LIU, J.

Case No. S200475

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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WESTERN STATES PETROLEUM ASSOCIATION,
*Plaintiff and Respondent,*

v.

CALIFORNIA STATE BOARD OF EQUALIZATION,
*Defendant and Appellant*

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On Appeal from the Court of Appeal,
Second District, Division 8
Appellate Court Case No. B225932

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# PLAINTIFF'S ANSWER TO PETITION FOR REVIEW

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Pursuant to California Rules of Court Rule 8.504(d), I certify that the following Answer to Petition for Review is 7,716 words in length (exclusive of tables) as determined by the Microsoft Word word-processing software used to prepare the brief.

DATED: March 16, 2012

CAHILL, DAVIS & O'NEALL, LLP

By: _____

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## INTRODUCTION

The California State Board of Equalization (the "SBE") postures its Petition for Review ("Petition") as one promoting uniform assessment standards. The unacknowledged reality is that the regulation at issue, Rule 474 (*Cal. Code Regs.*, tit. 18, § 474), creates a lone *exception* to otherwise uniform assessment standards. That exception is unsupported by new legislative action or a change in facts. The Court of Appeal's decision invalidating Rule 474 restores the assessment uniformity that prevailed for decades.

This case addresses a fundamental and long accepted appraisal principle, which is that fixtures, such as amusement park rides, wind turbines used to generate electricity, ovens used by commercial bakers, sound stage equipment used for filmmaking, bottling lines used by companies making soft drinks and crude units used to make gasoline at refineries, depreciate in value over time. In contrast, land and buildings tend to appreciate over time. This inherent distinction between fixtures and land[1] was recognized by the legislators enacting the statutes required to implement Proposition 13 ("Prop. 13"). Moreover, this distinction between fixtures and land has been recognized by the SBE itself to establish uniform assessment standards for all types of heavily fixturized businesses -- expressly including refineries -- for more than 30 years. Fixtures are therefore, and historically have been, assessed separately from

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[1] For purposes of this Answer, references to "land" will include improvements, such as buildings.

land and improvements in order to account for the depreciation intrinsic to that class of property.[2]

Rule 474 changes the practice of accounting for fixture depreciation *just for petroleum refiners*, but not for any other businesses utilizing fixtures. Creating this exception required that the SBE interpret the same statute, *Revenue and Taxation Code* section 51 ("Section 51"), and the same regulation, SBE Rule 461 (*Cal. Code Regs.*, tit. 18, § 461), in two different ways: one way for petroleum refiners to disallow consideration of fixture depreciation and a different way for all other businesses to ensure consideration of fixture depreciation. The SBE's new interpretation of Section 51, which is built into Rule 474, contradicts the statute itself as well as the way the SBE itself has consistently interpreted Section 51 and the way the SBE continues to interpret Section 51 for all businesses other than refiners. This case could be more accurately styled as *California State Board of Equalization v. California State Board of Equalization* given the inconsistent interpretations of long established law formulated by the SBE in an effort to justify disparate treatment of petroleum refiners.[3]

The Petition should be denied because there is no unsettled question of law presented. Simply put, the SBE does not have the "discretion" to

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[2] There is one exception to this general rule for extractive industries like mining, because fixture depreciation is measured by the removal of minerals (land), as discussed *infra*.

[3] Rule 474 is inconsistent with more than three decades of SBE guidance interpreting Section 51 and its own Rule 461. A detailed legislative and administrative history is provided in the Memorandum of Points and Authorities Supporting Western States Petroleum Association's Motion for Summary Judgment at pages 3 to 27. (8-AA-2300 to 2324.)

adopt a regulation that is inconsistent with the statute it purports to implement: the Court of Appeal's Opinion restores uniform application of the pertinent constitutional, statutory and regulatory authority, all of which are violated by Rule 474.

The second theme promoted by the SBE's Petition is that its wholly hypothetical "estimates" of Rule 474's expected economic impact satisfy Administrative Procedures Act ("APA") requirements, and that the Opinion would wrongly require an "exhaustive analysis" of the economic effect of new regulations that is more stringent than that required by the APA. The facts are that: (a) the SBE's "estimate" of the economic impact of its new Rule was unsupported by *any* evidence; and, (b) the SBE's method of calculating the economic impact could not be shown to bear *any* relationship to the changes in assessment practice required by the Rule. These compounding inadequacies prevented the Trial Court and Court of Appeal from reviewing the SBE's compliance with the APA.

The Trial Court carefully considered the SBE's Economic Impact Statement ("EIS"), to the point of conducting a separate hearing to allow the SBE to explain the basis for its conclusions about the expected economic impact of Rule 474. (Opinion, pp. 26-27.) Notwithstanding that hearing and review of the SBE's rulemaking file, the Trial Court, its frustration apparent, concluded:

> Frankly – despite extended oral argument on this point . . . the Court is utterly unable to understand why this calculation is correct as a measure of increased taxes from treating refineries as a single assessment unit for decline in value purposes . . . . Whatever the reason,

> the Economic Impact Statement lacks any believability, and appears actually misleading.

(Appellant's Appendix ("AA"), Vol. 11, p. 3234 (Order on Submitted Motion, p. 14).)[4] The Court of Appeal was in accord, concluding that the "SBE's EIS failed as an informational document;" and that the "EIS consists of a bald statement, devoid of any understandable foundation;" and "[t]he 'calculations' provided are little more than a numbers dump, with no explanation of how or from where the numbers are derived." (Opinion, p. 24.)

The Petition should also be denied because the SBE does not have the "flexibility" to simply ignore express rulemaking requirements established by the APA. The Court of Appeal correctly and reasonably required compliance with the APA sufficient to allow meaningful judicial review of the SBE's rulemaking effort.

