Exempt from Filing Fees
Government Code § 6103

No. S243360

In the Supreme Court of California

Eugene G. Plantier, et al.,
Plaintiffs and Appellants

vs.

Ramona Municipal Water District,
Defendant and Respondent

After a Published Decision by the Court of Appeal
Fourth District, Division One, Case No. D069798

On Appeal from the Superior Court of the State of California
County of San Diego, Case No. 37-2014-00083195-CU-BT-CTL
Honorable Timothy Taylor, Judge Presiding

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT/RESPONDENT RAMONA MUNICIPAL WATER DISTRICT

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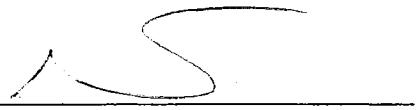
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Other than property owners and residents receiving sewer services from the Ramona Municipal Water District, there are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.488.

DATED: February 13, 2018

DANIEL S. HENTSCHKE

COLANTUONO, HIGHSMITH & WHATLEY, PC



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APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF

To the Honorable Chief Justice Tani G. Cantil-Sakauye:

Pursuant to California Rules of Court, rule 8.520(f), the League of California Cities ("League"), the California State Association of Counties ("CSAC"), the California Association of Sanitation Agencies ("CASA"), the California Special Districts Association ("CSDA"), and the Association of California Water Agencies ("ACWA") (collectively, "Local Government Amici") respectfully request permission to file an amicus curiae brief in support of Petitioner Ramona Municipal Water District. This application is timely made within 30 days of filing of the reply brief on the merits.

STATEMENT OF INTEREST OF AMICI CURIAE

Local Government Amici represent cities, counties, and special districts throughout California. The League is an association of 475 California cities. CSAC is a non-profit corporation composed of California's 58 counties. CASA is a non-profit corporation representing more than 100 sewer agencies. CSDA is a non-profit corporation with a membership of over 800 special districts. ACWA is a statewide coalition of 450 public water agencies. The public agencies which are members of Local Government Amici fund

essential public services to millions of Californians through user and other fees subject to the notice and hearing procedures established by Proposition 218. (Cal. Const., art. XIII C & D.)[1] Local Government Amici's members often rely on property related fees like those at issue here — fees subject to article XIII D, section 6.

Each Local Government Amici has a process for identifying cases affecting their members, such as this one, that warrant their participation. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, identifying those cases that have statewide or nationwide significance. CSAC sponsors a Litigation Coordination Program administered by the California County Counsels' Association. CSAC's Litigation Committee monitors litigation of concern to California's counties. ACWA has a Legal Affairs Committee, composed of attorneys from each of its regional divisions throughout the state. The Committee monitors litigation of significance to ACWA's members. CASA and CSDA similarly determined this case to be of significance to their members. Accordingly, the League, CSAC, CASA, CSDA, and ACWA

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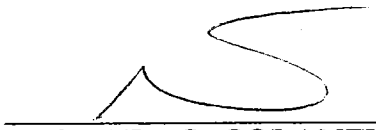
[1] References to articles and sections of articles are to the California Constitution.

respectfully request leave to file the brief combined with this application.

DATED: February 13 , 2018

DANIEL S. HENTSCHKE

COLANTUONO, HIGHSMITH & WHATLEY, PC



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INTRODUCTION

California courts have long held that a person challenging an agency's decision — whether legislative or quasi-judicial — must participate in its decision-making process and demonstrate that the judicial challenge is on the same grounds and evidence as presented to the decision-maker. This exhaustion of administrative remedies requirement applies whenever the law requires that those affected be given notice and opportunity to be heard before a decision is made. Generally, when a noticed opportunity to be heard is provided, persons affected by the decision must participate by appearing at the hearing and providing the agency with specific reasons and evidence why a challenged decision is wrong. Exhaustion of remedies applies whether the decision-making is judicial or legislative in character. It ensures informed decision-making, encourages public participation, and allows agencies to respond to criticism and concerns, apply their expertise, and develop records for judicial review. It provides a basis for judicial review and protects courts from being drawn too readily and too soon into disputes the political branches might resolve without judicial assistance.

In 1996, California adopted Proposition 218, empowering voters by enacting limitations on local government taxes, assessments, and property related fees. (Cal. Const., arts. XIII C & XIII D.) Property related fees cannot be adopted unless the local

government complies with specific procedural and substantive requirements, including conducting a public hearing noticed to property owners. (Cal. Const., art. XIII D, § 6 ("Section 6").) These procedural requirements "facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive." (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220–221 ("*Bighorn*").)

Section 6's robust hearing requirements have led agencies to implement expensive and time-consuming legislative procedures to impose new or to increase existing property related fees, including:

- retention of legal and financial advisors, including professional ratemaking consultants and cost-of-service experts;
- preparation of cost-of-service analyses (COSAs);
- preparing and mailing detailed notices to property owners;
- making public presentations or conducting workshops to educate the public as to the need for a new or increased fee;
- responding to public comments; and
- inviting a majority protest and holding at least one public hearing at which written protests may be submitted and counted.

Often set in conjunction with the adoption of annual budgets, fee hearings are commonly local agencies' most heavily attended meetings. (E.g., *Wallich's Ranch v. Kern County Pest Control District* (2001) 87 Cal.App.4th 878 ("*Wallich's Ranch*") [requiring exhaustion in budget hearing before challenge to assessment levied to fund that budget].)

