IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S150518

CALIFORNIA FARM BUREAU FEDERATION,
NORTHERN CALIFORNIA WATER ASSOCIATION, and
CENTRAL VALLEY PROJECT WATER ASSOCIATION
Plaintiffs and Appellants,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD,
Defendant and Respondent.

After an Opinion by the Court of Appeal,
Third Appellate District
(Case No. C050289)

On Appeal from the Superior Court of Sacramento County
(Case Nos. 03CS01776 & 04CS00473,
Honorable Raymond Cadei, Judge)

BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS AND APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

CALIFORNIA CONSTITUTION

CALIFORNIA STATUTES

MISCELLANEOUS

INTRODUCTION

Nearly 30 years ago, California voters approved Proposition 13 and amended their constitution as part of a now legendary "taxpayer revolt." The new provision was truly revolutionary, putting significant restrictions on the power of government at all levels to enact new or increased taxes.

With the enactment of Proposition 13, the distinction between taxes, fees, and other charges suddenly took on a new urgency and importance. If the charges at issue were "taxes," then Article XIIIA of the California Constitution either made it difficult to obtain approval for the new levies, or it forbade them altogether. However, this Court has noted that "'tax' has no fixed meaning, and that the distinction between taxes and fees is frequently 'blurred,' taking on different meanings in different contexts." *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 874 (1997).

Over the three decades since the enactment of Proposition 13, California has witnessed a cycle of state or local assertion of authority to enact new or increased charges free of the restrictions of Article XIIIA, followed by a new court decision approving or rejecting the new charge, and sometimes followed by a new initiative designed to restrict the new charge. Whether this can be characterized as an attempt to plug "government-devised loopholes in Proposition 13," *Apartment Ass'n of*

L.A. County, Inc. v. City of L.A., 24 Cal. 4th 830, 839 (2001),[1] or attempts to broaden the scope of the tax limitation first imposed in 1978, the result has been a long-running battle between the people, the initiative proponents, the Legislature (or the cities and counties), and the courts.

This history informs the task set before the Court in this case. At issue is not simply the interpretation of the legislation or even the administrative regulations. Instead, the Court interprets the Constitution of the State of California—and a provision of that Constitution adopted by the voters via the initiative process.

Amici have been subject to nearly every type of new or creative revenue charge since the adoption of Proposition 13. They are engaged in various enterprises that make up the economic engine of California. Creating jobs, generating growth and tax revenues, and making California the envy of other states (and nations) is the result of the daily efforts of these amici. They do not seek to avoid paying their share of taxes. They worry, however, that an increased move to fees without adequate remedies

[1] *See, e.g., Howard Jarvis Taxpayers Ass'n v. City of Riverside*, 73 Cal. App. 4th 679, 686 (1999) ("Proposition 218 was enacted to plug this loophole in Proposition 13 and to stop this rampant abuse of special assessments. The exemption therefore was intended, conversely, to carve out traditionally appropriate, nonabusive special assessments."); *Santa Clara County Local Transp. Auth. v. Guardino*, 11 Cal. 4th 220, 235 (1995) ("the evident intent of the drafters of Proposition 62 to close by legislation what they perceived were court-made 'loopholes' in Proposition 13").

will shift an unfair burden to a small minority without addressing the structural issues that seem to vex the Legislature.

Clear guidance from this Court on the scope of the Legislature's power to impose new charges without meeting the two-thirds vote requirement of Article XIIIA is desperately needed. Guidance is also required, however, on the appropriate remedy for when a line is crossed by an agency implementing a new charge. There must be a workable remedy that provides a ready and efficient means for swift enforcement of the limits recognized by this Court. The remedy must be workable for both the agency and the taxpayer. This case may provide the Court an opportunity to speak to these issues.

IDENTITY AND INTEREST OF AMICI

The California Chamber of Commerce is the largest, voluntary business association within the state of California, with 16,000 members, both individual and corporate, representing virtually every economic interest in the state. While the Chamber represents several of the largest corporations in California, 75% of our members have 100 or fewer employees. The Chamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues. The Chamber only participates as amicus curiae on matters that have a significant impact on California businesses; the above-captioned matter is but one example.

The Personal Insurance Federation of California (PIFC) is a nonprofit insurance trade association dedicated to representing its member companies' interests before governmental bodies, including the California Legislature, the Commissioner, and California courts. PIFC's members are insurers specializing in personal lines insurance, primarily private passenger automobile and homeowners insurance, in California and elsewhere. In addition, the National Association of Mutual Insurance Companies is an associate member of PIFC. PIFC's members account for approximately 48.7% of all personal lines insurance sold in California.

The Association of California Insurance Companies (ACIC) is an affiliate of the Property Casualty Insurers Association of America (PCI) and represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write 41.8% of the property/casualty insurance in California, including 57.3% of personal auto insurance, 45.7% of commercial automobile insurance, 40% of homeowners insurance, 32.5% of business insurance, and 43.4% of the private workers compensation insurance. PCI is composed of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association.

