BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

Jeffrey V. Dunn
Partner
(949) 263-2616
jeffrey.dunn@bbklaw.com

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VIA TRUEFILING

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

Re: Amicus Curiae Letter in Support of Petition for Review of
Mojave Pistachios, LLC v. Superior Court of Orange County
Supreme Court Case No. S284252

Dear Honorable Chief Justice Guerrero
and Honorable Associate Justices:

California Building Industry Association (CBIA) files this letter pursuant to California Rule of Court 8.500 and respectfully requests that the Court grant the petition for review. CBIA 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, CBIA, or their legal counsel, authored this letter or made a monetary contribution intended to fund the preparation or submission of this letter.

The issue regarding whether a public agency can disproportionately allocate a fee based upon its discretionary determination of users is of substantial concern to the CBIA. Homebuilders rely on certainty in planning housing developments. Certainty is especially important in a time, such as now, where California faces a housing crisis.

As the Court of Appeal's published opinion recognizes, before the Court are issues of "widespread interest and importance." (99 Cal.App.5th 605, 625) One of those issues is whether a landowner with overlying water rights can suddenly be treated as having **no** right to groundwater by a groundwater sustainability agency, an agency who then allocates **all** of that landowner's groundwater to other pumpers in the basin, and adopts an unaffordable fee that only applies to a few politically-favored landowners. In so doing, the agency decision places an unconstitutional condition upon the landowner's exercise of a vested water right and improperly shifts (1) to the landowner, the entire burden for groundwater basin management, and (2) to other groundwater users, the

benefit, by requiring that a few landowners fund the importation of supplemental water into the basin to benefit all landowners.

The Sustainable Groundwater Management Act (SGMA), as it applies to property owners, did not give groundwater sustainability agencies—here, the Indian Wells Valley Groundwater Authority (GSA)—such unfettered discretion. In exercising its discretion improperly, the GSA's allocation violates the rough proportionality tests of *Nollan* and *Dolan*. (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 837 (*Nollan*) [actual condition imposed must have a "nexus" to the impact of the project]; *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*) ["rough proportionality" must exist between the size of a condition and a development's social costs.]; see also Petition at pp. 40-41 ["Because Real Party determined that Petitioners had no right to native groundwater, evidenced by having zero Annual Pumping Allocations or access to native water via the [Transient Pool and Fallowing Program], Petitioners are one of only two parties in the entire Basin that must therefore pay the Replenishment Fee to import non-native groundwater for use on its Basin lands, at an unprecedented $2,130 per AF."].)

The lower court's opinion acknowledges that there are exceptions to the "pay first" rule including an exception for a violation of the federal Constitution. (99 Cal.App.5th at p. 629.) The opinion, however, does not find whether there is a violation of the federal Constitution but merely concludes that the fee is authorized under state law. (*Id*., at p. 632.) Stated simply, a fee authorized by law may nonetheless be unconstitutional. The allocation and the fees here are contrary to law, including the federal Constitution.

In *Alliance for Responsible Planning v. Taylor* (2021) 63 Cal.App.5th 1072, the Third District held a General Plan Amendment was unconstitutional because it allocated more than a project's fair share to proportional project traffic impact by requiring an owner/developer of a single project to be solely responsible to pay for construction of all road improvements necessary to bring traffic volume within acceptable levels of service. There must be a rough proportionality between the property the government demands and the social costs of the applicant's proposal. The *Alliance* court noted that "an unlawful condition need not only be for land – demands for money can also violate *Nollan-Dolan*." (*Alliance, supra*, 63 Cal.App.5th at 1085 [citing *Koontz v. St. Johns River Water Management District* (2013) 570 U.S. 595, 605-606 [the government may not leverage its interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to a projects impacts]].)

