No. S263734

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HILL RHF HOUSING PARTNERS, L.P. et al.,
Plaintiffs and Appellants

vs.

CITY OF LOS ANGELES; et al.,
Defendants and Respondents

MESA RHF PARTNERS, L.P. et al.,
Plaintiffs and Appellants

vs.

CITY OF LOS ANGELES; et al.,
Defendants and Respondents

Second District Court of Appeal
Case Nos. B295181, B295315
Los Angeles County Superior Court
Case Nos. BS170127 and BS170352
Hon. Mitchell L. Beckloff, Hon. Amy D. Hogue, Presiding

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INTRODUCTION

Amicus Benink & Slavens, LLP ("Amicus") correctly points out that Proposition 218 reversed the burden of proof at trial on two issues and heightened the standard of judicial review of assessments. (*Capistrano Taxpayers Assn., v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1506–1507 ("*Capistrano*").) An assessing government bears the burden to show properties receive special benefit, and that assessment amounts are proportional to and no greater than the special benefit conferred. (Cal. Const., art. XIII D, § 4, subd. (f).) Proposition 218 did not, however, eliminate other litigation procedures, including application of the exhaustion doctrine. (E.g., *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1191.) Nor did it alter longstanding separation of powers principles that an assessment levy is a legislative act subject to some deference (*Griffith v. Pajaro Valley Management Agency* (2013) 220 Cal.App.4th 586, 601 ("*Griffith*") [courts review, but do not make, rates], disapproved on other grounds by *City of San Buenaventura v. United Water Conservation Dist*. (2017) 3 Cal.5th 1191, 1209, fn. 6), and judicial review is therefore limited to the administrative record. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559 ("*Western States*").)

As the Joint Answering Brief details, it is precisely because the local agency must prove its assessments comply with Proposition

218 that exhaustion is critical. (Joint Answering Br. at pp. 47–52.) A goal of article XIII D, section 4's[1] notice and hearing requirements to require assessments to be submitted to property owners for approval or rejection is to advance the taxpayer consent principle. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 [discussing purpose of Proposition 218 to enhance taxpayer consent and reduce deference to agencies] ("*Silicon Valley*").) These notice and hearing requirements, and the dialog between assessees and local government the exhaustion requirement fosters, allow agencies to respond to criticism and concerns, defuse disputes where possible, apply their expertise, and develop records for judicial review when litigation cannot be avoided. Requiring objectors to state their objections at the hearing also allows other assessees to know of, and respond to them, empowering taxpayers collectively, rather than merely facilitating suit.

ARGUMENT

I. EXHAUSTION IS NECESSARY TO DEVELOP ADMINISTRATIVE RECORDS TO FACILITATE JUDICIAL REVIEW

Amicus disputes policies the exhaustion doctrine serves, arguing against the well-established litigation-on-the-record rule to claim agencies have no incentive for robust pre-litigation dialog. Not

[1] References to "articles" are to the California Constitution.

so. As Respondents' Joint Answering Brief urges, the Opinion on review here ("Opinion") should be affirmed because the protest hearing Proposition 218 requires is a two-way street, like all administrative decision-making. Government cannot later justify an assessment on grounds not raised during the assessment process, but is — like all litigants — is limited to the record on which it legislated. (*Western States*, 9 Cal.4th at p. 559.) As public agencies cannot consider a protest never made, disgruntled assessees must voice their objections to the agency before suit.

