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August 1, 2023

Honorable Chief Justice Patricia Guerrero and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: Amicus Letter of Support—Petition for Review
Los Angeles Waterkeeper v. State Water Resources Control Board (Petition for Review filed July 12, 2023 by Petitioner Los Angeles Waterkeeper)

Supreme Court Case Number S280906

Dear Honorable Chief Justice Patricia Guerrero and Honorable Associate Justices:

Pursuant to California Rules of Court, Rule 8.500 subd. (g), the Environmental Law Foundation ("ELF") respectfully submits this letter as amicus curiae in support of the Petition for Review filed by Petitioner, Los Angeles Waterkeeper on July 12, 2023 in Case Number S280906. Amicus joins interested residents statewide in asking the Court to grant review of this matter. The issues presented in this case are of enormous importance to California and will affect the state's ability to conserve its increasingly precious water resources in the years to come. The constitutional and statutory provisions at issue in the Court of Appeal's decision—colloquially known as the "waste and unreasonable use" provisions—are unique to California and provide important tools for protecting and managing California's water. But the lower court's decision blunts these tools significantly in critical contexts, notably at a time when maintaining robust protection is made all the more important by climate change and increasing water scarcity.

By holding that "neither the constitutional provision nor the Water Code imposes *any limits* on the [State Water Resources Control Board's ("State Board")] discretion how to prevent unreasonable use of water,"[1] the Court of Appeal effectively eliminates, in the context of water quality permitting, the constitutional duty enacted by California voters

[1] *Los Angeles Waterkeeper v. State Water Res. Control Bd.*, 92 Cal. App. 5th 230, 309 Cal. Rptr. 3d 394, 402 (2023) (hereafter "Opinion").

nearly a century ago and reaffirmed throughout the decades. A constitutional and statutory duty characterized only by discretion without "any limits" is, of course, no duty at all. Effects of the decision include undercutting public accountability in the water discharge permitting process, preventing the Los Angeles Water Quality Control Board ("Regional Board") from considering waste in permitting even when it wishes to do so, and dramatically weakening California's legal regime for water security.

Amicus can provide unique perspective on this matter as a longstanding California non-profit organization founded to preserve and maintain California's natural resources.

ELF is a California nonprofit organization founded to preserve and maintain California's natural resources, including through application of the waste and unreasonable use doctrine and the common-law public trust doctrine. ELF has for over a decade participated in administrative proceedings before state and local agencies and filed legal actions in the public interest aimed at aiding the recovery of anadromous fish populations, particularly in the Scott and Shasta Rivers of Northern California and the San Joaquin River in the Central Valley. As part of this work, ELF successfully litigated a case in the Third District Court of Appeal, establishing the State Board's and counties' authority and duty to regulate groundwater extraction under the public trust doctrine where extraction is interconnected with navigable surface waters.[2] ELF has also successfully petitioned to the State Board for an emergency regulation establishing a minimum flow standard in the Scott River relying in part on the waste and unreasonable use doctrine, and the State Board is currently considering a permanent regulation based on the same theory. ELF's work in the Central Valley relies in part on state and local agencies' authority and duties under the waste and unreasonable use doctrine. As such, ELF has a direct interest in the outcome of this case.

The Court of Appeal's decision will erode the legal regime designed to protect California's waters and have far-reaching effects on California's water scarcity.

Absent clarification by the Supreme Court, the Court of Appeal's decision will dramatically undermine article X, section 2 of the California Constitution and parallel sections of the Water Code[3] as they apply to the State Board and the Regional Water Quality Control Boards. The Court of the Appeal held that the State Board's duty to prevent waste and unreasonable use requires no action by the State Board—including

[2] *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.4th 844.
[3] Wat. Code §§ 100, 275.

evaluation of potential waste—with regards to any particular discharge, category of unreasonable use, or class of water users.[4] The Court of Appeal further held that the Regional Board not only has no duty, but also *lacks the authority* to prevent waste and unreasonable use in water quality permitting. This decision strips substantial power from the state agencies at the front lines of water use permitting—power that would otherwise have the potential to help California address current and future water supply conditions. It also relieves "the agencies charged with implementing State water policy from considering whether permitting the discharge of *over half a billion gallons water per day* is wasteful or unreasonable... render[ing] unenforceable the constitutional and statutory mandates to take *all* appropriate actions to prevent waste and unreasonable use in any particular instance or even category of use."[5]

