No. C088828

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

Miner's Camp, LLC,
Plaintiff and Respondent,
vs.
Foresthill Public Utility District,
Defendant and Appellant

Appeal from the Superior Court of the State of California
County of Placer, Commissioner Michael Jacques
Superior Court Case No. SCV0039661

APPLICATION OF LOCAL GOVERNMENT AMICI TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.208(d)(1), Amici disclose that the following persons have an interest in the outcome of this appeal:

Water customers of the Foresthill Public Utilities District.

DATED: December 23, 2020

/s/ Daniel S. Hentschke
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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Presiding Justice:

Pursuant to California Rules of Court, rule 8.200(c), the Association of California Water Agencies ("ACWA"), the California Special Districts Association ("CSDA"), the California State Association of Counties ("CSAC"), the League of California Cities ("Cal Cities"), and the Mountain Counties Water Resources Association ("MCWRA") (collectively, "Local Government Amici" or "Amici") respectfully request permission to file an amicus curiae brief in support of Appellant Foresthill Public Utility District. This application is timely made within 14 days of filing of the reply brief.

STATEMENT OF INTEREST OF LOCAL GOVERNMENT AMICI

Local Government Amici represent cities, counties, and special districts throughout California. ACWA is a California nonprofit public benefit corporation comprised of over 450 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts, and special purpose public agencies. CSDA is a non-profit corporation with a membership of over 900 special districts. CSDA's members provide a wide variety of public services to urban, suburban, and rural communities, including water, sewer, and waste removal services. CSAC is a non-profit corporation having a membership

consisting of the 58 California counties. Cal Cities is an association of 477 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. MCWRA is a nonprofit corporation organized to provide education and legislative advocacy on behalf of water agencies in the Sierra Nevada foothills upstream of the Sacramento and San Joaquin Valleys.

Members of Local Government Amici fund essential public services to millions of Californians through user and other fees subject to the notice and hearing procedures of Proposition 218. (Cal. Const., arts. XIII C & XIII D.)[1] Local Government Amici's members often rely on property related fees like those at issue here — fees subject to article XIII D, section 6.

Each Local Government Amicus has a process for identifying cases, such as this one, that warrant its participation. ACWA has a Legal Affairs Committee, composed of attorneys from each of its regional divisions throughout the state. The Legal Affairs Committee monitors litigation of significance to ACWA's members. CSDA similarly monitors litigation of concern to its members. CSAC sponsors a Litigation Coordination Program, which is administered by the California County Counsels' Association. CSAC's Litigation

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[1] Further references to articles are to the California Constitution.

Committee monitors litigation of concern to California's counties. Cal Cities is advised by its Legal Advocacy Committee, composed of 24 city attorneys from all regions of the state. The Legal Advocacy Committee monitors litigation of concern to municipalities, identifying those cases that have statewide or nationwide significance. MCWRA monitors litigation of concern to its members, based upon its 2019 Water Policy Principles. All of the Local Government Amici determined this case to be of significance to their members. Accordingly, the Local Government Amici respectfully request leave to file the brief combined with this application.

DATED: December 23 , 2020

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AMICUS CURIAE BRIEF

I. INTRODUCTION

Local Government Amici write to address a single issue — whether the doctrine of exhaustion of remedies bars Miner's Camp LLC's challenge to Foresthill Public Utility District's water rates under article XIII D, section 6 of the California Constitution ("Section 6"). The trial court found the challenge was not barred, relying on the since-superseded Court of Appeal decision in *Plantier v. Ramona Municipal Water Dist.* (2017) 12 Cal. App. 5th 856 (review granted), which had determined that the majority protest process required by Section 6 was categorically futile and exhaustion of that remedy was never required. In 2019, our Supreme Court affirmed the outcome, but with reasoning narrower than the Court of Appeal's. (*Plantier v. Ramona Municipal Water District* (2019) 7 Cal.5th 372 (*Plantier*).) The Supreme Court's *Plantier* opinion preserves the exhaustion of remedies doctrine and left open the issue presented here. Amici conclude the trial court's decision conflicts with the Supreme Court's opinion and other law.

