No. S263734

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HILL RHF HOUSING PARTNERS, L.P. et al.,
Petitioners and Appellants

vs.

CITY OF LOS ANGELES; et al.,
Defendants and Respondents.

MESA RHF PARTNERS, L.P. et al.,
Petitioners and Appellants

vs.

CITY OF LOS ANGELES; et al.,
Defendants and Respondents.

Second District Court of Appeal
Case Nos. B295181, B295315
Los Angeles County Superior Court
Case Nos. BS170127 and BS170352
Hon. Mitchell L. Beckloff, Presiding
Hon. Amy D. Hogue, Presiding

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INTRODUCTION

Proposition 218 provides an administrative remedy which requires: (1) notice of a proposed assessment; (2) 45 days' mailed notice of a hearing at which assessees may challenge the proposed assessment; (3) opportunity for written or oral challenges; and (4) the local agency to consider all such challenges. (Cal. Const., art. XIII D, § 4.) Moreover, the local agency may reject an assessment, even absent majority protest. This is an adequate remedy; under longstanding law, it must be exhausted before suit.

Our courts have long held that one challenging an agency's decision — whether legislative or quasi-judicial — must participate in its decision-making and exhaust all available administrative remedies before suit. The duty applies whenever those affected by action have notice and opportunity to be heard before a decision is made and government can meaningfully address concerns raised. Those affected by government action must appear at the hearing and articulate specific reasons the government should change its proposed actions — so called "issue exhaustion." The exhaustion rule ensures informed agency decision-making, encourages public participation, and allows agencies to respond to criticism and concerns, defuse disputes where possible, apply their expertise, and develop records for judicial review when litigation cannot be avoided. It serves the separation of powers fundamental to our democracy by aiding judicial review and protecting courts from

being drawn too readily and too soon into disputes the political branches might resolve.

Proposition 218 requires local agencies to conduct a noticed public hearing before imposing or increasing an assessment or a property-related fee. (Cal Const., art. XIII D, § 4, subd. (e) [assessments], § 6, subd. (a) [property-related fees].) The voters who approved Proposition 218 reserved to themselves the rights both to vote and to participate in decision-making before government levies any new or increased assessment or property-related fee. These mandatory hearings are a two-way street, like all administrative decision-making. The government cannot later justify an assessment on grounds not raised during the assessment process, but is limited to the record on which it legislated (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559 ("*Western States*")), and under the exhaustion rule, assessees cannot rely on reasoning they never provided government. As public agencies cannot consider a protest never made, disgruntled assessees must voice their objections to the agency before suit.

Petitioners here submitted "no" ballots on the assessments they challenge, but did no more. They failed to object in writing or orally at the hearings or to identify any basis for their objection. For all the City knew, these protestors thought the assessments legal, but undesirable on policy grounds. Accordingly, the Court of Appeal properly dismissed their suit for failure to exhaust. The City and the

contract operators of the two business improvement districts to be funded here (collectively, "Respondents") respectfully request that this Court affirm and conclude the Court of Appeal's opinion applies established law, rather than newly fashioning it and, therefore, has retroactive effect.

FACTUAL BACKGROUND

On petition of the assessed businesses, the Los Angeles City Council established the Downtown Center Business Improvement District ("DCBID") and San Pedro Business Improvement District ("SPBID") under the Property and Business Improvement District Law of 1994 (Sts. & Hy. Code, §§ 36600 et seq.) ("PBID Law") and article XIII D,[1] adopted by 1996's Proposition 218 (the "Right to Vote on Taxes Act").[2] Both allow for the creation of districts funded by assessments on real property[3] to promote economic revitalization and physical maintenance of business districts. (E.g., *Epstein v.*

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[1] References to articles are to the California Constitution.

[2] BIDs may be property-based — funded by assessments collected from property owners via the property tax roll — or non-property based, typically collected by a surcharge on business license taxes. Proposition 218 applies only to assessments on property. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, 394.) The BIDs disputed here are property-based business improvement districts or "PBIDs."

[3] Assessments need not be on real property, but Proposition 218 governs only those that are. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230.)

Hollywood Entertainment Dist. II Business Improvement Dist. (2001) 87 Cal.App.4th 862, 865.) Given strained municipal budgets, such districts have become essential to fund needed services such as supplemental security, graffiti abatement, and street cleaning. More than four dozen exist in Los Angeles;[4] myriad exist around California.[5]

The PBID Law and article XIII D — along with its implementing statute, Government Code section 53753— establish a comprehensive procedure cities and counties must follow to create a BID. Respondents complied with these elaborate statutory and constitutional procedures to successfully renew the assessments challenged here. Assessed businesses approved them by overwhelming margins — 94.17 percent of the weighted vote for DCBID; 80.69 percent for SPBID. (AR00168; SP00193.)[6] These

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[4] The City maintains an interactive map of these on its website at <https://clerk.lacity.org/business-improvement-districts/find-business-improvement-district> (as of Jan. 2, 2021).

[5] A consulting firm that aids local government and businesses in forming BIDs published a list of doxes of BIDs in California in 2016. <https://civitasadvisors.com/wp-content/uploads/2016/11/PBID_Matrix_12_20_2016.pdf> (as of Jan. 2, 2021).

[6] Citations to the Appellants' Appendix in *Hill RHF* are in the form "Hill RHF AA:[Page(s).];" to that in *Mesa RHF* as "Mesa RHF AA:[Page(s).];" to the Reporter's Transcript as "RT at [Page(s).];" to the Administrative Record in *Hill RHF* as "AR:[Bates No.];" and to that in *Mesa RHF* as "SP:[Bates No.]."

extraordinary levels of support demonstrate that nearly all assessed property owners value, and wish to pay for, BID services. Had a majority of the weighted vote of assessees opposed renewal of either assessment, the City Council would have been obliged to reject it. (Cal. Const., art. XIII D, § 4, subd. (e).)

As assessed owners of property within the BIDs, Petitioners had opportunity to vote for or against the renewals, which they did by voting "no." (AR00292–294; SP00193, SP00211.) However, they did no more. They did not otherwise participate in the comprehensive protest and hearing process, providing no written or oral comment before or after the hearing as to their concerns, depriving the City of the opportunity to evaluate and respond to their objections. As the Court of Appeal properly held, Petitioners' failure to inform the City of reasons for their objections did not exhaust administrative remedies as it served none of the policy bases of the exhaustion requirement.

I. DOWNTOWN CENTER BID

A. DCBID Provides Instrumental Services to Downtown Los Angeles

Founded in 1998, DCBID serves nearly 1,700 property owners in Downtown Los Angeles. (AR00026.) It was a principal driver of Downtown Los Angeles' renaissance, and instrumental in transforming it into the vibrant area it is today. Bounded by the Harbor Freeway to the west, First Street to the north, Main and Hill

Streets to the east, and Olympic Boulevard and 9th Street to the south, DCBID enhances the business environment and quality of life of 65 City blocks, serving 2,865 parcels. (AR00026; AR00039–41.)

Like its predecessors, DCBID allows property owners to assess themselves to fund services including the 24/7 "purple shirt" safety patrol, street and sidewalk cleaning, trash removal, and marketing and business recruitment — services over and above those the City provides. (AR00033–34; AR00042–48.) Over its 20-year existence, DCBID has responded to hundreds of thousands of calls for safety service, trimmed hundreds of trees annually, cleaned over 470 miles of sidewalks, and removed 53,000 bags of trash annually. (AR00264–265.)

As the Engineer's Report details, DCBID services include:

CLEAN AND SAFE PROGRAMS. The Clean Program provides sidewalk cleaning; trash collection; removal of graffiti, stickers, and flyers; beautification; and landscaping. (AR00097–99.) In Petitioners' zone of the District (there are two), parcels receive approximately 200 additional hours annually above the City's baseline of sidewalk sweeping, sidewalk cleaning, and graffiti removal. (AR00098.) The Safe Team Program provides security services, including bicycle patrols, nighttime vehicle patrol, and downtown ambassadors in highly visible purple shirts. The program is intended to prevent, deter, and report crime on the streets, sidewalks, storefronts, parking lots and alleys, employing a "broken windows" theory that

minor social disorder, if not quickly addressed, invites more serious urban decay. (AR00097.) The two District zones receive the same services to supplement, not replace, the City's police and sanitation services. (AR00097.)

