No Fees per Gov. Code § 6103

S243360

IN THE SUPREME COURT OF CALIFORNIA

EUGENE G. PLANTIER, as Trustee, etc., et al.,
Plaintiffs and Appellants,

v.

RAMONA MUNICIPAL WATER DISTRICT,
Defendant and Respondent.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL, FOURTH DISTRICT, DIVISION ONE
CASE NO. D069798

ANSWER TO BRIEF OF AMICUS CURIAE HOWARD JARVIS TAXPAYERS ASSOCIATION

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP
*KENDRA J. HALL (BAR NO. 166836)
GREGORY V. MOSER (BAR NO. 101137)
JOHN D. ALESSIO (BAR NO. 174900)
ADRIANA R. OCHOA (BAR NO. 256854)
525 B STREET, SUITE 2200
SAN DIEGO, CA 92101
TELEPHONE: 619.238.1900
kendra.hall@procopio.com
greg.moser@procopio.com
john.alessio@procopio.com
adriana.ochoa@procopio.com
ATTORNEYS FOR DEFENDANT AND RESPONDENT
RAMONA MUNICIPAL WATER DISTRICT

No Fees per Gov. Code § 6103

S243360

IN THE SUPREME COURT OF CALIFORNIA

EUGENE G. PLANTIER, as Trustee, etc., et al.,
Plaintiffs and Appellants,

v.

RAMONA MUNICIPAL WATER DISTRICT,
Defendant and Respondent.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL, FOURTH DISTRICT, DIVISION ONE
CASE NO. D069798

ANSWER TO BRIEF OF AMICUS CURIAE HOWARD JARVIS TAXPAYERS ASSOCIATION

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP
*KENDRA J. HALL (BAR NO. 166836)
GREGORY V. MOSER (BAR NO. 101137)
JOHN D. ALESSIO (BAR NO. 174900)
ADRIANA R. OCHOA (BAR NO. 256854)
525 B STREET, SUITE 2200
SAN DIEGO, CA 92101
TELEPHONE: 619.238.1900
kendra.hall@procopio.com
greg.moser@procopio.com
john.alessio@procopio.com
adriana.ochoa@procopio.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
RAMONA MUNICIPAL WATER DISTRICT

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES 4

INTRODUCTION 7

ARGUMENTS 10

I. PROPOSITION 218 CREATED REMEDIES AVAILABLE TO FEE-PAYORS 10

A. The Heightened Notice Requirements Urged by HJTA are Unsupported 11

B. A Balloting Procedure is Not Required to Create a Remedy. 14

C. The Existence of a Public Safety Issue Does Not Dictate the Existence of a Remedy 15

D. The Mandatory Duty to Exhaust Under Section 6(a) is Not Limited to a Hypothetical Enforcement Action.. 17

II. THE DUTY TO EXHAUST APPLIES TO ANY POTENTIAL CHALLENGE TO THE DISTRICT'S 2012-2014 RATES. 19

III. HJTA'S ARGUMENTS REGARDING THE ADEQUACY AND NECESSITY OF PROPOSITION 218'S REMEDIES LACK MERIT 22

A. Section 6(a) Involves More Than a Counting Exercise. 22

B. Consideration Necessarily Entails a Resolution to Accept or Reject an Objection. 24

C. Exhaustion of Proposition 218's Remedies Will Not Create an Unworkable System 28

D. Whether an Administrative Procedure to Challenge the Adoption of Rates Exists is Not Dependent on the Label Attached to Agency Action. 30

E. Proposition 218 Provides a Non-Duplicative Remedy. . 32

CONCLUSION 35

CERTIFICATE OF COMPLIANCE 36

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

City of Oakland v. Hotel.com (9th Cir. 2009)
572 F.3d 958, 961-962 18

CALIFORNIA CASES

Abelleira v. District Court of Appeal, Third District (1941)
17 Cal.2d 280 26

Acme Fill Corp. v. San Francisco Bay Conservation etc. Com. (1986)
187 Cal.App.3d 1056 32

Alexander v. State Personnel Board (1943)
22 Cal.2d 198, overruled by *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489 14

Ardon v. City of Los Angeles (2011)
52 Cal.4th 241 34

Bozaich v. State of California (1973)
32 Cal.App.3d 688 34

California Assn. for Safety Education v. Brown (1994)
30 Cal.App.4th 1264 28

California Cannabis Coalition v. City of Upland (2017)
3 Cal.5th 924 10

Coastside Fishing Club v. California Fish and Game Commission (2013)
215 Cal.App.4th 397 18

Donorovich–Odonnell v. Harris (2015)
241 Cal.App.4th 1118 29

Drum v. Fresno County Dept. of Public Works (1983)
144 Cal.App.3d 777 ..... 20, 21

Drummey v. State Bd. Funeral Directors and Embalmers (1939)
13 Cal.2d 75 (superseded by statute on other grounds) 10

Evans v. City of San Jose (1992)
3 Cal.App.4th 728 14

Evans v. City of San Jose (2005)
128 Cal.App.4th 1123 ..... 14, 15, 33

Howard v. County of San Diego (2010)
184 Cal.App.4th 1422 31

Lance Camper Manufacturing Corp. v. Republic Indemnity Co. (2001)
90 Cal.App.4th 1151 28