Section 6's legislative process fosters informed local decision-making, encourages fee-payor participation, and ensures local governing bodies have adequate information upon which to make decisions. It allows decision-makers to review the entire record, respond to fee-payor concerns, and apply their expertise before making decisions. It strengthens "the power-sharing arrangement" between local legislators and fee-payors envisioned by Proposition 218. (*Bighorn, supra,* 39 Cal.4th at p. 220.)

ARGUMENT

I. THE EXHAUSTION REQUIREMENT PROMOTES EFFICIENCY, PUBLIC PARTICIPATION, AND JUDICIAL REVIEW

A. WHEN AN ADMINISTRATIVE REMEDY IS PROVIDED, IT MUST BE INVOKED

The exhaustion of administrative remedies requirement is well settled. "The cases which so hold are legion." (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 73.) If an

administrative remedy is provided, it must be exhausted before judicial review is available. (*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd.* (1973) 8 Cal.3d 792, 794.) It is jurisdictional and applies whether or not it may afford complete relief. (*Yamaha Motor Corp. v. Superior Ct.* (1987) 195 Cal.App.3d 652, 657 ("*Yamaha*"); *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 496–501 ("*Sierra Club*").)

The doctrine applies to constitutional challenges to legislative action, such as the Proposition 218 challenge to retail sewer rates here. (*Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 93 ("*Mountain View*") [exhaustion applies to constitutional challenge to zoning ordinance].) The decision-making body "is entitled to learn the contentions of interested parties before litigation is instituted." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 384 [exhaustion under CEQA].) Exhaustion requires full presentation to the agency of all issues later to be litigated and the essential facts on which they rest. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609 [duty to exhaust PERB remedies before suing to enjoin strike].) Because it is jurisdictional, the rule is not a matter of judicial discretion. (*Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 687 [lawsuit barred even as to constitutional challenges because plaintiffs failed to object at city council hearing to assessment to abate public nuisance].)

B. POLICIES UNDERLYING THE EXHAUSTION DOCTRINE

"'[E]xhaustion of administrative remedies furthers a number of important societal and governmental interests, including: (1) bolstering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise, and exercise statutorily-delegated remedies; (3) mitigating damages; and (4) promoting judicial economy.'" (*Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 637, 644, citing *Rojo v. Kliger* (1990) 52 Cal.3d 65, 72.) Exhaustion is required even of an administrative remedy that cannot resolve all issues or provide the precise relief sought, "because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency. It can serve as a preliminary administrative sifting process, unearthing the relevant evidence and providing a record which the court may review." (*Sierra Club, supra,* 21 Cal.4th at p. 501, citations omitted.)

Exhaustion requires more than generalized objections at a public hearing — specific grounds must be raised. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197; *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 615–616 [hearing participants not held to same standards as lawyers in court, but must make known what facts are contested].) For example, *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656

rejected an attack on reports drafted by that city's financial expert because plaintiffs did not present a contrary financial analysis at the administrative hearing:

> If a party wishes to make a particular methodological challenge to a given study relied upon in planning decisions, the challenge must be raised in the course of the administrative proceedings. Otherwise, it cannot be raised in any subsequent judicial proceedings.

(*Id.* at 686.)

These important public interests necessitate application of the exhaustion doctrine to rate-making to fund essential public services.

C. THE EXHAUSTION DOCTRINE SERVES THE SEPARATION OF POWERS

The doctrine is jurisdictional due to the separation of powers principle fundamental to our democracy. (*County of Contra Costa, supra,* 177 Cal.App.3d at p. 76.) The legislative bodies of local agencies often make discretionary, policy choices from a range of lawful options. It is long settled that the establishment of service fees, such as those now subject to Section 6, is a legislative act. (*Kahn v. East Bay Mun. Util. Dist.* (1974) 41 Cal.App.3d 397, 409 [retail water rates]; *Durant v. Beverly Hills* (1940) 39 Cal.App.2d 133, 139 ["The universal rule is that in these circumstances the court is not a rate-fixing body, that the matter of fixing water rates is not judicial,

but is legislative in character"].) Neither Proposition 218, nor Proposition 13 before it, changed the legislative character of local rate-making. (*Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Auth.* (2008) 44 Cal. 4th 431, 444 [open space assessment]; *Brydon v. East Bay Muni. Utility Dist.* (1994) 24 Cal. App. 4th 178, 196 [retail water rates]; *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 368 [sewer rate-making is discretionary].) While Proposition 218 changed the substantive requirements for utility charges, it did not change the respective roles of local legislators and courts. (*Capistrano Taxpayers Ass'n v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1512–1513 ("*Capistrano*"); see *San Diego County Water Authority v. Metropolitan Water District of Southern California* (2017) 12 Cal.App.5th 1124, 1149 ["[T]he courts do not weigh competing methodologies to determine the best water rates" but apply the appropriate standard of review to the agency's record] [applying Prop. 26].)

