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Our File No. 33049.0003

November 3, 2020

VIA TRUEFILING

The Honorable Chief Justice Tani Cantil-Sakauye
Honorable Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: **Request for Depublication of *Malott v. Summerland Sanitary District* (2020) ___ Cal.App.5th ___ [2020 WL 6128117] (Case No. B298730) (Filed Oct. 19, 2020)**

Honorable Justices:

Introduction. Pursuant to rule 8.1125(a)(2) of the California Rules of Court, the Association of California Water Agencies ("ACWA"), California Association of Sanitary Agencies ("CASA"), California Special Districts Association ("CSDA"), California State Association of Counties ("CSAC"), and the League of California Cities (the "League") (collectively, "Amici") respectfully request depublication of this opinion. It fails to cite relevant case law on two issues. First, *Malott* addresses the duty to exhaust administrative remedies without acknowledging *Hill RHF Housing Partners, L.P. v. City of Los Angeles* (2020) 51 Cal.App.5th 621 (review granted Sept. 16, 2020) (*Hill RHF*). Second, and more concerning, *Malott* permits those who challenge a local agency's rates to introduce extra-record evidence at trial. It does not cite, and conflicts with, longstanding case law, starting with *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559 (*Western States*), prohibiting such evidence.

Moreover, the exhaustion question is pending in this Court in *Hill RHF*, which presents the following issue:

> In order to bring a judicial action challenging the validity of an assessment imposed pursuant to article XIII D, section 4 of the California Constitution, must a property owner articulate at the public hearing on the proposed assessment the reason or reasons it alleges the assessment is invalid?

Thus, *Malott* will soon be overtaken by a more thorough exploration of the issue on deeper briefing by parties and amici in *Hill RHF*.

Statement of Interest. 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.

CASA is a non-profit corporation comprised of more than 100 local public agencies, including cities, sanitation districts, community services districts, sewer districts, and municipal utility districts. CASA's member agencies provide wastewater collection, treatment, water recycling, renewable energy and biosolids management services to millions of Californians.

CSDA is a non-profit corporation with a membership of more than 900 special districts. CSDA's members provide a wide variety of public services to urban, suburban, and rural communities, including water, sewer, and waste removal services.

CSAC is a non-profit corporation having a membership consisting of the 58 California counties.

The League is an association of 476 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 local government members of Amici regularly defend traditional mandate actions subject to the exhaustion doctrine and the litigation-on-the-record rule. Those lawsuits will be immediately affected by *Malott*. If left published, it will undermine foundational principles of administrative law, encouraging litigants to sandbag local

governments by refusing to participate in legislative ratemaking hearings and withholding their best evidence for court.

The Opinion Creates Confusion as to the Duty to Exhaust Remedies. *Malott* holds a party is not required to exhaust administrative remedies in a Proposition 218 challenge to a ratemaking methodology. (*Malott, supra,* 2020 WL 6128117 at p. *4.) Courts have long held that challengers to government action must participate in its decision-making and limit suit to grounds presented to the decision-maker. This exhaustion of remedies doctrine applies to legislative (or quasi-legislative) actions such as ratemaking. Further, in that context, exhaustion generally requires all grounds and evidence to be presented to the legislative body before they may be raised in court (i.e., issue exhaustion) in service of the separation of powers of article III, section 3 and the division of responsibility between government and the governed reflected in the detailed notice and public hearing requirement of article XIII D, section 6 of the California Constitution. (See *Bighorn-Desert View Water Agency* (2006) 39 Cal.4th 205, 229.)

