No. S243360

IN THE
SUPREME COURT OF CALIFORNIA

EUGENE G. PLANTIER
AS TRUSTEE OF THE PLANTIER FAMILY TRUST et al.,
Plaintiffs and Appellants,

v.

RAMONA MUNICIPAL WATER DISTRICT,
Defendant and Respondent.

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

On Appeal from the Superior Court of the County of San Diego
The Honorable Timothy B. Taylor, Judge
Case No. 37-2014-00083195-CU-BT-CTL

RESPONDENTS' RESPONSE TO AMICUS CURIAE BRIEFS OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, ASSOCIATION OF CALIFORNIA WATER AGENCIES, AND MARIN MUNICIPAL WATER DISTRICT

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I. INTRODUCTION

Plaintiffs and Respondents provide this response to the Amici Curiae briefs submitted by 1) Marin Municipal Water District, ("Marin District") and 2) League of California Cities, California State Association of Counties, California Association of Sanitation Agencies, California Special Districts Association, and Association of California Water Agencies ("Local Government Amicus") (collectively "District Amici").

District Amici largely echo the arguments of Petitioner Ramona Municipal Water District. And, like Petitioner, District Amici fail to address relevant authority on the key issue before this Court: whether Proposition 218 (Cal. Const., art. XIII D), section 6, subdivision (a) creates an administrative remedy that must be exhausted as a jurisdictional prerequisite to bringing a lawsuit under section 6, subdivision (b).

District Amici admit that there is no express exhaustion requirement in section 6, subdivision (a). This Court must imply an exhaustion requirement if one is to exist. But it is inconsistent with the language of Proposition 218, and the voter intent, to make it harder for fee-payors to challenge property-related fees by implication. Contrary to the arguments of District Amici, Proposition 218 was not intended to create a "two-way street," or "reciprocal obligations" for government agencies and fee-payors. Instead, the intent was to make it harder for government

agencies to impose or increase property-related fees, and easier for fee-payors to challenge those fees in court.

The criticisms of the Court of Appeal's opinion by District Amici also fall flat. The Court of Appeal correctly applied relevant authority regarding the requirements for an administrative remedy. The Court of Appeal correctly rejected the trial court's reliance on *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 87 Cal.App.4th 878 [104 Cal.Rptr.2d 875]. The Court of Appeal's opinion is well-reasoned and should be affirmed.

District Amici also parrot Petitioner's arguments regarding application of the futility exception and the principle of exhaustion by others. But the record is clear that if Plaintiffs failed to exhaust any remedy provided by Proposition 218, they satisfied the general principles of exhaustion, any further exhaustion would be futile, and they can rely on the exhaustion of other fee-payors.

Plaintiffs respectfully request that this Court affirm the Court of Appeal's decision.

II. THE INTERPRETATION OF SECTION 6 ADVOCATED BY DISTRICT AMICI IS INCONSISTENT WITH THE PLAIN LANGUAGE AND VOTER INTENT OF PROPOSITION 218

The Court applies "similar principles when construing constitutional provisions and statutes, including those enacted through voter initiative." (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933 [401

P.3d 49, 222 Cal.Rptr.3d 210]; *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006, 1010 [96 Cal.Rptr.2d 246].) The Court's task is to give effect to the intent or purpose of the provision. (*California Cannabis*, 3 Cal.5th p. 933.) Like a statute, the ordinary meaning of the words of a voter initiative govern the Court's interpretation. (*Keller*, 80 Cal.App.4th at p. 1010.) If the intended purpose is not clear from the language, the Court "may consider extrinsic sources, such as an initiative's ballot materials." (*California Cannabis*, 3 Cal.5th at p. 934.) The Court "generally presume[s] electors are aware of existing law." (*Id.*) The Court applies a *de novo* standard of review when construing the provisions of a voter initiative. (*Id.*)

District Amici ask the Court to interpret section 6, subdivision (a) of article XIII D as an administrative remedy that must be exhausted before bringing a challenge to the substantive constitutionality of a property-related fee under section 6, subdivision (b). This interpretation ignores the plain language of section 6, and directly contradicts the express intent of the voters in passing Proposition 218.

A. The Plain Language of Section 6 Does Not Support District Amici's Interpretation

Section 6, subdivision (a) of article XIII D states:

> (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or

> increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:
>
> (1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.
>
> (2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(Cal. Const., art. XIII D, § 6, subd. (a).)