Furthermore, exhaustion of remedies as to challenges to property-related fees under Section 6 should be analyzed similarly to challenges to assessments under article XIII D, section 4. Proposition 218 enacted both and they are analogous in important respects. The Court of Appeal recently considered exhaustion as applied to assessments, concluding it applies to challenges under

article XIII D, section 4. (*Hill RHF Housing Partners, L.P. v. City of Los Angeles* (2020) 51 Cal.App.5th 621 (review granted Sept. 16, 2020) (*Hill RHF*).)

Plantier answered a narrow question:

> When an agency considers increasing a property related fee, must a fee payor challenging the **method** of fee allocation first exhaust 'administrative remedies' by participating in a Proposition 218 hearing that addresses only a proposed **rate** increase?

(7 Cal. 5th at p. 376.) Putting aside the meaning of "method of fee allocation" here, the Supreme Court expressed:

> no view on the broader question of whether a Proposition 218 hearing could ever be considered an administrative remedy that must be exhausted before challenging the substantive propriety of a fee in court.

(*Id.* at p. 388.) Like *Hill RHF*, this case presents the question *Plantier* reserved — whether the exhaustion doctrine applies to a hearing addressing the entirety of a rate structure, i.e., both the allocation of costs to customer classes (single-family residential, multi-family residential, commercial, etc.) and fee increases that do not affect rate structures (e.g., across-the-bard percentage increases).

In 1996, California voters adopted Proposition 218, limiting local government taxes, assessments, and a newly defined class of "property related fees." (Cal. Const., arts. XIII C & XIII D.) Local

governments may not adopt property-related fees except in compliance with the measure's procedural and substantive requirements, including conducting a public hearing on 45 days' mailed notice to property owners. (Cal. Const., art. XIII D, § 6.) Its procedural requirements:

> facilitate communications between a [] water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive.

(*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220–221 (*"Bighorn"*).)

Courts have long held that one seeking to challenge government action must participate in its decision-making and limit suit to grounds presented to the agency's decision-maker — so-called "issue exhaustion." This exhaustion of remedies doctrine applies to legislative actions such as ratemaking. With respect to revenue measures subject to Proposition 218, the exhaustion of remedies doctrine reflects the balance of powers Section 6 established — local governments may make rates for essential utility services, but affected property owners are entitled to notice and hearing and can attempt to muster a majority protest to block proposed rates.

Proposition 218 also established substantive and procedural requirements for assessments. (Cal. Const., art. XIII D, § 4.) And while assessments and property related fees are distinct, sections 4 and 6 have striking similarities. For example, assessments are apportioned according to the special benefit an assessment-funded project or service confers on assessed parcels (Cal. Const., art. XIII D, § 4, subd. (a)), while property-related fees are apportioned according to proportional cost of serving a parcel (Cal. Const., art. XIII D, § 6, subd. (b)(3)). Both sections require a noticed public hearing and afford an opportunity for majority protest. And while the majority protest processes differ (silence is consent only under Section 6), the public hearing requirements are strikingly similar.

The assessment hearing requirement states:

> **The agency shall conduct a public hearing** upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. **At the public hearing, the agency shall consider all protests** against the proposed assessment and tabulate the ballots. **The agency shall not impose an assessment if there is a majority protest**. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be

> weighted according to the proportional financial obligation of the affected property.

(Cal. Const., art. XIII D, § 4, subd. (e) (emphasis added).) The hearing requirement for property related fees reads:

> **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)(2) (emphasis added).) As *Hill RHF* observes, "Exhaustion of administrative remedies is not a pro forma exercise." (51 Cal.App.5th at 633.)

> If the agency's decision is to be challenged in court, the agency — the City in this context — is entitled to the benefit of the opportunity to either address the specific issues a property owner raises or to pass on the opportunity to do so and allow the courts to make a decision based on an administrative record that reflects

a development of the disputed issues to the extent the administrative process allows."

(*Id.* at p. 634.)

