No. A152048

Exempt from Filing Fees
Government Code § 6103

In the Court of Appeal, State of California

FIRST APPELLATE DISTRICT, DIVISION ONE

Marin Municipal Water District
Respondent and Appellant,

vs.

Anne Walker
Petitioner and Respondent

On Appeal from the Superior Court of the State of California
County of Marin, Case No. CV1501914
Honorable Stephen P. Freccero, Judge Presiding

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT MARIN MUNICIPAL WATER DISTRICT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Other than property owners and residents receiving water services from the Marin Municipal Water District, there are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.488.

DATED: May 9, 2018

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Presiding Justice Jim Humes:

Pursuant to California Rules of Court, rule 8.520(f), the Association of California Water Agencies ("ACWA"), 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") respectfully request permission to file an amicus curiae brief in support of Petitioner Marin Municipal Water District. This application is timely made within 30 days of filing of the reply brief on the merits.

STATEMENT OF INTEREST OF AMICI CURIAE

Local Government Amici represent cities, counties, and special districts throughout California. ACWA is a statewide coalition of 450 public water agencies. CASA is a non-profit corporation representing more than 100 sewer agencies. CSDA is a non-profit corporation with a membership of over 800 special districts. CSAC is a non-profit corporation composed of California's 58 counties. The League is an association of 475 California cities. The public agency members of Local Government Amici fund essential public services to millions of Californians through user and other

fees subject to the notice and hearing procedures established by Proposition 218. (Cal. Const., art. XIII C & D.)[1] Local Government Amici's members often rely on property related fees like those at issue here — fees subject to article XIII D, section 6.

Each Local Government Amicus has a process to identify cases affecting its members that warrant its participation as amicus. ACWA has a Legal Affairs Committee, composed of attorneys from each of its regional divisions throughout the state. The Committee monitors litigation of significance to ACWA's members. CSDA has a Legal Advisory Working Group, comprised of 22 special district attorneys from all regions of the state. The Working Group monitors litigation of concern to special districts, identifying cases of statewide or national significance. CSAC sponsors a Litigation Coordination Program administered by the California County Counsels' Association. CSAC's Litigation Committee monitors litigation of concern to California's counties. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, identifying cases of statewide or national significance. ACWA, CSDA, CSAC, and the League have determined this case to be of importance to their members. CASA has made a similar determination. Accordingly, Local Government Amici

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[1] References to articles are to the California Constitution.

respectfully request leave to file the brief combined with this application.

DATED: May 9, 2018

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INTRODUCTION

The protest hearings required by Proposition 218's article XIII D, section 6 ("Section 6") cannot be ignored by those who challenge property related fees subject to it. Otherwise, the hearings it requires will become meaningless, courts will be overburdened, and agencies will lose the opportunity to defuse disputes without suit and to apply their expertise to facilitate judicial review when disputes cannot be avoided. The exhaustion of remedies doctrine applies to legislative and quasi-judicial decisions both. Failing to apply it to Proposition 218 challenges will prove costly to courts, agencies, and rate-payers. Because nothing in the text of Proposition 218 requires or suggests deviation from established exhaustion doctrine, that doctrine applies to challenges to property related fees subject to that measure.

California courts have long held that one challenging an agency's decision — legislative or quasi-judicial — must participate in its decision-making and demonstrate that the judicial challenge is on the same grounds and evidence as presented to agency decision-makers. Thus, when a noticed opportunity to be heard is provided, persons affected by a decision must appear at the hearing and provide the agency specific reasons and evidence why a challenged decision is wrong. Thus, would-be litigants are generally required to exhaust administrative remedies by presenting their facts and

arguments to local governing bodies before seeking relief from judges.

There are sound reasons for this requirement. Exhaustion of remedies ensures informed decision-making (by both those making the decision and those reviewing it); encourages public participation in government; and allows agencies to respond to criticism and concerns, to apply their expertise, and to develop records for judicial review. It protects courts from being drawn too readily and too soon into disputes the other branches might resolve without judicial assistance. Thus, the rule protects all those affected by a decision: supporters and opponents, local legislators, and judicial reviewers.

