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

RESPONDENTS' ANSWER TO AMICUS CURIAE BRIEF OF HOWARD JARVIS TAXPAYERS ASSOCIATION

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INTRODUCTION

None of amicus Howard Jarvis Taxpayers Association's ("HJTA") points change the analysis or result here. Our courts have long held that one challenging an agency's legislative decision must meaningfully participate in its decision-making and exhaust all available administrative remedies before suit. Article XIII D, section 4[1] provides an adequate administrative remedy which applies to all assessment challengers equally, including Petitioners, without exception or exclusion. The record here shows Petitioners, who submitted a "no" ballot on the assessments they challenge but did nothing more, failed to exhaust.

ARGUMENT

I. PROPOSITION 218'S REMEDY HERE IS WELL ESTABLISHED AND UNIFORMLY APPLIED

HJTA argues the administrative remedy sought is discriminatory, and exhaustion should be excused based on Petitioners' low-income senior tenants or other potential challengers' unique circumstances. There is no support for such exception.

Where there is an administrative remedy to exhaust, it applies equally to everyone knocking on the courthouse door. Exhausting available administrative remedies promotes judicial efficiency, favors administrative autonomy, and prevents "sandbagging"

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

agencies for a more favorable judicial result. These policy goals justify the doctrine's broad application, regardless of a challenger's income-level, physical attributes, or unique circumstances. (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1137.) Exhaustion is jurisdictional, not a matter of judicial discretion, and is binding upon all who would sue. (*Abelleira v. District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 292–293.) While there are few exceptions to exhaustion — generally, inadequacy of remedy, irreparable injury, and when warranted by the public interest — Petitioners have argued none and the Court need not entertain HJTA's excursion into new theories. (*Dignity Health v. Local Initiative Health Care Authority of Los Angeles County* (2020) 44 Cal.App.5th 144, 166 ["[A] reviewing court need not address additional arguments raised by an amicus curiae."].)

Moreover, an administrative remedy is not inadequate, improper, or excused merely because it requires additional time, effort, and expense. (*Coachella Valley Mosquito & Vector Control Dist. v. California Pub. Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1081–1082.) It typically does. Instead, with rare exception, courts either apply the exhaustion rule or its few established exceptions without weighing the circumstances of a particular litigant or case. Jurisdiction goes to the role of courts in our democracy, not the peculiarities of a given plaintiff. Exhaustion applies in all types of cases, regardless of the sensitivity of facts or technicality of legal

issues. (E.g., *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311 [applying exhaustion to whistleblower's retaliation claim]; *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 623 [exhaustion of CEQA claims] ("*North Coast*").) Indeed, just this week the Court of Appeal applied the issue exhaustion doctrine in a CEQA case, explaining:

> The purposes of the doctrine are not satisfied if the objections are not sufficiently specific as to allow the Agency the opportunity to evaluate and respond to them. Thus, relatively bland and general references to environmental matters or isolated and unelaborated comments do not satisfy the exhaustion requirement. Rather, the exact issue must have been presented to the administrative agency. Requiring anything less 'would enable litigants to narrow, obscure, or even omit their arguments before the final administrative authority because they could possibly obtain a more favorable decision from a trial court.

(*Stop Syar Expansion v. County of Napa* (2021) ___ Cal.App.5th ___, Mar. 25, 2021, modified Apr. 23, 2021) Case No. A158723, 2021 WL 1596347, at p. *3, internal citations and quotations omitted [citing *North Coast*, *supra*, 216 Cal.App.4th at p. 623] ("*Stop Syar*").) The Court of Appeal noted this standard does not require the impossible, but must apply equally to all. (*Id.* at p. *3, n.3 ["This does not mean

an objector must be as specific as an attorney making an objection in a lawsuit. Nonetheless, the objection must fairly apprise the agency of the substance of the objection so that it has an opportunity to evaluate and respond to it." (Internal citation and quotation omitted)]; see also *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 629 ["To satisfy the exhaustion requirement, objections a party seeks to raise in a CEQA action must have been made known in some fashion, however unsophisticated, in the administrative proceeding." (Internal citation and quotation omitted)].)

