Case No. S226753

In the Supreme Court of the State of California

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,
a California nonprofit corporation,

Petitioner,

vs.

STATE WATER RESOURCES CONTROL BOARD, et al.,

Respondents.

PETITIONER'S OPENING BRIEF

After a Decision by the First Appellate District, Division Two
Court of Appeal Case No. A137680

On Appeal from the Superior Court, City & County of San Francisco
Superior Court Case No. CGC-11-516510
Honorable Curtis E.A. Karnow, Judge Presiding

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ISSUES PRESENTED

The Petition in this case presents the following issues for review:

1. Can a governmental agency lawfully establish purported "fees" by combining the total costs of all of its services provided to different classes of permittees for different types of programs and then "allocating" its total costs by creating different charges at different rates on distinct classes of permittees which are admittedly not based on evidence of the agency's costs of providing services to the various classes of fee payors?

2. When the Board admits, or its evidence shows, that its fees fail to fairly apportion the Board's costs "so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity," are the purported "fees" in reality "taxes?"

3. Following the voters' approval of Proposition 26, does the government agency have the initial burden of producing evidence to demonstrate the validity of its purported fees?

4. Does Water Code section 183, which requires that "... any final action of the board be taken by a majority of all the members of the board," apply to the respondent State Water Resources Control Board ("Board") and its adoption of the "schedule of fees" mandated by Water Code section 13260?

5. Was the Board's "schedule of fees" lawfully adopted by the votes of only two (2) members of the five-member Board?

INTRODUCTION

When governmental agencies seek to impose "regulatory fees," this Court has long mandated that the government must demonstrate that the purported "fees" do not exceed "the costs of the service or regulatory activity for which they are imposed" and must show that the fees fairly allocate the agency's costs of the regulatory activity for which the fees are charged "proportionally" among fee payors. (E.g., *California Farm Bureau Fed'n. v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 428, 435-443; *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 374-75; *County of Plumas v. Wheeler* (1906) 149 Cal. 758, 763.)

The Court of Appeal's majority Opinion erroneously approved the respondent Board's disregard of these requirements, and sanctioned the Board's admitted failure to comply with the constitutional and statutory requirements governing the Board's Storm Water permit fees challenged in this action. The Court of Appeal misread and failed to properly apply the actual holding of this Court in *California Farm Bureau Fed'n. v. State Water Resources Control Board* (2011) 51 Cal.4th 421, at 441 ["*Farm Bureau*"], where this Court explained: "the question [of the validity of the Board's fees] revolves around the scope and the cost of the ... regulatory activity and the relationship between those costs and the fees imposed." (Emph. added.) Here, however, the Board admitted that it had not produced any evidence to demonstrate that the challenged "schedule of fees" would be reasonably

related and limited to the scope and cost of the distinct regulatory activities for which the various fees are imposed, or "fairly apportioned" among fee payors.

The decision below also erred by reversing the parties' respective burdens of proof regardinging the challenged validity of the Board's Storm Water permit fees. Even before the enactment of Proposition 26 in 2010, this Court had repeatedly held that the initial burden of producing evidence to justify purported regulatory fees was properly placed on the government. (*Farm Bureau, supra,* 51 Cal.4th at 437-38; *Sinclair Paint Co. v. Board of Equalization* (1997) 15 Cal.4th 866, 878 ["*Sinclair Paint*"]: "the government should prove (1) the estimated costs of the service or regulatory activity, and (2) ... that the charges allocated to a payor bears a fair or reasonable relationship to the payor's burden on or benefits from the regulatory activity." [emph. added].) Since this case arose a year after the passage of Proposition 26, which clearly placed the entire burden of proof to demonstrate the validity of its fees on the Board (Cal. Const., art. XIII A, § 3 (d)), the appellate court decision is in error.

The majority Opinion also erred by holding that the Board could "transact business" with a mere "majority of a quorum," under Water Code § 181, rather than by applying § 183 (any "final action" of the Board can only be taken by a majority of all the members of the Board.)

The appellate decision must be reversed.

STATEMENT OF THE CASE

A. The Constitutional Context.

This case challenges the way the respondent Board established and subsequently sought to defend a "schedule of fees" imposed, ostensibly, to cover the costs of the Board's various regulatory activities. Even though the Board essentially conceded that the disputed fees established for Storm Water permit applicants were substantially in excess of the Board's costs for its Storm Water regulatory program, the Court of Appeal found nothing wrong with the Board's fees. It did so, largely, as a result of its erroneous inversion of the burden of proof, and by its improvisation of a new, "anything goes," theory for justifying purported fees. The majority Opinion by the Court of Appeal thus clearly fails to require the Board to comply with the requirements set by the voters in the Constitution, by the Legislature in the Water Code, and by this Court in a series of decisions making clear the burdens on governmental agencies when they seek to raise revenues by way of purported "fees" rather than by "taxes."

Following a series of voter initiatives (and decisions by this Court), state and local governments are now clearly required to comply with constitutional and statutory mandates before establishing or imposing "taxes," as well as similar revenue-generating charges, often disguised as "fees" or assessments. California's voters have amended their Constitution (1) to intensify the standards of judicial review to be applied when taxes or

fees are challenged, (2) to define and distinguish "fees" from "taxes" (3) to dispel any outdated notions of "deference" to poorly-justified fees, and (4) to clearly place evidentiary burdens on the government when enacting fees and when attempting to defend purported "fees" when they are challenged in court. (See, e.g., *Farm Bureau, supra,* 51 Cal.4th 421; *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 442-49 ("*Silicon Valley*"); *Apartment Assn. of Los Angeles County v. City of Los* Angeles (2001) 24 Cal.4th 830, 836-37 ("*Apartment Assn*"); *Capistrano Taxpayers Ass'n. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 ("*Capitstrano Taxpayers*"); *Lee Schmeer, et al.,* v. *County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1326 ("*Schmeer*").)

The most recent initiative in this series, Proposition 26, was approved by the voters in 2010, for the avowed purpose of halting the "phenomenon whereby the Legislature . . . disguise[s] new taxes as 'fees' in order to extract even more revenue from California taxpayers without having to abide by the [] constitutional voting requirements." (See Voter Information Guide, Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1(c) and (e), p. 114; see also *Schmeer,* v. *County of Los Angeles, supra,* 213 Cal.App.4th 1310, 1326.) Proposition 26 amended the California Constitution to expressly define the term "tax" for purposes of requiring compliance with its constitutional limitations on the imposition of new or increased governmental revenue measures (Cal. Const., art. XIII A, §3(b).) It also limited the types of charges that can be imposed

as valid "regulatory fees" as distinct from "taxes" and mandated that in order to qualify as a "fee," the government must show that the amount of the fee "is no more than necessary to cover the reasonable costs of the governmental activity" for which it is charged (Cal. Const., art. Xlll A, § 3(c).)

