EXEMPT FROM FILING FEES
PER GOVERNMENT CODE § 6103

**Case No. B277227**

*In the*

# Court of Appeal

*of the*

# State of California

**SECOND APPELLATE DISTRICT**
**DIVISION SIX**

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**GOLETA AG PRESERVATION**
*Petitioners and Appellants*

vs.

**GOLETA WATER DISTRICT, et al.,**
*Respondents and Defendants*

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Appeal from the Superior Court of the State of California
County of Santa Barbara, Case No. 15CV02489
Honorable Thomas P. Anderle, Judge Presiding

# APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

# AMICUS CURIAE BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION

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**TO THE HONORABLE PRESIDING JUSTICE:**

Pursuant to California Rules of Court, rule 8.200(c), the League of California Cities ("League"), the California State Association of Counties ("CSAC"), and the California Special Districts Association ("CSDA," together with the League and CSAC, collectively referred to herein as "Amici") jointly apply to this Court and respectfully request permission to file the amicus curiae brief that is combined with this application. This proposed brief, below, is in support of Respondent and Defendant Goleta Water District (the "District"). Amici jointly have a substantial interest in this case because their member public agencies are local governments, many of which are charged with the responsibility to provide a sustainable and reliable supply of water. Water conservation-based pricing structures, such as tiered rate structures, are proven effective techniques to manage water resources. As such, Amici have a substantial interest in litigation that interprets the statutory and constitutional requirements for imposing and structuring water service fees and charges, including the substantive requirements of California Constitution article XIII D, section 6, subdivision (b)[1] adopted in 1996 through voter approval of Proposition 218. Many, if not most, local agencies that provide water service, after following the procedures required by article XIII D, section 6 have established some form of conservation-based water rate structure as part of their overall water supply portfolio and management strategy. Thus, because the Amici believe that conservation-based water pricing structures are important water resource and demand management tools that are consistent with the requirements of the Constitution, they request

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[1] All references to "article XIII D, section 6, subdivision (b)" herein are to article XIII D, section 6, subdivision (b) of the California Constitution.

permission to file the amicus curiae brief to support the decision of the trial court.

Also, the League and CSDA joined with the Association of California Water Agencies ("ACWA") as sponsors of A.B. 1260 (Caballero), the 2007 legislation that added Government Code section 53755 to the Proposition 218 Omnibus Implementation Act. Amici have read the Amicus Curiae brief submitted by ACWA in this case and wish to join in the arguments made in it.

For the reasons stated in this application and further developed in the Introduction and Interest of Amici Curiae portion of the proposed brief, Amici respectfully request leave to file the amicus curiae brief that is combined with this application. This brief was authored by Kelly J. Salt, Best Best & Krieger LLP, and Daniel S. Hentschke, and no person made a monetary contribution to its preparation and submission.

Dated: April 14, 2017

Respectfully submitted:

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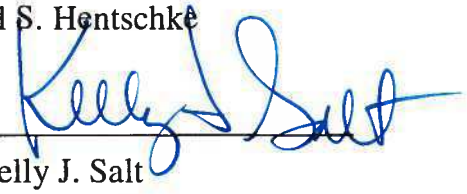
Daniel S. Hentschke

By: 

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## I.

## INTRODUCTION AND INTEREST OF AMICI CURIAE

"We never know the Worth of Water, till the Well is dry."[2] This case is about the scope of discretion the governing body of a local agency has to apportion the cost of water service to not only recover costs, but also to encourage conservation, prevent unreasonable or inefficient water use, and thereby seek to prevent the well from running dry for all Californians.

This case comes before the Court when most regions of California have come out of a multi-year drought which caused, and continues to cause for many, an ongoing water management crisis. The small portion of California that has yet to come out of drought includes the coastal Santa Barbara County area served by the District and its neighbors. Water management challenges require planning and implementing local, regional, and statewide strategies, and considerable resources. It takes substantial sums of money, almost all of which is collected by local water providers from water service customers as service fees and charges. Local governments that manage and provide water service throughout California must do so in accordance with two mandates of the California Constitution. First, California Constitution article X, section 2[3] mandates conservation and reasonable use (and prohibits unreasonable use) of all water in the state. Second, article XIII D, section 6 requires the cost of providing water service to be apportioned among customers according to the "proportionate

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[2] Fuller, Thomas, *Gnomologia: adagies and proverbs; wise sentences and witty sayings, ancient and modern, foreign and British* (1732), p. 237. Digitized version available through archive.org/details/gnomologiaadagi00conggoog; PDF download at ia802705.us.archive.org/34/items/gnomologiaadagi00conggoog/gnomologiaadagi00conggoog.pdf

[3] All references herein to "article X, section 2" are to California Constitution article X, section 2.

cost of the service attributable to the parcel" (i.e., the cost of providing the service attributable to a customer's use). Many water providers have found that the simple solution of allocating the cost of water service by using a single unit price neither adequately encourages conservation by discouraging unreasonable use, nor fairly apportions the cost of the service attributable to higher volume users. Therefore, many agencies have established conservation based pricing structures, such as tiered rates. The issue here is whether local decision-makers, particularly those who view water as an integrated system and not merely a commodity, have discretion to apply their expertise and experience to attribute water service differently among classes of users and to correspondingly allocate proportionately higher costs for that service with support in their rate-making records to substantiate those allocations.

Under a single unit price rate structure, a consumer who uses more water obviously will pay more than a consumer who uses less. However, the only reason for the variance is the amount of water used by each customer, and thus, the structure assumes that the cost of providing the water service to low volume consumers is the same as providing the service to high volume consumers. Under a tiered rate structure a proportionately greater share of the cost of providing water service is borne by those who place proportionately greater demands on an agency's water system and sources of supply. Thus, tiered rate structures more accurately attribute water service and more accurately apportion the cost of providing service to individual consumers. A tiered rate structure also encourages conservation and discourages unreasonable use by creating a greater financial incentive for a customer to reduce consumption in order to stay within a lower priced tier.

Here, the District adopted tiered rates after conducting a detailed analysis demonstrating that they would be effective in achieving the water

conservation and resource management mandates of article X, section 2 and also reasonably allocate the costs of providing water service based on service requirements in accordance with the limitations on local government fees established by article XIII D, section 6, subdivision (b), thereby harmonizing the two constitutional mandates. This Court should maintain that harmony and affirm the trial court's thoughtful, detailed decision.

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Legal Advocacy Committee monitors litigation of concern to cities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having statewide significance for cities.

The CSAC is a nonprofit corporation. The CSAC membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

CSDA is a California non-profit corporation consisting of approximately 1,000 special district members throughout California. These special districts provide a wide variety of public services to both suburban and rural communities, including water supply, treatment and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste

collection, transfer, recycling and disposal; library; cemetery; mosquito and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. CSDA is advised by its Legal Advisory Working Group, comprised of attorneys from all regions of the state with an interest in legal issues related to special districts. The Legal Advisory Working Group monitors litigation of concern to special districts and identifies those cases that are of statewide or nationwide significance. The Legal Advisory Working Group has identified this case as having statewide significance for special districts.

The outcome of this case will impact Amici's members because they are local governments, many of which are authorized to provide water service subject to the substantive and procedural requirements of article XIII D, section 6. (*See* Cal. Const. art. XIII C, § 1, subd. (b) and art. XIII D, § 2, subd. (a) [defining the "local agencies" to which Proposition 218 applies].) The local agencies represented by Amici have significant interest in cases, such as this, that involve statutory and constitutional limitations on their ability to establish budgets, allocate fiscal resources, and structure rates to achieve integrated, reliable, and secure water supplies. Additionally, many of Amici's member agencies have established conservation-based pricing of one form or another as part of their overall water resource management strategy that this case may impact.

The Legislature has specifically authorized public agencies to "encourage water conservation through rate structure design." (Wat. Code §§ 375, subd. (b); 10631, subd. (f)(1)(B)(iii).) The Legislature has also recognized that water is more than just a commodity but is an entire system that must be built, operated, maintained, and managed to deliver a safe and reliable water supply. (Govt. Code § 53750, subd. (m) [defining "water" for the purposes of article XIII D as "any system of public improvements intended to provide for the production, storage, supply, treatment, or

distribution of water from any source"].) And California's recent drought has plainly demonstrated that conservation of water in streams, reservoirs, groundwater, or even the snow pack on one day is a **source** of water for the next.

