Case No. D069798

In the Court of Appeal, State of California
FOURTH APPELLATE DISTRICT, DIVISION ONE

Eugene G. Plantier, et al.,
Petitioners and Appellants
vs.
Ramona Municipal Water District
Respondent

On Appeal from a Judgment in the
Superior Court of San Diego County
Case No. 37-2014-00083195
Honorable Timothy B. Taylor, Judge Presiding

AMICI CURIAE BRIEF OF CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES & THE LEAGUE OF CALIFORNIA CITIES

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AMICI CURIAE BRIEF

I. INTRODUCTION AND INTEREST OF AMICI CURIAE

California courts have long held that a person seeking to challenge a government decision must participate in its decision-making process and demonstrate that the judicial challenge is on the same grounds and evidence as he or she presented to the decision-maker. Known as the "exhaustion of remedies doctrine" or, more commonly, "exhaustion of administrative remedies," this requirement applies whenever the law requires those affected be given notice and opportunity to be heard before a decision is made. If a notice and hearing requirement exists, as a general rule, a person affected by a governmental decision must participate in the making of that decision by appearing at the hearing and providing the agency with specific reasons why the decision is asserted to be wrong and presenting evidence supporting the reasons asserted. This rule not only ensures informed decisions, but permits decision-makers to respond to criticism, apply their expertise, and develop a record suitable for judicial review.

This case involves application of the exhaustion of remedies doctrine to the adoption of local government sewer fees pursuant to the notice and hearing requirements of article XIII D, section 6[1] and of the District's local legislation.

[1] References to articles and sections of articles in this Brief are to the California Constitution.

In 1996, California voters adopted Proposition 218 to add articles XIII C and XIII D to California's Constitution to impose new limitations on local government taxes, assessments, and a newly defined class of "property related fees." These new limitations allocate power between elected governing bodies of local agencies and voters, tax and fee-payors and imposed new procedural and substantive restrictions on local governments. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220 ("*Bighorn*").) Among these are the requirements of article XIII D, section 6 regarding new and increased property related fees.

Our Supreme Court has observed that the notice and hearing requirements of article XIII D, section 6, subdivision (a) facilitate communications between local governments and those they serve, and its substantive restrictions should allay fee-payors' concerns that government service charges are too high. (*Bighorn, supra,* 39 Cal.4th at pp. 220–221.)

Procedural requirements for property related fees are found in subdivision (a) of section 6; substantive requirements appear in subdivision (b). These limitations have led local government agencies to implement expensive and time-consuming legislative procedures to impose new or increased property related fees, including:

- retention of legal and financial advisors, including professional ratemaking consultants and cost-of-service experts;
- preparation of cost-of-service analyses (COSAs);

- preparing and mailing detailed notices to property owners;
- responding to public comments;
- inviting a majority protest and holding at least one public hearing at which written protests may be submitted and are counted.

Many agencies set new or increased fees in conjunction with adoption of an annual budget and fee hearings are commonly the most heavily attended meetings of the year.

This legislative process ensures governing bodies have adequate information upon which to base their decisions. It allows decision-makers to review the entire record, respond to residents' concerns, and apply their expertise before making a final decision, thus, furthering the power sharing between local legislators and tax- and fee-payors Proposition 218 contemplates.

Each member of the Local Government Amici is an "agency" as defined in article XIII D. (Cal. Const., art. XIII D, § 2, subd. (a) [defining "agency" to mean local government as defined in Cal. Const., art. XIII C, § 1, subd. (b)].) Some are large, others small. Some provide a broad range of services, others but one. Regardless of whether an agency is a general-purpose government (a city or a county) or a special district, whether its power is broad or narrow, or whether it provides many services or just one, all local governments represented by Local Government Amici have three things in common:

- they need revenue to exist and to function;

- they must comply with article XIII D, section 6 when setting fees for property related services; and,
- they have common interest in the public policies that underlie the exhaustion of remedies doctrine.

Thus, for the reasons stated below, the Local Government Amici agree with the Respondent District that the doctrine of exhaustion of remedies applies to judicial challenges to property-related fees under article XIII D, section 6.

