Supreme Court of California
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No. S263734
Court of Appeal
2 CIVIL No. B295181
c/w B295315

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HILL RHF HOUSING PARTNERS, L.P., et al.,

Petitioners and Appellants,

vs.

CITY OF LOS ANGELES, et al.,

Defendants and Respondents.

MESA RHF PARTNERS, L.P.,

Petitioner and Appellant,

vs.

CITY OF LOS ANGELES, et al.,

Defendants and Respondents.

Los Angeles County Superior Court Case Nos.
BS170127 and BS170352
Hon. Mitchell L. Beckloff, Department 86
Judge of the Superior Court

REPLY BRIEF ON THE MERITS

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I.

INTRODUCTION

In their Joint Answer Brief on the Merits, Respondents extoll the salutary purposes and jurisdictional nature of administrative exhaustion. But those principles are not at issue here. Petitioners have shown that a previously unknown administrative exhaustion requirement cannot be inferred where the California Constitution specifies a ballot process that must be followed – and was followed – prior to levying assessments for a business improvement district ("BID"). Petitioners' Opening Brief shows that the Court of Appeal improperly grafted a new requirement onto Article XIII D which is *directly contrary* to Proposition 218's express language and its express intent to make it harder, not easier, for local governments to impose assessments and fees.

Respondents fail to refute this showing and fail to meet their burden to establish that the affirmative defense of failure to exhaust administrative remedies bars Petitioners' challenges to the BIDs. Rather than directly addressing Petitioners' arguments, Respondents mischaracterize the plain text of Proposition 218, its

underlying purpose, and its implementing legislation. This Court should decline to impose new requirements not specified by either the Constitution or the Legislature.

Nor do Respondents show that the newly-inferred exhaustion requirement would advance the purposes of the administrative exhaustion doctrine in the context of BID assessments, given that (1) the scope of an agency's power at an assessment hearing is limited and (2) courts must exercise independent judgment in reviewing the validity of special assessments. Yet while the doctrine itself would not be served by imposing more than a ballot requirement, the countervailing practical impact would be to immunize BID assessments from judicial challenge. It is simply not realistic to think that property owners, who currently just receive a simple ballot, will invest the time and resources to investigate the constitutional issues attendant to the creation of a BID in the short time frame provided so as to assure "issue exhaustion." Here, the City Council received almost 100 protest ballots related to the Downtown BID, but per the Court of Appeal's newly-created rule, in order to challenge the BID in court, each opponent would also have had to fully describe and

analyze the reasons for their no vote, either in a personal appearance at the hearing (often limited to one minute or whatever "reasonable time" the City Council decides to allow) or in a written opposition delivered prior to or at the hearing.

Moreover, the Court of Appeal imposed its newly-inferred exhaustion requirement retroactively, erasing not only Petitioners' substantive challenges to the propriety of these BIDs, but all other pending challenges made in ignorance of the new requirement. As Petitioners complied with the administrative procedure set forth in Article XIII D, section 4 and with prior case law, should this Court uphold the newly inferred exhaustion requirement, it should only apply prospectively.

II.

ARGUMENT

A. The Procedure for Protesting an Assessment Is Limited to the Assessment Ballot Process In Article XIII D, Section 4.

The assessment ballot procedure in Article XIII D, section 4, subdivisions (c) through (e) provides a detailed procedure for objecting to proposed assessments via the submission of protest

ballots. This starts with the requirement that the assessing agency's written notice of its proposed assessments "include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest . . . will result in the assessment not being imposed." (Art. XIII D, § 4, subd. (c).) Subdivision (d) further clarifies, "Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner of the parcel, and his or her support or opposition to the proposed assessment." Finally, subdivision (e) provides that if the weighted "ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment," a majority protest exists and the proposed assessment fails.

1. The Assessment Ballot Procedure Provides an Adequate Administrative Remedy by Itself.

Respondents do not challenge the assessment ballot

procedure as inadequate or incomplete in itself. Nor could they have prevailed on such a challenge if they had tried. The majority protest remedy accomplished by the assessment ballot procedure "establishes clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties." (*Rosenfield v. Malcom* (1967) 65 Cal.2d 559, 566.) The procedure has the potential to "provide the wanted relief," as a majority protest will result in mandatory rejection of the proposed assessment. *(Bozaich v. State of California* (1973) 32 Cal.App.3d 688, 698.) And, the "standard for decisionmaking" – in this case, the method for determining whether a majority protest exists – is "clearly defined." (*City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 237.) Thus, under the standards articulated by prior case law, the assessment ballot procedure provides a complete administrative remedy.

2. Nothing in the Language of Article XIII D, Section 4, the Omnibus Act, or the PBID Law Suggests that More than Submission of a Ballot Is Required.

Respondents claim that Petitioners "give short shrift to

constitutional … language governing procedural requirements for assessment challenges" by contending that Article XIII D, section 4 does not require "oral or written protest at the hearing" beyond submission of the assessment ballot. (Ans. Br. at 35.) It is difficult to see how this could possibly be the case. First, section 4 of Article XIII D never once uses the term "oral protest" or "written protest." Nothing in this constitutional provision requires the promulgating agency to solicit "protests," either orally or in writing, except through ballots. And, while an agency is expressly required to notify property owners of their right to participate via ballot submission (Art. XIII D., § 4, subd. (c)), the provision does not require the agency to inform voters that any right to submit *further* written or oral protests is even available.

Moreover, attendance at the hearing is expressly not mandatory. A ballot must be credited regardless of whether the taxpayer attends the hearing. (Art. XIII D, § 4, subd. (d).) In fact, the agency is *required* to provide an address at which assessment ballots may be submitted and received outside of the place and time of the public testimony, and those ballots must be counted. (Gov.