Malott applied *Plantier v. Ramona Municipal Water District* (2019) 7 Cal.5th 372 (*Plantier*), asking whether *Plantier* applies to administrative mandate claims under Code of Civil Procedure section 1094.5. (*Malott, supra,* 2020 WL 6128117 at p. *3.) However, judicial review of legislative rate-making does not arise in administrative mandate, but in traditional mandate. (*Western States, supra,* 9 Cal.4th at p. 567 ["Courts have traditionally held that quasi-legislative actions must be challenged in traditional mandamus proceedings rather than in administrative mandamus proceedings even if the administrative agency was required by law to conduct a hearing and take evidence."].) Malott's curious choice to petition for administrative mandate under section 1094.5 set the case on the wrong path. *Malott* reasons that, although the petitioner filed in administrative mandate, she could have sued for declaratory relief. (*Ibid.*) Because the opinion saw the difference between the two as a "mere formality," there was no rationale for requiring exhaustion. If so, exhaustion is required only of those who do not plead around it. The opinion fundamentally misunderstands the purpose and scope of the exhaustion doctrine — and the purpose of Proposition 218, which requires extensive notice to fee-payors before governments may impose property-related fees (Cal. Const., art. XIII D, § 6, subds. (a) & (c).)

A long and unbroken line of cases applies the exhaustion rule to guard against ills this Court identified in *Western States, supra,* 9 Cal.4th 559. If *Malott* remains published, the hearings article XIII D, section 6, subdivision (a) requires for property-related fees will become meaningless, courts will be burdened by controversies local governments

might have resolved, and local governments will lose the opportunity to apply their expertise and to make legislative records to facilitate judicial review, all contrary to *Western States*.

The exhaustion requirement serves the separation of powers. (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 76.) Local legislative bodies make discretionary, policy-laden choices from a range of lawful options — especially when setting service fees. (*Kahn v. East Bay Mun. Util. Dist.* (1974) 41 Cal.App.3d 397, 409 [judicial review of water rates under common law]; *Durant v. Beverly Hills* (1940) 39 Cal.App.2d 133, 139 [same] ["The universal rule is that in these circumstances the court is not a rate-fixing body, that the matter of fixing water rates is not judicial, but is legislative in character."].) For these and other reasons, judicial review of legislative acts is limited to the administrative record. (*Western States, supra,* 9 Cal.4th 559, 573.)

The exhaustion doctrine protects both legislative and adjudicative functions by allowing a legislative body to hear the evidence, apply its reasoned discretion and expertise, and create a record to facilitate judicial review. This is especially valuable in rate-making cases in which evidence and policies are highly technical. As this Court explained:

> The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. (*Duquesne Light Co. v. Barasch, supra,* 488 U.S. at p. 314, 109 S.Ct. at p. 619.) And, of course, courts are not equipped to carry out such a task. (*See, e.g., Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1166, 278 Cal.Rptr. 614, 805 P.2d 873 [stating that "we are ill equipped to make" "microeconomic decisions"].)

(*20th Century Ins. v. Garamendi* (1994) 8 Cal.4th 216, 293, internal quotation omitted.)

The exhaustion doctrine "'furthers a number of important societal and governmental interests, including: (1) bolstering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise and exercise statutorily-delegated remedies; (3) mitigating damages; and (4) promoting judicial economy.'" (*Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 637, 644, quoting *Rojo v. Kliger* (1990) 52 Cal.3d 65, 72.) Even if an administrative remedy cannot resolve all issues or provide the precise relief sought (as is typically true of legislative decisions), exhaustion is nevertheless required

> because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency. It can serve as a preliminary administrative sifting process, unearthing the relevant evidence and providing a record which the court may review.

(*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874–875, citations omitted [quasi-judicial decisions on EIR and land use permit].)

Malott neither not cites nor addresses *Hill RHF, supra,* 51 Cal.App.5th 621. Although this Court granted review of *Hill RHF* on September 16, 2020, it remains persuasive authority. *Hill RHF* requires issue exhaustion in a dispute over an assessment on real property under Proposition 218, correctly citing longstanding authority that the exhaustion doctrine is jurisdictional — a fundamental rule of procedure. (*Id.* at p. 631.) Public agencies must have opportunity to respond to factual and legal issues before suit. (*Id.* at p. 633.) This serves two purposes. First, it gives the public agencies notice and an opportunity to correct any flaws in the rate making procedure before taxpayers must fund litigation. Second, it promotes the resolution of issues before litigation commences, lightening the load on courts. (*Id.* at p. 634.)

