IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA FARM BUREAU, ET AL.

Plaintiffs and Appellants,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, ET AL.

Defendants and Respondents.

S150518

Court of Appeal, Third Appellate District, Case No. C050289
Sacramento County Superior Court Case Nos. 03CS01776, 04CS00473
The Honorable Raymond Cadei, Judge

RESPONDENTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

As permitted by California Rules of Court, rule 8.520, subdivision (d), the State Water Resources Control Board (SWRCB) and the State Board of Equalization (collectively, the State), respectfully submit this supplemental brief to address the Court's recent decision in *Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431 ("*Silicon Valley*").)

Silicon Valley is about the effect of Proposition 218 on the ability of *local* government to impose real property benefit assessments. With respect to the standard of review, *Silicon Valley* explains the burden of proof and standard of review for challenges to fees and assessments before the enactment of Proposition 218, and discusses how the initiative specifically changed the requirements for *local* governments. In explaining who had the burden of proof and the scope of that burden as it existed before Proposition 218, *Silicon Valley* supports the State's position, for neither Proposition 218 nor *Silicon Valley* affect state imposed charges.

The burden of proof language in Proposition 218 applies to judicial review of locally imposed fees and assessments, and is inapplicable to state imposed charges. With respect to the test for validity, *Silicon Valley* relies on Proposition 218's express language requiring proportionality for assessments imposed by local agencies. These proportionality requirements have no applicability to state imposed charges, and even as applied to local agencies, they have no applicability unless the fees are imposed as an incident to ownership of parcels of real property. The analysis in *Silicon Valley* – reliant as it is on Proposition 218's express language and intent – cannot be extended beyond the context of Proposition 218.

DISCUSSION

Silicon Valley Has No Application To Judicial Review Of State Imposed Fees

In *Silicon Valley,* the court recognized that Proposition 218's language particularly targeted the deferential standard applied in *Knox v. City of Orland* (1992) 4 Cal.4th 132. *(Silicon Valley, supra,* 44 Cal.4th at p. 446.) *Silicon Valley* holds that an independent standard of judicial review applies to determine the validity of local assessments under the specific constitutional provisions of Proposition 218. The court's holding is based on the express language of Proposition 218 and legislative history showing that the voters intended to overrule the deferential standard of review applied in *Knox.*

Proposition 218 expressly applies to *local* government agencies and the assessments, fees, or charges they impose, whether pursuant to state statute or local ordinance. (Cal. Const., art. XIII D, § 2, subd. (a) [defining "agency" to mean any local government]; *id.*, art. XIII D, §§ 1 [article's provisions apply to all assessments, fees and charges imposed pursuant to state statute or local government charter], 2, subds. (b) ["assessment" excludes levy or charge imposed by state government agency], and (e) ["fee" or "charge" excludes levy

imposed by state government agency]; *Silicon Valley, supra,* 44 Cal.4th at p. 448 [purpose of Proposition 218 is to limit local government revenue and enhance taxpayer consent].) Proposition 218 is not applicable to fees imposed by state government agencies, like the SWRCB's water right regulatory fees.

In *Silicon Valley*, the court explained that Proposition 218 requires local government to bear the burden of proof:

> The drafters of Proposition 218 specifically targeted this deferential standard of review for change. Article XIII D, section 4, subdivision (f), provides: "In any legal action contesting the validity of any assessment, *the burden shall be on the agency* to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question."

(*Silicon Valley, supra,* 44 Cal.4th at pp. 443-444 (emphasis added).) In language similar to the provision addressing local agency assessments, Proposition 218 specifies that in an action challenging a local agency's property-related fee, the local agency has the burden of proving compliance with Proposition 218. (Cal. Const., art. XIII D, § 6, subd. (b)(5).) Where the burden had been on the party challenging a local agency's fee, Proposition 218 explicitly requires the agency to bear the burden of proof.

Proposition 218, however, does not describe the nature of that burden: "Although it is clear that the voters intended to reverse the usual deference accorded governmental action and to reverse the presumption of validity by placing the 'burden' on the agency, the provision does not specify the scope of that burden." (*Silicon Valley, supra,* 44 Cal.4th at p. 448.) Relying on the clear statement of voter intent to make it more difficult for an assessment to be upheld and on Proposition 218's specific statement that its provisions should be liberally construed, the court in *Silicon Valley* held the independent judgment standard should apply: "Because Proposition 218's underlying purpose was to limit government's power to exact revenue *and to curtail the deference that had*

been traditionally accorded legislative enactments on fees, assessments, and charges, a more rigorous standard of review is warranted." (*Ibid.*)

Based on the explicit language in Proposition 218 that moved the burden of proof onto the government's shoulders, the court rejected the idea that the constitutional separation of powers doctrine requires the same deference to agencies in the context of Proposition 218 as it does in non-Proposition 218 cases. (*Silicon Valley, supra*, 44 Cal.4th at pp. 448-449.) Because Proposition 218's language is itself part of the state constitution and was expressly intended to shift the burden of proof, it can override or at least diminish the usual impact of the separation of powers doctrine.

