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2ND Civil No.
S226036

IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN BUENAVENTURA,
Respondent and Cross-Appellant,

vs.

UNITED WATER CONSERVATION DISTRICT AND BOARD OF DIRECTORS OF UNITED WATER CONSERVATION DISTRICT,
Appellants and Cross-Respondents,

On Appeal of Published Decision of the
Second Appellate District, Division 6, Case No. B251810

Reversing a Judgment of the Superior Court of Santa Barbara County
Case Nos. VENCI-00401714 and 1414739
Honorable Thomas P. Anderle

APPELLANTS AND CROSS-RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

Appellants and Cross-Respondents United Water Conservation District and Board of Directors of United Water Conservation District (collectively, the District) respectfully submit this Answer to the Petition for Review filed by Respondent and Cross-Appellant City of San Buenaventura (the City).

I. QUESTIONS FOR REVIEW

The District does not raise additional issues for review. The District notes, however, that the City's questions for review are not framed in terms of the facts of this case. This failure to comply with California Rules of Court, rule 8.504(b)(1) impedes the Court's understanding of how, whether and if the City's questions apply to this matter, or whether review is needed to secure uniformity of decision or to settle an important question of law.

The appropriate lens for the City's questions is a traditional mandamus proceeding, tried without extra-record evidence, but with fiercely disputed issues of material fact. The City challenged pumping fees levied by the District, which is neither a public utility nor a water retailer. The District exists instead to perform the functions of groundwater protection, conservation and enhancement. (Water Code sections 74000-76501.) Its mission is to accomplish these regulatory tasks for eight Ventura County basins in the most cost effective and environmentally balanced manner. To recover its costs, the District imposes a statutorily controlled and reasonable charge on the City's voluntary choice to pump groundwater from metered wells located in the basins protected by the District.

The City's fifth proposed question asks whether the regulatory fee test of *Sinclair Paint Co. v. State Bd. of Equalization* survives Proposition 26. This issue was not raised in the Court of Appeal. It may be refused for consideration under California Rules of Court, rule 8.500(c)(1).

II. INTRODUCTION

California's drought, now in its fourth year, has appropriately pushed the topics of water supply, conservation and tiered rates to the front pages of our newspapers. The issues, science and solutions are complex. Each branch of government has a central role to play, most especially this Court in cases of merit and consequence. This is not such a case.

Simply stated, the City wants to pay less for water that it uses, delivers and sells to 30,000 residences. The City has chosen to obtain this water by pumping from the basins that the District exists to protect. The District is a water conservation agency. It manages, protects, sustains, and enhances the eight local basins, which suffer from subsidence and salt water intrusion arising out of over pumping by well operators, like the City. The District's mitigation efforts center on its artificial recharge of the local basins by spreading diverted river water over the ground. As an additional conservation strategy, the District augments the available groundwater supply by delivering water through pipelines to coastal users -- where seawater intrusion is most acute – to forestall any attempts to meet their water needs by pumping.

The Court of Appeal rejected the City's legal efforts to obtain the District's compromised water resources at a cheaper price. Relying upon precedent from this Court, the Opinion concluded that the District's pumping charges are valid regulatory fees. The charges are not imposed solely by virtue of property ownership, which would bring them within Proposition 218. Rather, they are imposed on the voluntary act of pumping by well operators.

The Court of Appeal also analyzed the District's fees under Proposition 26, concluding that the pumping charges are not a tax. The District provides payor-specific benefits to the City at fees that do not exceed the District's resource management costs. The charges are in fair proportion to the City's burden on and benefit from the District's groundwater resource. The Opinion harmonized these findings with the 3:1 fee ratio between non-agricultural and

agricultural uses mandated by the Water Code, determining that this additional rate setting obligation was, and remains, within the Legislature's policy discretion to dictate.

The City now turns to this Court. The Petition offers a jumble of grievances and a crazy quilt of trial court matters that do not warrant review. The City's lead theory is that the Opinion conflicts with another published decision. The sense of conflict, however, has been created by the City, and not by incompatible case law. The Petition buries the distinctive facts that compelled different outcomes in *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364 (*Pajaro*) and this matter.[1] As a consequence, the Petition similarly obscures the decisional law that correctly distinguishes the two cases. Notably, the wells in *Pajaro* were the only source of water for the large majority of residential property owners who paid pumping charges. The fees under scrutiny in *Pajaro* did not serve a regulatory purpose. Armed with these troubling facts, the *Pajaro* court felt bound by residential water service case law. *Pajaro* treated the agency's extraction charges just like those for delivering water to homeowners through a pipeline, and therefore subject to Proposition 218.

