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DEC 16 2015

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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Deputy

CITY OF SAN BUENAVENTURA,
Plaintiff and Respondent/Cross-Appellant,

v.

UNITED WATER CONSERVATION DISTRICT AND BOARD OF DIRECTORS
OF UNITED WATER CONSERVATION DISTRICT,
Defendants and Appellants/Cross-Respondents.

SAN DIEGO COUNTY WATER AUTHORITY'S
APPLICATION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF; AND
AMICUS CURIAE BRIEF

Review of a Published Decision of the
Second Appellate District, Division 6, Case No. B251810

Reversing a Judgment of the Superior Court of the State of California
for the County of Santa Barbara, Case Nos. VENCI-00401714 and 1414739
Honorable Thomas P. Anderle, Judge Presiding

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APPLICATION FOR PERMISSION TO FILE *AMICUS* BRIEF

San Diego County Water Authority (“San Diego”) hereby applies for permission to file the attached proposed *amicus curiae* brief, pursuant to Rule of Court 8.520(f), as well as this Court’s December 8, 2015 order granting San Diego until December 11 to serve and file its *amicus* brief. As explained in further detail in San Diego’s *amicus* brief itself, as well as in San Diego’s November 25, 2015 application for relief from default, and in San Diego’s application for extension of time, filed December 8, 2015, San Diego has an interest in addressing issues raised by another *amicus*, the Metropolitan Water District of Southern California (“Met”), which seeks to obtain advisory rulings Met hopes will help it in its appeal of a judgment against Met and for San Diego in a case otherwise unrelated to this one. San Diego respectfully submits that its *amicus* brief will assist this Court by explaining why the arguments in Met’s *amicus* brief are legally erroneous. No party or counsel for any party in this case authored or funded any part of San Diego’s *amicus* brief, and no person or entity other than San Diego funded the preparation or submission of San Diego’s *amicus* brief.

Dated: December 11, 2015

KEKER & VAN NEST LLP

By: 

DAN JACKSON

*Attorneys for San Diego County
Water Authority*

No. S226036

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San Diego County Water Authority (“San Diego”) submits this brief as a friend of this Court in order to address issues raised in a brief filed by another *amicus*, the Metropolitan Water District of Southern California (“Met”). Met stated in its application to file its *amicus* brief that “the rates [it] charges its member agencies have been challenged under Proposition 26.” Met’s Nov. 18, 2015 App. at 2. More to the point, San Diego has been challenging Met’s rates under Proposition 26 (among other grounds) for the past five and a half years in the San Francisco Superior Court, and the Honorable Judge Curtis E.A. Karnow recently entered final judgment against Met in those cases, finding Met’s rates unconstitutional under Proposition 26, and invalid under California statutory and common law. Met has appealed that judgment, but rather than wait for its own appeal, Met’s *amicus* brief in this unrelated case asks this Court to “clarify” Proposition 26 in ways Met hopes to use in its appeal of Judge Karnow’s judgment. *See id.*; Met’s Nov. 23, 2015 *Amicus* Br. at 12-13. This Court should refuse Met’s request for “clarification,” not only because the “rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court,” *People ex rel. Lynch v. Superior Court*, 1 Cal. 3d 910, 912 (1970), but also because Met is simply wrong about the law.

The gist of Met’s argument is that “Proposition 26 does not cover payor-specific charges,” but only “regulatory fees.” Met’s *Amicus* Br. at 5, 9. But that contradicts the plain language of Proposition 26, as well as its

legislative history. Contrary to Met’s assertions, the Legislative Analysis provided to the voters made clear that Proposition 26 not only would redefine “some regulatory fees” as taxes, but also would redefine as taxes “other fees and charges,” including, for example, charges imposed on businesses to provide general benefits “rather than providing a direct and distinctive service to the business owner.” Prop. 26 Voter Info. Guide (Leg. Analysis) at 58.¹ Indeed, regulatory fees are the subject of just one of the seven exceptions to Proposition 26’s broad definition of “taxes”—exception (e)(3). Payor-specific charges, also known as “user fees,” are the subject of exceptions (e)(1) and (2). It is only true that “Proposition 26 does not cover payor-specific charges,” Met’s *Amicus Br.* at 5, in the circular sense that Proposition 26 does not affect charges that “comply with Proposition 26’s requirements already.” Prop. 26 Voter Info. Guide (Leg. Analysis) at 58. The same is true of regulatory fees, development fees, property-related fees, and every other type of fee or charge indicated in Proposition 26’s list of seven exceptions. *See id.*; Cal. Const. art. 13C § 1(e)(1)-(7). The real question is whether a particular fee or charge complies with Proposition 26’s requirements. Merely labeling a charge “payor-specific” begs that question instead of answering it.

¹ Available at <http://vig.cdn.sos.ca.gov/2010/general/pdf/english/26-title-summ-analysis.pdf>.

