No. D080308

In the Court of Appeal, State of California

FOURTH APPELLATE DISTRICT

DANIEL PATZ, et al.,
Plaintiffs and Cross-Appellants

vs.

CITY OF SAN DIEGO,
Defendant and Appellant

Appeal From the Superior Court of the State of California
County of San Diego, Case No. 37-2015-23413-CU-MC-CTL
Honorable Eddie C. Sturgeon, Presiding

BRIEF OF AMICI ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLANT AND CROSS-RESPONDENT CITY OF SAN DIEGO

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

These entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves:

Water customers of the City of San Diego.

DATED: May 19, 2023

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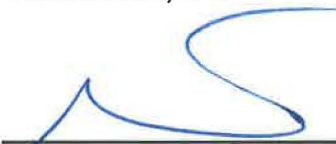

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INTRODUCTION AND SUMMARY OF ARGUMENT

California Constitution, article XIII D, section 6, adopted by 1996's Proposition 218, specifies many requirements for water, sewer and refuse removal fees, but not every detail. As to points it does not address, it preserves earlier law under the canon of construction disfavoring implied repeals. These unaddressed points include long-standing utility ratemaking practices which reasonably (but not perfectly) allocate costs among customers. Yet the trial court here demanded the "perfect data" this Court found both non-existent and unnecessary in *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892 ("*Morgan*"). It therefore rejected two routine ratemaking practices:

- assigning relatively inexpensive water supplies to efficient water uses and more expensive sources to less efficient use to make best use of scarce supplies — without tracing water molecules from source to tap; and,
- relying on peaking factors to assign costs among customer classes and to rate tiers without time-of-use data only recently available to a few, large utilities which can afford to deploy this new technology.

This is both bad public policy and a misreading of the law as to the evidence necessary to sustain rates and as to the nature of judicial review of legislative ratemaking.

Ratemakers need justify water rates only by a preponderance of the evidence and judicial review is for reason, not perfection. Due to the complexity of ratemaking, our Supreme Court emphasizes the need for flexibility. Flexibility is necessary so ratemakers may reasonably apportion costs among customers for the wide variety of utilities subject to our Constitution, the large and sophisticated and the small and under-resourced, both. For too-easy reversal in litigation can only multiply suits and impair governments' ability fund essential services.

Amici Curiae Association of California Water Agencies, California State Association of Counties, and League of California Cities (together, "Amici") respectfully request this Court to reverse and publish an opinion clarifying ratemakers' evidentiary standard and the standard of judicial review of legislative ratemaking under Articles XIII C and XIII D of our Constitution to protect their member entities and their ratepayers from needless litigation challenging long-standing, reasonable, ratemaking practices.

STATEMENT OF FACTS AND OF THE CASE

Amici incorporate by reference the statement of facts and procedural history of Appellant and Cross-Respondent City of San Diego's opening brief.

ARGUMENT

I. Ratemakers Need Only Justify Utility Rates By a Preponderance

Article XIII D, section 6, subdivision (b)(5)[1] assigns to local government the burden of proof in challenges to the property-related fees to which that article applies, including water, sewer and trash rates. It does not, however, state the evidentiary standard. Accordingly, the measure is understood to maintain earlier law. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1197 & fn. 19 ("*Sunset Beach*").) That earlier law, of course, is the basic rule of civil litigation that one who bears the burden to prove something need only do so by a preponderance unless some law states otherwise. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."].)

Only 14 years after the 1996 adoption of Proposition 218 did California voters specify in Proposition 26 a government's evidentiary burden as to these fees and charges. Although fees governed by Proposition 218 are not subject to that measure (Cal. Const., art. XIII C, § 1, subd. (e)(7)), the two measures are in pari materia (the later amends the earlier) and the text of each therefore is helpful to construe the other. (*California Cannabis*

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

Coalition v. City of Upland (2017) 3 Cal.5th 924, 941, 949; *Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 154 [in pari materia canon].)) Proposition 26 provides:

> The local government bears the burden of proving **by a preponderance of the evidence** that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear[s] a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

(Cal. Const., art. XIII C, § 1, subd. (e) [final par.].) Thus, when California voters did reach the evidentiary standard in 2010, they affirmed what was true in 1996 and earlier — the preponderance standard applies. Neither the clear and convincing evidentiary standard nor any other heightened evidentiary standard applies.