Wine Institute is the public policy advocacy association of California wineries. Wine Institute brings together the resources of 1,000 wineries and affiliated businesses to support legislative and regulatory advocacy,

international market development, media relations, scientific research, and education programs that benefit the entire California wine industry. The mission of the Wine Institute is to initiate and advocate state, federal, and international public policy to enhance the environment for the responsible consumption and enjoyment of wine.

The National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). To fulfill its role as the voice for small business in the courts, the NFIB Legal Foundation files amicus briefs in cases nationwide that will impact small businesses.

NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents over 22,000 members in California.

California Taxpayers' Association has represented the interests of California taxpayers with respect to issues of state or local tax law and policy since 1926. Its membership consists of large and small taxpayers from virtually all of California's diverse industries.

These organizations represent a substantial segment of California. Their participation in the economy helps make California the envy of the country and world. They also represent a substantial portion of California's workforce, providing jobs in nearly every sector of our economy. They are vitally interested in the continued success of California. They understand that California government must find a way to solve the increasing demand for government programs on the one hand, and the inevitable limit on available resources on the other. Amici believe that this can best happen through a faithful interpretation and application of the tax limitation measures that the voters have added to the Constitution—especially section 3 of Article XIIIA.

STANDARD FOR INTERPRETING THE LEGAL PROVISIONS AT ISSUE

In this case, the Court is called upon to do more than simply interpret a statutory measure. At issue here is the interpretation of a provision of the California Constitution. In this regard, the Court's "paramount task is to ascertain the intent of those who enacted it," looking first to the text of the measure. *Prof'l Eng'rs in Cal. Gov't v. Kempton*, 40 Cal. 4th 1016, 1037 (2007) (*quoting Thompson v. Dep't of Corr.*, 25 Cal. 4th 117, 122 (2001)); *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 212 (2006); *see also Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 577 (2000) (George, CJ, concurring). If the text is

ambiguous, "a court ordinarily must adopt that interpretation which carries out the intent and objective of the drafters of the provision and the people by whose vote it was enacted." *League of Women Voters of Cal. v. McPherson*, 145 Cal. App. 4th 1469, 1481 (2006).

It is also important to keep in mind that this provision of the constitution was adopted by initiative. "Initiative measures as well as other general constitutional provisions should be interpreted liberally to give full effect to the framers' objective and the growing needs of the people." *Mills v. County of Trinity*, 108 Cal. App. 3d 656, 660 (1980).

As this Court has noted, "'the initiative is in essence *a legislative battering ram* which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end.'" *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 228 (1978) (citation omitted). This Court in *Amador* noted that this was a particularly apt description for the adoption of Proposition 13. *Id.* To give full effect to the intent of the voters in adopting Article XIIIA, and especially section 3 of that article, this Court should view any exceptions to the limits on legislative power very narrowly.

ARGUMENT

I

THE COURT SHOULD CARFULLY SCRUTINIZE THE FEE PROGRAM AT ISSUE

A. Structural Pressures Increase Reliance on "Fees"

This Court should examine closely *any* new charges imposed without a two-thirds vote of the Legislature. As this Court is well aware, the Legislature is facing significant issues surrounding the state budget. While other states report surplus receipts,[2] California continues to labor under a structural deficit. According to the Legislative Analyst's Office, the recently approved state budget will continue to show operating deficits of as much as $5 billion each year through 2009. Legislative Analyst's Office, *The 2007-08 Budget Package* (July 24, 2007 Rev.) (*available at* http://www.lao.ca.gov/2007/floor_packet/072007_floor_packet.pdf) (last visited Aug. 25, 2007). The deficit cannot be blamed on declining receipts, however. California continues to report growing tax revenue, and predicts an increase of $200 million in fiscal year 2008. *The Fiscal Survey of States*, *supra*, at 18.

[2] Nat'l Governors Ass'n & Nat'l Ass'n of State Budget Officers, *The Fiscal Survey of States*, June 2007, at 23 (*available at* http://www.nasbo.org/Publications/PDFs/Fiscal%20Survey%20of%20the%20States%20June%202007.pdf) (last visited Aug. 25, 2007).

The deficit is becoming a structural problem for the state because the Legislature is unable to agree on reductions in expenditures and has not been able to muster the necessary two-thirds vote to increase tax rates.

In enacting Proposition 13, the people were aware that there would be a strong temptation to raise tax rates in order to overcome the command of reduced property taxes. To counteract this temptation, section 3 of Article XIIIA restricts the ability of the state to increase state taxes. While section 4 of Article XIIIA restricted new and increased "special" taxes imposed by local government, section 3 contained a different substantive limitation:

> any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature.

