Case No. S150518

IN THE
SUPREME COURT OF CALIFORNIA

CALIFORNIA FARM BUREAU FEDERATION, *ET AL.*,

Plaintiffs and Appellants,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, *ET AL.*,

Defendants and Respondents.

After A Decision By The Court Of Appeal,
Third Appellate District, Case No. C050289

Sacramento County Superior Court
The Honorable Raymond M. Cadei
CASE NO. 03CS01776 consolidated with CASE NO. 04CS00473

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents California State Water Resources Control Board, *et al.* ("Respondents") contend in their Answer to the Petition for Review of Appellants California Farm Bureau Federation, *et al.* ("Appellants") that they are entitled to retain most of the levies that the Court of Appeal declared unconstitutional. Respondents are wrong, and such a result would be unjust.

When various persons and associations initially protested the levies to the California State Water Resources Control Board ("SWRCB"), the SWRCB responded, "[t]he SWRCB has no power to declare a statute unconstitutional or unenforceable." The SWRCB was correct because Article III, section 3.5(b) of the California Constitution states: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power . . . [t]o declare a statute unconstitutional." This is consistent well-established California law. Therefore, California Courts of Appeal consistently have held that the filing of an administrative protest or petition, or the exhaustion of a similar administrative remedy, under such circumstances is unnecessary before seeking relief in the

courts as it clearly would be futile.

Nonetheless, Respondents here maintain the novel proposition that although the Court of Appeal found the subject levies unconstitutional, they should be permitted to retain the levies because certain individual feepayors did not protest first to the SWRCB that the levies were unconstitutional – an argument that the SWRCB admits it could do nothing about in any event. Permitting the SWRCB to retain unconstitutional levies would be unjust and inconsistent with California law. This Court should accept review limited to the sole question of whether all California citizens who paid the illegal levies should be provided with appropriate refunds.

II. THIS COURT SHOULD GRANT REVIEW OF THE LIMITED ISSUE OF WHETHER ALL THOSE WHO PAID THE ILLEGAL FEES ARE ENTITLED TO REFUNDS

A. The Court Of Appeal's Opinion Conflicts With California Law That Does Not Require The Exhaustion of Administrative Remedies Where The Administrative Agency Does Not Have The Power To Grant The Relief Sought

Respondents do not dispute that the Court of Appeal properly ruled that, under the California Constitution, "the SWRCB lacks the power to rule a statute unconstitutional or unenforceable unless an ap-

pellate court has made that determination . . ." Slip. opn., p. 52 (citing Cal. Const. Art. III, § 3.5(b)) ("An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power . . . [t]o declare a statute unconstitutional"). Nor could they – Respondents denied Appellants' petition for reconsideration on the very ground that they did not have the authority to declare the fees unconstitutional. *See* AA 175 (Order Denying Reconsideration at 7 n.6) ("[T]he SWRCB has no power to declare a statute unconstitutional or unenforceable.").

Nor do Respondents dispute that well-established California law does not require measures in the name of exhaustion of administrative remedies where such measures would be futile because the administrative agency from which relief is sought is without the authority to grant that relief. *See* Petition for Review at 19-22 (citing *Park 'N Fly of San Francisco, Inc. v. City of South San Francisco* (1987) 188 Cal. App. 3d 1201, 1208-09; *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal. App. 4th 637, 639). Here, where the SWRCB admittedly did not have the authority to declare the challenged fees unconstitutional, the filing of a petition for reconsideration asking the SWRCB to declare the fees unconstitutional is

the ultimate futile act. Accordingly, the Court of Appeal's conclusion that, in order to receive refunds, feepayors nonetheless must have performed this futile act, is simply contrary to California law.

Review thus should be granted on the basis that the Court of Appeal's ruling that a futile act must have been taken in order to recover payment of the illegal fees here is contrary to California law.

B. The Court Of Appeal's Opinion Requiring The Filing Of Petitions For Reconsideration Or Claims For Refund Conflicts With Revenue and Taxation Code Section 55221, Which Requires Mandatory Refunds To All Who Paid The Challenged Fees

It is undisputed that under the plain language of California Revenue and Taxation Code Section 55221 (the "Fee Collection Procedures Law"), once a determination has been made that an illegal fee has been collected, it is mandatory that the fee be refunded and no filing of a petition for reconsideration or claim for refund is required. *See* Cal. Rev. & Tax. Code § 55221(a). The Court of Appeal's holding, that the exhaustion of administrative remedies by the filing of both a petition for reconsideration and a claim for refund is required in order to receive a refund of the illegally collected fees here, thus con-

flicts with the Fee Collections Procedure Law.[1]

Respondents assert that the Court of Appeal's opinion does not conflict with the Fee Collections Procedure Law because that law is not "applicable" to claims for refund of the water right fees, and the "applicable statutes are in the Water Code."[2] Answer at 14 (citing Cal. Water Code § 1537). But the Water Code's refund procedure, which is available for erroneously calculated or erroneously charged fees, is inapplicable here, and the Court of Appeal's (and Respon-

