H046064

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

RAYMOND AND MICHELLE PLATA,

Plaintiffs, Appellants, and Cross-Respondents,

v.

THE CITY OF SAN JOSE,

Defendant, Respondent, and Cross-Appellant.

From the Superior Court in and for the County of Santa Clara
Judge Thomas E. Kuhnle
Case No. 1-14-CV-258879

THE LEAGUE OF CALIFORNIA CITIES' APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT AND CROSS-APPELLANT CITY OF SAN JOSE; AMICUS CURIAE BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

DATED: December 9, 2020 HANSON BRIDGETT LLP

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The League of California Cities ("CalCities") respectfully requests permission under rule 8.200(c) of the California Rules of Court to file an amicus curiae brief in support of Respondent and Cross-appellant City of San Jose.[1]

CalCities is an association of 477 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. A Legal Advocacy Committee, which comprises twenty-four city attorneys from all regions of the State, advises CalCities. The Committee monitors litigation of concern to municipalities, and identifies cases that have statewide or nationwide significance. This is one of those cases.

CalCities' members are responsible for municipal planning and budgeting processes throughout the State, and the decision here could implicate those processes. For instance, relaxing the claim presentation requirements to allow for pre-suit notices that contain only "veiled language" about the facts and claims raised at trial would jeopardize the efforts of League members to investigate, resolve, and plan for liabilities associated with those notices.

The appeal also threatens to establish new remedies for violating Proposition 218 that would impose serious burdens on

[1] CalCities certifies that no person or entity other than CalCities and its counsel authored or made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

CalCities' members. The Platas ask that this Court remedy their alleged Proposition 218 violations by imposing a resulting trust or refund. Existing law, however, does not support either remedy. Instead, a writ of traditional mandate is the most appropriate remedy, though declaratory relief also appears to be available. If this Court expressly recognizes either a resulting trust or a refund remedy, it would expand Proposition 218 liability beyond what either the Constitution or the Legislature allows, penalizing CalCities' members, creating a substantial financial burden that could imperil many of CalCities' members going forward, and lead to a judicial usurpation of their quasi-legislative ratemaking power.

By focusing on these important issues in a way that the parties cannot as a result of the need to address a range of other questions, CalCities can provide perspective that will highlight the practical implications of the Platas' arguments and thereby aid this Court's resolution of the issues presented.

DATED: December 9, 2020 HANSON BRIDGETT LLP

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BRIEF OF AMICUS CURIAE THE LEAGUE OF CALIFORNIA CITIES

INTRODUCTION

The relief Petitioners Raymond and Michelle Plata seek could upend established law on the Government Claims Act and Proposition 218. The Court should reject their remedy claims.

First, the Platas brought to trial challenges to the City of San Jose's tiered water rates that bore no resemblance to the claims presented in their statutorily required pre-suit notice. According to decades of precedent, this is a violation of the Government Claims Act and bars related monetary remedies. Yet the trial court fashioned a new standard that would allow claimants to pursue monetary claims in court based on the use of "veiled language" in their claims presentation. This new standard deprives public entities of the opportunity to investigate and resolve claims without litigation, in contravention of the very purposes of the Government Claims Act's claims-presentation requirement.

Second, even if the Platas had otherwise complied with the Government Claims Act, the particular remedies they seek should not be allowed. For example, the Platas seek a resulting trust. But a resulting trust is used to ensure that an unintended recipient of property holds and eventually conveys that property to its intended beneficiary. And Proposition 218 challenges never—or rarely, if ever—arise from a claim that property has been received by the wrong person or entity. Resulting trusts are therefore not an appropriate or even logical remedy.

Alternatively, the Platas seek a refund of alleged overpayments. But refunds should not be awarded in cases like this, alleging that a public agency has violated Proposition 218 by setting disproportionate rates. First, the California Constitution does not authorize a refund remedy for Proposition 218 violations. Second, mandate, declaratory, and injunctive relief provide meaningful, alternative remedies that appropriately protect ratepayers, ensure that public services are not unduly penalized, and respect separation of powers. Third, no published appellate decision appears to have held that a Proposition 218 plaintiff has a right to receive a refund. Allowing a refund would thus stray far from existing law, a departure which this court should not entertain.

A refund remedy for Proposition 218 violations would also cause serious operational concerns for public agencies. Proposition 218 requires, among other things, that property-related fees reflect the charging agency's total costs of providing services to all burdened properties, while allocating those costs proportionally among rate payers. Here, the Platas ultimately tried a claim that the City of San Jose's water rates allocated costs in a disproportional manner. In other words, they did not attempt to prove that the City received too much revenue, only that its rate structure caused some ratepayers to pay more than their fair share, and others to pay less. As a result, any nominal "refund" would not be a return of moneys received by the agency. It would be a kind of penalty, impermissible under the law, creating a funding deficit for the public service funded by the fee

or charge. While some agencies may have tax and other discretionary revenues they *could* use to subsidize the refund remedy, many do not. As a result, refunds could lead to substantial financial uncertainty for many agencies, especially among smaller special districts.

Moreover, a refund remedy would require that courts engage in quasi-legislative ratemaking analysis to determine with reasonable certainty the amount of a refund. That process is not just impracticable, but an unconstitutional judicial usurpation of quasi-legislative ratemaking power.