In light of the different institutional competencies of legislators and courts, judicial review of legislation is limited to the agency's record. (*Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal. 4th 559, 573 ("*Western States*").) The exhaustion doctrine and the *Western States* rule enhance judicial review by, inter alia, providing courts the benefit of an agency's expertise in preparing a full record, sifting the evidence, and, in some cases, evaluating the reports of competing experts. Further, it prevents parties from

embroiling courts in political and policy disputes and imposing on them a function to which they are ill-suited — legislating rather than adjudicating. By distinguishing between record-making and record-reviewing, the exhaustion of administrative remedies doctrine protects both legislative and adjudicative functions. It allows legislative bodies to hear the evidence, apply their reasoned discretion, and create records to facilitate judicial review, and it allows courts to review an agency decision on an adequate record supported by agency expertise.

D. EXHAUSTION AFFORDS AGENCIES AN OPPORTUNITY TO ADDRESS PUBLIC CONCERNS BEFORE COURTS MUST

The "'essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.'" (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1137 [charter city assessment], citing *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.) Under the exhaustion doctrine, "administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum." (*Sierra Club, supra,* 21 Cal.4th at p. 510.)

For example, *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 641 ("*Sun Pacific*") involved a statute

allowing the adoption of a citrus vector control district's budget only after a noticed protest hearing. A defendant who failed to object to a citrus pest eradication plan during such a hearing could not later challenge the plan in court. By failing to raise issues during the hearing, the challenger deprived the district of the "opportunity to address the merits of the protest and to modify the plan (and the budget) accordingly." (*Ibid.*) The district was "prejudiced by Sun Pacific's failure to raise its objection to the plan prior to its implementation, when the District could have addressed Sun Pacific's concerns and still made changes." (*Id.* at 642.)

Wallich's Ranch, supra, 87 Cal.App.4th at p. 880, cited *Sun Pacific* in rejecting a Proposition 218 challenge to another citrus pest assessment for failure to exhaust administrative remedies in the district's budget hearing. We discuss *Wallich's Ranch* further *infra.*

E. IF MULTIPLE REMEDIES ARE PROVIDED — ALL MUST BE EXHAUSTED

Acme Fill Corp. v. San Francisco Bay Conservation etc. Com. (1986) 187 Cal.App.3d 1056, 1064 ("*Acme*") holds that when multiple remedies are provided, all must be exhausted. The plaintiff there was required to exhaust all local and federal remedies before seeking judicial review. (*Ibid.*) Thus, for example, and as further discussed in Section II C *infra,* even assuming the existence and application of a statutory claim filing requirement to a suit for refund of a fee, the exhaustion doctrine independently requires

participation in the rate-making hearing. Moreover, as discussed in Section III C *infra*, claim and exhaustion requirements serve different policies and one cannot substitute for the other.

II. SECTION 6 ESTABLISHES AN ADMINISTRATIVE REMEDY FOR PROPERTY RELATED FEES

A. SECTION 6 ESTABLISHES MINIMUM NOTICE AND HEARING REQUIREMENTS

Section 6 establishes in considerable detail the minimum notice and hearing requirements for new or increased property related fees. (*Greene v. Marin County Flood Control and Water Conser. Dist.* (2010) 49 Cal. 4th 277, 285–286 [discussing article XIII D, §§ 4 & 6].) Under Section 6:

> Once the amount of the fee per parcel is calculated, the agency must provide written notice to each affected property owner and the opportunity to protest the fee. At the public hearing, the government agency is to tabulate all the written protests to the proposed fee, and if a majority of owners of the identified parcels protest, the fee will not be imposed.

(*Id.* at p. 286 [construing Cal. Const., art. XIII D, § 6, subd. (a)].)

B. SECTION 6 REQUIRES AGENCIES TO "CONSIDER ALL PROTESTS"

An agency must "consider all protests," oral or written — even in the absence of a majority protest. (Cal. Const., art. XIII D, § 6, subd. (a)(2).) The requirement ensures the consideration will be legally meaningful and prevents local governments from brushing aside protests for mere political expedience. The requirement also provides a local legislative body and the public opportunity to address and investigate cost-of-service issues before costly litigation. In other words, the power sharing between governors and the governed that Proposition 218 established promotes rate-making decisions that are "mutually acceptable and financially and legally sound." *(Bighorn, supra,* 39 Cal.4th at p. 220.) Exhaustion advances this objective by requiring those who would hold government accountable to give government an opportunity to be accountable before asking courts to compel it.

Thus, the phrase "consider all protests" cannot be ignored, but rather must be construed to establish the Section 6 protest hearing as a meaningful opportunity to make and to consider objections to new or increased fees. (E.g., *Hensel Phelps Const. Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1034 ["[w]e will not adopt a statutory interpretation that renders meaningless a large part of the statutory language"].)

Thus, the Opinion on review here erred by dismissing the Section 6 protest hearing as "inadequate" to trigger the duty to exhaust. (*Plantier v. Ramona Municipal Water District* (2017) 12 Cal.App.5th 856, 868, review granted ("the Opinion").)

