August 17, 2020

The Honorable Tani G. Cantil-Sakauye, Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Stanford Vina Ranch Irrigation Co. v. State of California*
Third Appellate District, Case No. C085762
California Supreme Court, Case No. S263378
Association of California Water Agencies, *et al.* Amici Curiae Letter in Support of Petitioner Stanford Vina Ranch Irrigation Co.'s Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rules 8.500(g) and 8.1125(a) of the California Rules of Court, Amici Curiae Association of California Water Agencies, Northern California Water Association, Sacramento River Settlement Contractors, San Joaquin River Exchange Contractors Water Authority, San Luis & Delta-Mendota Water Authority, State Water Contractors, Tehama Colusa Canal Authority, Byron Bethany Irrigation District, Central California Irrigation District, City of Ukiah, Contra Costa Water District, East Bay Municipal Utility District, El Dorado Irrigation District, Metropolitan Water District of Southern California, Placer County Water Agency, and Westlands

Water District (collectively, "Amici") respectfully submit this letter in support of Petitioner Stanford Vina Ranch Irrigation Company's Petition for Review of the Court of Appeal's opinion in *Stanford Vina Ranch Irrigation Co. v. State of California, et al.* (2020) 50 Cal.App.5th 976 (the "Opinion").[1]

Water rights are vested, constitutionally protected property rights. As such, California courts have long held that each holder of a water right must be afforded due process before the State Water Resources Control Board ("State Board") can adversely affect the exercise of that right. Here, the State Board circumvented these constitutional protections under the guise of an emergency rulemaking. The Court of Appeal said that is acceptable. It is not. The Court of Appeal erred by ignoring longstanding precedent, and if the decision is left to stand, it would allow the State Board to abuse its emergency regulatory powers to unlawfully infringe upon constitutional rights and undermine the water rights system that is a foundation of water planning statewide. This Court should grant review of the Court of Appeal's decision in order to protect fundamental constitutional rights to due process.

I. Interest of Amici Curiae

Amici are a diverse coalition of water associations and public water agencies engaged in municipal, agricultural, and wildlife refuge water supply service throughout California. Collectively, Amici and their association members are responsible for more than 90% of the water delivered to cities, farms, and businesses in California. In addition, these agencies include wildlife refuges that provide water for fish and wildlife uses across the state. Amici depend upon the consistent application of longstanding water rights principles, and on the procedural protections that have historically been applied in adjudicatory proceedings before the State Board and the courts, to ensure that the vast majority of Californians and California businesses have the water they need to survive and thrive.

The Amici support the petition for review and ask the State's highest court to protect the constitutional guarantee of due process with respect to California water rights. The State Board's actions at issue in this case undermine the basic foundation of water management and water service in California, by effectively taking water rights without due process. Indeed, the State Board's curtailment of water rights without affording adequate due process not only violates state and federal constitutional requirements, it also instills uncertainty in a water system that depends on reasonably stable expectations, especially under drought conditions.

As explained more fully below, the Appellate Court's Opinion fails to properly analyze the scope of the State Board's quasi-legislative authority and contravenes long-settled legal rules regarding the protections accorded water right holders and administration of water rights. In doing so, the Opinion creates instability and uncertainty for Amici, their rights, and the rights exercised to benefit them and those they serve.

[1] Amici will also be filing a request for depublication.

II. The Case Arises in a Unique Factual Setting in a Small Stream System in Northern California Amidst a Statewide Drought.