A preponderance, of course, requires only that the ratemaker's evidence outweigh its challenger's. (Evid. Code, §§ 500, 550; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) Thus, when the agency meets its burden to establish some evidence supporting its rates, the burden must shift to the challenger to identify some record evidence to the contrary; otherwise, the law requires judgment for the ratemaker. Of course, as here, a plaintiff may argue the agency has not met its prima facie burden. This

maintains what had been the law before the adoption of Proposition 26. *(California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 436 [the burden of producing evidence rests on the party with the burden of proof to make a prima facie case, then shifts to the other party to refute the case] [applying Prop. 13].)

Again, clear and convincing evidence is not required. Proposition 218 specifies the narrow circumstance to which a heightened evidentiary burden applies. (Cal. Const., art. XIII D, § 4, subd. (a) [exempting public property from assessment requires clear and convincing evidence it receives no benefit]; *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105 [*expressio unius* canon].) The *expressio unius* canon excludes application of any standard more demanding than the preponderance rule.

II. Whether a Revenue Measure is a Lawful Fee or Non-Voter-Approved Tax is a Question of Law

Of course, whether a revenue measure is a lawful fee or charge, or a tax unlawful absent voter approval, is a question of law. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 449 (*Silicon Valley*).) Thus, the City need only adduce evidence it reasonably assigned its service costs resulting in rates that reasonably reflect the cost of service. This Court owes no deference to the trial court's conclusion the challenged rates were, in fact, illicit taxes.

There is good public policy in this well-established law. First, it allows development of stable direction to ratemakers as to what the law expects rather than appellate decisions confined to a particular agency's facts. Second, it dovetails with the rule, discussed *infra*, that rates are reviewed on the agency's record, giving both the agency and its challengers incentive to make their records before the agency when it can make an informed decision, apply its expertise, and provide a fulsome record for judicial review. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572 ("*Western States*") [judicial review of agency legislative action confined to administrative record].) Finally, it preserves the role of appellate courts in developing the law, without the limitation of deferential review of trial-court fact-finding. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 139, fn. 4 [appellate courts review findings of "constitutional facts" without deference to protect role of appeal courts in construing Constitution]; *Pacific Tel. & Tel. Co. v. Public Utilities Commission* (1965) 62 Cal.2d 634, 646–648 [applying statute requiring Supreme Court to review PUC fact-finding in ratemaking context independently as to constitutional claims].)

Ultimately, what amounts to the reasonable cost-justification of rates Proposition 218 requires is a task for appellate courts to clarify unencumbered by trial courts' appraisal of administrative ratemaking records.

III. Given the Inherent Imprecision of Cost Allocation, Courts Review Rates for Reason, Allowing Flexibility

Proposition 218 is also silent as to the standard of judicial review in either trial or appellate courts. As stated above, that silence maintains earlier law. (*Sunset Beach, supra,* 209 Cal.App.4th at p. 1197, fn. 19.) Precedent both before and after the 1996 adoption of Proposition 218 affords flexibility to ratemakers. In *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 270 ("*Jacks*"), our Supreme Court held a city's franchise fee on a utility for use of rights-of-way was not a tax even when passed through to utility customers on bills. *Jacks* held that Proposition 218 requires ratemakers to show only a "reasonable relationship" between a franchise fee and real estate rights for which it is charged. (*Ibid*.)

Under Proposition 13 and common law, *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 193 ("*Brydon*") also applied a standard of reasonableness allowing flexibility to ratemakers. Our Supreme Court recently did the same when applying 2010's Proposition 26, which incorporates that earlier standard, to charges for groundwater augmentation: "cost allocations for services provided are to be judged by a standard of reasonableness with some flexibility permitted to account for system-wide complexity." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1213 ("*San Buenaventura*"), citing *Brydon*.)