Section 3 thus looks broadly at "any changes in State taxes" that increase revenues. As this Court has recognized, however, there are various types of charges that do not meet the definition of "taxes" under Proposition 13. Nonetheless, the language of section 3 requires a close look at attempts by the state to increase revenues without achieving the two-thirds vote requirement.

Shortly after the adoption of Proposition 13, local governments began to test the limits on their abilities to raise revenue. The Legislature responded with the adoption of Government Code section 50075, *et seq.*, to

define the types of charges that would not be subject to the restrictions on special taxes in Article XIIIA, section 4. "As used in this article, 'special tax' shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." Gov't Code § 50076. This statutory language came to form the basis of the definition of a regulatory fee. *See Sinclair Paint*, 15 Cal. 4th at 873.

While some courts opined that failure to meet this two-pronged definition ((1) the fee does not exceed reasonable cost of service *and* (2) it is not levied for general revenue purposes), this Court has rejected that approach for judging facial constitutionality of the fee. In *Barratt*, this Court stated, "[s]imply because a fee exceeds the reasonable cost of providing the service or regulatory activity for which it is charged does not transform it into a tax." *Barratt American, Inc. v. City of Rancho Cucamonga*, 37 Cal. 4th 685, 700 (2005).[3]

In rejecting the argument that excess collections would transform a fee into a tax, the Court did not suggest that the local agency could retain the excess. This seems to suggest that the crux of the matter for this Court is whether the fee is imposed for "general revenue purposes." That still

[3] While an over-collection may not render the entire fee program unconstitutional, there are serious concerns that attend to charging a fee that exceeds the cost of the program that call for this Court to require an administrative remedy. *See* page 28, *infra*.

leaves the problem, however, of how to divine the revenue purpose behind a particular charge.

B. The *Sinclair Paint* Decision Approves State-Imposed "Fees" Enacted By Majority Vote

The Court ruled that these principles also applied to state charges in the *Sinclair Paint* case in 1990. Using cases interpreting section 4's restriction of local governments imposing special taxes, this Court sought to define "taxes" for the purpose of section 3.

Other than the decision below, there are only three reported decisions considering the restriction in section 3 (*Sinclair*, *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 53 Cal. 3d 245 (1991), and *Cal. Ass'n of Prof'l Scientists v. Dep't of Fish & Game*, 79 Cal. App. 4th 935 (2000)). It is not surprising, therefore, that this Court in *Sinclair Paint* turned to cases interpreting the restriction on local special taxes (section 4) in order to aid in the interpretation of section 3. *Sinclair Paint*, 15 Cal. 4th at 873.

While those cases may assist in providing relevant general principles, care must be taken. The judicial gloss on section 4 has been impacted by this Court's one-time special rule of construction for section 4. In *L.A. County Transp. Comm'n v. Richmond*, 31 Cal. 3d 197 (1982), this Court opined that the two-thirds electoral vote requirement for new or increased taxes was fundamentally undemocratic. Therefore, the Court

decreed a special rule of construction for section 4 to limit the instances in which a two-thirds vote would be required:

> In view of the fundamentally undemocratic nature of the requirement for an extraordinary majority and the matters discussed above, the language of section 4 must be strictly construed and ambiguities resolved in favor of permitting voters of cities, counties and 'special districts' to enact 'special taxes' by a majority rather than a two-thirds vote.

Id. at 205.[4]

This rule of limiting construction, however, has never been applied to section 3 of Article XIIIA,[5] or to any other constitutional requirement for a two-thirds vote of the legislature.[6] Thus, cases that look with skepticism

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[4] This Court later limited this holding of *Richmond* (*Rider v. County of San Diego*, 1 Cal. 4th 1, 14 (1991)) and the voters reimposed the two-thirds vote requirement in Proposition 218 (Article XIIIC).

[5] *Cf. Kennedy Wholesale*, declining to construe section 3 as requiring a two-thirds voter requirement for adoption of state taxes by initiative. 53 Cal. 3d at 252 n.6. As this Court noted in *Kennedy Wholesale*, construing section 3 to require a two-thirds voter requirement would impose a limit on the right of the voters to enact laws by initiative. Such a construction, the Court noted, would run afoul of the duty to "'*resolve any reasonable doubts in favor of the exercise of this precious right*' (*Brosnahan v. Brown*, [32 Cal.3d 236, 241 (1982)])." *Kennedy Wholesale*, 53 Cal. 3d at 253.

[6] E.g. Cal. Const. art. IV, § 8(d) (urgency statutes); § 10 (veto override); § 12(d) (budget bill). California voters have demonstrated a strong policy preference for requiring a two-thirds vote of the Legislature in some instances. In 2004, a constitutional amendment was put forward proposing to reduce the vote requirement for approval of the annual budget. *See* Cal. Sec'y of State, *Official Voter Information Guide: California Primary Election—Proposition 56* (2004), *available at* http://primary2004.sos.ca.gov/propositions/prop56-title.html (last visited Aug. 28, 2007). That measure was *defeated* by a nearly two-thirds vote! *See* Cal. Sec'y of State, *Statement of Vote—State Ballot Measures* (2004), *available at* http://www.sos.ca.gov/elections/sov/2004_primary/measures.pdf (last visited Aug. 28, 2007).

on section 4 challenges may not always be applicable to challenges to raising questions under Section 3.

