No. S226036

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

City of San Buenaventura

Plaintiff, Cross-Defendant and Respondent/Cross-Appellant

v.

United Water Conservation District and Board of Directors of United Water Conservation District

Defendants, Cross-Complainants and Appellants/Cross-Respondents.

Of a Published Decision by the
Second Appellate District, Division Six
Case No. B251810

Reversing a Judgment of the Superior Court of the State of California,
County of Santa Barbara, Case Nos. VENCI 00401714 and 1414739
Honorable Thomas P. Anderle, Judge Presiding

APPLICATION OF CITY OF SIGNAL HILL FOR LEAVE TO FILE *AMICUS CURIAE BRIEF* IN SUPPORT OF CITY OF SAN BUENAVENTURA; PROPOSED *AMICUS CURIAE BRIEF* IN SUPPORT OF CITY OF SAN BUENAVENTURA

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CERTIFICATE OF INTERESTED PARTIES AND RULE 8.520(f)(4) STATEMENT

Pursuant to California Rules of Court, Rule 8.208, subdivision (e)(3), as counsel for *amicus curiae* City of Signal Hill, I hereby certify that none of the *amicus curiae* are "parties" in this case. Additionally, no party or counsel for a party in this appeal authored any part of the attached *amicus curiae* brief or made any monetary contribution to fund the preparation of the brief. No person or entity other than the City of Signal Hill and their attorneys made any monetary contribution to fund the preparation of the brief. Thus, I know of no entity or person that must be disclosed in this case under California Rules of Court, Rule 8.208, subdivision (e)(1) or (2), or Rule 8.520, subdivision (f).

DATED: November 18, 2015

Respectfully submitted,
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By: _____
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CITY OF SIGNAL HILL

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE CITY OF SIGNAL HILL

I. INTRODUCTION

Pursuant to Rule 8.520(f) of the California Rules of Court, the City of Signal Hill ("City") respectfully requests permission to file the attached *amicus curiae* brief in support of the City of San Buenaventura ("Ventura"). The City's interest in the present appeal arises out of its obligation and duty to provide essential water service to over 11,000 residents, and to ensure its water rates are not unnecessarily inflated by the groundwater extraction fees imposed upon it by its local groundwater replenishment district. The proposed brief addresses both questions under review, and it will apprise the Court of certain developments in the law of ratemaking generally and specifically in the groundwater pumping fee context, of the direct and significant impact of this Court's ruling on pumpers throughout the State similarly situated to the Ventura, and the importance that the Court's ruling honor the voters' intent that property-related fees conform to the principles of cost-of-service and proportionality.

II. INTEREST OF APPLICANT CITY OF SIGNAL HILL

The factual circumstances and legal claims of this litigation are very similar to the City's prior litigation against the Water Replenishment District of Southern California ("WRD"). The City overlies a groundwater basin known as the Central Basin, which is adjacent to a separate groundwater basin known as the West Coast Basin. The Central and West Coast Basins are both replenished by WRD and comprise its service area. Approximately 90% of the City's water supply comes from its groundwater produced from the Central Basin.

WRD's enabling act authorizes the district to levy a replenishment assessment ("RA") on every acre-foot of groundwater produced from each basin, however, the RA must be imposed at a uniform rate, regardless of the costs of service WRD incurs to replenish each basin. (See Water Code, § 60317.) In litigation that lasted almost five years, the City alleged this uniform rate amounted to an illegal subsidy and that its adoption and imposition violated Article XIII D of the California Constitution.

The City would like a clear ruling from this Court that agencies must comply with Proposition 218 in assessing groundwater extraction fees so as to avoid excessive, disproportionate RAs and future litigation. Therefore, the City has a direct interest in the outcome of this matter and in being afforded the procedural and substantive rights that are mandated by Article XIII D of the California Constitution.

III. HOW THE PROPOSED AMICUS CURIAE BRIEF WILL ASSIST THE COURT IN DECIDING THE MATTER

As a groundwater producer subject to extraction fees, and a public water purveyor subject to Proposition 218 in its own rate-making, the City offers a balanced perspective on Proposition 218's mandates. Moreover, the City spent nearly five years participating in litigation involving these same issues. As such, the City is uniquely qualified to, and proposes to submit, an *amicus curiae* brief which addresses the following issues and arguments in response to the Court's questions:

A. The brief offers important additional facts to frame the Court's analysis of these important issues.

The facts of this case are not unique to the litigations between UWCD and Ventura, or WRD and the City. As such, it is important that the Court receive briefing on the groundwater agencies and fees imposed throughout the State under

similar factual circumstances – which illustrate the breadth of this Court's ruling and the importance of a determination that i) groundwater extraction fees are "property-related" fees subject to the mandates of Proposition 218 and ii) statutorily-authorized "uniform" rate/ratio provisions are superseded by this later-enacted constitutional mandate.

B. The brief supplements the Proposition 218 analysis set forth in the briefs on file by the parties, which the City offers because of its unique experience litigating these issues for almost five years.

As outlined in the City's proposed briefing, a long line of Proposition 218 jurisprudence confirms that groundwater extraction charges like the rate paid by Ventura and the RA paid by the City are "property-related" fees. Moreover, the law does not support the distinctions offered by the Court of Appeal below as reason for deviation from this clear rule of law:

One, the Second District misinterprets the seminal *Pajaro Valley Water Management Agency v. AmRhein* (2007) 150 Cal.App.4th 1364 ("*Pajaro I*") decision, which is controlling in this case. Many of the errors in the opinion below ("Opinion") stem from its incorrect conclusion that "*Pajaro* was based upon a unique set of facts – 'that the vast majority of property owners in the Pajaro Valley obtained their water from wells, and that alternative sources were not practically feasible.'" (Opinion, at 18, citing *Pajaro I*, 150 Cal.App.4th at 1397.) The City can confirm that the situation in *Pajaro I* is not unique, as the City relies on groundwater for 90% of its supply. Alternative sources of water are cost prohibitive because the City's only alternative source is expensive imported water. Numerous pumpers throughout California similarly must rely on groundwater as a primary source of supply,

meaning those pumpers do not practically have the "option" of not pumping and avoiding the associated extraction fee.

Two, the commercial versus residential "end use" distinctions raised by the court can find no legal footing, nor do they apply to the types of fees paid by Ventura and the City to UWCD and WRD, respectively. Although various water districts around the State impose fees on groundwater extraction pursuant to different enabling acts, the condition for the application of the fee is the same: extraction from property within the agency's service area. Such fees are imposed on the extraction of groundwater from any property within the respective district's service area ***because the pumper has a real property interest in the land from which the water is pumped***, and ***regardless of the use to which that water will eventually be put.***

Three, the "regulatory purpose" exemption that the Opinion offers is both inconsistent with the law and a dangerous precedent to the California water community. This so-called exemption is offered as support for the court's conclusion that UWCD's pumping fees served the valid regulatory purpose of "conserving water resources," and are therefore not property-related. The creation of such an exemption is not supported by the law because (i) it improperly focuses on the effect rather than purpose of the fee at the time of its adoption, an after-the-fact consideration which has no bearing on the validity of a quasi-legislative enactment like a groundwater pumping fee, and (ii) it directly violates the plain language and stated legislative purpose of Proposition 218 itself.

Moreover, it is a dangerous legal precedent which must be stuck down. Given that the majority of the water districts currently in existence in California have a "conservation" function, including UWCD, it stands to reason that the adoption of a

regulatory water conservation exemption to Proposition 218 compliance threatens to obviate this constitutional rule in its entirety.

C. The brief interprets the significance of the Sustainable Groundwater Management Act of 2014 ("SGMA"), which demonstrates the California Legislature's view that Proposition 218 does apply to groundwater extraction fees.

SGMA added Water Code sections 10730 and 10730.2, which authorize the imposition of "fees on groundwater extraction" and expressly make those fees subject to "subdivisions (a) and (b) of Section 6 of Article XIII D of the California Constitution." Therefore, through SGMA, the California Legislature expressly recognized the applicability of Proposition 218 to statutory groundwater extraction fees in general.

D. Finally, the brief explains why Water Code section 75594 is facially unconstitutional in light of Proposition 218.

This is another legal issue the City is again uniquely situated to address, given that it has been involved in five years of litigation focused on the sole issue of whether a parallel uniform water rate provision – Water Code section 60317 – was facially invalid due to WRD's failure to comply with the procedural and substantive requirements of Proposition 218, and whether the City was entitled to a full or partial refund of the invalidated extraction fees.