This case and *Pajaro* properly co-exist side-by-side. To magnify the impression of conflict, the City improperly directs this Court to a recent ruling that attempted to apply *Pajaro*. That decision, *Great Oaks Water Co. v. Santa Clara Valley Water District* (2015), 235 Cal.App.4th 523, has been vacated and cannot be cited. Rehearing, not depublication, was granted in that matter. California Rules of Court, rule 8.268(d). Review by this Court is not needed to secure uniformity of decision or to settle an unresolved important question of law. Review should be denied.

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[1] The Petition refers to this case as *AmRhein*. As the Opinion refers to the case as *Pajaro*, this Answer does as well.

III. STATEMENT OF FACTS

The City continues to retry the facts of this case in the Petition. The facts are accurately set forth in the Opinion. Here are their highlights:

The District is a water conservation agency. Its purpose is to "manage, protect, conserve and enhance the water resources of the Santa Clara River, its tributaries and associated aquifers, in the most cost effective and environmentally balanced manner." (Opn. at pp. 2, 3.)

The District sustains eight basins in central Ventura County (Opn. at p. 3.) The basins are hydrogeologically interconnected. (Opn. at p. 26.) This means that the action of pumping water from one of the basins affects all of the other basins in complex ways and varying degrees. (Opn. at p. 26.) The District adds to the natural recharge of the basins through artificial recharge, which is critical to minimize "overdraft." This is the amount by which pumping by the City and others exceeds recharge. (Opn. at p. 3.) Despite the District's mitigation efforts, pumping by well operators exceeds the natural and artificial recharge of the basins. (Opn. at p. 4.)

To fund its mitigation efforts, the District charges a fee on the act of pumping. (Opn. at p. 4.) The Water Code authorizes these pump charges, not by customer class, but by geographic zone. Within any zone, the charges must be "fixed and uniform" for two separate water uses: water used for agricultural purposes and water used for all other purposes. (Opn. at p. 4.) Water Code section 75594 prohibits the District from equalizing the rates for these two uses. The rate for non-agricultural use must be three to five times higher than for agricultural use. The District has always set the rate differential between agricultural and non-agricultural use at the minimum 3:1 ratio. (Opn. at p. 4.)

There are at most 840 parcels with wells in the District. The record does not disclose the exact number of residential pumpers but makes it clear that this number is insubstantial compared to the number of residences within the District that receive delivered water from utilities located in the District.

The City delivers water that it pumps from its wells to approximately 30,000 City residences and itself uses pumped water for commercial purposes. (Opn. at p. 19.)

The District's Zone A includes the entire district; its revenues fund District-wide conservation efforts. (Opn. at p. 4.) The District's Zone B includes the area that receives the principal benefit from the Freeman Diversion project. (Opn. at pp. 4, 5.) The District correctly accounts and pays for its groundwater conservation efforts and for its authorized recreation activities. The District's costs associated with State and surface water are proper conservation costs because these actions ease the overall burden on the District's water resources. (Opn. at p. 27.)

A 1987 settlement agreement with the City over the Zone A and B charges led to creation of a Zone C and to lower pump charges for the City. The agreement expired at the end of the 2010-2011 water year, leading to higher pump charges for the City and to this litigation. (Opn. at pp. 4, 5.)

IV. PROCEDURAL HISTORY

The Petition omits the following key trial court rulings: (a) the trial court denied administrative mandamus relief (Opn. at p. 11); (b) the District's pumping charges were valid regulatory fees that bore a reasonable relationship to the City's burdens on and benefits from the District's regulatory activity; (c) the charges did not exceed the reasonable cost of the District's activity and were reasonable, fair, and equitable; and (d) the charges in the aggregate were reasonably proportional to the District's costs (Opn. at p. 10).

The Opinion's fundamental rulings bear repeating without the Petition's misleading characterizations that are nowhere to be found in the decision. The Court of Appeal held "that the pump charges paid by the City are neither property-related fees nor taxes, that they do not exceed the District's reasonable costs of maintaining the groundwater supply, and that the

District allocates these costs in a fair or reasonable relationship to the City's burdens on this resource." (Opn. at p. 11.) The pumping fees serve the valid regulatory purpose of conserving water resources. (Opn. at p. 19.) Pumpers like the City receive an "obvious benefit" in their ability to extract groundwater from a managed basin. (Opn. at p. 25.) By imposing fees based upon the volume of water extracted, the District charges individual pumpers in proportion to their received benefits. (Opn. at p. 26.)

The Opinion bolstered its conclusions by referencing the recently enacted Sustainable Groundwater Management Act (Stats. 2014, chs. 346, 347, 348) which requires fees for the "[s]upply, production, treatment or distribution of water" to be adopted in accordance with Proposition 218, but which excludes fees "to fund the costs of a groundwater sustainability program" from that requirement. (Opn. at p. 23.) As for the Water Code's required rate ratio, the Court of Appeal ruled that the statute does not discriminate between persons or parcels, but between types of use, and further that Proposition 218 applies to charges imposed by local agencies, not to policy decisions of the Legislature. (Opn. at p. 24.)

