway and the owner can otherwise maintain those flows. The Legislative Counsel’s summary of the bill states as much,

describing it as “[g]iv[ing]” a dam owner another “option.” (2 MJN 446; see *Van Horn v. Watson* (2008) 45 Cal.4th 322, 332, fn. 11 [“the Legislative Counsel’s summary digests” are “not binding” but are “entitled to great weight” when interpreting statutes], superseded by statute on another ground as stated in *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 327.)²⁰

This minor change unsurprisingly came with little fanfare. It passed through committee and both houses of the Legislature without a single dissenting vote. (2 MJN 412–414, 424–435.) It went unmentioned in the Governor’s annual address to the Legislature, even as he mentioned other water-related topics. (See 2 MJN 420.) And the only contemporaneous news article we are aware of relegates the bill to the bottom of its list of new wildlife legislation—several rungs below changes to the timing of the deer and dove hunting seasons. (2 MJN 453.)

D. Plaintiffs’ expansive reading of the 1937 amendment is at war with its statutory context and legislative history.

Plaintiffs claim the 1937 amendment “substantively expanded” section 5937, creating a categorical imperative on all dam owners to allow sufficient water to pass downstream—regardless of whether the wildlife agencies have issued an order

²⁰ Plaintiffs quote an earlier summary from the Legislative Counsel, without disclosing that the Legislative Counsel updated that summary. (See OBOM 37; 2 MJN 415.) In any event, the earlier summary does not support plaintiffs’ argument that the 1937 Legislature intended to scrap article 2’s three-option framework, because it doesn’t address the question of *which* dam owners are subject to section 5937’s requirements.

relating to a particular dam. (OBOM 36–37.) But plaintiffs’ reading cannot be squared with the amendment’s uneventful legislative history or ordinary tools of statutory interpretation.

1. The 1937 amendment did not dismantle the three-option framework.

Plaintiffs insist that the largely unnoticed 1937 amendment was in fact a wholesale rewrite of article 2’s three-option structure in favor of a de facto universal minimum flow requirement throughout the state. (OBOM 36–37.) Plaintiffs’ argument violates the “no-elephants-in-mouseholes canon.” (*Rodriguez v. FCA US LLC* (2024) 17 Cal.5th 189, 199, citing *Whitman v. American Trucking Associations* (2001) 531 U.S. 457, 468 [121 S.Ct. 903, 149 L.Ed.2d 1] (*Whitman*)). This Court presumes that the Legislature “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” (*Whitman*, at p. 468; see, e.g., *Rodriguez*, at p. 199; *People v. Strong* (2022) 13 Cal.5th 698, 715.)

This Court applies the canon not just to a statute’s text but also to its legislative history. So it presumes that the Legislature did not intend to make “‘a significant change’” when “the supposed change left no trace in the legislative history” and came “‘without so much as a passing reference’” to the supposedly significant change. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1171.)

This case implicates both variants of the canon. Beginning in 1870, a dam owner had no obligation to act unless ordered by

the Commission. (*Ante*, section II.C.1.) And in 1915 and 1917, when the Legislature created the discretion-laden, three-option framework that tasked the Commission to consider fish maintenance and the practicability of the actions it might order, any requirement to maintain flows required an order from the Commission. (*Ante*, sections II.C.2–3.) The 1933 amendment expressly did not make any substantive change to the law. (*Ante*, section II.C.4.)

So as of the 1937 statute, there was no flow requirement absent an order from the wildlife agencies. Plaintiffs want the Court to conclude that the Legislature created a new, universal rule in 1937: all dam owners must allow sufficient water to pass every dam to keep all fish in good condition at all times. And the Legislature supposedly made that fundamental change through a wink and a nod. It left intact the practicability provisions. (§§ 5933 [“not practicable”], 5938 [“impracticable”].) It retained the three-option, discretionary framework. (§§ 5930 [“time to time” examination of dams], 5938 [hatchery “in lieu” of downstream flows], 5942 [planting fish “in lieu” of flows or hatchery].)

