COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RESTORE HETCH HETCHY, a non-profit, public benefit corporation, Petitioner/Appellant vs. CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; SAN FRANCISCO PUBLIC UTILITIES COMMISSION, a municipal agency; and DOES I – X, inclusive, Respondents/Appellees	Case No. F074107 (Tuolumne County Superior Court No. CV 59426)
MODESTO IRRIGATION DISTRICT, a public agency; TURLOCK IRRIGATION DISTRICT, a public agency; BAY AREA WATER SUPPLY AND CONSERVATION AGENCY, a public agency, and ROES I-XXX, inclusive, Real Parties in Interest/Respondents	

RESPONDENTS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

The Honorable Kevin M. Seibert

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INTRODUCTION AND SUMMARY OF ARGUMENT

Given the important public infrastructure at issue in this case—a reservoir and dam, located in Yosemite National Park, that for decades have supplied millions of San Francisco Bay Area residents with water—it is not surprising that the Court has heard from several amici supporting each side. Respondents[1] here answer the briefs of amici who urge the Court to reverse the trial court's judgment: Barbara Griffin and Robert Binnewies, two former Yosemite National Park Superintendents; Huey Johnson, Daniel Lungren, the late John Van de Kamp, and Douglas Wheeler, joined by the Earth Island Institute; three Environmental Law Professors; and the California State Water Resources Control Board (State Board or Board).

While these amici collectively urge various arguments in favor of reversal in this case, it is what amici do *not* say that is most notable. These amici argue that the trial court improperly reached the question of preemption and wrongly held that the federal Raker Act preempts the claim Appellant Restore Hetch Hetchy (Appellant) pursues. But none of the amici deny that the Raker Act's purpose was to enable San Francisco to use the Hetch Hetchy Valley (Valley) for water storage. And no amicus disputes the trial court's finding that the very premise of Appellant's case is that the O'Shaughnessy Dam (Dam) and the Hetch Hetchy Reservoir (Reservoir) are unlawful and should be removed and drained respectively. These two determinations are the foundation of the trial court's preemption ruling, which properly held that the Raker Act forecloses Appellant's

[1] The term "Respondents" refers to the City and County of San Francisco (San Francisco), the Bay Area Water Supply and Conservation Agency, the Turlock Irrigation District, and the Modesto Irrigation District.

interpretation of Article X, section 2 of the California Constitution (Article X, section 2).

In addition, the State Board disputes the trial court's determination that Appellant's case is time-barred. Yet the Board does not explain how the trial court's decision departs from the well-established rules governing statutes of limitations; indeed, the Board scarcely acknowledges that those rules exist. Nor does the Board deny that the infrastructure Appellant challenges—the Dam and Reservoir—have been in place for nearly a century. None of the Board's arguments cast doubt on the trial court's determination that Appellant's claim accrued long ago and is now untimely.

In light of these omissions, the amicus briefs provide no reason to reverse the trial court's considered judgment. Instead, amici's arguments are largely based on exaggerations about the reach of the trial court's order, hypotheses about other claims or arguments that Appellant might have made, or concerns that the trial court's judgment may somehow impinge on amici's interests in the ongoing vitality of state water law. But the trial court's narrow, careful order made clear that this case threatens none of these interests. Respondents respectfully request that this Court affirm the trial court's judgment, which correctly held that Appellant's claim is preempted and time-barred.

ARGUMENT

I. The Trial Court Correctly Held That The Raker Act Preempts Appellant's Claim.

In seeking to overturn the trial court's preemption ruling, several amici argue that the trial court undervalued Congress's intent in the Raker Act to preserve state law and overstated the conflict with federal law that this case presents. (See Brief of Amici Curiae Huey Johnson, et al. at 10-

13 (hereafter Johnson, et al.); Brief of Amici Curiae Environmental Law Professors at 15-20 (hereafter Envtl. Law Profs.); Brief of State Water Resources Control Board at 31-38 (hereafter State Board).) In doing so, amici raise many points that Respondents do not dispute: that state law may govern the bypass and release of water from the Dam (Johnson, et al. at 18); that the Raker Act did not attempt to impose broad limits over California water distribution (Envtl. Law Profs. at 12); and that Article X, section 2 could, in theory, "require a wide range of operational or structural adjustments" to remedy an unreasonable method of use or diversion (State Board at 38).

But while the confluence of these factors might in theory create a difficult preemption question in a different case, here the preemption question is straightforward. Appellant's interpretation of Article X, section 2 as prohibiting San Francisco from storing water in the Hetch Hetchy Valley is irreconcilable with the Raker Act's purpose to enable that very water storage.[2] The trial court properly found Appellant's Article X, section 2 theory—and *only* that theory—to be preempted by federal law. In doing so, the court properly declined to re-write Appellant's Petition for Writ of Mandate (Petition) to hypothesize other claims that Appellant might have brought and to imagine other relief that Article X, section 2 might require in such a case. (State Board at 41-45.) Appellant has never denied that its claim attacks the Reservoir and Dam's very existence and can only

[2] Respondents have argued that Appellant's interpretation of Article X, section 2 is wrong as a matter of law. (RB at 53-61.) None of the amici address that argument. (Throughout this brief, "AOB" refers to Appellant's Opening Brief, "RB" to Respondents' Brief, and "ARB" to Appellant's Reply Brief.)

be redressed through restoration of the Hetch Hetchy Valley. The Raker Act precludes Appellant from pursuing this claim.

A. The Trial Court Properly Found This Lawsuit To Conflict With The Raker Act.

1. The Trial Court's Preemption Analysis Is Limited To Appellant's Interpretation Of Article X, Section 2.

The trial court's order is far more limited in scope than several amici wrongly imply. Various amici suggest that the trial court found the Raker Act to preempt Article X, section 2 in its entirety—which, if true, would mean that an Article X, section 2 claim could never challenge practices that the Raker Act also addresses. (See Envtl. Law Profs. at 7 ["[T]he Raker Act should not preempt Article X, section 2 of the California Constitution."]; see also Johnson, et al. at 10 [arguing that the trial court ruled that "article X, section 2 is categorically preempted by the Raker Act"].)

But this is not the approach the trial court took. That court properly limited its preemption analysis to Appellant's Article X, section 2 claim *alone*, and decided only that Appellant's particular interpretation of that provision is preempted. (See AA334 [finding that this case presents the question of whether there is "an actual conflict between the federal [Raker] Act and article X, section 2 of the California Constitution as interpreted by Petitioner"].) Both California and federal preemption decisions recognize that a particular interpretation of state law offered in a lawsuit can be preempted by federal law. (See, e.g., *PLIVA, Inc. v. Mensing* (2011) 564 U.S. 604, 618-619 (*PLIVA*) [finding state tort law claims preempted by federal drug regulations]; *Eckler v. Neutrogena Corp.* (2015) 238 Cal.App.4th 433, 447-448 [federal regulations can preempt conflicting state "requirements" which "may include state suits based on common law or

statutory provisions"].) This preemption is limited in scope, and does not reach beyond the lawsuit to preempt the underlying statute. (See *Fischer v. Time Warner Cable, Inc.* (2015) 234 Cal.App.4th 784, 797 [holding that federal regulations preempted state unfair competition law claims—not the state unfair competition law itself].)