V. LEGAL ARGUMENT

A. The Opinion Applies the Correct Standards of Review[2]

The City urges two interrelated issues regarding the appropriate standard of review; namely, (1) whether the City's purported "constitutional facts" are reviewed de novo in a Proposition 218 or 26 case; and (2) whether the substantial evidence standard applies only to trial court determinations of

[2] The District's Answer addresses the same points raised in the City's Petition for Review, but has reordered them to discuss the proper standards of review at the outset.

factual issues that were based on "extra record" evidence not presented in the underlying administrative proceeding.

The City claims confusion in the proper standard of review because the Opinion cites both the de novo and substantial evidence standards of review. (Petition at p. 28.) The City argues that a single de novo standard of review applies to this case. The City is wrong. More importantly, neither of the City's questions warrants consideration by this Court under California Rules of Court, rule 8.500. Supreme Court review is not necessary to secure uniformity of decision or to resolve important questions of law on the applicable standards of review, which are well settled.

The Opinion correctly reviewed de novo the trial court's legal determinations in this case, including whether the District's conduct violated the state constitution. (Opn. at p. 12. *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448-450.) However, regarding the factual conflicts, which were decided in the first instance by the trial court, the Court of Appeal properly declined to engage in fact-finding or re-deciding those disputes. (Opn. at p. 12. *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, 912 (*Morgan*).) The Court of Appeal reviewed the trial court's findings under the substantial evidence standard of review, which is less deferential than the standard applied to review of administrative agency findings, but nonetheless highly deferential. (Opn. at p. 12. *Morgan, supra,* 223 Cal.App.4th at p. 916.)

There were many sharply contested questions of fact at trial in this matter. Crucial findings in favor of the District included: (1) the District's groundwater pumping charges bore a reasonable relation to the City's burdens on and benefits from the regulatory activity; (2) the pumping charges did not exceed the reasonable cost to the District of providing its services and were reasonable, fair and equitable; (3) the pumping fees served the District's valid regulatory purpose of conserving water resources; and (4) the District's eight

basins are hydrogeologically interconnected, such that the actions of one pumper in the District affects every other pumper to some degree. (Opn. at pp. 10, 19 and 26.) For the City to claim that there were no disputed facts (Petition at p. 29) is disingenuous. Indeed, the Petition belies the City's claim. The City continues to dispute the sufficiency of the evidence regarding the interconnectivity of the District's basins (Petition at pp. 5-6), the benefits received by groundwater users in the District like the City (Petition at pp. 29-30 and 33) and whether the District improperly used funds obtained from imposition of groundwater extraction charges for purposes other than groundwater conservation and management (Petition at pp. 34-35).

Despite its ongoing factual quarrel, the City nonetheless contends that the Opinion improperly relied on *Morgan*, also a Proposition 218 rate making case, by applying the substantial evidence standard of review, instead of addressing these factual determinations de novo. Like our Court of Appeal, the *Morgan* court applied its independent judgment in reviewing whether the rate increases were constitutional. (*Id.* at p. 912.) The *Morgan* ruling stressed that even when exercising independent review, an appellate court does not take new evidence or decide disputed issues of fact. (*Ibid.*) *Morgan* noted that the adequacy of the data to support the contested cost of service study "was a vehemently disputed factual issue at trial." (*Id.* at 915.) The trial court found the data was reliable. (*Id.* at 916.) As a result, on appeal, the *Morgan* court applied the well-established substantial evidence standard of review to the trial court's resolution of that factual dispute. (*Ibid.*) *Morgan* criticized the rate protesters for failing to articulate on appeal why the evidence was insufficient to support the trial court's findings, for merely citing to evidence in favor of their attack on the underlying data and for erroneously asking the appellate court to reweigh the evidence. (*Id.* at pp. 916-917.)

The City argues that *Morgan* is inapplicable here because the agency in *Morgan* "waived the protection of the *Western States* rule limiting the

evidence on mandate review of legislative action to the administrative record and allowed the trial court to consider extra-record evidence, triggering substantial evidence review." (Petition at p. 28). This argument is made from whole cloth. Aside from a footnote indicating that a copy of the 2003 Bureau of Reclamation Part 417 Decision cited by the rate protestors in the appellate brief did not appear in the record, there was no discussion whatsoever in *Morgan* that the substantial evidence standard of review was applicable -- as opposed to de novo review -- because the trial court had considered "extra record" evidence in the mandate proceeding. "It is axiomatic that cases are not authority for propositions not considered." (*McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626, quoting *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