Local Government Amici do not suggest that utility rates should be immune from challenge. However, they urge this Court to follow *Hill RHF* by applying the exhaustion doctrine here. This will ensure that agencies can know challenges to their actions will be limited to those they have had opportunity to address. Exhaustion under Section 6 is not particularly difficult. It requires nothing more than submitting a protest and informing the agency at or before the public hearing of specific reasons for the owner's objections so the agency can consider them and be persuaded or make a record to support judicial review of its contrary conclusion. (*Hill RHF, supra,* 51 Cal.App.5th at p. 634.) Such a ruling would be consistent with *Plantier,* which concerned an as-applied challenge the respondent agency there could not have acted on in its across-the-board ratemaking hearing under Section 6.

II. STATEMENT OF CASE

The parties describe the facts of the case differently. (Appellant's Opening Brief (AOB), pp. 15 – 18; Respondent's Brief (RB), pp. 5 – 14.) Amici take the case as it is presented. Because this brief addresses only the exhaustion doctrine, Amici adopt

Foresthill's description of its 2014 ratemaking at AOB pages 15 – 16. Further, Amici reference the hearing notice at 2 AR 0456–0459.

III. ARGUMENT

A. EXHAUSTION OF ADMINISTRATIVE REMEDIES — POLICY, EFFICIENCY, AND PUBLIC PARTICIPATION

1. Plaintiffs must exhaust an administrative remedy that allows hearing on both rates and rate structure

Plantier did not decide whether exhaustion applies to hearings under Section 6 which address ratemaking methodology. The challenger there was a restaurateur who argued only that his business was assigned too many sewer service units; he did not question the proposed increased service rate per unit. (*Plantier, supra*, 7 Cal. 5th at p. 384 ("We consider only whether these Proposition 218 hearings were adequate to resolve plaintiffs' substantive challenge.") *Plantier* also holds:

> The requirement to "consider all protests" (art. XIII D, § 6, subd. (a)(2)) at a Proposition 218 hearing compels an agency to not only receive written protests and hear oral ones, but to take all protests into account when deciding whether to approve the proposed fee, even if the written protesters do not constitute a majority.

(*Id.* at p. 386.) Ratemaking under Proposition 218 is "zero sum game," meaning that the rates must generate sufficient revenues to recover the cost of providing the service while ensuring that each customer class pays only the portion of that cost reasonably attributed to it. In other words, when costs attributed to one class of customers rises, costs attributed to others must fall. (*Plantier, supra,* 5 Cal. 7th at p. 385 ("A methodological change in the allocation of costs among fee payors will almost always result in some parcels paying a higher fee to offset those that will now be required to pay less.").) Thus, in many instances, agencies will comply with Proposition 218's robust requirements by implementing expensive and time-consuming legislative procedures to impose new or increase existing property related fees, including:

- retaining legal and financial advisors, including professional ratemaking consultants and cost-of-service experts;
- preparing professional cost-of-service analyses;
- preparing and mailing detailed notices to property owners;
- responding to the public's questions; and
- inviting a majority protest and holding at least one public hearing at which written protests may be submitted and which must be counted and considered.

When an agency does so, and considers at a hearing both rates and rate structure, challengers must make their objections known at or before that hearing.

The elected decision-makers of the public agencies the Local Government Amici represent conduct noticed public hearings, listen to their constituents, consider oral and written protests (and expressions of support), and make vital governmental decisions. Those decisions, whether approving development projects, adopting a water management plan, or (as here) adopting fees for essential services, are commonly subject to procedural requirements and substantive limitations — such as those of Section 6. Proposition 218 established a power-sharing arrangement between government and the governed as to property-related fees, as this Court acknowledged in *Bighorn*. That arrangement is perhaps more direct than, but not fundamentally different from, such arrangements typical of other local legislative decision-making that have long been subject to exhaustion of administrative remedies.

The decision on review here disserves both legislators and courts. Allowing challengers to sidestep Proposition 218 hearings will be costly for courts, agencies, and utility customers, whose rates fund hearing and litigation costs in every venue. Courts will be needlessly burdened to review complex ratemaking issues in the first instance, without the support of a robust record reflecting the agency's expertise. Here, for example, courts were called to decide

whether the District properly allocated costs to multi-family residential clients — a question requiring the input of experts with no single, right answer.

Agencies incur significant costs to satisfy extensive Proposition 218 hearing requirements, but will not benefit from that expense under the rule applied below, and will lose opportunity to avoid needless litigation by addressing public concerns before suit.

