In the Supreme Court of the State of California

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Plaintiff and Appellant,

v.

STATE WATER RESOURCE CONTROL BOARD,

Defendant and Respondent.

Case No. S226753

First Appellate District, Division Two, Case No. A137680
San Francisco County Superior Court, Case No. CGC-11-516510
The Honorable Curtis E. A. Karnow, Judge

ANSWER TO BRIEF OF AMICI CURIAE

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INTRODUCTION

Contrary to the arguments of amici curiae (collectively the Dairy Associations), the trial court correctly required the California Building Industry Association (CBIA) to bear the burden of proof regarding the constitutionality of the fee schedule issued by the State Water Resources Control Board. CBIA and the Board agreed that the burden of proof was governed by *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421 (*Farm Bureau*), and differed only on how that decision should be interpreted. Correctly interpreting *Farm Bureau*, the trial court assigned the burden of proof to CBIA.

The Dairy Associations contend that the trial court should have assigned the burden of proof by applying Proposition 26, rather than *Farm Bureau*, and that other provisions of Proposition 26 also apply. The Dairy Associations' contentions fail, both procedurally and on the merits:

- CBIA never asked the trial court to consider Proposition 26, so the Dairy Associations may not assert that the trial court erred by not applying it.
- Proposition 26 is not relevant, because it applies only to a "change in state statute" that "results in" a higher tax. The Dairy Associations assert that the 2011-12 budget act was such a statute, but CBIA does not challenge the constitutionality of the budget act. The Dairy Associations must accept the case as they found it, and CBIA only challenges the Board's fee schedule, a regulation.
- The budget act did not "result[] in" a higher tax for purposes of Proposition 26, because the budget act only makes appropriations. Water Code section 13260 refers to the budget act, but the fee schedule implements section 13260 and not the budget act.

- To determine that an appropriation in the budget act can "result[] in" a higher fee for purposes of Proposition 26 would allow Proposition 26 to apply retroactively to fees adopted before 2010, contrary to the voters' unambiguous intent.
- The Dairy Associations' argument is contrary to Proposition 25—enacted the same day as Proposition 26—which allows the budget act to be approved by a simple majority vote.
- Under either Proposition 13 or Proposition 26, the undisputed facts establish that the fee schedule is constitutional.

The Court of Appeal's decision affirming the trial court's judgment should therefore be affirmed.

ARGUMENT

I. THE DAIRY ASSOCIATIONS IMPROPERLY PRESENT NEW ISSUES NOT RAISED AT TRIAL

A. CBIA Did Not Ask the Trial Court to Apply Proposition 26

The Dairy Associations argue that Proposition 26 required the Board to bear the burden of proof and that the trial court erred by failing to make findings of fact as to whether the Board satisfied that burden. (Dairy Associations' brief, pp. 11-12.) But CBIA never asked the trial court to apply Proposition 26 or make those findings of fact, so CBIA is responsible for the alleged error.

Proposition 26 amended article XIII A of the California Constitution in November 2010 to impose new legal requirements for "[a]ny change in state statute which results in any taxpayer paying a higher tax. . . ." (Cal. Const., art. XIII A, § 3, subd. (a).) Any such statute must be approved by a two-thirds majority of each house of the Legislature, and the state bears the burden of proving whether a statute imposes a "tax" subject to that rule. (*Id.*, subds. (a) & (d).) "Tax" is defined to include "any levy, charge, or

exaction of any kind imposed by the State," subject to several stated exceptions. (*Id.*, subd. (b).) Proposition 26 applies to "any tax adopted after January 1, 2010," but it does not provide for any other retroactive effect. (*Id.*, subd. (c).)

When CBIA presented its case to the trial court, CBIA never mentioned Proposition 26 at all. (See, e.g., Joint Appendix [JA] 4-22, 107, 538-539.) CBIA argued that the burden of proof was governed instead by *Farm Bureau, supra*, 51 Cal.4th 421. (JA 60-61, 538-539.) The Board agreed that *Farm Bureau* was controlling but disagreed with CBIA's interpretation of the case. (JA 106-107.) The trial court found it unnecessary to discuss the burden of proof, because the material facts were not in dispute and CBIA made "no showing" that the fee was invalid. (JA 552-555.)