C. LOCAL OR STATUTORY PROTEST PROCEDURES DO NOT DISPLACE SECTION 6

Plaintiff rate-payers cite *Coastside Fishing Club v. California Fish & Game Commission* (2013) 215 Cal.App.4th 397, 415 ("*Coastside*") to argue defendant Ramona Water District's ("Ramona" or "District") ordinances, rather than Proposition 218, establish the administrative procedure to challenge its fees. (Answer Brief at pp. 16, 27.) They quote *Coastside* as follows: "[i]n cases applying the exhaustion doctrine, the administrative procedure in question generally is provided by the statute or statutory scheme under which the administrative agency is exercising the regulatory authority challenged in the judicial action." (Answer Brief at p. 29, citing *Coastside, supra,* 215 Cal.App.4th at p. 415.) This sentence supports the **District's** position, not the Plaintiff rate-payors'.

Article XIII D, section 1 states, "[n]otwithstanding 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." Thus, the Constitution itself provides the administrative procedure — or, in

the parlance of the exhaustion cases, the "scheme" — by which the District imposed the challenged fees. Moreover, *Acme* demonstrates that, when multiple remedies are provided — all must be exhausted. (See discussion of *Acme* in section I E *supra*.) *Coastside* gives the Plaintiff rate-payors no basis to sue without first exhausting the administrative remedy voters provided in Section 6.

III. SECTION 6'S ADMINISTRATIVE REMEDY MUST BE EXHAUSTED

A. *WALLICH'S RANCH* APPLIES EXHAUSTION TO PROPOSITION 218 CHALLENGES

Wallich's Ranch applies the exhaustion doctrine to a Proposition 218 challenge to an assessment imposed under the Citrus Pest District Control Law (Food & Agric. Code §§ 5401 et seq.) ("Pest Control Law").

That statute establishes a procedure for imposing annual pest control assessments on benefitted citrus groves. An assessment funds district operations and is based on a district's annual budget. (*Wallich's Ranch, supra,* 87 Cal.App. 4th at 884.) The Pest Control Act provides for notice, opportunity to protest, and a hearing on the budget before assessments may be levied. (*Id.* at p. 885.) After a county assessor certifies the assessed value of all citrus trees in a district, the district board adopts a preliminary budget, and provides notice of intent to adopt a final budget and to levy an assessment to fund it. (Food & Agric. Code, § 8563.) Assessed

landowners may submit written protests "at any time not later than the hour set for hearing objections to the proposed budget." (Food & Agric. Code, § 8564.) Like Section 6's requirement to "consider all protests," the Pest Control Law obliges a district board "to hear and pass upon all protests so made" before adopting the budget and levying the assessment. (Food & Agric. Code, § 8565.)

Thus, "[t]he appropriate procedure for challenging the assessments imposed pursuant to the Pest Control Law is to first exhaust one's remedies by challenging the budget before the district." (*Wallich's Ranch, supra,* 87 Cal.App.4th at p. 884.) The Court of Appeal emphasized the point:

> [T]he appropriate procedure to oppose the assessment is to challenge the district budget, at which time the district has an opportunity to address the perceived problems and formulate a resolution. Here, the District was denied any opportunity to address the merits of Wallich's Ranch's claims. We reject the contention of Wallich's Ranch that exhaustion of administrative remedies was not required because the complaint related to constitutional arguments and protesting at the District's budget hearing would have been fruitless. (See *Bockover v. Perko* (1994) 28 Cal.App.4th 479, 486 [34 Cal.Rptr.2d 423] [general rule of exhaustion forbids a judicial action when administrative remedies have not

been exhausted, even as to constitutional challenges].)
Under our reasoning in *People ex rel. Lockyer v. Sun Pacific Farming Co., supra,* 77 Cal.App.4th at page 642, in order to challenge a citrus pest control assessment, one must first challenge the district's budget.

(*Id.* at p. 885.)

Wallich's Ranch applied a long and unbroken line of cases holding that, when an administrative remedy is provided, it must be exhausted before judicial review is available — even as to constitutional claims. Its reasoning is even more compelling here, where the Constitution itself provides the procedure to be exhausted.

B. PROPOSITION 218 DOES NOT DISPLACE THE EXHAUSTION DOCTRINE

Proposition 218 changed the burden of proof and standard of review for property-related fee challenges, but left the exhaustion doctrine intact. The last sentence of Section 6, subdivision (b) provides: "[i]n any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." Article XIII D, section 4, subdivision (f) has a similar effect for assessment challenges. These provisions shift the burden of proof from a challenger to a respondent agency. Similarly, Proposition 218 changes the standard of judicial review

from deference to independent judgment. (*Silicon Valley Taxpayers Assn. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443–450; *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal. App. 4th 892, 912 ["We exercise our independent judgment in reviewing whether the District's rate increases violated section 6. In applying this standard of review, we will not provide any deference to the District's determination of the constitutionality of its rate increase." (Citations omitted)].) Proposition 218 is silent about procedural or jurisdictional prerequisites to suit — including exhaustion.

Had the voters who adopted Proposition 218 intended to alter the well-established exhaustion doctrine, they could have done so. Instead, Proposition 218 simply shifted the burden of proof and standard of review, leaving other rules of procedure unchanged. This requires a conclusion voters intended to maintain those procedures unchanged. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1189 [Prop. 13 precedents undisturbed by Prop. 218 were intended to be maintained].) This is but application of the familiar canon of construction *expressio unius est exclusio alterius*. (E.g., *LeFrancois v. Goel* (2005) 35 Cal.4th 1094, 1105 ["The expression of some things in a statute necessarily means the exclusion of other things not expressed"].)