And, cutting against the essence of Proposition 218's power-sharing arrangement, average property owners, now at the center of Proposition 218 hearings, will be disempowered by impoverished hearings — they will not learn of their neighbors' concerns, or have opportunity to endorse or rebut them. Parties with the resources and appetite for litigation may move disputes straight to court. Their less pecunious neighbors will be silenced. These concerns animate much of California administrative law. (E.g., *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 578–579 ("*Western States*") [litigation-on-the-record rule reflects these concerns].)

The exhaustion of administrative remedies doctrine is well settled. "The cases which so hold are legion." (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 73.) If an administrative remedy is provided, it must be exhausted before judicial review of the administrative action is available. (*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd.* (1973) 8 Cal.3d 792, 794.) This requirement is jurisdictional and applies

whether or not it may afford complete relief. (*Yamaha Motor Corp. v. Superior Ct.* (1987) 195 Cal.App.3d 652, 657 ("*Yamaha*"); *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 496–501 ("*Sierra Club*").) The doctrine applies to constitutional challenges to legislative action, such as the Proposition 218 challenge to retail water rates here. (*Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 93 [exhaustion applies to constitutional challenge to zoning ordinance].) The decision-making body "is entitled to learn the contentions of interested parties before litigation is instituted." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 384.)

Exhaustion requires full presentation to the agency of all issues later to be litigated and the essential facts on which the issues rest. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609.) Because it is jurisdictional, the rule is not a matter of judicial discretion. (*Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 687 [suit barred even as to constitutional challenges because plaintiffs failed to object at a city council hearing to an assessment to abate a public nuisance].)

2. The policies underlying the exhaustion doctrine support reversal

> [E]xhaustion of administrative remedies furthers a number of important societal and governmental interests, including: (1) bolstering administrative

> autonomy; (2) permitting the agency to resolve factual issues, apply its expertise and exercise statutorily-delegated remedies; (3) mitigating damages; and (4) promoting judicial economy.

(*Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 637, 644, citing and quoting *Rojo v. Kliger* (1990) 52 Cal.3d 65, 72.) Even if an administrative remedy cannot resolve all issues or provide the precise relief sought, exhaustion is nevertheless required,

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

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

Exhaustion requires more than generalized objections at a public hearing — specific grounds must be raised. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197; *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 615–616 [hearing participants not held to standards as lawyers in court, but must make known what facts are contested].) *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 686 rejected an

attack on expert financial reports because plaintiffs did not present a contrary financial analysis at the administrative hearing:

> If a party wishes to make a particular methodological challenge to a given study relied upon in planning decisions, the challenge must be raised in the course of the administrative proceedings. Otherwise, it cannot be raised in any subsequent judicial proceedings.

3. Exhaustion serves the separation of powers

Exhaustion is jurisdictional because it is grounded on the separation of powers fundamental to our democracy. (*County of Contra Costa, supra,* 177 Cal.App.3d at p. 76.) Legislative bodies, such as those of local governments, make discretionary policy choices from a range of lawful options. It is long settled that adopting service fees, such as those now subject to Section 6, is a legislative act. (*Kahn v. East Bay Mun. Util. Dist.* (1974) 41 Cal.App.3d 397, 409; *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 139 ["[t]he universal rule is that in these circumstances the court is not a rate-fixing body, that the matter of fixing water rates is not judicial, but is legislative in character"].) While Proposition 218 changed substantive requirements for utility charges, it did not change the respective roles of local legislators and courts. (*Capistrano Taxpayers Ass'n v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1512–1513 ("*Capistrano*"); *San Diego County Water Authority v.*

Metropolitan Water District of Southern California (2017) 12 Cal.App.5th 1124, 1149 ["the courts do not weigh competing methodologies to determine the best water rates" but review rates on an agency's record under the applicable standard of review].)

For these same reasons — arising from the separation of powers and the respective institutional competencies of legislators and courts — judicial review of legislation is limited to the agency's record. (*Western States, supra,* 9 Cal. 4th at p. 573.) The exhaustion doctrine and the *Western States* rule enhance judicial review by, inter alia, providing the benefit of an agency's expertise in preparing a full record, sifting the evidence, and evaluating the reports of competing experts. It prevents parties from embroiling courts in political and policy disputes and imposing on them a function to which they are ill-suited — legislating rather than adjudicating. Distinguishing record-making from record-reviewing prevents litigants from drawing legislators and courts outside their respective roles in our tripartite democracy. The exhaustion doctrine protects both legislative and adjudicative functions by allowing a legislative body to hear the evidence, apply its reasoned discretion, and create a record to facilitate judicial review and allowing courts to perform that review on an adequate record support by agency expertise.

