EXEMPT FROM FILING FEES
PER GOVERNMENT CODE § 6103

Case No. G048969

In the

Court of Appeal

of the

State of California

FOURTH APPELLATE DISTRICT
DIVISION THREE

CAPISTRANO TAXPAYERS ASSOCIATION, INC.

Appellee and Plaintiff

vs.

CITY OF SAN JUAN CAPISTRANO,

Appellant and Defendant.

Appeal from the Superior Court of California, County of Orange
Case No. 30-2012-00594579
Honorable Gregory Munoz, Judge Presiding,

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

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TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to California Rules of Court, Rule 8.200(c), the Association of California Water Agencies, the League of California Cities, and the California State Association of Counties jointly apply to this Court and respectfully request permission to file the amicus curiae brief that is combined with this application. This proposed brief, below, is in support of Defendant and Appellant City of San Juan Capistrano (the "City"). Amici jointly have a substantial interest in this case because their member public agencies are local governments, many of which are charged with the responsibility to provide a sustainable and reliable supply of water. Water conservation-based pricing structures, such as tiered and allocation-based rate structures, and the development of new supplies, including affordable recycled water, are proven techniques for managing water resources. As such, Amici have a substantial interest in litigation that interprets the statutory and constitutional requirements for imposing and structuring water service fees and charges, including the requirements of California Constitution article XIII D, section 6 ("Article XIII D, section 6"), adopted in 1996 through voter approval of Proposition 218. Many, if not most, local public agency water purveyors, after following the procedures required by article XIII D, have established some form of conservation-based water rate structure, and many have developed recycled water as part

of their overall water supply portfolio and management strategy. Thus, because the Amici believe that conservation-based water pricing structures and affordable recycled water are important water resource management tools that are consistent with the requirements of the Constitution, they request permission to file the amicus curiae brief to support overturning the decision of the trial court.

For the reasons stated in this application and further developed in the Introduction and Interest of Amicus Curiae portion of the proposed brief, the Association of California Water Agencies, the League of California Cities, and the California State Association of Counties respectfully request leave to file the amicus curiae brief that is combined with this application. The amicus curiae brief was authored by Kelly J. Salt, Best Best & Krieger LLP and no person made a monetary contribution to its preparation and submission.

Dated: June 2, 2014

Respectfully submitted:

Best Best & Krieger LLP

By: Kelly J. Salt

Kelly J. Salt
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I.

INTRODUCTION AND INTEREST OF AMICUS CURIAE

Thomas Fuller observed, "We never know the worth of water till the well runs dry." This case is about determining the worth of water before the well runs dry. Stated another way, this case is about whether a local public agency water purveyor may charge those who use water inefficiently or unreasonably more than those who use it wisely and responsibly in order to achieve an integrated, reliable, and secure water supply for all customers, and what discretion a public agency has in allocating costs to users to achieve these purposes.

This case comes before the Court in the context of an ongoing water management crisis gripping California. On January 17, 2014, California's Governor "proclaimed a State of Emergency and directed state officials to take all necessary actions to prepare for these drought conditions." (Governor Brown Declares Drought State of Emergency (Jan. 17, 2014) State of California http://www.gov.ca.gov/news.php?id=18368 [as of May 13, 2014].) But solving today's water management challenges requires planning, design, engineering, and construction of local, regional, and statewide water facilities, that take time and considerable resources. This case involves critical questions of how to pay for the costs of responsible water management and supply development activities of a city that was

planning ahead to meet the water challenges of the future using time-tested techniques to implement the water conservation and reasonable use mandates of California Constitution Article X ("Article X"). These techniques included both demand management through a tiered water rate structure to encourage conservation and discourage unreasonable use, and expansion of total water supplies (and associated conservation of potable water) through development of recycled water. The City did so in a way that sought to harmonize the water management mandates of Article X with the limitations on local government fees under Article XIII D, section 6. Unfortunately, the trial court failed to achieve similar harmony and instead sowed discord through an unnecessarily restrictive and narrow interpretation Article XIII D, section 6. Action by this court is necessary to restore harmony.

Local public agency water purveyors throughout the State of California have faced the dual challenge of developing water service rate structures that are sufficient to fund their operations and effective to manage their limited water resources. The ability of local public agency water purveyors to meet these demands is circumscribed by Constitutional mandates that require that they: (1) demonstrate a clear nexus between the amount of the fee to be imposed and the cost of providing the service and (2) allocate the cost of providing the service among their customers proportionate to the cost of serving them. Some have suggested that the

Constitution now requires local public agency water purveyors to charge the same unit price to all water users—i.e., flat fees. Others, such as Plaintiff and Respondent Capistrano Taxpayers Association (the "CTA"), also suggest that the Constitution requires each molecule of water be separately traced from source to user and its cost accounted for and priced in structuring water rates. Amici agree with the City that the Constitution does not mandate such impossibly demanding accounting.

The Association of California Water Agencies ("ACWA"), organized in 1910, is a California nonprofit public benefit corporation. ACWA is comprised of over 450 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts, and special purpose public agencies. ACWA's Legal Affairs Committee, comprised of attorneys from each of ACWA's regional divisions throughout the State, monitors litigation and has determined that this case involves issues of significance to ACWA's member agencies.