Code § 53753(c).) Indeed, this Court recently stated that "'participation' in a Proposition 218 hearing refers to *either* submitting a written protest *or* speaking at the hearing." (*Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 379, n. 6 ("*Plantier*").) (Emphases added.)

Additionally, Article XIII D, section 4, subdivision (e) makes clear that "protests" are conflated with ballots: "At the public hearing, the agency shall consider all *protests* against the proposed assessment and tabulate the *ballots*. […] A *majority protest* exists if, upon the conclusion of the hearing, *ballots* submitted in *opposition* to the assessment exceed the ballots submitted in favor of the assessments." (Emphases added). In *Plantier*, interpreting related language in Article XIII D, section 6, subdivision (a), this Court again conflated "objections" with "protests" for purposes of Proposition 218: "The primary procedural remedy afforded … is that a *majority* of fee payors may reject a new or increased fee by submitting *written protests*." (7 Cal.5th 372, 384, emphases added). Clearly, the existence of a "written protest" is used to determine whether a "majority" of fee payors have rejected the proposed fee, thereby

"meet[ing] the rejection threshold." (*Ibid.*)

The same is true of the Omnibus Implementation Act of 1997, Government Code, section 53750 *et seq.* (the "Omnibus Act") and the Property and Business Improvement Law of 1994, California Streets and Highways Code, section 36600 *et seq.* (the "PBID Law"). The Omnibus Act provides: "At the public hearing, the agency shall consider all *objections or protests*, if any, to the proposed assessment." (Gov. Code § 53753, subd. (b).) As discussed in Petitioners' Opening Brief, the addition of the word "objection" to the term "protest" does not superimpose an additional administrative exhaustion requirement onto Proposition 218. (Op. Br. at 37-38.) Indeed, this Court just recently equated the two terms in *Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1114 ("Consistent with the requirements of Proposition 218, the City issued public notice of the hearing and provided an opportunity for residents to submit *objections via protest ballots*.") (Emphasis added.) But to the extent the two terms signify something different, the Code uses the word "or," not "and," clearly providing that *any* form of objection *or* protest satisfies the administrative exhaustion requirements.

The PBID Law, like the Omnibus Act, never defines what a "written protest" must consist of, although the PBID law does require that the protest shall "identify the business" in which the "person subscribing the protest is interested" and "written evidence that the person subscribing is the owner of the business or the authorized representative;" otherwise, the "written protest …shall not be counted in determining a majority protest." (Sts. & Hwy. Code § 36623, subd. (b).) The PBID statute also provides that "[i]f written protests are received from the owners … that will pay 50 percent or more of the assessments proposed to be levied," then "no further proceedings shall be taken." (*Ibid.*) Again, written protests are conflated with the ballot tabulation procedure; no distinction is made.[1]

[1] As noted by the trial court, "I'm not sure what more petitioners should have done other than vote 'no' during that process to exhaust their administrative remedies. . . . And looking at the process and the discussion of the process for the adoption of a B.I.D., it seems to [me] that that argument is correct." (RT at 36.)

3. Although an Agency May Be Required to Consider Substantive Objections and to Count Protest Ballots Separately, There Is No Obligation on Property Owners to Make Substantive Objections.

In search of a constitutional basis for the newly-inferred exhaustion requirement, Respondents point to that portion of Article XIII D, section 4, subdivision (e), which provides: "At the public hearing, the agency shall consider all protests against the proposed assessment *and* tabulate the ballots." (Emphasis added.) In *Plantier*, this Court determined that the obligation to "consider" all protests imposes on the agency more than "simply a vote-counting requirement" in the context of an agency hearing on "fees" and "charges" under Article XIII D, section 6. (*Plantier*, *supra*, 7 Cal.5th at pp. 384-386.)[2] However, to the extent Article XIII D, section 4, subdivision (e) requires an agency to "consider" the merits of any protests which happen to go beyond a simple "no" vote, this is an

[2] Article XIII D treats "assessments" as distinct from "fees" or "charges." (*See* Art. XIII D, § 2, subd. (e) ["'Fee' or 'charge' means any levy other than an ad valorem tax, a special tax, or an assessment[.]"].)

obligation on the *agency*. (*Plantier*, *supra*, 7 Cal.5th at pp. at pp. 385-386.) There is simply no language anywhere in Article XIII D imposing a corresponding obligation on property owners.

Respondents then turn to the Omnibus Act and the PBID Law, which they contend "sharpen[] the distinction" between protests and ballots. (Ans. Br. at 42-45.) However, the language of these statutes only emphasizes the point that while the *agency* may be required to consider substantive objections, the objecting property owners are not required to make them. The Omnibus Act states that "[a]t the public hearing, *the agency shall* consider all objections or protests" and "any person *shall be permitted* to present written or oral testimony." (Gov. Code § 53753, subd. (d), emphases added.) The PBID Law similarly allows that any person is "*permitted* to present written or oral testimony," which the agency "*shall* consider." (Sts. & Hwy. Code § 36623, subd. (b), emphases added.) While the agency "shall" consider all protests, the submission of "written or oral testimony" is only "permitted." (Gov. Code § 53753, subd. (d).)