Recurring droughts are a fact of life in California. California's most recent drought, which started in 2012 and continued through 2015, impacted every corner of the state, from the forests of the Sierra Nevada to river flows in the Sacramento Valley and home landscapes in every county. To address this statewide problem, the Legislature amended Water Code section 1058.5 to permit the State Board to adopt emergency regulations to prevent the unreasonable use of water. Pursuant to this amendment, the State Board, the state agency charged with protection of the public interest in the development of the State's water, twice adopted "emergency" regulations establishing minimum instream flows on Deer Creek, a small stream in rural northern California that ultimately flows to the Sacramento River, through the San Joaquin-Sacramento River Delta, and into the San Francisco Bay before draining to the ocean. The regulations provided that diversions from Deer Creek "that would cause or threaten to cause flows" to fall beneath minimum flow levels established by the State Board constituted a waste and unreasonable use of water under Article X, section 2 of the California Constitution. (Cal. Code Regs., tit. 23, former § 877.) The stated purpose of the emergency regulations was not to address the impacts and causes of the drought statewide, but rather to protect endangered salmon that sometimes inhabit Deer Creek. (*See* Cal. Code Regs., tit. 23, former § 877(a); Op. at 13 [observing that one curtailment order was suspended "due to the absence of [species of concern] in Deer Creek."].)

During the administrative process, the State Board acknowledged that it would be preferable to undertake "adjudicative water right proceedings" to assign responsibility for minimum instream flows (AR008442, ¶ 18). Nonetheless, the State Board styled its emergency regulations and related enforcement actions as quasi-legislative in nature to avoid compliance with what it characterized as "cumbersome" constitutional due process requirements. (AR008253 p. 27:11-28:6; 008255 p. 33:10-14; 008265 p. 74:11-14; 007815; 008249 p. 11:25-12:3.) The State Board subsequently issued four separate curtailment orders pursuant to the emergency regulations, directing all water right holders on Deer Creek to cease diverting water in 2014 and 2015. (Op. at pp. 10-13.)

Petitioner Stanford Vina filed the underlying civil action in October 2014. The operative complaint alleged that the State Board's adoption of the emergency regulations and issuance of the curtailment orders violated Stanford Vina's constitutional rights to due process and constituted a taking of private property triggering the constitutional requirement of just compensation. This amicus letter focuses on Stanford Vina's due process claims. With respect to those claims, Stanford Vina asserted that the State Board was required under state and federal law to hold an evidentiary hearing before it could adopt and enforce the emergency regulations.

In the trial court, the State Board argued that Stanford Vina was not deprived of due process because the emergency regulations themselves determined that Stanford Vina lacked a constitutionally protected interest in diverting water from Deer Creek. The trial court was understandably troubled by the circularity of this argument: "There is a 'chicken and egg' problem because it is the Water Board's actions, challenged in this case, which ostensibly established Stanford Vina's use was unreasonable and contrary to the public trust." (AR 1758.) Despite its stated reservations, the trial court determined that Stanford Vina was not entitled to the level of due process of law that is required in a quasi-adjudicatory proceeding and that should be accorded to a water right holder because the State Board's adoption of the emergency regulations was

"quasi-legislative" in nature. The Court of Appeal upheld this determination. (Op. at 15, 20.) Stanford Vina's Petition for Review was filed on July 21, 2020, and is now pending before this Court.

III. The Petition for Review Should Be Granted to Ensure Due Process is Afforded by Administrative Decisionmakers when Threatening to Impact Vested Rights.

A. Review Is Necessary to Settle an Important Question of Law and Secure Uniformity of Decision.

Rule 8.500(b)(1) of the California Rules of Court provides that the Supreme Court may order review of a Court of Appeal decision "[w]hen necessary to secure uniformity of decision or to settle an important question of law." The Court of Appeal's Opinion upended longstanding rules governing the procedural rights in administrative proceedings that involve modifying existing water rights. While the unique facts in this case concern a rural and remote area during a severe drought, the Opinion has broad implications for the future administration of water rights—and other types of real property rights—throughout the state. In addition to the need for this Court to address this important legal issue, review is also necessary to ensure that courts engage in the functional analysis that has long been held necessary to determine whether administrative actions are properly classified as legislative or judicial.

B. The Court of Appeal Failed to Undertake the Functional Analysis Required Under Existing Law to Determine Whether the State Board's Action was Legislative or Judicial in Nature.

