S226036

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

City of San Buenaventura
Plaintiff, Cross-Defendant, and Respondent / Cross-Appellants

v.

United Water Conservation District and Board of Directors of United Water Conservation District
Defendants, Cross-Complainants, and Appellants / Cross-Respondents

HOWARD JARVIS TAXPAYERS ASSOCIATION'S APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF CITY OF SAN BUENAVENTURA

Review of a Published Decision of the
Second Appellate District, Case No. B251810,
Reversing a Judgment of the Superior Court of
the State of California for the County of Santa Barbara,
Case Nos. VENCI 00401714 and 1414739
Honorable Thomas P. Anderle, Judge Presiding

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APPLICATION FOR LEAVE TO FILE

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 in their homes by limiting the rate and annual escalation of property taxes.

In 1996, HJTA authored and sponsored Proposition 218, the Right to Vote on Taxes Act. California voters passed Proposition 218, which added articles XIII C and XIII D to the California Constitution and placed strict limitations on local governmental entities' authority to levy taxes, fees, and charges for property-related services. HJTA also participated in the drafting process of Proposition 26 prior to its passage in 2010. Since that time, HJTA has litigated dozens of cases under Propositions 13, 218, and 26, some of which are directly relevant to the case at bar.

On the general merits of this case, Amicus HJTA supports Plaintiff and urges this Court to overturn the decision of the Second District, Division Six, Court of Appeal. Amicus respectfully requests leave from

this Court to file the accompanying Brief of Amicus Curiae in order to lend its expertise and perspective as tax- and ratepayer advocates. Specifically, Amici believe their involvement as authors and sponsors of Propositions 13 and its progeny will be helpful to the Court, specifically regarding historical context and voter intent of those ballot initiatives.

Amicus HJTA's staff attorneys authored the entirety of the proposed brief, and Amicus HJTA neither made nor received any monetary contributions intended to fund the preparation or submission of the brief.

For the foregoing reasons, Amicus HJTA respectfully requests this Court's permission to file the accompanying Brief of Amicus Curiae.

Dated: November 17, 2015

Respectfully submitted,

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BRIEF OF AMICUS CURIAE

I

INTRODUCTION

Amicus Howard Jarvis Taxpayers Association ("HJTA") strongly supports Plaintiff and Respondent / Cross-Appellant City of San Buenaventura (hereafter, the "City") and urge this Court to overturn the decision of the Second District, Division Six, Court of Appeal. (*City of San Buenaventura v. United Water Conservation District* (2015) 235 Cal.App.4th 228 ("*Ventura*").) While the City has more than sufficiently briefed the relevant issues presented, Amicus writes separately to share its expertise as a tax- and ratepayer advocate, and as the drafter and sponsor of Propositions 13 and 218.

Proposition 218 was a response by the People of California to the unfair tactics used by local governmental entities seeking to circumvent Proposition 13. Specifically, the voters sought to rein in the proliferation of tax hikes disguised as "fees" or "assessments" that followed the enactment of Proposition 13. But local governments remain undeterred, and continued to chip away at tax- and ratepayer protections even after the passage of Proposition 218.

The case at bar involves volumetric pumping charges imposed by United Water Conservation District (the "District") on well operators,

including the City, in certain parts of Ventura County. The pumping charges are intended to fund groundwater management programs in order to prevent aquifer depletion and saltwater intrusion. Though such charges have long been considered fees or charges for property-related services and thus subject to Proposition 218, the Second District erroneously concluded that they are not property-related. The Second District then compounded its error by adopting an extremely expansive interpretation of two of the enumerated exceptions in Proposition 26 that threatens to render nearly the entirety of the voter's intent regarding Proposition 26 void. For these reasons, Amicus respectfully requests that this Court vacate the decision of the Second District.

II

QUESTIONS PRESENTED

This Court certified the following questions in this matter: "(1) Do the District's ground water pumping charges violate Proposition 218 or Proposition 26? (2) Does the rate ratio mandated by Water Code section 75594 violate Proposition 218 or Proposition 26?"

As will be shown below, the answer to the first question is yes; the pumping charges are governed by Proposition 218, and they fail to satisfy its cost-of-service requirement. Therefore, they may be implemented only as a special tax subject to supermajority voter approval. For even if the

charges were governed by Proposition 26, they do not fit any of Proposition 26's enumerated fee exceptions and thus must be construed as taxes likewise subject to voter approval.