Significantly for this case, Proposition 26 also expressly placed the burden of proof on the State and its agencies (such as the Board):

"**The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bears a fair and reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.**" (Cal. Const., art. XIII A, § 3(d).)

The majority Opinion by the Court of Appeal incorrectly relied on pre-Proposition 26 case law, failed to apply the *expanded* definition of a "tax" and "tax increase" required by Proposition 26, erroneously "deferred" to the actions of the Board (more accurately, the actions of a mere minority of the Board membership), and erroneously imposed the burden of proof on the petitioner to demonstrate the invalidity of the challenged "storm water fees," in disregard of Proposition 26.

The Board did not even attempt to comply with these requirements.

B. Statutory Context: The Water Code Governs and Limits the Board's Establishment of Purported Fees.

The California Water Code establishes a five-member Board, the particular composition of which is specified in some detail. Water Code section 175 et seq. Water Code section 183 requires that "any final action of the board shall be taken by a majority of all the members of the board."

The Water Code authorizes and requires the Board to adopt a "schedule of fees" ["fees" in the plural] to fund the distinct water quality and waste discharge regulatory programs for which the Board is responsible. (§ 13260.)[1] As explained by the Board's own documentation in the record,[2] for the past several years the Board has maintained eight (8) distinct waste discharge regulatory programs under the authority of Section 13260, each of which is funded (at least in part) by distinct fees included in that "schedule of fees" under Section 13260, which are charged to discrete groups of permit applicants and fee payers for different types of waste discharge permits. (JA 0232, Staff Report for Board Meeting, September 19, 2011, and "Table 1" at JA 0233.)

One of the Board's eight waste discharge regulatory programs is

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1 Unless otherwise indicated, statutory references are to the Water Code.

2 The "record" in this action consists of the parties' "Joint Appendix on Appeal ["JA"], which includes a stipulated set of "joint exhibits" and "relevant excerpts of the administrative record," replacing the original set of exhibits and administrative record excerpts that were lodged with, but misplaced by, the Superior Court. (Stipulation, JA 0131 – 0527.)

commonly referred to as the "Storm Water Program." (*Ibid.*)

Section 13260(d)(2)(B) expressly requires the Board to account for its Storm Water fee separately from its other fees.

The Legislature has carefully specified in these Water Code sections how the Board is to determine the various fees in that "schedule of fees," the factors to be considered, the limitations on the Board's authority to establish the fee schedules, and the Board's duty to annually adjust its schedule of fees to reflect specified changes in the costs and revenues of the Board's programs, as well as any prior over-collections of fees.

Section 13260(d)(1)(B) requires the Board to establish fees which are equal to, but which do not exceed, the amounts necessary to cover the Board's "recoverable costs" incurred in connection with the Board's various waste discharge regulatory programs, including its Storm Water discharge program. Such "recoverable costs" are specifically defined in Section 13260(d)(1)(C)).

Section 13260(f)(1) also requires the Board "to automatically adjust the fees each fiscal year to conform to the revenue levels set forth in the Budget Act" and further to annually adjust the fees "to compensate for" the over-collection of excess fees in previous years. (JA 0232.)

The record clearly showed that the Board failed to comply with these statutory requirements in setting the challenged fees.

C. Factual Background – The Board Revealed That Its Storm Water Fees Are Far In Excess of the Costs of That Regulatory Program.

The facts giving rise to this litigation are based on the Board's own documentation, clearly demonstrating the Board's failure to comply with the Water Code in setting the subject "schedule of fees" in 2011, and its failure to conform its "fee"-setting practices to newly-adopted Proposition 26.

The Board's own staff issued a report publicly calling out the fact that for many years, the "fees" charged for the Board's Storm Water program had substantially exceeded the costs of providing that regulatory program, and that the excessive fee revenues collected had been internally transferred, year after year, to subsidize the costs of other Board regulatory programs. (See, SWRCB *Revenue and Expenditures by Program (2011),* JA 0220-0221 [a copy of which is attached as Appendix 1 to this Brief].) The Board's own documents showed that in every one of the seven (7) fiscal years leading up to the consideration of the challenged fee schedule in September 2011, the Board had collected substantially more revenues than it reported as "expenditures" for the Storm Water program. In fact, the net excess over the seven years since FY 2004-05 was reported as $23,506,000. (*Ibid.*)

Implicit in the staff report was acknowledgement of the Supreme Court's recent restatement (in *Farm Bureau*) of the broad constitutional standards applicable to the Board's "regulatory fees." "What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used

for general revenue collection. An excessive fee that is used to generate general revenue becomes a tax." (51 Cal.4th 421, 438.)

The Board itself separately accounts for the revenues collected as "fees" and the costs of providing each of its eight (8) distinct programs, including the subject Storm Water program. (See, "*Revenue and Expenditures by Program*" at JA 0220-0221.) The Board's documents showed that "fees" collected substantially exceeded the "costs" of the Storm Water program, and confirmed that some excess Storm Water fee collections were accumulated in a "surplus reserve," and that other portions of the over-collections were improperly transferred to subsidize the costs of other regulatory programs (and to artificially reduce the fees charged to the distinct groups of permittees under those other programs), or were improperly applied to Board activities and expenses other than operation of its Storm Water Program:

> Between FY 2004-05 and FY 2009-10, the Storm Water Program collected approximately $22 million more in revenue than it incurred in expenditures. This amount contributed to the large reserve balances carried in the WDPF during these years. It also allowed the State Water Board to minimize fee increases during this time period. (SWRCB Staff Report at JA 0236.)

Similar observations on the transfer and mis-use of over-collected Storm Water fee revenues to subsidize other, distinct, programs were made by many public agencies objecting to the excessive fees, e.g: "It is established and agreed [by Board staff] that Storm Water fees have been set

at inappropriately high levels for many years and those excess fees have been used by the State to subsidize other water quality programs." (City of Mountain View, at JA 0289.)

D. The Board Improperly Purported to Approve The New Schedule of Fees in September 2011.

The State Budget was eventually adopted during summer of 2011. (JA 00207.) The Board then scheduled a public hearing for September 19, 2011, for the consideration of a proposed new schedule of the Board's fees.

The Board's Staff Report (at JA 0232-0252) was not released until shortly before the September 19 hearing, including the text of the proposed new regulations and the proposed schedule of fees. Many complaints were voiced (by petitioner and by many public agencies, subject to the Storm Water fees) about the inadequacy of the "notice" provided by the Board.[3]

The Board's Staff Report (JA 0232-233) stated that the separate fees charged for all eight of the waste discharge regulatory programs would need to be increased substantially (over 30% for the Storm Water fees). The Board provided no evidence to the public or in the record to justify the basis of the "program costs" ostensibly driving the demand for the proposed stunning fee increases – and other than vague references to these changing State budget

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[3] E.g., JA 0305, letter dated 9/15/11 from Nevada County Sanitation District No. 1: "The District first received notice of these proposed rate increases three days ago. This is not adequate time to consider the impacts of a 60.6 percent fee increase."

policies. There was no evidence demonstrating the statutory "recoverable costs" of maintenance of regulatory activities under the Board's Storm Water Program, or any of its seven other programs. The Board also failed to provide the public with any evidence of the "reasonable costs" of actually conducting its various regulatory programs, much less any evidence demonstrating that the amount of the fees would not exceed the estimated reasonable costs of the regulatory activities for which they are ostensibly imposed, as required both by Section 13260 and by Cal. Const., art. XIII A, § 3(d).

