No. _____

In The Supreme Court of the United States

STANFORD VINA RANCH IRRIGATION COMPANY,

Petitioner,

v.

STATE OF CALIFORNIA, STATE WATER RESOURCES CONTROL BOARD, STATE WATER RESOURCES CONTROL BOARD MEMBERS FELICIA MARCUS, DOREEN D'ADAMO, FRANCES SPIVY-WEBER, STEVEN MOORE, AND TAM DODUC; and DOES 1 THROUGH 20,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

California water rights are real property rights pursuant to 160 years of California and Federal case law. "As such, they cannot be infringed by others or taken by government action without due process and just compensation." *United States v. SWRCB*, 182 Cal.App.3d 82, 101 (1986). Like nuisance, there is no property right in an "unreasonable" use or diversion of water. Cal. Const. Art. X, § 2.

Without due process or just compensation, the State of California adopted and implemented *regulations* declaring the use and diversion of water by a small group of named water right holders on three small creeks to be "unreasonable." The State claimed an emergency and argued, and the lower courts accepted, that constitutional rights to due process and compensation were inapplicable because the regulations declared the targeted right holders' use and diversions of water to be "unreasonable," and there is no property right in an unreasonable use or diversion of water. The State said it was an emergency in 2014, and again in 2015, and that the actions were "styled" as quasi-legislative regulations because of "exigent" emergency circumstances. Landowners were prohibited from utilizing their property right to divert and use their water for irrigation of crops as they had done for over 100 years.

Questions:

Whether government may avoid constitutional rights to due process and compensation by crafting

QUESTIONS PRESENTED – Continued

quasi-legislative regulations that eliminate the property interest of specific individuals and take their property.

Whether government may take the water of adjudicated California water rights for a public use without compensation or due process.

Whether an assertion of emergency authority alters constitutional rights to compensation and due process.

Whether the public trust doctrine may be asserted to the property rights of Mexican Land Grant lands, and without compensation or balancing.

LIST OF ALL PARTIES

The party to the judgment from which review is sought is Petitioner Stanford Vina Ranch Irrigation Company ("Petitioner" or "Stanford Vina"). Stanford Vina was a party in all proceedings below. Respondent is the State of California, the State Water Resources Control Board of California and State Water Resources Control Board Members Felicia Marcus, Doreen D'Adamo, Frances Spivy-Weber, Steven Moore, and Tam Dudoc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Stanford Vina states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

Stanford Vina Ranch Irrigation Company v. State of California, et al., Sacramento Superior Court, No. 34-2014-80001957, September 6, 2017. App. E.

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PETITION FOR A WRIT OF CERTIORARI

Stanford Vina respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Third Appellate District.

OPINIONS BELOW

The Opinion of the Third District Court of Appeal is reported at *Stanford Vina Ranch Irrigation Company v. State*, 50 Cal.App.5th 976 (2020), and is attached here as Appendix (App.) A. An order modifying the decision is attached as App. B. The denial of the Petition for Rehearing to the Third District Court of Appeal is attached as App. C. The opinion of the Trial Court is unpublished. It is attached here as App. D. The Judgment entered by the Trial Court is attached as App. E.

JURISDICTION

This Court has jurisdiction under the Fifth and Fourteenth Amendments to the United States Constitution. The California Supreme Court denied the petition for review on September 23, 2020. The denial is attached here as App. F. This court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS AT ISSUE

The U.S. Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. V.

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const., Amend. XIV.

California Constitution Article X, section 2 is set forth in full in App. G. It provides in part:

> The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water . . . nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled . . .

Cal. Const. Art. X, sec. 2.

California Code of Regulations, Title 23, Division 3, Chapter 2, Article 24, sections 877-879.2, and the State's resolutions adopting them in 2014 and 2015 are attached as App. H and App. I. The 2014 and 2015 Curtailment Orders issued pursuant to those regulations are attached as App. J, K, L, and M.

INTRODUCTION

This case compromises constitutional protection of property in California. By styling adjudicatory actions as quasi-legislative regulations that target specific individuals and entities on three creeks in rural Northern California, and *by eliminating their property interests in the regulation*, the State of California bypassed constitutional rights to compensation and due process when taking property. This bill of attainder type of practice vests the State with virtually limitless power to reclassify and confiscate real property without compensation or a due process hearing.

This Court should impose boundaries on the use of quasi-legislative regulations to recharacterize and take property from small groups without due process or compensation. This case presents a clean vehicle for doing so, as there is no meaningful dispute of the facts, and the State even said that it "styled" the actions as quasi-legislative regulations to avoid "cumbersome" constitutional rights when denying requests for cross-examination and an evidentiary hearing. App. G, H. As the trial court put it, this case "exploits" the distinction

between quasi-adjudicatory and quasi-legislative. App. R.

Lower courts have acknowledged the uncertainty surrounding the distinction of adjudicatory and legislative actions, and they have diverged on whether due process rights can apply to legislative rules or regulations that target a small group, or a single person, to eliminate their property interest. See *Philly's v. Byrne*, 732 F.2d 87, 93 (7th Cir. 1984) ("We . . . do not hold that there is never any requirement of due process in the legislative process . . . "); *Dibble v. Quinn*, 793 F.3d 803, 814 (7th Cir. 2015) ("no case clearly establish[es] that motive is relevant to determining whether a validly enacted statutory amendment eliminating an employee's property interest complies with procedural due process requirements."); *75 Acres, LLC v. Miami-Dade County, Fla.*, 338 F.3d 1288, 1296 (11th Cir. 2003) (Stating 11th Circuit has no articulated test for the legislative – adjudicative distinction, but the 2nd Circuit focuses on the function performed and the 7th Circuit focuses on an action's generality and prospectivity).

