In the Supreme Court of the State of California

WESTERN STATES PETROLEUM ASSOCIATION,

Plaintiff and Respondent,

v.

CALIFORNIA STATE BOARD OF EQUALIZATION,

Defendant and Appellant.

Case No. S200475

Second Appellate District, Case No. B225932
Los Angeles County Superior Court, Case No. BC403167
The Honorable Robert L. Hess, Judge

OPENING BRIEF ON MERITS

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TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

I. INTRODUCTION 2

A. Background 4

B. Summary of Argument 6

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS 8

STANDARD OF REVIEW 10

ARGUMENT 11

I. THE PROMULGATION OF PROPERTY TAX RULE 474 IS A PROPER EXERCISE OF THE BOARD'S DUTY TO INSTRUCT CALIFORNIA'S COUNTY ASSESSORS ON THE APPRAISAL METHODOLOGIES FOR PETROLEUM REFINERY REAL PROPERTY IN THE EVENT OF A DECLINE IN VALUE. 11

A. Rule 474 is Consistent with Section 51(d), as well as the Constitutional Fair Market Valuation Requirement. 13

B. Rule 474 is Consistent with Sections 51(a)(2), 51(d) and 110(a), which Require that the Marketplace Determine the Proper Appraisal Unit and which do not Require that Fixture Depreciation be Maximized 17

C. Section 51(d) Neither Refers to Fixtures nor Requires that Fixtures Constitute a Separate Appraisal Unit for Decline in Value Purposes. 22

D. The Court of Appeal's Opinion Disregards and Conflicts with Rule 324(b). 24

E. Section 51(d)'s Legislative History Supports the Board's Authority to Adopt Rules Based on Marketplace Changes 26

TABLE OF CONTENTS
(continued)

Page

F. The Court of Appeal Erred in Holding that the Legislature Intended to Freeze the Board's Duty to Modify Appraisal Methodologies Based on Fair Market Value or Market Circumstances. 29

G. The Court of Appeal Incorrectly Concluded that Fixtures Have Always Been Treated as a Separate Appraisal Unit. 31

H. The Court of Appeal Erroneously Conflates Valuation with Assessment. 32

I. Prior to the Adoption of Propositions 13 and 8, the Marketplace Principle Dictated the Proper Appraisal Unit for Determining Value. 33

II. THE BOARD'S INITIAL DETERMINATION THAT THERE WOULD BE NO SIGNIFICANT STATEWIDE ADVERSE IMPACT ON BUSINESS FROM ADOPTING RULE 474 SUBSTANTIALLY COMPLIED WITH THE APA 35

A. The Board's Adoption of Rule 474 is a Quasi-Legislative Act Subject to Limited Judicial Review 36

B. The Board's Economic Impact Statement and Initial Determination are Supported by Substantial Evidence in the Rulemaking Record. 37

C. Rule 474 Should Not be Declared Invalid Due to the Board's Initial Determination that the Adoption of Rule 474 Did Not Have a Significant Adverse Economic Impact on Business Because the Initial Determination is Not in Conflict with Substantial Evidence in the Rulemaking Record. 39

D. The Court of Appeal Erroneously Concluded that the Board Violated Government Code Section 11346.5, subdivision (a)(9) 44

TABLE OF CONTENTS
(continued)

Page

E. The Court of Appeal Improperly Imposes Unnecessary and Burdensome Obligations on Agency Initial Economic Impact Determinations Not Required by Statutory or Case Law. 46

CONCLUSION 49

TABLE OF AUTHORITIES

Page

CASES

20th Century Ins. Co. v. Garamendi
(1994) 8 Cal.4th 216 10

ALRB v. Exeter Packers
(1986) 184 Cal.App.3d 483 38

Amwest Sur. Ins. Co. v. Wilson
(1995) 11 Cal.4th 1243 19

Association of California Ins. Cos. v. Poizner
(2009) 180 Cal.App.4th 1029 36

Auerbach v. Assessment Appeals Bd. No. 1
(2006) 39 Cal.4th 153 26

California Assn. of Medical Products Suppliers v. Maxwell-Jolly
(2011) 199 Cal.App.4th 286 ..... passim

California Forestry Assn. v. California Fish & Game Commission
(2007) 156 Cal.App.4th 1535 36

City of San Diego v. Neumann
(1993) 6 Cal.4th 738 22

Conservatorship of Whitley
(2010) 50 Cal.4th 1206 28

County of L.A. v. Riley
(1936) 6 Cal.2d 625 23

County of Orange v. Orange County Assessment Appeals Bd.
(1993) 13 Cal.App.4th 524 ..... 23, 30

Environmental Protection Center. v. California Dept. of Forestry and Fire Protection
(2008) 44 Cal.4th 459 20

Exxon Mobile v. County of Santa Barbara
(2001) 92 Cal.App.4th 1347 ..... passim

Grafton Partners v. Superior Court
(2005)36 Cal.4th 944 23

Hahn v. State Bd. of Equalization
(1999) 73 Cal.App 4th 985 11

Kopp v. Fair Pol. Practices Com.
(1995) 11 Cal. 4th 607 23

Lennane v. Franchise Tax Bd.
(1994) 9 Cal.4th 263 16

Lynch v. State Bd of Equalization
(1985) 164 Cal.App.3d 94 14

Mahoney v. San Diego
(1926) 198 Cal. 388 32

Martinez v. Regents of University of Calif.
(2010) 50 Cal.4th 1277 43

McDonnell Douglas Corp. v. County of L.A.
(1990) 219 Cal.App.3d 715 22

Merrill Lynch v. Dabit
(2006) 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179 23

Moyer v. Workers' Comp. Appeals Bd.
(1973) 10 Cal.3d 222 24

Mutual Life Ins. Co. v. City of Los Angeles
(1990) 50 Cal.3d 402 16

People v. Scott
(1978) 21 Cal.3d 284 38

Plastic Pipe and Fittings Assn. v. Calif. Building Stds. Comm.
(2004) 124 Cal.App.4th 1390 38

Pulaski v. Occupational Safety & Health Stds. Bd.,
(1999) 75 Cal.App.4th 1319 ..... 46, 48

San Bernardino County Flood Control Dist. v. Sweet
(1967) 255 Cal.App.2d 889 38

State Bd. of Equalization v. Board of Supervisors
(1980) 105 Cal.App.3d 813 ..... passim

Temple Community Hospital v. Superior Court
(1999) 20 Cal.4th 464 43

Yamaha Corp. of America v. State Bd. of Equalization
(1998) 19 Cal.4th 1 ..... 10, 11, 36, 37

CONSTITUTIONAL PROVISIONS

Cal. Const., art. II, § 10, subd. (c) 19

Cal. Const., art. XIII, § 1 ..... 3, 4, 6, 9, 12, 27

Cal. Const., art. XIII, § 13 32

Cal. Const., art. XIII, § 17 10

Cal. Const., art. XIII, § 18 10

Cal. Const., art. XIII A, § 1 ..... passim

Cal. Const., art. XIII A, § 2 ..... passim

Cal. Const., art. XIII A, § 2, subd. (b) 1, 2, 12

STATUTES

Civ. Code
§ 660 16
§ 657-663 16

Evid. Code
§ 411 38
§ 451, subd. (f) 20
§ 720 38

Gov. Code
§ 11340....8
§ 11342.2....36
§ 11346.3....4, 40, 45
§ 11346.3, subd. (a)....8, 40, 46, 48
§ 11346.5....2, 35
§ 11346.5, subd. (a)(7)....4
§ 11346.5, subd. (a)(8)....passim
§ 11346.5, subd. (a)(9)....passim
§ 11349.1, subd. (d)(2)....40
§ 11350....8, 10, 35, 43
§ 11350, subd. (a)....35, 37
§ 11350, subd. (b)(2)....35, 36, 39, 48
§ 11370....2
§ 15606....2, 6, 9, 10, 11, 30
§ 15606, subd. (c)....1, 9, 11, 36
§ 15606, subd. (e)....1, 9, 12, 36
§ 15606, subd. (h)....12
§ 15619....49

Rev. & Tax. Code
§ 51....passim
§ 51, subd. (a)(1)....12
§ 51, subd. (a)(2)....4, 9, 17, 21
§ 51, subd. (d)....4, 17, 27
§ 105....32
§ 110....27, 33
§ 110, subd. (a)....3, 4, 9, 17, 21, 22
§ 110.1....2
§ 110.5....27
§ 408....49
§ 602....33
§ 607....32, 33
§ 2151....12
§ 2610.5....12

REGULATIONS

Cal. Code Regs., Title 18
§ 307....33
§ 324....4, 22
§ 324, subd. (b)....24
§ 461, subd. (e)....1
§ 468....14
§ 469....13, 14
§ 473....14
§ 474....1

OTHER AUTHORITIES

1975 Assessors' Handbook 501, *General Appraisal Manual* 34

Assembly Bill 1488.....28

ISSUES PRESENTED

Government Code section 15606, subdivisions (c) and (e) require the California State Board of Equalization (the "Board") to promulgate regulations to govern local property tax assessment practices and to publish instructions to guide county assessors on the appropriate appraisal methodologies to be used in valuing different types of real property to determine fair market value under "varying local circumstances." Based on this legislatively granted rulemaking authority, the Board, after public hearings, adopted Property Tax Rule 474, *Petroleum Refining Properties*. (Cal. Code Regs., tit. 18, § 474 "Rule 474".)

Rule 474 creates a rebuttable presumption for the sole purpose of determining declines in fair market value under California Constitution article XIII A, section 2, subdivision (b) as implemented in Revenue and Taxation Code section 51 ("Proposition 8"). The Board adopted Rule 474 because it determined that the marketplace commonly buys and sells, and thus values, petroleum refineries' land, improvements and fixtures as a single appraisal unit.[1] Rule 474 creates another exception to Rule 461(e) (Cal. Code Regs., tit. 18, § 461, subd. (e) ("Rule 461(e)")[2], the Board's general appraisal unit regulation, to properly reflect how petroleum refineries are typically bought and sold in the marketplace so that county assessors will be able to properly appraise the fair market value of real property when there has been a decline in value under Proposition 8. (2 AA

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[1] Respondent later admitted during this action that petroleum refineries are, in fact, commonly bought and sold as a single unit, including fixtures. (AOB, pp. 13-14; WSPA MSJ, p. 46, at 8 AA 2343:14-18; 6 AA 1797-1798; 7 AA 1818-1819; see 2 AA 512.)

[2] http://www.boe.ca.gov/lawguides/property/current/ptlg/rule/461.html.

