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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION TWO

HOWARD JARVIS TAXPAYERS ASSOCIATION,

Plaintiff and Respondent,

v.

COACHELLA VALLEY WATER DISTRICT,

Defendant and Appellant.

From the Superior Court in and for the County of Riverside
Case No. RIC 1904943
Hon. Sunshine S. Sykes and Hon. Craig Riemer, Judges Presiding

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APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES, ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA ASSOCIATION OF SANITATION AGENCIES FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT COACHELLA VALLEY WATER DISTRICT; AMICI CURIAE BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

DATED: January 3, 2024 HANSON BRIDGETT LLP

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TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS....2

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF....8

IDENTITY OF AMICI CURIAE....8

STATEMENT OF INTEREST....10

BRIEF OF AMICI CURIAE....12

INTRODUCTION....12

ARGUMENT....14

I. PROPOSITION 218 DOES NOT ALLOW A REFUND REMEDY....14

A. Proposition 218 does not contain any affirmative intent to authorize a refund remedy....17

B. The "Relevant Factors" under *Katzberg* militate against recognizing a refund to remedy a Proposition 218 violation....19

1. Prospective declaratory and injunctive relief are available and appropriate remedies for Proposition 218 violations....20

2. Imposing refunds to remedy Proposition 218 violations would change established law that only allows prospective relief....21

3. Declaratory and injunctive relief aligns with the nature and significance of Proposition 218....25

C. The "Special Factors" under *Katzberg* also militate against recognizing a refund to remedy a Proposition 218 violation....26

1. A refund remedy would create the adverse policy consequence of penalizing public agencies that did not benefit from any disproportionate amount charged....26

2. Public agencies whose main source of revenue is from water service fees and charges lack the financial resources to absorb the cost of refunding past violations of Proposition 218. 29

3. Determining the amount of a refund remedy would require courts to usurp public agencies' legislative ratemaking authority and would overwhelm the resources of courts and agencies. 32

CONCLUSION 35

CERTIFICATE OF COMPLIANCE 36

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Bush v. Lucas (1983)
462 U.S. 367 ..... 20, 21

California Cases

Bay Area Cellular Telephone Company v. City of Union City (2008)
162 Cal.App.4th 686 18

Bayside Auto & Truck Sales, Inc. v. Department of Transportation (1993)
21 Cal.App.4th 561 34

Brydon v. East Bay Municipal Utility District (1994)
24 Cal.App.4th 178 34

Capistrano Beach Water District v. Taj Development Corp. (1999)
72 Cal.App.4th 524 ..... 22, 23

Carpenter Foundation v. Oakes (1972)
26 Cal.App.3d 784..... 33

City of Ontario v. Superior Court (1970)
2 Cal.3d 335..... 18

David v. Fresno Unified School District (2020)
57 Cal.App.5th 911 18

Howard Jarvis Taxpayers Association v. City of Fresno (2005)
127 Cal.App.4th 914 21

Howard Jarvis Taxpayers Association. v. City of Roseville (2002)
97 Cal.App.4th 637 34

Kahn v. East Bay Municipal Utility Dist. (1974)
41 Cal.App.3d 397 33

Katzberg v. Regents of University of California (2002)
29 Cal.4th 300 ..... *passim*

Macy's Department Stores, Inc. v. City and County of San Francisco (2007)
143 Cal.App.4th 1444 ..... 33, 35

MHC Financing Limited Partnership Two v. City of Santee (2010)
182 Cal.App.4th 1169 25

Moore v. City of Lemon Grove (2015)
237 Cal.App.4th 363 34

San Luis Coastal Unified School Distrtict v. City of Morro Bay (2000)
81 Cal.App.4th 1044 34

Silicon Valley Taxpayers' Association, Inc. v. Santa Clara County Open Space Authority (2008)
44 Cal.4th 431 ..... 19, 21, 26

Simms v. Los Angeles County (1950)
35 Cal.2d 303 ..... 27, 29, 33

State Department of Corrections v. Workmen's Compensation Appeals Board (1971)
5 Cal.3d 885 27

Weisblat v. City of San Diego (2009)
176 Cal.App.4th 1022 18

White v. County of San Diego (1980)
26 Cal.3d 897 34

Williams v. Horvath (1976)
16 Cal.3d 834 24

Woosley v. State of California (1992)
3 Cal.4th 758 29

California Statutes

Evidence Code
§ 801(a) 34

Government Code
§ 815(a) 24
§ 818 27
§ 60016(a) 23
§ 66001 22
§ 66013 23
§ 66013(a) 23
§ 66016 23

California Constitution

Article XIII C 17
Article XIII C, § 1 ..... 31, 32
Article XIII D 17
Article XIII D, § 4, subd.(f) 18, 20
Article XIII D, § 6 24
Article XIII D, § 6, subd.(b) 31
Article XIII D, § 6, subd.(b)(1) 23
Article XIII D, § 6, subd.(b)(2) 31
Article XIII D, § 6, subd.(b)(5) 18, 32

Other Authorities

California Rules of Court,
Rule 8.200(c) 8
Rule 8.200(c)(3) 8

Public Policy Institute of California, *Paying for Water in California* (March 2014) 30

Recommendations Relating to Sovereign Immunity, No. 1-Tort Liability of Public Entities and Public Employees, 4 Cal. Law Revision Com. Rep. (Jan. 1963) 27

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

IDENTITY OF AMICI CURIAE

The League of California Cities, Association of California Water Agencies, California Special Districts Association, California State Association of Counties, and California Association of Sanitation Agencies collectively are "Amici" that respectfully request permission under rule 8.200(c) of the California Rules of Court to file an amici curiae brief in support of Appellant Coachella Valley Water District.[1]

The League of California Cities, or Cal Cities, is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. A Legal Advocacy Committee, which comprises twenty-five city attorneys from all regions of the State, advises Cal Cities. The Committee monitors litigation of concern to municipalities, and identifies cases that have statewide or nationwide significance. This is one of those cases.