And yet it supposedly intended to convert one sentence right in the middle of that framework into an unrelated, universal fish flow requirement by adding the “in the absence of a fishway” language to section 5937. That’s the exact “fundamental” altering of a regulatory scheme through a “vague term[]” or “ancillary provision[]” that the no-elephants-in-mouseholes canon rejects. (*Whitman, supra*, 531 U.S. at p. 468.)

The legislative-history variant of the canon also forecloses plaintiffs’ interpretation. This massive change in law and policy supposed by plaintiffs’ interpretation went unremarked by the Legislature, Governor, and public. (*Ante*, [section II.C.5.](#)) By contrast, when the Legislature later expressly displaced article 2’s three-option framework for a sliver of the state in 1953 (via [section 5946](#)), the public took notice—with numerous individuals and organizations writing the Governor in support or opposition. (See 2 MJN 535–561; 3 MJN 566–603.)

2. Section 5946 confirms that, when the Legislature intends to restrict the wildlife agencies’ discretion and mandate fish flows, it does so expressly.

“[S]tatutes in pari materia should be construed together so that all parts of the statutory scheme are given effect.” (*Lexin v. Superior Court* (2010) [47 Cal.4th 1050, 1090–1091.](#)) The Court, therefore, should interpret section 5937 in a manner consonant with [section 5946](#).

[Section 5946](#), which was enacted about a decade-and-a-half after the 1937 amendment to section 5937, expressly displaces article 2’s three-option framework in *one* of the state’s 37 Fish and Game Districts: District 4½, located within the Counties of Mono and Inyo. (§ 11012.) The Department had agreed under [section 5938](#) to allow the Los Angeles Department of Water and Power to build a hatchery in lieu of a fishway for its dams in District 4½. (*Cal Trout I, supra*, [207 Cal.App.3d at pp. 595–597.](#))

But the Legislature intervened to override that decision: “The provisions of [Section 5938](#) shall not be applicable to dams

constructed in District 4½ after September 9, 1953.” (§ 5946.) Instead, the Legislature required the implementation of downstream flows, instructing the Water Board to ensure that all future applications to appropriate water in District 4½ must be “conditioned upon full compliance with Section 5937.” (§ 5946, subd. (b).)

Section 5946 therefore strips the wildlife agencies of their discretion to order fish-maintenance measures other than compliance with section 5937—for a single district. Indeed, the bill’s legislative history says as much. The Legislative Counsel explained that section 5946 “[m]akes inapplicable” within the covered area “provisions of [now-section 5938], which authorize [the] Commission to accept [a] fish hatchery in lieu of [a] fishway or flow required by [now-section 5937].” (2 MJN 470–471, emphasis added.)

Section 5946 demonstrates the Legislature knows how to expressly displace section 5937’s three-option framework when, where, and how it wants to. That makes it even less likely that the Legislature intended to use a wink and nod in 1937 to accomplish *statewide* what it did expressly in 1953 for a single stream system with *specific* dams and fish.²¹

²¹ Plaintiffs also suggest that a Water Board regulation “apparently” supports their audacious understanding of the 1937 amendment. (AOB 49, fn. 12, citing Cal. Code Regs., tit. 23, § 782.) But that regulation retains agency discretion—requiring minimum flows or another “provision for the protection of fish.” (Cal. Code Regs., tit. 23, § 782.) In any event, what policy an agency adopts under a delegation (see Wat. Code, § 1058) does

E. Plaintiffs’ reading of section 5937 as an a priori rule would render it facially unconstitutional.

1. Plaintiffs’ reading of section 5937 would violate this Court’s precedent on reasonableness.

This Court has repeatedly held that reasonableness requires a fact-specific inquiry. (*Ante*, section I.C.) If, as plaintiffs assert, section 5937 attempted to legislate reasonableness statewide without consideration of a river system’s facts and circumstances, it would violate the 1928 amendment. Indeed, this Court’s decisions in *Tulare*, *supra*, 3 Cal.2d 489 and *Long Valley*, *supra*, 25 Cal.3d 339 make that result clear.²²

In *Tulare*, this Court considered the constitutionality of section 11 of the original Water Commission Act, which declared that 10 years of nonuse of a riparian right created a conclusive presumption of abandonment. (*Tulare*, *supra*, 3 Cal.2d at pp. 530–531; Stats. 1913, ch. 586, pp. 1012–1013, 1017–1018, as amended by Stats. 1919, ch. 310, p. 513–514.) Citing its prior decisions explaining the fact-specific inquiry required, this Court held that the statute was “contrary to the letter and spirit of the 1928 constitutional amendment,” which instead requires courts

not dictate what a statute means (see *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 6–8).

