No. S263734

SUPREME COURT OF CALIFORNIA

HILL RHF HOUSING PARTNERS, L.P., ET AL.

Petitioners and Appellants,

v.

CITY OF LOS ANGELES, ET AL.

Defendants and Respondents.

MESA RHF PARTNERS, L.P., ET AL.

Petitioner and Appellant,

v.

CITY OF LOS ANGELES, ET AL.

Defendants and Respondents.

Review of a Decision by the Court of Appeal,
Second Appellate District, Case Nos.
B295181 and B295315

APPLICATION FOR LEAVE TO FILE, AND BRIEF OF AMICUS CURIAE HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF PETITIONERS AND APPELLANTS

Jonathan M. Coupal, SBN 107815
Timothy A. Bittle, SBN 112300
Laura E. Dougherty, SBN 255855
Howard Jarvis Taxpayers Foundation
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
Telephone: (916) 444-9950
Facsimile: (916) 444-9823

Attorneys for Amicus

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CONSTITUTIONS

RULES

STATUTES

MISCELLANEOUS

APPLICATION FOR LEAVE TO FILE

Pursuant to Rule 8.520(f), leave is hereby requested to file the attached Brief of Amicus Howard Jarvis Taxpayers Association supporting Appellants Hill RHF Housing Partners and Mesa RHF Housing Partners in this case.

INTEREST OF AMICUS

Howard Jarvis Taxpayers Association ("HJTA") is a California nonprofit public benefit corporation with over 200,000 members. The late Howard Jarvis, founder of HJTA, utilized the People's reserved power of initiative to sponsor Proposition 13 in 1978. Proposition 13 was overwhelmingly approved by California voters, and added Article XIII A to the California Constitution. Proposition 13 has kept thousands of fixed-income Californians secure in their ability to stay in their own homes by limiting the rate and annual escalation of property taxes.

In 1996, HJTA authored and principally sponsored Proposition 218, entitled "Voter Approval for Local Government Taxes. Limitations on Fees, Assessments, and Charges." California voters passed Proposition 218, which added Articles XIII C and XIII D to the California Constitution and placed strict limitations and burdens on local governmental entities' authority to levy taxes, fees, and assessments.

HJTA therefore has a significant interest in this assessment case, as a drafter, sponsor, and frequent courtroom defender of Proposition 218. The interest of amicus is to have the intent of the drafters and voters acknowledged and given effect.

AUTHORSHIP AND FUNDING

No party or attorney to this litigation authored the attached amicus brief or any part thereof. No one other than HJTA made a monetary contribution toward the preparation or submission of the brief.

POINTS TO BE ARGUED

HJTA will argue that while *Plantier v. Ramona Municipal Water District* (2019) 7 Cal.5th 372 is not directly controlling here, the issue over exhausting administrative remedies works out the same way. Any alleged administrative remedy here is inadequate because there is nothing meaningful the City is obliged to do in response to a "protest" or "objection." Further, requiring the property owner to present legal quality testimony at the public hearing is not required by Proposition 218, is unduly burdensome, discriminates against handicapped and low-income property owners in the protection of their constitutional rights, and risks wasting the payer's personal funds for no purpose because a majority protest could occur at the same hearing.

HJTA will also argue that because Proposition 218 is a voter-initiated constitutional amendment, the Legislature was not authorized, through "implementing legislation" to reallocate the constitutionally assigned burden of proof so as to add extra burdens on property owners. (Cf. Cal. Const., art. XIII D, § 4; Gov. Code, §§ 53750 - 53758.) The dictates of Proposition 218's assessment provisions, found in Article XIII D, section 4, are on the City or business improvement district only.

