NO. S263734

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HILL RHF HOUSING PARTNERS, L.P., et al.,
Petitioners and Appellants,

v.

CITY OF LOS ANGELES, et al.,
Defendants and Respondents.

MESA RHF PARTNERS, L.P., et al.
Petitioners and Appellants

vs.

CITY OF LOS ANGELES, et al.
Defendants and Respondents.

Second District Court of Appeal, Case Nos. B295181, B295315;
Los Angeles County Superior Court, Case Nos. BS170127, BS170352,
Hon. Mitchell L. Beckloff, Presiding, Dept. 86

LEAGUE OF CALIFORNIA CITIES, ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION'S APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENTS CITY OF LOS ANGELES ET AL.; *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: March 29, 2021 BURKE, WILLIAMS & SORENSEN, LLP

By: */s/ Kevin D. Siegel*
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APPLICATION TO FILE *AMICI CURIAE* BRIEF

I. INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f), *amici curiae* Association of California Water Agencies ("ACWA"), League of California Cities ("Cal Cities"), California State Association of Counties ("CSAC"), and California Special Districts Association ("CSDA") (collectively, "Local Government *Amici*") respectfully request permission to file an *amicus curiae* brief in support of Defendants and Respondents.

This application is timely made within 30 days after the filing of the reply brief on the merits on February 25, 2021. (Rules of Court, rule 8.520(f)(2).)

II. INTEREST OF *AMICI CURIAE*

Local Government *Amici* represent cities, counties, and special districts throughout California. ACWA is a California nonprofit public benefit corporation comprised of over 430 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts, and special purpose public agencies.

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.

CSAC is a non-profit corporation having a membership consisting of the 58 California counties.

CSDA is a non-profit corporation with a membership of more than 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.

The Local Government *Amici* members provide innumerable services that benefit property owners, business owners, and residents across the State of California, including through the adoption of special assessments to provide special benefits to real property pursuant to section 4 of Article XIII D of the California Constitution (added by Proposition 218).

Each Local Government *Amici* has a process for identifying cases, such as this one, that warrant their participation. ACWA has a Legal Affairs Committee, composed of attorneys from each of its regional divisions throughout the State of California. The Legal Affairs Committee monitors litigation of significance to ACWA's members.

Cal Cities is advised by its Legal Advocacy Committee, comprised 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.

CSAC sponsors a Litigation Coordination Program, which is administered by the California County Counsels' Association. CSAC's Litigation Committee monitors litigation of concern to California's counties.

CSDA is advised by its Legal Advisory Working Group, comprised of 25 attorneys that represent special districts throughout the State. The group monitors litigation of concern to special districts and identifies cases that have statewide or nationwide significance.

Each of the Local Government *Amici* entities determined that this case is of significance to their members. *Amici* have reviewed the parties' principal briefs and conclude that additional argument would assist the Court. They desire to provide points and authorities to explain their views regarding the constitutional, statutory, and case law at issue and the implications of the various arguments presented to this Court, and to assist

this Court in evaluating the issues.

Accordingly, the Local Government *Amici* respectfully request leave to file the brief combined with this application.

III. CONCLUSION

Local Government *Amici* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: March 29, 2021

BURKE, WILLIAMS & SORENSEN, LLP

By: */s/ Kevin D. Siegel*
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***AMICI CURIAE* BRIEF**

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I. INTRODUCTION

Proposition 218 requires local governments to satisfy procedural and substantive requirements in order to impose assessments to provide special benefits to property. Confirmation that the exhaustion of administrative remedies doctrine applies to challenges to the imposition of assessments will foster better local government and judicial decision-making with respect to such claims, furthering the purpose of Proposition 218 to allow, and only to allow, assessments that satisfy Proposition 218's requirements.

Requiring property owners to comply with the doctrine—as they must per well-accepted case law—will advance local governments' efforts to satisfy Proposition 218, provide them an opportunity to correct the alleged error, and allow lawful assessments to be imposed upon majority approval of the property owners who will be specially benefitted by the project.

If the objector is dissatisfied with the administrative remedy or no correction is made, they may then file suit. Meanwhile, a more robust record will have been created during the local government proceedings, which will facilitate the court's review of the legality of the local government's legislative action to impose assessments.