Local agencies such as the District have faced a dual challenge in developing water service rate structures that sufficiently fund their operations and effectively manage their limited water resources. When rates promote conservation, they depress sales and therefore revenues while the costs to maintain infrastructures are largely fixed. The ability of local agencies to meet these demands is circumscribed by Constitutional mandates that require that they: (1) demonstrate a clear nexus between the amount of the fee to be imposed and the cost of providing the service; and (2) allocate the cost of providing the service among their customers proportionate to the cost of serving them. Respondent and Plaintiff, Goleta Ag Preservation, suggests the Constitution prohibits the District from adopting rates designed to encourage conservation as part of its water resource and demand management strategy, and requires the District to separately trace the costs of each line item in its budget to each user in structuring water rates. Amici cite authorities demonstrating the Constitution does not mandate such impossibly demanding accounting.

## II.

## FACTS AND PROCEDURAL HISTORY

Rather than restate the facts and procedural history in detail, Amici adopt the Statement of the Facts and Statement of the Case as set forth in the District's Opening Brief.

## III.

## ARGUMENT

### A. CALIFORNIA CONSTITUTION ARTICLE X, SECTION 2 MANDATES WATER CONSERVATION AND RESOURCE MANAGEMENT

In November 1996, California voters approved Proposition 218, adding articles XIII C and XIII D to the California Constitution. Article XIII D, section 6 established procedural requirements for imposing new, or increasing existing, property related fees and charges, and placed substantive limitations on the use of the proceeds of such fees and charges. Ten years later, in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 ("*Bighorn*"), the California Supreme Court determined that a public agency's ongoing water delivery fees for the volume of water essential to most uses of property are property related fees and charges subject to the provisions of article XIII D, section 6. At issue in the present case is whether a tiered rate structure that allocates the costs of providing water service, including water conservation, on the basis of the service attributed to customer classes, complies both with the conservation and reasonable use mandates of article X, section 2 and the substantive limitations of article XIII D, section 6, subdivision (b). Amici assert that it does.

#### 1. LOCAL AGENCIES ARE REQUIRED TO CONSERVE AND MANAGE THEIR WATER RESOURCES

An integrated, reliable, and secure water supply is essential to sustaining life and our economy. As early as 1928 water conservation has been recognized as a necessity in California with the adoption of former California Constitution article XIV, section 3, now article X, section 2. Article X, section 2 declares:

> because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare ... .This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

This constitutional mandate reflects the overriding statewide concern to responsibly and reasonably conserve and manage this vital public resource. As the courts observed shortly after this language was added to our Constitution: "What is a beneficial use at one time may, because of changed conditions, become waste of water at a later time." (*Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist.* (1935) 3 Cal.2d 489, 525.)

"[A]ll water use is now governed by California Constitution Article X, and accordingly, all use of water in this state must conform to the standard of reasonable use." (*Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 87.) The courts have recognized the difficulty local agencies face in determining reasonable use and managing their water resources to promote this State policy. "'The scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts. What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes. ...' '[W]hat is reasonable use of water depends on the circumstances of each case, such inquiry cannot be resolved *in vacuo* from statewide considerations of transcendent importance.'" (*U.S. v. State Water Res.*

*Control Bd.* (1986) 182 Cal.App.3d 82, 129-130 [quoting *Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.* (1980) 26 Cal.3d 183, 194].) "Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in [Article X, Section 2]." (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140, *superseded*, on other grounds *City of Emeryville v. Superior Court* (1991) 2 Cal.App.4th 21; *see also*, *Ivanhoe Irrig. Dist. v. All Parties & Persons* (1957) 47 Cal.2d 597, 621 ["It was early realized that water in this semiarid region was of utmost importance to the welfare, progress and prosperity of the people of the state."], *rev'd*, on other grounds *sub nom. Ivanhoe Irrig. Dist. v. McCracken* (1958) 357 U.S. 275; *Joerger v. Pacific Gas & Electric Co.* (1929) 207 Cal. 8, 22 ["It is ... the policy of the state to require the highest and greatest public duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes."]; *Cucamonga County Water Dist. v. Southwest Water Co.* (1971) 22 Cal.App.3d 245, 259 [noting the "special importance attached to efficient and economical use and distribution of water in the arid western states"].)

Faced with the basic human necessity for water and its relative scarcity in California, the Legislature has enacted legislation to implement article X, section 2's mandate to conserve and use water efficiently, and to ensure equity among all State residents. These numerous legislative enactments confirm that management of water resources is part of "the service" provided by public water suppliers, to ensure that water is available over time and that its use is appropriately regulated. By way of example, Water Code section 100 restates the policy of the state that the waste or unreasonable use of water shall be prevented and the water of this state shall be conserved in the interest of the people and for the public welfare. Water Code section 106, further amplifies this policy, declaring:

"that it is the established policy of this State that the use of water for domestic purposes is the highest use of water and the next highest use is for irrigation," and in additional provisions of the Water Code governing water.[4] Similarly, Water Code section 78500.2—adopted by Proposition

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[4] (*See also* Wat. Code §§ 106.5 [no municipality shall acquire or hold any right to waste water, or to use water for other than municipal purposes, or to prevent the appropriation and application of water in excess of its reasonable and existing needs to useful purposes]; 109 [ growing water needs of the State require the use of water in an efficient manner and the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights]; 275 [directing the Department of Water Resources to take all action to prevent waste, unreasonable use, method of use, or method of diversion of water]; 350 *et seq*. [local water agency may declare a water shortage emergency whenever it finds the ordinary demands and requirements of water consumers cannot be satisfied without depleting its water supply such that there would be insufficient water for human consumption, sanitation, and fire protection]; 370 *et seq*., [additional, alternate authority for public entities to encourage conservation through rate design]; 1009 [ water conservation programs are authorized water supply function of all municipal water providers]; 520 – 529.7 [requiring water meters and recognizing that metered water rates are an important conservation tool]; 535 [requiring installation of meters to measure landscape water]; 1011 [furthers State water conservation policies by providing that a water appropriator does not lose an appropriative water right due to water conservation programs]; 10631 [establishes water conservation pricing as a recognized water demand management measure for Urban Water Management Plans];10730.2, subd. (d) [authorizing tiered rates for groundwater extraction]; 12922 [declares State policy to prevent irreparable damage to ground water basins caused by overdraft and depletion]; 13000 [declaring that the People of the State have primary interest in the conservation, control, and utilization of water]; 13550 [use of potable water for nonpotable uses, including, but not limited to, cemeteries, golf courses, parks, highway landscaped areas, and industrial and irrigation uses, is a waste or an unreasonable use of the water under article X, section 2 if recycled water is available]; 13552.2 [use of potable water for the irrigation of residential landscaping is a waste or an unreasonable use of water under article X, section 2 if recycled water, is available]; 13552.6 [use of potable water for floor trap priming, cooling towers, and air-conditioning devices is a waste or an unreasonable use of water under Article X, section 2 if recycled water is available]; 13553 [use of potable

204 on the same ballot as Proposition 218 and by a larger number of votes—acknowledges that the limited water resources of this State must be protected and conserved, and that water conservation is essential to the State's long-term economic and environmental sustainability. Water conservation through rate structure design has been expressly authorized by the Legislature since 1993. (Wat. Code § 375, subd. (b).)[5] In 2008, after *Bighorn*, the Legislature granted further authorization for allocation-based conservation pricing, expressly invoking article X, section 2. (Wat. Code §§ 370 – 374.)

After California began to emerge from an earlier major water shortage in November 2009, a bipartisan package of five bills addressing California's mounting water crisis emerged from the Legislature's 2009 Extraordinary Session. Among those signed into law was Senate Bill X7-7 (2009—2010 7th Ex. Sess.) ("SB 7"). SB 7 requires the State to achieve a 20 percent reduction in urban per capita water use by December 31, 2020, with incremental progress measured by a 10 percent reduction by December 31, 2015 (the so-called "20 by 2020" legislation). (Wat. Code § 10608.16.) Urban retail water suppliers are required to determine in urban water management plans their own targets and methods to achieve this conservation and to assess the present and proposed means and methods to do so. (*Id.* at §§ 10608.20, 10608.36.) Thus, urban water

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water for toilet and urinal flushing is a waste or an unreasonable use of water under Article X, section 2 if recycled water is available].)