This case involves application of the long-standing exhaustion of remedies doctrine to challenges to service fees established to fund essential public services — such as water, sewer, and refuse collection. In 1996, Californians adopted Proposition 218, empowering voters by enacting limitations on local government taxes, assessments, and a newly defined class of "property related" fees. (Cal. Const., arts. XIII C & XIII D.) A local government cannot adopt a property related fee unless it complies with Proposition 218's procedural and substantive requirements, including a public hearing after 45 days' mailed notice to property owners. (Cal. Const., art. XIII D, § 6.) Section 6's procedural requirements in its subdivisions (a) and (c) "facilitate communications between a public water agency's board and its

customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's ... charges are excessive." (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220–221 ("*Bighorn*").)

Section 6's hearing requirements have led agencies to implement expensive and time-consuming procedures to impose new property related fees or to increase existing such 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;
- making public presentations or conducting workshops to educate the public as to the need for a new or increased fee;
- responding to public comments; and
- inviting a majority protest and holding at least one public hearing at which written protests may be submitted and counted.

Often set in conjunction with consideration of annual budgets, fee hearings are commonly local agencies' most heavily attended meetings. (E.g., *Wallich's Ranch v. Kern County Pest Control District* (2001) 87 Cal.App.4th 878 ("*Wallich's Ranch*") [requiring exhaustion

in budget hearing before challenge to assessment levied to fund that budget].)

Section 6's legislative process fosters informed local decision-making, encourages public participation in government, and ensures local governing bodies have adequate information upon which to act. It allows decision-makers to review the entire record, respond to constituency concerns, and apply their expertise before making decisions. It strengthens "the power-sharing arrangement" between local legislators and fee-payors our Supreme Court observed in Proposition 218. (*Bighorn, supra,* 39 Cal.4th at p. 220.)

ARGUMENT

I. THE EXHAUSTION REQUIREMENT PROMOTES EFFICIENCY, PUBLIC PARTICIPATION, AND JUDICIAL REVIEW

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

The exhaustion of administrative remedies requirement 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, it must be exhausted before judicial review 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 ("*Yamaha*"); *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 496–501 ("*Sierra Club*").)

The doctrine applies to constitutional challenges to legislative action, such as the Proposition 218 challenge to retail water rates here. (*Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 93 ("*Mountain View*") [exhaustion applies to constitutional challenge to zoning ordinance].) A 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 [CEQA exhaustion].) Exhaustion requires full presentation to the agency of all issues later to be litigated and the essential facts on which they rest. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609 [duty to exhaust PERB remedies before suit to enjoin strike].) It is jurisdictional, rather than a matter of judicial discretion. (*Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 687 [lawsuit barred even as to constitutional challenges because plaintiffs failed to object at hearing to assessment of cost to abate nuisance].)

B. 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.) Exhaustion is required, even of an administrative remedy that cannot resolve all issues or provide the precise relief sought,

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

(*Sierra Club, supra,* 21 Cal.4th at p. 501, citations omitted.)

Exhaustion requires more than generalized objections at a public hearing — 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 same standards as lawyers in court, but must make known what facts are contested].) For example, *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 686 rejected an attack on reports drafted by that city's financial expert because plaintiffs did not present a contrary 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.

These important public interests necessitate application of the exhaustion doctrine to challenges to rates established to fund essential public services.

C. The Exhaustion Doctrine Serves the Separation of Powers

The doctrine arises from the separation of powers fundamental to our democracy. (*County of Contra Costa, supra,* 177 Cal.App.3d at p. 76.) Legislative bodies of local agencies often make discretionary, policy choices from a range of lawful options. It is long settled that the establishment of service fees, such as those now subject to Section 6, is a legislative act. (*Kahn v. East Bay Mun. Util. Dist.* (1974) 41 Cal.App.3d 397, 409 [retail water rates]; *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"].) Neither Proposition 218, nor Proposition 13 before it, changed the legislative character of rate-making. (*Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Auth.* (2008) 44 Cal.4th 431,

444 [open space assessment]; *Brydon v. East Bay Muni. Utility Dist.* (1994) 24 Cal. App. 4th 178, 196 [retail water rates]; *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 368 [sewer rates].) While Proposition 218 changed the substantive requirements for utility charges, it did not change the respective roles of local legislators and courts. (*Capistrano Taxpayers Ass'n v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1512–1513 ("*Capistrano*"); see *San Diego County Water Authority v. Metropolitan Water District of Southern California* (2017) 12 Cal.App.5th 1124, 1149 ["[T]he courts do not weigh competing methodologies to determine the best water rates" but apply the appropriate standard of review to the agency's record] [applying Prop. 26].)