IV. CONCLUSION

For these reasons, the City respectfully requests the Court grant its request to file the proposed *amicus curiae* brief submitted concurrently herewith.

DATED: November 18, 2015

Respectfully submitted,
ALESHIRE & WYNDER, LLP

By: 

MILES P. HOGAN
Attorneys for Amicus Curiae
CITY OF SIGNAL HILL

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CERTIFICATE OF INTERESTED PARTIES

Amicus Curiae City of Signal Hill herein certifies, pursuant to Rule 8.208 of the California Rules of Court, that it knows of no entity or person that must be listed under Rule 8.208, subsection (e)(1) or (2).

DATED: November 18, 2015

Respectfully submitted,
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BRIEF OF *AMICUS CURIAE* CITY OF SIGNAL HILL

I. INTRODUCTION

Amicus curiae the City of Signal Hill ("City") welcomes the opportunity to address the Court on the two issues under review. The City submits this brief in support of the City of San Buenaventura ("Ventura") in order to apprise the Court of certain developments in the law of ratemaking generally and specifically in the groundwater pumping fee context, the direct and significant impact of this Court's ruling on pumpers throughout the State similarly situated to the City and Ventura, and the importance that the Court's ruling honor the voters' intent that property-related fees conform to the principles of cost-of-service and proportionality. The City respectfully urges the Court to find as follows: (1) groundwater pumping/extraction charges are "property-related" fees subject to Proposition 218; and (2) the rate ratio mandated by Water Code section 75594 violates Proposition 218 because it necessarily conflicts with the cost-of-service analysis and proportionality requirements of Proposition 218; or, in the alternative, the "fair or reasonable relationship" requirement of Proposition 26. Such a ruling is necessary for consistent development of California jurisprudence on appropriate rate-setting by local agencies, and is vital to the water community and all pumpers throughout California.

The opinion by the Court of Appeal for the Second District below ("Opinion"), which concludes that groundwater pumping fees assessed by the United Water Conservation District ("UWCD") are not "property related" fees and therefore are not subject to Proposition 218, directly contradicts a long line of Proposition 218 jurisprudence. Moreover, the Opinion's creation of a "regulatory purpose" exemption, allegedly stemming from *dicta* from the Court of Appeal for the Sixth District in *Pajaro Valley Water Management Agency v. AmRhein* (2007) 150 Cal.App.4th 1364 ("*Pajaro I*"), would nullify the voters' intent in passing Proposition 218 and turn back the clock by almost 20 years. With the adoption of the Sustainable Groundwater Management Act ("SGMA") in 2014, it is clear the California legislature now understands that groundwater extraction fees must comply with the procedural and substantive mandates of Proposition 218. The Opinion below simply cannot be reconciled with the plain text of Proposition 218, the voters' intent in adopting these constitutional protections for the express purpose of limiting taxation without taxpayer consent, case law interpreting Section 6 of Article XIII D of the California Constitution, and the practical concepts of proportionality in property-related fee rate-making.

Statutes like Water Code sections 75594 (at issue here) and 60317 (the authority for replenishment assessments imposed on the City), which dictate a set fee without accounting for or analyzing cost of service or taxpayer benefit, inevitably result in the assessment of unfair rates among similarly situated

pumpers and inhibit consistent application of the law. This system is inequitable for the City, Ventura, and for many other pumpers throughout the State, and allows groundwater conservation and replenishment agencies to impose costs that are disproportionate to the benefits received by certain ratepayers.

II. STATEMENT OF INTEREST

The City's interest in the present appeal arises out of its obligation and duty to provide essential water service to over 11,000 residents, and to ensure its water rates are not unnecessarily inflated by the groundwater extraction fees imposed upon it by the Water Replenishment District of Southern California ("WRD"). Such fees constitute a quarter of the City's water costs, yet the City has never been afforded the meaningful review and protest rights that are mandated by Section 6 of Article XIII D of the California Constitution ("Proposition 218" or "Article XIII D").

The City is located in Los Angeles County and overlies a groundwater basin known as the Central Basin, which is adjacent to a separate groundwater basin known as the West Coast Basin. The Central and West Coast Basins are both replenished by the WRD, and comprise WRD's service area.[1] The City is

[1] The Central and West Coast Basins are two of four groundwater sub-basins that comprise the Coastal Plain of Los Angeles Groundwater Basin. (See Coastal Plain of Los Angeles Groundwater Basin, Central Subbasin, Cal. Department of Water Resources Bulletin 118, 2004 Update, available at http://www.water.ca.gov/groundwater/bulletin118/basindescriptions/4-11.04.pdf; Coastal Plain of Los Angeles Groundwater Basin, West Coast Subbasin, Cal.

the owner and lessee, respectively, of two parcels with groundwater production facilities which extract water from the Central Basin. The City is one of more than 140 holders of rights to produce groundwater within WRD's service area, including private water companies, manufacturers, businesses, individuals, churches, and other organizations. Approximately 90% of the City's water supply comes from its groundwater production wells, with the remainder supplied through the purchase of treated surface water from the Metropolitan Water District of Southern California.

Like UWCD, WRD is a special district created in 1959 pursuant to the Water Replenishment Act, California Water Code §§ 60000, *et seq.* (the "WRD Act"), to replenish the Central and West Coast Basins for the benefit of groundwater pumpers and the public in general. WRD does not, however, manage any water or property rights in the basins within its service area. Jurisdiction over the adjudication of water rights in each basin is with the Los Angeles Superior Court in each of the cases that separately adjudicated the rights in each basin. (See *Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co., et al.* (2003) 109 Cal.App.4th 891 ("*Central Basin I*"), 898-899; *Water Replenishment Dist. of S. California v. City of Cerritos, et al.* (2012) 202 Cal.App.4th 1063 ("*Central Basin II*"), 1067-1068; *Cal. Water Svc. Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715 ("*West*

Department of Water Resources Bulletin 118, 2004 Update, available at http://www.water.ca.gov/groundwater/bulletin118/basindescriptions/4-11.03.pdf.)

Coast Basin I"), 721; *Hillside Memorial Park & Mortuary v. Golden State Water Co.* (2011) 205 Cal.App.4th 534 ("*West Coast Basin II*"), 540-541.) Important to the analysis herein, the City's vested right to extract water from the Central Basin arises from the Court's adjudication of those property rights in *Central Basin I* and *II.*

The WRD Act authorizes the district to levy a replenishment assessment ("RA") on entities that pump water from the Central and West Coast Basins, which is then used to fund replenishment and clean-up operations. (Water Code, §§ 60300-60352.) The RA is assessed on all groundwater production from any property within WRD's service area on a per acre-foot basis. The RA is the source of approximately 80-90% of WRD's revenues. The WRD Act, which pre-dates Proposition 218 by nearly forty years, requires the RA to be imposed at a ***uniform rate, regardless of the costs of service WRD incurs to replenish each basin***:

> If the board determines that a replenishment assessment shall be levied upon the production of groundwater from groundwater supplies within the district during the ensuing fiscal year, ... the replenishment assessment shall be fixed by the board at a uniform rate per acre-foot of groundwater produced.

(*Id.* at § 60317.)

WRD's resolutions adopting the RA, to date, use no other factor or condition for the imposition of the RAs on the extraction of groundwater other than production of water from a property within its service area. WRD does not set different classes or rates for different types of pumpers or for different

uses of the water extracted, nor does its RA rate account for the extreme disparity between the cost of providing service in the Central Basin as compared to the West Coast Basin.

WRD incurs much greater costs to replenish and clean-up the West Coast Basin than the Central Basin, but continues to assess a uniform rate to pumpers in both basins – even after the adoption of Proposition 218. Due to this illegal subsidy, a dispute arose between the City (and several other Central Basin pumpers) and WRD. On August 24, 2010, the City, along with the cities of Cerritos and Downey, filed a complaint against WRD alleging its uniform RA violates Proposition 218 and results in an illegal subsidy. The resulting litigation, *City of Cerritos, et. al. v. Water Replenishment Dist. of S. California*, Los Angeles County Superior Court Case No. BS128136, lasted almost five years. The case was settled earlier this year, with the order of dismissal signed by Hon. Michael P. Linfield on May 27, 2015.