²² Real parties did not challenge the facial validity of section 5937 in the Court of Appeal (*BBTK*, *supra*, 110 Cal.App.5th at p. 353, fn. 16), since that appeal focused on the trial court’s “no jurisdiction” holding and issues with its implementation order. Real parties raise it here because plaintiffs have gone beyond the issues decided below and asked this Court to broadly opine on the level of deference due to the statute.

to consider the specific riparian uses involved “in view of all the circumstances.” (*Tulare*, at p. 531.)

In *Long Valley*, this Court similarly considered state action attempting to extinguish riparian rights. That case reviewed the Water Board’s order in a water-rights adjudication of a particular stream, which extinguished certain unexercised riparian rights on the theory that the future exercise of long-dormant, unquantified riparian rights would be unreasonable given the uncertainty it would create for other users. (*Long Valley*, *supra*, 25 Cal.3d at pp. 346, 355.) This Court held that the Water Board, in a stream-wide adjudication, could “determine the nature of future riparian rights” and that the legislative grant of that power was “entirely consistent with the mandate of the amendment.” (*Id.* at p. 353.)

The Court distinguished *Tulare* on the ground that former-section 11 had treated future riparian rights as abandoned “without consideration of other needs and uses of the water in the stream system,” which “was inconsistent with the mandate of the amendment” because “what is a reasonable use of water varies with the facts and circumstances of the particular case.” (*Long Valley*, *supra*, 25 Cal.3d at p. 354.) By contrast, a stream-wide adjudication takes all of those facts and circumstances into account to enable “a complex balancing of both public and private interests.” (*Ibid.*; see Wat. Code, § 2550 [stream-wide adjudication begins with “an investigation of the stream system, of the diversion of water, of all beneficial uses being made of the water, and of the water supply available for those uses,” etc.].)

Long Valley reaffirmed the rule from *Tulare*, holding that a “blanket” rule would raise “a serious constitutional issue” regarding the extent of the Legislature’s constitutional power. (*Long Valley*, at pp. 357–358.)

Plaintiffs’ interpretation of section 5937 would make it a categorical rule like that struck down in *Tulare*—not the fact-specific adjudication upheld in *Long Valley*. To avoid that conclusion, plaintiffs argue that the Legislature has legislated reasonableness on a wholesale basis in other statutes. (OBOM 61.) But plaintiffs misread the statutes they identify. Water Code section 370 “encourage[s] . . . allocation-based conservation water pricing,” but it leaves the matter to local public agencies to “voluntarily” use those methods, “tailored to local needs and conditions,” disclaiming any “inten[t] the limit the discretion of public entities” to adopt methods suited to their specific circumstances.

And the statutes plaintiffs cite regarding potable water uses apply only “if recycled water is available,” “of adequate quality,” “at a reasonable cost to the user,” health authorities concur using potable water “will not be detrimental to public health,” and such use “will not degrade water quality” or “be injurious to plantlife, fish, and wildlife.” (Wat. Code, § 13550, subd. (a).) All these factors must be applied by the Water Board, which must “consider the impact” on “*each individual user*.” (*Id.*, § 13550, subds. (a)–(b), emphasis added.)

