S243360

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

EUGENE G. PLANTIER, *et al.*,
Plaintiffs and Appellants,

v.

RAMONA MUNICIPAL WATER DISTRICT,
Defendant and Respondent.

Review of a Published Decision of the
Fourth Appellate District, Division One, Case No. D069798

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

HOWARD JARVIS TAXPAYERS ASSOCIATION'S APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS

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APPLICATION FOR LEAVE TO FILE

Howard Jarvis Taxpayers Association ("HJTA") is a California nonprofit public benefit corporation with over 200,000 members. The late Howard Jarvis, founder of HJTA, utilized the People's reserved power of initiative to sponsor Proposition 13 in 1978. Proposition 13 was overwhelmingly approved by California voters, and added Article XIIIA to the California Constitution. Proposition 13 has kept thousands of fixed-income Californians secure in their ability to stay in their own homes by limiting the rate and annual escalation of property taxes.

In 1996, HJTA authored and principally sponsored Proposition 218, the Right to Vote on Taxes Act. California voters passed Proposition 218, which added Articles XIIIC and XIIID to the California Constitution and placed strict limitations on local governmental entities' authority to levy taxes, assessments, fees, and charges.

At issue in this case is whether Proposition 218 requires an individual to participate in a protest proceeding as an administrative remedy that must be exhausted before he can challenge an invalid fee or charge in court. In over a dozen

published or pending cases involving Proposition 218, HJTA is the named plaintiff, representing its members. In no case has HJTA's standing ever been challenged on the grounds that it needs to prove participation by members in a protest proceeding. Such a requirement would hamstring public interest litigation.

HJTA takes no position on the underlying dispute regarding RMWD's Equivalent Dwelling Unit (EDU) billing methodology. As amicus, HJTA argues only that 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. The purpose of the exhaustion doctrine is not served by such a requirement, nor does Proposition 218 impose such a condition on access to judicial review.

HJTA therefore has a direct interest in the case, both as author and sponsor of Proposition 218 and as a frequent defender of Proposition 218 in court. The interest of amicus is to have the intent of the drafters and voters acknowledged and given effect.

HJTA thus supports Plaintiff in this case and encourages

this Court to affirm the decision of the Fourth District, Division One, Court of Appeal. HJTA requests leave from this Court to file the accompanying Brief of Amicus Curiae.

HJTA's staff attorneys authored the entirety of the proposed brief, and HJTA neither made nor received any monetary contributions intended to fund the preparation or submission of the brief.

For the foregoing reasons, HJTA respectfully requests this Court's permission to file the accompanying Brief of Amicus Curiae.

Dated: March 2, 2018

Respectfully submitted,

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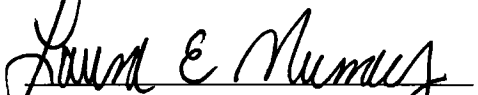

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BRIEF OF AMICUS CURIAE

INTRODUCTION

After more than twenty years of local governments functioning viably under Proposition 218, the Ramona Municipal Water District ("RMWD") argues that its viability is threatened by a regular challenge under Article 13D subsection 6(b) not to the amount of revenue it may collect from its customers, but only to the methodology of apportioning its revenue needs. RMWD is desperately trying to avoid judicial review of that methodology by erecting a new administrative remedy as a barrier to taxpayer litigation.

RMWD states that "[t]here appears to be no authority directly addressing the duty to exhaust administrative remedies under Proposition 218." (Petn. at p. 45.) Aside from any local legislative code as was satisfied here, the fee payer's administrative remedy has been clearly articulated in the Government Claims Act. (Cal. Code Civ. Proc., §313; Gov. Code, §§ 810; 945.4; *Sipple v. City of Hayward* (2014) 225 Cal.App.4th 349, 356, citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455.) RMWD argues, however, that fee payers should

be barred by another new administrative remedy, one it claims voters self-imposed in 1996, but with no evidence of voter intent.

Amicus HJTA submits that if there is an administrative remedy created by Article 13D subsection 6(a), this remedy attaches not to the fee payer who should be following local codes and the Government Claims Act, but to RMWD. Like individuals, public agencies are subject to the doctrine of exhaustion of administrative remedies. RMWD could choose to bring an action for enforcement of unpaid fees, in which case RMWD would have to show that it followed all proper procedures. Where the word "shall" is used following the noun "agency", as in subsection 6(a), it indicates a duty to be exercised by the agency, not the fee payer in a way that can only be, as here, speculative and duplicative.

The Court of Appeal correctly decided the case. RMWD conceded that Plantier exhausted administrative remedies established in the relevant codes. Subsection 6(b) is fundamentally distinct from subsections 6(a) and 4(d-e). The Court of Appeal amply explains how the application of subsection 6(a) as an administrative remedy to subsection 6(b) would be nonetheless inadequate. Amicus HJTA submits that it is also duplicative and unnecessary. The difference between rate

structures and rate-setting is far from artificial, especially here where RMWD's notices of public hearing expressly addressed only "proposed increases" and never the billing methodology itself. Amicus HJTA submits it is *impossibly* inadequate because fee payers will not have sufficient time or information to present claims in the detail RMWD proposes they should be able to do.