The City, therefore, has a direct interest in how the Court resolves the issues of whether Proposition 218 applies to groundwater pumping fees, and the appropriate standard with which the assessing agency must comply in setting said fees.

A. The Similarities Between the Ventura-UWCD Dispute and the City-WRD Litigation

The marked number of similarities between the City's litigation with WRD, and Ventura's litigation with UWCD unquestionably demonstrate the

City's interest in this case. For example, as detailed herein, both cases analyze the constitutional standards applicable to groundwater extraction fees imposed by a legislatively-created district formed to prevent overdraft. Both the City and Ventura are municipal water providers located in a multi-basin system. Both pay assessments pursuant to a uniform rate/ratio statute which are inequitable when compared to the actual benefit they receive.

Indeed, the Court of Appeal for the Second District's own characterization of these cases and parties demonstrate their similarity. The following statement of facts from the Second District's analysis of the City-WRD litigation, when compared to the parallel statement offered by the same Court in the Opinion (see Opinion, 211-212 [Factual and Statutory Background]), illustrates this point:

> Prior to the formation of [WRD], groundwater was being produced from the Central Groundwater Basin (Central Basin) and the West Coast Groundwater Basin (collectively Basins) that provided water to residents in Los Angeles County in amounts that "greatly exceeded natural replenishment, creating a condition in the Basins known as 'overdraft.' That overdraft condition caused numerous problems, including drastic overall decline of the elevation of the groundwater table and the intrusion of seawater into the Basins." As a result of these concerns, in 1959 the District was formed by a vote of the citizens of Los Angeles County and pursuant to the Water Replenishment District Act enacted in 1955, codified at section 60000 et seq. (Stats. 1955, ch. 1514, § 1, p. 2755) (Water Replenishment Act). The District manages the Basins, which provide water for almost 4,000,000 residents in Los Angeles County. The District replenishes the groundwater under its jurisdiction by, among other things, buying and selling water; exchanging water; storing water; recycling water; injecting water into seawater barriers located along the coast and

> spreading water at the Montebello Forebay; "[b]uild[ing] the necessary works to achieve ground water replenishment"; and "manag[ing] and control[ling] water for the beneficial use of persons or property within the district." (§ 60221.) On an annual basis, the District conducts an engineering survey to determine the state of groundwater supplies and total production of groundwater for "both the current year and the following year," holds a public hearing to determine the estimated costs of replenishing the groundwater supplies, and then adopts a resolution, levying an assessment on the production of groundwater from the Basins. (See §§ 60300, 60306, 60315.)

(*Water Replenishment Dist. of S. California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1454-1455 [holding that "pay first, litigate later" principle required city to pay assessment until a final judgment invalidated the assessment].)

Ventura and the City are similarly situated in that they both pay an assessment to a groundwater conservation/replenishment agency on every acre-foot of groundwater they pump. Ventura generally alleges that UWCD's rate-making administrative records do not comply with Proposition 218 for three reasons:

1) "The 3:1 ratio of M&I to agricultural charges cannot be justified on this – or any conceivable – record."

2) "The District admits its services are not of equal benefit to all eight basins by maintaining its Zone B charge, which requires those who benefit from the Freeman Diversion Dam alone to bear its cost; yet it pools all other charges in a District-wide Zone A that necessarily overcharges the City for the benefit it receives."

3) "The record is insufficient to show the District spends the proceeds of the charge only to provide groundwater services and

> that it has estimated the cost of that service with reasonable accuracy."

(City of San Buenaventura Opening Brief ["OB"], at 4-5.)

In its litigation against WRD, the City made very similar allegations. As to the first and second issues, the WRD Act mandates a uniform rate among all pumpers regardless of the basin they pump from, the customer class, or the ultimate use of water (Water Code § 60317); for UWCD, Water Code section 75594 dictates rates based on ultimate use of water (*i.e.*, municipal and industrial compared to agricultural uses). Additionally, UWCD imposes a uniform rate across all of its Zone A basins, regardless of the cost of providing service to the parcels overlying different basins within Zone A; WRD applies a uniform rate to parcels in the two distinct basins in its service area. As to the third issue, the City similarly alleged in its litigation against WRD that proceeds collected from the RA were spent on programs unrelated to WRD's function of providing groundwater replenishment and water quality services.

Finally, both UWCD and WRD have utilized parallel defenses in their respective litigations. To name a few, both have argued that these water rates are not "property-related" due to the fact that the water is sold to the City's residents and the cost "passed through." Both have argued that their uniform rates are statutorily authorized, and therefore they not required to comply with Proposition 218's proportionality requirements due to considerations of

"legislative policy." And both ask the courts to consider after-the-fact justifications for their rates not considered at the time of their adoption. For example, near the end of litigation, one of WRD's primary defenses was that the Central and West Coast Basins are hydrogeologically connected, and so a benefit to one basin is a benefit to both basins. Here, UWCD uses the same defense as to its uniform charge throughout all of its Zone A, which Ventura thoroughly dispels at pages 18 to 24 of its Opening Brief.

B. UWCD's Multi-Basin Operation Is Endemic in the California Water System; As Such, This Court's Rulings About How Rates Are Charged in Such a System Have Far-Reaching Implications for All Groundwater Pumpers Across the State

The issue of Proposition 218's applicability to groundwater extraction fees arises in many other circumstances beyond the specific fee before this Court. There are numerous special districts and local agencies throughout the State that have been authorized to replenish and manage groundwater basins for the limited purposes set forth in their enabling legislation.[2] That legislation

[2] See Water Code, §§ 10709 [Mendocino City Community Services District], 60317 [Water Replenishment District of Southern California], 75594 [United Water Conservation District, and several other water conservation districts]; Water Code App., §§ 40-23 [Orange County Water District], 60-26 [Santa Clara Valley Water District], 100-15.4 [Desert Water Agency], 118-343 [Monterey Peninsula Water Management District], 119-801 [Sierra Valley Groundwater Management District and Long Valley Groundwater Management District], 121-1001 [Fox Canyon Groundwater Management Agency], 124-1001 [Pajaro Valley Water Management Agency], 129-801 [Honey Lake Groundwater Management District], 131-1101 [Ojai Groundwater Management Agency], 135-801 [Willow Creek Groundwater Management Agency].

further authorizes the imposition of fees on groundwater extraction for the sole purpose of funding replenishment and other groundwater basin management. Therefore, whether statutory fees imposed on groundwater extraction are subject to the constitutional mandates of Proposition 218 is of great significance to many groundwater producers and agencies throughout the State paying or imposing such fees.

Moreover, with the implementation of SGMA, new Groundwater Sustainability Agencies ("GSAs") will be created throughout the State. (See Water Code, § 10723.) As discussed in further detail below, Water Code sections 10730 and 10730.2, added by SGMA, authorize the imposition of "fees on groundwater extraction" and expressly make those fees subject to "subdivisions (a) and (b) of Section 6 of Article XIII D of the California Constitution." (*Id.* at §§ 10730, 10730.2.) Therefore, a ruling by this Court that Proposition 218 does not apply to UWCD's pumping fees would confuse this area of the law for local agencies and pumpers forming GSAs. This will directly impact the hundreds of GSAs that will be formed in the coming years. The practical effect of SGMA is that, soon, virtually all properties overlying groundwater basins that require replenishment services will be affected by this ruling. This demonstrates the importance of the uniform application of Proposition 218 to groundwater pumping fees statewide.

Finally, this Court's ruling will have a significant impact on the City and the customers of its water department. WRD's costs of replenishing the

West Coast Basin are dramatically higher than the costs of replenishing the Central Basin. As the costs of imported water continue to rise, WRD's RA will likely rise each year. The RA is already 25% of the City's annual water system operating costs each year. Therefore, it is of utmost importance to the City and its customers that it only pay an assessment in the amount commensurate with the benefits it receives from the groundwater replenishment services actually provided by WRD.

As a municipal water provider subject to similar fees, the City provides herein not only its view of the legal support for the applicability of Proposition 218 to groundwater extraction fees, but also the importance of enforcing the protest and proportionality rights for the benefit of all ratepayers.

III. THIS COURT SHOULD AFFIRM THE WELL-SETTLED RULE OF LAW THAT FEES ON GROUNDWATER PUMPING ARE SUBJECT TO ARTICLE XIII D

Article XIII D applies to "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." (Cal. Const., art. XIII D, § 2, subd. (e) [emphasis added].) "The phrase '[p]roperty-related service" is defined to mean a "public service having a direct relationship to property ownership." (*Pajaro I*, 150 Cal.App.4th at 1385.) Whether a fee is a "service fee,"

however, is "beside the point if the charge is imposed as an incident of property ownership." (*Id.* at 1389.)

