S150518

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA FARM BUREAU FEDERATION, ET AL.

Plaintiffs and Appellants,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

Defendant and Respondent.

After a Decision by the Court of Appeal,
Third Appellate District, Case No. C050289

APPLICATION FOR LEAVE TO FILE, AND BRIEF OF AMICUS HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF APPELLANTS

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APPLICATION FOR LEAVE TO FILE BRIEF

TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT,

Leave is hereby requested to file the accompanying Brief of Amicus Curiae on behalf of the Howard Jarvis Taxpayers Association in support of Appellants, California Farm Bureau Federation, *et al.*, in this action.

APPLICANTS' INTEREST

The late Howard Jarvis, founder of the Howard Jarvis Taxpayers Association (HJTA), and Paul Gann, whose Citizens Committee ultimately merged with HJTA, were the chief authors and sponsors of Proposition 13. These men and literally thousands of voters who supported them worked hard to gather the necessary signatures to qualify Proposition 13 for the statewide ballot, and contributed a great deal of time and money to campaign for its passage. HJTA has a direct interest, therefore, in this Court's interpretation of the initiative as it pertains to the underlying litigation. The interest of Amicus is to have the true intent of the voters given effect; that is, to require any levy that fits the definition of a "tax," whether it fits other definitions or not, to first be approved by those required to pay it.

HOW THE BRIEF WILL ASSIST THE COURT

HJTA's brief will focus not on the specific facts of this case, but rather on the law to be applied. The brief will show why the Court, when determining which levies are subject to the constitution's vote requirement for new taxes, should begin and end its analysis by testing the levy to see if it is a "tax," applying the Court's own definition of a tax–that is, any exaction not necessitated by an approval, benefit, or privilege conferred on the payer, which provides revenue for operating the government or a public service. Rather than treating "taxes" as a classification of *last* resort, applicable only if the levy cannot pass muster under some easier-to-impose classification, the Court should test a challenged levy by comparing it to the description of a tax *first*.

If a thing is found to fit the description of a tax, then the constitutional protections enacted by the voters for taxes should apply.

DATED: August 28, 2007.

Respectfully submitted,

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I

THE POWER TO *FEE* IS THE POWER TO DESTROY

Chief Justice John Marshall penned the truth that the power to tax is the power to destroy. *McCulloch v. Maryland* (1819) 17 U.S. 316, 431. And in the 1970's, taxes *were* destroying homeowners in California. Property taxes at that time averaged 3% of market value, and market values were escalating much faster than personal incomes. For any one home, multiple local entities taxed the property, and could increase their tax rates by a simple majority vote of the governing body. It was impossible for families to budget for next year's taxes, because no one knew what next year would bring. It was not uncommon for fixed-income seniors *who had paid off their mortgages* to nonetheless lose their homes to foreclosure because they could not afford their taxes!

In 1978, California voters, through thousands and thousands of small donations and volunteer hours, qualified and passed Proposition 13, adding article 13A to the state constitution. While Proposition 13 capped the property tax rate at 1%, and limited increases in appraised value to 2% per year, it targeted more than just property taxes. Section 3 restricts increases in *all* state taxes, and section 4 restricts increases in local taxes.

As this Court explained in *Amador Valley Joint Union HS Dist. v. Bd. of Equalization* (1978) 22 Cal.3d 208, "since any tax savings resulting from the [property tax limitations] could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, sections 3 and 4 combine to place restrictions upon [them as well]." *Id.* at 231. Sections 3 and 4 were essential because capping property taxes protects people from losing their homes only if the income from which they pay their property taxes is not siphoned away by other levies.

Politicians, however, didn't like being told that their budgets need to respect the taxpayers' budgets, and soon began levying creative alternatives to

"taxes." Although this Court recognized in *Amador Valley* that, for sections 3 and 4 of article 13A to operate as intended, they should apply to all "state or local levies of other than property taxes," subsequent cases unfortunately applied a strict construction to the term "taxes" in order to find exceptions from Proposition 13's voter approval requirement. Exceptions were found for "benefit assessments" (*County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974) and "regulatory fees" (*San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132).

