In the Supreme Court of the State of California

STATE DEPARTMENT OF FINANCE, et al.,

Plaintiffs and Respondents,

v.

COMMISSION ON STATE MANDATES,

Defendant and Respondent,

COUNTY OF LOS ANGELES, et al.,

Real Parties in Interest and Appellants.

Case No. S214855

Second Appellate District, Division One, Case No. B237153
Los Angeles County Superior Court, Case No. BS130730
The Honorable Ann I. Jones, Judge

ANSWER TO THE PETITION FOR REVIEW

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General
NELSON R. RICHARDS
Deputy Attorney General
State Bar No. 246996
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5559
Fax: (415) 703-1234
Email: Nelson.Richards@doj.ca.gov
Attorneys for Plaintiffs and Respondents

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INTRODUCTION

The Court of Appeal held that four specific requirements in a stormwater sewer permit were federal mandates, not state mandates. In its opinion, the court said, "our decision is limited to the specific mandates addressed here"—that is, to permit terms requiring trash receptacles at transit stops and inspections of commercial, industrial, and construction sites. (*State Department of Finance v. Commission on State Mandates* (2013) 220 Cal.App.4th 740, 767-768, 774 (*Finance*).) This narrow decision offers no grounds for review by this Court. No other Court of Appeal has ruled on the issue, so review is not appropriate to secure uniformity. Nor is there a need to settle an important question of law: the court, in a well-reasoned and thorough decision, followed this Court's mandate precedent.

STATEMENT OF THE CASE

The Los Angeles Regional Water Quality Control Board issued the Los Angeles County Flood Control District, the County of Los Angeles, and 84 cities a 72-page stormwater sewer permit pursuant to a complex federal statutory and regulatory framework. (See *Finance*, *supra*, 220 Cal.App.4th at pp. 747-750 [explaining federal and state clean water scheme].) The federal Clean Water Act—whose purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—sits at the center of that framework. (33 U.S.C. § 1251(a).) "'The Clean Water Act anticipates a partnership between the States and the Federal Government . . . .'" (*Finance*, *supra*, 220 Cal.App.4th at p. 749, quoting *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101.) In California, the State Water Resources Control Board, together with nine regional water quality control boards, administers the federal National Pollutant Discharge Elimination System (NPDES) permitting scheme under the state's Porter-

Cologne Water Quality Control Act. (*Id.* at pp. 749-750, citing Wat. Code, § 13000 et seq., § 13370 et seq.)

The Clean Water Act prohibits pollutant discharges from "point sources" unless permitted under a NPDES permit. (33 U.S.C. §§ 1311, 1342.) It requires that permits for discharges from municipal separate storm sewers contain "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (*Id.* § 1342(p)(3)(B)(iii).) The federal maximum extent practicable requirement is what this dispute is about.

After the Los Angeles Water Board issued the permit to Petitioners in 2001, they filed a test claim with the Commission on State Mandates. Petitioners argued that four permit requirements—installation of trash receptacles at transit stops and inspections of commercial, industrial, and construction sites—were state mandates entitling them to a subvention of funds under article XIII B, section 6, subdivision (a) of the California Constitution. (See *Finance*, *supra*, 220 Cal.App.4th at pp. 756-760.) The Commission agreed, concluding that all four requirements were state mandates because: (1) federal law did not expressly call for them; and (2) they were new programs or higher levels of service in that they were not required before the 2001 permit issued. (*Id.* at pp. 758-761 [describing Commission's decision].) The Department of Finance, the Los Angeles Water Board, and State Water Board successfully petitioned the Superior Court for an administrative writ of mandate. (*Id.* at pp. 760-762.) The court held that the Commission had erred as a matter of law by failing to consider the Clean Water Act's maximum extent practicable standard and the evolving nature of the statute's requirements. (*Id.* at p. 762.)

On appeal, the Second District affirmed the trial court. The court engaged in a thorough discussion of the maximum extent practicable standard, explaining that it is a "highly flexible concept that depends on balancing numerous factors" and that it was "designed to require states to meet their Clean Water Act obligations." (*Finance*, *supra*, 220 Cal.App.4th at pp. 768-773.) The Second District observed that the federal Clean Water Act establishes a flexible standard requiring municipalities to reduce pollution in their stormwater discharges, but that ultimately, the regulating entity—whether the U.S. Environmental Protection Agency or the state—is responsible for ensuring that the permit satisfies Clean Water Act requirements. (*Id.* at pp. 771-772, citing *Environmental Defense Center, Inc. v. U.S.E.P.A.* (9th Cir. 2003) 344 F.3d 832.) It concluded that the federal statute enacting the standard "is a unique statute" that "imposes a broad standard in recognition of developing clean water technology." (*Id.* at p. 772, citing 33 U.S.C. § 1342(p)(3)(B)(iii).)

