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No. A170087

In the Court of Appeal, State of California

FIRST APPELLATE DISTRICT DIVISION THREE

ROBERT GLUCK, et al.
Plaintiffs and Appellants,

vs.

CITY AND COUNTY OF SAN FRANCISCO
Defendant and Respondent.

Appeal from the Superior Court of the State of California,
County of San Francisco. Case No. CGC-23-609954
Honorable Rochelle East, Judge Presiding, Department 302

BRIEF OF AMICI CURIAE ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT CITY AND COUNTY OF SAN FRANCISCO

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LEAGUE OF CALIFORNIA CITIES

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Amici Curiae Association of California Water Agencies, California State Association of Counties, and the League of California Cities ("Local Government Amici") in this appeal.

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

Customers of San Francisco's combined storm and wastewater utility.

DATED: November 13, 2024 **COLANTUONO, HIGHSMITH & WHATLEY, PC**

/s/ Adam Mentzer

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AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

San Francisco operates a combined sanitary and storm sewer system to provide a range of benefits to those it serves — flood protection and drainage, sanitation and environmental protection, and contributions to water supply. Are the fees it charges to do so within the partial exemption from Proposition 218's procedural requirements afforded by California Constitution, article XIII D, section 6, subdivision (c)? *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 ("*Salinas*"), a case of first impression on this issue, suggests that such terms as "water," "sewer," "drainage system," and "flood control" have mutually exclusive meanings and that only one can apply here. Not so. The terms overlap and San Francisco's services could be funded under any of those labels.

Local Government Amici submit this brief to urge that practical, flexible construction and to demonstrate it respects the text and context of Proposition 218 and furthers public policy. Accordingly, those Amici urge this Court to affirm.

II. JOINDER IN CITY AND COUNTY OF SAN FRANCISCO'S STATEMENT OF THE CASE

Local Government Amici join in the Statement of the Case of Respondent City and County of San Francisco. (Cal. Rules of Court, rules 8.204.)

III. ARGUMENT

A. Public Policy Favors Interpreting "Sewer Service" Under Proposition 218 to Include the Stormwater Management Provided by Storm Sewers

"When the plain meaning of the statutory text is insufficient to resolve the question of its interpretation … the court may consider the impact of an interpretation on public policy, for '[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.' " (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663, quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

As detailed *infra*, "sewer service" as used in California Constitution, article XIII D, section 6, subdivision (c) ("Section 6(c)") is ambiguous. Even so, public policy makes clear that sewer service

must be interpreted to include stormwater[1] management. Indeed, the Legislature adopted this interpretation via 2017's SB 231, codified at Gov. Code, § 53750, subd. (k), adopted to further important public policies, including:

- enabling sufficient and reliable funding for local water projects necessary to improve the state's water infrastructure;
- ensuring an adequate state water supply, especially during drought;
- reducing pollution, and
- providing important tools to local governments needed to effectively manage stormwater.

(Gov. Code, §§ 53750, 53751, subds. (a)–(d).)

1. Construing Stormwater Management as "Sewer Service" Is Necessary to Fund That Legal Duty

Proposition 218 added articles XIII C and XIII D to the

[1] For purposes of this brief, "stormwater" means runoff including, without limitation, stormwater, snowmelt, and dry weather runoff (such as water generated by irrigation, car washing, pavement cleaning, illegal discharges) that utilize the stormwater system.

California Constitution. Article XIII D, section 6, subdivision (a) requires an agency which intends to adopt, impose, or increase a property-related fee to mail notice to every affected property owner 45 days before a protest hearing.[2] (Cal. Const., art. XIII D, § 6, subd. (a)(2).) If written protests are submitted by a majority of fee payors, the agency may not adopt its proposal. (*Ibid*.)

Following this majority-protest proceeding, Section 6(c) also requires an election on yet 45 more days' notice, with majority approval of property owners or two-thirds of registered voters needed. (Cal. Const., art. XIII D, § 6, subd. (c).) Because of this high standard, few such fees have been proposed or adopted since Proposition 218 was approved in 1996. Recognizing that water, sewer, and trash services are essential to enjoyment of property, Section 6(c) exempts them from its election requirement and the significant costs, time, and delay associated therewith:

> (c) Voter Approval for New or Increased Fees and Charges. **Except for fees or charges for sewer, water, and refuse collection services**, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a

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

> majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(Cal. Const., art. XIII D, § 6, subd. (c), emphasis added.) Fees for these services are, of course, commonly proposed and approved.

