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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

City of San Buenaventura

Plaintiff, Cross-Defendant and Respondent / Cross-Appellant

vs.

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

Defendants, Cross-Complainants and Appellants / Cross-Respondents

ANSWER TO BRIEFS FILED BY AMICUS CURIAE

Of a Published Decision of the
Second Appellate District, 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

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INTRODUCTION

Application of Propositions 218 and 26 to water delivery charges has fomented substantial litigation, including disputes among each of California's major groundwater replenishment agencies and their customers, and between wholesale water providers and their customers. These issues divide the memberships of the State's local government associations, which typically provide amicus briefs reflecting consensus views of local government. Thus, those groups are absent here. Instead, amici are litigants in other cases pending. While some of their analysis is helpful, much amounts to requests for advisory opinions on those other disputes.

To the extent the briefs are helpful, they confirm the analysis of the principal briefing — Proposition 218 extends to water service charges of all types, ether delivered via pipes or the groundwater table. If it did not, Proposition 26 would impose comparable duties on Appellant United Water Conservation District ("UWCD" or the "District") to prove the fees challenged here recover no more than its cost to serve Respondent City of San Buenaventura ("City" or "Ventura") and are fairly apportioned to reflect the City's benefits from or burdens on UWCD's service.

A few of UWCD's amici urge this Court to overturn nearly a decade's worth of case law to follow a road not taken in 2006. They urge this Court to overrule *Pajaro Valley Water Management Agency v. AmRhein* (2007) 150 Cal.App.4th 1364 (*Pajaro I*) and to extend the

reasoning of *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 (*Apartment Association*) to water service charges. *Apartment Association* found a fee on landlords to fund housing code enforcement not subject to Proposition 218 because it was triggered not by property ownership alone but by a voluntary decision to participate in a regulated market. However, the argument does not serve the language of Proposition 218 well and would unsettle law and require this Court to take a path it rejected nearly a decade ago in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 (*Bighorn*).

Accordingly, to the extent amici illuminate the issues here, they support the City's demonstration that UWCD's fees cannot survive review under either Proposition 218 or Proposition 26 and the facial unconstitutionality of Water Code section 75594's mandate of a 3:1 ratio of the fees UWCD charges non-agricultural groundwater users to those it charges agricultural users.

I. DE NOVO APPELLATE REVIEW ON UWCD'S ADMINISTRATIVE RECORDS IS APPROPRIATE

A helpful new authority has been published since the principal briefing that illuminates a debate engaged by UWCD's amici as to the standard of appellate review of disputes under Propositions 218 and 26. (*Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2015) 242 Cal.App.4th 1187 [2015 WL 8236204] (*Great Oaks*).) In particular, that opinion holds a challenger bears the

burden to identify a specific legal basis on which to attack a revenue measure; if so, the rate-maker then bears the burden to demonstrate compliance with our Constitution and the legal character of a revenue measure is a legal question to be determined independently by the trial court and reviewed de novo on appeal. (*Id.* at p. *7.)

Rate-making is, of course, legislative activity. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 277 (*20th Century*); *Great Oaks, supra,* 2015 WL 8236204 at p. *24.) In such cases, judicial review is confined to the record before the rate-making agency under the rule of *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 579 ("*Western States*") (mandamus review of legislative action limited to agency's record). *Great Oaks* appropriately applies this rule to Proposition 218 and statutory challenges to rates for water supply services. (*Great Oaks,* 2015 WL 8236204 at p. *27.) As explained in the principal briefing, when such a case is tried only on a cold administrative record, that record is equally accessible to appellate as to trial courts and no justification for deference to the trial court appears. (Opening Brief on the Merits ("OB") at pp. 25–26; Reply Brief on the Merits ("RB") at pp. 12, 14–15).

Great Oaks also helpfully addresses the role of appellate courts in cases in which the trial court does **not** adhere to *Western States,* as was true there, in *Moore v. Lemon Grove* (2015) 237 Cal.App.4th 363 (*Moore*) and in *Morgan v. Imperial Irrigation District* (2014) 223

Cal.App.4th 892 (*Morgan*). Because its analysis is fresh and cogent, it bears quotation at some length.

It first discusses appellate review of statutory claims under the usual deferential rule:

> However, the fact that the [trial] court cannot be faulted for admitting this [extra-record] evidence [to which the District stipulated] does not mean that it was free to depart from all constraints on judicial review of quasi-legislative actions. Regardless of the evidence before it, a court reviewing a quasi-legislative act cannot reweigh the evidence or substitute its own judgment for that of the agency. Even when extra-record evidence has been received, the determination whether the decision was arbitrary, capricious or entirely lacking in evidentiary support must be based on the "evidence" considered by the administrative agency. If courts were to independently weigh conflicting evidence in order to determine which side had a preponderance of the evidence, this would indeed usurp the agency's authority and violate the doctrine of separation of powers. Thus, while the parties' stipulation entitled the trial court to consider the evidence before it for purposes of illuminating the controversy, it should have confined itself to the question whether the challenged

> actions were arbitrary, capricious, or wholly unsupported by the evidence before the District.

(*Great Oaks, supra,* 2015 WL 8236204 at p. *28, citations and internal quotations omitted.)

Thus, the extra-record evidence to which the *Great Oaks* parties stipulated could not invalidate the District's rates, but is not useless:

> Here, given the parties' mutual agreement to try the matter in an unorthodox manner, the testimony of such witnesses might reasonably be consulted on matters such as industry practice or applicable accounting concepts.

(*Ibid.*) It then turned to independent judgment review required by articles XIII C and XIII D of the California Constitution[1]:

> Of course, application of an independent standard of review does not require or permit us to substitute our judgment for that of the trial court on purely factual questions as to which the trial court's finding is supported by substantial evidence.

(*Ibid.*)

---

[1] References to articles and sections of articles are to the California Constitution.

Thus, *Great Oaks* establishes that appellate review of factual issues is de novo when the rule of *Western States* is observed and for substantial evidence when facts are found on the basis of extra-record evidence when that rule is not applied.

Moreover, *Great Oaks* recognizes that factual disputes will rarely drive rate challenges under Articles XIII C and XIII D: "it does not appear, however, that the trial court's imposition of liability under Article 13D depends on any such factual issues." (*Id.* at p. *7.)

So, too, here. The City and UWCD argue the legal significance of the record facts here, but dispute few factual issues as such.

UWCD's amicus Santa Ynez Water Conservation District ("Santa Ynez"), faults the City's reliance on the doctrine of constitutional fact to justify its claim for de novo review of UWCD's administrative records. (Santa Ynez Water Conservation District Brief ("Sta. Ynez Br.") at p. 31.) It observes that the doctrine extends only to facts on which constitutional rights turn. So, for example, constitutional review of defamation claims is often limited to facts which touch on "malice" as that term is used in First Amendment case law. (*Ibid.*) True enough. However, given the demands of Propositions 218 and 26, what facts in UWCD's records might be relevant here that are not also germane to the demands of our Constitution? While defamation law may allow a court to distinguish constitutional from ordinary fact, rate-making may not — especially given our Constitution's demand that the rate-maker

prove its rates are not taxes. (Cal. Const., art. XIII D, § 6, subd. (b)(5); art. XIII C, § 1, subd. (e) [final, unnumbered para.].)

Similar concerns motivated the Court of Appeal in *Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516 to allow a plaintiff to question for the first time on appeal compliance with the requirements of article XIII D, section 4 as to the special benefit and proportionality of assessment. (*Id.* at p. 1535.) It reasoned these issues arise in "any legal action contesting the validity of any assessment" whether or not pleaded and argued under the language of article XIII D, section 4, subdivision (f). (*Id.* at pp. 1534–1535.)

The City doubts Proposition 218 was intended to alter litigation practice in this way. It expressly shifts the burden the burden of proof in these cases. Why would it merely imply a change in the duties to exhaust administrative remedies and to raise all legal claims in trial courts? (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1231 [under *expressio unius est exclusio alterius* statutory exemptions beyond those expressed may not be implied].)

In any event, *Beutz*'s approach reflects an understanding that the factual issues on which Proposition 218 cases turn appear in administrative records equally accessible to trial and appellate courts and the burden is on the local government to prove compliance with the Constitution — once a prima facie case of a violation is made. Of course, when the rule of *Western States* is **not** observed and trial courts admit extra-record evidence— as in *Great*

Oaks, Morgan and *Moore* — the trial court does have its usual institutional advantage as a fact-finder. Thus, the appellate court reviews an agency's record de novo and the trial court's determination of facts disputed there for substantial evidence.

Santa Ynez also misapprehends the City's observation that the consequence of an administrative record is a legal question reviewed de novo on appeal. (Sta. Ynez Br. at p. 31.) That Judge Anderle gave no deference to UWCD's fact-finding (as the Constitution required he not) does not control whether an appellate court should defer to him. For the reasons stated in the City's principal briefs and above, the City respectfully argues this Court owes the trial court's fact-finding no deference. (OB at pp. 25–26; RB at pp. 12–13.)

II. UWCD'S FEES ARE SUBJECT TO PROPOSITION 218

A. *Apartment Association* Does Not Apply To Water Service Fees

Water service includes resource management, along with other activities for the production, supply, treatment, and distribution of water. (Gov. Code, § 53750, subd. (m); *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 595–596 (*Pajaro II*).) Local agencies may recover the cost of management as part of the water service charge along with the costs of activities and facilities that comprise the enterprise. (*Pajaro II, supra,* 220 Cal.App.4th at pp. 598–600; see also, *Moore, supra,* 237

Cal.App.4th at pp. 275–276.) This Court suggested in *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409 (*Richmond*) and held in *Bighorn* that fees for on-going water service are subject to Proposition 218. The use of water and water rights, like the use of any property, is subject to regulation under the police power of article XI, section 7 and, as to water in particular, the anti-waste mandate of article X, section 2. This Court held in *Apartment Association* that fees imposed to fund regulation of voluntary economic activity are generally not subject to Proposition 218. UWCD's amici seek to extend *Apartment Association*'s rationale to water service fees to overturn *Pajaro I* and a decade of settled case law. The City respectfully urges this Court to decline the invitation.

I. *Apartment Association* viewed property related fees narrowly, but *Richmond* and *Bighorn* rejected that view as to fees for ongoing water service

UWCD's amici urge this Court to overrule *Pajaro I* and to extend the reasoning of *Apartment Association* to fees based on measured use of supplied water. (E.g., Santa Clara Valley Water District Brief ("Sta. Clara Br.") at pp. 9–23.) While such an approach has intellectual integrity, it is not a persuasive construction of Proposition 218 — as *Pajaro I* explained in thoughtful detail. Moreover, it requires this Court to change a course it set almost a decade ago in *Bighorn*. Indeed, the Sixth District recently confirmed

its view of *Pajaro I* in a case presenting the very issues presented here. (*Great Oaks, supra,* 2015 WL 8236204 at p. *13.)