So, too, here. Each property owner received 45 days' mailed notice, with detailed information regarding the nature of the assessments, both in the form of the Engineer's Report and Management Plan, which explained the BIDs' services and assessment methodology in understandable terms. (Joint Answer Br. at pp. 14–22.) All were well informed of the date, time, and place of the public hearing, that they could provide "written or oral testimony" at that hearing, and that the City Council was obliged to "consider all objections or protests to the proposed assessment." (*Id*. at pp. 21–24.) Put simply, the procedure to approve or challenge the assessments were made clear to all property owners, and there is no reason here to disregard Petitioners' obligations to exhaust. Moreover, even on its own equitable terms, any infirmity of those

Petitioners serve does not excuse Petitioners' inaction — they are business entities, not elders or infirm individuals.

Nor does the Opinion on review here ("Opinion") require an assessee to "have a professional review the engineer's report for accuracy and legality, and prepare an opinion for the public hearing." (Joint Answer Br. at p. 18.) Instead, an assessee must only "fairly apprise the agency of the substance of the objection." (*Stop Syar, supra*, ___ Cal.App.5th ___, 21 WL 1596347 at p. *3, fn. 3.) An assessee need not provide a lengthy analysis of a proposed assessment, but only a fair description of her objection and its bases. The assessing agency must still prove, if challenged, that it assesses no more than the cost to confer special benefit. (Cal. Const., art. XIII D, § 4, subd. (f).) The exhaustion requirement does no more than provide the government a fair chance to meet that burden before litigation if it can, or to change course if it must.

Nor should this Court countenance HJTA's contention the special benefit here is illusory because Petitioners operate low-income senior housing "with legal prohibitions against raising rents." This might create hardship for Petitioners, but so would any increased cost of doing business. Moreover, whether Petitioners specially benefit from the BIDs' services is not before this Court, which granted review solely on the exhaustion question. Further, while Respondents assert (and the trial court found) Petitioners

derive special benefit from the BIDs' supplemental services,[2] they would be obliged to exhaust administrative remedies even if they did not. A jurisdictional issue is resolved at the threshold irrespective of the merits; it is not merely another label for the merits inquiry.

II. *PLANTIER* IS INAPPLICABLE AS PETITIONERS HAVE AN ADEQUATE ADMINISTRATIVE REMEDY

HJTA asserts this case is akin to *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372 ("*Plantier*"), arguing this Court should find any administrative remedy here is "inadequate because there is nothing meaningful the City is obliged to do in response to a 'protest' or 'objection'." (Amicus Br. at p. 8.) *Plantier* differs substantially from this case, and its carefully limited reasoning provides no guidance here. This Court granted review here to decide questions *Plantier* reserved. Article XIII D, section 4 provides an adequate and meaningful administrative remedy to assessment challengers, and specifically guides an agency's decision-making. Unlike in *Plantier*, an assessing agency **can** take specific and relevant

[2] This was briefed at length on appeal. While the Opinion does not address the merits, the trial court found: "[t]he engineer's report takes into consideration the characteristics of the different types of properties" within the BIDs, and that Petitioners' low-income senior tenants make ample use of the BIDS' services and benefit from them, benefiting Petitioners, too. (AA:583, 590, 603.)

action in response to public participation. (*Plantier, supra*, 7 Cal.5th at pp. 385–386.)

The Court limited *Plantier* to its unusual facts — a dispute as to the administration of sewer rates that happened to arise when the agency sought to legislate new rates. *Plantier* assumed without deciding that one must exhaust Proposition 218's majority protest hearing before a facial challenge to new, district-wide rates. (*Id.* at p. 390.) But, it concluded, Plantier's was not such a challenge as he challenged allocation of sewer service units to his restaurant, not the rates themselves. (*Ibid.*) His was an as-applied, not a facial claim. Since the sewer agency noticed a hearing on proposed rate increases affecting all sewer customers, and not its sewer-service-unit allocation formula, its board could not have acted on Plantier's complaint at the Proposition 218 hearing except by proposing new rates premised on a new formula, which would require a new hearing. (*Id.* at p. 387.) Because the hearing article XIII D, section 6, subdivision (a) requires for new or increased property-related fees could provide to Plantier no relief, it was not an adequate administrative remedy to be exhausted. This Court did not decide the broader question "whether, when, and under what circumstances a public comment process may be considered an administrative remedy." (*Id.* at p. 384 ["We consider only whether these Proposition 218 hearings were adequate to resolve plaintiffs' substantive challenge."].)