The battle continues today over where the boundaries lie between taxes (which, if local, need voter approval and, if imposed by the State, need two-thirds legislative approval), and these other forms of monetary exaction.

The battle continues because the courts have granted themselves permission to leave the boundaries "blurry." As this Court stated in *Sinclair Paint Co. v. Bd. of Equalization* (1997) 15 Cal.4th 866, "The cases recognize that 'tax' has no fixed meaning, and that the distinction between taxes and fees is frequently 'blurred.'" *Id.* at 874.

Just as an unsettled boundary line between two property owners would make it impossible to determine with certainty whether one owner was trespassing upon the other, so the maintenance of a blurred boundary between taxes and fees has made it difficult for the judiciary itself to determine with certainty in many cases whether a fee crossed the line and became a tax. As a result, the cases that make up this area of the law offer ammunition for both sides whenever a dispute arises, as in the case at bar.

The stakes in this battle are high for both sides. For the government, characterizing an exaction as an assessment or a regulatory fee rather than a tax often means easily passing a measure that would otherwise fail, by removing the constitutional hurdle of a two-thirds vote. For taxpayers, every new easily passed exaction, whether imposed on them directly, or passed

through indirectly via the sellers of their homes, utilities, products, and services, means more of their paycheck goes to the government and less is left to support their families.

For society, the maintenance of a blurry distinction between taxes and fees is influencing elections. Public employee unions realize that refinancing existing programs with new fees frees up money in the General Fund to increase salaries, add benefits, and reduce the age of retirement. So they invest big campaign dollars to elect candidates who are willing to levy more fees at both the State and local levels of government.

The willingness of elected officials to levy more fees has bred a cottage industry of consultants who specialize in disguising taxes as fees. For a share of the booty, such consultants will study the political climate, design a levy that the courts will likely uphold if levied without a two-thirds vote or without any vote. At the local level, if an election is deemed necessary, consultants will identify the pockets of resistance, divide the community into gerrymandered districts that disenfranchise the resistance, run a one-sided campaign, count the votes, announce the tally, and keep the ballots secret. As their success grows, so does the number of agencies who utilize their services, and the frequency with which they do so.

The long term effect of the judiciary keeping the separation between taxes and fees "blurred" can now be seen. It is rendering the legislators of the minority party, and those citizens and territories represented by them, irrelevant. It is also rendering irrelevant the vote requirements for taxes contained in sections 3 and 4 of article 13A, thus defeating an important protection that the people added to their constitution to guard their liberty and property from the government.

If, as the State argues in this case, fees are not taxes whenever they are reasonably related to providing a service or regulation, so long as the money is

kept in that fund, then almost everything government does will eventually be financed by fees (or assessments). Police, fire, parks, libraries, and road maintenance are all services. Animal control, health inspections, code enforcement, and land use planning are all regulatory. By carefully dissecting government activities and artfully wording statutes and ordinances, the State and local agencies will continue to successfully cheat on the diet prescribed for them when the people passed Proposition 13, until we're right back where we started in the 1970's: big fat governments, and California's seniors barely surviving in order to pay their taxes. Justice Marshall's words are again coming true in California, with only a change in the label on the government's mechanism: The power to *fee* is the power to destroy.

II

SINCLAIR PAINT IS THE PROBLEM

If the line between fees and taxes was already hard to see before 1997, this Court nearly brushed it out with *Sinclair Paint Co. v. Bd. of Equalization* (1997) 15 Cal.4th 866. Commenting on what it described as the "broad ... implications of *Sinclair*," the Court of Appeal in *California Assn. of Professional Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935 said, "*Sinclair* is noteworthy for its expansive legitimation of regulatory fees." *CAPS*, 79 Cal.App.4th at 947.