By failing to cite or address *Hill RHF, Malott* creates needless conflict in the law. *Hill RHF* reinforces the importance of the exhaustion doctrine, instructing that the doctrine is "not a pro forma exercise." (*Id.* at p. 633.) *Malott,* in contrast, dismisses the exhaustion doctrine — reading broadly language in *Plantier* this Court applied narrowly — to allow any plaintiff to avoid the exhaustion doctrine merely by pleading for declaratory relief. (*Malott, supra,* 2020 WL 6128117 at p. *3.) This Court's holding in *Plantier* was based on the unique factual context there. (*Plantier, supra,* 7 Cal.5th 372.) The plaintiff in *Plantier* had exhausted the appropriate administrative remedies by objecting to the rate methodology, engaging with the board, and speaking at a board meeting on the issue. (*Id.* at p. 378.) Thus, the plaintiff was not required to **also** protest the rate increase, as his challenge to the methodology was outside the scope of that hearing. (*Id.* at p. 387.) *Malott* improperly expands *Plantier* to eliminate the exhaustion doctrine for any Proposition 218 cases based on ratemaking methodology — a result *Plantier* does not support.

Malott also undermines the public hearing requirements of Proposition 218, reducing them to procedural formalities, a waste of public revenues. But, the intent of the voters who approved Proposition 218 and its elaborate notice and protest requirements was to enhance ratepayer consent by, in part, requiring notice to ratepayers of all factors

affecting a potential rate increase and requiring government to "consider all protests." (Cal. Const., art. XIII D, § 6, subd. (a)(2); *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 [summarizing Prop. 218 ballot materials].) Proposition 218 limits property-related fees to the cost of service. (Cal. Const., art. XIII D, § 6, subd. (b)(1).) This creates a zero-sum game in which reducing the amount one ratepayer (like Malott and other multi-family sewer customers of the Summerland Sanitary District) pays will increase the amount another must pay (like single-family customers of that district), as agencies are entitled to recover all their costs. (E.g., *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637, 647–648.) Thus, members of the public had the right to know Malott sought to decrease her rates at their expense. Requiring Malott to make her points in a public hearing allows that notice; allowing her to sandbag the District in court does not.

In contrast to the *Plantier* plaintiff, Malott did not object to the rate methodology before or at the Proposition 218 protest hearing. (*Malott, supra*, 2020 WL 6128117 at p. *1.) *Malott* reports there was no public hearing on the methodology, as in *Plantier*. (Compare *Plantier, supra*, 7 Cal.5th at p. 378 with *Malott, supra*, 2020 WL 6128117 at pp. *1–*2.) (The District's pending petition for rehearing in *Malott* asserts this misstates the record.) The first notice the District — and any member of the public — had of Malott's challenge to the methodology was her suit. This violates the intent and purpose of Proposition 218's notice and hearing requirements. Single-family residential customers of the District were entitled to know before or during the protest hearing that Malott sought to reduce multi-family residential sewer service fees at their expense. Permitting litigants to disclose their arguments for the first time in court not only deprives the public agency of an opportunity to respond — it deprives other ratepayers of notice of those arguments, too.

If the Court of Appeal does not grant the District's petition for rehearing to consider the law briefed here, this Court should depublish. Alternatively, this Court may grant review sua sponte and remand to the Court of Appeal for reconsideration in light of *Hill RHF* and *Western States*. Publication of *Malott* is unnecessary given this Court's pending review in *Hill RHF* and the depth of case law maintaining the litigation on the record rule of *Western States*. (E.g., *San Joaquin Local Agency Formation Commission v. Superior Court* (2008) 162 Cal.App.4th 159 [issuing appellate writ to require trial court to bar discovery in record case seeking review of legislative action]; *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93 [same in CCP 1094.5 review of quasi-judicial action].)