Similarly, in a challenge to State Water Resources Control Board regulatory fees under Propositions 13 and 26, our high Court wrote: "an inherent component of reasonableness in this context is flexibility." (*California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1052 ("*CBIA v. SWRCB*").)

Proposition 218 cases apply these standards, too. (*KCSFV I v. Florin County Water Dist.* (2021) 64 Cal.App.5th 1015; *Capistrano Taxpayers Ass'n, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 ("*Capistrano*").) In *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 368, this Court upheld sewer rates even though the allocation of labor costs between sewer service and other City services was supported only by a supervisor's informal estimate of how workers spent their time. In *Morgan, supra,* 223 Cal.App.4th at p. 923, this Court upheld water rates despite a dispute as to the quality of the data used to allocate costs: "While it is clear the District's water measurement system is not perfect, [article XIII D,] section 6 does not require perfection."(*Ibid.*)

These standards are sensible for several reasons. **First**, ratemaking is exceedingly complex. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 293.) Courts are not well equipped to make the judgments it requires (*Ibid.*) No perfect data on which to make rates exists; thus, reasonable estimates and judgments are required. (*Morgan*, *supra*, 223 Cal.App.4th at pp. 918, 924.)

Second, separation of powers requires that courts judge legislative acts, not adopt them. (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 600–601 ("*Griffith II*") [courts judge only that rates are within lawmakers' allowable discretion], disapproved on other grounds by *San Buenaventura, supra*, 3 Cal.5th 1191; *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1149 [courts do not seek the "best" rates, but determine lawfulness of agency's rates].)

Third, the financial stability of local governments and of their essential services require predictable revenues. (*Friedland v. City of Long Beach* (1988) 62 Cal.App.4th 835, 851.) Yet, Proposition 218 provides for independent judgment review, which is inherently less predictable than more deferential standards. (*Silicon Valley, supra*, 44 Cal.4th at pp. 437, 444 [independent judgment review under Prop. 218]; *San Buenaventura v. United Water Conservation District* (2022) 79 Cal.App.5th 110, 119 (*San Buenaventura II*) [same under Prop. 26].) Inordinate uncertainty will not only destabilize municipal finance, but it will continue to encourage litigation.

The widely publicized trial court ruling here requiring more specific and granular data to justify rates than has long been the industry standard invites considerable uncertainty and, therefore, litigation risk and reduced predictability in government finance. When plaintiffs' and defense counsel cannot confidently and

consistently predict the outcome of disputes, litigation will multiply. And fees for such litigation will come from the very tax- and ratepayers Proposition 218 sought to aid. (*Griffith, supra*, 220 Cal.App.4th at pp. 597–599 [service cost includes all costs, including stranded debt for abandoned pipeline]; *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 647–648 ["Of course, what it costs to provide such services includes all the required costs of providing service, short-term and long-term, including operation, maintenance, financial, and capital expenditures."].) Agencies which fail to defend their fees will often pay attorneys' fees under Code of Civil Procedure, section 1021.5 — also at ratepayers' expense.

Independent judgment review for reasonable rate-making judgments, and allowing ratemakers flexibility to account for complexity, serves these policy goals. For, of course, the voters who approved Proposition 218 intended to limit utility rates to cost of service, not to drive them up inordinately in the effort. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230, 235 [Prop. 218 intended to protect tax- and ratepayers].)

IV. Rates May Distinguish Among Customers Based On Peak Use Without Time-of-Use Data

Water ratemakers have long relied on so-called "peaking factors" to allocate costs among customers. (See American Water Works Association, Principles of Water Rates, Fees and Charges,

6th ed. (2012) ("AWWA"), p. 313–321; 1 ARA 338–346.[2]) Yet time of use data — "big data"[3] recording how much use each customer makes of a utility for each moment measured — is a novelty yet applied by few agencies.[4] So, peaking factors are derived from a utility's own data or from national and regional data regarding the peaking characteristics of particular classes of water users, such as residential, commercial, industrial and irrigation.