[5] In an uncodified portion of the bill adopting Water Code section 375, the Legislature specifically acknowledged that conservation is an important part of the State's water policy and that water conservation pricing is a best management practice. (Stats. 1993, c. 313, § 1 (A.B. 1712).) (*See Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 290—291 [courts defer to contemporaneous legislative enactments clarifying constitutional provisions].)

suppliers must develop long-term strategies for water conservation and resource management programs and practices that will be sufficient to reach their State-mandated overall water conservation targets. Similarly, agricultural water suppliers must also develop and implement efficient water management programs and practices to comply with the 20 by 2020 legislation.

As is evident in our constitutional and legislative history, water conservation is a way of life and a necessity in California.[6] As the California Supreme Court recognized shortly after the enactment of former California Constitution article XIV, section 3, "[t]he present and future well-being and prosperity of the state depend upon the conservation of its life-giving waters ... . The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very lifeblood of its existence." (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 701—702.)

This is even more evident today. California's Water Year 2014 (October 1, 2013 through September 30, 2014) was the third driest on record and followed two consecutive dry years throughout the State. On January 17, 2014, Governor Jerry Brown issued a drought state of emergency declaration in response to record-low water levels in California's rivers and reservoirs as well as an abnormally small snowpack and called upon all Californians to reduce their water use by 20 percent.[7]

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[6] (*See* Cal. Dep't of Water Res., State Water Res. Control Bd., Cal. Pub. Util. Comm'n, Cal. Dep't of Food and Agric., & Cal. Energy Comm'n, *Making Water Conservation a California Way of Life Implementing Executive Order B-37-16* (Final Report April 2017), *available at* www.water.ca.gov/wateruseefficiency/conservation/docs/20170407_EO_B-37-16_Final_Report.pdf as of April 11, 2017.)

[7] (*Governor's Proclamation of a State of Emergency* (Jan. 17, 2014), *available at* gov.ca.gov/news.php?id=18379 as of Mar. 29, 2017.)

On April 25, 2014, Governor Brown issued a second proclamation suspending the California Environmental Quality Act for the implementation of water reduction plans to reduce potable water usage for outdoor irrigation at recreational facilities and large institutional complexes, and the adoption of an emergency conservation regulation by the State Water Resources Control Board.[8]

On April 1, 2015, Governor Jerry Brown declared a statewide water shortage emergency and issued Executive Order B-29-15[9] that, in part, directed the State Water Resources Control Board ("SWRCB") to institute California's first-ever statewide mandatory reductions in water usage on water suppliers to achieve a statewide 25 percent reduction in potable urban usage through February 2016. On November 15, 2015, Governor Brown extended those conservation measures until October 31, 2016. Recognizing persistent, yet less severe, drought conditions throughout California, on May 18, 2016, the SWRCB adopted an emergency water conservation regulation to replace the earlier emergency regulation. The May 2016 regulation was in effect from June 2016 through January 2017 to require locally developed conservation standards based upon each agency's circumstances. It replaced the prior percentage-reduction-based water conservation standard with a localized "stress test" approach.[10]

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8 (*Governor's Proclamation of a Continued State of Emergency* (April 25, 2014), *available at* www.gov.ca/news.php?id=18496 as of Mar. 29, 2017.)

9 (*Executive Order B-29-15* (April 1, 2015), *available at* www.gov.ca.gov/docs/4.1.15_Executive_Order.pdf as of Mar. 29, 2017.)

10 (For information on the SWRCB's emergency regulation, *available at* www.waterboards.ca.gov/water_issues/programs/conservation_portal/emergency_regulation.shtml as of Mar. 29, 2017.)

The recent drought is characteristic of California's unpredictable and variable hydrologic cycle.[11] Modern experience shows that water is not a perfectly renewable resource. Although California's water supply is limited and continues to diminish, the State's population and economy continue to grow. Further, climate change[12] and federal and State mandates for the restoration of ecosystems further exacerbate water supply challenges.[13] As stewards of this vital public resource, local agencies must develop and implement permanent and effective water resource management practices and strategies, both in drought and non-drought years, to ensure the long-term sustainable use of water in California. Water

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[11] (*See* Cal. Dep't of Water Res., *California's Most Significant Droughts: Comparing Historical and Recent Conditions,* (Feb. 2015), *available at* www.water.ca.gov/waterconditions/docs/a9237_CalSignificantDroughts_v10_int.pdf .)

[12] (*See e.g.*, Cal. Dep't of Water Res., *Climate Change*, www.water.ca.gov/climatechange/ as of Mar. 29, 2017 ["Climate change is having a profound impact on California water resources, as evidenced by changes in snowpack, sea level, and river flows. These changes are expected to continue in the future and more of our precipitation will likely fall as rain instead of snow. This potential change in weather patterns will exacerbate flood risks and add additional challenges for water supply reliability… . Climate change is also expected to result in more variable weather patterns throughout California. More variability can lead to longer and more severe droughts. In addition, the sea level will continue to rise threatening the sustainability of the Sacramento-San Joaquin Delta, the heart of the California water supply system and the source of water for 25 million Californians and millions of acres of prime farmland."])

[13] (*See, e.g., In re Bay-Delta Prog. E.I.R. Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1153–1161 [Supreme Court discusses history of statewide water supply infrastructure and state and federal efforts to reconcile competing demands for water for both people and the environment through management of the Bay-Delta]; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 430–434 [Supreme Court discusses the standards for California Environmental Quality Act review of water supply sufficiency in connection with land use planning and development approval].)

conservation through rate-structure design must be a component of this overall strategy.

### 2. TIERED RATE STRUCTURES EFFECTIVELY CONSERVE AND MANAGE WATER RESOURCES

Tiered rate structures, such as that adopted by the District, impose progressively higher rates for water service as the relative level of consumption increases. They are an effective tool to encourage users to reduce consumption and are therefore an effective water conservation and resource management tool. They also fairly apportion service costs, as the trial court determined here.

Amici fully acknowledge that local agencies are constrained by article XIII D, section 6's substantive provisions. (Cal. Const. art. XIII D, § 6, subds. (b)(1)—(5).) These substantive requirements limit: (i) the use of the proceeds of property related fees and charges; and (ii) the allocation of costs recovered by such fees and charges to ensure that they are proportionate to the cost of providing the service. Of significance to the rates at issue here is article XIII D, section 6, subdivision (b)(3). That subdivision requires the amount of a water service "fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of **the service attributable to the parcel.**" (Cal. Const. art. XIII D, § 6, subd. (b)(3) (emphasis added).)

Although these substantive provisions require public agencies to closely tie the amount of fees imposed on customers of property related services to the nature and extent of service provided, Amici assert that these constitutional requirements permit water rates structured to encourage water conservation and resource management, and to discourage water overuse is part of the water service, the cost of which is being recovered by rates. Further, a tiered rate structure ensures full cost recovery while also requiring those who place proportionately greater burdens and demands on

a water system and its resources to bear a proportionately greater share of the cost of providing that service. (*See* S. Olmstead & R. Stavins, *Comparing price and nonprice approaches to urban water conservation*, 45 Water Resources Research W04301, at 3 (April 2009), *available at* frbatlanta.org/-/media/Documents/podcasts/061709OlmsteadStavinsWRR.pdf as of Mar. 29, 2017.; K. Baerenklau, K. Schwabe, & A. Dinar, *The Residential Water Demand Effect of Increasing Block Rate Water Budgets*, 90 Land Economics 683 (November 2014).)

Article X, section 2 and legislative enactments designed to achieve its purposes have historically played an important role in structuring water rates to encourage conservation in California. *Brydon v. East Bay Mun. Util. Dist.* (1994) 24 Cal.App.4th 178 ("*Brydon*"), decided before adoption of Proposition 218, and other court decisions and legislation issued thereafter, illustrate how courts and the Legislature have addressed these water conservation mandates in the context of rate structure design.

## B. THE SUBSTANTIVE LIMITATIONS OF CALIFORNIA CONSTITUTION ARTICLE XIII D, SECTION 6, SUBDIVISION B MUST BE HARMONIZED WITH THE WATER CONSERVATION MANDATES OF CALIFORNIA CONSTITUTION ARTICLE X, SECTION 2

### 1. *BRYDON V. EAST BAY MUNICIPAL UTILITY DISTRICT* — HARMONIZING ARTICLE X, SECTION 2 WITH ARTICLE XIII A, SECTION 4

Inclining block rate structures such as the one challenged here are intended, in part, to establish economic incentives to conserve water (or put another way, disincentives to unreasonably or excessively use water). Such a rate structure was upheld against a constitutional challenge in *Brydon*.