A. Judicial Review of an Assessment Levy is Limited to the Administrative Record

Amicus would limit *Western States* to allow challenges to assessments on evidence the levying agency never had opportunity to consider. (Amicus Br. at pp. 9–15.) This is contrary to the law and justification for the litigation-on-the-record rule. A challenge to a legislative act — regardless of the basis, constitutional or otherwise — sounds in mandate and evidence is limited to the administrative record. (*Western States*, 9 Cal.4th at p. 576; *American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 460 [in mandate review of legislation, court will "consider only the administrative record before the agency"]; *SN Sands Corp. v. City and County of San Francisco* (2008) 167 Cal.App.4th 185, 191–192 [challenge to contract as violating city charter limited to administrative record]; *Newhall County Water Dist. v. Castaic Lake*

Water Agency (2016) 243 Cal.App.4th 1430, 1450 [excluding extra-record evidence from Proposition 26 case, citing *Western States*].) An assessment levy is a legislative act, and judicial review is limited to the record before the agency when it acted for that reason. (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 683 ["the establishment of a special assessment district takes place as a result of a peculiarly legislative process grounded in the taxing power of the sovereign"], disapproved on other grounds by *Silicon Valley*, *supra*, 44 Cal.4th 431; *Western States*, *supra*, 9 Cal.4th at p. 567 ["Courts have traditionally held that quasi-legislative actions must be challenged in traditional mandamus proceedings rather than in administrative mandamus proceedings even if the administrative agency was required by law to conduct a hearing and take evidence."].)[2] Because government legislative acts are entitled to

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[2] The cases inconsistently refer to local government legislative acts as "legislative" or "quasi-legislative." Many cases emphasize the ambiguity, referencing "legislative or quasi-legislative," acts. (E.g., *Carroll v. City and County of San Francisco* (2019) 41 Cal.App.5th 805, 825.) Technically, quasi-legislation is the act of a delegated decisionmaker, like a State agency's regulation authorized by statute or a local government subordinate entity's use of delegated rule-making power by the legislative body. The legislative act of a city council or county board of supervisors is "legislation," and this brief therefore uses that term. (Compare *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8 ["quasi-legislative rules are the substantive product of a delegated legislative power conferred on the agency"] with *Strumsky v. San Diego County Employees Retirement Assn*. (1974) 11 Cal.3d 28, 34, fn. 2. [referring to "legislation" of local

judicial deference, limiting review to the administrative record advances the separation of powers. (*Western States*, *supra*, 9 Cal.4th at pp. 575–576.)

Western States and its progeny establish the bedrock principle that traditional mandate actions must be heard and decided on the administrative record of proceedings, without resort to post-hoc extra-record evidence. Applying a contrary rule would obligate courts to legislate rather than adjudicate, and greatly increase the risk and cost of litigation for California's state and local governments. As Justice Mosk explained for a unanimous Court in *Western States*:

> The issue would become not whether the administrative decision was a prejudicial abuse of discretion, but whether the decision was wise or scientifically sound in light of the extra-record evidence. As we have explained and as WSPA has conceded, such questions are not for the courts to answer.

(*Western States*, *supra*, 9 Cal.4th at p. 577.) Although a less deferential standard applies here under *Silicon Valley*, still, courts review rate-making legislation; they do not make rates. (*Griffith, supra*; *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1145 ["It is not the court's

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agencies]; see also Cal. Const., art. XI, § 5 [city charters have force of statutes as to municipal affairs].)

function to set water rates"].) The burden is on the proponent of extra-record evidence to demonstrate application of one of few, narrow exceptions to this rule. (*Id.* at p. 576–577.) But extra-record evidence "can **never** be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." (*Western States*, *supra*, 9 Cal.4th at p. 579, emphasis added.)

Western States' rule is rooted in the separation of powers and institutional competencies of legislators and courts. (*San Joaquin Local Agency Formation Com'n v. Superior Court* (2008) 162 Cal.App.4th 159, 167 [admitting extra-record evidence would "infringe upon the separation of powers"].) Absent that rule, public agencies will be sandbagged by new evidence in court without an opportunity to review and consider it during public hearings at which other assessees may participate in discussion. Litigants will withhold their best evidence for trial, requiring the courts to evaluate complex technical expert issues in the first instance. (*Western States*, *supra*, 9 Cal.4th at p. 575 ["commentators are correct" to "assert that if interested parties know they will not be able to introduce extra-record evidence in subsequent judicial proceedings, they will present all their evidence to the administrative agency in the first instance"]; *Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1271 ["allowing extra-record evidence under these circumstances would encourage interested parties to withhold

important evidence at the administrative level so as to use it more effectively to undermine the agency's action in court"].)