Apartment Association concluded a fee on multi-family landlords to fund housing code enforcement was not a property-related fee because it was not triggered by property ownership alone, but by elective participation in a regulated industry. (24 Cal.4th at p. 842.) However, this Court has since refused to extend that reasoning to water service fees, citing article XIII D, section 6, subdivision (c)'s partial exception of such fees from Proposition 218 to conclude they are within its reach. (*Richmond, supra,* 32 Cal.4th 409; *Bighorn, supra,* 39 Cal.4th 205.) Amici urge this Court to revisit those cases to extend *Apartment Association*'s reasoning to water service fees, or at least, groundwater fees. (E.g., Water Replenishment District of Southern California Brief ("WRD Br.") at pp. 11–13.)

This approach would limit Proposition 218 to water fees imposed in flat amounts, perhaps collected via the property tax roll, as *Pajaro I* explained. (*Pajaro I, supra,* 150 Cal.App.4th at p. 1387; see also City of Signal Hill Brief ("Signal Hill Br.") at p. 16, fn.3.)

This approach is also consonant with *Howard Jarvis Taxpayers Association v. City of Los Angeles* (2000) 85 Cal.App.4th 79 (*HJTA v. Los Angeles*). There, the Second District found Proposition 218 inapplicable to metered water rates because those rates require more than property ownership — they also require voluntary water use.

However, *Richmond* and *Bighorn* reject this approach and the latter expressly overruled *HJTA v. Los Angeles*. (*Bighorn, supra,* 39 Cal.4th at pp. 205 & 217, fn. 5.)

Richmond can be made consistent with the *Apartment Association* approach to water fees that UWCD's amici urge only by ignoring as dicta its language that Proposition 218 does apply to fees for ongoing water service through an existing connection. (Sta. Clara Br. at pp. 13–14.) Indeed, the Water Replenishment District of Southern California ("WRD") argues that, like the housing developer in *Richmond,* the City could avoid UWCD's fees by disusing its water rights. (WRD Br. at p. 15.)

However, this analogy to *Richmond* is unpersuasive for four reasons. First, this Court rejected it in *Bighorn,* elevating *Richmond*'s dicta to a holding. (*Bighorn, supra,* 39 Cal.4th 205 at pp. 212–215.) Second, UWCD knows precisely who is pumping groundwater from the eight basins it replenishes and can therefore comply with the notice requirements of article XIII D, section 6, subdivision (a) as the Shasta Community Services District in *Richmond* could not. Third, the City's water rights are property which have only one meaningful use — the pumping of groundwater for use in the City's utility services to its customers. Fourth, *Richmond* involved a one-time payment to mitigate impacts of development — not recurring fees for continuing water service. (Cf. Cal. Const., art. XIII C, § 1,

subd. (e)(6) [exempting development impact fees from Prop. 26]; art. XIII D, § 1, subd. (b) [same as to Prop. 218].)

Thus, UWCD's fees are imposed on activity that is "indispensable to most uses of [this] real property" just as the Court found water fees for domestic service to be in *Bighorn*. (*Bighorn, supra*, 39 Cal.4th at p. 214, quoting *Richmond, supra*, 32 Cal.4th at p. 415.) WRD would distinguish *Richmond* because the fee there was triggered by "nothing other than the normal ownership and use of property." (WRD Br. at p. 23, quoting *Richmond, supra*, 32 Cal.4th at p. 427; cf. Sta. Clara Br. at pp. 13–15.) However, the same can be said of Ventura's water rights — the normal ownership and use of that property is alone sufficient to trigger UWCD's fees.

Bighorn squarely rejected an approach to water service charges based on *Apartment Association* and elevated *Richmond*'s dicta to a holding. As a result, a growing body of case law applies Proposition 218 to a variety of water rates which are not the flat charges collected on the property tax roll to which an *Apartment Association* approach would confine it:

- *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914 (*HJTA v. Fresno*) (transfer of proceeds of water rate to general fund violated Prop. 218);
- *Morgan* (retail water rates subject to Prop. 218);
- *Mission Springs v. Verjil* (2013) 218 Cal.App.4th 892 (same);

- *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926 (*Palmdale*) (tiered water rates require cost-justification under Proposition 218);
- *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 (*San Juan Capistrano*) (same).

The City's amici develop this argument more fully. (E.g., Howard Jarvis Taxpayers Association Brief ("HJTA Br.") at p. 8; Jack Cohen Brief ("Cohen Br.") at p. 4; Tesoro Refining and Marketing Company, LLC Brief ("Tesoro Br.") at pp. 7–8; Great Oaks Water Company Brief ("Great Oaks Br.") at pp. 14–15.)

UWCD's amici who argue for application of *Apartment Association* to water rates cases read *Bighorn* narrowly and neglect this case law. Indeed, Santa Clara Valley Water District ("Santa Clara"), represented by able counsel who make a cogent case for this approach, cites none of these cases. A need to wipe away a decade's development of Proposition 218 case law demonstrates how much work will be required of the courts if this Court is to belatedly pursue the road not taken in *Bighorn*. *Pajaro I* notes the doctrinal significance of *Bighorn*'s rejection of *HJTA v. Los Angeles*. (*Pajaro I, supra,* 150 Cal.App.4th at p. 1387; see also Signal Hill Br. at pp. 21, 23.)

Indeed, this Court has cited *Apartment Association* just four times — and with little analysis. (*California Redevelopment Assn. v.*

Matosantos (2011) 53 Cal.4th 231, 279 [noting *Apartment Association*'s refusal to apply liberal construction provision of Proposition 218's uncodified § 5]; *Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 287 (*Greene*) [construction of Prop. 218 is legal question reviewed de novo]; *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 442–443 (*Silicon Valley*) [historic relationship of Proposition 218 to Proposition 13]; *id.* at p. 449 [ballot arguments as measure of Prop. 218's intent regarding assessments]; *Richmond, supra,* 32 Cal.4th at p. 414 [Prop. 218 adopted arts. XIII C and XIII D in 1996].) Thus, WRD rightly argues these passing citations make *Apartment Association* "vital," but they tell us little about its reach. (WRD Br. at p. 21.)

Indeed, as the City's amici note, no court has substantively applied *Apartment Association* to a water rates case since *Pajaro I* concluded *Bighorn* precluded it. (Cohen Br. at p. 15–16; HJTA Br. at p. 8.)

Santa Clara cites a January 1997 annotation of Proposition 218 by the Howard Jarvis Taxpayers Association ("HJTA"), a proponent of Proposition 218, to urge application of *Apartment Association* to volumetric water rates. (Sta. Clara Br. at pp. 8, 12, fn. 1.) However, the post-election views of an initiative proponent do not evidence intent of voters who adopted it. (E.g., *Carman v. Alvord* (1982) 31 Cal.3d 318, 331, fn. 10 [rejecting declaration of the late Howard Jarvis

in construing Proposition 13].) Indeed, the HJTA does not espouse the view. It argues Proposition 218 applies here. (HJTA Br. at p. 6.)

2. Even if this Court wished to reverse a decade of case law, Proposition 218 cannot be read to exclude water rates

Proposition 218 defines "property related fee" to encompass more than fees collected on the property tax roll. Article XIII D, section 2, subdivision (e) defines the property related fees to which article XIII D, section 6 applies to include:

- "any levy"
- "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).) Thus, it plainly includes more than fees on parcels.

While the phrase "as an incident of property ownership" might have meant "because of ownership of property," that is hard to reconcile with "a user fee ... for a property related service." Plainly, fees triggered by bare title are not the universe of property related fees under Proposition 218. Fees triggered by use of a "property related service" are such fees, too. Such a fee necessarily

involves both some ownership interest in property (a fee or leasehold) and the use of some service. (Cf. Great Oaks Br. at p. 18.)

Nor is "property ownership" limited to fee title, as article XIII D, section 2, subdivision (h) defines that term to "include tenancies of real property where tenants are directly liable to pay the ... fee, or charge in question." Thus, at least fee titles and tenancies are "property ownership" sufficient to bring fees within the reach of article XIII D.

Finally, "property related service" is defined — in somewhat circular terms — as "a public service having a direct relationship to property ownership." (Cal. Const., art. XIII D, § 2, subd. (h).) This phrase, too, suggests "property related fees" include more than those collected on the property tax roll.

Article XIII D's remaining terms provide context that illuminates this issue. Fees are distinguished from taxes and assessments by the permissible levies "upon any parcel of property or upon any person as an incident of property ownership" listed in article XIII D, section 3, subdivision (a).

Property related fees apparently include those for "sewer, water and refuse collection services" because, otherwise, the exclusion of such fees from the election requirement of article XIII D, section 6, subdivision (c) would be unnecessary. (See also *Pajaro II, supra*, 220 Cal.App.4th at p. 596 [groundwater augmentation charge was a fee for "water" service exempt from election requirement of

art. XIII D, § 6, subd. (c)]; see also *Crawley v. Alameda County Waste Management Authority* (Dec. 1, 2015, A143650) ___ Cal.App.4th ___ [2015 WL 9437953 at pp. *6–*7] (*Crawley*) [property tax roll fee for household hazardous waste management services was a fee for "refuse" service exempt from election requirement of art. XIII D, § 6, subd. (c)].)

Moreover, Proposition 218's framers deemed it necessary to expressly exempt "fees for the provision of electrical or gas service." (Cal. Const., art. XIII D, § 3, subd. (b).) If ordinary utility fees were not "fees for a property related service," these two exemptions would be unnecessary.

Other provisions of article XIII D limit the reach of its definition of "property related fee." Article XIII D, section 6, subdivision (a)'s notice requirements impliedly limits these fees to those as to which it is possible to know in advance what parcels are affected. (Cal. Const., art. XIII D, § 6, subd. (a)(1); *Richmond, supra,* 32 Cal.4th at pp. 422–423.) Some sort of service to property — as article XIII D, section 2, subdivision (g) defines the term — must be associated with the fee for these rate-making requirements of article XIII D, section 6, subdivision (b) to be sensible:

> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related **service.**

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the **service** attributable to the parcel.

(4) No fee or charge may be imposed for a **service** unless that **service** is actually used by, or immediately available to, the owner of the property in question.

(5) No fee or charge may be imposed for general government **services** ... where the **service** is available to the public at large in substantially the same manner as it is to property owners.

(Cal. Const., art. XIII D, § 6, subd. (b), emphases added; cf. Cohen Br. at p. 19 [arguing Proposition 218 prohibits property related fees other than for property related services].) This refutes Santa Ynez's argument (Sta. Ynez Br. at p. 19) that a fee can be incident to property ownership without triggering Proposition 218 if imposed for something other than a property related service. Such a fee must logically fall into another exception to article XIII D, section 3, subdivision (a) — as for taxes or assessments.

Still further, a property related fee must be imposed with respect to a purpose, identifiable when the fee is legislated for article XIII D, section 6, subdivision (b)(2) to be sensible: "Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed."