ECONOMIC DEVELOPMENT AND MARKETING. These programs promote the District's identity and improve marketability of the goods and services property owners and their tenants provide. (AR00099.) They aim to attract people to shop, eat, work, learn, or live there. These include, inter alia, newsletters, other public relations materials, information kiosks, maps, website design and operation, special events, advertising, and economic studies and planning (AR00099-101, 116.)

MANAGEMENT AND ADMINISTRATION. District improvements and activities are managed by professional staff, with management support. (AR00101.) Management and administration services cover personnel costs, office space, insurance, and other City and operating fees incurred to collect assessments and operate the BID, which operates like a mini-government with meetings subject to the Ralph M. Brown Act and records open to public inspection. (AR00101, 116; Sts. & Hy. Code, § 36612 [subjecting non-profit operators of BIDs to Brown Act and Public Records Act].)

The Engineer's Report extensively analyzed the special benefit to each parcel in the DCBID derived from the assessment-funded services, assessing each only for the cost of proportional special

benefit received pursuant to article XIII D, § 4, subd. (a). (AR00097–101, 110–115.) The Report found assessed parcels specially benefit from BID services, programs, and improvements, and should each be assessed (excepting a few publicly owned parcels). (AR00110–112, 118–119.)

B. DCBID's Assessees Overwhelmingly Approve Renewal

DCBID mailed petitions to District property owners seeking an election to renew the DCBID for a fifth term beginning January 1, 2018.[7] (AR00026; AR000261.) Reflecting deep support for the District among assessed property owners, 67.58 percent of them — subject to $4,523,895 of annual assessments — petitioned for renewal. (AR00026.)

Upon the City's receipt of a sufficient petition, statute required it to conduct a hearing and to consider extending the DCBID. (Sts. & Hy. Code, §§ 36621 [district formation and renewal]; 36624 [assessment]; Cal. Const., art. XIII D, § 4, subd. (e) [same].) To do so, the City Council was required to approve an Engineer's Report, a district management plan, and annual assessment amounts. (Cal. Const., art. XIII D, § 4, subds. (b), (c); Sts. & Hy. Code, § 36630; AR00160–161.) A professional engineer with over 50 years'

[7] The Streets & Highways Code limits BIDs to five-year initial and 10-year renewal terms, but property owners may petition for shorter terms. (Sts. & Hy. Code, § 36633, subd. (h).)

experience prepared a detailed, 59-page Engineer's Report describing the BID's setting, purpose, boundaries, services, special benefits conferred on parcels, and assessment. (AR00091.) A 58-page Management District Plan detailed the BID's implementation. (AR00031.)

The City mailed ballots to record owners of property in DCBID, including Petitioners. Hill RHF owns 255 S. Hill Street ("Angelus Plaza"), and Olive RHF owns 200 S. Olive Street ("Angelus Plaza North"), residential rental properties for low-income seniors. (AR00293–294.) A summary of the Management District Plan and Engineer's Report accompanied the ballots — complete copies were previously mailed with the petition. (AR00261, 271.)

The City also mailed District property owners notice of the hearing on the renewal of the DCBID and its assessment. (AR000271.) The notice stated ballots would be tabulated at the close of the hearing, and — as article XIII D, section 4, subdivision (e) requires — would be weighted according to the amount each property owner was to pay. (AR000271.)

> The notice summarized the Management District Plan, which includes the assessment formula, the total amount of the proposed assessment chargeable to the entire District, the duration of the payments, the reason for the assessment, the basis upon which the amount of

the proposed assessment was calculated, and the amount chargeable to each parcel … .

(AR000271; AR00275–292.) The notice also included an internet link to the complete Management District Plan and Engineer's Report. (AR00275.) This, too, complied with Proposition 218. (Cal. Const., art. XIII D, § 4, subd. (c).)

C. Hill RHF and Olive RHF Vote "No," But Submit No Written or Oral Objections to Renewal

Pursuant to Streets & Highways Code section 36623, the City Council held a hearing to allow interested persons to "present written or oral testimony" and at which the Council was obliged to "consider all objections or protests to the proposed assessment." (Cal. Const., art. XIII D, § 4, subd. (e); cf. *Plantier v. Ramona Municipal Water Dist*. (2019) 7 Cal.5th 372, 385–386 [construing art. XIII D, § 6] ("*Plaintier*"); AR00161, AR00255.) Because the District is well established and its services broadly valued, **no** written protests, and only four speaker cards, were submitted at the hearing. (AR00168.)

Hill RHF's and Olive RHF's commercially-zoned property has been within DCBID boundaries since its inception 20+ years ago. Each had opportunity to voice opposition, but neither filed a protest or voiced concern orally. (AR00161–162, 168; AR00255.) They voted "no," and did nothing else. (AR00292–294.)

After the hearing, the City Clerk tabulated the ballots. (AR00162.) The District includes 2,865 parcels owned by 1,710

stakeholders. Of these, 243 cast unweighted ballots supporting, and 98 opposing, renewal. (AR00168.) When weighted as Proposition 218 requires, **94.17 percent** voted for renewal and just 5.83 percent opposed. (AR00168; Cal. Const., art. XIII D, § 4, subd. (e) [final sentence].) The City Council then adopted Ordinance No. 185006, renewing the District and its assessment for 10 years. (AR00255–258.)

II. SAN PEDRO BID

A. SPBID Serves Historic Downtown San Pedro

SPBID's services are similar to DCBID's. Founded in 2007, the San Pedro Property Owners Alliance serves nearly 270 property owners of 804 parcels in the San Pedro neighborhood near Los Angeles harbor. (SP00012; SP00019.) SPBID was a principal driver in the renaissance of Historic Downtown San Pedro. It serves some 30 blocks of primarily commercial property along the coast, bounded by Vincent Thomas Bridge / Seaside Freeway to the north and Cabrillo State Beach to the south. (SP00012.)

As the Engineer's Report details, SPBID provides Visitor, Ambassador and Security Services; Sanitation, Beautification and Capital Improvements; Marketing and Special Events; and Administration and District Management, similar to DCBID's detailed above. (SP00115–119.)

B. SPBID's Assessees Overwhelmingly Approve Renewal

SPBID's approval process was like that for DCBID. SPBID mailed petitions to property owners seeking an election to renew the SPBID a third time, for a 10-year term beginning January 1, 2018. (SP00012; SP00019; SP00225.) Reflecting the District's deep support, 63.28% of assessed property owners — obliged for $806,290 in annual assessments — petitioned for renewal. (SP00012.) A professional engineer with over 30 years' experience prepared a detailed 79-page Engineer's Report describing the BID's setting, purpose, boundaries, services, special benefits conferred, and assessment methodology. (SP00109, SP00097–176.) A 76-page Management District Plan detailed implementation of the renewed BID. (SP00017–93.)

The City mailed ballots to property owners in SPBID, including Petitioner Mesa RHF's property at 340 South Mesa Street, a low-income-senior apartment building. (SP00211; SP00223.) The Management District Plan and Engineer's Report accompanied the ballots. (*Ibid*.) The City also mailed District property owners notice of a hearing on the proposed renewal. (SP00183.)

C. Mesa RHF Votes "No," But Submits No Written or Oral Objection

Pursuant to Streets & Highways Code section 36623, City Council held a hearing to allow interested persons opportunity to

"present written or oral testimony" and for the City Council to "consider all objections or protests to the proposed assessment." (SP00183.) Because the District is well established and its services broadly valued, only two persons spoke against, and **no** written protests were submitted. (SP00193.)

SPBID has served Mesa RHF's apartment building over the 12 years of its existence. Mesa RHF had opportunity to voice opposition, but did not. (SP00193.) It merely voted "no." (SP00211.)

After the hearing, the City Clerk tabulated ballots. (*Ibid*.) The District's 270 owners of 804 parcels submitted 50 unweighted ballots supporting, and 40 opposing, renewal. (SP00182, 193.) When weighted as Proposition 218 requires, **80.69 percent** voted for renewal; only 19.31 percent opposed. (SP00193.) The City Council then adopted Ordinance No. 185047 extending the assessment for 10 years. (SP00223–226.)

PROCEDURAL HISTORY

Petitioners sue in traditional mandate to challenge renewal of the two BIDs and the levy of assessments to fund their services to assessed property owners. They sought dissolution of the BIDs under Proposition 218, article XIII D, citing *Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431 ("*Silicon Valley*").