/ / /

BRIEF OF AMICUS CURIAE

I

THE "ADMINISTRATIVE REMEDY" SOUGHT BY THE DISTRICT WOULD BE DISCRIMINATORY

This case asks whether petitioners may have their day in court to challenge a business improvement district (BID) assessment. Petitioners challenge the assessments on their property because the "special benefit" to be provided is illusory in their case. The proclaimed "special benefit" is an ability to increase rent, but because the petitioners operate low-income senior housing with legal prohibitions against raising rents, the petitioners will never receive the special benefit. They will only lose money from their budgets. The legal justification for distinguishing assessments from taxes – that assessments are in exchange for compensating special benefits – is thus missing.

The trial court denied petitioners' claims on the merits. Petitioners appealed. The Court of Appeal affirmed without reviewing the merits, however. It affirmed solely on the issue of exhaustion of administrative remedies.

Assessments and property-related fees have closely related procedures that local agencies must follow under Proposition 218. (Cal. Const., art. XIII D, §§ 4 and 6.) Despite Proposition 218's intent to make it easier for taxpayers to hold government accountable, local agencies are increasingly insisting that property owners do more and act quicker to gain judicial access to ensure their constitutional rights as to both fees and assessments. (see *Malott v. Summerland Sanitary Dist.* (2020)

55 Cal.App.5th 1102 [sewer district attempted to exclude ratepayer's expert testimony on the basis that it was not presented at the last sewer rate increase hearing]; see also *Silva v. Humboldt County*, No. A160161, unpublished [County argued on appeal that challenger to a Board's amendment of a voter-initiated tax should have identified "issues they would litigate" at one of the public hearings on the amendment]; Senate Bill 323 (2021-2022 Reg. Sess.) Feb. 5, 2021 [this pending bill, sponsored by cities and public water agencies, would subject water rate challenges to the CCP §§ 860, *et al.*, validation statutes].)

Recently in *Plantier v. Ramona Municipal Water District* (2019) 7 Cal.5th 372, a local water district had complained that a ratepayer challenging the rate structure hadn't submitted a protest in opposition to the last rate increase. The assessment ballot relevant to this case is cousins with the water rate protest. Using an assessment ballot, a property owner votes yes or no for the charge the local governing body asserts will specially benefit their property. In *Plantier*, the petitioner was allowed to sue even though he did not submit a protest at the last rate increase hearing. Here, petitioners *did* submit their assessment ballots in opposition to the business improvement district proposal. That was arguably not even required under *Plantier*. The business improvement district, however, complains that petitioners *also* should have testified or contributed *additional* written protest *in the form of legal theories* at the hearing. And since the district is demanding that a property owner "articulate his legal theories" (Joint Answer Br., at p. 26), it would effectively hold all assessment payers to the standard of hiring legal counsel to appear or prepare a written opinion. (See also *id.* at p. 67

["Generalized objections at a public hearing do not suffice — challengers must raise them specifically."].)

Proposition 218's voters certainly never intended for such a burden on property owners. Ballots are returned by mail. The district does not explain how nonambulatory or mute owners are supposed to appear or speak at the hearing, or how indigent owners are supposed to afford an attorney. While some lawyers will bring a lawsuit under a contingency fee agreement, no lawyer will testify or prepare an opinion for free. Constitutional rights, especially the right to not be taxed unfairly, do not belong only to those with money.

While *Plantier* decided the related issue as to property-related fees under Article XIII D, section 6, the issue here falls under section 4: Must the challenger *of an assessment* have spoken, or hired representation to speak, in legally sufficient terms, at the public hearing on the assessment as a precondition of challenging its validity? In *Plantier*, the alleged administrative remedy of submitting a protest at the last hearing was found inadequate because the water district was not obligated to do anything about that petitioner's claim. The same plays out true here.

It is illuminating that the City "did not even record the content of a single protest or objection raised at or before the hearing." (Reply Br., at p. 44.) If the City insists on a full "administrative" record (for what it calls a legislative act), it is inconsistent behavior to not be *making* the record it insists it desires. Should one of the parties who made such an in-person comment bring a challenge to the assessment, the record would be no greater than it is here. The City's argument is thus not in good faith.