First, it is useful to define our terms. The time of greatest demand on a utility system — perhaps the afternoon of a hot summer day — is known as "peak demand." (AWWA, *supra*, at pp. 76, 95, 117; 1 ARA 101, 120, 142.) It is much more expensive to deliver a volume of water instantaneously at times of peak demand than it would be to deliver that same volume over time — meeting peak demand requires bigger pipes, more storge, greater supplies

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[2] Citations to the Appellant's Reply Appendix are in the form [volume] ARA [page(s)].

[3] The "big data" concept and its challenges are discussed here: https://www.oracle.com/uk/big-data/what-is-big-data/ (as of May 19, 2023).

[4] A discussion of the new application of this concept to power rates in the United Kingdom appears here: https://www.thegreenage.co.uk/tech/time-of-use-tariffs/#:~:text=Time%20of%20use%20tariffs%20are,higher%20rates%20at%20popular%20times. (as of May 19, 2023).

and larger treatment facilities than does meeting average demand. (AWWA, *supra*, at pp. 62, 83, 112; 1 ARA 87, 108, 137.) These larger facilities require more capital to acquire and to build and more labor to maintain and to operate. So, ratemakers divide operating and capital costs into those associated with meeting average demand and those required to meet peak demands. (AWWA, *supra*, at pp. 62, 83; 1 ARA 87, 108.) Peak demand costs are the incremental costs an agency incurs to build, maintain, and operate larger facilities needed to meet the peak demand. (AWWA, *supra*, at p. 112; 1 ARA 137.)

The "cost causation" ratemaking principle holds that it is appropriate to assign a cost to the customer, or class of customers, who or which causes the utility to incur it. (AWWA, *supra*, at p. 129, 130, 137, 138, 255; 1 ARA 154, 155, 162, 163, 280; see also *National Ass'n of Greeting Card Publishers v. U.S. Postal Service* (1983) 462 U.S. 810, 826 [cost causation principle applied to postal rates].) This is both fair and rational, as it sends a price signal that will discourage the most costly uses, containing costs for the benefit of all ratepayers. (E.g., *Panoche Energy Center, LLC v. Pacific Gas & Electric Co.* (2016) 1 Cal.App.5th 68, 78 [Air Resources Board effort to send price signal to deter greenhouse gas generation].)

This is true of **all** utility costs — customer classes impose particular costs on utilities to different degrees and are therefore allocated different shares of various costs. (AWWA, *supra*, at p. 76, 94–95; 1 ARA 101, 119–120; *KN Energy, Inc. v. F.E.R.C.* (D.C. Cir.

1992) 968 F.2d 1295, 1300 ["It has been traditionally required that all approved rates reflect to some degree the costs actually caused by the customer who must pay them."].)

To cite another example, residential customers typically impose more on customer-service staff per unit of water sold than large industrial water users like breweries, thus residential classes are typically assigned more of these so-called "customer" costs. (AWWA, *supra*, at pp. 62, 77, 79, 92, 94–95, 100, 318; 1 ARA 87, 102, 104, 117, 119–120, 125, 343.) Accordingly, it is appropriate to charge residential customers using an "increasing (tiered) block rate structure." (AWWA, *supra*, at p. 92; 1 ARA 117.)

Peak demand and "peaking factors" (i.e., the ratio of a class's peak water use to its average use) are widely used in the water industry to allocate capital and other costs. (AWWA, *supra*, at pp. 3, 314, 319; 1 ARA 28, 339, 344.) So, for example, industrial use of water tends to be consistent over time and less affected by weather than other uses. (AWWA, *supra*, at p. 115; 1 ARA 140.) Residential use varies with weather, especially water used to irrigate landscapes. And agricultural and other irrigation uses are seasonal. As residential and irrigation uses have higher peaking characteristics, a ratemaker can reasonably determine they should bear a larger share of peaking costs. (AWWA, *supra*, at p. 76, 100; 1 ARA 101, 125.)

