No. S243360

Exempt from Filing Fees
Government Code §6103

IN THE SUPREME COURT OF CALIFORNIA

Eugene G. Plantier, et al.,

Plaintiffs, Appellants, and Respondents,

v.

Ramona Municipal Water District,

Defendant, Respondent, and Petitioner.

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 & AMICUS CURIAE BRIEF OF MARIN MUNICIPAL WATER DISTRICT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.488, the Marin Municipal Water District and its undersigned counsel certify that, apart from the attorneys representing it (as listed on the cover of this brief) and the property owners and residents receiving services from the Ramona Municipal Water District, they know of no other person or entity that has a financial or other interest in the outcome of the proceeding.

Dated: February 28, 2018

BERTRAND, FOX, ELLIOT, OSMAN & WENZEL

By: _____

Thomas F. Bertrand
Attorneys for Applicant/Amicus Curiae
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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Tani Cantil-Sakauye:

Pursuant to California Rules of Court, Rule 8.520, subdivision (f), the Marin Municipal Water District respectfully requests permission to file an amicus curiae brief in support of Petitioner Ramona Municipal Water District. This application is timely made within 30 days of the filing of the reply brief on the merits.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Marin Municipal Water District in 1912 received its charter as the first municipal water district in California. The District serves the populous eastern corridor of Marin County from the Golden Gate Bridge northward up to, but not including, Novato, and is bounded by the San Francisco Bay in the east and stretches through the San Geronimo Valley to the west. The incorporated cities and towns of San Rafael, Mill Valley, Fairfax, San Anselmo, Ross, Larkspur, Corte Madera, Tiburon, Belvedere, and Sausalito are within the District's 147 square-mile service area.

The District provides high-quality drinking water to over 187,000 customers through over 60,000 accounts. Seventy-five percent of the District's water comes from more than 21,000 acres of protected watershed which flows into one of seven reservoirs and is then treated at one of the District's potable water treatment plants before being delivered to

residential and commercial customers. The District over the years has implemented robust conservation and recycled water programs to maximize the use of local resources and increase water supply reliability.

Currently, the District is the respondent in Marin County Superior Court Action Number CIV-1501914, *Anne Walker v. Marin Municipal Water District*, a Code of Civil Procedure Section 1085 writ action in which petitioner Walker challenged the District's 2011 and 2012 water rate ordinances, contending that the rates violated subdivision (b)(3) of Section 6 of Article XIII D of the California Constitution (Proposition 218). While promulgating the challenged water rate ordinances, the District went to great lengths and expense to comply with all Proposition 218 notice and hearing requirements, including holding numerous hearings and public workshops, none of which Walker bothered to attend. Nor did Walker ever file any type of written protest as provided for by Proposition 218 or otherwise give written or oral notice to the District of any alleged problems with its proposed water rate ordinances. The District then enacted its rate-setting ordinances in 2011 and 2012, securing the revenue necessary to meet its budgetary needs in each of those two years. Four years later, Walker filed a writ action challenging the validity of those ordinances.

On April 7, 2017, the Marin Superior Court filed an exhaustively-researched, 13-page Order Denying Petition For A Writ of Mandate based upon petitioner Walker's failure to exhaust her administrative remedies

under Proposition 218. Judgment was entered in the District's favor on April 21, 2017. However, the Fourth District Court of Appeal's opinion in *Plantier v. Ramona Municipal Water District* (2017) 12 Cal.App.5th 856 was published shortly thereafter. The Marin Superior Court subsequently granted Walker's request for a new trial and vacated the judgment decided in the District's favor, solely on the ground that the Fourth District Court of Appeal's *Plantier* decision "addresses the same issues as th[e] court's April 6, 2017 order, but reaches a different result." The District filed its Notice of Appeal to the First District Court of Appeal (Case No. A152048) on July 25, 2017, appealing the Marin Superior Court's order granting a new trial and vacating the judgment. That appeal is pending.

The duty to exhaust administrative remedies under Proposition 218 is an issue of State-wide importance to numerous local public entities such as applicant Marin Municipal Water District. Accordingly, applicant District respectively requests leave to file its amicus brief that is combined with this application.

Dated: February 28, 2018

BERTRAND, FOX, ELLIOT, OSMAN & WENZEL

By: _____

Thomas F. Bertrand
Attorneys for Applicant/Amicus Curiae
Marin Municipal Water District

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

I.

INTRODUCTION

This case presents the important question of law as to whether a fee payer must first exhaust administrative remedies by participating in the majority protest hearing procedures required for proposed new or increased property-related fees under California Constitution Article XIII D, Section 6, Subdivision (a) (Proposition 218) before challenging the propriety of such fees.

The Fourth District Court of Appeal's Opinion in this case (*Plantier v. Ramona Water District* (2017) 12 Cal.App.5th 856, review granted, hereinafter "the Opinion") is a flawed decision containing multiple legal infirmities. It also directly conflicts with the Fifth District Court of Appeal's decision in *Wallich's Ranch Co. v. Kern County Pest Control District* (2001) 87 Cal.App.4th 878.