Nothing in this provision suggests that the voters intended to create an exhaustion procedure that would require a fee-payor to submit a protest to a fee increase as a prerequisite to filing a lawsuit challenging whether the fee itself meets the requirements of section 6, subdivision (b). As this Court recently recognized in *California Cannabis*, "when an initiative's intended purpose includes imposing requirements on voters, evidence of such a purpose is clear." (*California Cannabis*, *supra*, 3 Cal.5th at p. 943.)

In *California Cannabis*, the Court addressed the question of whether the voter initiative enacted as California Constitution, article XIII C, which limits the ability of "local governments ... to impose, extend, or increase any general tax," prohibits voters from imposing taxes by way of a ballot initiative. (*Id.* at p. 930.) Construing the text of article XIII C and extrinsic evidence of voter intent, including the ballot pamphlet, the Court held that article XIII C did not limit voters' ability to impose a tax by ballot initiative. (*Id.* at p. 931.) The Court noted that the restrictions in article XIII D applied expressly to "local governments," and local governments could not be construed to include the voters. (*Id.* at p. 939.) The Court declined to extend the restrictions to the voters by implication in the absence of "an unambiguous indication that a provision's purpose was to constrain the initiative power." (*Id.* at p. 945.)

District Amici acknowledge that section 6 does not contain language that imposes an exhaustion requirement: "Proposition 218 is silent about procedural or jurisdictional prerequisites to suit – including exhaustion." (Local Government Amicus Br., p. 29.) The Court should similarly reject the request of District Amici to imply an exhaustion requirement in section 6, subdivision (a), where there is nothing in the text to support it. The voters could have easily included an express exhaustion requirement, but they did not.

Many statutes contain express requirements for exhaustion. For example, the California Environmental Quality Act expressly requires that the "alleged grounds for noncompliance" be "presented to the public agency orally or in writing by any person during the public comment period" before a person can bring a lawsuit. (Cal. Pub. Resources Code § 21177, subd. (a).) Petitioner's Legislative Code contains similar language expressly requiring exhaustion:

> Any person desiring to challenge any provision of this chapter must submit the grounds for challenge with supporting authority in writing, to the Board of Directors of the District for consideration. ***Failure to do so shall be grounds to bar any subsequent suit on the grounds of failure to exhaust administrative remedies.***

(7 AA 1259; 7 AA 1280 [emphasis added].)[1]

Petitioner's exhaustion requirement, rooted in the Government Code, pre-dates Proposition 218. (*Id.*) When construing a ballot initiative, courts presume that voters are aware of existing law. (*California Cannabis*, *supra*, 3 Cal.5th at p. 934.) It is reasonable to assume that voters were already aware that government agencies like Petitioner had their own administrative remedies, and there was no need to add a separate remedy that would be duplicative and impose an unnecessary and additional burden on fee-payors.

[1] It is undisputed that Plaintiffs complied with this exhaustion requirement. (8 AA 1594; 8 AA 1653.)

If voters wanted the notice and hearing procedure in section 6, subdivision (a) to create a mandatory administrative remedy, they could have included language that would make that purpose clear. (*California Cannabis*, *supra*, 3 Cal.5th at p. 943.) They did not. The Court should not imply an exhaustion requirement in section 6, subdivision (a).

B. The Voters Did Not Intend Proposition 218 to Create a "Two-Way Street" or "Reciprocal" Obligations for Voters

District Amici echo Petitioner's argument that Proposition 218 somehow created a "two-way street" imposing "reciprocal" obligations on government agencies and voters. There is no evidence in the history of Proposition 218 that supports this argument. Instead, Proposition 218 was designed to make it ***harder*** for local agencies to impose and increase property-related fees, and ***easier*** for fee-payors to challenge those fees. (*Silicon Valley Taxpayers Assn. v. Santa Clara Open Space Auth.* (2008) 44 Cal.4th 431, 446 [79 Cal.Rptr.3d 312, 187 P.3d 37].) "[T]he ballot materials explained to the voters that Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; ***make it easier for taxpayers to win lawsuits***; and limit the methods by which local governments exact revenue from taxpayers without their consent." (*Id.* at p. 448 [emphasis

added].) The notion that Proposition 218 somehow created a partnership between fee-payors and local agencies with reciprocal rights and obligations is entirely inconsistent with the expressed voter intent. The explicit goal of Proposition 218 was to shift power to fee-payors and increase the burden on local agencies.

District Amici complain about this burden, pointing out that to comply with Proposition 218 they must meet rigorous standards for analyzing, justifying, and obtaining approval for fee increases, sometimes on an annual basis. No doubt District Amici and other government agencies would prefer that their jobs were easier, but the fact that they must comply with these rigorous standards simply demonstrates that Proposition 218 is working as intended. It does not mean that the courts should imply an exhaustion requirement on fee-payors that is not in the language of Proposition 218 to somehow balance the burden.