The threat of water scarcity in California is beyond dispute, and Southern California is one of the most water-scarce regions in the state.[6] As climactic conditions change, shifts in the hydrologic landscape are presenting extreme challenges for water security and water resource management. These challenges will only grow. In the next few decades, California's Fourth Climate Change Assessment projects tens of billions of dollars in damages caused by droughts, wildfires, and coastal destruction, all of which present water security issues.[7] Most profoundly, climate change will reduce the Sierra snowpack that much of California relies on for seasonal water supply as a natural reservoir.[8]

To address these threats and support the region's water security, Southern California will need to significantly reduce its reliance on imported water.[9] A major way to accomplish this is by strengthening Los Angeles' local water resources, including through improving groundwater, stormwater, and water reclamation resource management.[10] To state it plainly: in times of increasing water scarcity, what we now call "wastewater" will become increasingly valuable.

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[4] Opinion 426.
[5] *State Water Resources Control Board v. Los Angeles Waterkeeper*, petition pending No. S280906 *(*Filed July 12, 2023) 13 (hereafter "Petition").
[6] *See e.g.* Pub. Policy Inst., *Floods, Droughts, and Lawsuits: A Brief History of California Water Policy*, in Managing California's Water: From Conflict to Reconciliation (2011).
[7] *See* California's Fourth Climate Change Assessment (2018) 8-9 (generally), 63, 98 (wildfires), 57 (droughts). *See* Carmen Milanes et al., Office of Environmental Health Hazard Assessment, Indicators of Climate Change in California (2018) 147 (for discussion see level rise contaminating surface and subsurface reservoirs).
[8] California's Fourth Climate Change Assessment, *supra*, 26; Sun et al., *Understanding End-of-Century Snowpack Changes Over California's Sierra Nevada* (Nov. 2018) 46 Geophysical Res. Letters 933, 933-43.
[9] While the City of Los Angeles has set a goal to reduce Los Angeles Department of Water and Power (LADWP) purchases of imported water by 50% by 2025, and to source 70% of the City's water locally by 2035, the City has much further to go to meet these goals. L.A.'s Green New Deal: Sustainable City pLAn (2019) 46; Katie Mika et al., LA Sustainable Water Project: Los Angeles City-Wide Overview, UCLA (2018) 19, 25-26.
[10] *See, e.g.* Hanak et al., *Priorities for California's Water: Responding to the Changing Climate*, PPIC Water Policy Center (Nov. 2021) 3-7.

These conditions of water scarcity place into stark context the staggering volumes of water at issue in this case. At issue is Defendants' authorization to discharge 562.5 million gallons per day ("MGD") of advanced treatment wastewater into the Los Angeles River and Santa Monica Bay, with a daily average of 285.5 MGD authorized.[11] Whether Defendants are handling this volume of water in a manner consistent with the waste and unreasonable use doctrine and how to ensure that consistency are questions of extraordinary importance.

The Court of Appeal's decision dramatically undermines the State Board's constitutional duty to prevent waste and mischaracterizes the permitting process, insulating future permitting from public accountability.

The Court of Appeal held that article X, section 2 of the Water Code imposes neither a mandatory duty on the State Board to prevent waste or unreasonable use, nor any limits on the State Board's discretion in water quality permitting. The Court of Appeal describes the State Board's duty as "highly discretionary" and writes: "neither the constitutional provision nor the Water Code imposes *any limits* on the State Board's discretion how to prevent unreasonable use of water."[12] But discretion implies limits. As legal scholar and philosopher Ken Greenawalt has written: "When a person's choice is not constrained at all we would not ordinarily use the term "discretion."[13] This is because discretion exists between the bounds of the underlying legal duty or principle. With no limits on discretion, the underlying duty is effectively negated.

The Court of Appeal characterizes the structure of State Board's obligations in precisely this way: a constitutional and statutory duty without "any limits," rather than discretion exercised within the bounds of a constitutional and statutory duty. By interpreting the State Board's discretion—which doubtless exists—to essentially eliminate its duty, the Court of Appeal eviscerates a legal doctrine enacted by California voters in 1928 and reaffirmed throughout the decades.