The answer to the second question is the rate ratio imposed by Water Code sec. 75594 unequivocally violates the cost-of-service requirements of both Propositions 218 and 26, and likewise may be imposed only as a special tax subject to voter approval.

III

LEGISLATIVE HISTORY OF PROPOSITIONS 13, 218, & 26

In 1978, California voters overwhelmingly passed Proposition 13, which was authored and sponsored by HJTA founder Howard Jarvis. In passing Proposition 13, the People of California, having determined that they were already overtaxed, intended to strictly limit the future tax-raising authority of the State and local governmental entities. (*City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 761-62.) One mechanism by which Proposition 13 accomplished this was to cap ad valorem property tax rates. (Cal. Const., art. XIII A, sec. 1, subdiv. (a).)[1]

In order to circumvent the restrictions imposed on their taxing authority by Proposition 13, many local government entities began charging

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[1]Unless otherwise stated, all future references to "articles" refer to our State Constitution.

new or higher non-ad valorem taxes, fees, charges, and assessments. (See *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057, 1072-74.) To remedy these and other abuses, HJTA authored and sponsored Proposition 218, which added articles XIII C and XIII D to our State Constitution:

> "In adopting this measure, the people found and declared that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. **This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.**"[2]

(*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640 (internal quotation marks omitted) (*Roseville*); citing Historical Notes, 2A West's Annotated California Constitution (2002 supp.) following article XIII C, section 1, page 38.)

Indeed, as this Court has noted,

> "**Proposition 218 specifically states that '[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.**' (Ballot Pamp., supra, text of Prop. 218, § 5, p. 109; Historical Notes, supra, p. 85.) Also, as discussed above,

[2]Unless otherwise stated, all emphasis is added.

> the ballot materials explained to the voters that Proposition 218 was designed to: ... make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent."

(*Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 (*Silicon Valley Taxpayers*).) Proposition 218 limits the authority of local governmental entities to levy taxes, as well as fees and charges for property-related services such as water utility service. (*City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926.)

In light of Proposition 218's new restrictions on taxes, property-related fees and charges, and assessments, local governments again sought to circumvent constitutional restrictions on revenue generation, this time by broadening the scope of "fees." The consequence of this trend, as well as this Court's seeming approval of the trend in *Sinclair Paint Co. v. State Bd of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*), was that the voters enacted Proposition 26 in 2010. (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322. (*Schmeer*).) "Proposition 26 expanded the definition of taxes so as to include fees and charges, with specified exceptions... and shifted to the state or local government the burden of demonstrating that any charge, levy or assessment is not a tax." (*Id.*)

IV

THE PUMPING CHARGES VIOLATE PROPOSITION 218'S COST-OF-SERVICE REQUIREMENT

Proposition 218 governs fees and charges for property-related services. (Art. XIII D, sec. 6.) "'Fee' or 'charge' means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Art. XIII D, sec. 2, subdiv. (e).) "Property-related service" is defined as "a public service having a direct relationship to property ownership." (Art. XIII D, sec. 2, subdiv. (h).)

As the City persuasively demonstrates, the groundwater pumping charges levied by the District are, under existing case law, fees for property-related services and thus subject to Proposition 218. (AOB at p. 27.) As the City notes, the District was formed pursuant to the Water Conservation District Law of 1931 (Wat. Code sec. 74000 et seq.) in order to manage groundwater in order to prevent overdraft and aquifer depletion in coastal Ventura County. (AOB at pp. 6-10.) The pumping charge at issue here is expressly authorized by the Water Conservation District Law:

> "The ground water charges are authorized to be levied upon the production of ground water from all water-producing facilities, whether public or private, within the district or a zone or zones thereof for the benefit of all who rely

> directly or indirectly upon the ground water supplies of the district or a zone or zones thereof and water imported into the district or a zone or zones thereof."

(Wat. Code sec. 75522.) This statute expressly provides that ground water charges are to be levied on all ("public or private") owners of water producing property, thus rendering such a charge "upon a parcel" or "as an incident of property ownership."

The appellate courts have previously considered the implications of Proposition 218 on such ground water management pumping charges. Indeed, the Sixth District twice considered pumping charges that are identical to those imposed by the District for all purposes relevant to this litigation. (E.g.: *Pajaro Valley Water Mgmt. Agency v. Amrhein* (2006) 150 Cal.App.4th 1364 ("*Pajaro I*").) There, the court found that "the groundwater augmentation charge is indeed imposed as an incident of property ownership, that it is subject to the restrictions imposed on such charges by Article 13D." (*Id.* at 1393.)