/ / /

II

"CONSIDERING" PROTESTS OR OBJECTIONS HERE IS EQUALLY INADEQUATE AS IN *PLANTIER*

Respondents are correct that this Court found the verb "to consider" means *more* than to count. (*Plantier, supra,* 7 Cal.5th at p. 385.) In fact, when HJTA argued in *Plantier* that "to consider" meant only to count, HJTA was simply relying on then-existing case law. (See *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 901-902 [extensive description of "The Protest Process" equated "considering" with counting the written protests for a property-related fee].) Districts should do more than just count the rate protests under section 6 or the assessments ballots under section 4. They should listen to the legal and nonlegal pleas of citizens who cannot afford more fees or assessments.

But even as districts should do more than count, the definition of "consider" never rises to an applicable and adequate administrative remedy. This Court has already noticed this in Government Code section 53753(d), a key statute at issue here. (*Plantier*, *supra*, 7 Cal.5th at p. 386 ["While an agency may continue a hearing to allow additional time for consideration (see Gov. Code, § 53753, subd. (d)), *nothing compels the agency to do so*. Further, *nothing in Proposition 218 or the legislation implementing it defines what level of consideration must be given*." Emphasis added.]; see also *Sierra Club v. San Joaquin County Local Agency Formation Commission* (1999) 21 Cal.4th 489 [under similar logic, requiring litigants to first seek discretionary action is unnecessary, overturning the former *Alexander* rule that if a petitioner "may" seek rehearing he "must" seek rehearing to exhaust remedies].) This Court also addressed the lack of instruction in the entirety of the Proposition 218 Omnibus Act, finding that "[t]he

legislation implementing Proposition 218 does not provide any additional guidance concerning the required form or content of a written protest. (See Gov. Code, §§ 53750-53756.)." (*Plantier*, *supra*, 7 Cal.5th at pp. 381-382, n. 9 ["Article XIII D does not define the term 'protest' or explain what form a written protest must take."].) Just as there is no adequate definition of "protest," there is equally no adequate definition of "comment" or "objection."

Here, nothing compels the district to "*do* anything in response to" a comment or protest, and there is no "*clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties*." (*City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 236, citing *Rosenfield v. Malcolm* (1967) 65 Cal.2d 559, 566 and *City of Coachella v. Riverside County Airport Land Use Comm.* (1989) 210 Cal.App.3d 1277, 1287. Emphasis in original.) The district has, in the public hearing at issue here, nothing but "general investigatory power," if anything, which is inadequate. (*City of Oakland, supra,* 224 Cal.App.4th at p. 237, citing *Coachella, supra*, at p. 1288.) Likewise, nothing could compel the district to do any more with an "objection," even assuming an "objection" is something other than a protest ballot. This is especially true in this *legislative* (*i.e.*, non-adjudicatory) context.

If an assessment is a legislative act as Respondents assert, Joint Answer Br., at p. 34, that context is of threshold importance. (See also *Malott, supra,* 55 Cal.App.5th at pp. 1109-1110 [administrative mandamus unnecessary for action challenging rates under Article XIII D, section 6; applying administrative mandate rules to such a case "gives improper deference to what could be a deficient administrative proceeding while

undermining the court's authority as the trier of fact."].) Setting an assessment is clearly not an administrative proceeding. At a public hearing on new legislation, no one is required to speak in order to challenge its constitutionality later in court. (See *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486 [constitutional challenge to Legislature's proposed Proposition 49 not contingent on having spoken against it in public hearings preceding proposition's passage].) This renders the cases on which Respondents rely inapplicable, as they regard unique administrative, not legislative, actions. (See *Western States Petroleum v. Superior Court* (1995) 9 Cal.4th 559 [creation of regulations per Administrative Procedures Act]; *Sierra Club v. San Joaquin County Local Agency Formation Commission*, *supra*, 21 Cal.4th 489 [development application]; *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258 [assessment appeal on an individual's personal property taxes]; *Yamaha Motor Corporation v. Superior Court* (1986) Cal.App.3d 1232 [unique dispute between motorcycle franchisor and franchisee subject to review by Department of Motor Vehicles]; *Flores v. Los Angeles Turf Club, Inc.* (1961) 55 Cal.2d 736 [one man forced to leave racetrack required to request hearing before Horse Racing Board per regulations].)