Lozada v. City and County of San Francisco (2006)
145 Cal.App.4th 1139 34

Morgan v. Imperial Irrigation Dist. (2014)
223 Cal.App.4th 892 ..... 18, 23, 24

Mountain View Chamber of Commerce v. City of Mountain View (1978)
77 Cal.App.3d 82 31

Park Area Neighbors v. Town of Fairfax (1994)
29 Cal.App.4th 1442 32

Payne v. Anaheim Memorial Medical Center (2005)
130 Cal.App.4th 729 ..... 26, 27

People ex rel. Lockyer v. Sun Pacific Farming Co. (2000)
77 Cal.App.4th 619 15

Redevelopment Agency v. Superior Court (1991)
228 Cal.App.3d 1487 31

Roth v. City of Los Angeles (1975)
53 Cal.App.3d 679 ..... 11, 15, 19

San Diego Water Authority v. Metropolitan Water District of Southern California (2017)
12 Cal.App.5th 1124 20

San Franciscans Upholding the Downtown Plan v. City & County of San Francisco (2002)
102 Cal.App.4th 656 29

Venice Town Council, Inc. v. City of Los Angeles (1996)
47 Cal.App.4th 1547 21

Wallich's Ranch Co. v. Kern County Pest Control District (2001)
87 Cal.App.4th 878 ..... passim

Younger v. State of California (1982)
137 Cal.App.3d 806 28

Zumbrun Law Firm v. California Legislature (2008)
165 Cal.App.4th 1603 23

STATUTES, REGULATIONS, AND RULES

Government Claims Act 33, 34

Government Code § 3.6 34

OTHER AUTHORITIES

California Constitution Article XIII D
section 6(a) ..... passim
section 6(a)(1) 12
section 6(b) 24
section 6(b)(2) 23
section 6(b)(3) 7
section 6(b)(5) 18, 22

INTRODUCTION

The brief of amicus curiae Howard Jarvis Taxpayers Association ("HJTA") takes a scattershot approach in arguing why a plaintiff bringing a California Constitution Article XIIID section 6(b)(3) substantive challenge should not be required to undertake the minimal burden of participating in the mandated Section 6(a) public hearing process. It likewise attributes motives to the District unsupported by the record. The District is not "desperately trying to avoid judicial review" by raising the issue of exhaustion.[1] Instead, the District, and the other agencies that have submitted amicus briefs herein, seek to ensure fee-payors meaningfully participate in the process voters implemented so that there is an opportunity for communication between decision-makers and fee-payors and an opportunity for agencies to apply their expertise and to create a record if subsequent judicial review cannot be avoided.

HJTA seemingly recognizes Section 6(a) creates administrative remedies, but argues only an agency, and not a disgruntled fee-payor wishing to challenge the propriety of a fee or charge, has an obligation

---

[1] In fact, the District's optimism about its chances at trial was bolstered when the trial court tentatively issued an order excluding Plaintiffs' only expert proffered to opine regarding the District's EDU-methodology. [8 AA 1637.]

to participate in the process. HJTA's attempt to limit the remedies available under Proposition 218 is unsupported by a plain reading of the constitutional provisions. The duty to exhaust also does not depend on the specific advisement of a duty to exhaust, nor was the District required in its notices to specifically invite fee-payors to bring a challenge to its rate-structure. Proposition 218's public hearing process provided an available remedy for a challenge to the District's approved 2012-2014 fees for which Plaintiffs now seek a refund.

The District received a handful of protests from fee-payors stating they generally objected to raising sewer fees; however, none raised a challenge to the rate-structure underlying those fees. There was no impediment in the District's notices of public hearing to challenging the District's rate-setting methodology in connection with the Proposition 218 public hearing process. If an objection to the District's rate-setting methodology had been brought in connection with the District's proposed rates in 2012-2014, it would have been considered; however, the District was never given that opportunity.

HJTA's supposition regarding what action by a fee-payor would have been required to exhaust under Section 6(a) is misplaced. There is no starting point from which to measure what would be required for a fee-payor to exhaust or whether the hypothetical impediments HJTA

argues render exhaustion "impossible" would have supported a defense because *no one challenged the District's EDU-methodology prior to filing this lawsuit.* HJTA's speculation is likewise contradicted by the record in this case establishing Plantier was aware of the remedies available under Proposition 218, and could easily have raised a methodological challenge in connection with the Proposition 218 public protest hearings, but deemed participation in the public protest process a waste of time.[2]

Participation in the process voters mandated places a minimal burden on a party seeking to later judicially challenge fees approved after a public protest hearing. Proposition 218 requires agencies to consider all objections and further places the burden on agencies to support approved rates if later challenged. Agencies have the expertise to evaluate methodological, or other objections, and the authority to adjust rates, or the underlying methodology used to set those rates, if deemed appropriate. The District had a history of lowering rates following the public protest hearing even when there was no written majority protest. HJTA's characterization of the public hearing as

---

[2] There were two written objections to the District's EDU-methodology in 2015, but they were not evaluated by the trial court because they were provided to the District after Plaintiffs' class lawsuit was filed. [8 AA 1637.]

involving no more than a counting exercise is contrary to the plain language of Section 6(a) and ignores the months of preparation preceding the hearing to ensure fee-payors and rate-makers have a meaningful dialog as envisioned by Proposition 218 before proposed fees are approved. Taxpayer consent and power sharing under Proposition 218 is not furthered if fee-payors have no obligation to bring their challenge to the agency's attention at the time fees are being approved.

