No. S243360

Exempt from Filing Fees
Government Code §6103

IN THE SUPREME COURT OF CALIFORNIA

Eugene G. Plantier, et al.,

Plaintiffs, Appellants, and Respondents,

v.

Ramona Municipal Water District,

Defendant, Respondent, and Petitioner.

After a Published Decision by the Court of Appeal
Fourth District, Division One, Case No. D069798

On Appeal From the Superior Court of the State of California
County of San Diego, Case No. 37-2014-00083195-CU-BT-CTL
Honorable Timothy Taylor, Judge Presiding

APPLICATION & AMICUS CURIAE BRIEF OF MARIN MUNICIPAL WATER DISTRICT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.488, the Marin Municipal Water District and its undersigned counsel certify that, apart from the attorneys representing it (as listed on the cover of this brief) and the property owners and residents receiving services from the Ramona Municipal Water District, they know of no other person or entity that has a financial or other interest in the outcome of the proceeding.

Dated: February 28, 2018

BERTRAND, FOX, ELLIOT, OSMAN & WENZEL

By: _____

Thomas F. Bertrand
Attorneys for Applicant/Amicus Curiae
Marin Municipal Water District

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Tani Cantil-Sakauye:

Pursuant to California Rules of Court, Rule 8.520, subdivision (f), the Marin Municipal Water District respectfully requests permission to file an amicus curiae brief in support of Petitioner Ramona Municipal Water District. This application is timely made within 30 days of the filing of the reply brief on the merits.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Marin Municipal Water District in 1912 received its charter as the first municipal water district in California. The District serves the populous eastern corridor of Marin County from the Golden Gate Bridge northward up to, but not including, Novato, and is bounded by the San Francisco Bay in the east and stretches through the San Geronimo Valley to the west. The incorporated cities and towns of San Rafael, Mill Valley, Fairfax, San Anselmo, Ross, Larkspur, Corte Madera, Tiburon, Belvedere, and Sausalito are within the District's 147 square-mile service area.

The District provides high-quality drinking water to over 187,000 customers through over 60,000 accounts. Seventy-five percent of the District's water comes from more than 21,000 acres of protected watershed which flows into one of seven reservoirs and is then treated at one of the District's potable water treatment plants before being delivered to

residential and commercial customers. The District over the years has implemented robust conservation and recycled water programs to maximize the use of local resources and increase water supply reliability.

Currently, the District is the respondent in Marin County Superior Court Action Number CIV-1501914, *Anne Walker v. Marin Municipal Water District*, a Code of Civil Procedure Section 1085 writ action in which petitioner Walker challenged the District's 2011 and 2012 water rate ordinances, contending that the rates violated subdivision (b)(3) of Section 6 of Article XIII D of the California Constitution (Proposition 218). While promulgating the challenged water rate ordinances, the District went to great lengths and expense to comply with all Proposition 218 notice and hearing requirements, including holding numerous hearings and public workshops, none of which Walker bothered to attend. Nor did Walker ever file any type of written protest as provided for by Proposition 218 or otherwise give written or oral notice to the District of any alleged problems with its proposed water rate ordinances. The District then enacted its rate-setting ordinances in 2011 and 2012, securing the revenue necessary to meet its budgetary needs in each of those two years. Four years later, Walker filed a writ action challenging the validity of those ordinances.

On April 7, 2017, the Marin Superior Court filed an exhaustively-researched, 13-page Order Denying Petition For A Writ of Mandate based upon petitioner Walker's failure to exhaust her administrative remedies

under Proposition 218. Judgment was entered in the District's favor on April 21, 2017. However, the Fourth District Court of Appeal's opinion in *Plantier v. Ramona Municipal Water District* (2017) 12 Cal.App.5th 856 was published shortly thereafter. The Marin Superior Court subsequently granted Walker's request for a new trial and vacated the judgment decided in the District's favor, solely on the ground that the Fourth District Court of Appeal's *Plantier* decision "addresses the same issues as th[e] court's April 6, 2017 order, but reaches a different result." The District filed its Notice of Appeal to the First District Court of Appeal (Case No. A152048) on July 25, 2017, appealing the Marin Superior Court's order granting a new trial and vacating the judgment. That appeal is pending.