The Court can and should avoid these problems by reinforcing decades of precedent under the Government Claims Act requiring that pre-suit notices "fairly describe" what public entities have done wrong, and finding that the Platas did not adequately preserve their claims for monetary relief here. But, to the extent the Court reaches the merits of their monetary claims, in light of these concerns, the Court should not be the first to establish either a resulting trust or refund remedy for Proposition 218 violations.

FACTUAL BACKGROUND

CalCities adopts and incorporates the factual background set forth in the City of San Jose's Combined Response Brief and Opening Brief on the Merits, pages 19-39 and 101-106.

ARGUMENT

I. The trial court's determination that the Platas' pre-suit notices satisfied the Government Claims Act upends the Act's purpose and decades of precedent.

The Platas' pre-suit notification under California's Government Claims Act fell far short of the standards historically adopted by courts to ensure that public agencies have an adequate opportunity to evaluate and, if appropriate, resolve a claim for money damages. (*City of San Jose v. Super. Ct.* (1974) 12 Cal.3d 447, 455 (*City of San Jose*).) The claim alleged that the City was charging rates in excess of *aggregate* costs and using rate revenue for unrelated purposes. (See Cal. Const., art. XIII D, § 6, subds. (b)(1), (b)(2).) But at trial, the Platas sought to prove that the City's tiered rate structure allocated costs in a disproportionate manner, an alleged violation of a legally and factually distinct requirement under the Constitution. (See Cal. Const., art. XIII D, § 6, subd. (b)(3); *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1499, fn. 6, 1506 (*Capistrano*) [holding tiered rates violate Proposition 218's proportionality requirement if each tier does not reasonably reflect the costs of providing service at that level].)

Despite the fact that their pre-suit notice referenced neither proportionality nor any concern with the City's tiered structure, the Platas were permitted to try a case focused entirely on whether the City's tiered rates complied with section 6(b)(3). Allowing plaintiffs to proceed to trial in this manner, with monetary claims not fairly described by their claims presentation, will undermine the Government Claims Act's very

purposes, creating uncertainty for public entities throughout California and generating otherwise unnecessary litigation.

A. The Government Claims Act allows prosecution only of those claims fairly described in pre-suit notices.

Key to any public entity's dispute resolution process is that claimants may not sue them for money or damages unless the claimants first comply with the Government Claims Act's claims filing procedures. (Gov. Code, § 945.4.) That pre-suit notice must state the "date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted" and describe the injury or damages. (Gov. Code, § 910, subds. (c)-(d).)

As this Court has held, rather than some "needless formality," the requirement reflects the Act's underlying purpose "to provide the public entity sufficient information to enable it to investigate claims adequately and to settle them, if appropriate, without the expense of litigation." (*City of San Jose*, *supra*, 12 Cal.3d at p. 455; see also *Alliance Fin. v. City and County of San Francisco* (1998) 64 Cal.App.4th 635, 647 (*Alliance Fin.*).) The Act also allows "the public entity to engage in fiscal planning for potential liabilities; and to avoid similar liabilities in the future." (*TrafficSchoolOnline, Inc. v. Clarke* (2003) 112 Cal.App.4th 736, 742 (*TrafficSchoolOnline*).)

Thus, a pre-suit notice outlining the theories of liability, and the facts supporting them, is a prerequisite to maintaining a lawsuit against any public entity. (*State of Cal. ex rel. Dept. of Transp. v. Super. Ct.* (1984) 159 Cal.App.3d 331, 334-335 (*Dept of*

Transp.).) And when "a plaintiff relies on more than one theory of recovery against [a public entity], each cause of action must have been reflected in a timely claim." (*Nelson v. State of Cal.* (1982) 139 Cal.App.3d 72, 79.) And, when a complaint includes a cause of action premised on a different factual basis than what was described in the pre-suit claim, that variance is "fatal" to the complaint. (*Fall River Joint Unified Sch. Dist. v. Super. Ct.* (1988) 206 Cal.App.3d 431, 435; see also *Dept. of Transp.*, *supra*, at p. 336 [holding courts consistently interpret the Government Claims Act to bar further prosecution of claims not reflected in a pre-suit notice].)

While strict, courts have interpreted this requirement to ensure it does not "snare the unwary where its purpose has been satisfied." (*Elias v. San Bernardino County Flood Control Dist.* (1977) 68 Cal.App.3d 70, 74.) A claim, the California Supreme Court has explained, "need not contain the detail and specificity required of a pleading, but need only 'fairly describe'" what the public entity has done wrong. (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Auth.* (2004) 34 Cal.4th 441, 446 (*Stockett*), quoting *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1426.) A plaintiff may build on and add specificity to the facts raised in their written claim. (*Id.* at p. 447.) But those added facts must "merely elaborate[ ] or add[ ] further detail to a claim" that "is predicated on the same fundamental actions or failures to act by the defendants…." (*Ibid.*, citing *White v. Super. Ct.* (1990) 225 Cal.App.3d 1505, 1510-1511 (*White*).) They must not hinge on an "entirely different set of facts" than those raised

in the pre-suit notice. (*Ibid*., quoting *Stevenson v. San Francisco Housing Auth.* (1994) 24 Cal.App.4th 269, 278.) When there is a complete shift in allegations from the written claim to the complaint, courts will bar prosecution. (*Ibid*., citing *Blair v. Super. Ct.* (1990) 218 Cal.App.3d 221, 226.)