4. Exhaustion allows agencies to address concerns before courts need do so

The "'essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.'" (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1137 [reviewing charter city assessment], citing *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.) "[A]dministrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum." (*Sierra Club, supra,* 21 Cal.4th at p. 510.)

B. SECTION 6 ESTABLISHES A REMEDY FOR PROPERTY-RELATED FEES

1. Section 6 establishes minimum notice and hearing requirements

Section 6 details minimum notice and hearing requirements for new or increased property-related fees. (*Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 285–286 [discussing art. XIII D, §§ 4 & 6].) Under Section 6:

> Once the amount of the fee per parcel is calculated, the agency must provide written notice to each affected property owner and the opportunity to protest the fee.

> At the public hearing, the government agency is to tabulate all the written protests to the proposed fee, and if a majority of owners of the identified parcels protest, the fee will not be imposed.

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

2. Section 6 requires agencies to consider all protests

An agency must "consider all protests," oral or written — even in the absence of a majority protest. (Cal. Const., art. XIII D, § 6, subd. (a)(2).) This requirement ensures the consideration will be legally meaningful and prevents local governments from brushing aside protests for mere political expedience. *Plantier* holds:

> The requirement to 'consider all protests' (art. XIII D, § 6, subd. (a)(2)) at a Proposition 218 hearing compels an agency to not only receive written protests and hear oral ones, but to take all protests into account when deciding whether to approve the proposed fee, even if the written protesters do not constitute a majority.

(*Plantier, supra,* 7 Cal. 7th at p. 386.) The requirement provides a public agency and its rate-payors opportunity to address and investigate cost-of-service issues before litigation. The power sharing Proposition 218 established between government and the governed promotes decisions that are "mutually acceptable and financially

and legally sound." (*Bighorn, supra,* 39 Cal.4th at p. 220.) In so doing, it reduces litigation and focuses that which cannot be avoided.

Exhaustion advances this objectives by requiring those who seek to hold government to account to give it the opportunity to be accountable before asking courts to compel it. As *Hill RHF* noted:

> While the process mandates that an assessment fail if there exists a majority protest, the process gives the city discretion to pass or decline an assessment even if property owners' votes are sufficient to sustain the assessment.

(*Hill RHF, supra,* 51 Cal. App. 5th at 634 (construing art. XIII D, § 4).) A large protest may fall short of a majority, but will not go unheard by those who might wish reelection. Similarly, in the context of property-related fees, if no majority protest exists, Section 6 gives an agency **discretion** to adopt new or increased property related fees, guided by the protests and other input of ratepayers at the hearing. Few elected officials will impose rates when faced with a large and loud protest without urgent need to do so. And remedies exist if they do, including initiative repeal of rates (Cal. Const., art. XIII C, § 3), recall (Cal. Const., art. XI, § 13), and voting the "rascals" out at the next election. But, even a single protester may provide information that persuades decision-makers, particularly when the protester presents new facts or meritorious arguments.

3. Proposition 218 does not displace the exhaustion doctrine

Proposition 218 changed the burden of proof and standard of review for fee challenges, but left the exhaustion rule intact. Section 6's subdivision (b) provides: "[i]n any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." Article XIII D, section 4, subdivision (f) similarly shifts the burden of proof in assessment cases. Proposition 218 also changes the standard of judicial review from deference to independent judgment. (*Silicon Valley Taxpayers Assn. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443–450; *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 912 ["We exercise our independent judgment in reviewing whether the District's rate increases violated section 6. (Citations omitted.) In applying this standard of review, we will not provide any deference to the District's determination of the constitutionality of its rate increase."].)

However, Proposition 218 says nothing about procedural prerequisites to suit — including exhaustion. Its silence is telling. Under the *expressio unius* rule, this omission is sufficient to maintain these prerequisites. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1191 [citing Sherlock Holmes' "dog that did not bark" to conclude Prop. 218 did not impliedly repeal city annexation statutes].)