354-375 [Final Statement of Reasons (FSR)], 1 AA 73-79 [FSR First Addendum], 1 AA 53-56 [FSR Second Addendum]).[3]

The questions presented for review are:

1. Whether the promulgation of Rule 474 to guide county assessors on the appropriate appraisal methodologies for the assessment of petroleum refineries was a proper exercise of the Board's authority pursuant to Government Code section 15606.

2. Whether the economic impact statement prepared by the Board prior to adopting Rule 474 complied with Government Code section 11346.5 of the Administrative Procedures Act (APA). (Gov. Code, §§ 11370 et. seq.)

I. INTRODUCTION

This case concerns the validity of Rule 474, a Board regulation that guides a county assessor's valuation of a petroleum refinery for property tax purposes, only when that unique type of property is claimed to have declined in value. Rule 474 creates a rebuttable presumption for the sole purpose of determining declines in fair market value under Proposition 8. The California Constitution requires county assessors to follow the *marketplace principle* in determining the fair market value of real property when its fair market value declines below Proposition 13's adjusted base-year value. (Cal. Const., art. XIII A, § 1 ("Proposition 13"); Cal. Const., art. XIII A, § 2, subd. (b), implemented in Rev. & Tax. Code, §§ 51 and 110.1;[4]

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[3] The designation "AA" refers to the Appellant's Appendix filed in the Court of Appeal. References thereto are indicated by "AA at p. [page], ln. [line]".

[4] All statutory references are to the Revenue and Taxation Code unless specifically stated otherwise.

see also Cal. Const. art. XIII, § 1, implemented in Rev. & Tax. Code, § 110, subd. (a).)

In this circumstance, section 51, subdivision (d) ("section 51(d)") defines "real property" as an "appraisal unit that persons in the marketplace commonly buy and sell as a unit, or that is normally valued separately." Based on evidence and other information presented in public hearings showing beyond dispute that petroleum refineries are commonly bought and sold as single units, the Board promulgated Rule 474, which in part creates a rebuttable presumption that the land, improvements, and fixtures and other machinery and equipment classified as improvements for a petroleum refining property constitute a single appraisal unit, except when a decline in value is caused by disaster.

The Court of Appeal struck down the Board's Rule 474, effectively forcing assessors to do piecemeal valuations of petroleum refineries by treating their fixtures separately from their land and improvements, with the likely result of dramatically lowering the property tax assessments on petroleum refineries, despite undisputed evidence that the marketplace treats refineries as single units. In reaching its erroneous conclusion, the Court of Appeal misapplied or violated fundamental statutory construction rules, failed to give sufficient deference to the Board's longstanding interpretation of applicable constitutional and statutory provisions, and made some inaccurate factual assumptions. This Court should reverse the judgment and restore Rule 474, which is a reasonable regulation promulgated to carry out the Board's statutory mandate to guide county assessors in their valuations of petroleum refineries.

The Court of Appeal impermissibly dictated to the Board how it must prepare an "economic impact statement" ("EIS") and disregarded the fact that the purpose of the requirement that an administrative agency prepare an economic analysis is to assist the agency in making an "initial

determination" of whether or not the proposed rule will "have a significant, statewide adverse economic impact directly affecting business" ("Initial Determination"). (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 304-308; Gov. Code, §§ 11346.3, 11346.5, subd. (a)(7) & (a)(8).)

A. Background

Following the adoption of Proposition 13 and Rule 461 in 1978, petroleum refineries' fixtures were treated as a separate appraisal unit of "real property" under the general rule set forth in Rule 461(e). But in 2008, after hearing testimony from county assessors, the Board concluded that Rule 461(e)'s application to refinery property declines in value violated both the fair-market valuation provisions of the California Constitution and the marketplace valuation mandate of section 51, subdivision (a)(2). (2 AA 354-375 [FSR]; 1 AA 73-79 [FSR First Addendum], 53-56 [FSR Second Addendum]; Cal. Const. arts. XIII, § 1, & XIII A, §§ 1, 2; Rev. & Tax. Code, §§ 51(a)(2), 51(d), 110(a); Cal. Code Regs., tit. 18, § 324 ("Rule 324")[5].)

For most types of properties, fixtures typically sell separately from land and improvements in the marketplace. Consequently, the Board adopted Rule 461(e)'s general appraisal unit rule to apply to most types of properties to ensure that their declines in value were measured consistently with the Constitution's fair market valuation mandate. Also, for most types of properties, fixtures do not represent a significant component of value nor are they typically structurally integrated with the land and improvements, such as in typical commercial retail properties. However, as established during the rulemaking process, approximately 80 percent of the value of a

[5] http://www.boe.ca.gov/lawguides/property/current/ptlg/rule/324.html; see also 2000 Amendment to Rule 324 at 8 AA 2244-2253.

petroleum refinery is in the fixtures, and the land and refinery fixtures are physically and functionally integrated, which materially differentiates petroleum refineries from most other types of manufacturing plants. (2 AA 358; 2 AA 520-528, 540-541; 6 AA 1781-1784.)

The rulemaking hearings established that petroleum refineries normally transfer as a single unit including fixtures. (2 AA 503-547; 6 AA 1596-1622.) This is unsurprising given that the majority of refinery real property consists of fixtures. (2 AA 520-528; 6 AA 1781-1784.) If a majority of the value of petroleum refineries is in its fixtures and a buyer wants to acquire an operating refinery, then the buyer will need to purchase the fixtures along with the land and improvements in order to acquire an intact operational unit. (Western States Petroleum Association ("WSPA") Motion for Summary Judgment ("MSJ"), p. 46, at 8 AA 2343:14-18; 6 AA 1797-1798; 7 AA 1818-1819; see Appellant's Opening Brief ("AOB"), pp. 13-14.) Based on this evidence, the Board adopted Rule 474 to conform its appraisal unit regulations to properly reflect the refinery marketplace.

As part of the rulemaking process, the Board made an Initial Determination on whether the proposed regulation would have a significant statewide adverse economic impact directly affecting business. (Gov. Code, § 11346.5, subd. (a)(8).) After analyzing relevant data and preparing an economic analysis, the Board made an Initial Determination that there would not be a significant adverse economic impact as a result of adopting Rule 474.[6] The Board's EIS and Initial Determination were based on

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[6] The Board's EIS is summarized by the Court of Appeal (Slip Opinion, pp. 23-24) and specific supporting information, including calculations, is found in the record. (See 1 AA 162-168 [Notice and EIS]; 3 AA 614-634 [Issue Paper No. 06-001 and Revenue Estimate]; 3 AA 635-646 [Notices to the public]; 1 AA 112-115 [Initial Statement of Reasons (ISR)].)

(continued...)

WSPA and County supplied data, and the rulemaking record does not contain substantial evidence that conflicts with the Board's determination. (2 AA 368.)

B. Summary of Argument

Under Government Code section 15606, the Board must instruct county assessors on appropriate appraisal methodology. The Board's instructions must be based on the marketplace when Proposition 13 limits do not apply. (Cal. Const., arts. XIII, §1 & XIII A, §§ 1, 2.) Unlike Proposition 13, which places a limit on fair market valuation, Proposition 8 requires *appraisals at fair market value* when real property has declined in value below the property's Proposition 13 adjusted base year value. (*State Bd. of Equalization v. Board of Supervisors* (1980) 105 Cal.App.3d 813, 819, 822.) Section 51(d) follows the fair market valuation principle by defining "real property" as the appraisal unit valued by the marketplace when buying and selling different types of real property.

The Board adopted Rule 474 after receiving information and hearing testimony from county assessors and industry during the rulemaking process. (2 AA 354-375; 1 AA 73-79, 53-56; 2 AA 503-547; 6 AA 1596-1622; 6 AA 1759-1792.) The Board concluded that, to fulfill its responsibilities under Government Code section 15606 and apply the constitutional marketplace principle and section 51, it was required to adopt a regulation for county assessors providing a rebuttable presumption that the appropriate appraisal unit for petroleum refineries is a single appraisal unit including land, improvements, and fixtures.

In its decision that Rule 474 is invalid, the Court of Appeal misinterpreted section 51(d), because it concluded that the statute requires

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that fixtures always constitute a separate appraisal unit for decline-in-value purposes. (Opinion, pp. 18-20.) Thus, in interpreting the statute defining "real property," the court created two alternative definitions for "real property" in concluding that the phrase "normally valued separately" must always mean "fixtures," despite marketplace circumstances. There is no evidence in the record that petroleum refinery fixtures are normally valued separately in the marketplace. To the extent that they have been valued separately by county assessors in the past for tax purposes, that circumstance can be ascribed to Rule 461(e), to which the Board has now made an exception for petroleum refineries in Rule 474.

The Board complied with the APA in adopting Rule 474. The Board heard extensive testimony from various experts in refinery appraisal. Both county assessors and industry participated in the rulemaking process. Acting in its quasi-legislative capacity, the Board determined that Rule 474 would not have a significant economic impact and that the compliance cost impact would be insignificant. (1 AA 162-168.) Using information provided by WSPA and the counties, the Board determined that California has over $32 billion in refinery property, of which $25 billion consists of fixtures. (3 AA 626-627; 2 AA 368.) The Board's analysis estimated that the annual increase in property tax from Rule 474's adoption would be $1.4 million. In its letter of September 21, 2006, WSPA's representative estimated that Rule 474 would increase property taxes by $5 to $10 million. (2 AA 313.) WSPA, however, did not provide any supporting documentation for its estimate. (2 AA 368.) Based on the Board's analysis of the tax impact, the Board made its Initial Determination that Rule 474 would not have a significant economic impact.

The Court of Appeal ruled, however, that the Board's EIS did not comply with Government Code section 11346.5, subdivision (a)(8), because it used projections. (Opinion, pp. 25-27.) Forcing administrative

agencies to make extensive, in-depth analyses to produce actual figures when preparing an EIS is not an APA requirement and, in fact, will undermine agencies' ability to comply with the APA and add significantly to the cost of rulemaking. Agencies need flexibility when preparing an EIS. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly*, *supra*, 199 Cal.App.4th 286, 302.) Prohibiting the use of projections also violates existing precedent and will hinder and/or prevent agencies from engaging in rulemaking.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

WSPA filed its complaint for declaratory relief challenging the validity of Rule 474 under Government Code section 11350. WSPA alleged that Rule 474 is inconsistent with section 51(d) and violates the APA. (Gov. Code, § 11340 et. al.) WSPA limited its allegations of APA violations to necessity, authority, consistency, clarity, reference, and non-duplication. (1 AA 11-39, ¶¶ 31-39 and 50-55.)