Thus, the trial court's judgment that "Petitioner's proposed interpretation of article X, section 2" is preempted by the Raker Act does not foreclose different applications of that constitutional provision. As Respondents have conceded (RB at 36-37), the trial court's order casts no doubt on other interpretations of Article X, section 2—or any other state law—that do not present a conflict with the Raker Act's central purpose of allowing water storage in the Hetch Hetchy Valley. There is thus no inconsistency between the trial court's preemption holding and the ongoing robust operation of state water law—including Article X, section 2—with respect to federally authorized projects. (See Johnson, et al. at 20-21 [describing state-law challenges to Los Angeles Aqueduct]; see also State Board at 27.) To the extent that amici incorrectly argue that the trial court's order has broader ramifications that could cripple Article X, section 2's reach in a future case (see, e.g., Johnson, et al. at 12 [claiming that the trial court concluded "that *any* application of Article X, section 2 to the City's Hetch Hetchy operations is federally preempted"]), or hamper the administration of state water law in general (see State Board at 12-13, 41), those arguments are incorrect.

2. Appellant's Article X, Section 2 Theory Conflicts With The Purposes And Objectives Of The Raker Act.

Although amici quibble with various aspects of the trial court's preemption analysis, none seriously disputes the two most important

determinations the trial court made: The Raker Act's core purpose was to enable the Hetch Hetchy Valley to be used for water storage, and the entire premise of Appellant's case is that the storage of water in the Reservoir in the Valley is unreasonable. (AA333-334.) Starkly absent from amici's briefing is any analysis of the text of the Raker Act itself, which makes evident Congress's focus on using the Valley for water storage. (See Raker Act, §§ 1, 2, 9(a)-(g), 9(j)-(l) [Respondents' Attachment] [referring to water storage in the Hetch Hetchy Valley]; see also *State of Cal. v. Federal Power Com*. (9th Cir. 1965) 345 F.2d 917, 920 [The Raker Act was enacted to "establish storage in the headwaters of the Tuolumne, to support the diversion of water for domestic use in the San Francisco Bay Area."].) That text is consistent with the legislative history, which shows that Congress made the considered judgment that the Valley be devoted to reservoir use to address the longstanding lack of a reliable water supply for the San Francisco Bay Area. (RB at 17-19; see also H.R. Rep. No. 41, 63rd Cong., 1st Sess., p. 19 (1913) [Respondents' Request for Judicial Notice Ex. D] [Raker Act's purpose is to "convert the valley into a magnificent lake and store the water from the melting snows."].) In enacting the Raker Act, Congress was not neutral concerning whether the Hetch Hetchy project should be carried out, and did not authorize the project as a mere accommodation to San Francisco. Rather, Congress envisioned that the Dam and Reservoir would be built and operated in the Valley, and enacted a law to accomplish that end. Amici do not dispute this central purpose of the Act.

Nor do amici dispute the trial court's conclusion that Appellant's "entire case" is premised upon the claim that the use of the Hetch Hetchy Valley for water storage in the Reservoir is unlawful. (AA333.) This

premise is clear both from the Petition's prayer for relief (AA31 [requesting that the court order Respondents to develop a plan "for modifying or removing the O'Shaughnessy Dam so that the Tuolumne River may again flow freely through the Hetch Hetchy Valley"]) and from various other allegations showing Appellant's objection to the "drowning [of] the Hetch Hetchy Valley of Yosemite National Park with a reservoir." (AA12; see also AA33 ["It is not reasonable for [R]espondents to monopolize a majestic valley within a world-famous national park as a reservoir"]; AA14 [describing an "essential component" of Appellant's mission as "the responsible elimination of the Hetch Hetchy Reservoir"]; AA22 [challenging "the reasonableness of flooding a uniquely beautiful valley in a national park"].) Appellant's sole objective in bringing this case is to achieve restoration of the Valley, i.e., the elimination of the Reservoir. (AA25 [Appellant's goal is "[r]estoring Hetch Hetchy Valley" and "[e]liminating diversions from storage within Hetch Hetchy Valley."].) The amicus brief from the former Yosemite National Park Superintendents highlights the purpose of this lawsuit. (Amicus Brief of Barbara Griffin and Robert Binnewies in Support of Restore Hetch Hetchy at 9 (hereafter Superintendents) ["Restoring Hetch Hetchy Valley would add approximately 1,200 acres that share many of the characteristics of Yosemite Valley" and "increase access to similar meadowlands and wilderness areas."].)

Amici argue that this lawsuit does not conflict with the Raker Act because the Raker Act "authorizes but does not carry out" construction of a dam in Hetch Hetchy Valley. (Johnson, et al. at 11; see also State Board at 35-36.) The State Board claims that the Act could not have imposed a "directive" mandating that San Francisco operate a dam and reservoir

because doing so would run afoul of the federal constitutional prohibition against commandeering state and local resources. (State Board at 35.) And Johnson, et al. argue that the Raker Act's specifications are "few" and relate to "construction," and therefore could be technically honored without using the Valley for water storage. (Johnson, et al. at 11-12; see also State Board at 40-41 [arguing that none of the Raker Act's height, foundation, and other "aesthetic requirement[s]" "facially conflict" with the "facility modifications" that could theoretically redress Appellant's injuries].)

But these assertions are a red herring. That Respondents could restore the Valley while still complying with some of the Raker Act's "requirements"—presumably, by draining the Reservoir while leaving the Dam in place—does not defeat the trial court's preemption analysis. Amici conflate the different forms of conflict preemption: impossibility and obstacle preemption. (Compare *Hillsborough County v. Automated Medical Labs.* (1985) 471 U.S. 707, 713 [impossibility preemption occurs when compliance with both state and federal directives is impossible] with *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 373 [obstacle preemption is found where a challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"].) Amici's suggestion that Appellant's claim is not preempted because it might be physically possible for San Francisco to drain the Reservoir while still preserving some of the infrastructure the Raker Act described is absurd. As the State Board concedes, a state-law action will be preempted when "it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (State Board at 29, quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 64.) None of amici deny that Congress intended the Raker Act to

enable water storage in the Valley. This purpose is flatly inconsistent with Appellant's state-law cause of action. As the Superintendents' Brief demonstrates, Appellant seeks to resurrect a debate about the appropriate use of the Hetch Hetchy Valley that Congress resolved when enacting the Raker Act. (See Superintendents at 4-11; see also RB at 27-28.)