The League of California Cities ("League") is an association of 472 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all

regions of the State. The Legal Advocacy Committee monitors litigation of concern to cities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having statewide significance for cities.

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

The outcome of this case will impact Amici's public agency members because they are local governments, many of which are authorized to provide water service subject to the requirements of various statutes governing the imposition and structuring of service fees and charges, as well as the substantive and procedural requirements of Article XIII D, section 6. See Cal. Const. art. XIII C, § 1(b) and art. XIII D, § 2(a) (defining the "local agencies" to which Proposition 218 applies). The local agencies represented by Amici have significant interest in cases, such as this one, that involve statutory and constitutional limitations on their ability

to establish budgets, allocate fiscal resources, and structure their water rates to achieve integrated, reliable, and secure water supplies. Additionally, many of Amici's member agencies have established conservation-based pricing of one form or another and have developed recycled water as part of their overall water supply portfolio and management strategy and therefore may be impacted by this case.

II.

FACTS AND PROCEDURAL HISTORY

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

III.

ARGUMENT

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

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

> because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.

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

In November 1996, California voters approved Proposition 218, adding articles XIII C and XIII D to the California Constitution. Article XIII D, section 6 established procedural requirements for imposing new, or increasing existing, property related fees and charges and placed substantive limitations on the use of the revenue collected from such fees and charges. Ten years later, in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, the California Supreme Court determined that a public agency's ongoing water delivery fees for the volume of water essential to most uses of property are property related fees and charges subject to the provisions of Article XIII D. At issue in this case is whether

the City's tiered rate structure complies both with the conservation mandate of Article X and the substantive limitations of Article XIII D, section 6.

"[A]ll water use is now governed by California Constitution Article X, and accordingly, all use of water in this state must conform to the standard of reasonable use." *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 87. The courts have recognized the difficulty local public agency water purveyors face in determining reasonable use and managing their water resources to promote this State policy. "'The scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts. What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes. ...' '[W]hat is reasonable use of water depends on the circumstances of each case, such inquiry cannot be resolved *in vacuo* from statewide considerations of transcendent importance.'" *U.S. v. State Water Res. Control Bd.* (1986) 182 Cal.App.3d 82, 129-130 (quoting *Environmental Defense Fund, Inc. v. E. Bay Mun. Util. Dist.* (1980) 26 Cal.3d 183, 194.

The State Legislature has adopted legislation to support and promote the policy of Article X. Water Code section 100 restates the proposition that the policy of the State of California is to prevent the waste of water and that the water of this State be conserved in the interest of the people and for

the public welfare. This policy is further amplified in Water Code section 106, which declares "that it is the established policy of this State that the use of water for domestic purposes is the highest use of water and the next highest use is for irrigation," and in additional provisions of the California Water Code governing water.[1] Similarly, Water Code section 78500.2—adopted by Proposition 204 on the same ballot as Proposition 218 and by a larger number of votes—acknowledges that the limited water resources of this State must be protected and conserved, and that water conservation is

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[1] *See also* Cal. Water Code § 106.5 (declares that no municipality shall acquire or hold any right to waste water, or to use water for other than municipal purposes, or to prevent the appropriation and application of water in excess of its reasonable and existing needs to useful purposes); § 109 (states that the growing water needs of the State require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights); § 350 *et seq.* (authorize a local agency water purveyor to declare a water shortage emergency condition whenever it finds and determines that the ordinary demands and requirements of water consumers cannot be satisfied without depleting its water supply such that there would be insufficient water for human consumption, sanitation, and fire protection); § 370 *et seq.*, (provide additional, alternate authority for public entities to encourage conservation through rate structure design; § 1009 (provides that water conservation programs are an authorized water supply function for all municipal water providers in the state); §§ 520 – 529.7 (require water meters and recognize that metered water rates are an important conservation tool); § 535 (requires installation of meters to measure landscape water); § 1011 (furthers the water conservation policies of the State by providing that a water appropriator does not lose an appropriative water right due to water conservation programs); § 10631 (establishes water conservation pricing as a recognized water demand management measure for purposes of Urban Water Management Plans); § 12922 (declares the policy of the State to prevent irreparable damage to ground water basins caused by overdraft and depletion).

essential to the State's long-term economic and environmental sustainability. Water conservation through rate structure design has been expressly authorized by the Legislature since 1993, (Cal. Water Code § 375, subd. (b).[2]) After the *Bighorn* decision, the Legislature in 2008 added further authorization for allocation-based conservation pricing, expressly invoking Article X. Cal. Water Code §§ 370 – 374.

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

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[2] In an uncodified portion of the bill adopting Water Code section 375, the Legislature specifically acknowledged that conservation is an important part of the State's water policy and that water conservation pricing is a best management practice. (Stats. 1993, c. 313, § 1 (A.B. 1712)).

for developing water conservation and water resource management programs and practices that will be sufficient to reach their State mandated interim and overall water use targets. Similarly, agricultural water suppliers must develop and implement efficient water management programs and practices in order to comply with the 20 by 2020 legislation.