The majority protest remedy and the opportunity to be heard are simply duties required of an agency prior to levying special

assessments. Agencies, just like the private entities subject to their authority, must comply with administrative procedures. In *City of Oakland v. Hotels.com LP*, the Ninth Circuit discussed a number of California cases concluding that cities must exhaust their administrative remedies by following the clear commands of their ordinances in *establishing* an assessment before the agency may bring an action to enforce that assessment. ((9th Cir. 2009) 572 F.3d 958, 960-962 [requirements that the tax administrator "'*shall* . . . assess . . . the tax" and "'*shall* give notice of the amount to be assessed'" impose affirmative obligations on the City; "This administrative chronology … imposes an obligation on the City to first assess the tax" before bringing suit to collect].) Just as the "City" in that case "shall" follow the procedures under the revenue code for assessing a tax, Respondents "shall" comply with the procedures for determining whether a majority protest exists before levying a special assessment under Article XIII D, section 4. There is simply no indication in the language of Article XIII D, the Omnibus Act, or the PBID Law that an obligation on fee payors to submit a written protest beyond a 'no' ballot was intended.

Plantier is in accord, as the Court explained that a "written protest" under Article XIII D may simply be a protest vote, or it may be more: "Proposition 218 compels an agency to not only receive written protests and hear oral ones, but to take all protests into account when deciding whether to approve a proposed fee, *even if the written protestors do not constitute a majority*." (*Plantier*, *supra*, 7 Cal.5th at pp. 386, emphasis added.)[3] Again, the written protests are counted to determine whether the majority threshold has been met. If this threshold is met, regardless of whether any specific reasons for the objecting ballots were provided, an agency's proposed assessment fails, rendering the agency powerless to take any further proceedings to levy the proposed assessment for a period of one year. (*See* Sts. & Hwy. Code § 36623, subd. (b).)

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[3] Although *Plantier* is not at odds with Petitioners' position here, it also bears noting that the requirements for participation in the majority protest remedy under Article XIII, section 6 required clarification, whereas no clarification is needed with respect to section 4. Section 6 provides a majority protest remedy "if written protests against the proposed fee or charge are submitted by a majority of owners of identified parcels" (Art. XIII D, § 6, subd. (a)(1)), but "does not … explain what form a written protest must take." (*Plantier*, *supra*, 7 Cal.5th at p. 381.) This is in contrast to Section 4, which provides a detailed process for soliciting and tabulating assessment ballots.

Moreover, interpreting these laws to impose a duty on the agency seeking to promulgate an assessment without imposing a corresponding duty on an objecting taxpayer is clearly consistent with Proposition 218's purpose to "place extensive requirements on local governments charging assessments." (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 ("*Silicon Valley*").) Where, as here, a constitutional amendment is enacted by voters, the Court is "obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law." (*Ibid.*, citing *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1355.) As this Court has acknowledged in interpreting Article XIII D in the past, "Proposition 218 specifically states that 'the provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.'" (*Ibid.*, citing Ballot Pamp., Gen. Elec. (Nov. 5, 1996), text of Prop. 218, § 5, p. 109.) To infer that a property owner must submit an objection that goes beyond a simple 'yes' or 'no' from the fact that "*an agency shall* consider" such

protests is not only unsupported by the language of Article XIII D, section 4, but is inconsistent with the constitutional provision's underlying purpose.

Finally, the absence of any requirement on the agency to even notify a property owner of the opportunity to provide a detailed objection in support of a 'no' vote clearly indicates that no detailed objection is required. Article XIII D, section 4, subdivision (c) sets forth specific and detailed requirements for the written notice of a proposed assessment: (1) a statement of the reasons for the proposed assessment and the amounts chargeable; (2) the date, time and location of the public hearing; and (3) "a summary of the procedures applicable to the completion, return, and tabulation of the ballots … including a disclosure statement that the existence of a majority protest … will result in the assessment not being imposed." (Emphasis added.) Respondents do not contend that the Omnibus Act or the PBID Law requires the agency to include in its notice of proposed assessment a procedure for the submission of a written protest other than the assessment ballot, either. (*See* Ans. Br. at 38-40.) Rather, Respondents' argument that the newly-inferred

exhaustion requirement depends entirely on the implication that an agency's obligation to "consider all protests" implies an obligation to provide the reasons for a protest vote. (*See id.* at 40-46.)

Consistent with the absence of any such notice, Respondents here did not provide Petitioners notice which "distinguish[ed] the requirements" to return an assessment ballot and provide a detailed objection. (*Id.*. at 44-45.) The actual Notice of Public Hearing provided to Petitioners said nothing about the opportunity to submit a detailed objection, stating only that the "City Council will hear all interested persons" and "certify the results of the tabulation of ballots[.]" (AR 271-272 [NOL 273-274][4], emphasis added.)[5]

Respondents' failure to solicit any participation from property owners beyond providing the required assessment ballots belies

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[4] The Notice of Public Hearing does not appear in the administrative record on the San Pedro BID, but was attached to Mesa RHF's Petition. (Mesa RHF AA 38-39.)

[5] The Ordinance of Intention was not provided as notice of Respondents' intention to create the BIDs, so Respondents cannot rely on its contents to argue that it notified property owners of the opportunity to provide the reasons for their objections. In any event, the Ordinance of Intention provided only, "City Council will consider all objections or protests to the proposed assessments." (AR00160-162.)

Respondents' arguments. If Respondents really valued the "meaningful exchange" they now claim is indispensable to the majority protest process, they could have at least provided notice of a procedure for submitting a detailed objection prior to the hearing.

4. Respondents Provide No Authority Supporting Imposition of a Judicially-Created Exhaustion Requirement on Top of an Existing Administrative Remedy.