Ultimately, the SBE's Petition strains to create an incorrect perception that this case presents unsettled questions of law upon which review should be granted. But in reality, no such issues are presented. The Petition should be denied.

## BACKGROUND

### A. Rule 474 prohibits consideration of depreciation affecting refinery fixtures for assessment purposes.

The SBE omits an explanation of how Rule 474 actually changes the assessment process. Rule 474, in a nutshell, abandons separate

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[4] Hereinafter references to Appellant's and Respondent's respective appendixes will be in the form volume – appendix – page number.

consideration of fixtures and land by adopting a "single appraisal unit" theory which combines land, improvements and fixtures into a single appraisal unit that allows appreciating real property values to offset fixture depreciation. The net result is an increase in assessable value because deprecation is no longer separately accounted for, and an increase in assessed value means increased taxes. As described by the Court of Appeal (and not disputed by the Petition):

> Essentially, the assessors proffered the proposition that refineries should not be allowed to claim a "decline in value" on fixtures (equipment) as a separate appraisal unit based on depreciation because the value of the land, improvements and fixtures would be better fixed by lumping all these elements together and viewing them as a single appraisal unit.

(Opinion, p. 11.)

Rule 474 redefines and limits the term "appraisal unit" for refineries as follows: "'appraisal unit' consists of the real and personal property that persons in the marketplace commonly buy and sell as a unit." (Rule 474(c)(2); 2-Respondent's Appendix ("RA")-416.) This definition is consistent with only the first of the two statutory definitions of "appraisal unit" contained in Section 51(d) ("'real property' means that appraisal unit that persons in the marketplace commonly buy and sell as a unit"), and omits the second portion of Section 51 (d)'s definition ("or that is normally valued separately") as discussed below. The SBE does not have the discretion or the authority to ignore half of the statutory definition, and especially not that portion of the definition relating to the type of property (fixtures) addressed by the new regulation.

### B. Fixtures have always been treated separately from land and improvements for assessment purposes.

Proposition 8 ("Prop. 8"), adopted in November 1978 as a "bookend" to Prop. 13, affirmed that taxable values must be reduced to reflect declines in value. (Cal. Const., art. XIIIA, § 2(b).)

The Court of Appeal accurately summarizes the implementation of Propositions 13 and 8 in the context of fixtures assessment (Opinion, pp. 5-7), as well as the significance of maintaining the historical treatment of fixtures as separate appraisal units. (Opinion, pp. 20-21.) Nevertheless, additional detail on this issue shows just how radically Rule 474 departs from the legal mandate to consider declines in value resulting from depreciation.

The requirement to recognize declines in value resulting from depreciation is longstanding. On June 29, 1978, shortly after adoption of Prop. 13, the SBE amended its Rule 461(b) to *prohibit reducing property values* downward to reflect *depreciation*. Subsequently, on November 7, 1978, the voters adopted Prop. 8, which required declines in value to be considered for assessment purposes. Thereafter, San Diego County amended its Assessment Appeals Board Rules to require recognition of all factors causing a decline in value as required by Prop. 8. The SBE sought a writ of mandate to invalidate the San Diego Board's new rule on the ground that it was contrary to the 1978 version of amended Rule 461(b). The Court of Appeal instead determined that Rule 461(b) as so amended was unconstitutional because Prop. 13 did not change the fair market value standard found in article XIII, section 1, and accounting for value declines caused by depreciation was essential to track market value. (*State Board*

*of Equalization v. Board of Supervisors* (1980) 105 Cal.App.3d 813, 822-823.)

The SBE amended the invalidated 1978 version of Rule 461 in 1979 in two pertinent respects: by removing the language prohibiting recognition of depreciation; and by adding paragraph (d), which expressly segregated land and fixtures:

> For purposes of this subsection fixtures and other machinery and equipment classified as improvements *constitute a separate appraisal unit.*

(1-RA-153, emphasis added; see also 1-RA-133.) Designating fixtures as a separate appraisal unit facilitated accounting for depreciation.

Rule 461(d), as thus amended, remains in effect unchanged today (although subdivision (d) is now designated subdivision (e)).

Propositions 13 and 8 required the Legislature to implement the new "acquisition value" property tax system. The Assembly formed a Task Force on Property Tax Administration to discuss the implementation of Propositions 13 and 8. In its January 22, 1979 Report to the California Assembly Committee on Revenue and Taxation ("Task Force Report"), the Task Force specifically addressed Prop. 8's "decline-in-value" aspects and recommended use of a bifurcated appraisal unit concept that considered declines in fixture values separately from land values. Declines in value would be "measured by *the appraisal unit which is commonly bought or sold in the market place,* ***or which is normally valued separately***." (2-RA-464, emphasis added.) The Task Force stated that "the controlling principle should be: how was such property [fixtures] treated prior to Prop. 13" (5-AA-1294 (Task Force Minutes dated

November 27, 1978) and subsequently explained in its Final Report: "The purpose of the 'appraisal unit' concept is to ensure that these increases or declines in value be measured *in the same manner as such property was appraised prior to Prop. 13.*"[5] (2-RA-468, emphasis added.)

The Legislature adopted, verbatim, the Task Force Report's "appraisal unit" recommendation and incorporated the language "or which is normally valued separately" into Section 51. At the time Section 51 was adopted, the SBE's Rule 461 expressly provided that fixtures constitute a separate appraisal unit,[6] and so were "normally valued separately."