The trial court denied relief[8], concluding:

- 2014 amendments to the Streets and Highways Code are constitutional;
- the BIDs specially benefit assessed parcels;
- the assessments allocate special benefit in light of differing characteristics of property; and
- the engineer's reports quantify those benefits and allocate assessments in proportion to each parcel's share of special benefit.

(Hill RHF AA:553; Mesa RHF AA:524.)

Most fundamentally, the judge found *Dahms v. Downtown Pomona Property & Business Improvement District* (2009) 174 Cal.App.4th 708 ("*Dahms*") "eviscerates" Petitioners' claims. *Dahms* upheld a substantially similar BID against a Proposition 218 challenge. The trial court here found DCBID's and SPBID's engineer's reports and district management plans adequately distinguished special from general benefits flowing from BID services, evaluated the benefits those services conferred on parcels, and properly allocated assessments in proportion to the special benefit each parcel received, providing substantial record support

[8] The two cases were initially assigned to the Hon. Amy D. Hogue, who issued preliminary rulings and trial scheduling orders. By the time of trial, the cases had been reassigned to the Hon. Mitchell L. Beckloff, who issued the rulings Petitioners challenge here.

for these findings of compliance with Proposition 218. (Hill RHF AA:553–566; Mesa RHF AA:548–576.)

The Court of Appeal affirmed in the two consolidated cases, concluding Petitioners failed to exhaust administrative remedies, *Hill RHF Housing Partners, L.P. et al. v. City of Los Angeles, et al.* (No. B295181) and *Mesa RHF Partners, L.P. v. City of Los Angeles, et al*. (No. B295315). *(Hill RHF Housing Partners, L.P., et al. v. City of Los Angeles, et al*. (2020) 51 Cal.App.5th 621 ("*Hill RHF*").) The appellate court affirmed the judgments on that ground, not reaching the merits.

The appellate court concluded one who would challenge an assessment under Proposition 218 must first exhaust administrative remedies. An assessee must file a written protest or appear at the public hearing and articulate his legal theories. (*Hill RHF, supra,* 51 Cal.App.5th at p. 634.) Simply voting "no" did not suffice. (*Ibid.*)

The appellate court also found that, while the property owners voted "no," they never expressed any concern these assessments violated any law. (*Hill RHF, supra,* 51 Cal.App.5th at p. 634.) Proposition 218 and its implementing statute, Government Code section 53753, require an assessing agency to mail notice of a hearing on the proposed assessment to the owner of every assessed parcel. (Cal. Const., art. XIII D, § 4, subd. (c).) The notice must summarize procedures for completion, return, and tabulation of ballots, and state that a majority protest will defeat the assessment. (*Ibid*.) At the hearing, the agency must "consider all protests against

the proposed assessment and tabulate the ballots." (*Id*., subd. (e).) Government Code section 53753 provides: "At the public hearing, any person shall be permitted to present written or oral testimony." The PBID Law has similar notice-and-hearing requirements. (Sts. & Hy. Code, § 36623, subd. (a).)

The Court of Appeal's opinion recites long-established law requiring exhaustion of administrative remedies, noting exhaustion allows agencies to reach a reasoned and final conclusion on each issue, to apply its expertise, and to make a full record facilitating judicial review. Citing a fresh precedent of this Court involving property taxes, it wrote:

> As in *Williams & Fickett* [*v. County of Fresno* (2017) 2 Cal.5th 1258], we conclude that the procedure outlined in the PBID Law "bespeaks a legislative determination that the [City] should, in the first instance, pass on" the questions Hill, Olive, and Mesa present in their petitions, "or decide that it need not do so."

(*Hill RHF, supra,* 51 Cal.App.5th at p. 632.) Voting against BID renewal — or even the assessment — without participating in the hearing or identifying particular concerns, was not sufficient. The appellate court reasoned that allowing a "no" vote alone to constitute exhaustion would frustrate the purpose of the rule to allow an agency to consider all concerns and to address them,

perhaps avoiding litigation or, at least, making a complete record for judicial review. (*Id.* at pp. 633–634.)

ARGUMENT

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

Petitioners attack well-settled law. If an administrative remedy is provided — expressly or impliedly — it must be exhausted before suit. (*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd.* (1973) 8 Cal.3d 792, 794.) Exhaustion is jurisdictional, not a matter of judicial discretion. (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 496 [exhaustion is "a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts."] ("*Sierra Club*").) It applies equally to constitutional challenges, like this Proposition 218 suit. (*Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 93 ("*Mountain View*").)

A. When an Administrative Remedy is Provided, it Must Be Fully Invoked

California courts have long held a challenger must participate fully in administrative decision-making and demonstrate that suit is on grounds and evidence presented to the decisionmaker. (*Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1264 ("*Williams &*

Fickett").) This is so even if an administrative remedy 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.)

The rule requires full participation. Exhaustion requires "termination of all available, nonduplicative administrative review procedures." (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080; *Acme Fill Corp. v. San Francisco Bay Conservation etc. Com.* (1986) 187 Cal.App.3d 1056, 1064.) Courts look to statutory language and legislative intent to determine the steps required before suit. (*Williams & Fickett*, *supra*, 2 Cal.5th at p. 1271.) And even absent express reference to an administrative remedy, one may be inferred. (*Ibid.*; *Flores v. Los Angeles Turf Club, Inc.* (1961) 55 Cal.2d 736, 747.)

Williams & Fickett is instructive. There, this Court considered whether the "nullity" exception excused a taxpayer who asserted it did not own the taxed property from appealing to an assessment appeals board, normally tasked to resolve disputes over property valuation. (2 Cal.5th at p. 1264.) Statute articulated the

administrative procedures — exhaustion required appeal to the assessment appeals board under Revenue and Taxation Code section 1602, and an administrative refund claim under Revenue and Taxation Code section 5097. (*Ibid*.) The taxpayer argued exhaustion would not serve the purpose of the exhaustion rule. This Court disagreed, explaining that even though the taxpayer's challenge raised no valuation question implicating the board's expertise, exhaustion was nevertheless required because the property ownership question was within the board's jurisdiction:

> [A]gainst the backdrop of the general rule that requires the exhaustion of adequate administrative remedies, the statutory scheme for assessment appeals evinces the Legislature's intent that disputes such as the one at bar be presented, in the first instance, to a county board through the assessment appeal process.
>
> … .
>
> The statutory procedures associated with assessment appeals connote that the central responsibility of county boards is to decide questions of valuation. (E.g., § 1603, subd. (a).) But when a party seeks a reduction in an assessment on the local roll, pure questions of valuation are often inextricably connected to related issues of fact, such as whether a change in ownership has occurred, whether property has been properly classified, and

> whether a taxpayer in fact owns assessed property. The statutory scheme recognizes the authority of the county boards to decide these issues.

(*Id.* at pp. 1267–1269.)

Exhaustion also requires more than generalized objections at a hearing; one must raise specific grounds — so-called "issue exhaustion." (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197 [generalized environmental comments at hearing inadequate to exhaust for CEQA challenge to EIR] ("*Coalition for Student Action*"); *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 615–616 [hearing participants not held to standards as lawyers in court, but must make known what facts are contested] ("*California Native Plant Society*"); *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019–1020 ["It was never contemplated that a party to an administrative hearing should withhold any defense … or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court."].) Exhaustion thus 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.)

San Franciscans Upholding the Downtown Plan v. City & County of San Francisco (2002) 102 Cal.App.4th 656, 686 rejected attack on

reports drafted by that city's financial expert because plaintiffs did not present a contrary financial analysis at the 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.

The rationale for complete — not partial or cursory — exhaustion is to promote the policy reasons for the rule. None are served by incomplete or inaccurate protests by those who simply check a box and articulate their concerns for the first time in court, as here.

B. Complete Exhaustion is Vital to Promote Administrative Autonomy and Judicial Efficiency

In analyzing an administrative procedure to be exhausted, courts consider whether requiring exhaustion promotes the policies justifying the rule. Exhaustion 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).

(*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391, citations omitted.) Its "essence" is the agency's ability to receive and respond to factual issues and legal theories before suit. (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Dirs.* (2013) 216 Cal.App.4th 614, 623, citing *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123.) Agencies must have 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.) As this Court has cautioned, "[i]ntervention by the court before the administrative agency that has resolved the claim would constitute an interference with the jurisdiction of another tribunal." (*California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1151.)