Consistently, courts provide some flexibility to disregard technical deficiencies in form when the claim otherwise meets all other statutory requirements. (*Nguyen v. Los Angeles County Harbor/UCLA Med. Center* (1992) 8 Cal.App.4th 729, 733, *modified (Sept. 4, 1992)*; *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 713 (*Santee*).) That flexibility, however, will not "cure [the] omission of essential facts necessary to constitute a valid claim." (*Lopez v. S. Cal. Permanente Med. Group* (1981) 115 Cal.App.3d 673, 677.) That limitation protects the Government Claims Act's core purpose of providing public entities with the information they need to investigate, address, and resolve liabilities without the expense of litigation. (*City of San Jose*, *supra*, 12 Cal.3d at p. 455; *Alliance Fin.*, *supra*, 64 Cal.App.4th at p. 647; *TrafficSchoolOnline*, *supra*, 112 Cal.App.4th at p. 742.)

In short, courts have established carefully limited flexibility to ensure that the Government Claims Act's purposes are fulfilled without preventing legitimate, fairly noticed claims from proceeding.

B. Allowing plaintiffs to try claims that were not fairly reflected in their pre-suit notice and that were only reflected in "veiled language," as the trial court did in this case, undermines the Government Claims Act's purpose.

Here, the trial court ignored the careful balance that appellate courts have struck in applying the Government Claims Act and allowed the Platas to proceed to trial on a claim that was both legally and factually distinct from the sole claim presented in their pre-suit notice. This Court should reverse in order to preserve that standard.

The Platas submitted three pre-suit notices, each containing nearly identical factual descriptions. (1 AA 00107-08; 1 AA 00110-11; 3 AA 00686-87.) They asserted that the City overcharged the Platas for water services by transferring monies out of the Municipal Water Fund for an allegedly unrelated purpose. (1 AA 00107-08; 1 AA 00110-11; 3 AA 00686-87.) This, they claimed, violated the California Constitution's requirements that property-related fees not exceed the total cost of related services and that resulting revenues be used exclusively for such services. (1 AA 00107-08; 1 AA 00110-11; 3 AA 00686-87; citing Cal. Const. art. XIII X, § 6, subds. (b)(1), (b)(2).)

The Platas then filed two complaints against the City. The first alleged the same facts as raised in the notices: The City had violated sections 6(b)(1) and 6(b)(2) of Article XIII D of the California Constitution by transferring monies from the Municipal Water System's Water Utility Fund to the City General Fund and City Hall Debt Service Fund. (1 AA 00048-67.) The Platas filed a second lawsuit, which the trial court

consolidated with the first. Then, they amended the pleadings to allege similar violations: The City, they claim, had transferred and used Municipal Water Funds in violation sections 6(b)(1) and 6(b)(2) of article XIII D of the California Constitution. (1 AA 00091 [¶¶ 11-13].)

But when the parties submitted a Joint Pre-Trial Statement, the Platas asserted for the first time that the City's tiered rate program violated section 6(b)(3)'s requirement that property-related fees allocate service costs proportionally among property owners. (17 AA 04506 [¶9]; 16 AA 04335 [¶¶12-14]; 16 AA 04455 [¶3].) This constituted a fundamental change in their legal and factual theory. At all prior times, they had asserted that the City's water fees were excessive *in the aggregate*, generating revenue greater than the City's total cost to provide water service. (1 AA 00107-08; 1 AA 00110-11; 3 AA 00686-87; citing Cal. Const. art. XIII X, § 6, subds. (b)(1), (b)(2).) By contrast, they sought to prove at trial that the City's rate tiers caused individual property owners to pay *disproportional* share of those costs, causing them to subsidize other property owners' water service. (16 AA 04260, citing Cal. Const., art. XIII D, § 6, subd. (b)(3).)

The City had no pre-suit opportunity to consider the *proportionality* of its water rates; it was only alerted to compare its aggregate rate revenue with its total cost of maintaining water service and to consider whether it had properly accounted for those revenues. Nonetheless, the trial court found the Platas' pre-suit notice sufficient because it "implicate[d] water rates

which must necessarily include tiered water rates." (16 AA 04257.)

It erred. Allowing claimants like the Platas to prosecute facts and legal theories that bear little resemblance to those raised in a pre-suit notice prevents public entities from investigating and settling without litigation. This Court should reverse in order to ensure that future litigants do not flout the Government Claims Act's purposes in the way that the Platas have done here. (See *City of San Jose*, *supra*, 12 Cal.3d at p. 455; *TrafficSchoolOnline*, *supra*, 112 Cal.App.4th at p. 742.)

II. Proposition 218 does not allow for resulting trust and refund remedies.

Should this Court reach the merits of the Platas' tiered-rate claims, despite their failure to satisfy the Government Claims Act's requirement, CalCities asks that it not approve the remedies that the Platas seek. Proposition 218 contemplates mandate and declaratory relief over a fee or charge's validity. By contrast, the resulting trust and refund remedies sought by the Platas are unauthorized. Moreover, if allowed, these remedies could leave public agencies exposed to substantial financial liabilities they have no clear ability to fund.

A. Resulting trusts remedy the receipt of property or benefit by an unintended party, circumstances bearing no resemblance to the claims in a Proposition 218 rate challenge.

The Platas argue that a resulting trust may remedy a Proposition 218 violation because, for every harm, there must be

a remedy. (AOB 39-40.) That maxim, however accurate, does not support the remedy they advocate.