The Association of California Water Agencies, or ACWA, is the largest coalition of public water agencies in the country. Its

[1] The League of California Cities, Association of California Water Agencies, California Special Districts Association, California State Association of Counties, and California Association of Sanitation Agencies certify that no person or entity other than Amici and their counsel authored or made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

460 members include small irrigation districts and some of the largest water wholesalers in the world. These members are collectively responsible for about 90 percent of the water delivered to cities, farms, and businesses in California. ACWA is dedicated to ensuring a high-quality and reliable water supply by sharing reliable scientific and technical information, tracking and shaping state and federal water policy, advocating for sound legislation and regulation, and facilitating cooperation and consensus among interest groups.

California Special Districts Association, or CSDA, is a nonprofit corporation with a membership of over 1,000 special districts throughout California that was formed to promote good governance and improve core local services through professional development, advocacy, and other services for all types of independent special districts. Independent special districts provide various public services to urban, suburban, and rural communities. CSDA is advised by its Legal Advisory Working Group, which consists of attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies cases that are of statewide significance. This is one of those cases.

The California Association of Sanitation Agencies, or CASA, is a nonprofit mutual benefit corporation composed of over 125 public agencies that collect, treat, and recycle wastewater and biosolids to millions of residents, businesses, industries, and institutions throughout California. CASA advocates on behalf of these clean-water agencies and their proactive approaches on

clean-water sustainability and renewable resource issues. It too has identified this case as one of statewide significance.

California State Association of Counties, or CSAC, is a nonprofit corporation whose members include the fifty-eight California counties. CSAC sponsors a Litigation Coordination Program that the County Counsels' Association of California administers and that the Association's Litigation Overview Committee oversees. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

STATEMENT OF INTEREST

Amici and their members are responsible for constructing, operating, and maintaining critical water supply and wastewater infrastructure on which 39 million Californians depend. To pay increasing costs to provide safe and reliable public water supply and wastewater services, Amici and their members undertake rate-setting, planning, and budgeting processes throughout California. The decision here could implicate these processes. Amici appreciate that there are many issues for the Court to consider. By focusing on the statewide impact the decision here could have on important planning and budgeting issues in a way that the parties cannot, Amici provide unique perspective on the practical downside implications of the Howard Jarvis Taxpayers Association ("HJTA") arguments. Amici submit this brief because the issues raised in this appeal threaten to disrupt those processes statewide. They also threaten to compromise the financial stability of Amici's members and the critical public

services they provide. Amici's members' interests focus on the inappropriateness of a refund remedy.

A refund remedy for alleged Proposition 218 violations is unavailable under existing law. Because a writ of mandate, declaratory relief, or injunctive relief can adequately remedy any violation of Proposition 218, a refund remedy is unavailable and inappropriate. In addition, a refund remedy would create an unworkable burden on public water suppliers that would need to raise rates on future ratepayers to refund prior ratepayers, which undermines the principle of proportional allocation of costs and creates a vicious cycle of escalating expenses.

Amici aim to aid this Court's review by providing broader public policy considerations on the refund issue. Their counsel have examined the parties' merits briefs and are familiar with the issues. Amici thus respectfully request that the Court grant them leave to file the brief included with this application.

DATED: January 3, 2024 HANSON BRIDGETT LLP

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BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES, ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA ASSOCIATION OF SANITATION AGENCIES

INTRODUCTION

If upheld, the trial court's judgment would set a problematic precedent authorizing a refund remedy, upend established law under Proposition 218, and jeopardize the treasuries of public water suppliers statewide. A public agency has no profit from which it might fund a refund remedy and has no shareholders from which it might extract capital. To raise revenue to support a refund, a public agency could only charge *future* ratepayers more to fund a refund to *prior* ratepayers.

Budgeted revenue demands are satisfied by charging customers for their water or wastewater service (referred to generically hereafter as water service). Proposition 218 requires public agencies to charge no more than the *reasonable* cost of the service and prohibits charging customers more than their property's *proportional* cost of the water service. Each agency makes policy decisions on how to proportionally allocate costs among ratepayers to collect system-wide revenue sufficient to meet the agency's expenses. This rate-setting process is generally a zero-sum exercise, in which a rate reduction to one class of customers will logically lead to a rate increase to another class so the agency can meet its annual revenue requirement in a given fiscal year.

A refund remedy would disrupt that process. Since Proposition 218 amended the California Constitution in 1996, courts have remedied violations through writs of mandate, declaratory relief, and injunctive relief. These prospective remedies adequately cure the violation by directing the agency to reform its rate approach going forward, and are the only remedies that Proposition 218 allows.