II. FACTS AND PROCEDURAL HISTORY

Appellants' and Respondent's briefs state the facts here somewhat differently. Local Government Amici must accept the case as they find it. However, the parties stipulated at trial to the submission of a joint administrative record, and other than slightly differing characterizations of the facts in that record, neither disputes its completeness.

Neither Appellant rate-payers nor the District appear to dispute that the fees at issue were imposed to fund the operations of the Ramona Municipal Water District, that the fees were adopted as specified in article XIII D, section 6, subdivision (a) and, in the course of the District's rate making hearings, that neither Appellant rate-payers nor anyone else raised the grounds upon which the District's rates are challenged here.

III. ARGUMENT

A. EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE GENERALLY

1. When an Administrative Remedy is Provided, It Must Be Invoked

The exhaustion of administrative remedies doctrine is well settled. "The cases which so hold are legion." (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 73.) If an administrative remedy is provided by statute, it must be invoked and exhausted before judicial review of administrative action is available. (*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd.* (1973) 8 Cal.3d 792, 794.) It is jurisdictional and applies whether or not it may afford complete relief. (*Yamaha Motor Corp. v. Superior Ct.* (1987) 195 Cal.App.3d 652, 657.) The doctrine applies to constitutional challenges to legislative action — as the rates here. (*Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 93 [exhaustion applies to constitutional challenge to zoning ordinance].) The decision-making body "is entitled to learn the contentions of interested parties before litigation is instituted." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 384.) Thus, exhaustion requires a full presentation to the administrative agency of all issues later to be litigated and the essential facts on which the issues rest. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609.) Because it is jurisdictional, the rule is not a matter of judicial discretion. (*Roth v. City of Los

Angeles (1975) 53 Cal.App.3d 679, 687 [lawsuit barred because plaintiffs failed to object at City Council hearing to an assessment to abate a public nuisance even as to constitutional challenges].)

2. Policies Underlying the Exhaustion Doctrine

"'[E]xhaustion of administrative remedies furthers a number of important societal and governmental interests, including: (1) bolstering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise and exercise statutorily-delegated remedies; (3) mitigating damages; and (4) promoting judicial economy.'" (*Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 637, 644, citing *Rojo v. Kliger* (1990) 52 Cal.3d 65, 72.)

Even if an administrative remedy cannot resolve all issues or provide the precise relief a plaintiff seeks, exhaustion is nevertheless required "because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency." [Citation.] It can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review. [Citation.]'" (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874–875, citations omitted.) Therefore, exhaustion requires more than mere generalized objections at a public hearing — the specific grounds must be raised. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197; *California Native*

Plant Society v. City of Rancho Cordova (2009) 172 Cal.App.4th 603, 615–616 [hearing participants not held to standards as lawyers in court, but must make known what facts are contested].) Similarly, *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656 rejected an attack on reports by that city's financial expert because the plaintiffs did not present a competing financial analysis at the administrative hearing. If a party "wishes to make a particular methodological challenge to a given study relied upon in planning decisions, the challenge must be raised in the course of the administrative proceedings. Otherwise, it cannot be raised in any subsequent judicial proceedings." (*Id.* at 686.)

3. The Exhaustion Requirement Serves the Separation of Powers

The jurisdictional aspect of the doctrine is grounded upon the separation of powers principle fundamental to our democracy. (*County of Contra Costa, supra,* 177 Cal.App.3d at p. 76.) Legislative bodies, such as those governing local public agencies, make discretionary, policy-laden choices from a range of lawful options. It is long settled that the establishment of service fees, such as those now subject to article XIII D, section 6 is a legislative act. (*Kahn v. East Bay Mun. Util. Dist.* (1974) 41 Cal.App.3d 397, 409; *Durant v. Beverly Hills* (1940) 39 Cal.App.2d 133, 139 ["The universal rule is that in these circumstances the court is not a rate-fixing body, that the matter

of fixing water rates is not judicial, but is legislative in character."].) Thus, while Proposition 218 changed the substantive requirements applicable to utility charges, it did not change the respective roles of the local legislative bodies and the courts. (*Capistrano Taxpayers Ass'n v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1512–1513 ("*Capistrano*").) For these same policy reasons arising from the separation of powers and the different institutional competencies of legislators and courts, judicial review of a legislative act is limited to the record of the legislative proceedings. (*Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal.4th 559, 573 ("*Western States*").) The exhaustion doctrine and the *Western States* rule limiting judicial review to the legislative record enhance judicial review by, among other things, providing the benefit of an agency's expertise in preparing a full record and sifting the evidence. It also prevents parties from embroiling the court in political and policy disputes and performing a function to which they are ill-suited — legislating rather than adjudicating. Distinguishing record-making and record-reviewing prevents litigants from drawing legislators or courts into the realm of the other. The exhaustion of administrative remedies doctrine protects both legislative and adjudicative functions by allowing a legislative body to hear the evidence, apply its reasoned discretion, and create a record to facilitate judicial review.