Plaintiffs also cite two cases in support of their a priori rule, which they say “hold[] that uses of water that deprive fish

of minimum flows . . . are properly deemed ‘unreasonable.’ ” (OBOM 49–50, citing *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976 (*Vina*); *Light, supra*, 226 Cal.App.4th at pp. 1473–1476.) But neither addresses an a priori rule; they approve specific applications of reasonableness by the Water Board. In *Light*, the Court of Appeal upheld a Water Board regulation applicable only to a particular stream system (the Russian River), which addressed a particular practice (frost protection) by creating a series of local, “self-organized” groups of diverters who would create plans to mitigate harms and report on them to the Water Board. (*Light, at pp. 1473–1476*; see Cal. Code Regs., tit. 23, § 862.)

In *Vina*, the Court of Appeal upheld an emergency regulation applicable only to three specific creeks in Tehama County, in response to a particular drought emergency, to protect specific protected fish. (*Vina, supra*, 50 Cal.App.5th at pp. 986–992, 999–1008.) Thus, these cases do not support a statewide a priori rule. They are instead examples of the stream-by-stream application of the constitutional standard, in both cases by the Water Board (not private plaintiffs). (Cf. *Long Valley, supra*, 25 Cal.3d at pp. 348–349, 353–354 [Legislature may authorize Water Board to apply reasonableness standard to particular streams, provided its actions do not transgress the policy of the amendment].)

2. The 1928 amendment was enacted precisely to eliminate categorical rules privileging one use over others.

The history of the 1928 constitutional amendment also shows that, if plaintiffs were correct about section 5937, that statute would be unconstitutional. If section 5937 established a categorical rule, that would violate the very purpose of the 1928 amendment, which rejected a series of judicial decisions that had similarly established a categorical rule favoring a particular use: that riparian rights trumped all others, without regard for whether a particular riparian was reasonably using the water.

Before the 1928 amendment, case law provided that riparian rights were not subject to any reasonableness limitation as against other water uses. (See *Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81 (*Herminghaus*); *Miller & Lux v. Madera Canal & Irrigation Co.* (1907) 155 Cal. 59, 64.) *Herminghaus* had confirmed that rule under egregious facts: allowing a riparian to enjoin *any* upstream diversion or storage of water, “[i]n order to have the beneficial use of less than 1 per cent” of the total flow, allowing the remaining 99 percent to be wasted. (*Herminghaus*, at p. 123 (dis. opn. of Shenk, J.)) A new standard was necessary.

There is no question that the 1928 amendment was enacted by the people of California in part to overcome the egregious outcome of *Herminghaus*. But they also substituted in its place the fundamental principle stated by Justice Shenk in his dissent in *Herminghaus* and then after the amendment is his majority opinion in *Gin Chow*: “not only under present conditions, but for

all time to come . . . the conservation of the waters of the state is of transcendent importance.” (*Gin Chow, supra*, [217 Cal. at pp. 701–702.](#))

In his *Herminghaus* dissent, Justice Shenk observed that a general rule “that limits the right to the use of water to that which is reasonably necessary for beneficial purposes” had become “general throughout the Western states.” (*Herminghaus, supra*, [200 Cal. 81 at p. 124](#) (dis. opn. of Shenk, J.)) He also pointed out that California courts applied that rule as between appropriators, as between different users of groundwater, and as between riparians; the only place it was not applied was between riparians and nonriparians. (*Ibid.*) The 1928 amendment not only resolved that inconsistency but also made it clear that a reasonable-use limit “appl[ies] to the use of *all* water, under *whatever right* the use may be enjoyed.” (*Peabody, supra*, [2 Cal.2d at p. 367](#), emphasis added.) The voters’ enactment of the 1928 amendment “vindicated” Justice Shenk’s dissent in *Herminghaus*. (*Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) [235 Cal.App.4th 1493, 1509–1510.](#))

As this Court summarized the 1928 amendment: “This amendment does more than merely overturn *Herminghaus*—it establishes state water policy. All uses of water, including public trust uses, must now conform to the standard of reasonable use.” (*National Audubon, supra*, [33 Cal.3d at p. 443.](#))²³

²³ Thus, this Court’s precedent rejects plaintiffs’ passing suggestion that the 1928 amendment’s purpose was solely “to overrule *Herminghaus*.” (OBOM 34.)

III. If this Court were to consider plaintiffs’ deference and burden arguments, which are not ripe for review, it should reject plaintiffs’ arguments.