A refund remedy, by contrast, operates retroactively. Because a public agency sets its charges to merely recover costs and receives no profit or windfall from the rate structure, it is unclear how a public agency would pay for a refund. It cannot make up the difference by going back in time to charge more to the ratepayers that it purportedly undercharged. And special districts like water districts that lack significant—if any—general funds may have no other revenue source. The only option would be to charge future ratepayers more to fund a refund to prior ratepayers. But would that charge—to future ratepayers—also be a non-proportional overcharge? Without a clear and clearly constitutional way to pay for it, a refund to remedy a Proposition 218 violation could threaten the solvency of local public agencies throughout California.

With those concerns in mind, Amici submit this brief to aid the Court's analysis of how the trial court erred by awarding a refund. Amici walk through the legal framework in *Katzberg v. Regents of University of California*, in which the Supreme Court of California articulates the conditions under which

constitutional claims authorize refund remedies. The legal framework shows there is no authority for a refund remedy here.

Aside from being impracticable and unsupported, a refund remedy also would invite a violation of the separation of powers. Trial courts would step into the legislative ratemaking shoes of agencies, exercise their discretion, and determine the difference between the rates that the agency actually imposed and *the rates the trial court believes the agency should have imposed*. Amici request that this Court not sanction this judicial usurping of legislative ratemaking power.

These problems are fundamental to the trial court's judgment and threaten to establish precedent that would clash with Proposition 218's intent and precedent. It also would clash with the expectations of hundreds of public water service providers throughout California that have relied on that precedent in setting their rates and budgets. Amici respectfully request that the Court consider these concerns and reverse the judgment.

ARGUMENT

I. PROPOSITION 218 DOES NOT ALLOW A REFUND REMEDY.

Amici encourage this Court to deny a refund for a violation of Proposition 218. The typical remedies for a Proposition 218 violation are, and should be, prospective—either by writ of mandate, declaratory relief, or injunction. By contrast, refunds operate retroactively. Given the nature of rate setting, refunds

would inappropriately disrupt public finances and budgeting, and could unfairly burden future ratepayers with increased rates necessary to restore agency revenue and reserves. Further, Amici have found no appellate decision that has analyzed or confirmed a refund for a Proposition 218 violation. And neither the trial court nor HJTA cited any court of appeal that has done so. Permitting claimants like HJTA to pursue a refund remedy would undermine government fiscal policy and stray from existing law. This Court should not entertain that departure.

Monetary damages like refunds are available only for certain constitutional violations. The Supreme Court of California in *Katzberg v. Regents of University of California* set forth the framework to determine whether money damages are available to remedy a constitutional violation. At the first step under *Katzberg*, the party seeking damages must provide "evidence from which [the court can] find or infer, within the constitutional provision at issue, an affirmative intent" to permit or preclude damages as a remedy. (*Katzberg v. Regents of Univ. of Cal.* (2002) 29 Cal.4th 300, 317 (*Katzberg*).)

"Second, if no affirmative intent either to authorize or withhold a damages remedy is found," then a court must consider the following "relevant factors": (a) "whether an adequate remedy exists," (b) "the extent to which a constitutional tort action would change established tort law," and (c) "the nature and significance of the constitutional provision." (*Katzberg*, *supra*, 29 Cal.4th at p. 317.)

If those "relevant factors" weigh against recognizing a "constitutional tort," the inquiry ends.

If not, then the court must further consider "any special factors counseling hesitation in recognizing a damages action, including deference to legislative judgment, avoidance of adverse policy consequences, considerations of government fiscal policy, practical issues of proof, and the competence of courts to assess particular types of damages." (*Katzberg*, *supra*, 29 Cal.4th at p. 317.)

Here, at each step in this inquiry, the conclusion is the same: A refund is not an appropriate remedy for a violation of Proposition 218. Although Coachella Valley's Opening Brief raises *Katzberg*, HJTA's Opening Brief did not mention the framework.

This amicus brief does not intend to rehash arguments already made; Amici intend only to provide the Court with a closer look at *Katzberg* to show why a refund remedy is inappropriate. If this Court considers the merits of HJTA's claims that Coachella Valley's rates violate Proposition 218, then Amici request that the remedy for those claims not include a refund. The remedy, instead, should be limited to a writ of mandate or declaratory relief reforming future rates. Alternatively, if this Court allows a refund because of case-specific facts like a stipulation between the parties, then Amici request that the Court clarify that the refund is based on those case-specific facts only and that a refund remedy is otherwise unavailable for a violation of Proposition 218.

A. Proposition 218 does not contain any affirmative intent to authorize a refund remedy.

The *Katzberg* framework begins with the language of the constitutional provision. If a plaintiff seeks damages for a constitutional violation that is not otherwise based on common law or statute, courts must first inquire whether the provision provides "an affirmative intent either to authorize or to withhold a damages action to remedy a violation." (*Katzberg*, *supra*, 29 Cal.4th at p. 317.) A court may consider "the language and history of the constitutional provision at issue, including whether it contains guidelines, mechanisms, or procedures implying a monetary remedy" when making this determination. (*Ibid.*)

Proposition 218 did not, and does not, authorize a refund remedy. Though HJTA repeatedly suggests that it "was not the intent of the voters when they adopted Proposition 218" to *bar* a refund remedy (Respondent's Opening Brief ["ROB"] 45; see also *id.* at pp. 43, 50), those suggestions cite no authority expressing an intent to *grant* a refund remedy. Instead, the opposite is true: Nothing in Proposition 218 affirmatively permits or requires recovery of a refund. (See Cal. Const., art. XIII C, D.) Neither amendment broadened the Constitution by explicitly authorizing recovery of a refund. HJTA's claims about Proposition 218's intent on providing a refund remedy thus are wrong.