As is evident in our constitutional and legislative history, water conservation is a way of life and a necessity in California. This is even more evident today. California's Water Year 2014 (October 1, 2013 through September 30, 2014) has been one of the driest in decades and follows two consecutive dry years throughout the State. On January 17, 2014, Governor Jerry Brown issued a drought state of emergency declaration in response to record-low water levels in California's rivers and reservoirs as well as an abnormally small snowpack. On April 25, 2014, Governor Brown issued a second proclamation suspending the California Environmental Quality Act (CEQA) to allow for the implementation of water reduction plans to reduce potable water usage for outdoor irrigation at recreational facilities and large institutional complexes, and the adoption of emergency regulations by the State Water Resources Control Board relating to water conservation. The current drought is endemic of California's unpredictable and variable hydrologic cycle.

Modern experience shows that water is not a perfectly renewable resource. Although California's water supply is limited and continues to diminish, the State's population and economy continue to grow. Further, climate change and federal and State mandates for the restoration of ecosystems further exacerbate water supply challenges. The integration of groundwater and surface water resources, development of alternative water sources—such as recycled wastewater, storm water capture and reuse, desalination of brackish groundwater and seawater, and development of previously unused local groundwater supplies—and the implementation of other water resource management practices is therefore critical to the long-term sustainable use of water in California.

Recycled water is clearly a component of the State's overall water supply and demand management policy. The State Legislature has established the following policies with regard to recycled water:

> It is hereby declared that the people of the state have a primary interest in the development of facilities to recycle water containing waste to supplement existing surface and underground water supplies and to assist in meeting the future water requirements of the state.

Cal. Water Code § 13510.

> The Legislature finds and declares that a substantial portion of the future water requirements of this state may be economically met by beneficial use of recycled water.

> The Legislature further finds and declares that the utilization of recycled water by local communities for domestic, agricultural, industrial, recreational, and fish and wildlife purposes will contribute to the peace, health, safety and welfare of the people of the state. Use of recycled water constitutes the development of "new basic water supplies" as that term is used in Chapter 5 (commencing with Section 12880) of Part 6 of Division 6.

Id. at § 13512.

> It is the intention of the Legislature that the state undertake all possible steps to encourage development of water recycling facilities so that recycled water may be made available to help meet the growing water requirements of the state.

Id. at § 13512.

> The Legislature hereby finds and declares that the use of potable domestic water for nonpotable uses, including, but not limited to, cemeteries, golf courses, parks, highway landscaped areas, and industrial and irrigation uses, is a waste or an unreasonable use of the water within the meaning of Section 2 of Article X of the California Constitution if recycled water is available.

Id. at § 13550.

In sum, "water service" means more than just supplying water; it includes managing and ensuring an ongoing, potable supply of water for all users, including the development and use of recycled water. *See Griffith v.*

Pajaro Valley Water Mgmt. Agency (2013) 220 Cal.App.4th 586, 595.[3] The cost of water service, therefore, must reflect all the costs of water resource management. Today local public agency water purveyors are faced with managing water in the face of current drought conditions, climate change, environmental constraints on water supply, and statutory and common law requirements intended to ensure a sustainable water supply.[4] As stewards of this vital public resource, local public agency water purveyors must develop long-term water management strategies that incorporate water conservation and resource management as key components of preserving our water supplies. Water conservation through rate-structure design must be a component of this overall strategy, as well as development of alternative water supplies such as recycled water.

Management of water resources through rate structure design ensures full cost recovery while also requiring those who place the greatest

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[3] Shortly after adoption of Proposition 218, the Legislature defined "water" for the purposes of that Article XIII D as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." Cal. Gov't Code § 53750(m).) The court in *Griffith* applied this definition in reaching its conclusions.

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

burdens and demands on a water system bear the greatest cost. Most often, water rate structure incentives are seen in the form of inclining block rates or the establishment of water-allocation or water-budget-based rates as were adopted by the City and are at issue in this case. Although public agencies are subject to certain constraints on their power to establish rates for water service, Amici assert that these constitutional requirements are not contrary to, but are fully consistent with, water rates structured to encourage water conservation and resource management and to discourage water overuse. Further, as discussed below, the trial court in this case failed to recognize the City's rate structure complies both with the conservation and reasonable use mandates of Article X and the substantive limitations of Article XIII D, section 6(b).

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

Article XIII D, section 6's substantive provisions appear in section 6, subdivisions (b)(1)-(5). In accordance with these provisions, a property related fee must meet all of the following requirements:

(1) revenues derived from the fee must not exceed the funds required to provide the property related service;

(2) revenues from the fee must not be used for any purpose other than that for which the fee is imposed;

(3) the amount of a fee imposed upon any parcel or person as an incident of property ownership must not exceed the proportional cost of the service attributable to the parcel;

(4) the fee may not be imposed for a service, unless the service is actually used by, or immediately available to, the owner of the property subject to the fee. A fee based on potential or future use of a service is not permitted, and stand-by charges must be classified as assessments subject to the ballot protest and proportionality requirements for assessments;

(5) no fee or charge may be imposed for general governmental services, such as police, fire, ambulance, or libraries, where the service is available to the public in substantially the same manner as it is to property owners.

Cal. Const. art. XIII D, §§ 6(b)(1)-(5). These substantive requirements limit: (i) the use of the revenue collected from property related fees and charges and (ii) the allocation of costs recovered by such fees and charges to ensure that they are proportionate to the cost of providing the service. At issue in this case are the requirements set forth in subdivisions (b)(1), (3) and (4).