That said, the decisions under Section 3, especially those touching upon the subject of regulatory fees, are rare. Other than this Court's decision in *Sinclair*, only the court of appeal decision in CAPS has considered the question now before this court.

In *Sinclair*, this Court noted that the word "tax" "has no fixed meaning, and that the distinction between taxes and fees is frequently 'blurred,' taking on different meanings in different contexts." *Sinclair Paint*, 15 Cal. 4th at 874. This Court then outlined some of the characteristics of "taxes" that distinguish those charges from "fees." First, the Court noted that "taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted." *Id.*[7] The Court later noted that the "revenue purpose" concept was not particularly helpful

[7] The Court cited *County of Fresno v. Malmstrom*, 94 Cal. App. 3d 974, 983 (1979) and *Shapell Indus., Inc. v. Governing Bd. of the Milpitas Unified Sch. Dist.*, 1 Cal. App. 4th 218, 240 (1991) as examples of fees in these charges that were not taxes under this standard. *Malmstrom* dealt with a special benefit assessment, where a specific parcel of real property bears the burden of paying the cost of public improvements that specially benefit that parcel. "[T]he compensating benefit to the property owner is the warrant, and the sole warrant, for the legislature itself to impose the burdens of these special assessments." *Spring Street Co. v. City of L.A.*, 170 Cal. 24, 30 (1915). *Shapell* dealt with developer fees which are generally imposed to mitigate public burdens created by the new development.

since "*all* regulatory fees are necessarily aimed at raising 'revenue.'" *Id.* at 880.[8]

The second characteristic noted by the Court is that, "[m]ost taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other governmental benefits or privileges." *Id*. at 874. The Court noted, however, that there are fees that are compulsory (*id*.) and could have noted as well that there are a number of taxes that are predicated on voluntary actions, including: the sales tax, property tax, excises taxes, vehicle license tax, and even the varying rates of the personal income tax. Finally, the Court noted that the distinction that fit under the section 4 cases was that the charges imposed by local entities that were recognized as "fees" rather than "taxes" were imposed under the entity's "police power, rather than the taxing power." *Id*. at 875.

This distinction may not be helpful, however, in deciding whether a charge imposed by the Legislature is subject to the restrictions in section 3 of Article XIIIA. All action of the California Legislature is predicated on its exercise of the police power. That is to say, the Legislature exercises inherent government authority in California and need not locate a source for its power in the Constitution. *See People v. Raymond*, 34 Cal. 492, 502

[8] The Court then noted decisions that attempted to distinguish whether the primary purpose of the enactment was to regulate or to raise revenue. "[I]f regulation is the primary purpose, the mere fact that revenue is also obtained does not make the imposition a tax." *Id*. at 880.

(1868); *Cent. Pac. R.R. Co. v. State Bd. of Equalization*, 60 Cal. 35, 59-60 (1882); *Ex parte Hayden*, 147 Cal. 649, 650 (1905) (noting that *both* the power to tax and the power to regulate find their source in the inherent police power of the state); *McDougald v. Lilienthal*, 174 Cal. 698, 702 (1917) (power to tax is an aspect of state sovereignty); *cf. In re Terui*, 187 Cal. 20, 22 (1921) (noting distinction between the "exercise . . . of the power of taxation" as distinguished from the "exercise of the police power of regulation"); *see generally* Joseph R. Grodin et al., *The California State Constitution: A Reference Guide* 84 (1993) ("the state legislature has plenary authority"). Instead, it only needs to be concerned with whether the people have placed in the Constitution a restriction on that power (such as section 3).

In other parts of the opinion, this Court observed that Sinclair did not argue that the charge at issue exceeded the reasonable cost of providing the service for which the fee was charged (medical screening for children exposed to lead-based paints) nor that the fee bore no reasonable relationship to the burdens that Sinclair's prior sale of lead-based paint generated. *Sinclair*, 15 Cal. 4th at 876.

Citing to a court of appeal decision, the Court noted that to establish that a charge was a "regulatory fee" rather than a "special tax":

> "the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so

> that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity."

Id. at 878 (*quoting San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.*, 203 Cal. App. 3d 1132, 1146 (1988)).[9] This Court further emphasized that the funds collected in *Sinclair Paint* were required to be used "*exclusively*" for the regulatory program. *Sinclair Paint*, 15 Cal. 4th at 881 (emphasis in original). This last point is important, as it underscores the point that the fee is merely part of the regulatory program rather than assessed for unrelated revenue purposes.