Exhaustion, too, eases the burden on the judiciary by allowing application of an agency's expertise and ability to resolve disputes without judicial aid. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 83.) The doctrine is grounded in the separation of powers. (*Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 168, superseded by statute on another ground as recognized by *Stoetzl v. Department of Human Resources* (2019) 7 Cal.5th 718, 741–742.)

Legislative bodies make discretionary, policy choices from a range of lawful options. It is long settled that an assessment is a

legislative act. (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 683 ["the establishment of a special assessment district takes place as a result of a peculiarly legislative process grounded in the taxing power of the sovereign"], disapproved on other grounds by *Silicon Valley, supra,* 44 Cal.4th 431.) The exhaustion rule limits issues subject to judicial review to those the agency had opportunity to consider, making a record for judicial review. (*Evans, supra*, 128 Cal.App.4th at p. 1130; *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240 [exhaustion rule "'facilitates the development of a complete record that draws on administrative expertise' and affords "a preliminary administrative sifting process, unearthing the relevant evidence and providing a record which the court may review"].)

A challenger thus must exhaust all aspects of all administrative remedies to further judicial economy and agencies' ability to resolve disputes, or frame them for judicial resolution, if necessary. One does not exhaust merely by initiating a remedy, but by pursuing it to completion.

In *Williams & Fickett*, this Court found exhaustion furthered these principles there even though courts have more expertise in determining title to real property than do assessment appeals boards. (2 Cal.5th at pp. 1272–1273.) This Court concluded a challenge to title typically raises questions of fact, "as to which administrative exhaustion through the assessment appeal process

would facilitate the development of a record conducive to judicial review." (*Id.* at p. 1272.) And this Court noted the parties might have resolved the dispute in the appeals board proceeding, sparing judicial resources. (*Ibid.*) Requiring exhaustion also imposed a deadline for resolution; excusing exhaustion risked allowing a stale claim that would be difficult to adjudicate and "hinders counties' ability to predict and budget for revenue." (*Id.* at p. 1273.) Because exhaustion of the assessment appeals hearing advanced the goals of the exhaustion rule, the Court found it required.

Similar analysis produces the same result here — Petitioners should have articulated at the City's hearings the specific reasons they assert the assessments are invalid before suit. As they did not, this Court should affirm the lower court's conclusions that writ relief is unavailable.

II. PROPOSITION 218 AND THE PBID LAW REQUIRE MORE THAN A "NO" VOTE

Of course, a court must "give significance to every word, avoiding an interpretation that renders any word surplusage." (*Regents of Univ. of Cal. v. Pub. Employment Relations Bd.* (2020) 51 Cal.App.5th 159, 177; *Weaver v. Chavez* (2005) 133 Cal.App.4th 1350, 1355.) Petitioners ask this Court to ignore this rule, giving short shrift to constitutional and statutory language governing procedural requirements for assessment challenges, which distinguish an assessment ballot from oral or written protests at the hearing. (Op.

Br. pp. 24, 34 [arguing there is "only the ballot requirement"].) Giving significance to every word of Proposition 218, the Proposition 218 Omnibus Implementation Act of 1997 (Government Code § 53750 et seq., the "Omnibus Act") and the PBID Law compels conclusion that exhaustion requires both a "no" vote **and** meaningful participation in the City's hearing. In particular, issue exhaustion is required. (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1316 [court first examines language of Prop. 218 as "the best indicator of the voters' intent"].)

The Omnibus Act aids Proposition 218's interpretation, clarifying, inter alia, assessment procedures. This Court has resorted to this legislative clarification of Proposition 218, an initiative constitutional amendment much in need of the services of the tender mercies of a Committee on Third Reading. (*Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 290–291 [citing Omnibus Act to construe article XIII D]; *Pajaro Valley Water Management Agency v. AmRhein* (2007) 150 Cal.App.4th 1364, 1378, fn. 10 ("*AmRhein*") [noting Proposition 218's "questionable draftsmanship"], disapproved on other grounds by *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1209 fn. 5.) The Legislature adopted the Omnibus Act — without dissenting vote in any committee or in either house — as urgency legislation signed by then-Governor Wilson to aid implementation of Proposition 218.

The PBID Law's procedural requirements are those of Proposition 218. For a new or increased property assessment, it requires a "notice and protest and hearing procedure [that] compl[ies] with Section 53753 of the Government Code." (Sts. & Hy. Code, § 36623, subd. (a); *Golden Hill Neighborhood Assn., Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416, 432.) Its 2016 amendments are also intended to "provide the Legislature's guidance with regard to this act, its interaction with the provisions of Article XIII D of the Constitution, and the determination of special benefits in property-based districts." (Sts. & Hy. Code, § 36601, subd. (h).) The PBID Law itself is intended to:

> supplement previously enacted provisions of law that authorize cities to levy assessments … to ensure that those assessments conform to all constitutional requirements and are determined and assessed in accordance with the guidance set forth in this act … .

(Sts. & Hy. Code, § 36602.) Such legislative clarification of our Constitution is common. (*Delaney v. Lowery* (1944) 25 Cal.2d 561, 569.)

As the appellate court found, the procedures required to establish or renew a BID and its assessment are comprehensive. (*Hill RHF*, *supra*, 51 Cal.App.5th at pp. 626–627; *Greene, supra*, 49 Cal. 4th at pp. 285–286 [noting "considerable detail" of article XIII C's notice and hearing requirements].) An assessing local government must

fulfill specific procedures, including mailing a ballot to every owner of land in the BID and conducting a hearing after 45 days' mailed notice. (Cal. Const., art. XIII D, § 4.) Each requirement is meaningful; none is surplusage.

A. Proposition 218 Requires Mailed Notice and Ballots

Article XIII D, section 4, subdivision (c) requires mailed notice of the particulars of a proposed assessment, notice of a hearing, description of the procedure for consideration, and the process for returning the ballot. A notice must also advise property owners that a majority protest will defeat the assessment.

> The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and

> tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

The Omnibus Act restates these requirements. (Gov. Code, § 53753, subd. (b).)

Article XIII D, section 4, subdivision (d) further requires a ballot to accompany the notice:

> Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

The Omnibus Act elaborates that the envelope must state "in no smaller than 16-point bold type: 'OFFICIAL BALLOT ENCLOSED.'" (Gov. Code, § 53753, subd. (a).)

Neither the Constitution, the Omnibus Act, nor the PBID Law require any more on the ballot than a place in which a property owner may indicate "support or opposition to the proposed assessment." (Cal. Const., art. XIII D, § 4, subd. (d).) Petitioners'

ballots show the City fulfilled these requirements, with the ballot form listing the property owner, the assessment amount, and boxes to check to show support or opposition. (E.g., AR00294.) Neither the Constitution nor statute require the ballot to invite substantive comment, although the hearing notice does for that is the essential purpose of the hearing. (Cal. Const., art. XIII D, § 4, subds. (c) & (e).) The City also posted the complete engineer's and management district reports to the internet. (E.g., AR00261 [petition to renew materials]; AR00271 [notice and ballot materials]; AR00275 [website link].)

B. Proposition 218 Separately Requires Agencies to Conduct Hearings and to Consider Objections

Article XIII D, section 4, subdivision (e) details the notice and hearing procedures:

> The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency **shall consider all protests against the proposed assessment and tabulate the ballots**. (emphasis added)

This Court has previously concluded the similar language of article XIII D, section 6, subdivision (a)(2) imposes a substantive requirement on local governments to solicit and consider comments:

> There is some dispute over whether "consider[ing]" all protests is a requirement separate from the majority protest procedure. Plaintiffs and amicus curiae Howard Jarvis Taxpayers Association urge that "consider" in this context simply means to count all written protests to see if a majority is achieved. That contention is unpersuasive. Article XIII D, section 6, subdivision (a)(2) provides that an agency may not impose a fee if a majority of owners present written protests. It follows that an agency must count all qualified protest votes it is required to receive. Further, although an agency is required to count all written protests, it must "consider" all protests at the hearing, even those not reduced to writing. (*Ibid*.) Thus, to "consider" all protests must mean more than simply counting the number of written protests. To interpret "consider all protests" as simply a vote-counting requirement would render that language redundant.

(*Plantier, supra*, 7 Cal.5th at pp. 385–386.)