Inclining block rate structures are intended to establish economic incentives to conserve water (or put another way, disincentives to unreasonably or excessively use), and generally impose higher charges per unit of water as consumption increases. Such a rate structure for water service fees and charges was first validated in *Brydon v. East Bay Municipal Utility District*, (1994) 24 Cal.App.4th 178, a case determined prior to the adoption of Article XIII D. There the court concluded that inclining block rates are not special taxes which require voter approval under Proposition 13 but are instead fees measured by the cost of service. After the adoption of Article XIII D, section 6, concerns have been expressed by some, and challenges have been brought by others, that inclining block rates may violate the substantive provisions of Article XIII D, section 6(b). Specifically, the concern has been that an inclining block rate may exceed the total cost of providing water service and the proportional cost of the water service to particular customers or classes of customers. Cal. Const. art. XIII D, §§ 6(b)(1) & 6(b)(3). A review of *Brydon*, however, demonstrates that inclining block rates fully comport with the substantive limitations placed on water rates pursuant to Article XIII D, section 6(b).

In *Brydon,* the utility district declared a water shortage emergency pursuant to Water Code section 350 and adopted a drought management

program that included a revenue-neutral[5] inclining block rate structure. The rate structure was challenged as a non-voter-approved special tax in violation of California Constitution, article XIII A, section 4 ("Article XIII A"). Article XIII A was added to the California Constitution by Proposition 13 in 1978 and was intended to provide taxpayer relief by limiting the property tax rate and requiring voter approval of "special taxes" imposed by cities, counties, and special districts. To implement the authorizations granted to public agencies in Article XIII A, the State Legislature enacted Government Code sections 50075 and 50076. Government Code section 50075 states the Legislature's intent to provide all public agencies with authority to impose special taxes, pursuant to Proposition 13. Government Code section 50076 then excludes from the definition of special tax "any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes."

Looking to Article X, the *Brydon* court found that the rate structure was designed in response to constitutionally mandated water resource conservation requirements. The court also recognized that Water Code section 375 permits the adoption and enforcement of water conservation programs to achieve these requirements and specifically permits the

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

enactment of ordinances to encourage water conservation through rate structure design. *Brydon*, 24 Cal.App.4th 178 at 193, 195. "In pursuing a constitutionally and statutorily mandated conservation program, cost allocations for services provided are to be judged by a standard of reasonableness with some flexibility permitted to account for system-wide complexity." *Id.* at 193 (citing *San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132 [air emission permit application fee based on volume of pollutants to be emitted was not special tax under Prop. 13]). The court deemed it appropriate to shift:

> the costs of environmental degradation from the general public to those most responsible ..... The inclining block rate structure is a reasonable reflection of the fact that it is the profligate usage of water which compels the initiation of regulated conservation measures ... . In the [court's] view it is reasonable to allocate costs based on the premise that the more unreasonable the water use, "the greater the regulatory job of the district." *Id.* (citation omitted).

Stated another way, inclining block rates reasonably reflect the proportionate cost of providing water service attributable to those parcels which use the most water. Such costs include not only the costs of regulating and promoting conservation, but of managing a limited public resource in the interest of the people and for the public welfare—e.g., the

costs of purchasing, producing, delivering, and replenishing water, and obtaining or developing additional sources of water such as recycled water. Managing this vital public resource from year to year and generation to generation is a fundamental responsibility of water purveyors throughout the State. *See Carlton Santee Corp. Padre Dam Mun. Water Dist.* (1981) 120 Cal.App.3d 14, 26 (long-term planning needs of waste water utility justify capacity charge imposed pre-connection). Paying for such resource management through rate structure design is an essential component to fulfilling that responsibility.

In conclusion, the *Brydon* court found nothing in Article XIII A to suggest that it was intended to subvert Article X, "which mandates water conservation and precludes 'the waste or unreasonable use or unreasonable method of use of water,'" or that it was intended "to accomplish the essential destruction of the rate setting structure of public utilities, nor the evisceration of the constitutional mandates compelling water conservation." *Brydon*, 24 Cal.App.4th at 194-195. Although *Brydon* addressed the competing concerns of Article X with those of Article XIII A, the court's conclusion and analysis is equally applicable to Article XIII D, section 6.

The provisions of Article X should be given equal dignity to those of Article XIII D, section 6(b). *See Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 447-448 (harmonizing

California Constitution article XIII D, section 4 with the separation of powers principle of California Constitution article III, section 3). The California courts have recognized that when two constitutional provisions appear to compete, their terms must be harmonized to effectuate their purposes.

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

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

Like Proposition 13's Article XIII A, Proposition 218's Article XIII D was enacted to buttress Proposition 13's limitations on *ad valorem* property taxes and special assessments by placing analogous restrictions on assessments, fees, and charges. Neither was intended to compromise water conservation and resource management efforts, which are governed by Article X. *See Howard Jarvis Taxpayers Ass'n v. City of Riverside* (1999) 73 Cal.App.4th 679, 682 (purpose of Proposition 218); *Brydon*, 24 Cal.App.4th at 187-188 (purpose of Proposition 13). To paraphrase

Brydon, an inclining block rate structure bears none of the indicia of taxation without voter approval which Article XIII D, section 6 sought to restrict. Such a rate structure imposes fees on water consumers in accordance with patterns of usage, thereby not passing on the cost of excessive water usage to other property owners. *See Brydon*, 24 Cal.App.4th at 194. Inherent in the cost of excessive water usage are the costs of water conservation and resource management. Inclining block rates internalize these costs and proportionately allocate them as a component of the cost of providing water service to those parcels that use the most water. *See Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1389-1390 ("The juxtaposition of that decision [i.e., *Apartment Association of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830] with *Bighorn* suggests the possibility that a fee falls outside Article XIII D to the extent it is charged for consumption of a public service for purposes or in quantities exceeding what is required for basic (i.e., residential) use of the property.") Inclining block rates therefore harmonize the competing constitutional mandates of Article X and Article XIII D, section 6(b).