The district's obligation to "consider all protests against the proposed assessment and tabulate the ballots," art. XIII D, § 4(e), produces one definite obligation and one indefinite obligation. Tabulating the ballots and not implementing the assessment if a majority of owners voting on the assessment weighted according to responsibility vote against it, *ibid.*, is the definite obligation. The required response is clear. If a weighted majority vote against the assessment, the district may not implement it. The indefinite obligation to "consider all protests"

implies something more than counting, but there remains no obligation to respond in a meaningful manner, or respond at all. One can "consider" something simply by thinking about it. Indeed, the district here did not make any record of those who *did* communicate at the hearing, much less respond to them. If there is a higher bar for the term "consider," this is a bad case to evaluate or insist upon it because the City is not practicing what it's preaching.

Proposition 218 was designed to empower payers, not to hand local agencies power to restrain payers. The extent of what the City would have liked plaintiffs to say at the assessment hearing is conveniently unclear, except that it must have been legally sufficient. (See Joint Answer Br., at pp. 13, 26 ["They failed to object in writing or orally at the hearings or to identify any basis for their objection." … or "articulate his legal theories"].) Would it have been enough to say, "Councilmembers, the assessment is excessive under Proposition 218"? At the hearing stage, payers should not be required to engage attorneys. The fact that a lay person cannot know what language would suffice is grounds for rejecting the district's theory.

An invitation to comment is not a requirement to comment, and certainly not here. Article XIII D, section 4, does not state that the property owner must appear and participate in the tabulation hearing. (Cf. *Flores v. Los Angeles Turf Club, Inc.* (1961) 55 Cal.2d 736, 739.) In fact, the ballot process described in Article XIII D, section 4, gives no clue that one needs to make a special presentation. Property owners are informed of their right to submit a ballot. They are not instructed, as in administrative appeals, that they have X number of days to perform

another act which is a condition precedent of going to court. From the property owner's perspective, all they are being asked to do is review the information and submit their ballot yes or no. The level of rapid, additional commitment expected by Respondents is not routine, and higher than any other challenge to a legislative act.

It is an important practical reality that it could waste a payer's personal money and time to engage counsel or expert testimony for the hearing because a majority protest could occur at the same time, eliminating the opportunity to comment. Even if the board inefficiently invited comments before the tabulation, any legal or expert testimony would become a moot point as the assessment could not be implemented regardless. And the testimony would not be valuable to future hearings because the local agency either would not re-propose the new assessment or would fashion a different one requiring fresh analysis. No payer should be expected to make that risky, potentially indefinite, investment.

/ / /

/ / /

/ / /

III

PRESENTING LEGALLY SUFFICIENT TESTIMONY AT THE PUBLIC HEARING IS AN UNREALISTIC EXPECTATION.

Even casting a ballot cannot be a required administrative remedy, primarily because property owners who take title after an assessment process must not be foreclosed from *their* constitutional rights. Our Constitution provides, without qualification, that the agency receives no deference for its assessment calculations, but rather has the burden to prove them correct:

> In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

(Cal. Const., art. XIII D, §4(e).)

This is a two-part burden of proof on the agency, not the property owner. Because the Constitution further guarantees to property owners that "[n]o assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel," art. XIII D, § 4(a), property owners who never had a ballot would be denied this constitutional right if ballot submission is an administrative exhaustion requirement.

There is already a short 30-day statute of limitations on challenging an assessment, which is itself constitutionally suspect. (Sts. & Hwy. Code, § 36633.) This is a short window for anyone, including new

property owners, and should fully satisfy the local agency's desire for expediency.