C. SATISFYING THE DISTRICT'S LOCAL ADMINISTRATIVE PROCESS OR THE GOVERNMENT CLAIMS ACT DOES NOT EXHAUST ADMINISTRATIVE REMEDIES UNDER SECTION 6

Ramona's code establishes means for persons to object to the fees they pay. Ramona Municipal Water District Legislative Code section 7.52.050, subdivisions D–F allow a property owner to request an adjustment of his or her sewer charge. Section 7.52.170 requires any person desiring to "challenge any provisions of this chapter" to submit the grounds for the challenge in writing to the District's governing body before suit. Plaintiff ratepayers argue compliance with this local procedure for adjustments under, and challenges to, the District's service fees and regulations satisfies their duty to exhaust. (Respondent's Answer Brief at pp. 29–31.) Not so.

The District's local administrative process, like the Government Claims Act's requirement for a claim before a suit for money, affords the District opportunity to investigate, and perhaps settle, a claim without litigation. (E.g., *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 247.) The exhaustion doctrine serves other purposes — including serving the separation of powers and the promoting the effective exercise of legislative and judicial powers. In the context of legislative action, this difference is highlighted. The District's local process, like the claim requirement, allows the District notice of particular claims of injury arising from application

of its legislation. The exhaustion doctrine provides an opportunity for course correction **before** legislation is adopted.

Moreover, case law treats the two requirements independently. *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139 ("*Lozada*") involved a police officer's suit under the Public Safety Officers Procedural Bill of Rights ("POBRA") even though he had not claimed under the Government Claims Act. The trial court granted summary judgment to the City and the Court of Appeal affirmed, noting the Legislature expressly disclaimed an exhaustion requirement for POBRA claims, but nevertheless finding compliance with the Government Claims Act obligatory:

> The origin and purposes of the government claim filing requirements and the administrative remedies exhaustion doctrine differ, and elimination of the exhaustion requirement does not release a litigant from the need to comply with Government Claims Act requirements. (*Bozaich v. State of California* (1973) 32 Cal.App.3d 688, 697–698, 108 Cal.Rptr. 392.)

(*Lozada, supra,* 145 Cal.App.4th at p. 1155.) One who fails to comply with the Government Claims Act may not sue for monetary relief, but may seek injunctive relief and return of bailed property. (E.g., *Sparks v. Kern County Bd. of Supervisors* (2009) 173 Cal.App.4th 794, 798–799.) However, one who fails to exhaust administrative remedies on a claim may not pursue judicial review at all.

Even if the District's local administrative process for challenges to its service fees and sewer regulations could be conflated with exhaustion, that would not save Plaintiff rate-payers' case. Where multiple remedies are afforded, a litigant must exhaust all. (*Acme, supra,* 187 Cal.App.3d at p. 1064 [federal remedies did not preempt state remedies and all must be exhausted before suit].) Because it is possible to lodge the protest afforded by Section 6, subdivision (a) and comply with the Government Claims Act's claim presentation requirement, Plaintiffs were obliged to do both. Having failed to do so, they may not sandbag the District in court with claims they did not raise in its rate-making hearings.

Thus, that Plaintiff rate-payers claim to have satisfied the administrative process under the District's local rules is irrelevant as to their duty to exhaust Section 6's protest hearing. To sue for a refund, they must do both.

IV. NEITHER FUTILITY NOR EXHAUSTION BY OTHERS SAVE RESPONDENTS HERE

Plaintiffs seek refuge in two, narrow exceptions to the duty to exhaust, but neither is availing.

A. EXHAUSTION WOULD NOT HAVE BEEN FUTILE

"Futility is a narrow exception to the general rule." (*Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 683.) The duty to exhaust a

statutory remedy is required unless a petitioner can positively state there is **no** possibility of a different result. (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418 [it must be absolutely clear exhaustion would be of no use whatever]; *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 691 [collecting cases illustrating limited scope of futility exception].) The exception does not apply simply because favorable agency action is unlikely — even if the agency rejected the desired outcome in other cases.

If courts excused exhaustion on this ground, the exhaustion requirements would disappear, as litigants normally sue without exhausting available local remedies precisely because they believe favorable action by the agency is unlikely — or simply prefer to litigate, perhaps in search of fees under Code of Civil Procedure section 1021.5. (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313–1314 [cannot infer from county position in court that its assessment appeals board would have rejected plaintiff's claim]); cf. *Graham v. DaimlerChrysler Corp.* (2004) 24 Cal.4th 553, 561 [claimant for catalyst fees under CCP § 1021.5 must offer to settle before suit to avoid perverse incentives].)

Again, *Wallich's Ranch* is instructive. That court rejected the petitioner's claim a Proposition 218 challenge to a pest control assessment would have been futile. (*Wallich's Ranch, supra,* 87 Cal.App.4th at p. 885.) The court noted the petitioner's apparent

long-term political animosity to the district and its assessment did not demonstrate exhaustion would be futile:

> Wallich's Ranch's contention that it exhausted its administrative remedies since it protested for 'a number of years' the District's budget is simply without support in the record. The evidence cited by Wallich's Ranch of its 'protests' consists of its circulation of petitions to dissolve the District and a February 1997 letter to counsel for the District contending the District was required to comply with Proposition 218. These actions plainly do not evidence a challenge to the District's budget for the fiscal years at issue.