In light of the different institutional competencies of legislators and courts, judicial review of legislation is limited to the agency's record. (*Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal. 4th 559, 573 ("*Western States*").) The exhaustion doctrine and the *Western States* rule enhance judicial review by, inter alia, providing courts the benefit of an agency's expertise in preparing a full record, sifting the evidence, and, in some cases, evaluating the reports of competing experts. Further, it prevents parties from embroiling courts in political and policy disputes and imposing on them a function to which they are ill-suited — legislating rather than adjudicating. By distinguishing between record-making and record-reviewing, the exhaustion of administrative remedies doctrine

protects both legislative and adjudicative functions. It allows legislative bodies to hear the evidence, apply their reasoned discretion, and create records to facilitate judicial review, and it allows courts to review an agency decision on an adequate record supported by agency expertise.

D. Exhaustion Affords Agencies Opportunity to Address Public Concerns Before Courts Must

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 [charter city assessment], quoting *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.) "[E]xhaustion is not excused merely 'because the ultimate legal issues ... are better suited for determination by the courts.'"(*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 276.) Even constitutional challenges to an administrative scheme involving vested rights must be "presented to the administrative agency in the *first* instance."(*Ibid.*, original emphasis.) 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, supra,* 21 Cal.4th at p. 510.)

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

Wallich's Ranch, supra, 87 Cal.App.4th at p. 880, cited *Sun Pacific* in rejecting a Proposition 218 challenge to another citrus pest assessment for failure to exhaust administrative remedies in the district's budget hearing. We discuss *Wallich's Ranch* further *infra.*

E. 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. The plaintiff there was required to exhaust all local and federal remedies before seeking judicial review. (*Ibid.*) Thus, for example, and as further discussed in Section II C *infra,* even assuming the existence and

application of a statutory claim filing requirement to a suit for a fee refund, the exhaustion doctrine independently requires participation in the rate-making hearing. Moreover, as discussed in Section III C *infra*, claim and exhaustion requirements serve different policies and one cannot substitute for the other.

II. SECTION 6 ESTABLISHES AN ADMINISTRATIVE REMEDY FOR PROPERTY RELATED FEES

A. Section 6 Establishes Minimum Notice and Hearing Requirements

Section 6 establishes — in considerable detail — the minimum notice and hearing requirements for new or increased property related fees. (Cal. Const., art. XIII D, § 6, subds. (a) & (c); *Greene v. Marin County Flood Control and Water Conser. Dist.* (2010) 49 Cal. 4th 277, 285–286 [construing article XIII D, §§ 4 & 6].) Under Section 6:

> 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.

(*Id.* at p. 286 [construing Cal. Const., art. XIII D, § 6, subd. (a)].)

Walker claims Section 6, subdivision (a)'s procedures are inadequate to trigger the exhaustion requirement. (Respondent's Brief, p. 35.) Quoting *Unfair Fire Tax Committee v. City of Oakland* (2006) 136 Cal.App.4th 1424, [*Unfair Fire Tax*], Walker states, "A statute or regulation provides an adequate remedy only when it establishes 'clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties.'" (*Id.* at p. 1429.) Yet Section 6 does all of those things.

In *Unfair Fire Tax*, Oakland claimed its ordinance initiating proceedings to create a fire suppression assessment district created an administrative procedure to be exhausted before suit. (*Id.* at pp. 1426–1427.) The relevant provision of the ordinance provided only: "The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the City Council." (*Id.* at p. 1428.) The Court of Appeal found this insufficient to establish an administrative remedy that must be exhausted because it lacked any procedural mechanism for submission, evaluation and resolution of the appeal. (*Id.* at p. 1430.) The City asked the Court to take judicial notice of four different provisions of the municipal code that, read together with the ordinance in issue, detailed the city council appeal process. (*Ibid.*) The Court held the ordinance's multiple cross-references to statutes did not provide a "clearly defined machinery" for consideration of an appeal. (*Id.* at p. 1426.)

Walker cannot persuasively equate Oakland's one-sentence appeal provision with Section 6's detailed notice and hearing requirements, providing a rate-making body "shall consider all protests against the proposed fee or charge." (Cal. Const., art. XIII D, § 6, subd. (a)(2).) Unlike Oakland's ordinance, Section 6 affords potential opponents notice of the proposed fee or charge, a public hearing 45 days after mailed notice, a requirement the legislative body consider all protests at the public hearing, and opportunity to bar imposition of a fee or charge. Section 6's procedures are entire, requiring no cross-reference to other law. Section 6 provides the "clearly defined machinery" *Unfair Fire Tax* requires.