The only other reported decision on this issue is *Cal. Ass'n of Prof'l Scientists*, 79 Cal. App. 4th 935. In that case, the court of appeal upheld a flat fee structure where project applicants were charged a higher filing fee for projects in which a "negative declaration" was prepared than for projects requiring a full environmental impact. *Id*. at 940. The court reached this conclusion on the basis of testimony that "staff *probably* spends more time on the review of a negative declaration." *Id*. at 955 (emphasis supplied). The court's decision was premised on its understanding of this Court's decision in *Sinclair Paint*: "*Sinclair* is noteworthy for its expansive legitimation of regulatory fees." *Id*. at 947.

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[9] The Court also cited to a portion of the court of appeal decision in *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.*, 165 Cal. App. 3d 227, 234-35 (1985), noting that the local agency bears the burden of proving the estimated cost of a project and the basis for allocating the charge to particular individuals.

The court based its conclusions that a flat fee met the requirement of proportionality on the fact that the total fees collected did not exceed the cost of the program. *Id*. at 950. This stands in interesting counterpoint to this Court's conclusion in *Barratt American* that, "[s]imply because a fee exceeds the reasonable cost of providing the service or regulatory activity for which it is charged does not transform it into a tax." *Barratt*, 37 Cal. 4th at 700. Taken together the two cases suggest that a fee need not be limited to the cost of the regulatory program and need not be charged at a rate proportional to the regulatory burden or cost created by the payor. This Court's decision in *Sinclair*, however, cannot be read so broadly.

C. Distinguishing a Fee From a Tax

These prior decisions present the Court with a number of different factors against which it can measure a particular charge. Does the charge pay for an activity previously financed by the taxes that are now subject to restriction?[10] Does the total amount collected under the charge exceed the cost of the regulation? *Cal. Ass'n of Prof'l Scientists*, 79 Cal. App. 4th at 950. Is the amount of the charge apportioned on the basis of the payor's burden or benefit? *San Diego Gas & Elec.*, 203 Cal. App. 3d at 1146. Is the purpose of the program of which the fee is only a part, primarily

[10] As with other factors, this point alone is of little use. Since the first decisions limiting the reach of Proposition 13, local (and now state) government has been shifting activities formerly funded by taxes to fees, assessments, or other types of charges thought to be free of Proposition 13's restrictions.

regulatory in nature? *United Bus. Comm'n v. City of San Diego*, 91 Cal. App. 3d 156, 165 (1979). Finally, is the fee used exclusively for the regulatory program? *Sinclair Paint*, 15 Cal. 4th at 881.

These criteria, in turn, suggest other related lines of inquiry. In apportioning the amount of the charge, is the payor being charged fees for burdens caused by others? Is the population of those charged the fee under or over-inclusive? If there is an overcharge in a particular year, is the overage credited to the payor or is it used for the general revenue purposes of the agency?

Taken in isolation, however, none of these factors can define a "tax," "fee," or "assessment." Instead, we must always keep in mind the purpose of the inquiry. The Court's purpose here is to give effect to the intent of the voters who decreed that enactment of measures increasing state revenues requires a broad consensus in the Legislature. Against this backdrop of purpose, the definition of "regulatory fee" must necessarily be narrow. Otherwise we risk defeating the intent of Article XIIIA, section 3 of the California Constitution—a provision that is to be construed liberally to effectuate the intent of the voters. *See, e.g.*, *Mills*, 108 Cal. App. 3d at 660, *Prof'l Eng'rs in Cal. Gov't*, 40 Cal. 4th at 1037.

Keeping in mind this purpose, then, a regulatory fee is a charge that is part of a larger program of regulation and is intended to fund that regulation. The incidence of the fee falls exclusively on those subject to the

regulation, and the fee must be used exclusively to fund the regulatory program. If the purpose of the fee is to finance the regulatory program[11] (as is alleged here), the amount of the fee is apportioned according to the burden created by the individuals and entities that are subject to the regulation.[12]

A statutory provision allowing collection of funds in excess of program needs, or permitting use of those funds for other programs, raises serious concerns that the charge is in reality a tax rather than a fee. Similarly, apportionment of the costs of the regulation in a manner unrelated to the burden of regulation also makes the charge more like a tax. *See, e.g.*, *Knox v. City of Orland*, 4 Cal. 4th 132, 142 (1992) (citations omitted) ("[A] tax can be levied '"without reference to peculiar benefits to particular individuals."'"); *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 327 (1981) ("taxes . . . need not be related to benefits received or burdens created.").

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[11] *Sinclair Paint* did not, strictly speaking, involve a "regulatory fee" in this sense. Instead, the fee in that case was intended to remedy a burden created by past conduct of the regulated entities. Apportioning the fee on anything other than market share would have brought the purpose of the fee into question.