The only evidence in the record was to the contrary, and was not specific to "program costs" but simply as to gross "expenditures." The Staff Report asserted that in FY 2010-11, "total expenditures" for all eight (8) of the distinct waste discharge regulatory programs had been $73.3 million. Despite the Staff's assurance that there would be "no program growth" in the coming fiscal year, the Staff Report simply stated that "total expenditures are anticipated to be $101.4 million." (JA 0232.)

Board staff did not even claim that its regulatory "costs" were increasing. To the contrary, Staff asserted only that these admittedly "very large" fee increases were the result of State budgetary shifts, and were not due to any improvement or expansion of Board regulatory programs or increasing levels of program activities.[4]

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[4] "**There is no program growth**. It is all either base revenue shortfall or general fund shifts of one form or another. I just want to make that clear on

The fact that the Board's regulatory programs were not expanding, combined with the Board's failure to claim or demonstrate that the costs of the regulatory programs were increasing by $27 million more in 2011-12 than they had in the previous year strongly supports the inference, at least, that the new fee revenues to be collected under the new schedule of fees would continue to be in excess of either the statutory "recoverable costs" or the "reasonable" costs of the program activities – in violation of State law.

The Staff Report proposed a schedule of fees in which the fees for all eight of the Board's programs should increase by a cumulative average of 37.8% above the previous year. In light of the history of excess fee collections from the Storm Water Program, staff proposed that those fees should be increased by "only" 34.9% for FY 2011-12. (See, Staff Report, *Table 1* at JA 0233.)

In addition, as a possible alternative reflecting the Staff's acknowledgment of the Board's history of more than $22 million over-collections of fees in the Storm Water program, the Staff Report also pointed out that it may be appropriate for the Board to consider a "option" which would reduce the rate of increase of the Storm Water fees to "just" a 20% increase above the prior fiscal year (rather than the proposed 34.9% increase)

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the outset that, yes, it is a very large fee increase, but they are not tied to program growth." (Testimony of M. Burnett, of SWRCB's Division of Administrative Services, in the transcript of the 9/19/11 Board hearing, at page 4, lines 16-20, at JA 0326.)

(JA 0236.) This "Storm Water Fee Rebalance Option" made no mention of the Water Code provisions or any constitutional limitations on charges by State agencies that required the Board to make fee adjustments intended to provide "compensation for" previous over-collections of fees.

CBIA, along with many others, submitted written comments, objections, and testimony at the Board hearing.[5] CBIA, and many other commentators and public agencies urged the Board to adopt the "Storm Water Fee Rebalancing" adjustments to the proposed fee schedule as required by § 13260(f)(1) – and as suggested by the Board's own staff.

At the end of the hearing, Board members expressed their concerns and unhappiness with the proposed schedule of fees and the fee increases. See, e.g., Board Chair Hoppin, at JA 0430, lines 1-8: "[W]e are all struggling with this, ... and I can't look you all in the face and say that it's right." Board Member Doduc at JA 0431: "[I]t just gets uglier and uglier every year."

The few members of the Board present, and the Board's staff, acknowledged the need for better identification, evaluation, and accounting

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[5] CBIA's letter at JA 0314; see also the 33 separate letters of objection, at JA 0266 – 0322, urging adoption of the Storm Water Fee Rebalancing Option were submitted by the Bay Area Stormwater Management Agencies Association (representing 96 agencies, including 84 cities and 7 counties); the California Stormwater Quality Association (whose member agencies provide stormwater management services to more than 22 million Californians); and many other cities and special districts. In addition, most of the 25 speakers at the hearing also opposed the fee increases or urged the rebalancing option. (See, RT of the hearing, at JA 0323-0433.)

of regulatory program costs (JA 0431-0432.) "[I]t is time for us to open ... our accounting books, time for us to really, really put on the table where our resources are going, where the programs are that are most resource incentive [sic] and ask ourselves, again: Are those the priorities that we need to focus on?" (JA 0431.)

Despite the overwhelming public objections, the inadequate evidence in the record before the Board, and the Members' own expressed reservations, a motion was made for action on the schedule of fees as proposed, without the Storm Water Rebalancing option, or any other "adjustment" for excess collections. (See, Reporter's Transcript at JA 0428-431, and the Board Minutes of the hearing at JA 0450.) One of the three Board Members present abstained, so only two (2) members voted to approve the Resolution (JA 0432.) (Resolution No. 2011-0042, at JA 0456-484.)

E. Summary of Superior Court Proceedings.

Having timely pursued and exhausted any available administrative remedies, CBIA timely filed the Complaint and Writ Petition on December 9, 2011 (JA 0004). The Board filed its Answer (in the form of a general denial) on February 9, 2012 (JA 0027.) CBIA hereafter requested the Board to prepare and provide the Board's "rulemaking file" pursuant to Government Code sections 11350(d), 11346(e), and 11347.3, and also served the Board with discovery requests on February 17, 2012. The Board objected, but the Board did agree to produce documents constituting its

proposed "record" and other existing public records in response to CBIA's requests. (JA 0032: Stipulation Re: Preparation of Administrative Record.)

The Board produced a draft index to its proposed "record" and the parties stipulated for the Board to compile and lodge the documents purporting to constitute the "record," and for the parties to jointly submit the other public records produced by the Board as "stipulated joint exhibits." [JA 0035: Stipulation Re: Administrative Record, dated June 27, 2012.] The parties also entered into a stipulation for a briefing schedule and hearing date, which was approved by the court on July 12, 2012 (JA 0038.)

The case was set for hearing on September 20, 2012, before the Honorable Curtis E.A. Karnow in San Francisco Superior Court.

Following arguments on some of the issues raised by the Board, but before counsel for CBIA was afforded an opportunity to respond to the Board's arguments, the hearing was terminated, at the request of the court reporter for a break. The hearing was not resumed, however. (JA 0591-592.) The court issued its Order Denying Writ Petition later that day (JA 0551).

CBIA moved for reconsideration (JA 0570.), which was heard on October 25, 2012. The court issued its Order Denying Motion for Reconsideration that same day. (JA 0629.)

Judgment was entered on November 27, 2012. (JA 0632.)

F. Summary of Appellate Court Proceedings.

CBIA timely filed its Notice of Appeal on January 23, 2013. (JA

0636.) The parties subsequently agreed to proceed on the basis of a Joint Appendix on Appeal ("JA") including the relevant pleadings and evidence.