The duty to exhaust administrative remedies under Proposition 218 is an issue of State-wide importance to numerous local public entities such as applicant Marin Municipal Water District. Accordingly, applicant District respectively requests leave to file its amicus brief that is combined with this application.

Dated: February 28, 2018

BERTRAND, FOX, ELLIOT, OSMAN & WENZEL

By: _____

Thomas F. Bertrand
Attorneys for Applicant/Amicus Curiae
Marin Municipal Water District

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I.

INTRODUCTION

This case presents the important question of law as to whether a fee payer must first exhaust administrative remedies by participating in the majority protest hearing procedures required for proposed new or increased property-related fees under California Constitution Article XIII D, Section 6, Subdivision (a) (Proposition 218) before challenging the propriety of such fees.

The Fourth District Court of Appeal's Opinion in this case (*Plantier v. Ramona Water District* (2017) 12 Cal.App.5th 856, review granted, hereinafter "the Opinion") is a flawed decision containing multiple legal infirmities. It also directly conflicts with the Fifth District Court of Appeal's decision in *Wallich's Ranch Co. v. Kern County Pest Control District* (2001) 87 Cal.App.4th 878.

As the following authorities and argument demonstrate, significant policy and societal interests compel that the exhaustion doctrine be applied to Proposition 218 cases. The exhaustion doctrine protects both legislative and adjudicative functions by allowing a legislative body to hear the evidence, apply its reasoned discretion and expertise and create a record to facilitate judicial review. This is especially critical in the complex area of rate-making, which is so closely intertwined with many local agencies' budgetary processes.

The duty to exhaust administrative remedies under Proposition 218 is an issue of State-wide importance. Clarity and consistency are particularly wanting in this area affecting all fee-payers, cities, counties, and special districts throughout California. The exhaustion doctrine is grounded in the separation of powers fundamental to our democracy. A long and unbroken line of cases holds that the exhaustion doctrine guards against ills this Court identified in *Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal.4th 559. Absent application of the exhaustion doctrine, hearings on property-related fees required under Article XIII D, Section 6, Subdivision (a) will become meaningless, courts and local governments will be burdened by suits those governments could have avoided, local governments will lose all opportunity to apply their expertise and to make legislative records facilitating judicial review, and local agencies will be impaired in their ability to provide their customers with stable rates and reliable services.

II.

ARGUMENT

Prior to Proposition 218's enactment in 1996, locally-elected governing bodies held most of the power over local revenue-raising measures. Proposition 218 shifted the power over taxation to residents and property owners and specifically gave them the power to prevent or reduce any local tax, assessment, or fee. Proposition 218 ensures a fee imposed

upon property owners shall not be extended, imposed, or increased by any agency unless certain substantive requirements are satisfied. Revenues derived from the fee cannot exceed the funds required to provide the property-related service. (Cal. Const., Art. XIII D, § 6(b)(1).) The amount of the fee imposed on any parcel or person as an incident of property ownership cannot exceed the proportional cost of the service attributable to the parcel. (§ 6(b)(3).) No fee may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. (§ 6(b)(4).) A fee may not be imposed for general government services where the service is available to the public at large in substantially the same manner as it is to property owners. (§ 6(b)(5).)