District Amici argue that section 6, subdivision (a) will be rendered meaningless if a fee-payor can challenge the constitutionality of a fee even if the fee-payor did not attend a Proposition 218 hearing on a rate increase. But their complaints about how much work they must put into proposing a rate increase demonstrate that section 6, subdivision (a) has substantial meaning and is effective in carrying out the voters' intent. This argument is also entirely speculative. Proposition 218 has been the law for nearly 22 years, and no court has ever

interpreted section 6, subdivision (a) to be an administrative remedy. Nonetheless, local agencies have continued to operate and provide services to their constituents.

The argument that allowing a fee-payor to challenge the substance of a fee without first attending a fee increase hearing would violate the principle of separation of powers is also unfounded. The substantive requirements for fees in section 6, subdivision (b) "are contained in constitutional provisions of dignity at least equal to the constitutional separation of powers provision." (*Silicon Valley Taxpayers, supra,* 44 Cal.4th 431 at p. 448.) Proposition 218 expressly shifted power away from legislative agencies by changing the burden of proof for compliance with section 6, subdivision (b), and removing the traditional deference granted to local agency decisions. (*Id.* p. 444 ["The drafters of Proposition 218 specifically targeted this deferential standard of review for change."].)

District Amici do not address a glaring problem with their interpretation of section 6, subdivision (a) raised in Plaintiffs' answer brief. Their interpretation would thwart the voters' intent in passing Proposition 218 by giving government agencies control over if, and when, a fee-payor could bring a substantive challenge to a fee under section 6, subdivision (b).

Proposition 218 does not require that an agency hold annual hearings. The protest and hearing requirements of section 6, subdivision (a) are only triggered when an agency seeks to impose a new, or increase an existing, fee or charge. A

government agency has full discretion over when it will seek a rate increase that will trigger a hearing under subdivision (a). If a fee-payor cannot raise a substantive challenge under section 6, subdivision (b) without first lodging a protest at a section 6, subdivision (a) hearing, a government agency can avoid scrutiny of any fee by not increasing it. For example, a government agency could continue to impose a fee that indisputably violates subdivision (b) indefinitely so long as it does not increase the fee. A government agency could also avoid scrutiny by adopting a five-year schedule of increases under Government Code section 53756 to avoid holding annual hearings. A fee-payor who purchases property subject to a property-related fee just after the five-year schedule is adopted would have to wait five years to challenge the fee.

Reading section 6, subdivision (a) to give government agencies the power to avoid scrutiny in this manner is antithetical to the voter intent behind Proposition 218. In passing Proposition 218, voters intended just the opposite – that it would be harder for government agencies to impose or increase fees, and easier for fee-payors to challenge those fees successfully. (*Silicon Valley Taxpayers*, *supra*, 44 Cal.4th at p. 446.)

The purpose of Proposition 218's protest and hearing procedure was not to create a procedural hurdle for taxpayers who want to challenge the proportionality of a fee or charge, but rather to give them a simple opportunity to veto any new or

increased fees. (*Silicon Valley Taxpayers, supra,* 44 Cal.4th p. 438.) The Court's task here is to interpret Proposition 218 to effectuate that purpose. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Comm.* (2012) 209 Cal.App.4th 1182, 1199 [147 Cal.Rptr.3d 696].) The interpretation advanced by District Amici flouts that purpose, and should be rejected.

C. District Amici Ignore Authorities That Address the Key Issue Here

The amicus briefs discuss at length the benefits of the exhaustion doctrine, but that is not the issue for this appeal. The issue is whether section 6, subdivision (a) is an administrative remedy that must be exhausted before bringing a claim under section 6, subdivision (b). District Amici fail to address the case law cited by Plaintiffs and the Court of Appeal that demonstrates that section 6, subdivision (a) cannot be construed as an administrative remedy.

In *Unfair Fire Tax Com. v. City of Oakland* (2006) 136 Cal.App.4th 1424, 1430 [39 Cal.Rptr.3d 701], property owners claimed that the City of Oakland failed to comply with the protest and hearing procedures required by Government Code section 53753, which implemented the requirements of Proposition 218. (*Id.* at p. 1427.) The City demurred on grounds that plaintiff failed to exhaust administrative remedies in a city ordinance that provided that "[t]he exclusive remedy of any person affected or aggrieved [by the creation of a special

assessment district] shall be by appeal to the City Council." (*Id.* at p. 1428.) The court held that the ordinance was not an administrative remedy because it did not provide "any procedural mechanism for submission, evaluation, and resolution" of an appeal. (*Id.* at p. 1430.) The ordinance did not specify "when an appeal must be filed, when it must be heard by the city council, what standard the city council should [apply] in reconsidering the decision to establish the district, what right the appellant may have to present evidence, or when the city council must resolve the appeal." (*Id.*)

