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Our File No. 10000.1191

January 24, 2022

Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Lejins v. City of Long Beach*, Case No. S272594: Amici Curiae Letter of the League of California Cities and California State Association of Counties in Support of Petition for Review

Honorable Chief Justice and Associate Justices:

INTRODUCTION AND SUMMARY OF ARGUMENT

The League of California Cities ("Cal Cities") and the California State Association of Counties ("CSAC") submit this letter as amici curiae in support of the petition for review of *Lejins v. City of Long Beach* (2021) 72 Cal.App.5th 303, 287 Cal.Rptr.3d 208 (*Lejins*). Specifically, Cal Cities and CSAC urge the Court to review the Court of Appeal's conclusion that article[1] XIII D of the California Constitution strips city and county voters of the power to approve general taxes on utility services despite assurances to the contrary in the ballot argument supporting Proposition 218 (which adopted that article). The decision has far-reaching negative implications for municipal finance, and threatens nearly 100 taxes on use of water and sewer services that generate hundreds of millions of dollars annually for essential local services.

[1] Unspecified references to "articles" are to the California Constitution.

Cal Cities is an association of 479 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. Cal Cities 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.

CSAC is a non-profit corporation whose 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.

Lejins interprets article XIII D to prohibit voters from approving general taxes on the use of water, sewer, garbage, and other "property-related" services to support core municipal functions such as police and fire services, parks, streets, and libraries despite the contrary language of article XIII C, section 2, subdivision (b), also adopted by Proposition 218. Indeed, proponents of Proposition 218 argued in ballot materials that voters would still have the option to vote on municipal utility taxes if they approved the measure. Thus, *Lejins* reaches a result California voters could not foresee, much less intend. It also conflicts with, while purporting to distinguish, *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373, which reached a contrary result on similar facts largely due to the ballot materials, implicitly respecting the power of voters to legislate that this Court articulated in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 945–946 (restrictions on voters must be express). Although *Lejins* "express[ed] no opinion on whether *Wyatt* was correctly decided," its interpretation of Proposition 218 directly conflicts with the interpretation *Wyatt* adopted. (Slip Op., at p. 28.)

This Court's guidance is necessary to resolve the split in authority and to eliminate uncertainty as to the continued vitality of hundreds of millions of dollars of annual local revenues. Otherwise, local governments will face a wave of lawsuits challenging every utility user tax and jeopardizing a key, stable source of revenue that municipalities desperately need given the impact of COVID-19 on other revenue sources (such as sales and transient occupancy taxes). Such litigation waves followed appellate decisions in *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 and *Citizens for Fair REU Rates v. City of Redding* (2015) 233 Cal.App.4th 402, depublished by grant of review and reversed by *Citizens for Fair REU Rates v. City of Redding* (2018)

6 Cal.5th 1 (*Redding*), demonstrating that the class action plaintiffs' bar watches municipal finance caselaw closely and responds quickly to perceived opportunities. Indeed, *Lejins* essentially invites those suits. (Slip Op., at pp. 28–29.)

THE ISSUE IS OF WIDESPREAD SIGNIFICANCE

Lejins affirmed a ruling that Long Beach's Measure M, a voter-approved general tax on use of the City's water and sewer utility services, was a "fee or charge" imposed "as an incident of property ownership," and therefore violated Proposition 218 because it funded services other than utility services. The decision conflates the utility service fees, of which voter approval is not required (Cal. Const., art. XIII D, § 6, subd. (c)) with the voter-approved tax on those fees — limiting the use of tax proceeds as though they were fee proceeds. In doing so, the decision calls into question taxes imposed by some 100 California cities and counties on the use of water and sewer utilities to fund essential services.