(*Ibid.*)

Thus, the futility exception recognizes that litigants must pursue administrative remedies that will **likely** fail, but need not pursue those that will **certainly** fail — as where the administrative tribunal lacks authority to consider a claim. Plaintiff rate-payors make no such showing here. The District had complete power to maintain existing rates, impose a smaller increase, or change its methodology for calculating rates had Plaintiff rate-payors persuaded them to do so.

B. OTHERS DID NOT EXHAUST THE CLAIMS PLAINTIFFS WOULD RAISE

A second, narrow, partial exception to the exhaustion doctrine allows one who participated in an administrative hearing to litigate issues others raised at that hearing. (*Leff v. City of Monterey Park* (1990) 218 Cal.App.3d 674, 682 ["An individual challenging a redevelopment plan need not have personally raised each issue at the administrative level, but may rely upon issues raised or objections made by others, even though they do not later join in the lawsuit, so long as the agency had the opportunity to respond."]; *Evans, supra,* 128 Cal.App.4th at p. 1137.)

The rationale for the exception is simple — an agency which has heard a claim need not hear it multiple times to ensure all who have standing can sue on the grounds presented to the agency. Prolixity is no more beneficial to an administrative hearing than to a judicial one. The essential point is that the agency need only litigate after sufficient notice of a plaintiff's argument before making the decision the plaintiff would challenge.

Notice sufficient to satisfy the exhaustion requirement has two aspects. First, a plaintiff's argument must be sufficiently similar to the protests the agency received in its hearing as to have given it notice of the argument. Second, protests to the agency must be sufficiently specific to allow it to respond.

The plaintiff in *Evans* sought judicial review of a redevelopment plan. She argued a preliminary report prepared by Keyser Marston Associates, Inc. ("KMA") to justify the plan was flawed for several reasons, including flawed data-gathering and compilation. *Evans* explains that exhaustion by others requires a plaintiff's argument to be similar to protests the agency received at its hearing:

> Although several people at the hearing and in written objections submitted during the administrative process questioned that there was blight in selected neighborhoods, there were no specific objections to the data-gathering and compiling methods of KMA or to the analysis in its report, and certainly nothing approaching the extensive and detailed objections presented by appellant. Under similar circumstances, courts have applied the doctrine of exhaustion of administrative remedies to preclude review.

(*Evans, supra,* 128 Cal.App.4th at p. 1144.)

Evans further provides that exhaustion by others requires the original complaints be sufficiently specific to allow the agency to respond to them:

> General complaints to the administrative agency that certain neighborhoods are not blighted are not sufficient to alert the agency to objections based on the method of

> data gathering and analysis employed by the writers of the report. Such general complaints do not allow the agency the opportunity to respond and to redress the alleged deficiencies. The administrative process does not contemplate that a party to an administrative hearing can make only a 'skeleton' showing and thereafter 'obtain an unlimited trial de novo, on expanded issues, in the reviewing court.'

(*Evans, supra,* 128 Cal.App.4th at p. 1145, citations omitted.)

Here, the Plaintiff rate-payors can find no harbor in the exhaustion-by-others rule for two reasons. First, they did not protest or otherwise participate in the hearing. They testified that, although they received hearing notices, they did not participate because they believed the hearings were a "waste of time." (Opening Brief at pp. 26–27.) As previously explained, such a belief does not excuse a failure to exhaust.

Second, no one raised at the District's hearing the challenges Plaintiff rate-payors brought to court. As the District details at page 27 of its Opening Brief, the District received only a handful written protests during its 2013 majority protest hearing — the last hearing before Plaintiffs sued. None challenged the District's rate-making methodology or its compliance with Proposition 218's proportionality requirement. (Cal. Const., art. XIII D, § 6, subd. (b)(3).)

V. THE OPINON ON REVIEW MISTAKES AND CONFUSES ESTABLISHED LAW

A. THE OPINION MISTAKES THE PURPOSE OF THE MAJORITY PROTEST PROCESS

The Opinion on review here provides:

> [T]he administrative remedy in subdivision (a)(2) of section 6 is limited to a protest over the imposition of, or increase in, rates for water and wastewater service fees, as opposed to protests over whether District complied with the substantive requirements of subdivision (b) of this section.

(*Opinion*, 12 Cal.App.5th, at p. 868.)

This is implausible. Voters imposed detailed notice and hearing requirements in subdivision (a) of Section 6, and detailed substantive requirements in subdivision (b) — plainly intending the two to inform one another. (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409 [water connection fee not subject to art. XIII D, § 6, subd. (b) because notice required by § 6, subd. (a)(1) not practicable].) Subdivision (a)(1) requires notice of "the basis upon which the amount of the proposed fee or charge was calculated" and "the reason for the fee or charge." Under subdivision (a)(2), "the agency shall consider all protests against the proposed fee or charge." Subdivision (b) provides substantive rules regarding the "calculation" of property related fees and the uses to

which fee proceeds may be devoted. Fees may not exceed the cost of service ((b)(1)), be used for other purposes ((b)(2)), exceed the proportionate cost to serve any parcel ((b)(3)), charge for a service to be provided in the future ((b)(4)), or charge for a service provided to society generally, not just to property owners ((b)(5)). The two subdivisions are plainly intended to be enforced together and to inform one another. The Opinion's conclusion that the majority protest hearing of subdivision (a) provides no forum to argue compliance with the substantive rate-making rules of subdivision (b) fails to persuade.