A resulting trust is an "intention-enforcing trust." (*Am. Motorists Ins. Co. v. Cowan* (1982) 127 Cal.App.3d 875, 884–885, quoting 7 Witkin, Summ. of Cal. Law (8th ed. 1974) Trusts, § 123, p. 5481.) This arises when a transferee receives property that the parties intended them to neither receive nor take a beneficial interest. (*Id.* at p. 884.) "In other words, the relationship between resulting trustee and beneficiary arises where one, in good faith, acquires title to property *belonging to another."* (*Estate of Yool* (2007) 151 Cal.App.4th 867, 874, original italics (*Yool*).) On acquisition, a trust "results" by implication of law in which the person with title holds property for its owner's benefit until, eventually, conveying it to the intended beneficiary. (*Ibid.*)

A resulting trust thus requires (1) an identifiable property and (2) a common intent. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 76, citing *Dabney v. Philleo* (1951) 38 Cal.2d 60, 68.) The party seeking to establish a resulting trust must show, "clearly, convincingly and unambiguously, the precise amount or proportion of the consideration furnished by [them]." (*Lloyds Bank Cal. v. Wells Fargo Bank* (1986) 187 Cal.App.3d 1038, 1045 (*Lloyds Bank*), quoting *Laing v. Laubach* (1965) 233 Cal.App.2d 511, 517 (*Laing*).) Proof of these two elements overcomes the presumption of ownership arising from legal title. Without that proof, a court will not declare a resulting trust. (*Ibid.*)

A typical scenario in which a resulting trust may arise is when a plaintiff purchases real property, but a defendant takes

title in their own name. (*Martin v. Kehl* (1983) 145 Cal.App.3d 228, 239.) It may also arise when an estate's administrator holds title to real property intended for a beneficiary. (*Yool*, *supra*, 151 Cal.App.4th at pp. 875-876.) In these scenarios, a trustee received property intended for another and a resulting trust ensures that the property goes to the intended beneficiary.

These scenarios are divorced from a typical Proposition 218 action for two reasons. First, a violation of Proposition 218 does not involve whether the proper recipient received property. Instead, a violation arises from fees set in a manner inconsistent with constitutional limits or misuse of resulting revenues. Whether a beneficiary received property as the parties intended is not an issue that would arise in a typical Proposition 218 action. There is thus no issue over "common intent" that a resulting trust may enforce.

Second, a resulting trust would struggle to cure a Proposition 218 violation because of inherent uncertainty in the damages. When a party intends to transfer real property to another, the party seeking a resulting trust often can show the precise amount of consideration furnished. How would a plaintiff raising a Proposition 218 challenge prove "clearly, convincingly and unambiguously, the precise amount or proportion of the consideration furnished by [them]"? (*Lloyds Bank*, *supra*, 187 Cal.App.3d at p. 1045, quoting *Laing*, *supra*, 233 Cal.App.2d at p. 517.) Proving the exact amount by which a levy violates Proposition 218 is abstruse and impossible. In no way could either a plaintiff or a public entity define the "precise amount" of

a Proposition 218 violation. And with no hope of proving exactness, a court could never declare a resulting trust. (*Ibid.*)

In these ways, claims under Proposition 218 are not congruous with the harms that resulting trusts may remedy. The trial court thus correctly held that "there are not any amounts of fees or charges for restitution or for deposit into a 'resulting trust.'" (16 AA 04259.) This Court should not reverse that holding.

B. Proposition 218 does not authorize a refund remedy for claims of disproportional allocations of costs.

CalCities also encourages this Court not to authorize a refund for a violation of Proposition 218's proportional-cost requirement. The typical remedies for a Proposition 218 violation are, and should be prospective—either by a writ of mandate or declaratory or injunctive relief. Refunds, however, are retrospective and, because of the nature of rate setting, would inappropriately disrupt public finances and budgeting. That is why Proposition 218 does not authorize a refund remedy. It is also why no court of appeal appears ever to have held that a refund may be awarded for a Proposition 218 violation. Permitting plaintiffs like the Platas to pursue a refund remedy thus would stray far from existing law. This Court should not entertain that departure.

Monetary damages, like refunds, are rarely available for constitutional violations. The California Supreme Court in *Katzberg v. Regents of University of California* devised a

framework to identify those rare circumstances in which they are available.[2] At the first step under *Katzberg*, the party seeking damages must provide "evidence from which [the court can] find or infer, within the constitutional provision at issue, an affirmative intent" to permit or preclude damages as a remedy. (*Katzberg v. Regents of Univ. of Cal.* (2002) 29 Cal.4th 300, 317 (*Katzberg*).)

"Second, if no affirmative intent either to authorize or withhold a damages remedy is found," a court must consider the following "relevant factors": (a) "whether an adequate remedy exists," (b) "the extent to which a constitutional tort action would change established tort law," and (c) "the nature and significance of the constitutional provision." (*Katzberg*, *supra*, 29 Cal.4th at p. 317.)

And if these "relevant factors" weigh against recognizing a "constitutional tort," the inquiry ends; but, if not, the court must further consider "any special factors counseling hesitation in recognizing a damages action, including deference to legislative judgment, avoidance of adverse policy consequences, considerations of government fiscal policy, practical issues of proof, and the competence of courts to assess particular types of damages." (*Katzberg*, *supra*, 29 Cal.4th at p. 317.)

At each step in this inquiry, all evidence points to the same result: A refund is not an appropriate remedy for a violation of

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[2] Even if a refund for a Proposition 218 violation is not best characterized as "damages," the multi-step *Katzberg* framework helps show the many practical problems for imposing a refund to remedy Proposition 218 violations.