In its motion for summary judgment, WSPA raised for the first time a violation of Government Code section 11346.5, subdivision (a)(9), arguing that no calculation of the economic impact on a "typical" or "representative" refinery had been made. (WSPA MSJ pp. 50-52, 8 AA 2347-2349.) Government Code section 11346.5, subdivision (a)(9), however, only relates to the "cost impact," that is, the cost of compliance, and not the tax impact, of Rule 474. (Gov. Code, § 11346.3, subd. (a) ["reporting, recordkeeping, or compliance requirements"].) During the Rule 474 rulemaking process, the Board made the required statement of no cost impact because Rule 474 contains no new compliance requirements.

The trial court granted WSPA's and denied the Board's cross-motion for summary judgment. The Board appealed the adverse trial court judgment to the Court of Appeal. The Court of Appeal affirmed the trial

court's judgment. The Court of Appeal held that Rule 474 was invalid because the rule was inconsistent with section 51(d), on the ground that fixtures must be treated as a separate appraisal unit in order to recognize maximum depreciation on the fixtures. (Opinion, pp. 18-20.) On an issue independently raised by the trial court, the Court of Appeal also held that the Board's EIS was inadequate under Government Code section 11346.5, subdivision (a)(8). (Opinion, p. 28.)

The Court of Appeal erred in ruling, without supporting authority, that oil refinery appraisal units must be selected to maximize depreciation. (Opinion, pp. 18-20.) In fact, there is no constitutional or statutory right to recognize fixture depreciation that the marketplace has not recognized. (See Cal. Const. art. XIII, § 1 & XIII A, §§ 1, 2; Rev. & Tax. Code, §§ 51, subd. (a)(2), 110, subd. (a).) The Court of Appeal also erred in its creation of a new standard for EIS preparation that prevents the use of projections. The Court of Appeal additionally confused the different requirements of Government Code section 11346.5, subdivisions (a)(8) and (a)(9).

The Court of Appeal misinterpreted section 51(d) by ignoring both the statute's plain meaning and the constitutional fair market valuation mandate. The Court of Appeal's error undermines the Board's quasi-legislative authority under Government Code section 15606, subdivisions (c) and (e) by creating an inflexible interpretation that, on its face, appears to permanently lock fixtures into a separate appraisal unit regardless of marketplace circumstances, in violation of the fair market valuation requirements of the California Constitution. (Opinion, pp. 18-20; Cal. Const. art. XIII, § 1 & XIII A, § 2; Rev. & Tax. Code, §§ 51, subd. (a)(2), 51, subd. (d), 110, subd. (a).)

While the Court of Appeal acknowledged the Board's regulatory authority (Opinion, pp. 2-3; see Cal. Const., art. XIII, §§ 17, 18; see also Gov. Code, § 15606), the Court of Appeal's conclusion that fixtures must

always constitute a separate appraisal unit for all types of properties,[7] essentially eliminated the Board's quasi-legislative rulemaking authority to define appraisal units, and establishes a judicially created property tax loophole for petroleum refineries.

STANDARD OF REVIEW

The Court exercises independent review of whether Rule 474 is consistent with section 51(d). When reviewing a quasi-legislative regulation for compliance with the APA, the Court's scope of review is narrow. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.) To determine whether the adoption of Rule 474 is necessary and proper under Government Code section 11350, the Court need only decide if the agency's adoption of the regulation is "arbitrary or capricious." (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 272-273.)

The Court of Appeal held that the trial court demonstrated adequate deference to the Board's interpretation of the statutes supporting Rule 474. (Opinion, at p. 16.) But the Court of Appeal should have granted more deference to the Board because Rule 474 is a quasi-legislative regulation. Rule 474 is a new rule adopted pursuant to the Board's quasi-legislative authority under Government Code section 15606, and approved by the Office of Administrative Law (OAL) for future application, which implements and makes specific the appropriate appraisal unit for use in the valuation of petroleum refineries in determining declines in value. In contrast, quasi-adjudicative administrative actions interpret and apply existing law to existing facts. (*20th Century Ins. Co. v. Garamendi, supra,* 8

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[7] Properties covered by the existing exceptions to Rule 461(e) set forth in Rules 468, 469 & 473, and single-family residences, however, went unmentioned.

Cal.4th at p. 275.) When an agency acts in its quasi-legislative capacity its action comes, "freighted with [a] strong presumption of regularity." (*Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th at p. 11.)

Rule 474 is not an interpretation of section 51(d) applied to a specific set of facts. Rule 474 is a new rule for general application to petroleum refineries created for the purpose of instructing county assessors about their proper appraisal. The Board provided this guidance to fulfill its statutory obligation to instruct county assessors on proper appraisal methodology. (See *Hahn v. State Bd. of Equalization* (1999) 73 Cal.App 4th 985, 997; *State Bd. of Equalization v. Board of Supervisors, supra,* 105 Cal.App.3d at p. 819.) The Court of Appeal failed to narrow its determination to whether the Board's adoption of Rule 474 is arbitrary or capacious. The resulting error effectively dictates to the Board how it should exercise its discretion to instruct county assessors under Government Code section 15606.

ARGUMENT

I. THE PROMULGATION OF PROPERTY TAX RULE 474 IS A PROPER EXERCISE OF THE BOARD'S DUTY TO INSTRUCT CALIFORNIA'S COUNTY ASSESSORS ON THE APPRAISAL METHODOLOGIES FOR PETROLEUM REFINERY REAL PROPERTY IN THE EVENT OF A DECLINE IN VALUE.

The Board is required to provide instructions to county assessors when they are equalizing the taxation between different types of property and assessing that property. (Gov. Code, § 15606, subd. (c).) In addition, the Board is required to instruct county assessors on the proper assessment methodologies to promote uniformity within the state and its local jurisdictions. (Gov. Code, § 15606, subd. (e).) The Board adopts its rules to the varying circumstances and differences between the character and

conditions of real property. (*Ibid.*) County assessors are required to follow the Board's rules and regulations. (Gov. Code, § 15606, subd. (h).)

County assessors apply the Board rules to appraise real property within their counties; and, after determining property values, they mail tax bills to property owners. (Rev. & Tax. Code, §§ 2151 & 2610.5.) Prior to Proposition 13, all real property was assessed at full market value. (Cal. Const., art. XIII, § 1.) After the passage of Proposition 13, the property tax is one percent of the appraised value limited to a 2 percent inflation factor on acquisition value every year (adjusted base year value). (Cal. Const., art. XIII A, §§ 1 & 2, subd. (b).)

But real property can also decline in value below its adjusted base year value. In those circumstances, county assessors must value "real property" at its fair market value because, pursuant to the Constitution, real property may *not* be valued at *greater* than its fair market value. (Cal. Const. arts. XIII, § 1 & XIII A, §§ 1, 2; Rev. & Tax. Code, § 51, subd. (a)(1); see *State Board of Equalization v. Board of Supervisors, supra,* 105 Cal.App.3d at pp. 821-822 ["The constitutional guaranty as to fair market value continues in force."].) To properly appraise real property at fair market value, county assessors must determine the correct appraisal unit. Section 51(d) requires that the Board define the appraisal unit based on the marketplace, consistently with section 110, subdivision (a) and Rule 324.

The Board has instructed county assessors on the appropriate appraisal unit for different types of property. Generally, Rule 461(e) makes fixtures a separate appraisal unit. This is because, for *most* types of non-residential property, fixtures *generally* sell separately in the marketplace. But for special types of property, the Board instructs county assessors to use a single appraisal unit. For example, under Rule 468, oil and gas properties use a single appraisal unit. The Board has also adopted other exceptions to Rule 461(e) for other special types of properties, including

mining and geothermal properties. (Cal. Code Regs., tit. 18, §§ 469 (Mining Properties) & 473 (Geothermal Properties).) Because the Board similarly determined that petroleum refineries are a special type of property requiring a single appraisal unit, it adopted Rule 474 as another exception to the general rule.

A. Rule 474 is Consistent with Section 51(d), as well as the Constitutional Fair Market Valuation Requirement.

The Opinion improperly holds that the Board has no discretion under section 51(d) to enact a regulation that includes fixtures with land and improvements as a single appraisal unit although it is undisputed that petroleum refinery property normally is bought and sold in the marketplace as a single unit consisting of land, improvements, and fixtures. (Opinion, p. 37; WSPA MSJ, p. 46, at 8 AA 2343:14-18; 6 AA 1797-1798; 7 AA 1818-1819; see AOB, pp. 13-14; see Opinion (concurring), p. 1.)

The Court of Appeal decided that it should not pay any deference to the Board's interpretation:

> The court disagrees for two reasons. First, the interpretation of section 51(d) now proffered by SBE is not contemporaneous with the enactment of section 51(d), and the agency's new interpretation detours from SBE's long-standing interpretation of section 51(d) as evidenced by Rule 461(e).

(Opinion, p. 21.)

These reasons are factually incorrect. Before section 51(d) was enacted, the Board adopted regulations that define certain types of "real property" as a single appraisal unit. For example, Rule 468 was adopted a year before section 51(d), and it instructs county assessors to define "real property" as a single appraisal unit for oil and gas properties. In fact, the

Board adopted Property Tax Rules 468 and 461 on the same date. (Compare Rule 468 with Rule 461.)

In addition, the Board's interpretation does not detour from its "long-standing" interpretation of section 51(d). It is true that Rule 474 creates a new definition of "real property" for petroleum refineries. But the Court of Appeal's reasoning only makes sense if the Board's other regulations requiring use of a single unit appraisal methodology are ignored. Rules 468, 469 and 473 all define "real property" as a single appraisal unit that includes fixtures. Because these long standing rules are consistent with Rule 474, the Court of Appeal's determination that Rule 474 took a detour from an existing administrative interpretation of section 51(d) cannot be reconciled with the Board's established regulations and practices.

The Court of Appeal focused on Rule 461(e) as evidence of the Board's "long-standing interpretation of section 51(d)." Rule 461 is a regulation of general application for real property value changes. Rule 461(e) contains a general rule for determining declining property values. Rule 461(e) says in part that, when there has been a decline in value of property, "fixtures and other machinery and equipment classified as improvements constitute a separate appraisal unit." Apparently, the Court of Appeal saw this general regulation as the only evidence of the Board's interpretation of section 51(d). The Court's view was too narrow.

There have long been exceptions to Rule 461(e). Rule 474 is just another exception to the general rule. (*Exxon Mobile v. County of Santa Barbara* (2001) 92 Cal.App.4th 1347, 1355; *Lynch v. State Bd of Equalization* (1985) 164 Cal.App.3d 94, 114-115.) For example, as mentioned above, the Board has adopted three other appraisal rules that require a single appraisal unit. (Cal. Code Regs., tit. 18, §§ 468, 469 & 473.)