Voters defined none of these terms — sewer, water, or refuse collection. (See Cal. Const., art. XIII D, § 2 [providing definitions to govern article].) The Legislature has defined them, however, in the Proposition 218 Omnibus Implementation Act, Government Code sections 53750 et seq. Relevant here is the definition of "sewer" adopted by SB 231:

> (k) "Sewer" includes systems, all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate sewage collection, treatment, or disposition **for sanitary or drainage purposes**, including lateral and connecting

> sewers, interceptors, trunk and outfall lines, sanitary sewage treatment or disposal plants or **works, drains, conduits, outlets for surface or storm waters**, and any and all other works, property, or structures necessary or convenient for the collection or disposal of sewage, industrial waste, **or surface or storm waters**. "Sewer system" shall not include a sewer system that merely collects sewage on the property of a single owner.

(Gov. Code, § 53750, subd. (k), emphasis added.)

The Legislature has defined "water" for purposes of Proposition 218, too:

> (n) "Water" means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source.

(Gov. Code, § 53750, subd. (n).)

Local Government Amici urge this Court to conclude that the operation of San Francisco's combined sanitary and storm sewer system is encompassed within both terms.

In an overly narrow ruling, *Salinas* held that stormwater management is not "sewer service" under Section 6(c) and that the City of Salinas could not impose stormwater drainage fees to

"finance the improvement of storm and surface water management facilities" necessary to comply with new pollution discharge requirements under the federal Clean Water Act without an election. (98 Cal.App.4th at pp. 1353, 1358–1359.) *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535 ("*Dep't of Finance*") similarly suggests that stormwater management is not "sewer service" under Section 6(c) and, as a result, local government stormwater discharge permittees lacked authority to charge fees to pay for several new discharge permit requirements, making those new requirements reimbursable state mandates.

The question here, then, is did the trial court and SB 231 correctly interpret "sewer service" under Section 6(c) to include stormwater management? A wholistic analysis of Section 6(c)'s text, context, legislative history, and relevant public policies — not found in *Salinas* or *Dep't of Finance* — confirms this reading.

Stormwater management prevents and mitigates flooding by collecting and moving water away from developed areas, protects the environment and public health by removing pollutants from flows into surface waters and the ocean, and promotes water conservation and increases water supply by recharging aquifers. (Wat. Code, § 10561; Amici Curiae Motion for Judicial Notice ("AC MJN"), Ex. 4 at pp. 18, 36, 49; 1AA36.) Depriving stormwater

management providers of fee authority adversely affects public safety, water quality, water conservation, and water supply. (See AC MJN, Ex. 3).)

2. Water Quality Mandates Are Demanding and Expensive

"The quality of our nation's waters is governed by a complex statutory and regulatory scheme … that implicates both federal and state administrative responsibilities." (*City of Burbank v. State Water Resources Control Bd.*, (2005) 35 Cal. 4th 613, 619, cleaned up.)

The federal Clean Water Act ("CWA") provides "a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters." (*City of Burbank, supra,* 35 Cal.4th at p. 620.) It limits the amounts, rates, and concentrations of pollutants in water discharges by what are known as "effluent limitations." (33 U.S.C. §§ 1311, 1362(11).) The primary means to enforce these standards is the National Pollutant Discharge Elimination System ("NPDES"), which "sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits" for the discharge of pollutants. (*City of Burbank, supra,* 35 Cal.4th at p. 621.)

States may establish and enforce their own water quality laws, provided effluent limitations are no less demanding than the CWA's. (33 U.S.C. § 1370.) The Porter-Cologne Water Quality Control Act establishes California's water quality standards. (Wat. Code, § 13000, et seq.) The State Water Resources Control Board and nine regional water quality control boards are responsible for coordinating and controlling water quality regulation under the Porter-Cologne Act. (Wat. Code, § 13001.) Permits granted by the regional boards known as waste discharge requirements (WDRs) constitute NPDES permits under the CWA. (Wat. Code, § 13374.)

Operators of systems that discharge both stormwater and sewage ("combined sewer systems"), like San Francisco's, must obtain an NPDES permit. (33 U.S.C. § 1342(q); 40 C.F.R. §§ 122.21, 122.26(a)(7).) So, too, must separate stormwater sewer systems (i.e., those that convey only stormwater). (33 U.S.C. § 1342(p); 40 C.F.R. § 122.26(a)(3)–(6).)