Proposition 218 also does not imply an intent to grant a refund remedy. While Proposition 218 refers to "legal actions," it mentions nothing about a refund or damages remedy. Section 4, for example, addresses the burden of proof for "any legal action

contesting the *validity* of any assessment." (Cal. Const., art. XIII D, § 4, subd. (f), emphasis added.) Similarly, section 6 addresses the burden of proof for "any legal action contesting the *validity* of a fee or charge." (Cal. Const., art. XIII D, § 6, subd. (b)(5), emphasis added.) Both sections address *prospective* actions over a fee or charge's *validity*, suggesting an equitable and prospective remedy. (See *City of Ontario v. Super. Ct.* (1970) 2 Cal.3d 335, 344 [describing validation actions as a form of declaratory relief]; cf. *David v. Fresno Unified School Dist.* (2020) 57 Cal.App.5th 911, 936-937 [holding that an action testing a contract's validity was moot once the contract was fully performed].) Neither provision implies a refund remedy. If anything, they imply that the remedy is limited to a determination of validity to be applied only to future performance.

The history of Proposition 218 reinforces that inference. The Proposition 218 drafters went to great lengths to expand ratepayer rights by enhancing their power of consent. (*Bay Area Cellular Tel. Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 693.) Yet the drafters expressed no intent that the law would allow a refund.

The state prepared an official ballot pamphlet—which this Court may consult to determine the voters' intent—that evidences no intent to allow a refund or damages for a violation of the law. (See *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1038-1039 (*Weisblat*) [quoting the Proposition 218 ballot pamphlet's statement of purpose].) The voter materials do not reference refunds or money damages, nor any guideline,

mechanism, or procedure that even implies a monetary remedy. (*Ibid.*; see also *Katzberg*, *supra*, 29 Cal.4th at p. 321 ["The presence of such express or implied guidelines, mechanisms, or procedures may support an inference that the provision was intended to afford such a remedy."].)

At most, the voter materials provide that a successful challenge under Proposition 218 would "result[ ] in reduced or repealed fees and assessments." (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 445 (*Silicon Valley*), quoting Ballot Pamp., Gen. Elec. (Nov. 5, 1996) analysis of Prop. 218, p. 74.) Reduced or repealed assessments operate in the future, not the past. So the voter materials anticipate a forward-looking remedy to determine validity, which mandate, declaratory, and injunctive relief provide. A retroactive refund does not achieve that result. The text and history of Proposition 218 thus are silent on authorizing a refund remedy.

B. The "Relevant Factors" under *Katzberg* militate against recognizing a refund to remedy a Proposition 218 violation.

Because nothing in Proposition 218 suggests an affirmative intent to authorize a refund remedy, the Court should next consider *Katzberg*'s "relevant factors." These factors "are whether an adequate remedy exists, the extent to which a constitutional tort action would change established tort law, and the nature and significance of the constitutional provision." (*Katzberg*, *supra*, 29 Cal.4th at p. 317.) These factors each demand a determination

that the remedies for a Proposition 218 violation do not include a refund.

1. Prospective declaratory and injunctive relief are available and appropriate remedies for Proposition 218 violations.

The first "relevant factor" is whether an adequate remedy exists. So long as a "meaningful" remedy is available, the lack of a "complete" alternative remedy will not support an action for a refund. (*Katzberg*, *supra*, 29 Cal.4th at p. 309, citing *Bush v. Lucas* (1983) 462 U.S. 367, 386 (*Bush*).) While HJTA claims that barring a refund remedy "would preclude ratepayers injured by local government's violations of Proposition 218 from ever receiving appropriate relief" (ROB 45), the reality is otherwise. Parties challenging a fee or charge's validity under Proposition 218 may obtain declaratory and injunctive relief, which are remedies that effectively correct and prevent the constitutional violation without depriving the agency of money needed to pay for the costs of providing an essential public service.

When a local public agency's property-related fee or charge violates Proposition 218, a court will invalidate it. (See Cal. Const., art. XIII D, §§ 4, subd. (f) [discussing burden of proof in actions contesting validity of an assessment], 6, subd. (b)(5) [same, with respect to actions contesting validity of a fee or charge]; *Silicon Valley*, *supra*, 44 Cal.4th at pp. 457–458 [finding an assessment was invalid for not meeting Proposition 218's requirements].) The remedy that safeguards against a public agency imposing and collecting an invalid levy must be

prospective. On that basis, the available remedies for a violation are a writ of mandate and declaratory relief. (See *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 927.) And that is all.

HJTA wants more, claiming dissatisfaction with prospective remedies that may not redress the alleged past violations. (See ROB 45 [a refund "restores money paid"].) But California law does not require a remedy that is retroactive; it requires only a remedy that is "meaningful." (*Katzberg*, *supra*, 29 Cal.4th at p. 309, citing *Bush*, 462 U.S. at p. 386.)

