No. G053002

Court of Appeal, Fourth Appellate District, Division Three

LISA WILLIAMS; et al.,

Plaintiffs and Appellants,

vs.

MOULTON NIGUEL WATER DISTRICT; et al.,

Defendants and Respondents

Appeal From a Judgment of the Superior Court,
County of Orange

Honorable Thierry Patrick Colaw (Case No. 30-2011-00519887)

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF AND AMICI BRIEF IN SUPPORT OF RESPONDENTS THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, MOULTON NIGUEL WATER DISTRICT AND IRVINE RANCH WATER DISTRICT

Attorneys for Applicants and Amici
Association of California Water Agencies; League of California Cities; San Diego County Water Authority, Las Virgenes Municipal Water District, Upper San Gabriel Valley Municipal Water District, Municipal Water District of Orange County, Foothill Municipal Water District and West Basin Municipal Water District.

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to California Rules of Court, Rule 8.200, subdivision (c), the Association of California Water Agencies ("ACWA"), League of California Cities ("League"), San Diego County Water Authority, Las Virgenes Municipal Water District, Upper San Gabriel Valley Municipal Water District, Foothill Municipal Water District, West Basin Municipal Water District, and Municipal Water District of Orange County (collectively, "amici") respectfully apply to this Court for permission to file the amicus curiae brief accompanying this application in support of respondents The Metropolitan Water District of Southern California, Moulton Niguel Water District, and Irvine Ranch Water District.

The brief of the amici will assist the Court by addressing the unacceptable uncertainty and liability that would result if the Court were to adopt Appellants' arguments and overturn the lower court decision. The brief concerns the critical role that the federal and state Safe Drinking Water Acts play in providing necessary certainty in the design, financing, build, and operation of public drinking water delivery infrastructure in California. The brief advances arguments on why Appellants' claims are preempted by federal and state law, and there is no inverse condemnation

liability for water agencies providing drinking water that meets state drinking water quality standards.

Amici represent California agencies that collectively provide drinking water to the vast majority of California's population. ACWA is a California nonprofit public benefit corporation comprised of over 430 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts, and special purpose public agencies. The agencies provide a wide variety of public services to both urban and rural communities, including drinking water supply. The League of California Cities 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 San Diego County Water Authority, Las Virgenes Municipal Water District, Upper San Gabriel Valley Municipal Water District, Foothill Municipal Water District, West Basin Municipal Water District, and Municipal Water District of Orange County, collectively, provide water deliveries to over eight million residents and businesses in the counties of San Diego, Orange and Los Angeles, respectively.

Each of the amici has a process for identifying cases, such as this one, that warrant their participation. For example, ACWA's Legal Affairs Committee, comprised of attorneys from each of ACWA's regional divisions throughout the state, monitors litigation and has determined that

this case involves issues of significance to ACWA's member agencies. The League's, comprised of 24 city attorneys from all regions of the state, monitors litigation of concern to municipalities, and identifies those cases, such as this one, that have statewide significance.

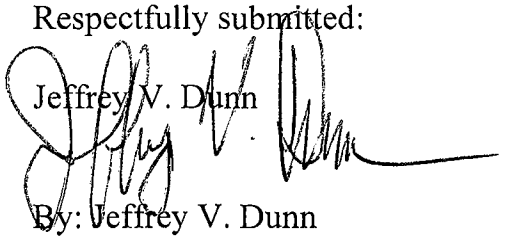
The members of ACWA and the League, together with the San Diego County Water Authority, Las Virgenes Municipal Water District, Upper San Gabriel Valley Municipal Water District, Foothill Municipal Water District, West Basin Municipal Water District, and Municipal Water District of Orange County have a significant interest in ensuring the certainty and applicability of the federal and state drinking water standards so they can plan, finance, and operate drinking water delivery systems. For sound legal and policy reasons, federal and state drinking water standards preempt Appellants' alleged property damages claims of corrosive drinking water, and there is no inverse condemnation liability for delivering drinking water meeting applicable federal and state water quality standards.

For the reasons stated in this application and further developed in the proposed amici brief, ACWA, the League, San Diego County Water Authority, Las Virgenes Municipal Water District, Upper San Gabriel Valley Municipal Water District, Foothill Municipal Water District, West Basin Municipal Water District and the Municipal Water District of Orange County respectfully request leave to file the amici curiae brief with this application.

The application and amicus curiae brief were authored by Jeffrey V. Dunn. ACWA, Las Virgenes Municipal Water District, Upper San Gabriel Valley Municipal Water District, West Basin Municipal Water District and the Municipal Water District of Orange County each contributed $2,500 toward the preparation and submission of the brief. The Foothill Municipal Water District contributed $1,500 toward the preparation and submission of the brief. No other person or entity made a monetary contribution to its preparation and submission.

Dated: December 22, 2016

Respectfully submitted:



Jeffrey V. Dunn

By: Jeffrey V. Dunn
Attorneys for the Amici

INTEREST OF THE AMICI CURIAE

The amici are as follows:

The Association of California Water Agencies (ACWA) is a coalition of over 430 public water agencies in California, and whose member agencies provide water supplies for domestic and other uses. ACWA member agencies design, build, operate, treat and distribute water to cities, towns and rural communities throughout the state. ACWA represents these agencies before the California Legislature, the United States Congress and numerous regulatory bodies, as well as supporting these agencies as amici curiae before the courts.