Lastly, there is no plain language in Proposition 218 demonstrating the voter intent RMWD claims.

In short, there is no exhaustion requirement in Proposition 218, except on the public agency imposing the fee. Subsection 6(a) simply requires the agency to honor a veto right, representing one step the agency must follow in order to validly establish a fee. Further requirements on the agency are listed in subsection 6(b), under which Plantier has validly brought its case.

QUESTION PRESENTED

The issue is presented in RMWD's petition as follows:

Must a fee-payor exhaust administrative remedies by participating in the public hearing required by California Constitution, Article XIII D, section 6 before challenging the propriety of a proposed property-related fee or charge?

(Petn. at p. 8.)

The answer to that question is no. The public hearing is not an administrative remedy attaching to the fee payer, and was not self-imposed in 1996.

ARGUMENT

I.

THE MANDATORY DUTY OF SUBSECTION 6(a) IS ON RMWD, NOT PLANTIER

Confusion has been set spinning regarding the majority protest hearing that RMWD is obligated to hold under subsection 6(a) of Article 13D of the California Constitution. Though it is spelled out clearly as to what *the agency* "shall" do, RMWD strives to convert that into a duty on the fee payer.

Hypothetically, RMWD could bring an enforcement action against an individual property owner who hasn't paid his fees. To do so, RMWD must exhaust its administrative remedies.

The doctrine of exhaustion of administrative remedies applies as firmly to government agencies as it does to individuals. (See *City of Oakland v. Hotels.com* (9th Cir. 2009) 572 F.3d 958, 961-962 ["Oakland argues that its Ordinance does not require a tax assessment before suit is brought and that, in any case, the administrative remedies apply only to the operators, not the

taxing authority. This strained interpretation is belied by the plain language of the Ordinance. ... it does not follow that the City can simply sue in federal court without exhausting its administrative remedies."].)

In *City of Oakland*, the Ninth Circuit described similar cases of cities across the nation suing hotels for tax assessments. All concluded that cities must first exhaust their administrative remedies by following the clear commands of their ordinances in *establishing* the assessments they sought to enforce. (*Ibid.*) Just as a City "shall" follow the process for assessing a tax (*ibid.*), RMWD "shall," per subsection 6(a), follow the process of proposing a new or increased fee. RMWD could not sue to recover unpaid fees if it had not first exhausted the remedy of holding the majority protest hearing.

Regarding rate-making, Local Government Amici argue it is legislative, and that the doctrine of exhaustion of administrative remedies applies to *both* legislative and administrative acts. (See Amicus Curiae Letter of Government Amici in Support of Petition for Review, August 17, 2017, p. 1.; See also AOB at p. 55 [describing rate-setting as "legislative line-drawing"].) If the process here is legislative rather than

administrative, the doctrine would not apply at all and certainly not through a public hearing. (See *Howard v. County of San Diego* (2014) 184 Cal.App.4th 1422, 1432 ["While the County recognizes that a [General Plan Amendment] is a legislative act, it argues it has provided an administrative process for seeking such relief. However, regardless of the *process* by which landowners may seek a GPA, the ultimate decision is a legislative one to be voted on, after a notice and hearing, by the County's Board of Supervisors. (Gov. Code, §§ 65355-65356.) That is not an administrative remedy."]. Emphasis in original.)

However the process may be characterized here, if the ultimate decision on a rate structure is legislative, the majority protest opportunity on a rate increase is simply a duty of the district and cannot be an administrative remedy required of the fee payer.

In contrast to what the agency "shall" do, the Government Code and local legislative codes prescribe what the fee payer must do before filing a claim against a local entity, including a district. (Gov. Code, §900.4.) Part 3 of Division 3.6 of Title 1 of the Government Code, using the claimant as the noun, provides for the claimant's procedures before bringing suit against a district.

Local legislative codes also prescribe procedures, which RMWD admits that Plantier followed.

No reasonable claimant would interpret another administrative remedy to apply from Article 13D, subsection 6(a) since the actor in subsection 6(a) is "the agency" and the actor in the Government Claims Act is "the claimant." Nowhere in Proposition 218 does it say that to litigate a claim under any part of subsection 6, the fee payer must have submitted a protest vote at the latest (or earliest) public hearing, related or unrelated, particularly where no ballot is provided and where all relevant information may not have been publicly available in advance[2]. In this case, someone may not have objected to the rate *increase* and logically found no reason to submit a protest vote.

If the rate structuring is an administrative act to which the doctrine of exhaustion of administrative remedies applies, the simple conclusion following the Ninth Circuit's reasoning in *City of Oakland v. Hotels.com, supra,* 572 F.3d at pp. 961-962 is that

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[2]See *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1501, n. 12 ["...A minor issue in the briefing is whether City Water should have made its consultants report available for taxpayer scrutiny prior to the public hearing contemplated in article XIIID, section 6, subdivision (c)."].

the majority protest hearing is a mandatory administrative remedy on RMWD, not Plantier.

II.