The Board has adopted exceptions to Rule 461(e) based, in part, on section 110, subdivision (a), which implements the constitutional marketplace principle and is consistent with the language found in section 51(d). Section 51(d) defines "real property" as "that appraisal unit that persons in the marketplace commonly buy and sell as a unit, or that is normally valued separately." Rule 324(b), which is unchallenged here, clarifies the statutory phrase "or that is normally valued separately":

> 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 in the marketplace separately from other property, or that is specifically designated as such by law.

The key to both fair market valuation and the selection of an appropriate appraisal unit is the marketplace for the particular type of property being valued. Here, there is no dispute that, in the open market, petroleum refineries are bought and sold as a single unit, not as two separate units. Because the marketplace treats refinery property, including fixtures, as a single unit, the marketplace principle demands valuation of that property as a single unit. The marketplace principle has been the key to fair market value "for over 100 years and continues to apply for property tax valuation purposes when Proposition 13 limits do not." (*State Bd. of Equalization v. Board of Supervisors, supra,* 105 Cal.App.3d at pp. 819-822.) The Court of Appeal mistakenly held that fixtures must be included in a separate appraisal unit to ensure that fixture depreciation is maximized. (Opinion, p. 18.) But even the Court of Appeal recognized that Proposition 8 is intended to recognize declines in value when the "*actual* fair market value" of the property declined below its adjusted base-year value under Proposition 13. (See Opinion, pp. 5-6, italics added.) Its acknowledgement that Proposition 8 requires the use of "actual fair market value" contradicts the Court of Appeal's holding that fixtures must constitute a separate

appraisal unit to maximize fixture depreciation when marketplace transactions do not reflect such depreciation.

The Court of Appeal's interpretation of section 51(d) also conflicts with common statutory construction rules. Statutory interpretation must follow the ordinary meaning of a statute and give significance to every word, phrase, sentence, and part of an act. (*Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 407.) Courts cannot "interpret away clear language in favor of an ambiguity that does not exist." (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.) The Opinion, not only fails to give significance to the word "marketplace" in section 51(d), it effectively chooses to ignore it. The result is a permanent judicial construction that treats fixtures as a separate appraisal unit for all types of real property under all circumstances, including petroleum refineries, despite the marketplace's treatment of the property.

Section 51(d) states:

> For purposes of this section, "real property" means that appraisal unit that persons in the marketplace commonly buy and sell as a unit, or that is normally valued separately.

The Court of Appeal's construction artificially separates section 51(d) into two separate and fixed types of appraisal units. According to the Court of Appeal, the first part of section 51(d) defines "real property" as an appraisal unit that includes land and improvements. And, under the Court of Appeal's reasoning, the second part of section 51(d), after "or," defines "real property" as an appraisal unit that only includes fixtures. (Opinion, pp. 19-20.) This interpretation ignores first, that "real property" consists of land, improvements, *and fixtures* (Civ. Code, §§ 660, 657-663); and, second, ignores the disjunctive "or," which provides an appropriate fair market valuation standard requiring assessors to examine the "marketplace" to determine if the real property at issue should be valued as a unit or

instead, valued in separate units pursuant to a special statute or regulation as provided in Rule 324(b).

In contrast, Rule 474, subdivision (d)(2) properly follows the marketplace approach by creating a rebuttable presumption, based on substantial evidence submitted during the rulemaking process, that land, improvements, and fixtures are rebuttably presumed to constitute a single appraisal unit for petroleum refineries. Rule 474, subdivision (d)(2) provides in pertinent part that:

> The land, improvements, and fixtures and other machinery and equipment classified as improvements for a petroleum refining property are rebuttably presumed to constitute a single appraisal unit, except when measuring declines in value caused by disaster, in which case land shall constitute a separate unit.

Under Rule 474, a refinery's fixtures may still be valued separately if evidence is presented that: (1) the fixtures "do not typically transfer in the marketplace" with the remainder of a refinery; or (2) that the fixtures are not functionally and physically integrated with the remainder of a refinery. (Rule 474, subd. (d)(3).) Through the creation of a rebuttable presumption, the Board follows section 51(d) by enabling taxpayers to overcome the presumption if a preponderance of the evidence demonstrates that the marketplace values the fixtures separately. (See 3 AA 912-921 [discrete instances where refinery fixtures may sell separately in the marketplace].)

B. Rule 474 is Consistent With sections 51(a)(2), 51(d) and 110(a), Which Require That The Marketplace Determine the Proper Appraisal Unit And Which Do Not Require that Fixture Depreciation be Maximized.

Rule 474 is based on how refinery property is bought and sold in the marketplace and thus is consistent with sections 51(a)(2), 51(d) and 110. For decline in value purposes, the cornerstone is the property's "full cash value," which is defined in section 110, subdivisions (a) and (b) as "fair

market value" and is based on marketplace valuations, specifically "the amount of cash or its equivalent that property would bring if exposed for sale in the open market."

Under Rule 474, fixture depreciation[8] will be recognized in the same manner that depreciation is recognized in the marketplace. The Court of Appeal failed to recognize that real property is defined as an appraisal unit that may consist of different types of real property. Under Propositions 13 and 8, when properties are included in a single appraisal unit with different useful lives, the declines in value of the shorter-lived assets due to depreciation may be masked by the overall fair market value of the combined unit as a whole. This is true, not only for units containing fixtures, but also for appraisal units limited to just land and improvements, such as structures.

While a structure may depreciate physically, land will not, and the growth in land values *may* serve to keep the fair market value of the unit above the Proposition 13 adjusted base-year value thus preventing a Proposition 8 decline in value based on the physical depreciation of the structure. This is merely an artifact of our fair market value-based system that necessarily must rely on marketplace-based appraisal units. Taken to its logical extreme, the Court of Appeal's reasoning would lead to an abandonment of fair market appraisal unit valuations and lead to scrap-value or "sticks and stones" separate valuations of land, bricks, and mortar to insure maximization of depreciation.

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[8] For purposes of this brief, by "depreciation," the Board does not mean depreciation used to claim income tax deductions, but actual depreciation in value as measured by the marketplace. Shorter-lived assets have shorter useful lives because they typically lose their value by physically wearing out more quickly. For example, in appraisal, a structure such as a house will be assumed to have a longer useful life than a water heater. Useful life is the expected period of use.

The Court of Appeal stated that, "consistency with controlling law is the predominant issue in this case". (Opinion, p. 17.) Rule 474 is consistent with controlling law, including sections 51(d) and 110(a), which is referred to in section 51(a)(2). Section 51(a)(2) provides a description of the marketplace principle. But the Court of Appeal misconstrued the statute's meaning:

> In light of the assessment practices which existed at the time section 51(d) was enacted, and in light [of] the legislative history (predominantly the Task Force Report) showing the Legislature['s] intent to carry forward existing assessment practices under Prop. 13 and Prop. 8, the second definition of "real property" found in section 51(d) — i.e., "that appraisal unit that is normally valued separately" — *means that fixtures shall be assessed as a separate appraisal unit of real property because they were at the time of the adoption of section 51(d) "normally valued separately" in order to account for depreciation.*

(Opinion, p. 18, italics added.)

The Court of Appeal's explanation is flawed. To the extent the Court of Appeal based its mistaken construction of section 51(d) on Proposition 8, the Court of Appeal violated the rules for construing an initiative. When construing an initiative, the Legislature lacks the authority to amend Proposition 8 except to further its purpose. (Cal. Const., art. II, § 10, subd. (c); *Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1255.) Courts can determine the purpose of a constitutional amendment enacted by initiative by examining many sources, including the historical context of the amendment, and the ballot arguments favoring the measure. (*Ibid.*)

The purpose of Proposition 8 was not, as the Court of Appeal erroneously concluded, to keep fixtures in a separate appraisal unit for all purposes. (See 8 AA 2224-2225.) The "Task Force on the Administration of the Property Tax" ("Task Force") explicitly states that appraisal units

would be determined by the Board on a "case by case basis." (3 AA 775-776.)

The Court of Appeal's interpretation also contradicts the historical context of Proposition 8 because, when the initiative was enacted, Rule 2 already required that county assessors follow the marketplace. (8 AA 2231.) Moreover, prior to Proposition 8's enactment, Rule 468 required a single appraisal unit, including fixtures, for oil and gas properties.

Fixtures are typically assessed separately for *most* types of commercial and industrial properties because they are normally bought and sold separately from land and improvements for the most common types of non-residential properties. In contrast, take the case of single-family residences. Despite Rule 461(e), houses are normally bought, sold, and valued in the marketplace with their fixtures intact, such as water heaters and central heating/air conditioning units as part of the unit. (Evid. Code, § 451, subd. (f.).)

Rule 474 is just another exception to the general rule of Rule 461(e). Rule 461 is a Board-adopted regulation. "As a general matter, courts will be deferential to government agency interpretations of their own regulations, particularly when the interpretation involves matters within the agency's expertise and does not plainly conflict with a statutory mandate." (*Environmental Protection Center. v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 490.)

Rules 468, 469, 473, and Rule 474, subdivision (d)(2) were formally adopted as exceptions to Rule 461(e) based on the Board's consistent interpretation of section 51(d). This evolving case-by-case approach is consistent with the legislative history for section 51(d), which shows legislative intent that the "[d]etermination of the 'unit' would be subject to Board rule, and assessor determination on a case-by-case basis," and "[t]he

key is the assessment unit employed, and thus assessors would be allowed to determine appropriate unit, case-by-case." (3 AA 775-776.)

Assessing the value of fixtures as a separate appraisal unit is not an *approach* that is found in any statute. This so-called "approach" is found only in Rule 461(e), and it has always been treated as a general rule to which exceptions will be made as required by marketplace circumstances, as intended by the Legislature. Some exceptions have been formally enacted in other regulations, such as Rule 468, others are just applied on a *de facto* basis, such as in the case of single-family residences.

The Court of Appeal incorrectly concluded that the justification for Rule 461(e) is "the long-recognized accounting realities that fixtures typically depreciate in value year-to-year, whereas land and improvements typically appreciate in value year-to-year, the last few years of our state's history notwithstanding," and the state "assessed the value of fixtures as a separate appraisal unit in order to account for depreciation." (Opinion, p. 3.) In reality, Rule 461(e) exists because of the constitutional mandate of fair market valuation and the Board's finding that, for most types of non-residential properties, fixtures are normally bought and sold together as a separate unit in the marketplace.[9] (Cal. Const. arts. XIII, § 1 & XIII A, § 2; Rev. & Tax. Code, §§ 51, subd. (a)(2) & 110, subd. (a); Property Tax Assessment (Oct. 1979) 7 AA 1919, 1923; Task Force Report (Jan. 1979) 7 AA 2074-2077.)