Under article XIII D, section 4, subdivision (c), a majority protest defeats an assessment just as a property-related fee under section 6, subdivision (a)(2) of that article:

> The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the

> conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

The language distinguishes the agency's hearing and consideration of protests at the public hearing from its tabulation of ballots — just as this Court found in *Plantier* as to property-related fees. An agency must tabulate the ballots **and** "consider all protests against the proposed assessment," oral or written — even absent a majority protest. (Cal. Const., art. XIII D, § 4, subd. (e).) Counting ballots and considering protests are independent requirements.

Were there a need to resort to secondary authority, the Omnibus Act sharpens the distinction between these requirements:

> At the public hearing, the agency **shall consider all objections or protests**, if any, to the proposed assessment. At the public hearing, **any person shall be permitted to present written or oral testimony**. The public hearing may be continued from time to time.

(Gov. Code, § 53753, subd. (d), emphasis added.) The agency must "consider" those "objections or protests," and "the public hearing may be continued from time to time" to do so. (*Ibid.*) The Omnibus Act also makes clear assessees may withdraw assessment ballots.

(*Id.*, subd. (e) [count of ballots "submitted, and not withdrawn"].) Indeed, upon consideration of the objections and protests, and absent a majority protest, the agency may impose, amend, or reject an assessment. (Cal. Const., art. XIII D, § 4; Gov. Code, § 53753, subd. (e)(5).) A large protest may well persuade an agency to revise or reject a proposal even though short of a majority.

Again, *Plantier* has resolved this point under article XIII D, section 6's parallel language. To "consider" means to "think about carefully" or to "take into account." (*Plantier, supra,* 7 Cal.5th at p. 386:

> The requirement to "consider all protests" … at a Proposition 218 hearing compels an agency to not only receive written protests and hear oral ones, but to take all protests into account when deciding whether to approve the proposed fee, even if the written protestors do not constitute a majority.)

Such "consideration" provides both the agency and assessees opportunity to address and investigate issues before suit. It furthers the power-sharing between the governed and government that Proposition 218 intends, promoting decisions that are "mutually acceptable and both financially and legally sound." (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220 ("*Bighorn*").) Exhaustion advances this power-sharing by requiring those who would hold government accountable to give the government

opportunity to act accountably before suit. "Consider all protests" cannot be ignored, but must be read to establish the hearing Proposition 218 requires as a meaningful opportunity to state objections so government may address them.

As in *Plantier*, Petitioners here ignore Proposition 218's careful distinction of the duties to tally ballots and to consider substantive objections. (Op. Br. at pp. 26–28.) Petitioners argue that an exhaustion requirement to attend a hearing and to object specifically somehow "undermines" the majority protest proceeding. (*Ibid.*) Not so. Each proper and timely ballot must be counted as article XIII D, section 4 requires, whether or not an assessee attends the hearing. (Art. XIII D, § 4, subds. (c)—(e); Gov. Code, § 53753, subds. (c)—(e).) Whether or not a property owner also voices specific objection to an assessment, the government must tally her ballot.

Property owners still have "final authority" to whether an assessment can proceed — a majority protest is binding; lesser protest and substantive comment can persuade. Petitioners ignore this — and *Plantier*'s reading of the language in article XIII D, section 6 which tracks that of its section 4. (Op. Br. at p. 29.)

The City's ordinances also distinguish these requirements. The Ordinance of Intention for the DCBID assessment detailed the hearing time and place, explaining: "[a]t the hearing, all interested persons will be permitted to present written or oral testimony, and the City Council will consider all objections or protests to the

proposed assessment." (AR00162.) So, too, the Notice of Public Hearing. (AR00271 ["the City Council will hear all interested persons for or against establishment of the District, the extent of the District, and the furnishing of specified types of improvements or activities and may correct minor defects in the proceedings."].) The City did the same for SPBID. (SP00183.)

Petitioners limit Proposition 218's language to a "yes" or "no" vote, making objections superfluous. (Op. Br. at pp. 24–27.) They ignore the language of article XIII D, section 4 and Government Code section 53753, which lead agencies to implement expensive and time-consuming procedures to impose new or extend existing assessments. As the appellate court noted, "[t]he PBID Law's detailed administrative procedural requirements 'provide affirmative indications of the Legislature's desire' that agencies be allowed to consider in the first instance issues raised during that process.'" (*Hill RHF*, *supra*, 51 Cal.App.5th at p. 632.) Compliance with article XIII D, section 4 fosters informed decision-making, encourages fee-payor participation, and ensures governing bodies act with adequate information. It allows decision-makers to view the entire record, respond to fee-payors' concerns, and apply their expertise. It strengthens the power-sharing between legislators and the fee-payors envisioned by Proposition 218. (*Bighorn, supra,* 39 Cal.4th at pp. 220–221.)

Mandatory consideration of protests provides more than opportunity to comment. It provides an opportunity for the assessee to command government's attention to his objections. At the hearing, the agency can abandon or reduce an assessment against some or all assessees.

Indeed, the Proposition 218 hearing is like the tax refund remedies at issue in *Williams & Fickett*, *supra*, 2 Cal.5th at p. 1280. Originally, "county boards of supervisors performed the function of local boards of equalization." (*Ibid*.) "As so constituted, these boards were sometimes criticized as having insufficient time and expertise to competently address assessment issues." (*Id.*) Nevertheless, a taxpayer was precluded from challenging a tax in court without exhausting this remedy. (*Dawson v. County of Los Angeles* (1940) 15 Cal. 2d 77, 81 [exhaustion required an objection "to the assessment before **the board of supervisors** … ."].)

Accordingly, *Hill RHF* concluded Petitioners' "no" vote alone was insufficient because exhaustion "is not a pro forma exercise." (51 Cal.App.5th at p. 633.) The Court of Appeal found here an even more compelling case than *Williams & Fickett* to require issue exhaustion, as the Constitution and PBID Law authorize the City to levy or reject an assessment even absent a majority protest:

> [T]he agency — the City in this context — is entitled to the benefit of the opportunity to either address the specific issues a property owner raises or to pass on the

> opportunity to do so and allow the courts to make a decision based on an administrative record that reflects a development of the disputed issues to the extent the administrative process allows.

(*Id.* at p. 634.) Application of the exhaustion requirement to serve its policy goals is firmly rooted in our law and proper here.

III. REQUIRING MEANINGFUL PARTICIPATION AT AN ASSESSMENT HEARING ADVANCES PROPOSITION 218'S PURPOSE

Petitioners also do not persuade that requiring meaningful participation at an assessment hearing frustrates Proposition 218's purpose. (Op. Br. at pp. 30–32.) Rather, it advances voter consent, serving Proposition 218's purpose to facilitate communication between government and those it serves. Allowing a "no" ballot alone to exhaust administrative remedies would render meaningless the voters' directive that elected officials "consider all protests" at a hearing on an assessment.

Both protest ballots and substantive objections must be given weight to fulfill Proposition 218's purpose of "limiting local government revenue and enhancing taxpayer consent." (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 267, citation omitted.) Voters approved Proposition 218 in 1996 as one of a series of initiative limits on government revenues. (*Id.* at pp. 258–60.) Proposition 218's limitations on local taxes, assessments, and a newly defined class of

"property-related fees" allocate power among elected governing bodies, voters, and tax- and fee-payors, imposing procedural and substantive restrictions on local government. (*Bighorn*, *supra*, 39 Cal.4th at p. 220.)

In particular, article XIII D, section 4 made fundamental changes to assessments on real property:

- It requires specific, uniform method of notice, protest, and hearing, discussed *supra*. (Cal. Const., art. XIII D, § 4, subds. (a), (c)–(e).)
- Its substantive requirements limit assessments to the "special benefit" assessed properties received and excludes the "general benefit" arising from an assessment-funded facility or service from funding, requiring other funds for that portion of a project or service budget. (Cal. Const., art. XIII D, § 4, subd. (a).)
- It shifted to government the burden to show properties receive special benefit, and that assessment amounts are proportional to and no greater than the special benefit conferred. (Cal Const., art. XIII D, § 4, subd. (f).)

Proposition 218 reversed the burden of proof and heightened the standard of review for challenges to assessments, but left all other litigation procedures unchanged, including the exhaustion doctrine. This is but application of the *expressio unius* rule. (See *Citizens Association of Sunset Beach v. Orange County Local Agency*

Formation Com. (2012) 209 Cal.App.4th 1182, 1191 [citing Sherlock Holmes' "dog that did not bark" to find Prop. 218 does not impliedly repeal annexation statutes].)