4. Exhaustion Allows an Agency Opportunity to Address Concerns Before Judicial Review

The "'essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.'" (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1137 [judicial review of charter city assessment], citing *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198).) Under the exhaustion doctrine, "administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum." (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 510.)

For example, *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 641, involved a statute allowing adoption of a citrus pest control district's budget only after a noticed protest hearing. A defendant who failed to object to an eradication plan during the district's protest hearing and before adoption of its budget could not later challenge the plan in court. By failing to raise issues during the district's hearing process, the challenger deprived the district of the "opportunity to address the merits of the protest and to modify the plan (and the budget) accordingly." (*Ibid.)* The district was prejudiced by defendant's failure to object to the plan before its implementation, as it could have addressed its concerns. (*Id.* at 642.)

Wallich's Ranch v. Kern County Pest Control District (2001) 87 Cal.App.4th 878 ("*Wallich's Ranch*") subsequently relied upon *Sun Pacific Farming* in a Proposition 218 challenge to another citrus pest assessment. The later case held the plaintiff's failure to raise objections based upon alleged constitutional violations during the budget hearing and protest process barred it from suing on those grounds. That case, controlling on the trial court here, is discussed further below.

5. If Multiple Remedies Are Provided, All Must Be Exhausted

Acme Fill Corp. v. San Francisco Bay Conservation etc. Com. (1986) 187 Cal.App.3d 1056, 1064 ("*Acme*") holds that when multiple remedies are provided, all must be exhausted before judicial review is available. There, the plaintiff was required to exhaust local and federal remedies before seeking judicial review. (*Ibid.*)

B. ARTICLE XIII D, SECTION 6 ESTABLISHES AN ADMINISTRATIVE REMEDY FOR PROPERTY RELATED FEES

Article XIII D, section 6, subdivision (a) establishes the minimum notice and hearing requirements for new or increased property related fees. As detailed below, additional hearing and protest procedures may be established by statute or local regulation, in which case all remedies must be exhausted. (E.g., *Acme, supra,* 187 Cal.App.3d at p. 1064.)

"Once the amount of the fee per parcel is calculated, the agency must provide written notice to each affected property owner and the opportunity to protest the fee. At the public hearing, the government agency is to tabulate all the written protests to the proposed fee, and if a majority of owners of the identified parcels protest, the fee will not be imposed." (*Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 286 [construing Cal. Const., art. XIII D, § 6, subd. (a).) Although only a majority written protest precludes an agency from imposing a new or increased fee, the Constitution mandates it to "consider **all** protests," oral or written, even in the absence of a majority protest. (Cal. Const., art. XIII D, § 6, subd. (a)(2).) This consideration is mandatory, expressly provided for in the Constitution, and thus must be construed to have meaning. (E.g., *Hensel Phelps Const. Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1034 ["We will not adopt a statutory interpretation that renders meaningless a large part of the statutory language."].) The requirement provides both the public agency and its rate-payers the opportunity to address and investigate cost-of-service issues before costly litigation. In other words, the power sharing Proposition 218 establishes between governors and the governed promotes decisions that are "mutually acceptable and both financially and legally sound." *(Bighorn,* 39 Cal.4th at p. 220.) The exhaustion doctrine serves this objective by requiring those who would hold government accountable give it the opportunity to be accountable before seeking judicial review.