For these reasons, the Sixth District recently concluded groundwater replenishment charges are subject to Proposition 218 as fees for a property related service. (*Great Oaks, supra,* 242 Cal.App.4th 1187 [2015 WL 8236204 at pp.*11–*12].) It reasoned as follows:

> In *Amrhein* [i.e., *Pajaro I*] we essentially concluded that the groundwater augmentation charge there was conceptually indistinguishable, for purposes of property-relatedness, from the charges in those two cases [i.e., *Richmond* and *Bighorn*].)
>
> In *Griffith* [i.e., *Pajaro II*] we took the further step of acknowledging that the indirect delivery of water to groundwater extractors — whether by replenishment of the groundwater basin, or by measures reducing demands on it — was conceptually indistinguishable from the direct delivery of water.

(*Ibid.*)

Thus, *Great Oaks* explains why this Court chose in *Bighorn* not to follow the path suggested by *Apartment Association* as to water service charges, but to follow instead the path suggested in *Richmond.* (*Bighorn, supra,* 29 Cal.4th at pp. 216–217.)

3. Applying *Apartment Association* to water rates to overturn *Pajaro I* is unnecessary and disruptive

Local governments have adapted to Proposition 218's demands for water rates in the decade since *Bighorn*. This has required more careful cost justification of rates and has required some litigation to clarify our Constitution's demands, as demonstrated by *Pajaro I, Pajaro II, Palmdale, Morgan,* and *San Juan Capistrano*. However, Proposition 218 does not prevent water utilities from recovering all of their costs or managing limited resources, as UWCD's amici fear. (E.g., Sta. Ynez Br. at p. 26; *Pajaro II, supra,* 220 Cal.App.4th at pp. 597–598 [property related fee under Prop. 218 can recover agency's costs, including debt incurred for abandoned projects and costs to plan future services], *Moore, supra,* 237 Cal.App.4th at pp. 369–370 [same].) Above-cost pricing is neither essential to conserving water nor permitted by Proposition 218 or Proposition 26, despite Santa Ynez's unpersuasive claim to the contrary. (Sta. Ynez Br. at pp. 26-27.)

Santa Ynez is more persuasive when it argues *San Juan Capistrano* over-reached in rejecting the use of fines to accomplish regulatory goals attendant to water service, including the conservation goal of article X, section 2. (Sta. Ynez Br. at pp. 26–28.)

However, whether or not one accepts the very exacting review of legislative rate-making espoused by *San Juan Capistrano;* utilities

plainly may decide how much water to make available, for what uses, and on what terms. (Wat. Code, § 370 et seq. [safe harbor for tiered rates]; *id.* at § 372.)

Applying *Apartment Association* to water rates now, and thus limiting Proposition 218 to water rates imposed in flat amounts collected on the tax roll — as *Pajaro I* suggests is a possible reading of *Apartment Association* (*Pajaro I, supra,* 150 Cal.App.4th at pp. 1386–1387) — would unsettle expectations that have arisen over the last decade and raise questions as to the application of Proposition 218 to other fees — including:

- sewer fees as in *Moore;*
- the refuse collection fees mentioned in article XIII D, section 6, subdivision (c); and
- the water quality and flood control fees at issue in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 and in *Greene.*

Thus, although the path amici would blaze from *Apartment Association* to the original (i.e., pre-rehearing) ruling in *Pajaro I* is intellectually consistent and could have been the law, it is not the law. It does not comport well with the language of Proposition 218 — especially the partial exemption of water fees from the election requirement of article XIII D, section 6, subdivision (c) and the complete exemption for gas and electric fees of article XIII D, section 3, subdivision (b) — and would require this Court to

overturn a decade of case law. It would unsettle the law to create rate-making discretion not necessary to allow utilities to recover all of their costs and to manage scarce water resources.

In any event, it is not possible to sustain the rates in issue here without overruling *Pajaro I*, as the trial court concluded and as the City's amici demonstrate. (10JA:88:2150; Great Oaks. Br. at p. 22.)

B. Regulatory Fees Are Exempt from Proposition 218, but the Fee in Issue Here Is Not Such a Fee

As *Apartment Association, Richmond* and the analysis of *Pajaro I* demonstrate, a fee on voluntary conduct to fund regulation of that conduct is not a fee for a property related service subject to Proposition 218. (Cf. Cal. Const., art. XIII C, § 1, subd. (e)(3) [regulatory fee exemption from Prop. 26].) To this extent, the City disagrees with its amicus, Jack Cohen, who entirely rejects *Sinclair Paint*'s purpose test of the legal character of revenue measures. (Cohen Br. at p. 11; see also *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874 (*Sinclair Paint*).) Even the HJTA, which reads the regulatory fee exception to Proposition 26 very narrowly (HJTA Br. at p. 19), agrees with this point. The Sustainable Groundwater Management Act, Water Code sections 10720 et seq. ("SGMA"), authorizes such fees, too, as the Kern County (at pp. 6, 13–16), Signal Hill (at p. 13) and Cohen (at p. 13) briefs demonstrate. However, these are not fees for a property related service, such as delivery of the volume of water needed for

residential use of property. (*Richmond, supra,* 32 Cal.4th at p. 415; *Bighorn, supra,* 39 Cal.4th at p. 214.) Santa Ynez's claim (Sta. Ynez Br. at p. 18) that this amounts to a legislative recognition that only water supply fees need comply with Proposition 218 is imprecise. It better serves the Constitution to observe that only fees for a property related water service need comply with Proposition 218.

Thus, *Apartment Association* exempted from Proposition 218 a fee for housing code enforcement as to those who chose to participate in the rental housing market. *Richmond* similarly exempted a fee to fund public services to new development. The SGMA fees which the Legislature has not required to comply with Proposition 218 involve regulation of the use of groundwater — as distinct from groundwater augmentation service. (County of Kern Brief ("Kern County Br.") at pp. 6, 13–16; Signal Hill Br. at pp. 13, 32). That statute **does** require Proposition 218 compliance for groundwater service charges. (Wat. Code, § 10730.2; Cohen Br. at p. 13 [arguing the SGMA statute codifies *Pajaro II*]; Signal Hill Br. at p. 34 [noting *Greene, supra,* 49 Cal.4th at pp. 290–291 stated: "In cases of ambiguity we also may consult any contemporaneous constructions of the constitutional provision made by the Legislature or by administrative agencies." (quoting *City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563, construing art. XIII, § 11)].)

However, UWCD's is not such a fee. Rather, it is a fee for groundwater service and acts to encourage agricultural water use by delivering water at rates subsidized by higher rates on non-agricultural customers. *Great Oaks* reached the same conclusion regarding the similar fee of the Santa Clara Valley Water Conservation District:

> The District directs us to nothing in the record that would compel or even permit a finding that the extraction fee here falls within the "regulatory purpose" hypothesis we posited in *Amrhein* [i.e., *Pajaro I*]. While the fee as a whole may be intended in part to influence the consumption of groundwater, it is not "structured" in the sense contemplated above. Nor does anything in the District Act "clearly establish[ ]" that it has a regulatory purpose. Nothing in the notice to owners explaining the basis for the fee alluded to any such objective. The trial court expressly found that the charge "does not serve a significant regulatory purpose." We detect no error in that finding.

(*Great Oaks, supra,* 2015 WL 8236204 at p. *13, all but first abridgment original.) Accordingly, the claims of UWCD's amici that its fees can be justified as regulatory because they promote water conservation simply misread the records here. (E.g., Sta. Clara Br. at p. 20.) Moreover, the same claim could have been made in *Bighorn* and was

expressly rejected as a basis to exempt water service fees from Proposition 218 in *Palmdale* and *San Juan Capistrano*. (*Bighorn, supra,* 39 Cal.4th 205; see also *Palmdale, supra,* 198 Cal.App.4th at p. 985; *San Juan Capistrano,* 235 Cal.App.4th at p. 1510.)

In fact, as the City has explained, UWCD's principal act precludes it from imposing fees that promote conservation because Water Code section 75593 requires uniform rates throughout the District. (See OB at p. 39; RB at pp. 20–21, 31; see also Cohen Br. at p. 31; Great Oaks Br. at p. 23; Signal Hill Br. at p. 36.) Unlike the tiered rates that some water retailers — who also have a duty to conserve water — impose, UWCD's flat rates do not discourage wasteful use of groundwater. (See RB at pp. 20–21.) Instead, the subsidized rate agriculture pays makes it profitable for growers to switch from low-water-intensity orchard crops to water-hungry berry crops. (OB at p. 39; RB at p. 20.)

As the HJTA observes, nothing in the ordinance imposing the fee in issue here speaks to a regulatory objective. (HJTA Br. at p. 20.) UWCD's two records also demonstrate it imposes this fee to recover the cost of augmenting groundwater supplies, not to cover its cost to regulate groundwater use. (AR1:65 [resolution imposing FY2011–2012 rates]; AR2:142 [resolution imposing FY2012–2013 rates]; see also Wat. Code, § 75523 [groundwater charge proceeds may be used for any "district purposes authorized by [the Water Conservation District Law of 1931]"].)

Of course, every water provider engages in regulation to some extent — to limit the demand for their services, to protect public health, and to manage a scarce resource. This is apparent from the definition of "water" services partially exempt from Proposition 218. (Cal. Const., art. XIII D, § 6, subd. (c); Gov. Code, § 53750, subd. (m); *Pajaro II, supra,* 220 Cal.App.4th at p. 596.) It is also apparent from the similarities — and differences — between the two Water Code sections authorizing newly formed SGMAs to impose regulatory and service fees. (Wat. Code, §§ 10730, subd. (a), 10730.2; see also Kern County Br. at pp. 6–7; Signal Hill Br. at pp. 13, 32). Indeed, fees that mix service and regulatory purposes have arisen in other contexts. (Cohen Br. at p. 9, citing *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1424 [fee on tax roll to fund county landfill was both service fee and served "a regulatory or police power function"].) Thus, a broad exemption from Proposition 218 for fees with a "regulatory" purpose could prevent its application to fees for property related services entirely, effectively excising that phrase from our Constitution. (Cf. Signal Hill Br. at p. 40.)

How, then, ought courts to distinguish regulatory fees governed by Propositions 13 and 26 pertinent to water use from retail water service fees governed by Proposition 218 and wholesale water service fees governed by Proposition 26? As this Court distinguishes all revenue measures — in light of the principal

purpose for which they are imposed. (*Sinclair Paint, supra,* 15 Cal.4th at p. 874; cf. *Richmond, supra,* 32 Cal.4th at p. 426 [finding connection fees imposed not "on such persons 'as an incident of property ownership' but instead as an incident of their voluntary decisions to request water service"]; *Bighorn, supra,* 39 Cal.4th at pp. 216–217 ["Because it is imposed for the property-related service of water delivery, the Agency's water rate, as well as its fixed monthly charges, are fees or charges within the meaning of article XIII D."]; see also Signal Hill Br. at pp. 36–40.)