3. The Trial Court Properly Analyzed Federal Reclamation Act Cases In Construing the Raker Act.

Several amici argue that the trial court's judgment in this matter should be reversed because that court assessed case law construing the federal Reclamation and Power Acts in analyzing the Raker Act's preemptive reach. (See State Board at 33-38; Johnson, et al. at 15-20; Envtl. Law Profs. at 20-22; see also AA337-340 [trial court held that it "may be guided in its preemption analysis by interpretations of the nearly identical language of section 8 of the federal Reclamation Act"].) Amici argue that despite the textual similarities among the statutes—which all contain near-identical language providing that "[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water" (RB at 29, 34)—Congress intended that state law would play a more robust role in the Hetch Hetchy project than in projects authorized by the Reclamation or Federal Power Acts. (Johnson, et al. at 20; State Board at 37; Envtl. Law Profs. at 22.)

Amici's arguments for distinguishing the Reclamation Act from the Raker Act are familiar and unconvincing. Amici adopt Appellant's characterization of the Raker Act as providing a mere "conditional grant" to San Francisco of a right of way over federal land, and contrast that purpose with the Reclamation Act's purportedly "massive program for the

construction and operation of federal dams and related works." (State Board at 34; see also Johnson, et al. at 19; Envtl. Law Profs. at 20; AOB at 38 [offering similar characterizations of the Raker Act]; ARB at 25 [same].) But as Respondents have argued, the size of a federal program has no bearing on the federal purpose a statute aims to further, or the federal interest the statute is designed to protect. (RB at 40.) As amici concede, Congress enacted the Raker Act pursuant to its "sweeping power under the Property Clause" to transfer federal land. (Envtl. Law Profs. at 19.) The federal government's interest in projects taking place on federal land in "Yosemite National Park and Stanislaus National Forest" (State Board at 34), is as strong as it is with respect to all other projects on federal land. That interest is borne out by the significant responsibilities the Raker Act reserved to the federal Department of Interior. (See *Sierra Club v. F.E.R.C.* (9th Cir. 1985) 754 F.2d 1506, 1510 [The Raker Act "placed construction of the dam and other necessary facilities under the supervision of the Secretaries of Interior . . . and Agriculture."]; see also RB at 40-41.) The Reclamation and Raker Acts' similar federal interests and purposes suggest that their saving clauses should be interpreted in harmony.

But even if amici are correct that Section 11 of the Raker Act has broader effect than Section 8 of the Reclamation Act—thereby giving state law a more substantial role under the Raker Act—the trial court's preemption holding must still stand. Whatever intent Congress had to preserve state law cannot possibly extend to state-law claims seeking to drain the Reservoir in the Valley, as that result is directly contrary to Congress's very purpose in enacting the Raker Act in the first place. (See pp. 15-16, *supra*.) To suggest that Congress intended such a result—even if it did intend state law to play a significant role under the Raker Act—is

difficult to believe. Further, a finding that Congress intended for state-law claims to undo the heart of the Raker Act would contravene controlling precedent. The United States Supreme Court has repeatedly made clear that a federal statute's saving clause cannot operate in this way. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 343 ["As we have said, a federal statute's saving clause 'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself,'" quoting *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.* (1998) 524 U.S. 214, 227-228]; see also *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, 870 [finding it "difficult to understand" why Congress would have "wished the Act to 'save' all state-law tort actions, regardless of their potential threat to the objectives of . . . that Act"].)

For this reason, this case does not demand resolution of whether Section 8 of the Reclamation Act and Section 11 of the Raker Act must be interpreted in parallel. A judgment holding that the Raker Act preempts a state-law cause of action that would prohibit water storage in the Hetch Hetchy Valley does not require the Court to consider the precise metes and bounds of Section 11's reach or to "harmonize" Article X, section 2 with the Raker Act in general. (State Board at 32.) Appellant's Article X, section 2 claim is indisputably preempted regardless of the resolution of this issue. For this reason, Respondents would welcome an opinion from this court similar to the trial court's order: narrow and tailored to the circumstances of this case.

And in any case, the trial court's reliance on Reclamation and Federal Power Act cases is beside the point. This Court "do[es] not review

the trial court's reasoning, but rather its ruling. A trial court's order is affirmed if correct on any theory," regardless of the underlying reasoning. (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16.) Moreover, the trial court did not rely upon Reclamation Act cases in finding Appellant's claim preempted; instead, it made clear that those cases were simply "useful and relevant for their presentation and analysis of general preemption principles." (AA340.) At bottom, the trial court found preemption based largely on the text of the Raker Act, which made clear Congress's intent that the Valley be devoted to water storage through use of the Dam and Reservoir. (AA335) [finding that "[t]he Raker Act is clear on its face"].) No amicus disputes this conclusion, which was the cornerstone of the trial court's preemption ruling. (AA335-336.)

B. The Trial Court Properly Found Appellant's Claim Preempted Based On The Allegations In The Petition.

The trial court was also right to decide the question of preemption at the demurrer stage based on Appellant's Petition as a whole. (AA339-340.) The State Board disputes this, and argues that the court should have disregarded Appellant's concededly obvious request for relief that would result in draining the Hetch Hetchy Valley and removing the Reservoir. (State Board at 12, 27 ["[Appellant's] petition and briefs have apparently pushed for a particular remedy—removal of the dam and draining of the reservoir."].) Instead, the Board argues, the court should have re-imagined the Petition as stating a claim that could be remedied by "less severe relief." (*Id*. at 45-46.)

The Court should disregard these new arguments, which Appellant itself has never advanced. Courts routinely "refuse to consider arguments

raised by amicus curiae when those arguments are not presented in the trial court, and are not urged by the parties on appeal." (*California Assn. for Safety Ed. v. Brown* (1994) 30 Cal.App.4th 1264, 1275.) The Board's contention lacks merit in any case, as there was no basis for the trial court to ignore the very essence of Appellant's allegations. The trial court properly held that "[p]reemption is clear from the face of the Raker Act, without requiring any evidentiary showing." (AA339.)

1. Preemption Questions Are Resolved At The Demurrer Stage.

The State Board's request to delay resolution of the preemption issue is contrary to the established preference for resolving such questions at the threshold of the case, before the parties or the court expend unnecessary resources. California and federal cases have long held that a demurrer "is an appropriate vehicle to secure a dismissal of a state law action based on federal law preemption." (*Ball v. GTE Mobilnet of Cal.* (2000) 81 Cal.App.4th 529, 535 (*Ball*).) This is because "[p]reemption is predominantly a legal question, resolution of which would not be aided greatly by development of a more complete factual record." (*Hotel Employees & Restaurant Employees Internat. Union v. Nevada Gaming Com.* (9th Cir. 1993) 984 F.2d 1507, 1513.) The trial court's decision to sustain Respondents' demurrer on preemption grounds is consistent with this established authority.

The court's decision is also consistent with controlling precedent making clear that a court should not delay resolving a preemption issue, even where further development of the record might arguably be helpful to the inquiry. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission* (1983) 461 U.S. 190 (*Pacific*

Gas), the high court rejected the argument that the trial court should have awaited further application and interpretation of a challenged state law governing nuclear waste disposal—developments that could have shed light on the statute's interaction with federal law. (*Id.* at pp. 201-202.) The Court held that "although it would be useful to have the benefit of California's interpretation[,] . . . resolution of the preemption issue need not await that development" because "[t]he question of preemption is predominantly legal." (*Id.* at p. 201.) The Court further noted the significant harms that would accrue from delaying resolution of the preemption question: it "would require the industry to proceed without knowing whether the moratorium is valid," thus "impos[ing] a palpable and considerable hardship on the utilities" as well as potentially on "the citizens of California." (*Id.* at pp. 201-202.) For these reasons, the Court held that the question of preemption "should be decided now." (*Id.* at p. 202.)