As the environmental challenges related to stormwater have become better understood, the requirements for stormwater dischargers under the CWA have become steadily more demanding over the years. For sewer systems that combine stormwater and wastewater, the Environmental Protection Agency ("EPA") issued a

National Combined Sewer Overflow Strategy that charged all states with developing state-wide permitting strategies to reduce, eliminate, or control combined sewer overflows ("CSOs"). (54 Fed. Reg. 37370 (Aug. 10, 1989).) The EPA's Combined Sewer Overflow Control Policy followed, requiring development of site-specific NPDES permit requirements. (59 Fed. Reg. 18688 (April 19, 1994).)

For separate stormwater sewers (so-called municipal separate stormwater sewers or MS4s), Congress adopted a phased approach to stormwater sewers in the Water Quality Act of 1987, which led to iterative regulation of storm sewers. (33 U.S.C. § 1342(p).) The EPA then promulgated regulations in 1990 prescribing permit requirements for larger cities (so-called phase 1 permits), followed by an Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems, followed in turn with permit requirements for smaller governments and municipal areas in 2003 (so-called phase 2 requirements). (40 C.F.R. Parts 122 and 123; 55 Fed.Reg. 48063 (Nov. 16, 1990) [phase 1]; 61 Fed.Reg. 41698 (May 17, 1996) [interpretive memorandum]; 64 Fed.Reg. 68722, 68843 (Dec. 8, 1999) [phase 2].)

Permit requirements and compliance costs continue to increase under the Porter-Cologne Act, too. For example, this year the San Francisco Bay Regional Water Quality Control Board

adopted an order requiring a regionwide 40% reduction in dry-season total inorganic nitrogen loads to San Francisco Bay including flows from the City's Southeast Water Pollution Control Plant. (AC MJN, Ex. 1 at p. 7; 2AA93.) "[T]he cost to implement these load reductions will be significant," and one study estimated an **$11 billion** cost to do so. (AC MJN, Ex. 1 at p. 7.)

Permit requirements are demanding, and they become ever more demanding as permits are periodically renewed. By way of example of a major iterative increase on local requirements, the State Water Resources Control Board adopted the "trash provisions" amendment to the Ocean Plan in 2015, establishing a prohibition on the discharge of trash, and triggering permit amendments across the entire state.[3] All stormwater management providers are now required to ensure that storm sewers do not convey trash to surface waters, regardless of whether there is cooperation from the public.

As another example, in the 2022 renewal of the regional MS4 permit that applies to most San Francisco Bay local governments, the San Francisco Bay Regional Water Board issued a permit that extends for no less than 724 pages. The permit mandates public

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[3] See https://www.waterboards.ca.gov/water_issues/programs/ocean/docs/oceanplan2019.pdf.

education, construction permitting, monitoring, asset management, and annual reporting; it prohibits MS4 operators from discharging rubbish, refuse, bark, sawdust, or other solid waste into surface waters and requires them to prohibit private parties (i.e., society generally) from discharging non-stormwater into storm drains and watercourses. (AC MJN, Ex. 2 at pp. 9–10.) The order requires MS4 operators to timely implement many costly control measures involving sewer infrastructure, including:

- developing best management practices for street and road repair and maintenance, pavement washing, and graffiti removal;
- inspecting and marking at least 80% of municipally maintained storm drain inlets with pollution prevention messages;
- implementing low impact development requirements (i.e., soil and plant features to enhance treatment and recharge);
- adopting a stormwater monitoring strategy for the many emerging contaminants [i.e., newly identified contaminants of concern like PFAS, so-called "forever chemicals"] and implementing that strategy; and,

- investigating land areas that likely contribute mercury to MS4s.

(*Id.* at pp. 11–30.) The budgetary requirements for implementing these permit requirements are massive, and the annual reports extend for hundreds of pages, and in some cases, more.[4]

As regulators pursue laudable goals of water quality, sustainability, and conservation by imposing progressively more demanding permit requirements, compliance costs grow apace. (See, e.g., AC MJN, Ex. 1 at p. 7; AC MJN, Ex. 3.) This makes it crucial that stormwater management agencies have authority to increase fees to fund attainment of permit requirements. This is the policy context for this appeal.