The Board agrees that fair market valuations must account for depreciation, with the qualification that depreciation should be recognized only if, and to the extent that, the depreciation is recognized by the marketplace and reflected in fair market value. The appropriate focus of

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[9] In addition, unlike improvements and fixtures, land does not physically depreciate.

any appraisal is to first determine the proper appraisal unit or "real property" that must be valued. Contrary to the Court of Appeal opinion, the overriding principle is that the marketplace governs the determination of the proper appraisal unit. (Cal. Const. arts. XIII, § 1 & XIII A, § 2; Rev. & Tax. Code, §§ 51, 110, subd. (a); Cal. Code Regs., tit. 18, § 324; Assessors' Handbook (AH) 501, pp. 1-12, http://www.boe.ca.gov/proptaxes/pdf/ah501.pdf; AH 502, p. 2, at 7 AA 2260; AH 504, pp. 95-96, 7 AA 1878-1879; *Exxon v. County of Santa Barbara Co., supra,* 92 Cal.App.4th at p. 1353; *McDonnell Douglas Corp. v. County of L.A.* (1990) 219 Cal.App.3d 715, 726; *City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 756; 10 AA 2779-2786 [article by WSPA's counsel, C. Stephen Davis, regarding fair market valuation standard].)

The Court of Appeal also ignores the fact that the definition of "real property" under section 51(d) applies to both section 51(a)(1) and (a)(2) and is not restricted to declines in value. This undermines the court's contention that the phrase "normally valued separately" means only fixtures and fixture depreciation.

C. Section 51(d) Neither Refers To Fixtures Nor Requires That Fixtures Constitute A Separate Appraisal Unit For Decline In Value Purposes.

The Court of Appeal determined that section 51(d)'s "normally valued separately" provision refers to Rule 461(e), and that the Legislature intended that fixtures must permanently remain a separate appraisal unit for all types of properties for determining declines in value. (Opinion, pp. 18-21.) The precise language in Rule 461(e), however, had not been adopted when the first "Task Force on the Administration of the Property Tax" was published on January 22, 1979, but was later added on January 25, 1979. (7 AA 2044; 8 AA 2186; 10 AA 2761:13-28 [BOE Reply], 2789; 11 AA 3191, 3194, 3204, 3210 [RJNs 21-22].) Section 51 became effective on

July 10, 1979, and its relevant provision has remained unchanged since its enactment. (10 AA 2761:20-26, 2762:1-7 [BOE Reply].) Therefore, if the Legislature's intent was to make fixtures permanently a separate appraisal unit in section 51(d), it could have adopted the pertinent language of Rule 461(e).

"[J]udicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." (*Merrill Lynch v. Dabit* (2006) 547 U.S. 71, 126 S. Ct. 1503, 1513, 164 L. Ed. 2d 179.) The Legislature's decision not to explicitly make fixtures a separate appraisal in section 51(d), as was done in Rule 461(e), contradicts the Court of Appeal's holding. (*Grafton Partners v. Superior Court* (2005)36 Cal.4th 944, 959 [statute did not have a temporal requirement because the Legislature explicitly required temporality in other statutes].)

Additionally, the Court of Appeal implicitly reformed section 51(d), by inserting the word "fixture." It is impermissible to reform the statute when insertion of the word "fixtures" is contrary to the California Constitution's requirement to follow marketplace practices. (*Kopp v. Fair Pol. Practices Com.*, (1995) 11 Cal. 4th 607, 661 [statutory interpretation must give 'significance to every word, phrase, sentence, and part of an act].) If the terms of a statute are -- by fair and reasonable interpretation -- capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution. (*County of L.A. v. Riley* (1936) 6 Cal.2d 625, 628-629.) The Board's interpretation of section 51(d) is consistent with the Constitution.

Further, the decision in *County of Orange v. Orange County Assessment Appeals Bd.* (1993) 13 Cal.App.4th 524, 530, supports the

Board because it concludes that section 51, in a prior version of the statute, does not mandate the use of any particular appraisal unit in all circumstances. There is substantial supporting evidence demonstrating that the determination of the proper appraisal unit must ultimately depend upon marketplace circumstances. There is no set or "one-size-fits-all" rule for determining the appropriate appraisal unit as erroneously held by the Court of Appeal.

D. The Court of Appeal's Opinion Disregards and Conflicts with Rule 324(b).

The Court of Appeal's decision ignores Rule 324(b), which interprets section 51(d):

> 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 *in the marketplace* separately from other property, or that is specifically designated as such by law.

(Cal. Code Regs., tit. 18, § 324, subd. (b), italics added.)

Rule 324(b) remains a valid regulation, and is consistent with the fair market value requirement under the California Constitution. (Cal. Const., arts. XIII, § 1 & XIII A, § 2.) Under the principle of *in pari materia*, section 51(d), section 110, Rule 461(e), and Rule 324(b) should be interpreted consistently with each other and with the constitutional fair market value principle. (*Moyer v. Workers' Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.)

The Court of Appeal, however, did not discuss Rule 324(b) in its decision, nor address the constitutional imperative of fair market valuation. Rule 324(b) governs the appraisal of California real property and requires assessments at "full value." (*Exxon Mobil Corp. v. County of Santa Barbara, supra,* 92 Cal.App.4th at p. 1353.) In *Exxon Mobil*, the court

interpreted Board regulations and held that two separate oil and gas units should be assesed as a single appraisal unit based on Rule 324(b) and Rule 468. (*Exxon Mobil Corp. v. County of Santa Barbara, supra,* 92 Cal.App.4th at 1355; Rule 324, subd. (b).) Based on the fair market value principle and consistent with the clear language of Rule 324(b), the court held that a county assessor is required to assess real property at its full value. (*Ibid.*)

The property in *Exxon Mobil* consisted of a refinery with an offshore oil drilling unit and an onshore refining unit that were connected by an oil pipeline. The county assessor attempted to separate the facilities into separate appraisal units. Applying Rules 324(b) and 468 the court held that the units were a single appraisal unit because the units constituted a "single integrated oil/gas production operation" and the oil and gas facillities required specialized appraisal techniques. (*Exxon-Mobil Corp. v. County of Santa Barbara, supra* at p. 1354.)

Unlike the Court of Appeal in this case, the *Exxon Mobil* court relied on the declaration of the Board's expert regarding the marketplace's treatment of oil and gas properties. The Board's expert stated he was "unaware of any circumstance in which an operating oil treatment plant is assessed, or which has been sold, separately from the minerals it treats." (*Exxon Mobil Corp. v. County of Santa Barbara, supra,* 92 Cal. App. 4th at p. 1357.) The record in *Exxon Mobil* thus showed the same marketplace treatment of oil refineries as the rulemaking record considered by the Board when it adopted Rule 474. There is no doubt that the marketplace treats petroleum refineries as a single unit.

E. Section 51(d)'s Legislative History Supports the Board's Authority To Adopt Rules Based On Marketplace Changes.

The legislative history of section 51(d) supports the Board's authority to promulgate rules based on changes in the marketplace. The legislative history of section 51 demonstrates that "fair market value" is the keystone. With the passage of section 51, the Legislature did not mandate that fixtures always be treated as a separate appraisal unit to maximize depreciation because all fixtures are allegedly "normally valued separately." Instead, recognizing that different properties may be treated differently in the marketplace, the Legislature gave assessors the authority to determine the proper appraisal unit based on how the marketplace "buys and sells" real property when there is a decline in value under Proposition 8.

After Proposition 8 was passed but before section 51(d) was enacted, the Legislature created the Task Force to help it enact statutes to implement the new law. (7 AA 2047-2048.) The Task Force Report is recognized authority as to the intent of Proposition 13. (*Auerbach v. Assessment Appeals Bd. No. 1* (2006) 39 Cal.4th 153, 161.) The Task Force Report states that:

> The Task Force felt that the purpose of Prop. 13 was to place a cap on the value of property in any one year, while Prop. 8 sought to allow values to rise and fall without restriction at any point below this cap, should actual market values so dictate. [¶] 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.

(7 AA 2076, underline in original.)

Proposition 8 is thus based on "actual market values;" that is, the fair market value as dictated by the marketplace. Property tax assessments

prior to Proposition 13 were based on the fair market value principle. (See 8 AA 2231 [Rule 2, adopted 1967]; 10 AA 2802 [1958 AH], 10 AA 2988-2989 [1966 AH] and 11 AA 3088-3089 [1975 AH].) Proposition 13 did not repeal, either expressly or by implication, the provisions of California Constitution article XIII, section 1, pertaining to assessment at fair market value when there is no applicable Proposition 13 limitation. (*State Board of Equalization v. Board of Supervisors, supra,* 105 Cal.App.3d at p. 813.) Thus, the marketplace principle continues to apply for property tax valuation purposes when Proposition 13 limits do not apply, including when there is a decline in value under Proposition 8.

The legislative history shows intent to recognize a decline in value of taxable property below the Proposition 13 adjusted base year value only when actual fair market values dictate. The legislative history does not discuss any requirement to recognize depreciation on fixtures independently of the actual market value of real property. In fact, to do so would conflict with the California Constitution, as well as statutory law. (Cal. Const. arts. XIII, § 1 & XIII A, § 2; Rev. & Tax. Code, §§ 110, 110.5, 51 (d).)

Importantly, on November 27, 1978, the Task Force issued its minutes on implementation of Propositions 13 and 8. (3 AA 773-776.) In the section discussing declines in value, the Task Force stated:

> There was general consensus to recommend the following:
>
> (1) that the Prop 8 changes to Section 2 (a) of Article XIIIA shall be offered by the Board of Supervisors upon taxpayer request and (2) that the second Prop. 8 "recommendation" previously adopted be clarified to indicate that the market value determination be the net of increases and/or decreases in the various components of value (land, improvements) which comprise each "assessment unit", as described in the Assessor's Handbook. **Determination of the "unit" would be subject to Board rule, and assessor determination on a case-by-case basis.**

[¶]

> Extensive discussion centered on the "unit" of assessment. The question was raised as to whether the value of land versus that of improvement should be separate for purposes of determining declines in value, or whether the net change in value for the entire unit be the determining value.
>
> Concerns were raised that commercial/industrial owners would divide their properties so that only those depreciating assets would be under one ownership, while appreciating assets would be under other ownership. This way, even if the net were used, the net would always be a decline, and thus overall assessment levels could be manipulated.
>
> Interpretation of Prop. 8 varied somewhat, but there was general agreement that the purpose of Prop. 8 "decline in value" section was that no taxpayer be assessed higher under XIII A than under pre-Prop. 13 law. Thus, the controlling principle should be: how was such property treated prior to Prop. 13? **The key is the assessment unit employed, and thus assessors would be allowed to determine appropriate unit, case-by-case.**

(3 AA 775-776, bold added, underline in original.)