Ratemakers and their water industry clients have long relied on such factors. (E.g., Xiaoyi Zhang, Steven Buchberger, Jakobus

van Zyl (2005) A Theoretical Explanation for Peaking Factors, Proceedings of World Water and Environmental Resources Congress, American Society of Civil Engineers [peaking factors have been used in water ratemaking for 100 years] < https://ascelibrary.org/doi/10.1061/40792%28173%2951 > (as of May 19, 2023); see Federal Energy Regulatory Commission Order on Rehearing, 137 FERC ¶ 61,075 at pp. 19, 20 [cost-causation is a long-standing rate-making principle].)

As nothing in Proposition 218 indicates the voters intended to require more than reasonableness in accounting for service costs, they cannot be understood to have intended to outlaw this long-standing practice. (*Sunset Beach, supra,* 209 Cal.App.4th at pp. 1192, 1198 & fn. 19 [Prop. 218 does not impliedly repeal earlier law].)

This practice well predates the advent of the "big data" that allow some well-funded agencies to use time-of-use metering. Even large agencies like San Diego lack time-of-use data on customer-by-customer and class-by-class bases. (*Morgan, supra*, 223 Cal.App.3d at p. 900 (district lacked "particularized volumetric use data"); *Abatti v. Imperial Irrigation District* (2020) 52 Cal.App.5th 236, 268 [IID had uniquely "sophisticated computerized data system for recording how much water is delivered" but data was "not necessarily accurate".) Moreover, our Constitution provides standards for **all** water utilities — large and small, well-resourced and underfunded. We need not collect time-of-use data to make reasonable judgments

about how different classes of customers use water — industry standards and reason are sufficient to distinguish them.

The trial court's demand for time-of-use data is error because it is unsupported by the language of Proposition 218 and underestimates the complexity of ratemaking. It imagines an easy solution to the difficult task of judicial review of legislative ratemaking — it demands the "perfect data" *Morgan* acknowledges does not exist. (*Morgan*, *supra*, 223 Cal.App.4th at p. 918; *Griffith II*, *supra*, 220 Cal.App.4th at p. 601 [rejecting contention that Proposition 218 requires a "finely calibrated apportionment" of costs].) Instead, the solution to the daunting task of such review is found in the basic tools of judging — burdens of proof and standards of review. Courts review rates only for reason, allowing flexibility to the ratemaker given the inherent complexity of the task. The lower court's demand for more perfect data ignores *Morgan* and *Griffith II,* and is reminiscent of "the CSI effect" attributable to television crime dramas in which some jurors require iron-clad scientific evidence to convict in criminal cases — ignoring the more realistic evidentiary requirements of the Evidence Code.

Furthermore, cost allocation — an essential element of ratemaking — can never have the precision the trial court, plaintiff Patz and his Amici demand. Precedent finds the ratemaking steps recommended by the AWWA manual — described below — to satisfy Propositions 13 and 218. (*Hansen v. City of San Buenaventura*

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(1986) 42 Cal.3d 1172, 1181 [describing ratemaking process and upholding resulting rates under common law and Prop. 13]; *Griffith, supra,* 220 Cal.App.4th at p. 600 [AWWA Manual ratemaking process satisfies Prop. 218].)

The AWWA Manual's approach to ratemaking, affirmed in both *Hansen* and *Griffith* has these steps:

1. IDENTIFY THE REVENUE REQUIREMENT: An agency first identifies its total cost to provide service, subtracting any non-rate revenues available to fund it, to arrive at a "net revenue requirement." (*Griffith, supr*a, 220 Cal.App.4th at p. 600.)
2. ALLOCATE THE REVENUE REQUIREMENT TO FUNCTIONS AND TO CUSTOMER CLASSES: Next, the agency allocates its service costs to its essential functions — like water supply, distribution, treatment, and customer service. This produces so-called "functionalized costs." (AWWA, *supra*, at p. 61; 1 ARA 86.) Functionalized costs are then allocated to customer classes based on their relative demand for those functions — an application of the cost-causation principle. So, for example, residential customers are assigned more customer service costs than others, as discussed *supra*
3. RATE DESIGN: Once each class's share of functionalized costs is determined, rates are developed to recover those

costs from that class. (AWWA, *supra*, at pp. 89, 91; 1 ARA 114, 116.)