Thus, the exhaustion doctrine fosters robust, better-informed decision-making, by local governments and the courts, and facilitates the purposes of Proposition 218 to allow the imposition of Proposition 218-compliant assessments for the benefit of consenting property owners.

Confirmation that the exhaustion doctrine applies to challenges to assessments under Proposition 218 will advance the interests of all stakeholders, including local governments, the judiciary, proponents of assessments, and opponents of assessments, with one exception—project

opponents who seek an unfair litigation advantage by denying local governments the opportunity to resolve alleged infirmities before suit is filed to invalidate the legislative action adopted upon majority approval of the specially benefitted property owners.

II. DISCUSSION

A. The Exhaustion Doctrine Improves Administrative and Judicial Decision-Making, Reduces Wasteful and Counter-Productive Litigation Tactics, Protects Administrative Autonomy and Separation of Powers, and Applies to Public Agencies' Quasi-Adjudicatory and Legislative Acts.

The Second District's opinion and Respondents' Joint Answer Brief articulate the exhaustion doctrine's numerous principles and requirements. Local Government *Amici* highlight key points that individually and collectively demonstrate, *inter alia*, how applying the exhaustion doctrine (1) improves decision-making, by both public agencies and the courts, (2) helps to avoid and narrow disputes, and (3) protects the separation of powers between public agencies and the judiciary.

1. The Exhaustion Doctrine Improves Decision-Making, by Public Agencies and the Courts, Helps Avoid and Narrow Disputes, and Protects Administrative Autonomy and Separation of Powers.

The courts view the exhaustion doctrine "with favor because it facilitates the development of a complete record that draws on administrative experience and promotes judicial efficiency." (*Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, 501; see also *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1137.) Through this process, public agencies make better-informed decisions, on both adjudicatory and legislative matters within their jurisdiction.

Indeed, " '[t]he 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*, 128 Cal.App.4th at 1137, quoting *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198, original emphasis.) This obligation extends to alleged constitutional violations. (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 276; *Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 93.)

Thus, a party who objects to a public agency's proposed action must specifically and fully apprise the public agency of each of its contentions before commencing litigation. (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Dirs.* (2013) 216 Cal.App.4th 614, 623, *citing Evans*, 128 Cal.App.4th at 1137.)[1] The objector bears the burden to address the "exact issue" (*id.* at 623; *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 527), and to provide non-conclusory evidence, including expert evidence where warranted. (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 686.) As this Court cogently explained: "Administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are

[1] If objectors subsequently file suit, they bear the burden to plead and prove satisfaction of the exhaustion doctrine. (*Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 156 [pleading obligation]; *McAllister*, 147 Cal.App.4th at 274-75 [pleading obligation]; *North Coast Rivers Alliance*, 216 Cal.App.4th 614, 623-24 [burden of proof].)

Petitioners nonetheless assert that the public agency bears the burden to plead and prove exhaustion as an affirmative defense. But the case they cite for their contention is not on point. In *Burke v. Ipsen* (2010) 189 Cal.App.4th 801, 807-08, the Court merely held that a labor union had the burden of proof on whether it sought to enforce rights under an employee relations ordinance.

raised in a judicial forum." (*Sierra Club*, 21 Cal.4th at 510.)

This requirement provides the public agency with requisite information so that it can endeavor to resolve the dispute and avoid litigation. (*Evans*, 128 Cal.App.4th at 1137; see also *McAllister*, 147 Cal.App.4th at 276 [requiring exhaustion of factual and legal issues provides the public agency an opportunity to resolve the issue, and avoids unnecessary judicial intervention].) Thus, the exhaustion doctrine fosters better-informed administrative decisions, for the benefit of the objector, the public agency, and members of the public within the public agency's jurisdiction.

The doctrine also benefits the courts and the judicial process. By facilitating public agencies' ability to resolve disputes, the doctrine reduces the burden on courts. (*Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1268; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 83.) Sometimes, no judicial resolution will be needed at all. Other times, the disputes will be narrowed so the parties can litigate, and the court can resolve, the remaining issues. (*Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 383 [exhaustion doctrine promotes judicial efficiency by "allow[ing] an administrative agency to provide relief without requiring resort to costly litigation," and, even if an administrative remedy does not provide "complete relief, it still may reduce the scope of litigation"]; see also *McAllister*, 147 Cal.App.4th at 275, 276 [doctrine promotes judicial efficiency]; *Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 637, 644.)