Subsequently, on January 22, 1979, and October 29, 1979, the Task Force issued reports on implementation of Propositions 13 and 8, respectively. (7 AA 1896-2043; 7 AA 2044-2100; 8 AA 2011-2226.) Both reports discuss in detail the background of the propositions and specifically the passage of Assembly Bill 1488, which codified Proposition 8 by enacting section 51. Nothing in either report contradicts the Task Force's statement that the Board's regulations and county assessors must determine the appropriate appraisal unit, or its concern that industry would try to artificially separate a single appraisal unit into pieces in order to exploit the declines in value of short-lived fixtures due to depreciation. (3 AA 775-776.) Although legislative history is not determinative, reliance on these reports is "instructive in filling out the picture of the Legislature's purpose." (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1218, fn. 3.)

Contemporaneous with the enactment of section 51(d), the Task Force decided not to draft a statute on oil and gas properties, and instead relied on Rule 468, an exception to Rule 461(e):

> Although without a special constitutional provision for valuation; oil and gas properties do qualify as a special problem. The Task Force debated at some length whether to recommend separate statutory treatment of these properties; it opted not to. No statute has yet been enacted, although Board Rule 468 does address the valuation of these properties.

(7 AA 1924.)

Thus, the Task Force considered whether to recommend specific statutory treatment for one type of special-use property -- specifically, oil and gas properties -- but chose not to do so. Consequently, the Legislature explicitly left to the Board's quasi-legislative rulemaking authority the valuation of this special type of property. Similarly, petroleum refineries fall within the classification of special-use properties left to the Board's quasi-legislative rulemaking authority.

F. The Court of Appeal Erred in Holding that the Legislature Intended to Freeze the Board's Duty to Modify Appraisal Methodologies Based on Fair Market Value or Market Circumstances.

The Court of Appeal's holding that petroleum refinery fixtures must be a separate appraisal unit is based on its reading of Proposition 13's legislative history in a manner to conclude that the Legislature wanted to freeze the appraisal methodologies used prior to the adoption of Proposition 13. (Opinion, pp. 18, 20-21.) This interpretation, however, is based on false assumptions. The fair market value principle existed prior to the adoption of Propositions 13 and 8 and remains valid law. (*State Board of Equalization v. Board of Supervisors*, *supra*, 105 Cal.App.3d at p. 820.)

In *State Board of Equalization v. Board of Supervisors*, *supra*, 105 Cal.App.3d at p. 820, the court concluded that an amendment to Rule 461 was invalid precisely because it failed to recognize *actual* market value depreciation. The court emphasized that the fair market value principle continues to apply when Proposition 13 limits do not, and that Proposition 8 requires recognition of a decline in value when the *actual market value* of the subject real property is *less than* its adjusted base year value under Proposition 13. (*Id.* at pp. 820-822.)

Here, the Court of Appeal's decision would prevent the Board from adopting new regulations to address the multitude of different situations that may arise based on evolving marketplace facts and circumstances. (Compare *Exxon Mobil Corp. v. County of Santa Barbara, supra,* 92 Cal.App.4th at p. 1356 with *County of Orange, supra,* 13 Cal.App.4th at pp. 531-532.) For example, the Board issues instructions to county assessors on the appraisal of all types of property, including regulations and other guidance material. (Rev. & Tax Code, § 15606; see AH 501, pp. 10-12, found at http://www.boe.ca.gov/proptaxes/pdf/ah501.pdf; see AH 502, pp. 2-5, found at http://www.boe.ca.gov/proptaxes/pdf/ah502.pdf.) Because the Court of Appeal's holding would deprive the Board of the necessary flexibility, including the flexibility to direct the use of a single appraisal unit for any type of unique property, it should be reversed. The Board must have the flexbility to adapt to a changing marketplace.

G. The Court of Appeal Incorrectly Concluded that Fixtures Have Always Been Treated as a Separate Appraisal Unit.

The Court of Appeal determined that:

> As best as we are able to discern from the parties' briefs on appeal and the appellate record, assessors for many years leading up to the late 1970's assessed the value of land and improvements as one appraisal unit, and assessed the value of fixtures as a separate appraisal unit in order to account for depreciation. And, it appears from the appellate record that while the owner of a manufacturing or industrial property may have received a single real property tax bill each year, the bill would have been the reflection of an assessed value for land and improvements, and an assessed value for fixtures. The total assessed value of the real property would then be computed by adding the two distinct appraisal units, with the ad valorem real property tax then imposed on the total assessed value.

(Opinion, p. 3.)

The Court of Appeal identified no support for its finding that "assessors *for many years leading up to the late 1970's* assessed the value of land and improvements as one appraisal unit, and assessed the value of fixtures as a separate appraisal unit in order to account for depreciation." (Opinion, p. 3, italics added.) In fact, as discussed below, the submitted pre-Proposition 13 materials demonstrated that the appraisal unit for property tax valuation purposes has always been determined by the marketplace principle, and not by the need to maximize depreciation. Contrary to the constitutional mandate, the Court of Appeal's holding will promote non-marketplace appraisal units by allowing property owners to maximize depreciation through piecemeal appraisals.

The only reason that fixtures for most types of properties were treated as a separate appraisal unit for decline in value purposes, *from the late-1970's onwards,* was because of Rule 461(e), which was adopted in 1978, and which itself was based upon observed marketplace practices for most

but not all types of commercial and industrial properties. (See Rules 468, 469, & 473.)

H. The Court of Appeal Erroneously Conflates Valuation with Assessment.

The Court of Appeal relied on the separation between land and improvements (which include fixtures in this case) in property tax statements to conclude that different appraisal units are typically used. (Opinion, p. 3.) The California Constitution article XIII, section 13's requirement that land and the improvements thereon shall be separately assessed, however, does not refer to the valuations to be placed on real property, which must be based upon fair market value using an appropriate appraisal unit, but instead merely to the fact that the fair market value fixed by the assessor shall be separately stated in his or her assessment books.

Prior to 1939, California Constitution article XIII, section 13, and Revenue and Taxation Code section 607, and predecessor provisions, provided that, "Land and improvements thereon shall be separately assessed."[10] (See AH 502, p. 5 "Appraisal Unit and Assessed Value Allocation" at http://www.boe.ca.gov/proptaxes/pdf/ah502.pdf.) Nevertheless, provisions requiring land and improvements thereon to be separately *assessed* do not refer to the *values* to be placed on the taxable real property. (*Ibid.*; *Mahoney v. San Diego* (1926) 198 Cal. 388, 398-399.) Instead, those provisions merely refer to the fact that the valuation fixed by an assessor on the appraisal unit of real property in conformity with sections 51 and 110, and other provisions of the law relating to the assessment of property value, must be separately stated in the county

[10] In this context, fixtures are part of the improvements. (Rev. & Tax. Code, § 105.)

assessment books. (Rev. & Tax. Code, §§ 602 & 607; see also Cal. Code Regs., tit. 18, § 307.)

I. Prior to the Adoption of Propositions 13 and 8, the Marketplace Principle Dictated the Proper Appraisal Unit for Determining Value.

The conclusion that section 51(d) is intended to provide the Board and assessors with authority to determine appraisal units based on the marketplace is corroborated by Board regulations and Assessors' Handbooks in effect *before* the passage of Propositions 13 and 8. (BOE Reply at 10 AA 2764-2770.) Specifically, Rule 2, *The Value Concept*, adopted June 21, 1967 (8 AA 2231), provides, in part, that: "The words 'value,' 'full cash value,' 'cash value,' 'actual value,' and 'market value' mean the price at which a property, if exposed for sale in the open market with a reasonable time for the seller to find a purchaser, would transfer for cash or its equivalent under prevailing market conditions. . . ." This provision is nearly identical to that found in Revenue and Taxation Code section 110 (a)'s definition of "full cash value" and "fair market value," which is referenced in section 51.

The 1958 Assessors' Handbook states under "Appraisal of Total Property" that:

> The procedures and approaches discussed in the following sections agree with the underlying appraisal principle that **proper valuation** of improved property is obtained **only by valuation of property as an operating unit. In other words, an assumption that improved real property can be correctly valued by the addition of the vacant-land value to the value or replacement cost of the building generally is erroneous.**
>
> (10 AA 2789, 2802, bold added.)

Further, the Assessors' Handbook for 1966 states, in part, under "Unit To Be Valued" that:

> It is obvious that market value necessarily involves a unit as well as a price. Consequently, no discussion of market value is complete unless there is some analysis of the unit to be valued. It seems to be clear that, since the objective is market value, the proper unit to be valued is the unit that is dealt in by the market; i.e. one that people buy and sell.

(10 AA 2789, 2988-2989.)

Additionally, the 1975 Assessors' Handbook 501, *General Appraisal Manual*, states under "Unit To Be Valued" that:

> Since the appraisal objective is to estimate the market value, the proper unit to be valued is the unit that people in the market buy and sell.
>
> [¶¶]
>
> [T]he appraiser's decision [on the unit to be valued] should reflect the unit most likely to be sold as indicated by the analysis of market data.

(11 AA 2789, 3088-3089.)

This guidance reflects the marketplace principle. The Assessors Handbook further states that: "Property tax law requires a separate assessment of land, improvements, and personal property, but the statutes do not require separate appraisals of these different segments of a unified property." (10 AA 2789, 11 AA 3089, underline in original.)

The history of California property tax assessment supports the conclusion that the Board must instruct county assessors based on marketplace behavior. The Court of Appeal's decision misinterprets this history by concluding that fixtures must always be a separate appraisal unit.

II. THE BOARD'S INITIAL DETERMINATION THAT THERE WOULD BE NO SIGNIFICANT STATEWIDE ADVERSE IMPACT ON BUSINESS FROM ADOPTING RULE 474 SUBSTANTIALLY COMPLIED WITH THE APA.

As stated in a recent decision: "The APA is 'intended to advance 'meaningful public participation in the adoption of administrative regulations by state agencies' and create 'an administrative record assuring effective judicial review.' [Citation.]" (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly*, *supra,* 199 Cal.App.4th 286, 303.) Specifically, the APA requires, among other things, a state agency to make an initial determination about whether a regulation will have a significant, statewide adverse impact on business:

> An agency's initial determination and declaration that a proposed adoption, amendment, or repeal of a regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.

(Gov. Code, § 11346.5, subd. (a)(8).)

Government Code section 11350 applies to actions for declaratory relief under the APA. Government Code section 11350, subdivision (a) provides the general rule that a regulation may be declared invalid for "substantial failure" to comply with the APA. If there is no substantial failure under Government Code section 11350, subdivision (a), a regulation can still be invalid if its Initial Determination fails to comply with Government Code section 11350, subdivision (b)(2). A declaration of invalidity under this provision requires a finding that: "[t]he agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5

is in conflict with substantial evidence in the record." (Gov.. Code, § 11350, subd. (b)(2); italics added.)

