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August 22, 2017

VIA FEDEX

Hon. Chief Justice Tani Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: **Amicus Curiae Letter in Support of Request for Depublication of *Plantier v. Ramona Municipal Water District*, Case No. S243360**

Honorable Chief Justice and Associate Justices:

Pursuant to rule 8.1125(b) of the California Rules of Court, the California Association of Sanitation Agencies ("CASA"), the California Special Districts Association ("CSDA"), the California State Association of Counties ("CSAC"), and the League of California Cities ("League") (collectively "Local Government Amici"), support the request to depublish *Plantier v. Ramona Municipal Water District* (2017) 12 Cal.App.5th 856 ("Opinion") — if review is not granted. The Opinion holds that participation in the majority protest hearing required for new or increased fees under California Constitution article XIII D, section 6, subdivision (a) is not a prerequisite to a judicial review of such fees. The Opinion confounds basic principles of administrative law, creates uncertainty for local governments, and makes litigation more likely and more burdensome. It affects local governments across California and — given the relation of Propositions 218 and 26 — the State, too. The Opinion merits review or depublication because it conflicts with existing law by incorrectly suggesting that rate-making may not be a legislative activity and limits exhaustion of remedies to quasi-adjudicative actions. Local Government Amici separately support review.

I. INTEREST OF AMICI

Local Government Amici represent cities, counties, and special districts throughout California. CASA is a non-profit corporation comprised of more than 100

sewer agencies. CSDA is a non-profit corporation comprised of approximately 1,000 special districts. CSAC is a non-profit corporation composed of California's 58 counties. The League is an association of 475 California cities. Local Government Amici's members fund essential public services to Californians through user and other fees subject to notice and hearing procedures such as those established by Proposition 218, articles XIII C and XIII D of the California Constitution.[1] Most Local Government Amici members rely on property related fees like those at issue here — fees subject to article XIII D, section 6.

II. THE OPINION CREATES CONFUSION AS TO THE DUTY TO EXHAUST REMEDIES

Courts have long held that one seeking to challenge government action must participate in its decision-making process and limit suit to grounds presented to the decision-maker. This exhaustion of remedies doctrine applies to both quasi-legislative and quasi-judicial actions — although the procedures to be exhausted differ as between the two. Adjudicatory procedures must provide a participant an opportunity to prevail. (Slip Op. pp. 21–22 [citing cases involving quasi-judicial action].) Given the nature of our representative democracy, legislative procedures need not enable one who disagrees with legislators to impose his or her policy preferences. The reserved powers of initiative and referendum serve that function. Nevertheless, the exhaustion of remedies doctrine has been held to apply consistently to both legislative and quasi-judicial proceedings and generally requires all grounds and evidence to be presented to an administrative decision-maker before they may be raised in court.

Conflicting with precedent, the Opinion found article XIII D, section 6, subdivision (a)'s procedures unworthy of exhaustion because they are legislative in character despite their requirements of notice, a protest hearing, consideration of all protests, and suspension of the legislative effort if a majority protest arises. (Slip Op., at pp. 3, 11–13.) The Opinion conflates the ability to achieve a majority protest with the ability of even a single rate-payer to change decision-makers' minds. The Constitution's requirement to consider all protests creates far better odds of victory than is typical in the legislative context, as one usually has a right to be heard, but not a right to prevail. (Cf. Gov. Code, § 65590 [hearing procedures mandated by Planning and Zoning Law require hearings and findings but do not otherwise constrain legislative action], *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [discussing role of land use

[1] Further references to articles and sections of articles are to the California Constitution.

findings in facilitating judicial review].) As discussed at page 6 of this letter, the substantive requirements of article XIID, section 6 increase the odds of success even further. The Opinion erroneously confines exhaustion to half its sphere — limiting it to quasi-judicial, and not legislative, acts.

a. Established Law Requires Exhaustion to Preserve Separation of Powers

A long and unbroken line of cases apply the exhaustion rule to guard against ills this Court identified in *Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal.4th 559 (*"Western States"*) [judicial review of CARB regulations].) If the Opinion is the law, *Western States* teaches that the hearings article XIII D, section 6, subdivision (a) requires for property related fees will become meaningless, courts will be burdened by controversies local governments might defuse, and local governments will lose opportunity to apply expertise and to make legislative records to facilitate judicial review.

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

While Proposition 218 expressly adopts procedural and substantive requirements for water, sewer and trash charges (Cal. Const., art. XIII D, § 6, subd. (a), (b)), it did not change the roles of legislators and courts. (*Capistrano Taxpayers Ass'n v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1512–1513 (*"Capistrano"*) [Prop. 218 challenge to water rates].) No amendment to article VI or to article II of our Constitution appears in Proposition 218.