An assessment levy is a legislative act. (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 683 ["the establishment of a special assessment district takes place as a result of a peculiarly legislative process grounded in the taxing power of the sovereign"], disapproved on other grounds by *Silicon Valley*, *supra,* 44 Cal.4th 431.) Local legislators like the Los Angeles City Council fund their services by discretionary, policy-laden choices from a range of lawful options. To preserve the separation of powers, judicial review of such decisions is limited to the administrative record of the agency's decision. (*Western States*, *supra*, 9 Cal.4th at p. 573; *San Joaquin County Local Agency Formation Commission v. Superior Court* (2008) 162 Cal.App.4th 159, 167.) Proposition 218 does not amend these basic principles and, by silence, preserves them. (Cf. *Metropolitan Water Dist. v. Dorff* (1979) 98 Cal.App.3d 109 [Prop. 13 did not impliedly repeal authority to annex property, subjecting it to MWD's property tax].)

Before Proposition 218, courts presumed an agency's ratemaking decision was reasonable, fair, and lawful, and challengers bore the burden to prove otherwise under the deferential substantial evidence standard. (*Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79, 82.) Under

Proposition 218, the agency now has the burden to prove compliance with Proposition 218 under the independent judgment standard. (*Capistrano Taxpayers Association v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1506–1507; *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 912.) It must do so, of course, on the same administrative record to which challengers are limited by *Western States*.

Accordingly, failure to require exhaustion of remedies deprives the defendant agency of notice and a reasonable opportunity to resolve any dispute and avoid litigation or to build a record that can pass Proposition 218 muster. It is one thing to bear the burden of proof on your record; it is another to do so without notice of the issues a challenger might raise. City Councils cannot be expected to be clairvoyant, and Proposition 218 is not ready to require the impossible. (*Richmond v. Shasta Community Services Dist*. (2004) 32 Cal.4th 409, 427–428 [connection charge not property-related fee under art. XIII D because agency could not know who would propose new connections to give required notice].)

Moreover, elimination of a meaningful hearing would frustrate Proposition 218's purpose to "enhance[e] taxpayer consent." (Op. Br. at p. 32–33; Cal. Const., art. XIII C, § 5.) A goal of the procedural requirements of article XIII D, section 4 is to allow assessments to be submitted to property owners for approval or rejection, after notice and public hearing, in order to advance the

policy of permitting those financially obligated to pay to impact the decision of whether or not the levy is imposed. (See *Silicon Valley*, *supra*, 44 Cal.4th at p. 448 [discussing historical purpose of Proposition 218 to enhance taxpayer consent and curtail agency deference].) The requirement for an engineer's report also enables assessees to understand assessment proposals and to voice their objections. (See, e.g., *Silicon Valley*, *supra*, 44 Cal.4th at p. 457; cf. *Bighorn*, *supra*, 39 Cal.4th at p. 220 [Article XIII D, section 6 intended to facilitate communication between agency and its customers].)

Unless unhappy assessees voice the reasons for their objections, the communication Proposition 218 seeks will not occur. Proposition 218 intends a meaningful exchange. Exhaustion is similarly a two-way street as government, too, must litigate on the record and its failure to respond to claims raised in its hearings will defeat an assessment.

The practical implications of Proposition 218 further show that it intended robust administrative hearings. Consider an assessee generally favoring a BID, but believing the BID unconstitutional. Such an assessee would want the BID established (and vote "Yes" on its ballot) but would argue for changes to the BID to make it compliant. Absent a fulsome hearing, this assessee could not be heard without suing to challenge a BID that the assessee, in the end, wishes to see established.

Moreover, Petitioners are not the only assessees with a right to a meaningful administrative hearing. If Petitioners had raised their concerns at the City's hearings, other participants in those hearings could hear those concerns and respond to them. The City and all affected could have an informed public dialog about the issue, which would have facilitated the City's ability to ensure that all those who were exercising the right to vote on the proposed assessments under Proposition 218, whether yes or no, were voting on a substantively lawful proposal.

But Petitioners raised their concerns only in court, silencing their neighbors and undermining the rights of all those voting, particularly those who voted in favor of the assessments who were denied an opportunity to respond to the objectors' contentions during the administrative proceedings to help ensure the lawfulness of the assessments. Proposition 218's goal of participatory decision-making by those affected by decisions is furthered by the exhaustion requirement long part of our law and never mentioned in Proposition 218 which does alter other rules for finance litigation.

IV. ALLOWING A "NO" VOTE TO EXHAUST WILL FRUSTRATE ASSESSMENT HEARINGS AND DESTABILIZE LOCAL FINANCE

The essence of the exhaustion doctrine is the agency's "opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review."

(*Evans, supra,* 128 Cal.App.4th at p. 1137 [charter city assessment], citing *Coalition for Student Action, supra,* 153 Cal.App.3d at p. 1198.) As this Court has observed:

> If exhaustion were not required a litigant would have an incentive to avoid securing an agency decision that might later be afforded deference … . Further, creating an agency with particular expertise to administer a specific legislative scheme would be frustrated if a litigant could bypass the agency in the hope of seeking a different decision in court.

(*Plantier*, *supra*, 7 Cal.5th at p. 383, internal citations omitted.)

As noted above, Article XIII D, section 4's robust hearing requirements lead agencies to implement expensive and time-consuming legislative procedures to impose or renew assessments. These include:

- Retaining legal and financial advisors to ensure compliance with Article XIII D;
- The BIDs' preparation of annual reports and management district plans;
- Analyzing, formulating, and updating services property owners and a district need;
- Preparing and mailing detailed notices to property owners;

- Making public presentations to educate the public as to the need for new or renewed assessments and of the services to be provided;
- Responding to public comments and questions that promptly follow mailed notice; and
- Inviting a majority protest and holding at least one public hearing at which oral or written protests may be submitted and at which they must be counted.

These procedures foster informed decisions, encourage fee-payor participation, allow application of agency (and consulting) expertise, allow local government to identify and diffuse, if possible, disputes, and provide a record that focuses the issues for judicial review — all the justifications for the exhaustion doctrine in other contexts. Article XIII D, section 4's strengthens the "power-sharing arrangement" between local legislators and fee-payors Proposition 218 envisioned. (*Bighorn*, *supra*, 39 Cal.4th at p. 220.)

If assessees raise concerns in assessment hearings, the City or BID can address the issue and revise an assessment if warranted. Doing so could avoid litigation and conserve judicial and party resources.

Exhaustion will at least give the City opportunity to answer questions to better articulate its rationale, and thereby provide a more fully developed record for judicial review. Participation in the Proposition 218 hearings here would have allowed the City and the

BIDs to address factual issues, apply their expertise, and allow the community as a whole to consider and weigh in on the Petitioners' claims, and would have permitted a fulsome record for judicial review. A review of Appellants' objections to these BIDS (Hill RHF AA:14–17, ¶¶ 27–32; Mesa RHF AA:11–18, ¶¶ 24–31) shows that many could have been redressed by minor revisions to the Management Plans or Engineer's Reports. As with any written product, language can always be revised to clarify intent and eliminate possible misconstructions.

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 valuable in assessment and other rate-making contexts involving highly technical evidence and policies. As this Court explained:

> 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"].)

(*20th Century Ins. v. Garamendi* (1994) 8 Cal.4th 216, 293, internal quotation omitted.)

Allowing a "no" ballot alone to constitute exhaustion would reduce the hearing requirement to a meaningless formality. This contradicts the intent of Proposition 218's elaborate notice and protest requirements to enhance the local agency's responsiveness to property owners' concerns. Proposition 218 enhanced ratepayer consent by, in part, requiring notice to ratepayers of all factors affecting a potential rate increase and requiring government to "consider all protests." (Cal. Const., art. XIII D, § 6, subd. (a)(2); *Silicon Valley, supra,* 44 Cal.4th at p. 448 [summarizing Prop. 218 ballot materials].) Requiring assessees to state their concerns where their fellow assessees can hear and respond promotes that objective too.