The delay the State Board seeks here would similarly impose a significant harm on Respondents as well as the public, with no clear accompanying benefit to this case. San Francisco would face uncertainty about whether its water infrastructure—infrastructure that is critical for providing water to millions of Bay Area residents (RB at 14)—might be vulnerable to a state-law challenge. (*Pacific Gas*, *supra*, 461 U.S. at p. 201.) In addition, the resources of the parties, the courts, and ultimately those of "the citizens of California" (*id.* at p. 202), would be compromised by the lengthy, perhaps decades-long inquiry[3] into the factual and legal

[3] As the cases cited by the Board demonstrate, resolution of state water law questions often requires many years of expensive proceedings. (See, e.g., *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 190; *Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548, 552-553.)

questions the State Board claims exist. (State Board at 41-43.) The Board's offer to decide these questions itself is likely to prolong this case and increase the expenses associated with delay. (State Board at 13 [advising that "the State Water Board [must] be paid for its expenses on reference"].) At the same time, the Board points to no specific factual questions that further litigation will resolve—only the vague possibility that more litigation may shed light on "what California law would require." (State Board at 41-42.) The Court should not accept the Board's invitation to delay resolution of this case. (*Pacific Gas*, *supra*, at p. 201.)

2. The Petition's Allegations And Prayer For Relief Make Clear That Appellant's Cause Of Action Is Preempted.

The State Board also incorrectly argues that the trial court should have disregarded the prayer for relief in Appellant's Petition—which, as the Board admits, "pushed for a particular remedy—removal of the dam and draining of the reservoir." (State Board at 12.) But the well-settled rule in a preemption case is that a court must "focus on the 'actual gravamen of the complaint' in construing it." (*K.C. Multimedia, Inc. v. Bank of America Tech. & Operations, Inc.* (2009) 171 Cal.App.4th 939, 959, quoting *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387; see also *Ball*, *supra*, 81 Cal.App.4th at p. 540; *Nathan Kimmel, Inc. v. DowElanco* (9th Cir. 2002) 275 F.3d 1199, 1203 (*Nathan Kimmel*).) In doing so, the court must look at the allegations in the "complaint[] as a whole" and consider whether the "substance of the claim," regardless of the "plaintiffs' characterization of it," would interfere with the operation of a federal law. (*Wells Fargo Bank, N.A. v. Superior Court* (2008) 159 Cal.App.4th 381, 386.) That analysis considers the factual allegations as well as the type of relief the complaint seeks. (*Ibid.*) In deciding what type of relief a

complaint seeks, a court looks both to the particular remedies the complaint seeks on its face (*Nathan Kimmel*, *supra*, at p. 1203), and to the relief that would most naturally address the harm identified in the factual allegations (see *Whistler Investments, Inc. v. Depository Trust & Clearing Corp*. (9th Cir. 2008) 539 F.3d 1159, 1167-1168).

The trial court followed this established authority in finding Appellant's cause of action preempted. As the Board concedes, Appellant's prayer for relief demonstrates that the Petition seeks the removal of the Reservoir and the restoration of the Valley. (State Board at 12.) The Board admits that this prayer is difficult to reconcile with Congress's purpose in enacting the Raker Act (*ibid.*), and thus that the claim must be preempted. The State Board's argument that Respondents make a "premature assumption" that Appellant's claim seeks removal of the Dam and Reservoir is incorrect.

But even if the trial court had ignored the prayer for relief and focused solely on the factual allegations in the Petition, those allegations invite no remedy other than drainage of the Reservoir and breaching of the Dam. It is not surprising that the State Board does not point to any specific factual allegations in the Petition showing that Appellant's theory is in fact more limited. (State Board at 44-45.) The very essence of Appellant's claim is that the Dam and Reservoir are unreasonable and hence unlawful; the Petition is replete with factual allegations showing that it is the Reservoir's very "presence" that purportedly offends the Constitution and making clear that only full restoration will redress that injury. (AA21; see also AA25 [Petition seeks to "eliminat[e] diversions from storage within Hetch Hetchy Valley"]; AA26 [discussing the costs of "breaching the O'Shaughnessy Dam" and "restoring Hetch Hetchy Valley"]; see also

pp. 16-17, *supra*.) The Petition's entire legal theory is based on the idea that the Dam and Reservoir are *themselves* unlawful. (AA29 ["The operation of O'Shaughnessy Dam and flooding of the Hetch Hetchy Valley within Yosemite National Park is an unreasonable method of diversion."].) The State Board's claim that the trial court should have considered the availability of "less severe relief" is irreconcilable with these allegations. There are no other remedies beyond removal of the Reservoir that could address the constitutional violation Appellant asserts. Even if the court could have ignored the Petition's prayer for relief, that would not change the preemption analysis.

3. The Trial Court's Analysis Was Consistent With Established Standards Governing Demurrers.

The trial court's resolution of this case was not, contrary to the State Board's contention, inconsistent with the "established standards" governing review of a writ petition or complaint at the demurrer stage. (State Board at 43-44.) Considering the gravamen of the Petition is not inconsistent with the court's obligation to construe the factual allegations in a complaint favorably to the plaintiff. (*Ibid.*) The cases the Board cites concern the accepted rule that a court must liberally construe the facts in a complaint to assess whether they state a *cause of action*. (*Blank v. Kirwin* (1985) 39 Cal.3d 311, 319-320 [considering whether the complaint "state[s] facts sufficient to constitute a cause of action" under federal equal protection law); *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1558 [assessing whether complaint "states causes of action for traditional mandate, declaratory judgment and injunctive relief"]; *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103-105 [similar].) None concerns preemption at all, let alone dictates that a court

should conduct an especially searching review of a complaint when deciding if it is preempted. The trial court did not offend traditional rules governing demurrers by finding the Petition's sole cause of action preempted.

Indeed, it is the State Board's argument, not the trial court's judgment, that is contrary to established authority. Courts have declined to hypothesize other allegations that a complaint might have made, or other scenarios that a plaintiff might not have directly referenced, in deciding whether a cause of action is preempted. (See *PLIVA*, *supra*, 564 U.S. at p. 623 ["[P]reemption analysis should not involve speculation about ways in which federal agency and third-party actions could potentially reconcile federal duties with conflicting state duties."]; see also *Funke v. Sorin Group USA, Inc.* (C.D. Cal. 2015) 147 F.Supp.3d 1017, 1025 ["Though [case law] indicate[s] that in some cases it is possible to plead a failure to warn claim that is not preempted, the Complaint as written lacks the necessary factual and legal support to maintain such a claim."].) This authority is consistent with the broader rule that "[t]he issues [in a case] are framed by the allegations of the complaint." (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 893.) The Board's argument, if accepted, would up-end this precedent.