Amicus argues the litigation-on-the-record rule applies only when review is for abuse of discretion. Not so. Amicus intermingles the statutory limitation for administrative mandate actions (Code of Civ. Proc., § 1094.5, subd. (e)), with *Western States*' common-law rule arising from our Constitution's commitment to the separation of powers. *Western States* has been broadly and consistently applied in traditional mandamus review of legislative actions. (E.g., *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 695, 706 [applying *Western States* to claims for mandate, declaratory, and injunctive relief]; *Meaney v. Sacramento Housing & Redevelopment Agency* (2007) 13 Cal.App.4th 566, 582 [reverse validation]; *SN Sands Corp. v. City and County of San Francisco* (2008) 167 Cal.App.4th 185, [mandate challenge to contract award].)

Though Amicus does not cite it, Respondents note the recent decision in *Malott v. Summerland Sanitary District* (2020) 55 Cal.App.5th 1102 is not to the contrary. While the case permits extra-record evidence in a Proposition 218 challenge to sewer rates, it neither cites nor applies *Western States*, and as a Court of Appeal opinion, cannot undermine this Court's precedent.

As *Western States* and its progeny explain, the policy rationale for the litigation-on-the-record rule must be respected in **all** traditional mandamus matters. Courts review legislation, they do

not legislate, and agencies often apply expertise unavailable to courts. (*Western States*, 9 Cal.4th at pp. 572–573.) Allowing post-hoc evidence in **any** traditional mandamus action "would seriously undermine the finality of quasi-legislative administrative decisions." (*Ibid.*) This is no less so in cases involving independent review. (E.g., *Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 120 ["Regardless of whether common law principles under *Western States* apply or the action is subject to Code of Civil Procedure section 1094.5, subdivision (e), the underlying principles in determining whether extra-record evidence is admissible are essentially the same."].)

As *Western States* observed, if extra-record evidence is allowed, a vicious cycle could ensue — litigants could present evidence for the first time in court, win a new agency proceeding, and sue to challenge the result of that second proceeding on the basis of still new evidence. Logically, the process would end only when all plausible claims are litigated or the agency's will to proceed is exhausted. (*Western States, supra*, 9 Cal.4th at p. 578.) Limiting litigation to the administrative record protects courts, administrators, and participants in hearings alike by making hearings meaningful and facilitating efficient judicial review.

Moreover, Amicus mistakes the relevance of the standard of review. It is true a reviewing court exercises independent judgment whether a BID and its assessment satisfy Proposition 218. (*Silicon*

Valley, *supra*, 44 Cal.4th at p. 448.) But independent review is not trial de novo — a court employs independent review of the administrative record to determine whether an assessment complies with Proposition 218, not whether it is a good idea. Judicial analysis begins with a presumption the agency's findings are correct. (*Fukuda v. Angels* (1999) 20 Cal.4th 805, 817.) But for the two issues named in article XIII D, section 4, subdivision (f), the challenger bears the burden to persuade.

Nor does the limited exception to the litigation-on-the-record rule for informal administrative actions taken without hearing — like a building permit hearing — apply here. (See, e.g., *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 238 [allowing extra-record evidence for informal action without hearing].) As Amicus acknowledges, article XIII D and the Property and Business Improvement District Law (Sts. & Hwy. Code, §§ 36600 et seq.) dictate a robust notice and hearing process to allow for meaningful judicial review of assessment decisions — on a fulsome administrative record.