As the following authorities and argument demonstrate, significant policy and societal interests compel that the exhaustion doctrine be applied to Proposition 218 cases. The exhaustion doctrine protects both legislative and adjudicative functions by allowing a legislative body to hear the evidence, apply its reasoned discretion and expertise and create a record to facilitate judicial review. This is especially critical in the complex area of rate-making, which is so closely intertwined with many local agencies' budgetary processes.

The duty to exhaust administrative remedies under Proposition 218 is an issue of State-wide importance. Clarity and consistency are particularly wanting in this area affecting all fee-payers, cities, counties, and special districts throughout California. The exhaustion doctrine is grounded in the separation of powers fundamental to our democracy. A long and unbroken line of cases holds that the exhaustion doctrine guards against ills this Court identified in *Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal.4th 559. Absent application of the exhaustion doctrine, hearings on property-related fees required under Article XIII D, Section 6, Subdivision (a) will become meaningless, courts and local governments will be burdened by suits those governments could have avoided, local governments will lose all opportunity to apply their expertise and to make legislative records facilitating judicial review, and local agencies will be impaired in their ability to provide their customers with stable rates and reliable services.

II.

ARGUMENT

Prior to Proposition 218's enactment in 1996, locally-elected governing bodies held most of the power over local revenue-raising measures. Proposition 218 shifted the power over taxation to residents and property owners and specifically gave them the power to prevent or reduce any local tax, assessment, or fee. Proposition 218 ensures a fee imposed

upon property owners shall not be extended, imposed, or increased by any agency unless certain substantive requirements are satisfied. Revenues derived from the fee cannot exceed the funds required to provide the property-related service. (Cal. Const., Art. XIII D, § 6(b)(1).) The amount of the fee imposed on any parcel or person as an incident of property ownership cannot exceed the proportional cost of the service attributable to the parcel. (§ 6(b)(3).) No fee may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. (§ 6(b)(4).) A fee may not be imposed for general government services where the service is available to the public at large in substantially the same manner as it is to property owners. (§ 6(b)(5).)

Significantly, pursuant to Section 6, subdivision (a)(1), local agencies must also comply with the following mandatory procedures before imposing or increasing any fee or charge: (1) identify the parcels on which a fee is proposed; (2) calculate the amount of the fee; and (3) provide written notice by mail of the proposed fee to the record owner of each identified parcel. (§ 6(a)(1).) The written notice must provide the amount of the fee proposed upon each parcel, the basis upon which the proposed fee was calculated, the reason for the fee, and the date, time, and location of the public hearing on the proposed fee. (*Ibid.*)

Section 6 also requires that not less than 45 days after mailing the notice, the agency shall conduct a public hearing regarding the proposed

fee. At this hearing, the agency must consider all protests against the proposed fee. If a majority of the owners of the identified parcels present written protests to the fee, the agency cannot impose the fee. (§ 6(a)(2).) If the agency votes to impose a fee, it has the burden to establish it complied with all of the provisions of Proposition 218. (§ 6(b)(5).)

The foregoing requirements of Proposition 218 have led local government agencies to implement extensive procedures to support, explain, and publicize their rate-setting methodologies and needs for services provided to the public. Many agencies set new or increased fees in conjunction with adoption of an annual budget, and the fee hearings conducted by the agencies are commonly the most heavily attended meetings of the year.

Proposition 218 imposes both substantive and procedural requirements upon the rate-making process. At issue in this case are the procedural requirements which are imposed upon both the local agency and the rate-payer seeking to challenge the agency's proposed rates. These are reciprocal requirements, to be fulfilled by both sides. When a rate-payer fails to uphold his or her part of the procedural requirements under Proposition 218's legislative scheme, then application of the administrative remedy doctrine properly occurs.

A. The Exhaustion Of Administrative Remedy Doctrine

It is well-settled that if an administrative remedy is provided by statute, it must be invoked and exhausted before judicial review of administrative action is available. (*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd.* (1973) 8 Cal.3d 792, 794.) Exhaustion requires a full presentation to the administrative agency of all issues later to be litigated. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.App.4th 597, 609.) This rule is not a matter of judicial discretion, but is rather jurisdictional. (*Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 687 [lawsuit barred because plaintiffs failed to object at city council hearing to an assessment to abate a public nuisance on their property].) "[E]ven where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief." (*Ibid.*, quoting *United States v. Superior Court* (1941) 19 Cal.2d 189, 195.)

"'[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, quoting *Rojo v. Kliger* (1990)

52 Cal.3d 65, 72.) "'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, 1138 [judicial review of charter city assessment], quoting *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.) Even where the administrative remedy may not resolve all issues or provide the precise relief a plaintiff seeks, exhaustion is nevertheless required "because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency." [Citation.] It can serve as a preliminary administrative sifting process [Citation], unearthing the relevant evidence and providing a record which the court may review. [Citation.]'" (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874-75, citations omitted).