Respondents fail to meet their burden to prove that failure to exhaust administrative remedies bars Petitioners' challenges to the BIDs. (*See*, *e.g.*, *Burke v. Ipsen* (2010) 189 Cal.App.4th 801, 807-808 [party seeking to invoke defense of failure to exhaust administrative remedies "ha[s] the burden of proof on this issue."].) Instead, Respondents again incorrectly cite *Williams & Fickett v. County of Fresno* (2018) 2 Cal.5th 1258 *("Williams & Fickett")* for the proposition that courts may "infer" an unstated exhaustion requirement. (Ans. Br. at 29-31, 34-35.)[6] However, the issue in

[6] As discussed in Petitioners' Opening Brief, *Williams & Fickett* stands only for the proposition that an exhaustion requirement will be inferred "even within statutory schemes that 'do not make the

Williams & Fickett was not whether the Court could create additional requirements not stated in the statute, but rather, whether the plaintiff's claims were of the kind appropriately resolved by the detailed administrative appeals process provided for by the applicable statute. (2 Cal.5th 1258, 1271-1274.) The plaintiff in that case admitted that he did not avail himself of the administrative appeals process for obtaining an assessment reduction, contending that he was contesting the ownership of the parcel, not the amount assessed. (*Id.* at 1273.) The Court rejected the plaintiff's argument, finding that "the relevant statutes provide affirmative indications of the Legislature's desire that claims such as plaintiff's be submitted to a local board through the assessment appeal process." (*Id*. at p. 1271.) That is not the case here, where Petitioners did avail themselves of the available administrative remedy provided in Article XIII D, section 4 by submitting a protest ballot. Moreover, the language and purpose of Article XIII D and its related statutes give "affirmative indications" that property owners may voice their

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exhaustion of the [administrative] remedy a condition of the right to resort to the courts.'" (*Id.* at p. 1271.) That principle has no application here.

objection by participating in the assessment ballot procedure.

Importantly, the agency in *Williams & Fickett* actually provided notice that that participation in the appeals process was necessary. There, "when the County first gave notice of the escape assessments, it informed plaintiff that *if plaintiff wished to challenge the assessments*, it had 60 days from the date of the notice to apply to the County's assessment appeals board for assessment reductions," which application the plaintiff did not make. (*Id.* at p. 1265, emphasis added.) Here, the "Notice of Public Hearing" to establish these BIDs merely stated that the City Council "will hold a public hearing to determine whether to establish [the BID] and levy assessments." (AA 49-50 [Hill RHF]; AA 38-39 [Mesa RHF].) The notice then provided detailed instructions regarding the enclosed *assessment ballot*, but gave no instructions for presenting the basis for any opposition prior to the hearing, and in fact, did not even indicate that written objections beyond the ballot provided would be considered. There is simply nothing in *Williams & Fickett* to suggest that a court may infer an additional administrative exhaustion requirement where one is already provided by statute.

Respondents cite a number of cases discussing statutory administrative remedies supposedly similar to the ones at hand in which attendance at a public hearing was required to satisfy the exhaustion doctrine. (*See* Ans. Br. at 60-61.) However, in each of these cases, either participation in the public hearing was expressly required, or no other administrative procedure for registering an objection existed, or both.[7]

To begin with, *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* discussed the administrative procedure for challenging an act or decision of a public agency under the California Environmental Quality Act ("CEQA"). ((2001) 91 Cal.App.4th 342, 381-383, discussing Cal. Pub. Res. Code § 21000 *et seq*.) The relevant provision of the CEQA provided that "No action or proceeding may be brought . . . unless the alleged grounds

[7] One case cited by Respondents, *City of San Jose v. Operating Engineers Local Union No. 3*, held that "Whenever possible, labor disputes asserting unfair labor practices under the Meyers-Milias-Brown Act, Gov. Code, § 3500 et seq., should be submitted first to the California Public Employment Relations Board (PERB) rather than a court." ((2010) 49 Cal.4th 597, 611.) There was no discussion of attending a general public comment hearing, so this case has no apparent relevance to the issue at hand.

. . . were presented to the public agency orally or in writing by any person during the public comment period provided[.]" (Cal. Pub. Res. Code § 21177, subd. (a), emphasis added.) Thus, the requirement that an objecting party present the "grounds" for its objection to the relevant agency was clearly stated in the statute. Such a requirement is not spelled out in Article XIII D or the related statutes, although typically such a requirement is made explicit where courts find that "issue exhaustion" during the administrative process is required. (*See* Ans. Br. at 36.)

In *Roth v. City of Los Angeles*, the applicable statute did not provide any procedure to object to a proposed abatement except attendance at the city council hearing. ((1975) 53 Cal.App.3d 679, 686-687, discussing Gov. Code § 39566.) Additionally, the notice provided that "All property owners having any objections … are hereby notified to attend a meeting of the [name of agency, place and time of meeting]." (*Id.* at fn. 3, emphasis added.) Here, by contrast, Petitioners were notified that a meeting would be held, but the notice informed them that tabulation of the assessment ballots would determine whether the proposal passed – there is no

requirement that an objector attend the noticed hearing in order to partake in the majority protest remedy provided by Article XIII D.

Finally, in *People ex rel. Lockyer v. Sun Pac. Farming Co. ("Lockyer")*, the Court considered the protest procedure provided for annual certification of the budgets for specially-designated pest control districts. ((2000) 77 Cal.App.4th 619.) Pursuant to the Food & Agriculture Code, the pest control district board is required to estimate the cost of its operating plan for the next fiscal year. (Food & Agr. Code § 8558.) The budget can only be adopted after a noticed hearing, prior to which any grower in the district is allowed to make a written protest to the budget or any item in it. (*Id.*, §§ 8560-8564.) The board is required to evaluate all protests at the noticed hearing. (*Id.* § 8565.) The procedure is similar to the one set forth in Article XIII D, section 4, with one major exception: the statute <u>does not provide a majority protest remedy</u> or any kind of ballot submission procedure – the only way to have one's objection registered is to attend the hearing. In the absence of any other available procedure, the court determined that "[t]he appropriate procedure for challenging the plan's effectiveness was to first

exhaust remedies by challenging the budget before the district." (*Lockyer*, *supra*, 77 Cal.App.4th at p. 641.) The hearing was the only administrative remedy available under the applicable statute, and the property owner did not attend that hearing or otherwise raise any objection at all prior to challenging the budget in court. That is not the case here, where Petitioners submitted protest ballots as required by statute.