B. Section 6 Requires Agencies to "Consider All Protests"

A rate-making agency must "consider all protests," oral or written — even absent a majority protest. (Cal. Const., art. XIII D, § 6, subd. (a)(2).) The requirement to consider all protests is more than a mere counting exercise — it ensures the legislative body's consideration will be legally meaningful and prevents local governments from brushing aside protests for mere political expedience or delegating consideration to staff. The requirement also provides a local legislative body and the public opportunity to address and investigate cost-of-service issues before costly litigation. This "power sharing" between governors and the governed under

Proposition 218 promotes rate-making decisions that are "mutually acceptable and financially and legally sound." *(Bighorn, supra,* 39 Cal.4th at p. 220.) Exhaustion of administrative remedies advances this objective by requiring those who would hold government accountable to give government an opportunity to be accountable before asking courts to compel it.

Walker also cites *City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, and *Martino v. Concord Community Hospital Dist.* (1965) 233 Cal.App.2d 51, for the proposition that "[m]erely requiring an agency to consider a claim does not create an administrative remedy." (Respondent's Brief, p. 34.) This argument assumes the Constitutional requirement that the District "consider all protests" is a meaningless formality, as evidenced by the cases cited. This is not so and the voters who approved Proposition 218 should not be assumed to have approved a nullity.

None of these cases involve a noticed protest process comparable to the process established by Section 6. *City of Coachella v. Riverside County Airport Land Use Com., supra,* 210 Cal.App.3d at p. 1288 held, "While it is true that this rule **does** contain a mandatory provision requiring the scheduling of meetings, it is also true that the rule **does not** mandate that anything be done as a result of such meeting" (original emphasis). The court distinguished general

participation in a public meeting from statutes that require the body "to actually accept, evaluate and resolve disputes or complaints." (*Id.* at p. 1287.) *Lindelli v. Town of San Anselmo, supra,* 111 Cal.App.4th at p. 1106, similarly states, "The city council was not required to do anything in response to [opponents'] participation." *Martino v. Concord Community Hospital Dist., supra,* 233 Cal.App.2d 51, held the right to "file a request for appeal which will be disposed of in an unspecified manner by the executive committee of the medical staff" is a "nebulous procedure [that] cannot be deemed an adequate procedural remedy[.]" This last point is distinguishable as involving a quasi-judicial determination. As noted *infra,* exhaustion requires more in that context than in the legislative context here.

In contrast to the statutory provisions in the cases cited above, Section 6 imposes a substantive requirement on the District. The District must not only give notice and count written protests, but it must hold a hearing and "consider all protests" whether written or oral. The phrase "consider all protests" cannot be ignored, but rather must be construed to establish the Section 6 protest hearing as a meaningful opportunity to make and to consider objections to new or increased fees. (E.g., *Hensel Phelps Const. Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1034 ["[w]e will not adopt a statutory interpretation that renders meaningless a large part of the statutory language"].) Moreover, Section 6 provides that a majority protest prevents legislation entirely — allowing rate-payers to

impose their will without exercising the powers of initiative and referendum, typically the only ways to "prevail" in a legislative setting.

Thus, Walker does not persuade that Section 6's procedures are unworthy of exhaustion or that the policies served by exhaustion are not equally applicable here as in the other contexts to which "legion" cases have applied it.

III. SECTION 6'S ADMINISTRATIVE REMEDY MUST BE EXHAUSTED

A. *Wallich's Ranch* Applies Exhaustion to Proposition 218 Challenges

Wallich's Ranch applies the exhaustion doctrine to a Proposition 218 challenge to an assessment imposed under the Citrus Pest District Control Law (Food & Agric. Code, §§ 5401 et seq.) ("Pest Control Law").

That statute establishes a procedure for imposing annual pest control assessments on benefitted citrus groves. An assessment funds district operations and is based on a district's budget. (*Wallich's Ranch, supra,* 87 Cal.App.4th at p. 884.) The Pest Control Act provides for notice, opportunity to protest, and a hearing on the budget before assessments may be levied. (*Id.* 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 a final budget and to levy an

assessment to fund it. (Food & Agric. Code, § 8563.) Assessed landowners may submit written protests "at any time not later than the hour set for hearing objections to the proposed budget." (Food & Agric. Code, § 8564.) Like Section 6's requirement to "consider all protests," the Pest Control Law obliges a district board (not staff) "to hear and pass upon all protests so made" before adopting the budget and levying the assessment. (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 of Appeal emphasized the point:

> [T]he 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 here, where the Constitution itself provides the procedure to be exhausted.