The League of California Cities ("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 Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The San Diego County Water Authority sustains a $222 billion regional economy and the quality of life for 3.3 million residents through a

multi-decade water supply diversification plan, major infrastructure investments and public policies that promote fiscal and environmental responsibility. A public agency created in 1944, the San Diego Water Authority delivers a safe and reliable wholesale water supply at an affordable cost to 24 retail water agencies including cities, special districts and a military base. (See http://www.sdcwa.org/about-us#sthash.lME1hXSN.dpuf/)

The Las Virgenes Municipal Water District was established in 1958. The District provides water, wastewater treatment, and recycled water services to more than 65,000 residents in the cities of Agoura Hills, Calabasas, Hidden Hills, Westlake Village and surrounding unincorporated areas of Los Angeles County. (See http://www.lvmwd.com/about-us)

The Upper San Gabriel Valley Municipal Water District was incorporated in 1959, covers approximately 144 square miles and includes all or parts of 18 cities and portions of unincorporated Los Angeles County with more than 950,000 residents. Upper District partners with many public and private entities to provide a sustainable, high quality water supply to residents and businesses within the greater San Gabriel Valley. (See http://upperdistrict.org/about/service-area/)

The Foothill Municipal Water District was incorporated on January 7, 1952 to help meet the needs of the rapidly growing communities in the La Canada Flintridge area following the end of World War II. It covers

about 22 square mile in the foothills of the San Gabriel Mountains, bordered between the City of Pasadena on the east and the City of Glendale on the south and west. Foothill serves approximately 80,000 persons through its member agencies in the Altadena, La Canada Flintridge and La Crescenta-Montrose communities. (http://www.fmwd.com/#Who_We_Are)

The West Basin Municipal Water District provides drinking and recycled water to its 185-square mile service area in southwest Los Angeles County. West Basin serves a population of nearly a million people living within 17 cities the South Bay area of Los Angeles County and in unincorporated areas including the cities of Carson, Culver City, El Segundo, Gardena, Hawthorne, Hermosa Beach, Inglewood, Lawndale, Lomita, Malibu, Manhattan Beach, Palos Verdes Estates, Rancho Palos Verdes, Redondo Beach, Rolling Hills, Rolling Hills Estates and West Hollywood. (http://www.westbasin.org/about-west-basin/cities-we-serve.html)

The Municipal Water District of Orange County ("MWDOC") is a wholesale water supplier and resource planning agency. It focuses on sound planning and appropriate investments in water supply development, water use efficiency, public information, legislative advocacy, water education and emergency preparedness. MWDOC's service area covers all of Orange County, with the exception of the cities of Anaheim, Fullerton,

and Santa Ana. MWDOC serves Orange County drinking water needs through 28 retail water agencies. (See http://www.mwdoc.com/about)

Collectively, amici have a common interest in ensuring the uniform application of federal and state drinking water standards. The amici or their members or constituents build, operate and maintain drinking water projects and facilities that serve many different public needs and uses throughout the State—promotion of economic development and job creation, protection of the public health and safety, and provision of water supplies for urban, agricultural and other uses. The amici rely on the certainty of federal and state safe drinking water standards because they have made enormous investments and incurred significant costs in building the necessary infrastructures to comply with those standards. While statutorily authorized regulatory agencies may change the standards after complying with public notice and comment requirements of the applicable state or federal Administrative Procedure Act, courts are not authorized to do so.

Appellants' unprecedented legal arguments threaten to undue billions of dollars of public water supply infrastructure designed and built to conform to federal and state safe drinking water standards. In reliance upon the federal and state standards, amici have designed and built the necessary public water supply infrastructure and have made significant long-term financial commitments. By recognizing that the federal and state

standards preempt Appellants' claims, the lower court's decision upholds applicable water quality standards and confirms that no liability arises from water quality treatment meeting applicable federal and state standards, thereby supporting the amici's interest in ensuring the certainty of such standards. Therefore, the amici have a significant interest in the issues presented in the appeal.

SUMMARY OF ARGUMENT

The federal Safe Drinking Water Act, 42 U.S.C. section 300f et seq., ("Act") establishes national primary drinking water regulations applicable to public water systems. (42 U.S.C. § 300f(1).) Under the Act, states have primary enforcement authority provided that they meet certain criteria, including the adoption of drinking water standards that are no less stringent than the national primary drinking water regulations promulgated by the federal Environmental Protection Agency ("EPA") (42 U.S.C. § 300g-2(a)(1)-(6); 40 C.F.R. § 142.10.) Thus, a local water agency's compliance with the state drinking water standards constitutes compliance with the federal and state standards and any damages claims against the local water agency are preempted by federal and state law.

The Act does not authorize ad hoc determinations by courts in lawsuits claiming property damages based on drinking water deliveries. If the Act were construed otherwise, courts would usurp legislative and

executive authority by effectively revoking federal and state drinking water standards. If Congress and the California Legislature had intended to create such an unwieldy usurpation of authority, they would have spoken clearly on the subject, and no such clarity appears in either federal or state acts. On the contrary, one of the federal and state acts' main goals is to ensure uniform drinking water standards. If courts are not bound by the federal and state safe drinking water quality standards and are, instead, free to make their own determinations, the standards are rendered meaningless as courts make ad hoc determinations in alleged property damages cases.