Section 6 states that, to impose or increase a fee, "an agency shall follow the procedures pursuant to this **section** ..., including, but not limited to" the notice and hearing provisions of subdivision (a)(1) and (2). (Emphasis added.) Section 6's procedures are expressly not limited to those contained in subdivision (a), but include the requirement for an election under subdivision (c) and the requirement of subdivision (b)(5) that the agency bear the burden in a legal action of demonstrating compliance with article XIII D. Thus, reading Section 6 as a whole, as we must — and giving meaning to all of its provisions in context — it is apparent that all the requirements of Section 6, procedural or substantive, are at issue during the protest hearing under its subdivision (a), just as procedural and substantive considerations are at issue at the public hearing to consider the approval of a zone change under the

Planning and Zoning Law or certification of an environmental impact report under CEQA. No hearing is isolated to process. Substance infuses all.

B. THE OPINION INCORRECTLY SUGGESTS PLAINTIFFS NEED NOT PARTICIPATE IN THE SECTION 6 HEARING BECAUSE A MAJORITY PROTEST IS UNLIKELY

The Opinion on review here provides:

> It seems implausible plaintiffs would ever have been able to secure written opposition by a "majority" of parcel owners in order to trigger the primary administrative remedy in subdivision (a)(2) of section 6.
>
> Without the administrative remedy that requires a "majority" of parcel owners to protest in writing to the proposed "fee or charge," a parcel owner is left solely with the right to "protest" the proposed "fee or charge." Although subdivision (a)(2) requires the agency to "consider all protests" at the public meeting, we conclude merely having an agency consider a protest — without more — is insufficient to create a mandatory exhaustion requirement.

(*Opinion,* 12 Cal.App.5th at p. 870.)

This is mistaken for two reasons. First, it confuses a meaningful ability to prevail — characteristic of hearings on quasi-judicial matters — with meaningful quasi-legislative procedures, where one never has more than an opportunity to persuade. One can impose his will on a legislature only by initiative or referendum. Second, exhaustion is required whether or not the procedures in issue can afford complete relief. (*Yamaha, supra,* 195 Cal.App.3d at p. 657 [quasi-judicial proceeding before New Motor Vehicle Board].) Exhaustion in local legislative contexts is not limited to those who might successfully persuade decision-makers. (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874–875.)

Even in failing to persuade, those who exhaust administrative procedures accomplish other purposes of the doctrine: making a record, triggering agency expertise, limiting courts' exposure to political disputes. It is the journey, not the destination, that matters most here. The duty to raise issues regardless of the plausibility of a victory is at the core of the exhaustion doctrine and is especially relevant in rate-making, where intertwined policy considerations of revenue stability and fairness compete with cost causation and administrable apportionment. It is always the case that those who bear the burden of the exhaustion requirement think they can get no traction in the hearings they would avoid.

To exonerate Plaintiff rate-payors here as the Opinion does, renders the majority protest and public hearing requirements of

Section 6 meaningless and undermines rather than serves the intent of the voters who adopted it. This Court should affirm the trial court and disavow the Opinion.

C. THE OPINION MISTAKENLY APPLIES THE "COMPREHENSIVE SCHEME OF DISPUTE RESOLUTION" REQUIRED OF QUASI-JUDICIAL PROCESSES TO LEGISLATIVE PROCESSES

The Opinion on review mistakenly applies the "comprehensive scheme" of dispute resolution procedures required in the quasi-judicial context to judicial review of legislation. Exhaustion is required in the legislative context not only because administrative procedures may resolve a dispute without judicial assistance, but to facilitate judicial review just as *Western States'* litigation-on-the-record rule does — developing a record, allowing an agency to apply its expertise, and discouraging sand-bagging. For these reasons, exhaustion is required before judicial review of legislative acts. (E.g., *Sun Pacific, supra,* 77 Cal.App.4th at p. 641 [vector district rate-making]; *Mountain View, supra,* 77 Cal.App.3d at p. 93 [sign ordinance].)

As discussed above, one never has the ability to "win" in a legislative setting; one can only persuade. Requiring a means for an administrative litigant to succeed makes sense in the quasi-judicial setting where there are necessarily winners and losers. It makes no

sense in the legislative setting and is a fundamental error of the Opinion below — by applying a standard no legislative process can satisfy, it effectively limits the exhaustion doctrine to the quasi-judicial context. This has never been the law.

D. THE OPINION ERRONEOUSLY SUGGESTS RATE-MAKING IS NOT LEGISLATIVE

The Opinion on review states:

> None of the parties sufficiently briefed or considered the issue of whether the actions of the District "in imposing or increasing any fee or charge" under section 6 were "legislative" as opposed to "administrative" in nature. (See *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1431–1432 [noting "[l]egislative actions are political in nature, 'declar[ing] a public purpose and mak[ing] provisions for the ways and means of its accomplishment,' " in contrast to administrative actions that "apply law that already exists to determine 'specific rights based upon specific facts ascertained from evidence adduced at a hearing,' " and further noting that, because an amendment of a general plan is deemed a legislative action, plaintiffs were not required to seek an amendment to the general plan to adequately exhaust their administrative

> remedies].) Nor was counsel at oral argument able to respond meaningfully to this issue on questioning by the panel. In any event, because we conclude the administrative remedies in section 6 are inadequate, we need not decide whether the District's actions were legislative, as opposed to administrative, in nature.