3. Requiring Voter Approval of Stormwater Management Charges Would Hinder State and Federal Water Policies

In addition to the Clean Water Act requirements discussed above, state and federal water supply and conservation objectives

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[4] The 2017-2018 annual report for the Los Angeles MS4 permit (the last annual report posted), for example, is over 4 gigabytes; available at: https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/annual_reports.html.

are also implicated here.

Water “is central to California’s strength and vitality.” (AC MJN, Ex. 3 at p. 1.) California currently faces a range of water challenges, including unsafe drinking water, flood risks, depleted groundwater, drought, and uncertain water supplies — all exacerbated by climate change. (*Ibid.*) As California’s population and economy continue to grow, “the future prosperity of our communities and the health of our environment depend on tackling pressing current water challenges while positioning California to meet broad water needs through the 21st century.” (*Ibid.*) This requires a “broad portfolio of collaborative strategies” involving government, local communities, water agencies, and other stakeholders. (*Ibid.*)

A flexible water management system is crucial to addressing the State’s water challenges, and stormwater management is a key element in improving water quality, increasing water supply, combatting drought, and protecting the public from flooding. Stormwater management “can be used to recharge aquifers, refill reservoirs, reduce heat island effects, provide landscape irrigation, and reduce river and ocean pollution.” (AC MJN, Ex. 4 at p. 18.) Indeed, the State seeks to diversify California’s water supplies by its Water Resilience Portfolio, proposing

> statewide authority for wastewater facilities to accept stormwater and incentivize stormwater permittees to divert their captured stormwater at times when wastewater facilities have the capacity to accept such diversions.

(*Id.* at p. 20.) Merging storm and sanitary flows is a water-supply strategy and, like the combined system at issue here, makes unpersuasive the facile distinction between storm and sanitary sewers *Salinas* and *Dep't of Finance* assumed, which is an artifact of insufficiently informed decision-making.[5]

The Legislature found joint use of storm water and other water sources to be "fundamental for developing California's 21st century water portfolio," and adopted a statutory framework allowing wastewater and stormwater management entities to make agreements by which stormwater can be diverted to wastewater

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[5] For example, there are a myriad of documented co-benefits to stormwater capture projects, ranging from water quality to recreation. These quantifiable community benefits merit consideration. (California Stormwater Quality Association, The Socioeconomic Value of Urban Stormwater Capture (2024), available at: https://www.casqa.org/wp-content/uploads/2024/02/FINAL-The-Socioeconomic-Value-of-Urban-Stormwater-Capture-02-03-2024.pdf.)

collection or treatment systems and the combined waters can be collectively managed, treated, reused, and discharged. (Wat. Code, §§ 13910, subd. (a), 13911, *see also* Wat. Code, §§ 13910, subd. (d), 13912, subd. (a)(1).) This is not surprising, given that these types of diversion programs, many of which are currently under development and expected to expand, increase water supply reliability by providing an additional water source for recycled water production that helps offset trending reductions in production caused by conservation efforts that have decreased wastewater flows historically used for recycled water production. (Los Angeles County Sanitation District, Water Reuse Case Study: Los Angeles County, California (2024), available at: https://www.epa.gov/waterreuse/water-reuse-case-study-los-angeles-county-california.) However, a municipality's ability to fund such vital projects is restricted to its tax and fee authority, as constrained (or not) by Section 6(c). (Wat. Code, § 13912, subd. (a)(3).)

Salinas and *Dep't of Finance*'s overly narrow interpretation of "sewer" and "water" service under Section 6(c) may prohibit wastewater agencies from charging fees necessary to offset the costs to accept, transport, treat, and discharge stormwater. (Compare *Griffith v. Pajaro Valley Water Management Agency*, 220 Cal.App.4th 586, 595–596 [groundwater management is a "water" service,

distinguishing *Salinas*].) Thus, if this Court finds that Section 6(c) does not exempt fees for storm sewer service from its election requirement, then wastewater and stormwater management agencies will find it difficult to fund combined stormwater/wastewater treatment projects, despite the legislative policy encouraging them to do so.

4. Distinguishing Stormwater From Water and Sanitary Sewer Service Impairs Water Management

Distinguishing stormwater management from either water or sewer service under Section 6(c) would adversely affect water and sewer service. Indeed, existing authority holds that aspects of stormwater management are water service under that section.