THE COURT OF APPEAL CORRECTLY DECIDED THE CASE

A. RMWD Conceded Exhaustion of Remedies Under The Relevant Codes.

On November 21, 2013, plaintiffs submitted a "written administrative claim to District" with "a detailed explanation of plaintiffs' challenge to the EDU system." (*Plantier v. Ramona Municipal Water Dist.* ("*Plantier*") (2017) 12 Cal.App.5th 856, 874.) This alone distinguishes the case from *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* ("*Wallich's Ranch*")(2001) 87 Cal.App.4th 878 where that plaintiff "did not attempt whatsoever" to do so. (*Plantier v. Ramona Municipal Water Dist.* (2017) 12 Cal.App.5th 856, 874.) Plantier thus exhausted remedies per the RMWD legislative code.

The "District conceded both in its reply brief in support of its bifurcation motion and at the hearing that plaintiffs' administrative claim satisfied the general exhaustion requirement under the RMWD legislative code." (*Plantier v. Ramona Municipal Water Dist.* (2017) 12 Cal.App.5th 856, 874.)

RMWD has crafted a notion that the duty which befalls the agency in subsection 6(a) of Article 13D creates another administrative remedy which Plantier should have exhausted in order to challenge the EDU rate structure under subsection 6(b).

B. Subection 6(b) Is Fundamentally Distinct From Subsection 6(a) and Certainly Distinct From Subsections 4(d-e).

The Court of Appeal correctly stated:

> First, it is not even clear that the present controversy falls within the purview of subdivision (a)(2) of section 6, inasmuch as the subject of the instant case involves whether District complied with one (or more) of the *substantive* requirements of section 6, which, as noted *ante*, are set forth in subdivision (b) of this section, in calculating wastewater usage based on the EDU system, as opposed to the imposition of, or increase in, any proposed 'fee or charge' that is the subject of subdivision (a) of this section. (*Plantier, supra*, 12 Cal.App.5th at p. 867. Emphasis in original.)

There are key differences between subsection 6(a) and 6(b) which RMWD would blur even as the voter intent is clear on plain language. Subsection 6(a) is entitled: "*Procedures* for New or Increased Fees and Charges." (Emphasis added.) Subsection 6(b) is entitled: "*Requirements* for *Existing,* New or Increased Fees and Charges." (Emphasis added.) These are voter-approved headings in the State Constitution.

Subsection 6(a) requires mailed notice containing specified information about the new or increased fee, an opportunity to submit written protests, and a hearing to tabulate protests to determine whether a majority protest exists.

Subsection 6(b) applies not just to new or increased fees, but to existing fees as well. Accordingly, property-related fees cannot exceed the cost of providing service, cannot be for some purpose other than providing service, and must be proportional to a parcel's use of service.

Thus, subsection 6(a) sets forth procedures that must be followed to enact or increase a fee. Subsection 6(b) is exactly as the Court of Appeal described it: *substantive*. It sets forth the substantive requirements not only for new and increased fees, but for *existing* fees. Subsection 6(d) then reinforces this by imposing the substantive requirements of subsection 6(b) on all property-related fees, even those pre-dating Proposition 218: "Beginning on July 1, 1997, all fees or charges shall comply with this section."

Plantier challenges RMWD's existing EDU billing methodology as violating the substantive requirements of subsection 6(b), namely that the oversimplified EDU system does not charge parcels in proportion to their use of sewer service.

Plantier did not bring its action under subsection 6(a). Plantier challenged the *existing* charge.

The Court of Appeal correctly found that the trial court "erred in relying on section 4 when it imposed on plaintiffs a mandatory exhaustion requirement." (*Plantier, supra*, 12 Cal.App.5th at p.870.) Section 4 of Article 13D is entitled "Procedures and Requirements for All Assessments," not property-related fees. It likewise imposes on the agency a 45-noticed hearing requirement, but unlike subsection 6(a) with regard to new and increased property-related fees, subsections 4(c-d) require the agency to mail actual paper ballots and marked return envelopes for the majority protest. The agency does not have to provide ballots or return envelopes under subsection 6(a).

The assessment majority protest process also differs from the property-related fee majority protest process in that the weight of ballots in an assessment majority protest is according to financial obligation whereas the weight of ballots in a property-related fee majority protest is per parcel. (Cal. Const., Art. 13D, §§4(e); 6(a)(2).) Amicus HJTA would not support an interpretation that this imposes an administrative remedy to be exhausted by the assessment payer anymore than subsection 6(a)

could possibly do for subsection 6(b), but at least the property owner is provided a ballot and envelope in hand solemnizing the procedure. Subsection 6(a) provides the least formal process in all of Proposition 218 for rendering a protest vote.

Nowhere does Proposition 218 say that the property owner must submit a protest vote under subsection 6(a) or forego all other constitutional rights established therein, including subsection 6(b) claims unrelated to the latest hearing. RMWD concludes with no support: "The voters intended that these provisions be enforced together and that a substantive challenge to a proposed fee based on subdivision (b) be made at the majority protest hearing provided by subdivision (a)." (AOB at p. 36.) It provides zero evidence of this contention. The plain language, by contrast, contradicts RMWD's assertion.