We now briefly address the several issues that plaintiffs attribute to the Court of Appeal but were not actually decided by that court. (See *ante*, section I.E.)

A. Even assuming plaintiffs are correct about how to read section 5937, this Court should hold that no deference is due to the Legislature.

The Court of Appeal stated that legislative enactments have a role to play in a constitutional-reasonableness analysis. (*BBTK*, *supra*, 110 Cal.App.5th at pp. 351–352, 356–357.) But without any citation, plaintiffs assert the Court of Appeal “disclaims any deference” (PFR 37) and mandates de novo review in all cases (OBOM 53–54, 60). Plaintiffs urge that the 1928 amendment serves to “constitutionalize the Legislature’s power to determine reasonable and beneficial uses.” (OBOM 34.) Thus, they argue that courts must always give water-use statutes extreme deference and may set aside a water-use statute (or relief requested under one) as unconstitutional under the 1928 amendment only if it’s “manifestly unreasonable.” (OBOM 11, citing *Cal Trout I*, *supra*, 207 Cal.App.3d at p. 625.)

For several reasons, this Court need not decide whether the “manifestly unreasonable” standard is the right one for judicial review of water-use statutes passed under the in-furtherance clause. As explained, section 5937 was not enacted under that clause. (*Ante*, section II.A.) Plus, the Court of Appeal never reached this issue—since the trial court hasn’t conducted any

reasonableness review. But if this Court were to reach plaintiffs’ deference question, it should reject their request of an across-the-board answer that would apply to every statute.

To start, the legislative history of the 1928 Amendment forecloses plaintiffs’ request for extreme deference. The original draft gave the Legislature broad authority, but that language was replaced by the much narrower in-furtherance clause. (1 MJN 79 [as introduced], 81–86, 145 [as amended]; see [Bezerra, California Water Law \(2022\) pp. 166–169](#) [redline].)

Several years later, in 1934, one of the authors of the 1928 amendment proposed another amendment, which would have expanded the Legislature’s authority under the 1928 amendment. ([Bezerra, supra, pp. 181–182.](#)) But that proposal was soundly defeated. (*Id. at p. 183.*) The People did not approve an unfettered authority for the Legislature to define what is reasonable. (See *Rice v. Howard* (1902) [136 Cal. 432, 439–440](#) [self-executing provisions are “of a statutory character” but “made directly by the people instead of by the legislature . . . for the express purpose of depriving the legislature of the power to change or modify them”].)

In developing the standards that might govern whether a statute is constitutional under the 1928 amendment, this Court should draw an analogy from appellate standards of review. In this case, section 5937—as interpreted by plaintiffs—would violate the 1928 amendment based on a pure legal question, and so a court should review without any deference to the Legislature. (See *People v. McDavid* (2024) [15 Cal.5th 1015, 1023](#)

[statutory interpretation involves “a pure question of law,” warranting “a de novo standard of review”].) The Court would discern “the policy” of the 1928 amendment (constitutional interpretation), determine the meaning of the statute at issue (statutory interpretation), and then assess whether they are compatible. Here, the 1928 amendment requires a fact-specific analysis for reasonableness; plaintiffs’ reading of section 5937 prescribes a categorical rule. Section 5937, under that reading, would not be “in the furtherance” of the 1928 amendment and should therefore be set aside as unconstitutional.

It might be another matter if the Legislature, when enacting a water-use statute, considered all the facts and circumstances of a stream system and elected a particular balance of interests, but even then the Court should conduct something akin to abuse of discretion review to determine whether the Legislature’s determination fits “within the permissible range of options set by the legal criteria.” (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 452, internal quotation marks omitted.) The legislative history before this Court shows that, when the Legislature enacted section 5937, it gave no consideration whatsoever to the conditions, beneficial uses, balancing of public interests, or reasonableness of water uses in the Kern River system past or present. (1 MJN 190–266; 2 MJN 271–453.) Thus, this case presents a purely *legal* question, not a challenge to the Legislature’s record of fact-finding or its policy-laden balancing of competing water uses in a particular stream system.