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[1] In their attempt to read the relevance of the Fee Collections Procedure Law entirely out of the law, Respondents erroneously assert that the Court of Appeal's opinion does not actually require those who paid the illegal fees to file claims for refunds with the BOE pursuant to the Fee Collections Procedure Law, but rather that only payment of the fees and filing petitions for reconsideration "constitute" claims for refunds. *See* Answer at 9. In fact, the Court of Appeal's opinion plainly states that those who are "seeking refunds must *first* exhaust their administrative remedies before the BOE," and "the BOE *is authorized to accept refund claims* from persons or entities who filed petitions for reconsideration with the SWRCB." Slip op. at 52-53 (emphasis added). Thus, the Court of Appeal's opinion (though in error) plainly holds that both petitions for reconsideration and claims for refund are required.

[2] Respondents also erroneously assert that the Court of Appeal held that the Fee Collections Procedure Law was "not applicable." Answer at 15. This is a misstatement of the Court of Appeal's holding. The Court of Appeal found that the Water Code "limit[s]" the BOE's role under the Fee Collections Procedure Law. Slip op. at 15.

dents') conclusion to the contrary is contradicted by the language of the statutory provisions themselves; and in fact, is contradicted to the SWRCB's own prior statements regarding the inapplicability of those statutory provisions.

In support of the Court of Appeal's construction, Respondents point to language in Water Code Section 1537 that, notwithstanding the refund provisions of the Fee Collections Procedure Law, the BOE does not process claims for refunds filed "based on the assertion that a determination by the board improperly or erroneously calculated the amount of a fee, or incorrectly determined that the person or entity is subject to the fee . . .". Answer at 14; Cal. Water Code § 1537 (b)(3). But here, a claim for refund under Section 1537 would not be appropriate because, by its terms, Section 1537 is inapplicable, where Appellants did not allege that one or another of the feepayors was mistakenly charged or that any fee was "erroneously calculated." *See* Cal. Water Code § 1537 (b)(3). Rather, Appellants challenged the constitutionality of Water Code Section 1525 and the Emergency Regulations adopted pursuant to Section 1525 – and Section 1537 specifically states that it does not apply to such challenges: "[t]his subdivision [requiring the filing of a petition for reconsideration] ***shall***

not be construed to apply Chapter 4 (commencing with Section 1120) of Part 1 to the adoption of regulations under this chapter . . . (emphasis added). Respondents, in fact, conceded the inapplicability of these statutory provisions in denying Appellants' petition for reconsideration in this suit on this very ground:

> On petition by any interested person or entity, the SWRCB may order reconsideration of all or part of a decision or order adopted by the SWRCB, including a determination that a person or entity is required to pay a fee or a determination regarding the amount of the fee. (Wat. Code §§ 1122, 1537, sub. (b)(2) ***Pursuant to Water Code Section 1537, subdivision (b)(4), the SWRCB's adoption of the regulations may not be the subject of a petition for reconsideration.***

Clerk's Augmented Record on Appeal at 170 (Order denying CFBF's Petition for Reconsideration) (emphasis added); AA 298 (Order denying Petition for Reconsideration of the NCWA Appellants). Furthermore, Respondents continue to take the position that "a petition for reconsideration to obtain a refund is not the proper method for challenging the adoption of the regulations . . ." Answer at 10.

The Court of Appeal's conclusion that the Fee Collection Procedures Law, which mandates refunds of illegally collected fees, is "limit[ed]" by these statutory provisions thus is unsupported by the plain language of those statutory provisions and Respondents' own

admissions. The Fee Collection Procedures Law mandates that illegally collected fees "shall" be refunded, and thus this Court should grant review to determine whether the Court of Appeal has improperly restricted refunds to those who have filed petitions for reconsideration and who now file claims for refunds.

C. The Court Of Appeal's Opinion Requiring The Filing Of Petitions For Reconsideration And Claims For Refunds Conflicts With The Takings Clause of the United States And California Constitutions, Which Require Full Refunds To All Who Paid The Illegal Fees

Respondents argue that the Takings Clause is not violated here because "an exhaustion requirement is not a 'taking,'" and the Takings Clause do not "require[] payment of a blanket refund in the absence of the exhaustion of administrative remedies." Answer at 16. Respondents miss the point. As set forth above and in Appellants' Petition for Review, under well-established law, *no "exhaustion requirement" should have been imposed here.* Because the Takings Clause requires mandatory refunds here, and the Court of Appeal erroneously has imposed an "exhaustion requirement" that enables the

SWRCB to retain their illegal taking, the Takings Clause is violated.[3] Review thus should be granted to conform the Court of Appeal's ruling with the Takings Clause.