While not a Proposition 218 case but a tax appeal case, this Court very recently in *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258 strongly reaffirmed the purpose and application of the exhaustion rule. Stated this Court in its opinion:

> The exhaustion rule "'is not a matter of judicial discretion, but is a fundamental rule of procedure . . . binding upon all courts.'" (*Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 321, 25 Cal.Rptr.3d 320, 106 P.3d 976 (*Campbell*).) We have explained that "[t]he exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not

> interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary). [Citations]." (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391, 6 Cal.Rptr.2d 487, 826 P.2d 730; see also *Rojo v. Kliger* (1990) 52 Cal.3d 65, 83, 276 Cal.Rptr. 130, 801 P.2d 373 [explaining that the exhaustion doctrine advances policy interests such as "easing the burden on the court system, maximizing the use of administrative agency expertise and capability to order and monitor corrective measures, and providing a more economical and less formal means of resolving [a] dispute"]; *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240, 230 Cal.Rptr. 382 [observing that the exhaustion doctrine "'facilitates the development of a complete record that draws on administrative expertise'" and affords "a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review"].)
> (*Id.* at p. 1268.)

Concluded this Court in *Williams & Fickett*:

> Application of the exhaustion rule to the circumstances present here also advances the purposes served by the exhaustion of administrative remedies requirement in general. . . . Where exhaustion is excused, therefore, the predictable result is stale claims like the one before the court in this case. The passage of time can make these claims difficult to adjudicate; it also hinders counties' ability to predict and budget for revenue. (Emphasis added.)
> (*Id.* At pp. 1272–73.)

B. Proposition 218's Administrative Remedy For Rate-Payers

On the local agency's side of the legislative scheme, Article XIII D, Section 6 mandates the following expensive, time-consuming, and robust procedural requirements for new or increased property-related fees:

- Retention of legal and financial advisors, including rate consultants and cost-of-service experts, to provide the record justification for rates required by Article XIII D, Section 6, Subdivision (b)(5) [agency bears burden of proof on fees];
- Development of fee structures to fairly apportion the revenue requirement according to service characteristics reasonably attributable to different classes of users to satisfy the mandate of Article XIII D, Section 6, Subdivision (b)(3);
- Preparing and mailing detailed notices to property owners as required by Article XIII D, Section 6, Subdivision (a)(1);
- Conducting a majority protest hearing on 45-days' mailed notice to all affected customers pursuant to Article XIII D, Section 6, Subdivision (a)(2);
- Responding to public comments as required by Article XIII D, Section 6, Subdivision (a)(2) ["At the public hearing, the agency shall consider all protests against the proposed fee or charge."]; and
- Abandoning the proposed new or increased fee if a majority protest is lodged as required by Article XIII D, Section 6, Subdivision (a)(2).

Thus, local agencies are required to "conduct a public hearing upon the proposed fee or charge." (Cal. Const., Art. XIII D, § 6(a)(2).) They are further required to "consider all protests against the proposed fee or charge" and, if protests had been presented by a majority of owners of the identified parcels, the agency could "not impose the fee or charge." (*Ibid.*) Regardless of whether there is a majority protest, the public hearing and protest requirement for Proposition 218 challenges is mandatory so that local boards of small public agencies have ample opportunity to address and investigate cost-of-service issues before costly litigation brought by ratepayers occurs. (See *Hensel Phelps Const. Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1034 ["We will not adopt a statutory interpretation that renders meaningless a large part of the statutory language."].)

As to the procedural requirements applicable to rate-payers, Proposition 218 shifted significant power away from local governing bodies and put it in the hands of residents and property owners – their participation alone can mandate an outcome. Participation in the public hearing is the centerpiece of Proposition 218's procedural requirements applicable to rate-payers. The constitutional mandate is for the agency board to "consider all protests," not just those of a majority. (§ 6(a)(2).) Rate-payers are required procedurally, at a minimum, to participate in the process by at least lodging a written or oral protest during the rate-making

process. A local agency is unable to consider a protest not made. Any contention that a rate-payer is free to ignore Proposition 218's procedural requirement of lodging a written or oral protest would eviscerate this significant part of Article XIII D, Section 6.

The *Wallich's Ranch* decision of the Fifth District Court of Appeal involved a rate-payer who failed to participate in any way in the rate-making process there involved. Plaintiff Wallich's Ranch alleged, among other things, that the Citrus Pest Control Law (Food & Agr. Code, 5401 et. seq.) violated Proposition 218, specifically Articles XIII C & XIII D (see 87 Cal.App.4th at pp. 878, 882). It was held in *Wallich's Ranch* that plaintiff failed to establish "it had exhausted its administrative remedies, a jurisdictional prerequisite to judicial consideration of the issues." (*Wallich's Ranch*, *supra*, 87 Cal.App.4th at p. 883.) Since the Pest Control Law provided for notice, opportunity to protest, and hearing on the question of the adoption of the proposed budget, the appropriate procedure to oppose the assessment was to challenge the district budget, "at which time the district has an opportunity to address the perceived problems and formulate a resolution." (*Id.* at p. 885.) Accordingly, plaintiff's failure there to "protest or provide any testimony in opposition to the district's budget for any of the fiscal years in question" barred its lawsuit. (*Ibid.*)[1]

[1] While the protest procedures under the Pest Control Law are similar to (continued . . .)