The Opinion Misstates the Law on Extra-Record Evidence. *Malott* holds the trial court erred in striking an expert declaration presented for the first time at trial to impeach the evidence on which the District relied to make the challenged rates. (*Malott, supra,* 2020 WL 6128117 at p. *4.) This discussion cites only *Plantier,* which did not involve extra-record evidence. The opinion does not cite, or even acknowledge, *Western States* or the myriad cases applying its rule. *Malott* flatly contradicts this Court's prohibition on extra-record evidence to attack the evidence presented in an agency's hearing — without even citing *Western States, supra,* 9 Cal. 4th 559, although both parties did so below. *Malott* reversed the trial court's entirely correct order excluding from trial an expert declaration introduced for the sole purpose of contradicting the District's cost allocation methodology. (*Malott, supra,* 2020 WL 6128117 at p. *4.) Thus, if *Malott* remains published, it will invite error in every challenge to property-related fees under Proposition 218.

Western States, supra, 9 Cal.4th 559, and ample authority following it in the 25 years since this Court decided it, limit judicial review of legislative acts to the administrative record. Justice Mosk wrote for a unanimous Court in *Western States* to explain its rationale:

> The issue would often become not whether the administrative decision was a prejudicial abuse of discretion, but whether the decision was wise or scientifically sound in light of the extra-record evidence. As we have explained and as WSPA has conceded, such questions are not for the courts to answer.

(*Id.* at p. 577.) The burden is on the proponent of extra-record evidence to demonstrate application of one of few, narrow exceptions to this rule. (*Id.* at p. 576–577.) Extra-record evidence "can **never** be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." (*Id.* at p. 579, emphasis added.)

Western States' rule is rooted in the separation of powers and institutional competencies of legislatures and courts. (*San Joaquin Local Agency Formation Com'n v. Superior Court* (2008) 162 Cal.App.4th 159, 167 [admitting extra-record evidence would "infringe upon the separation of powers"].) This Court explained this rationale when it "very narrowly construed" an exception for extra-record evidence that pre-exists a challenged decision, but could not have been presented to the legislative body in the exercise of reasonable diligence:

> However, WSPA goes on to contend that this exception would allow it to introduce **any and all** expert testimony and reports prepared **after** the ARB adopted the regulations. It apparently reasons that because this evidence did not exist when the ARB made its decision, it could not have been discovered "in the exercise of reasonable diligence." Such a broad reading of this exception would seriously undermine the finality of quasi-legislative administrative decisions. Any individual dissatisfied with a regulation could hire an expert who is likewise dissatisfied to prepare a report or give testimony explaining the grounds for his disagreement, introduce this evidence in a traditional mandamus proceeding, and, if he can persuade the court that the report raises a question regarding the wisdom of the regulation, obtain an order reopening the rulemaking proceedings. And if the administrative body were to adopt a regulation in the second proceeding that still was not to the individual's satisfaction, he could simply repeat the process. Therefore, although we agree that there is such an exception in traditional mandamus proceedings challenging quasi-legislative administrative decisions, this exception is to be very narrowly construed.

(*Western States, supra,* 9 Cal.4th at p. 578 [original emphases]; see also *id.* at p. 575 ["commentators are correct" to "assert that if interested parties know they will not be able to introduce extra-record evidence in subsequent judicial proceedings, they will present all their evidence to the administrative agency in the first instance"]; *Carrancho v. California Air Resources Board* (2003) 111 Cal. App. 4th 1255, 1271 ["allowing extra-record evidence under these circumstances would encourage interested parties to withhold important evidence at the administrative level so as to use it more effectively to undermine the agency's action in court"].)