Furthermore, the Board's position is difficult to reconcile with the standard of review governing an appeal from an order sustaining a demurrer. In such cases, the appellant bears two important burdens: the burden to show the existence of reversible error, and the burden to show there is a reasonable possibility he can amend to "change the legal effects of his pleading," if he previously declined to do so. (*Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649, 656 (*Everett*).) Here, the

State Board advances an interpretation of Appellant's Petition, and a basis for reversal, that Appellant itself has not advanced, either to this Court or to the trial court. Appellant could have amended its Petition along the lines the State Board proposes, but it declined to do so. (AA347.) Considering the State Board's argument is therefore improper. (*Everett*, *supra*, at p. 655 [Because "the burden is on the appellant to demonstrate the existence of reversible error . . . we need only discuss whether a cause of action was stated under the theories raised on appeal."]; see also *Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 7-8 [affirming order sustaining demurrer where plaintiff "made no attempt to indicate how the complaint may have been amended to state a cause of action"].)

4. None Of The State Board's Additional Arguments Support Its Request For Reversal.

The State Board's additional reasons for seeking a remand also lack merit. First, the Board argues that two cases from the United States Court of Appeals for the Ninth Circuit demonstrate that the trial court erred in deciding the question of preemption at the threshold of the case, before deciding Appellant's Article X, section 2 claim on the merits. (State Board at 42-43.) Neither case shows anything of the sort.

In *Natural Resources Defense Council v. Houston* (9th Cir. 1998) 146 F.3d 1118, 1132, the Ninth Circuit held that a court should resolve any uncertainty about whether state law applies to a federally approved project before considering whether such federal approval preempts that state law. Because the trial court "never explicitly ruled" that the disputed state law "applied to the Friant dam at issue" or considered "whether the actual application" of the state law was consistent with federal law, further proceedings were necessary. (*Ibid.*) Respondents do not disagree with this

commonsense approach—but it has no application to this case. There is no dispute about whether Article X, section 2 applies to the Hetch Hetchy water system; Respondents have long admitted that it does. (RB at 36-37.) While some cases might first require consideration of "whether state law applies" (State Board at 42), no such threshold determination is necessary in this case.

Likewise, the Ninth Circuit's decision in *United States v. State of California, State Water Resources Control Board* (9th Cir. 1982) 694 F.2d 1171, 1178-1179 (*State of Cal.*), has no application to this case. Far from suggesting that a trial court should *defer* resolving preemption questions at the outset of a case (State Board at 43), the Ninth Circuit found *no* preemption where there was no reason to believe that state law would be implemented in a manner that would intrude on federal authority. (*State of Cal.*, *supra*, at pp. 1178-1179 ["The condition refusing immediate appropriation of water by the United States for consumptive use has not been shown invalid."].) The court faulted the federal government for failing to show that state law was likely to "clash[] with significant federal policies" or "did not properly implement congressional intent." (*Id.* at p. 1178.) Again, Respondents do not disagree with this straightforward approach, which does little more than restate the standard for conflict preemption and does not suggest that a factual record is needed to resolve such inquiries. And again, there is no parallel to this case, where the relief that Appellant seeks is abundantly clear, and the conflict that relief would cause with federal law is obvious from the Raker Act's text and purpose. (See pp. 16-17, *supra*.)

Second, the Board obliquely suggests that its views should be entitled to special weight, and that this special weight warrants a remand of

this action not to the trial court, but instead to the Board itself. (State Board at 12-13.) But while the Board assuredly has substantial expertise in the administration of *California's* water laws, it has no particular knowledge about the question that would remain unresolved: the object, purpose, and preemptive effect of the Raker Act on Appellant's cause of action. Courts have held that state agencies' views about the preemptive scope of a *state* statute are not entitled to special weight. (See *Lopez v. World Savings & Loan Assn.* (2003) 105 Cal.App.4th 729, 743-744.) It must follow that the State Board has no expertise on the preemptive effect of a *federal* law, notwithstanding its expertise in the area of state water law. It is the role of this Court alone to determine the scope of the Raker Act. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 18.) There is thus no good reason to give weight to the State Board's arguments here—or to allow the Board to decide the preemption issue in this case in the first instance.

II. The Trial Court Correctly Held That Appellant's Case Is Time-Barred.

The trial court concluded that Appellant's case, filed in 2015, was time-barred because the sole cause of action relates to the construction of the Dam and the Reservoir, and thus accrued decades ago. The State Board claims that the trial court's ruling was incorrect because it fails to account for the evolving nature of Appellant's Article X, section 2 claim. In addition, the Board claims that exceptions to the usual rules about statutes of limitations—exceptions that Appellant itself does not advance—apply to Appellant's claim. Both arguments are incorrect and, if true, would threaten the repose and certainty that water rights holders must have. (RB at 52-53.)

A. The State Board's Argument Regarding The Evolving Nature Of Reasonableness Is Irrelevant.

The State Board first raises the familiar argument that "the trial court failed to properly apply the common law interpretation of reasonableness under article X, section 2." (State Board at 18.) The State Board, like Appellant, cites several cases that it claims stand for the proposition that what constitutes the "reasonable use" of water "evolves" over time. (State Board at 19-21; AOB at 28-29.) Even if the Board were correct,[4] this point is irrelevant. Whether Article X, section 2's reasonableness standard is fixed or evolves over time has no bearing on the statute of limitations applicable in this action.[5]

The irrelevance of the State Board's argument is illustrated by the Board's failure to apply or even acknowledge the well-established framework governing statutes of limitations. Any statute of limitations analysis must begin with Code of Civil Procedure section 312, which provides, in its entirety: "Civil actions, *without exception*, can only be commenced within the periods *prescribed in this title*, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute." (Code Civ. Proc., § 312, emphases added.) This provision establishes the two basic questions in any statute of limitations analysis: 1) what statutory limitations period applies to the cause of action, and 2) when did the cause of action accrue. (See, e.g., *Norgart v.*

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[4] In its Reply Brief, Appellant erroneously states that Respondents do not dispute the "continually evolving reasonableness standard." (ARB at 28.) Not true. As here, Respondents' Brief provides, "*Even if* Appellant is correct, such a standard has no bearing on when this action accrued." (RB at 50, emphasis added.)

[5] Nor does this argument have any bearing on San Francisco's position that Appellant's Article X, section 2 cause of action fails as a matter of law. (RB at 53-61.)

Upjohn Co. (1999) 21 Cal.4th 383, 397 (*Norgart*) ["Under the statute of limitations, a plaintiff must bring a cause of action within the limitations period applicable thereto after accrual of the cause of action."].)