In *Griffith v. Pajaro Valley Water Management Agency*, the respondent agency increased charges to fund projects to provide supplemental water to reduce groundwater overdraft, retard seawater intrusion, and improve and protect groundwater supplies. ((2013) 220 Cal.App.4th 586, 591.) One project diverted stormwater for groundwater recharge. (*Ibid*) Another piped treated wastewater blended with stormwater for agricultural use. (*Ibid.*) *Pajaro* rejected the contention that the groundwater augmentation charge was for

"groundwater management" and not "water" service under Section 6(c), finding that "a distinction without a difference." (*Id.* at p. 595.) It found the charge to be for water service within Section 6(c) even though part of its proceeds funded collection, transportation, and discharge of stormwater — the facts here. (*Id.* at p. 596.) *Pajaro* distinguished *Salinas* based on the use of the water. The storm drainage fee in *Salinas* funded a system that monitored storm water for pollutants, carried it away, and discharged it into nature, whereas the groundwater augmentation charge funded a system to deliver stormwater and recycled wastewater for farm use. (*Id.* at pp. 595–596.)

As *Pajaro,* Wat. Code, section 13910, et seq., and San Francisco's combined sewer system illustrate, stormwater is often a water source, an aspect of sanitary sewer service (as where flows are combined), or both. Because of the integrated nature of water-related services, it is reasonable to construe stormwater service as "water" or "sewer" service under Section 6(c). Indeed, this is how our Constitution is meant to be construed:

> [A] written constitution is intended as and is the mere framework according to whose general outlines specific legislation must be framed and modeled, and is

> therefore … necessarily couched in general terms or language, it is not to be interpreted according to narrow or supertechnical principles, but liberally and on broad general lines, so that it may accomplish in full measure the objects of its establishment and so carry out the great principles of government.

(*Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 244–245, cleaned up.) It "must be given a reasonable interpretation, and … a literal construction which will lead to absurd results should not be given if it can be avoided." (*Dempsey v. Market Street Ry. Co.* (1943) 23 Cal.2d 110, 113.)

Salinas and *Dep't of Finance* misread Proposition 218, creating rigidity where essential services like water require flexibility. The statutory definitions of "water" and "sewer" better serve the needs of our state and therefore the likely intent of voters who, of course, cannot be understood to have voted to impair vital water service. (See *Dep't of Finance*, 85 Cal.App.5th at 558 quoting *New Orleans Gaslight Co. v. Drainage Com. of New Orleans* (1905) 197 US 453, 460) ("[t]he drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised.").)

B. *Salinas* Misreads Proposition 218

In cases of constitutional interpretation, the force of stare decisis, while substantial, is not as great as in cases of statutory construction. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) The Legislature can correct the judicial branch's constructions of statutes, but only courts can remedy a mistaken interpretation of our Constitution. (*Ibid.)* "Although the doctrine of stare decisis does indeed serve important values, it nevertheless should not shield court-created error from correction." (*Birks, supra,* 19 Cal.4th at p. 117.) Thus, while precedent "usually must be followed even though the case, if considered anew, might be decided differently by the current justices … [this] policy is a flexible one which permits this court to reconsider, and ultimately to depart from" its precedent in appropriate cases. (*Birks*, *supra,* 19 Cal.4th at pp. 116–117.) And, of course, *Salinas* and *Dep't of Finance* are not binding here. (*Los Angeles County Employees Retirement Assn. v. County of Los Angeles* (2024) 102 Cal.App.5th 1167, 1200, review granted [no horizontal stare decisis in California].)

1. Voters Intended "Sewer Service" Under Section 6(c) to Include Storm Sewer Service

"The principles of constitutional interpretation are similar to

those governing statutory construction. In interpreting a constitution's provisions, our paramount task is to ascertain the intent of those who enacted it." (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal. 4th 1016, 1037 quoting *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122.)

When interpreting initiatives, courts apply the principles applicable to statutory construction, but seek voters' intent. (*Kempton, supra,* 40 Cal.4th at p. 1037.) The first step is to examine an initiative's language, giving its words their ordinary meanings as understood by the average voter and construing the language "in the context of the statute as a whole and the [initiative's] overall … scheme." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) If language is unambiguous, then courts

> presume that the voters intend the meaning apparent on the face of an initiative measure and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.

(*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543 (cleaned up).)

"[V]oters are presumed to have been aware of existing laws at the time the initiative was enacted." (*Kempton, supra,* 40 Cal.4th at

1048.) Proposition 218 was passed by voters in November 1996. *Salinas* failed to consider that when voters approved Proposition 218 the law included stormwater management in "sewer service."