Proposition 218 proportional cost requirement. Even if this Court considers the merits of the Platas' claims that the City's tiered rates violate Proposition 218, the remedy for those claims should not include a refund. Instead, it should be limited to a writ of mandate or declaratory relief.

1. Proposition 218 contains no affirmative intent to authorize a refund remedy.

The *Katzberg* framework begins with the language of the constitutional provision. When a plaintiff seeks damages for a constitutional violation that is not otherwise based on common law or statute, courts must first inquire into whether the provision provides "an affirmative intent either to authorize or to withhold a damages action to remedy a violation." (*Katzberg*, *supra*, 29 Cal.4th at p. 317.) A court may consider "the language and history of the constitutional provision at issue, including whether it contains guidelines, mechanisms, or procedures implying a monetary remedy" when making this determination. (*Ibid*.)

Nothing in Proposition 218 affirmatively permits a recovery of a refund. (See Cal. Const., art. XIII C, D.) While Proposition 218 refers to "legal actions," it mentions nothing of a refund or a damages remedy. Section 4, for example, addresses the burden of proof for "any legal action contesting the *validity* of any assessment." (Cal. Const., art. XIII D, § 4, subd. (f), emphasis added.) Similarly, section 6 addresses the burden of proof for "any legal action contesting the *validity* of a fee or charge." (Cal. Const., art. XIII D, § 6, subd. (b)(5), emphasis added.) Both

sections address *prospective* actions over a fee or charge's validity, suggesting an equitable and prospective evaluation. (See *City of Ontario v. Super. Ct.* (1970) 2 Cal.3d 335, 344 [describing validation actions are a form of declaratory relief]; cf. *David v. Fresno Unified School Dist.* (2020) __ Cal.App.5th __ [2020 WL 6882737] [holding action to test contract's validity was rendered moot once the contract was fully performed].) Neither provision implies a refund remedy. If anything, they imply that the remedy is limited to a prospective determination of validity.

The history of Proposition 218 reinforces this implication. The Proposition 218 drafters went to great lengths to expand ratepayer rights by enhancing their power of consent. (*Bay Area Cellular Tel. Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 693.) Yet the drafters expressed no intent that the law would allow a refund.

The State prepared an official ballot pamphlet—which this Court may consult to determine the voters' understanding and intent—that evidences no intent to allow damages for a violation of the law. (See *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1038-1039 (*Weisblat*) [quoting the Proposition 218 ballot pamphlet's statement of purpose]; 34 AA 08547-8548.) The voter materials reference neither refunds, money damages, nor any guideline, mechanism, or procedure that even implies a monetary remedy. (*Weisblat*, , at pp. 1038-1039; 34 AA 08547-8548; see also *Katzberg*, *supra*, 29 Cal.4th at p. 321 ["The presence of such express or implied guidelines, mechanisms, or

procedures may support an inference that the provision was intended to afford such a remedy."].)

At most, the voter materials provide that a successful challenge under Proposition 218 would "result[ ] in reduced or repealed fees and assessments." (34 AA 08548.) Again, this imagines a forward-looking remedy over validity, which mandate and declaratory relief provide. A retroactive refund does not achieve that result. The text and history of Proposition 218 thus are silent on authorizing a refund remedy.

2. The "Relevant Factors" under *Katzberg* militate against recognizing a refund to remedy a Proposition 218 violation.

Because nothing in Proposition 218 suggests an affirmative intent to authorize a damages remedy, the Court should next consider *Katzberg's* "relevant factors." These factors "are whether an adequate remedy exists, the extent to which a constitutional tort action would change established tort law, and the nature and significance of the constitutional provision." (*Katzberg*, *supra*, 29 Cal.4th at p. 317.) These factors each demand a determination that the remedies for a Proposition 218 violation do not include a refund.

a. Prospective declaratory and injunctive relief are available and appropriate remedies for Proposition 218 violations.

The first "relevant factor" is whether an adequate remedy exists. So long as a "meaningful" remedy is available, the lack of

a "complete" alternative remedy will not support an action for damages. (*Katzberg*, *supra*, 29 Cal.4th at p. 309, citing *Bush v. Lucas* (1983) 462 U.S. 367, 386 (*Bush*).) Since parties challenging a fee or charge's validity under Proposition 218 may obtain declaratory and injunctive relief, adequate alternative remedies preclude a refund remedy.

When a public entity's fee or charge violates Proposition 218, a court will invalidate it. (See Cal. Const., art. XIII D, §§ 4, subd. (f) [discussing actions contesting validity of a fee or charge], 6, subd. (b)(5) [same]; *Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 457–458 (*Silicon Valley*) [finding an assessment was invalid for not meeting Proposition 218's requirements].) The remedy that safeguards against a public entity from continuing to impose and collect an invalid levy must be prospective. On that basis, the available remedies for a violation are a writ of mandate as well as declaratory relief. (See *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 927.) And that is all.

Because declaratory and injunctive relief are forward looking remedies, and because plaintiffs must pay a fee before challenging it under Proposition 218,[3] the Platas may argue that prospective remedies do not redress the alleged past violations. (*Babb v. Super. Ct. of Sonoma County* (1971) 3 Cal.3d 841, 848.) But California law does not require a perfect remedy, only one

[3] See *Water Replenishment Dist. of So. Cal. v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1455, 1469-1470.

that is "meaningful." (*Katzberg*, *supra*, 29 Cal.4th at p. 309, citing *Bush*, 462 U.S. at p. 386.)