Prior to imposition of the assessment, the local agency has the resources and burden to calculate the assessment constitutionally, and it should be the only party expected to do so in detail.

The new standard the City would have this Court impose on assessment payers is this: Within forty-five days of receipt of an assessment public hearing notice and ballot, the would-be payer must not only determine if the assessment is disagreeable to him personally, but must have a professional review the engineer's report for accuracy and legality, and prepare an opinion for the public hearing, possibly with an expert witness proficient in similar public projects. This is all with no guaranteed response other than that "the agency shall consider all protests against the proposed assessment and tabulate the ballots." (Cal. Const., art. XIII D § 4(e).) Should the payer need public records regarding background information on the engineer or to confirm that the assessment was proposed according to law, a diligent payer could lose up to 24 of the 45 days waiting to hear if responsive documents exist. (Gov. Code, §6253(c).) And so, the burden of requiring particularized testimony at the one public hearing on the assessment is inefficient, impossible for many, and unreasonable for all.

/ / /

/ / /

/ / /

IV

ANY ADMINISTRATIVE REMEDY IN THIS CASE IS IMPOSED ON THE CITY OR DISTRICT, NOT THE PAYER.

The dictates of Article XIII D, section 4, are being viewed through the wrong lens. They are requirements on the district, not the property owner. The City could bring an enforcement action against an individual property owner who hasn't paid his assessment. To do so, the City must have exhausted *its* administrative remedies.

The doctrine of exhaustion of administrative remedies applies as firmly to government agencies as it does to individuals. (See *City of Oakland v. Hotels.com* (9th Cir. 2009) 572 F.3d 958, 961-962 ["Oakland argues that its Ordinance does not require a tax assessment before suit is brought and that, in any case, the administrative remedies apply only to the operators, not the taxing authority. This strained interpretation is belied by the plain language of the Ordinance. ... it does not follow that the City can simply sue in federal court without exhausting its administrative remedies."].)

In *City of Oakland*, the Ninth Circuit described cases of cities across the nation suing hotels for tax assessments. All concluded that cities must first exhaust their administrative remedies by following the clear commands of their ordinances in establishing the assessments they sought to enforce. (*Ibid.*) Just as a City "shall" follow the process for assessing a tax (*ibid.*), the City here "shall," per Article XIII D, section 4, "conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel" and "consider all protests against the proposed assessment and tabulate the ballots." Because the actor of

these sentences is "the agency," any administrative remedies to be exhausted here fall upon the City or the district. The intended result is: The City could not sue to recover unpaid assessment fees if it had not first properly exhausted the remedy of holding the majority protest hearing according to Article XIII D.

V

IMPLEMENTING LEGISLATION CANNOT BE PRESUMED TO HAVE REVISED OR EXPANDED PROPOSITION 218.

Government Code sections 53750 to 53758 may implement Article XIII D, section 4, not revise or expand it. (See *In re Albert C.* (2017) 3 Cal.5th 483, 493 ["But neither a statute nor a local protocol can supplant the duty and prerogative of courts to independently interpret constitutional principles."]; *Mendoza v. State* (2007) 57 Cal.Rptr.3d 505, 518 ["[T]he California Constitution is a limitation or restriction on the powers of the Legislature."]; *Silicon Valley Taxpayers Ass'n. Inc., v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 ["But after Proposition 218 passed, an assessment's validity, including the substantive requirements, is now a constitutional question. 'There is a clear limitation, however, upon the power of the Legislature to regulate the exercise of a constitutional right.' (*Hale v. Bohannon* (1952) 38 Cal.2d 458, 471.) '[A]ll such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it.' (*Ibid.*)."]; *id.* [Section 5 of Proposition 218 required liberal construction in favor of limiting government revenues and enhancing taxpayer consent, including "constrain[ing] local governments' ability to impose assessments" and

"mak[ing] it easier for taxpayers to win lawsuits."]. Emphasis added.) Thus, any interpretation of a statute that would erect hurdles or revise section 4 is void absent legislation put to the voters and approved by them. Since the Court of Appeal's decision rests heavily on the Government Code, careful attention is needed, returning always to the voter-initiated constitutional language in Article XIII D, section 4. If the Legislature inadvertently created any appearance of an administrative remedy mandatory on payers in Government Code section 53753, reference back to section 4 confirms that voters intended all burdens to be on the agency, not the property owner.