Congress enacted the Clean Water Act in 1972 and the EPA began addressing contamination from "storm sewers" in its 1975 regulations. (*Natural Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1372, fn. 5 [discussing former 40 C.F.R. section 125.4(f)(1)].) Since 1984 the EPA has defined of

- "**storm sewer**" under the Clean Water Act as "[a] sewer designed to carry only storm waters, surface run-off, street wash waters, and drainage;"
- "**combined sewer**" as "[a] sewer that is designed as a sanitary sewer and a storm sewer;" and
- "**sanitary sewer**" as

> [a] conduit intended to carry liquid and water-carried wastes from residences, commercial buildings, industrial plants and institutions together with minor quantities of ground, storm and surface waters that are not admitted intentionally.

(40 C.F.R. § 35.2550(11), (37), (47); 49 Fed.Reg. 6234 (Feb. 17, 1984).) Similarly, the Clean Water Act has used "sewer" to describe both

sanitary and storm sewers since the enactment of Section 402(b) in 1987. (Water Quality Act of 1987, Pub. Law. No. 100-4, § 405, 101 Stat. 7, 69 (codified at 33 U.S.C. § 1342(p)).)

Voters are presumed to know that the Clean Water Act defined "sewer service" to include both sanitary and storm sewers.

2. *Salinas* and *Dep't of Finance* Construe Proposition 218 Too Narrowly

Salinas determined that "[t]he popular, nontechnical sense of sewer service, particularly when placed next to 'water' and 'refuse collection' services, suggests the service familiar to most households and businesses, the sanitary sewerage system." (*Salinas, supra,* 98 Cal.App.4th at p. 1357). The opinion provides little further reasoning to support its conclusion, rejecting the parties' reliance on canons of construction and citing no definitions from dictionaries or statutes. While this may have been the most familiar understanding of the term "sewer service" to the court, nothing in the opinion demonstrates that the voters intended to ascribe this meaning to "sewer service" in approving Proposition 218. And, of course, the Legislature has concluded otherwise. (Gov. Code, § 53751, subd. (f).)

Dep't of Finance addresses the meaning of "sewer" in Section 6(c), largely as does an Attorney General's opinion applying

Salinas. (85 Cal.App.5th at pp. 568–569; 81 Ops.Cal.Atty.Gen. 104, 106 (1998).) Disregarding SB 231's definition of "sewer" because it was enacted after the 2017 NPDES permit disputed there, *Dep't of Finance* found Proposition 218's use of "sewers" and "drainage systems" in the same sentence in article XIII D, section 5 ("Section 5") demonstrated to distinguish those words. The court applied the maxim *expressio unius est exclusion alterius*[6] to find that Section 6(c) does not exempt fees for drainage systems from its election requirement because they are omitted from Section 6(c)'s rule for property-related fees yet included in Section 5's provision to grant legacy status to listed assessments. Finding that "storm drainage systems" qualify as "drainage systems" within the meaning of Section 5, the court concluded "the voters did not intend the exemption of 'sewer' service fees from article XIII D's voter-approval requirement to include fees for stormwater drainage systems." (85 Cal.App.5th at p. 568.)

But initiatives are not construed as legislation is. If we were

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[6] "When language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful, and that the Legislature intended a different meaning." (*Dep't of Finance*, 85 Cal.App.5th at p. 589, cleaned up).

construing work of the Legislature reflecting professional support, three readings, and many opportunities to clarify and correct, this would be a plausible construction. But we are construing the Constitution as amended by initiative, requiring some degree of flexibility due to the relative difficulty of amending it, and the work of the voters, making application of the canons less likely to disclose voters' intent. (E.g., *Kempton*, *supra*, 40 Cal.4th at pp. 1038–1039 [disregarding canon disfavoring implied repeals to serve apparent intent of voters].)

Dep't of Finance and the Attorney General arrived at their interpretations applying the definition of "drainage system" supplied by the Proposition 218 Omnibus Implementation Act as "any system of public improvements that is intended to provide for erosion control, for landslide abatement, or for other types of water drainage." (Gov. Code, § 53750, subd. (d).) The Attorney General determined that stormwater management service also qualifies as "flood control" as that term is used in Section 5. (81 Ops.Cal.Atty.Gen. 104, 106 (1998).)