(*Opinion*, 12 Cal.App.5th at p. 865, fn. 7, abridgements by Court of Appeal.)

This footnote is wrong in several respects. First, the law is clear that rate-making is quasi-legislative in character, as detailed above. Second, because the adequacy of administrative procedures in the legislative context cannot be judged by rules fashioned for quasi-judicial action, it **was** necessary for the Opinion to resolve the issue. Indeed, its failure to do so is the Opinion's essential error. By applying exhaustion standards for adjudication to find legislative procedures insufficient, the Opinion eliminates the benefits of exhaustion in legislative contexts. This Court should reverse that error by affirming the trial court order sustaining the District's demurrer.

CONCLUSION

The protest hearings required by Proposition 218's Section 6 cannot be ignored by those who would challenge property related fees. Otherwise, the ills this Court warned of in *Western States* will follow: hearings will become meaningless, courts will be overburdened, and agencies will lose the opportunity to defuse disputes without suit and to apply their expertise to facilitate judicial review when disputes cannot be avoided. The exhaustion of remedies doctrine is applied to legislative and quasi-judicial decisions alike. Failing to apply it to Proposition 218 will be costly to courts, agencies, and rate-payers. Because nothing in the text of Proposition 218 requires or suggests deviation from the established exhaustion doctrine, the doctrine applies to fees subject to Section 6.

This Court has recently warned of reading Proposition 218 to reach ends it does not discuss. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 ["local agency" as defined in art. XIII C, § 1 did not reach voters acting by initiative]; *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191 ["property related service" as defined in art. XIII D, § 2 did not include groundwater augmentation].) So, too, here.

Throughout California, city councils, boards of supervisors, and boards of directors of the public agencies represented by Local Government Amici conduct noticed public hearings, listen to their

constituents, consider oral and written protests (and expressions of support), and make vital governmental decisions. Those decisions are commonly subject to procedural requirements and substantive limitations imposed by law — such as those of Section 6. The "power-sharing arrangement" *Bighorn* found Proposition 218 to establish as to property related fees is perhaps more direct than, but not fundamentally different from, the power-sharing arrangements typical of other local legislative decision-making schemas that have long been subject to exhaustion of administrative remedies.

The Opinion on review here disserves both the legislative process by which decisions are made and the judicial process by which they are reviewed. Allowing challengers to ignore Proposition 218 hearings as a "waste of time" will be costly for courts, agencies, and property owners whose rates pay to staff proceedings in every venue. Courts will be overburdened. Agencies already burdened by an extensive and expensive Proposition 218 hearings will fail to benefit from that expense and will not have a fair opportunity to avoid needless litigation. And cutting against the essence of Proposition 218's power-sharing arrangement, ordinary property owners — now at the center of the Proposition 218 protest hearings — will be disempowered by impoverished hearings in favor of parties with the resources and appetite for litigation, who may move disputes readily to our courts.

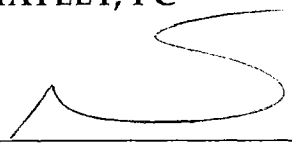
The trial court correctly held that Plaintiff rate-payors cannot challenge the District's rates on theories not raised at the District's protest hearing. Mistaking and confusing established law, however, the Opinion on review here reversed. The duty to exhaust applies to claims under Proposition 218 just as to other constitutional claims.

For these reasons, and for the reasons set forth in the District's briefs, the Local Government Amici respectfully urge this Court to affirm the trial court, reverse the Opinion, and affirm that the duty to exhaust administrative remedies applies under Proposition 218 as in all other areas of local government legislative and quasi-judicial decision-making.

DATED: February 13 , 2018

DANIEL S. HENTSCHKE

COLANTUONO, HIGHSMITH & WHATLEY, PC



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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(b) and 8.204(c), the foregoing Brief of Amicus Curiae in Support of Petitioner contains 6,907 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000-word limit set by rules 8.520(b) and 8.204(c). In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

DATED: February 13 , 2018

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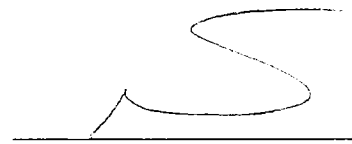

MICHAEL G. COLANTUONO

PROOF OF SERVICE

Eugene G. Plantier, et al., v. Ramona Municipal Water District
Supreme Court Case No. S243360
Fourth District Court of Appeal, Division One, Case No. D069798
San Diego County Superior Court Case No. 37-2014-00083195

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 95945-5091. On February 14, 2018, I served the document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT/RESPONDENT RAMONA MUNICIPAL WATER DISTRICT** on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

X **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope. 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 February 14, 2018, at Grass Valley, California.

Ashley A. Lloyd

SERVICE LIST

Eugene G. Plantier, et al., v. Ramona Municipal Water District
Supreme Court Case No. S243360
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