In *Brydon,* the utility district declared a water shortage emergency pursuant to Water Code section 350 and adopted a drought management program that included a revenue-neutral[14] inclining block rate structure. The rate structure was challenged as a non-voter-approved special tax in violation of California Constitution, article XIII A, section 4. Article XIII A, section 4 was added to the California Constitution by Proposition 13 in 1978 and was intended to provide taxpayer relief by limiting the property tax rate and requiring voter approval of "special taxes" imposed by cities, counties, and special districts. To implement the authorizations granted to public agencies in article XIII A, section 4, the State Legislature enacted Government Code sections 50075 and 50076. Government Code section 50075 states the Legislature's intent to provide all public agencies with authority to impose special taxes, pursuant to Proposition 13. Government Code section 50076 then excludes from the definition of special tax "any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes."

*Brydon* found the rate structure was reasonably designed in response to the constitutionally mandated water resource conservation requirements of article X, section 2. The court also recognized that Water Code section 375 permits the adoption and enforcement of water conservation programs to achieve these requirements and specifically authorizes rate designs to encourage water conservation. (*Brydon*, *supra*, 24 Cal.App.4th at 193, 195.) The court deemed it appropriate through rates to shift the costs of environmental degradation from the general public to those most responsible. The court noted that the district's rate structure reasonably reflected "the fact that it is the profligate usage of water which compels the

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[14] By "revenue-neutral" the utility district intended no net increase in its overall revenues.

initiation of regulated conservation measures" and that it is intuitively apparent that "such measures are necessitated predominately by those citizens least inclined toward conservation." (*Id.* at 193.) Thus, from the court's perspective, "it is reasonable to allocate costs based on the premise that the more unreasonable the water use, 'the greater the regulatory job of the district.'" (*Id.* (citations omitted).)

Stated another way, tiered water rates reasonably reflect the proportionate cost of providing water service attributable to those parcels that use the most water and place the greatest demands on an agency's resources. "To the extent that certain customers overutilize the resource, they contribute *disproportionately* to the necessity for conservation, and the requirement that the District acquire new sources for the supply of domestic water." (*Id.* at 202, italics added (citation omitted).) Such costs include not only the costs of regulating water use and promoting conservation, but of managing a limited public resource "in the interest of the people and for the public welfare" (art. X, § 2.)—i.e., **all** of the costs of water service, including conservation. Managing this vital public resource from year to year and generation to generation is a fundamental responsibility of water purveyors throughout the State. (*See Gin S. Chow*, *supra*, 217 Cal. at 701–702.) Funding such resource management through rate structure design is an essential means to fulfill that responsibility. (*Brydon*, *supra*, 24 Cal.App.4th at 204.)

Amici recognize Brydon was decided before article XIII D was adopted and, therefore, is not precedent with respect to article XIII D. However, Brydon's analysis is instructive as to the full scope of water service and whether aspects of that service, such as the greater costs of management, storage, conservation, peaking capacity, sources of supply, and the like may reasonably be attributed to higher-volume users.

*Brydon* found nothing in article XIII A to suggest it was intended to subvert article X, section 2 "which mandates water conservation and precludes 'the waste or unreasonable use or unreasonable method of use of water,'" or that it was intended "to accomplish the essential destruction of the rate setting structure of public utilities, nor the evisceration of the constitutional mandates compelling water conservation." (*Id.* at 194—195.) As discussed below, although one Court of Appeal (expressly disagreeing with others) has questioned the relevance of *Brydon* post-Proposition 218, Amici argue *Brydon's* conclusion and analysis remains equally applicable to the competing concerns of article X, section 2 and those of article XIII D, section 6 today, just as they were with article X, section 2 and article XIII A, section 4 in 1994.

### 2. LEGISLATIVE ENACTMENTS DEMONSTRATE THE HARMONY BETWEEN ARTICLE X, SECTION 2 AND ARTICLE XIII D, SECTION 6 IN STRUCTURING RATES

California courts have long recognized that apparently competing constitutional provisions must be harmonized to effectuate the purposes of each:

> [C]onstitutional provisions must not be examined in isolation but rather in view of other provisions in the Constitution which bear on the same subject so that respective provisions can be harmonized (1) to avoid conflict, (2) to give effect to the scheme as a whole and (3) to avoid an implied repeal or partial repeal of a constitutional provision.

(*Calif. Bldg. Industry Ass'n v. Governing Bd. of the Newhall Sch. Dist.* (1988) 206 Cal.App.3d 212, 229 (citations omitted); accord *Bd. of Supervisors of San Diego County v. Lonergan* (1980) 27 Cal.3d 855, 868—869; *SBAM Partners v. Wang* (2008) 164 Cal.App.4th 903, 909.)

Consequently, article X, section 2 should be given equal dignity as article XIII D, section 6. (*See Silicon Valley Taxpayers' Ass'n v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 447—448 [article XIII D, section 4 can be harmonized with the separation of powers principle of California Constitution article III, section 3]; *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 936—937 ["article X, section 2 is not at odds with article XIII D... ."].)

Like Proposition 13's article XIII A, section 4, Proposition 218's article XIII D, section 6 was enacted to buttress Proposition 13's limitations on *ad valorem* property taxes and special assessments by placing analogous restrictions on assessments, and property related fees and charges. Neither was intended to compromise the water conservation and resource management objectives of article X, section 2. (*See Howard Jarvis Taxpayers Ass'n v. City of Riverside* (1999) 73 Cal.App.4th 679, 682 [purpose of Proposition 218]; *Brydon*, *supra*, 24 Cal.App.4th at 187—188 [purpose of Proposition 13].) To paraphrase *Brydon*, an inclining block rate structure bears none of the indicia of taxation without voter approval which article XIII D, section 6 sought to restrict. Such a rate structure imposes fees on water consumers in accordance with patterns of usage, thereby protecting low-consumption water users from costs they do not cause. (*See Brydon*, *supra*, 24 Cal.App.4th at 194.) Inherent in the cost of excessive water usage are the costs of water conservation and resource management. Inclining block rates allocate these costs proportionately to those who use the most water. (*See Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1389—1390 ["The juxtaposition of that decision [i.e., *Apartment Association of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830] with *Bighorn* suggests the possibility that a fee falls outside article XIII D to the extent it is charged for consumption of a public service for purposes or in quantities

exceeding what is required for basic (i.e., residential) use of the property."].) Inclining block rates therefore harmonize the competing constitutional mandates of article X, section 2 and article XIII D, section 6, subdivision (b).

Any doubt about the harmony existing between article X, section 2 and article XIII D, section 6 and tiered rates was eliminated in 2009 when the Legislature adopted Assembly Bill 2882 ("AB 2882"). Effective January 1, 2009, AB 2882 amended the Water Code to add Chapter 3.4 (commencing with section 370). Chapter 3.4 authorizes allocation (or "water budget")—based conservation rates, a form of inclining block rate structure, to effectuate the constitutional mandates of article X, section 2—to prevent the waste and unreasonable use of water—and article XIII D, section 6, subdivision (b)—to ensure that water fees and charges are proportionate to the cost of service. Invoking article X, section 2, the Legislature expressly found: "[t]he use of allocation-based conservation water pricing by entities that sell and distribute water is one effective means by which waste or unreasonable use of water can be prevented and water can be saved in the interest of the people and for the public welfare, within the contemplation of Section 2 of Article X of the California Constitution." (Wat. Code, §§ 370 – 374.)

In *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, the California Supreme Court was required to reconcile the secret-ballot provisions of California Constitution article II, section 7 with article XIII D, section 6, subdivision (c)'s voter-approval process for certain property related fees and charges. The Court looked to the Proposition 218 Omnibus Implementation Act of 1997, Government Code section 53750 *et seq.*, and specifically noted the that the court should consider Legislative enactments in interpreting the Constitution:

> "[I]n cases of ambiguity we also may consult any contemporaneous constructions of the constitutional provision made by the Legislature or by administrative agencies." "[O]ur past cases establish that the presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind. In such a case, the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision. Although the ultimate constitutional interpretation must rest, of course, with the judiciary, a focused legislative judgment on the question enjoys significant weight and deference by the courts."