The parties briefed both the procedural and the substantive invalidity of the Board's action. Respondents argued that even in the absence of substantial evidence in the record to justify the excessive Storm Water fees, the court should validate the fees based on the notion that "a regulation is presumed valid." Petitioner pointed out that purported "fees" are not "presumed to be valid," particularly following approval of Proposition 26, and that the Board had failed to carry its burden of proof. (E.g., Appellant's Closing Brief, pp. 20-21.)

Following the submission of briefing by both sides, the appeal came on for its first oral argument in January 2014. Following that argument, the case was submitted. However, on March 13, 2014 the Court of Appeal vacated the submission, and requested the parties to provide supplemental briefing "discussing the application and interplay, if any, of Water Code sections 181 and 183." The parties submitted supplemental briefs, and petitioner also requested judicial notice of materials relevant to the legislative history of Water Code sections 181 and 183, which was granted.

The appeal was heard again at the second oral argument on January 20, 2015.[6]

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[6] The appellate panel for this second oral argument was different from the first oral argument, and this second panel included the Hon. Steven A. Brick

The Court of Appeal issued its decision on April 20, 2015, which consisted of the majority Opinion by Presiding Justice Kline, joined by Judge Brick, and a Dissenting Opinion by Justice Richman. The majority Opinion concluded that the Board was operating properly under Water Code section 181, rather than section 183, when it approved the fee schedule with the votes of just two Board members. The majority Opinion then proceeded to address the substantive challenge to the invalidity of the "fees" and concluded that the schedule of fees complied with Section 13260, even though the majority Opinion admitted that "the Board acknowledges that the fee for storm water dischargers exceeded the actual expenditures for that program...." (Slip. Opn. 14-18) The majority Opinion accepted the Board's erroneous *post hoc* assertion that it could lawfully adopt a schedule of several different fees to be charged to at least eight different classes of permit applicants (and for different, separately-accounted-for) regulatory programs without any evidence that the resulting "fees" imposed for Storm Water discharge permits bear any fair or reasonable relationship to the costs of the regulatory activities attributable to such Storm Water permit applicants.

The Dissenting Opinion detailed why the majority Opinion had erred in failing to apply Water Code § 183, erred in failing to recognize that it had been amended in 1969 to supplant the common law ("majority of a quorum")

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of the Alameda County Superior Court.

and to instead explicitly require "a majority of all the members of the Board" for the Board to take "any final action." In view of the Dissent's conclusion on the procedural invalidity of the Board's action, it did not address the substantive invalidity of the schedule of fees (although hinting that the purported "fees" might well be viewed as "taxes").

Petitioner timely filed a Petition for Rehearing with the Court of Appeal. The Court denied that Petition on May 11, 2015 (but made corrections to the majority Opinion).

STANDARD OF REVIEW

The appropriate standard of judicial review for the questions of law that dominate this appeal is *de novo*, as explained in *Farm Bureau, supra,* 51 Cal.4th at 436-437.

To the extent that this appeal calls for interpretation of constitutional provisions, such as Cal. Const., art. XIII A and Proposition 26, "[t]he principles of constitutional interpretation are similar to those governing statutory construction." (*Silicon Valley, supra*, 44 Cal.4th at 444-45.) "We must ... enforce the provisions of our Constitution and 'may not lightly disregard or blink at ... a clear constitutional mandate.'" (*Id.*, at p. 448.)

To the extent that this appeal also calls for interpretation of the Water Code, and for determination of whether the Board complied with state law, those are similarly questions of law that the Court decides *de novo*. (*See*

Kelsoe v. State Water Resources Control Bd. (2007) 153 Cal.App.4th 569, 578 ["We review *de novo* a question of statutory interpretation."].) The Court does "not accord the Board's interpretation controlling weight" and the Board's "interpretation is subject to [the Court's] independent review." (*Id.*)

ARGUMENT

I. VALID "REGULATORY FEES" MUST NOT EXCEED THE REASONABLE COST OF THE PARTICULAR REGULATORY ACTIVITY FOR WHICH THE FEES ARE OSTENSIBLY IMPOSED

This Court recently explained the limitations on charges that are intended to operate as valid regulatory fees, ironically in a case challenging a different set of fees imposed by the respondent Board: "A fee may be charged by a government entity so long as it does not exceed the reasonable cost of providing services necessary to regulate the activity for which the fee is charged." (*Farm Bureau, supra*, 51 Cal.4th at 437.) In *Farm Bureau*, the Court emphasized that the Water Code only authorized the Board to collect fees "for this activity" and confirmed that the appellate court in that case had properly limited the fees to the costs of the "administrative costs incurred in carrying out the permit functions authorized" in three subdivisions of Water Code section 1525. (51 Cal.4th at 440.)

The Court held that the Board's imposition of the challenged fees

could not stand, because the Board had failed to carry its burden make the necessary evidentiary showing that its fees were "reasonable" under the applicable legal standards: "The trial court is directed to make detailed findings focusing on the Board's evidentiary showing that the associated costs of the regulatory activity were reasonably related to the fees assessed on the payors." (*Farm Bureau, supra*, 51 Cal.4th at 442 [emph. added].)

The Court of Appeal erroneously allowed the Board to defy this Court's (pre-Proposition 26) holdings as to the requirements for valid "regulatory fees" by breaking the necessary connection between the amount of the fee charged from the actual or reasonable costs of the particular governmental "activity for which the fee is charged."

This Court, by contrast, has long held that in order for a purported regulatory charge to be valid as a "fee" (rather than subjected to the rules governing taxes) the charge "must not be more than is reasonably necessary for the purpose sought, i.e., the regulation of the business." (*County of Plumas v. Wheeler* (1906) 149 Cal. 758, 763 [emph. added].) The amount of the fee must be shown to be limited to the costs of the particular governmental activity for which the fee is sought, or imposed on the fee payer or class of fee payers. See, e.g., *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375, explaining that valid fees "do not exceed the reasonable costs of providing services necessary to the activity for which the fee is charged ...." (quoting *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660

[emph. added].) Following passage of Proposition 13 (Cal. Const., art. XIII A), the Court again explained that valid regulatory fees "do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged, and which are not levied for unrelated revenue purposes." (*Sinclair Paint, supra,* 15 Cal.4th at 878 [emph. added].)

The (pre-Proposition 26) requirements limiting "regulatory fees" were summarized in *California Ass'n of Professional Scientists v. Dept. of Fish & Game* (2000) 79 Cal.App.4th 935, 945, as follows:

> Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A, section 4 analysis if the " ' "fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." ' " (*Sinclair Paint Co. v. State Bd. of Equalization, supra*, 15 Cal.4th at p. 876; *Townzen v. County of El Dorado* (1998) 64 Cal.App.4th 1350, 1359.) The government bears the burden of proof. (*Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235.) It must establish (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity. (*Id.* at pp. 234-235.)