If the objector remains dissatisfied and files suit, the court will be better positioned to determine whether the public agency's action was lawful. The court will benefit from the agency's expertise on the relevant facts and issues still in dispute. (*Williams & Fickett*, 2 Cal.5th at 1268; *Sierra Club*, 21 Cal.4th at 501; *Evans*, 128 Cal.App.4th at 1137; *McAllister*, 147 Cal.App.4th at 276.) The doctrine serves as "a preliminary

administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review." (*Williams & Fickett*, 2 Cal.5th at 1268, citations and internal quotation marks omitted.) As such, the doctrine promotes more sound, better-informed adjudication of unresolved issues.

In addition to improving administrative and judicial decision-making, the doctrine promotes administrative autonomy by ensuring that courts do not interfere with public agency decision-making unless and until exhaustion has been satisfied. (*Plantier*, 7 Cal.5th at 383; see also *McAllister*, 147 Cal.App.4th at 276.) In other words, by precluding litigation unless the objector has exhausted administrative remedies, the doctrine honors the separation of powers between public agencies and the courts. (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 76.)

This is not mere lip service. Satisfaction of the doctrine is "jurisdictional prerequisite, not a matter of judicial discretion." (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 589.) The requirement to exhaust administrative remedies "is founded on the theory that the administrative tribunal is created by law to adjudicate the issue sought to be presented to the court, and the issue is within its special jurisdiction. If a court allows a suit to go forward prior to a final administrative determination, it will be interfering with the subject matter of another tribunal." (*Ibid.*; see also *Plantier*, 7 Cal.5th at 383 ["allowing a court to intervene before an agency has fully resolved the matter would 'constitute an interference with the jurisdiction of another tribunal,' " quoting *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1151.)

2. The Doctrine Prevents Counter-Productive Practices and Reduces Unnecessary Litigation.

If exhaustion were not required, parties disputing the wisdom of agency actions would often refrain, for strategic purposes, from revealing their alleged grievances to agency decision makers, hoping to achieve a different result in the courts. (*Plantier*, 7 Cal.5th at 383 ["If exhaustion were not required, a litigant would have an incentive to avoid securing an agency decision that might later be afforded deference," and to "bypass the agency in the hope of seeking a different decision in court"]; *Tahoe Vista*, 81 Cal.App.4th at 594 [in the absence of an exhaustion requirement, objectors to proposed agency action would be incentivized "to narrow, obscure, or even omit their arguments before the final administrative authority because they could possibly obtain a more favorable decision from a trial court"].)

Indeed, "it was never contemplated that a party to an administrative hearing should withhold any defense or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court." (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197, internal quotation marks and citations omitted; cf. *Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1271 [plaintiffs may not present in court evidence that was not before the public agency when it took legislative action, as to do so "would encourage interested parties to withhold important evidence at the administrative level so as to use it more effectively to undermine the agency's action in court"].)

If exhaustion were not required, objectors to public agency action would, perversely, be incentivized to refrain from seeking resolution to disputes during the administrative processes, and instead look to the courts in the first instance for a remedy.

3. The Doctrine Applies to Public Agencies' Quasi-Adjudicatory and Legislative Actions.

The exhaustion doctrine applies to both quasi-adjudicatory and legislative actions. (*City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021 [doctrine applies to local governments' quasi-adjudicatory actions]; *McAllister*, 147 Cal.App.4th at 283, 293 [same]; *Evans*, 128 Cal.App.4th 1123 [doctrine applies to cities' legislative actions, including adoption of redevelopment plan at issue]; *Mountain View Chamber of Commerce*, 77 Cal.App.3d 93 [same, as to zoning ordinance]; *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 87 Cal.App.4th 878, 884-85 [doctrine applies to administrative agencies' legislative action, including adoption of budget and assessments pursuant to Pest Control Law]; *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 365, 641 [same].)

B. The Court Should Hold that the Exhaustion Doctrine Applies to a Property Owner's Challenge to Special Assessments Imposed Pursuant to Proposition 218.