These are precisely the questions the trial court posed and answered. The trial court first determined that Code of Civil Procedure section 343's four-year, catch-all statute of limitations applies to this action. (AA342-343.) Section 343 was enacted expressly to rebut the inference that actions not specified in the other general provisions of the Code of Civil Procedure are to be regarded as exempt from limitations. (*Geneva Towers Ltd. Partnership v. City of San Francisco* (2003) 29 Cal.4th 769, 774, citing *Bogart v. George K. Porter Co*. (1924) 193 Cal. 197, 201 (*Bogart*).) Where the Legislature "has intended that an action shall be exempt from limitations it has said so in clear and unmistakable language." (*Moss v. Moss* (1942) 20 Cal.2d 640, 645, quoting *Bogart*, *supra*, at p. 201; *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 878 (*Marin*).)[6] These rules apply equally to constitutional claims like Appellant's. (See, e.g., *Miller v. Board of Medical Quality Assurance* (1987) 193 Cal.App.3d 1371, 1377.) The trial court reached the obvious conclusion that no limiting language is present here: "article X, section 2 does not provide for any shortening or extension of the so-called 'catch-all' statute of limitations at Code of Civil Procedure section 343." (AA343.) As such, the four-year limitations period applies. (*Ibid*.)

[6] Article X, section 2 was drafted, passed, and placed on the ballot by the California Legislature. (AA201-205.) In interpreting a voter initiative, courts apply the same principles that govern statutory construction generally. (*People v. Rizo* (2000) 22 Cal.4th 681, 685.)

The trial court next determined that the limitations period barred Appellant's cause of action. (AA344.) A cause of action accrues "when the cause of action is complete with all of its elements . . . the elements being generically referred to by sets of terms such as 'wrongdoing' or 'wrongful conduct,' 'cause' or 'causation,' and 'harm' or 'injury.'" (*Norgart*, *supra*, 21 Cal.4th at p. 397, internal citations omitted.) The trial court found that "the specific events that gave rise to this lawsuit"—the "clear-cutting of the trees in the Hetch Hetchy Valley" (AA20), "the completion of the O'Shaughnessy Dam" (AA20), and "the flooding of the Hetch Hetchy Valley" (AA18)—all took place decades ago. (AA343-344.) Appellant admits that this is the wrongful conduct that caused its purported injuries: "The presence of the Reservoir is destroying and impairing numerous beneficial uses that are designated for the Tuolumne River within the Hetch Hetchy Valley." (AA15.) Thus, the trial court properly determined that San Francisco's storage of water in the "Hetch Hetchy Reservoir—what lies at the heart of [Appellant's] claims—was already in place, by means of massive infrastructure built and maintained pursuant to the terms of the Raker Act, when the amendment that [Appellant] claims makes such operations unreasonable and unconstitutional was enacted. Accordingly, [Appellant's] cause of action accrued at the time of enactment of what is now article X, section 2: in 1928." (AA344.)

In light of the trial court's straightforward application of the well-established statute of limitations framework, the State Board's argument is puzzling. The Board does not directly challenge either of the trial court's central findings. Nor does the Board point to any legal error the trial court made when performing its analysis. Instead, the Board makes an unrelated argument regarding Article X, section 2's standard of reasonableness,

which it claims evolves over time. But even if the Board were correct, that evolution would not affect the limitations period applicable to Article X, section 2 claims. No court has ever held that changes to the standard for assessing reasonableness revive otherwise stale claims, or otherwise bear on the statute of limitations.

An analogy helps highlight the flaw in the State Board's position. The tort of negligence is often defined as the failure to use ordinary or reasonable care. The standard of "ordinary care" in a negligence claim may very well evolve or vary "with changing circumstances." (See, e.g., 6 Witkin, Summary 10th Torts § 867 (2005).) But this evolving standard of care has no bearing on the fact that a negligence claim accrues when the "claimed harm occurred." (Judicial Council of Cal. Civil Jury Instruction 454.) In other words, a plaintiff's negligence claim stemming from a car accident (and associated injuries) in 1928 accrued at the time of the accident. By 2015, the standard of care applicable to drivers may very well have changed, but this fact does not serve to revive the otherwise stale claim stemming from an accident that occurred nearly a century ago.

Without saying so explicitly, the State Board's argument here would render all Article X, section 2 claims—and, by extension, all types of claims based on evolving standards—subject to an ever-shifting limitations period. This contention is impossible to square with the well-established framework for determining and applying statutes of limitations. (See pp. 32-33, *supra*.) The Board's position, if adopted, would also undermine the very purpose of such statutes, which is "to protect defendants from the stale claims of dilatory plaintiffs." (*Norgart*, *supra*, 21 Cal.4th at p. 395.) "Statutes of limitations also serve many other salutary purposes—some of which are relevant to this case—including protecting settled expectations;

giving stability to transactions; promoting the value of diligence; encouraging the prompt enforcement of substantive law; *avoiding the retrospective application of contemporary standards*; and reducing the volume of litigation." (*Marin*, *supra*, 103 Cal.App.4th at p. 872, emphasis added.) Re-opening a limitations period based on purported changes in the definition of reasonableness runs counter to these important public purposes.

B. Neither The Continuing Violations Doctrine Nor The Theory Of Continuous Accrual Salvages Appellant's Claim.

The State Board advances two more arguments in the alternative: that both the continuing violations doctrine (State Board at 21-23) and the theory of continuous accrual (State Board at 24-26) override application of any statute of limitations in this action. These two doctrines are among a handful of equitable exceptions, developed by courts over time, to the usual rules governing limitations period. (*Aryeh v. Canon Business Solutions, Inc*. (2013) 55 Cal.4th 1185, 1192 (*Aryeh*).) Neither applies in this case.

1. The Court Should Not Consider Arguments That Appellant Does Not Raise.

As a threshold matter, this Court should not consider either of these arguments. Appellant advanced both arguments before the trial court. (AA237-239.) The trial court analyzed and rejected both of them. (AA345-347.) Appellant declined to amend its complaint and, on appeal, Appellant elected not to advance either argument, instead arguing exclusively that Article X, section 2 claims are not subject to any statute of limitations. (AOB at 51-59.)

Because Appellant chose not to raise either of these arguments in its opening brief, they are not properly before this Court. "Obvious

considerations of fairness in argument demand that the appellant present all of his points in the opening brief." (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335 fn. 8, quoting 9 Witkin, Cal. Proc. (3d ed. 1985) § 496, p. 484.)[7] It is for this reason that courts generally do not consider new issues raised by amici. (See *Interinsurance Exchange v. Spectrum Investment Corp* (1989) 209 Cal.App.3d 1243, 1258-1259; see also pp. 22-23, *supra*.) Doing so would also run afoul of the requirement that a party seeking review of an order sustaining a demurrer must identify the particular grounds for reversal. (See pp. 28-29, *supra*.) This Court should disregard the State Board's arguments premised on the continuing violations doctrine and the theory of continuous accrual.