ARGUMENTS

I. Proposition 218 Created Remedies Available to Fee-Payors.

HJTA appears to recognize administrative remedies exist under Section 6(a), but makes various arguments attempting to exempt Plaintiffs' class action lawsuit from its reach. HJTA does not dispute that when construing an initiative to determine voter intent, electors are presumed to be aware of the law. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 935.) A remedy exists if the law provides for notice, opportunity to protest and a hearing. (See *Wallich's Ranch Co. v. Kern County Pest Control District* (2001) 87 Cal.App.4th 878, 883 ("*Wallich's Ranch*"); see also *Drummey v. State Bd. Funeral Directors and Embalmers* (1939) 13 Cal.2d 75, 80-81 ["[d]ue process does not require any particular form of notice or method of procedure].)

Express language notifying fee-payors of a duty to exhaust was not required to be included in the initiative. The drafters of Proposition 218 are presumed to have been aware that by requiring agencies to provide notice, opportunity to protest and a hearing where all protests are considered, they were creating an available administrative remedy.

A. The Heightened Notice Requirements Urged by HJTA are Unsupported.

HJTA is incorrect to suggest a "reasonable ordinary plaintiff" would only believe Section 6(a) required them to take action if express language notifying fee-payors of a duty to exhaust was included in an agency's hearing notice. [HJTA Brief, pp. 17, 31-32, 34 (HJTA complains the District notices "did not invite [property owners] to protest a conversion of the underlying rate structure from an EDU model to an actual metered consumption model, or vice versa.").] Notice providing the time and place of a hearing and indicating objections would be considered is enough to create a remedy. (See *Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 683; see also *Wallich's Ranch Co. v. Kern County Pest Control District* (2001) 87 Cal.App.4th 878, 880 [notice of a budgetary hearing was deemed sufficient notice of the opportunity to challenge a pest control assessment].)

The District's notices complied with the Section 6(a)(1) requirement to provide information regarding "the proposed fee or charge...the amount of the fee or charge proposed to be imposed upon each parcel, 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." (Cal. Const. Art. XIIID, § 6, subd. (a)(1).) The adequacy of the District's notices have never been challenged in this lawsuit, and are not at issue in this case. The District's notices included information regarding the amount of the proposed fees and the basis upon which the amount of the fee were calculated; thus, the methodology for calculating the proposed fees was necessarily implicated. The adequacy of the underlying rate structure was and is a core issue at all rate-setting hearings because it was and is the basis upon which the proposed fee or charge is calculated.

Fee-payors were notified that written protests may be submitted by mail, in person, or at the public hearing, and instructed that protests must be received "prior to the close of the Public Hearing, which will occur when public testimony on the proposed rate increases is concluded." [5 AA 886-887; see, e.g., 6 AA 1076.] Fee-payors were also explicitly advised the District Board "will hear and consider all

written and oral protests to the proposed rate increases at the Public Hearing," and that at the end of the hearing, the Board "will consider adoption of the proposed rate and fee increases." [6 AA 1077.] The notices provided that if written protests against the proposed rate or fees are not presented by a majority of property owners or customers, the District Board "will be authorized to impose the respective rate and fee increases." [*Id.*]

The focus of the exhaustion of remedies analysis centers on the ability to obtain some relief without the need for a lawsuit. It is the existence of a remedy, not any magic words in an agency's notice that is controlling. As evidenced by the protests received by the District, property owners did not feel limited by the notices and in fact did provide reasons for their objections. [See 8 AA 1409-1414, 1420-1428, 1434-1452, 1454-1467.] Even if what a "reasonable ordinary plaintiff" would believe were part of the exhaustion of remedy analysis, a reasonable plaintiff would certainly understand that the Proposition 218 public hearing provided them an avenue to have a challenge considered by the District prior to approval of the proposed fees.

B. A Balloting Procedure is Not Required to Create a Remedy.

The decision in *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, supports the conclusion a duty to exhaust existed in this case. HJTA seeks to distinguish *Evans* by arguing it involved a protest submitted by way of a balloting procedure. The existence of a balloting procedure in *Evans* did not control whether an administrative remedy existed. While it is true the plaintiff in *Evans* partially satisfied the duty to exhaust by checking the appropriate box on her ballot, she was also found to have exhausted available remedies because she "wrote the city council prior to its public hearing." (*Id.* at 734.) As held by the court of appeal: "This Act set out a specific protest procedure. Evans followed that procedure. She also wrote a letter to the city council which was received and considered prior to the public hearing. We conclude that Evans satisfied her obligations to pursue administrative remedies." (*Id.*) By contrast, while a handful of property owners filed protests here, none of the Plaintiffs raised an objection in connection with the Proposition 218 public hearings to the methodology underlying the District's proposed 2012, 2013 or 2014 rates.

HJTA is also incorrect that the citation in the *Evans* decision to *Alexander v. State Personnel Board* (1943) 22 Cal.2d 198, which

involved the duty to exhaust when there is an opportunity for a petitioner to seek reconsideration or rehearing, renders *Evans* bad law. The issue in *Evans* was not whether there was a duty to exhaust by seeking "rehearing" or "reconsideration," nor is that an issue in this case.