III. IF THIS COURT GRANTS RESPONDENTS' PETITION FOR REVIEW OF THE COURT OF APPEAL'S DETERMINATION THAT THE CHALLENGED FEES ARE ILLEGAL, THIS COURT SHOULD GRANT REVIEW TO CONSIDER AN ALTERNATIVE BASIS FOR AFFIRMING THE ILLEGALITY OF THE FEES BASED ON THE UNCONSTITUTIONALITY OF WATER CODE SECTION 1525 ON ITS FACE

For the reasons set forth in Appellants' Answer to Respondents' Petition for Review, this Court should not grant Respondents' Petition for Review of the Court of Appeal's determination that the challenged fees are illegal. If, however, this Court does grant such review, this Court also should consider an alternative basis for affirming the illegality of the fees because Respondents essentially conceded in their

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[3] Respondents fail to distinguish *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 162-63, which held that a government exaction of monies was a "taking" in violation of the Takings Clause, asserting only that it is a "rare" case finding that "a fee amounted to a taking." Answer at 17. Here, as in *Webb*, the government has taken feepayors' monies without compensation or justification, and the proper remedy for this illegal taking is the return of the monies to those from whom they were taken.

Petition for Rehearing that Water Code Section 1525 is unconstitutional "on its face," not merely "as applied" through the regulations.

While Respondents now purport to deny that such concessions were made (Answer at 18), the meaning of those concessions is plain. *See* Petition for Review at 29-30. Furthermore, while Respondents argue that they do not concede unconstitutionality, ***glaringly absent from Respondents' rebuttal is any assertion that Water Code Section 1525 is constitutional on its face.*** Thus, should this Court grant review of the Court of Appeal's determination that Section 1525 is unconstitutional as applied through the Emergency Regulations, this Court also should grant review of the Court of Appeal's determination that Section 1525 is not unconstitutional on its face.

IV. IF THIS COURT GRANTS RESPONDENTS' PETITION FOR REVIEW OF THE COURT OF APPEAL'S DETERMINATION THAT THE CHALLENGED FEES ARE ILLEGAL, THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE MINIMUM FEE HERE IS NOT "REASONABLE"

If this Court grants review of the Court of Appeal's determination that the challenged fees are illegal, this Court also should grant review to clarify that the Court of Appeal did not rule that, even though Respondents did not present sufficient evidence to support the

$100 minimum fee, it is still "reasonable." If so interpreted, the Court of Appeal's ruling in this regard would conflict with other portions of its opinion, where it holds, based on well-established law, that "in regulatory fee cases, the state has the burden of showing 'the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relation to the payor's burdens on or benefits from the regulatory activity.'" Slip opn., p. 37 (citing *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal. 4th 866, 878 ("*Sinclair*") (quoting *San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal. App. 3d 1132, 1135) ("*SDG&E*")); *see also California Association of Professional Scientists v. Department of Fish & Game* (2000) 79 Cal. App. 4th 935, 945 ("*CAPS*").

Respondents argue that such a ruling would not conflict with California law because the Court did, in fact, hold that Respondent presented sufficient evidence to satisfy their burden to show that $100 minimum fee was properly apportioned to minimum feepayors.[4] An-

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[4] Respondents also purport to point to the following statement by the SWRCB after the fees were established as evidence that satisfies

[Footnote continued on next page]

swer at 20-21. The Court did not so conclude, and Respondents point to no portion of the Opinion where the Court of Appeal arrives at any such conclusion. Accordingly, if this Court grants review of the Court of Appeal's determination that the challenged fees are illegal, this Court also should grant review to clarify the Court of Appeal's conclusion regarding the minimum fee to the extent it could be interpreted to be in conflict with the test set forth in *CAPS*, *Sinclair*, and *SDG&E* to determine whether fees are properly borne by feepayors.

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[Footnote continued from previous page]

their burden: "the minimum fee is adequate to cover the cost of processing the fee, the water use reports that water right holders are required to submit and any notices that the Division is required to provide to the water right holder." Answer at 22. This purported "evidence" is no more than Respondents' own *ex post facto* justification, which, given a plain reading does not satisfy Respondents' burden. Simply because an amount is "adequate" to cover certain costs does not mean that it correlates to those costs. Indeed, a $1,000 minimum fee likewise would be "adequate" to cover such costs.

V. CONCLUSION

To prevent Respondents from benefiting from the imposition of the illegal fees – surely an unjust and inappropriate result – Appellants' Petition for Review should be granted.

Respectfully submitted,

/s/ David A. Battaglia

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March 26, 2007

CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, rule 28.1, subdivision (d)(1))

I, Eileen M. Ahern, hereby certify that the total number of words in this Reply In Support Of Petition For Review is 2,551 words as counted by the word-processing program used to generate this brief.

DATED: March 26, 2007

Eileen M. Ahern

CERTIFICATE OF SERVICE

I, Mary Anderson, declare as follows:

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