Other circuits have also recognized that constitutional protection of property will be meaningless if legislative processes can be used to eliminate property interests without due process. *Club Misty, Inc. v. Lask,* 208 F.3d 615, 619 (7th Cir. 2000) (Warning against use of legislative processes to eliminate property rights without due process). And this Court has prohibited government from taking private property by simply reclassifying it as public property through legislative or

adjudicative actions. *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 164 (1980).

In a period of societal instability, pandemic, deficits, and political paralysis, government's use of labels such as "regulation" and "emergency" to avoid Constitutional compensation and hearing rights must be restricted.

This Court also has a history of assessing the constitutionality of California's efforts to control private property, and the inventive nature of the State's actions here warrants review. *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987); *Summa Corp. v. California State Lands Comm'n,* 466 U.S. 198 (1984); *First English Evangelical Lutheran Church of Glendale v. Los Angeles,* 482 U.S. 304 (1987).

This Court should grant review to address the following issues:

First, this Court should determine how procedural due process and compensation rights apply to government actions styled as quasi-legislative regulations that eliminate the property interest of a small group of targeted individuals to take their property for a public purpose.

Second, this Court should resolve the conflict between this case and this Court's opinions in *Dugan v. Rank,* 372 U.S. 609, 623-626 (1963) ("*Dugan*") and *U.S. v. Gerlach Live Stock Co.,* 339 U.S. 725, 751-755 (1950) ("*Gerlach*"), holding that governmental interference with California water rights is a compensable physical taking of property.

Third, this Court should address whether assertions of emergency authority authorize government to postpone compliance with constitutional hearing and compensation rights, or if they excuse them altogether.

Fourth, this Court should review this case to resolve the conflict with *Summa Corp. v. California State Lands Comm'n,* 466 U.S. 198 (1984) ("*Summa Corp.*"). which prohibits assertions of the public trust doctrine to patented Mexican Land Grant lands, and whether compensation or balancing is required when public trust assertions take or damage property, including judicially adjudicated water rights.

STATEMENT OF THE CASE

A. Background.

This case arises from actions of the State of California to prohibit a small group of water right holders from diverting and using their water in rural Northern California. Petitioner Stanford Vina and its landowners have vested real property rights to their adjudicated riparian and pre-1914 water rights and water on Deer Creek in rural Tehama County, California. App. D at 53-54. Their utilization of the waters of Deer Creek for irrigation has continually existed since the mid-1800s, and their water rights were adjudicated by the Tehama County Superior Court on November 27, 1923. (*Ibid*.) The adjudication resulted in a court decree that Stanford Vina is entitled to 66% of Deer Creek flows. *Ibid.*; App. J at 159. Deer Creek and the

lands of Petitioner are patented Mexican Land Grant lands. App. D at 53. Stanford Vina lands range from irrigated pasture and walnut orchards, to a Catholic monastery that operates and is partially sustained by its own vineyard.

California water rights are real property rights pursuant to 160 years of California and Federal case law. *Gerlach*, 339 U.S. at 727-730, 752-756; *Dugan*, 372 U.S. at 623-626; 1 W. Hutchins, Water Rights Laws in the Nineteen Western States (1971) at 143; *United States v. SWRCB*, 182 Cal.App.3d 82, 101 (1986). Article X, Section 2 of the California Constitution limits the use of water to what is reasonably required for the beneficial use served, and prohibits the waste and unreasonable use of water. Cal. Const. Article X, section 2; App. G.

Without due process or compensation, and after a five minute public comment period at "workshops" in 2014 and 2015, the California State Water Resources Control Board ("SWRCB" or "State"), prohibited Stanford Vina and its landowners from utilizing their adjudicated property right to divert and use their Deer Creek water to irrigate as they had done without interruption for over 100 years. App. D at 51-54, 58-63, 88. The State said it was an emergency and the water was needed for in-stream public trust fishery flows. App. H, I. Stanford Vina landowners were left without irrigation water to sustain their crops and livestock during the critical irrigation periods of 2014 and 2015. See App. D at 52, 63, 70-80. Crops were stressed, herds were culled, and lands were fallowed.

B. The Emergency Regulations and Curtailment Orders.

The State acted by adopting and implementing emergency regulations ("regulations") stating that all diversions and uses of water that conflicted with specific minimum in-stream public trust fish flows on Deer, Mill, and Antelope Creeks in rural Tehama County California were "unreasonable" under Article X, section 2, and were required to cease, and which directed the issuance of curtailment orders ("orders") the day before the minimum flow requirements of the regulations were in effect. App. A at 11-17; App. D at 52, 58-63; App. H, I. The requirements applied to twenty-nine (29) individual water right holders on Deer, Mill, and Antelope Creeks, seventeen (17) of whom are on Deer Creek, and who were listed by name. Apps. J at 166-167; K at 173-174; L at 181-182; M at 190-191; App. S. The State adopted the regulations on May 21, 2014, and again one year later on March 17, 2015, and the State issued orders for Deer Creek water right holders on June 5, 2014; October 14, 2014; April 17, 2015; and October 22, 2015. App. D at 60-63; App. H, I, J, K, L, M. The 2014 regulations and orders were almost identical to the 2015 versions. *Ibid.* App. D at 62. The regulations were adopted in 2014 and 2015 with five and seven business days' notice to water right holders. App. D at 52, 60-62, 88.