The Opinion subject to this Court's review held that groundwater extraction fees are *not* subject to Proposition 218. This Opinion stands in sharp contrast from this Court's broad and proper application of Proposition 218 to fees for water service of any kind. (See *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 ("*Bighorn*"); *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431("*Silicon Valley*"); *Greene v. Marin County Flood Control & Water Conservation District* (2010) 49 Cal.4th 277 ("*Greene*"); *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409 ("*Richmond*").) Consistently, this Court has enforced the intent of the voters when they passed Proposition 218.

The Second District, however, has disregarded this Court's conclusions based upon (1) a misinterpretation of the seminal *Pajaro I* decision, which is controlling in this case, and (2) the false assumption that groundwater producers have alternative sources of water and are, therefore, voluntarily seeking the services of water districts for groundwater replenishment.

A. The Court of Appeal Has Conclusively Determined That Fees on Groundwater Extraction Are "Intimately Connected" With Property Ownership

The Sixth District Court of Appeal, in *Pajaro I* and *Pajaro II*, determined that a "groundwater augmentation charge" levied by the Pajaro

Valley Water Management Agency was a property-related fee subject to Proposition 218's cost-of-service requirements. (*Pajaro Valley Water Management Agency v. AmRhein* (2007) 150 Cal.App.4th 1364 ("*Pajaro I*"), 1370; *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 587 ("*Pajaro II*"), 592.) Like UWCD and WRD, the Pajaro Agency was created through a legislative act to manage groundwater resources in a specific geographic area: the Pajaro Valley Groundwater Basin. (*Pajaro I*, 150 Cal.App.4th at 1371.) The Pajaro Agency levied a "groundwater augmentation fee" upon all users of groundwater from the Pajaro Valley Groundwater Basin to fund its replenishment activities. (*Id.* at 1372.) In 2003, the Pajaro Agency proposed to increase its per-foot charge to fund projects to replenish coastal areas of its basin, disproportionately benefitting the coastal pumpers. (*Id.* at 1373-1374.)

The Sixth District initially interpreted this Court's decisions regarding Proposition 218 to mean that consumption-based fees, as opposed to flat fees, could not be subject to Article XIII D restrictions. (*Pajaro I*, 150 Cal.App.4th at 1385-1386.)[3] Two days later, however, this Court "flatly rejected the view that consumption-based delivery fees are beyond the reach of [Proposition

[3] "In our original opinion we reasoned that in holding ongoing service fees to be within the purview of Article 13D, the *Richmond* [*v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409] court must have been speaking of *flat fees*, as opposed to those based on the amount of water (or similar commodity) consumed." (*Id.* at 1387 [emphasis in original].)

218]" and expressly disapproved *Howard Jarvis Taxpayers Association v. City of Los Angeles* (2002) 98 Cal.App.4th 1351 ("*Howard Jarvis*"). (*Bighorn–Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 ("*Bighorn*").)

In light of the *Bighorn* decision, the *Pajaro I* court granted a re-hearing, reasoning:

> [T]he only question left for us by *Bighorn* is whether the charge on groundwater extraction at issue here differs materially, **for purposes of Article 13D's** restrictions on fees and charges, from a charge on *delivered* water. We have failed to identify any distinction sufficient to justify a different result, and the Agency points us to none.

(*Id.* at 1388-1389 [first emphasis added].)

As this re-hearing, the Court recognized that the fee for water delivery in *Bighorn* (*i.e.*, water delivered via a water utility's distribution mains) was different from the charge on groundwater extraction before it, ***but found no reason to distinguish them for purposes of Article XIII D.*** (*Ibid.*) Accordingly, it held that the agency's groundwater augmentation charge was a property-related fee under Article XIII D, and thus subject to Proposition 218. (*Id.* at 1370, 1387-1389.) In so holding, the Court importantly noted that, the groundwater extraction fee was "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.***" (*Id.* at 1391.)

In the *San Juan Capistrano* decision issued earlier this year, applying the above-stated rule of law from *Bighorn*, another Court of Appeal affirmed

that water rates are subject to Proposition 218 and public water agency is therefore required to comply with Proposition 218 and account for proportional cost of service in its tiered water rate structure:

> Proposition 218 requires public water agencies to calculate the actual costs of providing water at various levels of usage. Article XIII D, section 6, subdivision (b)(3) of the California Constitution, as interpreted by our Supreme Court in [*Bighorn*] provides that water rates must reflect the "cost of service" attributable to a given parcel.
>
> ...
>
> If the phrase "proportional cost of service attributable to the parcel" is to mean anything, it has to be that article XIII D, section 6, subdivision (b)(3) assumes that there really is an ascertainable cost of service that can be attributed to a specific hence the little word "the" – parcel. Otherwise, the cost of service language would be meaningless. Why use the phrase "cost of service to the parcel" if a local agency doesn't actually have to ascertain a cost of service to that particular parcel?

(*Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 ("*San Juan Capistrano*"), 1497, 1505.)

This Court was asked to disturb this general ruling and the specific application of Proposition 218's proportionality requirements to the water rates at issue in *San Juan Capistrano*. It declined to do so, and should consistently issue a similar ruling here.

B. Groundwater Rights Are "Intimately Connected with Property Ownership" As Recognized in *Pajaro I*

The *Pajaro I* court relied upon well-established California law that groundwater rights are connected to property ownership, and the rights to pump and use groundwater are property rights. (*Pajaro I*, 150 Cal.App.4th at

1393.) Indeed, the *Pajaro I* court relied on case law regarding the nature of rights to take groundwater ***from the West Coast Basin*** to demonstrate the connection between groundwater rights and property rights and to support its holding that groundwater rights are tied to property ownership. (*Id.* at 1391-1392, citing *Cal. Water Svc. Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715("*West Basin I*"), 725 ["These rights are said to be 'based on the ownership of land and . . . appurtenant thereto."].)

This analysis is consistent with the long-established tenet that real property includes "all freehold interests, together with such things closely associated with land as fixtures, growing crops and ***water***." (4 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 3(6), at 217 [emphasis added]; see also 4 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 178, at 272-273 [right to divert water for nonriparian use is real property right].) Section 11 of Article XIII entitled "Taxation of local government ***real property***," includes "***rights to use or divert water*** from surface or underground sources and any other interests in lands" as real property subject to taxation. (Cal. Const., art. XIII, § 11 [emphasis added]; see also *Stanislaus Water Co. v. Bachman* (1908) 152 Cal. 716, 725 [right to use water diverted from stream for irrigation is real, not personal, property].)

C. The Extraction Charge Paid by Ventura and the RA Paid by the City Are Indistinguishable From the Rate Charged in *Pajaro I*

The "groundwater augmentation fee" levied by the Pajaro Agency is indistinguishable from fees imposed by UWCD and WRD. Nor is it different from any other statutory fee on groundwater extraction imposed pursuant to separate legislation, in that they require no other factor for an agency to impose fees other than the activity of groundwater extraction from parcels within the agency's service area. Nothing else.

The Opinion below incorrectly observes that, "*Pajaro* was based upon a unique set of facts – 'that the vast majority of property owners in the Pajaro Valley obtained their water from wells, and that alternative sources were not practically feasible.'" (Opinion, at 18, citing *Pajaro I*, 150 Cal.App.4th at 1397.) The City can confirm that the situation in *Pajaro I* is not unique, as the City relies on groundwater for 90% of its supply. Alternative sources of water are cost prohibitive because the City's only alternative source is expensive imported water. Numerous pumpers throughout California similarly must rely on groundwater as a primary source of supply, meaning those pumpers do not practically have the "option" of not pumping and avoiding the associated extraction fee.

The charge in this case is analogous to the charge in *Pajaro I*, and those facts are not "unique" to that case.

D. Proposition 218's Plain Language & Jurisprudence Applying The Same Confirm That Groundwater Extraction Charges Are "Property Related," Regardless of Their End Use

While courts have not indicated the full scope of fees subject to Article XIII D, they have expressly applied Article XIII D to water delivery charges and fees imposed upon groundwater extraction. As discussed in detail above, this Court's opinion in *Bighorn* and the Sixth District's opinion in *Pajaro I* settled the applicability of Proposition 218 to fees imposed by government agencies upon the extraction of groundwater.