Here, article XIII D, section 4 provides remedy that **can** provide assessees complete relief. Property owners have three options when given notice of an assessment protest hearing:

(1) support the proposed assessments and special benefits and submit a "yes" vote;

(2) oppose the assessment on personal or policy grounds, such as opposition to the services or unwillingness to pay assessments, vote "no," and voice objection at the hearing or by letter or email in advance of it; or

(3) oppose imposition of the assessment on legal grounds, asserting violation of article XIII D, section 4's procedural or substantive obligations, vote "no," and voice objection — again, in person or by a pre-hearing writing.

A majority, weighted "no" vote defeats the assessment. (Cal. Const., art. XIII D, § 4, subd. (e).) Otherwise, the agency may address challengers' concerns in any way that does not increase assessments on others. It could:

(1) levy the proposed assessment, but better explain it;

(2) reduce the assessment on opponents, providing additional non-assessment funding for the BIDs;

(3) continue the public hearing to further consider the concerns and to develop means to address them; or

(4) reject the new or renewed assessment, and potentially start the process over again based on a new Engineer's Report and management plan that considers challengers' objections.

This is much more than the "general investigatory power" HJTA describes — it is legislative power. That the agency could start over proves nothing. In myriad circumstances to which exhaustion applies, the decision-maker can scrap a proposal and start over. This is often true under CEQA for example. (E.g., *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559 [CEQA review of CARB rule-making it could abort].)

Exhaustion fosters informed decision-making and the dialog of government and the governed this Court recognized as necessary under Proposition 218's power-sharing scheme. (*Bighorn-Desert Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220.) Exhaustion ensures a local government examines legal objections, including their bases, so that it may seek to fix any infirmity. This is an appropriate and adequate remedy. (*Rosenfield v. Malcolm* (1967) 65 Cal.2d, 559, 566 [administrative remedy provides "clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties"]; *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"].)

III. THE RECORD DEMONSTRATES PETITIONERS FAILED TO EXHAUST

HJTA claims a lack of clear parameters for a government to "consider" challengers' objections, and that requiring exhaustion will lead to "unrealistic expectations." The record supports neither claim.

First, as addressed in the Joint Answer Brief, Proposition 218, as clarified by the Proposition 218 Omnibus Implementation Act of 1997 and the Property and Business Improvement District Law (Sts. & Hwy. Code, § § 36600 et seq.), and case law clarify what is required to "consider" objections. (Joint Answer Br. at pp. 40–47.) HJTA argues that absent further guidance, "consideration" cannot be an adequate administrative remedy. But, as HJTA concedes, "consider" must mean more than counting ballots, as the Constitution articulates it as a separate requirement (Cal. Const., art. XIII D, § 4, subd. (e) ["At the public hearing, the agency shall consider all protests against the proposed assessment **and** tabulate ballots."] (emphasis added).) This Court has agreed. (*Plantier*, *supra*, 7 Cal.5th at pp. 385–386 ["To interpret 'consider all protests' as simply vote-counting requirement would render that language redundant."].) The Omnibus Act offers further that the public hearing may be "continued from time to time" for the agency to "consider" "objections or protests." (Gov. Code, § 53753, subd. (d).) If an agency finds an objection has merit — or it bears further consideration — it may take additional time to do so. This Court

interprets "consider[ing] all protests" under article XIII D, section 6's parallel language to compel an agency to "take into account" all objections when deciding whether to approve a proposed property-related fee. (*Plantier*, *supra*, 7 Cal.5th at p. 386.) Absent a majority protest, an agency may impose, amend, or reject an assessment. A large protest, even if less than a majority, may persuade an agency to change course — these are elected officials, after all. Thus, the duty to "consider all protests" is neither empty language nor an "indefinite obligation," as HJTA contends. That duty provides both the agency and assessees opportunity to investigate and address issues, engage in the democratic dialog *Bighorn* recommended, and take appropriate action.