Here, the lower court's decision upholds the congressional and state legislative intent to establish uniform standards, because, under the court's decision, there is no liability for drinking water deliveries unless there are factual findings that the deliveries do not meet applicable statutory standards.

Stated simply, a public water supplier meeting applicable state water quality standards cannot be held liable for alleged damages to property due to drinking water delivery. To hold otherwise would frustrate the purposes of the federal and state legislative schemes and create unacceptable uncertainty because public water suppliers would be unable to design, build and operate public water treatment and supply systems due to the liability uncertainty.

There is an important distinction between damages claims for violations of the safe drinking water standards and such claims for water meeting the standards. In deciding whether public entities are liable for alleged damages due to drinking water deliveries, trial courts are to decide such cases under applicable federal and state statues as well as applicable case law.

Here, the lower court's interpretation of applicable federal and state water quality law and its applicable case law is consistent with the language and structure of the Act, which vests the federal and state administrative agencies with exclusive authority over water quality standards. The lower court reasoned that federal and state standards cannot be preempted by Appellant's claims or there would be an unacceptable uncertainty in applicable drinking water standards.

The lower court's judgment and supporting analysis are consistent with the California Supreme Court's decision in *Hartwell v. Superior Court* (2002) 27 Cal.4th 256 ("*Hartwell*") and the subsequent Court of Appeal decision in *In re Groundwater Cases* (2007) 154 Cal.App.4th 659, holding that only the federal and state administrative agencies have authority to establish safe drinking water standards and that courts should not usurp that authority by making ad hoc determinations of water quality in damages cases.

The amici, or their members or constituents, build, operate and maintain public water supply projects and facilities that serve tens of millions of Californians. The water treatment and supply systems are needed for economic development and job creation, protection of public health and safety, and the provision of water supplies for urban, agricultural and other uses. These public water supply projects and facilities are subject to federal and state water quality standards, and the ability of the local governments to plan, construct and operate the water supply systems depends on the certainty and finality of the water quality standards. If, as Appellants contend, courts are to make ad hoc determinations on allegations that drinking water quality causes property damage even though the water meets applicable standards, amici's ability to design, build and operate water treatment facilities is significantly impaired.

Therefore, this Court should uphold the lower court's judgment.

ARGUMENT

I. THE LOWER COURT'S DECISION FUNDAMENTALLY UPHOLDS THE FEDERAL AND STATE SAFE DRINKING WATER ACTS BY FINDING THERE IS NO LIABILITY FOR ALLEGED PROPERTY DAMAGE WITHOUT FINDING THAT THE DRINKING WATER DOES NOT MEET STATUTORY WATER QUALITY STANDARDS.

To understand the drinking water quality issues before the Court, "[i]t is helpful to have a basic framework of the statutory scheme as it relates to this case." (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887; see also *In re Groundwater Cases*, 154 Cal.App.4th at p. 674 [same].)

A. Under 42 U.S.C. Section 300g-2(a)(1)-(6), The EPA Has Primary Authority Over Safe Drinking Water Standards, Including Authority To Permit States To Establish Standards At Least As Stringent As The Federal Standards.

42 U.S.C. section 300g-(1)(b) authorizes the EPA to establish national drinking water quality standards. (*Coshow v. City of Escondido* (2002) 132 Cal.App.4th 687, 703.) Section 300g-2(a)(1)-(6) provides a role for the states, by authorizing the states to implement safe drinking water standards at least as stringent as the federal standards. (42 U.S.C. §

300(g)-2(a)(1)-(6); 40 C.F.R. 142.10; *In re Groundwater Cases* , *supra*, 154 Cal.App.4th at pp. 677-678.) Thus, while the EPA has nationwide authority over drinking water quality standards, the EPA may delegate to the states its authority to implement the standards under certain conditions.

Although the EPA clearly has authority under the federal Safe Water Drinking Act to establish national standards,—thus precluding courts from adopting their own standards—the Appellants essentially contend the lower court was authorized to specify other standards, and that the courts can thereby effectively revoke, or "veto," the federal standards. (AA-2384, Statement of Decision, p. 13 ["In effect, Plaintiffs are asking this Court to assume control of the EPA's and Responsible Agency's regulatory powers. . . .") The lower court properly rejected Appellants' contention.

The lower court did not find any limits upon the EPA's authority to establish nationwide drinking water quality standards. Further, the lower court did not find that the EPA's authority is limited by any circumstances relevant to the Appellants' damages claims. Under the lower court's decision, the EPA has authority "to develop and set national standards for drinking water. The evidence shows that the EPA established numeric limits for secondary disinfectants in drinking water, including chloramines." (IX AA Tab 146 at 2364, 2374, Statement of Decision, p. 11.)

In quoting applicable language from the Federal Register, the lower court recognized the "detailed analysis" undertaken by the EPA to develop water quality standards including standards applicable to water corrosiveness: "EPA was required to consider a host of complicating factors in developing regulatory requirements: different disinfectants, different health effects (acute and chronic) different [disinfectant byproduct] formation kinetics, different sources water types and qualities, different treatment processes, and the need for simultaneous compliance with other rules such as the . . . Lead and Copper Rule. . . . The [EPA] chose to evaluate all these factors by developing requirements that minimized impacts on various classes of [water] systems while enabling States to implement the [standards]." (IX AA Tab 146 at 2364, 2374, Statement of Decision, p. 12.) The lower court considered how the EPA established the nationwide drinking water standards, and made a factual finding that the Respondent water agencies complied with applicable federal and state standards.