The majority Opinion disregarded these authorities and would instead tolerate fees even though they were admittedly divorced from evidence of the costs of providing the distinct regulatory services for which the different fees were charged. The Board's fees made no pretense of being justified by any "cost/fee" evidence or analysis, and the majority Opinion is inconsistent with cases upholding regulatory fees only upon a substantial evidentiary

showing of fees being related to the regulatory costs reasonably attributable to the fee payors or class of fee payors upon whom the fees are imposed. This Court explained this requirement in *Farm Bureau, supra*, 51 Cal.4th at 441: "the question [of the validity of the Board's fees] revolves around the scope and the cost of the ... regulatory activity and the relationship between those costs and the fees imposed." (Emph. added.) The only evidence in the record here affirmatively conceded the absence of such relationships.

The recent decision by the Fourth Appellate District in *Capistrano, supra*, 235 Cal.App.4th at 1504, followed and applied *Farm Bureau* in a situation similar to this, where "fees" were being imposed at different rates ("tiers") on different classes of fee payers, but without any evidence linking the different rates to any differential costs of providing water service at differing levels of usage, nor any evidentiary basis supporting the agency's "apportionment" of the costs of its overall water supply services between the various types of fee payers ("an analogous lacuna"). (235 Cal.App.4th 1504.) The *Capistrano* court held that the disputed schedule of differential fees could not stand, in the absence of such evidence. *Capistrano* (p. 1506) explicitly rejected arguments such as those made by the Board in this case, and held an agency must do more than merely balance its total costs with its total fee revenues to comply with the Constitution. *Capistrano* followed this Court in holding that if an agency wants to charge different fees to different groups of fee payors, it must provide evidence to correlate the fees to the

costs of service attributable to the different classes of fee payors.

The Board's fees in this case admittedly were not based on any such evidence of the Board's costs of providing the particular regulatory "services" to the eight distinct groups of permittees/fee payors to whom it charged different fees.

II. AFTER PROPOSITION 26, IT IS CLEAR THAT THE GOVERNMENT HAS THE BURDEN OF PROVING THE VALIDITY OF ITS PURPORTED "REGULATORY FEES"

A. The Court of Appeal Erroneously Shifted the Board's Burden of Proof to the Petitioner

The majority Opinion by the Court of Appeal asserted: "The plaintiff challenging a fee bears the burden of proof to establish a prima facie case showing that the fee is invalid." (235 Cal.App.4th at p. 1451.) That Court purported to be relying on a passage extracted from this Court's decision in *Farm Bureau, supra,* at 51 Cal.4th p. 436, in making that erroneous assertion. However, it misconstrued the actual holding in *Farm Bureau,* and erroneously shifted the Board's evidentiary burdens to the Petitioner. The Court of Appeal overlooked this Court's further explanation of the limitations on "fees" at 51 Cal.4th 437-38:

> [A] fee may be charged by a government entity so long as it does not exceed the reasonable cost of providing services necessary to regulate the activity for which the fee is charged. A valid fee may not be imposed for unrelated revenue purposes. ... What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. An excessive fee that is used to generate general revenue becomes a tax.

The Board's own documents showed that the challenged fees unlawfully: (a) exceeded the reasonable cost of the regulatory activity in the Storm Water program for which the Storm Water fee is charged, and (2) the surplus or excessive Storm Water fee revenues were being used for unrelated revenue purposes (building a 'reserve' surplus account) and for subsidizing the charges imposed on other groups of distinct fee payers for costs of different regulatory programs.

The Court of Appeal also erroneously overlooked this Court's cautionary note in *Farm Bureau*, in which the Court expressly explained that the decision was not being decided under Proposition 26, which, at the time, had been only recently enacted. (51 Cal.4th at p. 428, fn. 2.)

Following the enactment of Proposition 26 in 2010, however – a year before the "fees" were purportedly adopted in this case – it is crystal clear that the Court of Appeal erroneously placed the burden of proof on petitioner, and that error tainted the rest of its analysis of the validity of the fees.

B. Proposition 26 Made It CLEAR That the Burden of Proof Is On the Government To Demonstrate the Validity of Purported "Fees"

The Constitution now expressly provides: "The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the

reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair and reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII A, § 3(d).)

This constitutional provision is clear and unambiguous. (See *Southern California Edison Co. v. Public Utilities Com.* (2014) 227 Cal.App.4th 172, 197 ["In 2010, the voters approved Proposition 26, which . . . shifted to state or local government the burden of demonstrating that any charge, levy, or assessment is not tax."]; *Schmeer, supra,* 213 Cal.App.4th at p. 1322 ["Proposition 26 . .. shifted to the state or local government the burden of demonstrating that any charge, levy or assessment is not a tax."].)

C. The Court of Appeal Erroneously Disregarded The Impact of Proposition 26 On Shifting the Burden of Proof to the Board, and On the Changed Definitions of "Fees" and "Taxes"

The majority Opinion suggested, erroneously, in footnote 9, that Proposition 26 should have no impact on this case simply because "the Board's fee schedule is not a 'change in state statute.'" However, *Western States Petroleum Ass'n v. Board of Equalization* (2013) 57 Cal.4th 401, 423, cited in that footnote, dealt only with a distinct argument that the Board of Equalization's change of an assessment rule was a new "tax" requiring 2/3 approval by each house of the Legislature, under art. XIIIA, section 3,

subdivision (a). The decision did not address the impact of Proposition 26 on the burden of proof nor address the broad new provisions in section 3 *subdivision (d),* making it clear that "the State bears the burden ...."

As noted above, this aspect of Proposition 26 has been recognized as confirming that the Constitution places the burden on the government to justify the imposition of fees, charges or other exactions. (See, e.g., *Capistrano Taxpayers, supra*, 235 Cal.App.4th at 1504; *Southern Cal. Edison v. PUC, supra,* 227 Cal.App.4th at 197-198; *Schmeer, supra*, 213 Cal.App.4th at 1322; see also Cal. Const. art. XIII A, § 3 subd. (d); art. XIII C, § 1, subd. (e); art. XIII D, § 6, subd. (b)(5).) As a result, the majority Opinion erred by excusing the Board's absolute failure to produce any evidence in the record demonstrating that its Storm Water permit fees were limited to its Storm Water regulatory costs for which the fees were ostensibly charged. (Cf., *Cal. Farm Bureau, supra*, 51 Cal.4th at 428, requiring the Board to demonstrate the relationship between its program costs and its fees.)

The Court of Appeal also relied on older, pre-Proposition 26, cases for its erroneous shifting of the burden of proof to the petitioner and for its outdated view of the distinctions between valid "fees" and invalid taxes. (E.g., *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 *(Sinclair Paint)* and *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132.)

However, the purpose and intent of Proposition 26 was to change the

law which had allowed fees like those in *Sinclair Paint,* and to replace such loose "justification" for fees with limits and an objective list of charges for which legitimate regulatory fees could be charged.[7]

The Board's schedule of fees failed to comply with these requirements, and the appellate court erred by relieving the Board of its constitutional burden of proof to justify its charges as "fees."