Stanford Vina manages its landowners' asserted senior riparian and pre-1914 appropriative water rights to divert and beneficially use water from Deer Creek. (AR 20, 8183, 8192-8193, 8194, 88183; *see also,* Appellant's Opening Brief at 16). Riparian and pre-1914 appropriative water rights are vested property rights that cannot be taken without due process and just compensation. (*See, United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 100 ["It is equally axiomatic that once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by government action without due process and just compensation."]; *see also, Casitas Municipal Water District v. United States* (Fed. Cir. 2013) 708 F.3d 1340, 1353-1354; *Ivanhoe Irr. Dist. v. All Parties* (1957) 47 Cal.2d 597, 623.) Because water rights are vested property rights, the State Board has traditionally utilized adjudicative processes to issue or modify such rights. (*See, e.g., Bank of America, N.A. v. State Water Resources Control Board* (1974) 42 Cal.App.3d 198; *see also Abatti v. Imperial Irr. Dist.* (2020) 52 Cal.App.5th 236, 2020 WL 4013439 at *12 ["The farmers are beneficial owners of the District's water rights . . . and that right is constitutionally protected."].)

The State Board admittedly styled its emergency regulations and related enforcement actions as quasi-legislative to avoid compliance with "cumbersome" constitutional due process requirements. (AR008253 p. 27:11-28:6; 008255 p. 33:10-14; 008265 p. 74:11-14; 007815; 008249 p. 11:25-12:3.) An agency acts in a legislative capacity when it formulates a rule to be applied in future cases and in an adjudicative capacity when it applies such a rule to a specific set of facts. (*Patterson v. Central Coast Regional. Com.* (1976) 58 Cal.App.3d 833, 840.) But the line between judicial and legislative decision-making is not always clear. Consequently, California courts have

traditionally applied a comprehensive functional analysis in determining whether an action is quasi-judicial or quasi-legislative in nature. (*Wilson v. Hidden Val. Mun. Water Dist.* (1967) 256 Cal.App.2d 271, 280.) In undertaking such a comprehensive functional analysis, courts have traditionally considered a variety of factors, including:

- Whether the agency is determining a question of right or obligation, or of property;
- Whether the agency's action determines individual rights, or involves the exercise of a discretion governed by considerations of the public welfare;
- Whether the agency's action resolves the rights and interests of individuals or resolves fundamentally political questions; and
- Whether the agency's determination is informed by how it will affect a large community.

(*Id.*; *California School Boards Assn. v. State Bd. of Education* (2015) 240 Cal. App. 4th 838, 847.)

Here, the Court of Appeal declined to undertake the comprehensive functional analysis required by law. Instead, the Court of Appeal merely stated, in conclusory fashion, that it had "no difficulty concluding the regulations formulated a rule to be applied to future cases, and were therefore legislative in nature." (Op. at 20.)

Had the Court of Appeal undertaken the required comprehensive functional analysis, it would have been forced to grapple with a number of critical facts that render the State Board's actions in this instance quasi-judicial in nature. First, the number of persons directly affected by the subject emergency regulations is extremely small. (*See* Petition at 39 [regulations applied to only seventeen Deer Creek water right holders].) Second, because water rights are a species of real property, the emergency regulations indisputably determine a question of property rights—in this case, whether Stanford Vina's continued exercise of its senior water rights was unreasonable. Third, the State Board adopted the emergency regulations based in part on its authority under the public trust doctrine, which requires the State Board to balance the interests of the public with Stanford Vina's specific private interests – which it clearly did not do. (*See Natl. Audubon Soc. v. Superior Court* (1983) 33 Cal.3d 419, 445 [describing duty to protect public trust "whenever feasible"].)

The State Board also adopted the emergency regulations based on Article X, Section 2 of the California Constitution. This Court has repeatedly emphasized that the determination of what constitutes an unreasonable use of water is a factual determination that must account for competing uses and assess alternatives in the context of Article X, Section 2's mandate that water "be put to beneficial use to the fullest extent" possible. (*See e.g., Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal. 2d 132, 139.) These factual determinations and the balancing required under *Joslin* and its progeny are nowhere to be found in the Opinion. Indeed, none of the relevant factors present here—the small number of parties directly affected by the regulations, their application to a form of real property, and the requirement that the State Board balance competing trust uses and make specific factual findings in exercising its authority under the public trust doctrine and Article X, Section 2—supported the Court of Appeal's holding that the State Board's action was legislative in nature.