The lower court's decision fundamentally supports the EPA's authority under 42 U.S.C. section 300g-2(a)(1)-(6). Section 300g-2(a)(1)-(6) authorizes the EPA to exercise authority over safe drinking water standards, and thus the EPA has exclusive authority to establish minimum standards. Although section 300g-2(a)(1)-authorizes the states to adopt their own respective drinking water standards, the state standards must be at

least as stringent as the EPA's nationwide standards, thereby preserving the EPA's paramount authority to issue safe drinking water standards. In other words, the ultimate responsibility for deciding what constitutes the baseline for safe drinking water belongs to the EPA.

By holding that Respondents' drinking water deliveries are not subject to damages claims unless the delivered water fails to meet statutory standards, the lower court's decision recognizes the needed certainty that leads to efficient and consistent administration of the federal and state Safe Drinking Water Acts as applied to drinking water deliveries. Under such consistent application of statutory authority, two different branches of government—the EPA and authorized state agencies—would have authority to establish applicable drinking water standards which would avoid duplicative, potentially conflicting ad hoc court decisions concerning drinking water liability.

For analogous example, in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* (2009) 557 U.S. 261, the United States Supreme Court rejected the argument that the Clean Water Act provides for a bifurcation of permit authority between the EPA and the U.S. Army Corps of Engineers ("Corp") over discharges of dredged or fill materials. The Court held that if the discharge falls within the Corps' permit authority under section 404(a) of the Clean Water Act, the EPA does not have permit authority over the discharge under section 402(a), 33 U.S.C. § 1342(a), the

overarching provision that grants the EPA general permit authority over discharges of pollutants into the nation's waters. (*Coeur Alaska*, 557 U.S. at pp. 273-274.) As the Court said, a bifurcation of authority between the EPA and the Corps "would create numerous difficulties for the regulated industry," *id.* at p. 276, and Congress meant to avoid a "confusing division of permit authority" by developing "a defined, and workable, line for determining whether the Corps or the EPA has permit authority." (*Id.* at p. 277.)

Similarly, Congress did not intend to create a confusing and unworkable bifurcation of authority with the federal Safe Drinking Water Act which would undoubtedly create numerous difficulties, to say the least, for the amici and their respective members or constituents that build, operate and maintain drinking water projects and facilities to meet the public's drinking water needs. Congress did not authorize state courts to revoke or supplant the EPA's authority to establish drinking water quality standards together with the state's authority to implement standards. Congress instead entrusted the EPA and the states with this exclusive authority, thereby avoiding a "confusing division" of authority with the courts, and impairing drinking water project design, finance, construction and operation for the regulated drinking water suppliers including Respondents and their amici here.

Appellants do not provide a rational reason to have this court veto the EPA's authority or to create a confusing division of authority between the regulating state agencies and the courts. Appellants would have the courts adopt unknown water quality standards or even no standards at all.

Appellants' attempts to avoid the statutory standards are unsupported by applicable statutory language; nothing in the federal or state statutes authorizes courts to make their own ad hoc water quality standard determinations. If Congress had intended to authorize state courts to "amend" a section of the federal Act, Congress would have spoken clearly on the subject, and Congress did not do so. (*See Connecticut Nat. Bank v. Germain*, (1992) 503 U.S. 249, 253-254 [a legislature "says in a statute what it means and means in a statute what it says."]) Therefore, the EPA has sole authority to establish nationwide drinking water quality standards, and under section 42. U.S.C. § 300g-2(a)(1)-(6), the states have the authority to enforce them, and there is no authorization for the courts to supplant such authority.

B. The States Have Primary Enforcement Responsibility Under The Federal Safe Drinking Water Act.

Under the federal Safe Drinking Water Act, the states have primary enforcement authority provided that the states meet certain criteria including implementing state standards at least as stringent as the federal

standards. (42 U.S.C. § 300(g)-2(a)(1)-(6); 40 C.F.R. 142.10; *In re Groundwater Cases*, *supra*, 154 Cal.App.4th at pp. 677-678.) Accordingly, the California Legislature passed the California Safe Drinking Water Act ("state Act") authorizing the California Department of Health Services ("DHS") to establish statewide drinking water quality standards that are at least as stringent as the EPA standards. (Health & Saf. Code § 116365(a); *In re Groundwater Cases*, 154 Cal.App.4th at p. 678; *Western States Petroleum Assn v. State Dept of Health Services*, *supra*, 99 Cal.App.4th at p. 1008.) The State Water Resources Control Board ("Regulating Agency") now implements statewide drinking water standards. (Health & Saf. Code § 116271.)

Under the statutory system of state primary enforcement, a California water agency's compliance with the state drinking water quality standards necessarily constitutes compliance with the EPA's standards. (Health & Saf. Code § 116287(a)-(c); *In re Groundwater Cases*, 154 Cal.App.4th at pp. 677-678.) As noted herein and not in dispute in the lower court is its factual finding that Respondents' complied with applicable drinking water quality standards.