Appellants' Reply Brief cite at pages 7 and 11 *Coastside Fishing Club v. California Fish & Game Commission* (2013) 215 Cal.App.4th 397, 415 in support of their mistaken argument that Ramona's own local legislative code and not Proposition 218 establishes the administrative procedure for challenging local fees. Appellants quote the following from *Coastside*: "In cases applying the exhaustion doctrine, the administrative procedure in question generally is provided by the statute or statutory scheme under which the administrative agency is exercising the regulatory authority challenged in the judicial action." This sentence supports the District's position, not Appellant rate-payers'. Article XIII D, section 1 states, "[n]otwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority." Thus, the Constitution itself provides the administrative procedure by which Respondent imposed the challenged fees. In any event, *Acme* demonstrates that, when multiple remedies are provided, all must be exhausted.

C. PROPOSITION 218'S ADMINISTRATIVE REMEDY MUST BE EXHAUSTED

1. *Wallich's Ranch* Applies the Exhaustion Doctrine to Proposition 218 Challenges

Wallich's Ranch v. Kern County Pest Control District (2001) 87 Cal.App.4th 878 applies the exhaustion of administrative remedies doctrine to a Proposition 218 challenge to a property related fee. The case challenged an annual assessment imposed

under the Citrus Pest District Control Law (Food & Agric. Code §§ 5401 et seq.) ("Pest Control Law".)

The Pest Control Law establishes a procedure for imposition of annual pest control assessments. The assessment on citrus growers funds, in part, district operations and is derived from the district's annual budget. (*Id.* at 884.) Although the Pest Control Law does not provide means to protest an assessment; it does provide for notice, opportunity to protest, and hearing on the budget on which assessments are based. (*Wallich's Ranch, supra,* 87 Cal.App.4th at p. 885.) After a county assessor certifies the assessed value of all citrus trees in a district, the district board adopts a preliminary budget, and provides notice of intent to adopt that budget and to levy an assessment to fund it. (Food & Agric. Code, § 8563.) Written protests by citrus groves owners are permitted "at any time not later than the hour set for hearing objections to the proposed budget." (Food & Agric. Code, § 8564.) Similar to the requirement of article XIII D, section 6, subdivision (a)(2), a district board is obliged "to hear and pass upon all protests so made" before adopting a budget. (Food & Agric. Code, § 8565.)

Thus, "[t]he appropriate procedure for challenging the assessments imposed pursuant to the Pest Control Law is to first exhaust one's remedies by challenging the budget before the district." (*Wallich's Ranch*, *supra*, 87 Cal.App.4th at p. 884.) The Court emphasized the point:

> Thus, the appropriate procedure to oppose the assessment is to challenge the district budget, at which time the district has an opportunity to address the perceived problems and formulate a resolution. Here, the District was denied any opportunity to address the merits of Wallich's Ranch's claims. We reject the contention of Wallich's Ranch that exhaustion of administrative remedies was not required because the complaint related to constitutional arguments and protesting at the District's budget hearing would have been fruitless. (See *Bockover v. Perko* (1994) 28 Cal.App.4th 479, 486 [34 Cal.Rptr.2d 423] [general rule of exhaustion forbids a judicial action when administrative remedies have not been exhausted, even as to constitutional challenges].) Under our reasoning in *People ex rel. Lockyer v. Sun Pacific Farming Co., supra,* 77 Cal.App.4th at page 642, in order to challenge a citrus pest control assessment, one must first challenge the district's budget.

(*Id.* at p. 885.)

Wallich's Ranch applied a long and unbroken line of cases holding that, when an administrative remedy is provided, it must be exhausted before judicial review is available — even as to constitutional claims. Its reasoning is even more compelling

where the Constitution itself provides the procedure to be exhausted.

2. Proposition 218 Does Not Displace the Exhaustion Doctrine

Proposition 218 changes some things about litigation procedures for fee challenges – the exhaustion doctrine is not among them. The last sentence of article XIII D, section 6, subdivision (b)(5) provides: "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." Article XIII D, section 4, subdivision (f) is to similar effect for assessment challenges. These provisions shift the burden of proof from a challenger to a respondent agency. Similarly, Proposition 218 changes the standard of judicial review from deference to independent judgment. (*Silicon Valley Taxpayers Assn. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443–450; *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 912 ["We exercise our independent judgment in reviewing whether the District's rate increases violated section 6. In applying this standard of review, we will not provide any deference to the District's determination of the constitutionality of its rate increase." (Citations omitted.)]) These provisions say nothing about procedural or jurisdictional prerequisites to suit, such as the exhaustion doctrine.