C. The Court of Appeal Misapplied the First Appellate District's Decision in *Light v. State Water Resources Control Board.*

The Court of Appeal relied on the First District Court of Appeal's decision in *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463 to support its determination that the State Board regulations were legislative in nature. But *Light* did not obviate the obligation of a court to undertake the comprehensive functional analysis described above. Importantly, and unlike in this case, the State Board regulation in *Light* did not limit any individual diversions of water; it simply established a regulatory process under which such limitations might be imposed in the future following additional regulatory decision-making. In fact, the regulation in *Light* delegated the task of determining what diversion limitations needed to be imposed to comply with the regulation to local bodies composed of individual diverters themselves. (*Light*, *supra*, 226 Cal.App.4th at 1472.) In other words, the court in *Light* did not address a circumstance where limitations on diversions were imposed as an immediate response to the State Board's regulation. Instead, the State Board "established a schedule allowing for the collection and analysis of baseline data during the first two and a half years following adoption" of the regulation. (*Id*. at 1476.) These provisions led the *Light* court to conclude that the plaintiffs' fears that implementation of the regulation would result in violations of the rule of priority were "premature" until specific limitations on diversions were imposed under locally developed water demand management programs. (*Id*. at 1490.)

The regulation at issue in *Light* is distinguishable from the regulations at issue here. The trial court specifically found that adoption of the subject regulation and the curtailment of Stanford Vina's water rights was part of a single, integrated and consolidated regulatory action. (AR 1729; 1730; 1738; 1739; 1740.) Whereas *Light* involved a facial challenge to a two-step regulatory process before limitations on diversions could be imposed, in this case the legislative determination and the curtailment of diversions occurred essentially simultaneously and were part of a single consolidated action.

D. The Opinion Has Broad and Troubling Implications for the Administration of Water Rights in California Generally and Due Process Protections Specifically.

Failing to undertake the comprehensive functional analysis required by California law, the Court of Appeal erroneously held that Stanford Vina was not entitled to an evidentiary hearing before its exercise of its water rights was halted. Amici are concerned that, if the Opinion stands, the State Board will utilize the Opinion to continue to chip away at due process protections available in water right proceedings generally, beyond the narrow context of emergency regulations.

While there is no constitutionally protected right to an unreasonable use of water, the right holder is entitled to the due process protection of an evidentiary hearing to determine whether its use is, in fact, unreasonable. Any other rule would empower the State Board to avoid the due process requirements of the federal and state constitutions by, in essence, defining a water right out of existence. As the Ninth Circuit has observed, "a state cannot validly effect a taking of property by the simple expedient of holding that the property right never existed." (*Cherry v. Steiner* (9th Cir. 1983) 716 F.2d 687, 692 [ultimately holding that the Arizona Supreme Court's decision in *Town of Chino Valley v. City of Prescott* (Ariz. 1981) 131 Ariz. 78 did not constitute a "startling and unpredictable change in Arizona property law, if it represent[ed] any change at all." (internal

quotation marks omitted)].) In light of the fact that Stanford Vina's water use had been occurring—and presumably considered reasonable—for more than a century, the State Board's decision here constitutes exactly the type of "startling and unpredictable change" in property law that the state and federal constitutions forbid.

An emergency is not an excuse to dispense with a water right holder's federal and state due process rights. Nor is it lawful for an agency to use the guise of emergency regulations to effectively take individual property rights. Here, the evidence shows the State Water Board did not want to do the "cumbersome" but necessary work to allow for due process, and chose rather to abuse its emergency rulemaking authority to avoid procedural due process. While recurring droughts are a fact of life in California, they do not occur overnight. The State Board had almost one full year to convene an evidentiary hearing before curtailing Stanford Vina's diversions again in 2015. The State Board regularly conducts evidentiary hearings of this type, and Stanford Vina's request for even a limited evidentiary hearing was denied (AR 8282, pg. 143:11-16; 9396-9397 ¶ 2-3; 9399 ¶ 2; 9/23/2014 Transcript, Pg. 16-18; 3/17/2015 Transcript Pg. 20:2-11, Pg. 69:23-70:3).