(*Greene*, *supra*, 49 Cal.4th at 290—291 (internal citations omitted); *see also Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 595 [relying on Proposition 218 Omnibus Implementation Act to interpret "water service" for purposes of article XIII D, section 6]; *Richmond v. Shasta Cmty. Services Dist.* (2004) 32 Cal.4th 409, 423 [relying on the Proposition 218 Omnibus Implementation Act in determining if challenged water connection fees were assessments]; *Capistrano Taxpayers Ass'n, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1502 [relying on the Proposition 218 Omnibus Implementation Act definition of "water"].)

Legislative constructions of potentially ambiguous provisions of the Constitution are given great deference:

> [W]here a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the legislature has by statute adopted one, its actions in this respect is well nigh, if not completely, controlling. When the legislature has once construed the constitution, for the courts then to place a different construction

> upon it means that they must declare void the action of the legislature. It is no small matter for one branch of the government to annul the formal exercise by another and coordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the constitution, a statute passed by the legislature, unless it can be said of the statute that it positively and certainly is opposed to the constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the constitution.

(*San Francisco v. Indus. Accident Comm'n* (1920) 183 Cal. 273, 279; *accord Woodcock v. Dick* (1950) 36 Cal.2d 146, 148—149; *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 692.

The Legislature has expressly recognized "conservation pricing" as a permissible demand management tool for attaining State water conservation goals both before and after the adoption of Proposition 218. (*See* Wat. Code, §§ 370 et seq., 375.)[15] The District adopted tiered rates consistent with Water Code section 375. The rates were structured, in part, to promote water conservation, prevent excessive and wasteful water use, and assist the District in managing its water resources. The rates were not only consistent with, but were in harmony with, both the substantive provisions of article XIII D, section 6, subdivision (b)(3) and the water conservation and resource management mandates of article X, section 2.

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[15] Recently, in the historic legislative package establishing a groundwater management regulatory framework for California, the Legislature again specifically authorized the imposition of tiered rates for groundwater extraction charges subject to Article XIII D, section 6. California Water Code section 10730.2(d) was added by 2014 Stats., ch. 347 (the legislative package included AB 1739 (2014 Stats., ch. 347), SB 1168 (2014 Stats., ch. 346), and SB 1319 (2014 Stats., ch. 348).)

### 3. *CITY OF PALMDALE V. PALMDALE WATER DISTRICT* – CALIFORNIA CONSTITUTION ARTICLE X, SECTION 2 CAN BE HARMONIZED WITH ARTICLE XIII D, SECTION 6

In *Palmdale*, the Palmdale Water District adopted an allocation-based water rate structure pursuant to Water Code section 372 *et seq*. The rates were comprised of two components—a fixed monthly charge based on the size of the customer's meter and a per-unit commodity charge for the amount of water used. The commodity charge had five tiers. If customers stay within their water budget,[16] the commodity charge would be billed at the rates established in the first tier. The Tier 1 rate was the same for all customer classes. Customers billed within higher tiers depending on the amount of water consumed, but the incremental rate increase depended on customer class. For example, irrigation customers would be subject to Tier 2 rates if they exceeded their water budget by up to 10 percent, whereas residential customers would not be subject to the Tier 2 rate until they exceeded their budget by up to 25 percent and commercial customers by up to 30 percent.[17] The City of Palmdale, an irrigation customer, challenged the rates, claiming on the legislative record reviewed there that irrigation customer rates exceeded the proportional cost of providing water service in

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[16] A water budget is an amount of water allocated to a customer during a billing period for efficient water use based on their particular circumstance. The indoor water budget is generally based on the number of persons residing in a home, and the outdoor water is generally based on a number of factors such as the irrigable area of a parcel, climatic conditions and evapotranspiration.

[17] The differences in the rates within each tier were significant. The Tier 1 rate was established at $0.64 per unit; the Tier 2 rate was established at $2.50 per unit; the Tier 3 rate was established at $3.20 per unit; the Tier 4 rate was established at $4.16 per unit; and the Tier 5 rate was established at $5.03 per unit.

violation of article XIII D, section 6, subdivision (b). The Court of Appeal agreed. (*Palmdale*, 198 Cal.App.4th at 930.) Applying its independent judgment, the *Palmdale* court found the district made no showing in its rate-making record that its cost of water service to irrigation customers was proportionately higher than its cost of water service to residential and commercial customers and, therefore, irrigation customers should not pay Tiers 2 through 5 sooner than other classes. Consequently, the court concluded the Tier 2 and higher rates on irrigation customers exceeded the proportional cost of providing the water service. (*Id.* at 937—938.)

*Palmdale* expressly recognized that article X, section 2 can be harmonized with article XIII D, section 6, subdivision (b) to allow for budget-based and tiered water rates that promote water conservation, provided conservation is attained in a manner that "shall not exceed the proportional cost of the service attributable to the parcel." (*Id.* at 936.)

In effect, *Palmdale* recognizes that if the voters who approved Proposition 218 had intended to eviscerate the constitutional mandate for water conservation through rate structure design, that result would have been explicit in the ballot proposition. There is nothing, however, in Proposition 218 to suggest such intent. (*See Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Comm'n* (2012) 209 Cal.App.4th 1182, 1186, 1191.)

As discussed in District's Brief, the administrative record the District developed demonstrates at length how costs were allocated among the various user classes in proportion to the cost of serving each. Unlike the water district in *Palmdale*, the District did not make arbitrary changes to the formal rate study with no regard to the actual costs necessary to provide the water service attributable to each customer class. Rather, the District followed the recommendations of its independent rate consultant, who applied nationally recognized industry ratemaking standards

established by the American Water Works Association, Principles of Water Rates, Fees and Charges: Manual of Water Supply Practices M1 (the "M1 Manual"). (*See Griffith*, *supra*, 220 Cal.App.4th at 600 [acknowledging that use of the M1 Manual is consistent with article XIII D, section 6]; *Morgan v. Imperial Irrig. Dist.* (2014) 223 Cal.App.4th 892, 899 [acknowledging that rates upheld against article XIII D, section 6, subdivision (b) challenge were designed using commonly accepted professional standards developed by the American Water Works Association].)

While *Palmdale* emphasizes the importance of a good administrative record to demonstrate that water rates comply with article XIII D, section 6, subdivision (b), it did not provide any guidance on what "proportional to the cost of the service attributable to a parcel" means. That issue was addressed in *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586.

**4. *GRIFFITH V. PAJARO VALLEY WATER MANAGEMENT AGENCY* – PROPORTIONALITY MAY BE DETERMINED BY CUSTOMER CLASS; AGENCIES HAVE FLEXIBILITY IN MAKING ALLOCATIONS**

*Griffith* provides considerable guidance as to how local agencies may comply with the substantive requirements of article XIII D, section 6, subdivision (b) in setting water rates. *Griffith* and its reasoned analysis are instructive here.

*Griffith* reviewed a challenge to the Pajaro Valley Water Management Agency's (the "Agency") groundwater augmentation charges. The Agency was created to manage the Pajaro Valley Groundwater Basin. The Agency is authorized to levy augmentation charges on the pumping of groundwater "for the purposes of paying the costs of purchasing, capturing,

storing, and distributing supplemental water for use within the [A]gency's boundaries]." (*Griffith*, *supra*, 220 Cal.App.4th at 591 [quoting *Amrhein*, *supra*, 150 Cal.App.4th 1364, 1372].) The Pajaro Valley Groundwater Basin has been subject to chronic overuse, resulting in overdraft and seawater intrusion, particularly near the coast. To protect the basin, the Agency implemented a program to deliver supplemental water to some coastal users to displace pumping which contributed to seawater intrusion and to develop other supplemental water projects.[18] The cost of the program was to be shared by all properties the Agency served, even those inland of the coastal delivered water zone.[19]

In 2002, the Agency adopted groundwater augmentation charges. The charges were subsequently increased in 2003 and 2004. Beginning in 2010, the Agency adopted a three-tiered groundwater augmentation charge to fund the supplemental water projects and groundwater management program. (*Griffith*, *supra*, 220 Cal.App.4th at 593.)