A. The Second District's Reliance on *Apartment Association* is Misguided and Contrary to Settled Precedent.

The most profound mistake in the Second District's opinion is its misapprehension of this Court's decision in *Apartment Association of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830 ("*Apartment Association*"), which exempted from Proposition 218 fees for property

inspection imposed on landlords. *Apartment Association* reasoned that the fees at issue were regulatory fees for housing code compliance not imposed as an incidence of property ownership. However, following this Court's decision in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216-17 ("*Bighorn*") no court has applied the reasoning of *Apartment Association* to cases involving fees related to water service prior. In *Bighorn*, this Court determined that charges for water service, including both fixed monthly overhead charges and metered water consumption charges, are fees for property-related services subject to Proposition 218.

Upon the issuance of *Bighorn*, the Sixth District reheard *Pajaro I*. Initially, the Sixth District had determined that the groundwater augmentation charge was exempt from Proposition 218 under the reasoning of *Apartment Association*. *(Pajaro Valley Water Management Agency v. Amrhein* (2006) 141 Cal.App.4th 928, reh'g granted.) Upon rehearing and in light of *Bighorn*, the Sixth District reversed itself and ruled that groundwater augmentation charges are charges for a property-related service subject to Proposition 218. (*Pajaro I*, supra, 150 Cal.App.4th at 1393.) The Sixth District reaffirmed its reasoning when it again held that groundwater augmentation charges imposed on well operators are within the scope of water service as defined by Government Code § 53750(m) and thus subject to Proposition 218. (*Griffith v. Pajaro Valley Water*

Management Agency (2013) 220 Cal.App.4th 586 ("*Pajaro II*").)

The factual differences between the instant case and those from the Sixth District are immaterial. Each case involves the imposition of groundwater augmentation charges on well operators by a public entity in order to recharge the aquifer and stave off saltwater intrusion. Under the reasoning of *Pajaro I* and *II*, such charges are considered fees for a property-related service (i.e.: water service) subject to Proposition 218. However, in the instant case the Second District determined such charges are regulatory fees unrelated to the property or property ownership and thus not subject to Proposition 218. (*Ventura*, supra, 235 Cal.App.4th at 251-53.)

1. The *Pajaro* Cases Must Govern the Case at Bar.

Between the *Pajaro* cases and the Second District's opinion in the instant case, the former are better reasoned. The *Pajaro I* court held that:

> "[T]he charge here is not actually predicated upon the use of water but on its extraction, **an activity in some ways more intimately connected with property ownership than is the mere receipt of delivered water**. The precise nature of a property owner's interest in underlying groundwater, and whether it constitutes a kind of real property ownership, is an esoteric and nuanced subject. There appears to be no doubt, however, that an overlying owner possesses 'special rights' to the reasonable use of groundwater under his land. These rights are said to be 'based on the ownership of the land and ... appurtenant

> thereto.' Thus, even if an overlying landowner does not strictly 'own' the water under his land, his extraction of that water (or its extraction by his tenant) represents an exercise of rights derived from his ownership of land. **In that respect a charge imposed on that activity is at least as closely connected to the ownership of property as is a charge on delivered water**."

(*Pajaro I*, supra, 150 Cal.App.4th at 1391-92 [citations omitted].) Indeed, the Second District's contrary conclusion that a property owner who is self-reliant and supplies his or her own water service somehow has fewer property rights and lessened ratepayer protections than an owner who relies on offsite infrastructure for water delivery is logically backward. Self-sufficient property owners should be subject to no greater governmental interference with their property rights than those relying on the government for their utility service.

Indeed, the court's statement that generation of one's own utilities is "arguably ... not a normal use of property" would likely come as a shock to the two million Californians who rely on private domestic wells[3] and the owners of more than 438,000 rooftop solar energy installations across the state.[4] (*Ventura*, supra, 235 Cal.App.4th at 223.)

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[3]A Guide for Private Domestic Well Owners (March 2015) California Water Resources Control Board <http://www.waterboards.ca.gov/gama/docs/wellowner_guide.pdf> [as of November 13, 2015].

[4]Go Solar California <http://www.gosolarcalifornia.ca.gov/> [as of November 16, 2015].