Public policy also supports the rule the Court of Appeal applied here. California's initiative restrictions on public revenues are not a model of clarity. (E.g., *AmRhein*, *supra*, 150 Cal.App.4th at p. 1378, fn. 10.) Litigation has been frequent and continuous since the 1978 adoption of Proposition 13. (E.g., *City and County of San Francisco v. All Persons Interested in Matter of Proposition C* (2020) 51 Cal.App.5th 703 [article XIII A, § 4 does not require two-thirds voter approval of special taxes proposed by initiative]; *Amador Valley Joint*

Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208 [deciding constitutionality of Prop. 13 in exercise of Court's original jurisdiction].) Courts clarify these measures' requirements, sometimes in unanticipated ways. (E.g., *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 246 & fn. 17 [upholding Prop. 26's voter-approval requirement for local general taxes, overruling *City of Woodlake v. Logan* (1991) 230 Cal.App.3d 1058 and distinguishing *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623].)

When such changes in the law occur, local governments can be expected to comply with them, but they cannot be expected to foresee them. (E.g., *Gonzales v. City of Norwalk* (2017) 17 Cal.App.5th 1295, 1311 ["Lacking clairvoyant powers, the Norwalk voters cannot have intended to incorporate an interpretation of a federal statute that **had not yet been promulgated**." original emphasis].)

Absent an exhaustion requirement, every such change in the law can be expected to attract an opportunistic string of challengers, many suing for classes given the relatively new availability of that tool to challenge local, but not state, revenues. (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241.)

Indeed, this has been local governments' recent, expensive experience. *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 increased the required justification of water rates imposed in tiers to encourage water

conservation in service of article X, section 2 of our Constitution. Though none produced published appellate decisions, cite-checking that decision identifies four copycat challenges filed in its wake that reached the Court of Appeal.[9] *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 produced a similar spate of litigation, already generating these published progeny:

- *Mahon v. City of San Diego* (2020) 57 Cal.App.5th 681;
- *Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, review granted; and,
- *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority* (2020) 51 Cal.App.5th 435, review granted.

The problem is compounded by the absence of a meaningful statute of limitations in many local revenue cases. (E.g., *Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809 [new cause of action arises under Prop. 26 which each monthly payment of utility tax].)

An exhaustion requirement will preclude many opportunistic suits, allowing local governments to bring their revenue practices

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[9] These are *Boyd v. Soquel Creek Water District*, 2016 WL 1752932 (6th DCA filed Apr. 29, 2016); *Delano Guardians Committee v. City of Delano*, 2018 WL 5730155 (5th DCA filed Nov. 3, 2018); *Glendale Coalition for Better Government, Inc. v. City of Glendale*, 2018 WL 6804360 (2d DCA filed Dec. 27, 2019); *Goleta Ag Preservation v. Goleta Water District*, 2019 WL 337814 (2d DCA filed Jan 28, 2019). Cognizant of California Rules of Court, rule 8.1115, Respondents do not cite these case as authority, but ask only that this Court note their existence.

into compliance with the law as they learn of it. The absence of such a rule would encourage such opportunistic suits, requiring local agencies to defend their revenues again and again with each development of the law. The cost to do so, both in legal fees and in refund claims, can only come from the very funds those rates and fees are intended to fund, for many utility providers are funded only by utility rates. (*Plantier, supra*, 7 Cal.5th at p. 385 [ratemaking is commonly a zero-sum game].)

Yet our Constitution is solicitous of stability in government finance. (Cal. Const., art. XIII, § 32 [state revenues may be refunded only in strict compliance with statutory procedures]; see *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 71–72 [extending "pay-first-litigate-later" rule to local government], disapproved on another ground by *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626.) Many statutes authorize validation of local government revenue measures and courts apply those statutes to achieve their purpose in promoting finality and stability in government finance. (E.g., Wat. Code, § 30066 [assessments and debts of municipal water district]; *Katz v. Campbell Union High School Dist*. (2007) 144 Cal.App.4th 1024 [challenge to parcel tax barred by failure to comply with validation statutes].)

Thus, the policies which underlie article XIII, section 32 and the case law developing it weigh in favor of preserving an exhaustion requirement in Proposition 218 challenges. The

alternative is to allow opportunistic litigation with each development of this fertile area of law. Such suits will punish agencies which fail — as many will — to foresee new legal developments. Such litigation will necessarily come at the expense of the tax- and rate-payers Proposition 218 was adopted to protect.

For this reason, too, Respondents urge this Court to affirm.

V. SIMILAR LAWS REQUIRE FULL PARTICIPATION AT A HEARING FOR EXHAUSTION

The Court of Appeals decision here is also consistent with exhaustion required in other contexts in which a hearing and comment are necessary:

- Under the California Environmental Quality Act (CEQA), a party must appear and voice objection at the hearing to exhaust remedies. (E.g., *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 384 [identification of specific objections at hearing constituted exhaustion].)
- To exhaust Public Employment Relations Board (PERB) remedies, one must also appear at a hearing and articulate specific objections. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609.)
- Taxpayers seeking judicial relief from an erroneous assessment must first exhaust, at a hearing or by written protest. (E.g., *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 a city council hearing to assessment to abate public nuisance]; *Williams & Fickett*, *supra*, 2 Cal.5th 1258.)

- Exhaustion as to zoning and planning decisions also requires specific objections. (E.g., *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656 [rejecting attack on reports from city's financial expert because plaintiff failed to present contrary financial analysis at hearing]; *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 641 [no exhaustion as plaintiff failed to object to citrus pest eradication plan at hearing]; *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442 [neighbors failed to exhaust administrative remedies before suit challenge development approval].)

Of course, there is nothing novel about these cases — they apply well-established rules of exhaustion of remedies, which likewise apply to Proposition 218 challenges as nothing in that measure expressly provides otherwise or is inconsistent with an exhaustion requirement.

Plantier is not to the contrary; it reserved rather than decided the issue here. (Op. Br. at p. 38.) The respondent sewer agency there charged commercial establishments on the basis of floor area rather

than water use. Plaintiff Plantier challenged his restaurant's allocation (an as-applied issue) while the agency was making new, district-wide rates (which might be challenged facially). Plantier did not raise his objection in the hearing article XIII D, section 6, subdivision (a) requires, and the trial court dismissed for failure to exhaust. (*Plantier, supra,* 7 Cal.5th at p. 379.) The Court of Appeal reversed, holding a Proposition 218 majority protest proceeding need never be exhausted because a litigant cannot prevail in such a hearing. It conflated the different exhaustion standards for quasi-judicial proceedings (in which the ability to prevail is relevant) from those for legislative proceedings (where it is not) and expressly disagreed with another case. (*Id.* at p. 380.)

This Court took the case to resolve the split, but concluded only that exhaustion was not required on *Plantier*'s somewhat unique facts. (*Plantier, supra,* 7 Cal.5th at p. 372.) *Plantier* assumed without deciding that one must participate in a Proposition 218 majority protest hearing before challenging ratemaking in general – i.e., a facial challenge. But, it concluded, Plantier's was not such a challenge. (*Id.* at pp. 390.) The sewer agency noticed a hearing on proposed rate increases affecting all sewer customers, not its sewer-service allocation formula. (*Id.* at pp. 384–385.) Its board could not have acted on Plantier's complaint at the Proposition 218 hearing except by proposing new rates premised on a new formula, which would require a new hearing after notice of the new proposal. (*Id.* at

p. 387.) Because the Section 6 hearing could not provide any relief to the challengers, it did not provide an adequate administrative remedy and need not be exhausted.

By contrast here, the City could have addressed Petitioners' concerns in any way that did not require an increase in assessments on others — as by maintaining the assessment as proposed, but explaining it more thoroughly, or changing it to reduce the burden on Petitioners and to require additional non-assessment funding for the BIDs. While utility ratemaking is commonly a "zero sum game," (*Plantier, supra*, 7 Cal.5th at p. 385 [raising one person of class' fee will require others' rates to rise if utility is to fully fund service]), an assessment levy is not. An assessment can recover the full cost of a project only in the rare circumstance in which all the benefits of a project ere special and all beneficiaries are within the assessing agency's reach. (E.g., *Silicon Valley, supra*, 44 Cal.4th at p. 455; see *City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202, 1225 [assessment funded conversion of cul-de-sac to through-street conferred no general benefit]; see also *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057, 1079–1080 [utility undergrounding to enhance views conferred no general benefit].) Thus, in an assessment proceeding, non-assessment funds are typically required. (E.g., *Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516, 1530 [use of non-assessment funds for capital component of park plan].) Petitioners' objection here might have required a bit more such funding, but

would not have required — as in *Plantier* — an entirely new hearing. (E.g., AR00008, AR00021; SP00007–9, SP00014–15 [reflecting non-assessment funding relied upon for general benefits].)