But this definition is intended to apply to the assessment provisions of Proposition 218, which use the term — not to its fee provisions, which do not. (Cal. Const., art. XIII D, § 5, subd. (a) [exempting pre-Proposition 218 assessments for specified purposes

including sewers, water, flood control, drainage systems].) Moreover, as the definitions of "water" and "sewer" quoted above demonstrate, these terms overlap — *Dep't of Finance's* assumption that they are distinct lead it astray. (Gov. Code, § 53750, subds. (k) & (n).) And the flexibility with which the Constitution is construed counsels against such a view. San Francisco's combined system serves all the purposes of drainage, flood control, water, and sanitary sewer service. It can be funded by an assessment under article XIII D, sections 4 and 5 as well as by a property-related fee under article XIII D, section 6(c) without an election.

Dep't of Finance and the Attorney General's reliance on the definition of "drainage systems" overlooks that the sanitary sewer systems may also entail the collection, treatment, or disposition of wastewater for drainage purposes. (Pub. Util. Code, § 230.5.) As "sewer" is undefined by Proposition 218, stormwater and wastewater are **both** "types of water drainage" under Government Code, section 53750, subdivision (d). Where, as here, wastewater and stormwater are combined in one sewer system and transported, treated, reused, and discharged together, there is no basis to distinguish them or to take San Francisco's fee out of Section (c)'s exemption from its election requirement. (*Dep't of Finance*, *supra*, 85 Cal.App.5th at p. 568; 1AAR34.)

While *Salinas* and *Dep't of Finance* construe "sewer service" too narrowly under Section 6(c), the trial court here and the Legislature more persuasively conclude that section uses "sewer service" to include services necessary to collect, treat, reuse, or dispose of storm water. (3AA920; Gov. Code, §§ 53750, subd. (k), 53750.5 [defining "water service" broadly to include fire flows.)

IV. CONCLUSION

The conveyances that transport stormwater for treatment and discharge are similar to the conveyances that carry wastewater, and the separate rule for each in this context serves no legal purpose and should be disposed of. Storm sewer fees are exempt from the election requirement of article XIII D, section 6, subdivision (c) as "water" fees, "sewer" fees, or both, especially for combined sanitary and storm sewer systems like San Francisco's. This reading is consistent with the text and context of Proposition 218, voter intent as measured by earlier law of which voters had notice, the Legislature's interpretation, and public policy.

The unduly narrow construction of "sewer service" adopted in *Salinas* and *Dep't of Finance* should not persuade here. Indeed, the broader reading is necessary to enable public agencies to fund Clean Water Act compliance and pursue the joint use of storm and other

water supplies to serve our desert state, as the Legislature has urged. Local agencies' ability to fund such services is vital to public health and safety, environmental health, water conservation, and water supply reliability. For these reasons, Local Government Amici respectfully request this Court affirm.

DATED: November 13, 2024 **COLANTUONO, HIGHSMITH & WHATLEY, PC**

/s/ Adam Mentzer
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CERTIFICATE OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.204(c)(1)

Pursuant to California Rules of Court, rule 8.204(c)(1), the foregoing BRIEF OF AMICI ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT CITY AND COUNTY OF SAN FRANCISCO is produced using 13-point Palatino Linotype font and contains 5,048 words (excluding the tables, cover information, and Certifications) and is thus within the limit of 14,000 words permitted by rule 8.204(c) . In preparing this Certificate, I relied on the word count generated by Microsoft Word for Office 365 MSO.

DATED: November 13, 2024 **COLANTUONO, HIGHSMITH & WHATLEY, PC**

/s/ Adam Mentzer

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PROOF OF SERVICE

Gluck et al. v. City and County of San Francisco
First Appellate District, Division 3 Case No. A170087
San Francisco County Superior Court Case No. CGC23609954

I, Tracey S. West, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is 790 E. Colorado Boulevard, Suite 850, Pasadena, CA 91101-2109. My e-mail address is: TWest@chwlaw.us. On November 13, 2024, I served true copies of the following document(s) described as **BRIEF OF AMICI CURIAE ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT CITY AND COUNTY OF SAN FRANCISCO** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I electronically transmitted the above document(s) to the person(s) at the e-mail address(es) set forth below via the TrueFiling electronic service portal.

BY MAIL: By placing true copies thereof 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 Pasadena, California, in the ordinary course of business. I am aware that on motion of the party served, service is deemed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on November 13, 2024, at St. Louis, Missouri.

Tracey S. West

SERVICE LIST

Gluck et al. v. City and County of San Francisco
First Appellate District, Division 3 Case No. A170087
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