II. THE LOWER COURT'S DECISION UPHOLDS THE ACT'S GOAL OF ENSURING CERTAINTY AND FINALITY OF SAFE DRINKING WATER QUALITY STANDARDS.

As noted earlier, a main goal of the state Act is to establish safe drinking water standards for California. (*In re Groundwater Cases*, *supra*, 154 Cal.App.4th at pp. 682-683.) The lower court's decision supports this legislative objective. Under the Appellants' legally unsupportable claims, a water agency who has built the necessary infrastructure and is in compliance with the water quality standards may find, months or even years after the water delivery infrastructure was completed, that a court can unilaterally revoke the standards by imposing liability for water delivery notwithstanding compliance with federal and state standards. If a court were to have such authority, a proverbial Sword of Damocles would hang over all water suppliers in California, because all such water delivery systems could be subject to tort or constitutional takings claims at any time irrespective of the water supplier's compliance with statutory standards.

By impairing the congressional and state legislative objectives of certain and consistent water quality standards, Appellants' arguments, if adopted, would seriously impair the ability of amici's and their members' ability to provide safe drinking water to the public. Amici and their members are often required to obtain permits in operating and maintaining

drinking water treatment and delivery facilities. They make substantial investments in the planning and construction of the facilities, and they depend on the certainty of complying with federal and state drinking water standards to ensure that drinking water delivery systems are managed safely and in a manner that protects the public health and environment. Any lack of certainty or significant threat of liability even when complying with federal and state standards would make it impossible for these agencies to be perform these functions and obtain the necessary financing for their facilities. (See *In re Groundwater Cases*, *supra*, 154 Cal.App.4th at p. 668 quoting *Hartwell, supra*, 27 Cal.4th at p. 276 [Whether a (water) treatment facility is needed, and, if so, the expense thereof, cannot be determined except with reference to an applicable water quality standard."])

Many ACWA and League members are public agencies that provide drinking water supplies throughout California, a largely arid region that is highly dependent on reliable drinking water supplies and delivery systems for its economic growth and prosperity. These public water agencies provide drinking water for tens of millions of Californians. The lower court's decision fundamentally recognizes the substantial financial commitments that these agencies have made in building and maintaining their existing drinking water treatment projects and operations, while Appellants' positions would make it greatly more expensive and difficult

for water agencies to plan and obtain reasonable financing for future projects and operations.

For example, the San Diego County Water Authority's ("Water Authority") began considering development of desalination as a source of supply in 1998. In 2003, the Water Authority incorporated a desalination facility into its Water Facilities Master Plan. In 2012, the Water Authority entered into a Water Purchase Agreement with Poseidon Resources for the construction and delivery of desalinated water from the Claude "Bud" Lewis Desalination Plant, which was completed in 2015. Under the agreement, Poseidon will treat and deliver between 48,000 and 56,000 acre feet per year of desalinated water to the Water Authority for a 30-year period. This constitutes 10 percent of the Water Authority's water supply and ensures a reliable drought proof supply for the San Diego region. The Water Authority teamed with Poseidon to secure financing for the desalination plant and the pipeline via tax-exempt bonds. The agreement also established water quality parameters that must be met in the delivered water to ensure compliance with state and federal drinking water standards. The desalination plant was designed and is operated to meet these drinking water standards. Inability to rely on state and federal standards will create uncertainty regarding the Water Purchase Agreement.

(http://www.sdcwa.org/sites/default/files/desal-carlsbad-fs-single.pdf)

Las Virgenes Municipal Water District is currently constructing the Westlake Filtration Plant Expansion and Pump Station Upgrade Project at a cost of approximately $7.5 million. The project consists of expanding the capacity of the filtration plant from 15 to 18 million gallons per day, modifying the filter-to-waste piping to comply with state and federal drinking water standards, and converting existing natural gas-powered pumps to electric. The major function of the filtration plant is to produce potable water that meets state and federal drinking water standards. It is critical that the water produced by the plant is disinfected in a similar manner as the treated water purchased by the Las Virgenes Municipal Water District from the Metropolitan Water District of Southern California because the waters blend in the Las Virgenes Municipal Water District's water distribution system. Changes to state and federal drinking water standards or the Metropolitan Water District of Southern California's method of disinfection could result in the need for costly modifications to the Westlake Filtration Plant and other water system facilities. (http://www.lvmwd.com/your-water/potable-water/facilities/westlake-filtration-plant)

A court's ability to unilaterally revoke a standard would upend these projects and create severe financial hardship on those entities and their ratepayers left to carry the burden of paying for what would become a stranded investment. There can be no reasonable doubt that Appellants'

arguments threaten the certainty and finality of these and other important drinking water infrastructure projects throughout California.

In sum, the amici, or their members or constituents, are water agencies that are responsible for building, operating and maintaining many different kinds of projects and facilities that serve many different public needs and uses throughout California, and they undertake enormous investments and incur significant costs in performing these functions. All of these drinking water delivery systems and projects are subject to the federal and state Safe Drinking Water Acts, and the amici depend on the certainty of their compliance with those Acts in carrying out their responsibility to provide a secure water public water supply. Their ability to provide safe drinking water would be significantly impaired if their compliance with statutory standards is subject to unilateral revocation by a trial court in a case alleging property damage to water deliveries in compliance with the federal and state statutes.