The parties dispute here the second and third steps — allocating the City's functionalized costs to customer classes and developing rates for each class. All three steps require estimates drawn from such sources as budgets (themselves projections), historical financial data, and projections from available information about water supply and weather. (AWWA, *supra*, at p. 95; 1 ARA 120; *Southern California Edison Co. v. Public Utilities Commission* (1978) 20 Cal.3d 813, 839 ["the basic system of ratemaking is to estimate the rate base, … estimate the costs of the utility, and to set the rates to provide revenues to cover … costs."] (dis. opn. of Clark, J.).) Yes, water ratemaking amounts to predicting the weather because we use more water when it is hot and dry than when it is rainy and cool, and supplies are more plentiful (and cheaper) in wet years than in dry. Those who are skeptical of rates resist the discretion involved here, claiming the ratemaker "is making this all up." Yet, how else to do it? Using the best available information and data to make reasonable projections and estimates is how the industry has long made rates. These industry standards are long-standing for good reason — they reflect the best thinking of the ratemaking profession and its clients over decades. (AWWA, *supra*, at p. xvii [Acknowledgments: Rate and Charge Committee, Editorial Committee, and various other contributors]; 1 ARA 22.)

Such estimates are necessarily wrong most of the time — they will be high or low when compared to subsequent events — no one predicts the future accurately. (*Southern California Edison, supra,* 20 Cal.3d at p. 839 ["the entire system of ratemaking is based on estimates of what the future will hold, and it is obvious that the estimates will rarely, if ever, be exactly realized"] (dis. opn. of Clark, J.).) Accordingly, estimates need not be prescient, only reasonable when made. (*CBIA v. SWRCB, supra*, 4 Cal.5th at pp. 1050–1051 [upholding regulatory fees which exceeded actual costs by 3 percent because estimates reasonable when made]; *Morgan, supra,* 223 Cal.App.4th at pp. 916, 918 [allowing "reasonably accurate" estimates].) Demanding "perfect data" of inherently imprecise estimates and judgments ignores the fundamental nature of ratemaking and imagines a simpler world than we live in. Our Supreme Court has not done so. (E.g., *CBIA v. SWRCB, supra,* 4 Cal.5th at p. 1052.) Nor should this Court.

Thus, there can be no one right answer to the legislative task of ratemaking. Neither Patz's pro-flat-rates Amici nor the City's pro-tiered-rates Amici have a monopoly on policy arguments. But the City Council was elected to choose among them and the Constitution affords it discretion to do so.

The law requires only reasonable judgments based on some evidence, allowing flexibility and a variety of approaches. The Constitution is not offended if one agency or Amicus prefers

uniform rates across all customers and extensive conservation efforts (at some cost), while others prefer to require those who use water inefficiently to bear more of the agency's burden of their profligate use — purposefully using price signals to discourage waste. (*Capistrano, supra,* 235 Cal.App.4th at p. 1511 [Prop. 218 allows, but does not require, tiered rates to discourage water waste].) The Constitution **is** offended when plaintiffs encourage courts to intrude on the discretion our democracy affords legislators. (*Western States supra,* 9 Cal.4th at p. 572 [litigation-on-the-record rule serves separation of powers].) Also, nothing in Proposition 218 — or 26, for that matter — alters the separation of powers article III established or the judicial function article VI defines. But it does limit article II to authorize initiatives affecting taxes notwithstanding article II, sections 8 and 9. (Cal. Const., art. XIII C, § 3.) Thus, the *expressio unius* rule requires a reading of Proposition 218 that preserves articles III and VI intact.