[12] The "polluter pays" rationale of the *San Diego Gas & Elec.* decision creates a different species of regulatory fee. In that case, the court ruled that apportionment of the fee could be based on a particular legislative policy goal (reduction of pollution). *See Brydon v. E. Bay Mun. Util. Dist.*, 24 Cal. App. 4th 178, 192 (1994) ("the regulatory scheme set forth by the APCD was designed to achieve a legislatively mandated ecological objective.") The Legislature in this case, however, did not identify a regulatory purpose for the fee beyond cost recoupment.

If some regulated parties are asked to pay for regulation of others who do not pay (or are not even assessed), the charge becomes a pure revenue measure rather than self-contained regulatory program. Where the charge is apportioned on the ability to pay, ease of collection, or likelihood of compliance, its purpose is to raise revenue rather than regulate. The regulated entity is not paying for the burden they create or the cost of regulating their own activities. Instead, they are serving a more general governmental purpose of subsidizing a program for the general welfare. In short, they are paying a tax.

Along the same lines, allowing collection of fees in excess of the cost of the program raises serious concerns that the charge is not imposed to pay for the cost of the regulation. While a reduction in fees in subsequent years may work when the population of payors remains stable and they are assessed on an annual basis, few regulatory regimes operate on such a closed-end basis. If the fee payor in the year of over-collection discontinues that portion of their business, dies, or goes out of business, then the fee they paid is not used to offset any regulatory burden they caused. When the excess revenue collected in one year is simply applied to costs incurred in subsequent years, the payor is again subsidizing a program for the general welfare rather than paying for the cost of the regulatory burden it has caused. Another problem with fund balances that roll into subsequent years is whether those funds will be put to other uses.

Under the pressures of competing demands for state resources, the Legislature has diverted funds intended for other purposes into the general fund in the past. This is not to indict the Legislature or to ascribe ill motives, but rather to acknowledge a fact of modern political life where competing demands on the public fisc exceed the revenues collected. *See, e.g., Bd. of Admin. of the Pub. Employees' Ret. Sys. v. Wilson*, 52 Cal. App. 4th 1109, 1117 (1997) (funding state pension "in arrears"); *Cal. Teachers Ass'n v. Cory*, 155 Cal. App. 3d 494, 502 n.4 (1984) (reduced contributions to teachers pension program); *Valdes v. Cory*, 139 Cal. App. 3d 773 (1983) (suspension of payments to pension fund); *Urban v. Riley*, 21 Cal. 2d 232, 234 (1942) (transfers from real estate fund to general fund); *Veterans of Foreign Wars of the United States v. State of California*, 36 Cal. App. 3d 688, 695-96 (1974) (transfer of "surplus" in Veteran's Farm and Home Building Fund); *White v. State of California*, 88 Cal. App. 4th 298, 315-16 (2001) (noting the practice of fund transfers generally).[13]

D. Applying the Criteria in This Case

In judging the constitutionality of legislation, this Court's stated policy of liberally construing the provisions of the Constitution to effectuate the voter's intent must be applied. The Court should look carefully at the statutory scheme in light of the constitutional command that

[13] The recently enacted state budget also features transfers from transportation funds to supplement the general fund. *The 2007-08 Budget Package*, *supra*, at 11.

legislative changes providing for increases in revenue should be approved by a two-thirds vote. If there is to be an exception to that general rule, the exception should be based on a policy of advancing the intent of the voters to restrict increases in state taxation without a consensus decision of the Legislature.[14]

When the Legislature enacts a sufficiently general authorization for the collection of regulatory fees, facial constitutionality will rarely be an issue. However, the charge at issue in this case is underinclusive, in that not all regulated parties are required to pay.[15] Further, the legislation expressly authorized the Department to impose the charge on *some* parties that are not regulated. Anticipating that the federal government would refuse to pay a fee, the Legislature authorized the Department to charge that

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[14] The state argues in its brief that shifting this cost to fees (thus increasing state revenues since there was no off-setting tax reduction) somehow aids taxpayers. Section 3, however, commands a two-thirds vote in order to increase revenues. There is no doubt that this measure increased revenue since it did not provide for an off-setting tax reduction. It is hard to understand, therefore, how taxpayers gain a financial benefit here. This is especially true since the fee is imposed on a vital resource on which all Californians rely.

[15] As noted below, entities holding 38% of the water rights in California are not charged this fee. These individuals and agencies hold rights that date to before 1914 or that are based on riparian rights. Nonetheless, these parties, like the current licensees, are required to file annual reports with the Department stating the amount of water that will be withdrawn. *See* State Water Res. Control Bd., *State Water Resources Control Board Information Pertaining to Water Rights in California—1990* at 12 (*available at* http://www.waterrights.ca.gov/Forms/app_geninfo.pdf) (last visited Aug. 25, 2007); Water Code § 5101. This enables the Department to regulate the total amount of water left to flow in rivers and streams to support other public values.

share of the fee to individuals and entities that contract with the federal government for that water.[16] So, in addition to failing to charge all subject to the regulation, the charge is also *overinclusive*.