Any doubt about the harmony existing between Article X and Article XIII D, section 6 was eliminated in 2009 when the Legislature adopted Assembly Bill 2882 ("AB 2882"). Effective January 1, 2009, AB 2882 amended the Water Code to add Chapter 3.4 (commencing with

section 370). Chapter 3.4 authorizes the adoption and implementation of allocation-based conservation water pricing, such as that adopted by the City, to effectuate the constitutional mandates of Article X—to prevent the waste and unreasonable use of water—and Article XIII D, section 6(b)—to ensure that water service fees are proportionate to the cost of service. The provisions of Water Code section 370 clearly reflect this legislative intent:

> (a) The use of allocation-based conservation water pricing by public entities that sell and distribute water is one effective means by which waste or unreasonable use of water can be prevented and water can be saved in the interest of the people and for the public welfare, within the contemplation of Section 2 of Article X of the California Constitution.
>
> (b) It is in the best interest of the people of California to encourage public entities to voluntarily use allocation-based conservation water pricing, tailored to local needs and conditions, as a means of increasing efficient uses of water, and further discouraging wasteful or unreasonable use of water under both normal and dry-year hydrologic conditions.
>
> (c) The Legislature intends that allocation-based conservation water pricing is an alternative method that can be used by public entities to encourage water users to conserve water, increase efficient uses of water, and further discourage waste of water. The Legislature does not intend to limit the discretion of public entities to evaluate and select among different methods for conserving water or to create a presumption that the election to not use a particular method is a waste or unreasonable use of water by the public entity.

(d) Nothing in this chapter is intended to limit, or dictate, the design of rate structures that public entities may use to promote conservation by water users.[6]

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

> Moreover '[i]n cases of ambiguity we also may consult any contemporaneous constructions of the constitutional provision made by the Legislature or by administrative agencies.' *City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563 [41 Cal. Rptr. 2d 88, 896 P.2d 181].) '[O]ur past cases establish that the presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind. [Citation.] In such a case, the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision. Although the ultimate constitutional interpretation must rest, of course, with the judiciary (see *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 176–180 [2 L. Ed. 60]), a focused legislative judgment on the question enjoys significant weight and deference by the courts.' (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 [172 Cal. Rptr. 487, 624 P.2d 1215].)"

Id. at 290-291.

Allocation-based water pricing is a form of inclining block rate. Water allocations, sometimes referred to as or "water budgets," are volumetric allotments of water to customers based on customer-specific characteristics and water resource standards. An allocation-based water rate structure will generally establish inclining block rates with the blocks defined differently for each customer based on his or her water allocation. Research has demonstrated that inclining block rates and allocation-based rates such as those adopted by the City do in fact result in reductions in the demand for water and are an important water resource management tool. K. Baerenklau, K. Schwabe, & A. Dinar, *Do Increasing Block Rate Water Budgets Reduce Residential Demand? A Case Study in Southern California*, Water Science and Policy Center, University of California, Riverside Working Paper (2013), http://wspc.ucr.edu/working_papers/WSPC-WP-01-0913_block%20rate%20water%20budgets%20so%20cal%20v2.pdf .

The City adopted tiered rates consistent with the provisions of Water Code section 370 *et seq*. The rates were structured to promote water conservation, prevent excessive and wasteful water use, and assist the City in managing its water resources. As discussed below, the rates were also consistent with the substantive provisions of Article XIII D, section 6(b), subdivisions (1), (3), and (4).

C. THE CITY'S ALLOCATION OF THE COSTS OF SERVICE COMPLIES WITH THE SUBSTANTIVE REQUIREMENTS OF ARTICLE XIII D, SECTION 6(B)

1. THE ADMINISTRATIVE RECORD DEMONSTRATES COMPLIANCE

In *City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926 ("*Palmdale*"), the court acknowledged that Article X may be harmonized with Article XIII D, section 6(b). In *Palmdale*, the water district's allocation-based water rate structure was challenged as failing to comply with the substantive provisions of Article XIII D, section 6(b). Significantly, the court noted that "California Constitution, Article X is not at odds with article XIII D so long as, for example, conservation is attained in a manner that 'shall not exceed the proportional cost of service attributable to the parcel.'" *City of Palmdale*, 198 Cal.App.4th at 936-937. In that instance, however, the court found that the water district made no showing that the cost of delivering water service to irrigation customers is higher than its cost of delivering water service to other customers. Indeed, the water utility had made arbitrary changes to the formal rate study with no regard to the actual cost responsibility of each customer class. That is not the case here.