Section 51 also expressly requires taxable value to reflect depreciation. Section 51 provides that for purposes of Section 2(b) of article XIIIA of the California Constitution, ". . . the taxable value of real property shall . . . be the lesser of: (1) its base-year value, compounded annually since the base-year by an inflation factor . . . ; or (2) its full cash value, as defined in Section 110, as of the lien date, *taking into account reductions in the value due to damage, destruction,* ***depreciation,***

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[5] The Task Force Report has long been considered the definitive statement of intent interpreting statutes implementing Prop. 13 and Prop. 8. (See *Auerbach v. Assessment Appeals Board No.1 for County of Los Angeles* (2006) 39 Cal.4th 153, 161; *Pacific Southwest Realty Co. v. County of Los Angeles* (1991) 1 Cal.4th 155, 161.)

[6] Rule 461(d) was adopted by the SBE November 13, 1979. Section 51 was enacted in 1981. Hence, the phrase "or which is normally valued separately" was included in the statute *after* the SBE's regulation had already expressly designated fixtures to be a separate appraisal unit as a matter of law.

*obsolescence, removal of property or other factors causing a decline in value.*" (*Rev. & Tax. Code*, § 51(c)(1)-(2), emphasis added.)[7]

Following the enactment of Section 51, the Assembly Revenue and Taxation Committee issued a report entitled "Implementation of Prop. 13 – Property Tax Assessment" dated October 29, 1979 ("Assembly Report"). The Assembly Report confirmed that fixtures were "normally valued separately" from land:

> Fixtures, however, are normally appraised separately, thus owners may claim a decline based on depreciation of the fixture without regard to the value of the surrounding land or improvements.

(2-RA-479, emphasis in original.)

Alexander Pope, the Los Angeles County Assessor and Task Force member, also confirmed the existing practice for fixtures assessment in his letter dated December 4, 1979 to David Doerr, Chief Consultant for the Assembly Revenue and Taxation Committee concerning the Task Force recommendation. Mr. Pope emphasized the importance of continuity in implementing Prop. 8, observing:

> With respect to the question of the appraisal unit to which the Proposition 8 test should be applied, *we believe fixtures and personal property should, in accordance with past practice, be treated separately from land and*

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[7] Section 110, referenced by Section 51, establishes the statutory fair market value (full cash value) standard, which standard Section 51 then states must take into account depreciation. Section 51 thus specifically states that "full cash value" requires consideration of depreciation (which affects fixtures but not land).

*buildings.* Anything else would be administratively unworkable at this time.

(2-RA-472, emphasis added.)

The SBE complains that "the decision forces the Board to maintain the treatment of fixtures that existed prior to the passage of Propositions 13 and 8." (Petition, pp. 6-7.) But the Opinion does not force the SBE to preserve the pre-Prop. 13 recognition of fixtures as a separate appraisal unit: the Legislature adopted that standard over 30 years ago. The SBE's complaint is with the voters, the Task Force and the Legislature, not the Court of Appeal, which is merely enforcing the Legislature's intent. The issues framed by the SBE in its Petition are hardly "unsettled" points of law that would justify or require granting of the Petition.

## ARGUMENT

### A. THE COURT SHOULD DENY REVIEW BECAUSE THE COURT OF APPEAL CORRECTLY INTERPRETED THE CALIFORNIA CONSTITUTION AND SECTION 51 TO FIND THAT RULE 474 WAS INCONSISTENT WITH THAT AUTHORITY.

#### 1. The Constitutional "Market" Value Standard Requires Consideration of Declines in Value.

The SBE asserts: "The court's ruling improperly limits the Board's discretion to adopt appraisal units that follow the *marketplace's approach to fair market valuation*, an approach required by article XIIIA, section 2 of the California Constitution ('Proposition 8')." (Petition, p. 6, emphasis added.) The implication that the SBE is just trying to mimic the marketplace is merely wordplay concealing the fact that Rule 474 prohibits

statutorily required consideration of declines in value resulting from refinery fixture depreciation. Considered in the actual context of Rule 474, the SBE's assertion necessarily assumes that the "marketplace" does not account for declines in value caused by refinery fixture depreciation, and assumes further that the SBE is somehow required to ensure that assessors do not account for the depreciation either.

The SBE's assertion that assessors should not account for depreciation separately because the marketplace does not do so contradicts Prop. 8. As mentioned above, the SBE amended its Rule 461 shortly after the adoption of Prop. 13 to prohibit the consideration of declines in value. As amended, Rule 461 provided:

> The taxable value of real property shall not reflect changes for depreciation or appreciation, whether caused by zoning changes or otherwise, after the base assessment year full value has been established other than by tax inflation rate.

(*State Board of Equalization v. Board of Supervisors*, *supra*, 105 Cal.App.3d at 816.) That 1978 amendment to Rule 461, meant, in effect, that acquisition value would become the assessed value permanently regardless of post-acquisition declines in market value, including depreciation.

The Court of Appeal rejected the 1978 amendment, holding that Rule 461, as amended to prohibit consideration of declines in value resulting from depreciation, violated article XIII, section 1 of the California Constitution. (*State Board of Equalization v. Board of Supervisors*, *supra*, 105 Cal.App.3d at 823.) Article XIII, section 1 establishes the "market value" assessment standard. The Court of Appeal explained:

> The Board, by its ruling, seeks to alter 129 years of constitutional law. The people of California, since 1849, have relied on the principle that "all property in this state shall be taxed in proportion to its value, to be ascertained as directed by law . . . ." (Cal. Const. of 1849, art. XI, § 13.) This historical guaranty was reiterated in the 1974 revision of article XIII, section 1 . . . [which provides the only possible basis] for the Board to alter this constitutional principle . . . .

(*Id.* at 820.) The Court of Appeal also noted that Prop. 8 had been adopted, which Proposition "amended the Constitution, specifically providing [that] the acquisition value would be reduced to reflect a decline in real property value" (*id.* at 817), and that Prop. 8 should be applied retroactively to clarify Prop. 13 to allow consideration of value declines consistent with the market value standard established by article XIII, section. 1. (*Id.* at 824-825.)