Section 6, subdivision (a) requires even less that the ordinance at issue in *Unfair Fire Tax*. The only requirement is that a government agency "consider" protests. (Cal. Const. art. XIII D, § 6(a).) Subdivision (a) does not provide any guidance regarding what is required to protest, other than to state the fact of protest itself. It does not contain any provision for the submission of evidence to support a protest. It does not require that Petitioner actually resolve the protest or make findings in response to the protest. And it does not state anywhere that participation in a hearing under section 6, subdivision (a) is a jurisdictional prerequisite to challenging the substantive compliance of a fee or charge under section 6, subdivision (b). At trial, Petitioner's Chief Financial Officer confirmed that the "consideration" Petitioner gives to protests is to simply count them. (5 AA 936:20-937:16.)

Amazingly, District Amici fail to address *Unfair Fire Tax* and its analysis of what constitutes an administrative remedy. Local Government Amicus do not even mention *Unfair Fire Tax* in their brief. Marin District dismisses it without analysis in its brief.

District Amici also fail to address *City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277 [258 Cal.Rptr. 795]. There, the city claimed that a local airport land use commission's plan violated certain provisions of the State Aeronautic Act. (*Id.* at pp. 1281-82.) The commission adopted its plan after two public hearings. (*Id.* at p. 1282.) The city received notice of the hearings, but chose not to participate or submit written objections. (*Id.*) The commission argued the city's failure to participate in the hearing process barred its suit for failure to exhaust administrative remedies. (*Id.* at p. 1287.) The court disagreed, finding that the exhaustion doctrine was inapplicable "in those situations where no specific administrative remedies are available to the plaintiff." (*Id.*, citing *Rosenfeld v. Malcolm* (1967) 65 Cal.2d 559, 566 [55 Cal.Rptr. 505, 421 P.2d 697].) The opportunity to appear at a hearing and submit relevant information beforehand was not an administrative remedy because it "did not require that the commission do anything in response to the submissions or testimony received by it incident to those hearings." (*Id.*) The hearing process was thus insufficient "to call the [exhaustion] doctrine into play." (*Id.*)

Similarly, the mere fact that section 6, subdivision (a) calls for a hearing does not make it an administrative remedy, particularly when a fee-payor's claims arise under a different provision - section 6, subdivision (b). The hearings that Petitioner claims Plaintiffs should have participated in were directed at increases to an existing sewer service fee, and not the methodology of the fee itself. Petitioner never gave notice to Plaintiffs or any other fee-payor that the methodology of the fees would be considered at the hearings. (6 AA 1152 [2013]; 7 AA 1344-45 [2014]; 7 AA 1408 [2015].)

District Amici argue that an administrative remedy and a government claim serve different purposes, but that is not relevant to the key issue. The administrative claim that Plaintiffs filed with Petitioner, according to the express instructions of Petitioner's Legislative Code section 2.44.050, fulfilled every purpose sought to be achieved by administrative exhaustion. (8 AA 1553, 1558-59.) Plaintiffs' administrative claim gave Petitioner the opportunity to settle without litigation. It gave Petitioner the opportunity to analyze and consider the merits of Plaintiffs' claims before litigation commenced. (5 AA 1047-51; 8 AA 1493-1541.) It advised Petitioner of potential issues months in advance of Petitioner's next budget and Proposition 218 hearing.

The purpose of the exhaustion doctrine is to afford an agency like Petitioner the "opportunity to receive and respond to articulated factual issues and legal

theories before its actions are subjected to judicial review." (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.) Plaintiffs' compliance with Petitioner's Legislative Code, is sufficient to meet Plaintiffs' requirements under both the Government Claims Act and the exhaustion doctrine. Proposition 218 does not require more.

III. THE COURT OF APPEAL'S OPINION IS WELL-REASONED AND SHOULD BE UPHELD

A. The Opinion Does Not Mistake the Purpose of the Majority Protest Process

The Court of Appeal properly found that Plaintiffs' claims under section 6, subdivision (b), are outside the scope of any administrative remedies in subdivision (a) of section 6. (*Plantier v. Ramona Municipal Water Dist.* (2017) 12 Cal.App.5th 856, 868 [219 Cal.Rptr.3d 197].) In so finding, the Court of Appeal relied on the language of subdivision (a)(2) of section 6, and Petitioner's hearing notices. Petitioner's notices were directly solely to the proposed increase to the fee, not the fee itself: "Any property owner ... may submit a written protest to the proposed ***increases*** to the rates and fees; ... ." (*Id.* at p. 868 [quoting Petitioner's notices of hearings in 2012, 2013, and 2014] [emphasis in original].)