C. The Existence of a Public Safety Issue Does Not Dictate the Existence of a Remedy.

A duty to exhaust does not depend, as urged by HJTA, on the existence of "an immediate public safety issue" or "one-time hazardous conditions created by individual property owners endangering others." [HJTA Brief, pp. 39, 46.] *Roth* involved vegetation on *various* properties, including the property owned by plaintiffs, "declared by ordinance to be a nuisance which must be abated." (*Roth*, 53 Cal.App.3d at 682.) The plaintiffs therein were given notice of a hearing and advised their objections would be considered. Their duty to exhaust was based on the opportunity to have an objection considered, not because weeds are "a fire hazard and safety issue under state police power." [HJTA Brief, p. 46.]

In *Wallich's Ranch* "an immediate public safety issue" did not "drive" the court's decision finding a duty to exhaust. Instead, the court found the facts before it indistinguishable from those in *People ex rel.*

Lockyer v. Sun Pacific Farming Co. (2000) 77 Cal.App.4th 619, which held even though the Citrus Pest District Control Act "does not provide for notice to the property owners of the making of the proposed assessment and affords them no opportunity to protest, it does provide for notice, opportunity to protest, and hearing on the question of the adoption of the proposed budget." (*Wallich's Ranch*, 87 Cal.App.4th at 884-885, citation omitted.) Unlike the facts in *Wallich's Ranch*, Plaintiffs were not required to figure out they needed to exhaust by objecting to proposed rates at a budget hearing. Instead, Plaintiffs need only have participated in the very hearings wherein the rates they now challenge were approved.

Even if public safety was a factor in finding a duty to exhaust, the ability of the District to meet the users' needs for treating and disposing of its wastewater undoubtedly qualifies as a public health and safety issue. Providing safe and dependable sewer services to a community requires that the wastewater systems bring in sufficient, stable revenues to cover operation and maintenance costs and meet future needs to maintain the facilities. HJTA asserts that in twenty years Proposition 218 has not caused any "health or safety emergencies," but ignores the threat to an agency's ability to serve an

entire community by a class action lawsuit raising a methodological challenge affecting potentially all fee-payors.[3]

D. The Mandatory Duty to Exhaust Under Section 6(a) is Not Limited to a Hypothetical Enforcement Action.

HJTA's argument that the administrative remedies available under Section 6(a) only apply to a hypothetical enforcement action by an agency equally lacks merit. The requirement that an agency "shall" conduct a noticed public hearing before approving new or increased rates does not create a unilateral obligation or eliminate the remedy provided to a disgruntled fee-payor by virtue of that mandatory public protest process. The District held noticed public hearings in 2012, 2013 and 2014, providing anyone wishing to object to the proposed rates that are the subject of Plaintiffs' class action an opportunity to file a "no" vote, a written protest unlimited in content, and the opportunity to appear at the hearing and present oral objections. Pursuant to Section 6(a) all objections were to be considered by the District and pursuant to

---

[3] HJTA's claim that the lack of authority addressing exhaustion under Proposition 218 is probative of whether a duty exists is equally unavailing. The issue may not have been triggered by the facts in other cases or perhaps it did not occur to other litigants to raise the issue. The illogical implication HJTA asks this Court to make ignores that any number of reasons unrelated to whether a duty to exhaust exists could have impacted the lack of on-point authority addressing the issue to date.

Section 6(b)(5) the burden was placed on the District to support approved rates in the event of a later challenge.

HJTA's reliance on *City of Oakland v. Hotel.com* (9th Cir. 2009) 572 F.3d 958, 961-962, wherein the City of Oakland failed to comply with the procedure for establishing assessments, is therefore misplaced. The District did not seek to avoid the public hearing process. The point HJTA disregards is that the mandatory process the electorate voted to impose on agencies also resulted in a commensurate duty placed on fee-payors to participate in the process and to seek all available remedies prior to resorting to a judicial action.

The goals of Proposition 218 cannot be furthered if there is no dialogue between fee-payors and decision-makers regarding the imposition of fees prior to the adoption of proposed rates. (*Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 905 [goals of Section 6 are to minimize water rates and promote dialog between ratepayers and rate makers].) HJTA's argument creates friction between the policies underlying exhaustion and Proposition 218 – if the drafters did not want the notice and hearing process to create an administrative remedy, or if it were to be limited only to an enforcement action, they could have said so. (See *Coastside Fishing Club v. California Fish and Game Commission* (2013) 215 Cal.App.4th

397 [Administrative Procedure Act provides the "right to judicial determination shall not be affected by the failure either to petition or to seek reconsideration of a petition..."].)

II. THE DUTY TO EXHAUST APPLIES TO ANY POTENTIAL CHALLENGE TO THE DISTRICT'S 2012-2014 RATES.

HJTA maintains "nonparticipation in the protest proceeding for a rate increase should not bar one from challenging the validity of a rate structure that is alleged to be unconstitutional at its core regardless of whether the rates are raised or remain the same." [Brief, p. 9.] However, the duty to exhaust exists regardless of whether a constitutional challenge is raised. (*Roth,* 53 Cal.App.3d at 687 [even where statute is challenged on constitutional grounds completion of administrative remedies is prerequisite to equitable relief].) HJTA likewise cannot circumvent the administrative remedies delineated in Section 6(a) by characterizing Plaintiffs' challenge as one to an "existing" rather than a "new" or "increased" fee or charge simply because the rate-setting methodology underlying the challenged fees remained the same in 2012-2014. [HJTA Brief, p. 21.] The complaint challenges the rates charged by the District reaching back to November 22, 2012 and seeks refunds for all sewer customers for alleged overcharges. [1 AA 9.] HJTA therefore mischaracterizes Plaintiffs'

class action in stating there has not been a challenge to adopted rate increases that were the subject of a District protest hearing. [HJTA Brief, p. 41.] It does not matter that the rate structure underlying the approved increased fees was not changed.