The plaintiffs, inland well users who did not receive supplemental water, asserted, among other substantive challenges, that the fee they paid was disproportionate to the cost of the service provided to them because they do not take any of the water delivered to the coastal zone. Rejecting this argument, the court concluded plaintiffs overlooked that "'the management of the water resources ... for agricultural, municipal, industrial, and other beneficial uses is in the public interest ...' and [the

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[18] The groundwater management strategy is "to use recycled wastewater, supplemental wells, captured storm runoff, and a coastal distribution system." (*Griffith*, *supra*, 220 Cal.App.4th at 590.)

[19] The Agency's record showed that "'even those taking water from [inland] wells benefit from the delivery of water to [coastal users], as that reduces the amount of groundwater those [coastal users] will extract [from their own wells], thereby keeping water in [all] wells from becoming too salty.'" (*Id.* at 590—591.)

Agency] was created to manage the resources 'for the common benefit of all water users.'" (*Id.* at 600.) The court therefore found the charges did not exceed the proportionate cost of service because **all** groundwater users benefit from the Agency's groundwater management activities, not just the coastal landowners receiving supplemental water. (*Id.* at 600, 602.) *Griffith* supports the practice of many public agencies to require all property owners who receive the benefits of a property-related service to share in a portion of the costs of that service, including water conservation and resource management costs.

The *Griffith* plaintiffs also challenged the method by which the Agency calculated its charges, claiming they violated the proportionality requirements of article XIII D, section 6, subdivision (b)(3). In addressing this claim, the court provided substantial guidance on how rates may be designed to comply with article XIII D, section 6, subdivision (b)(3) and the degree of flexibility afforded them in allocating the costs of service. The court found article XIII D, section 6, subdivision (b)(3) does not require property-related fees to be calculated on a parcel-by-parcel or individual basis; rather, the court determined that grouping similar users together (i.e., calculating fees on a class-by-class basis) is a reasonable method of allocating the costs of service. In reaching this conclusion, the court recognized:

> Apportionment is not a determination that lends itself to precise calculation... . "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." Given that Proposition 218 prescribes no particular method for apportioning a fee or charge other than the amount shall not exceed the proportional cost of the service attributable to the parcel, [the Agency's] method of grouping similar users together for the same ... rate and charging the

> users according to usage is a reasonable way to apportion the cost of service. That there may be other methods favored by plaintiffs does not render [the Agency's] method unconstitutional. Proposition 218 does not require a more finely calibrated apportion.

(*Id.* at 601, (citations omitted); *see also, Morgan*, *supra*, 223 Cal.App.4th at 899 ["The Cost of Service Study took into account the character of the District and its customers. Most of the District's water system and its delivery costs are shared by all users. However, some types of service require extra costs, and therefore, the study allocated those costs only to the corresponding more expensive services."].) *Griffith* cited the California Supreme Court's decision in *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421 ("*Farm Bureau*"), in which a regulatory fee was challenged as a tax under Proposition 13. The California Supreme Court held there that:

> [t]he question of proportionality is not measured on an individual basis. Rather it is measured collectively, considering all rate payors. Thus, permissible fees must be related to the overall cost of the government regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive.

(*Farm Bureau*, *supra*, 51 Cal.4th at 438, (citations omitted).) Most notably, *Farm Bureau* held that, in applying these principles, public agencies may assess proportionality within a range of reasonableness. (*Id.* at 442; *Calif. Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 132.)[20]

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[20] (*See also Paland v. Brooktrails Township Cmty. Serv. Dist. Bd. of Dir.* (2009) 179 Cal.App.4th 1358, 1370 [court refused to look at individual property owner activity to determine whether service was "immediately available" as required for a fee pursuant to California Constitution article XIII D, § 6, subd. (b)(4).]; American Water Works Association, Principles of Water Rates, Fees and Charges: Manual of Water Supply Practices M1

*Farm Bureau*'s and *Griffith*'s conclusions that proportionality requirements can be met at the customer class level affirms a local agency's discretion in rate-making. While fees and charges must be proportionate to the cost of providing water service attributable to a parcel, article XIII D, section 6, subdivision (b)(3) does not restrict how the attribution of that service is made by the legislative body of the local agency. Therefore pre-Proposition 218 legislative discretion in these areas remains. (*Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1188 [a utility may classify its customers on a reasonable basis].) When an agency has first reasonably attributed service to customer classes and then calculated fees to that class with respect to the costs to provide the service so attributed, it has complied with the Constitution.

### 5. *CAPISTRANO TAXPAYERS ASSOCIATION V. CITY OF SAN JUAN CAPISTRANO* — COURT OF APPEAL MISCONSTRUES THE PROPORTIONALITY REQUIREMENTS OF ARTICLE XIII D, SECTION 6, SUBDIVISION (B)(3)

Appellants' Opening Brief relies heavily on *Capistrano Taxpayers Association v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 ("*Capistrano*") to assert the District's tiered rates do not comply with the proportionality requirement of article XIII D, section 6, subdivision (b)(3). As discussed in more detail below, Amici conclude that *Capistrano*

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at p. 75 (6th ed. 2012) [In allocating costs, the M1 Manual notes: "The ideal solution to developing rates for water utility customers is to assign cost responsibility to each individual customer served and to develop rates to derive that cost. Unfortunately, it is neither economically practical nor often possible to determine the cost responsibility and applicable rates for each customer served. However, the cost of providing water service can reasonably be determined for groups or classes of customers that have similar water-use characteristics and for special customers having unusual water-use or service requirements."].)

misconstrues this subdivision and urge this Court to follow the better reasoned analysis of *Griffith* and *Morgan*. (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4. [A decision of a court of appeal is not binding in the courts of appeal. As a consequence, one appellate "district or division may refuse to follow a prior decision of a different district or division."]; *Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187, 1193.)

At issue in *Capistrano* was whether that city's tiered rate structure complied with article XIII D, section 6, subdivision (b). On appeal, the court held that the city's tiered rates were not proportional to the cost of service because the city conceded at argument it had made no effort to tie the price of water in each tier to the cost of providing that volume of water. (*Capistrano*, *supra*, 235 Cal.App.4th at 1505.) Specifically, the court criticized the city for not correlating its rates within each tier to the cost to deliver water used in each tier.

In interpreting article XIII D, section 6, subdivision (b)(3), *Capistrano* noted: "[i]f the phrase 'proportional cost of service attributable to *the* parcel' is to mean anything, it has to be that *article XIII D, section 6, subdivision (b)(3)* assumes that there really *is* an ascertainable cost of service that can be attributed to a specific — hence that little word 'the' — parcel." (*Id.* at 1505, italics original.) In an inconsistent statement, however, the court later concluded this does not mean that a utility must calculate distinct rates for properties across the street from one another. (*Id.* at 1514.)

Significantly, *Capistrano* acknowledged "numerous times" that tiered rates are "consonant" with and "not incompatible" with article XIII D, section 6, subdivision (b), provided the rates reasonably reflect the cost of service attributable each parcel:

- "[T]iered, or inclined rates that go up progressively in relation to usage are perfectly consonant with article XIII D, section 6, subdivision (b)(3)" (*id.* at 1497—1498);
- "As we will say numerous times in this opinion, tiered water rate structures and Proposition 218 are thoroughly compatible 'so long as'—and that phrase is drawn directly from *Palmdale*—those rates reasonably reflect the cost of service attributable to each parcel" (*id.* at 1499, fn. 6);
- "[N]othing ... prevents water agencies from passing on the incrementally higher costs of expensive water to incrementally higher users" (*id.* at 1516);
- "[N]othing in *article XIII D, section 6, subdivision (b)(3)* is incompatible with water agencies passing on the true, marginal cost of water to those consumers whose extra use of water forces water agencies to incur higher costs to supply that extra water." (*id.*, italics original.)

On the rate-making record there, however, *Capistrano* found no justification of the relative cost of the sources of supply claimed to justify the rate tiers.[21] (*Id.* at 1499.) For example, *Capistrano* noted there was nothing in the record to explain why the city could not calculate the costs of service at given usage levels that require it to tap into more expensive water supplies, and then bill its users in the higher tiers accordingly. (*Id.* at 1516.) The court stated that in calculating the rates for each tier, the city

> had to do more than merely balance its total costs of service with its total revenues—that is already covered in subdivision (b)(1). To comply with subdivision (b)(3), [the city] also

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[21] The city obtains its water from five sources of supply, including a groundwater recovery plant, five local groundwater wells, imported water, recycled water, and another retail water agency.

> had to correlate its tiered prices with the actual cost of providing water at those tiered levels. Since [the city] did not try to calculate the actual costs of service for the various tiers, the trial court's ruling on tiered pricing must be upheld simply on the basis of the constitutional text.