The courts have further made clear that it was the intent of the voters that these constitutional protections be "liberally construed" in favor of taxpayers. Conversely, the Opinion's convoluted interpretation of *Pajaro I* and of the cases leading up to *Pajaro I* is not in line with the intent of the voters, or the plain meaning of Article XIII D. The ruling below, if adopted by this Court, threatens to overturn this long-established body of law to the detriment of thousands of groundwater pumpers that are similarly situated to Ventura and the City.

1. Jurisprudential History Confirms That Groundwater Pumping Charges Are "Property-Related" Fees

This Court's opinion in *Bighorn* and the Sixth District's opinion in *Pajaro I* years ago settled the applicability of Proposition 218 to fees imposed by governmental agencies upon the extraction of groundwater. The Opinion's contrary determination that groundwater pump charges are not "property-

related" fees is based, in large part, on the mischaracterization of those fees as "a charge on the activity of pumping [rather] than a charge imposed by reason of property ownership." (Opinion, at 20.) This is a distinction without a difference, and directly contradicts *Pajaro I* and *Bighorn*, which are not – as the Opinion suggests – "distinguishable."

As noted, in *Pajaro I*, the Sixth District determined that water extraction is "***an activity*** in some ways more intimately connected with property ownership than is the mere receipt of delivered water." (*Pajaro I*, 150 Cal.App.4th at 1391 [emphasis added].) Similarly, in *Bighorn*, this Court rejected the argument that only a fixed monthly charge, rather than a charge based on the user's amount of pumping activity, was property related. The *Bighorn* opinion pointed out that Article XIII D "include[s] a user fee or charge for a property related service" (Cal. Const., art. XIII D § 2, subd. (e)) and concluded that "***[c]onsumption-based water delivery charges also fall within the definition of user fees***, which are 'amounts charged to a person using a service where the amount of the charge is generally related to the value of the services provided'" – *i.e.* a fee on the activity of pumping. (*Bighorn*, 39 Cal.4th 205 at 227 [emphasis added].)

*In Ho*ward Jarvis, the Fifth District Court of Appeal made the same mistake in interpreting Article XIII D as the Second District now makes here. The court there held that Article XIII D exempts water fees from the voting requirement and therefore such charges must be exempt from Article XIII D

altogether. *(Howard Jarvis*, 98 Cal.App.4th at 83.) The Court also reasoned that if the fee did not depend on property ownership, it must not be subject to Article XIII D. (*Ibid.*) This Court later disapproved this misinterpretation, and should do the same here. (*Bighorn*, 39 Cal.4th 205 at 217, fn. 5.)

Earlier Proposition 218 jurisprudence is similarly clear that groundwater pumping charges imposed by virtue of the simple fact that the pumper owns the property on which the water is delivered or extracted, and is putting that property to its normal use, are "property-related" and thus subject to Proposition 218. (*Bighorn*, 39 Cal.4th 205 at 215; *Richmond*, 32 Cal.4th at 427.) For example, in *Richmond, supra,* 32 Cal.4th at 427, this Court found that "[a] fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property." This was confirmed in *Bighorn,* where this Court noted that "[a] fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' ***because it requires nothing other than normal ownership and use of property***." (*Bighorn, supra,* 39 Cal.4th at 215 [emphasis added].)

In *Bighorn,* the agency argued its rates were not subject to Proposition 218 because they were consumption based, levied as a result of the landowners' "voluntary decision" to use water. (*Bighorn*, 39 Cal.4th at 216.) This Court rejected this distinction finding that both fixed and metered rates for water service to existing customers to be within the reach of Proposition

218, and disapproving of *Howard Jarvis*. (*Id.* at 216, 217, fn. 5.) The *Bighorn* decision supports the conclusion that any fee on groundwater extraction from groundwater-producing facilities are imposed "as an incident of property ownership," because they do not require anything other than normal ownership and use of the groundwater-producing facilities.

2. *The Commercial/Residential Use Distinctions Cited By the Opinion Below Have No Bearing on this Rule of Law*

The Opinion generally acknowledges the rule of law offered in *Richmond* and *Bighorn* that a groundwater extraction fee that is paid for "nothing other than normal ownership and use of property" is a property-related fee subject to Proposition 218. (Opinion, at 15, 21.) However, it ultimately incorrectly concludes that "voluntarily generating one's own utilities arguably is not a normal use of property, and in any event, it is a 'business operation' in the sense that it affects the demand for municipal services." (*Id.* at 21; cf. *Wickard v. Filburn* (1942) 317 U.S. 111.)

Stated another way, the Opinion concludes that the fee at issue is not property-related because Ventura sells the groundwater it extracts, thus concluding that Ventura's use is "commercial" rather than "residential." Proposition 218 jurisprudence makes clear that these distinctions based on the ultimate end use of the extracted water should not and do not have any bearing on whether or not the fee at issue is "property-related."

For example, in *Pajaro II*, the Sixth District upheld the various rates applicable in different zones within a single basin. (220 Cal.App.4th at 603-604.) Importantly, the court made clear that the applicability of Proposition 218 and an agency's obligations pursuant thereto are not changed or limited when an owner of a parcel with a groundwater-producing facility happens to be a water service provider (a public utility). (*Id.* at 596 [Court *rejected* argument that it was not the public utility that was entitled to notice of the fee, because that public utility eventually passed on the fee to its customers].)

Notably, in *Pajaro II*, the agency therein set rates based upon the location of the groundwater producing facility of the pumper, much of which coincided with the types of water use of each pumper. (220 Cal.App.4th at 593, fn. 4.) The metered wells outside the delivered water zone applied "primarily [to] municipal, industrial, and agricultural users." (*Ibid.*) Nevertheless, the court did not split the Proposition 218 applicability to the water pumped and used on the parcel.

Nor does the *Pajaro I* decision support a legal distinction between pumpers who use the water for residential rather than commercial purposes, as the Opinion posits. (Opinion, at 17 [claiming supposed residential/commercial distinction was "dispositive" in *Pajaro I*].) To the contrary, the *Pajaro I* court itself explicitly rejects this distinction, along with the idea that the characterization of a fee for Proposition 218 purposes could depend on

whether the pumper being charged uses water for residential or commercial purposes:

> A charge may be imposed on a person because he *owns* land, or it may be imposed because he *engages in certain activity* on his land. A charge of the former type is manifestly imposed as an incident of property ownership. A charge of the latter may not be. This appears to be the distinction Justice Mosk sought to articulate for the court in *Apartment Association*. We doubt that it is satisfactorily captured by a distinction between business and domestic uses or purposes.

(150 Cal.App.4th at 1391, fn. 18 [emphasis in original].)

The supposed residential/commercial distinction thus finds no support in the law, and flatly contradicts the explicit language of *Pajaro I.*

Moreover, it would be difficult to reconcile a domestic use distinction with the facts of *Pajaro I.* The majority of water in *Pajaro I* was used for the business of farming, which had statutory priority over other uses. (150 Cal.App.4th at 1371-1372.) Indeed, three out of seven of the agency's board members were required to derive most of their income from the "production of agricultural products." (Pajaro Valley Water Management Agency Act, Stats. 1984, ch. 257, § 402, p. 805.) Thus, the only reasonable meaning of "domestic" in *Pajaro I* is use on landowners' property, ***for any purpose.***

Although various water districts around the State impose fees on groundwater extraction pursuant to different enabling acts, the imposition and purpose of the fees are indistinguishable for purposes of Proposition 218. They are imposed on the extraction of groundwater from any property within

the respective district's service area ***because the pumper has a real property interest in the land from which the water is pumped***, and ***regardless of the use to which that water will eventually be put***. Some districts set different rates for different types of use, but the condition for the application of the fee is the same: extraction from property within the agency's service area.

In the case of Ventura, Signal Hill and many other cities across the State, the groundwater extraction rights secured and settled long ago are the primary sources of water. Therefore, the Opinion's conclusion that Proposition 218 does not apply, because groundwater pumping is "voluntary," is a misapplication of the law and reflects a complete misunderstanding of the reality of water resources in California.

