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April 29, 2024

The Honorable Chief Justice Patricia Guerrero
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Via TrueFiling

Re: Amicus Curiae Letter in Support of Petition for Review of *Mojave Pistachios and Paul G. Nugent and Mary E. Nugent v. Superior Court*, Supreme Court Case No. S284252.

Dear Honorable Chief Justice Guerrero and Honorable Associate Justices:

Howard Jarvis Taxpayers Association (HJTA) files this letter pursuant to California Rules of Court Rule 8.500(g) and respectfully requests that the Court grant the Petition for Review.[1] The issue of whether the "Pay First, Litigate Later" requirement set forth in California Constitution article XIII, section 32 should be expanded to apply not only to the Replenishment Fee ("Fee") itself, but also to bar litigation of any issue affecting the determination of the Fee, is of substantial concern to HJTA, its members, and all California residents.

As discussed in the Petition for Review, the Indian Wells Valley Groundwater Authority ("Authority") allocated its Exempted Pumping Allotments entirely to non-agricultural users without reference to judicially determined water rights. If a zero allotment of this exemption to agriculture is upheld, Petitioners face bankruptcy. In the meantime, the Authority seeks to shield its determination of Exempted Pumping Allotments from judicial review as to both statutory and constitutional infirmity by invoking the Pay First rule.

If the Pay First rule denies Petitioners a hearing in court, the demise of their agricultural operations will not merely constitute unfortunate collateral damage that must be accepted in order to maintain a sustainable groundwater basin. Instead, as the Petition for

[1] HJTA authored this letter and made a monetary contribution to fund the preparation and submission of this letter. No other person or entity, other than the amicus curiae, HJTA, or their legal counsel, authored this letter or made a monetary contribution intended to fund the preparation or submission of this letter.

Review demonstrates with ample citation to the record, elimination of agriculture is the Authority's stated goal.

In other words, the exemption allocation methodology was intended to eliminate large-scale farming, and the Fourth Appellate District erroneously approved this tactic by expanding the Pay First rule to bar any challenge that might impact calculation of the Fee, regardless of whether the methodology results in an unconstitutional taking or whether a zero allocation distorts established water rights in violation of the Sustainable Groundwater Management Act.

A. The Opinion Expands Pay First, While Further Diminishing Due Process.

Courts have already stretched the Pay First rule to the limits of due process. As a historical matter, the Fourth District observes that "the most severe financial hardship resulting in bankruptcy was judged not to be an irreparable injury sufficient to permit judicial intervention." (Opinion at p. 23, citations omitted.) Thus, it does not seem to matter whether a fee is set so high that payment by the injured party is literally impossible. The mere theoretical prospect that a different party – a billionaire, for example – might be able to pay the fee is sufficient to satisfy due process.

The Fourth District has now expanded legal authority under which "no reed is too thin" to anchor due process, with a double-standard that considers not only whether the methodology used to determine Exempted Pumping Allotments is itself a fee subject to the Pay First rule (which it is not, because an exemption is not a fee to begin with), but also whether, as a practical matter, a challenge to the exemption methodology affects the determination of a fee subject to the Pay First rule. Thus, the Pay First rule is now elevated above due process because, according to the Fourth District, due process is satisfied by a purely theoretical standard, while Pay First requires practical consideration. These inconsistent standards, which shield public agencies from judicial scrutiny, are fundamentally unfair.

B. The Exempted Pumping Allotment Methodology And Replenishment Fee Are Separable.

This Court has recognized that non-tax portions of an ordinance are subject to judicial review notwithstanding the Pay First rule, if they are "grammatically, functionally, and volitionally separable" (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821). The Fourth District summarily concluded that the Exempted Pumping Allotment is not severable from the Replenishment Fee, simply because both appear under the same heading in Ordinance No. 03-20. As discussed in the Petition for Review, "appearance under the same heading" is not a proxy for the *Calfarm* test, and the Exempted Pumping Allotment is clearly severable as a grammatically, functionally, and volitionally separate provision.

Moreover, the *Calfarm* test does not depend on whether the severable provision would change the manner in which rates were calculated under the remaining provisions. Thus, the Fourth District's expansion of Pay First, under which legal review cannot be obtained for any methodology or process that affects the calculation of a fee, is unprecedented.

C. Pay First Should Not Shield Fees Designed To Eliminate A Business.

The Opinion claims to be "mindful that a rigid application of the 'pay first' rule could allow local groundwater sustainability agencies to impose unreasonable fees that target certain users, knowing that they would be unable to afford to pay the fees under protest, and those users could eventually be run out of business." (Opinion at p. 30.) However, it summarily concludes "that is not the case before us today," notwithstanding the fact that the Authority seeks to sustain groundwater levels by simply eliminating agriculture, and cannot expect Petitioner to actually pay a charge that would render its orchards worthless.

While the challenged methodology for the Exempted Pumping Allotments, which target agriculture with fees designed to run them out of business, present an opportunity to prevent the abuse described above, at the very least this Court should grant review to reject the expansion of Pay First under these circumstances.

Respectfully submitted,

/s/ Amy C. Sparrow
Amy C. Sparrow
Senior Counsel

PROOF OF SERVICE

I, Kiaya Algea, declare:

I am employed in the County of Sacramento, California. I am over the age of 18 years, and not a party to the within action. My business address is: 1201 K Street, Suite 1030, Sacramento, California 95814. My electronic service address is: kiaya@hjta.org. On April 29, 2024, I served:

- **Letter Re: Amicus Curiae Letter in Support of Petition for Review of *Mojave Pistachios and Paul G. Nugent and Mary E. Nugent v. Superior Court*, Supreme Court Case No. S284252**

on the interested parties below, using the following means:

SEE ATTACHED SERVICE LIST

X **BY ELECTRONIC SERVICE** On the date listed above, I electronically transmitted the above document(s) in a PDF format to the persons listed below to their respective electronic mailbox addresses via TrueFiling.

X **BY MAIL:** On the date listed above, I enclosed the document(s) in a sealed envelope or package addressed to the interested parties at their respective addresses listed above and deposited the sealed envelopes with the United States Postal Service, with the postage fully prepaid. The envelope or package was placed in the mail at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 29, 2024, at Sacramento, California.

Kiaya R. Algea

SERVICE LIST

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