There is no question that prospective relief satisfies this standard. And a claim for mandate can be evaluated quickly through California's alternative writ procedures, allowing a diligent plaintiff to avoid significant payments of disputed fees. Indeed, plaintiffs should be encouraged to prosecute these claims swiftly not only for their own sake, but to allow public agencies accused of constitutional violations to adjust their planning and budgeting if needed and limit financial risks and disruption. There is neither any need nor any basis for expanding the reach of constitutional jurisprudence here by allowing a retroactive refund remedy.

b. Imposing refunds to remedy Proposition 218 violations would remake established law that only allows prospective relief.

The second "relevant factor" addresses whether awarding a damages remedy would change established law. Under established law, as discussed, courts prescribe prospective relief when it invalidates a levy under Proposition 218. And like the trial court and the parties, CalCities could not find any case in which a court awarded a refund or other monetary damages for a public entity's failure to comply with Proposition 218. So if this Court awards a refund for a Proposition 218 violation, it would set a new precedent that would cut against established law.

Indeed, when no constitutional or statutory provision authorizes a refund action, courts will bar a refund remedy. In

Capistrano Beach Water Dist. v. Taj Development Corp. (1999) 72 Cal.App.4th 524 (*Capistrano*), for example, a payer sued a water district for a refund of a sewer connection fee under the Mitigation Fee Act. The Mitigation Fee Act, however, expressly authorizes refund claims for the unexpended portions of the fees imposed on a "development project." (Gov. Code, § 66001.) The Fourth District found that a water district's sewer connection fees were not fees for a "development project," and the Mitigation Fee Act did not apply. (*Capistrano*, *supra*, at pp. 529–530.) Instead, a different section of the Government Code—section 66013—controlled the district's sewer connection fees. Unlike the Mitigation Fee Act, section 66013 did not authorize a refund for connection fees. (*Id.* at p. 528.) Without a statutory remedy for a refund of an excessive sewer connection fee, the court affirmed the judgment for the water district and barred a refund action over the sewer connection fees. (*Id.* at p. 530.)

This guides the remedy analysis here. Both section 66013 and Proposition 218 restrict how a public entity may impose and use fees or charges. For instance, both limit the amount of a fee or charge vis-à-vis the cost for providing the related service. (Cal. Const. art. XIII D, § 6, subd. (b)(1) [a fee or charge must not exceed the funds needed to provide the service]; Gov. Code, § 66013, subd. (a) [a water or sewer connection fee or charge must not exceed the reasonable cost of providing the service].) And neither provides a remedy for a refund. Instead, the remedy under both is prospective relief only.

Without either a constitutional or statutory authorization for a refund, the Fourth District's holding in *Capistrano Beach Water District* compels the same outcome here: There is no refund remedy for water service rates that may violate section 6 of article XIII D.

The Platas may argue that *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 recognizes the Government Claims Act as an independent basis for tax refunds. But *Ardon* merely recognized the availability of class actions for refunds of taxes paid in excess of local laws; it did not recognize a refund remedy for violations of the Constitution's proportionality requirements.

CalCities thus encourages this Court not to award a refund remedy here. Any other result would change established law on the unavailability of a refund remedy under Proposition 218, and thus be inconsistent with *Katzberg*.

c. Declaratory and injunctive relief is consistent with the nature and significance of Proposition 218.

The third factor—nature and significance of the provision—is not one in which courts provide much consideration. (*Katzberg*, *supra*, 29 Cal.4th at p. 328; *MHC Fin. Ltd. P'ship Two v. City of Santee* (2010) 182 Cal.App.4th 1169, 1187.) Though carrying little weight, still the factor leans toward precluding a refund. The nature of rights under Proposition 218 is to limit public entities' power to exact revenue. (*Silicon Valley*, *supra*, 44 Cal.4th at p. 448.) Though significant, that right can be

adequately protected by diligent plaintiffs seeking prospective relief, as discussed above.

3. The "Special Factors" under *Katzberg* also militate against recognizing a refund to remedy a Proposition 218 violation.

Because the "relevant factors" militate against recognizing a refund remedy for Proposition 218 violations, the inquiry into whether Proposition 218 permits a refund ends. But even if the inquiry continues, the *Katzberg* "special factors" that courts consider next reinforce why there is no refund remedy under Proposition 218. Of the "special factors" that courts may consider,[4] several militate against recognizing a refund remedy: (1) avoiding adverse policy consequences; (2) considerations of government fiscal policy; and (3) practical issues of proof and the competence of courts to assess particular types of damages.

a. A refund remedy would create the adverse policy consequence of penalizing public entities that did not benefit from the disproportionate amount charged.

Serious practical implications would result if courts were to begin imposing refund remedies for Proposition 218 violations.

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[4] The "special factors counseling hesitation in recognizing a damages action…[include] deference to legislative judgment, avoidance of adverse policy consequences, considerations of governmental fiscal policy, practical issues of proof, and competence of courts to assess particular types of damages." (*Katzberg*, *supra*, 29 Cal.4th at p. 329, internal citations omitted.)

For one thing, a refund remedy would unlawfully penalize public entities. (See Gov. Code, § 818 [prohibiting punitive or exemplary damages against public entities].) The general rule is that public entities are not liable for punitive or exemplary damages because the cost of penalizing them "would fall upon the innocent taxpayers." (*State Dept. of Corr. v. Workmen's Comp. App. Bd.* (1971) 5 Cal.3d 885, 888, quoting Recommendations Relating to Sovereign Immunity, No. 1-Tort Liability of Public Entities and Public Employees, 4 Cal. Law Revision Com. Rep. (Jan. 1963) p. 817.) A refund remedy would do just that: it would impose financial obligations on public entities that punish the innocent taxpayers. The Government Code forbids adverse policy consequences of this kind.