Second, HJTA's claim that exhaustion imposes "unrealistic expectations" on challengers is unsupported. As the Joint Answer Brief detailed, meaningful participation allows for information-gathering and notice to the agency — and to other assessees who attend the hearing and have access to writings in advance of it (Gov. Code, §§ 54954.1, 54957.5) — of the challengers' objections, whether to the BIDs' services, assessment methodology, or notice and hearing procedures, for example. Absent exhaustion, government and other assessees cannot consider specific objections to determine to support, oppose, or alter the assessment. Of course, precisely what is required to exhaust depends upon the circumstances of each case. (*E.g.*, *Stop Syar*, supra, ___ Cal.App.5th ___, 2021 WL 1596347,

at p. *3 ["consideration of whether such [issue] exhaustion has occurred in a given case will depend upon the procedures applicable to the public agency in question"].) This Court need not and should not determine, as HJTA urges, what is required in every assessment case. This record shows Petitioners did **nothing** beyond voting no. They failed to object in writing or orally at the hearings or to identify any basis for their objection. They utterly failed to apprise the City Council of their objection, denying it opportunity to "consider," evaluate, or act on it. (E.g., *Stop Syar*, *supra*, ___ Cal.App.5th ___, 2021 WL 1596347 at p. *3, n. 3.) This plainly does not constitute exhaustion. More nuanced analysis can develop, as our common law system does, in cases that require it. This case does not.

IV. ENFORCING THE EXHAUSTION RULE DOES NOT ALTER PROPOSITION 218'S BURDEN OF PROOF

HJTA turns the exhaustion argument on its head, claiming that Proposition 218's assignment of the burden of proof on two specific points to the City somehow also imposes the duty to exhaust on it, too. Not so. First, Respondents do not dispute that Proposition 218 obliges government to comply with its comprehensive procedures and substantive requirements. As the Joint Answer Brief detailed, Proposition 218 requires an engineer's report, mailed notice and assessment protest ballots, as well as public hearings at which the agency must "consider all protests." (Joint Answer Br. at pp. 38–

47, citing Cal. Const., art. XIII D, § 4, subd. (e).) The agency's duties are express — nothing need be implied. The agency does bear the burden to show assessed properties receive special benefit, and that assessment amounts are proportional to and no greater than the special benefit conferred, but the burden of proof is otherwise unaltered from ordinary civil practice. (Cal. Const., art. XIII D, § 4, subd. (f); *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2013) 209 Cal.App.4th 1182, 1191 [applying expressio unius canon to Prop. 218, citing Arthur Conan Doyle's "dog that did not bark"].) What Proposition 218 changed about assessment litigation, it did so expressly.

HJTA contends, however, that only government has an administrative "remedy" — and that after following Proposition 218's detailed procedures, as the agencies did here (Joint Answer Br. at pp. 14–24), they may sue for unpaid assessments. (Amicus Br. at p. 20.) The conflates enforcement of laws with administrative remedies granted those to whom law applies. The argument would eliminate the duty to exhaust in any setting. Article XIII D does not provide the government an administrative "remedy," but instead sets forth the process it must undertake to levy an assessment. (Cf. Cal. Const., art. XIII D, § 1, subd. (a) ["Nothing in this article or Article XIII C shall be construed to: (a) Provide any new authority to any agency to impose tax, assessment, fee, or charge."].)

In any event, article XIII D, section 4 does provide assessees an administrative remedy. They have an opportunity to present objections to the local agency, and the local agency must consider those objections, and has power to act on them. Assessees are not excused from exhaustion by such remedies as government may have.

An administrative remedy to be exhausted broadly includes "clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties." (*Rosenfield v. Malcolm* (1967) 65 Cal.2d, 559, 566.) Article XIII D, section 4 provides such a remedy to those who object to assessments. Property owners hold "final authority" over assessment proceeds — a majority protest is binding; lesser protest and substantive comments can persuade. During a public hearing, an agency must consider issues raised during that process.

This duty to consider protests provides more than opportunity to comment. It allows an assessee to command government's attention to his objections. The agency may abandon or reduce an assessment against some or all assessees as a result of such objections. The City and Districts could have addressed Petitioners' concerns in any way that did not require an increase in assessments on others — by maintaining the assessments as proposed, but explaining them more thoroughly, or changing them to reduce burden on Petitioners by requiring additional non-

assessment funding for the BIDs. They might have carved Petitioners out of the District, allowing others to pay for and receive its benefits. The City Council might also have refused renewal of the BIDs. Or it could have changed the BIDs services. 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 and, therefore, must be exhausted before suit.