The exhaustion doctrine protects both legislative and adjudicative functions by allowing a legislative body to hear the evidence, apply its reasoned discretion and expertise, and create a record to facilitate judicial review. This is especially valuable in rate-making cases in which evidence and policies are highly technical. As this Court explained in a Proposition 103 dispute:

e. The Opinion Conflicts With *Wallich's Ranch*

Wallich's Ranch Co. v. Kern County Pest Control District (2001) 87 Cal.App.4th 878 ("*Wallich's Ranch*") required exhaustion of administrative remedies in a Proposition 218 challenge to a property related fee. Wallich's Ranch Company challenged an annual assessment on its citrus groves imposed under the Citrus Pest Control District Law (Food & Agric. Code, §§ 5401 et seq.) Noting that the assessment was statutorily required to be based on the district's budget, which was subject to notice and hearing, *Wallich's Ranch* concluded:

> 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.)

The Opinion's effort to distinguish *Wallich's Ranch* (at pp. 23–25) is unpersuasive. First, the Opinion notes: "the trial court in *Wallich's* [*Ranch*] found the district in that case was exempt from article XIII D (as a result of section 5, subdivision (a), which subdivision is not at issue in the instant case)". (Slip Op. p. 23.) However, the Court of Appeal in *Wallich's Ranch* did not find the assessment there to be excluded from Proposition 218.

Second, the Opinion cites *Capistrano,* noting it was decided "**without** discussing or analyzing whether the plaintiff exhausted its administrative remedy in subdivision (a) of section 6 by challenging the new water rates in writing beforehand and/or by appearing at the public hearing of the city." (Slip Op. p. 23, original emphasis added.) This, however, is irrelevant. *Capistrano* is persuasive authority for the legal issue it addresses. It is not

authority for those it does not. (E.g., *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [cases not authority for issues they do not consider].)

Third, the Opinion narrows *Wallich's Ranch* to its facts: "Unlike the pest control law [in *Wallich's Ranch*], section 6 does not require an agency such as District to hold an **annual** meeting." (Slip Op. p. 24, original emphasis.) "As such, if an agency such as District decided not to impose a new or increased fee or charge year over year, parcel owners like plaintiffs herein challenging the method used by an agency to determine such fees or charges would have no remedy, adequate or otherwise, under section 6 during such period." (*Ibid.*) Proposition 218 hearings must be conducted each time a rate is adopted or increased. (Cal. Const., art. XIII D, § 6, subd. (a).) They may be adjusted for inflation without further hearings for up to five years. (Gov. Code, §53756, subd. (a).) The distinction between annual hearings and those which occur upon increases or every five years is a legislative one — a line-drawing exercise. It is not of constitutional dimension. It proves no persuasive basis to distinguish *Wallich's Ranch* — especially as both this case and *Wallich's Ranch* involve property related fees subject to the notice and hearing requirements of article XIII D, section 6.

The tension between the Opinion and *Wallich's Ranch* is plain. Courts, litigants and local governments are left to wonder what aspects of *Wallich's Ranch's* facts required exhaustion and what aspects of the hearing requirements of article XIII D, section 6, subdivision (a) are insufficient to require it in other rate-making disputes — disputes which are common, as this Court's docket makes clear. (E.g., *City of San Buenaventura v. United Water Conservation District,* Case No. S2260306 [Prop. 218 & 26 challenge to groundwater charges; to be argued Sept. 6, 2017]; *Citizens for Fair REU Rates v. City of Redding,* Case No. 224779 [Prop. 26 challenge to electric rates; fully briefed as of July 21, 2015].)

III. CONCLUSION

Local Government Amici urge this Court to grant Ramona's request for depublication if it does not grant review. This Court can act to avoid an unfounded split in authority on exhaustion, to prevent confusion on the legislative nature of ratemaking,

and to maintain the long-standing application of the exhaustion doctrine to legislative, as well as quasi-adjudicative, acts.

Respectfully submitted,

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Enclosure: Proof of Service

PROOF OF SERVICE

Eugene G. Plantier, et al., v. Ramona Municipal Water District
Supreme Court Case No. S243360
Fourth District Court of Appeal, Division One, Case No. D069798
San Diego County Superior Court Case No. 37-2014-00083195

I, Georgia K. Gray, 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 August 22, 2017, I served the document described as **AMICUS CURIAE LETTER IN SUPPORT OF REQUEST FOR DEPUBLICATION OF *PLANTIER v. RAMONA MUNICIPAL WATER DISTRICT*** on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

X **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 August 22, 2017, at Grass Valley, California.

Georgia K. Gray

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SERVICE LIST

Eugene G. Plantier, et al., v. Ramona Municipal Water District
Supreme Court Case No. S243360
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