2. The Distinction Between Commercial and Residential Water Use Has No Basis in the Constitutional Text.

The Second District's reliance on *Apartment Association* is fundamentally flawed because it hinges on a distinction between "commercial" and "residential" uses of water that is entirely unsupported by the constitutional text. (*Ventura*, supra, 235 Cal.App.4th at 248-50.) The decision declares that because the vast majority of the water pumped by the City and subject to the groundwater augmentation charge is for commercial purposes, then the charges are not incidental to properly ownership but are regulatory fees instead. (*Ibid.*)

However, this argument imagines limitations on the constitutional text that simply do not exist. Proposition 218 governs all fees and charges imposed for property-related service. (Art. XIII D, sec. 6.) Fees for water service, including ground water management, are property construed as being imposed "incident[al] of property ownership." (*Pajaro I*, supra, 150 Cal.App.4th at 1393.) Indeed, such charges were exactly what the People of California intended to limit when they enacted Proposition 218. There is no text to suggest that the voters intended to exempt from Proposition 218 any activities that might be linked to commercial activity. Accordingly, this Court should affirm the decision of *Pajaro I* and overrule the Second District here.

3. Even if the Commercial Distinction were Valid, the Facts of this Case Do Not Support the Second District's Conclusion.

Even assuming the constitutionally unsupported distinction between residential and commercial water usage is relevant to the Proposition 218 analysis, the Second District misapplied its own rule to the facts at hand. The Second District noted that the vast majority of residential property owners obtain their water via water delivery systems administered by the City and obtained via its wells:

> "While the record does not disclose the exact number of residential customers who pump water in lieu of connecting to an existing water delivery network, it is evident that this number is insubstantial relative to the number of residential customers receiving delivered water. There are at most 840 parcels with wells in the District. The City, whose 11 parcels account for only about 6 percent of the water extracted from these wells, delivers water to approximately 30,000 residential dwelling units in the District. And of course the City itself uses the water it pumps for commercial rather than residential purposes."

(*Ventura*, supra, 235 Cal.App.4th at 248.) This analysis fails to consider that the City itself is bound by Proposition 218, specifically including the cost-of-service rate limitation, when it provides water utility service to its residents. In such cases, the City is not engaged in commerce in any meaningful sense of the term. Rather, the City is acting merely as a middleman constitutionally bound to sell water strictly at cost and entitled

to no profit. It is the water ratepayers (i.e.: Ventura residents) rather than the City who truly bear the financial costs of the pumping charges. Though the City might write the check for the District's augmentation charge, the City immediately recoups that cost by passing it through to ratepayers.

The passthrough issue in the instant case is remarkably similar to that of *Jacks v. City of Santa Barbara* (2015) 234 Cal.App.4th 925 (*Jacks*), an opinion drafted by the author of the instant case and presently under review by this Court. *Jacks* involved a 1% surcharge on electrical bills collected by Southern California Edison and remitted to the City of Santa Barbara in accordance with a franchise agreement. After determining the franchise fee at issue was "an illegal tax masquerading as a franchise fee," the court rejected an argument that constitutional ratepayer protections did not apply because the illegal taxes were imposed on an intermediary rather than the ratepayers directly:

> "The other basic flaw in the League's argument is its assumption that the 1% surcharge was imposed on [Southern California Edison]. As we have explained, it was actually imposed on the utility users. [Southern California Edison] is merely a conduit through which the tax revenues flow with no real interest in the tax's validity or amount."

(*Jacks*, supra, 234 Cal.App.4th at 935.)

The same reasoning ought to apply to the case at bar. The City is merely a passthrough for the vast majority of pumping charges to its

residential water service customers. Under these circumstances, the constitutional protections afforded to ratepayers ought to apply to the City as well. That the City serves as an intermediary should not insulate a fee for a property-related service from Proposition 218's protections.

B. The District Has Not and Cannot Justify its Pumping Charges.

As has been demonstrated, the pumping charges are properly considered fees for property-related service subject to Proposition 218. Proposition 218 specifically provides:

> "A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:
>
> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. [...]
>
> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. [...] **In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.**

(Art. XIII D, sec. 6, subdiv. (b).) As the City has painstakingly established, the District has not and cannot justify the pumping charge as a cost-of-service attributable to individual property owners. (AOB at pp. 40-53.)

Indeed, the Second District explicitly acknowledged the impossibility of calculating individual costs-of-service to justify the pumping charges under Proposition 218 because, under its analysis, the property owners receive no identifiable service:

> "We think it self-evident that in charging property owners for pumping groundwater, the District is not providing a 'service' to property owners in the same way that the Bighorn agency provided a service by delivering water through pipes to residences. The conceptual difficulty with a contrary conclusion is apparent from [*Pajaro I's*] attempt to define what the 'service' at issue is. In its view, the District's service is securing the water supply for everyone in the basin. But, if so, such a service cannot meet the requirement that it be "actually used by, or immediately available to, the owner of the property in question." (Cal. Const., art. XIII D, § 6, subd. (b)(4).) Moreover, it would fall within the realm of prohibited "[f]ees or charges based on potential or future use of a service." (*Ibid.*) Worse still, such a service is "available to the public at large in substantially the same manner as it is to property owners." (*Id.* at subd. (b)(5).) There is a fundamental conflict between a pump fee's classification as a property-related service and its validity under article XIII D."