2. The Continuing Violations Doctrine Does Not Apply To This Action.

Even if Appellant had not abandoned the continuing violations argument on appeal, the State Board's argument in support of this doctrine is incorrect. The doctrine is an exception to the usual rules governing limitations periods, and provides that a defendant "is liable for actions that take place outside the limitations period if these actions are sufficiently *linked to unlawful conduct that occurred within the limitations period*." (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1056, emphasis added; see also *Aryeh*, *supra*, 55 Cal.4th at p. 1198 ["Allegations of a pattern of reasonably frequent and similar acts may, in a given case, justify

[7] Appellant made a single passing reference to the term "continuing violation" in its Reply Brief. (ARB at 31.) But "[i]t is well settled that a point raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present such point before. [Citations.]" (*Duncanson-Harrelson Co. v. Travelers Indemnity Co*. (1962) 209 Cal.App.2d 62, 70; *Monk v. Ehret* (1923) 192 Cal. 186, 190; *Julian v. Hartford Underwriters Ins. Co*. (2005) 35 Cal.4th 747, 761 fn 4.) Appellant has not attempted to make any such showing.

treating the acts as an indivisible course of conduct actionable in its entirety, notwithstanding that the conduct occurred partially outside and partially inside the limitations period."].)

The continuing violations doctrine does not apply to Appellant's action for two independent reasons. First, when alleging one of the nonstatutory exceptions to the applicable limitations period, like the continuing violations doctrine, it is the plaintiff's burden—even at the pleadings stage—to demonstrate that the claim survives. (*Aryeh*, *supra*, 55 Cal.4th at p. 1197.) Here, Appellant has not identified *any* unlawful conduct that occurred within the four-year limitations period—which accrued decades ago—that could then be linked with more recent conduct to give rise to a valid claim. In fact, Appellant concedes that it does not (and cannot) identify any point at which the Dam and Reservoir allegedly became unlawful. (See, e.g., AOB at 55-56 [calling it an "arduous task" to determine "exactly when the method of diversion became unreasonable"].) The State Board echoes this point: "[Appellant] alleges in its Petition and argues in its opening brief, that, *at some unspecified point in time after construction of the dam*, diversions from the reservoir became unreasonable." (State Board at 24, emphasis added.)

This failure was among the reasons the trial court held the continuing violations doctrine inapplicable here: "[T]o the extent that the rationale for the continuing violation doctrine is to allow later misconduct that falls outside of the limitations period to be linked to misconduct that falls within the limitations period so that the entire course of conduct is actionable, Petitioner seems to imply, through its arguments about evolving standards, that Respondents' earlier conduct was not necessarily unreasonable or unconstitutional—which means that there is no misconduct

within the limitations period to which later conduct can be linked." (AA345-346.)

Unable to refute the trial court's conclusion that the continuing violations doctrine does not apply to Appellant's Article X, section 2 claim, the State Board takes a second, different approach. The Board argues that it is "appropriate" to analogize Appellant's theory to a nuisance claim—an area of law where the doctrine is more frequently invoked.[8] (State Board at 21-23.) But the analogy misfires. Even in the nuisance context, the continuing violations doctrine would be inapplicable to Appellant's claim here.

"Two distinct classifications have emerged in nuisance law which determine . . . the applicable statute of limitations. On the one hand, *permanent* nuisances are of a type where by one act a permanent injury is done, and damages are assessed once for all." (*Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 868, internal quotations and citations omitted, emphasis added (*Baker*).) "In such cases, plaintiffs ordinarily are required to bring one action for all past, present and future damage within three years after the permanent nuisance is erected." (*Id*. at p. 869.) "On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered *continuing* in character and persons harmed by it may bring successive actions for damages until the nuisance is abated." (*Ibid*., emphasis added.) This is the continuing

[8] Appellant does not and cannot claim that the Dam or Reservoir are actual nuisances. They are expressly authorized by the Raker Act. (See Civil Code, § 3482 ["Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."].)

violations doctrine. The exception to the usual accrual rules applies to continuing nuisances, not permanent ones.[9]

In *Spaulding v. Cameron* (1952) 38 Cal.2d 265, 267 (*Spaulding*), the Supreme Court held that "[t]he clearest case of a permanent nuisance or trespass is the one where the offending structure or condition is maintained as a necessary part of the operations of a public utility." Despite the obvious similarities, the State Board goes to great lengths to distinguish the Dam and Reservoir at issue here from the public utility infrastructure deemed "permanent"—and thus outside the ambit of the continuing violations doctrine—in *Spaulding*.

The Board misses the point. *Spaulding* is but one of many examples holding the continuing violations doctrine inapplicable to permanent nuisance cases. In addition to *Spaulding*, other cases finding an alleged nuisance to be unquestionably permanent in nature have involved a wide range of solid structures, infrastructure and equipment, such as a 25-year-old sewer pipe buried eight feet beneath plaintiff's property (*Field–Escandon v. DeMann* (1998) 204 Cal.App.3d 228, 234); telephone lines and equipment buried underground (*Spar v. Pac. Bell* (1991) 235 Cal.App.3d 1480, 1486-1488); buildings encroaching on another's property (*Troeger v. Fink* (1958) 166 Cal.App.2d 22, 28; *Rankin v. DeBare* (1928)

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[9] The State Board also refers to trespass. The same rules apply whether the wrong is characterized as a nuisance or a trespass. (*Mangini v. Aerojet–General Corp*. (1991) 230 Cal.App.3d 1125, 1148.) When a trespass is of a permanent nature, the cause of action accrues when the trespass is first committed. (*Castelletto v. Bendon* (1961) 193 Cal.App.2d 64, 66.) "Where the injury or trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is suffered or the trespass committed." (*Rankin v. DeBare* (1928) 205 Cal. 639, 641.)

205 Cal. 639, 641); railroad tracks (*Williams v. Southern Pacific R.R. Co*. (1907) 150 Cal. 624, 626); concrete piers (*Bertram v. Orlando* (1951) 102 Cal.App.2d 506, 509); and walls, foundations, pipes and vents erected on another's property (*Tracy v. Ferrera* (1956) 144 Cal.App.2d 827, 828).

On the other hand, examples of a *continuing* nuisance include an ongoing or repeated disturbance where damages may vary over time, such as a nuisance caused by noise, smoke, and vibrations from airplane flights over homes (*Baker, supra*, 39 Cal.3d at p. 869), "offensive chemical pollution which can be abated" (*Mangini v. Aerojet–General Corp*. (1991) 230 Cal.App.3d 1125, 1146), and a dairy whose noxious odors pervade surrounding properties (*Wade v. Campbell* (1962) 200 Cal.App.2d 54, 59).

As the foregoing examples make plainly clear, the Dam and Reservoir challenged here—massive pieces of fixed, public infrastructure, which have caused the same (alleged) harms to Appellant since the moment they were erected nearly a century ago—are, in the nuisance context, permanent. (See also Raker Act, § 4 [describing the Dam and Reservoir as "structures not of a temporary character"].)[10] Thus, while some Article X, section 2 cases may bear some similarities to continuing nuisances (see State Board at 21-22), the same cannot possibly be said of Appellant's challenge to the Dam and Reservoir.