"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 v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.App.4th 489, 510; *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 641 [the proper method of challenging the effectiveness of the plan was "to first exhaust one's remedies by challenging the budget before the district. If the challenge is not initiated then, the district has no opportunity to address the merits of the protest and to modify the plan (and the budget) accordingly."].) As the *Wallich's Ranch* decision (87 Cal.App.4th at p. 885) held:

> The right to protest an assessment after the budget is fixed would be an idle act and could accomplish nothing. The performance of an idle act need not be required.

The time for rate-payers to exercise their right to protest proposed rate ordinances is during the Proposition 218 hearings, when local agencies consider the proposed rates and are required to consider any and all protests. Allowing any rate-payer to bypass the Proposition 218 hearing process and years later proceed to court (seeking a refund) disserves Article XIII D, Section 6 of the Constitution. *Evans v. City of San Jose* (2005) 128

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those in Proposition 218, Proposition 218 goes further to provide that a majority protest bars approval of a proposed fee. This makes the administrative remedy provided by Proposition 218 a more powerful tool, and the need to exhaust this administrative remedy even more justified.

Cal.App.4th 1123, a municipal revenues case, recognized: "The purposes of the [exhaustion] doctrine are not satisfied if the objections are not sufficiently specific so as to allow the Agency the opportunity to evaluate and respond to them." (*Ibid.*, quoting *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447; see also *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198 ["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."]; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019–20 [all legitimate issues must be presented to the agency "to preserve the integrity" of the proceedings and "to endow them with a dignity beyond that of a mere shadow-play"]; see also *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 686 [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."].)

Nor can a rate-payer claim the so-called "futility" exception to the exhaustion requirement. "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 it could be positively stated

that the local agency had declared what the ruling or enactment was going to be in a particular case. (See *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418 [requiring that it be absolutely clear that exhausting administrative remedies would be of no use whatsoever]; see also *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 691 [collecting cases to illustrate the limited circumstances governed by the futility exception].) The exception does not apply simply because favorable agency action is unlikely or even if the agency rejected the desired outcome in earlier cases. If courts excused exhaustion on this ground, the exhaustion requirements would practically disappear, since litigants normally go to court without having exhausted remedies precisely because they believe favorable agency action is unlikely (or they simply prefer to litigate). (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313–14 [cannot infer from county position in court that its assessment appeals board would have rejected plaintiff's claim].)

Proposition 218 hearings are some of the most significant hearings held by the local agency on behalf of rate-payers. They involve extensive preparation by the agency to estimate the anticipated costs and revenues of its utility system. The fees to be charged property owners flow from the

agency's annual budget.[2] The Proposition 218 hearings are attended by agency staff and expert consultants marshalled on behalf of all the rate-payers, and the agency is obliged to consider any protest. This is the opportunity for rate-payers to exercise their right to protest rates and to propose alternatives. The rate-payer's procedurally-required participation will permit the agency to address any claims, develop a factual record, apply its expertise and that of its consultants and allow the community as a whole to consider and weigh in on the claims. The agency and its ratepayers otherwise are denied the opportunity to receive and respond to any objections, and no rate-payer should years later be rewarded by any decision from the Court on those claims which have been withheld from the agency's hearings. Doing so would impoverish the agency's hearings and burden both trial courts and appellate courts years later with newly-stated claims on which the agency had no opportunity to apply its expertise to aid judicial review.

Proposition 218's administrative remedy is designed for legislation like rate-making. It is not like the remedies commonly found in the quasi-judicial context, in which a party has a claim to be appealed from one

[2] See footnote 3 (*infra*, at pp. 22) and the authorities there cited holding that a local agency's adoption of its budget, just like rate-making, is a legislative act.

administrative adjudicator to another. As *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198 explains:

> 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.

The purpose of exhaustion is to ensure public agencies have the opportunity to consider matters within their expertise, respond to objections, and correct any errors before the courts intervene. This protects the separation of powers, prevents surprise to public agencies, and protects courts from having to review technical issues in the first instance, without the benefit of a well-developed record reflecting agency expertise. Proposition 218's remedy is akin to that of the Pest Control Law considered in the *Wallich's Ranch* case. The budget and assessment at issue there were legislative acts, too, and the failure to comment at the budget hearing barred suit to challenge the resulting assessment. *Wallich's Ranch* found this remedy satisfied due process and was sufficient to bar suit if not exhausted.

Nor can a rate-payer persuasively argue that the constitutional nature of Proposition 218 should overcome these rules. First, a Proposition 218 claim was at issue in *Wallich's Ranch*, discussed above. Second, Proposition 218 expressly changes some aspects of judicial review of local legislation. (e.g., Cal. Const., Art. XIII D, § 4(f) and § 6(b)(5) [shifting burden of proof to respondent agency]; *Silicon Valley Taxpayers Ass'n. v.*

Santa Clara County Open Space Authority (2008) 44 Cal.4th 431 [establishing independent judgment review of legislation under Prop. 218].) Had the framers of Proposition 218 – or the voters who approved it – intended to weaken the requirement that rate-payer litigants exhaust administrative remedies, they would have said so, just as they did as to the burden of proof and standard of review. They did not do so. Proposition 218's mandatory protest procedures cannot be disregarded by those who would sue under it.