Silicon Valley cannot be extended outside the context of Proposition 218, however, because the essential premise of the court's analysis arises from the express language and intent of Proposition 218 itself. Unlike Proposition 218, Proposition 13 has no express language shifting the burden of proof. (See *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 873, fn. 2.) Without this key language, what is left are the usual rules that laws are presumed valid and the separation of powers doctrine, requiring deference to legislative (and quasi-legislative) acts. Courts presume the constitutionality of a legislative act and resolve all doubts in its favor; courts must uphold the act unless it clearly and unquestionably conflicts with a provision of the state or federal Constitution. (*County of Sonoma v. State Energy Resources Conservation Etc. Com.* (1985) 40 Cal.3d 361, 368; *Rains v. Belshe* (1995) 32 Cal.App.4th 157, 170; see also *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 421 [the presumption of validity traditionally accorded to legislative acts applies to fees].) The party challenging the constitutionality of a statute bears the burden of proving it unconstitutional. (*Rains, supra,* at p. 170.)

Likewise, it is well-settled that the constitutionally-required standard of

review of a state agency's regulation (a quasi-legislative act) is the deferential abuse of discretion standard. (See *Ray v. Parker* (1940) 15 Cal.2d 275, 310-311 ["Under the circumstances here present, judicial interference should occur only when it can be said that administrative action has been arbitrary and capricious"]; *Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 604-607.) This rule applies in tax refund cases (see, e.g., *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 70 Cal.3d 60, 65-66) and when a regulation is challenged on constitutional grounds (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216). This court recently reaffirmed the longstanding rule that when a party makes a facial challenge to a rulemaking decision, "judicial review is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notice required by law." (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal4th 653, 667, quoting *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11-12; accord, *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.)

Silicon Valley explains that before Proposition 218, case law placed the burden of proof on the plaintiff and required deference to the agency's findings of fact. (*Silicon Valley, supra,* 44 Cal.4th at p. 443, citing *Knox v. City of Orland, supra,* 4 Cal.4th at pp. 145-149 and *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 684-685; accord, *Credit Insurance General Agents Assoc. of California, Inc. v. Payne* (1976) 16 Cal.3d 651, 657 [agency's action comes before the court with a presumption of correctness and regularity, placing the burden of demonstrating invalidity on assailant].) *Silicon Valley* describes this standard of review as follows:

> A special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts *unless it clearly appears on the face of the record before [the legislative] body, or from facts which may be judicially noticed*, that the assessment as

> finally confirmed is not proportional to the benefits to be bestowed on the properties to be assessed or that no benefits will accrue to such properties.

(*Silicon Valley, supra,* 44 Cal.4th at p. 444, quoting *Dawson, supra,* 16 Cal.3d at p. 685 (emphasis added).) In other words, the assessment would be invalidated "only 'when the courts *can* plainly see that the legislature has not really exercised this judgment at all, or that manifestly and certainly no such benefit can or could reasonably have been expected to result.'" (*Id.* at p. 444 (emphasis original), citing *Lent v. Tillson* (1887) 72 Cal. 404, 429.)

Knox reaffirmed the rule that a special assessment is presumptively valid and that the plaintiff had the burden of proof to show its invalidity: "A special assessment finally confirmed by a local legislative body in accordance with applicable law *will not be set aside by the courts unless it clearly appears* on the face of the record before that body, or from facts which may be judicially noticed" that the assessment is not proportional to the benefits bestowed or that no benefits will accrue. (*Knox v. City of Orland, supra,* 4 Cal.4th at pp. 145-146, emphasis added, quoting *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676; see *Silicon Valley, supra,* 44 Cal.4th at pp. 444-445.) *Knox* concerned special assessments (also called benefit assessments) for park maintenance. (*Knox v. City of Orland, supra,* 4 Cal.4th at pp. 135-136 and fn. 1.) *Knox* rejected plaintiffs' request for a reevaluation of the standard of review for special assessments based on the decision in *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235. (*Silicon Valley, supra*, 44 Cal.4th at p. 446.) The *Knox* court carefully analyzed *Beaumont Investors'* statement that the local government should bear the burden of proof as to whether a fee for water hook-ups on new construction was reasonably allocated, but was "not persuaded by the *Beaumont Investors* decision [citation] to deviate from the traditional standard of review." (*Knox, supra,* 4 Cal.4th at p. 147; accord, *Brydon v. East Bay Municipal Utility Dist.*