RMWD's tangential emphasis on what it means to "consider" all protests for increased fees or charges is contrary to existing precedent interpreting that term, and would impose an administrative hardship on local agencies, especially those with large populations. The true intent of the term is simple. The word "consider" means to act, and offers no guarantees about the meaningfulness of the interaction occurring beforehand. (See

Zumbrun Law Firm v. California Legislature (2008) 165 Cal.App.4th 1603, 1614.) The level of thoughtful interaction *before* the acting is purely discretionary. The words "shall consider" only enforce the counting of protest votes. (See *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 902 [in rate protest involving 12,642 APNs, "[t]he protests by owners/tenants were then counted by parcel per section 6 of article XIIID of the California Constitution and Government Code section 53755 subdivision (b).".]

In *Morgan v. Imperial Irrigation District*, water rate payers sought separate protest tabulations for each rate level and lost. The Fourth District Court of Appeal determined that a "fee-by-fee protest procedure" would be unworkable and beyond the general nature of the language of Section 6. (*Id.* at pp. 907-908.) It would be ironic to conclude that a public agency need not separately consider each rate class, but must separately consider the protest form submitted by each rate payer.

The agency could entertain discussion of any protests beyond a mere veto vote, including perhaps a complaint about the rate structure even though that is not the subject of the hearing, but none of this is required, much less enforced, by Proposition

218. No record is created other than the percentage of protest votes. There are no guidelines for the level of consideration RMWD proposes. Aside from counting the votes, "[s]ection 6 offers no other instructions regarding the procedural requirements of holding a protest vote." (*Morgan v. Imperial Irrigation Dist., supra*, 223 Cal.App.4th at p.907.) "Instead, the requirements are very general regarding the timing of the public hearing and considering all protests." (*Id.* at p. 908.) On RMWD's assertion, there would have to be a substantive responsive procedure compliant with due process to which the agency is obligated for each and every protest, lest the asserted administrative remedy be nothing but a facade. But there is no such requirement in Proposition 218.

Even in the unrelated context of assessment protests, where ballots are required under subsection 4(d) indicating "name, reasonable identification of the parcel, and his or her support or opposition of the proposed assessment," the common practice of agencies is to provide a machine-readable protest form containing nothing more than the parcel's identity and check boxes for "I protest" or "I approve." If RMWD's "administrative remedy" is super-imposed on subsection 6(b), protest forms will

need to be provided as in subsection 4(d), and they will need to have room for property owners to write out their detailed protest and explanation of their particular grievance, together with attached documentation as necessary to provide the full information, as the trial court said, "to insure that boards in small municipalities such as RMWD have ample opportunity to address and investigate issues relating to charges and fees prior to litigation" (8 AA 1629) because "[e]xhaustion requires 'a full presentation to the administrative agency upon all issues of the case." (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609.)

In populated areas such as Los Angeles where protests number in the thousands, the City Council would need to continue the hearing for several days, weeks, or months to consider each property owner's potentially unexpected challenge and accompanying support. Small districts with no staff attorney would need to increase their budget for outside legal counsel to research the merits of each protest, not just those made under the Government Claims Act as a formal precursor to litigation.

RMWD's novel interpretation of Proposition 218 would create unworkable new administrative responsibilities for

districts large and small, something courts should avoid unless the voters clearly intended it. *Morgan v. Imperial Irrigation Dist., supra,* 223 Cal.App.4th 892 addressed the same suggestion. "The individual protest procedure argued by Farm Bureau would create an almost unworkable system, where a minority of voters could frustrate the purposes of section 6." *(Id.* at p. 911.)

The majority protest opportunity for an increased fee or charge is designed to offer fee payers a streamlined way to object to something so obviously over-priced that they can come together in a short window of time to say so. It is an efficiency mechanism to ward off what could be property taxation violating Proposition 13. The substance of an *existing* fee, after opportunity to review *all* information[3], however, is guided by subsection 6(b) and the relevant codes impose the administrative remedies to exhaust.

The trial court may have laudably intended to give full effect to the requirement that agencies "consider all protests against the proposed fee or charge," but the word "all" simply means that the agency must count all qualified protest votes.

Amicus HJTA regularly sends out letters to agencies not counting all qualified votes. Tenants are the most common group

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[3]See fn. 2, *infra.* See section III, *infra.*

of disenfranchised voters because they represent a large percentage of the total count and by disqualifying them the agency can reduce the total to less than a majority[4]. Other improperly disqualified groups include owners who do not live in the district or protesters who are not registered to vote. Ensuring that all qualified protests are counted, amicus submits, is the intended purpose of requiring all protests to be considered.

C. If Plantier Has An Administrative Remedy In Subsection 6(a) That Somehow Applies to Subsection 6(b), It Is Inadequate And Unnecessary.

The Court of Appeal next correctly concluded, with extensive reasoning, that if subsections 4(d-e) and 6(a) somehow did apply to subsection 6(b) to mandate an administrative remedy on fee payers, the remedy is nonetheless inadequate. (*Plantier, supra*, 12 Cal.App.5th at pp. 868-874.) Boiled down, since there is no procedure located in subsection 6(b) or even 6(a) for "acceptance, evaluation, and *resolution*, of disputes," any "remedy" imposed from subsection 6(a) is inadequate. (*Id.* at p. 871, emphasis in original, citing *Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 741-742.)

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[4]Tenants are entitled to protest under article 13D, section 2(g) and Government Code section 53755(b).

