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 *AMICUS CURIAE* CENTRAL DELTA WATER AGENCY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DANTE JOHN NOMELLINI, SR.
Counsel of Record
NOMELLINI, GRILLI & MCDANIEL
PROFESSIONAL LAW CORPORATIONS
235 East Weber Avenue
Stockton, California 95202
(209) 465-5883
ngmplcs@pacbell.net

Counsel for Amicus Curiae

February 4, 2021

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

BRIEF OF *AMICUS CURIAE* CENTRAL DELTA WATER AGENCY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *Amicus curiae*, the Central Delta Water Agency ("CDWA"), submits this brief in support of petitioner Stanford Vina Ranch Irrigation Company.

INTERESTS OF *AMICUS CURIAE*[1]

The CDWA is a political subdivision of the State of California created by the California Legislature under the Central Delta Water Agency Act, Chapter 1133 of the Statutes of 1973 (Wat. Code App., § 117-1.1 et seq.). The agency's boundaries encompass approximately 120,000 acres located entirely within both the western portion of San Joaquin County and the "Sacramento-San Joaquin Delta" as defined in California Water Code section 12220. (*See* Cal. Wat. Code App., § 117-9.1.) While the lands within the agency are primarily devoted to agriculture, said lands are also devoted to numerous other uses including recreational, wildlife habitat, open space, residential, commercial, and institutional uses. CDWA is empowered to take all reasonable and lawful actions, including legislative and legal actions, that have for their general purpose: (1) to

[1] Rule 37 statement: The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; *amicus* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

protect the water supply of the lands within the agency against intrusion of ocean salinity; or (2) to assure the lands within the agency a dependable supply of water of suitable quality sufficient to meet present and future needs. (*See* Cal. Wat. Code App., § 117-4.1, subd. (a).) CDWA may assist landowners, districts, and water right holders within its boundaries in the protection of vested water rights and may represent the interests of those parties in water right proceedings and related proceedings before the California State Water Resources Control Board ("State Water Board") and the courts of the United States to carry out the purposes of the agency. (*See* Cal. Wat. Code App., § 117-4.2, subd. (b).) The lands within CDWA were mostly conveyed into private ownership pursuant to the Arkansas Act of 1850, sometimes referenced as the "Swampland Act of 1850." The riparian and pre-1914 appropriative water rights of the landowners within CDWA extend back to the late 1800s.

SUMMARY OF ARGUMENT

When California adopted its landmark amendment to its constitution in 1928 pertaining to the exercise of riparian and appropriative water rights, it forever changed how water would be used throughout the state. That amendment, Article X, section 2, declared that the waste or unreasonable use, or unreasonable method of use, of water throughout the state shall henceforth be prevented. In *Stanford Vina Ranch Irrigation Co. v. State*, 50 Cal. App. 5th 976 (2020)

("*Stanford Vina*"), the Third District Court of Appeal of California went astray and sanctioned the California State Water Resources Control Board's ("State Water Board") use of Article X, section 2 to curtail water rights in a manner that circumvents the state and federal constitutional prohibitions against taking property for public purposes without just compensation. A circumvention that this Court itself determined was not contemplated by Article X, section 2. The Third District Court of Appeal also sanctioned the State Water Board's use of Article X, section 2 to curtail water rights in a manner that deprived Stanford Vina Ranch Irrigation Company of procedural due process by denying it the opportunity of an evidential hearing to address the complex site-specific factual circumstances involved in curtailments of water rights in California, and especially within the vast Sacramento-San Joaquin River Delta Watershed.

If left intact, the *Stanford Vina* decision will have profound negative impacts on riparian and appropriative water right holders within the CDWA and throughout the entire state by substantially impairing these fundamental constitutional protections and safeguards that all water right holders have been relying on in good faith to support their investments and activities that depend on water.

ARGUMENT

I. In Contravention of this Court's Precedents, *Stanford Vina* Sanctions the State Water Board's Curtailment of Water Rights Under Article X, section 2, in a Manner that Circumvents the Constitutional Prohibition Against Taking Property for Public Purposes Without Just Compensation.

"It is . . . 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 governmental action without due process and just compensation." (*United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 101 (Ct. App. 1986).) Nevertheless, *Stanford Vina* holds that water rights can indeed be infringed or taken by the State Water Board without just compensation pursuant to Article X, section 2. That holding, however, directly conflicts with this Court's own interpretation of Article X, section 2 in *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

Article X, section 2 provides in pertinent part:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people

> and for the public welfare. 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. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that 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. . . .