Like the Pest Control Law, Article XIII D, Section 6, Subdivision (a)(2) states:

> The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

This is more than the notice and comment remedy found sufficient to require exhaustion by the *Wallich's Ranch* decision under the Pest Control Law – it is a mechanism to prevent legislation if a majority protest is mustered. The notice and comment opportunity must be exhausted before challenging a legislative decision, as *Wallich's Ranch* teaches. Moreover, Proposition 218 requires robust notice. It requires 45 days' mailed notice to every customer of:

> [T]he proposed fee or charge . . . the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge. (Art. XIII D, § 6, subd. (a)(l).)

Under Article XIII D, Section 6, Subdivision (b)(3), the "amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service." Further, the agency bears the burden to make a record to demonstrate this fact – a record made at the hearings which a non-participating rate-payer never bothered to attend. (*Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 238 [applying Prop. 13].) It defeats Proposition 218's regulatory scheme to permit such non-participating rate-payers to sue years after fees were enacted when they never participated in this mandatory process and never gave the agency fair notice and an opportunity to consider their claims. Instead, years later they present their technical rate-making arguments to the trial court in the first instance. This is precisely the outcome case law prohibits. (*Western States Petroleum Ass'n, supra,* 9 Cal.4th 559, holding extra-record evidence inadmissible on judicial review of agency action in order to prevent surprise, to allow agency to apply expertise, and to protect courts from having to review technical issues in the first instance.)

C. The Court Of Appeal's Opinion Is Erroneously Decided

1. The Opinion Erroneously Concludes That The Majority Protest Hearing Of Subdivision (a) Provides No Forum To Argue Non-Compliance With The Substantive Rate-Making Requirements Of Subdivision (b)

Under the plain language of Proposition 218, voters imposed detailed procedural (notice and hearing) requirements in Section 6, Subdivision (a) and detailed substantive requirements in Subdivision (b), and clearly intended the two to complement one another. Subdivision (a)(1) procedurally 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." Subdivision (b) provides substantive requirements regarding the "calculation" of property related fees and the "reasons" for which they may be imposed (e.g., they may not exceed the cost of service ((b)(1)); they may not be used for other purposes ((b)(2)), they may not charge any parcel owner more than the proportionate cost of serving him or her ((b)(3)); they may not charge for a service to be provided in the future ((b)(4)) or a service provided to society generally, not just to property owners ((b)(5)). The two subdivisions are of one piece and are plainly intended to be enforced together. The Opinion, however, erroneously truncates and deforms the function of the majority protest hearing required by Article XIII D, Section 6, Subdivision (a):

> [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 at p. 868)

The Opinion's conclusion that the majority protest hearing of Subdivision (a) provides no forum to argue non-compliance with the substantive rate-making rules of Subdivision (b) simply does not make sense.

2. The Opinion Erroneously Concludes That Rate-Payers Need Not Participate In Majority Protests If They Are Unlikely To Achieve Such A Protest

The Opinion suggests the plaintiffs need not participate in the majority protest hearing (i.e., fulfill their half of the procedural requirements of Proposition 218) because they were unlikely to achieve a majority protest. (Opinion at p. 870.) The Opinion states:

> [I]t 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." 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. (*Ibid.*)

This conclusion confuses the meaningful ability to prevail, which is a common characteristic of hearings on quasi-judicial matters, with meaningful procedures in a legislative context. Moreover, exhaustion is required whether or not the procedures in issue can afford complete relief

(*Yamaha Motor Corp. v. Superior Ct.* (1987) 195 Cal.App.3d 652, 657 [quasi-judicial proceeding before New Motor Vehicle Board].) Exhaustion, particularly in legislative contexts, is not limited to those who might actually persuade decision-makers to their point of view. As another Court of Appeal explained:

> Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency. [Citation.] It can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review.
> (*Lodi, supra*, 144 Cal.App.4th at pp. 874–875, citations omitted.)

3. The Opinion Erroneously Concludes That A "Comprehensive Scheme" Of Dispute Resolution Procedures Applicable In The Quasi-Judicial Context Also Applies To Legislative Decision-Making

The Opinion mistakenly applies a requirement for a "comprehensive scheme" of dispute resolution procedures, which only applies in the quasi-judicial context, to legislative decision-making. In the legislative context, exhaustion is required not only because administrative procedures may resolve a dispute without judicial assistance, but also because it facilitates judicial review for the same reasons *Western States'* litigation-on-the-record rule does – developing a record, allowing the agency to review that record in light of its expertise, discouraging surprise and facilitating judicial review.

Exhaustion has often been required before judicial review of legislative acts. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 641 [unlawful delegation challenge to vector district rule-making]; *Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 93 [challenge to local sign ordinance].) The Opinion erroneously applies standards appropriate to quasi-judicial dispute resolution to prevent application of the exhaustion rule in legislative contexts such as rate-making.