The Court of Appeal's endorsement of the State Board's use of emergency regulations to circumvent due process requirements in water right proceedings has grave implications for Amici and their members and water users throughout the state. If allowed to stand, the Opinion will be used by the State Board to strip water right holders of due process protections and make future declarations of "per se" unreasonable water use under the guise of quasi-legislative actions. The Opinion provides a disincentive for the State Board to prepare in advance for future droughts because it incorrectly holds they may effectively invalidate water rights without due process.

E. Review Is Necessary to Avoid Frustrating Public Policy Regarding the Consideration of the Relative Priority of Water Rights that May Be Subject to Regulation.

In adopting the emergency regulations and curtailment orders, the State Board failed to analyze whether curtailment of water rights junior to Stanford Vina's rights could have achieved the emergency regulations' minimum flow objectives, and instead simply issued blanket curtailment orders. The Opinion compounds this error by simply stating that the State Board implemented its unreasonableness determination by "curtailing all diversions that threatened to violate" the minimum flow requirements. (Op. at 35.) Without any analysis of whether curtailment of more junior rights could have allowed Stanford Vina to exercise its asserted senior rights, the Court of Appeal's conclusion that the State Board did not violate the rule of priority is unfounded, and is inconsistent with legislative direction that is directly on point. The use of the words "threatened to violate" is also troublesome, as, without a due process hearing, there was no evidence that continued use of the water right would actually have an adverse impact on the fishery.

By amending Water Code section 1058.5, the Legislature intended that curtailment regulations would "follow established California water right laws concerning priority." (*See* 2013 California Senate Bill No. 104, California 2013-2014 Regular Session, California Committee Report (Feb. 27, 2014).) Both the State Board's actions and the Opinion undermine the Legislature's intent by frustrating the public policy that requires the State Board to consider the relative priority of water rights that may be subject to curtailment. As the Third District Court of Appeal, the same court that issued the Opinion, previously emphasized, the State Board has an affirmative obligation to

make "*[every] effort . . .* to respect and enforce the rule of priority." (*El Dorado Irr. Dist. v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 966, emphasis added [striking down a State Board action to impose a term in a senior appropriator's water right permit when the State Board had failed to impose a similar term in the permits and licenses of more junior appropriators with later priority dates].) For this additional reason, review should be granted to ensure that future courts effectuate the Legislature's intent regarding priority of water rights.

IV. Conclusion

Amici respectfully request that this Court grant Stanford Vina's Petition for Review.

Respectfully submitted,

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PROOF OF SERVICE

Stanford Vina Ranch Irrigation Company v. State of California, et al.
California Supreme Court Case No. S263378

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.

On August 17, 2020, I served true copies of the following document(s) described as **AMICI CURIAE LETTER IN SUPPORT OF PETITIONER STANFORD VINA RANCH IRRIGATION CO.'S PETITION FOR REVIEW** on the interested parties in this action as follows:

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Downey Brand LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Sacramento, California.

The Honorable Timothy M. Frawley (Ret.),
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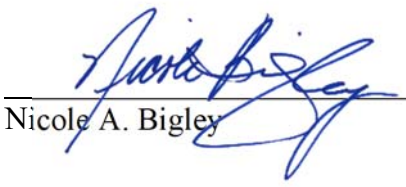
BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

To Each on the Attached Service List
COURT OF APPEAL OF CALIFORNIA,
Third Appellate District, per Rule 8.500(g)(1)
SUPREME COURT OF CALIFORNIA, per
Rule 8.500(g)(1)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 17, 2020, at Sacramento, California.



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