Moreover, the shift in the burden of proof, coupled with the policy purposes of the exhaustion doctrine, supports application of issue exhaustion to ratemaking hearings in which both the fee amounts and rate methodology are the subjects. The rate methodology disputed here **did** involve legislative choice, opportunity for record-making, and application of expertise. It involves a fixed monthly rate subject to credits for below-average use, plus a variable rate based on consumption, and a rate per equivalent dwelling unit (EDU) for multiple residences served by a single meter. The proper allocation of water service costs within such a structure involves ratemaking expertise courts should not have to parse in the first instance — or exercise.

C. *PLANTIER* AND *HILL RHF* REQUIRE EXHAUSTION WHEN AN AGENCY CAN ADJUST ITS RATE STRUCTURE AT A HEARING

1. Requiring exhaustion is consistent with the Supreme Court's *Plantier* opinion

In *Plantier*, our Supreme Court found the exhaustion doctrine did not apply to the unusual circumstances there because the agency's Proposition 218 hearings "did not allow the District to resolve plaintiffs' particular dispute." (7 Cal. 5th at 879.) The plaintiff restaurateur objected to the agency's decision to triple the sewer service units assigned to his business, not to the rate to be set

for each such unit. His as-applied challenge to the assignment of sewer service units was unrelated to the across-the-board rate increase that was the subject of the hearing at which the respondent district argued he should have exhausted remedies. Further, the Supreme Court acknowledged its decision was specific to these unusual facts:

> We do not decide and express no view on the broader question of whether a Proposition 218 hearing could ever be considered an administrative remedy that must be exhausted before challenging the substantive propriety of a fee in court.

(*Id.* at p. 388.) Indeed, this Court granted review in *Hill RHF* to address that question. However, *Plantier* **does** reiterate the exhaustion doctrine applies when an agency can resolve a dispute at its hearing. (*Id.* at p. 383.)

Voters imposed detailed notice and hearing requirements in Section 6's subdivision (a) and detailed substantive requirements in its subdivision (b) — intending the two to inform each other. (*Cf. Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409 [water connection fee not subject to art. XIII D because notice required by § (6), subd. (a)(1) not practicable].) Subdivision (a)(1) requires notice of "the basis upon which the amount of the proposed fee or charge was calculated" and "the reason for the fee or charge." Subdivision (a)(2) provides "the agency shall consider all protests

against the proposed fee or charge." It also provides substantive rules regarding the "calculation" of property-related fees and the uses to which fee proceeds may be devoted. Fees may not exceed the cost of service ((b)(1)), be used for other purposes ((b)(2)), exceed the proportionate cost to serve any parcel ((b)(3)), charge for a service to be provided in the future ((b)(4)), or charge for a service provided to society generally, not just to property owners ((b)(5)). The two subdivisions are intended to be enforced together and to dovetail.

Section 6 states that, to impose or increase a fee, "an agency shall follow the procedures pursuant to this section ..., including, but not limited to" the notice and hearing provisions of subdivision (a). Section 6's procedures are not limited to those, however, but include subdivision (c)'s election requirement and subdivision (b)(5)'s requirement that the agency bear the burden in court to demonstrate compliance with article XIII D. Thus, reading Section 6 as a whole, as we must, and giving meaning to all of its provisions in context, it is readily apparent that all its requirements, procedural and substantive, are at issue in the public hearing its subdivision (a) requires. This is so, just as procedural and substantive considerations are at issue in a public hearing to consider a zone change under the Planning and Zoning Law or an environmental impact report under the California Environmental Quality Act.

Foresthill's notice advised property owners that both its rate structure and the proposed fee increase were to be decided. (3AR0808–0811 [hearing notice]; 3AR 0776–0807 [Rate Study cited and described in notice].) Foresthill's Resolution 14-06 adopted both after that hearing. (3AR0774–0808.) Miner's Camp agrees Foresthill's "Resolution 14-06 adopt[ed] water rates and charges in accordance with the recommendations of the 2014 Water Rate Study." (RB at 15.) Unlike in *Plantier*, Foresthill's multi-unit rates, along with its other distinctions of customer classes, were among the subjects of the hearing. Thus, the trial court should have applied the exhaustion doctrine to bar Miner's Camp's challenge.