(*Ventura*, supra, 235 Cal.App.4th at 251-52.)

The Second District may well be correct in its assessment that groundwater management benefits are too ill-defined to be properly apportioned to individual property owners. However, that analysis does not support its ultimate conclusion. Charges for water service, including groundwater management fees imposed on well operators, are, for the reasons discussed previously herein, precisely the sort of charges the voters meant to control when they enacted Proposition 218. If the District cannot meet its burden of establishing the validity of its charges, then that does not mean they are therefore immune from Proposition 218 review; rather, it means the pumping charges may only be properly construed as special taxes subject to voter approval. (Art. XIII D, sec. 3.)

"Proposition 218 allows **only four types** of local property [levies]: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge. It buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges." (*Silicon Valley Taxpayers*, supra, 44 Cal.4th at 443 [citations and quotation marks omitted]; citing *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681–682.) The pumping charges here are clearly not ad valorem property taxes or assessments; therefore, if they cannot be characterized as fees for property-related service, they must be special taxes.

Well-settled precedent holds that the pumping charges at issue here are fees or charges for property-related service subject to all of Proposition 218's requirements, including the cost-of-service requirement. Because the District has not and cannot justify its charges as a function of actual cost, the charges violate our state Constitution and are thus invalid unless and until they are presented to and approved by the voters.

V

THE PUMPING CHARGES VIOLATE PROPOSITION 26

As an advocate for tax- and ratepayers, Amicus would obviously prefer that groundwater pumping charges be classified as special taxes needing two-thirds voter approval. But the judicial precedents that have led the law to this point compel the conclusion that groundwater charges constitute a property-related water service fee which may be imposed under article XIIID without an election, provided merely that the agency mail notice, hold a hearing, and take care to avoid overcharging or disproportionality. (See, e.g., *Pajaro I & II.*) If this Court rejects the existing precedents, however, and decides that groundwater charges are not subject to the lesser controls of article XIIID, then as the Second District acknowledged, "we must address the City's alternative contention that the pump charges are taxes that were imposed in violation of Proposition 26." (*Ventura*, supra, 235 Cal.App.4th at 253.)

"Proposition 26 expanded the definition of taxes so as to include fees and charges, with specified exceptions ... and shifted to the state or local government the burden of demonstrating that any charge, levy or assessment is not a tax." (*Schmeer*, supra, 213 Cal.App.4th at 1322.) Prior to the enactment of Proposition 26, the term "tax" had no fixed meaning and "the distinction between taxes and fees [was] frequently 'blurred,' taking on different meanings in different contexts." (*Sinclair Paint*, supra, 15 Cal.4th at 874.) Now, however, "tax" is defined in the state constitution as "any levy, charge, or exaction of any kind imposed by a local government" unless specifically exempted. (Art. XIIIC, sec. 1(e).)

As the Second District stated, "Pursuant to Proposition 26's presumption that 'any levy, charge, or exaction of any kind imposed by a local government' is a tax, the pump fees must be taxes unless they fall into one of seven enumerated exceptions." (*Ventura*, supra, 235 Cal.App.4th at 253.) The Second District found "two of these exceptions ... apply to varying extents." (*Ibid.*) These were (1) the regulatory fee exception in article XIIIC, section 1(e)(3); and (2) the exception for a payor-specific benefit or privilege in section 1(e)(1). If the Court erred and neither exception applies, then the District's groundwater charge is, by default, a tax which required but did not receive two-thirds voter approval. Amicus will establish why neither exception is relevant to the instant case.

A. The Pumping Charges Are Not "Regulatory Fees" as Described in Proposition 26.

Article XIIIC, section 1(e)(3) exempts "charge[s] imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof." This exception is carefully worded to apply only to charges for a limited list of specified regulatory functions, indicating voter intent that it not be treated as a general exemption for funding the entirety of a regulatory program. Where an exception is limited by a list in this way, courts construe voter intent by applying the maxim *expressio unius est exclusio alterius*; that is, the enumeration of things to which the exception applies is presumed to exclude things not mentioned. (*Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 89-90; *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1443.)