A utility users' tax ("UUT") is a "[t]ax imposed on utility services" authorized by the home rule power of charter cities (Cal. Const., art. XI, § 5, subd. (a)), and by statute for general law cities (Gov. Code, § 37100.5) and counties (Rev. & Tax Code, § 7284.2). Such taxes are levied by a city or county, collected by utilities (public and private) from their customers, and remitted to the taxing agency. (*Edgemont Community Services Dist. v. City of Moreno Valley* (1995) 36 Cal.App.4th 1157.) Virtually all UUTs in California, which are imposed variously on water, sewer, garbage, gas, electric, and telephone services, are general taxes.[2] UUTs provide vital funding of critical city services — especially in "bedroom communities" which have residents to serve, but no commercial tax base to fund those services. On average, UUTs generate 15 percent of general-purpose revenue in cities that levy them, and up to as much as one-third of a city's general fund.[3] Nor are UUTs a recent development, as "utility users' tax revenue [was the] third largest source of city tax revenue" in 1989. (*Re Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Gov't Entities on Pub. Utilities* (1989) 32 Cal. P.U.C. 2d 60 [Cal. P.U.C. Dec. No. 89-05-063].)

[2] "Desert Hot Springs' 7 percent tax is dedicated to public safety, Mammoth Lakes' 2.5 tax rate funds Mobility, Recreation, and Arts & Culture.'" Michael Coleman, California Local Government Finance Almanac, Utility User Tax Facts (Jan. 2021), at p. 4, available at <http://californiacityfinance.com/UUTfacts21.pdf>, last accessed Jan. 17, 2022.

[3] *Ibid*.

UUTs are popular. Over the last 20 years, voters have approved over 165 utility tax measures, including validations, extensions, and increases. In that same time, only two UUTs have been successfully referended, one in 2002 and another in 2003.[4] This popularity is likely why Proposition 218's proponents assured voters this revenue would remain available to fund local services. The "Yes" argument on Proposition 218 promised:

> Proposition 218 does NOT prevent government from raising and spending money for vital services like police, fire and education. If politicians want to raise taxes they need only convince local voters that new taxes are really needed. (Original emphasis)[5]

Yet *Lejins* reads article XIII D, section 6 to do precisely that.

The ballot arguments similarly emphasize that cities and counties had imposed "**[n]on-voted** taxes on electricity, gas, water, and telephone services" and assured voters that "Proposition 218 will allow you and your neighbors — not politicians — to decide how high your taxes will be." (Emphasis added.)[6] Propositions 218's Impartial Analysis nowhere mentions the loss of hundreds of millions of dollars in utility tax revenue among its fiscal impacts.[7]

Like other legislators, voters do not hide "elephants in mouse holes." (*California Chamber of Commerce v. State Air Resources Bd.* (2017) 10 Cal.App.5th 604, 625 (*Cal. Chamber*).) This is especially true given this Court's guidance that voters' power to tax is not limited by implication, but only by the clearest expression of voters' intent. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 945–946 (*Upland*).) Unfortunately, *Lejins'* construction of Proposition 218 strips voters of even more authority, as it allows UUTs on investor-owned, but not public, utilities. Such a system would allow municipalities to tax utility services only by surrendering the public benefits of municipal delivery of utility services. Again, if voters intended such choice, Proposition 218's text or legislative history would more plainly reflect such intent. *Lejins* erred to find otherwise.

[4] *Id*. at p. 3.
[5] <https://vigarchive.sos.ca.gov/1996/general/pamphlet/218yesarg.htm>, last accessed Jan. 17, 2022.
[6] *Ibid.*
[7] *Ibid*.

LEJINS ERRED TO CONCLUDE PROPOSITION 218 BANS VOTER-APPROVED GENERAL UTILITY TAXES

Proposition 218 states "[n]o tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except" the 1 percent ad valorem property tax allowed by Proposition 13 (art. XIII A, § 1, subd. (a)), a voter-approved special tax, an assessment, or a "property related fee" governed by article XIII D. (Cal. Const., art. XIII D, § 3.) The core dispute in *Lejins* is whether a voter-approved general tax on the use of water and sewer service is imposed by an agency "as an incident of property ownership," so as to trigger the requirements of article XIII D, sections 3 and 6, rather than merely "on" an incidence of property ownership, a critical distinction articulated by this Court in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 840. The tax challengers here maintained it does, while the City of Long Beach argued article XIII D must be harmonized with article XIII C, which empowers voters to approve general taxes by a simple majority. (Cal. Const., art. XIII C, § 1, subd. (a).) *Lejins* adopted the challengers' view citing *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427 (*Richmond*), which held that "[a] fee for ongoing water service through an existing connection is imposed as an incident of property ownership' because it requires nothing other than normal ownership and use of property." (Slip Op., at pp. 22–23.) Consequently, it found "the language of article XIII D is clear and unambiguous" and refused to engage the legislative history to address the apparent conflict with article XIII C approved by the same initiative amendment to our Constitution. (*Id.* at p. 15.)