RMWD asserts that the plethora of cases cited in support of the Court of Appeal's decision do not support the decision. Its assertion hinges upon District testimony given in hindsight that "[t]he Board is always very interested in input that they get from the public, and is very sensitive to the input from the public on rates and expenses," and that "I think if any member of the public wanted to discuss that schedule that [the rate protest hearing] would be the appropriate forum for them to do that." (AOB at p. 24, citing 5 AA 921-922; 5 AA 881; 5 AA 926-927.) This hindsight testimony is speculative at best and even if taken as a promise or intention, still applies only to the personal intentions of individuals currently serving on RMWD's Board. The good intentions of today's Board members cannot be deemed a legal requirement for future RMWD Boards, or the boards of other agencies throughout California. Without such a codified legal requirement, there is no adequate remedy assuring that "the [b]oard [will] *do* anything in response to the submissions or testimony received by it at the hearing." (*Plantier, supra*, 12 Cal.App.5th at p. 871, citing *Payne v. Anaheim Memorial Medical Center, Inc., supra*, 130 Cal.App.4th at pp. 741-742, emphasis added.) There is nothing in Proposition 218 requiring the district

to do anything other than count the protest votes and not to pass a rate increase if a majority protests.

RMWD relies on *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728 wherein a business owner submitted one of 90 ballots protesting an assessment to fund a property and business improvement district ("PBID") under the Streets & Highways Code. Because the business owner was deemed to have exhausted her administrative remedy by submitting a protest, this case *at first blush* appears similar. Unlike here, however, a ballot was provided to Ms. Evans. Also unlike here, the protest ballot and noticed hearing directly related to the thing Ms. Evans was protesting – levying an assessment upon business owners to fund proposed services, not proposed improvements. Finally, unlike here, the Court found that a protest ballot was the only avenue for challenging the proposed PBID assessment.

RMWD argues under *Evans* that "[a]n administrative remedy, even if not comprehensive, must be exhausted." (AOB at p. 29, emphasis added.) The *Evans* decision cites *Alexander v. State Personnel Board* ("*Alexander*")(1943) 22 Cal.2d 198 in its supporting discussion leading up to the inference drawn by RMWD that Plantier *must* exhaust any remedy even if not

comprehensive. (*Evans v. City of San Jose, supra*, 3 Cal.App.4th 728, 733-734.)

Seven years after *Evans*, however, this Court formally abandoned the *Alexander* rule. (*Sierra Club v. San Joaquin Local Agency Formation Commission* (*"Sierra Club"*)(1999) 21 Cal.4th 489.) *Alexander* had held that when the Legislature provided that a petitioner may seek reconsideration or rehearing, the petitioner must do so to exhaust administrative remedies. Even though a rehearing is "unquestionably such a remedy," where it would only duplicate what has already been argued, this Court found it unnecessary. (*Id.* at p. 493-494; 497; see also *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1268 [re-stating that the doctrine of exhaustion of administrative remedies applies to "all available, *nonduplicative* administrative review procedures." Emphasis added.].) Thus, if the option to protest were an administrative 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 of all others, marginal at best in cumulative effect, and thus likewise unnecessary. Under current law articulated by this Court, that it may be done does not mean that it must.

To the extent RMWD then relies on the later-decided *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, the point continues on in another context: "An individual challenging a redevelopment plan need not have personally raised each issue at the administrative level, but may rely upon issues raised or objections made by others, even though they do not later join in the lawsuit, so long as the agency had the opportunity to respond. ... The policies of the exhaustion doctrine have been served if issues are raised for evaluation and resolution during the administrative process by similarly situated property owners, one or more of whom later file suit raising those same issues. ... It would be impractical to require each individual to repeat all objections raised by all of the other speakers in order to preserve the issues for review." (*Id.* at pp. 1137-1138, citations omitted.)

If, even where there is a detailed administrative procedure a duplicative action is unnecessary as in *Sierra Club*, it makes no sense to impose an extra duplicative administrative remedy where the procedure is not comprehensive, not detailed, nor related to the substance of the decision being made. Here, the reasonable ordinary plaintiff under subsection 6(b) challenging

the rate structure would simply never expect to need to take action under subsection 6(a).

D. The Difference Between a Rate Structure and a Rate Increase Is Not Artificial Here. The Purpose of Exhaustion Doctrine Would Be In No Way Served By Morphing The Two.

"The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary)." (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609.)

The second purpose of clarifying what is necessary to bring a case to court has just been discussed above. If for "judicial efficiency" we spare courts from hearing and deciding cases that could have been resolved by the administrative agency, that desire is not served by adopting RMWD's new rule. One protest added to an insufficient number of protests when a majority is needed to defeat the increase will not spare the court from hearing or deciding the case. Whatever exhaustion policy is served by the presentation of an insufficient number of protests,

if that policy is even applicable, is fully served whether the protest votes are 40.00% or 40.01%.

Moreover, the applicable exhaustion procedure is already established. "Code of Civil Procedure section 313 provides that the 'general procedure for the presentation of claims as a prerequisite to commencement of actions for money or damages' against a local government entity is prescribed by the Government Claims Act (Gov. Code, § 810 et seq.). The Government Claims Act 'established a standardized procedure for bringing claims against local governmental entities.' (citing *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 246.) The purpose of the Government Claims Act 'is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation.' (citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455.)." (*Sipple v. City of Hayward, supra,* 225 Cal.App.4th at p. 356.)