Western States allows limited exceptions to its litigation-on-the-record rule. Because *Malott* is uninformed by *Western States,* it cites none of the few, narrowly construed exceptions to its rule. *Western States* identifies the "rare," "narrow" exceptions to its rule: when the evidence in question existed before the agency made its decision and it was not possible, in the exercise of reasonable diligence, to present it to the agency before the challenged decision (*Western States, supra,* 9 Cal.4th at p. 578); or, possibly, to address issues unrelated to the merits — such as standing, affirmative defenses, or procedural unfairness (*id.* at p. 575, fn. 5). It also acknowledges unusual circumstance in which expert testimony may be needed to explain an administrative record's jargon or complex concepts. (*Id.* at p. 578; *Bunker Hill Co. v. EPA* (9th Cir. 1977) 572 F.2d 1286

[allowing extra-record evidence to illuminate science and jargon in record of Idaho's Clean Air Act implementation plan as to sulfur dioxide control].) *Western States* rejected a proposed exception for extra-record evidence to show that the decisionmaker did not consider "all relevant factors." (*Western States, supra,* 9 Cal.4th at p. 577.) Such an exception would swallow the rule, as this Court explained. (*Ibid.*)

The expert declaration *Malott* ordered the trial court to consider is within no exception *Western States* authorized. (*Malott, supra,* 2020 WL 6128117 at p. *5.) The declaration was drafted after the district made its decision and cannot meet the general exception. (*Western States, supra,* 9 Cal.4th at p. 578.) The declaration was not submitted as to issues unrelated to the merits, but critiqued the district's cost allocation. (*Malott, supra,* 2020 WL 6128117 at p. *5.) Nor does it seek to explain jargon or illuminate complexity. That last exception is rarely appropriate in tax and fee cases because, as this Court has observed: "Courts are familiar with the process of determining the constitutionality of the taxes, fees, and assessments that local governments impose." (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 449.)

To the extent *Malott* ruled the declaration admissible because it found the district's administrative record lacking, introduction of extra record evidence is the wrong remedy. A ratemaking agency has the burden to produce a record adequate to support its rates. (*Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 236 [applying Proposition 13].) The agency also has the burden of persuasion of the lawfulness of its rates under art. XIII D, section 6, subdivision (b)(5). That an agency has failed to meet its evidentiary burdens is grounds to grant the writ, not to allow post hoc, extra-record, expert evidence.

Western States' litigation-on-the-record rule is a bedrock principle of California administrative law. The policy interests supporting it are well stated there. Absent the rule, public agencies will be sandbagged by new evidence in court without an opportunity to review and consider it during ratemaking hearings. Litigants will withhold their best evidence for trial, requiring the courts to evaluate complex technical expert issues in the first instance. All of this occurred in *Malott*. This Court has already considered these risks, and established the litigation-on-the-record rule to mitigate them. *Malott* distorts the law and, should the Court of Appeal not grant rehearing, this Court should depublish or grant review sua sponte and remand for consideration of the authorities cited here.

Conclusion. Depublication is warranted because *Malott* is uninformed by *Hill RHF* and *Western States*. As a result, it undermines central principles of administrative law intended to protect both public agencies and the courts from unnecessary litigation, and to preserve the separation of powers on which our democracy is based. It disserves the goal of the notice and hearing requirements of Proposition 218 of well-informed dialog between government and the governed. If *Malott* remains published, it will sow confusion in the lower courts and confound efficient resolution of rate-making challenges. Moreover, it is needless, as this Court will soon clarify the exhaustion requirement in *Hill RHF* and myriad cases apply the *Western States* rule. Accordingly, Amici respectfully ask this Court to:

1. Depublish *Malott*; or,

2. Grant review sua sponte and remand to the Court of Appeal to reconsider its ruling in light of *Hill RHF* and *Western States*; or

3. Grant review sua sponte and hold briefing behind *Hill RHF*.

Respectfully submitted,

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MGC:lw
Enclosure: Proof of Service

PROOF OF SERVICE

Lucinda Malott v. Summerland Sanitary District
Second Appellate District Court of Appeal, Division 6, Case No. B298730
Santa Barbara County Superior Court Case No. 18CV01923

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 November 3, 2020, I served the document(s) described as **REQUEST FOR DEPUBLICATION** on the interested parties in this action addressed as follows:

SEE 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 November 3, 2020, 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 November 3, 2020, at Grass Valley, California.

Ashley A. Lloyd

SERVICE LIST

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Second Appellate District Court of Appeal, Division 6, Case No. B298730
Santa Barbara County Superior Court Case No. 18CV01923

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