III. A REGULATORY FEE IS INVALID UNLESS THE GOVERNMENT DEMONSTRATES THAT THE AMOUNT OF THE FEE DOES NOT EXCEED THE REASONABLE COSTS TO THE GOVERNMENT OF CONDUCTING THE REGULATORY ACTIVITY FOR WHICH THE FEE IS CHARGED

Both the Constitution and the Water Code required the Board to carry the burden of providing evidence sufficient to show that the schedule of fees do not exceed "the reasonable cost of providing services necessary to regulate the activity for which the fee is charged." (*Farm Bureau, supra*, 51 Cal.4th at 437 [emph. added].)

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[7] The Legislative Analyst's explanation of the background precipitating the effort to have Proposition 26 on the ballot and the "evils" it was intended to cure – including the State's increasing reliance on unfettered "regulatory fees" to address shortfalls in the State budget and tax revenues --was further detailed in the letter brief dated June 26, 2015, submitted by *amicus curiae* "Dairy Associations" in support of the Petition for Review. (See also, Proposition 26's findings and declaration of purpose [*Schmeer, supra*, 213 Cal.App.4th at 1322-23; Voter Information Guide, Gen. Elec., *supra*, Analysis of Prop. 26 by Legislative Analyst.)

A. The Board Failed to Comply With Constitutional Requirements.

Farm Bureau and other decisions have made clear that valid regulatory fees must be related to the costs of the particular activity or service for which they are charged. See, e.g., *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375, quoting *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660: purported "fees" can only be justified by evidence showing that the charges "do not exceed the reasonable costs of providing services necessary to the activity for which the fee is charged...." (See also, *County of Plumas v. Wheeler* (1906) 149 Cal.758, 764.)

In this case, however, the majority Opinion upheld the Board's unjustified schedule of multiple fees, based on reasoning that was explicitly rejected in *Capistrano*, and *Farm Bureau*, among others. The uncontradicted evidence showed that the Board made no attempt to "correlate" the various fees charged for its eight or so different types of permits under its waste discharge authority to the actual costs of its services or activities in those distinct permit programs.

B. The Board Failed to Demonstrate Compliance With Statutory Requirements of the Water Code.

Not only did the Board fail to show the fees to meet constitutional requirements, it also failed to demonstrate that the fees comply with the applicable statutory requirements and limitations. And, even if it had provided evidence somehow showing its compliance with the Water Code's

mandates for setting the "scheduled of fees" that would not necessarily end the judicial scrutiny for compliance with the constitutional requirements, as this Court explained in *Farm Bureau*: "The court must determine whether the statutory scheme and its implementing regulations provide a fair, reasonable, and substantially proportionate assessment of all costs related to the regulation of affected payors." (51 Cal.4th at 442.)

1. Violation of Water Code Section 13260(d)(1).

Section 13260(d)(1) specifically requires the Board to adopt a schedule of fees equal to, but not in excess of, the "recoverable costs" (as defined in § 13260(d)(1)(C)) of the Board's regulatory programs. The record before the Board affirmatively showed the opposite, i.e., that the revenues from the proposed new schedule of fees would continue to substantially exceed the estimated costs of the Storm Water regulatory program (JA 0220; JA 0232, et seq.) The Board failed to provide evidence that its new fees would not exceed the statutory recoverable costs. To the contrary its own documents affirmatively demonstrate that these fees would exceed those statutorily "recoverable costs" of the Storm Water regulatory program.

2. Violation of Water Code Section 13260(d)(1)(C).

The Legislature specifically defined by statute what types of regulatory program costs are deemed to be "recoverable" by fee revenues imposed on permit applicants. The Board made no attempt to provide substantial evidence in the record to demonstrate that what those statutory

recoverable costs would be. Nor did the Board provide any evidence in the record showing that the amount of the new Storm Water fees bears a reasonable relationship to the statutorily "recoverable" costs of the Board's Storm Water regulatory program (whatever they may be).

3. Violation of Water Code Section 13260(f)(1).

Section 13260(f)(1) specifically requires the Board to adjust the fees annually "to compensate for the over-collection of excess fees" in previous years. In *Farm Bureau*, this Court construed the similar requirement in Section 1525(d)(3) as " safeguard" against the Board collecting fees in excess of the costs of the particular activities for which they are charged. (51 Cal.4th at 440.) (See also, *Barratt American, Inc. v City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 703, stating that government cannot continue to over-collect fees without providing adjustments or relief.) The evidence before the Board showed without dispute that the Board had dramatically over-collected Storm Water permit fees – more than $22 million – for at least the past seven years. (JA 0220; JA 0236.)

The Board's own staff went out of its way to call the Board's attention to the fact that the Storm Water fees established in previous years had generated Storm Water fee revenues substantially in excess of program costs that could be "adjusted" in order to soften the blow of the new fee schedule on those subject to such Storm Water fees: "Between FY 2004-05 and FY 2009-10, the Storm Water Program collected approximately $22 million

more in revenue than it incurred in expenditures." (JA 0236.) According to the Board's documents, the actual amount of the admitted excess fee revenue was more like $23.5 million. (JA 0220, Appendix 1.)

The Board failed to comply with any of these requirements of the Water Code. Since the Board's schedule of fees was admittedly devoid of the required cost/fee evidentiary justification, the Court may simply determine that the purported "fees" are invalid because they do not meet constitutional or statutory requirements (*Northwest Energetic Services v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 861) or are really illegal taxes masquerading as fees. (E.g., *Weisblat v. City of San Diego* (2001) 176 Cal.App.4h 1022, 1038.)

IV. A REGULATORY FEE IS INVALID UNLESS THE GOVERNMENT DEMONSTRATES THAT THE COSTS OF THE REGULATORY ACTIVITY FOR WHICH THE FEE IS CHARGED ARE ALLOCATED TO THE FEE PAYOR IN AN MANNER ASSURING THAT THE FEE BEARS A FAIR AND REASONABLE RELATIONSHIP TO THE PAYOR'S BURDENS ON OR BENEFITS FROM THE REGULATORY ACTIVITY

A. No Evidence That The Fees Fairly Allocate the Board's Costs of Storm Water Permit Regulatory Activity.

The Court of Appeal erroneously held or implied that a regulatory agency has unfettered discretion to "allocate" the overall "costs" of its entire set regulatory activities among multiple classes of fee payors, without regard to the burden of such fee payors on the agency's costs or the "benefits" to such classes of fee payors. This novel proposition is contrary to the

Constitution and Water Code.

These fees are not supported by any "cost/fee" evidence or analysis, and the decision is inconsistent with cases upholding regulatory fees only upon a substantial evidentiary showing of fees being related to regulatory costs attributable to the fee payors or class of fee payors.

Section 13260(d)(2)(B) expressly requires the Board to account for its Storm Water fee separately from its other fees, but the Board failed to provide evidence in the record relating these fees to the costs of the Storm Water Program – other than the evidence showing that the Storm Water permittees were paying far more than the costs to the Board, and were being over-charged year after year, to the tune of more than $20 million.