Had the voters who adopted Proposition 218 intended to alter the well-established exhaustion doctrine, they could have

done so; they did not. Instead they shifted the burden of proof and standard of review, but left other rules of procedure unchanged. This compels a conclusion voters intended to maintain those unchanged procedures. (*Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Com'n* (2012) 209 Cal.App.4th 1182, 1189, [Prop. 13 precedents undisturbed by Prop. 218 were intended to be maintained].) This is but application of the familiar canon of construction named *expressio unius est exclusio alterius.* (E.g., *LeFrancois v. Goel* (2005) 35 Cal.4th 1094, 1105 ["The expression of some things in a statute necessarily means the exclusion of other things not expressed.")

3. Satisfying the Government Claims Act Does Not Exhaust Administrative Remedies

Appellant rate-payers argue in their Reply Brief that their claimed satisfaction of the requirement of the Government Claims Act, Government Code section 810 et seq., amounts to exhaustion of remedies. (Reply Brief at pp. 7–11.) Not so.

The Government Claims Act requires one who would sue government for monetary relief to first file a timely claim to apprize the agency of the claim and to afford it opportunity to investigate and, perhaps, settle it without litigation. (E.g., *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 247.) The exhaustion of administrative remedies doctrine serves the other purposes discussed here that support the separation of powers and facilitate the effective exercise of both legislative and judicial powers.

Moreover, case law treats the two requirements independently. *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139 (*Lozada*) involved a police officer's effort to pursue claims under the Peace Officers Procedural Bill of Rights Act (POBRA) even though he had not filed a timely claim under the Government Claims Act. The trial court granted summary judgment to the City on that ground and the Court of Appeal affirmed. The Court of Appeal noted that the Legislature has expressly disclaimed an exhaustion requirement for POBRA claims, but nevertheless found compliance with the Government Claims Act obligatory:

> However, elimination of the requirement that officers must exhaust their administrative remedies before pursuing judicial relief for asserted POBRA violations does not eliminate the statutory claim filing requirements under the Government Claims Act. Appellant and amicus curiae PORAC argue that the "initial jurisdiction" language of POBRA has the same effect upon the statutory claim filings requirements of the Government Claims Act as it does upon the judicially created doctrine of exhaustion of administrative remedies — eliminating both. We disagree.
>
> The origin and purposes of the government claim filing requirements and the administrative remedies exhaustion doctrine differ, and elimination

> of the exhaustion requirement does not release a litigant from the need to comply with Government Claims Act requirements. (*Bozaich v. State of California* (1973) 32 Cal.App.3d 688, 697–698, 108 Cal.Rptr. 392.)

(*Lozada, supra*, 145 Cal.App.4th at p. 1155.)

One who fails to comply with the Government Claims Act may not sue for monetary relief, but may seek injunctive relief and return of bailed property. (E.g., *Sparks v. Kern County Bd. of Supervisors* (2009) 173 Cal.App.4th 794, 798–799.) One who fails to exhaust administrative remedies on a claim may not pursue it at all under the cases discussed throughout this brief.

Even if the Government Claims Act could be conflated with exhaustion requirements — if it were a mere administrative remedy to be exhausted — this would not save Appellant rate-payers' case. Where multiple remedies are afforded, a would-be litigant must satisfy all of them. Federal remedies were not found to preempt state remedies in *Acme* and, as detailed above, Proposition 218 does not generally displace the procedural law governing tax, rate and fee litigation. Because it is possible to lodge the protest afforded by article XIII D, section 6, subdivision (a) and to present a claim under the Government Claims Act, Appellants were obliged to do both. Having failed to do so, they may not sandbag the District in court with claims they might have, but did not, raise in the District's rate-making hearings.

Thus, that Appellant rate-payers claim to have satisfied the claim presentation requirement of the Government Claims Act wins them nothing as to the issue on which the trial court ruled below — exhaustion of administrative remedies is a distinct requirement. Those who would challenge sewer rates and seek a refund must both exhaust administrative remedies by raising their concerns, and the evidence on which they base them, in the majority protest hearing required by article XIII D, section 6, subdivision (a) and, if they wish monetary relief, file a timely claim.