As held in *San Diego Water Authority v. Metropolitan Water District of Southern California* (2017) 12 Cal.App.5th 1124, "fees and rates are 'subject to attack' when reenacted, even if they are essentially the same as previous ones. (*Id.* at 1142 ["'[w]ere all subsequent reenactments...immune to judicial challenge or review,' 'there would be no effective enforcement mechanism to ensure that local agencies' base rates on cost of service."].) The *San Diego Water Authority* court's finding that the underlying rate structure carries forward and is subject to challenge each time it is reenacted was not *dicta*; instead, that finding was the basis for the court's determination the plaintiffs' challenge therein was not barred. (*Id.*) It is likewise unsupported and illogical that the drafters of Proposition 218 would intend to limit the ability to protest the methodology underlying a new or increased fee simply because a component may have been in place for a period of years.

HJTA's non-Proposition 218 authorities on this issue are distinguishable. In *Drum v. Fresno County Dept. of Public Works*

(1983) 144 Cal.App.3d 777, a homeowner gave notice to his neighbors that he planned to build a large garage on his property, and that he was seeking a variance from otherwise applicable side yard requirements, but failed to advise the planned garage would have an additional story above the garage to be used as living quarters. The court concluded that notice of the intent to build the smaller structure was not sufficient to provide the statutorily required notice with respect to the larger structure. (*Id.* at 781–783.) Here, the District's notice was broad enough to allow challenges to the District's rate-setting methodology used to calculate the new and increased fees.

HJTA's reliance on *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, is also misplaced. In that case, as a matter of policy interpretation, the city made a particular determination each time the same zoning issue was presented to it. The plaintiffs contended the policy conflicted with state law. In seeking dismissal of the plaintiffs' action, the city contended administrative appeals from individual zoning decisions were sufficient to provide relief to plaintiffs. The court held exhaustion was not required because the administrative hearings, while potentially correcting individual errors, could not force the city to change its underlying policy. (*Id.* at 1568.)

Here, the administrative process provided by the District was fully capable of addressing Plaintiffs' challenges to the EDU-methodology. To the extent a decision from the District would have resulted in new or changed rates, a second notice and public hearing could have been provided to property owners. Nothing in the language of Proposition 218 prohibits an agency from giving notice of, and conducting, additional hearings. Indeed, an agency has every incentive to do so given Section 6, subdivision (b)(5) provides: "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." Plaintiffs should not be permitted to bypass the District by presenting Proposition 218 issues directly to a court without having participated in the process.

III. HJTA'S ARGUMENTS REGARDING THE ADEQUACY AND NECESSITY OF PROPOSITION 218'S REMEDIES LACK MERIT.

A. Section 6(a) Involves More Than a Counting Exercise.

HJTA conflates the two avenues available under Proposition 218 for fee-payors to challenge a proposed fee. First, a fee-payor may submit a written protest to be counted by an agency in determining whether there is majority protest preventing an agency from approving the proposed fee. Second, a fee-payor may submit a written or oral objection that must be considered by an agency prior to approving a

proposed rate or fee. While the information that must be included by a fee-payor for a written protest to be counted is prescribed, there are no limits on the content of any other oral or written objection.

HJTA's attempt to equate the obligation to "consider" with the obligation to "count" contradicts the plain language of Section 6(a) and ignores that objections presented during the hearing are not included in determining whether there is a majority protest. (Cal. Const. Art. XIIID § 6 (a) (2).) HJTA's citation to *Zumbrun Law Firm v. California Legislature* (2008) 165 Cal.App.4th 1603, does not support HJTA's constrained reading of Proposition 218, and instead supports the opposite conclusion that "consider" means more than count. (*Zumbrun Law Firm,* 165 Cal.App.4th at 1614 ["The right of the Legislature to consider such matters clearly implies the right to act substantively to protect the safety and security of its members, and that includes the power to contract for the construction of facilities to provide for such safety."].)

Morgan v. Imperial Irrigation District (2014) 223 Cal.App.4th 892, also does not support interpreting "consider" to mean "count." An entirely different issue of statutory interpretation was involved in *Morgan* regarding whether the district was required to calculate the number of protesters in each individual protest group or rate class,

which would have provided certain parcel owners with more heavily weighted votes. In resolving an ambiguity in the procedural requirements of Section 6, the court of appeal analyzed the substantive requirements of Proposition 218 and found that although the substantive requirements of Section 6(b) limit the fees paid by each owner of a parcel to his or her proportion of the cost of service, there was nothing in either Section 6(a) or (b) indicating that the owners paying more have a larger say in any fee increase. (*Id.* at 909.) The holding of *Morgan* has nothing to do with what it means for an agency to "consider" a protest. However, the analysis performed in *Morgan* does support the District's assertion that Sections 6(a) and 6(b) inform each other such that a challenge based on Section 6(b) must first be brought within the context of Section 6(a)'s public protest hearing.[4]

B. Consideration Necessarily Entails a Resolution to Accept or Reject an Objection.

HJTA argues that if administrative remedies exist by virtue of Section 6(a), they are "inadequate" because, unlike the facts in *Wallich's*, the obligation to "consider all protests" does not require the District to "hear and pass upon" the protests. [HJTA Brief, p. 36.]