Significantly, pursuant to Section 6, subdivision (a)(1), local agencies must also comply with the following mandatory procedures before imposing or increasing any fee or charge: (1) identify the parcels on which a fee is proposed; (2) calculate the amount of the fee; and (3) provide written notice by mail of the proposed fee to the record owner of each identified parcel. (§ 6(a)(1).) The written notice must provide the amount of the fee proposed upon each parcel, the basis upon which the proposed fee was calculated, the reason for the fee, and the date, time, and location of the public hearing on the proposed fee. (*Ibid.*)

Section 6 also requires that not less than 45 days after mailing the notice, the agency shall conduct a public hearing regarding the proposed

fee. At this hearing, the agency must consider all protests against the proposed fee. If a majority of the owners of the identified parcels present written protests to the fee, the agency cannot impose the fee. (§ 6(a)(2).) If the agency votes to impose a fee, it has the burden to establish it complied with all of the provisions of Proposition 218. (§ 6(b)(5).)

The foregoing requirements of Proposition 218 have led local government agencies to implement extensive procedures to support, explain, and publicize their rate-setting methodologies and needs for services provided to the public. Many agencies set new or increased fees in conjunction with adoption of an annual budget, and the fee hearings conducted by the agencies are commonly the most heavily attended meetings of the year.

Proposition 218 imposes both substantive and procedural requirements upon the rate-making process. At issue in this case are the procedural requirements which are imposed upon both the local agency and the rate-payer seeking to challenge the agency's proposed rates. These are reciprocal requirements, to be fulfilled by both sides. When a rate-payer fails to uphold his or her part of the procedural requirements under Proposition 218's legislative scheme, then application of the administrative remedy doctrine properly occurs.

A. The Exhaustion Of Administrative Remedy Doctrine

It is well-settled that if an administrative remedy is provided by statute, it must be invoked and exhausted before judicial review of administrative action is available. (*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd.* (1973) 8 Cal.3d 792, 794.) Exhaustion requires a full presentation to the administrative agency of all issues later to be litigated. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.App.4th 597, 609.) This rule is not a matter of judicial discretion, but is rather jurisdictional. (*Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 687 [lawsuit barred because plaintiffs failed to object at city council hearing to an assessment to abate a public nuisance on their property].) "[E]ven where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief." (*Ibid.*, quoting *United States v. Superior Court* (1941) 19 Cal.2d 189, 195.)

"'[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, quoting *Rojo v. Kliger* (1990)

52 Cal.3d 65, 72.) "'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, 1138 [judicial review of charter city assessment], quoting *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.) Even where the administrative remedy may not resolve all issues or provide the precise relief a plaintiff seeks, exhaustion is nevertheless required "because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency." [Citation.] It can serve as a preliminary administrative sifting process [Citation], unearthing the relevant evidence and providing a record which the court may review. [Citation.]'" (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874-75, citations omitted).

While not a Proposition 218 case but a tax appeal case, this Court very recently in *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258 strongly reaffirmed the purpose and application of the exhaustion rule. Stated this Court in its opinion:

> The exhaustion rule "'is not a matter of judicial discretion, but is a fundamental rule of procedure . . . binding upon all courts.'" (*Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 321, 25 Cal.Rptr.3d 320, 106 P.3d 976 (*Campbell*).) We have explained that "[t]he exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not

> interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary). [Citations]." (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391, 6 Cal.Rptr.2d 487, 826 P.2d 730; see also *Rojo v. Kliger* (1990) 52 Cal.3d 65, 83, 276 Cal.Rptr. 130, 801 P.2d 373 [explaining that the exhaustion doctrine advances policy interests such as "easing the burden on the court system, maximizing the use of administrative agency expertise and capability to order and monitor corrective measures, and providing a more economical and less formal means of resolving [a] dispute"]; *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240, 230 Cal.Rptr. 382 [observing that the exhaustion doctrine "'facilitates the development of a complete record that draws on administrative expertise'" and affords "a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review"].)
> (*Id.* at p. 1268.)

Concluded this Court in *Williams & Fickett*:

> Application of the exhaustion rule to the circumstances present here also advances the purposes served by the exhaustion of administrative remedies requirement in general. . . . Where exhaustion is excused, therefore, the predictable result is stale claims like the one before the court in this case. The passage of time can make these claims difficult to adjudicate; it also hinders counties' ability to predict and budget for revenue. (Emphasis added.)
> (*Id.* At pp. 1272–73.)