In *Gerlach* this Court examined whether, in the aftermath of the adoption of Article X, section 2, riparian water right holders still have the right to be compensated when their water rights are sacrificed or otherwise taken by the government for public purposes. This Court held that they do:

> [T]he public welfare, which requires claimants to sacrifice their benefits to broader ones from a higher utilization, does not necessarily require that their loss be uncompensated any

> more than in other takings where private rights are surrendered in the public interest. . . .
>
> Public interest requires appropriation; it does not require expropriation. We must conclude that by the Amendment California unintentionally destroyed and confiscated a recognized and adjudicated private property right, or that it remains compensable although no longer enforceable by injunction. The right of claimants at least to compensation prior to the Amendment was entirely clear. Insofar as any California court has passed on the exact question, the right appears to survive. . . .
>
> [I]n light of [the Supreme Court of California's] precedents and its conclusions and discussions of collateral issues . . . , we conclude that claimants' right to compensation has a sound basis in California law.

(*U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 752–754 (1950).)

Notwithstanding this Court's confirmation that riparian water right holders are still protected against uncompensated takings for public purposes in the wake of Article X, section 2, *Stanford Vina* holds that riparian (and appropriative) water right holders have no right to compensation when their rights are curtailed by the State Water Board under Article X, section 2 for public purposes, such as the protection of fishery resources.

In *Stanford Vina* the State Water Board adopted a regulation declaring that riparian and appropriative water holders' diversions of water must be curtailed because such diversions would be "unreasonable" under Article X, section 2 because the water under those diversions was needed for public fishery purposes. *Stanford Vina* held, quoting *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 145 (1967):

> "[S]ince there was and is no property right in an unreasonable use, there has been no taking or damaging of property by the deprivation of such use and, accordingly, the deprivation is not compensable."

(*Stanford Vina Ranch Irrigation Co. v. State*, 50 Cal. App. 5th 976, 1007 (2020).)

In so holding, *Stanford Vina* directly conflicts with this Court's holding in *Gerlach*. Whereas in *Gerlach* this Court held that the adoption of Article X, section 2 did not "unintentionally destroy[] and confiscate[] a recognized and adjudicated private property right [instead] it remains compensable . . . ," *Stanford Vina* holds the opposite. (*U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 753 (1950).) Under *Stanford Vina* the State Water Board can freely destroy and confiscate riparian and appropriative rights for public purposes under Article X, section 2 by merely declaring that water diversions under those rights are "unreasonable" because that water is needed for public purposes, such as the protection of fishery resources.

Stanford Vina thus enables a substantial circumvention of the state and federal constitutional prohibitions against taking property for public purposes without compensation. A circumvention that this Court itself determined was not contemplated by Article X, section 2.

This Court's review is requested and warranted to address this inconsistency and fundamental impairment of water right holders' protections against such takings.

II. Because of the Factual Complexities of Water Curtailments under Article X, section 2, Fair and Impartial Quasi-Judicial Evidentiary Hearings Are Necessary to Afford Adequate Procedural Due Process.

Given the unique complexities of California water rights and the State Water Project ("SWP") and federal Central Valley Project's ("CVP") coordinated and widespread water operations throughout the vast Sacramento-San Joaquin River Delta Watershed ("Delta Watershed") (which includes the upper tributary [Deer Creek] at issue in *Stanford Vina*), it is especially imperative that quasi-judicial evidentiary hearings, rather than the imposition of quasi-legislative regulations as was the case in *Stanford Vina*, be utilized whenever the State Water Board makes determinations of reasonableness under Article X, section 2 within that watershed.

As with all tributaries within the Delta Watershed, the plight of the protected fish on Deer Creek at issue in *Stanford Vina* is in significant part dependent upon the water temperature, flow and habitat conditions in the lower reaches of the watershed, including the Delta itself, which are greatly impacted by the operation and facilities of the SWP and CVP.

There are numerous special statutory priorities and protections for water right holders and fishery resources against harm from the SWP and CVP's operations that must be properly and fairly taken into consideration whenever the State Water Board curtails water right holders to protect fishery resources within the Delta Watershed. Those protections include the "Delta Protection Act of 1959" (Cal. Wat. Code, § 12200 et seq.) and the "Watershed Protection Act" (Cal. Wat. Code, § 11460 et seq.). The basic protections afforded by those acts are the protections against SWP and CVP exports of water from the Delta and Delta watersheds of origin that is not surplus to the present and future needs of the Delta and those watersheds, including the needs of fish and wildlife.