Citing *Bixby v. Pierno* (1971) 4 Cal.3d 130 (*Bixby*), the City next proposes that there are special "constitutional facts" at issue that require de novo review. *Bixby* does not stand for that proposition. In *Bixby*, this Court concluded that the trial court had properly reviewed the agency determination under the substantial evidence standard, because the administrative decision did not affect the loss of a fundamental vested right challenged under Code of Civil Procedure section 1094.5. (*Id.* at 148.) Like *Bixby*, this case does not involve an agency's determination substantially affecting an individual's vested fundamental right. Moreover, the City's cause of action under section 1094.5 was denied by the trial court. (Opn. at p. 11, fn 6.) Thus, the statutory language contained in section 1094.5 that allows for independent review in those fundamental vested rights cases where the court is authorized by law to exercise independent judgment on the evidence cannot possibly apply. (*See, Bixby, supra*, 4 Cal.3d at 137.)

The City also improperly relies on *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916 and *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016,

1032, where the trial court's decision did not turn on disputed facts. However, distilled to its essence, the City is merely complaining that the Court of Appeal reviewed the trial court's findings of disputed fact under the substantial evidence standard. The City's claim that the Court of Appeal applied the wrong standard of review and should have applied a de novo standard not only with respect to the legal issues decided by the trial court, but also regarding the trial court's factual determinations, is contrary to the law.

B. Review is not Needed to Secure Uniformity of Decision

This case was properly decided. With careful deliberation, the Opinion evaluated Propositions 13, 218 and 26, and the relevant case authority. The Court of Appeal concluded, on the specific facts of this case, that the District's pumping charges are most aptly classified as regulatory fees, not as property-related services. The Opinion distinguished one groundwater case, *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364 (*Pajaro*), and by extension that same case in its second iteration, *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 (*Griffith*), which added nothing to *Pajaro* of relevance here. The third case that the City cites as its predicate for conflict, *Jacks v. City of Santa Barbara* (2015) 234 Cal.App.4th 925, has absolutely no bearing on this matter.

1. The Opinion is Consistent with Controlling Authority

Two Proposition 218 rulings of this Court govern the outcome in this case. In *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 (*Apartment Association*), the Court concluded that an annual housing inspection fee was not a property-related fee within the meaning of Proposition 218. The Court reached this outcome by refusing to rewrite article XIII D of the California Constitution to extend to fees imposed ***on*** an incident of property ownership. The Court confined the reach of

Proposition 218 to its plain language: charges levied "on a parcel or a person ***as*** an incident of property ownership."[3]

This one-word distinction was and remains pivotal. As explained in *Apartment Association*, the hallmark of article XIII D is that it "applies only to exactions levied solely by virtue of property ownership." (*Id.* at p. 842.) For this reason, the inspection fee levied on residential property owners did not fall within Proposition 218. The fee was "not imposed solely because a person owns property." It was imposed "on those landowners who choose to engage in the residential rental business, and only while they are operating the business." The fee "ceases along with the business operation, whether or not ownership remains in the same hands." (*Id.* at p. 838.)

The successor case to *Apartment Association* adopted its analysis. In *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409 (*Richmond*), this Court confirmed that supplying water to residences through a pipeline is a "property-related service" within the meaning of article XIII D, but rejected the broader argument "that *all* water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges." (*Id.* at pp. 426-427.) The Court proceeded to distinguish an ongoing domestic water delivery fee from "a fee for making a new connection to the system." (*Id.* at p. 427.) The former "requires nothing other than normal ownership and use of property" whereas the latter "results from the owner's voluntary decision to apply for the connection." (*Ibid.*) The charge on the voluntary decision to seek a service connection was not subject to Proposition 218. (*Id.* at p. 428.)

The Opinion correctly followed *Apartment Association* and *Richmond.* The District's regulatory fees are not imposed because the payor owns a parcel

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[3] All references to roman numeral-numbered articles are to the California Constitution.

of land; the fees are not assessed "as an incident of property ownership." The record does not even assert that all pumpers own the land on which they operate. Instead, the charges are levied on the voluntary activity of payors who choose to pump groundwater.[4] The fees end with the cessation of pumping. They fall outside the ambit of Proposition 218.

2. The Opinion Properly Distinguishes *Pajaro*

The Petition misstates the reach and rule of *Pajaro, supra,* 150 Cal.App.4th 1364.[5] Through selective quotations from *Pajaro* and the Opinion, the City stretches both rulings to argue that: (1) all groundwater charges are subject to Proposition 218 as a result of *Pajaro*; (2) the Opinion erroneously turned on a distinction, rejected in *Pajaro*, between business and domestic water uses; (3) the Opinion improperly "seized" on regulatory fee dicta in *Pajaro* to distinguish that case; and (4) no evidence exists of the factual disparities that separate *Pajaro* from this case. None of the City's contentions are accurate. The Opinion properly distinguished *Pajaro* based on the distinctively different records in the two matters.