The regulations themselves determined that Stanford Vina's water would be taken to meet the in-stream fishery flow requirements; the orders only notified water right holders when the requirements were in effect.

App. A at 25-26; App. D at 79. The in-stream flow requirements of the regulations were first implemented and enforced fourteen (14) days after the regulations were adopted in 2014, and they were again adopted and implemented one year later in 2015. App. H, J. The regulations and orders provided for penalties of $1,000 per-day and $2,500 per-acre foot for violations of the prohibition on water use. see App. H at 140, § 879.2; App. J at 165, ¶ 6.

No California water right holders except those on Deer, Mill, and Antelope Creeks were subject to the State's actions, or any equivalent measures.

C. Evidentiary Hearing and Compensation Requests.

Stanford Vina's requests for a due process hearing and compensation in 2014 and 2015 were not granted. App. D at 79-80. At the "workshops" where the State's actions were adopted, State and Federal employees were allowed to present at length on the purported merits and necessity of the State's actions, but water right holders were not allowed to participate with cross-examination or testimony. In refusing cross-examination and testimony requests at the 2014 workshop, counsel for the State declared:

> This is an *exigent circumstance* where, in order to provide a timely and appropriate mechanism, the board is – or board staff is proposing that the board proceed through this quasi-legislative process.

> this is not a quasi-judicial proceeding. *We're styling this as a quasi-legislative proceeding*. That means that the board has considerable flexibility in terms of how it structures this.
>
> As part of that quasi-legislative process, there is not an opportunity for cross-examination.

App. N [Emphasis Added].

State staff also declared that "enforcement in the absence of a regulation is *cumbersome* . . . " because "water right holders may request a full evidentiary hearing. . . ." App. N [Emphasis Added].

The resolution adopting the regulations stated, "this approach is not the Board's preferred alternative to identify, balance, and implement in-stream flow requirements. The Board reaffirms its preference for undertaking adjudicative water right proceedings to assign responsibility for meeting in-stream flows." App. H at 125-126 ¶ 18.

D. Alternative Supplies and Unfinished Projects.

The State said its actions were necessary due to the "lack of developed alternative water supplies" and that "all water users should develop alternative water supplies" at their own cost because similar minimum in-stream flow requirements would be imposed in future years. App. O. Yet for decades prior to 2014 and the declaration of an "emergency," government agencies studied and planned an in-stream fishery water flow project on Deer Creek in which private landowners were paid

by government to enhance in-stream flows by pumping groundwater, with correlating projects on Mill and Antelope Creeks. App. T, V, W. Government did not finance or complete the projects, and when drought struck, those same agencies asked the State for the in-stream flow requirements as a substitute for the unfinished public projects. App. D at 54-57; App. H at 121, ¶ 5; I at 142 ¶ 6; App. A at 11-12, fn. 6; App. X, Y.

E. Stanford Vina's State Court Lawsuit.

Stanford Vina's lawsuit sought damages for inverse condemnation; a declaratory judgment that the State took Stanford Vina's property without due process or compensation; and a writ of mandate directing the State to set aside the emergency regulations and curtailment orders and enjoin the State from taking similar actions without compliance with due process and compensation requirements. App. D at 63-64, 66, 68-69. Stanford Vina argued that the State's actions constituted a physical taking of property under the California and United States Constitutions, and that the State violated due process by refusing to hold an evidentiary hearing. Stanford Vina also argued the State's actions were quasi-adjudicatory; violated Article X, section 2 of the California Constitution; were not lawful emergency actions; violated the Deer Creek adjudication, and violated the public trust doctrine because Stanford Vina's lands and Deer Creek are former Mexican Land Grant lands, and the public trust doctrine was asserted without balancing or compensation. App. D.

F. The Trial Court's Decision.

The Sacramento Superior Court ("Trial Court") denied Stanford Vina's claims. The Court held that the regulations were quasi-legislative, therefore due process rights were inapplicable to the reasonableness determination or its implementation, and because there is no property right in an unreasonable use or diversion of water, the due process and inverse condemnation claims failed. App. D at 68-70, 76-82, 87; App. E; App. A at 17-20. The Trial Court stated that findings as to whether Stanford Vina possessed a real property interest applied to both the taking and due process claims. App. D at 68. The Trial Court also held that the State had not violated Article X, section 2 or the public trust doctrine; that *Summa Corp*. was inapplicable because the State asserted the public trust for fish, rather than the title to lands, and that the State's action were neither unlawful emergency measures or in violation of the water rights adjudication. App. D at 88-92, 98-99, 106-112.