A. The Board's Adoption of Rule 474 is a Quasi-Legislative Act Subject to Limited Judicial Review.

Rule 474 is the product of the Board's exercise of its quasi-legislative rulemaking authority because the regulation does not merely interpret a statute, but implements and carries out constitutional provisions and statutes. (Gov. Code, §§ 11342.2, 15606, subd. (c) & (e); *Yamaha Corp. of America v. State Bd. of Equalization (*1998) 19 Cal.4th 1, 11.) Under its authority in Government Code section 15606, subdivision (c), the Board adopted Rule 474 to implement and carry-out section 51(d), and to make specific the appropriate appraisal unit to use with petroleum refinery properties for Proposition 8 declines in value appraisals. Rule 474 falls within the Board's delegated rulemaking authority because it is necessary to "fill in the gaps" of section 51(d)'s requirement that marketplace transactions define "real property" for the purpose of property tax assessment. (*California Forestry Assn. v. California Fish & Game Commission* (2007) 156 Cal.App.4th 1535, 1554.)

"When a petition seeks to invalidate a regulation adopted pursuant to a delegation of legislative power," as here, then "the judicial function is limited to determining whether the regulation (1) is 'within the scope of the authority conferred' [citation] and (2) is 'reasonably necessary to effectuate the purpose of the statute ....' (*Yamaha Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at p. 11.) In contrast, a court independently reviews whether the regulation is consistent with the governing statutes. (*Association of California Ins. Cos. v. Poizner* (2009) 180 Cal.App.4th 1029, 1045.)

The Court of Appeal, however, erroneously held that Rule 474 is not quasi-legislative and that even if it were quasi-legislative, that judicial review is unlimited. (Opinion, p. 16.) But Rule 474 is a quasi-legislative act because the Board "is creating a new rule for future application." (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly, supra,* 199 Cal.App.4th at p. 302.) Rule 474 is not merely an administrative interpretation of section 51(d) but the creation of a regulation for general application to petroleum refineries. (*Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th at pp. 6-7.)

B. The Board's Economic Impact Statement and Initial Determination are supported by Substantial Evidence in the Rulemaking Record.

A court may declare a regulation invalid for substantial failure to comply with the APA. (Gov. Code, § 11350, subd. (a).) Here, the Board concluded that there were no compliance costs associated with the adoption of Rule 474, but that petroleum refineries would likely see a small percentage increase in their property taxes as a result of the adoption of Rule 474, and the Board made its *Initial* Determination "that the adoption of Rule 474 will not have a significant statewide adverse economic impact directly effecting business," under Government Code section 11346.5, subdivision (a)(8).[11] (1AA 162-168; 3 AA 614-640.)

The record supporting the Initial Determination contains specific and detailed information supporting the Board's estimate, including the evidence relied on, the source of the information, the methodology applied,

[11] Board staff incorrectly listed the estimated $1.4 million increase in property taxes as a "cost" impact under Government Code section 11346.5, subdivision (a)(9), in section B of the Board's EIS and in a few of the Board's notices to the public, even though there are no compliance costs associated with the adoption of Rule 474. (1 AA 113-117; 3 AA 635-640.)

and the exact calculations used in preparing the EIS, and the supporting documentation. (See 1 AA 162-168; 1 AA 113-114; 3 AA 601-634 [Issue Papers, Revenue Estimates & EIS]; 3 AA 635-646 [Notices to Public].) The tax estimate was based on information received from both the county assessors and WSPA during the public rulemaking process. (3 AA 626-627.)

The testimony and evidence submitted by the county assessors and industry constituted substantial evidence supporting the Board's adoption of Rule 474. (2 AA 359-375 (FSR), 408-411, 412-422, 520-526, 539, 541; 3 AA 626-627; 6 AA 1613-1615; 6 AA 1773-1775, 1781-1789; *ALRB v. Exeter Packers* (1986) 184 Cal.App.3d 483, 492-494; *Plastic Pipe and Fittings Assn. v. Calif. Building Stds. Comm.* (2004) 124 Cal.App.4th 1390, 1407-1408.) Assessors are experts on real property valuation. (Evid. Code, § 720; *San Bernardino County Flood Control Dist. v. Sweet* (1967) 255 Cal.App.2d 889, 899.)

Evidence is substantial if a reasonable trier of fact can conclude that it is reasonable, credible, and of solid value. (*Plastic Pipe and Fittings Assn. v. Calif. Building Stds. Comm., supra*, 124 Cal.App.4th at p. 1407..) The issue hinges on quality not quantity. The number of witnesses is not determinative. Instead, the question is whether the evidence is inherently reliable. (Evid. Code, § 411; *Plastic Pipe and Fittings Assn. v. Calif. Building Stds. Comm., supra*, 124 Cal.App.4th at p. 1407; *People v. Scott* (1978) 21 Cal.3d 284, 296.)

If an agency's Initial Determination that the adoption of a regulation will not have a significant economic impact on business is adequately supported in the record by substantial evidence, a party's belated showing that the EIS or Initial Determination were incorrect or inaccurate is insufficient to overturn the regulation in the absence of substantial conflicting evidence presented during the rulemaking process. (*California*

Assn. of Medical Products Suppliers v. Maxwell-Jolly, supra, 199 Cal.App.4th at pp. 304-309.)

Under the APA, if an industry participant disagrees with an agency's economic analysis and Initial Determination, then industry must come forward and provide the agency with substantial evidence to support its contrary position. (Gov. Code, §§ 11346.5, subd. (a)(8) & 11350, subd. (b)(2).) Nowhere in the statutes or case law is there any indication that it suffices to merely state during the rulemaking process that the agency's economic analysis was incorrect, and then wait until after the adoption of a regulation to bring a declaratory relief action.

C. Rule 474 Should Not be Declared Invalid Due to the Board's Initial Determination that the Adoption of Rule 474 Did Not Have a Significant Adverse Economic Impact on Business because the Initial Determination is Not in Conflict with Substantial Evidence in the Rulemaking Record.

Based on an argument not found in either the complaint or the summary judgment motions, but instead raised for the first time by the trial court during oral argument, the Court of Appeal incorrectly declared Rule 474 invalid because the Board's initial estimate of increased property taxes under Rule 474 allegedly was inaccurate and unsupported by substantial evidence. But, under Government Code section 11350, subdivision (b)(2), the inaccuracy of an Initial Determination based on an economic analysis is not sufficient to overturn a regulation. Instead, a regulation may be declared invalid under Government Code section 11346.5, subdivision (a)(8) only if the agency's determination is *in conflict with substantial evidence in the rulemaking record.* The Rule 474 rulemaking record does not contain conflicting evidence.

Government Code section 11346.5, subdivision (a)(8) requires agencies to submit a declaration if they determine that compliance with the regulation will not have an adverse economic impact on industry. Moreover, Government Code section 11349.1, subdivision (d)(2) requires agencies adopting a regulation to comply with Government Code section 11346.3. Under Government Code section 11346.3, subdivision (a), an agency must make a determination of the potential economic impact of a regulation on industry.

> State agencies proposing to adopt, amend, or repeal any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements.

(Gov. Code, § 11346.3, subd. (a).)

This direction focuses on an early, not an in-depth assessment. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly, supra,* 199 Cal.App.4th at p. 307.) And this early assessment is meant to be the agency's initial determination about an absence of significant, statewide adverse economic impact. (Gov. Code, § 11346.5, subd. (a)(8).)

Consistent with its obligations under the APA, the Board prepared an economic and fiscal impact statement (STD. 399 (Rev. 2-98)) after analyzing relevant data, which included both an economic analysis used to determine the economic impact of Rule 474 on the private sector, and a fiscal impact statement used to determine the impact of Rule 474 on the state and local governments, in accordance with the instructions in the State Administrative Manual. (1 AA 162-168; 3 AA 614-633.) The EIS included an analysis of whether the adoption of Rule 474 would have a significant adverse economic impact on business and indicated that the only economic impact the adoption of Rule 474 would have on business was a slight

percentage increase in property taxes. (1AA 162-168.) The Board's analysis was limited to taxes, because there were no additional compliance costs. (1AA 162-168.) Specifically, the Board estimated an annual tax impact of $1.4 million, and provided substantial supporting evidence.

Apart from the evidence submitted by the county assessors and Board staff, the only other information submitted during the rulemaking process on Rule 474's economic impact was an unsupported statement from WSPA stating that the annual tax increase might be between $5 and $10 million. (1 AA 146; 2 AA 313.) WSPA did not provide any explanation, calculation, or substantiating data for this statement. In any event, regardless of whether the estimated adverse tax impact is $1.4 million or $5-$10 million, the estimated burden would not impose a significant adverse economic effect on the refinery business given the $32 billion value base in California refinery property. (3 AA 626-627.)

During the Board's administrative hearing on proposed Rule 474, WSPA made the following objection:

> Objection #7: The Financial Impact of Rule 474 is Greatly Understated.
>
> [WSPA] questions the "Cost Impact" figure set forth on page 2 of the SBE's August 11, 2006 Notice of Proposed Regulatory Action. The $1.4 million figure significantly understates the cost of impact that Rule 474 will have on California refineries. [Western States] believes that direct cost impact of Rule 474, in terms of additional taxes on California refineries, **will be at least $5 million, and <u>perhaps</u> as much as $10 million or more.** The SBE should provide the public with the complete basis for its calculation of the $1.4 million figure.
>
> (2 AA 313; bold and underline added.)

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The Board addressed WSPA's objection in its Final Statement of Reasons, with the following response:

> Objection 7: The Financial Impact of Proposed Rule 474 is Greatly Understated.
>
> Response 4-7
>
> Board staff prepared a Revenue Estimate, Issue #06-001 (Revenue Estimate), of the impacts of the proposed rule. This is the only dollar-value measure of potential underassessment of petroleum refinery properties that appears in the record to date. As part of the Revenue Estimate, a cost impact of proposed Rule 474 was calculated using Western States- and County-supplied data. The derivation of this figure is included in the Revenue Estimate. Western States has not provided data or methodology from which its cost impact estimates can be independently derived.

(FSR, p. 15, at 1 AA 146; bold and underline added.)

WSPA's unsupported and speculative statement of disagreement with the Board's Initial Determination under Government Code section 11346.5, subdivision (a)(8) does not constitute a valid basis for overturning Rule 474 because WSPA's speculation did not constitute "substantial evidence" as it lacked reliability. WSPA did not provide any supporting data, calculations, or methodology for the Board to independently assess or verify its statement. (1 AA 146; 2 AA 313.) The Board recognized this deficiency: "Western States has not provided data or methodology from which its cost impact estimates can be independently derived." (1 AA 146.)