Respondents' argument for an exhaustion requirement to facilitate a complete administrative record is thus fully justified. Where objections raised in court have already been presented to a local government, as exhaustion requires, the local government has opportunity to address any objections — it might produce additional supporting evidence before taking action, for example, or

alter or abandon its proposal. Moreover, requiring objections to be presented to the local government will better develop the record. Developed records, with evidence both supportive of and disputing the propriety or legality of assessments, allow courts to independently determine whether local governments have met their evidentiary burden.

B. Requiring Complete Exhaustion of Remedies Does not Shift Proposition 218's Burden of Proof

Like HJTA, Amicus also wrongly contends enforcing the exhaustion requirement will shift the burden of proof to challengers on the two issues article XIII D, section 4, subdivision (f) assigns to government. (Amicus Br. at p. 15.) Again, not so. For the reasons detailed in the Joint Answer Brief and in the answer to the HJTA amicus brief, exhaustion makes Proposition 218's protest hearing meaningful and advances dialog between government and assesses — including assessees who favor an assessment program. By its terms, Proposition 218 requires both mailed notice and ballots, and public hearings where the agency "consider(s) all protests." (Joint Answering Br. at pp. 38–47, citing Cal. Const., art. XIII D, § 4, subd. (e).) Meaningful participation at an assessment hearing advances taxpayer voter consent, serving Proposition 218's purpose to facilitate communication between government and those it serves. (Joint Answering Br. at pp. 47–52.) Allowing a "no" ballot alone to

exhaust administrative remedies would make meaningless the duty to "consider all protests" at an assessment hearing.

Nor does this "gut" Proposition 218, as Amicus asserts. (Amicus Br. at p. 16.) An agency must still comply with all Proposition 218's notice and hearing requirements, provide assessees detailed information, including an engineer's report, as to the services to be provided, the amount of the assessment, and the allocation of special benefit and burden to fund it. (Cal. Const., art. XIII D, § 4, subds. (a) – (d).) An agency still must show assessed properties receive special benefit, and that assessment amounts are proportional to and no greater than the special benefit conferred. (*Id*., subd. (f); *Capistrano*, 235 Cal.App.4th at pp. 1506–1507.) To meet these obligations, an assessing agency must carefully analyze constitutional requirements and develop supporting evidence. What the agency cannot do, however, is guess every potential theory for challenge. Meaningful participation allows for information-gathering and notice of a challengers' concerns — whether to a BID's services, the assessment methodology, or the notice and hearing procedures. This imposes no burden of proof on the challenger to prove noncompliance. It merely requires unhappy assessees to voice their objections and their bases, providing notice and opportunity for government to "consider the protests" and respond, or to litigate on that record.

Moreover, Proposition 218 clearly and specifically addressed and altered the burden of proof, not the exhaustion of administrative remedies. Article XII D thus provides that "[i]**n any legal action** contesting the validity of any assessment, the burden shall be on the agency to demonstrate . . . proportionality." (Cal. Const., Art. XIII D, § 4, subd. (f) [emphasis added].) Article XIII D explicitly addresses only the burden of proof in "any legal action," and specifically does not alter the obligations of a challenger to raise cogent objections to an assessment during the assessment process. Proposition 218 cannot be "gutted" by an exhaustion requirement Proposition 218 explicitly did not address.

Nor does such a requirement implicitly affect the burden of proof at trial. The government still must prove in the "legal action" that it satisfies the proportionality requirement of article XIII D. Once the challenger raises an objection, the government must decide whether to produce additional evidence during the administrative proceeding, alter the assessment in some manner to address the objection, or to proceed and hope to prevail at trial with the record as it stands.

Administrative exhaustion here does not circumvent the government's burdens under article XIII D. Instead, it allows the government a fair chance to meet them. Without some reasonable administrative notice of why a challenger believes an assessment is flawed the government cannot cure the flaws or investigate whether

the assessment is truly flawed. Instead, the government would be acting without guidance or knowledge, at its peril should it err.