If the charge is not imposed on all who are subject to the regulation, but it is imposed on others who are not regulated, it is no longer part of the larger regulatory program. The purpose must be seen as primarily to raise money for the program, regardless of the source of the money. That is the classic definition of a tax. "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 (1937) (cited with approval in *Knox*, 4 Cal. 4th at 142).

It is understandably difficult to restrict the Legislature's ability to increase the state's revenue. However, as this Court noted, "Proposition 13 put local government on a strict budget and thus required it to make painful choices." *Ventura Group Ventures, Inc. v. Ventura Port Dist.*, 24 Cal. 4th 1089, 1103 (2001). In *Ventura*, this Court ultimately ruled that, "[t]he city could not, consistent with Proposition 13, avoid making painful choices." *Id*. at 1104. As painful and as difficult as those choices may be, the same must be true for the state in this case.

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[16] No similar provision in the law authorizes assessment of fees against the customers of those holding Pueblo or pre-1914 appropriative rights.

II

THE COURT SHOULD DEFINE THE REMEDY DUE TO THE INDIVIDUAL FEE PAYER

When a new fee is authorized, an administrative remedy must be made available so fee payors can seek an individualized refund without challenging the entire program. Even where the Legislature's authorization for a fee meets the requirements set by this Court for avoiding the two-thirds vote requirement of section 3, challenges to agency implementation are likely.

The increasing disconnect between available resources and desired programs at the state level is likely to lead the state to look for more opportunities to impose charges and increase revenues in a manner not covered by Article XIIIA, section 3's consensus vote requirement. Certainly, the enactment of Proposition 13 was met by local agency attempts to find new sources of revenue that were not subject to the new restrictions. With the state now facing increasing budgetary pressures, it would be unreasonable to expect that the Legislature will not attempt the same device.

When local governments began to implement these new funding ideas, they were predictably met with legal challenges. *See, e.g.*, *Bighorn-Desert View Water Agency*, 39 Cal. 4th at 212-13; *Barratt American*, 37 Cal. 4th at 701; *Ventura Group Ventures*, 24 Cal. 4th at 1103-04;

Apartment Ass'n of L.A. County, 24 Cal. 4th at 839; *Santa Clara County Local Transp. Auth.*, 11 Cal. 4th at 235-36; *Knox*, 4 Cal. 4th at 141-42; *Rider*, 1 Cal. 4th at 16; *Pennell v. City of San Jose*, 42 Cal. 3d 365, 375 (1986); *L.A. County Transp. Comm'n*, 31 Cal. 3d at 205; *Amador Valley Joint Union High Sch. Dist.*, 22 Cal. 3d at 228-29; *Howard Jarvis Taxpayers Ass'n*, 73 Cal. App. 4th at 686; *Isaac v. City of L.A.*, 66 Cal. App. 4th 586, 597 (1998); *Brydon*, 24 Cal. App. 4th at 192-93; *Alamo Rent-A-Car, Inc. v. Bd. of Supervisors of Orange County*, 221 Cal. App. 3d 198, 202-03 (1990); *San Diego Gas & Elec.*, 203 Cal. App. 3d at 1135; *Terminal Plaza Corp. v. City & County of S.F.*, 177 Cal. App. 3d 892, 906 (1986); *Trent Meredith*, 114 Cal. App. 3d at 327; *Mills*, 108 Cal. App. 3d at 660.

These reported decisions are but a small sampling of the tremendous amount of judicial resources devoted to battles between taxpayers and local agencies since the enactment of Proposition 13. Will the state face a similar experience—but with the resources for critical statewide programs called into question?

As noted above, a sufficiently general command to collect charges that can be made into true regulatory fees should pass facial constitutional scrutiny. The devil, as they say, is in the details. Taking that general legislative command, state agencies will be called on to implement the scheme at a level of detail that is well beyond the Legislature's contemplation. Given the size and complexity of California's government,

the Legislature could not possibly master the many details of how a particular charge will actually work on a day-to-day basis in a particular program. The Legislature must, therefore, rely on expert administrative agencies to supply those details. As can be seen from this case, those details can be expected to generate a great deal of conflict.

When faced with an analogous entrenched conflict surrounding a different constitutional freedom, the United States Supreme Court hit upon the idea of mandating a procedural remedy for resolution of individual claims short of filing a case in federal court.