The State Board's reliance upon *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585 (*California Trout*), does not change this analysis. There, the plaintiffs brought an action

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[10] Contrary to the Board's contention (State Board at 23), there is nothing "doubtful" about whether the public infrastructure challenged here is permanent. Furthermore, the Board is merely *analogizing* to nuisance cases, thus the suggestion that Appellant be permitted to decide the character of the nuisance is inapposite.

against the State Board to require the Board to condition licenses issued to Los Angeles Water and Power on compliance with Fish and Game Code provisions. In electing not to apply a statute of limitations, the court reasoned that the Board's failure to properly condition the licenses was similar to a nuisance action where "the nuisance is the sort of ongoing conduct that can be discontinued by an order to stop acts or omissions" and is thus considered "continuing" and hence "abatable." (*Id.* at p. 628.) The State Board argues that the nuisance-like condition was not the license, but the dewatering of the stream. (State Board at 23.) Not so. The court held that "the failure to affix to the licenses language conditioning future diversion upon such releases presents a continuing violation of the statute as to which no statute of limitations prevents remediation." (*California Trout*, *supra*, at p. 628.) *California Trout* thus involved a continuing activity that bears no similarity to the Dam and Reservoir that Appellant challenges in this case.

3. The Theory Of Continuous Accrual Does Not Apply To This Action.

The State Board's arguments about the continuous accrual theory are also unavailing. The theory of continuous accrual provides that "[w]hen an obligation or liability arises on *a recurring basis*, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period." (*Hogar Dulce Hogar v. Community Development Com*. (2003) 110 Cal.App.4th 1288, 1295, emphasis added.) To determine whether the doctrine applies in a given case, courts look "to the nature of the obligation allegedly breached." (*Aryeh*, *supra*, 55 Cal.4th at p. 1200.)

The State Board, once again, attempts to recast Appellant's case, this time to wedge it into the theory of continuous accrual. It suggests a

"liberal" reading of the Petition where each diversion of water is a "new independently actionable wrong, with its own time limit for recovery." (State Board at 24-25.) The State Board makes no attempt to explain how the Dam and Reservoir—longstanding and fixed public infrastructure—could be construed as making separate and recurring diversions of water.

The trial court properly rejected this argument. It determined that the nature of Appellant's challenge to a dam built nearly a century ago—"infrastructure 'not of a temporary character' (Raker Act, § 4)"—was not analogous to any of the *recurring* breaches where the theory of continuous accrual had been found to apply (i.e., a defendant's *monthly* bills with fraudulent or unfair charges, an agency's *annual* failure to properly pay into a housing fund, and a city's *monthly* collection of an allegedly invalid utility tax). (AA346-347.)

Appellant has not identified (much less challenged) any recurring, wrongful acts San Francisco committed within the applicable limitations period here. Appellant concedes that it "does not question the reasonableness of the City's use of its Tuolumne River water rights." (AA218.) Rather, it only questions Respondents' practice of storing water via a Dam and a Reservoir, built nearly a century ago in the Hetch Hetchy Valley. (*Ibid*.) The theory of continuous accrual does not apply when, as here, "there is no allegation of a recurring wrongful act." (*Hameed v. IHOP Franchising LLC* (9th Cir. 2013) 520 Fed.Appx. 520, 522.)

Recognizing that Appellant's action here is easily distinguishable from those instances where the theory of continuous accrual has applied, the State Board relies upon a single case, *Hicks v. Drew* (1897) 117 Cal. 305 (*Hicks*), which no party has previously cited. (State Board at 25-26.) *Hicks* was "an action to recover damages for injuries to real estate." (*Hicks*,

supra, 117 Cal. at p. 307.) It bears little resemblance to Appellant's action here where a non-property owner seeks the removal (and relocation) of a Dam and Reservoir from public land. *Hicks* was also decided 120 years ago, long before Article X, section 2 was enacted and well before the theory of continuous accrual had been established. Most importantly, *Hicks* does not stand for the proposition—as the Board erroneously suggests—that a plaintiff can recover damages "even though" the case was filed after the statute of limitations had run. (State Board at 25-26.) On the contrary, consistent with the well-established framework discussed above (see pp. 32-34; *Norgart*, *supra*, 21 Cal.4th at p. 397), the action in *Hicks* did not accrue when a bulkhead was built, but when the plaintiff began to suffer injuries at a later time.

In stark contrast, all the injuries Appellant identifies stem from the *presence* of the Dam and the Reservoir in the Valley. For example, according to Appellant, its members frequently visit the Hetch Hetchy area, and during these visits "their scenic, aesthetic, and recreational experience is dominated by the presence of Hetch Hetchy Reservoir. These visits are fraught with regret over the presence of the dam and reservoir. The members' experiences when visiting the Valley are severely diminished because they are precluded from experiencing the untrammeled grandeur of the Valley that existed prior to its being drowned by the Dam and Reservoir." (AA14; see also AA20-21.) Thus, all the alleged injuries commenced when the Dam and Reservoir were constructed nearly a century ago.

The continuous accrual doctrine applies only to recurring legal wrongs, not merely to recurring or ongoing harms. "The context of continuing—that is, periodic—accrual for periodic breach is to be

distinguished from that of a single breach or other wrong which has continuing impact." (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co*. (2004) 116 Cal.App.4th 1375, 1389.) "[I]f continuing injury from a completed act generally extended the limitations periods, those periods would lack meaning. Parties could file suit at any time, as long as their injuries persisted. This is not the law. The time bar starts running when the plaintiff first learns of actionable injury, even if the injury will linger or compound." (*Vaca v. Wachovia Mort. Corp*. (2011) 198 Cal.App.4th 737, 745, internal citation omitted.)

The time for this case—challenging the nearly century-long presence of the Dam and Reservoir in the Hetch Hetchy Valley—has passed. The trial court properly rejected each argument the State Board now raises, and found that the unique circumstances of this case rendered it time-barred. While common-law exceptions could theoretically play a role in a different kind of case—one challenging a temporary nuisance, or one involving recurring wrongs—they are inapplicable here. "[T]he fixing of time limits within which particular rights must be asserted is a matter of legislative policy the nullification of which is not a judicial prerogative." (*Muller v. Muller* (1960) 179 Cal.App.2d 815, 819, internal quotation omitted.) The trial court was correct to sustain Respondents' demurrer on statute-of-limitations grounds.

CONCLUSION

None of amici's arguments offer a reason to reverse the trial court's order in this case. Instead, they overstate the significance and implications of the trial court's narrow decision, while failing to address the key foundations of the court's ruling. The State Board, in particular, presents arguments related to cases and legal issues not presented here. The amicus

briefs should properly be viewed as encouraging a narrow decision in this case so as to avoid any unintended effects on other cases in the future. Respondents do not disagree with that goal. A limited opinion addressing Appellant's claim—like the order the trial court entered—will suffice to achieve that aim. Respondents therefore respectfully request that this Court affirm the trial court's order sustaining Respondents' demurrer.

Dated: May 2, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 10,428 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on May 2, 2017.

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PROOF OF SERVICE

I, Catheryn M. Daly, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Sixth Floor, San Francisco, CA 94102.

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

Executed May 2, 2017, at San Francisco, California.

Catheryn M. Daly

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