Although the myriad fees that now exist or may hereafter be created will undoubtedly create some hard cases, the general rules of decision are plain: a fee imposed to recover the cost of water service is subject to Proposition 218 if it is a property related fee (as *Bighorn* and its progeny define the term) and subject to Proposition 26 otherwise (because Proposition 26 applies to all fees government imposes unless an exception applies); and a fee imposed to regulate conduct to achieve public purposes is subject to Proposition 26 — and, of course, Proposition 13 and its implementing statute. (Gov. Code, § 50076 [defining "special tax" under Prop. 13 to include fees in excess of service or regulation]).

Although Proposition 218 does not expressly apply such a purpose test, its definitions are consistent with it — fees are subject to that measure if they are property related, i.e., if imposed on a parcel or on a person as an incident of property ownership,

including a fee for a property related service. (Cal. Const., art. XIII D, § 2, subd. (e).) A fee for a property related service is a fee imposed for the purpose of funding such a service and thus, *Sinclair Paint*'s test of fees under Proposition 13 is consonant with the requirements of the successor to that measure — Proposition 218.

This approach respects both the language of Proposition 218, which treats fees for property related services as within its reach, and earlier case law upholding regulatory fees not incident to property ownership. *Great Oaks* recently adopted this approach:

> Here the District Act states that the charge is levied upon extraction facilities within affected zones "for the benefit of all who rely directly or indirectly upon the ground water supplies of such zone or zones and water imported into such zone or zones." (District Act, § 26.3) It then declares that the proceeds of the charge shall be used for importing, treating, and distributing water, as well as replenishing the groundwater basin. (District Act, § 26.3) We see no material distinction between these purposes and the purposes that, as we held in *Griffith* [i.e., *Pajaro II*], made the charge in that case one for water service.

(*Great Oaks, supra,* 2015 WL 8236204, at p. *12.)

Thus, the regulatory fee rule need not eviscerate Proposition 218 as UWCD and its amici argue and as Jack Cohen

fears. (Cohen Br. at pp. 9–10.) Whether or not the categories of regulatory fees and fees for property related services overlap, as Cohen argues (at p. 11) — and *Apartment Association* would seem to belie — Proposition 218 applies to fees for property related services by its terms.

C. Amici's Suggested Limitations on *Richmond* and *Bighorn* Serve Neither the Language of Proposition 218 Nor the Facts Here

Perhaps recognizing their primary argument overreaches, UWCD's amici suggest a number of distinctions between rates for piped water service as in *Richmond* and *Bighorn* and groundwater augmentation charges at issue here and in *Pajaro I* and *Pajaro II*. None respects the language of Proposition 218 and many simply do not comport with the facts here.

1. Proposition 218 does not distinguish commercial from residential water use

Although *Pajaro I* persuasively rejects any distinction under Proposition 218 between fees for commercial water use and those for residential water use, UWCD's amici argue the point, while the City's amici refute it. (Compare Sta. Clara Br. at pp. 14–19, 20 with Great Oaks Br. at p. 23; HJTA Br. at p. 11; Cohen Br. at p. 12, citing *Palmdale, San Juan Capistrano* and *Morgan*; and Signal Hill Br. at pp. 24–26.) Santa Clara purports to cite *Bighorn* for this distinction,

but, to do so, finds it necessary to add "domestic" to this Court's language there. (Sta. Clara Br. at p. 21, fn. 5.) This Court's own short-hand references to *Bighorn* read it to apply to **all** water delivery charges: "In [*Bighorn*], we addressed whether water delivery charges to existing customers were fees or charges within the meaning of article XIIIC, section 3 ... ." (*Greene supra*, 49 Cal.4th at p. 296.)

Even UWCD's amicus WRD agrees with the City on this point. (WRD Br. at p. 21.) This argument also makes the result in this case turn on who sued (a water utility or a rural resident) rather than the purpose and legal character of the rates in issue.

UWCD and most other groundwater agencies are statutorily obliged to establish "uniform" rates, so fees lawful as to those who use water for residential purposes must be uniform with fees on those who use water for other purposes. (Signal Hill Br. at pp. 7–8 [noting WRD has statutory obligation like UWCD's].) Thus, this distinction would not help decide this case — or most others. Even the intensely urban service area of the Water Replenishment District of Southern California in the coastal plain of Los Angeles County includes at least some wells operated for residential use. (WRD Br. at pp. 1–2; Signal Hill Br. at pp. 5, 26–28.)

2. Proposition 218 does not distinguish water delivered via the groundwater table from that delivered by pipe

Pajaro I found groundwater augmentation charges to be property related fees because it could find no constitutional basis to distinguish water supplied via the groundwater table from that delivered by pipes. (*Pajaro I, supra,* 150 Cal.App.4th at pp. 1388–1389.) UWCD's amici argue for just that distinction, urging this Court to overrule *Pajaro I.* (E.g., Sta. Clara Br. at p. 20.)

What basis in our Constitution's text allows a distinction among fees for water service based on the means of delivery? The essential language of Proposition 218 gives not a hint of such a purpose: "'Property-related service' means a public service having a direct relationship to property ownership." (Cal. Const., art. XIII D, § 2, subd. (h).) Nothing in this definition suggests the technology by which water is delivered is of constitutional significance. Moreover, technology changes, but our Constitution does not. (E.g., *Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 137 ["'Drafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances they could not possibly envision.' (Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) pp. 85–86.)"].) Thus, it is a fraught task to construe Proposition 218 as depending on the technology by which government delivers water.

Santa Clara nevertheless urges this distinction, characterizing use of domestic water delivered by mains as "passive" and extraction of groundwater by a well as "active." (Sta. Clara Br. at pp. 18–19.) However, every use of water requires some action of the customer, whether it be to open a tap or to operate a well. Indeed, the Court of Appeal has rejected a distinction between active and passive customer conduct in deciding the scope of Proposition 218's requirement that property related services be "immediately available":

> In sum, we conclude the water and sewer base rates imposed on parcels with water or sewer connections regardless of whether they are active or inactive, and whether or not the property owner uses the services, are fees subject to the provisions of article XIII D, section 6 . . . .

(*Paland v. Brooktrails Tp. Community Services Dist. Board of Directors* (2009) 179 Cal.App.4th 1358, 1137.) Nor is there anything in the language of Proposition 218 that can sustain such a distinction.

Kern County urges a broad rule exempting all groundwater fees from Proposition 218. (Kern County Br. at pp. 15–16.) However, it notes groundwater providers can comply with Proposition 218's procedures, as the Shasta Community Services District in *Richmond* could not as to the water connection fees disputed there. (*Id.* at p. 12.) It more persuasively argues to limit *Pajaro I* to water delivery

and water service charges, subjecting true regulatory fees to Proposition 26 instead. (*Id.* at p. 16.) This argument is the more persuasive and better accounts for case law, as Signal Hill's brief demonstrates. (Signal Hill Br. at p. 15.) The fees in dispute here are for water service and can and should be imposed consistently with Proposition 218. That conclusion need not impair the power of Sustainable Groundwater Management Agencies to impose fees to fund regulation consistently with Proposition 26 despite Kern County's fears.

Moreover, these amici misconstrue the Sustainable Groundwater Management Act. Water Code section 10730, subdivision (a), allows groundwater management agencies to impose fees under SGMA to recover costs that are plainly and solely regulatory without requiring Proposition 218 compliance. Water Code section 10730.2 authorizes fees for groundwater augmentation, but requires Proposition 218 compliance. The Legislature's interpretation of the reach of Proposition 218 as expressed in these contrasting, adjacent code sections, reflects this Court's holdings in *Richmond* and *Bighorn*, as well as the Court of Appeal's conclusions in *Pajaro I* and *Pajaro II*, while recognizing that *Apartment Association* applies to purely regulatory fees but not to charges for water supply services. This point is elaborated in the City's supplemental brief to the Court of Appeal filed September 29, 2014.

Thus, WRD's repeated suggestion that UWCD's fees can be saved because it serves its customers via the groundwater table rather than through pipes is unsupported and unpersuasive. (WRD Br. at p. 22.) Water delivery does not become groundwater regulation merely because delivery is via the groundwater table.

3. Proposition 218 is not triggered by some minimum number of residential users

The Court of Appeal opinion here purports to distinguish *Pajaro I* by observing UWCD serves relatively fewer residential groundwater users than does the Pajaro Agency. (*City of San Buenaventura v. United Water Conservation District* (2015) 185 Cal.Rptr.3d 207, 221–222 (*Buenaventura*).) UWCD's amici repeat the claim, citing only the Court of Appeal opinion in this case as authority. (Sta. Clara Br. at pp. 17, fn. 3; 20.) This suggests Proposition 218's constitutional standards have a residential-density trigger nowhere stated in our Constitution. The relevant definition of Proposition 218 is: "Property-related service means a public service having a direct relationship to property ownership." (Cal. Const., art. XIII D, § 2, subd. (h).) This says nothing of any number of customers or residential customers. Thus, the claimed residential-density threshold fails. Moreover, the factual predicate is incorrect on this record. (OB at p. 30 ["[T]he record contains no evidence of the number of residential groundwater users in the District ... ."]; RB at p. 28.) As Great Oaks and Jack Cohen argue persuasively, the facts

here are not distinguishable from those in *Pajaro I*. (Great Oaks Br. at pp. 22–23; Cohen Br. at pp. 5–6.)

4. Violation of Proposition 218's substantive requirements cannot exempt a fee from its reach

Santa Ynez turns Proposition 218 on its head by arguing a fee that violates the substantive restrictions of article XIII D, section 6, subdivision (b) is — for that reason — not a property related fee subject to Proposition 218. (Sta. Ynez Br. at p. 19.) As Great Oaks demonstrates, the Court of Appeal did so, too. (Great Oaks Br. at pp. 24–25.) This cannot have been the intent of the voters who adopted Proposition 218, for it would make the measure meaningless and circular — the only measures which need comply with Proposition 218 are those which do.

Santa Ynez mistakes an argument this Court found persuasive in *Richmond* — that a measure cannot (rather than did not) comply with the **procedural** requirements of Proposition 218 suggests that measure was not intended to be within its scope. Because the Shasta Community Services District could not predict who might develop new buildings requiring water service so as to provide the notice required by article XIII D, section 6, subdivision (a)(1) of a fee imposed on new service connections illustrated that the fee was not within the reach of Proposition 218. That a fee **cannot** comply with

Proposition 218's **procedures** is very different from a fee which **does** not comply with its **substantive** restrictions.

5. That UWCD's fee is mandatory does not exempt it from Proposition 218

Santa Ynez also claims UWCD's fee must be for a benefit rather than for a service because it is unlawful to pump water from the basins UWCD serves without paying its fee. (Sta. Ynez Br. at pp. 20–21.) The same might be said of any government revenue — it is unlawful to evade government fees, just as taxes whether by gate-jumping at a ticketed event; tampering with a water meter; or engaging in untaxed, black-market transactions. The mandatory nature of a government revenue measure is necessary to trigger any of our constitutional revenue limitations; it is of no use in distinguishing their respective reaches. (Cal. Const., art. XIII A, § 4 [local governments may "impose" special taxes]; art. XIII C, § 1, subd. (e) [taxes include "any levy, charge, or exaction of any kind imposed by a local government"]; art. XIII D, § 2, subd. (e) [defining property related fee as "any level ... imposed by an agency"]; see also *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1770 [defining "impose" for purpose of Fee Mitigation Act as involving the use of force or authority]; *Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Com'n* (2012) 209 Cal.App.4th 1182, 1194 [defining "impose" under Prop. 218 as "the first enactment of a tax"].)