---

[4] The letters HJTA claims it sends out to ensure agencies are properly calculating majority protests are not pertinent to the exhaustion of remedy analysis. [HJTA Brief, pp. 26-27.]

HJTA seeks to draw a distinction without a difference. The obligation to consider necessarily entails hearing and passing upon an objection prior to the District making its final decision whether to approve proposed rates. Whether the citrus pest control law addressed in *Wallich's* provides a separate remedy by virtue of a majority protest is irrelevant. Proposition 218 requires all objections to be considered regardless of whether a majority protest exists, and the District has voted to reduce fees in the past absent a majority protest. [5 AA 887-892.] The District's notices advise fee-payors that following the Proposition 218 hearing, proposed fees may be voted on (i.e. a final determination).[5]

HJTA likewise ignores the record in arguing the District has been "deceptive" in referring to its "Proposition 218 annual public hearing." [HJTA Brief, p. 37.] The District holds annual hearings and held informative public hearings before setting the very rates at issue in Plaintiffs' class suit. The lead class representatives testified they choose not to avail themselves of the administrative remedies available because they were a "waste of time." [8 AA 1650-1651.] The trial court

---

[5] HJTA argues the absence of language in Proposition 218 stating a time for appeal means there is no administrative remedy, but fails to point to any authority supporting its assertion.

properly rejected conjecture the District might not hold an annual Proposition 218 public hearing in the future. [8 AA 1622-1623.] Had the facts established no public hearings were held, perhaps Plaintiffs would then have an argument establishing an exception to the duty to exhaust based on irreparable injury.[6] However, the facts established the District's Proposition 218 hearings occurred annually and were directly tied to the adoption of the District's fiscal operating budget. The ability of an agency to pass through certain types of rate increases for a period of five years—which did not occur here—does not affect the availability of an adequate administrative remedy.

Finally, HJTA's reliance on *Payne v. Anaheim Memorial Medical Center* (2005) 130 Cal.App.4th 729, as support for the notion that Proposition 218 does not provide administrative remedies is misplaced. The plaintiff in *Payne*, an African–American medical doctor, complained about wrongdoing at Anaheim Memorial by a radiologist, Dr. Siegel, and other personnel. (*Id.* at 733–734.) The court of appeal concluded that under the applicable regulations, "Payne had only the

---

[6] For example, court will excuse the failure to exhaust administrative remedies upon a compelling showing that plaintiff would suffer irreparable injury if judicial review were delayed or denied. (*Abelleira v. District Court of Appeal, Third District* (1941) 17 Cal.2d 280, 296-300.)

right to complain about...Siegel's comment, and about his general perception that hospital personnel were discriminating against him (and his patients) based upon racial considerations. He did so, both directly and through his attorney. However, once he had done so, the medical staff bylaws guaranteed him nothing more. He had no right to compel anyone to take his assertions seriously, let alone to examine them in the context of a quasi-judicial proceeding." (*Id.* at 739.) On that basis, the court concluded: "But having offered Payne no 'quasi judicial remedy' to address his grievance, we cannot permit Anaheim Memorial to assert the exhaustion doctrine as a means of depriving him of an actual judicial remedy." (*Id.* at 743.)

Proposition 218 provided Plaintiffs an opportunity to present an oral or written objection unlimited in content and required the District to consider the objection before approving proposed rates. The lack of any "guideline for the level of consideration" does not render the District's obligation to consider all protests "a façade." [HJTA Brief, p. 24.] In the event of a subsequent challenge, the District had the burden to establish compliance with Proposition 218's substantive provisions. The differing facts between *Payne* and this case only highlight why Proposition 218 provides an available remedy that should have been exhausted.

C. Exhaustion of Proposition 218's Remedies Will Not Create an Unworkable System.

"'Amicus Curiae must accept the issues made and the propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered.' [Citations.] Otherwise, amicus curiae, rather than the parties themselves, would control the issues litigated. It would also be inappropriate for amicus curiae unilaterally to augment the scope and thus the cost of litigation to the opposing party." (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (2001) 90 Cal.App.4th 1151, 1161, fn. 6.) "It is a general rule that an amicus curiae accepts a case as he or she finds it," and "[a]micus curiae may not 'launch out upon a juridical expedition of its own unrelated to the actual appellate record.'" (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1274; see also *Younger v. State of California* (1982) 137 Cal.App.3d 806, 813 [rule "universally recognized that an appellate court will consider only those questions properly raised by the appealing parties."] HJTA may not insert a new issue and unsubstantiated facts from outside this record into this case.

HJTA urges that by enforcing Proposition 218's exhaustion requirement, agencies will no longer be able to use machine-readable

forms and the system will be unworkable. [Brief, pp. 24-25.] This issue was not raised by the parties. Moreover, conjecture and speculation are not proper bases for statutory interpretation. (*Donorovich–Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1132.) HJTA's arguments contradict evidence in the record that the District received only a handful of written protests—all of which were considered. [See, e.g., 5 AA 907-908; 8 AA 1409-1428.]