Met argues that *California Farm Bureau Federation v. State Water Resources Control Board*, 51 Cal. 4th 421 (2011), somehow established—despite expressly declining to address Proposition 26, *see id.* at 428 n.2—that Proposition 26’s payor-specific exceptions do not impose any proportionality requirements, but only “refer to the *overall* cost of related government activities.” Met’s *Amicus* Br. at 11 (Met’s emphasis). Met is wrong. *Cal. Farm Bureau* did not address payor-specific fees, but regulatory fees, which may be “valid despite the absence of any perceived ‘benefit’ accruing to the fee payers.” *Cal. Farm Bureau*, 51 Cal. 4th at 438 (quoting *Cal. Assn. of Prof’l Scientists v. Dep’t of Fish & Game*, 79 Cal. App. 4th 935, 945 (2000)). Even as to regulatory fees, *Cal. Farm Bureau* held that they must be apportioned in a manner that bears “a fair or reasonable relationship to the payor’s burdens on or benefits from the regulatory activity.” *Id.* at 437. That requirement is now codified in the final paragraph of article 13C, section 1(e), and is *additional* to the requirement that Met erroneously treats as the only one Proposition 26 imposes: “that the amount is no more than necessary to cover the reasonable costs of the governmental activity.” Cal. Const. art. 13C § 1(e), final ¶; *see also Griffith v. City of Santa Cruz*, 207 Cal. App. 4th 982, 996-97 (2012) (“The concluding sentence of” Cal. Const. art. 13C § 1(e) “repeats nearly verbatim the language” quoted in *Cal. Farm Bureau*, which

not only prohibits charges that exceed regulatory costs, but also prohibits charges that are unfairly or unreasonably apportioned).

Furthermore, payor-specific charges, unlike regulatory fees, are *not* “valid despite the absence of any perceived ‘benefit’ accruing to the fee payers.” *Cal. Farm Bureau*, 51 Cal. 4th at 438. Exactly the opposite: exception (e)(1) applies only to a “charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege”; and exception (e)(2) applies only to a “charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.” Cal. Const. art. 13C § 1(e)(1)-(2).

Even before Proposition 26, the courts rejected Met’s argument that such payor-specific charges—otherwise known as “user fees”—are valid, and not taxes, as long as the revenues generated “do not exceed the cost of providing [the] services,” and the fee or charge “is not levied for general revenue purposes.” *Bay Area Cellular Tel. Co. v. City of Union City*, 162 Cal. App. 4th 686, 698 (2008). On the contrary, user fees may only be charged for a specific service, only to the person actually using that service,

and only in an amount based on the service actually provided. *See id.* at 694-98; Cal. Const. art. 13C § 1(e)(1)-(2) (codifying these requirements).

Met's assertion that a payor-specific charge is valid as long as it does not exceed the "overall cost of related government activities," Met's *Amicus Br.* at 11, amounts to the assertion that Proposition 26 somehow *reduced* the former requirements for such charges, such that now the *only* requirement is that they cannot exceed "the reasonable costs of the government activity." Cal. Const. art. 13C § 1(e), final ¶. Again, that contradicts the language and legislative history of Proposition 26. *See id.*; <http://vig.cdn.sos.ca.gov/2010/general/pdf/english/26-arg-rebuttals.pdf>. Proposition 26 not only prohibits charges that exceed the costs of the government activity, but *also* requires "that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity," *and* that the local government prove that the charge is not a tax—*i.e.*, that it falls within one of the seven exceptions. Cal. Const. art. 13C § 1(e), final ¶. And, if the local government seeks to rely on one of the first two exceptions, the local government must *further* prove that the charge is imposed for a specific benefit, privilege, service or product provided directly to the payor and not to those not charged, and that the charge does not exceed the reasonable costs to the local government of providing that benefit, privilege, service or product. Cal. Const. art. 13C § 1(e)(1)-(2).

Finally, although Met contends that its position is supported by *Capistrano Taxpayers Ass'n, Inc. v. City of San Juan Capistrano*, 235 Cal. App. 4th 1493 (2015), that case refutes Met's argument that a charge is valid and not a tax as long as the amount collected does not exceed the overall costs of the government activity. *See id.* at 1504-14. The notion that "[a]pportionment is not a determination that lends itself to precise calculation," on which Met relies, "does not excuse water agencies from ascertaining the true costs of supplying water to various tiers of usage." *Id.* at 1514 (quoting *Griffith v. Pajaro Valley Water Mgmt. Agency*, 220 Cal. App. 4th 586, 601 (2013)); *cf.* Met's *Amicus Br.* at 14-15. Nor can a water agency's "work-backwards-from-total-cost methodology ... trump the plain language of the California state Constitution," or "excuse utilities from ascertaining cost of service now that the voters and the Constitution have chosen cost of service." *Capistrano*, 235 Cal. App. 4th at 1514.

For all of these reasons, San Diego respectfully submits that this Court should disregard Met's erroneous and self-serving arguments.

Dated: December 11, 2015

KEKER & VAN NEST LLP

By: 

DAN JACKSON
*Attorneys for San Diego County
Water Authority*

CERTIFICATE OF WORD COUNT

(Cal. Rule of Court 8.524(c)(1))

The text of this brief consists of 1,412 words, as counted by the Microsoft Word program used to generate the brief.

Dated: December 11, 2015

KEKER & VAN NEST LLP

By: 

DAN JACKSON

*Attorneys for San Diego County
Water Authority*

PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Kecker & Van Nest LLP, 633 Battery Street, San Francisco, CA 94111-1809.

On December 11, 2015, I served the following document(s):

SAN DIEGO COUNTY WATER AUTHORITY'S APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AND AMICUS CURIAE BRIEF

- by regular **UNITED STATES MAIL** by placing Copy in a sealed envelope addressed as shown below. I am readily familiar with the practice of Kecker & Van Nest LLP for collection and processing of correspondence for mailing. According to that practice, items are deposited with the United States Postal Service at San Francisco, California on that same day with postage thereon fully prepaid. I am aware that, on motion of the party served, service is presumed invalid if the postal cancellation date or the postage meter date is more than one day after the date of deposit for mailing stated in this affidavit.

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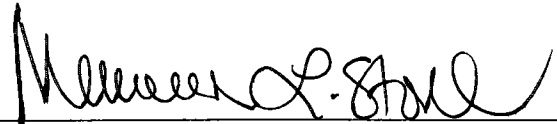
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Executed on December 11, 2015, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California
that the above is true and correct.



Maureen L. Stone