That the exception is narrowed by this list is also evident from Proposition 26's declaration of purpose, which states in part: "Fees couched as 'regulatory' but which exceed the reasonable costs of **actual regulation** or are simply imposed to raise revenue for a new program **and are not part of any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes**." (Ballot Pamp., Gen. Elec. Nov. 2, 2010, text of Prop. 26, sec. 1, p. 114, reprinted in

Historical Notes, 2A West's Ann. Cal. Const. (2013 supp.) following art. XIIIC, sec. 3, pp. 141-142.) Consulting the exception's list, then, it is clear that a charge for issuing a permit to the payor, or for conducting an inspection of the payor's operation, would not be a tax under Proposition 26. But the charge at bar, which raises undesignated revenue for a commingled assortment of program costs, does constitute a tax because it is much too broad to fit the narrow exception described in Proposition 26.

Indeed, this was arguably true even before Proposition 26. The difference between valid regulatory fees and taxes that require voter approval was described in *Oakland Raiders v. City of Berkeley* (1976) 65 Cal.App.3d 623. In that case, the court noted that the ordinance in question, like the pumping charges here, contained "no provision which would regulate the conduct of anyone who is subject to the ordinance," and went on to conclude that "[w]here [a] statute contains no regulatory provisions, but only provides for the subjects and amounts of [revenue collection]," it is a tax. (*Id.* at 627.) Similarly, the court in *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 165, stated: "If revenue is the primary purpose and regulation is merely incidental the imposition is a tax." (See also *Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 694, fn. 7. (*Bay Area Cellular*).) Proposition 26 has now defined "tax" so as to make the necessity of voter approval the general rule.

It expressly narrowed the circumstances under which a "regulatory fee" exception would apply. Under Proposition 26, therefore, it is even harder for a levy like the District's pumping charge to escape voter approval.

As the Second District conceded, "[m]any of the costs associated with managing, protecting, conserving, and enhancing the District's water resources lie beyond the scope of this exception." It then erroneously reasoned, "but not all [do]. In particular, the District is authorized to 'make surveys and investigations' of its water supply and resources. ([Wat. Code sec.] 74520.) These costs, to the extent they are included in the pump fees, are not taxes." (*Ventura*, supra, 235 Cal.App.4th at 253.)

The Second District clearly erred. If "many of the costs" funded by this charge "lie beyond the scope of this exception," then the exception cannot apply at all because the charge is obviously excessive to the extent it funds more than just qualifying costs. Proposition 26 places on the District "the burden of proving by a preponderance of the evidence ... that the amount [of the charge] is no more than necessary to cover the reasonable costs of the governmental activity." (Cal. Const., art. XIIIC, § 1(e).) Here, since the Court of Appeal conceded that the amount of the charge is more than necessary to cover the qualifying regulatory activities, the District has not met its burden of proving that its pumping charges fit the regulatory fee

exception.[5]

Even before Proposition 26, courts classified excessive regulatory "fees" as taxes. "Special taxes do not encompass fees charged to particular individuals in connection with regulatory activities or services when those fees do not exceed the reasonable cost of providing the service or activity for which the fee is charged, and are not levied for unrelated revenue purposes." (*Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1421; *Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326, 1346; *Bay Area Cellular*, supra, 162 Cal.App.4th at 694.)

Proposition 26 draws an even tighter circumference around the regulatory activities for which an exempt "fee" may be charged. Under Proposition 26 it is even clearer that the pumping charges are "excessive" because they pay for a multi-faceted program no part of which actually licenses or regulates the payor. Such charges are therefore taxes requiring voter approval.[6]

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[5]Even the one supposedly qualifying activity identified by the Second District may be ineligible for the exception. The court described it as "the District ... mak[ing] surveys and investigations of its water supply." But this activity is not regulating the payor. (*Oakland Raiders*, 65 Cal.App.3d at 627.) The Proposition 26 exception exempts a charge collected to investigate the payor, but not necessarily to take inventory of the agency's own resources.

