No. 20-890

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 a Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

BRIEF OF NORTHERN CALIFORNIA WATER ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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January 21, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTERESTS OF *AMICUS CURIAE*[1]

The Northern California Water Association ("NCWA") is a nonprofit corporation established in 1992. Its principal purpose is to advance the economic, social, and environmental sustainability of the Sacramento Valley by enhancing and preserving the water rights, water supplies, and water quality of the region. NCWA's members include private landowners, public water agencies, mutual water companies and counties. NCWA's members utilize water to serve farmland, cities, rural communities, wildlife refuges, wetlands, fisheries, and recreation. NCWA supports the petition for writ of certiorari and asks the Court to protect the constitutional guarantee of due process both with respect to California water rights and to administrative actions generally.

This case exemplifies an administrative agency's power to nullify vested property rights by defining them out of existence through *per se* rules. The California State Water Resources Control Board's ("State Board") actions at issue in this case undermine the basic foundation of property rights, water management and water service in California, by effectively taking water rights without due process. The State Board's curtailment of water rights without affording adequate due process not only violates state and federal constitutional requirements, it also injects significant uncertainty into a water rights system that depends on reasonably stable expectations, especially

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[1] *Amicus* has notified counsel for all parties of their intention to file this brief, and all parties have provided written consent. Sup. Ct. Rules 37.2(a). This brief was not authored in whole or in part by counsel for any party, and only *Amicus*, its members or counsel, made monetary contributions to this brief. Sup. Ct. Rule 37.6.

under drought conditions. The formalistic regulatory tools the State Board employed in this matter threaten due process protections in a broader administrative context.

As explained more fully below, the Opinion of the California Court of Appeal, Third Appellate District, fails to properly analyze the scope of the State Board's quasi-legislative authority and contravenes long-settled rules regarding the protections accorded to water right holders. In doing so, the Opinion creates instability and uncertainty for NCWA's members. NCWA's members rely on the certainty provided by California's water rights priority system to make decisions on how to best manage the Sacramento Valley's precious water resources. These decisions, in turn, affect the economy and environment of the Sacramento Valley.

SUMMARY OF THE ARGUMENT

Due process is a constitutional cornerstone of governmental legitimacy. The petition for writ of certiorari seeks relief from an agency's exercise of purported quasi-legislative authority where the action should have been classified as quasi-judicial, thus triggering appropriate due process protections. The agency action at issue was a regulation by the State Board that redefined the nature and scope of vested water rights—property rights that cannot be taken without due process and just compensation—as to a small number of entities and individuals in limited geographic and other circumstances. The regulation applied to extremely narrow, future, drought-related conditions. In the past, where the State Board has limited such vested property rights, it has utilized an adjudicative process. Here, however, the State Board avoided due process by taking advantage of the

extreme leeway agencies have in determining whether their actions are "quasi-legislative" versus "quasi-judicial."

The State Board's choice of procedures resulted in a deliberate elimination of due process protections. In its regulation, the State Board adopted a *per se* redefinition of Petitioners' water rights, and employed, with inadequate analysis, a mechanistic classification of its action as quasi-legislative. The resulting elimination of due process protection for those affected calls urgently for the adoption of a clarifying rule or rules that would straightforwardly mandate due process for purely procedural administrative impacts on traditionally vested property rights. A rule such as that discussed below would guide the administrative process, especially where due process disappears as a result of the imposition of *per se* rules.

In addition to establishing a clarifying rule to check unexamined administrative impingements on due process protections, this Court should mandate the application of appropriate analytic criteria to the classification of agency actions as quasi-legislative. This will ensure some measure of fairness by shifting the focus from mechanistic classification to examining the nature of the rights affected and shifting the balance toward ensuring due process protections when classification becomes difficult or doubtful. Requiring decisional criteria will also ensure that due process is not discarded, as it was here, by an off-handed, conclusory determination by both the State Board and the Court of Appeal. California courts have previously employed an appropriate analytical framework in this regard, as discussed below. In this case, however, the State Board and the Court of Appeal ignored it.