6. Proposition 218 does distinguish "parcels" from "property"

WRD would read Proposition 218 to protect property owners from fees on their "parcels" but not on other property interests, like the City's water rights. (WRD Br. at pp. 3, 14 [arguing water rights are severable from land], 16.) This reading ignores our Constitution, which defines a property related fee as a charge "upon a parcel or upon a person as an incident of property ownership." (Cal. Const., art. XIII D, § 2, subd. (e).) It defines "property ownership" "to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." (*Id.*, § 2, subd. (g).) Had Proposition 218's framers meant to limit its protections to fees on parcels, the words "property ownership" would not appear in section 2, subdivision (e), nor would they be specially defined in section 2, subdivision (g) to include some tenancies. WRD offers this crabbed reading while acknowledging the use of the word "including" in a definitional section like article XIII D, section 2, subdivision (g), is a term of enlargement. (WRD Br. at p. 8.)

Perhaps WRD means to argue that, whether a fee is paid by an owner or a tenant, it must affect a parcel of land and not some severable interest in land like water rights. Even that argument is not well taken for two reasons. First, nothing in the text or legislative history of Proposition 218 supports it. It defines the property related fees to which it applies as "**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." (Cal. Const., art. XIII D, § 2, subd. (e).) Justice Mosk explained that "as an incident" does not mean "on an incident" and thus, property related fees are not those triggered by title alone. (*Apartment Association, supra,* 24 Cal.4th at pp. 840–841.) However, neither *Apartment Association* nor the text of Proposition 218 allow us to read this broad language out of the Constitution entirely. Plainly, Proposition 218 reaches further.

More fundamentally, such a reading cannot account for *Richmond* and *Bighorn* and their progeny reaching water fees, as detailed above. (See section II.A, *supra.*)

Still further, if the City's water rights, and its title to the parcels from which it exercises those rights, were not a "parcel" to be protected by Proposition 218, neither would home sites of rural residents UWCD serves. And, as the City's principal briefs argue, UWCD's duty to impose "uniform rates" requires it to charge the City comparably with those who are protected by Proposition 218. (OB at pp. 9–10, 35; RB at p. 31.) Thus, WRD's observation that the City is not situated precisely as a residential pumper does not persuade, as WRD overlooks UWCD's (and WRD's own) duty to impose uniform rates. (WRD Br. at p. 14, fn. 7; p. 21, fn. 9.)

Plainly, WRD's restrictive reading of Proposition 218's definitions cannot save UWCD's fees here nor can it justify

application of the 3:1 ratio of Water Code section 75594. *Pajaro I*'s more thorough reading better harmonizes *Apartment Association* with Proposition 218's specific references to rates for water service underlying this Court's conclusions in *Richmond* and *Bighorn*. WRD's claim *Pajaro I* somehow turns only on "the method of calculating the amount of the charge" simply does not respect the depth of that court's analysis. (Compare WRD Br. at p. 22 with *Pajaro I, supra,* 150 Cal.App.4th at pp. 1384–1394.)

7. Proposition 218 is not limited to consumption-based fees

WRD misquotes *Bighorn* to propose another untenable limitation of Proposition 218. *Bighorn* ruled that water service fees are subject to Proposition 218 even when measured by consumption, refusing to extend *Apartment Association* to conclude a fee triggered by voluntary use of property in a particular way is not a property related fee. To understand WRD's error, it is necessary to quote the language of *Bighorn* from which it argues:

> Article XIII D defines "fee" or "charge" as "*including* a user fee or charge for a property related service." (Cal. Const., art. XIII D, § 2, subd. (e), italics added.) The word "including" is "'ordinarily a term of enlargement.'" (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 717, 3 Cal.Rptr.3d 623, 74 P.3d

726.) As we explained in *Richmond, supra,* 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518, domestic water delivery through a pipeline is a property-related service within the meaning of this definition. (*Id.* at pp. 426–427, 9 Cal.Rptr.3d 121, 83 P.3d 518.) Accordingly, once a property owner or resident has paid the connection charges and has become a customer of a public water agency, **all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee.**[5] Consumption-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." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 957, 5 Cal.Rptr.3d 520.) Because it is imposed for the property-related service of water delivery, the Agency's water rate, **as well as its fixed monthly charges,** are fees or charges within the meaning of article XIII D ... .

(*Bighorn, supra,* 39 Cal.4th at p. 227, emphases added.) The footnote five omitted from this quote expressly overrules *HJTA v. Los Angeles'*

holding that consumption-based water fees are outside the reach of Proposition 218 under the logic of *Apartment Association.*

WRD's able counsel renders this as a limitation of Proposition 218 to consumption-based fees:

> As used in article XIII D, section 2, subdivision (e), the term "user fee" means an "'amount[] charged to a person using a service where the amount of the charge is generally related to the value of the services provided.'" (*Bighorn, supra,* 39 Cal.4th at p. 217.) The amounts of the pump charges at issue are not related to the value of any service the pumper receives from the District. Instead, the amounts are determined by the volume of water the pumper extracts from the ground .... Accordingly, the pump charges are not "user fees" within the meaning of article XIII D. The City does not disagree; its briefs on the merits do not address "user fees."

(WRD Br. at p. 9.)

This argument is entirely unsupported by the cited language from *Bighorn,* as the fuller quotation above plainly reveals. Thus, the City **does** disagree. It briefs no separate argument about "user fees" because no authority supports WRD's effort to limit Proposition 218 to such fees. (Cf. *HJTA v. Fresno, supra,* 127 Cal.App.4th at p. 918 ["Proposition 218 uses the words 'fees' and 'charges'

interchangeably and, usually, in combination, as 'fee or charge.' (See, e.g., art. XIII D, § 6.) For convenience, we shall refer to these simply as 'fees.'"].)

8. Whether groundwater is served to an adjudicated or unadjudicated basin is immaterial

Seeking to litigate its own disputes here, WRD urges this Court to reserve whether Proposition 218 applies equally to agencies which serve water via adjudicated and unadjudicated basins. (WRD Br. at pp. 27–32.) WRD would distinguish its legal obligations from UWCD's, stating:

- the Central and West Basins of Los Angeles County it maintains have been adjudicated to operate as a common pool,
- pumping there exceeds the safe yield of those basins,
- it operates under a different statute than UWCD, and
- it has no obligation to distinguish agricultural from non-agricultural water use.

(WRD Br. at pp. 28–32.) Signal Hill, WRD's recent adversary in litigation, rebuts these claims. (Signal Hill Br. at pp. 8–12.)

The City need not referee a dispute to which it is a stranger. However, it must observe that water rights are property whether limited by adjudication or only by the duty to use water reasonably

and to avoid the waste forbidden by article X, section 2. (Tesoro Br. at pp. 1–5.) Moreover, the distinctions WRD asserts do not actually distinguish this case, which involves both adjudicated (Santa Paula) and unadjudicated basins (the remaining seven). (AR1:95:0004 & 0033.) The "common pool" theory is disputed both here (OB at pp. 16–17) and in Los Angeles (Signal Hill Br. at pp. 8–12). Both agencies exist to address overdraft — water pumping in excess of safe yield leading to subsidence and salt water intrusion. (OB at pp. 42–43, citing AR1:62:0069–0070; AR2:53:0069–0070; AR1:62:0034; AR2:53:0034; WRD Br. at pp. 9–10.) The Sustainable Groundwater Management Act distinguishes adjudicated and unadjudicated basins for purposes of groundwater management — largely excluding adjudicated basins governed by court-appointed water masters. (WRD Br. at p. 31, citing Wat. Code, § 10720.8.) It does not do so for purposes of fee-setting power. (Wat. Code, §§ 10730, subd. (a), 10730.2.) That WRD does not distinguish farmers from others in its intensely urbanized boundaries does not undermine the force of this case for the broader rate-making principles in issue.

In short, WRD's desire that this Court write narrowly cannot justify writing more narrowly than the facts of this case require.

D. UWCD's Fees Are Incident to the Exercise of Ventura's Property Rights in Groundwater

The City's amici persuasively demonstrate the City's groundwater rights are themselves real property. (Tesoro Br. at

pp. 2–5; Great Oaks Br. at pp. 16–17.) Indeed, as *Great Oaks* freshly states:

> That it is incidental to ownership of the property also follows from the statutory definition of "appurtenant" as a synonym of "incidental." (Civ. Code, § 662 ["A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another."].)

(*Great Oaks, supra,* 2015 WL 8236204 at p. *7.) It further goes on to hold that the appropriative right to extract groundwater is, of itself, ownership of real property. (*Id.* at p. *9–*10 ["an appropriative water right is itself real property"].)

Thus, a fee that must be paid because the City exercises its groundwater rights is necessarily incident to those property rights. Indeed, amicus Great Oaks draws a helpful analogy to case law holding excise taxes on privileges related to property are property related taxes. (Great Oaks Br. at p. 13.)

It is Orwellian to claim, as Santa Ynez does, that UWCD may impose a fee on Ventura so the City may "enjoy the privilege of exercising their rights to pump groundwater." (Sta. Ynez Br. at p. 21.) Rights are not mere privileges conferred by government. Charging Ventura to use its groundwater is akin to charging a homeowner to occupy his house. (Cf. *Buenaventura, supra,* 185

Cal.Rptr.3d at p. 226 [finding homeowner analogy "inapt"].) Either of these hypothetical charges is a tax requiring voter approval unless it complies with Proposition 218's rules for property related fees and Proposition 26's rules for other fees.

The Court of Appeal's contention UWCD's fee is comparable to a park entrance fee would persuade if UWCD owned Ventura's water rights as the state owns its parks. (*Buenaventura, supra,* 185 Cal.Rptr.3d at p. 226.) The City's amici persuasively demonstrate otherwise. The City's groundwater rights are its property, not UWCD's. Indeed, our Constitution's understanding that public agencies own property appears not only in article XIII, section 11's provisions for its taxation (specifically including water rights), as Signal Hill notes (at p. 19), but also in Proposition 26's recognition that fees for the use of government property are not taxes and need not be limited to any cost of service. (Cal. Const., art. XIII C, § 1, subd. (e)(4).) The Court of Appeal and Santa Ynez overlook this separate treatment of fees for use of property, treating park fees as a species of fees for a government-conferred benefit or privilege. (*Buenaventura, supra,* 185 Cal.Rptr.3d at p. 226; Sta. Ynez Br. at p. 24.)