Pajaro most assuredly did not announce that all groundwater charges fall within Proposition 218. The *Pajaro* ruling was profoundly influenced and limited by its record of primarily residential, rather than business, customers who were charged for groundwater augmentation in that case. What appeared

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[4] Groundwater fees are not imposed on property owners, but on operators of ground water-producing facilities (Water Code section 75591); these are not necessarily the same population.

[5] This Answer does not separately address *Pajaro's* progeny, *Griffith*, because that second case added nothing new of relevance here. The Answer also does not address the vacated appellate ruling that the City improperly offers as the basis for conflict with the Opinion, but reserves the right to do so in briefing on the merits should a new published opinion issue in that case. (*Great Oaks Water Co. v. Santa Clara Valley Water District* (2015), 235 Cal.App.4th 523.)

dispositive to the *Pajaro* court was the presence of approximately 3,000 residential wells used for domestic purposes, contrasted with 660 non-residential wells used for farming, and that the domestic users were charged based on estimates, rather than on actual consumption. (*Pajaro, supra,* 150 Cal.App.4th at pp. 1374, 1390.) As Justice Bamattre-Manoukian explained in her concurrence:

> It appeared from the record here that the vast majority of property owners in the Pajaro Valley obtained their water from wells, and that alternative sources were not practically feasible. In these circumstances, I was concerned whether the continued use of this water should be characterized as part of the "normal ownership and use of property." (*Id.* at p. 1397.)

In addition to being responsive to its unique factual record, *Pajaro* expressly acknowledged the possibility of a correct, but contrary, conclusion under different circumstances. According to *Pajaro,* "if not for the prohibitive cost of metering smaller wells, which necessitates charging those extractors on the basis of estimated usage, *the fee might well be justified on regulatory grounds*." (*Id.* at p. 1381, emphasis added.) The court in *Pajaro* even recognized "that delivery of water for irrigation or other nonresidential purposes is not a property-based service, and that charges for it are not incidental to the ownership of property." (*Id.* at p. 1389.)

The contrasting facts anticipated by *Pajaro* are precisely the facts in this case. As the Opinion identified, there exist at most 840 parcels with wells in the District and the number of residential customers within the District receiving water from wells is "insubstantial" compared to the number of residential customers receiving delivered water. (Opn. at pp. 18-19.)[6] In the

[6] The City itself misstates the Opinion by claiming that the Court found "no evidence" in the record to support its finding. The Court in fact determined that while the record did not disclose the "exact number" of residential

main, the District's charges are based on the actual amounts pumped. The District exclusively uses its pumping fees to support its regulatory water conservation mandate. Contrary to the City's insistence, the Opinion did not rely upon evidence outside the record to reach these conclusions. (*Ibid.*)

These significant factual differences aside, the Court of Appeal not only did not rely upon, but essentially rejected, the *Pajaro* commercial/residential distinction as a relevant consideration in deciding the Proposition 218 issue: "Even if there were no factual record regarding the relative number of residential versus commercial well owners and a clear regulatory purpose, we would still conclude that a charge on groundwater extraction is not imposed as an incident of property ownership." (Opn. at p. 20, citing *Orange County Water Dist. v. Farnsworth*, *supra*, 138 Cal.App.2d 518 [holding that a pump fee is more in the nature of a levy on the activity of producing ground water than by reason of property ownership].) "Nor do we think it overly important that pumping may not always be a "business operation." (Opn. at p. 21.) With respect to the few households that pump water, the Opinion further offered: "Voluntarily generating one's own utilities arguably is not a normal use of property" and is in any event a "business operation" that affects the demand for municipal services. (*Ibid.*, citing *Richmond.*)

Pajaro merits two final notes. First, *Pajaro* arrived at its conclusion by rough analogy to this Court's ruling in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 (*Bighorn*). Citing *Richmond* for the proposition that a public water agency's charges for ongoing residential water delivery through pipes are charges within the meaning of article XIII D, *Bighorn* held that residential water delivery charges are also fees within article XIII C,

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customers pumping water in lieu of connecting to an existing water delivery network, it was "evident" -- based on information in the record -- that the number was insubstantial.

whether calculated on the basis of consumption or imposed as a fixed monthly fee. (*Bighorn, supra*, 39 Cal.4th at pp. 216, 217.) In the absence of a regulatory purpose, and troubled that the large majority of the pump charges were imposed on homeowners and based on estimates rather than actual use, *Pajaro* equated *Bighorn's* fees for ongoing residential water delivery to the *Pajaro* charges for residential groundwater extraction. A similar analogy to *Bighorn* is not possible under the contrasting facts of this case.