[6]The District's Answer Brief, in arguing for an expansive "regulatory fee" exception, contends that "the authors of Proposition 26, which included ... the Howard Jarvis Taxpayers Association, acknowledged that regulatory fees on activities designed to achieve environmental goals are [exempt from both Propositions 218 and 26]." (AB at p. 24.) As support for this statement, the

B. Nor Does Proposition 26's "Payor-Specific Benefit" Exception Apply.

The second potential exception cited by the Second District is the exception for a payor-specific benefit or privilege. (Art. XIIIC, sec. 1(e)(1).) That section exempts "A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." This benefit exception builds on the foundation of a test articulated by this Court in *Sinclair Paint*: "In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges." (*Sinclair Paint*, supra, 15 Cal.4th at 874 [citations omitted].) Proposition 26 elevated the *Sinclair Paint* exception to tilt the scale toward a presumed

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District quotes the Ballot Argument in Favor of Proposition 26. (*Ibid.*) The argument should be ignored. Amicus HJTA was neither an author of Proposition 26 nor a signer of the ballot argument. Moreover, ballot arguments are notoriously unreliable indicators of a measure's actual–or even intended–effects. They appear in the Voter Information Guide above a warning: "Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency." (Gov. Code § 88002.) For courts as well as voters, "[o]ne difficulty with relying on ballot arguments is that they are stronger on political rhetoric than on legal analysis." (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 143 fn. 11.) In any event, "[t]he opinion of drafters ... who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent. [Citations.]" (*Taxpayers to Limit Campaign Spending v. Fair Political Practices Com.* (1990) 51 Cal.3d 744, 764-765, fn. 10.)

conclusion that a levy is a tax. Now, in addition to being "in response to a voluntary decision ... to seek government benefits or privileges," the benefit or privilege must be conferred or granted "directly to the payor" and must be "not provided to those not charged."

This exception, according to the Court of Appeal, provides the best argument that groundwater charges are not a tax under Proposition 26: "The District's strongest argument that the groundwater extraction fees are not taxes is that they fall within the first exception for payor-specific benefits and privileges. **Pumpers receive an obvious benefit-they may extract groundwater from a managed basin.**" (235 Cal.App.4th at 254.) But the benefit is not obvious at all. A levy is exempt under this exception only when the levying agency has "**granted** directly to the payor" a benefit not provided to those not charged. Under the facts of this case, however, the District granted nothing to the City in 2011 when it began charging the fee challenged by this lawsuit. The City was already extracting water from a managed basin, and doing so legally. The City was not granted anything new. Nor did the District begin providing any new service. Indeed, the only thing new was the pumping charge.

According to the Second District's own recitation of the facts, the charge newly levied on the City in 2011 was a charge that had been collected in other areas of the District prior to 1987. However, it was not

collected from the City because the City and the District had stipulated in a written agreement that the City did not benefit from its expenditure. (*Ventura*, supra, 235 Cal.App.4th at 237.) The charge was to fund construction of the Freeman Diversion Project which recharges a basin other than the one the City draws from, which is not hydrologically connected to the City's basin. (*Id.* at 236-37.) By holding that the District may now levy this charge (which has never been put before the voters) on the City for projects in other locations that do not necessarily benefit the City, the Court is rejecting the voters' unambiguous intent of tightening the *Sinclair Paint* test.

Indeed, there is a strong argument that the District's pumping charges do not even pass muster under the now-obsolete standard of *Sinclair Paint* and its predecessors. "Special assessments and development, regulatory and user fees are generally not regarded as taxes, and thus are exempt from the reach of [the voter approval requirement for taxes] because with each of these levies, **a discrete group receives a benefit, service, or public improvement that inures to the benefit of that discrete group**. The courts have recognized that although the public as a whole may be incidentally benefitted by the expenditure of the proceeds of these levies, a discrete group is specially benefitted by the expenditure." (*Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1038; *Bay Area Cellular*, supra,

162 Cal.App.4th at 695; *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, 738.)

As discussed previously herein, the Second District explicitly held that the District does not provide a 'service' to the City. (Section IV(B), supra.) This is why the court "distinguished" the existing precedents holding that groundwater charges are property-related fees for water service under Article XIIID. According to the Second District, the District provides a "benefit" instead of a "service." The benefit that the District provides is *management* of the basins in the District:

> "A pump fee is ... like the entrance fee to a state or local park, which is not a tax (see Cal. Const., art. XIII C, § 1, subd. (e)(4); id. art. XIII A, § 3, subd. (b)(4)). Although citizens generally have the right to enter such public land, the government is entitled to charge them a fee for its efforts to maintain the land so that it can be enjoyed by all who use it. (See Pub. Resources Code, § 5010.) Without the District's resource management operations, groundwater would be depleted far faster and overdraft in the District would be far more severe."