This is not a novel rule; it is what this Court has done—cautioning against “blanket” rules in *Long Valley, supra*, 25 Cal.3d at pp. 357–358, and finding them “contrary to the letter and spirit of the 1928 constitutional amendment” in *Tulare, supra*, 3 Cal.2d at p. 531. It is also consistent with how this Court interprets other clauses of the state Constitution, including other provisions that are expressly self-executing while also expressly permitting implementing legislation. (*Ante*, fn. 9.) An analogy might also be drawn to home-rule cases deciding what is a “municipal affair,” which like reasonableness “is not a fixed or static quantity” but depends on factual and historical circumstances. (*State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 557.) In those cases, while courts “accord great weight to the factual record that the Legislature has compiled,” they still exercise their independent obligation to interpret the constitutional text. (*Id.* at p. 558; see generally *Bezerra, supra*, at pp. 62–67, 70–73 [discussing analogy].)

B. This Court should hold that plaintiffs bear the burden of proving constitutional reasonableness.

Plaintiffs next ask this Court to decide who bears the ultimate burden in a reasonableness inquiry. (OBOM 63–64, 68–71; *ante*, sections I.D–I.E.) As explained, the Court of Appeal never reached this question because it had no occasion to after the trial court refused to conduct reasonableness review and

plaintiffs presented no evidence relevant to the question. (*Ante*, section I.E.)

But in any event, the burden question is answered by a basic principle of civil procedure: just as a plaintiff has the burden to ultimately prove its case (Evid. Code, § 500), a plaintiff seeking a preliminary injunction bears the burden of showing a likelihood of success on the merits (e.g., *Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1333.)

Given this Court’s holding that “[a]ll uses of water” must be reasonable (*National Audubon, supra*, 33 Cal.3d at p. 443, emphasis added), reasonableness is part of a plaintiff’s prima facie case. This is consistent with this Court’s holding in *Long Valley*, where this Court put the burden on the state to make a “showing” that its curtailment of existing rights was “necessary to the promotion of the reasonable and beneficial use of a stream system.” (*Long Valley, supra*, 25 Cal.3d at pp. 357–358.) If the state itself must make such a showing before making an order limiting water rights, private plaintiffs must similarly bear the burden of proving entitlement to such an order from a court. In fact, in *Tulare*, the Court held a party with senior water rights seeking to enjoin a water use by a junior right has the burden to first prove the reasonableness of their use. (*Tulare, supra*, 3 Cal.2d at p. 535.)

Here, there is yet another reason for allocating the burden of proof to plaintiffs. When a court is asked to order public water agencies to change their operations under their water rights, the presumption of regularity applies and places the burden on the

plaintiff to show that the change is required. “It is to be presumed [a public agency] will exercise its powers in conformity with the statute and Constitution of the state.” (*People v. Globe Grain & Milling Co.* (1930) 211 Cal. 121, 128; see Evid. Code, § 664; *In re Stobie’s Estate* (1939) 30 Cal.App.2d 525, 530.) Even if plaintiffs’ interpretation of section 5937 were correct, a lack of flow below any of the weirs could still be construed in at least two ways: as a violation of the statute or as the application of the higher law of the 1928 amendment in a situation where strict application of the statute would conflict with the rule of reasonable use. Under the presumption of regularity, the trial court must assume it is the latter, unless plaintiffs meet the burden of proving otherwise.

Plaintiffs contend applying these ordinary rules of procedure to them would “impose a burden” that “could frustrate the Legislature’s purpose by precluding or unduly delaying enforcement of the statute.” (OBOM, 67–68.) That argument proves too much, as the requirements of due process and the rules of evidence always “impose a burden” on litigants.

Furthermore, the 1928 amendment’s policy and the Legislature’s preferences are contrary to plaintiffs’ position. The quantification of both water rights and flow requirements is essential to the conservation and reasonable use of water. This Court has acknowledged that the “uncertainty” created by unquantified claims on the use of water has “pernicious effects” that the 1928 amendment addresses. (*Long Valley, supra*, 25 Cal.3d at pp. 354–357.)