In *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), the Court ruled that the First Amendment protections at issue in agency shop fee litigations were entitled to procedural protections. Those procedures did not, however, stem from the requirements of the due process clause. *Cf. Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1192-93 (7th Cir. 1984) (finding a due process remedy compelled by the liberty interest at stake). Instead, the Supreme Court ruled that the procedural protections were inherent in the First Amendment. *Chicago Teachers*, 475 U.S. at 307. Because the case dealt with the possible infringement of First Amendment liberties, the Court rejected the notion that "ordinary judicial remedies" were sufficient. *Id*. at 307 n.20. Nonetheless, by opening the door to a way to resolve a constitutional dispute short of the courthouse door, the Court appears to

have hit upon an effective concept for both protecting the constitutional liberty at stake and preserving judicial resources.

Facing a similar issue, this Court ruled that public school teachers subject to similar fees that might violate state *statutes* were also entitled to an advanced, informal remedy. *Cumero v. Pub. Employment Relations Bd.*, 49 Cal. 3d 575, 588, 590 (1989). This Court also found a procedural remedy component in a different First Amendment context in *Kash Enterprises, Inc. v. City of L.A.*, 19 Cal. 3d 294, 309 (1977).

Again, this Court noted the importance of procedural remedies for state employees facing discipline in *Skelly v. State Pers. Bd.*, 15 Cal. 3d 194 (1975). There, this Court noted that the statute granted procedural protections to employees, "[t]o help insure that the goals of civil service are not thwarted by those in power." *Id*. at 202.[17]

This case, of course, does not deal with First Amendment liberties. However, as was the case in *Skelly*, it deals with fundamental questions about the manner in which California government operates. The parties to these disputes need a reasonably prompt method of adjudicating their claims without calling into question the financial resources for an entire state program.

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[17] *See also* Carmen H. Warschaw, *California's New Fair Housing Law*, 37 S. Cal. L. Rev. 47 (1963-64) (noting success of Fair Employment Practices Commission in resolving disputes short of formal enforcement proceedings).

To this end, amici suggest this Court consider requiring the state to offer a prompt and effective administrative remedy. Assuming that the program authorized by the Legislature can be implemented in a constitutional manner, individuals and businesses subject to these new charges should have the ability to seek a refund when an agency overcharges or improperly calculates a fee. When an agency collects too much—in other words, when the regulated entities have been charged more than the cost of the regulatory program—a refund should available instead of requiring a challenge to the entire program. Similarly, when fees are calculated so that one group subsidizes another, or is otherwise charged more than its proportionate share of the regulatory burden, the administrative remedy could offer individualized adjustments to the fee.

The idea of refunding wrongly calculated fees undoubtedly will cause some consternation among the agencies. After all, refunds reduce their available resources and the remedy could result in a shortfall. Yet, individualized refunds should be far preferable to the agency to the prospect of having the entire fee invalidated.

It must be recognized that providing such an administrative remedy will not always be convenient for the agency, and will entail a cost to the state government. On the other side of the scale, however, is the constitutional policy of the State of California. The limits in section 3 of Article XIIIA are "constitutional mandates of the people . . . . Any

modification of these mandates must come from the people who, by constitutional amendment, may adopt such changes by a simple majority vote." *Rider*, 1 Cal. 4th at 16.

CONCLUSION

As the Chief Justice noted,

> As judges, we are not free to disregard applicable statutory or constitutional requirements even when they impose formidable obstacles to the government's financial ability to meet pressing public needs. The provisions of Proposition 62 and Proposition 13 were enacted by the voters of this state, and under our constitutional system the remedy for any untoward consequences that flow from those provisions necessarily lies with the voters, not with the justices of this court.

Rider, 1 Cal. 4th at 25 (George, J concurring). The majority opinion echoed the same theme: "We are sympathetic to the plight of local government in attempting to deal with the ever-increasing demands for revenue . . . . Yet Proposition 13 and its limitations on local taxation are constitutional mandates of the people which we are sworn to uphold and enforce." *Id*. at 16.

The state now faces many of the same difficult choices encountered by local governments in the immediate wake of Proposition 13. Yet, the constitutional policy is clear. It takes a two-thirds vote to increase state tax revenue.

This Court can grant some relief to *both* the state and the fee payors by requiring an administrative remedy for challenges to the manner in

which an agency implements an otherwise constitutional enactment. Such a remedy would afford individual fee payors a forum to challenge the application of the fee without calling into question the funding for an entire state-wide program. In this manner, the Court preserves the intent and purpose of section 3 while at the same time granting some breathing room to agencies faced with the difficult task of translating legislative commands into day-to-day practice.

DATED: August 29, 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS AND APPELLANTS is proportionately spaced, has a typeface of 13 points or more, and contains 7,744 words.

DATED: August 29, 2007.

_____

ANTHONY T. CASO

DECLARATION OF SERVICE BY MAIL

I, Lynda Bolton, declare as follows:

I am a resident of the State of California. I am over the age of 18 years and am not a party to the above-entitled action.

On August 29, 2007, true copies of BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS AND APPELLANTS were placed in envelopes addressed to:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 29th day of August, 2007, at Sacramento, California.

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LYNDA BOLTON