(*Ventura*, supra, 235 Cal.app.4th at 254.) In so reasoning the court has brazenly rewritten the regulatory fee exception in order to remove all of its limitations. After noting that "many of the costs associated with **managing** [the basin] lie beyond the scope of [Proposition 26's regulatory fee exception] (*Id.* at 253)," the Court then holds that those costs fall within the exception for payor-specific benefits because "[p]umpers receive an

obvious benefit–they may extract groundwater from a **managed** basin. ... Without the District's resource **management** operations, groundwater would be depleted far faster and overdraft in the District would be far more severe."

But the word "management" is nothing more than a synonym for "regulation." If the District's management of the basin is the basis for exempting these fees from Proposition 26, then one must look to the regulatory fee exemption. (See Section V(A), supra.) The reasoning of the Second District contorts both constitutional text and legal concepts in an attempt to transmute a non-exempt regulatory function into an exempt payor-specific benefit. The result is the bastardization of Proposition 26's discrete, enumerated exceptions so as to remove most, if not all, limitations. Not only is this result beyond the plain text of Proposition 26 and the voters' unambiguous intent, it creates a loophole that threatens to swallow the rule.

As explained in Section IV, supra, the pumping charges are properly construed as fees or charges for property-related services subject to Proposition 218. However, even if the pumping charges are not considered fees for property-related services, they remain subject to Proposition 26's requirements. Because the activities funded by the pumping charges do not fall within any of the fee exceptions enumerated in Proposition 26, they

must be construed as taxes subject to voter approval. Because no such approval ever occurred, the pumping charges are therefore invalid.

VI

THE RATIO IMPOSED BY WATER CODE SECTION 75594 VIOLATES THE COST-OF-SERVICE REQUIREMENTS OF BOTH PROPOSITIONS 218 & 26

Water Code sec. 75594 provides, in relevant part:

> "[A]ny ground water charge in any year **shall be established at a fixed and uniform rate for each acre-foot for water other than agricultural water which is not less than three times nor more than five times the fixed and uniform rate established for agricultural water**. However, any groundwater charge in any year for water other than agricultural water used for irrigation purposes on parks, golf courses, schools, cemeteries, and publicly owned historical sites may be established at a fixed and uniform rate for each acre-foot which shall not be less than the rate established for agricultural water, nor more than the rate established for all water other than agricultural water."

As discussed previously herein, the pumping charges are subject to but substantively noncompliant with Proposition 218, and must be construed as taxes under Proposition 26 in any case. This is so because both Propositions 218 and 26 include payor-specific cost-of-service requirements; under either Proposition, the charges levied against the payor must be justified in terms of actual, proportional cost of the benefit or service received, or the actual cost of the regulatory program at issue.

The ratio imposed by sec. 75594 is facially unconstitutional irrespective of whether this Court construes the pumping charges as subject to Proposition 218 or 26 for that same reason. The statute unambiguously requires a price floor for non-agricultural water that correlates not to **cost**, but to the **price** of agricultural water. Because this price floor ("not less than three times nor more than five times") is not correlated in any way to the cost of non-agricultural water, it has the effect of skewing the price of agricultural water as well. For if the total revenue from groundwater rates cannot exceed the cost of providing service, then sec. 75594 can be implemented only by overcharging non-agricultural pumpers in order to subsidize agricultural pumpers. Therefore, the ratio is entirely arbitrary as to the cost it purports to represent, and is therefore invalid. (See *Roseville*, supra, 97 Cal.App.4th at 648.)

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VII

CONCLUSION

For the foregoing reasons, Amicus HJTA respectfully requests that this Court vacate the decision of the Second District.

Dated: November 17, 2015 Respectfully submitted,

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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 pages, tables, and this certification, as measured by the word count of the computer program used to prepare the brief, contains 6,795 words.

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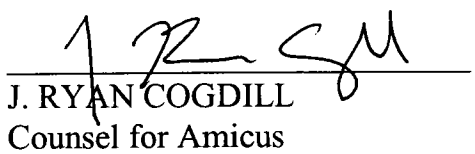

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PROOF OF SERVICE

CALIFORNIA SUPREME COURT

I, Lorice Strem, 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 November 17, 2015, I served the foregoing document described as: **HOWARD JARVIS TAXPAYERS ASSOCIATION'S APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF CITY OF SAN BUENAVENTURA** on the interested parties below, using the following means:

SEE ATTACHED SERVICE LIST

__X__ **BY UNITED STATES MAIL** I enclosed the document in sealed envelopes or packages addressed to the respective addresses of the parties stated above and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Sacramento, California.

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__X__ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 17, 2015, at Sacramento, California.

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