B. Proposition 218's Administrative Remedy For Rate-Payers

On the local agency's side of the legislative scheme, Article XIII D, Section 6 mandates the following expensive, time-consuming, and robust procedural requirements for new or increased property-related fees:

- Retention of legal and financial advisors, including rate consultants and cost-of-service experts, to provide the record justification for rates required by Article XIII D, Section 6, Subdivision (b)(5) [agency bears burden of proof on fees];
- Development of fee structures to fairly apportion the revenue requirement according to service characteristics reasonably attributable to different classes of users to satisfy the mandate of Article XIII D, Section 6, Subdivision (b)(3);
- Preparing and mailing detailed notices to property owners as required by Article XIII D, Section 6, Subdivision (a)(1);
- Conducting a majority protest hearing on 45-days' mailed notice to all affected customers pursuant to Article XIII D, Section 6, Subdivision (a)(2);
- Responding to public comments as required by Article XIII D, Section 6, Subdivision (a)(2) ["At the public hearing, the agency shall consider all protests against the proposed fee or charge."]; and
- Abandoning the proposed new or increased fee if a majority protest is lodged as required by Article XIII D, Section 6, Subdivision (a)(2).

Thus, local agencies are required to "conduct a public hearing upon the proposed fee or charge." (Cal. Const., Art. XIII D, § 6(a)(2).) They are further required to "consider all protests against the proposed fee or charge" and, if protests had been presented by a majority of owners of the identified parcels, the agency could "not impose the fee or charge." (*Ibid.*) Regardless of whether there is a majority protest, the public hearing and protest requirement for Proposition 218 challenges is mandatory so that local boards of small public agencies have ample opportunity to address and investigate cost-of-service issues before costly litigation brought by ratepayers occurs. (See *Hensel Phelps Const. Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1034 ["We will not adopt a statutory interpretation that renders meaningless a large part of the statutory language."].)

As to the procedural requirements applicable to rate-payers, Proposition 218 shifted significant power away from local governing bodies and put it in the hands of residents and property owners – their participation alone can mandate an outcome. Participation in the public hearing is the centerpiece of Proposition 218's procedural requirements applicable to rate-payers. The constitutional mandate is for the agency board to "consider all protests," not just those of a majority. (§ 6(a)(2).) Rate-payers are required procedurally, at a minimum, to participate in the process by at least lodging a written or oral protest during the rate-making

process. A local agency is unable to consider a protest not made. Any contention that a rate-payer is free to ignore Proposition 218's procedural requirement of lodging a written or oral protest would eviscerate this significant part of Article XIII D, Section 6.

The *Wallich's Ranch* decision of the Fifth District Court of Appeal involved a rate-payer who failed to participate in any way in the rate-making process there involved. Plaintiff Wallich's Ranch alleged, among other things, that the Citrus Pest Control Law (Food & Agr. Code, 5401 et. seq.) violated Proposition 218, specifically Articles XIII C & XIII D (see 87 Cal.App.4th at pp. 878, 882). It was held in *Wallich's Ranch* that plaintiff failed to establish "it had exhausted its administrative remedies, a jurisdictional prerequisite to judicial consideration of the issues." (*Wallich's Ranch*, *supra*, 87 Cal.App.4th at p. 883.) Since the Pest Control Law provided for notice, opportunity to protest, and hearing on the question of the adoption of the proposed budget, the appropriate procedure to oppose the assessment was to challenge the district budget, "at which time the district has an opportunity to address the perceived problems and formulate a resolution." (*Id.* at p. 885.) Accordingly, plaintiff's failure there to "protest or provide any testimony in opposition to the district's budget for any of the fiscal years in question" barred its lawsuit. (*Ibid.*)[1]

[1] While the protest procedures under the Pest Control Law are similar to (continued . . .)

"Administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum." (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.App.4th 489, 510; *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 641 [the proper method of challenging the effectiveness of the plan was "to first exhaust one's remedies by challenging the budget before the district. If the challenge is not initiated then, the district has no opportunity to address the merits of the protest and to modify the plan (and the budget) accordingly."].) As the *Wallich's Ranch* decision (87 Cal.App.4th at p. 885) held:

> The right to protest an assessment after the budget is fixed would be an idle act and could accomplish nothing. The performance of an idle act need not be required.

The time for rate-payers to exercise their right to protest proposed rate ordinances is during the Proposition 218 hearings, when local agencies consider the proposed rates and are required to consider any and all protests. Allowing any rate-payer to bypass the Proposition 218 hearing process and years later proceed to court (seeking a refund) disserves Article XIII D, Section 6 of the Constitution. *Evans v. City of San Jose* (2005) 128

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those in Proposition 218, Proposition 218 goes further to provide that a majority protest bars approval of a proposed fee. This makes the administrative remedy provided by Proposition 218 a more powerful tool, and the need to exhaust this administrative remedy even more justified.

Cal.App.4th 1123, a municipal revenues case, recognized: "The purposes of the [exhaustion] doctrine are not satisfied if the objections are not sufficiently specific so as to allow the Agency the opportunity to evaluate and respond to them." (*Ibid.*, quoting *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447; see also *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198 ["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."]; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019–20 [all legitimate issues must be presented to the agency "to preserve the integrity" of the proceedings and "to endow them with a dignity beyond that of a mere shadow-play"]; see also *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 686 [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."].)

Nor can a rate-payer claim the so-called "futility" exception to the exhaustion requirement. "Futility is a narrow exception to the general rule." (*Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 683.) The duty to exhaust a statutory remedy is required unless it could be positively stated

that the local agency had declared what the ruling or enactment was going to be in a particular case. (See *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418 [requiring that it be absolutely clear that exhausting administrative remedies would be of no use whatsoever]; see also *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 691 [collecting cases to illustrate the limited circumstances governed by the futility exception].) The exception does not apply simply because favorable agency action is unlikely or even if the agency rejected the desired outcome in earlier cases. If courts excused exhaustion on this ground, the exhaustion requirements would practically disappear, since litigants normally go to court without having exhausted remedies precisely because they believe favorable agency action is unlikely (or they simply prefer to litigate). (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313–14 [cannot infer from county position in court that its assessment appeals board would have rejected plaintiff's claim].)

Proposition 218 hearings are some of the most significant hearings held by the local agency on behalf of rate-payers. They involve extensive preparation by the agency to estimate the anticipated costs and revenues of its utility system. The fees to be charged property owners flow from the

agency's annual budget.[2] The Proposition 218 hearings are attended by agency staff and expert consultants marshalled on behalf of all the rate-payers, and the agency is obliged to consider any protest. This is the opportunity for rate-payers to exercise their right to protest rates and to propose alternatives. The rate-payer's procedurally-required participation will permit the agency to address any claims, develop a factual record, apply its expertise and that of its consultants and allow the community as a whole to consider and weigh in on the claims. The agency and its ratepayers otherwise are denied the opportunity to receive and respond to any objections, and no rate-payer should years later be rewarded by any decision from the Court on those claims which have been withheld from the agency's hearings. Doing so would impoverish the agency's hearings and burden both trial courts and appellate courts years later with newly-stated claims on which the agency had no opportunity to apply its expertise to aid judicial review.

Proposition 218's administrative remedy is designed for legislation like rate-making. It is not like the remedies commonly found in the quasi-judicial context, in which a party has a claim to be appealed from one

[2] See footnote 3 (*infra*, at pp. 22) and the authorities there cited holding that a local agency's adoption of its budget, just like rate-making, is a legislative act.