CBIA first mentioned Proposition 26 in its reply brief in the Court of Appeal. (See CBIA's opening brief on appeal, pp. 23-25; CBIA's closing brief on appeal, p. 20.) CBIA then cited Proposition 26 only regarding the burden of proof. (CBIA's closing brief on appeal, pp. 1-3, 20, 31-34.) As the Court of Appeal observed, "CBIA argues that the Board's fee is an unconstitutional tax but it does not cite any constitutional provision. It relies on cases applying Proposition 13 . . . ." (Slip opn., p. 18, fn. 9.) Even now, CBIA does not specify whether the merits of the case are governed by Proposition 26, Proposition 13, or both. (See CBIA's opening brief, pp. 1-6, 20-24, 28-29, 32-34; CBIA's reply brief, pp. 10-11, 29-32, 35, 45-47.)

"[I]t is the general rule that an amicus curiae accepts the case as he finds it and may not 'launch out upon a juridical expedition of its own unrelated to the actual appellate record . . . .' " (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1047, fn. 12, quoting *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497

510-511, in turn quoting *Pratt v. Coat Trucking, Inc.* (1964) 228 Cal.App.2d 139, 143.) Under that rule, "California courts will not consider issues raised for the first time by an amicus." (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1154, fn. 7.)

Since CBIA never asked the trial court to apply Proposition 26, the Dairy Associations may not now assert that Proposition 26 applies or that the trial court erred by failing to make findings of fact required by Proposition 26. (See *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 48 [the doctrine of invited error prevents a party from taking advantage of an error that "could have been corrected earlier if brought to the trial court's attention"].)

B. CBIA Has Never Challenged Any Change in Statute

The Dairy Associations argue that the 2011-12 budget act was a "change in state statute" governed by Proposition 26. (Dairy Associations' brief, pp. 11-13.) Their argument implies that the budget act itself increased a "tax" and therefore required approval by a two-thirds majority of both houses of the Legislature. (See Cal. Const., art. XIII A, § 3, subd. (a).) Since the budget act was not approved by a two-thirds majority, the Dairy Associations seem to suggest that the budget act itself was not validly enacted.

However, CBIA does not challenge the budget act, so the validity of the budget act is not in issue. CBIA does not challenge *any* change in statute, but only challenges the Board's fee schedule for fiscal year 2011-12. (JA 5, 21-22.) The fee schedule is a regulation and not a statute. (Cal. Code Regs., tit. 23, §§ 2200, 2200.6, & 2200.7, Register 2011, No. 42 (Oct. 19, 2011); Water Code, § 13260, subd. (f)(1) [requiring the Board to

issue an annual fee schedule by emergency regulation].)[1] As amici, the Dairy Associations may not address claims that neither party has raised. (See *Professional Engineers in California Government v. Kempton*, *supra*, 40 Cal.4th at p. 1047, fn. 12.)

II. THE BUDGET ACT DID NOT "RESULT[] IN" A HIGHER FEE

Even if the Dairy Associations' contentions were properly before the court, they would fail on the merits.

A. The Budget Act Only Appropriated Funds and Did Not Result in a Higher Fee

The budget act did not "result[] in" a higher fee for purposes of Proposition 26. The statute that governs the amount of the waste discharge permit fee is section 13260, which requires the fee to be set at the amount necessary to help recover the Board's regulatory costs. The budget act only makes appropriations. Although section 13260 refers to the budget act, the only statute that "results in" the fee is section 13260.

Section 13260 requires the Board to set the amount of the fee each year by adopting a fee schedule by emergency regulation. (§ 13260, subd. (f)(1).) The total amount of the fee generated by the fee schedule must equal the "amount necessary" to help recover the Board's regulatory costs that year:

> The total amount of annual fees collected pursuant to this section *shall equal that amount necessary to recover costs incurred* in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(§ 13260, subd. (d)(1)(B), italics added.) Section 13260 also lists examples of recoverable regulatory costs. (§ 13260, subd. (d)(1)(C).)

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[1] All further statutory references are to the Water Code unless otherwise stated.