(1994) 24 Cal.App.4th 178, 191.) In fact, the *Beaumont* court's broad statements regarding the burden of proof were unnecessary to its actual holding that the government had provided an insufficient record to identify the basis for the allocation. (*Beaumont Investors, supra,* 165 Cal.App.3d at pp. 236-237; *Knox, supra,* 4 Cal.4th at p. 147, fn. 20.) The government's failure to bear the initial burden of producing an adequate rulemaking record -- the burden of producing evidence – does not determine the ultimate burden of persuasion. (See generally, *Metropolitan Water Dist. of Southern California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 969-970 [explaining the distinction between the "burden of producing evidence" and the "burden of persuasion" and noting that the courts have frequently confused the two concepts].)

Proposition 218's Proportionality Test Does Not Apply To State Regulatory Fees

In addition to addressing the burden of proof in Proposition 218 litigation, *Silicon Valley* applies Proposition 218's proportionality requirement for assessments. (*Silicon Valley, supra,* 44 Cal.4th at pp. 456-458; Cal. Const., art., XIII D, § 4, subd. (a).) Proposition 218 sets a similar proportionality requirement for property related fees. (Cal. Const., art. XIII D, § 6, subd. (b)(3).) Like the provisions of Proposition 218 addressing the burden of proof, these proportionality requirements apply only to local government. (Cal. Const., art. XIII D, § 2, subd. (a).)

Even with respect to fees imposed by local governments, however, the proportionality requirement of Proposition 218 applies only to property related fees, defined as fees imposed "upon a parcel or upon a person as an incident of property ownership." (Cal. Const., art. XIII D, §§ 2, subd. (e), 6, subd. (b)(3).) Proposition 218's proportionality requirement does not govern a local regulatory fee that is not a "property related" fee.

Sinclair Paint establishes a "reasonable relationship" test for regulatory fees, not a proportionality test. (*Sinclair Paint, supra,* 15 Cal.4th at pp. 866, 876, 878.) Indeed, proving the validity of a benefit assessment has never been completely analogous to proving the validity of a regulatory fee. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874.) A benefit assessment's purpose is "to require the properties which have received a special benefit from a public improvement to pay the cost of that improvement, and not to fund an agency's ongoing budget." (*Silicon Valley, supra,* 44 Cal.4th at p. 457 [internal quotations omitted].) A regulatory fee, unlike a benefit fee or a development fee, may have the purpose of paying for an ongoing regulatory program, including indirect costs. (*Sinclair Paint, supra,* 15 Cal.4th at pp. 874-875; 878 [discussing the state's police power and broad legislative discretion to regulate business, including license fees]; *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1135 [fee to apportion the costs of permit programs among all monitored polluters].) Consequently, nothing in the case law precludes a regulatory fee from being calculated by first determining the amount to be collected in fees, and then deciding how to allocate the fee among the regulated community, as long as the allocation is reasonable.

CONCLUSION

Silicon Valley supports the State's position regarding the appropriate standard of review and burden of proof in this challenge to the constitutionality of state water right fee regulations and statutes. Proposition 218 does not apply to charges imposed by state government. Proposition 13 has no language or history comparable to that found in Proposition 218. Consequently, the reasoning of *Silicon Valley* does not extend to an action challenging the validity of state regulatory fees. While SWRCB must provide a record sufficient to support its findings of fact under "the abuse of discretion standard of review," the regulations should be presumed valid, and validity is determined based on a fair and reasonable relationship test, not a requirement for strict proportionality.

Dated: October 8, 2008

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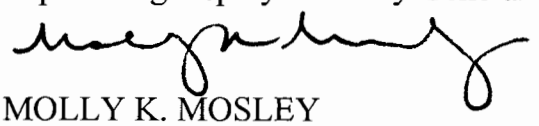

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CERTIFICATION OF WORD COUNT

The text of the State's Supplemental Brief consists of 2,495 words according to the word processing program used to prepare the brief.

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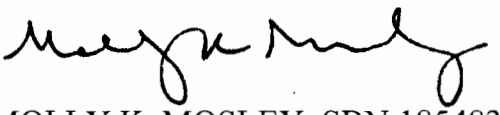

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DECLARATION OF SERVICE BY U.S. MAIL

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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 that same day in the ordinary course of business.

On October 8, 2008, I served the attached **RESPONDENTS' SUPPLEMENTAL BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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