The Government Claims Act does not require the registering of a protest vote, but does require RMWD to provide the forms for filing claims. (Gov. Code, §§ 945.4; 910.4; 900.2; 900.4; see also *Schutte & Koerting, Inc. v. Regional Water*

Quality Control Board (2007) 158 Cal.App.4th 1373, 1385-1386 [request for hearing before board not required to exhaust administrative remedies; statute authorizing claims "silent" on this alleged remedy].) These existing procedures already provide the opportunity RMWD so desires for *specificity* of challenges and time to evaluate them. Registering a protest vote on a rate increase is not only unnecessary, but not helpful in this regard.

Regarding the first purpose, while "courts should not interfere with an agency determination until the agency has reached a final decision," RMWD was not making a decision on whether it should allocate costs using an EDU model or some other model. The notice mailed to affected property owners did not invite them to protest a conversion of the underlying rate structure from an EDU model to an actual metered consumption model, or vice versa. The noticed hearing and protest proceeding was limited to a proposed increase of the EDU rates. Thus, there was no pertinent final agency decision being made. A reasonable fee payer would find it illogical to submit a protest vote at such a hearing when his or her contention is not with the proposed increase, but with the existing apportionment methodology of the EDU rate structure. To expect fee payers to force the issue into

such a hearing as an administrative remedy is odd and unreasonable. To submit a protest on the proposed rate increase would in no way indicate to RMWD that the payer objected to the EDU methodology. Should a payer submit a special written or oral statement to that effect, he would reasonably expect to be turned away for irrelevance.

RMWD relies heavily on *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 87 Cal.App.4th 878 to counter this point. *Wallich's Ranch* involved a challenge to a citrus pest control assessment not imposed under Proposition 218 and subject to "a simple matter of division" which "amounts to no more than the performance of a ministerial act" once the total budget is calculated. (*Id.* at p. 885.) The structure was simple and unchallenged. As an annually calculated assessment, there was no rate for any ongoing service.

First, the Court of Appeal in *Wallich's Ranch* never applied Proposition 218 and it does not apply. It is true that the Proposition 218 argument was raised by the plaintiffs. However, the appellate decision is limited to the language of the citrus pest control law found in Food & Agricultural Code sections 8551-8568. This law applies to owners of citrus trees, not to owners of

real property as owners of real property, the purpose being to prevent the spread of pests, not to benefit the property. (*Ibid.*) The language regarding protests is different. Unlike the majority protest process in Proposition 218, the citrus pest control law refers to an agency *hearing* protests and rendering a final decision: "At the time set for hearing protests, the board shall proceed to hear and pass upon all protests so made and its decision on the protests shall be final and conclusive." (Food & Agr. Code, § 8565.) Proposition 218 requires the agency to "consider" the protests but does not indicate that its decision is then "final and conclusive." Also unlike Proposition 218, there is no indication that a majority of protest votes will defeat the assessment. The pest control agency will "hear and pass upon" the protests. (*Ibid.*) Unlike with Proposition 218, one protest alone could defeat the assessment or all owners of citrus trees could protest and the assessment could still be passed. This implies that the *content* of the citrus pest control protests are actually heard and that the protest process under Proposition 218 is the mere counting procedure it truly is.

Secondly, the process in *Wallich's Ranch* was far simpler than here. In *Wallich's Ranch* there is no structure versus rate

issue about which to argue. Under citrus pest control law, the assessment is "a simple matter of division", *Wallich's Ranch, supra,* 87 Cal.App.4th at p. 885, under an *annual* budget hearing. In other words, how many infected trees are there this year? How much will it cost to remove them? Who will therefore owe how much this year? The job is one and done. Here, water service is ongoing and variable, with multiple potential methodologies of fixed and variable rates and a public hearing which generally occurs only once every five years or more. It would thus hamstring Proposition 218 enforcement to delay subsection (b) litigation until plaintiffs can participate in a protest proceeding for a subsection (a) rate increase.

Under Government Code section 53756, a public agency may, with one protest proceeding, adopt a five-year schedule of fees that increase according to a formula for inflation and that pass through increases imposed by a wholesaler. It is thus deceptive where RMWD refers to the protest hearing in this case as a "Proposition 218 annual public hearing." (AOB at p. 42.) Further, there is no requirement that the agency revisit its fees at the end of the five years. If RMWD's proposed exhaustion rule is imposed and an agency knows that it faces litigation as soon as

the plaintiffs can participate in a protest proceeding for a subsection (a) rate increase, the agency could dip into its reserves as necessary to delay the need for a protest proceeding – and thus, the litigation – for several more years. Agencies would have a huge financial incentive to delay litigation as long as possible because an action for refund can only reach back twelve months. (Gov. Code, § 911.2.) An agency could retain years of income that it knows to be objectionable, based on structure or rate, simply by delaying the next protest hearing.