4. The Opinion Erroneously Suggests Rate-Making Is Not Legislative

Footnote 7 of the Opinion 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.
> (*Id.* at p. 865)

This footnote is erroneous in several respects. First, if briefing and argument did not address the issue, rehearing was appropriate. (Gov. Code, § 68081.) Second, the law is plain that rate-making is legislative in character.[3] Third, the adequacy of administrative procedures cannot be judged in the legislative context by rules fashioned for the quasi-judicial action, and this was a seminal issue that needed to be decided in this case. Indeed, the Opinion's failure to do so is its essential shortcoming – by applying the standards of the exhaustion rule fashioned for the adjudicatory context to find legislative procedures insufficient, the Opinion eliminates altogether any benefits of the exhaustion rule in legislative contexts such as local agencies' rate-making.

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[3] Local agencies' enactment of water rates are legislative acts. (See, e.g. *Kahn v. East May Mun. Util. Dist.* (1974) 41 Cal.App.3d 397, 409 ["The fixing or refixing of rates for a public service is legislative, or at least quasi legislative."]; see also *Silicon Valley Taxpayers' Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443-444, 448 [establishing and imposing assessment on property is legislative]). Likewise, adoption of a municipal budget by any means–ordinance, resolution, or action stated on the minutes–is a legislative act (*Scott v. Common Council* (1996) 44 Cal.App.4th 684, 693), as is setting utility rates (*Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 139 ["the matter of fixing water rates is ... legislative in character."]); see also, *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2015) 235 Cal.App.4th 523, 572 [An administrative agency's decision to impose a fee, charge, or other exaction is a quasi-legislative act. An agency also exercises quasi-legislative power when it decides how to manage and spend the funds under its control.]

5. The Opinion Fails To Adequately Distinguish *Wallich's Ranch* And Relies Upon Inapplicable Case Authorities

The Opinion's distinction of *Wallich's Ranch* (at pp. 872–874) is unpersuasive. First, the Opinion notes: "the trial court in *Wallich's Ranch* found the district in that case was exempt from Article XIII D (as a result of section 5, subdivision (a), which subdivision is not at issue in the instant case)." [4] (*Id.* at p. 872.) However, the Court of Appeal in *Wallich's Ranch* never addressed this point and thus it did not find that the assessment there was excluded from Proposition 218.

Second, the Opinion cites *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, *as modified* (May 19, 2015), noting it was decided "without discussing or analyzing whether the plaintiff exhausted its administrative remedy in subdivision (a) of section 6 by challenging the new water rates in writing beforehand and/or by appearing at the public hearing of the city." (Opinion at p. 860, fn. 4.) Simply put, the fact in and of itself that the Court in *Capistrano* never discussed the exhaustion remedy is irrelevant. *Capistrano* is persuasive authority for the legal issues it addresses. It is no authority for those it does not. (e.g., *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [cases are not authority for issues they do not consider].)

[4] Section 5, subdivision (a) deals with the "traditional purpose" exception for existing assessments that do not need property owner approval to continue.

Third, the Opinion reads *Wallich's Ranch* from such an antagonistic viewpoint that it attempts to narrow it to its meaningless facts: "Unlike the pest control law [in *Wallich's Ranch*], section 6 does not require an agency such as District to hold an *annual* meeting." (Opinion at p. 873, emphasis in original.) "As such, if an agency such as District decided not to impose a new or increased fee or charge year over year, parcel owners like plaintiffs herein challenging the method used by an agency to determine such fees or charges would have no remedy, adequate or otherwise, under section 6 during such period." (*Ibid.*) However, Proposition 218 hearings must be repeated each time a rate is adopted or increased and may be avoided via an inflation adjustment provision in a fee for only five years. (Cal. Const., Art. XIII D, § 6(a) [hearing before fee adopted or increased]; Gov. Code, § 53756(a) [authorizing inflation adjustments for up to five years].) The distinction between annual hearings and those which occur upon increases and not less than every five years is a legislative one – a line-drawing exercise. It is of no constitutional import. It provides no persuasive basis to distinguish *Wallich's Ranch* – especially as both this case and *Wallich's Ranch* involve legislatively enacted property-related fees subject to the notice and hearing requirements of Article XIII D, Section 6.

Fourth, the Court of Appeal in its Opinion cites and follows the decisions in *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210 and *Unfair Fire Tax Committee v. City of*

Oakland (2006) 136 Cal. App.4th 1424. These decisions are distinguishable, are not on point, and do not apply to the instant case. *Unfair Fire Tax Committee* merely applies to a municipal ordinance the well-established rule that no administrative remedy exists to exhaust if no remedial procedure is provided; Proposition 218's administrative remedy was not considered there (cf. *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734, 735 [holding cases not authority for propositions not considered].) Likewise, *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 235–236, held the municipal charter provision at issue there was a claiming requirement for employees rather than an administrative remedy an employer must exhaust; it has nothing to do with Proposition 218 or a rate-payer's failure to exhaust here. Proposition 218 does provide a remedial procedure required of those who subsequently challenge legislative acts like rate-making: it requires would-be litigants to make protests, compels the legislative body to consider them, and allows suit if those concerns – once raised – remained unredressed. (Cal. Const., Art. XIII D, § 6(b)(2); cf. Pub. Resources Code, § 21177 [exhaustion under the California Environmental Quality Act (CEQA) by public comment before legislative body exercises discretion to certify environmental analysis].) Thus, the authorities cited in the Opinion merely recite established law applicable when no remedy is provided or a

plaintiff in fact puts an agency on notice of the substance of her claims; none involves Proposition 218.