In summary, Respondents' argument that "if an administrative remedy is provided – expressly or impliedly – it must be exhausted" is irrelevant. (Ans. Br. at 28.) The remedy provided by the Constitution, the Omnibus Act, and the PBID Law is the assessment ballot procedure, and it is undisputed that Petitioners fully availed themselves of that remedy. In each of the cases cited by Respondents, a detailed administrative exhaustion procedure was available, and the plaintiff ignored it. That is not the case here. Accordingly, Respondents have failed to refute Petitioners' showing that participation in the ballot assessment procedure set forth in Article XIII D, section 4, subdivisions (c) – (e) is the <u>only</u> requirement for protesting a special assessment.

B. Respondents Fail To Refute Petitioners' Showing that Upholding the Newly-Inferred Exhaustion Requirement Would Undermine the Fundamental Purpose of Proposition 218.

1. Proposition 218 Was Designed to Constrain Local Governments' Ability to Impose Assessments, Not to "Promote Power-Sharing."

This Court has articulated the fundamental purpose of Proposition 218 in clear and definitive terms:

> Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent.

(*Silicon Valley*, *supra*, at p. 448.)

Respondents' Answer Brief never directly addresses the conflict between the express purpose of Proposition 218 and the countervailing effects that upholding the Court of Appeal's newly-inferred exhaustion requirement would have. (*See* Op. Br. at 25-33.)

Respondents do not even attempt to explain how requiring property owners affected by an assessment to articulate the specific reason for his or her opposition would serve these clearly-articulated interests. This is because the Court of Appeal's decision simply does not advance the purposes of Proposition 218; it undermines them. Rather than "making it easier for taxpayers to win lawsuits," the newly-inferred requirement presents a surprise obstacle to property owners' ability to bring claims in court. Proposition 218 was enacted to "shift the burden of demonstrating an assessments' legality to local governments," but requiring objecting property owners to exhaustively articulate the reasons for their opposition only shifts some of that burden back onto property owners.

Instead of addressing these concerns head-on, Respondents list a number of interests that would supposedly be advanced by the new requirement. According to Respondents, requiring property owners to articulate a specific basis for their objections would advance "power-sharing" between agencies and taxpayers, "foster informed decision-making," and allow "decision-makers" to "respond to fee-payors' concerns." (An. Br. at 43-45.) However, Proposition

218 was not intended to promote any of these goals, so whether the new requirement advances these interests is irrelevant.

Tellingly, Respondents cite only one case, *Bighorn-Desert View Water Agency v. Verjil ("Bighorn")* (2006) 39 Cal.4th 205, which purportedly held that "power-sharing" and reaching "mutually acceptable" fee arrangements were among the objectives Proposition 218 was designed to foster. However, *Bighorn* addressed only Article XIII C, which was also passed by voters as part of Proposition 218. Article XIII C grants voters the power to "reduc[e] or repeal[] any local tax, assessment, fee or charge" by way of a ballot initiative. (*Bighorn*, *supra*, 39 Cal.4th at pp. 211-212.) So, Article XIII C, like Article XIII D, accomplished a "power-shifting" by making voters, and not local agencies, the final decision-makers when it comes to assessments and fees.

In fact, the Court in *Bighorn* expressly found that the "power-sharing" Respondents repeatedly tout as a salutary effect of the newly-inferred exhaustion requirement was an unfortunate side-effect necessitated by the drafting of Proposition 218. The narrow issue in *Bighorn* was whether Article XIII C, section 3, gives voters

the right to "reduce the rate that a public water district charges for domestic water" using the initiative power. (*Id.* at p. 209.) The Court held that it does, but that Article XIII C "does not authorize an initiative to impose a requirement of voter preapproval for future rate increases or new charges for water delivery." (*Id.* at p. 220.) The opinion acknowledged that "this power-sharing arrangement" was not ideal, and "had the potential for conflict." (*Ibid.*) However, the Court found the result acceptable because the substantive and procedural restrictions on an agency's power to impose fees or charges "should allay customers' concerns that the agency's water delivery charges are excessive." (*Id.* at p. 221.) *Bighorn* does not advance Respondents' argument.

2. Property Owners Contesting a Proposed Assessment Have Never Previously Been Required to Articulate the Reasons for Their Objections at a Public Hearing.

Respondents insist that overturning the exhaustion requirement newly-inferred by the Court of Appeal would have "practical implications" contrary to the purpose of Proposition 218.

Overturning the decision, Respondents urge, would mean "elimination of a meaningful hearing," which would frustrate taxpayer consent, "silence" the voices of "unhappy assessees," and "destabilize local finance." (Ans. Br. at 50-54.)

In the first place, the argument that courts and agencies have been reaping the benefits of a "robust" hearing requirement since the passage of Proposition 218 is patently ridiculous because property owners have never been required to articulate the specific reason for their objections to a proposed assessment prior to the Court of Appeal's decision below in June 2020. In response to the string of cases Petitioners cite indicating that no Court of Appeal decisions have previously said anything about an exhaustion requirement in the context of an Article XIII D, section 4 hearing (Op. Br. at 41-42), Respondents assert only that "[c]ases are not law for propositions they do not consider." (Ans. Br. at 65.) Petitioners do not contend otherwise. However, it remains true that none of these decisions was decided based on a property owner's failure to exhaust administrative remedies under Article XIII D or suggested there was any such requirement. Thus, Respondents' arguments

about the destabilizing effects of reversing the decision below are baseless. Reversing the decision would only preserve the status quo.