B. The "Fees" Were Actually Disguised "Taxes"

The Board appeared to be trying to explain away the new "schedule of fees" and to excuse its "very large" increases by pointing at alleged revenue-shifting in the State Budget, with resulting pressure on the Board to generate more revenues to fill the fiscal voids created by the Budget. By the Board's own admission, therefore, generating increased "revenue" was thus the primary "driver" for the new and dramatically increased "schedule of fees," rather than any increases in the size, scope, or recoverable costs of the Board's regulatory activities. That is further evidence demonstrating that these are not really "fees" at all, but rather are thinly disguised "revenue enhancements" more accurately characterized as "taxes."

Courts use a "primary purpose" test to try to distinguish a purported "regulatory fee" from a "tax:" "If revenue is the primary purpose, and regulation is incidental, then the imposition is a tax; but if regulation is the primary purpose, the mere fact that revenue is also generated does not make the imposition a tax." (*Sinclair Paint Co., supra*, 15 Cal.4th at 880; also, *Weisblat v City of San Diego* (2009) 176 Cal.App.4th 1022, 1037-38, 1044 [holding the city's "residential rental property business tax administration fee" to be, in fact, an invalid tax]; *Estate of Claeyssens v. State of California* (2008) 161 Cal.App.4th 465 [holding probate court "fee" to be an invalid tax]; *Northwest Energetic Services v. Franchise Tax Board* (2008) 159 Cal.App.4th 841 [holding the Board's purported LLC registration "fee" to be an invalid tax].) In *Morning Star Co. v. Board of Equalization* (2011) 201 Cal.App.4th 737, 750-753, charges were held to be "taxes" rather than regulatory fees, notwithstanding H & S Code § 25205.6 which directed the Board to impose a schedule of "annual fees" with revenues to be used for "a wide range of governmental programs related to hazardous waste control." The court observed: "At its most basic level, the ... charge is not a regulatory fee because it is not regulatory. It is monetary.")

On this record, the Board's new schedule of "fees" more closely resembles invalid "taxes."

V. THE BOARD'S PURPORTED APPROVAL OF THE SCHEDULE OF FEES WAS REQUIRED TO COMPLY WITH WATER CODE SECTION 183 ("A MAJORITY OF ALL MEMBERS OF THE BOARD") BUT IT FAILED TO COMPLY WITH THAT REQUIREMENT

Water Code Section 183 unambiguously states that "any final action of the board shall be taken by a majority of all members of the board." Since the Board has, by law, five members a vote by just two is not a "majority of all members of the board."

The majority Opinion fails to apply established rules of statutory interpretation in concluding that Water Code section 183 does not govern the "final actions" of the Board despite its explicit text. The text, the structure, and the legislative history of the Water Code all refute the Board's attempt to pass off the vote of just two members as valid "final action" by the Board. The majority Opinion also disregards the "relevant," "germane," and "virtually dispositive" evidence of the Legislature's intent in amending the Water Code in 1969, as emphasized by the Dissenting Opinion. This section was amended expressly to remove any prior "ambiguity" and the legislative history evidence showed that action was taken in 1969 amending section 183 "requiring that final board action shall always require the concurrence of a majority of all the members of the board, not just a majority of a quorum." (Opn., Richman, J. dissenting, at p. 15, discussing the "Report of the Senate Committee on Water Resources on Assembly Bill 412" submitted by Sen. Gordon Cologne, Chair of the Senate Committee, in August 1969 [printed in

full in the dissent at pp. 9-10].)

The Board itself has recognized that Section 183 governs its votes on matters similar to this, and requires at least three (3) votes by Board members in order to take valid action. (See, *Marina County Water District v. State Water Resources Control Bd.* (1984) 163 Cal.App.3d 132, 136 [following challenge to purported Board action based on Section 183, Board rescinded its prior approval and took new action supported by at least 3 votes].)

This statutory requirement that the Board take final action only by way of a vote by a majority of the Board's total membership is fully consistent with many similar provisions of California law applicable to public agencies, and indeed, inherent in the principles of representative democracy, as explained in *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 345-346. [The court held that an arbitration statute impermissibly intruded upon the authority of a local governing to establish compensation for county employees. The court construed the term "governing body" in accordance with Code Civ. Proc., § 15, and Civ. Code, § 12, to mean a majority of the governing body. Since a board of supervisors consisted of five members, approval by three members was necessary for valid action under Gov. Code, § 25005.]

The Court in *County of Sonoma* noted that the Legislature itself had established this interpretation in California law:

Both Code of Civil Procedure section 15 and Civil Code

> section 12 provide: "Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the Act giving the authority." (See also Pen. Code, § 7, subd. 17 [same].) The California Supreme Court long ago described this as "a necessary rule, and established by the general authorities ...." (*Jacobs v. Board of Supervisors* (1893) 100 Cal. 121, 132 [34 P. 630].) ....

The Court also explained California's requirement that public agencies act by a majority of the full membership of the governing entity:

> "California's statutory law provides additional support for this reading. The firmly established common law rule is "that legislative action is only valid if it has been approved by a majority of the members elected." (2 Martinez, LOCAL GOVERNMENT LAW (2008) *Processes of Governance*, § 11:9, p. 11-55.) This rule finds specific expression in the Government Code provisions relating to the boards of supervisors of general law counties. Under Government Code section 25005, "[n]o act of the board shall be valid or binding *unless a majority of all the members concur therein.*" (Italics added.)

County of Sonoma also pointed out that California's rule requiring "a majority of the members of a board" is deliberately different than the "majority of a quorum" rule urged by the Board here:

> We note that this language alters the ordinary common law rule, which is "that ... in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body." (*FTC v. Flotill Products* (1967) 389 U.S. 179, 183.) Because Government Code section **25005** requires the concurrence of "a majority of all the members" of the board of supervisors before the body's actions may be valid or binding, valid acts require the affirmative vote of a majority of the board's entire membership, and not merely that of a majority of a quorum. (See *Dry Creek Valley Assn., Inc. v. Board of Supervisors* (1977) 67 Cal.App.3d 839, 845; see also *Pimental*

v. City of San Francisco (1863) 21 Cal. 351, 360 [city charter requiring that no ordinance could be passed "'unless by a majority of all the members elected to each Board'" meant that four-to-three vote of eight-member board was insufficient to pass measure]; *Ordinance Mandating Four-Fifths Vote on Specified Matters Before County Board of Supervisors*, 66 OPS.CAL.ATTY.GEN. 336, 337 (1983) (*Four-Fifths Vote*).)

The Dissent also pointed out that the majority Opinion would otherwise lead to "an absurd and invidious result" allowing a minority of just two members to take "quasi-legislative" action to impose statewide charges of many millions of dollars, which might otherwise be proved to be invalid taxes, in derogation of constitutional demands in California for public accountability (including Proposition 26) and voter control of "taxes."