There is no question that prospective relief satisfies this "meaningful" standard. Plaintiffs should be encouraged to prosecute these claims swiftly—not only for their own sake, but so that public agencies accused of constitutional violations can adjust their planning and budgeting if needed and limit financial risks and disruption. There is no need nor any basis for expanding the reach of constitutional jurisprudence here by creating a retroactive refund remedy when voters did not expressly or clearly provide one.

2. Imposing refunds to remedy Proposition 218 violations would change established law that only allows prospective relief.

The second "relevant factor" addresses whether awarding a damages remedy would change established law. Under established law, as discussed, a court prescribes prospective relief when it invalidates a levy under Proposition 218. Amici could not find any case in which a court of appeal has analyzed or

confirmed an award for a refund or other monetary damages for a public agency's failure to comply with Proposition 218. It appears neither the trial court nor the parties could find any case either. So if this Court analyzes and awards a refund for a Proposition 218 violation, it would be the first court of appeal to do so. And this new precedent would cut against established law.

Precedent shows that courts will generally bar a refund remedy when no constitutional or statutory provision authorizes a refund action. In *Capistrano Beach Water Dist. v. Taj Development Corp.* (1999) 72 Cal.App.4th 524 (*Capistrano*), for example, a payer sued a water district for a refund of a sewer connection fee under the Mitigation Fee Act. The Mitigation Fee Act, however, expressly authorizes refund claims for the unexpended portions of the fees imposed on a "development project." (Gov. Code, § 66001.) The Fourth District found that a water district's sewer connection fees were not fees for a "development project" and the Mitigation Fee Act did not apply. (*Capistrano*, *supra*, at pp. 529–530.)

Rather, a different section—Government Code section 66013—controlled the district's sewer connection fees.[2] Unlike the Mitigation Fee Act, section 66013 does not authorize a refund for water or sewer connection fees. (*Capistrano*, *supra*, 72

[2] Government Code sections 66013 and 66016 pertain to water and sewer connection fees or capacity charges, which are subject to the cost proportionality requirements of Proposition 26. Because they are not "property related fees and charges," they are not subject to Proposition 218. Nevertheless, the proportionality requirements are essentially the same.

Cal.App.4th at p. 528.) Instead, the remedy for an exceedance of actual cost, governed by section 66016, is for the local agency to reduce *future* fees or charges. Section 60016 explicitly provides "for a reduction of future connection fees if earlier fees created 'revenues in excess of actual cost.'" (*Id*., quoting Gov. Code, § 60016, subd. (a).) "A refund remedy was not included in the statute." (*Id*.) Without a statutory remedy for a refund of an excessive sewer connection fee, the court affirmed the judgment for the water district and barred a refund action over the sewer connection fees. (*Id.* at p. 530.)

That precedent should guide the remedy analysis here. Both section 66013 (for connection fees/capacity charges) and Proposition 218 (for service fees and charges) restrict how a public agency may impose and use water and sewer fees or charges. For instance, both limit the amount of a fee or charge to the proportional cost for providing the related service. (Cal. Const. art. XIII D, § 6, subd. (b)(1) [a fee or charge must not exceed the funds needed to provide the service]; Gov. Code, § 66013, subd. (a) [a water or sewer connection fee or charge must not exceed the reasonable cost of providing the service].) And neither provides a remedy for a refund. Instead, the remedy under both is prospective relief only.

Without either a constitutional or statutory authorization for a refund, the Fourth District's holding in *Capistrano Beach Water District* compels the same outcome here: There is no refund remedy for water service rates that violate section 6 of article XIII D.

HJTA argues otherwise by pointing to "the statutory authority for monetary awards" under the Government Claims Act (ROB 48), which misapplies the Government Claims Act. The Government Claims Act's intent was "not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances: immunity is waived only if the various requirements of the act are satisfied." (*Williams v. Horvath* (1976) 16 Cal.3d 834, 838.) In other words, the Act does not create liability; it limits it. Under the Government Claims Act, a public agency remains immune for injuries "[e]xcept as otherwise provided by statute." (Gov. Code, § 815, subd. (a).) Any authority for damages or a refund to remedy violations of the Constitution's proportionality requirements thus must exist independent of the Government Claims Act. None exists.

But HJTA's argument about the Government Claims Act reflects another error. By assuming that the Government Claims Act's procedure for monetary claims authorizes monetary damages for constitutional violations, HJTA's position would render the Supreme Court's *Katzberg* framework meaningless. Enacted decades before *Katzberg*, the Supreme Court was aware of the Government Claims Act. So when it decided *Katzberg* to resolve whether an individual may sue a public agency for money damages on a constitutional violation "in the absence of a statutory provision," it could have found that the Government Claims Act provides that generalized authority. (*Katzberg*, *supra*, 29 Cal.4th at p. 303.) But it did not. That outcome underscores

why the authority for a refund or damages must arise outside the Government Claims Act.

Amici ask this Court not to award a refund remedy here. Any other result would change established law on the unavailability of a refund remedy under Proposition 218, and would conflict with *Katzberg*.