Petitioners now seek review of that decision.

REASONS TO DENY THE PETITION

The petition fails to show that review is necessary to decide important legal questions or to secure uniformity.[1] The petition also mischaracterizes the Court of Appeal's decision in three significant ways.

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[1] Similarly, the December 5, 2013 letter submitted to this Court by the Building Industry Legal Defense Foundation as amicus curiae makes no attempt to meet the standard for granting review. It argues that the Court of Appeal should have engaged in a preemption analysis. But it does not explain how the court's refusal to do so either rose to the level of an important legal question meriting review by this Court, or created disuniformity among the Courts of Appeal. In any event, the Court of Appeal offered a compelling rejection of the argument. (See *Finance*, *supra*, 220 Cal.App.4th at pp. 774-775.)

I. CONTRARY TO PETITIONERS' ASSERTION, THE COURT OF APPEAL DID NOT EXEMPT CLAIMS RELATING TO CLEAN WATER FROM CALIFORNIA'S MANDATE JURISPRUDENCE

Petitioners contend that the court disregarded "mandate jurisprudence in cases in the area of clean water law" and "exempted an entire area of substantive law from mandate jurisprudence." (Pet. at p. 3; see also Pet. at p. 21.) There are several fundamental errors in those contentions. First, Petitioners fail to explain how a case limited to four specific permit requirements could operate to exempt "an entire area of substantive law" from mandate jurisprudence. (See Pet. at 3.) Not only did the court confine its decision to the four permit requirements before it, but it also analyzed each permit requirement by "balanc[ing] numerous factors, including the particular requirement's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness." (See *Finance*, *supra*, 220 Cal.App.4th at p. 773.) That approach allows courts reviewing other NPDES permit requirements in future cases to find them to be state mandates, if appropriate, in accord with the cases that Petitioners cite. (See, e.g., Pet. at p. 18, citing *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 627–628.) Thus, the claim that the decision generally exempts NPDES permits from state mandate scrutiny is incorrect.

Second, Petitioners ignore the court's discussion of mandate jurisprudence, which applied the analysis set forth in this Court's decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 (*City of Sacramento*). In that case, this Court explained that the variety of federal-state-local programs made the type of one-size-fits-all argument urged by Petitioners impossible. The Court of Appeal followed that guidance, saying:

> there is no precise rule or formula for determining whether a cost imposed on a local government or agency is a federal mandate. "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program . . . ."

(See *Finance*, *supra*, 220 Cal.App.4th at p. 767, quoting *City of Sacramento*, *supra*, 50 Cal.3d at p. 76.) Tellingly, Petitioners do not cite *City of Sacramento*, discuss how the outcome they urge comports with this Court's holding in that case, or explain how the Court of Appeal's reliance on it creates any rift with other cases.

Third, Petitioners cite no California case ruling on the merits of mandate issues in the context of the Clean Water Act, and Respondents are aware of no such decision.[2] One other case has been fully briefed and is awaiting decision in the Third District: *Department of Finance v. Commission on State Mandates* (C070357). That case addresses whether seven NPDES permit requirements, which are different from the ones at issue here, are federal or state mandates. Unless the Third District issues an opinion at odds with the Second District's opinion, there will continue to be no conflict among the appellate districts, and therefore no lack of uniformity for this Court to address.

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[2] The Second District issued an earlier decision in this case. (See *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.) But that decision did not reach the merits. It addressed the constitutionality of Government Code section 17516, subdivision (b), and whether the Commission on State Mandates could review test claims involving certain water board orders.

II. CONTRARY TO PETITIONERS' ASSERTION, THE COURT OF APPEAL DID NOT "DECLINE TO FOLLOW" EARLIER COURT OF APPEAL DECISIONS

Petitioners contend that the court "declined to follow" earlier Court of Appeal decisions in *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155 (*Long Beach Unified*) and *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 (*Hayes*). (Pet. at p. 2; see also Pet. at pp. 17, 19, 25.) That description does not accurately characterize the decision. The court discussed those cases at length, explaining that it "did not disagree" with their holdings. (See *Finance*, *supra*, 220 Cal.App.4th at pp. 758-759, 764-768, 772.) *Long Beach Unified* and *Hayes* dealt with federal laws significantly different from the Clean Water Act. (See *Long Beach Unified*, *supra*, 225 Cal.App.3d at pp. 172-173 [considering state executive order regarding desegregation]; *Hayes*, *supra*, 11 Cal.App.4th at pp. 1593-1594 [considering implementation of the Education for the Handicapped Act].) The Court of Appeal harmonized its decision with those two cases, comparing and contrasting the "maximum extent practical" standard and the federal laws considered in those cases, and demonstrated the ways in which their differences required a different result. (See *Finance*, *supra*, 220 Cal.App.4th at p. 772.) That careful analysis was exactly what this Court contemplated in *City of Sacramento*.