The Dairy Associations disregard those parts of section 13260 and focus only on the part that refers to the budget act. (§ 13260, subd. (f)(1) ["The total revenue collected each year through annual fees shall be set at an amount equal to the revenue levels set forth in the Budget Act"].) But the budget act merely appropriates funds for the ensuing fiscal year. (See Cal. Const., art. IV, § 12, subd. (c)(1) [requiring the Governor's annual budget to be "accompanied by a budget bill itemizing recommended expenditures"].) Appropriations do not generate revenue, so "[b]y definition, appropriations are not taxes." (*Yes on 25, Citizens For An On-Time Budget v. Superior Court* (2010) 189 Cal.App.4th 1445, 1455.)

The Board issued its fee schedule under the authority granted by the Water Code, not the budget act. (See Cal. Code Regs., tit. 23, §§ 2200, 2200.6, & 2200.7, Register 2011, No. 42 (Oct. 19, 2011) [citing §§ 185 and 1058 as statutory authority and referring also to § 13260]; see also, Dairy Associations' brief, p. 3 [identifying section 13260 as the "authority at issue in this case"].) In contrast to section 13260, the budget act does not mention either the waste discharge permit program or the waste discharge permit fee; it includes only a single line item that states the amount the Board may spend from the Waste Discharge Permit Fund. (JA 209 [line item 3940-001-0193].) The budget act only affects the fee schedule indirectly, and only by operation of section 13260. (Cf. *California School Boards Ass'n v. Brown* (2011) 192 Cal.App.4th 1507, 1526 [the Governor's line-item veto of an appropriation in the budget act "was not an act of substantive lawmaking," even though the veto had the effect of suspending a state mandate "due to the operation of a previously enacted statute"].) To treat both section 13260 *and* the budget act as "result[ing] in" the amount of the fee would nonsensically subject *both* statutes to the requirement of a two-thirds majority.

The logical reason why section 13260 refers to the budget act is that a fee may be excessive if it exceeds the governmental spending that the fee supports. (See *Farm Bureau, supra*, 51 Cal.4th at p. 438 [regulatory fees "must be related to the overall cost of the governmental regulation"].) But Proposition 26 requires a two-thirds majority only for statutes that result in higher taxes, not statutes that result in higher appropriations. (Cal. Const., art. XIII A, § 3, subd. (a).) For purposes of Proposition 26, the only statute that "results in" the waste discharge permit fee is section 13260.

The phrase "change in state statute which results in any taxpayer paying a higher tax" was intended for a specific purpose unrelated to the budget act. The phrase replaced the former requirement of Proposition 13 that a two-thirds majority was required for "changes in state taxes enacted for the purpose of increasing revenues." (Former Cal. Const., art. XIII A, § 3, added by initiative, Primary Elec. (June 6, 1978), commonly known as Prop. 13; amended by initiative, Gen. Elec. (Nov. 2, 2010), commonly known as Prop. 26.) The new language was intended "to end the Legislature's practice of approving by a simple majority vote so-called 'revenue-neutral' laws that increased taxes for some taxpayers but decreased taxes for others." (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1329 [citing the Legislative Analyst's analysis in the official ballot pamphlet].) Neither the Dairy Associations nor CBIA contends that the rationale of prohibiting "revenue-neutral" laws is relevant here.

The Dairy Associations ask the court to strain the language of Proposition 26 to achieve a result the voters could not reasonably have intended. When the courts interpret measures adopted by initiative, " 'the voters should get what they enacted, not more and not less.' " (*People v. Park* (2013) 56 Cal.4th 782, 798, quoting *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

B. To Determine that the Budget Act Can "Result[] in" a Higher Fee Would Allow Proposition 26 to Apply Retroactively to Fees Adopted Before 2010, Contrary to the Voters' Unambiguous Intent

For the court to determine that the annual budget act can "result[] in" a higher fee would cause Proposition 26 to apply retroactively to fees that the Legislature adopted before 2010. The language of Proposition 26 was unambiguously intended to avoid that result.

As a statewide initiative, Proposition 26 took effect on November 3, 2010, the day after it was approved by the voters. (*Brooktrails Township Community Services District v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 205, citing Cal. Const., arts. II, § 10, subd. (a), & XVIII, § 4.) As with newly enacted statutes, constitutional amendments are presumed to apply only prospectively. (*Brooktrails Township*, at p. 205, citing *Strauss v. Horton* (2009) 46 Cal.4th 364, 470.) To overcome that presumption, "[t]here must be either an express retroactivity provision in the actual language of the amendment, or extrinsic sources leave no doubt that such was the voters' manifest intent." (*Brooktrails Township*, at p. 205.)