Petitioners exercised their right to vote, by written ballot, against the adoption of two business improvement districts ("BIDs") and imposition of property-based special assessments, pursuant to the Business Improvement District Law of 1994 (Sts. & Hy. Code § 36600 et seq.) ("PBID Law") and section 4 of Article XIII D of the California Constitution. However, the majority of the weighted ballots were cast in favor of adoption of the BIDs and imposition of the assessments, which provided the City discretion to establish the BIDs and impose the special assessments. (See *Hill RHF Housing Partners, L.P. v. City of Los Angeles* (2020) 51 Cal.App.5th 621, 626-28, on review.)

At no point during the administrative proceedings did Petitioners object to the lawfulness of the BIDs or the special assessments imposed

pursuant thereto. Nonetheless, Petitioners sued the City, alleging the City had unlawfully established the BIDs and imposed special assessments, including on the ground that the assessments unlawfully charge Petitioners for general benefits in violation of Proposition 218. (*Id.* at 628-29.) Thus, Petitioners seek to adjudicate the lawfulness of City actions despite never having presented their contentions to the City.

This Court should hold that a property owner may not challenge the lawfulness of a local government's legislative decision to impose special assessments unless the property owner has exhausted administrative remedies by apprising the agency of its specific challenges.

1. The Exhaustion Doctrine Is Consistent with Proposition 218's Substantive and Procedural Rules Governing Special Assessments.

Petitioners contend that in adopting Proposition 218, the voters intended to make it "harder" for local governments to impose assessments, and that application of the exhaustion doctrine would undermine that purpose by making it easier for local governments to defend against lawsuits challenging special assessments. Petitioners' premise does not fairly represent the purpose of Proposition 218. Rather, the exhaustion doctrine is consistent with Proposition 218's substantive and procedural rules governing special assessments. Holding that the doctrine applies will advance those purposes.

a. Proposition 218 Imposes Substantive and Procedural Requirements, Not to Hinder Local Governments' Ability to Impose Lawful Assessments, But to Ensure They Only Impose Justified Assessments and Secure Property Owner Approval.

Contrary to Petitioners' contention, Proposition 218's procedural and substantive rules are not intended to hinder local governments' ability to adopt substantively valid special assessments, following notice and

opportunity to be heard. Rather, Proposition 218 empowers taxpayers to ensure that local governments only adopt properly justified special assessments, with taxpayer approval.

As this Court has explained, "Proposition 218 can best be understood against its historical background, which begins in 1978 with the adoption of Proposition 13. The purpose of Proposition 13 was to cut local property taxes." (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 442, citation and internal quotation marks omitted.) One mechanism intended to prevent local governments from "subverting" Proposition 13 was to require two-thirds voter approval of special taxes. (*Ibid.*) However, the Supreme Court held that a special assessment was not a tax for which two-thirds voter approval was required. (*Ibid.*) Thus, local governments were able to avoid Proposition 13 by imposing special assessments and other charges that did not qualify as taxes subject to Proposition 13. "In part to change this rule, the electorate adopted Proposition 218." (*Id.* at 443.)

Proposition 218's uncodified statement of purpose declares that local governments had frustrated the purpose of Proposition 13 by imposing " 'excessive tax, assessment, fee and charge increases' " without taxpayer consent, and that Proposition 218 " 'protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.' " (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838, quoting Ballot Pamp., Gen. Elec., *supra*, text of Prop. 218, § 2, p. 108; reprinted as Historical Notes, 2A West's Ann. Cal. Const. supra, foll. art. XIII C, § 1, p. 33.)[2]

[2] The entire statement of purpose is as follows: " 'The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax,

To achieve this purpose, Proposition 218 imposed new substantive and procedural requirements that local governments must satisfy. With respect to assessments, Proposition 218 requires local governments only to impose (i) justified, non-excessive assessments, which charge property owners only for the proportionate special benefit conferred on their property, (ii) following additional notice and opportunity for property owners to approve the assessments by weighted voting. (Cal Const., art. XIII D, § 4; *Silicon Valley*, 44 Cal.4th at 443].) Thus, the purpose is not to block special assessments, but to tighten the substantive requirements and ensure sufficient opportunity for property owners to consider whether they favor the imposition of assessments to benefit their property. (Cf. *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220-21 ["The notice and hearing requirements of subdivision (a) of section 6 of California Constitution article XIII D will facilitate communications between a public 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;" footnotes omitted].)