(*Id.* at 1506.) This observation was sufficient to affirm the trial court's invalidation of the City of San Juan Capistrano's rates. However, *Capistrano* continues on describing expansively the burden a rate-maker must bear to justify tiered rates, expressly disagreeing with *Griffith* and implicitly disagreeing with *Morgan* and *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363 in so doing. (*Capistrano*, *supra*, 235 Cal.App.4th at 1513-1514.)

### (A) *CAPISTRANO* FAILS TO HARMONIZE THE PROVISIONS OF CALIFORNIA CONSTITUTION ARTICLE XIII D, SECTION 6 AND ARTICLE X, SECTION 2

*Capistrano* rejected reliance on article X, section 2 to promote water conservation as the basis for establishing tiers, holding the city had to show that the various usage tiers corresponded with its actual costs of delivering water in those increments. (*Id.* at 1508-1511.) Looking to the origins of article X, section 2, *Capistrano* took an extremely narrow view of this constitutional provision—ignoring a century of case law since its adoption —to conclude that its purpose was only to prevent the waste of water by letting it flow "unused, unrestricted, and undiminished to the sea." (*Id.* at 1510.) It even went so far as to suggest article X, section 2 is superseded by article XIII D. (*Id.* at 1511.)[22] Moreover, *Capistrano* dismissed *Brydon*

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[22] A suggestion that ignores the court's own prior opinion that repeal by implication is disfavored. (*Citizens Ass'n of Sunset Beach v. Orange County LAFCO* (2013) 209 Cal.App.4th 1182, 1192 [Proposition 218 does

regarding the import of article X, section 2 and tiered rate structures, dismissing it as decided before the adoption of Proposition 218 and therefore of no application to post-Proposition 218 cases. (*Id.* at 1512—1513; cf. *Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Comm'n* (2012) 209 Cal.App.4th 1182, 1195—1199 [same division concluding Proposition 218 maintains Proposition 13 precedents except to the extent they are squarely irreconcilable].)

*Capistrano's* analysis entirely disregarded the principles discussed above requiring that: (1) when two constitutional provisions appear to compete, their terms must be harmonized to effectuate the purposes of both; and (2) if the Constitution is susceptible to more than one meaning and the Legislature has provided one, "its actions in this respect is well nigh, if not completely, controlling." (*San Francisco*, *supra,* 183 Cal. at 279.)

### (B) *CAPISTRANO* FUNDAMENTALLY MISCONSTRUES THE NATURE AND SCOPE OF PUBLIC WATER SERVICE

*Capistrano*'s conclusion, driven by that City's admitted failure to provide cost justification for its tiered rates, appears to be based on the mistaken premise that the service provided by public water providers is limited to "actually providing water" or "delivering water" in "marginal" or "incremental amounts." (*Capistrano*, *supra*, 235 Cal.App.4th at 1497, 1498, 1499, 1501, fn.12, 1505, 1508, 1516.) Thus, *Capistrano* found that price tiers must be based only on increasing costs to deliver increments of water allotted to each tier such that price differentials between tiers reflect an increase in the cost to provide a particular volume of water. Under *Capistrano*'s reasoning, for example, a water provider that obtains its entire supply at one cost from a single source or wholesaler cannot employ tiered

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not impliedly repeal Government Code section 56375.3 relating to island annexations].)

rates. Or, if taken to its logical conclusion, *Capistrano* requires a local agency to determine at a granular level what it refers to as the "true cost" of service for each parcel; this simply cannot be achieved or would result in potentially tens of tiers to correlate specific costs to individual parcels. Simply stated, *Capistrano* ignores that water agencies do not simply provide a commodity; they manage water resources to ensure reliable service to their customers day-to-day, year-to-year, and generation-to-generation. As discussed throughout this brief, in the context of the Constitution, water is more than just two hydrogen atoms and one oxygen atom.

Other courts have recognized—before and after Proposition 218—the obligation of public water agencies to conserve and manage water resources and that rates can recover their cost to do so and also can be designed to foster conservation by individual customers. (*Brydon, supra,* 24 Cal.App.4th at 203—204 [construing Cal. Const. art. XIII A, as adopted by Proposition 13]; *Carlton Santee Corp. v. Padre Dam Mun. Wat. Dist.* (1981) 120 Cal.App.3d 14, 28 [applying pre-Proposition 13 common law of utility rate-making]; *Griffith, supra,* 220 Cal.App.4th at 600 [applying article XIII D, section 6 to the management of water resources is for the common benefit of all users].) In this respect, *Capistrano* utterly fails to acknowledge the water conserving function and resource management responsibility of local water agencies.

To reiterate, "water" is defined for the purposes of article XIII D, section 6 to mean the entire system that must be built, operated, maintained, and managed, and that conservation of water kept in streams, reservoirs, groundwater, or even snow pack on one day is a **source** of water for the next. (Gov. Code, § 53750, subd. (m).) Moreover, article XIII D, section (6), subdivision (b)(3) which caps the amount of property-related fees imposed to "the proportional cost of the service attributable to the parcel,"

thus requiring an agency first to determine the service attributable to the parcel and then determine the proportionate share of that attributed service. Thus, so long as the services are *reasonably* attributed across customer classes, the fees for that attributed service will comply with the proportionality requirements of article XIII D, section 6, subdivision (b)(3). (*Griffith*, *supra*, 220 Cal.App.4th at 601 [the parcel-by-parcel analysis is not required; grouping similar users together is a reasonable way to apportion the cost of service]; *Morgan*, 223 Cal.App.4th at 899, 916 [different services may cost more and different users create special costs; there is no requirement that the data determining rates be perfect].)

A public agency should not have to separately account for every drop of water from source to user (i.e., parcel) to charge that user for that service. It is appropriate to allocate all costs of supplying water to all customers who receive water service. (*Griffith, supra,* 220 Cal.App.4th at 600, 602; *Farm Bureau*, *supra*, 51 Cal.4th at 438.) Ultimately, in allocating these costs, local agencies must be allowed reasonable flexibility to attribute services and proportionally allocate the cost of those services. (*See Farm Bureau*, *supra*, 51 Cal.4th at 442; *Calif. Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 132.)

### (C) *CAPISTRANO* FAILS TO GIVE APPROPRIATE CONSIDERATION TO THE JUDGMENT OF LOCAL AGENCIES IN ATTRIBUTING SERVICE TO PARCELS

As discussed throughout this brief, "water service" means more than just supplying water; it includes managing and ensuring an ongoing, supply of water for all users. (*Griffith*, *supra,* 220 Cal.App.4th at 595; Gov. Code, §53750, subd. (m).) In rate-making, water agencies must decide how to attribute services to customers based on the benefits received and burdens

caused. (Cf. Cal. Const., art. XIII C, § 1, subd. (e) [final, unnumbered par.].) Yet, *Capistrano* repeatedly uses phrases such as "actual cost," "true cost," and "true marginal cost" as though there is an objectively determinable, judicially verifiable, single true answer to the rate-making challenge. (*E.g.*, *Capistrano*, *supra*, 235 Cal.App.4th at 1497—1499, 1503, 1505, 1507—1508, 1510—1511, 1514, 1515.) If only ratemaking were that simple! Not only does *Capistrano* truncate service to the mere delivery of water, it focuses on attributing "cost of service" to "the parcel" as a simple mathematical calculation, rather than properly focusing on a legislative choice among a range of reasonable options to determine "the service attributable to the parcel."

Because water service is much broader than the mere delivery of water, before a local agency can "correlate its tiered prices" with the cost of "the service" provided to those tiers, it must determine "the service" that is "attributable" to each tier. Amici argue that "the service" attributable to customers who place a greater demand on a water system appropriately includes efforts to meet that profligate demand, including increased water conservation and resource management. Accordingly, "the service" attributable to a local agency's customers who consume water in its upper tiers appropriately includes a proportionately heavier share of the responsibility to pay for costs to conserve scarce resources. Further, the measure of "the service" is not objectively "ascertainable," but is "attributable" through the water agency's reasonable legislative judgment. Indeed, the District's attribution of service to parcels using excessive water follows the path charted by the Legislature. (Wat. Code, §§ 370—375, 10631, subd. (f)(1)(B)(iii) [authorizing tiered water rates].) However, *Capistrano* focuses on "the parcel" to the exclusion of "the service attributable" to the parcel.