ARGUMENT

I. THE COMBINATION OF *PER SE* RULES AND MECHANISTIC INVOCATIONS OF QUASI-LEGISLATIVE AUTHORITY EXEMPLIFIED BY THIS CASE NULLIFIES DUE PROCESS PROTECTION AND EXTENDS THESE TOOLS OF NULLIFICATION TO ADMINISTRATIVE AGENCIES GENERALLY.

To address a statewide drought, the California Legislature amended California 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 agency charged with the administration of water rights and water quality in California—twice adopted "emergency" regulations establishing minimum instream flows on Deer Creek, a small stream in rural northern California with seventeen water right holders that ultimately flows to the Sacramento River, through the San Joaquin-Sacramento River Delta, and into the San Francisco Bay before draining to the Pacific Ocean. *See* Stanford Vina Ranch Irrigation Company Petition for Writ of Certiorari ("Stanford Vina Petition"), at 8 (2020) (regulations applied to only seventeen Deer Creek water right holders). 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); *Stanford Vina Ranch Irrigation Company v. State*, 50 Cal.App.5th 976, 991 (2020) (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. *See* Stanford Vina Petition, Appendix H at 126 (2020). 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. *See* Stanford Vina Petition, Appendix N at 192 (2020). 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. *See* Stanford Vina Petition, Appendix D at 60-63, Appendix H, I, J, K, L, M (2020).

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* brief 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." *See* Stanford Vina Petition, Appendix D at 76 (2020). 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. *Stanford Vina Ranch Irrigation Company v. State*, 50 Cal.App.5th 976, 1008 (2020).

This case exemplifies an agency's power to nullify vested property rights by defining them away through *per se* rules—in this case, of unreasonableness—that have a patently adjudicative effect. Such rulemaking must not be allowed to erase the due process protections otherwise accorded to those rights. Courts have long recognized that administrative rulemaking is fraught with uncertainty, in part because of overlap with adjudicative actions. As Justice Jackson said bluntly in his dissent in *Federal Trade Commission v. Ruberoid Co*., 343 U.S. 470 (1952):

> Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies

> have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 487 (1952).

As the State Board did here, administrative agencies will sometimes strain to classify the actions they take into one of two categories: rulemaking (i.e. making a rule or "quasi-legislative action") or adjudication (i.e. invoking an order or "quasi-judicial action"). After all, the Administrative Procedure Act ("APA") prescribes different procedures that an agency must follow depending upon whether their action is a formal or informal rulemaking or adjudication. *See* 5 U.S.C. §§ 551-559 (2018); *see Ass'n of Nat. Advertisers, Inc. v. F.T.C*., 627 F.2d 1151, 1160 (D.C. Cir. 1979). The APA defines "rulemaking" as the "agency process of formulating, amending, or repealing a rule," which is the "whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551 (2018). An "adjudication," on the other hand, is the formulation of an "order," which means "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id*.

Importantly, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), this Court observed that some rulemaking proceedings can involve "quasi-judicial" determinations. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 542 (1978). This undercuts the idea that "quasi-judicial" actions fit neatly into the category of an agency "adjudication," while "quasi-legislative" actions fit neatly into the category of an agency "rulemaking." It also promotes the idea Justice Jackson proffered that the "quasi-legislative, quasi-executive, and quasi-judicial" classifications are a strained attempt to squeeze administrative functions into the separation-of-powers formulation. *See Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487 (1952). However, in reality, the "retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion . . . ." *Id*. Therefore, according to the Court's logic in *Vermont Yankee*, a "quasi-judicial" or "quasi-legislative" nametag assigned to an agency's action is not dispositive of whether the action is a rulemaking or an adjudication—and, further, perhaps rulemakings and adjudications are not cleanly separate categories.