The exhaustion doctrine is consistent with, and enhances, these purposes, as discussed next.

b. The Exhaustion Doctrine Enhances the Purposes of Proposition 218's Rules for Special Assessments.

The exhaustion doctrine advances the purposes of Proposition 218's procedural and substantive rules for the adoption of special assessments.

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assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.' " (*Ibid.*)

To hold otherwise would be contrary to the purposes of Proposition 218. It would diminish opportunities for property owners and local governments to address potential infirmities during the administrative proceedings and to protect property owners' rights to vote to approve substantively valid assessments.

Article XIII D, section 4, subdivisions (c), (d) and (e) require local governments to provide property owners at least 45 days' notice of the public hearing on the proposed assessments. The notices must provide the property owners detailed information regarding the proposed assessments and the property owners' rights to protest and vote.

During this time, the property owners can evaluate the detailed Engineer's Report—which provides the principal, substantive analysis regarding the bases for the proposed assessments for the subject properties. The would-be payors may develop various positions regarding whether to support or oppose the proposal to impose the assessments. This determination might be based on a policy position or personal preference, e.g., whether the underlying project is warranted or whether the property owner simply does not want to pay for the project irrespective of the special benefits it would provide. In addition, or instead, the determination might be based on legal concerns, e.g., whether the local government satisfied Proposition 218's procedural or substantive requirements. Consideration of three such scenarios sheds light on why the exhaustion doctrine must apply.

Some property owners might enthusiastically support the proposed project and the special benefits to be provided to their property, and also find that local government has met its procedural and substantive obligations, including that the Engineer's Report and other evidence provided by the local government demonstrates that the proposed assessments satisfy section 4's substantive requirements. Such property owners could submit a yes vote prior to or at the public hearing and request

that, if their position is supported by a majority of the weighted ballots, the local government impose the assessments and proceed with the project that will specially benefit their property.

Other property owners may oppose imposition of the assessments, but not based on any legal ground. They may, for example, oppose the project and assessments on policy or personal grounds, e.g., because the property owner does not support the project or simply does not want to pay for it. Such property owners could submit a no vote prior to or at the duly-noticed public hearing. They would, of course, hope that the majority of the weighted ballots were also against imposition of the assessments, which would preclude their imposition. However, if these property owners were outvoted and the local government proceeded, they would not commence or support litigation to challenge the approval as they have no legal objection. Rather, since the assessments secured majority approval, and the local government followed the majority vote, they would be willing to accept the outcome of this democratic process.

But other property owners may instead, or also, object to the assessments on the ground that they do not satisfy section 4's procedural or substantive obligations only to impose proportionate assessments and not to charge for general benefits. These property owners could exercise their voting rights as well as their rights to seek an administrative remedy and thereafter, if the local government did not resolve the dispute, to seek a judicial remedy.

First, they could vote no and hope that a majority of the weighted ballots were also no votes, thereby collectively exercising property owners' rights under Proposition 218 to prohibit imposition of assessments without taxpayer consent.

Second, they may also seek to persuade the local government that imposition of the proposed assessments would be unlawful—for procedural

or substantive reasons— and that even if the majority of the weighted ballots are in favor, the agency should not impose the assessments at all, or in the proposed amounts. And, if the local government did not remedy the claimed error (e.g., by re-noticing the public hearing to fix a procedural error, modifying or eliminating the objector's assessment, or declining to impose any assessments at all), these objectors may then file suit to vindicate their rights not to be unlawfully charged under Proposition 218.

These scenarios illustrate that the exhaustion doctrine advances the purposes of Proposition 218, as well as the interests of each of the stakeholders. The exhaustion doctrine will ensure, for example, that the local government examines the legal objection, including the bases therefor, so that it may seek to fix the potential infirmity. This benefits everyone – the local government by providing information that will help it to cure any defect and take lawful action, the supporters of the proposed action who want to see the local government impose lawful assessments and provide special benefits to their property, and the objectors who want to prevent unlawful actions. The exhaustion doctrine advances the purposes of Proposition 218 by ensuring public agencies exercise their authority only to adopt assessments that satisfy Proposition 218's procedural and substantive requirements, and by protecting the rights of the majority of the property owners who consented to the assessments under Proposition 218. Indeed, holding that the exhaustion doctrine applies will " 'effectuate the purposes of limiting government revenue and enhancing taxpayer consent.' " (*Silicon Valley*, 44 Cal.4th at 448, quoting Ballot Pamp., Gen. Elec. (Nov. 5, 1996). text of Prop. 218, § 5, p. 109; reprinted in Historical Notes, West's Ann. Const., art. XIII C, p. 85.)