B. Proposition 218 Changed the Burden of Proof and Standard of Review, But Did Not Displace the Exhaustion Doctrine

Proposition 218 changed the burden of proof and standard of review for property-related fee challenges, but left the exhaustion doctrine intact. The last sentence of Section 6, subdivision (b) provides: "[i]n 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) has a 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)].) Proposition 218 is silent as to procedural or jurisdictional prerequisites to suit — including exhaustion.

Had the voters who adopted Proposition 218 intended to alter the well-established exhaustion doctrine, they could have done so. Instead, Proposition 218 simply shifted the burden of proof and standard of review, leaving other procedural rules unchanged. This requires a conclusion voters intended to maintain those procedures. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1189 [Prop. 13 precedents undisturbed by Prop. 218 intended to be maintained].) This is but application of the familiar canon of construction 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"].)

IV. NEITHER FUTILITY NOR EXHAUSTION BY OTHERS SAVE RESPONDENTS HERE

Walker seeks refuge in two, narrow exceptions to the duty to exhaust, but neither is availing.

A. Exhaustion Would Not Have Been Futile

"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 a petitioner can positively state there is **no** possibility of a different 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 requirements would disappear, as litigants who sue without exhausting available remedies normally do so precisely because they believe favorable agency action is 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's litigation position that its assessment appeals board would have rejected claim]); cf. *Graham*

v. DaimlerChrysler Corp. (2004) 34 Cal.4th 553, 561 [claimant for catalyst fees under CCP § 1021.5 must offer to settle before suit to avoid perverse incentives].)

Again, *Wallich's Ranch* is instructive. That court rejected the petitioner's claim a Proposition 218 challenge to a pest control assessment would have been futile. (*Wallich's Ranch, supra,* 87 Cal.App.4th at p. 885.) The court 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 authority to consider a claim. Walker makes no such

showing here. The District had complete power to maintain existing rates, impose a smaller increase, or change its rate-making methodology had Walker persuaded it to do so.

B. Others Did Not Exhaust the Claims Walker Would Raise

A second, narrow, partial exception to the exhaustion doctrine allows one who participated in an administrative hearing to litigate issues others raised at that hearing. (*Leff v. City of Monterey Park* (1990) 218 Cal.App.3d 674, 682 ["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."]; *Evans, supra,* 128 Cal.App.4th at p. 1137.)

The rationale for the exception is simple — an agency which has heard a claim need not hear it multiple times to ensure all who have standing can sue on the grounds presented to the agency. Prolixity is no more beneficial to an administrative hearing than to a judicial one. The essential point is that the agency need only litigate after sufficient notice of a plaintiff's argument before making the decision the plaintiff would challenge.

Notice sufficient to satisfy the exhaustion requirement has two aspects. First, a plaintiff's argument must be sufficiently similar to the protests the agency received in its hearing as to have given it

notice of the argument. Second, protests to the agency must be sufficiently specific to allow it to respond.

In *Evans* the plaintiff sought judicial review of a redevelopment plan. She argued a preliminary report prepared by Keyser Marston Associates, Inc. ("KMA") to justify the plan was flawed for several reasons, including flawed data-gathering and compilation. *Evans* explains that exhaustion by others requires a plaintiff's argument to be similar to protests lodged at the agency's 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, supra,* 128 Cal.App.4th at p. 1144.) The concern, of course, is sand-bagging.

Evans further provides that exhaustion by others requires the original complaints be sufficiently specific to allow the agency to respond:

> 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. 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.'

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

Here, Walker can find no harbor in the exhaustion-by-others rule for two reasons. First, even though the notices were mailed to Walker's home, she attended none of the respondent District's many public hearings, nor did she submit any protest. (Opening Brief, p. 22.) Second, **no one** raised at the District's hearing the challenges Walker brought to court, not least because *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 — on which Walker relies — was years in the future when the respondent District made the challenged rates. As the administrative record reflects, the District received 104 written protests of its 2011 rate increase (AR, Vol. 49, Exh. 87, 14269–14273) and 102 written

protests of its 2012 increase (AR, Vol. 70, Exh. 240, 20330–20334). None challenged the District's 2012 tiered-rate structure.