Thus, the Court of Appeal concluded that the SBE could not prohibit consideration of factors causing declines in value such as depreciation without violating the market value standard found in article XIII, section 1.

Moreover, the SBE's contention that it is required to enforce a single consolidated appraisal unit consisting of land, improvements and fixtures has also been expressly rejected. (*County of Orange v. Orange County Assessment Appeals Board* (1993) 13 Cal.App.4th 524, 530 (County's attempt to appraise cable franchise operation as a single unit rejected. "Taken as a whole, neither Section 51 in general nor subdivision (e) in particular, mandate appraisal of the property as a whole."). )

The undisputed fact is that fixtures depreciate, and so the Legislature expressly directed that depreciation be considered to ascertain "market value" in Section 51(c). Thus, for properties with fixtures, depreciation

must be accounted for pursuant to article XIII, section 1 and Prop. 8 (art. XIIIA, § 2) as interpreted by *State Board of Equalization v. Board of Supervisors, supra*, and Section 51(c). Moreover, the SBE itself expressly designates fixtures as a separate appraisal unit to accomplish this requirement. (Rule 461(e).)

The SBE, however, now perversely contends, notwithstanding that the California Constitution actually *requires* depreciation of refinery fixtures to be considered in order to respect the market value standard, that only by *eliminating* fixture depreciation from refinery assessments can the "marketplace" be respected. The SBE contends "when the court finds that refineries cannot be assessed as a unit (which include fixtures) it goes beyond California law and conflicts with the constitutional fair market principle." (Petition, p. 7.) The opposite is actually true, because failing to segregate fixtures for assessment means that fixture depreciation cannot be accounted for, and failing to account for depreciation conflicts with the constitutional fair market principle. This principle was judicially established against the SBE long before this case was decided.

### 2. The Court of Appeal Correctly Interprets the Statutory Phrase "Normally Valued Separately" as Referring to Fixtures.

The SBE contends that the Court of Appeal misinterpreted "Section 51(d)'s phrase 'normally valued separately' as referring to fixtures." (Petition, p. 7.) Yet, the SBE shares the same interpretation. The SBE's own Opening Brief in the underlying appeal states that the Trial Court erred by "concluding that Rule 474 impermissibly departs from the longstanding general rule that fixtures are a separate appraisal unit under Rule 461(e). . . . *The Board does not dispute that, in general, Rule 461(e) has*

*consistently interpreted Section 51(d) to require that fixtures be treated as a separate appraisal unit.*" (SBE's Opening Brief, p. 19, emphasis added; see also Opinion, p. 18.) It is therefore undisputed that the SBE has historically shared the Court of Appeal's view that Section 51(d)'s phrase "normally valued separately" refers to fixtures.

It is also undisputed that the SBE continues to maintain this interpretation for all other property except petroleum refineries (and extractive industries as distinguished below). (Opinion, p. 21.)

The SBE complains that the Court of Appeal's interpretation of the "normally valued separately" phrase of Section 51(d) as referring to fixtures, "will effectively remove the Board's statutory power to ever adopt a single appraisal unit methodology . . . ." (Petition, p. 9.) The SBE's sweeping reference to infringement of an unidentified "statutory power" to disregard Section 51 and its own Rule 461 is curiously undeveloped.

The SBE's criticism of the Court of Appeal's interpretation of Section 51 lacks both authority and conviction in light of its own interpretation of the same authority.

3. The Petition is Replete with Errors.

The Petition contains numerous remarks that, while abbreviated, are misleading. These are addressed as follows:

*The Opinion artificially segregates appraisal units.*

The Petition states that: "The Court of Appeal's interpretation artificially separates section 51(d) into two separate and fixed types of appraisal units." (Petition, p. 8.) This separation is not "artificial," nor is it the product of "interpretation," but instead the statute itself establishes the

two separate appraisal units. The separation was intended to permit the assessment of properties as bought and sold, except where fixtures are present and separate appraisal is required to account for fixture depreciation. Rule 474 eliminates the separation required by statute.

*SBE Rule 324*

The SBE observes that its Rule 324 is not addressed by the Court of Appeal, implying some kind of oversight or perhaps an inability to distinguish contrary authority:

> The court's decision also completely ignores Rule 324, cited by the Board and unchallenged by the Respondent, which interprets section 51 subdivision (d) as follows: An appraisal unit of property is a collection of assets that functions together, and that persons in the marketplace commonly buy and sell as a single unit or that is normally valued separately *in the marketplace* separately from other property, or that is specifically designated as such by law.

(Petition, p. 9, italics original to Petition, but added to the quoted Rule.) Rule 324 was "unchallenged" but not unexplained by Respondent Western States Petroleum Association ("WSPA"). (See Respondent's Brief, pp. 31-32.) Similar to its disregard of Section 51(d)'s "normally valued separately" language, the SBE highlights Rule 324's reference to the "marketplace," but ignores the language referring to appraisal units "designated as such by law." That latter phrase refers to Rule 461(e) expressly establishing fixtures as a separate appraisal unit.

The SBE was advised by its own counsel that Rule 324 was *consistent* with Rule 461:

> Rule 461[e] specifically directs that fixtures and other machinery and equipment classified as improvements constitute a separate appraisal unit. *Revenue and Taxation Code*, section 51(d) provides a clear alternative to the marketplace appraisal unit in the last clause which states: " . . . or which are normally valued separately . . ." This is an explicit exception that results from rule 461[e]. *Rule 324(b) has a parallel exception that states: ". . . or that are specifically designated as such by law.*"

(Letter dated November 7, 1996 from Mary Armstrong, SBE Acting Chief Counsel, to SBE Member Andal, (rejecting assessors treating a cable television system as a single appraisal unit ("essentially, the treatment applied by the assessor eliminates any value reduction with respect to the machinery and equipment due to depreciation . . . ."), emphasis added.) (1-RA-225-226.) Thus, even the SBE does not interpret its own Rule 324 to require use of a single appraisal unit when fixtures are involved.