If the exhaustion doctrine did not apply, Proposition 218 would be undermined. An objector could vote no without informing the public agency of any legal objections, and then file suit. The local government

(and the majority it represents) would have been deprived of any opportunity to address the concern and ensure it was acting lawfully under Proposition 218, and would face a lawsuit and potential liability it might have been able to avoid.

The local government would not be the only victim of such lay-in-wait tactics. Supporters of the assessments—who collectively exercised their rights under Proposition 218 to vote for the assessments and are looking forward to the provision of special benefits—would be at risk of their votes being negated by a property owner who never voiced any legal objections until they filed suit. By not fairly disclosing the legal basis for an objection before the local government acted, the objector would have effectively subordinated the majority's rights under Proposition 218 to consent to the imposition of assessments to the objector's right to challenge the assessments.[3]

Further, to excuse plaintiffs from their obligation to satisfy the exhaustion doctrine would lead to immense waste of taxpayer funds. The local government will have expended substantial resources, likely hundreds of thousands of dollars for the Engineer's Report and staff time, for the administrative proceedings and public hearing. The local government will then spend substantial taxpayer funds to defend against or otherwise resolve the lawsuit. If it turns out that the plaintiff has a meritorious claim, the local government will need to rescind its approval and recommence the process. If however, the objector had timely presented their objection during the local government's proceedings, the government likely could have provided an administrative remedy. Thus, contrary to the spirit of

[3] The effect of such asymmetrical tactics is particularly pronounced here, where the weighted ballots were 94% and 81% in favor of the respective Downtown Center and San Pedro BIDs, respectively.

Proposition 218, to except plaintiffs from the exhaustion doctrine will waste taxpayers' money and may foster a result contrary to the majority's wishes.

In sum, holding that the exhaustion doctrine applies will advance the purpose of Proposition 218 to allow for, and to only allow for, the imposition of lawful assessments with taxpayer approval. By contrast, were this Court to create an exemption to the applicability of the exhaustion doctrine, the ruling would undermine the rights of local governments and property owners to enact and receive the benefits of lawful assessments that specially benefit property.

2. The Administrative Remedy Provided by Section 4 of Article XIII D Is to Have the Public Agency Fix the Infirmity, Not for Property Owners to Withhold Consent.

As discussed above, voting no on an assessment informs the public agency that the voting property owner does not want to be assessed. If the weighted majority also votes no, those property owners will secure their desired outcome of no assessments.

But that is not an administrative remedy. Rather, that would be the result of the democratic voting process established by Proposition 218.

However, were the property owner to inform the local government of grounds for the protest, as they are empowered to do under section 4, the local government may provide a remedy. It may, for example, eliminate or reduce particular assessments per the protest to ensure that the property does not pay for any general benefits (and to substitute public agency funds in its stead to pay for such general benefits).[4] Meanwhile, upon majority approval by the property owners, the local government may proceed with

[4] Of course, there are other options to remedy an alleged infirmity. For example, a city may modify the boundaries of a PBID pursuant to Streets & Highways Code section 36024.

the larger project for the benefit of all specially benefitted properties.[5]

Further, at the public hearing on whether to adopt the proposed assessments, the local government must (i) consider any and "all protests," whether oral or written, and (ii) tabulate the written, weighted ballots. (Cal. Const., art. XIII D, § 4(e).) As to tabulating the weighted ballots, the local government is determining whether the taxpayers have conveyed their written consent for the local government to impose the assessments. As to the written or oral protests, the local government must take their points into account, irrespective of whether the weighted ballots support the assessments. (See *Plantier*, 7 Cal.5th at 386.) Even if the majority consented to the assessment, the local government may provide a remedy, e.g., to reduce or decline to impose the assessment, thereby resolving the dispute and obviating the need for litigation.

Thus, Petitioners incorrectly conflate the property owners' authority to withhold consent to imposition of assessments with the local government's authority to provide an administrative remedy to satisfy a demand presented in any written or oral protest.