It is true, as the Opinion notes, that the *Richmond* court determined that a ***connection fee*** imposed by a local water district (*i.e.*, a fee for making a new connection to the system), "voluntarily" incurred by the pumper in order to connect to the system, was *not* a charge subject to Article XIII D. (Opinion, at 21.) However, this statement should not be further stretched to stand for the proposition that commercial uses of groundwater by a public entity are "voluntary" and therefore not subject to Proposition 218.

Unlike the *Richmond* connection fee, the groundwater extraction fees imposed by UWCD and WRD are not limited to new wells on properties, but instead ***apply to groundwater extraction from all groundwater-producing facilities within both district's geographical boundaries***. (Water Code, §

60317 [uniform rate imposed on "groundwater extraction from all groundwater-producing facilities within [WRD's] district"].) There is no factual support for the notion that fees imposed on the simple exercise of extraction rights are not "property-related" simply because they have a commercial rather than residential "end use."

The Opinion's analogies to *Apartment Association of Los Angeles v. City of Los Angeles* (2001) 24 Cal.4th 830 ("*Apartment Association*"), do not change this. In that case, this Court held that an inspection fee on the ***business*** of renting property was not subject to Article XIII D. This Court noted that "the mere fact that a levy is regulatory (as [the] fee clearly [was]) or touches on business activities (as it clearly [did there]) is not enough, by itself, to remove it from article XIII D's scope." (*Id.* at 838.) This Court reasoned, however, that the fee there depended solely on the business of renting property. (*Id.* at 838-841.) Here, on the other hand, the owners of groundwater-producing facilities within UWCD and WRD's service areas are subject to the groundwater extraction fees simply by virtue of ownership the groundwater-producing facilities and putting them to their normal use: the extraction of groundwater.

3. Article XIII D Must Be Liberally Construed Pursuant to the Intent of the Voters

Additionally, the Opinion diminishes the constitutional rights this Court articulated in *Silicon Valley* and enforced in *Bighorn*. The analysis by the court below is not limited to an attempt to distinguish or contradict the

opinions of the Sixth District, but is also an attempt to carve out exceptions to *Bighorn*. Neither is consistent with the interpretation of Proposition 218 as this Court expressly and clearly stated in *Silicon Valley*.

By passing Proposition 218, "the voters intended to reverse the usual deference accorded governmental action and to reverse the presumption of validity." (*Silicon Valley*, 44 Cal.4th at 445.) To that end, the voters were clear that Proposition 218 must be "liberally construed to effectuate its purposes," which purposes included (1) "limiting the methods by which local governments exact revenue from taxpayers without their consent" and (2) "to make it easier for taxpayers to win lawsuits that result in reduced or repealed taxes." (*Id.* at 448, citing Ballot Pamp., Gen. Elec., text of Prop. 218, argument in favor of Prop. 218, p. 76 ("Ballot Pamphlet"), §§ 2, 5, pp. 108-109.)

Pumping fees became the primary source of revenue for these districts after the passage of Proposition 13[4] in 1978, which restricted the amount of taxes that can be imposed without voter approval. This shift in revenue source was precisely what the voters intended to address with Proposition 218,[5] and which this Court has stressed in its earlier decisions. Now, the decision below

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[4] Cal. Const., art. XIII C, § 1, subd. (e) ("Proposition 13").

[5] By way of example, the City notes that the RAs constituted 81-91% of WRD's total revenue for the years at issue in its earlier litigation against the district.

creates a large loophole in Proposition 218 and it does so in direct conflict with decisions from the Sixth District Court of Appeal and this Court.

In utilizing a narrow interpretation of *dicta* in *Pajaro I*, the Opinion directly contradicts the legislature's clear direction that Proposition 218 must be "liberally construed" in favor of taxpayers and to limit taxation without consent. Had this Court intended such a narrow interpretation of Proposition 218 vis-à-vis groundwater pumping fees, it could have granted review of the Sixth District's opinions in *Pajaro I* and *Pajaro II*. This Court did not take issue with the Sixth District's conclusions that fees on groundwater pumping are imposed as an incident of property ownership and subject to Proposition 218. The Second District in this Opinion has, however, taken issue with those decisions and attempts to contradict them. Therefore, the City requests that this Court establish a clear and singular interpretation of the constitutional mandates of Proposition 218: that it applies to fees on groundwater pumping applied by many groundwater conservation and replenishment agencies throughout the State.

E. The Legislature Agrees that Proposition 218 Applies to Groundwater Pumping Fees, As Demonstrated By Its Adoption of Fee Provisions Mandating Proposition 218 Compliance in the Sustainable Groundwater Management Act of 2014

SGMA was enacted by the California Legislature in 2014, authorizing certain local agencies to undertake replenishment and other management activities in previously unadjudicated groundwater basins, and further

authorizing those agencies to impose fees on groundwater extraction therefrom. While SGMA does not have any direct applicability to fees imposed pursuant to separate legislation, SGMA certainly provides the California Legislature's view that statutory fees imposed upon groundwater extraction – without any other requirement or factor – are subject to Proposition 218.

Specifically, Water Code sections 10730 and 10730.2 authorize the imposition of "fees on groundwater extraction" and expressly make those fees subject to "subdivisions (a) and (b) of Section 6 of Article XIII D of the California Constitution." Therefore, SGMA expressly recognizes the applicability of Proposition 218 upon statutory groundwater extraction fees in general. The SGMA fee is indistinguishable from the fees imposed by UWCD, the Pajaro Valley Water Management Agency, WRD, and other statutory fees on groundwater extraction imposed pursuant to separate legislation, in that it requires no other factor for the imposition of the fees. The only relevant factor is the activity of groundwater extraction from parcels within the agency's service area.

1. SGMA Authorizes a Proposition 218 Fee and a Proposition 26 Fee

SGMA establishes Water Code section 1529.5 fees, which are fees charged by the State Water Resources Control Board ("State Water Board") for participation in an administrative adjudication of rights in a groundwater

basin. (See Water Code, §1529.5; see also Water Code, §§ 10730, *et seq.* [establishing administrative adjudication process].) The Legislature recognizes the applicability of Proposition 26 to those fees, by expressly subjecting the determination of the amount of those fees to Article XIII A, Section 3. (*Id.* at § 1529.5, subd. (e).) The fees are similar to other fees imposed by the State Water Board for the management of surface water rights. (See *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 437-444 [review of existing Water Code section 1525].) Notably, the Act requires compliance with Article X, Section 2 (the reasonable and beneficial use mandate) in connection with the administrative adjudication process (or "State Intervention"), as this is the process that establishes water rights and the amounts a party may extract from a probationary basin. (Water Code, § 10735.8, subd. (c) [restricting groundwater extraction and establishing extraction rights], and subd. (d) [expressly incorporating Article X, Section 2].) The same is true in judicial adjudications. (*Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co.* (1989) 207 Cal.App.3d 363.) Neither the SGMA administrative process nor the judicial adjudication process, however, is relevant to the statutory fees imposed upon groundwater extraction presently before this Court or even to the statutory fees imposed upon groundwater extraction by SGMA.

SGMA separately establishes statutory fees upon groundwater extraction that are similar to the fees presently before this Court. The Act

establishes Water Code section 10730 fees upon groundwater extraction for the purpose of funding the costs of a groundwater sustainability plan designed to replenish a groundwater basin. (Water Code, §§ 10730, subd. (a), and 10730.2, subd. (a).) The fees are applicable based upon one condition: the extraction of groundwater. The fees are, therefore, no different than the UWCD fee. Unlike UWCD's fees, however, the Legislature enacted this fee after the passage of Proposition 218 and, therefore, had the opportunity to expressly incorporate the requirements of Proposition 218. Fees enacted prior to Proposition 218 must nevertheless similarly yield to the constitutional mandate. (*Bighorn*, 39 Cal.4th at 217.)

There is nothing in SGMA that establishes a distinction between Proposition 218's applicability in adjudicated and unadjudicated basins. The Act only sets out to establish management regimes in unadjudicated basins; therefore, no need existed for the Act to address any statutory or other fees applicable in adjudicated basins.

2. SGMA Recognizes That Statutory Fees Imposed Upon Groundwater Extraction Are Fees Imposed "As An Incident of Property Ownership" Subject to Proposition 218

Section 10730 fees are indistinguishable from the UWCD fees before this Court, the fees in the *Pajaro I* and *Pajaro II* decisions, and the fees imposed by WRD. Each fee is triggered simply by the activity of groundwater extraction – nothing else. (Water Code, §§ 10730, subd. (a), and 10730.2,

subd. (a).) Indeed, in *Pajaro I*, the Court noted that the particular nature of a right pursuant to which a groundwater producer extracted its water was irrelevant for purposes of Proposition 218, because it was not considered when the fee was adopted. (150 Cal.App.4th at 1391.) Similarly, the nature of a particular right is not a factor in the Section 10730 fees or UWCD fees.