Great Oaks is more persuasive on this point:

> The ultimate question is not how legal scholars might view the rights in question, but whether the voters intended to extend Article 13D's reach to such a charge. As in the foregoing cases, this question must be

> answered by consulting other evidence of the voters' intent.
>
> ....
>
> [T]he voter pamphlet provides strong evidence that the voters expected, and thus intended, that the article would reach charges for water service.

(*Great Oaks, supra,* 2015 WL 8236204 at p. *10.) Tesoro also shows voters intended Proposition 218 to apply to water service fees. (Tesoro Br. at pp. 5–7.)

In sum, because groundwater rights are real property rights, a fee for the City's exercise of those rights is property related.

E. The City's Amici Go Too Far on Some Points

HJTA contends UWCD's fees are subject to Proposition 218 because the City passes them through to its rate-payers in its retail water service rates. (HJTA Br. at p. 13.) This argument is unpersuasive for several reasons. First, this would make every wholesale fee subject to Proposition 218 even though those who buy water for resale may have no property to which this service can relate, thus taking them outside the language of article XIII D, section 2. Second, as HJTA's reference to *Jacks v. City of Santa Barbara* (pending here as case number S225589, review granted June 10, 2015) demonstrates, this argument allows the economic incidence of a fee (who ultimately pays it) to control its legal character, rather

than its legal incidence (who legislation obliges to pay it). That deviates from the "purpose" principle of *Sinclair Paint* and this Court's other cases characterizing disputed revenue measures. (*Sinclair Paint, supra,* 15 Cal.4th at pp. 874 [collecting cases].) And, as detailed in the City of Santa Barbara's briefs on the merits in *Jacks,* such a rule would destabilize the law by allowing mutual and debatable questions of econometric fact (i.e., who actually bears the economic burden of a fee) control over the more stable legal incidence inquiry, which turns only on the usual tools of statutory construction. (E.g., *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 783, fn. 28, citing *Fulton Corp. v. Faulkner* (1996) 516 U.S. 325, 341 [distinguishing economic and legal incidences of revenue measure].)

Economic incidence can change from time to time and place to place depending on the market power of the parties to a given transaction. Although this Court is immune from taxation, it pays sales taxes imposed on the privilege of selling except when its vendors declare "sales tax holidays" and decide not to pass on the tax.

Moreover, HJTA offers no means to distinguish every other cost government incurs to provide service. (See, e.g., *Pajaro II, supra,* 220 Cal.App.4th at p. 598 [detailing costs property related fee may recover].) If UWCD's charges are subject to Proposition 218 because Ventura funds them by its retail water rates, are the City's contracts

for labor and materials subject to Proposition 218, too? HJTA's pass-through test proves too much.

Amicus Great Oaks suggests UWCD's fee is a special tax because it has a purpose to benefit society generally and because the City does not benefit from UWCD's services. (Great Oaks Br. at pp. 9, 18–19, 25, 27.) The City disagrees. It does benefit (to differing degrees based on well location and basin hydrogeology) from the water UWCD delivers. Cost-limited fees for such services are plainly excluded from our Constitution's definition of "tax". (Cal. Const., art. XIII C, § 1, subd. (e)(2) [fees for government services limited to cost and apportioned consistently with payor's benefits from or burdens on service not taxes under Prop. 26]; art. XIII D, § 6, subd. (c) [water service fees are property-related fees exempt from election requirement of Prop. 218]; Gov. Code, § 50076 [user fees limited to cost are not taxes under Prop. 13].) Adopting Great Oaks' claim would prevent UWCD from funding its services without the two-thirds voter approval Proposition 13's article XIII A, section 4 requires for special taxes — assuming it has statutory power to tax, as not all special districts do. Yet Proposition 218's framers specifically exempted water service charges from that high hurdle. (Cal. Const., art. XIII D, § 6, subd. (c).)

The City's own water utility service is funded by fees subject to the demands of Proposition 218 and exempt from those of Propositions 13 and 26. (*Bighorn, supra*, 39 Cal.4th at p. 217.) Thus,

the Constitution protects City customers from abuse of its rate-making power. It is not necessary to impair governments' ability to fund water services to address UWCD's unlawful rate discrimination between agriculture and others.

Signal Hill urges application of the liberal construction rule of Proposition 218's uncodified section 5. (Signal Hill Br. at pp. 28–29.) Of course, if this Court concludes the language of Proposition 218 is genuinely ambiguous in light of case law construing it to date, resort to this rule of construction may provide some assistance. In general, however, such self-serving language in initiative proposals can contort our law to partisan advantage in ways voters are unlikely to have considered. Thus, this Court's previous reluctance to resort to that rule strikes the City as prudent. (*Apartment Association, supra*, 24 Cal.4th at pp. 844–845.)

III. UWCD'S FEES VIOLATE PROPOSITION 218 BECAUSE THEY EXCEED THE PROPORTIONAL COST OF SERVING THE CITY

Cases arising under Proposition 13 have allowed rate-makers to establish rates for rationally drawn classes of customers who take comparable services at comparable cost. (E.g., *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 438 (*Farm Bureau*).) Despite the more specific language of Proposition 218's article XIII D, section 6, subdivision (b)(3) ("the proportional cost of the service attributable to the parcel"), cases

allow the practice for property related fees, too. (*Pajaro II, supra,* 220 Cal.App.4th at p. 601; *Morgan, supra,* 223 Cal.App.4th at pp. 908–909 ["There is nothing in section 6 that prohibits an agency from charging different rates to its customers as long as the fees paid by customers are proportional and the total amount the agency collects does not surpass the cost of providing the service"].)

The reason is one of practicality — it is not administratively feasible to make minute distinctions between thousands of similarly situated utility customers, and the cost to do so would overcome any benefit. The rule, thus, cannot apply without practical justification for it. State Water Project contractors with a handful of customers therefore may not have the benefit of this rule, and the San Diego County Water Authority persuasively rebuts the incomplete analysis of the Metropolitan Water District of Southern California. (San Diego County Water Authority Brief ("SDCWA Br.") at pp. 3–6; Metropolitan Water District of Southern California Brief ("Metropolitan Br.") at pp. 11–13.) The authorities on which Metropolitan relies, *Farm Bureau* and *Brydon,* construe Proposition 13. (See *Farm Bureau, supra,* 51 Cal.4th at p. 437; *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 187.) They cannot account for the final, unnumbered paragraph of Proposition 26, adopted in 2010, or the demand of article XIII D, section 6, subdivision (b)(3) adopted by 1996's Proposition 218.

Amicus Jack Cohen wishes the Constitution might become more demanding as technology makes fine distinctions among customers more practicable and less costly. (Cohen Br. at pp. 29, 36.) However, no language in Proposition 218 invites such an evolving legal standard. Rate-making is legislative. (*20th Century, supra,* 8 Cal.4th at p. 277; *Great Oaks, supra,* 2015 WL 8236204 at p. *24.) And judicial review of rate-making is generally confined to the rate-maker's administrative record. (*Great Oaks, supra,* 2015 WL 8236204 at p. *27; see also *Western States, supra,* 9 Cal.4th at p. 576 [mandamus review of legislative action confined to legislative record]; *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1144 ["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"].)

Thus, whether an agency may make rates on the basis of well-drawn customer classes is, initially, a legislative choice then subject to judicial review. That judicial review is independent under Propositions 218 and 26. (Cal. Const., art. XIII D, § 6, subd. (b)(5); art. XIII C, § 1, subd. (e) [final, unnumbered para.]; *Silicon Valley, supra,* 44 Cal.4th at p. 448; *Crawley, supra,* 2015 WL 9437953 at p. *3 [de novo appellate review and independent trial court review under Prop. 218].) Thus, Metropolitan's argument that class-by-class rate-making is always permissible (at p. 15), even for an entity like Metropolitan with a few dozen customers, cannot be true as a

general matter. Although class-by-class rate-making is reasonable when administrative necessities require it and the rate-making record supports it, it is not a privilege to be applied when the rationale for it does not pertain.[2]

The City has no objection here to classes that distinguish agricultural water customers from others. It does object, however, to UWCD's logically inconsistent treatment of costs arising from its Freeman Diversion Dam — which it isolates to its Zone B — from costs to operate other recharge facilities — which it charges to a District-wide Zone A. It alleges a common pool for most of its costs, but disparate impacts on some basins from the Freeman Diversion Dam. This unexplained inconsistency makes UWCD's rates difficult to justify on any record and indefensible on this one.

The City (OB at pp. 42–52, 55–58; RB at pp. 16–20, 22–24) and its amici (e.g., Great Oaks Br. at p. 29) demonstrate that UWCD fails to cost-justify its fees to the City on its records here. That is the extent of the necessary judicial inquiry, for UWCD bears the burden to prove that point on its records under either Proposition 218 or

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[2] Application of class-by-class rate-making to a water supplier with just four customers with distinct costs of service is pending in *Newhall County Water District v. Castaic Lake Water Agency* (B257964, app. pending). The Second District heard argument December 17, 2015 and decision is therefore due by March 16, 2016.

Proposition 26. (Cal. Const., art. XIII C, § 1, subd. (e)(1) & (2) & final, unnumbered para.; art. XIII D, § 6, subd. (b)(5).)

IV. IF PROPOSITION 26 PROVIDES THE RULE OF DECISION, UWCD'S FEES ALSO FAIL

A. UWCD's Service, If Not Property Related, Is Not Provided Directly to the City without Free Riders as Proposition 26 Requires

Every service to a fee-payor has — in our interconnected, global world — some impact on others. The existence of potable water service allows water customers to engage in health and sanitation practices that promote public health for themselves and others. However, this does not mean domestic water service is a general social benefit rather than a property related service under Proposition 218. Nor does it mean this service is provided to one other than the payor.

The Legislature has observed as much, in language worthy of this Court's consideration under the holding of *Greene, supra,* 49 Cal.4th at page 291 (Omnibus Act is good authority to construe Prop. 218):

> For purposes of Article XIII C of the California Constitution and this article:
>
> ....

> (b) "Specific government service" means a service that is provided by a local government directly to the payor and is not provided to those not charged. A specific government service is not excluded from classification as a "specific government service" merely because an indirect benefit to a nonpayor occurs incidentally and without cost to the payor as a consequence of providing the specific government service to the payor. A "specific government service" may include, but is not limited to, maintenance, landscaping, marketing, events, and promotions.

(Gov. Code, § 53758, subd. (b).)

To defeat the demands of Proposition 218, UWCD and its amici argue its services are provided not to the City or even to groundwater users, but to society at large. (See Answer Brief on the Merits ("AB") at pp. 35–36; Sta. Ynez Br. at pp. 14–16; WRD Br. at p. 10.) Perhaps unwittingly, these descriptions echo the legislative guidance of Government Code section 53758, subdivision (b). They emphasize "indirect benefit to a nonpayor" that "occurs incidentally and without cost to the payor as a consequence of providing" UWCD's groundwater augmentation service to Ventura and others who benefit from that water supply.