Rule 324 simply did not create an inconsistency with Section 461(e). Moreover, the Court of Appeal did not "take away" the SBE's supposed authority to mandate appraisal units to be used by county assessors, even assuming it has such authority, but instead simply affirmed the SBE's interpretation of its own regulations (Rule 461(e) and the Rule 324) as written, consistent with Section 51(d) – all of which consider fixtures to be separately designated by law as a separate appraisal unit.

*Unique or Favorable Treatment of Refineries*

The SBE implies that the Opinion somehow extends favorable or unique assessment treatment to refinery fixtures. The SBE criticizes the Court of Appeal, for example, because it "permanently makes petroleum refinery fixtures a separate appraisal unit." (Petition, p. 6.) The SBE also

mischaracterizes the effect of the Opinion as somehow "maximizing" the depreciation adjustment. (Petition, pp. 5, 11.) In fact, the Opinion simply restores to refinery fixtures the same treatment of depreciation that had always been recognized, and which continues to be recognized for all other businesses and industries utilizing fixtures.

*Concurring Opinion*

The SBE asks that Justice Rubin's concurring opinion (which in actuality concurs only in part) be considered in support of its Petition. (Petition, p. 5.) A concurring opinion is not controlling. (*In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 795, limited on other grounds in *In re Marriage of Lamusga* (2004) 32 Cal.4th 1072, 1099-1100; *Turney v. Collins* (1941) 48 Cal.App.2d 381, 388 [holding that a concurring opinion is not the opinion of the court]; *Mix v. Ingersoll Candy Co.* (1936) 6 Cal.2d 674, 679 [holding that concurring opinion was a personal opinion of author and not controlling], overruled on other grounds by *Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617.)

In any event, Justice Rubin's concurring remarks are limited. The justice merely stated, without explanation or authority, that he "had doubts" about whether the Rule "ran afoul of the statute." (Concurring Opinion, p. 1, fn 1.) Justice Rubin also characterized the new rule as merely making a "factual determination . . . that over the years petroleum refineries are now being bought and sold in one unit comprising real property, improvements and fixtures. On that factual assumption, the new rule creates a rebuttable presumption that refineries are sold in such a manner." (*Id.*) There are at least two problems with the Concurring Opinion's observation which mirror Rule 474's defects. First, the Concurring

Opinion does not explain how the newly made "factual" determination authorizes the SBE to instruct assessors to ignore value declines as required by the Constitution, statutes and the SBE's own regulations. That is, the Concurring Opinion does not explain how that factual change is pertinent to long standing legal requirements. Second, no change in factual circumstances occurred: "There was no evidence that market factors affecting refineries had changed between the 1970's and the 2000's." (Opinion, p. 11.) And, "there is no evidence that there has been an actual change in circumstances in the marketplace, rather than merely a change in the SBE's perspective of the marketplace." (Opinion, p. 20.) Justice Rubin's Concurring Opinion does not substantively address these pivotal issues, which form the foundation of the majority's Opinion. As such, it is inconsistent with the record and it does not establish any specific ground on which the Petition should be granted.

*Rebuttable Presumption*

The SBE characterizes the Rule as only creating a rebuttable presumption about the single appraisal unit, implying that a refiner can avoid the effect of the Rule by some kind of evidentiary showing. (Petition, pp. 5, 7.) The Trial Judge, Judge Hess, observed that only two facts could be considered for purposes of rebutting the presumption, which were (1) that land, fixtures and improvements were not under common ownership *and* that they do not transfer as a unit *or* (2) that the fixtures are not functionally integrated and operated as a unit with the realty. Judge Hess concluded that:

> Given the nature of a petroleum refinery, limiting assessors to consideration of these two criteria appears to render the presumption functionally irrebuttable.

> This is because the facts to be negated to rebut the presumption are precisely those characteristics which supposedly define a refinery in the first place.

(Order on Submitted Motion, p. 6, fn. 8; 11-AA-3226.) The fact is, the so-called "rebuttable presumption" is not rebuttable at all, even assuming for sake of argument that a rebuttable presumption could pass constitutional and statutory muster.

*Case of First Impression*

The Opinion is not truly a case of "first impression" as suggested by the SBE. (Petition, p. 6.) The Court of Appeal considered and rejected the SBE's core contention, *i.e.*, that it can instruct assessors to disregard depreciation adjustments, in *California State Board of Equalization v. Board of Supervisors, supra,* in 1980. *County of Orange v. Orange County Assessment Appeals Board, supra,* rejected the view that Section 51 mandates appraising property as a single unit in 1993. In addition, the Los Angeles County Superior Court expressly interpreted section 51(d) and Rule 461 in a refinery fixture case that pre-dates Rule 474, *BP West Coast Products v. County of Los Angeles and City of Carson,* LASC Case No. BC269200 (Hon. Susan Bryant-Deason) in 2004. Judge Bryant-Deason ruled in part that:

> SBE Rule 461(e) is consistent with Section 51 of the Revenue and Taxation Code, and it clearly requires treatment of fixtures as a separate appraisal unit. Further, the legislative history of Revenue and Taxation code section 51 confirms the policy implemented by SBE Rule 461(e). . . . Treatment of fixtures as a separate appraisal unit is consistent with the policy of Proposition 13.