The Legislature agrees, and has required applicants to quantify the amount of water they seek to divert in “definite terms,” such as “cubic feet per second, gallons per minute or per day, or acre-feet per annum.” (Wat. Code, § 1260, subds. (a) & (c); Cal. Code Regs., tit. 23, § 696). And it requires any proposed instream flow requirements adopted by the wildlife agencies to be “specified in terms of cubic feet of water per second.” (Pub. Resources Code, § 10002.)

Plaintiffs’ insistence on the difficulty of private plaintiffs formulating an appropriate estimate—despite that being commonplace for state agencies—is just further evidence that the Legislature committed this subject in the first instance to the Water Board and the wildlife agencies, who have specialized expertise that private plaintiffs often lack. (*Ante*, sections II.B–D.)

C. This Court should hold that a trial court has a duty to ensure its orders affecting water use are constitutionally reasonable.

Plaintiffs also object that the opinion “can be read” as imposing a duty on courts to sua sponte assess reasonableness. (OBOM 70; see OBOM 10, 23.) But those words never appear in the Court of Appeal’s opinion. And the Court of Appeal had no reason to consider whether a court must raise the reasonableness of a water use sua sponte, because real parties raised the issue. (See 6 AA 1375–1376; 13 AA 2914–2915; 14 AA 3139–3141.) But again, if this Court were to reach this issue, it should hold that

trial courts *do* have a sua sponte duty to assess the reasonableness of relief requested.

This Court has long held that. The 1928 amendment “enjoined upon trial courts . . . the responsibility of weighing the evidence in conformity with constitutional requirements and framing their decrees accordingly.” (*Peabody, supra*, 2 Cal.2d at p. 373.) Thus, in water cases, courts have the obligation *before* issuing any order to consider the reasonableness of the water use directed by the order and, if the requested order would lead to a waste or unreasonable use, to “ascertain whether there is a physical solution of the problem that will avoid waste and which will not unreasonably or adversely affect the rights of the parties.” (*Rancho Santa Margarita, supra*, 11 Cal.2d at pp. 558–559; see *City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316, 339–340 (*Lodi*).)²⁴

And this Court has long held that a court “should not grant an injunction until every reasonable physical solution, and every reasonable source of supply, has been thoroughly investigated.” (*Rancho Santa Margarita, supra*, 11 Cal.2d at p. 556.) Not only must a court always consider reasonableness, it even has the duty to seek a physical solution sua sponte if necessary. (*Id.* at pp. 558–559; *Lodi, supra*, 7 Cal.2d at p. 341; *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 480.)

²⁴ The term “physical solution” is a term of art for a “resolution of conflicting claims in a manner that advances the constitutional rule of reasonable and beneficial use of the state’s water supply.” (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287.)

IV. Even if plaintiffs prevail on the issues they raise, the preliminary injunction cannot be reinstated and reversal of the implementation order must stand, based on uncontested alternative grounds.

Plaintiffs request that the Court direct reinstatement of the preliminary injunction as modified. (OBOM 72.) This Court cannot do so, because the Court of Appeal also reversed the injunction and implementation order on independent grounds. (See *BBTK*, *supra*, [110 Cal.App.5th at pp. 357–367.](#))

Specifically, the Court of Appeal held that the injunction must be reversed for lack of an appropriate bond requirement. (*BBTK*, *supra*, [110 Cal.App.5th at pp. 360–361.](#)) And the implementation order was separately reversed, because it did not meet the minimum due process requirement of “an opportunity for all parties to be heard.” (*Id.* at p. 366.)

These independent holdings were not “raised or fairly included in the petition or answer.” (Cal. Rules of Court, [rule 8.516\(b\)\(1\).](#)) Nor were they addressed in the opening brief, and so any challenge to them has been forfeited. (*Tisher v. California Horse Racing Bd.* (1991) [231 Cal.App.3d 349, 361.](#)) After this Court concludes its review, those holdings will again be binding authority. (Cal. Rules of Court, [rule 8.1115\(e\)\(2\).](#))

**CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)**

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