In reaching this conclusion, *Lejins* rejected the City of Long Beach's argument that general taxes on utility use are not imposed on ratepayers "as an incident of property ownership" but merely "on" such an incident and therefore are not a "fee or charge" subject to article XIII D. It also rejected Cal Cities' argument, as amicus, that a voter-approved general tax is not imposed by an "agency," but rather by the voters. It erred on both points.

First, relying on *Richmond*, *Lejins* incorrectly found that taxes on utility use are imposed "**as** an incident of property ownership." (Slip Op., at pp. 19–22.) But *Richmond* dealt with a fee for service imposed directly by a water utility without voter approval, not a voter-approved general tax on a utility service, as here and in *Wyatt*. (*Richmond, supra,* 32 Cal.4th at 427; see also *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 215–216 [same].) One cannot harmonize the fee provisions of article XIII D, section 6

with the tax provisions of Article XIII C by citing only authorities on the former to the exclusion of those on the latter. Agency-imposed user fees are deemed to be levied "as" an incident of property ownership by their express inclusion in the definition of "fee or charge" in article XIII D, section 2, subdivision (e). By contrast, a tax placed on the use of utility services is not levied "as an incident of property ownership" because it is not "imposed directly on property owners in their capacity as such." (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838 [noting crucial distinction of impositions "on" and "as" incidents of property ownership].)

Next, this Court has held that voter approval of an initiative tax takes it outside article XIII D, and such a tax is not imposed by an "agency," but by voters. (*Upland*, *supra*, 3 Cal.5th at pp. 937–938.) So, too, has the Court of Appeal. (*City and County of San Francisco v. All Persons Interested in the Matter of Proposition C* (2020) 51 Cal.App.5th 703 [initiative special tax not subject to two-thirds voter approval Props. 13, 218 imposed on government tax proposals]; *City of Fresno v. Fresno Building Healthy Communities* (2020) 59 Cal.App.5th 220 [same].) Nothing in Proposition 218's legislative history suggests it intended to change this rule for taxes voters approve, but do not initiate (i.e., those placed on the ballot by government, like Long Beach's Measure M). *Lejins* relegates this point to a footnote, incorrectly citing *Upland* for a supposed rule that "when an agency places a measure on the ballot for voter approval— as the City did here — it is the agency, not voters, that assesses or imposes the tax, assessment, fee, or charge within the meaning of article XIII D." (Slip Op., at p. 16, fn. 4, citing *Upland*, *supra*, 3 Cal.5th at pp. 940, 941–942.) But *Upland* merely rejected the argument that voters become part of "local government" when they approve new taxes. (*Upland*, *supra*, 3 Cal.5th at pp. 941–942.) It did not hold the inverse, that voter-approved general taxes are assessed by local government under article XIII D.

Lejins is also fundamentally at odds with *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373 (*Wyatt*). *Wyatt* involved a general fund transfer obligation essentially identical to Measure M, which a simple majority of Sacramento voters imposed as a general tax on that city's utilities to be funded by utility rates. (*Id.* at p. 377.) *Wyatt* concluded this voter-approved general tax does not violate article XIII D, section 6 even though ratepayers bore its economic burden. (*Id.* at pp. 379–387.) Only utility rates, not their use to fund Sacramento's tax — i.e., the city's "budgetary act of **transferring sums**" — may be challenged under Propositions 218 and 26. (*Wyatt, supra*, 60 Cal.App.5th at p. 382, original emphasis, citing *Redding*, *supra*, 6 Cal.5th at pp. 12, 14–15 and *Webb v. Riverside* (2018) 23 Cal.App.5th 244.) *Wyatt* concluded an agency may include in the amount required to provide property-related services, as ongoing costs of providing

service, any lawful obligations to transfer money that are approved by local voters. (*Wyatt, supra*, 60 Cal.App.5th at p. 382.) This logic includes not only sales and use taxes, both state and local, but also taxes like those at issue in *Wyatt* and *Lejins*