Walker seeks to circumvent the rule entirely, claiming, "The District's rate increase hearing notices did not require that property owners explain or state any grounds for their protest to proposed rate increases."(Respondent's Brief, p. 43.) Thus, "If protesting at the District's rate increase hearings constitutes a separate and additional remedy to be exhausted before filing suit, then any of these dozens of protest letters submitted by putative class members satisfies this requirements." (Respondent's Brief, p. 44.) This reduces the exhaustion by others rule to a nullity.

Walker argues that any protest, regardless of the grounds, is sufficient to excuse her non-participation. That is not the law. Rather, the law requires the grounds upon which suit is brought to be sufficiently similar to the protests the agency received in its hearing to have given it notice of the issue of concern. (*Bohn v. Watson* (1954) 130 Cal.App.2d 24, 37 ["It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court"].) Here, general objections to the increase in rates lodged by other ratepayers did not place the District on notice as to Walker's specific challenge

to the District's tiered rates, Walker's claim evidences the very sand-bagging which is the core concern of the exhaustion requirement.

V. *PLANTIER* CONFUSES ESTABLISHED LAW

A. *Plantier* Mistakes the Purpose of Section 6's Majority Protest Hearing

The lower court ordered a new trial ("Order") in light of *Plantier v. Ramona Municipal Water District* (2017) 12 Cal.App.5th 856 ("*Plantier*") review granted, Sept. 13, 2017, Case No. S243360. That case was controlling below but not here, both because our Supreme Court has granted review (California Rules of Court, rule 8.112(d)) and because horizontal stare decisis is not an aspect of California law. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 456 [trial court not bound when appellate decisions diverge].) The trial court wrote:

> Although factually distinguishable in certain respects, the key legal holding in *Plantier* is that a substantive challenge to the method used to calculate fees [under Section 6, subdivision (b)] is "outside the scope of administrative remedies" set out in Section 6(a). In other words, although Proposition 218 provides a mechanism to protest fee increases, it does not provide for the resolution of constitutional challenges. This legal conclusion is directly contrary to the court's previous

order, which held that Petitioner was bound to raise her constitutional claim by participating in the rate proceedings before the District.

Plantier's interpretation of Section 6 is implausible. Voters imposed detailed notice and hearing requirements in its subdivision (a), and detailed substantive requirements in its subdivision (b) — plainly intending the two to inform one another. (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409 [water connection fee not subject to art. XIII D, § 6, subd. (b) because notice required by § 6, subd. (a)(1) not practicable].) Subdivision (a)(1) requires notice of "the basis upon which the amount of the proposed fee or charge was calculated" and "the reason for the fee or charge." Under subdivision (a)(2), "the agency shall consider all protests against the proposed fee or charge." Subdivision (b) provides substantive rules regarding the "calculation" of property related fees and the uses to which fee proceeds may be devoted. Fees may not exceed the cost of service ((b)(1)), be used for other purposes ((b)(2)), exceed the proportionate cost to serve any parcel ((b)(3)), charge for a service to be provided in the future ((b)(4)), or charge for a service provided to society generally, not just to property owners ((b)(5)). The two subdivisions are plainly intended to be enforced together and to inform one another. *Plantier*'s conclusion that the majority protest hearing of subdivision (a)

provides no forum to argue compliance with the substantive rate-making rules of subdivision (b) fails to persuade.

Section 6 states that, to impose or increase a fee, "an agency shall follow the procedures pursuant to this **section** ..., including, but not limited to" the notice and hearing provisions of subdivision (a)(1) and (2). (Emphasis added.) Section 6's procedures are **not** limited to those of subdivision (a), but include the requirement of subdivision (c) for an election and the requirement of subdivision (b)(5) that the agency bear the burden in a legal action to demonstrate compliance with article XIII D. Thus, reading Section 6 as a whole, as we must — and giving meaning to all of its provisions in context, as, too, is required — it is apparent that all the requirements of Section 6, procedural or substantive, are germane to the protest hearing under its subdivision (a). This is just as procedural and substantive considerations are at issue in a public hearing to consider a zone change under the Planning and Zoning Law or certification of an environmental impact report under CEQA. No hearing is isolated to process. Substance infuses all.