3. Declaratory and injunctive relief aligns with the nature and significance of Proposition 218.

The third *Katzberg* factor—the nature and significance of the constitutional provision at issue—also weighs against a refund remedy. Using this factor, courts have generally found that monetary damages are not authorized unless the lawsuit involves a fundamental or bedrock constitutional protection, such as the right to free speech. (See *Katzberg*, *supra*, 29 Cal.4th at p. 328; *MHC Fin. Ltd. P'ship Two v. City of Santee* (2010) 182 Cal.App.4th 1169, 1187.) The right protected under Proposition 218 is to limit the power of public agencies to exact revenue; it does not implicate fundamental or bedrock constitutional protections like First Amendment protections. (Cf. *Silicon Valley*, *supra*, 44 Cal.4th at p. 448.) Though significant, the right under Proposition 218 can be adequately protected by diligent plaintiffs seeking prospective relief, as discussed above. This factor weighs in favor of not creating a refund remedy.

C. The "Special Factors" under *Katzberg* also militate against recognizing a refund to remedy a Proposition 218 violation.

The "relevant factors" cut strongly against creating a refund remedy for Proposition 218 violations, so the inquiry into whether Proposition 218 permits a refund should end there.

But even if the inquiry were to continue, the *Katzberg* "special factors" reinforce why there is no refund remedy under Proposition 218. Of the "special factors" that courts may consider,[3] several militate against creating a refund remedy: (1) avoiding adverse policy consequences; (2) considerations of government fiscal policy; and (3) practical issues of proof and the competence of courts to assess particular types of damages.

1. A refund remedy would create the adverse policy consequence of penalizing public agencies that did not benefit from any disproportionate amount charged.

Serious adverse practical implications would result if courts were to begin imposing refund remedies for Proposition 218 violations. Consider that a refund remedy cannot be "contrary to the policy that the public should not be deprived of revenue necessary for the performance of governmental functions." (*Simms v. Los Angeles County* (1950) 35 Cal.2d 303,

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[3] The "special factors counseling hesitation in recognizing a damages action … [include] deference to legislative judgment, avoidance of adverse policy consequences, considerations of governmental fiscal policy, practical issues of proof, and competence of courts to assess particular types of damages." (*Katzberg*, *supra*, 29 Cal.4th at p. 329, internal citations omitted.)

315 (*Simms*).) Consider too that a refund remedy cannot unlawfully penalize public agencies. (See Gov. Code, § 818 [prohibiting punitive or exemplary damages against public agencies].) The general rule is that public agencies are not liable for punitive or exemplary damages because the cost of penalizing them "would fall upon the innocent taxpayers." (*State Dept. of Corr. v. Workmen's Comp. App. Bd.* (1971) 5 Cal.3d 885, 888, quoting Recommendations Relating to Sovereign Immunity, No. 1-Tort Liability of Public Entities and Public Employees, 4 Cal. Law Revision Com. Rep. (Jan. 1963) p. 817.) A refund remedy would punish the innocent future ratepayers by imposing financial obligations on public agencies that could be funded only by those future ratepayers. The Government Code forbids such adverse policy consequences.

HJTA's allegations against Coachella Valley underscore the refund's punitive nature. HJTA seeks "restitution designed to make the injured Class 2 ratepayers whole." (ROB 46.) And the trial court desired to impose a refund that would "return the parties to the status quo ante, i.e., to the position they would have been in had the Class 2 rates not been adopted." (AA03748 [Order re Scope of Evidentiary Hearing re Remedies for Unlawful Rates, Aug. 19, 2022, at p. 2].) What the trial court awarded was "a 'common fund' from which the injured Class 2 ratepayers will receive restitutionary relief in the form of on-bill credits (or, in the case of former customers, refund checks)." (ROB 46.)

While Proposition 218 restricts how public agencies may impose and use fees and charges, a violation does not create a

windfall for the public agencies. After a public agency corrects a rate misalignment, it does not lead to any less—or any more—revenue received; it is just paid in different proportions by ratepayers. For Coachella Valley, the zero-sum outcome means that a rate adjustment would increase Class 1 rates while decreasing Class 2 rates. (Appellant's Opening Brief ["AOB"] at p. 77.) There is no loss or gain in revenue to the public agency.

A misalignment's incidental beneficiary is not the public agency defendant, but the ratepayer who underpaid and is not a party to the lawsuit. Yet claimants like HJTA do not pursue refunds from those who underpaid; nor does it seem likely that it could. It instead seeks to win that money from the public agency, which has not benefitted from the misalignment and, as discussed below, has at best a limited ability to pay it. Since the public agency receives no surplus revenue from violating Proposition 218's proportionate cost requirement for a particular customer class, it must resort to paying that refund from its general-fund revenue (if any) or future rates. This means that, for cities and other local agencies that have discretionary sources of revenue, a refund results in less revenue for general governmental services, like fire, police, and other social services. But many local public agencies have little to no general-fund revenue and therefore no source from which to pay refunds except future receipts, as explained in more detail below.

2. Public agencies whose main source of revenue is from water service fees and charges lack the financial resources to absorb the cost of refunding past violations of Proposition 218.