Lejins acknowledged *Wyatt*, but did not meaningfully distinguish it, merely stating "*Wyatt's* analysis is inapplicable to the case before us because the City here never argued, and there is nothing in the record indicating, the Measure M transfers and/or surcharge were in any way related to the costs of providing water and sewer services." (Slip Op., at p. 28–29.) Indeed, as noted above, *Lejins* refrains from endorsing *Wyatt* as properly decided. Respondents now suggest ways to harmonize *Wyatt* and *Lejins* (Answer to Petition for Review, filed January 14, 2022, at pp. 12–15), but none appeared in *Lejins* or is particularly compelling.

Lejins calls into question not just UUTs, but all uses of utility rates to fund financial obligations imposed on municipal utilities by either the State or local governments. (See Rev. & Tax Code, § 6001 [state sales tax]; Rev. & Tax Code § 7200 et seq. [Bradley-Burns Uniform Local Sales and Use Tax Law]; *Cal. Chamber, supra,* 10 Cal.App.5th 604 [cap-and-trade fees]; *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174 [art. XIII D, § 6 does not impair Legislature's power to impose mandates on water utilities that rates must fund].) Without guidance from this Court, such taxes and mandates will prove fertile ground to the plaintiff's bar.

Respondents suggest review is unnecessary (although their counsel sought it in *Wyatt*, before *Lejins* was decided), because if challenges to UUTs under Proposition 218 were viable, they would already have occurred. (Answer to Petition for Review, at pp. 17–18.) Not so. One need only look to the flood of Proposition 218 litigation against municipal water districts with tiered rates in the wake of *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493. That flood is easily evidenced by cite-checking the *Capistrano* decision. As of mid-January 2022, some 19 cases cite it and 17 cite this Court's decision in *Redding*. *Lejins* is the first case to cast doubt on UUTs under Proposition 218. Others will inevitably follow if this Court does not act to forestall years of costly litigation, paid from the public fisc to the detriment of essential public services. At the very least, if this is to be the newly discovered consequence of 1996's Proposition 218, this Court should be the one to say so.

CONCLUSION

This Court should grant review to resolve the split in authority between *Wyatt* and *Lejins,* and to stabilize the law of utility users' taxes. For the reasons stated above and in the City of Long Beach's Petition for Review, Cal Cities and CSAC respectfully urge this Court to grant review. Should it decline to do so, Cal Cities and CSAC urge this Court to depublish the decision so *Wyatt* may state the law of our State.

Respectfully,

/s/ Michael G. Colantuono

Michael G. Colantuono
California State Bar No. 143551

MGC:mcs

Attachment (Proof of Service)

PROOF OF SERVICE

Lejins v. City of Long Beach
California Supreme Court Case No. S272594
Second Appellate District Court of Appeals, Div. 1 Case No. B305134
Los Angeles County Superior Court Case No. 18STCP02628

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. My email address is: ALloyd@chwlaw.us. On January 24, 2022, I served the document(s) described as **AMICI CURIAE LETTER OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action addressed as follows:

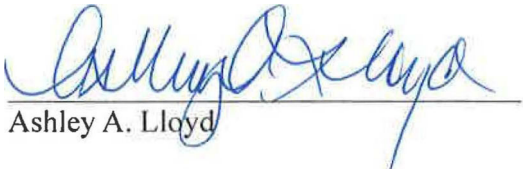
SEE THE ATTACHED LIST FOR METHOD OF SERVICE

☒ **BY MAIL**: The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Grass Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION**: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on January 24, 2022, from the court authorized e-filing service at TrueFiling.com. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 24, 2022, at Grass Valley, California.



Ashley A. Lloyd

SERVICE LIST

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