So, how ought a court to review the rationale and evidence for water rates? For reasonableness and some evidence. (*CBIA v. SWRCB, supra,* 4 Cal.5th at p. 1050.) And that evidence can include longstanding ratemaking practices of the water industry and expert opinion,[5] both of which support the use of peaking factors even

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[5] While Amici must take the case as they find it, they note that allowing post hoc expert evidence to impeach an administrative record, as occurred here and in *Malott v. Summerland Community*

without expensive and often unavailable time-of-use data. Such evidence supports reasonable projections and estimates of demands on a water system, reflects how costs are incurred, and in turn, how they may be allocated.

Further, requiring absolute precision when setting tiered rates sacrifices the "good" for the "perfect." If agencies are prohibited from establishing tiered rates unless such rates are based on precise and perfect data, many agencies will be limited to uniform rates. While some agencies may desire uniform rates, others with infrastructure and capital costs driven by large water users may be forced to subsidize large water users by uniform rates on large and small users alike. But this Court found in *Capistrano* that Proposition 218 is intended to protect "lower-than-average users from having to pay rates that are higher than the cost of service for them because those rates cover capital investments their levels of consumption do not make necessary." (*Capistrano, supra*, 235 Cal.App.4th at p. 1503.)

In short, the trial court's demand for time-of-use data is prejudicial error this Court should correct.

Services District (2020) 55 Cal.App.5th 1102 violates the litigation-on-the-record rule and the separation of powers which underlies it. (*Western States, supra*, 9 Cal.4th at p. 572.)

V. Ratemakers May Assign Supplies Without Tracing Water Molecules

No utility can trace water from its source to a user unless it has but one source (rare and risky, in our drought-ridden state) or it has distinct distribution systems for each source (an expensive impracticality). Yet, this Court has accepted that it is a "very good idea" to assign the cheapest sources to lower rate tiers to recover the most essential (interior residential use) or most efficient uses of water at the lowest price and to assign more costly, marginal supplies to higher rate tiers to recover the higher costs of less essential and less efficient uses (like wasteful water use that grows mushrooms on verdant lawns in drought). (*Capistrano, supra*, 235 Cal.App.4th at p. 1511.)

This cost-allocation strategy, too, is long-standing. (E.g., *Hansen, supra,* 42 Cal.3d at p. 1186 [lawful under Prop. 13 and common law to charge customers for water supply they could not access directly].) It is supported by expertise and industry standards. The AWWA advocates use of "generally accepted cost-based principles and methodologies for establishing rates." (AWWA, *supra,* at p. 3; 1 ARA 28.) The "base-extra capacity" approach to cost-allocation is widely used. (*Id*. at p. 61; 8 ARA 86.) Both parties' experts here support its use. Dr. Robert Smith, Patz's expert, stated he is unaware of any other cost allocation methods besides commodity-demand and base-extra capacity methods — asserting

the City used the latter. (Smith Deposition, 8 AA 2427–2428.) Ann Tu-Anh Bui, the City's expert, testified the base-extra capacity method of cost allocation is an industry standard. (Bui Deposition, 11 AA 2997.)

Given the shear complexity of ratemaking, simplifying assumptions are necessary — especially in a large, complex city like San Diego with its quarter-million water accounts. Demanding time-of-use data and tracing of water molecules from source to customer would strip ratemakers of tools long used to balance competing goals, including:

- efficiency (i.e., not spending more on cost allocation and billing than is reasonable);
- equity (treating like customers alike and different customers differently);
- social goals (ensuring water needed for health and sanitation is affordable to as many as possible); and
- article X, section 2's mandate to avoid water waste.

Again, precedent allows ratemakers "flexibility" (*CBIA v. SWRCB, supra,* 4 Cal.5th at p. 1052), and stripping them of it will make it much harder to manage limited water supplies in recurrent droughts. If judicial review is unrealistically demanding, only uniform rates of *x* cents per unit of water will be safe from suit. For, again, there are "no perfect data." (*Morgan*, *supra*, 223 Cal.App.4th at p. 918.) Uniform rates do not discourage water waste, but treat waste

and essential water use alike. Nothing in Proposition 218's demand that rates not exceed the reasonable cost of service requires equivalence between water used for health and safety and that used to grow unwanted mushrooms.