This is precisely the dilemma posed by this case: the State Board assigned a convenient nametag to its action without examining Petitioners' underlying rights. *Amicus* and its members are acutely concerned with this case particularly because the regulation at issue and its ramifications are not isolated. Admittedly, the regulation at issue applied in narrow circumstances to a small group, and with only vague future application. First, and partly the point here, the action met the criteria for quasi-adjudicative

action. Secondly, however, nothing about this regulatory procedure ends with this agency, or with water rights or drought exigencies. Under the court's reasoning, the State Board or any agency could simply redefine the scope or nature of any right or obligation and thereby place its modification beyond the reach of due process. Moreover, the court's citation to the "emergency" nature of the Board's action has no bearing on logic supporting the determination that either no vested right was affected, or that the action itself was quasi-legislative in nature. In short, the reach of the court's justification for upholding the agency action has no evident limit.

The Court of Appeal relied on the decision in *Light v. State Water Resources Control Board*, 226 Cal.App.4th 1463 (2014) to support its determination that the State Board regulations were legislative in nature and, importantly, that a *per se* rule that cancels due process protection is unproblematic. But, 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 v. State Water Resources Control Board*, 226 Cal.App.4th 1463 (2014). In other words, limitations on diversions were not imposed in *Light* 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 State Board curtailed Stanford Vina's diversions soon after its emergency regulations were adopted. *See* Stanford Vina Petition, Appendix D at 52 (2020). 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. *Id*. at 74, 80, 84. Whereas *Light* involved a facial challenge to a two-step regulatory process before limitations on diversions could be imposed, this case involves a legislative determination and a curtailment of diversions imposed upon a small group of diverters that occurred essentially simultaneously and were part of a single, consolidated, "quasi-legislative" action. Legislative, judicial, and executive actions were exercised with the flip of an administrative switch.

The more fundamental problem than *per se* rulemaking of the type at issue here is the facile characterization of agency action as quasi-legislative where vested property rights are affected. As noted above, the spectrum between quasi-legislative and quasi-judicial actions is broad and agency actions can easily span overlapping features along that spectrum.

Whether a diversion is an unreasonable use may well fall within the purview of administrative agency expertise, triggering the deference courts afford such determinations. But whether due process must be afforded is self-evidently not a matter of administra-

tive expertise, and the question should be examined by such agencies in accordance with extra-agency guidance, by legislation or, as *Amicus* asks here, by a judicially imposed rule. Further, the right of due process must be determined by agencies according to definite legal and logical criteria that ensure the benefit of any doubt will favor constitutional protection. *Amicus* urges the Court to provide that guidance.

II. THIS CASE PRESENTS THE OPPORTUNITY TO FASHION A RULE THAT PROTECTS DUE PROCESS RIGHTS REGARDLESS OF WHETHER THE AGENCY CHARACTERIZES ITS ACTION AS LEGISLATIVE OR ADJUDICATIVE.

As discussed above, the vagaries of classifying agency actions as quasi-legislative or quasi-judicial are well recognized in federal cases expressing the notion that "the line between legislative and adjudicative action for purposes of procedural due process analysis is not always easy to draw." *Garcia-Rubiera v. Fortuno*, 665 F.3d 261, 274 (1st Cir. 2011) (explaining an administrative scheme may "contain both legislative elements—the application of a general rule to a large number of people—as well as adjudicative elements—fact-specific determinations of rule compliance in individual circumstances."); *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 245 (1973) ("The line dividing them may not always be a bright one . . . ."); *L C & S, Inc. v. Warren County Area Plan Com'n*, 244 F.3d 601, 603 (7th Cir. 2001) ("Unfortunately the line between legislation and adjudication is not always easy to draw . . . ."); *Thomas v. City of New York*, 143 F.3d 31, 36 (2d Cir. 1998) (examining whether a government action is "in fact, fully legisla-

tive or, at least in part, adjudicative."); *Gallo v. U.S. Dist. Court For Dist. of Arizona*, 349 F.3d 1169, 1182 (9th Cir. 2003) (reiterating that the line between legislation and adjudication is not easy to draw).