Here, Real Party GSA attempts to dilute the effect of its taking of water rights by imposing a fee upon the landowner, claiming one of two things: first, the landowner can pay an exorbitant fee to get new water; or second, even if they want to challenge the

reallocation, they must first pay the fee despite it being excessive at a staggering $2,130 per acre-foot, or approximately $10 to $12 million dollars **per year** until the matter is resolved. This violates the unconstitutional conditions doctrine. (See, e.g., *Sheetz v. County of El Dorado*, 2024 WL 1588707 [property owner may file lawsuit challenging development impact fee under *Nollan* and *Dolan* where the public agency failed to make an individualized determination that an "essential nexus" and "rough proportionality" existed between the traffic impacts caused by or attributable to his project and the need for improvements to state and local roads thus violating rough proportionality test and the "unconstitutional conditions doctrine"]; *Ballinger v. City of Oakland* (9th Cir. 2022) 24 F.4th 1287; *Knight v. Metropolitan Gov't of Nashville & Davidson et al.* (6th Cir. 2023) 67 F.4th 816.) Here, in the same way, the "fee" assessed has not been shown to be even remotely proportional to Petitioner's burden on the basin.

If the lower court's ruling stands, landowners who retain overlying rights to groundwater—meaning the landowner's rights to groundwater exist without obligation to pay anything or take any action to enforce to protect that right—may nevertheless face a SGMA agency who could unilaterally declare they have a zero water allocation from a particular water basin. More egregiously, the SGMA agency could insulate this zero allocation from legal challenge by tying it to a prohibitively expensive tax (which again, here, for 1,600 acres, the fee is equivalent of tax amounts to approximately $10 million per year) to continue to pump water from beneath their own land and for which the same water mere days before was free. This outcome is unconstitutional and cannot be shielded by the inapplicable "pay first" rule.

For the foregoing reasons, the CBIA respectfully requests that the Court grant the petition for review and reverse the decision of the Court of Appeal.

Respectfully submitted,

Jeffrey V. Dunn
of BEST BEST & KRIEGER LLP

JVD

PROOF OF SERVICE

I, Dawn R. Forgeur, CCLS, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 500 Capitol Mall, Suite 2500, Sacramento, California 95814. On April 18, 2024, I served a copy of the within document(s):

California Building Industry Association's Amicus Curiae Letter
in Support of Petition for Review of
Mojave Pistachios, LLC v. Superior Court of Orange County
Supreme Court Case No. S284252

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Sacramento, California addressed as set forth below.

☒ by transmitting via TrueFiling electronic transmission the document(s) listed above to the person(s) at the e-mail addresses set forth below.

VIA ELECTRONIC SERVICE Scott S. Slater Amy M. Steinfeld Elisabeth L. Esposito Brownstein Hyatt Farber Schreck, LLP sslater@bhfs.com asteinfeld@bhfs.com eesposito@bhfs.com	Attorneys for Petitioners: Mojave Pistachios, LLC Paul G. Nugent Mary E. Nugent
VIA ELECTRONIC SERVICE James L. Markman B. Tilden Kim Kyle H. Brochard Jack Hensley Richards Watson & Gershon jmarkman@rwglaw.com tkim@rwglaw.com kbrochard@rwglaw.com jhensley@rwglaw.com Phillip W. Hall Kern County Office of County Counsel phall@kerncounty.com Wayne Keith Lemieux, Jr. Aleshire & Wynder, LLP klemieux@awattorneys.com	Attorneys for Real Party in Interest: Indian Wells Valley Groundwater Authority The Board of Directors of the Indian Wells Valley Groundwater Authority

VIA U.S. MAIL Superior Court of Orange County William Claster Dept. CX104 751 West Santa Ana Boulevard Santa Ana, CA 92701	**VIA ELECTRONIC SERVICE** California Court of Appeal 4th District, Division Three Electronic service under Cal. Rules of Court, rule 8.500(f)(1)
VIA ELECTRONIC SERVICE Derek R. Hoffman Byrin Romney Fennemore Dowling Arron dhoffman@fennemorelaw.com	Attorneys for Defendants Meadowbrook Dairy Real Estate, LLC; Big Horn Fields, LLC; Brown Road Fields, LLC; Highway 395 Fields, LLC; The Meadowbrook Mutual Water Company in related case
VIA ELECTRONIC SERVICE James A. Worth McMurtrey, Hartsock & Worth jim@mhwlegal.com John C. Murphy Douglas J. Evertz Emily L. Madueno Murphy & Evertz LLP jmurphy@murphyevertz.com devertz@murphyevertz.com emadueno@murphyevertz.com	Attorneys for Real Party in Interest: Indian Wells Valley Water District

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 18, 2024, at Sacramento, California.

Dawn R. Forgeur, CCLS