RMWD broadly claims that under *Wallich's Ranch*, "Exhaustion of Administrative Remedies in the Context of a Proposition 218 Challenge Was Required." (AOB at p. 40.) RMWD also cites *Wallich's Ranch, supra,* 87 Cal.App.4th at p. 883 for the broad assertion that under California law, "[a] remedy exists if the law provides for notice, opportunity to protest and a hearing." (AOB at p. 29; ARB at p. 10.) This sweeping generalization does not hold here where *Wallich's Ranch* concerned a one-time annual assessment rather than a fee which may be ongoing and variable for five or more years, was not analyzed under Proposition 218, and had no structure/rate issue. Moreover, page 883 of *Wallich's Ranch* simply does not say this.

Rather, on page 884, *Wallich's Ranch* acknowledges weakness in the pest control law and an immediate public safety issue *driving* the administrative remedy: "'We recognize the statute is not well written and does not specifically state an eradication plan may be challenged at the budget hearing. Given the public health and safety issues inherent in the Pest Control Law, in addition to the policy of resolving disputes expeditiously, we find the general exhaustion rule applicable.' (Citations.)." In twenty years, Proposition 218 litigation has not caused any health or safety emergencies. The policy of resolving disputes expeditiously is already ensured by the actual administrative remedies under the Government Claims Act and local legislative codes.

RMWD also uses dicta out of context from *San Diego County Water Authority v. Metropolitan Water District* (2017) 12 Cal.App.5th 1124, 1142 to argue that there is no distinction between rate structures and rate setting. The Metropolitan Water District had tried to argue that the plaintiffs' case was time-barred because the rate structure had been set in 2002 and was not challenged until 2010 and 2012. Metropolitan argued that the lawsuits challenging 2011 and 2014 rates were untimely because they had been linked to bonds issued in 2002 which

coincided with the setting of a new rate structure. Because bonds must be challenged within sixty days under the validation statutes, Metropolitan argued that the plaintiffs' case should have been tried in 2002. When the First District Court of Appeal wrote, "[t]his argument is untenable," it was referring to Metropolitan's argument of untimeliness, not holding that rate structure and rate-setting cases are universally one.

Like *Wallich's Ranch*, this was also not a Proposition 218 case. It was a Proposition 26 case in which water conveyance from the State Water Project to the San Diego County Water Authority was a specific government service provided directly to Metropolitan and not provided to those not charged. (*San Diego County Water Authority v. Metropolitan Water District*, *supra*, 12 Cal.App.5th at pp. 1152-1154.) The term "rate structure" in this case is of no moment to the multitude of individual property owners receiving property-related services under Proposition 218.

In *Venice Town Council, Inc. v. City of Los Angeles,* a neighborhood association sued the City of Los Angeles for granting multiple permits to convert apartment buildings to commercial units, alleging that the Mello Act forbids the conversion of low or moderate income housing unless the City

requires developers to provide replacement housing or pay and in-lieu fee. The trial court sustained the City's demurrer, finding that the Mello Act's conditions could be imposed or not at the City's discretion and therefore plaintiff's failure to participate in any of the conversion hearings barred its suit under the exhaustion doctrine. The Court of Appeal reversed.

> "The complaint in the case at bar constitutes an exception to the requirement of exhaustion of administrative remedies prior to the judicial review of the City's actions. Appellants do not challenge any of the City's past land use decisions which implicate the Mello Act. Instead, appellants' complaint seeks review of the City's overarching policies in implementing the requirements of the Mello Act and seeks to correct the City's interpretation of its responsibilities under that statute. Consequently, they were not required to exhaust administrative remedies prior to filing suit." (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1567. See also *Knoff v. City and County of San Francisco* (1969) 1 Cal.App.3d 184, 199.)

The same is true here. Appellants do not challenge the rate increase that was the subject of RMWD's recent protest proceeding. Instead they seek review of RMWD's "overarching policy" of allocating costs by EDU model rather than by actual metered consumption. The limited notice mailed to customers for a garden-variety rate increase affords no notice that the agency might fundamentally revise its basic rate structure, nor does the

hearing for a rate increase provide the agency's board with the information, staff input, legal advice, or public comment needed to take such a drastic step. (*Drum v. Fresno County Dept. of Public Works* (1983) 144 Cal.App.3d 777, 782 [hearing is an inadequate remedy where notice tells recipients that a different or lesser proposal will be the subject of the hearing].)

Administrative autonomy and judicial efficiency are in no way helped by morphing the constitutionally separate procedures of establishing water rate structures and water rate increases.

III.

THERE IS NO EVIDENCE OF VOTER INTENT IN PROPOSITION 218 TO SELF-IMPOSE AN ADMINISTRATIVE REMEDY BEYOND THE GOVERNMENT CLAIMS ACT AND LOCAL LEGISLATIVE CODES

"When interpreting a provision of our state Constitution, our aim is 'to determine and effectuate the intent of those who enacted the constitutional provision at issue.' (Citing *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 418.) When, as here, the voters enacted the provision, their intent governs. (Citing *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) To determine the voters' intent, 'we begin by examining the constitutional text, giving the words their ordinary meanings.'

(Citing *Richmond, supra*, at p. 418.)." (*Bighorn-Desert View Water Agency v. Verjil* ("*Bighorn*")(2006) 39 Cal.4th 205, 212.)

The ordinary meanings of the words in Article 13D subsection 6(a) indicate no administrative remedy on the fee payer before bringing a challenge under subsection 6(b). Subsection 6(a) also uses no ordinary language to indicate that fee payers can expect a final determination and a time for appeal.