Fortunately, this case does not present the question of whether vested property rights have been affected by regulation (they have) and therefore whether due process protections would normally attach (they would), nor does this case call for a determination of what form of due process should apply. Here, the sole question *Amicus* raises is how the Court can ensure appropriate due process in instances where agency action employs either formulaic, *per se* rules or formalistic invocations of quasi-legislative authority—or both—to avoid due process protections. *Amicus* asks the Court to clarify the need for due process and the need to ameliorate the effects of such formalisms.

Such clarification would enable this Court to place a needed check on the often unrestricted accrual of power to administrative agencies by appropriately imposing due process restrictions on quasi-legislative actions in narrow, limited circumstances. This case perfectly exemplifies the precise situation where a rule such as the following is appropriate to check agency actions: *When a regulation redefines the scope or nature of a vested property right in such fashion as to eliminate due process rights that would otherwise obtain, such exercise of quasi-legislative power thereby exceeds its Constitutional authority*.

This rule would eliminate administrative authority to dispense with due process protections by *per se* regulation. It would also militate toward due process protection in cases where assertions of quasi-legislative authority are questionable. And, it would accomplish these ends without burdening administra-

tive bodies with prescriptions for extensive or complex procedures, or require mirror-image replications of court proceedings.

III. THIS CASE PRESENTS THE OPPORTUNITY TO REQUIRE THAT INVOCATIONS OF QUASI-LEGISLATIVE AUTHORITY PROCEED IN ACCORDANCE WITH CLEARLY DEFINED ANALYTICAL CRITERIA.

Stanford Vina manages its landowners' asserted senior riparian and pre-1914 appropriative water rights to divert and beneficially use water from Deer Creek. *See* Stanford Vina Petition, Appendix D at 53-54 (2020). 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*, 182 Cal.App.3d 82, 100 (1986) ("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*, 708 F.3d 1340, 1353-1354 (Fed. Cir. 2013); *Ivanhoe Irr. Dist. v. All Parties*, 47 Cal.2d 597, 623 (1957). 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*, 42 Cal.App.3d 198 (1974); *see also Abatti v. Imperial Irr. Dist.*, 52 Cal.App.5th 236, 263 (2020) ("The farmers are beneficial owners of the District's water rights . . . and that right is constitutionally protected.").

The State Board quite openly styled its emergency regulations and related enforcement actions as quasi-legislative to avoid compliance with what it called "cumbersome" constitutional due process requirements. *See* Stanford Vina Petition, Appendix N at 192 (2020). 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*., 58 Cal.App.3d 833, 840 (1976). As federal courts have done, California courts have also recognized that 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*., 256 Cal.App.2d 271, 280 (1967). In undertaking such a comprehensive functional analysis, California courts have traditionally considered a variety of factors, including (i) whether the agency is determining a question of right or obligation, or of property, (ii) whether the agency's action determines individual rights, or involves the exercise of a discretion governed by considerations of the public welfare, (iii) whether the agency's action resolves the rights and interests of individuals or resolves fundamentally political questions, and (iv) 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*, 240 Cal.App.4th 838, 847 (2015).

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." *Stanford Vina Ranch Irrigation Co. v. State*, 50 Cal.App.5th 976, 996 (2020). But, the Court of Appeal found no difficulty because it strained to avoid finding any. Indeed, the future effect of the rule at issue is indistinguishable on its face from a court-ordered injunction, an action that could hardly be confused with legislative rulemaking.

Had the Court of Appeal undertaken the required comprehensive functional analysis, whether of the APA variety discussed in federal cases or according to the four criteria above, 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* Stanford Vina Petition at 8 (2020) (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*, 33 Cal.3d 419, 445 (1983) (describing duty to protect public trust resources "whenever feasible").

The State Board also adopted the emergency regulations based on Article X, Section 2 of the California Constitution, which mandates that the water resources in California be put to reasonable and

beneficial use to the fullest extent possible. Courts have 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*., 67 Cal. 2d 132, 139 (1967). These factual determinations, and the balancing required under *Joslin* and its progeny, are nowhere to be found in the Court of Appeal's 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.