Proposition 26 includes only a limited retroactivity provision governing taxes adopted between January 1, 2010, and November 3, 2010:

> Any tax adopted after January 1, 2010, but prior to the effective date of this act, that was not adopted in compliance with the requirements of this section is void 12 months after the effective date of this act unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.

(Art. XIII A, § 3, subd. (c).) The ballot materials associated with Proposition 26 are not part of the record, but those materials have been found to show no intent to affect taxes adopted before 2010. (*Brooktrails*

Township Community Services District v. Board of Supervisors of Mendocino County, *supra*, 218 Cal.App.4th at p. 207.)

The waste discharge permit fee was adopted almost 50 years ago, as part of the Porter-Cologne Water Quality Control Act. (Stats. 1969, ch. 482, § 18, p. 1063.) The original reference to the budget act was added to section 13260 in 1988, more than 20 years before the voters approved Proposition 26. (Stats. 1988, ch. 1026, § 1.) Section 13260 was amended in 2011 to provide additional examples of costs that may be recoverable through the fee (Stats. 2011, ch. 2, § 28), but neither CBIA nor the Dairy Associations challenge that amendment or any other statute enacted after Proposition 26.

The voters are presumed to have been aware of section 13260 when they approved Proposition 26. (See *Professional Engineers in California Government v. Kempton*, *supra*, 40 Cal.4th at p. 1048.) If the voters intended to require a two-thirds majority of the Legislature to appropriate funds for the waste discharge permit program, the voters would have referred to appropriations as well as taxes.

C. To Apply Proposition 26 to the Budget Act Would Conflict with Proposition 25

In the same election when the voters enacted Proposition 26, they also enacted Proposition 25, which allows the annual budget act to be passed with a majority vote of the Legislature. (Cal. Const., art. IV, § 12, subd. (e)(1), added by initiative, Gen. Elec. (Nov. 2, 2010).) The Dairy Associations' interpretation of Proposition 26 causes a direct conflict between the two initiatives, because every budget act not approved with a two-thirds majority would be subject to challenge. For example, the waste discharge permit fee was increased in tandem with increased appropriations in fiscal years 2008-2009 and 2010-2011, as well as 2011-2012. (See Joint Exhibits [JE] 91 & 158; JA 232-233.) If the voters considered the budget

act to be a statute that "results in" higher taxes, they would not have approved Proposition 25.

When reasonably possible, the courts must " ' "harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. [Citations.]" ' " (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955, quoting *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805, in turn quoting *Hough v. McCarthy* (1960) 54 Cal.2d 273, 279.) Contrary to that rule, the Dairy Associations ask the court to create a conflict between two initiatives by interpreting Proposition 26 unreasonably.

The Board's interpretation of Proposition 26 is consistent with the plain language of both initiatives. However, to the extent that the court finds an unavoidable conflict between Propositions 25 and 26, Proposition 25 must prevail, as it was approved with a greater number of affirmative votes. (Cal. Const., art. II, § 10, subd. (b); Ballot Pamp., Gen. Elec. (Nov. 2, 2010), text of Proposition 26, § 4, reprinted at Historical Notes, 2B West's Ann. Cal. Const. (2013 ed.) foll. art. XIII A, p. 297; see Board's motion for judicial notice filed concurrently with this brief.)

III. TO FIND THAT PROPOSITION 26 APPLIES WOULD NOT AFFECT THE OUTCOME OF CBIA'S APPEAL

A. Shifting the Burden of Proof Would Not Assist CBIA's Case

The Dairy Associations assert that Proposition 26 requires the Board to bear the burden of proof. (Dairy Associations' brief, p. 2-3, 8-11.) But as the trial court noted, the material facts are not in dispute, and CBIA made "no showing" that the fee was invalid. (JA 552-555.) The parties differ primarily over issues of law, rather than conflicting evidence. Thus, as the Board explained in its answer brief, shifting the burden of proof

would not assist CBIA's challenge to the fee schedule. (Answer brief, p. 32.)