(Statement of Decision, Rulemaking File, p.1221; 5-AA-1262; see WSPA's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, 27:3-23; 8-AA-2324.) Judge Hess said of *BP West Coast Products* that he was aware of the Statement of Decision, and while that Decision "does not have precedential force, the Court finds [that] her analysis of the effect of Rule 461(e), and its interpretation by the Board prior to adoption of Rule 474, to be entirely consistent with the information provided to the Court." (Order on Submitted Motion, p. 9, fn. 10, 11-AA-3229.)

Thus, the overarching constitutional issues and the specific interpretation of Section 51(d) and Rule 461 have each received prior judicial consideration consistent with the Opinion. There is no novel or unsettled question of law warranting this Court's review.

4. Rules 468, 469 and 473 are the Exceptions that Prove the Rule.

The SBE contends that the Opinion "*creates* an inconsistency in existing Board regulations," referring to its mineral extraction Rules 468 (oil and gas), 469 (hard minerals) and 473 (geothermal). (Petition, p. 11, emphasis added.) This argument is based on the false assumptions that: (a) the Opinion *creates* the distinction between minerals assessment and manufacturing and industrial assessment; and (b) that refinery fixtures are somehow analogous to fixtures used for mineral extraction.

The argument fails for at least three reasons. First, the difference (which the SBE now mischaracterizes as an inconsistency) between fixtures used to produce minerals and all other fixtures, and the methods of accounting for their depreciation for property tax purposes, existed for

decades before Rule 474 was adopted and those differences will continue with or without Rule 474. To attribute the differences in the methods for accounting for depreciation between extractive and non-extractive properties to the Opinion is absurd.

Second, a difference is not necessarily an inconsistency. There is no *inconsistency* because the inherent differences between extractive properties and non-extractive properties require use of different techniques to measure fixture depreciation. Mineral production is based on removing minerals (land). The depreciation of the fixtures used to produce the minerals is therefore based on the rate at which the minerals are extracted and the amount of minerals remaining to be produced. Once the minerals are depleted, the fixtures have little or no value. Hence, a single appraisal unit that takes into account mineral depletion and recoverable reserves is used to determine fixture depreciation in that context. (See Respondent's Brief, pp. 41-42.) For all other properties, ski resorts, movie sound stages, amusement parks, food processing facilities and the like, as well as petroleum refiners before Rule 474 was enacted, the value and life of fixtures are unrelated to the rate of mineral (land) depletion. Thus, for such non-mineral properties, fixtures are and will continue to be treated as separate appraisal units.

Third, even SBE Staff rejected the view that mineral extraction properties provided guidance for assessing refining fixtures during the rulemaking process. (2-AA-556 (Issue Paper No. 06-001, recommending the SBE deny Assessors' Petition to Initiate Rulemaking Process to Adopt Rule 474).)

The purported "inconsistency" does not exist, and does not create an unsettled issue of law upon which this Court should grant review.

## B. THE COURT SHOULD DENY REVIEW BECAUSE THE COURT OF APPEAL CORRECTLY REQUIRED THE SBE TO REASONABLY ESTABLISH AND DISCLOSE THE ECONOMIC IMPACT OF THE NEW RULE.

### 1. Economic Analysis Determinations Must Be Based on Facts, Evidence, Documents, Testimony, or Other Evidence or Studies.

A primary purpose of the APA is to require administrative agencies to create a record of regulatory activity sufficient to support meaningful judicial review. (*Gov. Code*, § 11346(a).) Under the APA's minimum procedural requirements, the Board was obligated to assess the potential for adverse economic impact on California business enterprises (11-AA-3255:11-12; *Gov. Code*, §§ 11346.2(b)(4), 11346.3(a)), including the costs for "a representative business." (*Gov. Code,* § 11346.5(a)(9).) It was required to base its determination on "adequate information . . . concerning the consequences of . . . proposed governmental action," and the "proposal's impact on business" (*Gov. Code*, § 11346.3(a), (b)), and the Board was required to "provide facts, evidence, documents, testimony, or other evidence upon which the agency relies to support its initial determination." (*Gov. Code*, §§ 11346.5(a)(8). See also § 11346.2(b)(4); *Gov. Code*, § 11346(a)(1); *Gov. Code*, § 11347.3.) These statutory requirements are hardly "unsettled" and do not support review.

The Court of Appeal concluded that the SBE failed to meet the statutory requirements because it used what amounted to hypothetical

assumptions: "It is not altogether clear in our view whether the numbers used in the 'calculations' reflect actual facts. [Opinion, p. 24] . . . The problem with the [SBE's] issue paper, however, is that it largely hypothetical -- the valuation data figures used in the issue paper's calculations are assumed [Opinion, p. 26]. . . . We depart with the SBE in its implicit proposition that flexibility in making *reasonable* economic estimates and projections equates with *hypothetical* estimates and projections." (Opinion, p. 27, emphasis added.)

The Court of Appeal was rightly concerned about the public's ability to critique the unsupported economic conclusions that were merely asserted by the agency: "SBE would have the public simply accept the agency's ultimate conclusion ($1.4 million) without the ability to evaluate the conclusion. [Opinion, p. 25] . . . . Public participation in the rule-making process requires that an adopting agency show the foundation for its conclusions, if only so that the foundation and conclusions may be subject to meaningful scrutiny." (Opinion, p. 12.)