However, the Trial Court found:

> . . . the regulations and Curtailment Orders should be evaluated collectively, as part of a single consolidated proceeding. The regulations themselves determined that the diversions would be curtailed to meet minimum flow requirements. [citations omitted] The Curtailment Orders simply notified affected water right holders that the regulatory provisions were put into effect.

App. D at 79.

The Trial Court also acknowledged, "the regulations could be characterized as quasi-adjudicatory because they applied general principles of 'reasonable use' and 'public trust' to specific waterways, and established specific minimum flow requirements for a relatively small number of water right holders." App. D at 81-82.

G. The Opinion of the Third District Court of Appeal of California and the Petition to the California Supreme Court.

Stanford Vina appealed and presented the same claims and arguments to the Court of Appeal of the State of California, Third Appellate District. App. A. The Court of Appeal held that the State did not violate constitutional due process hearing or compensation rights, or otherwise act unlawfully in 2014 or 2015. App. A at 3-4, 25-26, 28-29, 38-39, 42-46. The Court of Appeal reasoned there is no property right in the unreasonable use and diversion of water, and the State determined Stanford Vina's use and diversion of water was unreasonable in the regulations. The decision concluded the regulations were quasi-legislative because they defined diversions under "certain emergency circumstances" to be per-se unreasonable, and because they "formulated a rule to be applied to future cases. . . ." App. A at 26, 38-39. The decision acknowledged that the application and implementation of the regulations through the curtailment orders was adjudicatory, but held that constitutional due process and compensation rights were inapplicable because Stanford Vina's use

and diversion of water was declared unreasonable in the regulations, and there is no property right in an unreasonable use and diversion of water, to trigger constitutional due process hearing or compensation rights. App. A at 2-4, 38-39, 42-45. The decision acknowledged that the regulations themselves determined the flows would be taken, and the regulations implemented the in-stream flow requirements. App. A at 11, 16, 19, 25. Like the Trial Court, the Court of Appeal acknowledged "Stanford Vina's previously-adjudicated right" to approximately 66% of the flow of Deer Creek, but held the State acted lawfully notwithstanding the court adjudication. App. A at 45; App. D at 106-107.

Stanford Vina filed a Petition for Rehearing on June 29, 2020 which was denied on July 6, 2020. App. C. Stanford Vina then filed a Petition for Review to the California Supreme Court on July 21, 2020, again arguing that the State's actions violated due process and constituted a taking of real property without compensation under the California and United States Constitutions. Stanford Vina also asserted that the actions violated Article X, section 2 and public trust authorities, were not lawful emergency actions, and were barred by the Deer Creek adjudication. The California Supreme Court denied review on September 23, 2020. App. F.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant the Petition to Address Whether Due Process and Compensation Is Required for Actions Styled as Quasi-Legislative Rules or Regulations that Target Small Groups or Specific Individuals and Take Their Real Property.

This case raises important questions of whether constitutional rights to due process and compensation apply when government utilizes legislative rules or regulations to take the property of specific individuals. Although the regulations applied the standard of "unreasonable" to the property rights of twenty nine (29) rural water right holders on three creeks to physically take their water, constitutional rights to due process and compensation were excused because the regulations declared their diversions to be "unreasonable," and because there is no property right in an unreasonable use or diversion of water, due process and compensation rights were deemed inapplicable to the reasonableness determination *or* its implementation to physically take the water. App. A at 3-4, 25-27, 38-39, 41-45; App. D at 76, 80-82, 87.

An individual *never* gets a due process hearing or compensation under the reasoning of this case. Government may draft quasi-legislative rules or regulations declaring a specific individual's use of property to be a nuisance under specific conditions, or their use of water to be unreasonable, and require that they cease their use of property when the conditions occur. When the regulations are implemented, there is no right to

due process or compensation because there is no property right in a nuisance or an unreasonable use of water. Such constitutional circularity warrants review. The system invites government to circumvent constitutional due process hearing and compensation requirements by styling adjudicatory actions as legislative rule or regulations. The State of California even stated that it "styled" its actions as quasi-legislative regulations to avoid "cumbersome" evidentiary hearing requirements here. App. N.

A. The Court Should Reconcile this Case with the Distinction of Adjudicatory and Legislative Actions and Address How Due Process Rights Apply When Legislative Actions Target the Property Rights of a Small Group or a Single Individual.

This Court should reconcile this case with the framework for determining whether due process applies to an action of government, or to revisit the framework in its entirety. Due process rights will be of little value if government may craft quasi-legislative regulations to circumvent them when invading the property rights of targeted individuals.

In *Bi-Metallic Investment. Co. v. State Board of Equalization*, 239 U.S. 441 (1915), Justice Holmes reasoned that due process did not apply to government actions generally applicable to the voting population of an electoral jurisdiction because all citizens "stand alike" and are "equally concerned" and therefore

possess meaningful electoral recourse. (*Id*. at 445.) Justice Holmes distinguished the legislative measure in *Bi-Metallic* from the adjudicative action in *Londoner v. City and County of Denver*, 210 U.S. 373 (1908) ("*Bi-Metallic*") which impacted a "relatively small number of persons . . . who were exceptionally affected . . . " and for which due process was required because they lacked meaningful electoral recourse. *Bi-Metallic*, 239 U.S. at 445-446. The *Bi-Metallic* framework for applying procedural due process has been adopted by California and other jurisdictions, and California has adhered to a formalistic approach in which due process only applies to adjudicatory actions, not legislative ones. *Horn v. County of Ventura*, 24 Cal.3d 605, 612 (1979) ("only those governmental decisions which are *adjudicative* in nature are subject to procedural due process principles. *Legislative* action is not burdened by such requirements.").