B. *Plantier* Incorrectly Suggests Walker Need not Participate in the Section 6 Hearing because a Majority Protest is Unlikely

Walker cites *Plantier* to argue Section 6's remedy is futile because it was impossible to (1) obtain a majority of written protests and (2) obtain written protests from ratepayers who would not benefit from the relief sought. (Respondent's Brief, pp. 38–41.) *Plantier* provides:

> It seems implausible plaintiffs would ever have been able to secure written opposition by a "majority" of parcel owners in order to trigger the primary administrative remedy in subdivision (a)(2) of section 6.
>
> Without the administrative remedy that requires a "majority" of parcel owners to protest in writing to the proposed "fee or charge," a parcel owner is left solely with the right to "protest" the proposed "fee or charge." Although subdivision (a)(2) requires the agency to "consider all protests" at the public meeting, we conclude merely having an agency consider a protest — without more — is insufficient to create a mandatory exhaustion requirement.

(*Plantier, supra,* 12 Cal.App.5th at p. 870.)

But *Plantier,* like Walker, is mistaken for two reasons. First, it confuses a meaningful ability to prevail — characteristic of hearings

on quasi-judicial matters — with meaningful quasi-legislative procedures, where one never has more than an opportunity to persuade. One can impose his will on a legislature only by initiative or referendum. Second, exhaustion is required whether or not the procedures in issue can afford complete relief. (*Yamaha, supra,* 195 Cal.App.3d at p. 657 [quasi-judicial proceeding before New Motor Vehicle Board].) Exhaustion in legislative contexts is not limited to those who might successfully persuade decision-makers. (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874–875.)

Even in failing to persuade, those who exhaust administrative procedures accomplish the doctrine's other purposes: making a record, inviting application of agency expertise, and limiting courts' exposure to political disputes. It is the journey, not the destination, that matters most here. The duty to raise issues regardless of the likelihood of victory is at the core of the exhaustion doctrine and is especially relevant in rate-making, where intertwined policy considerations of revenue stability and fairness compete with cost causation and administrable apportionment. It is always the case that those who bear the burden of the exhaustion requirement think they can get no traction in the hearings they would avoid.

To exonerate Walker here as the trial court does, renders the majority protest and public hearing requirements of Section 6 meaningless and undermines rather than serves the intent of the voters who adopted it. This Court should reverse the trial court's

grant of a new trial and order the reinstatement of its earlier decision.

C. *Plantier* Mistakenly Demands of Legislative Processes the "Comprehensive Scheme of Dispute Resolution" Required of Quasi-Judicial Processes

Plantier mistakenly applies the "comprehensive scheme" of dispute resolution procedures required in the quasi-judicial context to judicial review of legislation. Exhaustion is required in the legislative context not only because administrative procedures may resolve a dispute without judicial assistance, but to facilitate judicial review just as *Western States'* litigation-on-the-record rule does — developing a record, allowing an agency to apply its expertise, and discouraging sand-bagging. For these reasons, exhaustion is required before judicial review of legislative acts. (E.g., *Sun Pacific, supra,* 77 Cal.App.4th at p. 641 [vector district rate-making]; *Mountain View, supra,* 77 Cal.App.3d at p. 93 [sign ordinance].)

As discussed above, one never has the ability to "win" in a legislative setting; one can only persuade. Requiring a means for an administrative litigant to succeed makes sense in the quasi-judicial setting where there are necessarily winners and losers. It makes no sense in the legislative setting and is a fundamental error of *Plantier* — by applying a standard no legislative process can satisfy, it

effectively limits the exhaustion doctrine to the quasi-judicial context. This has never been the law.

D. *Plantier* Erroneously Suggests Rate-Making is Not Legislation

Plantier states:

> None of the parties sufficiently briefed or considered the issue of whether the actions of the District "in imposing or increasing any fee or charge" under section 6 were "legislative" as opposed to "administrative" in nature. (See *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1431–1432 [noting "[l]egislative actions are political in nature, 'declar[ing] a public purpose and mak[ing] provisions for the ways and means of its accomplishment,' " in contrast to administrative actions that "apply law that already exists to determine 'specific rights based upon specific facts ascertained from evidence adduced at a hearing,' " and further noting that, because an amendment of a general plan is deemed a legislative action, plaintiffs were not required to seek an amendment to the general plan to adequately exhaust their administrative remedies].) Nor was counsel at oral argument able to respond meaningfully to this issue on questioning by

> the panel. In any event, because we conclude the administrative remedies in section 6 are inadequate, we need not decide whether the District's actions were legislative, as opposed to administrative, in nature.

(*Plantier, supra,* 12 Cal.App.5th at p. 865, fn. 7, abridgements by Court of Appeal.)