This interpretation has serious consequences for advocates and others who seek to enforce California's waste and unreasonable use provisions to protect the state's waters. The Court of Appeal's decision removes a central mechanism by which the State Board and the Regional Board can be held accountable to the public for their actions by determining that the State Board's discretion is so expansive that it does not have a duty

[11] Petition 15 (citing Administrative Record ("AR") 0006; AR 7003; AR 5065; AR 5286; AR 5415; AR 5287; AR 5288).
[12] Opinion 402 (emphasis added).
[13] Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUMBIA L. REVIEW 2, 359, 365 (1975).

to act on potential waste or unreasonable use of water in any particular case.[14] The Court of Appeal's formulation of limitless discretion undermines the right to petition for review of any particular alleged waste and unreasonable use pursuant to Water Code section 13320 since, under the court's ruling, the State Board has no duty to act on any particular waste or unreasonable use.

In coming to its conclusion that the State Board has limitless discretion, the Court of Appeal relies on its characterization of the State Board's review of permits as an instance of "enforcement discretion," rather than as an integrated component of the water quality permitting process available to aggrieved parties.[15] But Section 13320 of the Water Code provides for a standard review process by which the State Board provides administrative oversight of permits proposed to be issued by Regional Water Quality Control Boards upon petition.[16] To the extent the State Board has discretion in handling petitions for review, which it surely does, that discretion remains bounded by the State Board's independent duty to ensure consistency with California's waste and unreasonable use provisions. Beyond the impacts that flow from the Court of Appeal's interpretation of limitless discretion, the mischaracterization of the State Board's role in the permitting process as one of enforcement discretion will have independent and harmful impacts on public accountability by unduly limiting the public's ability to challenge the permitting process and allowing agencies to "ignore constitutional and statutory mandates without consequence."[17]

Along with the constitutional provision, sections 100 and 275 of the California Water Code collectively form the state's waste and unreasonable use doctrine. Section 100 repeats the language of Article X, section 2: "that the waste or unreasonable use or unreasonable method of use of water be prevented."[18] Section 275 of the Water Code charges the State Board with the responsibility of preventing the waste and unreasonable use of state water resources.[19] This provision demands that the "board *shall* take *all* appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."[20] The presence of the terms "shall" and "all" in this directive signal a legislative intent to impose a mandatory duty to prevent waste in the

[14] In 1983, the Supreme Court established in Nat'l Audubon Soc'y v. Superior Ct. that California, as a trustee, "has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *Nat'l Audubon Soc'y v. Superior Ct.* (1983) 33 Cal. 3d 419, 446. The Audubon decision strengthened and clarified the State Board's duty by recognizing the obligation to consider public trust interests in water allocation and planning. *Id.* at 444.
[15] *See* Opinion 426, 429-430.
[16] Wat. Code §§ 13320, 13377.
[17] Petition 43.
[18] Wat. Code § 100.
[19] Wat. Code §275.
[20] Wat. Code § 275 (emphasis added).

context of discharges of this magnitude on the State Board which the Court of Appeals ignores in its decision.

The Court of Appeal's decision as to the Regional Board will prevent the Regional Board from considering waste or unreasonable use of water in water quality permitting decisions even where it wishes to do so.

The Court of Appeal held further that neither the California Constitution nor the Water Code empowers any of the nine Regional Water Quality Control Boards to prevent or even consider the waste or unreasonable use of water in water quality permitting decisions.[21] The Court of Appeal asserted: "[N]othing in article X, section 2 or the Water Code empowers the Regional Board, a body expressly tasked to regulate water quality, also to prevent the unreasonable use of water by [publicly owned treatment works ("POTWs")]. Waterkeeper thus seeks to impose a duty on the Regional Board to regulate unreasonable use that is beyond the powers the Legislature gave it."[22] As a result of the Court of Appeal's insistence—in the face of the Regional Board and the State Board's assertion that the Regional Board does in fact does have authority to consider waste and its request that the Court of Appeal modify the opinion to reflect this[23]—the Regional Board will be precluded from even evaluating waste and unreasonable use of water in future permitting decisions. As the Court of Appeal itself acknowledged in its first (withdrawn) opinion, the decision creates a "quandary" by denying the primary permitting body's authority to consider waste while simultaneously reading limitless discretion into the parent agency's authority to consider waste in that permit. Additionally, the decision's expansive reasoning in support of its conclusion opens troubling and unresolved questions about the scope of Regional Boards' authorities throughout California to consider wasteful uses of water in other circumstances, too.