D. NEITHER FUTILITY NOR EXHAUSTION BY OTHERS SAVE APPELLANTS HERE

Appellants seek refuge in two, narrow exceptions to the duty to exhaust, but neither is availing.

1. Exhaustion Would Not Have Been Futile Here

"Futility is a narrow exception to the general rule." (*Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 683.) The duty to exhaust a statutory remedy is required unless it can be positively stated the agency had declared the ruling or enactment to result. (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418 [it must be absolutely clear exhaustion would be of no use whatever]; *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 691 [collecting cases illustrating limited scope of futility exception].) The exception does not apply simply because favorable agency action is unlikely — even if the agency rejected the desired

outcome in other cases. If courts excused exhaustion on this ground, the exhaustion requirement would practically disappear, as litigants normally sue without exhausting precisely because they believe favorable action unlikely — or simply prefer to litigate, perhaps in search of fees under Code of Civil Procedure section 1021.5. (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313–1314 [cannot infer from county position in court that its assessment appeals board would have rejected plaintiff's claim]); cf. *Graham v. DaimlerChrysler Corp.* (2004) 24 Cal.4th 553, 561 [claimant for catalyst fees under CCP § 1021.5 must offer to settle before suit to avoid perverse incentives].)

Wallich's Ranch summarily rejected the petitioner's claim of futility on a Proposition 218 challenge to a pest control assessment. (*Wallich's Ranch*, *supra*, 87 Cal.App.4th at p. 885.) There, the Court of Appeal noted the petitioner's apparent long-term political animosity to the district and its assessment did not demonstrate exhaustion would be futile:

> Wallich's Ranch's contention that it exhausted its administrative remedies since it protested for 'a number of years' the District's budget is simply without support in the record. The evidence cited by Wallich's Ranch of its 'protests' consists of its circulation of petitions to dissolve the District and a February 1997 letter to counsel for the District contending the District was required to comply with Proposition 218. These actions plainly do not

evidence a challenge to the District's budget for the fiscal years at issue.

(*Ibid.*)

Thus, the futility exception recognizes that litigants must pursue administrative remedies that will **likely** fail, but need not pursue those that will **certainly** fail — as where the administrative tribunal lacks power to consider the petitioner's claim — like a constitutional challenge to the very existence of the tribunal.

2. Others Did Not Exhaust The Claims Raised Here

A second, narrow exception to the exhaustion doctrine that allows one who participated in an administrative hearing to raise issues others raised at that hearing. "An individual challenging a redevelopment plan need not have personally raised each issue at the administrative level, but may rely upon issues raised or objections made by others, even though they do not later join in the lawsuit, so long as the agency had the opportunity to respond. (*Leff v. City of Monterey Park* (1990) 218 Cal.App.3d 674, 682; *Evans, supra,* 128 Cal.App.4th at p. 1137.) The rationale for the exception is plain enough — an agency which has heard a claim need not suffer to hear it multiple times to ensure all who would sue can do so. Prolixity is no more beneficial to an administrative hearing than to a judicial one.

However, this is not so much an exception, but a rule allowing one who participates in a hearing and exhausts as to

some issues to also raise in court grounds others raised at the administrative hearing. The essential point is that the agency had sufficient notice of plaintiff's argument.

Sufficient notice has two aspects. First, a plaintiff's argument must be similar enough to the protests received by the agency in its hearing as to have given the agency sufficient notice of the argument. Second, the protests must be specific enough to allow the agency to respond.

The plaintiff in *Evans* sought judicial review of a plan adopted under the California Community Redevelopment Law. The plaintiff argued a preliminary report prepared by the consulting firm of Keyser Marston Associates, Inc. (KMA) to assess blight necessary to justify a redevelopment plan was flawed for several reasons, including flawed gathering and compilation of data. *Evans* explains exhaustion-by-others requires a plaintiff's argument to be similar to protests the agency received at its hearing:

> Although several people at the hearing and in written objections submitted during the administrative process questioned that there was blight in selected neighborhoods, there were no specific objections to the data-gathering and compiling methods of KMA or to the analysis in its report, and certainly nothing approaching the extensive and detailed objections presented by appellant. Under similar circumstances,

> courts have applied the doctrine of exhaustion of administrative remedies to preclude review.