III. APPELLANTS' ARGUMENTS ARE INCONSISTENT WITH *HARTWELL* AND OTHER PUBLISHED CALIFORNIA APPELLATE DECISIONS.

As the trial court recognized, Appellants would have the court "assume control of the EPA's and Regulating Agency's regulatory powers.

. . ." Courts have rejected such efforts in other published cases where plaintiffs sought damages based on drinking water deliveries. (See *In re Groundwater Cases*, *supra*, 154 Cal.App.4th at pp. 680-681 citing *Hartwell*, *supra*, 27 Cal.4th at p. 276; *Coshow v. City of Escondido*, *supra*, 132 Cal.App.4th at p. 707; *Western States Petroleum Assn v. State Dept of Health Services*, *supra*, 99 Cal.App.4th at p. 1008.) In rejecting claims similar to those raised by Appellants, courts have both recognized and deferred to the Regulating Agency's expertise and experience in establishing drinking water quality standards. (E.g., *In re Groundwater Cases*, *supra*, 154 Cal.App.4th at pp. 680-681 [DHS as the regulating agency].) As the lower court itself found, courts recognize that the Regulating Agency has the expertise to establish safe drinking water quality standards and must consider various factors including, among others, the cost and technical feasibility. (*Id.*, at p. 681, fn. 15.) The Regulating Agency, in deciding upon statewide drinking water quality standards, must consider both the environmental effects of the drinking water quality standards and the impact upon water agencies' economic costs in implementing the standards.

As in the lower court, Appellants are asking the Court to "second guess" the Regulating Agency standards by having the trial court make its own determination as to acceptable drinking water standards. No matter how creative Appellants may be in phrasing their arguments and cause of

action, however, they cannot recover damages for drinking water deliveries meeting applicable state standards. (In *In re Groundwater Cases*, *supra*, 154 Cal.App.4th at pp. 680-681 [Court of Appeal recognized that "no matter how [the] argument is phrased, a lawsuit claiming damages due to drinking water deliveries "is clearly prohibited by [the California Supreme Court's decision in] *Hartwell*, and for good reason."]) As in *In re Groundwater Cases*, Appellants' arguments run afoul of the California Supreme Court's decision in *Hartwell* because it bars not only legal challenges to the drinking water quality standards but also claims for damages allegedly caused by water permitted by the standards. (*In re Groundwater Cases*, supra, 154 Cal.App.4th at p. 680 quoting *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132, 1147 [explaining *Hartwell* barred damages claims allegedly caused by water meeting state drinking water standards.])

It is important to note that property damages were claimed in the *In re Groundwater Cases* and, yet, there was no finding of liability for such damages because the drinking water met the federal and state standards. (154 Cal.App.4th at p. 669 ["All of these actions alleged personal injury, wrongful death, and/or property damage. . . ."]) The *In re Groundwater Cases* court carefully explained, "[p]ermitting courts and juries to second guess the carefully considered decisions of the regulatory agencies on technical water quality issues would flout the Legislature's policy choice to

entrust such matters to DHS and the [California Public Utilities Commission]. This we will not do." (154 Cal.App.4th at p. 681.)

Amici respectfully request that the Court not "second guess" the Regulating Agency's standards at issue here or impose liability for drinking water deliveries meeting such standards. To allow Appellants to recover property damages allegedly caused by water meeting safe drinking water standards, creates an untenable legal anomaly in that Regulating Agency has authority to establish statewide drinking water standards but courts can disregard the standards in property damages cases. Such an anomaly would produce an inefficient and incongruous administration of the state Act's requirements, and is severely unfair and prejudicial to amici who rely on the state Act standards in building the necessary infrastructure to deliver drinking water to the public.

IV. THE LOWER COURT'S APPLICATION OF THE FEDERAL AND STATE SAFE DRINKING WATER ACTS IS CONSISTENT WITH FEDERAL AND STATE PREEMPTION DOCTRINES.

The amici concur with the federal and state law preemption analysis provided by Respondents' in their merits brief. Thus, it is not necessary for amici to repeat the arguments here. There are other preemption

considerations that amici respectfully request that the court consider in this case.

If Appellants' lawsuit were to go forward, it would have the trial court make its own determination of water quality standards or worse, disregard any standard by finding liability any time drinking water damages property. To allow courts to make such determinations would overturn the standards authorized by federal and state Acts, interfere with the regulatory program of the Regulating Agency, and create an obstacle to the purposes of the federal and state acts. (See *Hartwell*, *supra*, 27 Cal.4th at p. 276 [potential interference with the PUC regulatory program]; *In re Groundwater Cases*, *supra*, 154 Cal.App.4th at p. 681 ["Permitting court and juries to second guess the carefully considered decisions of the regulatory agencies on technical water quality issues would flout the Legislature's policy choice to entrust such matters to (former state regulating agency) DHS and the PUC."])

Moreover, to allow Appellants' lawsuit to continue would place amici in an unacceptable situation because they would face "open-ended future liability" for water damages claims and would deprive amici of the "safe harbor" provided by their compliance with the state Act. (See *In re Groundwater Cases*, *supra*, 154 Cal.App.4th at p. 682.) As the *Western States* court observed "'few,' if any, water supplies are entirely clear of a broad range of contaminants." (*Western States, supra*, 99 Cal.App.4th at p.