CONCLUSION

The Court of Appeals decision should be reversed.

Dated: September 21, 2015

RUTAN & TUCKER, LLP

By: _____
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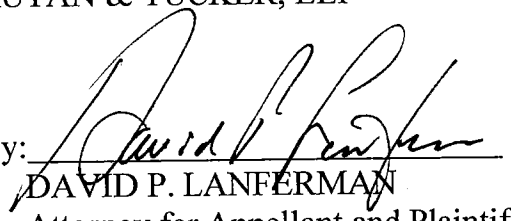
CERTIFICATE OF COMPLIANCE

The text of this Petition for Review consists of 9,400 words as counted by the Microsoft Word 2013 word-processing program used to generate this Petition.

Dated: September 21, 2015

RUTAN & TUCKER, LLP

By: 

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APPENDIX 1

State Water Resources Contro... Board
Revenue and Expenditures by Program
($000)

NPDES			
Fiscal Year	Revenue	Expenditures	Difference
2004-05	$14,930	$12,678	$2,252
2005-06	$14,123	$13,355	$768
2006-07	$14,014	$14,179	($165)
2007-08	$14,199	$18,500	($4,301)
2008-09	$17,729	$19,235	($1,506)
2009-10	$15,377	$18,531	($3,154)
2010-11	$16,929	$18,925	($1,997)
Total	$107,300	$115,403	($8,103)

Storm Water			
Fiscal Year	Revenue	Expenditures	Difference
2004-05	$18,279	$13,069	$5,209
2005-06	$18,476	$13,720	$4,757
2006-07	$21,235	$16,499	$4,736
2007-08	$19,148	$17,641	$1,507
2008-09	$20,565	$18,250	$2,315
2009-10	$20,164	$16,303	$3,861
2010-11	$17,230	$16,109	$1,121
Total	$135,097	$111,591	$23,506

WDR			
Fiscal Year	Revenue	Expenditures	Difference
2004-05	$10,721	$10,825	($104)
2005-06	$10,283	$12,175	($1,892)
2006-07	$11,523	$14,024	($2,501)
2007-08	$11,935	$15,285	($3,350)
2008-09	$16,885	$18,547	($1,661)
2009-10	$16,622	$15,924	$698
2010-11	$16,553	$15,517	$1,036
Total	$94,522	$102,298	($7,776)

Land Disposal			
Fiscal Year	Revenue	Expenditures	Difference
2004-05	$5,287	$4,634	$652
2005-06	$4,669	$4,534	$135
2006-07	$4,784	$5,778	($994)
2007-08	$4,979	$6,134	($1,155)
2008-09	$6,335	$6,772	($437)
2009-10	$6,332	$5,968	$364
2010-11	$8,257	$7,798	$459
Total	$40,643	$41,618	($975)

401 Certification			
Fiscal Year	Revenue	Expenditures	Difference
2004-05	$3,073	$3,332	($259)
2005-06	$3,446	$2,516	$930
2006-07	$3,275	$2,775	$500
2007-08	$2,356	$3,534	($1,178)
2008-09	$2,536	$3,610	($1,075)
2009-10	$2,897	$3,004	($107)
2010-11	$2,993	$3,396	($402)
Total	$20,577	$22,168	($1,591)

State Water Resources Control Board
Revenue and Expenditures by Program
($000)

Confined Animal Facilities			
Fiscal Year	Revenue	Expenditures	Difference
2004-05	$882	$1,378	($496)
2005-06	$1,711	$1,223	$488
2006-07	$705	$2,096	($1,391)
2007-08	$371	$2,565	($2,194)
2008-09	$2,815	$3,093	($277)
2009-10	$2,733	$2,480	$253
2010-11	$2,579	$2,372	$207
Total	$11,796	$15,205	($3,409)

Irrigated Lands (Ag Waivers)			
Fiscal Year	Revenue	Expenditures	Difference
2004-05	$0	$3,169	($3,169)
2005-06	$569	$2,114	($1,545)
2006-07	$644	$391	$253
2007-08	$643	$445	$198
2008-09	$666	$438	$227
2009-10	$710	$343	$367
2010-11	$678	$330	$348
Total	$3,909	$7,230	($3,921)

SWAMP			
Fiscal Year	Revenue	Expenditures	Difference
2004-05	$5,278	$6,582	($1,304)
2005-06	$5,816	$7,056	($1,240)
2006-07	$4,733	$10,003	($5,269)
2007-08	$5,712	$6,918	($1,206)
2008-09	$7,373	$5,198	$2,175
2009-10	$7,451	$9,528	($2,077)
2010-11	$6,733	$6,237	$496
Total	$43,096	$51,523	($8,427)

GAMA			
Fiscal Year	Revenue	Expenditures	Difference
2004-05	$1,530	$1,940	($410)
2005-06	$1,468	$2,033	($565)
2006-07	$1,522	$1,907	($386)
2007-08	$1,617	$1,956	($339)
2008-09	$2,434	$2,253	$181
2009-10	$2,382	$1,999	$383
2010-11	$2,522	$2,009	$513
Total	$13,475	$14,097	($622)

Total WDPF Program Revenue			
Fiscal Year	Revenue	Expenditures	Difference
2004-05	$59,978	$57,607	$2,371
2005-06	$60,561	$58,725	$1,836
2006-07	$62,435	$67,652	($5,217)
2007-08	$60,959	$72,978	($12,019)
2008-09	$77,340	$77,397	($57)
2009-10	$74,668	$74,080	$588
2010-11	$74,474	$72,693	$1,781
Total	$470,415	$481,133	($10,717)

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

I am employed by the law office of Rutan & Tucker, LLP in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action. My business address is Five Palo Alto Square, 3000 El Camino Real, Suite 200, Palo Alto, CA 94306-9814.

On September 21, 2015, I served on the interested parties in said action the within:

PETITIONER'S OPENING BRIEF

as stated below:

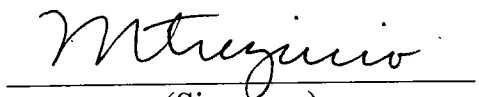
☒ (BY MAIL) by placing a true copy thereof in sealed envelope(s) addressed as shown on the attached mailing list.

In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand personal observation, become readily familiar with Rutan & Tucker, LLP's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, I deposited such envelope(s) in an out-box for collection by other personnel of Rutan & Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same day in the ordinary course of business. If the customary business practices of Rutan & Tucker, LLP with regard to collection and processing of correspondence and mailing were followed, and I am confident that they were, such envelope(s) were posted and placed in the United States mail at Palo Alto, California, that same date. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I certify that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 21, 2015, at Palo Alto, California. I declare under penalty of perjury that the foregoing is true and correct.

Maryknol Respicio
(Type or print name)


(Signature)

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San Francisco County Superior Court
400 McAllister St.
San Francisco, CA 94102

Case No. CGC-11-516510

Court of Appeal of the
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First Appellate District, Division Two
350 McAllister St.
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Case No. A137680

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