The Dairy Associations disregard that CBIA builds its case on a variety of erroneous legal assumptions, rather than any conflict in the evidence:

- CBIA assumes that the fees paid by storm water dischargers are distinct fees that require separate constitutional analysis from the fees paid by the other regulated dischargers. (See, e.g., CBIA's opening brief, pp. 29, 32-33.)
- CBIA assumes that the Board was compelled to use the 2011-12 fee schedule to adjust for earlier years in which storm water dischargers paid more fees than the Board anticipated. (See, e.g., CBIA's opening brief, pp. 31-32.)
- CBIA assumes that the Board was required to base its fee schedule on the actual costs of regulating each category of dischargers, as opposed to the Board's budgeted spending on each category of dischargers. (See, e.g., CBIA's opening brief, pp. 20-24, 28-29, 32-33.)
- CBIA assumes that if a fee increases without increased regulatory costs, the fee is necessarily being increased for general revenue purposes and is therefore an unconstitutional tax. (See, e.g., CBIA's opening brief, pp. 33-34.)

Each of those assumptions is wrong as a matter of law. (Answer brief, pp. 13-27.)

The Dairy Associations also disregard that under the correct legal analysis, the material facts are undisputed: (1) the Board reasonably designed its fee schedule for fiscal year 2011-12 to generate only the amount of revenue necessary to help support the waste discharge permit program that year; and (2) the fee schedule allocated the fee by a reasonable

method among all the regulated dischargers based on that year's budgeted spending for each program area. (Answer brief, pp. 18-19, 22-25, 32.) Regardless of where the burden of proof belongs, the evidence supports the trial court's judgment.

B. Applying the Other Provisions of Proposition 26 Would Not Assist CBIA's Case

The Dairy Associations do not directly dispute that the waste discharge permit fee falls within two of the exceptions stated within the definition of "tax" added to the Constitution by Proposition 26. (Dairy Associations' brief, p. 13.) The Dairy Associations assert instead that the trial court made no findings of fact regarding those exceptions. (Dairy Associations' brief, p. 13.) Again, however, CBIA never *asked* the trial court to apply Proposition 26 or make those findings of fact. (JA 4-22, 107, 538-539.) Accordingly, any necessary findings of fact must be implied, and the only issue on appeal is whether the implied findings are supported by substantial evidence. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792-793.)

The undisputed facts establish that both of those exceptions do apply. (See answer brief, pp. 29-30.) First, the fee is "imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits," because dischargers must pay only the Board's budgeted regulatory costs incident to the waste discharge permit program. (Cal. Const., art. XIII A, § 3, subd. (b)(3); see JA 232-233, 412-413.) Second, the fee is "imposed for a specific benefit conferred or privilege granted directly to the payor," because dischargers pay the fee in exchange for the privilege of discharging waste. (Cal. Const., art. XIII A, § 3, subd. (b)(1); see Wat. Code, § 13260, subds. (a)-(c); JA 232-233, 412-413.)

The Dairy Associations also assert that the trial court should have considered two other requirements stated in Proposition 26: that the total

amount of the fee "is no more than necessary to cover the reasonable costs of the governmental activity," and that "the manner in which those costs are allocated to a payor bear[s] a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII A, § 3, subd. (d); see Dairy Associations' brief, p. 14.) But those two requirements "repeat[] nearly verbatim" the requirements imposed by cases interpreting Proposition 13. (*Southern California Edison Company v. Public Utilities Commission* (2014) 227 Cal.App.4th 172, 199; see answer brief, pp. 17-18, 28.) The trial court found that the material facts regarding both requirements were undisputed, as explained in part III.A. above. Thus, for the court to determine that Proposition 26 applies would not affect the judgment.

CONCLUSION

The Court of Appeal's decision affirming the trial court's judgment should be affirmed.

Dated: March 29, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Brief of Amici Curiae uses a 13 point Times New Roman font and contains 3,717 words.

Dated: March 29, 2016

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DECLARATION OF SERVICE BY U.S. MAIL

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No.: **S226753**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On March 29, 2016, I served the attached **ANSWER TO BRIEF OF AMICI CURIAE** by placing a true copy thereof enclosed in a sealed envelope 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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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 29, 2016, at Sacramento, California.

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