III. CONTRARY TO PETITIONERS' ASSERTION, THE COURT OF APPEAL DID NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE COMMISSION

Petitioners contend that the Court of Appeal "substituted its judgment for that of the Commission." (Pet. at pp. 3, 21-24.) Petitioners style this purported error as an "important and recurring issue[]"—a claim they fail to substantiate. (See Pet. at p. 21.) Moreover, the argument is legally incorrect. The Court of Appeal did not substitute its judgment for the Commission's. Rather, it held that "the Permit's requirements are not state

mandates as a matter of law," correcting the Commission's erroneous legal analysis. (*Finance*, *supra*, 220 Cal.App.4th at p. 774; see also *id.* at p. 772 ["we conclude the Permit's requirements for the trash receptacles and inspection of commercial, industrial, and construction sites as a matter of law constitute federal mandates"].) Making such legal determinations is a core function of the Courts of Appeal. (See, e.g., *id.* at p. 763 ["We examine the interpretation of legal matters utilizing a de novo standard of review"].)

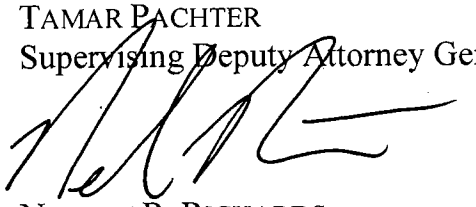
CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Court deny the Petition for Review.

Dated: December 23, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General



NELSON R. RICHARDS
Deputy Attorney General
Attorneys for Plaintiffs and Respondents

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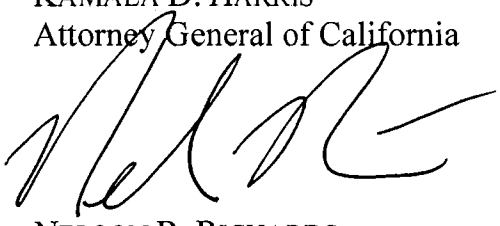
CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Petition for Review uses a 13 point Times New Roman font and contains 1,855 words.

Dated: December 23, 2013

KAMALA D. HARRIS
Attorney General of California



NELSON R. RICHARDS
Deputy Attorney General
Attorneys for Attorneys for Plaintiffs and Respondents

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Department of Finance, et al. v. Commission on State Mandates (County of Los Angeles)**

No.: **S214855**

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 December 23, 2013, I served the attached **ANSWER TO THE PETITION FOR REVIEW** 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Representing Real Party in Interest County of Los Angeles: John F. Krattli, County Counsel Judith A. Fries, Principal Deputy Office of Los Angeles County Counsel 500 West Temple Street, Room 653 Los Angeles, CA 90012	***Representing Real Party in Interest City of Monterey Park:*** Christi Hogin Jenkins & Hogin LLP Manhattan Towers 1230 Rosecrans Avenue, Suite 110 Manhattan Beach, CA 90266
Representing Real Parties in Interest County of Los Angeles, Cities of Bellflower, Carson, Commerce, Covina, Downey, and Signal Hill: Howard Gest David W. Burhenn Burhenn & Gest, LLP 624 South Grand Avenue, Suite 2200 Los Angeles, CA 90017	***Representing Respondent Commission on State Mandates:*** Camille Shelton Chief Legal Counsel Commission on State Mandates 980 Ninth Street, Suite 300 Sacramento, CA 95814

Representing Real Parties in Interest Cities of Artesia, Beverly Hills, Norwalk, Rancho Palo Verde, and Westlake Village: Norman A. Dupont Ginetta L. Giovinco Richards, Watson & Gershon 355 South Grand Avenue, 40th Floor Los Angeles, CA 90071-3101	***Representing Real Party in Interest City of Vernon:*** Nicholas George Rodriguez City Attorney City of Vernon 4305 Santa Fe Avenue Vernon, CA 90058
Clerk, Court of Appeal Second Appellate District Ronald Reagan State Building 300 S. Spring Street, 2nd Floor North Tower Los Angeles, CA 90013	Clerk Los Angeles County Superior Court 111 N. Hill Street Department 86 Los Angeles, CA 90012

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 December 23, 2013, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

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