Palmdale generated some confusion among local public agency water purveyors because, if read too broadly, it appears to imply a requirement for parity in the rates charged to the different customer classes. In fact, the court did not hold that an allocation-based rate structure violates

the substantive provisions of Article XIII D, section 6(b), but simply that the Palmdale Water District failed to demonstrate the proportionality of its rates. To be clear, the *Palmdale* court did not say that rates may not differ by customer class, but rather that insufficient justification was provided to justify the rates at issue in *Palmdale*. Such is not the case here.

The essential holding of *Palmdale* is that utilities must make a good administrative record of the methodology used for developing rates and the evidence to support the application of that methodology to the local agency's own service costs. That record may be a rate study and a rate model, such as that prepared in this case by the City's rate consultant Black & Veatch. There is nothing in Article XIII D, section 6(b) that requires a local public agency water purveyor state in a narrative fashion how costs are allocated; rather its burden is to demonstrate compliance with the substantive provisions of Article XIII D, section 6(b). Cal. Const. art. XIII D, § 6(b)(5). Compliance may just as easily be demonstrated, as the City did in part here, in a numerical fashion such as the rate model's complex and inter-related spreadsheets.

The trial court incorrectly concluded that the City "failed to identify any support in the record for the inequality between tiers depending on the category of use." Final Statement of Decision and Judgment, filed August 28, 2013, 4:1-2. As discussed in Appellant's Opening Brief, the

administrative record for the City demonstrates at length how costs were allocated among the various user classes in proportion to the cost of serving each. Unlike the water district in *Palmdale*, the City did not make arbitrary changes to the formal rate study with no regard to the actual cost responsibility of each customer class. Rather, the City followed the recommendations of its rate consultant which applied nationally recognized industry ratemaking standards established by the American Water Works Association, Principles of Water Rates, Fees and Charges: Manual of Water Supply Practices M1 (the "M1 Manual").

The 6th District Court of Appeal's recent decision in *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 provides considerable guidance as to how local public agency water purveyors may comply with the substantive requirements of Article XIII D, section 6(b) in setting water service fees. *Griffith* was decided after the trial court's decision against the City on appeal here. The trial court therefore did not have the benefit of this analysis when it ruled. The *Griffith* decision and its reasoned analysis should, however, be considered by this court.

The *Griffith* case challenged the Pajaro Valley Water Management Agency's (the "Agency") groundwater augmentation charges. The Agency was created to manage the water resources of the Pajaro Valley Groundwater Basin. The Agency is authorized to levy groundwater

augmentation charges on the extraction of groundwater "for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within the [A]gency's boundaries]." *Griffith*, 220 Cal.App.4th at 591 (quoting *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1372). The Pajaro Valley Groundwater Basin has been subjected to chronic overuse, resulting in overdraft and seawater intrusion, particularly near the coast. To protect the groundwater basin, the Agency implemented a program to deliver supplemental water to some coastal users and develop other supplemental water projects.[7] The cost of the program was to be shared by all properties served by a well within the boundaries of the Agency.[8]

In 2002, the Agency adopted groundwater augmentation charges. The charges were subsequently increased in 2003 and 2004. The charges and subsequent increases were challenged on the grounds that the Agency failed to comply with Article XIII D, section 6. In *Pajaro Groundwater Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1370, the 6th District Court of Appeal held that the groundwater augmentation

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

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

charges were property related fees governed by Article XIII D, section 6. The court, however, did not determine whether the charges were fees or charges for "water service" and therefore exempt from the election requirement for other property related fees pursuant to Article XIII D, section 6(c).[9]

Beginning in 2010, the Agency adopted a three-tiered groundwater augmentation charge increase to fund the supplemental water projects and groundwater management program and conducted a majority protest hearing pursuant to Article XIII D, section 6(a) for that purpose. *Griffith*, 220 Cal.App.4th at 593. Several of the objections to the *Pajaro* rates concerned whether the charges complied with the substantive provisions of Article XIII D, section 6(b), including whether the method by which the Agency determined the amount of the charges violated this subdivision.[10] The Agency used a "revenue-requirements" model whereby it budgeted the rates of the augmentation charges by:

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[9] The court held that, for purposes of Article XIII D, section 6, the augmentation charge did not differ materially "from a charge on *delivered* water." *Amrhein*, 150 Cal.App.4th at 1388-1389, original emphasis.

[10] The plaintiffs challenged the Agency's groundwater augmentation charges on several grounds, including its conduct of a mailed-ballot election among customers under Article XIII D, section 6(c). Among the Agency's defenses was that its rates were "water service" charges exempt from this election requirement. Both the trial and appeal court concluded that the *Pajaro* charges were fees or charges for water service exempt from this election requirement.

> (1) calculating its total costs of the chargeable activities;
>
> (2) subtracting all other sources of revenue other than the augmentation charges; and
>
> (3) apportioning the remaining revenue requirement among the augmentation charge customer classes.

Id. at 600. The court acknowledged that this revenue requirements method for allocating costs is consistent with industry standards established by the M1 Manual.[11] *Id.* The M1 Manual is the most widely used rate setting manual among public water purveyors nationally.