Dicta in *Bighorn* provides that the requirements of subsection 6(b) "should allay customers' concerns" about excessive charges, *id.* at p. 220, but this is a far cry from a mandatory administrative remedy on the customers. It would require the fee payer to assume that everything listed in subsection 6(b) has been satisfied. No reasonable voter would have intended only 45 days to assess and challenge all elements of subsection 6(b).

RMWD's briefing focuses on the agency's desire for finality and then superimposes a facade of voter intent on its own desire. The agency's desire for absolute finality cannot go back in time to create intent of voters to impose a trap door on themselves as to *all* Proposition 218 challenges within the 45 days of notice of a proposed rate increase. RMWD cites zero evidence of such voter intent and its plain language argument is empty.

More honestly, RMWD complains how "expensive and time-consuming" Article 13D, section 6 is. (Amicus Curiae Letter of Local Government Amici in support of Petition for Review, August 17, 2017, at p. 5.) As recently as 2015, another district described it as "too complex" to calculate actual costs of water service at different levels of usage. (See *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1505.) More alarmingly for purposes of this case, in *Capistrano*, the agency did not make "its consultants' report available for taxpayer scrutiny prior to the public hearing contemplated in article XIII D, section 6, subdivision (c)." (*Id* at p. 1501, n. 12.) We cannot presume that the payers have all relevant and complete information before them necessary for compliance with subsection 6(b) at the subsection 6(a) public hearing.

Thus, the new standard RMWD would impose on payers is this: Within 45 days from receipt of a postcard summarizing a proposed new or increased fee, the payer is not only supposed to determine if the increase seems too high for him personally, but must access and review all ordinances and all current and previous reports (which the agency may or may not be disclosing)

regarding the fee itself and its underlying structure, find a knowledgeable attorney and schedule a consultation for advice, and be capable of substantiating a presentation to the agency at the public hearing with one's own expert witnesses, if necessary, but with no procedural guarantee other than that the agency shall "consider" the fact that he opposes the proposed increase. Despite being an "expensive and time-consuming" process for the agency, the payer should be able to accomplish all of this in response in 45 days. Acting fast and submitting a Public Records Act Request for reports on compliance with subsection 6(b), a diligent taxpayer could still lose up to 24 of the 45 days waiting to hear if responsive documents *exist.* (Gov. Code, §6253(c).) Nowhere does Proposition 218 impose this kind of a mandatory, not to mention impossible, administrative duty on the fee payer.

Finally, there is no voter intent in Proposition 218 to equate the majority protest proceeding for a generalized property-related fee to a safety hazard assessment process on unique properties. RMWD relies on *Roth v. City of Los Angeles* (*"Roth"*)(1975) 53 Cal.App.3d 679 to argue that voters intended these processes to be the same. (AOB at pp. 45-47.)

In *Roth,* property owners were sent notice that a fire hazard existed in the weeds on their property. If the Roths did not abate the weeds, the fire department would do so and assess the cost to the Roths. The Roths did not appear at the City Council meeting at which the final determination would be made unique to their property and thus forfeited their right to challenge the weed abatement assessment.

Unlike the "final determination" in *Roth*, Proposition 218 governs assessments and fees for ongoing services, not one-time hazardous conditions created by individual property owners endangering others. Weeds are a fire hazard and safety issue under state police power. This is a different process. Such has a final determination followed by an appeals process after "due consideration" stated as a guarantee to each property owner. A protest here is a mere veto vote to be counted with the others. That was the voter intent.

CONCLUSION

On plain language, Proposition 218 does not impose the additional mandatory administrative remedy on fee payers proposed by RMWD. Rather, the alleged mandatory exhaustion requirement would belong to RMWD should it pursue

enforcement of any unpaid fees. Such a mandatory remedy on fee payers would be inadequate, unnecessary, and impossible. The Court of Appeal should be affirmed.

WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c), of the California Rules of Court, that the attached brief, including footnotes, but excluding the caption pages, tables, and this certification, as measured by the word count of the computer program used to prepare the brief, contains 7,310 words.

Dated: March 2, 2018

Respectfully submitted,

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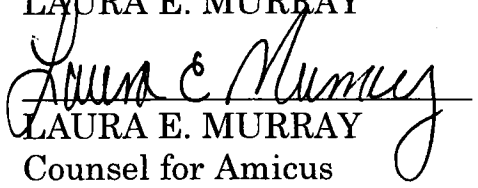

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PROOF OF SERVICE

SUPREME COURT OF CALIFORNIA

Plantier v. Ramona Municipal Water District
Supreme Court Case No. S243360

I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is: 921 11th Street, Suite 1201, Sacramento, California, 95814. On March 2, 2018, I served the attached document described as: **HOWARD JARVIS TAXPAYERS ASSOCIATION'S APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS** on the interested parties listed below, using the following means:

BY UNITED STATES MAIL I enclosed the documents in a sealed envelope or package addressed to the interested parties at the addresses listed below and on the attached page. I deposited the sealed envelopes with the United States Postal service, with the postage fully prepaid. I am employed in the county where mailing occurred. The envelope or package was placed in the mail at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 2, 2018, in Sacramento, California.

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