HJTA's assertion that it would have been impossible to exhaust the remedies provided by Proposition 218 prior to the filing to Plaintiffs' class action lawsuit is also an issue not raised by the parties and unfounded. None of the protests challenged the District's use of the EDU-methodology to calculate sewer fees or alleged that the District's use of that method violated Proposition 218. Accordingly, there is no record from which to determine if a party sufficiently informed the District of the basis for an objection. Plantier could easily have satisfied the duty to exhaust.[7] He and the other lead plaintiffs understood remedies were available, but testified they viewed the

[7] Plantier need only have made a sufficiently specific objection so that the District was provided the opportunity to evaluate and respond. (See, e.g. *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 686 [rejecting methodological challenge to reports by city's financial expert because plaintiffs did not present competing financial analysis].)

process as a "waste of time." After the filing of Plaintiffs' complaint, other members of the community did file objections to proposed rates based on the methodology used by the District in rate-setting. [8 AA 1637] While it was unnecessary for the trial court to determine whether those challenges satisfied the duty to exhaust, HJTA's concerns regarding what would be required to exhaust are overstated and not based on reality.

The District was denied the opportunity to evaluate and respond to the specific complaints now raised by Plaintiffs despite the District having annually incurred significant time and expense in providing Plaintiffs an opportunity to resolve the very issues for which they seek judicial review. Finding the exhaustion doctrine applies in this case provides both the public agency and its fee-payors the opportunity to address and investigate cost-of-service issues before costly litigation and while the District still has an opportunity to make changes before approving its budget and making decisions that impact an entire community.

D. Whether an Administrative Procedure to Challenge the Adoption of Rates Exists is Not Dependent on the Label Attached to Agency Action.

HJTA posits that if rate-setting is legislative, no duty to exhaust applies. [HJTA Brief, p. 16.] The label attached to the agency's action

is not what controls whether a remedy exists. (*Redevelopment Agency v. Superior Court* (1991) 228 Cal.App.3d 1487, 1492 ["The exhaustion doctrine speaks to whether or not an administrative remedy for questionable governmental action exists, not to the character of the underlying governmental action itself."]) HJTA is also incorrect that there is no duty to exhaust in the context of legislative decision-making. (*Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 93 [exhaustion applies to constitutional challenge to zoning ordinance].) The facts of *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, wherein plaintiffs bringing an inverse condemnation claim were not required to first seek a General Plan Amendment (GPA), are distinguishable (*Id.* at 1432). The court in *Howard* ruled that whether the public agency had reached a "final decision" resulting in a regulatory "taking" was a factual question, given the plaintiffs' efforts to gain approval for their project, that could not be resolved at the pleading stage. (*Id.* 1431.) The court also found a triable issue of fact whether further attempts to seek approval would have been futile. (*Id.*) Finally, the court found there was a factual question as to whether a GPA was even necessary, given the public agency's guidance to the plaintiffs. In this unusual context, the court

ruled the plaintiffs could proceed to trial, even though they had not sought such a legislative action.

E. Proposition 218 Provides a Non-Duplicative Remedy.

If multiple remedies exist, they must be exhausted. (*Acme Fill Corp. v. San Francisco Bay Conservation etc. Com.* (1986) 187 Cal.App.3d 1056, 1064 [when multiple remedies are available, all must be exhausted before judicial review is available]; *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447-1448 [exhaustion required under Government Code and Fairfax Tax Code].) HJTA has failed to counter these authorities.

HJTA's arguments incorrectly depend on limiting the remedy provided under Proposition 218 to casting a vote in an effort to obtain a majority protest. [Brief, p. 30 ("if the option to protest were a remedy on Plantier, the content of one protest (which can be guaranteed to be no more specific than a "no" vote on the proposed rate increase) is duplicative or all others, marginal at best in cumulative effect and thus likewise unnecessary.").] Proposition 218 requires all objections must be considered. HJTA's claim that protests can be "guaranteed" to be a simple "no" vote ignores the plain language of Section 6(a) and the written objections in the record.

HJTA also does not dispute objections must also be received so that they may be considered in an agency's decision-making process. (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1143.) Timing is of critical importance for agencies engaged in rate-setting and in determining whether the specific remedies provided by Proposition 218 have been exhausted. Plantier's objections in the context of his private dispute with the District regarding past due sewer permits, connection fees and past due service charges owed for his property were not made at the time the District was deciding whether to adopt the proposed rates now challenged. The communications did not involve the specific rates for which Plaintiffs now seek a refund or the calculation of annual service charges District-wide. [See District Reply Brief on the Merits, pp. 25-30.] Plantier's objections under the District's legislative code did not exhaust the requirement that Plantier, or another member of the represented class, exhaust the remedies available under Proposition 218 when the now-challenged rates were being set.