The cost of service allocations used by the City in the "Revenue Requirements, Cost of Service Allocations, and Rate Design for the Water and Wastewater Utilities Final Report" prepared by Black & Veatch in 2009 were prepared using the "revenue requirements model" of the M1Manual and are consistent with industry standards. The *Griffith* court acknowledged that the principles and methodologies established in the M1 Manual for structuring rates for water service fees comply with the proportionality requirements of Article XIII D, section 6(b). *Id.* at 600; *see also Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 899

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[11] The revenue requirement analysis "[c]ompares the revenues of the utility to its operating and capital costs to determine the adequacy of the existing rates to recover the utility's costs." American Water Works Association, Principles of Water Rates, Fees and Charges: Manual of Water Supply Practices M1 5 (6th ed. 2012).

(the cost of service study followed commonly accepted professional standards developed by the American Water Works Association for cost of service studies).

2. RECYCLED WATER USERS ARE SIMPLY ANOTHER CUSTOMER CLASS

The *Griffith* plaintiffs also asserted that the Agency's use of the revenue requirements methodology and its apportionment of the costs among different classes of users were contrary to *Palmdale*, which, they claimed, requires rates be proportional to the cost of service on a "parcel-by-parcel" basis. The court rejected this claim, noting that *Palmdale* did not require a parcel-by-parcel analysis. Rather, it held that the water district failed to carry its burden to justify disparate treatment of its customer classes. *Griffith*, 220 Cal.App.4th at 601.

In addressing this claim, the *Griffith* court provided a framework for how a public agency may demonstrate compliance with the proportionality requirements of Article XIII D, section 6(b). The court found that Article XIII D, section 6(b) does not require that property related fees be calculated on a parcel-by-parcel or customer-by-customer basis; rather, the court determined that grouping similar users together (i.e., calculating fees on a class-by-class basis) is a reasonable method of allocating the costs of service. In reaching this conclusion, the court recognized that:

> [a]pportionment is not a determination that lends itself to precise calculation. ... Given that

> Proposition 218 prescribes no particular method for apportioning a fee or charge other than the amount shall not exceed the proportional cost of the service attributable to the parcel, [the Agency's] method of grouping similar users together for the same ... rate and charging the users according to usage is a *reasonable* way to apportion the cost of service. That there may be other methods favored by plaintiffs does not render [the Agency's] method unconstitutional. Proposition 218 does not require a more finely calibrated apportion.

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

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

Calif. Farm Bureau Fed'n, 51 Cal.4th at 438 (citations omitted) (emphasis added). Most notably, the court held that, in applying these principles, public agencies may employ a flexible assessment of proportionality within a range of reasonableness. *Id.* at 442; *Calif. Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 132 .[12]

The court's ruling that the proportionality requirements can be met at the customer class level affirms a local public agency water purveyor's discretion in rate-making. Thus, so long as the costs of providing a property related service are *reasonably* allocated across customer classes, the fee complies with the proportionality requirements of Article XIII D, section 6(b). *See also, Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637, 647-648; *Howard Jarvis Taxpayers Ass'n v.*

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[12] *See also Paland v. Brooktrails Township Cmty. Serv. Dist. Bd. of Dir.* (2009) 179 Cal.App.4th 1358, 1370 (court refused to look at individual property owner activity to determine whether service was "immediately available" as required for a fee pursuant to California Constitution article XIII D, section 6(b)(4).); American Water Works Association, Principles of Water Rates, Fees and Charges: Manual of Water Supply Practices M1 at p. 75 (6th ed. 2012) (In allocating costs, the M1 Manual notes: "The ideal solution to developing rates for water utility customers is to assign cost responsibility to each individual customer served and to develop rates to derive that cost. Unfortunately, it is neither economically practical nor often possible to determine the cost responsibility and applicable rates for each customer served. However, the cost of providing water service can reasonably be determined for groups or classes of customers that have similar water-use characteristics and for special customers having unusual water-use or service requirements.")

City Fresno (2005) 127 Cal.App.4th 914, 922-923 (2005) (Article XIII D, section 6 requires cities to reasonably determine the costs of service); *Morgan*, 223 Cal.App.4th at 899, 916 (different services may cost more and different users create special costs; there is no requirement that the data determining rates be perfect). The City's recycled water customers are simply one of many customer classes. As demonstrated in Appellant's Opening Brief, the costs of providing water service were reasonably allocated among the various customer classes, including the recycled water customer class and those customer classes that receive potable water. Thus, the City's fees were related to the *overall cost of service*; such overall cost of service includes the costs of providing all water within the City's service area, not just from a single supply source.

3. RECYCLED WATER BENEFITS ALL WATER CUSTOMERS; POTABLE WATER SERVICE FEES MAY FUND A PORTION OF THE COSTS OF RECYCLED WATER

The *Griffith* plaintiffs—inland well users—also argued that the amount imposed on their property was disproportionate to the cost of the service provided because they do not use any of the services, emphasizing that many of the services were delivered to coastal property owners closest to the salt water intrusion zone. Rejecting this argument, the court stated that plaintiffs' argument overlooks the fact that "'the management of the water resources . . . for agricultural, municipal, industrial, and other

beneficial uses is in the public interest . . .' and [the Agency] was created to manage the resources 'for the common benefit of all water users.'" *Id.* at 600. The court therefore found that the groundwater augmentation charges did not exceed the proportionate cost of providing the service because the record evidence demonstrated that all groundwater users benefit from the Agency's groundwater management activities, not just the coastal users receiving supplemental water. *Griffith,* 220 Cal.App.4th at 600, 602.