During the rulemaking, WSPA provided only a statement of disagreement and conjecture [using tentative words like "believes" and "perhaps"]. (See Gov. Code, § 11346.5, subd. (a)(8); 2 AA 313.) Accordingly, looking solely at the letter submitted to the Board by a WSPA representative during the rulemaking process, the Board was not provided with any reliable evidence supporting WSPA's speculative estimate of $5-

10 million. Thus, as noted by the Board at the time, WSPA's letter provides only mere conjecture and speculative belief rather than substantial evidence. Furthermore, WSPA's statement is unreliable because it was not made by an independent expert or appraiser. WSPA is a lobbying organization. Unsubstantiated statements made by lobbyists do not constitute reliable evidence. (*Martinez v. Regents of University of Calif.* (2010) 50 Cal.4th 1277, 1293.)

In summary, WSPA's unsubstantiated statement is not credible, conflicting evidence because: (1) it was made by a registered lobbyist for the oil and gas industry, and not an appraiser, economist or other qualified expert; thus, it inherently lacks objectivity and credibility; (2) it failed to provide any explanation or detail for its statements; and (3) it did not provide supporting expert testimony, other substantiating evidence or data from which the Board could reasonably analyze or verify the validity of its conclusion. Instead, WSPA simply stated its *belief* that the revenue impact "will be at least $5 million, and *perhaps* as much as $10 million or more." (2 AA 313, italics added.)

WSPA provided no further information, explanation, or substantial evidence to support this statement until it filed its summary judgment, after the rulemaking was closed. (See Respondent's Brief p. 46, fn. 19; 8 AA 2347-2349, 2354-2356 [analysis provided by WSPA subsequently].) These facts demonstrate that the alleged $5-10 million revenue estimate presented to the Board by WSPA does not constitute substantial evidence. (*Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 470.)

If an agency's Initial Determination is supported by substantial evidence, as here, then regardless of the accuracy or inaccuracy of the EIS or Initial Determination, Government Code section 11350 requires substantial conflicting evidence in the record to invalidate the challenged

regulation under Government Code section 11346.5, subdivision (a)(8). This requirement is not met here because the only substantial evidence in the record concerning the economic impact relates to the Board's $1.4 million EIS. (1 AA 146 [FSR]; 1 AA 162-168; 1 AA 113-114; 3 AA 601-633 [Issue Papers and Revenue Estimates].)

D. The Court of Appeal Erroneously Concluded that the Board Violated Government Code Section 11346.5, subdivision (a)(9).

The Court of Appeal misinterpreted Government Code section 11346.5, subdivision (a)(9), by finding that the Board violated the statute's requirements:

> The economic impact statement leaves a reader without an understanding of what the taxes on a *representative refinery* would have been under the formerly applicable Rule 461(e), and what the taxes would be under the new Rule 474(d)(2). (See Gov. Code, § 11346.5, subd. (a)(9) [an agency shall evaluate the costs to be incurred by a "representative business" affected by a proposed regulation].)

(Opinion, p. 25, italics added.)

Government Code section 11346.5, subdivision (a)(9) requires a state agency to provide:

> A description of all cost impacts, known to the agency at the time the notice of proposed action is submitted to the office, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
>
> If no cost impacts are known to the agency, it shall state the following:
>
> "The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action."

The Board's EIS for Rule 474 only addressed the possibility of increased taxes for petroleum refineries because there are no additional compliance costs. In other words, Government Code section 11346.5, subdivision (a)(9) does not require the Board to determine the tax or economic impact for a *representative* refinery, as both the trial court and Court of Appeal erroneously concluded; this requirement only applies to compliance costs. Government Code section 11346.5, subdivision (a)(8) uses the phrase, "adverse economic impact directly affecting business." In contrast, Government Code section 11346.5, subdivision (a)(9) uses the phrase, "A description of all cost impacts." "Cost" must have a different meaning than "adverse economic impact" because the Legislature used different terms for the subdivisions.

The Court of Appeal misconstrued Government Code section 11346.5, subdivision (a)(9), by equating the word "costs" with "tax." (12 AA 3546.) Under Government Code section 11346.5, subdivision (a)(9), "cost" means actual compliance costs, as in whether there are additional filing or reporting costs required by Rule 474. (Gov. Code, § 11346.3 ["reporting, recordkeeping, or compliance requirements"]; (11 AA 3249-3250; AOB, pp. 28-30.) If Government Code section 11346.5, subdivision (a)(9) referred to tax impact and all categories of economic impact, there would be no need for a separate provision.

Because Rule 474 adds no additional compliance burden to refinery owners, the Board found that there were no additional compliance costs. During its rulemaking process, the Board stated: "The cost impact on private persons or businesses will be insignificant." (1 AA 162.) Rule 474 could not impose additional compliance costs because it does not create any additional reporting or accounting requirements. Therefore, the Board was in full compliance with the APA under Government Code section 11346.5, subdivision (a)(9).

E. The Court of Appeal Improperly Imposes Unnecessary and Burdensome Obligations on Agency Initial Economic Impact Determinations Not Required by Statutory or Case Law.

The Court of Appeal's decision imposes obligations not required by the plain language of Government Code sections 11346.3, subdivision (a), or Government Code section 11346.5, subdivision (a)(8), which only requires an agency to produce an "initial determination" of economic impact.

The Legislature's use of "initial determination" means that an agency does not have to conduct an extensive analysis of the potential economic impact. Thus, the Board, like other agencies, can rely on reasoned estimates. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly, supra,* 199 Cal.App 4th at pp. 306-308; *Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1328-1329, 1336.) The statute intentionally grants agencies flexibility when estimating a regulation's economic impact. But the Court of Appeal's decision threatens to limit, if not to eliminate, an agency's discretion in using estimates to make its Initial Determination of economic impact.

For example, Government Code section 11346.5, subdivision (a)(8) provides a broad range of evidence that an agency may rely on, such as "facts, evidence, documents, testimony, or other evidence" in making the required declaration. Nevertheless, the Court of Appeal held that the Board could not use estimates in its EIS to determine Rule 474's potential for an adverse statewide economic impact on California businesses. (Opinion, pp. 26-27.) The Court of Appeal stated:

> We agree with the trial court's conclusion that SBE's economic impact analysis lacked meaningful quantification of Rule 474's "real world" impact. That is, an economic impact based on data concerning fixture depreciation on assessed values.
>
> (Opinion, p. 25.)

But the term, ""real world impacts" is undefined and, as applied by the court, exceeds the requirements of the APA.

The Court of Appeal also held that the Board's EIS must include data concerning the fixture depreciation for each representative refinery. (Opinion, p. 25.) This is, however, contrary to the requirements of the APA, which does not require an agency to make a tax impact determination with respect to "each representative business." (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly*, *supra,* 199 Cal.App.4th at p. 308.) Again, the court appears to have confused Government Code section 11346.5, subdivisions (a)(8) -- "statewide adverse economic impact directly affecting business," which includes increased taxes and Government Code section 11346.5, subdivision (a)(9) -- increased compliance costs.

The Court of Appeal's opinion prohibits the use of estimates, even though in most, if not all, rulemaking activities the uncertainty of projecting economic costs requires their use. As the Board disclosed early in the rulemaking process: "The revenue effect of not always treating fixtures as a separate appraisal unit for declines in value is extremely difficult to estimate due to the many factors involved and their lack of predictability." (3 AA 610, 626 [Revenue Estimates].) The Court of Appeal ruled that the Board's estimate of economic impact was inadequate because it did not use actual figures to determine the future tax impact for a representative

petroleum refinery.[12] (Opinion, p. 24.) There is no statutory requirement, however, on agencies to conduct in-depth investigations to determine every possible impact of a proposed regulation. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly, supra,* 199 Cal.App.4th at. p. 307-308.) An agency is only required to do an *initial analysis*, which necessarily will involve projections, because an agency cannot know for certain the exact impact of a regulation. (*Pulaski v. Occupational Safety & Health Stds. Bd.,, supra,* 75 Cal.App.4th at p. 1329 [court upheld agency's estimation of cost to comply with new ergonomics control measures].)

Maxwell Jolly discussed a State Department of Health Care Services' EIS's compliance with the APA. There the court concluded that the agency's obligation was to make an initial showing that there was some factual basis for the agency's decision. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly, supra,* 199 Cal.App.4th at p. 308.) *Maxwell Jolly* explained that an agency's Initial Determination should only be reviewed to determine whether the agency had substantially complied with its obligations, and whether the agency's Initial Determination is supported by some quantum of substantial evidence. (*Id.* at p. 304; *Pulaski v. Occupational Safety & Health Stds. Bd, supra,* 75 Cal.App.4th at p. 1336 [evaluating whether administrative conclusions about economic impact pursuant to Gov. Code, § 11346.3, subd. (a) were supported by substantial evidence].) Then, if the court finds that the Initial Determination was in conflict with substantial evidence in the record, this *may* provide a ground for finding the rulemaking invalid. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly, supra,* at p. 308; Gov. Code, §§ 11346.5, subd. (a)(8) & 11350, subd. (b)(2).)

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[12] There is no mention of using a "representative" business in the economic impact provision in Government Code section 11346.5, subdivision (a)(8).

The Court of Appeal's newly created requirement for the use of actual numbers is highly impractical. Not only does this exceed the statutory requirements for an EIS, but the Board would be obligated to provide actual "representative" taxpayer data. This would impose additional costs and could result in the disclosure of confidential taxpayer information in violation of privacy and confidentiality laws. (See Gov. Code, § 15619; Rev. & Tax. Code, § 408.)

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Dated: September 14, 2012

Respectfully submitted,

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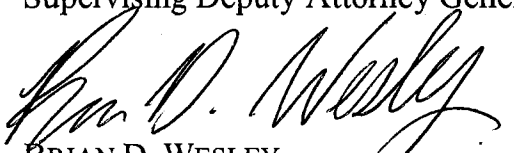

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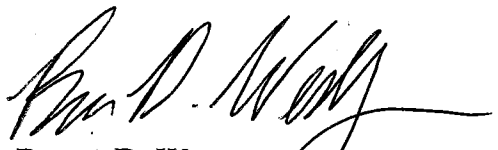
CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON MERITS** uses a 13 point Times New Roman font and contains **13,557** words.

Dated: September 14, 2012



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Western States Petroleum v. California State Board of Equalization**

California Supreme Court Case No.: **B225932**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 14, 2012, I served the attached **OPENING BRIEF ON MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 14, 2012, at Los Angeles, California.

Kathi Palacios	
Declarant	Signature

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