3. SGMA Is a Clear Expression of the Legislature's Intent and Understanding of the Constitution and Groundwater Pumping Fees

Notably, in SGMA, the Legislature has expressly recognized not only the application of Proposition 218 to statutory groundwater extraction fees (Water Code § 10730), but also the application of Proposition 26 to other management fees not imposed directly as an incident of property ownership (Water Code § 1529.5). This interpretation is consistent with this Court's and the Sixth District Court of Appeal's decisions, as well as the trial court in this case. Although SGMA is not directly applicable to the UWCD fee, the express incorporation of Proposition 218 within this Act demonstrates the Legislature's interpretation of the issue and is therefore, persuasive. (See *Greene*, 49 Cal.4th at 290-291 ["[i]n cases of ambiguity we also may consult any contemporaneous constructions of the constitutional provision made by the Legislature or by administrative agencies" (citation omitted)].)

The fact that the agencies created or authorized to act under SGMA will be created for the purpose of managing unadjudicated basins is irrelevant for purposes of Proposition 218 and SGMA's statutory fee on groundwater

extraction (Section 10730 fees). SGMA imposes separate fees in connection with the administrative adjudication procedure it establishes for groundwater basins that have not yet been adjudicated in a court proceeding. Section 1529.5 authorizes the imposition of fees upon those who seek to establish their water rights pursuant to the State Water Board's adjudicative process established at Sections 10735, *et seq.* of the Act.

SGMA expressly distinguishes between the different types of fees and expressly incorporates Proposition 218's requirements for statutory fees imposed upon groundwater extraction and Proposition 26's requirements for fees imposed in connection with the administrative adjudication process. (Water Code, §§ 1529.5, subd. (c), 10730, subd. (a), 10730.2, subd. (a).) SGMA correctly does this because the fees are distinct from each other. Both UWCD and WRD's fees are statutory fees imposed upon groundwater extraction, with no other relevant factor. Therefore, they are indistinguishable from Section 10730 fees for purposes of Proposition 218 and are not similar in any way to the SGMA's Section 1529.5 fees.

Moreover, the fees here are not conditioned upon any adjudication within UWCD's district, nor is WRD's RA conditioned upon the adjudications of the Central and West Coast Basins. (See Water Code, §§ 75500, *et seq.*; Water Code, § 60317.) Similarly, the Legislature has authorized a statutory fee on groundwater extraction in SGMA that is not conditioned in any way on

the administrative adjudicative process created concurrently therewith. (Water Code, §§ 1529.5, 10730, 10730.2.)

F. *Pajaro I* Did Not, As the Opinion Concludes, Create a Regulatory Purpose Exemption

The Opinion below interpreted *dicta* in *Pajaro I* as creating a "regulatory purpose" exception, allowing an entity that levies a fee with a valid regulatory purpose to argue that the fee falls outside the scope of Proposition 218. (Opinion, at 29.) Specifically, the court claims that the fact that UWCD's pumping fees served the valid regulatory purpose of "conserving water resources" supports its holding that the fees are not property-related. (*Ibid.*)

The creation of such an exemption is not supported by the law because (i) it improperly focuses on the effect rather than purpose of the fee at the time of its adoption, an after-the-fact consideration which has no bearing on the validity of a quasi-legislative enactment like a groundwater pumping fee, and (ii) it directly violates the plain language and stated legislative purpose of Proposition 218 itself. Moreover, given that the majority of the water districts currently in existence in California have a "conservation" function, including UWCD, it stands to reason that the adoption of a regulatory water conservation exemption to Proposition 218 compliance threatens to obviate this constitutional rule in its entirety.

1. The Court of Appeal's Analysis of this So-Called "Regulatory Purpose" Exemption Improperly Focuses on the Effect Rather Than the Purpose of the Fee to Determine Its Classification & Validity

The Opinion's conclusion that *dicta* in *Pajaro I* creates a regulatory purpose exemption to Proposition 218 compliance is fundamentally flawed because it focuses on the ***effect*** of the fee to determine whether it is "regulatory" and therefore "exempt," rather than the ***purpose*** of the fee at the time it is adopted. As the court's own summary of the classification system created by Propositions 13, 218 and 26 makes clear (Opinion, at 5-9), a measure is classified based upon the purpose for which it is enacted (*e.g.*, general revenue purposes, an identified special purpose such a groundwater replenishment, etc.).

The validity of these actions then "stands or falls" on the administrative record which supports the agency's stated purpose for imposing the exaction ***at the time it was adopted***. (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1144, 1153 ["A fundamental rule of administrative law is that a court's review is confined to an examination of the record before the administrative agency at the time it takes the action being challenged."]; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576, 579 [validity of quasi-legislative decision to adopt fee is based solely on the administrative record; extra-record evidence can never be admitted to contradict the evidence the agency relied on in making the decision]; *Beverly Hills Federal Savings &*

Loan Association v. Sup. Ct. (1968) 259 Cal.App.2d 306, 324 ["The sufficiency of the evidence to support the commissioner's decision for the purpose of judicial review sought by an objector stands or falls on the administrative record."].)

It would run contrary to this clear body of law to create an exemption like the one offered by the Opinion – which looks not to the purpose, but instead to the after-the-fact effect of the fee to determine whether it is subject to Proposition 218. For example, the court below reasons that an otherwise "property-related" groundwater extraction fee could be exempt from Proposition 218 because Ventura is choosing to pump that water and then sell it to residents. This effect or end use is clearly not something that an agency could know at the time it adopted the fee – only at the time it imposed and collected the same. As such, this "effect" cannot be considered in determining whether the fee at issue is subject to Proposition 218.

2. *A Finding that the District's Fees Do Not Violate Prop 218 Based On the Application of a "Regulatory Purpose" Exemption Would Turn Back the Clock on Proposition 218 Jurisprudence 20 Years*

Pajaro I does not hold, in *dicta* or otherwise, that the fact that a fee has some valid regulatory purpose renders it exempt from Proposition 218. Instead, *Pajaro I* stands for the proposition that a fee that is predominantly designed to regulate consumption of a resource, rather than to generate revenue, might tenably fall outside the scope of Proposition 218. The

pumping fee paid by Ventura, much like the RAs paid by the City to WRD, was imposed to finance the construction of improvements to UWCD's facilities, not to encourage conservation, even if it secondarily served that purpose.

Furthermore, it would undercut the constitutional protections of Proposition 218 and run counter to the plain language of this constitutional provision for this Court to conclude that such a "regulatory purpose" exemption exists. Article XIII D, Section 3, unequivocally states that ***"[n]o tax, assessment, fee, or charge shall be assessed*** by any agency upon any parcel of property or upon any person as an incident of property ownership except" unless that agency complies with the procedural (*i.e.* voter approval) and substantive (*i.e.*, proportionality) requirements of Proposition 218. Moreover, the voters were clear that Proposition 218 must be "liberally construed" to effectuate its purpose: "limiting the methods by which local governments exact revenue from taxpayers without their consent." (*Silicon Valley*, 44 Cal.4th at 448, citing Ballot Pamphlet, §§ 2, 5, pp. 108-109.)

A regulatory purpose exemption directly contradicts this plain language of Proposition 218 by permitting a property-related fee to be imposed without compliance with the procedural or substantive requirements of Article XIII D so long as the fee is imposed for the amorphously-stated regulatory purpose of "conserving water resources." It stands to reason that, particularly in the era of extreme drought that California is experiencing, every groundwater

extraction fee is – at least in some way – imposed in order to conserve water resources. In this regard, the exemption has the potential to eclipse the rule of law created by Proposition 218 entirely. At a minimum, it runs contrary to the purpose of "limiting the methods by which local governments exact revenue from taxpayers without their consent" – instead authorizing the proliferation of classes of exactions for which Proposition 218 mandated voter approval is no longer required.