1015.) "Thus, to impose liability on water suppliers for failing to provide 'pure' water would impose on them a standard impossible to achieve." (*In re Groundwater Cases*, 154 Cal.App.4th at p. 683.)

Finally, allowing courts to make their respective liability decisions not only runs afoul of both Congressional and state legislative intent to have applicable statewide drinking quality standards but water suppliers would also be subject to multiple and highly likely inconsistent trial court decisions on water quality standards. The risk of multiple, inconsistent court decisions defeats the very purpose of the federal and state acts including having the Regulating Agency establish statewide drinking water quality standards.

The obvious purpose of having standards is to achieve uniform and consistent water quality compliance so that everyone – water suppliers, customers and courts – can know what is expected. Without standards there would be unacceptable uncertainty and impossible inconsistency preventing design, financing, construction and operation of drinking water delivery systems, and there would be an impermissible obstacle to the purposes of the federal and state Safe Drinking Water Acts.

V. THE LOWER COURT'S DECISION ON APPELLANTS' INVERSE CONDEMNATION CLAIMS IS CONSISTENT WITH FEDERAL AND STATE TAKINGS LAW.

A. There Is No Constitutional Taking Because Appellants Were Not Forced To Bear A Burden Alone.

If, as the Appellants contend, Respondents' compliance with the EPA standards together with the state safe drinking water standards can nonetheless create a taking under the takings clauses of the federal and states constitutions, which require the government to pay "just compensation" for the taking of property for "public use" (U.S. Const., Amend. V; *Lucas v. South Carolina Coastal Council* (1992)505 U.S. 1003, 1029); Cal. Const. art. I, § 19), there would be a reversal of well-established constitutional law on alleged takings.

As the United States Supreme Court has said, the takings clause in the federal constitution requires the government to pay compensation when it "force[s] some people *alone* to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49 [emphasis added]; *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368 ["*Customer Co.*] [California adopts the same constitutional requirement for California Constitution Article I, section 19].) Under this well-established principle, there is no

legitimate basis for Appellants to be paid compensation for receiving public drinking water meeting statewide standards like all of Respondents' water customers.

Respondents' providing drinking water does not unconstitutionally "forc[e] some people alone to bear public burdens. . . ." Appellants do not even claim that they were somehow "forced . . . alone" to take drinking water. Appellants do not even claim that they received drinking water and that Respondents' other customers did not receive the drinking water. Stated simply, there is no factual basis to find that Respondents' were "force[d] . . . *alone* to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" because they received drinking water as did Respondent's other customers. (*Customer Co.*, *supra*, 10 Cal.4th at p. 409 [emphasis added].)

B. There Is No Constitutional Taking Because Respondents Do Not Control The Copper Pipes In Appellants' Houses And, Therefore, Appellants Were Not Forced To Bear A Burden That Fairness And Justice Require Be Borne By The Public At Large.

There is no showing that constitutional "fairness and justice" demand that Appellants, a relatively few customers, should receive just compensation when all other customers received the drinking water

deliveries but did not incur pin hole copper leaks or other plumbing problems. If it truly were the water quality that has caused the alleged damages, then California courts would be inundated with vast numbers of lawsuits seeking inverse condemnation damages filed by literally millions of water customers. The explanation for no such situation has to be that the Appellants' copper pipe plumbing was itself of defective quality, poorly manufactured, incorrectly installed, suffered damage due to Appellants' own installed soft water treatment systems, if any, or some combination thereof.

It is patently unfair and unjust to hold Respondents' liable in inverse condemnation for residential plumbing for which they have no control. Respondents did not select the copper used for the copper pipes in Appellants' houses. Respondents did not design or manufacture the copper pipes installed in Appellants' houses. Respondents did not install the copper pipes in Appellants' houses. Respondents did not install water softener systems that may have been installed in Appellants' houses that would certainly affect the composition of delivered drinking water.

To hold Respondents responsible for copper pipe pinhole leaks in Appellants' houses would be manifestly unfair and unjust to the public at large, not the Appellants. There can be no inverse condemnation liability for drinking water deliveries that meet the Regulating Agency standards and are uniform to all of Respondents' respective customers.

C. There Is No Constitutional Taking Because There Was No Taking For A Public Use.

If there is no taking for a public use, there can be no taking under Article I, section 19 of the California Constitution, even when property is physically occupied or damaged by government for a legitimate public purpose. Article I, section 19, subdivision (a) of the California Constitution provides that property may be taken or damaged for a *public use* upon payment of just compensation. Thus, not all physical damage of property constitutes a taking or damaging of property for a public use. (*Customer Co.*, *supra*, 10 Cal.4th at p. 409 ["It is well settled that not every governmental interference with private property is either compensable or void."]) To hold otherwise here, "'will seriously impede, if not stop,' beneficial undertakings,"--the continued operation of drinking water delivery systems and new water supply infrastructure. (*Id.* quoting *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 296.)

Article I, section 19 of the California Constitution is never to be applied literally without regard to its history or intent. (*Customer Co.*, *supra*, 10 Cal.4th at p. 378.) In *Customer Co.*, the California Supreme Court rejected a takings claim premised on police attempts to capture a criminal suspect that resulted in property damage, explaining what the claims was: "based upon a literal (and overly simplistic) interpretation of

section 19—an assertion that its property was 'damaged for public use' within the meaning of that constitutional provision. But section 19 never has been applied in a literal manner, without regard to the history or intent of the provision. As Justice Oliver Wendell Holmes observed regarding the analogous provision of the Fifth Amendment to the federal Constitution: '[T]he constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme. . . .'" (10 Cal.4th at p. 378 [citations omitted].)