This footnote is wrong in several respects. First, the law is clear that rate-making is legislation, as detailed above. Second, because the adequacy of administrative procedures in the legislative context cannot be judged by rules fashioned for quasi-judicial action, it **was** necessary for *Plantier* to resolve the issue. Indeed, its failure to do so is *Plantier*'s essential error. By applying exhaustion standards for adjudication to find legislative procedures insufficient, *Plantier* eliminates the benefits of exhaustion in legislative contexts. This Court should not repeat that error, but should instead reverse the new trial order and order reinstatement of the trial court's earlier decision.

CONCLUSION

The protest hearings required by Proposition 218's Section 6 cannot be ignored by those who would challenge property related fees. Otherwise, the ills this Court warned of in *Western States* will follow: hearings will become meaningless, courts will be overburdened, and agencies will lose the opportunity to defuse disputes without suit and to apply their expertise to facilitate

judicial review when disputes cannot be avoided. The exhaustion of remedies doctrine is applied to legislative and quasi-judicial decisions alike. Failing to apply it to Proposition 218 will be costly to courts, agencies, and rate-payers. Because nothing in the text of Proposition 218 requires or suggests deviation from the established exhaustion doctrine, the doctrine applies to property related fees subject to Section 6.

The Supreme Court has recently warned of reading Proposition 218 to reach ends it does not discuss. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 ["local agency" as defined in art. XIII C, § 1 did not reach voters acting by initiative]; *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191 ["property related service" as defined in art. XIII D, § 2 did not include groundwater augmentation].) So, too, here.

Throughout California, city councils, boards of supervisors, and boards of directors of special districts conduct noticed public hearings, listen to their constituents, consider oral and written protests (and expressions of support), and make vital governmental decisions. Those decisions are commonly subject to procedural requirements and substantive limitations imposed by law — such as those of Section 6. The "power-sharing arrangement" *Bighorn* found Proposition 218 to establish as to property related fees is perhaps more direct than, but not fundamentally different from, the power-sharing arrangements typical of other local legislative decision-

making schemas long subject to exhaustion of administrative remedies.

The trial court correctly held that Walker cannot challenge the District's rates on theories not raised at the District's protest hearing. The duty to exhaust applies to claims under Proposition 218 just as to other constitutional claims.

For these reasons, and for the reasons set forth in the District's briefs, the Local Government Amici respectfully urge this Court to reverse the grant of new trial and order reinstatement of the trial court's earlier ruling denying the writ for Walker's failure to exhaust administrative remedies. The duty to exhaust administrative remedies applies under Proposition 218 as in all other areas of local government legislative and quasi-judicial decision-making.

DATED: May 9 2018

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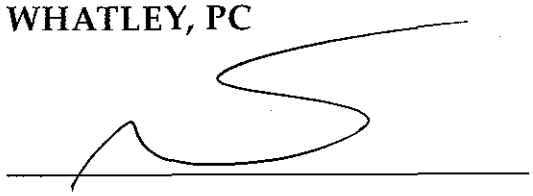

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(b) and 8.204(c), the foregoing Brief of Amicus Curiae in Support of Petitioner contains 7,389 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000-word limit set by rules 8.520(b) and 8.204(c). In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

DATED: May 9, 2018

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PROOF OF SERVICE

Marin Municipal Water District v. Anne Walker
First Appellate District, Division One Case No. A152048
Marin County Superior Court Case No. CV1501914

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 May 10, 2018, I served the document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT MARIN MUNICIPAL WATER DISTRICT** on the interested parties in this action addressed as follows:

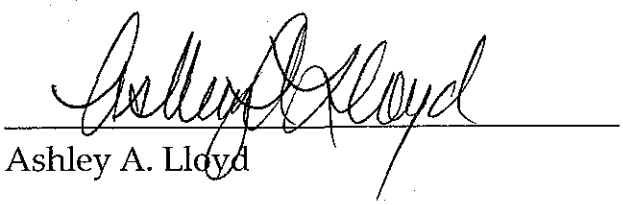
SEE ATTACHED LIST FOR METHOD OF SERVICE

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.

X **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on May 10, 2018, from the court authorized e-filing service at TrueFiling.com No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

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

Executed on May 10, 2018, at Grass Valley, California.



Ashley A. Lloyd

SERVICE LIST

Marin Municipal Water District v. Anne Walker
First Appellate District, Division One Case No. A152048
Marin County Superior Court Case No. CV1501914

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