Respondents' claim that reversing the Court of Appeal would prevent "unhappy assessees" from "voic[ing] the reasons for the objections" is similarly unfounded. (Ans. Br. at 51.) Again, Respondents provide no authority supporting their argument that participation in a "robust administrative hearing" was ever required. (*Ibid.*) Moreover, Petitioners do not, nor have they ever, sought to prohibit property owners from participating in the noticed public hearing in a more robust way. If the decision below is reversed, assessees will still be permitted to submit detailed reasons for their objections and to engage in "meaningful exchanges" with an assessing agency, just as they were able to before.

3. Upholding the Newly-Inferred Exhaustion Requirement Would Unduly Burden Property Owners Without Advancing the Interests of Proposition 218.

Finally, Respondents contend that "Mandatory consideration

of protests provides more than an opportunity to comment. It provides an opportunity for the assessee to command government's attention to his objections." (Ans. Br. at 46.) However, the exhaustion requirement newly inferred by the Court of Appeal does not promote such opportunities.

In the first place, the requirement to fully present every reason for an objection at or before the noticed public hearing is far more burdensome on objecting taxpayers than it is on agencies, who are only required to "consider" taxpayer protests. Respondents repeatedly complain that Article XIII D has required them to implement "expensive and time-consuming procedures" and that they would be inhibited in their ability to develop an administrative record if the newly-inferred requirement were overturned. (Ans. Br. at 46, 50.) Yet Proposition 218 was not concerned with ameliorating any burden or expense imposed on agencies. Moreover, the overly burdensome requirement created by the Court of Appeal would merely function as a roadblock to property owners' ability to challenge assessments in court. The new rule would require that within 45 days of receiving a proposed assessment (*see* Gov. Code

§ 53753, subd. (b)), the property owner must determine if the proposed assessment is too high for him personally; analyze and review the assessment and its underlying structure; and prepare a presentation to the agency at the public hearing. Despite acknowledging that the assessment hearing is an "expensive and time-consuming" process for the agency, Respondents propose that the objecting taxpayers should be able to accomplish all of this in 45 days. It defies logic to suggest that voters, in passing Proposition 218, intended to self-impose this burdensome requirement.

Furthermore, understanding Article XIII D, section 4 to require only that an agency consider substantive objections, and not that a taxpayer make such objections, better addresses the policy concerns discussed in *Plantier* – namely, that "a fee payor has little control over when or even if its complaints may be heard." (*Plantier*, *supra*, 7 Cal.5th at p. 384.) In discussing the policy concerns behind its administrative remedy analysis, the Court in *Plantier* made clear that it was concerned with enforcing the assessing agency's obligation to "consider" the protests of affected fee payers, not any requirement that fee payers inform the agency of their specific

grievances.

Subdivision (e) of Article XIII D, section 4 provides that "a majority protest exists" if the weighted ballots "submitted in opposition to assessment exceed the ballots submitted in favor of the assessment." (Emphasis added.) By contrast, "the primary procedural remedy afforded by article XIII D, section 6, subdivision (a) is that a *majority* of fee payors may reject a new or increased fee by submitting written protests." (*Plantier*, *supra*, 7 Cal.4th at p. 384, italics in original.) The Court found this highly persuasive in deciding that Section 6 requires agencies to do more than simply count the number of protests for two reasons. First, unlike with the weighted assessment ballot procedure, where a property owner's say is proportional to his financial obligation, "a single written protest would seldom, if ever, determine whether a proposed fee would be rejected." (*Ibid.*) Second, under Section 6, "thousands of individual property owners would have to protest in writing to meet the rejection threshold," making it much less likely that the majority protest threshold intended to keep agencies in check would be met at all. (*Ibid.*) By contrast, because the majority protest remedy for

assessment ballots requires only a weighted majority of participating tax payers, the probability that a majority protest will cause a proposed assessment to be rejected is much higher.

The analysis in *Plantier* strongly implies that separately requiring agencies to consider protests and tabulate ballots was necessary in the context of the procedural remedy in Section 6, subdivision (a) in order to "effectuate" Proposition 218's "purposes of limiting local government revenue and enhancing taxpayer consent.'" (*Silicon Valley*, *supra*, 44 Cal.4th at p. 448.) Without such a requirement, agencies would have little incentive to "consider" the protests of affected property owners at all. These same policy concerns do not apply to the assessment ballot procedure in subdivision (e) of Section 4.

The bottom line is that "Allowing a 'no' ballot alone to exhaust administrative remedies" would not, as Respondents claim, "render meaningless the voters' directive that elected officials 'consider all protests' at a hearing on an assessment." (Ans. Br. at 47.) There is nothing preventing an objecting property owner from presenting a detailed explanation for his objection, and an agency seeking to levy

an assessment must consider all such protests regardless of whether the Court of Appeal's decision stands. In order to rectify the lack of incentive an agency would otherwise have to consider all protests in the absence of a majority protest, all that is needed is a requirement that the agency consider any reasons offered by a property owner for his or her objections.

C. Respondents Fail to Show that the Newly-Inferred Exhaustion Requirement Advances the Purpose of the Administrative Exhaustion Doctrine.