Proposition 218's remedy is part of a comprehensive constitutional regulatory rate-setting scheme applicable to quasi-legislative acts, but does not involve quasi-judicial administrative acts; it is a remedy to be exhausted nonetheless.[5] As *Langsam v. City of Sausalito* (1987) 190 Cal.App.3d 871, 879 states:

> As our California Supreme Court has observed, ". . . the distinction between the quasi-legislative and quasi-judicial decision contemplates the function performed rather than the area of performance; . . ." (*Pitts v. Perluss, supra*, 58 Cal.2d at p. 834). Putting the matter another way, the mere fact that an agency proceeding may contain certain characteristics of the judicial process does not convert the proceeding into a quasi-judicial function. (Emphasis added.)

This constitutional rate-setting scheme under Proposition 218 fosters informed decision-making by assuring that the governing bodies have adequate information from protesting rate-payers upon which to base rate-making decisions. It forces decision-makers to create a record, review the entire record, respond to citizen concerns, and apply agency expertise

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[5] The *City of Oakland* (*supra*, 224 Cal.App.4th at p. 237) decision notes that "[t]he cases cited by the Association and the Board in which exhaustion was required are distinguishable as involving challenges brought in the context of comprehensive regulatory schemes . . . . [Citation to *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464 and CEQA scheme, as well as *Woodard v. Broadway Federal Savings & Loan Ass'n of Los Angeles* (1952) 111 Cal.App.2d 218 and comprehensive federal banking regulatory scheme]."

before making a final decision. The exhaustion doctrine contributes to this objective by requiring that rate-payers who would hold the government accountable for its actions, to participate in the decision-making process, marshal their claims and their evidence, allow the government an opportunity to consider those claims and evidence, develop complementary evidence if need be, and make an adequate record to facilitate efficient judicial review. Only then may a rate-payer sue.

6. The Opinion Sows Confusion And Discord In Proposition 218 Cases

The tension between the Opinion and *Wallich's Ranch* is plain. Courts, litigants, and local governments are left to wonder what aspects of *Wallich's Ranch* facts required exhaustion there and what aspects of the hearing requirements of Article XIII D, Section 6, Subdivision (a) are insufficient to require exhaustion on the facts of this and other water, sewer, and trash rate-making cases. The Opinion fundamentally confounds basic principles of administrative law, creating uncertainty for local governments and those who depend on their services, and makes litigation more likely and more burdensome. It affects all California local governments and, given the relation of Propositions 218 and 26, the State as well.

The Opinion would confine the exhaustion doctrine to half its historic sphere – limiting it to quasi-judicial acts and excluding legislative acts. However, a long and unbroken line of cases demonstrates the

exhaustion doctrine guards against ills the Supreme Court identified in *Western States.* If the Opinion is the law, as *Western States* warns, the hearings on property-related fees required by Article XIII D, Section 6, Subdivision (a) will become meaningless, courts and local governments will be burdened by suits those governments might have avoided, and local governments will lose all opportunity to apply expertise and to make legislative records to facilitate judicial review.

The exhaustion doctrine is grounded in the separation of powers. (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 76 [judicial review of state legislation].) Local legislative bodies make discretionary, policy-laden choices from a range of lawful options – perhaps especially so when setting rates for government services. (*Kahn v. East Bay Mun. Util. Dist.* (1974) 41 Cal.App.3d 397, 409 [judicial review of water rates under common law]; *Durant v. Beverly Hills* (1940) 39 Cal.App.2d 133, 139 [same] ["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."].) Judicial review of legislative acts is limited to the record of the legislative proceedings. (*Western States, supra,* 9 Cal.4th at p. 573.)

While Proposition 218 expressly changed some substantive requirements for rate-setting (Cal. Const., Art. XIII D, § 6(b)), it did not change the respective roles of local legislative bodies and the courts.

(*Capistrano Taxpayers Association, Inc., supra,* 235 Cal.App.4th at pp. 1512-1513 [Prop. 218 challenge to water rates].) No amendment to Article VI of our Constitution appears in Proposition 218, nor does any amendment to Article II.

The exhaustion doctrine protects legislative functions by allowing a legislative body to marshal its evidence, apply its reasoned discretion and expertise, and create a record to facilitate judicial review. This is perhaps especially valuable in rate-making cases because these decisions are among the most technical and fraught that a government makes. As this Court in *20th Century Ins. v. Garamendi* (1994) 8 Cal.4th 216, 293 explained in a Proposition 103 dispute:

> "The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties." (*Duquesne Light Co. v. Barasch, supra*, 488 U.S. at p. 314, 109 S. Ct. at p. 619.) And, of course, courts are not equipped to carry out such a task. (See, e.g., *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1166, 278 Cal.Rptr. 614, 805 P.2d 873 [stating that "we are ill equipped to make" "microeconomic decisions"].)