This case turns the *Bi-Metallic* framework on its head, or as the Trial Court observed, "exploits" it. App. R. While the State's actions were labeled as quasi-legislative regulations, the targeted Tehama County water right holders were "exceptionally affected" and lack the meaningful electoral recourse dispositive in *Bi-Metallic*. The State did not adopt a general regulation applicable to all California water right holders on all California watersheds, or to all locations where the fish species migrate. Nor did it adopt a general standard to be applied in future proceedings – there was no "future proceeding." Each lower court correctly recognized that the regulations themselves determined that

the water of the targeted water right holders would be taken – the orders simply notified water right holders when the regulatory provisions were in effect. App. D at 79; App. A at 11, 16, 19. And the regulations were implemented to physically take Stanford Vina's water a mere fourteen (14) days after they were first adopted in 2014. App. H; App. J.

B. There is Conflict in the Lower Courts on the Application of Due Process to Legislative Actions that Target Small Groups or Specific Individuals.

Other lower courts have rejected the formalist approach to the distinction of adjudicatory and legislative of California in this case. *Nasierowski v. City of Sterling Heights*, 949 F.2d 890, 896 (6th Cir. 1991) ("Government determinations of a general nature . . . do not give rise to a due process right. . . . But when a relatively small number of persons is affected on individual grounds, the right to a hearing is triggered."); *L C & S, Inc. v. Warren County Area Plan Comm'n*, 244 F.3d 601, 603 (7th Cir. 2001) ("the line between legislation and adjudication is not always easy to draw, especially when the extent of the legislative domain is extremely limited . . . "); *Harris v. County of Riverside*, 904 F.2d 497, 501-502 (9th Cir. 1990) ("In determining when the dictates of due process apply . . . we find little guidance in formalistic distinctions between 'legislative' and 'adjudicatory' or 'administrative' government actions.").

Moreover, some lower courts have held that due process can be required for legislative actions that affect a small group, or a single individual. *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000) (Due process required for legislative action that deprived liquor license holders of property right in license); *Dibble v. Quinn*, 793 F.3d 803, 814 (7th Cir. 2015) ("We can imagine situations where a public employee is terminated under the ruse of a statutory amendment designed to avoid the protections of the Due Process Clause."); *Philly's v. Byrne*, 732 F.2d 87, 93 (7th Cir. 1984) (Stating due process may be required if legislation affects "only a tiny class of people. . . ."); see *Horn v. County of Ventura*, 24 Cal.3d 605, 612 (1979), J. Newman, concurrence. (Stating due process should not be limited to adjudicatory actions).

These lower court decisions, and their conflict with this case, affirm the uncertainty surrounding the application of due process to actions that are styled as legislative, but which target small groups and invade their property rights. Review should be granted to reconcile this case with the framework for distinguishing adjudicative and legislative actions, and to clarify when due process is required.

C. This Case Conflicts with Decisions Prohibiting Government from Interfering with Property Rights Without Procedural Due Process.

This case undermines this Court's decisions requiring a due process hearing for government actions that interfere with property interests. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *Connecticut v. Doehr*, 501 U.S. 1 (1991). Due process requirements do not simply disappear when government applies a label of "nuisance" or "unreasonable" to real property, or whatever other limitation is asserted, and notwithstanding that such conditions are never established in an evidentiary hearing. Yet that is the holding and effect of this case. This case absolves the State of California from due process requirements if quasi-legislative regulations are styled to eliminate property interests when taking property. Judge Posner has warned against this practice in the Seventh Circuit, but this case endorses it for California. *Club Misty, Inc. v. Laski*, 208 F.3d at 619 (Warning against use of legislative processes to eliminate property rights without due process). The Court should clarify that this is wrong, and thereby resolve the conflict about whether due process may be avoided by styling of quasi-legislative rules or regulations to eliminate property interests when taking property.

D. The Court Should Grant the Petition to Resolve the Conflict Between this Case and Other Circuits that Have Prohibited States from Defending Against Due Process Claims by Asserting the Property Interest Was Eliminated by the Challenged Action.

Other circuits have prohibited States from defending due process claims by arguing that the property interest was eliminated by the very state action that is challenged. *Youakim v. McDonald*, 71 F.3d 1274, 1289 (7th Cir. 1995) ("A state . . . may not defend against a due process claim . . . by arguing that the plaintiff now lacks a protectable property interest by virtue of the very state action the plaintiff has challenged."); *Bennett v. Tucker*, 827 F.2d 63, 73 (7th Cir. 1987) ("a state may not deprive an individual of his or her property interest without due process, and then defend against a due process claim by asserting that the individual no longer has a property interest."). This case endorses the opposite standard for California. The State argued, and the lower courts agreed, that because Stanford Vina's use and diversion of water was declared unreasonable in the regulations, and because there is no property right in an unreasonable use or diversion of water, due process and compensation rights do not apply to the reasonableness determination or its implementation to physically take the water. App. A at 2-3, 19-20, 25-26, 38-39, 42-45; App. D at 68, 78-80, 82, 87; App. E. Review should be granted to resolve this constitutional conflict between California and other jurisdictions.