Although *Plantier* expressly stopped short of deciding "the broader question of whether, when, and under what circumstances" a Proposition 218 public comment and hearing process may be considered an administrative remedy, its analysis is still relevant to the dispute presented here. (*Plantier*, *supra*, 7 Cal.5th at p. 384.) *Plantier* held that the objecting fee payors were not required to raise their objections at the noticed public hearing because, on the specific facts of that case, the noticed hearing "did not allow the District to resolve plaintiffs' particular dispute." (*Id.* at p. 387.) However, *Plantier* highlights the importance of a defendant agency

demonstrating that a purported "administrative remedy" would in fact serve the underlying purposes of the exhaustion defense – the Court in *Plantier* ultimately rejected the defense because "the purposes of the exhaustion rule are not served by the public hearing here." (*Id.* at p. 388.) Nor are those purposes served here.

"'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.'" (*Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1155, quoting *Bozaich v. State of California* (1973) 32 Cal.App.3d 688, 698.) In general, this purpose is not served unless the "administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief." (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501, quoting *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 982.) Here, Respondents fail to show that requiring an objecting property owner to provide a detailed objection at or before the public hearing actually serves any purpose that might justify requiring that procedure to be exhausted.

Respondents fail to address the fact that, besides the

assessment ballot submission procedure, there is no procedure in Article XIII D, section 4 for "submission, evaluation, and *resolution* of disputes by aggrieved parties." (*Plantier*, *supra*, 7 Cal.5th at p. 384, quoting *Rosenfield v. Malcom* (1967) 65 Cal.2d 559, 566.) Even accepting that an agency must "consider" all protests, there is no indication of what "consider" entails – an agency is not required to resolve disputes, nor is it required to produce a written record of any determination. The closest the statutory scheme here comes to requiring anything more than a determination of whether a majority protest exists is the PBID Law requiring that, following the public hearing, an agency that decides to proceed with establishing a BID adopt a resolution of formation of a BID including "A determination regarding any protests received." (Sts. & Hy. Code § 36625(a)(4).) However, Respondents here made no record of any specific "determinations," and did not even record the content of a single protest or objection raised at or before the hearing. In fact, all Respondents determined, according to the record, is that the "City Council has received all evidence and heard all testimony concerning the establishment of the District and desires to establish

the District" and "City Council hereby finds that there was no majority protest against the establishment of the District and levy of assessments." (AA 73-74 [Hill]; *see* AA 83-84 [Mesa].) Thus, there is absolutely no indication that compliance with the requirement will facilitate "development of a complete record conducive to judicial review" – one of the primary benefits Respondents tout in support of upholding the exhaustion requirement imposed below.

Moreover, as Respondents themselves admit, Proposition 218 was enacted in part because "county boards of supervisors" were "sometimes criticized as having insufficient time and expertise to competently address assessment issues." (Ans. Br. at 46, quoting *Williams & Fickett*, *supra*, 5 Cal.5th at p. 1280.) Similarly, the City Council here is not a specialized group of experts with expertise in adjudicating property assessment disputes, but rather a general legislative body elected to enact a broad range of policies.

In addition to reflecting a determination that local agencies were not "competent' at resolving assessment disputes, this Court has acknowledged that voters intended Article XIII D, section 4, to "curtail the deference that had been traditionally accorded legislative

enactments on fees, assessments, and charges" and to "shift the burden of demonstrating assessments' legality to local government[] mak[ing] it easier for taxpayers to win lawsuits." (*Silicon Valley, supra,* 44 Cal.4th at 448.) Thus, this Court has concluded that section 4, subdivision (f)'s burden-shifting provision means that "courts should exercise their *independent judgment* in reviewing local agency decisions" regarding the validity of special assessments. (*Ibid*., emphasis added.) Even if abrogating agency authority to render decisions about the propriety of a special assessment were not part of the fundamental purpose of Proposition 218 – which it is – Article XIII D made the legality of a special assessment a constitutional question not entitled to the "deferential standard of review" traditionally applied to agency decisions. (*Ibid.*) Respondents do not point to a single case in which this Court found that exhaustion of administrative remedies was necessary where an agency's decision was entitled to no deference by a reviewing Court. Nor do Respondents cite to any authority supporting their position that simply allowing an agency the opportunity to adjust a proposed BID to "make it compliant" is sufficient to justify application of the

administrative exhaustion doctrine, especially when the agency is not actually required to do so. (Ans. Br. at 51.) Thus, the notion that requiring administrative exhaustion here would aid reviewing courts by soliciting agency expertise and promoting the development of a complete administrative record is simply false.

Finally, Respondents fail to show that the proposed remedy would be "adequate" to resolve the present dispute. By Respondents' own admission, the scope of an agency's power at an assessment hearing is limited: the Notice of Hearing stated that "the City Council will hear all interested persons for or against establishment of the District, the extent of the District, and the furnishing of specified types of improvements or activities and may correct minor defects in the proceedings." (Ans. Br. at 45, quoting AR00271, emphasis added.) The notice to property owners indicated that the hearing was only intended to correct minor procedural defects. Respondents admit that their power is limited to "abandon[ing] or reduc[ing] an assessment," although even this limited power was not clearly disclosed in advance of the hearing. (Ans. Br. at 46.) This limitation on the scope of agency authority

following the public hearing is supported by the language of the PBID law, which provides that "Proposed assessments may only be revised by reducing any or all of them." (Sts. & Hwy. Code § 36624.)