It would be inherently unfair, and contrary to Proposition 218, to read a notice of right to protest an ***increase*** to an existing fee to encompass any challenge to the constitutionality of the underlying fee itself. Where the noticed issue is

solely an increase to an existing fee, the remedy provided in subdivision (a)(2) is limited to rejection of the proposed increase. If a majority of fee-payors had submitted protests to Petitioner's proposed fee increase in 2012, 2013, or 2014, the only remedy for fee-payors would be that the Petitioner could not implement the increase. The majority protest would have no impact on Petitioner's ability to continue imposing the fee.

B. The Opinion Does Not Suggest that Plaintiffs Need Not Participate in the Section 6 Hearing Because a Majority Protest Is Unlikely

In analyzing the key issue here – whether section 6, subdivision (a) provides an administrative remedy, the Court of Appeal properly considered not only the unlikely chance that a fee-payor could ever achieve a remedy that requires a majority protest, but also the fact that "considering" a protest alone does not create an administrative remedy. (*Plantier, supra,* 12 Cal.App.5th at p. 871.) The Court of Appeal relied on multiple cases to support its conclusion. (*Id.* at pp. 870-72.) District Amici do not address any of these cases.

C. The Opinion Does Not Mistakenly Apply to "Comprehensive Scheme of Dispute Resolution" Required of Quasi-Judicial Processes to Legislative Processes

The Court of Appeal's finding that the protest and hearing procedures in subdivision (a) of section 6 do not constitute a remedy was not solely because it is unlikely that a majority protest could ever be achieved. The Court of Appeal properly found that a requirement that an agency "consider" a protest, with no

more, does not bear the hallmarks of an administrative remedy that would require exhaustion. (*Id.* at pp. 870-72.) This finding does not limit the exhaustion doctrine to the quasi-judicial context. It is merely re-states the law followed by multiple cases relied on by the Court of Appeal that hold that an administrative procedure must involve more than just consideration of a protest. (*Id.*)

D. The Opinion Does Not Erroneously Suggest That Rate-Making Is Not Legislative.

District Amici criticize footnote 7 of the Court of Appeal's opinion, and claim that it erroneously suggests that rate-making is not legislative. The footnote, however, has no bearing on the Court's ultimate holding. Moreover, the Court of Appeal was not suggesting that rate-making is not legislative. It was instead suggesting that rate-making ***is*** legislative. In *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422 [109 Cal.Rptr.3d 647], cited in the footnote, the appellate court held that a legislative action cannot itself be an administrative remedy. (*Id.* at 1432.) By citing *Howard*, the Court of Appeal was suggesting that because the rate-making process is legislative, it cannot also be an administrative remedy.

E. The Court of Appeal Correctly Recognized That *Wallich's Ranch* Did Not Impose an Exhaustion Requirement Under Proposition 218

The Court of Appeal correctly rejected the trial court's reliance on *Wallich's Ranch* as authority for finding a mandatory administrative remedy in section 6(a)

of Proposition 218. The plaintiff in *Wallich's Ranch* challenged a pest control assessment under Proposition 218, Proposition 62, and article XI, section 11, subdivision (a) of the California Constitution. (*Wallich's Ranch, supra*, 87 Cal.App.4th at p. 880.)[2] But *Wallich's Ranch* followed the administrative remedy set forth in the Citrus Pest Control District Law, not any remedy found in the language of Proposition 218. Unlike section 6(a), the administrative scheme of the Pest Control Law requires annual budget hearings and an iterative process for comment and protest. (Food & Agric. Code §§ 8551 *et seq.*) This is materially different from the protest and hearing procedure in section 6, subdivision (a), which does not require an annual hearing and does not describe any process for receiving, reviewing, and responding to comments and protests.

The Court of Appeal also correctly recognized that unlike the plaintiff in *Wallich's Ranch*, Plaintiffs here "satisfied the general exhaustion requirement under the RMWD Legislative Code." (*Plantier*, 12 Cal.App.5th at p. 874.) *Wallich's Ranch* does not recognize an administrative remedy under Proposition 218, and is not a basis for reversing the Court of Appeal's opinion.

[2] Protests to assessments are governed by a different provision of Proposition 218, article XIII D, section 4. They are not governed by article XIII D, section 6.