Second, in addition to distinguishing *Pajaro*, the Opinion did take exception to one strand of *Pajaro's* reasoning. The *Pajaro* court dismissed the Proposition 218 requirement that property-related fees must be for "service." (*Pajaro, supra,* 150 Cal.App.4th 1389.) The Opinion disagreed: "That is simply an untenable construction of the constitutional text, particularly taken in context." (Opn. at p. 21.) The Opinion then listed the many provisions of article XIII D that expressly refer to *services* and recited the inability of the *Pajaro* pump charge to meet such article XIII D service tests as: actual use by the property owner, immediately available, and not involving potential or future use. (Opn. at pp. 22-23.) The City does not contest the Opinion's analysis on this important Proposition 218 point.

There is nothing about *Pajaro* or the Opinion's treatment of *Pajaro* that warrants review by this Court. The two cases stand on their unique facts for their reconcilable conclusions.

3. The Opinion and the *Jacks* Decision are Consistent

The City asserts that the Opinion contradicts an earlier opinion of the same appellate district in *Jacks v. City of Santa Barbara* (2015) 234 Cal.App.4th 925 (*Jacks*), rehearing denied (March 27, 2015), petition for review filed (April 7, 2015). The assertion is wrong.

Jacks is both legally and factually distinguishable. Its bearing on this case is illusory. While *Jacks* is a Proposition 218 case, it involved article XIII

C relating to voter approval of local government taxes, and not article XIII D relating to property-related fees and charges. (*Id.* at p. 931). Further, the specific question in *Jacks* was whether a 1% surcharge on electrical utilities was a tax that required voter approval under article XIII C, or a franchise fee that did not. (*Jacks*, supra, 234 Cal.App.4th at p. 932.) Relying upon the "primary purpose" test enunciated by this Court in *Sinclair Paint Co. v. State Board of Equalization* (1977) 15 Cal.4th 866, the *Jacks* court found that the surcharge bore all the hallmarks of a tax and, in fact, its primary purpose was to generate revenue from electrical users for general spending purposes. Accordingly, *Jacks* held that the surcharge was a tax that required voter approval under Proposition 218. (*Jacks, supra,* 234 Cal.App.4th at p. 933.) *Jacks* further concluded that the surcharge was an "illegal tax masquerading as a franchise fee." (*Id.* at p. 927).

The pump charges here bear no resemblance to the issues or the taxes described in *Jacks*. The City tries in vain to draw a parallel by noting that the illegal fees in *Jacks* were "passed along" by the utility, Southern California Edison, to its customers for payment, much as the City passes along the District's pumping charges to the City's water customers. Yet, this tangential similarity was not a factor in the *Jacks* analysis of whether or not Proposition 218 was applicable to the charges. The *Jacks* ruling simply recognized that the general revenue purpose of a utility user tax could not be hidden through the device of using Southern California Edison as the City's middleman for tax collection. (*Id.* at 934.)

Jacks did not establish an "economic incidence" test replacing or supplementing the primary purpose test for adjudicating a fee to be a tax under Proposition 218. There is no contradiction between the Opinion and *Jacks*.

The City's contention that either of these cases turns on a "legal versus economic incidence" test is an artifice.[7]

C. Review is not Needed to Resolve an Important Question of Law

The City also contends that review is necessary to address whether this Court's decision in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*), as subsequently applied in *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421 (*Farm Bureau*), survives the passage of Proposition 26. The vitality of these rulings was not raised in the Court of Appeal, where the City, as recently as its Petition for Rehearing, referenced both cases and the propositions for which they stand with approval.

The City's newfound vacillation aside, review by this Court is unnecessary to confirm that *Sinclair Paint* and *Farm Bureau* are alive and well. These precedents provide essential, relevant direction for judicial evaluation of whether a government measure is a tax or a regulatory fee. To those who would challenge their currency, the District notes that Proposition 37 was rejected by the voters in November 2000. It would have overruled *Sinclair Paint*. And although neither *Sinclair Paint* nor *Farm Bureau* directly address Proposition 26, as that initiative was not adopted by the voters until November 2010, Proposition 26 borrowed, rather than negated, their controlling wisdom. In addition to broadening the article XIII C definition of "tax," Proposition 26 turned a passage constraining regulatory fees excerpted from *Sinclair Paint* into the present constitutional mandate. (Cal. Const.,

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[7] The City asserts that its "legal versus economic incidence" test is also pending before the Court in *Wheatherford v. City of San Rafael* (review granted September 10, 2014). However, that case asks another question entirely; namely whether only taxes assessed directly upon a taxpayer suffice to trigger standing under Code of Civil Procedure section 526a.