E. This Case Conflicts with Decisions Prohibiting Government from Reclassifying Private Property as Public Property Without Compensation and Requiring Compensation for Both Legislative and Adjudicatory Actions that Take Property.

This case undermines decisions of this Court requiring compensation for the taking of property irrespective of whether government acts in a legislative or adjudicatory capacity. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987) (General regulation deemed physical taking); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 713-714 (2010) ("*Stop the Beach*") ("The Takings Clause . . . is concerned simply with the act, and not with the governmental actor . . . "). This case undermines these decisions by authorizing government to make findings in quasi-legislative regulations that eliminate the property interest of specific individuals, and to then avoid compensation when physically confiscating their property because no property interest exists. This cannot be the law. This Court has prohibited States from converting private property without compensation by simply reclassifying it as public property. *Stop the Beach*, 560 U.S. at 713, 726-728 ("States effect a taking if they recharacterize as public property what was previously private property."); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 at 164 (1980) (Taking Clause prohibits Legislatures and Courts from taking property

"simply by recharacterizing" it as public); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-833 (1987) (Holding California Constitutional prohibition on obstructions to navigable waters did not excuse compensation requirements). While California water rights, like all property rights, are subject to limitations, these conditions cannot serve as a pretext for uncompensated physical taking of property, even if asserted in quasi-legislative rules or regulations to eliminate a property interest. Compensation is required even if the State's actions were quasi-legislative.

II. This Court Should Grant the Petition to Resolve the Conflict Between this Case and the Decisions by this Court and the Federal Court of Claims Requiring Compensation for Government Interference with California Water Rights.

The interference with Stanford Vina's use and diversion of water pursuant to its adjudicated water rights in this case constitutes a compensable physical taking of private property in violation of the Fifth Amendment of the United States Constitution, as incorporated against the States by the Fourteenth Amendment. The State took Stanford Vina's water for a public purpose, and in doing so compelled a small number of rural water right holders to alone bear the cost of a public fishery use and project. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Constitution prevents requiring citizens to give up property for costs of achieving goals properly borne by public as a whole).

A. Government Interference with a California Water Right is a Physical Taking of Property Under Decisions of This Court and the Court of Claims.

This case undermines this Court's jurisprudence establishing that interference with the use or diversion of water pursuant to a California water right constitutes a compensable physical taking of property. *Dugan*, 372 U.S. at 623-626 (Government interference with California water rights treated as a physical taking requiring compensation); *Gerlach*, 399 U.S. at 754 (Government interference with California water rights utilized for irrigation analyzed as a physical taking of private property requiring compensation); see also *International Paper v. United States*, 282 U.S. 399, 407 (1931).

The Federal Court of Claims has also established that fishery or environmental restrictions on use of water that interfere with California water rights and diversions, even if temporary, constitute compensable physical takings of private property for a public purpose and use. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (2008 Fed. Cl.) ("*Casitas 1*") ("Casitas will never get that water back . . . the government action was a physical diversion for a public use – the protection of an endangered species . . . "); *Casitas Mun. Water Dist. v. U.S.*, 556 F.3d 1329 (2009 Fed. Cl.) ("*Casitas 2*") (Upholding physical taking finding for fishery restrictions on use of California water right); *Casitas Mun. Water Dist. v. United States*, 102 Fed.Cl. 443, 458-461 (2011 Fed. Cl.) ("*Casitas 3*") (Fifth

Amendment compensation requirements apply to government interference with California water rights notwithstanding harm to fish); *Tulare Lake Water Storage Dist. v. U.S.*, 49 Fed.Cl. 313, 318-321 (2001) (Endangered species restrictions that interfered with California water supply constituted physical taking).

Moreover, in *Gerlach* this Court held that Article X, section 2 does *not* authorize the taking of water rights without just compensation. *Gerlach*, 399 U.S. at 751-754. This Court held that Article X, section 2's waste and unreasonable use standard had not "destroyed and confiscated a recognized and adjudicated private property right" in California water rights, and instead Article X, section 2 was the result of a "studied purposes to preserve" the rights of water right holders. *Id*. at 751, 753. This Court reasoned that alternative proposals to "revoke or nullify all common-law protection to riparian rights" had been rejected as "confiscatory." *Id.* at 751, 753 ("Public interest requires appropriation; it does not require expropriation."). The Court of Claims in *Casitas 3* also affirmed the Fifth Amendment takings protections for water rights notwithstanding Article X, section 2's reasonableness condition and the public trust doctrine. *Casitas 3*, 102 Fed.Cl. at 458-460.

These Federal takings cases are nullified by this case. Like the fishery restrictions and government interference with water rights in *Casitas 1-3*, *Tulare*, *Dugan* and *Gerlach*, here the State of California physically and permanently confiscated Stanford Vina's water for a public purpose, project, and use – fishery

interests – and in doing so committed a physical taking of Stanford Vina's real property in 2014 and 2015. This case authorizes government to utilize labels of unreasonable, public trust, emergency, and regulation to take water from California water right holders for a public purpose and project without compensation. This Court should grant review to reconcile this case with Federal decisions establishing that government interference with a California water rights is a compensable physical taking of property.