Sinclair upheld a substantial fee (Sinclair Paint Company was paying approximately $100,000 per year in 1991) to finance a government program to train doctors how to detect lead poisoning, test "at risk" children for lead poisoning, treat children who have lead poisoning, and identify the likely source(s) responsible for each child's poisoning. *Sinclair*, 15 Cal.4th at 871. The program was "supported *entirely* by fees collected under the Act." *Id.* The fee was collected from every person "formerly and/or presently engaged in the stream of commerce of lead or products containing lead." *Id.* at 872. In

other words, the fee fell not only manufacturers, but also *shippers* and *stores* that sold lead-based paints, batteries, lead pipes, fishing sinkers, electrical solder, etc., in the past when the dangers of lead were unknown. *CAPS*, 79 Cal.App.4th at 947.

Had the Legislature called this fee for past conduct a "fine" for past conduct, it would have violated the constitution's *ex post facto* clause and the requirement of *mens rea*. See *People v. Wallace* (2004) 120 Cal.App.4th 867, 874 (court security fee would have violated *ex post facto* prohibition had it been a fine); *People v. Westlund* (2001) 87 Cal.App.4th 652, 657 (fine for possession of illegal product requires proof of defendant's knowledge that product was illegal).

Granting law-abiding taxpayers less protection than criminals, the Court ruled that this "fee" for past conduct, which takes from the taxpayer the same amount of money as a fine, could be imposed "on the basis of past conduct when not only were fees nonexistent, but the dangers of lead ... were unknown." *CAPS*, 79 Cal.App.4th at 947.

Had the Legislature called this fee to fund a public health program a "tax" to fund a public health program, it would have required a two-thirds vote of both houses. Although the fee takes from the taxpayer the same amount of money, for the same purpose, as a tax, the Court ruled that it also bore characteristics of a regulatory fee and therefore could be imposed without a two-thirds vote.

Thus, one label [fine] would have prohibited the fee altogether, another label [tax] would have required a two-thirds vote, while the one chosen [fee] removed all constitutional hurdles. This is illogical, but it illustrates how blurred the classifications are under *Sinclair*.

When legislators take advantage of the uncertainty created by *Sinclair*, confusion, conflict, and abuse can result. At this moment, for example, a

controversy is raging over the vote required to impose on certain employers a new state "fee" of 7.5% of payroll to pay for state-administered employee health insurance. Business associations, taxpayer groups, and Republican legislators argue that employers are already paying for work-related injuries and illnesses through Workers Compensation. Requiring employers to now insure their employees outside of work, and insure their dependents, is a "tax," they argue, that needs a two-thirds vote. However, the bill, AB 8 (Nunez), calls for only a majority vote.

If the law were clear, it would not be possible for policy makers and their advisors on both sides to believe with conviction that they are right and the other side is wrong. Yet that is the case; which means the law needs to be fixed.

III

FIXING THE LAW AND HONORING THE VOTERS' INTENT

Restoring the separation between classifications will require some clarification of *Sinclair*. Fortunately, the clarifying language is already embedded in the *Sinclair* opinion; it just needs to be emphasized and enforced. Reviewing past rulings regarding the nature of a tax, this Court observed, "In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted." 15 Cal.4th at 874. "Taxes are raised for the general revenue of the governmental entity to pay for ... *public* services." *Id.* "Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges." *Id.*

Summarizing these general rules about the nature of a tax, a tax is an exaction, not reasonably related to an approval, benefit, or privilege conferred by the government on the payer, which provides revenue for operating the government or a public service.

Rather than treating these general rules about the nature of taxes as though they described a classification of *last* resort, applicable only if the levy cannot pass muster under some easier-to-impose classification, the Court should test a challenged levy by comparing it to the description of a tax *first*. If a thing is found to fit the description of a tax, then the constitutional protections enacted by the voters for taxes should apply.