### 2. The SBE's Economic Analysis Was Not Fact-Based and Did Not Correlate to the Actual Effect of the New Regulation.

The SBE complains that the Court of Appeal unfairly required the SBE to "provide actual and not estimated figures when attempting to estimate the economic impact of Rule 474." (Petition, pp. 5, 13.) The SBE exaggerates and misstates the grounds for the Court of Appeal's determination that the SBE failed to comply with the APA. The Court of Appeal does not forbid use of economic projections to estimate the economic impact of a new regulation, but it does require that facts support the projection and that the projection methodology be set forth for

examination (the Court of Appeal describes the standard as "real world," Opinion, pp. 25 and 26). The methodology used to calculate the impact must also bear a reasonable relationship to the actual effect of the regulation at hand. Here, the SBE did not base its economic analysis on facts, and neither the Trial Court nor the Court of Appeal could understand how the SBE's method of calculating the regulatory impact had any relationship to the change in assessment methodology made by Rule 474. As Judge Hess observed: "[T]here is zero analysis of, I mean zero analysis of what happens with fixtures." (RT 172:19-21.)

The superficiality of the SBE's analysis was demonstrated by WSPA's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment at pages 51 to 52. (8-AA-2348 to 2349 and in demonstrative exhibits, 8-AA-2353 to 2356; Declaration of Kathy Spletter in Support of Motion for Summary Judgment, 1-RA-1.)[8] WSPA estimated that the actual impact of Rule 474 on a representative refinery was a tax increase of approximately $7.9 million over a five-year period, and that a tax increase of approximately $114 million would be imposed on all California refiners for the same period. The facts underlying this conclusion and the methodology used to quantify the tax increases were summarized and depicted by Exhibit "A" to WSPA's Memorandum. This detailed analysis shows that the SBE's $1.4 million estimate of increased tax (and increasing by an undisclosed amount thereafter), for all California refiners was grossly understated, and that the SBE did not use the method

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[8] This information was properly submitted to the Trial Court pursuant to the APA, *Gov. Code*, § 11350(d)(3) to demonstrate what the SBE should have, but failed to include in the rulemaking file. The Trial Court erroneously sustained objections to that information.

required to realistically determine the impact of the new Rule. The SBE never questioned the accuracy of WSPA's tax estimates proffered at trial and, therefore, implicitly admitted the gross inadequacy of its own rulemaking file.

The Opinion will not have an adverse impact on the administrative rulemaking process. To the contrary, the Opinion simply requires actual adherence to the APA's requirement that government agencies determine and disclose the economic effects of the regulations they promulgate instead of constructing merely an appearance of feigned compliance.

The SBE had opportunity after opportunity to explain the basis for its EIS before the Trial Court (which held a separate hearing for the purpose), before the Court of Appeal and now before this Court, by means of the pending Petition, but has failed to do so. Nor does the SBE assert that the Court of Appeal's description of its methodology is wrong. Furthermore, the SBE has never, not once, contended that WSPA's estimate of the actual economic impact of Rule 474 was wrong. The SBE thus asks the Court to grant review to consider the adequacy of an analysis that it has never demonstrated to any lower court. The self-created inadequacy of the SBE's analysis should not form the basis for review by this Court.

### 3. The SBE Did Not Need Confidential Data to Comply With the APA.

The SBE seems to urge, without citation of authority, that it should be relieved of its obligation to comply with the APA because compliance would require the use of "confidential information," the nature of which the SBE does not reveal. (Petition, p. 17.) This is untrue. WSPA prepared its

economic analysis, *supra*, at 24, without using confidential data. Moreover, the assessed values and the allocation of those values between land, improvements and fixtures are all in the public record obtainable from the tax rolls. Judge Hess found: "At oral argument on March 19th, the Court understood that actual assessed values were publically available, why were the actual numbers not used to calculate the impact, at least for comparative purposes?" (Order on Submitted Motion, p. 14, fn. 14; 11-AA-3234.) Moreover, local assessors are expressly required to disclose confidential taxpayer information to the SBE upon request (Section 408(b)), and so the "confidential information" the SBE claims to have required was readily available to the SBE.

The SBE did not need confidential data to comply with the APA, and even if it did, the SBE had access to that data.

4. *California Association of Medical Products Suppliers* Is Consistent With the Opinion.

The SBE asserts that the Opinion conflicts with *California Assn. of Medical Products Suppliers* v. *Maxwell-Jolly* (2011) 199 Cal.App.4th 286 ("*CAMP*") (Petition, p. 13). In reality, *CAMP* is consistent with and supports the Opinion. In this case, the SBE relied upon merely hypothetical or assumed valuation data figures in analyzing the economic impact of Rule 474. (Opinion, p. 26 .) Consistent with the Opinion's requirement that the actual impact of a new regulation be determined and disclosed, the *CAMP* decision states: "[T]he agency must do something more than merely 'consider' a proposal's impact" (*CAMP, supra,* at 305), and "mere speculative belief is not sufficient to support an agency declaration of its initial determination about economic impact . . . the agency must provide in

the record any 'facts, evidence, documents, testimony, or other evidence' upon which it relies on for its initial determination." (*Id.* at 305-306.) *CAMP* considered the factual support for the new regulation therein reviewed, in part with respect to "inferences that are the product of logic and reason" (*id.* at 308), and determined that the Department in that case did not act "on speculative belief in light of the record as a whole." In contrast, both the Trial Court and the Court of Appeal in this case determined that the SBE's "analysis" of the economic impact of Rule 474 was hypothetical and assumed -- or speculative to use a different word. The SBE's economic impact analysis does not satisfy the standards articulated in *CAMP*. There is no conflict between *CAMP* and the Opinion.