articles XIII A, § 3 and XIII C, § 1; *Sinclair Paint, supra*, 15 Cal.4th at p. 878, citing *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1145-1146; *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 996.)[8]

Farm Bureau provides the instruction that the City seeks. It analyzes the *Sinclair Paint* language that the drafters of Proposition 26 adopted. The question in *Farm Bureau* was whether the annual license and permits fees of the State Water Resources Control Board were valid regulatory fees or illegal taxes. The Court first concluded that the fees were regulatory, charged only for specific functions costs linked to issuing, monitoring, enforcing and administering licenses and permits, and not for general revenue purposes. The Court then examined whether the state had produced evidence to show the estimated costs of the regulatory activity, and the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity. The Opinion in the instant case rested on, and recited largely verbatim, *Farm Bureau's* guiding answer:

> 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

[8] The City bristles that Proposition 26 was a reaction to *Sinclair Paint* and intended to alter its rule. (Petition at p. 23.) The impact of Proposition 26 is its broadening of the constitutional definition of "tax" (Opn. at pp. 7-8), which it accomplished even as it copied *Sinclair Paint's* words.

> collection. An excessive fee that is used to generate general revenue becomes a tax. (Opn. at p. 26, citing *Farm Bureau, supra,* 51 Cal.4th at p. 438.)

The Petition works overtime to ignore *Farm Bureau's* teaching. Noting that remand was required in that case, the Petition insists that the agency was ordered to provide proof of the proportionality of the charges to the benefits or burdens of each "customer class." (Petition at p. 24.) Not true. As to this so-called "second prong" test, the factual issues on remand were instead stated as: "whether the fees are reasonably related to the total budgeted cost of the Division's 'activity,' keeping in mind that a government agency should be accorded some flexibility in calculating the amount and distribution of a regulatory fee." (*Farm Bureau, supra,* 51 Cal.4th at p. 442.) The City similarly cites in vain to *Sinclair Paint* for a purported requirement that the proportionality of a regulatory fee be "fair in toto and as to each class of ratepayers" (Petition at p. 24). *Sinclair Paint* establishes no such standard.

The City's complaint is not with the continued relevance of *Sinclair Paint* or *Farm Bureau.* Instead, it is with the outcome that these controlling California Supreme Court authorities require. The Opinion correctly applied *Farm Bureau,* holding that substantial record evidence supported the interconnectivity of the District's basins, the impact of each pumper's activity on the others and the reasonable proportionality of the District's fees. "Yet, by imposing fees based upon the volume of water extracted, the District largely does charge individual pumpers in proportion to the benefit they receive from the District's conservation activities. The District ensures water availability District-wide. Large-scale users such as the City receive a far greater benefit from individual landowners who pump water for personal consumption. That is more than is required." (Opn. at p. 26.)

The City remains unwilling to acknowledge that the District's pumpers are charged in lawful proportion to the regulatory benefit that they receive and

to harmonize this Proposition 26 finding with the companion 3:1 fee ratio prescribed by Water Code section 77594. The Opinion properly reconciles both mandates to conclude that the District's groundwater pumping fee is a valid regulatory fee and not an excessive "tax."

D. Review to Address Dissimilar Trial Court Cases is Unwarranted

The City argues that review should be granted because Proposition 218 and 26 issues are currently under consideration in nine trial courts. (Petition at pp. 35-37.) This argument leaps over the orderly and essential progression of cases from trial through appeal. It plays fast and loose with the proper predicates for review by this Court. It presupposes that the legal determinations of the Court of Appeal on the Proposition 218 and 26 issues based on the record evidence in this case will somehow be dispositive of or inform the decision-making in those other cases. The City's argument is fundamentally flawed.

Proposition 218 cases necessarily turn on their unique facts. For example, water delivery charges for services provided to property owners by municipalities or by water agencies acting as purveyors of water are a far different creature than water extraction fees that do not depend on property ownership. The camouflaged electricity surcharge in the *Jacks* case is an entirely different animal; the issue in that case also addressed a different portion of Proposition 218 than addressed by the Court of Appeal in this case.

The very nature of the agency, municipality or water district responsible for imposing the fee or charge in dispute in a given case may warrant a different analysis and different outcome. There are myriad different types of water districts in the State of California with different mandates, including:

- water conservation districts;
- flood control and water conservation districts;

- municipal water districts;
- county water districts;
- water storage districts;
- irrigation districts;
- water replenishment districts;
- community services districts;
- supply and conservation agencies;
- water quality departments;
- recreation and conservation districts;
- water resources departments;
- water management districts; and
- reclamation districts.

There are over a thousand special water districts in California, with a great diversity of purposes, governance structures and financing mechanisms. Some are governed by a county board of supervisors or city council while others, like the District, are independent with governing boards directly elected by the public. Some provide utility services, such as water services, and waste disposal (sanitation), while others serve safety needs, such as flood control. Still others provide important regulatory functions, such as water conservation or replenishment of depleted or deficient water supplies.