The Platas' allegations against the City show the penal nature of a refund. The Platas claim "the City imposed tiered water rates on customers without performing a proportionality analysis." (AOB 36.) As a result, they also allege, the City failed "to calibrate the tiers to offset the impact caused by higher-volume consumers." (AOB 37.) Since the City did not calibrate the tiers, the Platas claim, the City imposed disproportionate rate amounts on the ratepayers, in violation of Proposition 218. (See Cal. Const., art. XIII D, subd. (b)(4).) To cure this alleged violation, "ratepayers should have received a refund of amounts paid at rates exceeding the Tier One rate." (AOB 40.)

Refunds to ratepayers, however, will not return the parties to the status quo ante. While Proposition 218 restricts how public entities may impose and use fees and charges, a violation

does not create a windfall for the public entities. It is true that a misalignment in the proportional amount charged means that some ratepayers paid more than what Proposition 218 permits. But the misalignment also means that some ratepayers underpaid. After a public entity corrects a rate misalignment, it does not lead to any less—or any more—revenue received; it is just paid in different proportions by ratepayers.

The incidental beneficiaries of misalignments thus are not public entities, but the ratepayers who underpaid. Yet claimants like the Platas do not pursue refunds from those who underpaid; nor does it seem likely that they could. Instead, they pursue them from the public entity. Since the public entity receives no surplus revenue from violating Proposition 218's proportionate cost requirement, it must resort to paying that refund from its general-fund revenues (if any). This means, for those agencies that *have* discretionary sources of revenue, fewer funds for general services, like fire, police, and other social services.

b. Public entities whose main source of revenue is from the fees and charges lack the financial resources to absorb the cost of refunding past violations of Proposition 218.

Another practical consequence of imposing refunds for Proposition 218 violations is the impact it would have on governmental fiscal policy. As mentioned, a public entity that violates Proposition 218 does not receive a monetary windfall. When one payer overpays, another underpays. So if a court orders a public entity to issue a refund to those who overpaid, the entity cannot "return" the excess amount collected. Instead, it must pay the refund out of general funds, which causes a net negative for the public entity's budget. This is a substantial financial burden, particularly for entities with few if any revenue sources other than what they collect from fees and charges. Unable to absorb that financial burden, a Proposition 218 refund thus could lead to the inevitable dissolution of many local governments.

Take water agencies. Most of the revenue generated by water-related public agencies is from special districts. (See Public Policy Institute of California, *Paying for Water in California* (March 2014) Technical Appendix B, Table B3, p. 6 [finding that special districts generated $8.375 billion in revenue, as compared to $4.358 billion and $1 billion by cities and counties, respectively].) The sole purpose of these special districts is to provide water-related service. And most of their revenue sources are from charges:

Share of Revenue Sources **Revenue Sources for Local Water-Related Public Agencies (2008-11 Average)**					
Water Supply	**Sales & Service Charges (%)**	**Property Taxes (%)**	**Assessments & Special Taxes (%)**	**Gov't Grants (%)**	**Other (%)**
County	64	n/a	n/a	0	36
City	90	n/a	n/a	1	9
Special Districts	80	5	6	2	8
Total	**83**	**3**	**4**	**2**	**8**

(Public Policy Institute of California, *Paying for Water in California* (March 2014) Technical Appendix B, Table B3, p. 6.)[5]

[5] The Technical Appendices for *Paying for Water in California* are found at <https://www.ppic.org/content/pubs/other/314EHR_appendix.pdf> (as of Dec. 9, 2020), and the full report can be accessed at <https://www.ppic.org/publication/paying-for-water-in-california/> (as of Dec. 9, 2020).

Proposition 218 limits these special districts' ability to impose and use these levies, requiring them to earmark these revenues for specific, intended uses. (See, e.g., Cal. Const., art. XIII C, § 1 [imposing burden on local government to show that they allocated a levy, charge, or other exaction to a payor in accordance with the benefits they received from the governmental activity]; *id.*, art. XIII D, § 6, subd. (b)(2) [requiring that local governments not use revenues from fees or charges for any purpose other than that for which they imposed them].)

In this way, smaller public entities with narrow purposes—like water agencies and other special districts—differ from larger, general purpose public entities. Those larger entities may have general funds on which they may rely to cover unanticipated costs like refund damages resulting from a Proposition 218 lawsuit. While inequitable, the larger entities can absorb the cost.

Not so with smaller entities like special districts. Having calibrated their rates to ensure revenue roughly matches aggregate costs of service, such agencies have little to no additional money to subsidize the cost of a refund related to a successful proportionality challenge. And the agencies have no mechanism to recover the needed funds from those ratepayers who underpaid pursuant to the invalidated rate structure. Without a source of funding not already earmarked for specific costs, it is not clear how some agencies would pay for a court ordered refund, or whether they could.

Therefore, if courts begin imposing refunds to cure Proposition 218 violations, that remedy could threaten the dissolution of any local government faced with a claim that they violated Proposition 218. While Proposition 218 protects taxpayers, it is not a Sword of Damocles that imperils public entities' existence. This is an extreme result that Proposition 218 did not intend, and must be avoided. Again, the best solution is to encourage the swift and diligent prosecution of rate challenges by mandate.

c. Determining the amount of a refund remedy requires an inquiry that would overwhelm the resources of courts and public agencies.