One need only look as far as the typical administrative record of any local agency to see just how complex the rate-setting process can be. The agency's rate-setting consultant reviews and analyzes thousands of pages of documents and many more of its financial data points, to design its rate-setting model. Further and most significantly, the agency's rate-setting and budgetary processes are inextricably intertwined. They are mated both

temporally and substantively. Sufficient revenue must be generated to meet the agency's costs in any given fiscal year, and this complex and constantly-evolving process must be made Proposition 218-compliant.

The exhaustion doctrine, applied in Proposition 218 cases with their concomitant budgetary processes, "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 [review of DFEH adjudication of labor claim], citing *Rojo v. Kliger* (1990) 52 Cal.3d 65, 72 [same].) Even if an administrative remedy cannot resolve all issues or provide the precise relief a plaintiff seeks (as is typically true of legislative decisions), exhaustion is nevertheless required:

> [B]ecause it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency. [Citation.] It can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review.
> (*Lodi, supra*, 144 Cal.App.4th at pp. 874–875, citations omitted.)

The notice and hearing requirements mandated by Proposition 218 are arduous, time-consuming, and expensive. A local agency typically will first hire, at considerable cost, the best rate consultant it can find to assure

that its rate-making process is Proposition 218-compliant. This consultant over many months then will review and analyze an enormous amount of data in order to prepare a Proposition 218-compliant rate model. The agency next mails to each of its customers detailed and proper Proposition 218 notices as to the rates proposed, and also usually publishes media notices and place additional notices in customers' bills. Multiple public meetings typically are noticed and held. Additional special community workshops on the proposed rates are commonly convened. A vast amount of staff time is consumed by this process. The rate consultant also usually is paid to appear at the public meetings. Detailed presentations are often given to the public with handouts and visual presentations loaded with graphs, charts and data. All customer letters are received, reviewed, and tabulated per Proposition 218's requirements.

What is the point or purpose of all of these robust and expensive notice, hearing, and majority-protest requirements if a totally non-participating customer years later is permitted to file a legal challenge to rates and budgets long-since enacted, implemented and then superseded? Such an ill is inimical to any local agency's ability to plan and execute fiscally-sound decisions assuring its financial stability and the reliable delivery of essential public services such as a potable water supply. The agency's many other customers are adversely impacted by see-sawing rates and topsy-turvy financial conditions when such a customer refuses to

participate in the Proposition 218 process or share objections but then years later files a lawsuit. This is precisely the type of harm the exhaustion doctrine is designed to prevent. Proposition 218's administrative remedies are robust, and any local agency which ignores its customers' well-founded protests is acting at its peril. An agency, however, cannot correct a protest never made. Nor can it be expected to function in a financially stable manner when years later it is subject to costly legal challenges it readily could have addressed during the relevant rate-setting process.

Upholding the Court of Appeal's Opinion would permit circumvention of both the robust procedural requirements of Proposition 218 and the entire judicial policy behind the exhaustion doctrine, as well as inject instability and uncertainty into every agency's good-faith efforts to provide their customers with reliable services at stable rates.

III.

CONCLUSION

Amicus Marin Municipal Water District respectfully urges this Court to reverse the Court of Appeal's Opinion in this case and affirm that the duty to exhaust administrative remedies applies in disputes under Proposition 218 as in all other areas of local government legislative and quasi-judicial decision-making.

Respectfully submitted,

Dated: February 28, 2018 By: _____
Mary R. Casey (SBN 104285),
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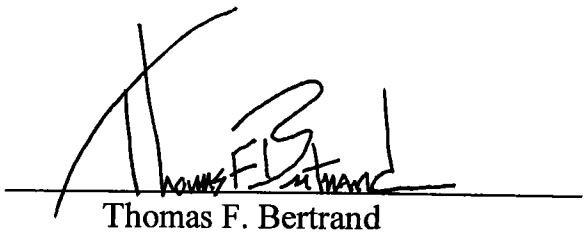
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.520(b) and 8.204(c), the foregoing Brief of Amicus Curiae contains 7,615 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, Statement of Interest, 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 16, included in Microsoft Office 2016.

Dated: February 28, 2018



Thomas F. Bertrand

PROOF OF SERVICE

I, the undersigned, declare that I am employed in the County of San Francisco, California; I am over the age of eighteen years and not a party to the within cause; and my business address is 2749 Hyde Street, San Francisco, California 94109.

I am readily familiar with the practice of Bertrand, Fox, Elliot, Osman & Wenzel with respect to the collection and processing of pleadings, discovery documents, motions and all other documents which must be served upon opposing parties or other counsel in litigation. On the same day that briefs are placed for collection and mailing, they are deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

On **March 1, 2018**, I served the following document(s):

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Said service was performed in the following manner:

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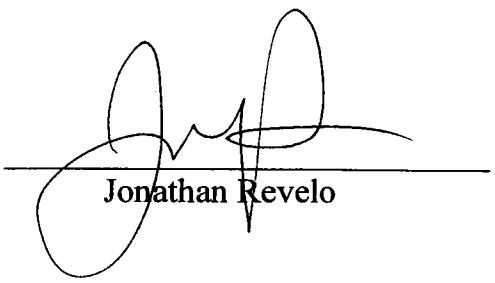

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