As to the SBE's assertion that "there is no statutory requirement to conduct an in-depth assessment to determine every possible impact of a proposed regulation" (Petition, p. 15), it is true that the *CAMP* decision holds that "'significant' indicates that the agency need not assess or declare all adverse economic impact anticipated." (*CAMP*, *supra*, at 307.) However, it was the SBE that identified increased taxes as the significant impact of Rule 474, and then purported to evaluate that tax impact by means of its hypothetical estimates without demonstrating how the tax increase would actually be calculated in actual practice. Having itself identified the tax impact as a significant consequence of the new Rule, the SBE was required to support its analysis with actual evidence – not mere hypothesis. In any event, the SBE wrongly implies that it was required to identify *all* impacts of Rule 474, when in fact it failed to meaningfully quantify *any* impacts. The SBE's position, when considered in context, is

that it need not demonstrate *any* facts to comply with the APA. Again, there is no conflict between *CAMP* and the Opinion.

### 5. There Is No Distinction Between "Cost" and "Tax" in this Case.

The SBE contends that the Court of Appeal misinterprets *Government Code* section 11349.5(a)(9), which requires an agency to determine the "cost impacts . . . that a representative private . . . business would necessarily incur in reasonable compliance with the proposed action." The SBE contends that the statute does not require the taxing agency to calculate the "tax impact" of the regulation. (Petition, p. 16.) The entire purpose of the Rule was to change "the [tax] assessment scheme for fixtures used in refineries." EIS, section "D," (1-AA-168) and "Rule 474 would clarify the assessment of petroleum refineries. . . ." (EIS, section "B," 1-AA-165.) Hence, the cost impact is necessarily measured by the amount of tax that would result from the change required by the new regulation. And the SBE agrees because the EIS prepared by the SBE itself, in section B, labeled "Estimated Costs," identifies increased taxes: "Describe other economic costs that might occur: See Attachment." (1-AA-164.) That attachment provides: "Petroleum refineries are projected to pay $1.4 million more in property taxes . . . ." (1-AA-168.) Thus, the SBE contends that the Court of Appeal erred by interpreting the APA exactly as did the SBE itself.

Just like the SBE attempts to justify an exception to the constitutional requirement to recognize value declines, so also the SBE seems to ask this Court to create an exception from compliance with the APA for regulations intended to increase taxes. The overarching theme of

the Petition is that the SBE can indulge in rulemaking unrestrained by any legal standards. The Opinion simply rejects this view.

## CONCLUSION

The Opinion promotes assessment uniformity by restoring refinery fixtures assessment to governance by the same law which governed those assessments for decades and which continues to govern the assessment of all other fixtures.

The Opinion is consistent with and effectuates existing law, *i.e.*, California Constitution, article XIII, section 1 and article XIIIA, section 2 as interpreted by *State Board of Equalization v. Board of Supervisors* more than 30 years ago to mean that the marketplace requires recognition of declines in value caused by depreciation; *County of Orange v. Orange County Assessment Appeals Board, supra,* rejecting the view that the law requires the combination of fixtures and land into a single appraisal unit; SBE Rule 461 that designates fixtures as separate appraisal units to facilitate recognition of fixture depreciation; Section 51 that specifically requires consideration of depreciation to establish market value; and, more than 30 years of the SBE's own interpretation of that authority. In contrast, Rule 474 is inconsistent with all of these authorities. No new, novel or unsettled law is presented by this case, and there is therefore no basis for this Court to grant review.

The Opinion also provides a common sense application of the APA, which is that the mere pretense of compliance is not acceptable and that only transparent, "real world" implementation of the APA requirements with respect to economic impact analysis will suffice.

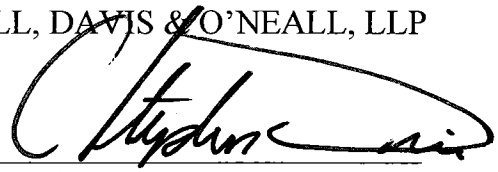
The Opinion properly offers a strongly populist view of administrative rulemaking. The Opinion emphasizes the importance of respecting the public's oversight of rulemaking activity, an especially sensitive matter in the context of taxation, and requiring compliance with the APA to ensure meaningful public and judicial review.

The Opinion is a beautifully written, cogent decision that stands as a model for judicial writing. This case does not create an inconsistency in existing authority, but instead provides a scholarly overview of the voters' intent in adopting Prop. 13 and Prop. 8. No review is required. The Petition should be denied.

Dated: March 16, 2012

Respectfully submitted,

CAHILL, DAVIS & O'NEALL, LLP

By: 

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**DECLARATION OF SERVICE**

*Code of Civ. Proc.*, § 1013

State of California )
) ss.
County of Los Angeles )

Annette P. Siulagi states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to or interested in the within action; that my business address is 550 South Hope Street, Suite 1650, Los Angeles, CA 90071.

On **March 16, 2012**, I served the foregoing document described as: **PLAINTIFF'S ANSWER TO PETITION FOR REVIEW** on the parties or attorneys for parties in this action as identified below, using the following means of service.

**BY U.S. MAIL.** I placed a true copy of the foregoing document in a sealed envelope individually addressed to each of the parties on the attached service list, and caused each such envelope to be deposited in the mail at 550 S. Hope Street, Suite 1650, Los Angeles, CA 90071. Each envelope was mailed with postage thereon fully prepaid.

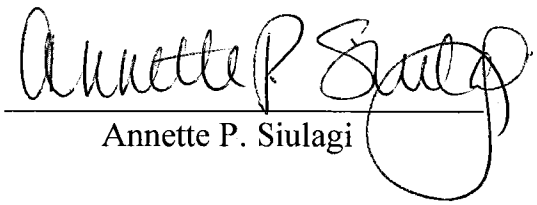
I am readily familiar with this firm's practice of collection and processing of correspondence for mailing.

Under that practice, mail is deposited with the United States Postal Service the same day that is it collected in the ordinary course of business.

**SEE ATTACHED SERVICE LIST**

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

Executed on **March 16, 2012**, at Los Angeles, California.



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