The direct effects of this decision are enormous in the context of California water use: The Hyperion Plant alone discharges a volume of water equal to about 20% of total coastal municipal discharge in California.[24] The indirect effects are even more profound. The Opinion treats unreasonable use and water quality as entirely separate, when in fact water quality is closely linked to water use: Los Angeles's water comes from hundreds of miles away, from as far as Lake Shasta, Mono Lake in the Owens Valley, and the Colorado River.[25] Each of the watersheds affected by the city's water imports has their own water quality problems that are exacerbated by the Los Angeles area's demand for

[21] Opinion 421.
[22] *Id.*
[23] Opinion 401.
[24] *See* Heal the Ocean, Inventory of Municipal Wastewater Discharges to California Coastal Waters (2018) 6.
[25] Petition 9, 14.

water—a demand that could be significantly lessened if the discharges at issue here were addressed.[26] Moreover, the decision could prevent waste and unreasonable use consideration for all wastewater discharged by permits authorized by Regional Water Quality Control Boards throughout the state—an enormous quantity of water—and potentially be used to limit Regional Water Quality Control Boards' capacity to consider wasteful uses of water in contexts beyond water quality permitting. The four POTWs at issue in the North Outfall Sewer System, along with the Los Angeles County-operated Joint Outfall System, "cumulatively dump as much as 450 billion gallons per year—over one third of the entire state's urban water demand—of potentially re-useable or recyclable water."[27] Legal tools to support the State Board and Regional Board as they attempt to respond to increasing water scarcity and the statewide water quality impacts related to increasing water demand are only growing more essential. The Court of the Appeal decision removes a key tool that the Regional Board might rely on to do so.

By radically shrinking the power of the waste and unreasonable use provisions, the Court of Appeal's decision conflicts with the intended purposes of those provisions at the time of enactment and with their interpretative history.

The Court of Appeal decision breaks with the intended purpose and interpretative history of the waste and unreasonable use doctrine. The constitutional provision at issue was adopted by voters to control wasteful uses of water such as those squarely at issue in this case, and was intended to provide new, substantive controls against water waste. Those considering the amendment recognized at the time "that prevention of a wasteful use of water [wa]s a matter of paramount importance to the general welfare of the State."[28] The 1928 general election ballot stated that the purpose of the constitutional amendment creating article X, section 2 was "to prevent the waste of the waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea,"[29] exactly the sort of practice challenged in this case. The enactment of article X, section 2 had a profound impact in California, making the doctrine of waste and unreasonable use foundational to all of California water law.[30] The Legislature intended for article X, section 2 to be enforced widely and to be used to

[26] *See, e.g.,* California Sportfishing Protection Alliance, et al. Protest and Objection to March 18, 2022 Temporary Urgency Change Petition of Department of Water Resources and Bureau of Reclamation (April 6, 2022) [discussing temperature effects on salmonid survival in the Sacramento as a result of water exports to Southern California], available at https://calsport.org/news/wp-content/uploads/CSPA-et-al-Objection-TUCP-SWP-CVP-w-att-040622.pdf; State Water Resources Control Board, Mono Lake Basin Water Right Decision 1631 (1994) 77-82 [lower water levels in Mono Lake lead to higher salinity, which negatively affects aquatic ecosystem productivity].
[27] Petition 16.
[28] Journal of the Assembly During the 47th Session of the Legislature of the State of California (1927) 510.
[29] Ballot Pamp., Gen. Elec. (Nov. 6, 1928) 14 [argument in favor of Prop. 7].
[30] Pub. Policy Inst., Floods, Droughts, and Lawsuits: A Brief History of California Water Policy, in Managing California's Water: From Conflict to Reconciliation (2011) 40.

combat decades of poor water resource management caused by prior water right allocations.[31]

Consistent with this history, courts have taken up the invitation to interpret and apply the doctrine broadly to ensure that all water uses in California are reasonable.[32] The waste and unreasonable use doctrine has also always been applied on a case-by-case basis and in a manner that takes into account changing conditions over time.[33] This Court has emphasized that changing environmental, economic, political, and hydraulic conditions may make prior reasonable water uses unreasonable, ensuring that the doctrine is particularly useful and flexible in times of changing water availability.[34] The provision is meant to ensure that *all* water use in California is reasonable, a determination which must be made in light of both local and statewide conditions of water scarcity, with due recognition of the changing climatic conditions in the state.