Another practical consequence of imposing a refund remedy is the trouble in proving its amount. No one disputes that the Constitution imposes on public entities the burden to prove compliance with its limitations on taxes, assessments, fees, and charges. (See Cal. Const., art. XIII C, § 1 ["The local government bears the burden…."]; *id*., art. XIII D, § 6, subd. (b)(5) ["…the burden shall be on the agency to demonstrate compliance with this article."].) But the burden to prove compliance is different from the burden to prove damages. The latter burden remains with the party claiming damages. And that party must prove their damages "with reasonable certainty." (See *Carpenter Found. v. Oakes* (1972) 26 Cal.App.3d 784, 799 ["It is elementary that a party claiming damage must prove that [they have] suffered damage and prove the elements thereof with reasonable certainty."].)

A refund remedy for a Proposition 218 violation would be impractical because no plaintiff could prove with any "reasonable certainty" the amount of the refund required. A party seeking a refund must account for each customer's payment and compare that amount with the amount that should lawfully have been charged. (See *Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2007) 143 Cal.App.4th 1444, 1447, 1450 (*Macy's*) [holding tax refund is limited to the difference between the amount paid the amount lawfully charged].)

As the trial court correctly put it, "[i]dentifying 'winners' and 'losers,'…quickly becomes a morass." (16 AA 04260.) From month to month, one customer may use different amounts of water that may subject them to a different rate tier each month. (*Ibid*.) Public entities, with thousands of customers whom they often bill on a monthly or bi-monthly basis, would have millions of bills to review over a several year period. (*Ibid*.) Courts and parties must consider each bill, yielding an extensive analysis that the trial court described as a "monumental task (if possible at all)." (*Ibid*.) It is no wonder why the Platas provided no proof of harm to individual water customers. (16 AA 04261.) That proof "may be impossible" to provide. (16 AA 04260-04261.)

Another practical issue in proving a refund remedy is that it forces a judicial usurpation of public entities' ratemaking authority. A court may compel a public entity to exercise discretion, but it may not issue a mandate that controls that discretion. (*San Luis Coastal Unified Sch. Dist. v. City of Morro Bay* (2000) 81 Cal.App.4th 1044, 1051 (*San Luis*), citing *Bayside*

Auto & Truck Sales, Inc. v. Dept. of Transp. (1993) 21 Cal.App.4th 561, 570 (*Bayside*).) "Mandate may not order the exercise of discretion in a particular manner unless discretion can be lawfully exercised only one way under the facts." (*San Luis*, at p. 1051, citing *Bayside*, at p. 570.) The Legislature and courts commit matters to an agency's discretion when it presents "a subject beyond the trial court's and [court of appeal's] common experience and knowledge." (*Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 375, citing Evid. Code, § 801, subd. (a).)

Cost allocation methodologies under Proposition 218 are one such area. Proposition 218 prescribes no particular method apportionment, but provides constitutional guardrails within which agencies must act "reasonably." (See *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 647-648; see also *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 196 [holding public entity rate structure is a quasi-legislative action].) Apportionment thus does not involve precise calculations that find an "exact relationship" between the amount levied and the benefit received. (*White*, *supra*, 26 Cal.3d at p. 905.) Without a "one-size-fits-all" method, agencies—not courts—must exercise discretion to develop an appropriate methodology.

Nevertheless, a court-ordered refund inherently requires a determination of what fee could lawfully have been charged to each customer. (*Macy's*, *supra*, 143 Cal.App.4th at pp. 1447, 1450.) This determination inherently and improperly displaces the agency's legislative authority with the preferences of judges

and litigants. Thus, even if it were possible to determine the amount of a refund with "reasonable certainty," the process for doing so would cause an unconstitutional usurpation of quasi-legislative ratemaking power. For these reasons, Proposition 218 does not authorize a refund remedy.

CONCLUSION

CalCities respectfully asks this Court to overturn the trial court's determination that the Platas' tiered rate claims satisfied the Government Claims Act's written notice requirements. That determination threatens to establish precedent that conflicts with the Act's purpose and decades of case law. But even if the Platas satisfied the Act's written notice requirements, CalCities encourages this Court to affirm the principle that remedies like resulting trusts and refunds are unavailable to cure Proposition 218 violations.

DATED: December 9, 2020 HANSON BRIDGETT LLP

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CERTIFICATE OF COMPLIANCE

The text of this brief consists of 7,632 words as counted by Microsoft Word, the program used to prepare this brief.

Dated: December 9, 2020

By: */s/ Sean G. Herman*
Sean G. Herman

PROOF OF SERVICE

Raymond and Michelle Plata v. City of San Jose
California Court of Appeal, Sixth Appellate District
Case No. H046064

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 425 Market Street, 26th Floor, San Francisco, CA 94105.

On December 9, 2020, I served true copies of the following document(s) described as:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT AND CROSS-APPELLANT CITY OF SAN JOSE; AMICUS CURIAE BRIEF

on the interested parties in this action as follows:

BY ELECTRONIC SERVICE: By submitting an electronic version of the document(s) to *TrueFiling,* which provides e-service to all indicated recipients through email.

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

Executed on December 9, 2020, at San Francisco, California.

/s/ Georgette D. Peck
Georgette D. Peck

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	Superior Court of California County of Santa Clara 191 North First Street San Jose, California 95113 Case No: 1-14CV-258879 VIA ECF/EFILING