Another practical consequence of imposing refunds for Proposition 218 violations is its impact on governmental fiscal policy. As mentioned, a refund violates public policy if it deprives agencies of revenue needed for performing their governmental functions. (*Simms*, *supra*, 35 Cal.2d at p. 315.) This public policy is grounded in a practical concern about ensuring "that governmental entities may engage in fiscal planning based on expected tax revenues." (*Woosley v. State of California* (1992) 3 Cal.4th 758, 789.)

A refund intending to remedy a public agency's violation of Proposition 218 would defy that policy. Again, a local public agency that violates Proposition 218 receives no monetary windfall. So if a court orders a public agency to issue a refund to those who overpaid, the agency cannot "return" the excess amount collected. It must instead pay the refund out of its operating funds, which reduces revenue available to pay costs of operating and maintaining critical infrastructure. That is a substantial financial burden, particularly for agencies with few—if any—revenue sources other than what they collect from fees and charges. Unable to absorb that financial burden, a Proposition 218 refund could lead to bankruptcy or dissolution of a local agency providing critical infrastructure services, like drinking water and sewer services.

Water agencies are particularly vulnerable to this outcome. Most of the revenue generated by water-related public agencies is from special districts. (See Public Policy Institute of California, *Paying for Water in California* (March 2014) Technical Appendix B, Table B3, p. 6 [finding that special districts generated $8.375 billion in revenue, as compared to $4.358 billion and $1 billion by cities and counties, respectively].) The sole purpose of many of these special districts is to provide water-related service. And most of their revenue sources are from charges:

Share of Revenue Sources **Revenue Sources for Local Water-Related Public Agencies (2008-11 Average)**					
Water Supply	**Sales & Service Charges (%)**	**Property Taxes (%)**	**Assessments & Special Taxes (%)**	**Gov't Grants (%)**	**Other (%)**
County	64	n/a	n/a	0	36
City	90	n/a	n/a	1	9
Special Districts	80	5	6	2	8
Total	**83**	**3**	**4**	**2**	**8**

(Public Policy Institute of California, *Paying for Water in California* (March 2014) Technical Appendix, B, Table B3, p. 6.)[4]

Proposition 218 limits how these special districts impose and use fees and charges, requiring them to earmark this revenue for specific, intended uses. (See, e.g., Cal. Const., art.

[4] The Technical Appendices for *Paying for Water in California* are found at <https://www.ppic.org/content/pubs/other/314EHR_appendix.pdf> (as of Jan. 3, 2024), and the full report can be accessed at <https://www.ppic.org/publication/paying-for-water-in-california/> (as of Jan. 3, 2024).

XIII C, § 1 [imposing burden on local government to show that they allocated a levy, charge, or other exaction to a payor in accordance with the benefits they received from the governmental activity]; *id.*, art. XIII D, § 6, subd. (b)(2) [requiring that local governments not use revenue from fees or charges for any purpose other than that for which they imposed them].) Having calibrated their rates to ensure revenue roughly matches aggregate costs of service (see Cal. Const., art. XIII D, § 6, subd. (b)), special districts generally have little to no other money to subsidize the cost of a refund related to a successful proportionality challenge. And the agencies have no mechanism to recover the needed funds from past ratepayers who underpaid under the invalidated rate structure. Without a source of funding not already earmarked for specific costs, it is unclear how some agencies would pay for a court-ordered refund, or whether they could.

For special districts, the harm from a refund is existential. Even the trial court and HJTA recognized this risk by "express[ing] concern over the solvency of" Coachella Valley if a refund were awarded to return plaintiffs to their status quo ante. (AA03748 [Order re Scope of Evidentiary Hearing re Remedies for Unlawful Rates, Aug. 19, 2022, at p. 2].) That concern reflects the risk with refunds generally under Proposition 218. And if courts begin imposing refunds to cure Proposition 218 violations, then that remedy could threaten the bankruptcy or dissolution of any local government faced with a claim that they violated Proposition 218.

While Proposition 218 protects ratepayers, it should not be a Sword of Damocles that imperils the very existence of a local public agency and the availability of critical infrastructure services like providing safe and reliable public water service. That would be an extreme result that Proposition 218 did not intend and must be avoided. Instead, a writ of mandate, obtained by swift and diligent prosecution of rate challenges, remains a reasonable and meaningful remedy.

3. Determining the amount of a refund remedy would require courts to usurp public agencies' legislative ratemaking authority and would overwhelm the resources of courts and agencies.

Another practical consequence of imposing a refund remedy is the trouble in proving its amount. No one disputes that the Constitution imposes on public agencies the burden to prove compliance with its limitations on taxes, assessments, fees, and charges. (See Cal. Const., art. XIII C, § 1 ["The local government bears the burden … ."]; *id*., art. XIII D, § 6, subd. (b)(5) ["… the burden shall be on the agency to demonstrate compliance with this article."].) But the burden to prove compliance is different from the burden to prove damages. The latter burden remains with the party claiming damages. And that party must prove their damages "with reasonable certainty." (See *Carpenter Found. v. Oakes* (1972) 26 Cal.App.3d 784, 799 ["It is elementary that a party claiming damage must prove that [they have] suffered damage and prove the elements thereof with reasonable certainty."].)