II. EXHAUSTION REQUIRES MEANINGFUL PARTICIPATION IN PROPOSITION 218 PROTEST HEARINGS

Amicus argues that, because an assessment hearing preceded the City's renewal of the BID and levy its assessments, it is not an administrative "remedy" to be exhausted. Amicus asserts that because Proposition 218 dictates no **post**-legislative procedure, it provides no true administrative remedy. This ignores the very purpose of exhaustion, as well as Proposition 218's detailed procedural and substantive requirements for assessments.

At its core, exhaustion of remedies is grounded on separation of powers and administrative autonomy — if an administrative remedy is provided by statute, it must be invoked and exhausted before judicial review of the administrative action is available. (*Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 686–687; *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1137 ["essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review"].) Proposition 218 evidences no intent to dispense with well-established administrative exhaustion requirements that are a precondition to judicial action — it was express as to the elements of assessment litigation it changed.

(Cal. Const., art. XIII D, § 4, subd. (f).) Proposition 218 was enacted to promote dialog between assessees and assessors (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220), and requiring exhaustion furthers this goal.

Moreover, Amicus ignores the broad scope and application precedent gives the exhaustion doctrine. A**ny** agency process by which relief could be obtained must be exhausted. The most common remedies to be exhausted consist of agency hearings and appeals of unfavorable initial decisions to an agency head or by some other internal review procedure. (E.g., *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 223 Cal.App.4th 149 [requiring assessees to protest budget and assessments before challenge to pest control assessment;]; *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 640–642 [farmers contesting citrus pest elimination plan must raise objections in agency's budget process before suit]; *Redevelopment Agency v. Superior Court* (1991) 228 Cal.App.3d 1487, 1492 [exhaustion required whether redevelopment plan adoption is quasi-legislative or administrative]; *Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 687 [even constitutional challenges barred by plaintiffs' failure to object to nuisance abatement assessment at city council hearing].) Even permissive remedies must be exhausted. (*City of Grass Valley v. Cohen* (2017) 17 Cal.App.5th 567, 576–578 [voluntary remedy must be exhausted].)

Article XIII D, section 4 provides Petitioners a remedy here. It establishes "clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties." (*Rosenfield v. Malcolm* (1967) 65 Cal.2d, 559, 566 [defining "remedy"].) The City could have addressed Petitioners' concerns in any way that did not increase assessments on others — by maintaining the assessments as proposed, but better explaining them, or reducing Petitioners' assessments using non-assessment funding to fill the gap. The City might also have rejected renewal of the BIDs, changed their services, or carved the objectors out of the districts. An assessment hearing under article XIII D, section 4 — which obligates the City Council to "consider all protests" before levying an assessment — is an adequate administrative remedy for the challenges raised here.[3]

CONCLUSION

As detailed in Respondents' Joint Answer Brief on the Merits, Respondents respectfully request this Court affirm the Opinion. Maintaining the well-established exhaustion rule and the litigation-on-the-record rule is fully consistent with Proposition 218's text and

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[3] As detailed in the Answering Brief and Answer to Amicus Curiae of Howard Jarvis Taxpayers Association, *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, is not to the contrary, but rather expressly reserves the issue here. (Joint Answering Br. at pp. 60–65; Answer to HJTA Amicus Br. at pp. 7–10.)

makes the protest hearing it mandates meaningful. It does not alter burdens of proof and serves all the policies that underly the exhaustion requirement in other settings. This Court should also give the Opinion ordinary retroactive effect for the reasons stated in the Joint Answering Brief.

DATED: April 30, 2021

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DATED: April 30, 2021

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Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Answer to Petition for Review is produced using 13-point type including footnotes and contains approximately 3628 words, fewer than the 14,000 total words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word program used to prepare this brief.

DATED: April 30, 2021

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Supreme Court for the State of California Case No. S263734

Hill RHF Housing Partners, L.P. v. City of Los Angeles, et al.
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Mesa RHF Partners, L.P. v. City of Los Angeles, et al.
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Los Angeles Superior Court Case No. BS170352

I, the undersigned, declare:

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