B. The Assertions of California's "Unreasonable" Standard in this Case is Unprecedented.

In analyzing whether a State has reclassified property as public, "[w]hat counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right alleged taken was established." *Stop the Beach*, 560 U.S. at 726-728. It is beyond dispute that the real property right of Stanford Vina in its adjudicated California water rights is established. Nevertheless, the injurious and confiscatory nature of the application of Article X, section 2 here is unprecedented – a SWRCB Member described the State's actions as a "backdoor" reconfiguration of California water law when voting on them. App. O. The actions were debased from background principles of California water law. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027, 1029 (1992).

Article X, section 2 is not confiscatory – it only limits the use and diversion of water to what is

"reasonably required for the beneficial use to be served . . . " so 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, sec. 2. It is intended to maximize beneficial use of water through efficiency and conservation when more efficient methods are available, without injury to water right holders. Cal. Const. Art. X, sec. 2 (" . . . nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water . . . "); *Gerlach*, 339 U.S. at 751-755. (Article X, section 2 is not "confiscatory" and is the result of a "studied purposes to preserve" the property right in water rights.); *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 700, 706 (1933) (Upholding unreasonableness finding to maximize beneficial use through storage when no injury to water right holder). And "what is an unreasonable use is a judicial question depending upon the facts in each case." *Id*. at 706.

Here, the State utilized a label of "unreasonable" to take Stanford Vina's irrigation water for an instream public use it preferred. This is unprecedented. A specific use and diversion of water pursuant to a water right – a real property right – has *never* been declared unreasonable and ordered to cease without an evidentiary hearing, or to take water from one beneficial use so that it can be allocated to another, subjectively preferred public purpose, without balancing the competing beneficial uses, and with severe injury to a water right holder.

Findings of unreasonableness under Article X, section 2 have historically been limited to valueless water

uses such as flooding to kill gophers, or non-agricultural uses that interfere with water storage projects that maximize beneficial use, and such findings were only made after a trial. *Tulare Dist. v. Lindsay-Strathmore Dis.*, 3 Cal.2d 489, 568 (1935) (Flooding to kill gophers unreasonable); *Gin S. Chow*, *supra*, 217 Cal. at 706; *Joslin v. Marin Municipal Water District*, 67 Cal.2d 132, 135, 141 (1967). And irrigation is a preferred use of water in California, second only to domestic use. Cal. Water Code § 106.

While some California appellate courts have held the State has *authority* to issue general policy statements of unreasonableness, analogous to negligent per se, in response to facial challenges in *Light v. SWRCB*, 226 Cal.App.4th 1463 (2014); *People ex rel. SWRCB v. Alfred F. Forni, et al.*, 54 Cal.App.3d 743 (1976), and *Cal. Trout, Inc. v. SWRCB*, 207 Cal.App.3d 585, 623-625 (1989), these cases contain no discussion of how constitutional hearing or compensation rights apply to the State's exercise of its authority, and this is the first case in which Article X, section 2 has ever been implemented by a regulation to physically regulate an actual use and diversion of water.

C. The State's Actions Were a Substitute Public Project.

For decades government studied and even began a public project on Deer Creek paying private landowners and water right holders to forgo their surface water diversions and to pump groundwater to supplement in-stream fishery flows, with correlating projects

on Mill and Antelope Creeks. App. D at 54-57; App. T-Y. However, no project was completed or financed, and when drought struck, the State took Stanford Vina's water to create the same in-stream fishery flows. The State said its actions were necessary due to the lack of developed alternative water supplies, and that water users should develop alternative water supplies because similar requirements would be imposed in future years. App. O. The State's actions were a substitute public project, funded by water right holders such as Stanford Vina, and which violated the Court's decisions in *Gerlach*, 399 U.S. at 754 and *Dugan*, 372 U.S. at 623-626, and the decisions of the Federal Court of Claims in *Casitas 1-3*.

D. Review Should be Granted to Address the Policy Implications of Destabilizing California's Water Rights System by Excusing Compensation Requirements.

This court should grant the petition to address the disorder that will occur if compensation requirements are excused when government interferes with California water rights. This case authorizes whoever controls State government at any given time to instantaneously confiscate and reallocate water in accordance with their personal preferences and aversions. As this Court recognized in *Arizona v. California*, 460 U.S. 605, 620 (1983):

> Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area

> of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. [citations omitted]. The doctrine of prior appropriation, the prevailing law in the western states, is itself largely a product of the compelling need for certainty in the holding and use of water rights.

The Court of Claims has also warned of the chaos that would result from eroding compensation protections for California water rights. *Casitas 3*, 102 Fed.Cl. at 458-459 (Excusing compensation for water rights when harm to fish is " . . . a principle that would eviscerate private property interests and throw the water rights regime into chaos.").

III. This Court Should Grant the Petition to Address How Assertions of Emergency Authority Alter Constitutional Rights to Compensation and Due Process.

The State's reliance on emergency authority in 2014, and again in 2015, warrants review. Emergency authority is invoked with increasing frequency in America, and emergency conditions are seemingly more complex and prevalent than before. There is also a trend towards classifying general societal problems as emergencies. This case is an opportunity for the Court to address the relationship between constitutional rights and assertions of emergency authority.