Plaintiffs' compliance with the Government Claims Act also did not exhaust the remedies available to them under Proposition 218. [Brief, pp. 42-46.] The Government Claims Act filing requirements and the administrative remedies exhaustion doctrine differ. The Government Claims Act requires a lawsuit for monetary relief against

an agency to be preceded by a claim, affording the agency opportunity to investigate and potentially settle the claim short of litigation. (See, e.g. *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 247.) As explained by the court of appeal in *Bozaich v. State of California* (1973) 32 Cal.App.3d 688, the exhaustion doctrine serves other purposes:

> The doctrine of exhaustion of administrative remedies evolved for the benefit of the courts, not for the benefit of litigants, the state or its political subdivisions. It rests 'on considerations of comity and convenience,' and its basic purpose is to secure a 'preliminary administrative sifting process' [citation] to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief. [Citation.] The claim-filing requirements of the Government Code are directly related to the doctrine of governmental immunity and exist for the benefit of the state, not the judicial system; they were adopted by the Legislature in the exercise of its legislative prerogative to impose conditions as a prerequisite to the commencement of any action against the public entity. [Citation.] The doctrine of exhaustion of administrative remedies has no relationship whatever to division 3.6 of the Government Code, and it follows that any exception to that doctrine is not controlling here.

(*Id.* at 698; see also *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1156 [the doctrine of exhaustion of administrative remedies is unrelated to the claim presentation provisions of the Government Claims Act].) Accordingly, whether or not a claim for refund is made under the Government Claims Act, there is still a separate obligation pursuant to Proposition 218 to exhaust its

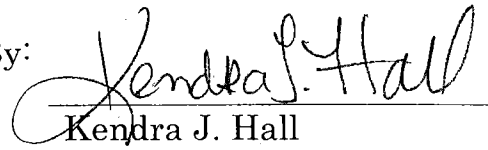
available administrative remedies. If members of the public participate in the Proposition 218 hearing and specifically object to a proposed fee, the need for judicial intervention may be rendered totally unnecessary either because of a majority protest or because the District determines a written or oral objection is valid and decides not to approve a proposed fee or charge in consideration of the merits of that objection.

CONCLUSION

Speculation and hyperbole are not a basis to construe Proposition 218 contrary to its plain meaning. Exhaustion of the remedies resulting from Proposition 218's mandated protest process is required before the propriety of a property-related fee, including the methodology used to determine that fee, may be subject to judicial challenge. The decision of the Court of Appeal should be reversed.

DATED: April 12, 2018

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: 

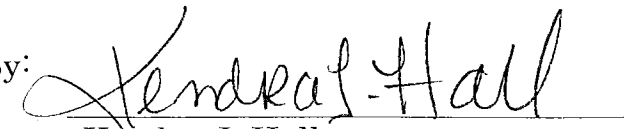
Kendra J. Hall
Gregory V. Moser
John D. Alessio
Adriana R. Ochoa
Attorneys for Defendant and Respondent RAMONA MUNICIPAL WATER DISTRICT

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.520(c)(1), I certify that this Answer to Brief of Amicus Curiae Howard Jarvis Taxpayers Association is proportionately spaced, has a typeface of 13 points or more, and contains 6,225 words.

DATED: April 12, 2018

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: 

Kendra J. Hall
Gregory V. Moser
John D. Alessio
Adriana R. Ochoa
Attorneys for Defendant and Respondent RAMONA MUNICIPAL WATER DISTRICT

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 "B" Street, Suite 2200, San Diego, California 92101. On April 12, 2018, I served the within documents:

ANSWER TO BRIEF OF AMICUS CURIAE HOWARD JARVIS TAXPAYERS ASSOCIATION

☑ **BY U.S. MAIL** by placing the document(s) listed above **on April 12, 2018** in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

☐ **BY OVERNIGHT DELIVERY** by placing the document(s) listed above in a sealed overnight envelope and depositing it for overnight delivery at San Diego, California, addressed as set forth below. I am readily familiar with the practice of this firm for collection and processing of correspondence for processing by overnight mail. Pursuant to this practice, correspondence would be deposited in the overnight box located at 525 "B" Street, San Diego, California the ordinary course of business on the date of this declaration.

☑ **BY E-MAIL OR ELECTRONIC SERVICE (Per CRC 8.60(f))** based upon court order or an agreement of the parties to accept service by electronic transmission, by electronically mailing the document(s) listed above **on April 13, 2018** to the e-mail address(es) set forth below, or as stated on the attached service list and/or by electronically notifying the parties set forth below that the document(s) listed above can be located and downloaded from the hyperlink provided. No error was received, within a

reasonable time after the transmission, nor any electronic message or other indication that the transmission was unsuccessful.

SEE SERVICE LIST

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

Executed on April 12, 2018, at San Diego, California.

Kristina Terlaga

Kristina Terlaga

SERVICE LIST

Attorney for Plaintiffs, Appellants and Respondents
James Richard Patterson
Allison Hughes Goddard
Patterson Law Group
402 West Broadway,
29th Floor
San Diego, CA 92101
Jim@pattersonlawgroup.com
Ali@pattersonlawgroup.com
jackie@pattersonlawgroup.com

[1 electronic copy on April 13, 2018]

Attorney for Plaintiffs, Appellants and Respondents
Todd D. Carpenter
Carlson Lynch Sweet Kilpela & Carpenter, LLP
1350 Columbia Street, Suite 603
San Diego, CA 92101
tcarpenter@carlsonlynch.com
bcasola@carlsonlynch.com

[1 courtesy electronic copy on April 13, 2018]

Superior Court
Clerk of the Superior Court
San Diego Superior Court
330 West Broadway
San Diego, CA 92101

[1 copy via U.S. Mail on April 12, 2018]