2. That a majority protest may be improbable does not excuse failure to exhaust

Miner's Camp contends the exhaustion doctrine can never apply to property owners who are less than a majority of all customers — i.e., that it applies to nearly no one. (RB, pp. 25, 27.) This is mistaken for two reasons. **First**, Miner's Camp confuses the meaningful ability to prevail, which is a characteristic of hearings on quasi-judicial matters, with meaningful legislative procedures, where one never has more than an opportunity to persuade — at least in the absence of a majority protest to an assessment or property related fee under Proposition 218. One can impose one's will on a legislative body in other contexts only by initiative and referendum (where it applies). (*Wilde v. City of Dunsmuir* (2020) 9

Cal.5th 1105 [water rates may be reduced by initiative, but are not subject to referendum].) Yet precedent still requires exhaustion. **Second**, exhaustion is required whether or not the procedures in issue can afford complete relief. (*Yamaha, supra,* 195 Cal.App.3d at p. 657 [quasi-judicial proceeding before New Motor Vehicle Board].) Further, it appears Miner's Camp actually did mount a successful protest to a 2019 proposal to replace the 2014 rates litigated here. (Reply Brief at p. 22.)

Exhaustion, in legislative contexts, is not limited to those who might actually persuade decision-makers. (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874–875.) Even if opponents fail to persuade, their opposition accomplishes the other purposes of the exhaustion rule: making a record, engaging agency expertise, limiting courts' exposure to political disputes, and sifting the evidence. It is the journey, not the destination that matters most here, especially in the context of local government decisions affecting agency revenues — the life-blood of local services.

CONCLUSION

Those challenging property related fees cannot ignore the protest hearings Proposition 218 requires. Otherwise, the ills the Supreme Court warned of in *Western States* will follow — hearings will become meaningless, courts will be overburdened, and agencies will lose opportunity to resolve disputes without suit and to apply their expertise to facilitate judicial review when dispute is inevitable.

Undermining Proposition 218 hearings will be costly to courts, agencies, and rate-payors. As nothing in the text of Proposition 218 requires or suggests deviation from the established exhaustion doctrine, it applies.

The trial court erred by applying the superseded Court of Appeal opinion to go where this Court's later *Plantier* opinion does not lead — to a conclusion that exhaustion is never required in a Proposition 218 dispute. The duty to exhaust applies to claims under Proposition 218, just as it does to other constitutional claims.

For those reasons, and for the reasons set forth in Foresthill PUD's briefs, the Local Government Amici respectfully urge this Court to reverse the judgment. It should affirm that the duty to exhaust administrative remedies applies in disputes under Proposition 218 as in all other areas of local legislative and quasi-judicial decision-making. In particular, exhaustion is required as to any dispute that can be resolved in a hearing under Section 6. As such hearings address both rate structures and rates, most such disputes will be subject to exhaustion.

DATED: December 23, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), the foregoing Brief of Amicus Curiae in Support of Petitioner contains 5,059 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000-word limit set by rule 8.204(c). In preparing this certificate, I relied on the word count generated by the version of Word included in Microsoft Office 365 Pro Plus.

Dated: December 23, 2020

MICHAEL G. COLANTUONO

PROOF OF SERVICE

Miner's Camp, LLC v. Foresthill Public Utility District
Third District Court of Appeal Case No. C088828
Placer County Superior Court Case No. SCV0039661

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. My email address is: ALloyd@chwlaw.us. On December 23, 2020, I served the document(s) described as **APPLICATION OF LOCAL GOVERNMENT AMICI TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT** on the interested parties in this action addressed as follows:

SEE ATTACHED LIST FOR METHOD OF SERVICE

☒ **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Grass Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION**: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on December 23, 2020, from the court authorized e-filing service at TrueFiling.com. No electronic message or other indication that the

transmission was unsuccessful was received within a reasonable time after the transmission.

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

Executed on December 23, 2020, at Grass Valley, California.

Ashley A. Lloyd

SERVICE LIST

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Third District Court of Appeal Case No. C088828
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