Referencing the stated purpose on the ballot "to prevent the waste of waters of the state," this Court has said this purpose "is beyond question."[35] The Court described the amendment as "an endeavor on the part of the people of the state, through its fundamental law, to conserve a great natural resource[.]"[36] The Court also has stated: "It was undoubtedly the purpose of the proponents of the amendment of 1928 to make it possible to marshal the water resources of the state and make them available for the constantly increasing needs of all of its people."[37] Interpreting article X, section 2 expansively to protect against the waste and unreasonable use of water gives effect to the provision's purpose and accords with longstanding doctrine concerning the interpretation of California constitutional amendments.[38] Recognizing the State Board's duty to prevent the waste and unreasonable use of water in this case is consistent with the voters' intent and the development of the doctrine in the courts.

Conclusion

[31] *See* Gray, The Reasonable Use Doctrine in California Water Law and Policy in Sustainable Water: Challenges and Solutions from California (Lassiter edits., 2015) 84.
[32] *See Id.* 85-89.
[33] *Lux v. Haggin* (1886) 69 Cal. 255, 408; *Envtl. Def. Fund, Inc. v. E. Bay Mun. Util. Dist*. (1980) 26 Cal.3d 183, 194; *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 368.
[34] *Envtl. Def. Fund, Inc., supra*, 26 Cal.3d 194-95.
[35] *Gin S. Chow v. Santa Barbara* (1933) 217 Cal. 673, 700.
[36] *Id.*
[37] *Meridian v. San Francisco* (1939) 13 Cal. 2d 424, 449.
[38] *See In re Quinn* (1973) 35 Cal.App.3d 881, 888 (in construing constitutional amendments, California courts "take judicial cognizance of the existence of the evil which the Legislature in framing such amendment, and the people ratifying it, endeavored to correct"); *Turlock Irrigation Dist. v. White* (1921) 186 Cal. 183, 188 (courts resolve ambiguities in constitutional amendments based on "the object to be accomplished or the mischief to be remedied or guarded against").

Amicus supports Los Angeles Waterkeeper's petition for review in this case. Climate change is heightening Southern California's already pressing water scarcity concerns. This case presents crucial questions about the State and Regional Boards' authority and obligation to take action to protect the state's water resources in permitting and the ability of the public to hold those bodies accountable. Thank you very much for your consideration.

Respectfully submitted,

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DECLARATION OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and am not a party to the within action. My business address is 405 Hilgard Avenue, Los Angeles, California 90095. My electronic service address is lazenby.elc@law.ucla.edu. On August 1, 2023, I served the within document:

LETTER OF *AMICI CURIAE* ENVIRONMENTAL LAW FOUNDATION IN SUPPORT OF PETITIONER

☐ **VIA UNITED STATES MAIL.** I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. I enclosed the above-referenced document(s) in a sealed envelope or package addressed to the person(s) at the address(es) as set forth below, and following ordinary business practices I placed the package for collection and mailing on the date and at the place of business set forth above.

☐ **VIA OVERNIGHT DELIVERY.** I enclosed the above-referenced document(s) in an envelope or package designated by an overnight delivery carrier with delivery fees paid or provided for and addressed to the person(s) at the address(es) listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☒ **VIA ELECTRONIC SERVICE THROUGH TRUEFILING.** Based on a court order or an agreement of the parties to accept service by electronic transmission through TrueFiling, I caused the above-referenced document(s) to be sent to the person(s) at the electronic address(es) listed below.

I declare that I am employed in the office of a member of the bar of this court whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 1, 2023, at Los Angeles, California.

_____/s/ *Ruth Lazenby*_____

Ruth Lazenby

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