The *Customer Company* court stated that public use is traditionally tied to public improvements: "[t]he destruction or damaging of property is sufficiently connected with 'public use' as required by the Constitution, if the injury is a result of dangers *inherent in the constitution of the public improvement* as distinguished from dangers *arising from the negligent operation of the improvement.*" (*Customer Co., supra*, 10 Cal.4th at p. 382 [citation omitted and emphasis in original.) The *Customer Company* court found that the police action involved no public improvement and thus, no public use even though there was physical occupancy and destruction of property for a legitimate public purpose. (*Id.* at p. 386.) The police action in *Customer Company* is akin to the water delivery here in that it involves no public improvement.

In *City of Los Angeles v. Superior Court* (2011) 194 Cal.App.4th 210, the Court of Appeal found no public use when the City of Los Angeles

acquired multiple parcels of land and razed structures on the property. (*Id.* at pp. 214-217.) The City later held the property as vacant land without any public use. (*Id.* at p. 228.) Adjoining property owners claimed that the vacant land was as a blight which constituted a taking or damaging of their property and thus, requiring payment of just compensation under Article I, section 19 of the California Constitution. (*Id.* at pp. 214-220.)

In sum, it is not enough for Appellants to claim a governmental taking or damage to property. The federal and state takings clauses do not require government to make out a check to every affected property owner when government does the business of governing. (See, e.g., *Pennsylvania Coal Company v. Mahon* (1922) 260 U.S. 393, 413 ["Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."]) There must be a taking or damaging for *a public use* for Article I, section 19 of the California Constitution to apply to this case.

Here, the Appellants merely alleged that , because the Respondents exercised their government power for a legitimate government purpose by delivering drinking water to Appellants' homes, Respondents are liable for any negative effects the drinking water may have on Appellants' property value. To uphold Appellants' interpretation of Article I, section 19 would effectively disable local agencies to carry out their important public functions.

In *McMahan's of Santa Monica* (1983) 146 Cal.App.3d 683, the Court of Appeal upheld an inverse condemnation award due to broken water main.

In *Yee v. City of Sausalito* (1983) 141 Cal.App.3d 917, the Court of Appeal affirmed an inverse condemnation award for subsidence damages due to a collection of surface water in a city drainage system.

In *Marin v. City of San Rafael* (1980) 111 Cal.App.3d 591, the Court of Appeal found inverse condemnation liability for a ruptured storm pipe drain.

In *Sheffett v. County of Los Angeles* (1970) 3 Cal.App.3d 720, the Court of Appeal recognized inverse condemnation liability for surface waters and mud draining across and onto private property.

In *Yue v. City of Auburn* (1992) 3 Cal.App.4th 751, the Court of Appeal found inverse condemnation liability due to storm water runoff from a nearby construction project that increased the flow of storm water.

In *California State Auto Assn Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal.App.4th 474, the Court of Appeal found inverse condemnation because a sewer backup into a private home was caused by a blockage in a city sewer line.

Finally, the case that Appellants curiously contend is "dispositive" (Reply brief, p. 24) is not an inverse condemnation case but an archaic water rights case: *Thayer v. California Development Co.* (1912) 164 Cal.11.) In *Thayer* the California Supreme Court was concerned with the use and allocation of Colorado River water; there is no damages discussion or mention of inverse condemnation liability. As Appellants state in their reply brief, '[i]t is axiomatic that cases do not stand for propositions of law that were not specifically raised"(Reply brief, p. 22.) and that is true with *Thayer* and the other inverse condemnation cases upon which Appellants rely.

Here, there are no claims that a public improvement has damaged property, i.e., no Respondent is alleged to have damaged property by a broken water line. Instead, Appellants create an inverse condemnation legal fiction using inapposite cases concerning physical damage to property caused by public improvements. Appellants have no such claims but claim that drinking water admittedly meeting all applicable water quality standards is somehow responsible for damages to Appellant's own copper pipe plumbing.

VI. CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the lower court decision be affirmed.

Dated: December 22, 2016

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CERTIFICATE OF WORD COUNT

I certify that the text of this brief consists of 7,773 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: December 22, 2016

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CERTIFICATE OF SERVICE

I, Kerry V. Keefe, declare:

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 18101 Von Karman Avenue, Suite 1000, Irvine, California 92612. On December 22, 2016 I caused to be served the following document(s)

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF AND AMICI BRIEF IN SUPPORT OF RESPONDENTS THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, MOULTON NIGUEL WATER DISTRICT AND IRVINE RANCH WATER DISTRICT

By Electronic Service, pursuant to the Court's electronic filing system, TrueFiling. The Court's TrueFiling system sends an e-mail notification of the filing to the parties and counsel of record who are registered with the Court's TrueFiling system.

California Court of Appeal
Fourth Appellate District, Division Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701
and

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

By Mail. I enclosed the documents in an envelope or package and addressed to the persons at the addresses listed below. I placed the envelope or package for collection to be mailed.

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 22, 2016, at Irvine, California.

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