Additionally, many of the same concerns which led the Court to conclude that the noticed Proposition 218 hearing was inadequate in *Plantier* apply here. In *Plantier*, as here, the hearing provided "a limited opportunity for an agency to evaluate protests." (*Plantier*, *supra*, 7 Cal.5th at p. 386.) There, as here, "While an agency may continue a hearing to allow additional time for consideration (see *Gov. Code*, *§ 53753, subd. (d)*), nothing compels the agency to do so." (*Ibid.*) Here, Respondents received almost 350 ballots with respect to the DCBID alone – including 98 ballots in opposition. (Ans. Br. at 21-22, citing AR00168.) Respondents do not even address whether the noticed hearing would be sufficient to address, in the "meaningful" detail Respondents advocate for, each of these opposition ballots. However, it is clear that the hearing would not suffice.[8] Requiring a separate detailed objection for each of the

[8] Under the Rules of the Los Angeles City Council, a property owner objecting in person at a public hearing would be limited to whatever "reasonable time" the City Council decides to allow.

almost 100 parcels whose owners objected to the creation of the BID would impose an enormous burden on the property owners, yet Respondents would be allowed to merely "consider" these objections without reaching any resolution.

Thus, the scope of an agency's authority at a public hearing is insufficient to address Petitioners' challenges to the methodology used to calculate the assessments and the broader constitutionality of the proposed BIDs. The purposes of the administrative exhaustion doctrine would clearly not be advanced by requiring detailed oral or written objections by each property owner opposing the BID, as the Court of Appeal required. As such, exhaustion of administrative remedies does not require submission of such an objection.

(Rules of the L.A. City Council, as amended January 2019, rule 8 [for public hearing items designated to "receive separate public input on a specific matter," "Interested persons … shall be given reasonable opportunity to present oral arguments for or against any proposed action."].) However, the default rule is that a "general public comment" at a Los Angeles City Council hearing is limited to one minute. (*Id.*, rule 7.)

D. If This Court Upholds the Exhaustion Requirement Newly Inferred by the Court of Appeal, the Requirement Should Only Apply Prospectively

Respondents' argument that the Court of Appeal's decision should be applied retroactively relies entirely on mischaracterizing the status of the exhaustion requirement under Article XIII D, section 4. Respondents claim that "there is no 'new' rule here," and that the "Court of Appeal applies well-established law to Proposition 218 (adopted 24 years ago) and the PBID Law (adopted 26 years ago)." (Ans. Br. at 66.) Yet, again, Respondents do not point to a single case in which a property owner challenging a special assessment under Article XIII D, section 4 was required to exhaust administrative remedies in the manner advanced by the Court of Appeal below. To the extent "the exhaustion remedies required here [are] already plainly set forth in Proposition 218 and the PBID law," the plain language of both clearly requires only submission of an assessment ballot. (Ans. Br. at 67.) Thus, unlike cases in which a new rule was given retroactive application, the requirement newly-inferred by the Court of Appeal "could not have been anticipated" by Petitioners.

(*Vazquez v. Jan-Pro Franchising Internat., Inc.* (2021) 10 Cal. 5th 944, 949.)

"[T]here is a recognized exception [to the rule of retroactivity] when a judicial decision changes a settled rule on which the parties below have relied." (*Williams & Fickett*, *supra*, 2 Cal.5th at p. 1282.) In fact, the only case to squarely address the issue of whether imposition of assessments on a business district requires attendance at a noticed public hearing, *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, found that submission of the provided protest ballot was sufficient to exhaust administrative remedies. Although the case was decided prior to the passage of Proposition 218 and the current PBID Law, the facts are similar enough that Petitioners were justified in relying on the opinion's reasoning:

> City also argues that the protest procedure set forth in Streets and Highways Code section 36523 is not the administrative remedy Evans was obligated to exhaust. It makes this claim in spite of the fact that no other remedies are specified in the Act. However, city claims we should infer other remedies from the following: because a public hearing is required to establish a BID, and because the public can appear at that hearing, the public must appear if it wishes later to seek judicial review of the administrative agency's decision. [Citation omitted.] Under the facts of this case, we must disagree. 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.

(*Evans*, *supra*, 3 Cal.App.4th at p. 735.) Because Petitioners generally relied on prior law, and complied with the ballot procedures explicitly set forth in the applicable statutes, the new exhaustion requirement, if upheld, should only apply prospectively.

Additionally, due process mandates that the newly-inferred exhaustion requirement should operate prospectively. There is no question that Respondents' reading of the administrative remedy provided by Article XIII D, section 4 will impose an administrative exhaustion requirement where none existed before. Applying this rule to Petitioners' case will deprive them of their right to have the merits of claims adjudicated by the Court of Appeal. "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.' [Citation omitted]." (*United States v. Goodwin* (1982) 457 U.S. 368, 372; *see also People v. Dunn* (2016) 248 Cal.App.4th 518, 527 [same].) The unforeseeability of the Court of Appeal's adoption of the new administrative exhaustion requirement and the due process

concerns present sufficient "compelling and unusual circumstances justifying departure from the general rule" of retroactivity. (*Newman v. Emerson Radio Corp.* (1989) 48 Cal. 3d 973, 983.)

III.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the Court of Appeal's decision. In the alternative, this Court should hold that the Opinion be given only prospective effect.

DATED: February 24, 2021 REUBEN RAUCHER & BLUM

By: _____
Stephen L. Raucher
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

[Cal. Rule of Court 8.204(c)(1)]

The text of this brief consists of **8,395** words as counted by the Microsoft Word 2010 word-processing program used to generate the brief, not including the tables of contents and authorities, and caption page.

DATED: February 24, 2021 REUBEN RAUCHER & BLUM

By: 
Stephen L. Raucher
Attorneys for Petitioners

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Nathalie Quach

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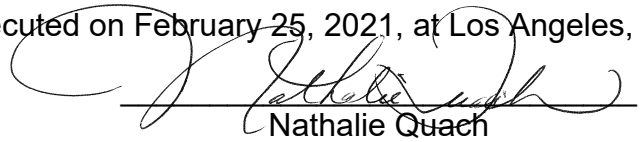

Nathalie Quach

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Raucher, Stephen (162795)

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