Special statutory protections for fishery resources within the Delta Watershed also include the "Davis-Dolwig Act" (Cal. Wat. Code, § 11900 et seq.) which mandates that the SWP contractors themselves, and not any other diverters, pay for "all costs incurred by the [California Department of Water Resources] for the preservation of fish and wildlife and determined to be allocable to the costs of the [SWP] works constructed

for the development of that water and power, or either." (Cal. Wat. Code, § 11912.)

California Water Code section 11912 provides:

> "The department, in fixing and establishing prices, rates, and charges for water and power, shall include as a reimbursable cost of any state water project an amount sufficient to repay all costs incurred by the department, directly or by contract with other agencies, for the preservation of fish and wildlife and determined to be allocable to the costs of the project works constructed for the development of that water and power or either. Costs incurred for the enhancement of fish and wildlife or for the development of public recreation shall not be included in the prices, rates, and charges for water and power, and shall be nonreimbursable costs."

SWP contractors are additionally obligated to pay for the entire costs of the project including salinity control. *See* Water Code 12200 et seq. The California Water Resources Development Bond Act was intended to preclude a shift in costs to the taxpayers. The 1960 California Water Resources Development Bond Act Argument in Favor provided:

> "This Act, if approved, will launch the statewide water development program which will meet present and future demands of all areas of California. The program will not be a burden on the taxpayer; no new state taxes are involved; the bonds are repaid from

> project revenues, through the sale of water and power. In other words, it will pay for itself."

"This Act will assure construction funds for new water development facilities to meet California requirements now and in the future. No area will be deprived of water to meet the needs of another. Nor will any area be asked to pay for water delivered to another."

In *Goodman v. Riverside*, 140 Cal. App. 3d 900, 906 (1993) the Court included footnote 3 providing the following:

> "Governor Pat Brown's press comments at the time are also informative:
>
> Governor, what is your answer to people who say, 'I don't want to pay for somebody else's water.' Like San Franciscans. 'I have already paid for one water project. Why should I be compelled to buy another?
>
> Governor Brown: Well, they won't. The plan itself is completely self-supporting. The law provides that the contracts have to provide for the repayment of the cost of the entire Project. That's the real answer to it."

Compounding the factual complexities of State Water Board curtailments within the Delta Watershed are the SWP and CVP's failures to carry out their planned development of projects to capture sufficient flood and other surplus flows to meet their project requirements and desires of their water contractors. Of

particular consequence was the SWP's failure to develop projects in the California North Coast watersheds to import to the Delta five million (5,000,000) acre feet of water seasonally by the year 2000 to meet the SWP's obligations for salinity control, fish and wildlife preservation and contractor entitlements. The result of these failures is tremendous increased strain on the water resources and fishery resources within the Delta Watershed and its various tributaries.

For these reasons, the need for adequate procedural due process, in particular evidential hearings, in connection with any State Water Board infringements or takings of water rights within the Delta Watershed for the protection of fishery resources, or any other public purpose, is essential to a meaningful and fair consideration of these factual complexities and a proper determination and allocation of responsibility for any harm to fishery or other public resources. The CDWA defers to the detailed discussions of *Stanford Vina*'s impairments of procedural due process set forth in the underlying Petition for Writ of Certiorari and other *Amicus* briefs.

CONCLUSION

The deprivation of Stanford Vina Ranch Irrigation Company's longstanding and customary exercise of water rights for agricultural purposes under the guise of reasonable regulation should not be allowed without

affording adequate procedural due process by way of a full and impartial hearing on the facts and just compensation for any deprivation deemed necessary for the protection of public fishery resources or other public purposes.

Article X, section 2 was never intended to impair these constitutional safeguards and protections.

Your grant of review of *Stanford Vina* to protect against such impairments and address conflicts with your precedents is respectfully requested.

Respectfully submitted,

DANTE JOHN NOMELLINI, SR.
Counsel of Record
NOMELLINI, GRILLI & MCDANIEL
PROFESSIONAL LAW CORPORATIONS
235 East Weber Avenue
Stockton, California 95202
(209) 465-5883
ngmplcs@pacbell.net

Counsel for Amicus Curiae

February 4, 2021