Finally, the nature of the underlying administrative proceeding and evidence in the record may very well dictate different results in the trial court based on the standard of review applicable to administrative decision-making, and hence different results on appeal.

The City's "one size fits all" approach to Proposition 218 and Proposition 26 issues is overly simplistic. This is reason enough for this Court to decide that the cases referenced in the Petition do not present a need for California Supreme Court direction. That conclusion is only amplified by a

case-by-case consideration of the nine cases. Those nine trial courts will not be looking at this case, the *Jacks* case, or the now vacated *Great Oaks* case for direction as the City claims. (Petition at pp. 36-39.)

The two groundwater fee cases cited in the Petition are resolved. *North San Joaquin Water Conservation District v. All Persons Interested in the Matter of the Resolution Imposing Groundwater Charge* was a validation action. Judgment was issued in that case nearly seven years ago, on July 1, 2008. As the City even admits, the appeal was dismissed and the case was rendered moot by the repeal of the dispute charge. (Petition at p. 36, fn. 20.) As has been widely reported, the one case with at least a passing similarity to this case, *City of Cerritos, et al., v. Water Replenishment District of Southern California* (Super. Ct. L.A. County, No. BS128136) has settled.

The three matters glibly lumped together in the Petition as "cost of service" cases, *Glendale Coalition for Better Government v. City of Glendale*, *Sweetwater Authority Ratepayers Ass'n, Inc. v. Sweetwater Authority*, and *Plata v. City of San Jose*, concern municipal entities or publicly owned water agencies that are purveyors of waters to residential and business customers. Like recently decided *Capistrano Taxpayers Ass'n v. City of San Juan Capistrano* (Apr. 20, 2015) __ Cal.App.4th __, 2015 WL 1798898, the first two of those cases involve tiered water rates and are governed by the holding in *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926. The *Plata* action challenges the transfer of water revenues to the municipal general fund. None of these issues were discussed or decided in the Opinion.

The City's four San Diego trial court matters are described as impinging on the same "economic or legal incidence" question that the Petition never competently raises. But even if that underlying issue were clearly identified for this Court, it is not possible to equate the four San Diego cases with this case. Each of the San Diego matters concerns, on demurrer, whether the plaintiff had standing to challenge such disparate charges as a

tourism marketing assessment, business improvement district fees and a maintenance assessment charge. Neither the facts required to achieve taxpayer standing or the legal threshold for pleading sufficiency are at issue here.

The City's implication that the issues in the nine referenced trial court cases are identical or similar to the questions addressed in the Opinion does not hold water. The City's patchwork of cases involving different Proposition 218 and Proposition 26 issues do not provide grounds for review by this Court and must be rejected.

VI. CONCLUSION

The District respectfully submits that this Court should decline to review the Opinion, which correctly applies the facts and the controlling law to the District's regulatory pumping charges, which are vital and appropriate to the decades belated efforts of us all to sustain our groundwater.

DATED: May 18, 2015 MUSICK, PEELER & GARRETT LLP

By: */s/ Jane Ellison Usher*
Jane Ellison Usher
Attorneys for Appellants and Cross-Respondents UNITED WATER CONSERVATION DISTRICT AND BOARD OF DIRECTORS OF UNITED WATER CONSERVATION DISTRICT

CERTIFICATE OF COUNSEL

I, Jane Ellison Usher, hereby certify pursuant to rules 8.268(b)(2) and (3) and 8.204 of the California Rules of Court that this Appellants and Cross-Respondents' Answer to Petition for Review was produced on a computer, and that it contains 7,070 words, exclusive of tables, the verification, this Certificate, and the proof of service, but including footnotes, as calculated by the word count of the computer program used to prepare this brief.

DATED: May 18, 2015

MUSICK, PEELER & GARRETT LLP

By: */s/ Jane Ellison Usher*
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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is One Wilshire Boulevard, Suite 2000, Los Angeles, California 90017.

On May 18, 2015, I served true copies of the following document(s) described as **APPELLANTS AND CROSS-RESPONDENTS' ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

☐ **BY E-MAIL OR ELECTRONIC TRANSMISSION**: I caused a copy of the document(s) to be sent from e-mail address c.staley@mpglaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Musick, Peeler & Garrett LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☒ **BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on May 18, 2015, at Los Angeles, California.

/s/ Cindy L. Staley
Cindy L. Staley

SERVICE LIST

United Water Conservation District, et al. v. City of San Buenaventura
Santa Barbara County Superior Court
Case Nos. VENCI 00401714 and 1414739
Court of Appeal Case No. B251810

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