V. THE OMNIBUS IMPLEMENTATION ACT APPROPRIATELY CLARIFIES PROPOSITION 218

HJTA asserts that Government code sections 53750 to 53758 or the Proposition 218 Omnibus Implementation Act of 1997, may not revise or expand Proposition 218. Specifically, it may not "inadvertently create[] any appearance of an administrative remedy mandatory on payers." (Amicus Br. at p. 21.) As discussed *supra*, requiring meaningful participation at the protest hearing does not shift the burden of proof to assessment challengers.

Legislation commonly clarifies our Constitution. (*Delaney v. Lowery* (1944) 25 Cal.2d 561, 569.) This Court found utility in legislative clarification of Proposition 218, an initiative constitutional amendment not professionally drafted and much in need of clarification. (*Greene v. Marin County Flood Control and Water Conser. Dist.* (2010) 49 Cal.4th 277, 287 ("*Greene*") [citing Prop. 218 Implementation Act to construe article XIII D]; *Pajaro Valley Water*

Management Agency v. AmRhein (2007) 150 Cal.App.4th 1364, 1378, n. 10 [noting Proposition 218's "questionable draftsmanship"], disapproved on other grounds by *City of San Buenaventura v. United Water Conservation Dist*. (2017) 3 Cal.5th 1191, 1209 n. 6.) The Legislature adopted the Omnibus Act — without dissenting vote in any committee or in either house — as urgency legislation signed by then-Governor Wilson to aid implementation of Proposition 218.

The Omnibus Act aids Proposition 218's interpretation, clarifying, *inter alia*, assessment procedures. It neither erects hurdles, nor revises article XIII D, section 4, as HJTA suggests. Rather, it clarifies Proposition 218's procedural and substantive requirements:

- It restates notice and ballot requirements. (Gov. Code, § 53753, subd. (b).)
- As does Proposition 218, it requires no more on an assessment ballot than a place in which a property owner may indicate "support or opposition to the proposed assessment." (*Ibid.)*
- It reiterates, but sharpens the distinction, between the agency's hearing and consideration of protests at the protest hearing, from its tabulation of ballots. (*Id.*, subd. (d).) The agency must "consider" those "objections or protests," and "the public hearing may be continued from time to time" to do so.

- It confirms that, upon consideration of the objections and protests, and absent a majority protest, the agency may impose, amend, or reject an assessment. (*Id.*, subds. (e)(4), (5).)

The language and scope of the Omnibus Act is that of Proposition 218 — it simply offers clarification. The Court of Appeal appropriately looked to it in interpreting Proposition 218. (*Hill RHF Housing Partners, L.P. v. City of Los Angeles* (2020) 51 Cal.App.5th 621, 630.) The Opinion applies the exhaustion doctrine to Proposition 218's procedural requirements, as the Omnibus Act illuminates them:

> Exhaustion of administrative remedies in this context requires nothing more of a property owner than submitting a ballot opposing the assessment and presenting to the agency at the designated public hearing the specific reasons for its objection to the establishment of a BID in a manner the agency can consider and either incorporate into its decision or decline to act on. The administrative procedure outlined in the Constitution and the Government Code allows property owners to do that either orally or in writing at a public hearing called for the purpose of "consider[ing] all objections or protests … to the proposed assessment" and tabulating ballots. (Gov. Code, § 53753, subd. (d).)

This is a proper reading of Proposition 218 and the Omnibus Act, as well as principles of exhaustion. What *Greene* did — rely on the Omnibus Act to construe Proposition 218 — the Opinion might properly do.

CONCLUSION

Respondents respectfully request this Court to affirm the Opinion. A property owner must articulate the specific reasons for opposition to an assessment, orally or in writing, at or before protest hearing article XIII D, section 4 requires to serve all the purposes of the exhaustion requirement — preserving judicial resources, respecting administrative autonomy, facilitating judicial review, and encouraging civic dialog among government, objectors, and other assessees. This Court should also hold the Opinion has ordinary retroactive effect for the reasons stated in the Joint Respondents' 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 3,900 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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Hill RHF Housing Partners, L.P. v. City of Los Angeles, et al.
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Los Angeles Superior Court Case No. BS170127

Mesa RHF Partners, L.P. v. City of Los Angeles, et al.
Second District Court of Appeal, Division 1, Case No. B295315
Los Angeles Superior Court Case No. BS170352

I, the undersigned, declare:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/30/2021

Date

/s/Christina Rothwell

Signature

Graham, Pamela (216309)

Last Name, First Name (PNum)

Colantuono, Highsmith & Whatley, PC

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