A refund remedy for a Proposition 218 violation would be impractical because no plaintiff could prove with any "reasonable certainty" the amount of the refund required. A party seeking a refund must account for each customer's payment and compare that amount with the amount that should lawfully have been charged. (See *Simms*, *supra*, 35 Cal.2d at pp. 316-317 [holding that recovery for taxes paid under protest limited to difference between tax paid and amount that should have been exacted]; *Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2007) 143 Cal.App.4th 1444, 1447, 1450 (*Macy's*) [holding tax refund is limited to the difference between the amount paid and the amount lawfully charged].)

The trial court here established a "Common Fund Account" to hold the "monetary relief." (AA04081 ¶ 9 [Judgment, March 1, 2023].) Its intent purports to include the difference between what the ratepayers have paid and what the ratepayers *should have paid*. (*Id*. ¶ 10.) But what the ratepayers *should have paid* is a legislative determination reserved for the public agency. (See *Kahn v. East Bay Mun. Util. Dist.* (1974) 41 Cal.App.3d 397, 409 ["The fixing or refixing of rates for a public service is legislative, or at least quasi legislative."].) As the trial court's judgment reflects, determining the reasonably certain refund amount forces the judicial branch to usurp the legislative ratemaking authority and discretion of local public agencies.

A court may compel a public agency to exercise discretion, but it may not issue a mandate that controls that discretion. (*San Luis Coastal Unified Sch. Dist. v. City of Morro Bay* (2000) 81

Cal.App.4th 1044, 1051 (*San Luis*), citing *Bayside Auto & Truck Sales, Inc. v. Dept. of Transp*. (1993) 21 Cal.App.4th 561, 570 (*Bayside*).) "Mandate may not order the exercise of discretion in a particular manner unless discretion can be lawfully exercised only one way under the facts." (*San Luis*, at p. 1051, citing *Bayside*, at p. 570.) The Legislature and courts commit matters to an agency's discretion when the matters present "a subject beyond the trial court's and [court of appeal's] common experience and knowledge." (*Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 375, citing Evid. Code, § 801, subd. (a).)

Cost allocation methodologies under Proposition 218 are one such area. Proposition 218 prescribes no allocation method, but provides constitutional guardrails within which agencies must exercise their discretion to act "reasonably." (See *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 647-648; see also *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 196 [holding public agency rate structure is a quasi-legislative action].) Apportionment thus does not involve precise calculations that find an "exact relationship" between the amount levied and the benefit received. (*White v. County of San Diego* (1980) 26 Cal.3d 897, 905.) Without a "one-size-fits-all" method, local agencies—not courts—must exercise discretion to develop an appropriate methodology for allocating their unique costs of providing services like safe and reliable public water service or wastewater service.

But a court-ordered refund necessarily requires courts to determine what fee could lawfully have been charged to each

customer. (*Macy's*, *supra*, 143 Cal.App.4th at pp. 1447, 1450.) That determination improperly displaces the agency's legislative authority and discretion with the preferences of judges and litigants, violating our Constitution's separation of legislative and judicial powers.

Thus, even if it were possible to determine the amount of a refund with "reasonable certainty," the process for doing so would cause an unconstitutional usurpation of legislative ratemaking power.

For all of these reasons, Proposition 218 does not authorize a refund remedy.

CONCLUSION

Amici respectfully ask this Court to affirm that a refund is unavailable as a remedy in Proposition 218 litigation. Any other outcome would conflict with case law and Proposition 218's purpose while violating the constitutional separation of local legislative ratemaking power from the state judicial power.

DATED: January 3, 2024 HANSON BRIDGETT LLP

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CERTIFICATE OF COMPLIANCE

The text of this brief consists of 5,709 words as counted by Microsoft Word, the program used to prepare this brief.

Dated: January 3, 2024

By: */s/ Sean G. Herman*
Sean G. Herman

PROOF OF SERVICE

Howard Jarvis Taxpayers Association v. Coachella Valley Water District
Fourth Appellate District Case No. E080870

STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Contra Costa, State of California. My business address is 1676 N. California Blvd., Suite 620, Walnut Creek, CA 94596.

On January 3, 2024, I served a true copy of the following document described as:

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES, ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA ASSOCIATION OF SANITATION AGENCIES FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT COACHELLA VALLEY WATER DISTRICT; AMICI CURIAE BRIEF

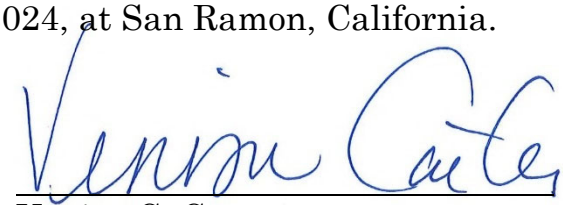
on the interested parties in this action as follows:

BY ELECTRONIC MAIL: By submitting an electronic version of the document to *TrueFiling*, who provides e-serving to all indicated recipients in the Service List through email.

BY MAIL: The document was placed in a sealed envelope addressed to the person at the address listed in the Service List. The envelope was placed for collection and mailing, following our ordinary business practices. I am readily familiar with Hanson Bridgett LLP' practice for collecting and processing correspondence for mailing; on the same day that correspondence is placed for collection and mailing, it is deposited with the United States Postal Service, with postage fully prepaid.

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

Executed on January 3, 2024, at San Ramon, California.



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Howard Jarvis Taxpayers Association v. Coachella Valley Water District
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