Evans explains further that exhaustion-by-others requires the original complaints to be sufficiently specific to allow the agency to evaluate and respond to them:

> General complaints to the administrative agency that certain neighborhoods are not blighted are not sufficient to alert the agency to objections based on the method of data gathering and analysis employed by the writers of the report. Such general complaints do not allow the agency the opportunity to respond and to redress the alleged deficiencies. [Citation.] The administrative process does not contemplate that a party to an administrative hearing can make only a "skeleton" showing and thereafter "obtain an unlimited trial de novo, on expanded issues, in the reviewing court." [Citation.]

(*Evans, supra,* 128 Cal.App.4th at p. 1145.)

Appellants here can find no harbor in the exhaustion-by-others rule. No one raised at the hearing the challenges they now bring to the District's rate-making. As Respondents detail at page 24 of their Brief, the District received only nine written protests during its 2013 majority protest hearing — the last before Appellants filed this action. Only three of those mentioned sewer fees and even these simply expressed general opposition to any increase.

Local Government Amici concede that exhaustion by one is exhaustion by all. However, Appellant rate-payers cannot demonstrate exhaustion by any on the claims they assert here.

CONCLUSION

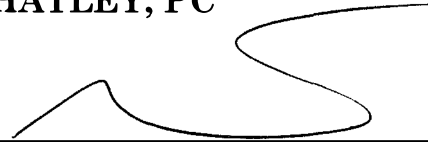
The protest hearings required by Proposition 218 cannot be ignored by those who would sue to challenge property related fees. Otherwise, the ills of which our Supreme Court warned in *Western States* will follow: hearings will become meaningless, courts will be overburdened, and agencies will lose opportunity to defuse disputes without suit and to apply their expertise to facilitate judicial review when dispute cannot be avoided. Emasculating Proposition 218 hearings will be costly to courts, agencies, and rate-payers. As nothing in the text of Proposition 218 requires deviation from the well-established principles of administrative law that prevent these results, those earlier principles continue.

The trial court appropriately concluded that Appellants cannot challenge the District's rates on theories neither they nor any other raised in the District's hearings. The duty to exhaust applies to claims under Proposition 218 just as to other constitutional claims.

The Local Government Amici respectfully urge this court to affirm.

DATED: February 8, 2017

COLANTUONO, HIGHSMITH & WHATLEY, PC



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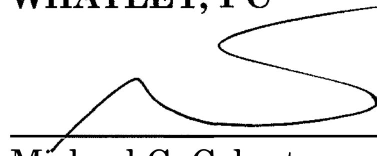
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the foregoing Brief of Amici Curiae in Support of Respondent contains 5,254 words, including footnotes, but excluding the Application, caption page, and tables. This is fewer than the 14,000 word limit set by rule 8.204(c)(1) of the California Rules of Court. In preparing this certificate, I relied on the word count generated by Word version 15, included in Microsoft Office 365 ProPlus 2013.

DATED: February 8, 2017

COLANTUONO, HIGHSMITH & WHATLEY, PC



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PROOF OF SERVICE

Eugene G. Plantier, et al., v. Ramona Municipal Water District
Fourth Appellate District, Division 1, Case No. D069798
San Diego County Superior Court Case No. 37-2014-00083195

I, Ashley A. Lloyd, declare:

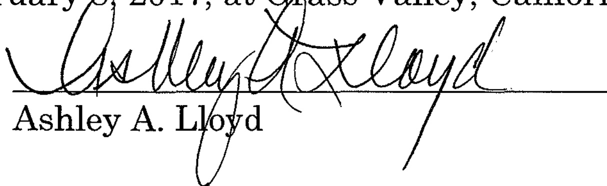
I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. On February 8, 2017, I served the document(s) described as **AMICI CURIAE BRIEF OF CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES & THE LEAGUE OF CALIFORNIA CITIES** on the interested parties in this action addressed as follows:

SEE ATTACHED LIST

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

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

Executed on February 8, 2017, at Grass Valley, California.



Ashley A. Lloyd

SERVICE LIST

Eugene G. Plantier, et al., v. Ramona Municipal Water District
Fourth Appellate District, Division 1, Case No. D069798
San Diego County Superior Court Case No. 37-2014-00083195

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