If price signals to discourage waste are forbidden, agencies will have to resort to command-and-control regulation and penalties to contain demand in drought. Indeed, in wealthy communities in which price signals are ineffective, this has been the recent result. (Hayley Smith, Sean Greene, "Kim Kardashian, Kevin Hart and Sylvester Stallone Accused of Drought Restriction Violation," (Aug. 2022) Los Angeles Times, (< www.latimes.com/california/story/2022-08-22/kim-kardashian-kevin-hart-california-drought-water-waste> [as of May 19, 2023).) Given the libertarian impulse that animates Proposition 218, this would be an ironic outcome indeed.

CONCLUSION

Accordingly, Amici urge this Court to reverse and remand with instructions to grant judgment for the City. It should publish its ruling to augment the sparse law guiding water ratemakers under Propositions 218 and 26. And that opinion should reflect these rules of decision:

a. An agency meets its burden in a Proposition 218 or 26 rate challenge by producing an administrative record that demonstrates the rates are reasonable and

supported by at least some evidence. When it has done so, the burden shifts to the challenger to cite record evidence sufficient to rebut the agency's case. If the challenger does not, the agency must prevail.

b. Review is independent, but allows ratemakers flexibility, requiring they show only that rates are reasonably related to cost of service. And when ratemaking estimates prove wrong (as they nearly always will) no Constitutional violation arises if surpluses remain in the utility fund to reduce future rates and shortages are accounted there to be covered by future rates. (*CBIA v. SWRCB, supra,* 4 Cal.5th at p. 1037.) Flexibility and a rule of reason are no less vital to water ratemakers than to those who craft franchise fees (*Jacks, supra,* 3 Cal.5th at p. 293) or regulatory fees (*CBIA v. SWRCB*, *supra*, 4 Cal.5th at p. 1052).

c. Peaking characteristics of water use — supported by time-of-use data or not — are an allowable tool to allocate costs and to design rates. Peaking characteristics are a reasonable means to avoid cross-subsidies among water users.

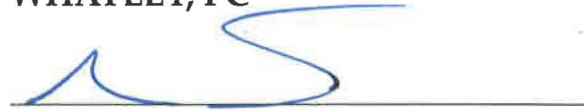
d. Ratemakers need not trace water molecules from source to use to allocate relatively cheap supplies to efficient or

essential uses, and relatively expensive supplies to other uses.

Respectfully submitted,

DATED: May 19, 2023

COLANTUONO, HIGHSMITH & WHATLEY, PC



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CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204

I certify that, under rule 8.204(c)(1) of the California Rules of Court, this Amicus Brief is produced using 13-point type and contains 5,297 words including footnotes, but excluding the application for leave to file, tables, and this Certificate, fewer than the 14,000 words permitted by the rule. In preparing this Certification, I relied upon the word count generated by Microsoft Word for Office 365, included in Microsoft Office 365 Pro Plus.

DATED: May 19, 2023

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PROOF OF SERVICE

Daniel Patz, et al. v. City of San Diego
Fourth District Court of Appeal, Division 1 Case No. D080308 San Diego County Superior Court Case No. 37-2015-0023413

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. My email address is: ALloyd@chwlaw.us. On May 19, 2023, I served the document(s) described as **BRIEF OF AMICI ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLANT AND CROSS-RESPONDENT CITY OF SAN DIEGO** on the interested parties in this action addressed as follows:

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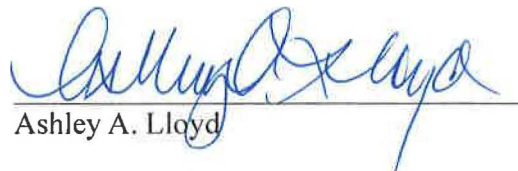

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