Plantier harmonized its ruling with the case the lower courts had criticized there (*Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist*. (2001) 87 Cal.App.4th 878), finding neither resolved whether one must exhaust a majority protest hearing under article XIII D, section 6, subdivision (a) to challenge property-related fees. *Plantier* expressly reserved that question:

> We do not decide the broader question of whether, when, and under what circumstances a public comment process may be considered an administrative remedy. We consider only whether these Proposition 218 hearings were adequate to resolve plaintiffs' substantive challenge.

(7 Cal.5th at p. 384, fn. omitted.)

Even that question would be only analogous authority for the issue here — whether Petitioners must exhaust the article XIII D, section 4 hearing at which the City Council was obliged to "consider all protests" before levying the assessment Petitioners challenge. That Proposition 218 details distinct requirements for assessments (art. XIII D, §§ 4, 5) than for property related fees (art. XIII D, § 6) is enough to prove that developments as to one do not resolve questions as to the other.

Article XIII D, section 4, unlike section 6, would have allowed the City to address the concerns Petitioners raised in court. The City might have rejected renewal of the BIDs. It might have altered the assessment methodology in any way that did not increase assessment of others, increased the use non-assessment funds, or changed the BIDs' services. An assessment hearing under article XIII D, section 4 is an adequate administrative remedy for the challenges raised here and, indeed, most assessment challenges.

Plantier thus does not reach, much less change, the law obliging Petitioners to participate in the City's hearing, to state their objections and the legal and factual bases for them.

Moreover, it appears the *Plantier* plaintiff exhausted his remedies by objecting to the rate methodology, engaging with the board, and speaking at a board meeting. (7 Cal.5th at p. 378.) He was not required to also protest the rate increase, as his challenge was with his sewer-service allocation, not with the rate applied to all such allocations. (*Id.* at p. 387.)

Petitioners' observation that many assessment cases fail to discuss exhaustion also does not persuade. Cases are not law for propositions they do not consider. (E.g., *Los Angeles County Metropolitan Transportation Authority v. Yum Yum Donut Shops, Inc.* (2019) 32 Cal.App.5th 662, 673.) No case covers every aspect of potentially relevant law — courts decide cases, they do not write treatises. Review of available appellate briefs in the cases Petitioners

cite shows that exhaustion was not argued. (E.g., *Dahms v. Downtown Pomona Property & Business Improvement Dist.*, Appellant's Opening Brief, 2005 WL 3741792.) In others, exhaustion is mentioned, but not disputed. For example, in *City of Saratoga, supra,* 115 Cal.App.4th at p. 1209, the property owner did not merely vote "no"; he also wrote the City Council before the public hearing threatening suit. So, too, in *Town of Tiburon v. Bonander*. (Respondents' Brief, 2008 WL 2329781, at p. *45 [property owners objected at hearing].) Nothing in the case law supports Petitioners' claim a "no" vote alone is sufficient to exhaust remedies under Article XIII D.

VI. DECISION SHOULD BE RETROACTIVE

As a general rule, judicial decisions have retroactive effect, with only limited exception where the decision changes a settled rule on which the parties below relied. (*Claxton v. Waters* (2004) 34 Cal.4th 367, 378–379.) That narrow exception does not apply here.

First, as explained *supra*, there is no "new" rule here unlike in *Williams & Fickett*. The Court of Appeal applies well-established law to Proposition 218 (adopted 24 years ago) and to the PBID Law of 1994 (adopted 26 years ago). The conclusion below and the argument here is that Proposition 218 did not impliedly change this aspect of revenue litigation, as it expressly changed others. If Petitioners were surprised by this routine requirement of California administrative law, they have little justification for it.

The exhaustion requirement is plain, simple, and well established. A 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 [CEQA exhaustion].) Generalized objections at a public hearing do not suffice — challengers must raise them specifically. (*Coalition for Student Action, supra,* 153 Cal.App.3d at p. 1197; *California Native Plant Society, supra,* 172 Cal.App.4th at pp. 615–616 [hearing participants not held to standards of lawyers in court, but must identify what facts are contested].) 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, supra,* 49 Cal.4th at p. 609 [duty to exhaust PERB remedies before suing to enjoin strike].) Petitioners simply failed to comply with these well-established rules.

Moreover, the exhaustion remedies required here were already plainly set forth in Proposition 218 and the PBID law, and interpreted as such by case law, as detailed *supra*. Because such a decision is not a new declaration of law, it should apply retroactively to the effective date of Proposition 218, as this Court construes here its requirements. It does not establish them. (E.g., *Rose v. Hudson* (2007) 153 Cal.App.4th 641, 653 ["A court decision does not announce a new rule of law if it does not 'overrule or disagree with any unanimous and unquestioned body of California

decisional authority'"], citing *Gentis v. Safeguard Business Systems, Inc.* (1998) 60 Cal.App.4th 1294, 1305–1306.)

Second, the factors weigh against prospective-only application here. Significantly, there was no reliance on an earlier, inconsistent rule — nor surprise to Petitioners. As set forth *supra*, Proposition 218 (as clarified by the Omnibus Act) and the PBID Law require both opportunity to submit a ballot and to object at a hearing. The City's notices also advised Petitioners of both remedies. (E.g., AR00271–00272.) While Petitioners had an opportunity to voice their opposition, they elected to neither file a protest nor to voice their concerns orally. (AR00161, AR00255, SP00193.)

Third, public policy and fairness weigh in favor of retroactivity. As detailed *supra*, exhaustion would have achieved all the purposes of the exhaustion rule. It would have:

- apprised the City of Petitioners' concerns;
- allowed the City, Petitioners, and the BIDs to make a record on those issues to facilitate judicial review;
- allowed the City to apply its expertise to that record and to address those concerns; and
- given the City opportunity to resolve the disputes.

Petitioners' failure to meaningfully participate in the City's hearing disserved all these purposes and sandbagged the City.

There are no compelling policy reasons to depart from retroactivity here. Indeed, both fairness and public policy support it.

Applying the rule only prospectively will eliminate public agency's failure to exhaust defense from all pending cases. Any who submitted only a ballot, with no specified objection, may litigate, burdening assessment agencies and courts alike. Trial and appellate courts will be required to resolve technical ratemaking issues without the benefit of well-developed administrative records, or of agency expertise. None of the policy rationales for the rule of exhaustion will be advanced.

Williams & Fickett is not to the contrary. There, this Court overruled prior law on which that petitioner may have relied in failing to exhaust. Earlier law excused a failure to present a claim of non-ownership of property in an appeal to the assessment appeals board. *Williams & Fickett* newly required such exhaustion after analyzing intervening decisions construing the nullity exception:

> We therefore overrule *Parr-Richmond Industrial Corp. v. Boyd*, *supra*, 43 Cal.2d 157 … . Nevertheless, we recognize that a taxpayer in plaintiff's position might have reasonably relief on our decision in *Parr-Richmond* to believe it was unnecessary to timely exhaust its administrative remedies through the assessment appeal process before filing a tax refund claim and bringing a refund action pressing a claim of nonownership of the assessed property.

(2 Cal.5th at p. 1282.) There is nothing to overrule here. No justification for prospective application of decision here appears.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm. A property owner must articulate the specific reasons for opposition to an assessment, orally or in writing, at or before hearing required by article XIII D, section 4. Otherwise, he or she fails to exhaust administrative remedies and cannot challenge the assessment in court. This Court should also hold that it has ordinary retroactive effect.

DATED: January 11, 2021

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CITY OF LOS ANGELES

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Answer to Petition for Review is produced using 13-point type including footnotes and contains approximately 12,651 words, fewer than the 14,000 total words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word program used to prepare this brief.

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PROOF OF SERVICE

Supreme Court for the State of California Case No. S263734

Hill RHF Housing Partners, L.P. v. City of Los Angeles, et al.
Second District Court of Appeal, Division 1, Case No. B295181
Los Angeles Superior Court Case No. BS170127

Mesa RHF Partners, L.P. v. City of Los Angeles, et al.
Second District Court of Appeal, Division 1, Case No. B295315
Los Angeles Superior Court Case No. BS170352

I, the undersigned, declare:

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Executed on **January 11, 2021,** at Pasadena, California.

Christina M. Rothwell

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Lower Court Case Number: **B295181**

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1/11/2021

Date

/s/Christina Rothwell

Signature

Graham, Pamela (216309)

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