In *Harris v. County of Riverside*, the Ninth Circuit characterized the U.S. Supreme Court's decision in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), as impliedly recognizing that it is "the character of the action, rather than its label" that determines whether due process rights apply. *See Harris v. County of Riverside*, 904 F.2d 497, 502 (9th Cir. 1990). The Ninth Circuit said, "[i]n determining when the dictates of due process apply, however, we find little guidance in formalistic distinctions between 'legislative' and 'adjudicatory' or 'administrative' government actions." *Id*. Rather, the court should look to the nature of the action and apply the tools and tests described in the above sections. In *Harris*, the Ninth Circuit said "[a]s the California Supreme Court has expressly cautioned, land use planning decisions less

extensive than general rezoning c[an] not be insulated from notice and hearing requirements by application of the 'legislative act' doctrine." *Id*. (internal quotations omitted) (citing *Horn v. County of Ventura*, 24 Cal.3d 605, 613 (1979).

Therefore, according to the Ninth Circuit, a safeguard to ensure that quasi-legislative agency actions do not infringe on due process rights is determining due process rights based on "the character of the action," which strongly implies examining the nature of the rights affected, "rather than its label." *See Harris v. County of Riverside*, 904 F.2d 497, 502 (9th Cir. 1990). The fact that an action is given the name-tag "quasi-legislative" or even "rulemaking" does not prevent it from containing a component that is "quasi-judicial" with due process rights attached. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, Inc., 435 U.S. 519, 542 (1978) ("[E]ven in a rulemaking proceeding when an agency is making a 'quasi-judicial' determination . . . in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process.").

Amicus urges this Court to mandate the use of an analytical framework similar to that set forth in *Wilson, supra*, or in any number of federal cases to ensure fairness in the determination of whether due process protections apply. As noted above, deference to agency expertise may extend to many of its regulatory activities. Nothing suggests, however, that agency expertise extends to determinations of whether due process protections apply, at least not without the benefit of a well-constructed analytic framework to guide those decisions.

IV. THE PETITION PRESENTS A UNIQUE OPPORTUNITY TO GUIDE ADMINISTRATIVE POWER AND PROTECT THE SEPARATION OF POWERS.

The ease with which both the State Board and the Court of Appeal determined the legislative nature of the agency action testifies to the threat of consolidation of governmental authority—legislative, executive, and judicial—within the administrative state. The Court of Appeal could only have made this determination in the way it did, without meaningful analysis, because it has become second nature to accept with little question the sovereignty of agencies over all aspects of the matters they regulate. Mandating agencies to observe a definitive rule for according due process, and engaging in genuine analysis of the character of their actions for the same purpose, provide a means of guiding the exercise of administrative power so that its continuing growth is not wholly uncontrolled.

The growing accrual of power in the administrative state risks not only due process protections, but naturally calls into question how adequately protected the separation of powers is itself. Then-Judge Gorsuch discussed the importance of separation of powers, and how the founders considered separation of powers "a vital guard against governmental encroachment on the people's liberties" in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016). There, he observed that the Court has allowed "executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Id*. Judge Gorsuch continued, "[t]he very idea

of self-government would soon be at risk of withering to the point of pointlessness" if separation of powers broke down. *Id*. "A government of diffused powers, they [the founders] knew, is a government less capable of invading the liberties of the people." *Id*.

Similarly, as Chief Justice Roberts observed in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010):

> One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.

Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010).

CONCLUSION

The petition for writ of certiorari presents a clear record on undisputed facts to add needed protections against unchecked administrative actions, especially those taken, as here, at numerous removes from any voting constituency. Providing the guidance *Amicus* requests can only help channel the considerable energies of the administrative state toward the due process safeguards that in large part lend vested property rights their value. *Amicus* respectfully urges the Court to grant the petition.

Respectfully submitted,

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January 21, 2021