For instance, by imposing its charges not "for the District's delivery of water to customers, but on the extraction of groundwater

by predominately commercial users, like the City" (AB at p. 33), UWCD acknowledges its service is provided "directly to the payor" (Gov. Code, § 53758, subd. (b)). Although UWCD argues it does not impose the fee on "every parcel or owner of a parcel of property in the District," the revenue the District receives from the fee "fund the District's mandates, including conservation of the groundwater for future use." (AB at pp. 34–35.) Santa Ynez reinforces this notion by arguing UWCD's "duty is not to the homeowner or parcel, but to the basin." (Sta. Ynez Br. at p. 14.) "[I]f UWCD dissolved, ... [p]umps would continue to pull groundwater up from the basin ... until the basin runs dry." (*Id.* at p. 16.) WRD emphasizes "the District's efforts to conserve water resources may fairly be characterized as a public service" that benefits "[p]roperty owners and non-owners alike." (WRD Br. at p. 10.) UWCD's amici thus also acknowledge that the District provides "indirect benefit to a nonpayor ... incidentally and without cost to the payor." (Gov. Code, § 53758, subd. (b).) The diffuse benefit UWCD claims to provide is accordingly incident to providing the "specific government service" to the City both logically and under Government Code section 53758, subdivision (b).

Indeed, as Jack Cohen points out, UWCD has no statutory authority to impose the fee in issue here unless it finds the fee funds services of benefit to those who use groundwater. (Cohen Br. at p. 20, citing Wat. Code, § 75522.) Great Oaks makes the similar point

that a fee imposed to fund service to society at large must be approved by voters as a tax. (Great Oaks Br. at pp. 18–19, 27–28.)

Nor is there additional cost to Ventura for these benefits of UWCD's groundwater service, thus bringing this case squarely within Government Code section 53758, subdivision (b)'s interpretation that incidental benefits of services without additional cost to service recipients do not defeat the character of the service as one directly to its recipient.

Moreover, if UWCD's services were as it wishfully describes them — to society at large rather than to groundwater users — they would be taxes under either Proposition 218 or Proposition 26, as the City's amici argue. (Great Oaks Br. at pp. 18–19, 25–29; HJTA Br. at pp. 16, 27; SDCWA Br. at pp. 4–5.) This is because the fee on Ventura's exercise of its property rights in groundwater would fund not services to Ventura, but to others —violating article XIII D, section 6, subdivision (b)(2), which requires property related fees to fund only services to fee payors. Indeed, Ventura argues this is the case here as to some of UWCD's expenditures. (See OB at pp. 48–49, 52–53.) Similarly, such arrangements would violate Proposition 26's requirements that service fees fund services provided "directly" to the payor and that such services not be provided to those who do not pay them — its "no free riders" rule. (Cal. Const., art. XIII C, § 1, subd. (e)(2).)

Indeed, UWCD's amici seemed trapped by their illogic. They argue UWCD's services provide direct benefit to the City, so as to survive review under Proposition 26, without being a service related to the City's use of its property implicating Proposition 218, even though it draws water from wells on land it owns and its water rights are themselves property. (Compare, e.g., Sta. Ynez Br. at pp. 14–16 [groundwater service is of no direct benefit to Ventura] with *id.* at p. 22 ["Groundwater Charges Fund Specific Services that Benefit Only Fee Payors"].)

Thus, UWCD and its amici are unpersuasive in their efforts to describe a groundwater service as an environmental enhancement program. No doubt, the environment is enhanced, but that is an incidental consequence of supplying groundwater, just as public health benefits are incidental to a domestic water supply. If Proposition 26 provides the rule of decision here, UWCD's fees fail as not provided directly to the City without free-riders.

B. UWCD's Fees Are Not Limited to Service Cost

Proposition 26 has two cost-of-service limitations: one the Court of Appeal cites and applies; another it overlooked. Article XIII C, section 1, subdivision (e)(2) exempts service fees from the "taxes" which require voter approval only if limited "to the reasonable costs to the government of providing the service." This is a limit on fee revenues in toto — across all fee payors — and is comparable to Proposition 218's similar restriction. (Cal. Const.,

art. XIII D, § 6, subd. (b)(1).) However, the final, unnumbered paragraph of Proposition 26 applies, too, to limit allocation of costs among fee payors. While, as Metropolitan observes (at pp. 6–8), it is not identical to the "proportional cost of service" rule of Proposition 218's article XIII D, section 6, subdivision (b)(3); it is comparable. It states:

> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, 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, subd. (e) [final, unnumbered para.], emphasis added.) Thus, it is not enough to find (as the Court of Appeal erroneously did) that UWCD spends the proceeds of the challenged fee only on groundwater augmentation. (*Ventura, supra,* 185 Cal.Rptr.3d at p. 227 ["The District need only ensure that its charges in the aggregate do not exceed its regulatory costs."].) To uphold this fee, a court must also find that Ventura's bill bears a "fair or reasonable relationship to [its] burdens on, or benefits received from" UWCD's service. Metropolitan and Santa Ynez err, then, to argue Proposition 26 limits fees to cost only in toto and does

not restrict the allocation of cost among fee-payors. (Compare Metropolitan Br. at pp. 11–13 and Sta. Ynez Br. at p. 25 with SDCWA Br. at pp. 3–4; *Ventura, supra,* 185 Cal.Rptr.3d at p. 227.)

Moreover, as its administrative records here demonstrate, UWCD cannot even meet this aspect of Proposition 26 because it spends proceeds of the challenged fees on purposes unrelated to groundwater delivery, as the City's principal briefs detail. UWCD did not lawfully apportion its charges because, first, it distributes costs equally to its eight basins for benefits that affect those basins disparately. (See OB at p. 50–52, 59). Thus, the District improperly imposes the same Zone A charge on the City's wells in the Santa Paula Basin to fund recharge operations, though its recharge operations do not benefit Santa Paula Basin wells equally as other basins. (E.g., AR1:81:17 ["Santa Paula Basin doesn't respond to recharge at United Water's Saticoy spreading grounds."]; AR1:22:144 [2011–2012 budget chart showing negligible recharge of Santa Paula Basin from Lake Piru releases].) Second, the District cannot show the charges do not fund services to non-payors because it commingles Zone A charges with discretionary revenue. (See OB at pp. 48–50, citing, inter alia, AR2:106:49 [water treatment chemicals], AR2:106:58 [State Water Import costs to serve delivered water], & AR2:106:51 ["Recreation Activities subfund," which includes potable water delivery to Lake Piru concessionaire].) Finally, as Judge Anderle

properly concluded, UWCD's records entirely lack evidence to justify the 3:1 ratio. (10JA88:2123, 2157.)

UWCD's failure to properly apportion its costs among fee-payors is fatal under Proposition 26. (Cal. Const., art. XIII C, § 1, subd. (e)(2) [service fees limited to "the reasonable costs to the local government of providing the service"].) This is also true under case law construing Proposition 13 on which Proposition 26 builds, as detailed by the Howard Jarvis Taxpayers Association. (HJTA Br. at p. 22, citing *Kern County Farm Bureau v. County of* Kern (1993) 19 Cal.App.4th 1416, 1421 [property tax roll fee funding County landfills not a tax because limited to service cost and fairly apportioned], *Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326, 1346 [same as to building permit and inspection fees], and *Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 694 [emergency services fee a tax because paid by those who do not receive service].)

To avoid Proposition 218, Santa Ynez argues Ventura must pay UWCD's fees whether or not UWCD recharges groundwater. (Santa Ynez Br. at p. 15.) This is only true in the short-run — UWCD cannot use the fee for any other purpose both by statute (Wat. Code, §§ 75521–75523) and because Propositions 218 and 26 each limit use of fee proceeds to the purpose for which it is imposed. (Cal. Const., art. XIII D, § 6, subd. (b)(2); art. XIII C, § 1, subd. (e)(2) & final, unnumbered para.)

Rate-makers need not show the rates a customer pays fund the very increments of service he or she receives — my rates need not fund the molecules of water I consume — but only that rates fund service from which the customer benefits. Thus, *Pajaro II* concluded the agency there could use rate proceeds to repay debt as well as to plan for future services. (*Pajaro II, supra,* 220 Cal.App.4th at pp. 597–598; see also *Moore, supra,* 237 Cal.App.4th at pp. 369–370.)

Indeed, as rate-making relies on estimates of such unpredictable things as weather (we use less water when it rains), rate-making will always produce surpluses and deficits. This is permissible provided surpluses fund future service and deficits are repaid from future rates. (See *County of Orange v. Barratt American, Inc.* (2007) 150 Cal.App.4th 420, 432–433 [construing Mitigation Fee Act].)

Similarly, Santa Ynez notes UWCD's services do not change when a customer stops pumping. (Sta. Ynez Br. at p. 15.) This is true of retail rates subject to Proposition 218 under *Bighorn,* too. Nothing happens at the water utility when you turn off your tap or go on vacation. Thus, this distinction tells us little about whether Proposition 218 or 26 controls here. Volumetric rates exempt customers from fees when they consume no service but the Constitution does not require such rates, but only that:

- fees not exceed cost of service in toto (Cal. Const., art. XIII D, § 6, subd. (b)(1); art. XIII C, § 1, subd. (e)(2) & final, unnumbered para.),
- fees fund only the service for which they are imposed (Cal. Const., art. XIII D, § 6, subd. (b)(2); art. XIII C, § 1, subd. (e)(2)), and
- property related service fees be limited to proportional cost of service (Cal. Const., art. XIII D, § 6, subd. (b)(3)) and other fees be apportioned in fair or reasonable relation to the payor's benefits from or burdens on the service. (Cal Const., art. XIII C, § 1, subd. (e) [final, unnumbered para.].)

Santa Ynez next argues retail water rates are more easily attributed to customers than are groundwater rates. (Sta. Ynez Br. at p. 16.) Perhaps so. Yet each can be constructed as a volumetric charge based on the amount of water used. Indeed, Water Code sections 75592 through 75594 require UWCD to impose volumetric rates per acre-foot of water use; and Water Code sections 75591 and 75593 allow UWCD to levy different charges within different zones of the District. Yet Santa Ynez claims that determining the degree of hydrological connection between groundwater basins is an "unanswerable question." (Sta. Ynez Br. at p. 17.) It worries that overlapping Sustainable Groundwater Management Agency service areas will confound the task. (*Ibid.*) Yet the Legislature requires UWCD to attempt it.

Case law old and new demonstrates that rate-making — whether for retail or wholesale service, groundwater or piped water — is a complex, legislative task.

> "The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties." (*Duquesne Light Co. v. Barasch, supra,* [(1989)] 488 U.S. [299] at p. 314.) And, of course, courts are not equipped to carry out such a task. (See, e.g., *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1166 [stating that "we are ill equipped to make" "microeconomic decisions"].)

(*20th Century, supra,* 8 Cal.4th at p. 293.)