CONCLUSION

For the reasons above, the Court of Appeal should be reversed and the case remanded for consideration on the merits.

DATED: March 29, 2021.

Respectfully submitted,

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/ Laura E. Dougherty
LAURA E. DOUGHERTY
Counsel for Amicus

WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached brief, including footnotes but excluding the caption page, tables, application, and this certification, as measured by the word count of the computer program used to prepare this pleading, contains 3,244 words.

DATED: March 29, 2021.

/s/ Laura E. Dougherty
LAURE E. DOUGHERTY
Counsel for Amicus

PROOF OF SERVICE

I, Kiaya Heise, 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: 921 11th Street, Suite 1201, Sacramento, California 95814. On March 29, 2021, I served **APPLICATION FOR LEAVE TO FILE, AND BRIEF OF AMICUS CURIAE HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF PETITIONERS AND APPELLANTS** on the interested parties below, using the following means:

SEE ATTACHED SERVICE LIST

__X__ **BY UNITED STATES MAIL** I enclosed the document(s) in a sealed envelope or package addressed to the interested parties at the addresses listed below. I deposited the sealed envelope with the United States Postal service, with the postage fully prepaid. The envelope or package was placed in the mail in Vacaville, California.

__X__ **BY ELECTRONIC MAIL** I electronically transmitted the document(s) in a PDF or Word processing format to the persons listed below via TrueFiling at their respective electronic mailbox addresses.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 29, 2021, at Vacaville, California.

Kiaya R. Heise

SERVICE LIST

Stephen L. Raucher Reuben Raucher & Blum 12400 Wilshire Blvd, Suite 800 Los Angeles, CA 90025 E: sraucher@rrbattorneys.com *Attorney for Plaintiff/Appellant* **Via TrueFiling**	Michael G. Colantuono Holly O. Whatley, Pamela K. Graham Colantuono, Highsmith & Whatley, PC 790 East Colorado Blvd., Suite 850 Pasadena, CA 91101 E: mcolantuono@chwlaw.us hwhatley@chwlaw.us pgraham@chwlaw.us *Attorneys for Defendants/Respondents Downtown Center Business Improvement District Management Corporation* and *San Pedro Property Owners Alliance* **Via TrueFiling**
Daniel M. Whitley Beverly A. Cook Deputy City Attorney City Hall East 200 N. Main Street, Room 920 Los Angeles, CA 90012 E: daniel.whitley@lacity.org beverly.cook@lacity.org *Attorneys for Defendant/Respondent City of Los Angeles* **Via TrueFiling**	Kevin D. Siegel Tamar M. Burke BURKE, WILLIAMS & SORENSEN, LLP 1901 Harrison Street, Suite 900 Oakland, CA 94612 E: ksiegel@bwslaw.com *Attorneys for Amici Curiae League of California Cities, Association of California Water Agencies, California State Association of Counties,* and *California Special Districts Association* **Via TrueFiling**

Eric J. Benink Vincent D. Slavens BENINK & SLAVENS, LLP 8885 Rio San Diego Dr., Ste. 207 San Diego, CA 92108 E: eric@beninkslavens.com vince@beninkslavens.com *Attorneys for Amicus Curiae BENINK & SLAVENS, LLP* **Via TrueFiling**	Los Angeles Superior Court Hon. Michael L. Beckloff 111 North Hill Street, Dept. 86 Los Angeles, California 90012 **Via United States Mail**
Xavier Becerra Office of the Attorney General 300 South Spring Street Los Angeles, CA 90013 **Via United States Mail**	