The trial court in this case concluded that the City's administrative record "reflects the City imposed a fee on all ratepayers for recycled water services and delivery of recycled water, despite the fact that not all ratepayers used recycled water or have it immediately available to them or would ever be able to use it." Final Statement of Decision and Judgment, 4:6-9. The trial court, however, failed to recognize that the recycled water provided by the City is no different than the Agency's recycled water that was blended with well water and delivered to the coastal well users. *Id.* at 599. Recycled water provides a benefit to all water users within the City's service area, even those who do not receive it, because it displaces the demand for scarce potable water resources. As such, it is appropriate to allocate a portion of the costs of recycled water to all water users just as it is to charge them for other water supplies.

The *Griffith* plaintiffs also claimed that the groundwater augmentation charges were being used to fund a service that is not immediately available to property owners because the ordinance provided that the charge will be used to identify and plan for future supply projects. *Id.* The court dismissed this argument and held that identifying and planning for the future needs of the Agency is part of the cost of the Agency's current services. Thus, the costs of planning for future needs may be recovered from charges imposed on current users. *Id.* at 602.

This aspect of the case supports the City's practice of charging present day potable water customer's its cost to plan and fund recycled water capital projects through current rates. Charging current users for future capital projects that benefit all water users is also consistent with the *Howard Jarvis Taxpayers Association v. City of Roseville* court's determination that the "costs to provide such services includes all the required costs of providing service, *short-term and long-term*, including operation, maintenance, financial, and *capital expenditures*." *Roseville*, (2002) 97 Cal.App.4th 637, 647-648 (emphasis added); *see also Fresno*, (2005) 127 Cal.App 4th 914, 922 ("Cities are still entitled to recover all of their costs for utility services through user fees.").

Based on water resource operations and management practices it is appropriate to allocate to all potable water customers a portion of the costs

of ongoing operations and maintenance and future capital projects of a recycled water system because recycled water benefits all water users, including potable water users who do not receive the recycled water. Imposing these costs on such potable water customers does not result in a fee for a service that is not immediately available to them because it is a cost of an agency's overall costs of providing water service. *Griffith,* 220 Cal.App.4th at 600, 602; *see Roseville* (2002) 97 Cal.App.4th 637, 647-648.

First, recycled water is simply another source of water supply similar to groundwater, surface water, and imported water. Water Code § 13511 ("use of recycled water constitutes the development of 'new basic' water supplies"). A public agency should not have to separately account for every drop of water in its total water supply portfolio from source to user to charge that user for that supply. It is appropriate to allocate all costs of supplying all water to all customers who receive water service. *Griffith,* 220 Cal.App.4th at 600, 602; *see* Cal. Water Code § 13550(a)(2) (recycled water may be furnished at reasonable cost). In determining the reasonable cost of water service, a local public agency water purveyor may consider all relevant factors, including, but not limited to, the present and projected costs of supplying, delivering, and treating potable domestic water, the present and projected costs of delivering recycled water, and other

programs to encourage conservation and reduce competition for limited supplies. *See id.*

Second, recycled water is a water resource management tool that benefits all water users. Cal. Water Code §§ 13510 (recycled water supplements existing surface and underground water supplies and helps meet future water requirements); 13512 (recycled water helps meet growing water requirements). As noted above, recycled water benefits all water users within a local public agency water purveyor's service area, even those who do not take recycled water, because it displaces demand for scarce potable water resources and reduces the need for conservation by potable water customers. The primary difference between recycled water and other water supplies is that there are restrictions on the application of recycled water. *See id.* at §§ 13520 *et seq.* Ultimately, in allocating these water supply costs, local public agency water purveyors must be allowed to reasonably employ a flexible assessment of proportionality in calculating the amount and distribution of its fees. *See Calif. Farm Bureau Fed'n*, 51 Cal.4th at 442; *Calif. Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist.*, (2009) 178 Cal.App.4th 120, 132.

Third, if the logic of the trial court ruling regarding the funding of its recycled water is extended, all water, regardless of the source of its production—whether by treatment of waste water, or desalination of

seawater or brackish groundwater, or capture and treatment of storm water, or transfer of conserved water, or importing water from one part of the State to another, or any other means of production or supply—would have to be traced from the source to the customer for rate setting purposes. "Melding" costs of various water supplies into a single supply cost for rate setting purposes is an extremely common practice of water purveyors throughout the State. There is nothing in Article XIII D, section 6(b) that requires an end to this practice.

IV.

CONCLUSION

For all of the reasons stated above, Amici respectfully request this Court reverse the trial court judgment on the merits and provide declaratory relief that the City's rates are lawful and may be enforced.

Dated: June 2, 2014

BEST BEST & KRIEGER LLP

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CERTIFICATE OF WORD COUNT

The text of this Appellant's Opening Brief consists of 8,341 words as counted by the Microsoft Word 2010 word-processing program used to generate said document.

Dated: June 2, 2014

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CERTIFICATE OF SERVICE

I, Lisa Grennon, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 655 West Broadway, Fifteenth Floor, San Diego, California 92101-3542. On June 2, 2014, I served the within document(s):

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

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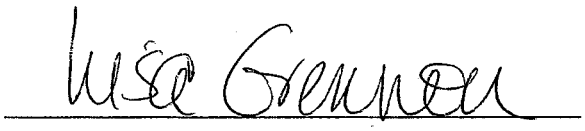

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