Thus, there is no one, right way to make rates. Indeed, the City's concern with *Capistrano* is that it underestimates the challenge of the rate-making task and defers too little to the policy choices which remain open to rate-makers under our Constitution. Instead, provided rates are reasonable, supported by the rate-making record, and comply with statutory and Constitutional standards, they ought to survive judicial review. That apportionment can be difficult requires judicial review to be sensitive to that difficulty. It is not an excuse to ignore our Constitution — or UWCD's principal act. Nor need this Court undertake the rate-making task, as Santa Ynez, at least, seems to ask. (Sta. Ynez Br. at p. 28.)

Thus, these rate-making realities do little to distinguish Proposition 218 here and Santa Ynez fails to persuade.

C. UWCD Failed to Apportion Its Fees as Proposition 26 Requires

Few of UWCD's amici seek to defend under Proposition 26 its rates and the 3:1 ratio demanded by Water Code section 75594. As Kern County observes, those who do repeat the Court of Appeal's error — they overlook the requirement of the final, unnumbered paragraph of article XIII C, section 1, subdivision (e) that the government prove — whether its fees are justified as a government-conferred benefit, a government service, or regulation — "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." (See, Kern County Br. at pp. 16–17.)

The Court of Appeal opinion never applies this test, though it does cite it, quote the language of *Sinclair Paint* from which it is drawn, and affirm the trial court's conclusion on the point. (*Ventura, supra,* 185 Cal.Rptr.3d at pp. 214–217.) Instead, it applies *California Farm Bureau Federation v. State Water Resources Control Board,* a Proposition 13 case involving a charge imposed under the State's police power, which it quotes as follows:

> A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors. [Citation.] The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors. [Citation.] [¶] Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. An excessive fee that is used to generate general revenue becomes a tax.

(*Ventura, supra,* 185 Cal.Rptr.3d at 226, quoting *Farm Bureau, supra,* 51 Cal.4th at p. 438.)

Applying Proposition 13's more lenient standard (and ignoring that this Court remanded the proportionality issue in *Farm Bureau* for further trial court fact-finding (*Farm Bureau, supra,* 51 Cal.4th at p. 442), it concluded "the District's pump fees do not exceed the reasonable cost of regulating the District's groundwater supply. Accordingly, these regulatory fees are not taxes and are not subject to approval by the voters." (*Ventura, supra,* 185 Cal.Rptr.3d at p. 227.) Yet Proposition 26 was plainly intended to require more than Proposition 13. The City demonstrated with copious citations to

UWCD's two records here that the charge it pays UWCD does not bear a fair or reasonable relationship to the City's benefits from or burdens on UWCD's services. (OB at pp. 42–53, 58–61; RB at pp. 16–20.) Great Oaks develops this point, too. (Great Oaks Br. at pp. 29–30.)

Yet, like the Court of Appeal, UWCD's amici read Proposition 26's apportionment requirement out of our Constitution. (See, e.g., WRD Br. at pp. 24–26.) Indeed, WRD entirely omits the language of the final, unnumbered paragraph of Proposition 26 in discussing its cost limitations. (*Id.* at p. 4.)

That language is, of course, part of our Constitution and applies here if Proposition 26 does. The City's briefs demonstrate that UWCD failed to comply with its duty to fairly or reasonably apportion its fees to the City's benefits from or burdens on UWCD's water augmentation service. For that reason, too, the fees challenged here cannot survive scrutiny under Proposition 26.

V. THE FARM BUREAU'S ARGUMENTS DO NOT SAVE WATER CODE SECTION 75594

The Farm Bureau of Ventura County ("Farm Bureau") argues that Water Code section 75594 is facially constitutional because UWCD can harmonize its statutory duty to set fees at a ratio between 3:1 and 5:1 for non-agricultural and agricultural water users with the cost limitations of our Constitution. It claims this is possible by using non-rate revenues to "buy down" the agricultural price

from the cost of service to a subsidized rate desired for reasons of legislative policy. (Farm Bureau of Ventura County Brief ("Farm Bureau Br.") at pp. 9–11 & fns. 6–8.)

It is unquestionably true that a rate-maker with discretionary revenue may charge some customers less than the cost of service provided that the subsidy is not at the expense of other customers. (*Morgan, supra*, 223 Cal.App.4th at p. 923 [rates may be less than cost]; cf. *Green Valley Landowners Association v. City of Vallejo* (2015) 241 Cal.App.4th 425, 439–440 [cross-subsidies violate art. XIII D, § 6, subd. (b)(3)]; see also Cohen Br. at p. 29.) Propositions 218 and 26 provide only that fees may not exceed cost; they do not mandate that fees equal cost. (Cal. Const., art. XIII D, § 6, subd. (b)(1), (3); art. XIII C, § 1, subd. (e)(1)–(3), & final, unnumbered para.)

However, this broad statement of legislative discretion is of little use to UWCD in construing its statutory authority. Its statute states:

> Except as provided in Section 75595, any ground water charge in any year **shall be established at a fixed and uniform rate for each acre-foot for water other than agricultural water which is not less than three times nor more than five times the fixed and uniform rate established for agricultural water.** ...

(Wat. Code, § 75594.) "Shall," of course, is mandatory. (Wat. Code, § 15.) Thus, under Water Code section 75594, the charge challenged

here "shall be established at a fixed and uniform rate" that bears the specified ratio. The discretion to subsidize rates to preferred customers a city or a county would enjoy under the utility power of article XI, section 9 or the police power of article XI, section 7 confers no discretion on UWCD. A creature of statute, it has the power the Legislature conferred and no more. (See *Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1178 ["[A]n administrative agency created by statute is vested only with the powers expressly conferred by the Legislature and cannot exceed the powers granted to it."], citing *El Camino Community College Dist. v. Superior Court* (1985) 173 Cal.App.3d 606, 612.) The Farm Bureau's general statement of rate-making discretion, which neither quotes nor engages the language of Water Code section 75594 (at pp. 9–12 & fns. 6–9), cannot save it from Propositions 218 and 26. The Howard Jarvis Taxpayers Association makes this point in other terms. (HJTA Br. at p. 29.)

The Farm Bureau makes policy arguments, too. (Farm Bureau Br. at pp. 13–16.) These are better directed to legislators than to judges, as Signal Hill demonstrates. (Signal Hill Br. at p. 41.)

As Signal Hill also points out, there need be no concern here about allowing implied preemption of Water Code section 75594 by Propositions 218 and 26. (Signal Hill Br. at pp. 41–42.) *Ventura Group Ventures, Inc. v. Ventura Port District* (2001) 24 Cal.4th 1089 demonstrates this was the intended effect of Proposition 218. (*Id.* at

pp. 1098–1099 [Prop. 218 impliedly preempts statutory taxing powers of special district].) Moreover, article XIII D commences with sweeping language to describe its intended impact:

> Sec. 1. Application. **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.

(Cal. Const., art. XIII D, § 1, subd. (a).) Thus, law vitiated by Proposition 218 is not impliedly preempted, but expressly so.

The claim that agricultural groundwater use returns some water to the groundwater table while other uses do not is a factual argument to be resolved by the rate-maker on its rate-making record in the first instance. (See Farm Bureau Br. at p. 16.)

> It is not the judiciary's function, however, to reweigh the "legislative facts" underlying a legislative enactment. (See, e.g., *Minnesota v. Clover Leaf Creamery* (1981) 449 U.S. 456, 464, 101 S.Ct. 715, 724, 66 L.Ed.2d 659 ["states are not required to convince the courts of the correctness of their legislative judgments ..."].)

(*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 372.) While Propositions 218 and 26 do require independent judicial review of rate-making, they do not require courts to make

rates in the first instance, or to establish legislative facts rather than to review such facts independently on a legislative record.

The parties here have briefed the records in detail. (E.g., OB at pp. 10–17; AB at pp. 5–9; RB at pp. 16–20.) UWCD cannot justify a 3:1 ratio of non-agricultural to agricultural rates as an abstract principle divorced from the facts of this case. Watering tomatoes in a resident's garden returns water to the groundwater table just as does watering those in a farmer's field. There is no conceptual difference between the two that can save Water Code section 75594. If there are differences in degree and consequence for the groundwater table, that is a question of fact for the rate-maker to determine and to document in its rate-making record and for a court to review on that record. It is not a legal issue to be resolved in the first instance by courts.

CONCLUSION

Thus, it is too late and too disrespectful of the language of Proposition 218 to take now the path rejected in *Bighorn* in 2006 by applying *Apartment Association* to water service charges. Applying Proposition 218 to UWCD's two records here, as Judge Anderle did, must lead to affirmance of his judgment for the City. UWCD simply cannot prove on its records that its fees are limited to the proportional cost to serve the City or that they are spent for groundwater service alone. Such review therefore also justifies the relief the City seeks by cross-appeal with respect to UWCD's failures

to justify all uses of the proceeds of the fees and to reflect the differential benefits its eight groundwater basins receive from its replenishment efforts. That analysis demonstrates that Water Code section 75594 is facially unconstitutional because it demands a 3:1 ratio of non-agricultural to agricultural fees without respect to the cost of service shown by UWCD's rate-making records.

If this Court takes the alternative path and applies Proposition 26, UWCD's fees and Water Code section 75594 fail nevertheless. UWCD's amici's efforts to show its fees comply with Proposition 26 instead prove it does not. Review of the record evidence cited in the City's principal briefs — and unrefuted by UWCD and its amici —show the fee is not limited to UWCD's service cost. Moreover, if UWCD's amici's arguments are accepted, the charge funds services to those who do not pay it in violation of the no-free-rider principal of article XIII C, section 1, subdivisions (e)(1) and (e)(2). Finally, UWCD's fees can survive Proposition 26 review only if one ignores, as did the Court of Appeal, the requirement of the final, unnumbered paragraph of article XIII C, section 1, subdivision (e) that UWCD apportion its fees to fairly or reasonably reflect the City's benefits from or burdens on UWCD's service.

For all these reasons, the City respectfully asks this Court to reverse the Court of Appeal, affirm Judge Anderle's judgment for

the City, and grant the declaratory relief sought by the City's cross-appeal.

DATED: January 15, 2016

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CERTIFICATION OF COMPLIANCE

Pursuant to California Rules of Court, rules 8.204(c)(1) and 8.520(c)(1), I hereby certify that the foregoing Answer to Briefs Filed by Amicus Curiae contains 16,409 words including footnotes, but excluding the tables and this Certificate. It exceeds the 14,000 words permitted by those rules and is therefore accompanied by an Application for Leave to File an Overlength Answer Brief. In preparing this certificate, I relied on the word count generated by Microsoft Word 2013.

DATED: January 15, 2016

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PROOF OF SERVICE

City of San Buenaventura v. United Water Conservation District, et al.
Supreme Court Case No. S226036
Court of Appeal, Second Appellate District, Div. 6, Case No. B251810
Santa Barbara Superior Court Case Nos. VENCI 00401714 & 1414739

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945. On January 15, 2016, I served the document described as **ANSWER TO BRIEFS FILED BY AMICUS CURIAE** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

__X__ **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Grass Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on January 15, 2016, at Grass Valley, California.

Ashley A. Lloyd

SERVICE LIST

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