Rate-making is a quasi-legislative[23] task not because local agencies prefer discretion, but because the line-drawing exercises that rate-making requires are not suitable for courts, which apply law but do not make policy in the first instance. A local legislative body must take into account the various types of costs of operating a system (fixed, customer-based, and variable) and the differential demands that various types of customers and classes of customers place on water utilities. (*E.g., 20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216 [rate-making is a complex legislative task].) Additionally, courts have long held that rate design is both discretionary and legislative. (*E.g., Pac. Tel. & Telegraph Co. v. Pub. Util. Com.* (1965) 62 Cal.2d 634, 655; *Brydo*n, *supra*, 24 Cal.App.4th at 196; *see also Moore*, *supra*, 237 Cal.App.4th at 368 ["[C]ourts afford agencies a reasonable degree of flexibility 'to apportion costs of ... programs in a variety of reasonable financing schemes."] (citation omitted).)

Article XIII D, section 6, subdivision (b)(3) recognizes the legislative task to "attribute" costs of service to customers. It does not provide, as *Capistrano* suggests, that water rates must be limited to the "cost of service." Rather, article XIII D, section 6, subdivision (b)(3) states, "[t]he amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of *the service attributable to the parcel.*" (Italics added.) The opinion reads "attributable" out of the Constitution. This is most clear from its statement that an agency must "ascertain" costs of "service" in general rather than "the service" it reasonably "attributes" to a parcel, i.e., a customer or customer class. (*Capistrano*, *supra*, 235 Cal.App.4th at 1505.)

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[23] *See Home Builders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 561; *Kahn v. East Bay Mun. Util. Dist.* (1974) 41 Cal.App.3d 397, 409; *Calif. Ass'n of Prof'l Scientists v. Dep't of Finance* (2011) 195 Cal.App.4th 1228, 1232; *Brydon*, *supra*, 24 Cal.App.4th at 196.

The opinion implies rate-making involves no active decision-making usually associated with the legislative branch, but merely requires discovering an objectively determinable, "true" cost of service for various customer classes at various levels of consumption. This is an unrealistically simplistic rendering of the rate-maker's task. In sum, the opinion does not address the relationship between its holding and the constitutional acknowledgement that an agency may "attribute" water services—including both supplies and regulatory efforts to encourage conservation and to promote water resource management of an essential and finite resource—to a customer class and then structure rates that recover those costs so as to encourage conservation. It does not explain why an agency may not achieve a regulatory purpose by encouraging water conservation through rate structure design. (*See Brydon*, *supra*, 24 Cal.App.4th at 192–193, 198–204.)

*Capistrano*'s quest for a determination of the "true cost" of delivering water ignores the dual aspects of apportionment: the attribution of service and the apportionment of the costs of the attributed service. *Griffith* addresses both aspects in concluding that article XIII D, section 6, subdivision (b)(3) does not require property-related fees to be calculated on a parcel-by-parcel or customer-by-customer basis; rather, the court determined that grouping similar users together (i.e., calculating fees on a class-by-class basis) is a reasonable method of allocating the costs of service.[24]

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[24] Although Amici believe that *Capistrano* improperly interprets the Constitution, the District has complied with that opinion's overly stringent view of the law. The District's Brief demonstrates that the District reasonably attributed the various aspects of water service and appropriately allocated the costs of that service among its customer classes. The District's fees apportioned all of the costs of all of its services, including water conservation and resource management. The District has

## C. LOCAL AGENCIES MUST RETAIN A REASONABLE DEGREE OF FLEXIBILITY IN DESIGNING THEIR WATER RATES

The local agencies that provide water service in California are as diverse as our population. Some agencies are urban, others are rural. Some are large, some are small. Some have a multitude of water supply sources—e.g., groundwater, surface water, desalinated water, and recycled water. Others rely entirely on a single source of supply, such as imported water or groundwater. Some agencies have made significant investments in water conservation programs, while others have yet to meter all service connections. Some have long-range infrastructure plans requiring multiple debt issues, others fund their capital programs on a pay-as-you-go basis. Some may have service areas that generate high utility costs because pumps are required to lift and deliver the water to customers in higher elevations. Others have systems that are largely gravity driven. The average per capita income in one may be as high as $100,000, while in another the average per capita income may be at or near the poverty level. The Legislature has recognized this diversity. (*See* Cal. Water Code § 10608, subd. (h) [recognizing the diversity of factors impacting water use efficiency targets].) In short, the costs of providing water service are different for each local agency and are not wholly dependent on the supply price of the water delivered.

The members of the legislative bodies of these local agencies are just as diverse in their opinions, experience and backgrounds as the communities they serve. Their diversity influences their decision-making, and the goals and policies that guide their agencies, including their determination of what is a fair and equitable rate structure for their

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proportionately allocated a greater share of its services and correspondingly a greater share of the cost of providing those services to profligate users.

customers within the constraints of the law, namely article X, section 2 and article XIII D, section 6, subdivision (b).

Because of this diversity, Amici urge the Court to consider that nothing in the text or context of article XIII D, section 6, subdivision (b) evidences an intent to eliminate the legislative discretion of local public agencies to price their water resources, or to design rates, to reflect disparate local goals and policies provided State policies are preserved. (*Brydon*, *supra*, 24 Cal.App.4th at 194–195 [analyzing voters' intent and water rate structure design to harmonize article X, section 2 and article XIII A, section 4].) Revenues from water service fees may not exceed the costs of providing service in toto and the costs of service must be reasonably and equitably distributed among the customer classes in proportion to the cost of the service reasonably attributed to each. At least three authorities sustain this point:

- *Brydon*, *supra*, 24 Cal.App.4th at 194—"in pursuing a constitutionally and statutorily mandated conservation program, cost allocations for services provided are to be judged by a standard of reasonableness with some flexibility permitted to account for system-wide complexity."
- *Griffith*, *supra*, 220 Cal.App.4th at 601—"[a]pportionment is not a determination that lends itself to precise calculation .... Given that Proposition 218 prescribes no particular method for apportioning a fee or charge other than the amount shall not exceed the proportional cost of the service attributable to the parcel, ... grouping similar users together for the same ... rate and charging the users according to usage is a reasonable way to apportion the cost of service."
- *Morgan*, *supra,* 223 Cal.App.4th at 908–909—"[t]here is nothing in section 6 that prohibits an agency from charging

different rates to its customers as long as the fees paid by customers are proportional and the total amount the agency collects does not surpass the cost of providing the service. These substantive requirements help section 6 achieve the voters' objective of limiting the local government revenue."

## IV.

## AMICI JOIN IN THE ASSOCIATION OF CALIFORNIA WATER AGENCIES' AMICUS BRIEF

Amici join in and adopt the arguments made in the Amicus Curiae Brief submitted by the Association of California Water Agencies in this case. For all of the reasons stated in that brief, Amici assert that Government Code section 53755 is constitutional and the District's notice legally sufficient.

## V.

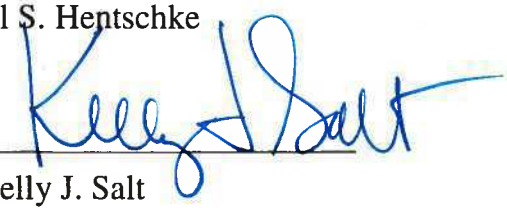
## CONCLUSION

For all of the reasons stated above, Amici respectfully request this Court reject Appellant's challenge and sustain the trial court's thoughtful and well-reasoned judgment on the merits.

Dated: April 14, 2017

Respectfully submitted:

Kelly J. Salt
Daniel S. Hentschke

By: 

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## CERTIFICATE OF WORD COUNT

The text of this Amicus Brief consists of 12,550 words (excluding caption, tables, and this certification) as counted by the Microsoft Word 2010 word-processing program used to generate said document.

Dated: April 14, 2017

BEST BEST & KRIEGER LLP

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## CERTIFICATE OF SERVICE

I, Lisa Atwood, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 655 West Broadway, Fifteenth Floor, San Diego, California 92101-3542. On April 14, 2017, I served the within document(s):

**APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS**

**AMICUS CURIAE BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION**

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I further declare that this same day I electronically submitted one copy of the within document to the California Court of Appeal, Second Appellate District, Division Six (per Rule 8.70.)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 14, 2017, at San Diego, California.

Lisa Atwood