Here, the State relied on the "cumbersome" nature of due process hearing rights to justify the very

emergency measures bypassing them in 2014, and again in 2015. App. N. Constitutional rights are inherently cumbersome, and this Court should address whether constitutional hearing and compensation rights can be excused because compliance is "cumbersome." As Justice Jackson said, the forefathers "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

Review should also address whether a multi-year emergency authorizes government to postpone compliance with constitutional rights to due process and compensation, or excuses them altogether. It is indisputable that there was sufficient time for compliance with these constitutional rights in the full year between adoption in 2014 and re-adoption in 2015. App. D at 111, fn. 18 ("The court acknowledges that the Board had sufficient time between the adoption of the 2014 and 2015 emergency regulations to address the problem through nonemergency regulations."). If a multi-year emergency strips individuals of their constitutional rights, such authority should be analyzed.

Review should also be granted to address whether emergency authority can excuse compensation or due process rights when the emergency conditions are caused by governments failure to take measures it knows are needed to prevent foreseeable conditions.

Other lower courts have refused to absolve government of constitutional compensation requirements when the government is responsible for creating the emergency, or when the emergency conditions and resulting damages are foreseeable. *In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, 146 Fed.Cl. 219, 264 (2019). Government's failure to follow through with the project it desired here – enhanced instream fishery flows – created the low-flow conditions on Deer Creek in 2014 and 2015 – the very "emergency" that Stanford Vina's water was taken to mitigate. App. D at 54-57; App. T-Y. Had government followed through with its project, there would not have been a basis for an emergency in 2014 and 2015. But no project was completed, and when drought struck, as it inevitably would, the government imposed the instream flow requirements here – a substitute project. The State even justified its actions on the lack of an adequate project, and expressly based them on the flow objectives of the unfinished projects and past studies. App. O, T-Y. This case eliminates the incentive for California to execute projects intended to prevent foreseeable adverse impacts when conditions such as drought or flood conditions strike – a regular occurrence in the Western United States. Review should address whether constitutional protections of property may be excused under such circumstances, and the broader relationship between assertions of emergency authority and constitutional rights.

IV. This Court Should Grant Review to Resolve the Conflict of this Case with *Summa Corp. v. California State Lands Comm'n*, 466 U.S. 198 (1984) and to Address Whether the Public Trust Doctrine May be Asserted Without Compensation or Balancing.

The State of California said that that it was declaring Stanford Vina's use and diversion of water unreasonable so that additional water would be available to serve public trust interests, and that it was applying the public trust doctrine with Article X, section 2. App. D at 92-93; App. Q; App. Y ("In this particular case, application of the reasonable use and public trust doctrines requires particularized consideration . . . ").

This case raises an important question of whether the State of California may assert the public trust doctrine to former Mexican Land Grant lands. Deer Creek and Stanford Vina lands are patented Mexican Land Grant lands. App. B at 2. This Court unequivocally held in *Summa Corp.*, *supra*, 466 U.S. 198 that California could not apply the public trust to former Mexican Land Grant lands and waters. *Summa Corp.*, *supra*, at 206-209. Review should be granted to address whether the State is exempt from *Summa Corp.*, as the trial court held, when the State asserts a public trust interest relating to fish or waters that overlay or occupy Mexican Land Grant lands subject to *Summa Corp.* App. D at 27.

Moreover, review should be granted to reconcile this case with decisions requiring compensation if

government damages private property when asserting the public trust doctrine. In *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), this Court held if the public trust doctrine was utilized to take back the use of property, the State "ought to pay" for "expenses incurred in improvements made under such a grant" when the State wishes to resume possession of the water or property interests under the public trust. *Id*. at 455; see also *Casitas 3*, *supra*, 102 Fed.Cl. 443, 457 (Holding public trust doctrine does not place California water rights beyond the protection of the Fifth Amendment.).

Lower courts have also required balancing of public trust needs with competing interests, yet the State openly admitted that no such balancing occurred here. App. H at 125-126 ¶ 18 ("this approach is not the Board's preferred alternative to identify, balance, and implement in-stream flow requirements."); *Casitas 3*, 102 Fed.Cl. 443, 459 ("Implementation of the public trust doctrine requires not only balancing of the various public trust values, but also weighing of those values against other, broader public interests."). A mere showing of public trust fishery interests "alone is not enough" – the public trust doctrine does not "presume[] that the needs of fish trump all other uses . . . what is in the best interest of a single public trust resource is not necessarily what is in the best interest of the public as a whole." *Casitas 3*, 102 Fed.Cl. 443, 461. The Court should grant review to address whether compensation is required when private property is damaged to serve public trust interests, and whether

public trust interests must be balanced with competing interests.

California's application of the public trust in this case is also in stark contrast to neighboring Nevada which recently established, "the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation." *Mineral County v. Lyon County*, 136 Nev. Adv. Op. 58, No. 75917, WL 5849506136 (2020). Stanford Vina's adjudicated water rights were reallocated to public trust interests by California after a five-minute public comment period at a "workshop" in 2014 and 2015, and without an evidentiary hearing or compensation. The Court should grant review to clarify whether the public trust doctrine may be applied to adjudicated water rights in the Western United States, and if so, whether it may be applied without due process or compensation.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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