Applying the test for taxes first would not outlaw regulatory fees. On the contrary, most regulatory programs "establish jurisdiction" over their subjects by requiring a permit to engage in the regulated activity, whether it be operating a business, developing real property, selling a product or service, storing a potential pollutant, etc. When an agency requires a permit, regulatory conditions necessitated to approve an applicant's request for that permit can be required, including the payment of a regulatory fee to finance the cost of the regulation. Regulatory fees would continue to be available to government to finance the cost of processing permits, developing regulations, educating permitees how to comply with regulations, monitoring their reports, inspecting their facilities, etc. However, conditions that fit the test of a "tax," because they are not solely related to approving the applicant's permit, but rather finance a public service, would be subject to the constitutional vote for taxes.

In *Sinclair*, this Court found it "helpful," in developing a test for state taxes, to borrow from the law relating to local taxes. 15 Cal.4th at 873. That being the case, there is precedent in the law relating to local taxes that supports our proposal that the "tax test" should be applied first and, if it fits, the constitutional protections for taxes should apply.

In *Fenton v. City of Delano* (1984)162 Cal.App.3d 400, the Court of Appeal held that where a utilities charge could be considered *either* a tax or a fee, "the trial court properly found 'the utilities charge in issue is a tax.'" *Id.* at 405. Similarly, in *Bixel Associates v. City of Los Angeles* (1990) 216

Cal.App.3d 1208, a fire hydrant replacement fee had attributes of both a regulatory fee, imposed under the police power, and a tax to raise revenue for a public service, imposed pursuant to the taxing power. The court, however, did not let the regulatory fee portion of the levy "rescue" the tax portion from the constitutional requirement that taxes be voter approved. *Id.* at 1220. Again in *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, both parties agreed that, to the extent a "facilities fee" exceeded the cost of providing facilities to plaintiff, it fit "the definition of 'special tax' as contemplated by Proposition 13." *Id.* at 234. The court explained that where limits are placed on government's power by the people's initiative, exceptions must be read narrowly. *Id.* at 235. Since the agency failed to prove that *all* of its levy fit the regulatory fee exception, the levy could not escape the constitutional requirement that taxes be voter approved. *Id.* at 238. If the rule were otherwise, the court noted, there would be an incentive for government to inflate fees and keep their calculations vague, rather than limit fees and show the public the details of their calculations. "Such a perversion of process was surely not intended by the voters [who passed Proposition 13]." *Id.* at 236.

Within the constitution itself there is precedent that "tax" is not a classification of last resort, applicable only if the levy cannot be rescued by finding elements of some easier-to-impose classification. Article 13D, another article added by the people's initiative, section 2(e) defines a "fee" as "any levy *other than* an ad valorem tax, a special tax or an assessment ..." In other words, the people in article 13D indicated their intent that *fees* should be the category of last resort, applicable only if the levy is not found to fit some *harder*-to-impose classification.

Applying a tax-first analysis will restore the protections that taxpayers worked hard to add to their constitution through Proposition 13. It will honor

their intent that special votes apply to new taxes–*all* new taxes–not just those drafted by an amateur who didn't know how to mix in attributes of a regulatory fee. It will promote fair government, as illustrated by the *Bixel* case, where a group is not singled out because they happen to be over a regulatory barrel, to bear the cost of public services that rightfully should be financed by the general public through voter-approved taxes. And it will sensibly construe the constitution, not only by harmonizing article 13D, section 2(3), but also by applying *Beaumont*'s logic, that where constitutional conditions are imposed by the people on the taxing power of the Legislature, self-serving exceptions created by the Legislature (*e.g.*, Gov. Code § 50076) are read narrowly.

The alternative–keeping the distinction between taxes and fees blurred, and rescuing levies in the blurry zone from the constitution's special vote requirements–will only perpetuate the confusion, invite more abuse, and guarantee more litigation. This Court is urged to use the case at bar to restore clarity and predictability to the law.

DATED: August 28, 2007.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify, pursuant to Rule 14(c) of the California Rules of Court, that the above brief, including footnotes, but excluding the caption page, tables, and this certification, as measured by the word count of the computer program used to prepare the brief, contains 2,724 words.

DATED: August 28, 2007.

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