V. THE UNIFORM PUMP CHARGES AUTHORIZED BY WATER CODE SECTION 75594, LIKE THE PARALLEL PROVISION OF THE WRD ACT, VIOLATE AND ARE SUPERSEDED BY PROPOSITION 218

A. Neither UWCD Nor WRD's Enabling Act Can Exempt These Fees From Proposition 218

Pursuant to Water Code sections 75594 and 60317, UWCD and WRD, respectively, are authorized to charge a "uniform" rate. Under the 1965 statute, the UWCD is required to impose fees on the municipal and industrial groundwater users that are three to five times higher than those imposed on agricultural users. Similarly, under the WRD Act, the District imposes a uniform "RA" on both Central and West Basin pumpers despite the fact that the cost to replenish the West Basin far exceeds the cost to replenish the Central Basin. As such, ***on any conceivable administrative record***, these legislatively authorized water extraction rates impose a disproportionate rate on the non-agricultural users in UWCD's service area and the Central Basin pumpers in WRD's service area.

Nevertheless, the Court of Appeal below concludes – for reasons the Opinion does not make clear – that "it is possible to reconcile the language of Proposition 218 [requiring a proportionate rate] with section 75594's mandatory rate ratio [requiring a uniform ratio]." (Opinion, at 225.) In so holding, the court reasoned that the fact "[t]hat the City's desired use for the water it pumps is subject to a higher regulatory fee than agricultural use is a ***policy decision*** made by the Legislature, not the District," with which the District is statutorily bound to comply. (*Ibid.* [emphasis added].)

To the contrary, California law is clear that statutory "policy decisions" are superseded by Constitutional mandates. "The Legislature is bound by the state Constitution." (*Bighorn*, 39 Cal.4th 205 at 217 [rejecting contention that initiative power required by Proposition 218 might be defeated by statutory provision regarding the setting of water rates].) Where legislation conflicts with the Constitution, "the Legislature's authority in enacting the statutes under which the Agency operates must . . . yield to constitutional command." (*Ibid.*) Accordingly, the City respectfully asks this Court to affirm that uniform groundwater extraction rates that do not proportionately charge users for the benefits received are superseded by Proposition 218.

The question of whether the constitutional amendment of 1996 was intended to supersede the existing authority of agencies to exact revenue from rate payers was clearly answered by Article XIII D, § 1, which provides that:

> Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority.

The voters made only two exceptions to this rule that are not applicable here: (1) fees or charges imposed as a condition of property development, and (2) timber yield taxes. (*Id.* at subds. (b) and (c).) Thus, compliance with UWCD's and WRD's Enabling Acts (the "Acts") does not exempt their rates from Article XIII D. There is nothing that the voters who approved the formation of these districts in the early to mid-1900s could have intended with respect to Proposition 218 applicability, which was passed decades later.

If the mandates of the Acts and Article XIII D conflict, as they do here, the constitutional mandates supersede the requirements of the WRD Act. (*Bighorn*, 39 Cal.4th 205 at 217.) Indeed, the Legislature has recognized this, amending most (but plainly not all) local government finance statutes to implement Proposition 218's mandates. For example, Government Code section 53753(a), addressing implementation of Proposition 218, provides that "[t]he notice, protest, and hearing requirements imposed by this section supersede any statutory provisions applicable to the levy of a new or increased assessment that is in existence on the effective date of this section, whether or not that provision is in conflict with this article."

Case law applying this rule of law to water extraction fees supports the view that statutory authority cannot be utilized as justification for violating the

California Constitution. For example, in *Bighorn*, this Court held that fees for water delivery service are subject to Article XIII D, regardless of the authority in the Bighorn Mountains Water Agency Law enacted in 1969. (*Bighorn*, *supra*, 39 Cal.4th 205 at 210.) This Court rejected the agency's argument that compliance with Proposition 218 "would interfere with the statutory responsibility of the Agency's board of directors to set the water rate. . .." (*Ibid.*)

Additionally, the *Bighorn* court disapproved the *Howard Jarvis* holding that Article XIII D is inapplicable to water rates, even though the City Charter authorized Los Angeles to fix rates at a uniform rate. (*Bighorn,* 39 Cal.4th 205 at 217, fn. 5.; see also *Howar*d Jarvis, 98 Cal.App.4th at 81-82.) As more directly applicable to this case, in *Pajaro I*, statutory authority did not exempt the fees on groundwater extraction from Article XIII D applicability. (*Pajaro I*, 150 Cal.App.4th at 1371-1372.)

B. Water Code Sections 77594 and 60317 Are Facially Invalid

Water Code sections 77594 and 60317 are facially unconstitutional because they violate Proposition 218's substantive requirement that an agency set rates as follows: "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." (Cal. Const., art. XIII D, § 6, subd. (b)(3).) An agency must analyze the proportional cost of providing service in setting rates and that analysis must be demonstrated in the

rate-setting administrative record. By their express terms, Water Code sections 77594 and 60317 tell these agencies not to perform that analysis, and to instead impose fees at pre-determined rates. A statute that runs counter to such analysis by instead mandating a uniform rate violates Proposition 218 and is facially invalid, as a matter of law.

Alternatively, Proposition 26 substantively requires that an agency set rates as follows: "The local government bears the burden of proving by a preponderance of the evidence...that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII C, § 1 [unnumbered text].) Proposition 26 requires agencies to perform an analysis to ensure the costs allocated to a payor "bear a fair or reasonable relationship" to the benefits received by the payor from the agency's groundwater conservation/replenishment services. Water Code sections 77594 and 60317 violate the California Constitution on their face by inhibiting such analysis and preventing levies from being set at a "reasonable" rate.

VI. THIS COURT SHOULD STRIKE WATER CODE SECTION 75594 AS UNCONSTITUTIONAL SO UWCD AND OTHER AGENCIES WILL COMPLY WITH PROPOSITION 218

The City will leave the Court with a rhetorical question that speaks to the policies and interests at play in this litigation: Why does UWCD care

whether it imposes a uniform rate throughout its Zone A at a 3-to-1 non-agricultural to agricultural rate ratio throughout its service area? The City cannot think of any reason why a conservation/replenishment district would show a justifiable preference for pumpers in certain basins in its service area, or a preference for particular uses in its service area. UWCD and WRD, and any other conservation/replenishment agency, should only be concerned about recovering the costs of providing groundwater conservation/replenishment services.

This leads to the conclusion that UWCD and WRD are only imposing their rates without the necessary cost-of-service analysis and proportionality requirements because specific legislation is directing them to do so. Therefore, these agencies will continue violating the mandates of the California Constitution until it is made clear that what the legislation is directing them to do is unconstitutional.

VII. CONCLUSION

For these reasons, *amicus curiae* City of Signal Hill respectfully requests the Court grant the relief requested by the City of San Buenaventura.

DATED: November 18, 2015

Respectfully submitted,
ALESHIRE & WYNDER, LLP

By: _____
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CERTIFICATE OF COMPLIANCE WITH
California Rules of Court 8.520(b) and 8.204(c)(1)

WORD COUNT

Pursuant to California Rules of Court, Rules 8.520(b) and 8.204(c)(1), the foregoing Amicus Brief by Amicus Curiae the City of Signal Hill contains 12,060 words (including footnotes, but excluding Table of Contents and Table of Authorities, Application, and this Certificate, and is within the 14,000 word limit set by California Rules of Court, Rules 8.520(b) and 8.204(c)(1). In preparing this Certificate, I relied on the word count generated Microsoft Word, version 14, included in Microsoft Office Professional Plus 2010.

DATED: November 18, 2015 ALESHIRE & WYNDER, LLP

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01002.0003/274271.2

PROOF OF SERVICE

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
City of San Buenaventura v. United Water Conservation District, et al.
CASE NO. S226036

At the time of service, I, Bonnie J. Blythe, was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 18881 Von Karman Avenue, Suite 1700, Irvine, CA 92612.

On November 18, 2015, I served the following document(s) described as **APPLICATION OF CITY OF SIGNAL HILL FOR LEAVE TO FILE *AMICUS CURIAE BRIEF* IN SUPPORT OF CITY OF SAN BUENAVENTURA; PROPOSED *AMICUS CURIAE BRIEF* IN SUPPORT OF CITY OF SAN BUENAVENTURA** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

[X] BY U.S. MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Aleshire & Wynder, LLP for collecting 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. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Irvine, California.

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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.

Executed on November 18, 2015, at Irvine, California.

Bonnie J. Blythe

Bonnie J. Blythe

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SERVICE LIST

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City of San Buenaventura v. United Water Conservation District, et al.
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