3. The Right to Submit a Protest Triggers the Obligation to Exhaust if an Objector Seeks to File Suit.

It has long been settled that if an administrative remedy is available, "relief must be sought from the administrative body and such remedy

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[5] In this regard, the assessment context differs from the property-related fee context under section 6. In the assessment context, property owners and the local government are considering, and voting upon, the allocation of costs between the owners and the government, based on whether the costs are proportionate and only for special benefits conferred. By contrast, in the property-related fee context, at issue is the allocation of costs among the fee payors (not between the fee payors and the public agency). If the government lowers fees for one class of fee payors based on a re-allocation of costs, fees will necessarily increase for another class of fee payors, a "zero sum game." (*Plantier*, 7 Cal.5th at 385.)

exhausted" before judicial relief is available. (See, e.g., *Rojo v. Kliger* (1990) 52 Cal.3d 65, 83; *Abelleira v. District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 292.) Petitioners seek to undo this rule by asserting that they had not been informed of any obligation to exhaust, and thus had no duty. The contention lacks merit.

No law obligates the local governments to explain to property owners the difference between voting and exhausting administrative remedies.

Further, the courts have made clear that a project opponent's expression of a position regarding whether a project should proceed is not the equivalent of exhausting administrative remedies. In *Park Area Neighbors v. Town of Fairfax*, the plaintiffs had appeared before the Town Council to oppose a project. However, they had not actually administratively appealed the Planning Commission's underlying decision. Despite having informed the Town Council of their position, by failing to administrative appeal to formally ask the Council to take certain action, the plaintiffs deprived the court of jurisdiction to consider their claims pursuant to the exhaustion doctrine. (*Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1445, 1447, 1450.)

Further, the *Park Area Neighbors* plaintiffs were not excused from their failure to exhaust despite having been misinformed by a planning commissioner that appearing at the Council meeting was sufficient. (*Id.* at 1450.) As the Court explained, a plaintiff may not "avoid a procedural rule of jurisdictional dimension based on receipt of purportedly misleading legal advice from an administrative official." (*Ibid.*)

This Court should follow this principle and rule that local governments have no obligation to inform property owners of their obligation to exhaust. The law does not burden local governments with an affirmative duty to advise property owners that if they fail to inform the

government of the bases for their challenge, then the objectors may not file suit on those grounds. Applied here, the Court should hold that Petitioners failed to satisfy their burden to show that they exhausted their administrative remedies.

4. Application of the Exhaustion Doctrine to Challenges to the Legislative Decision at Issue Here Is Consistent with Similar Precedents Applying the Doctrine to Challenges to Legislative Acts.

A local government acts in its legislative capacity when deciding whether to impose assessments, and if so, the assessment amounts. (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 683, disapproved on other grounds by *Silicon Valley*, 44 Cal.4th at 447-50.)

In similar cases challenging legislative acts, the courts have held that the exhaustion doctrine applies.

In *Wallich's Ranch*, property owners filed suit to challenge the pest control district's adoption of a budget, which included assessments to be imposed on the property owners to pay for pest eradication. No statute stated that exhaustion of administrative remedies was required as a prerequisite to suit, and the district had not informed the owners of any such obligation. Nonetheless, the Court held that the owners had a duty to exhaust administrative remedies by protesting the budget and assessments. (*Wallich's Ranch*, 87 Cal.App.4th at 883-85.) Since the property owners denied the district the opportunity to address the claims for which they sought judicial relief, their suit was barred. (*Id.* at 885.)

As the *Wallich's Ranch* Court had explained a year earlier in another case:

> Therefore, we find the appropriate procedure for challenging a plan's effectiveness is to first exhaust one's remedies by challenging the budget before the district. If the challenge is not initiated then, the district has no opportunity to address the merits of the

> protest and to modify the plan (and the budget) accordingly. If we allowed growers to sit back and wait until some undisclosed future time to challenge the effectiveness of a plan, we would promote inconsistent and multiple results through litigation in different courts. The result would be to thwart the purpose of the Pest Control Law—the control and eradication of citrus pests.

(*People ex rel. Lockyer*, 77 Cal.App.4th at 641.)

The same is true here. The appropriate procedure for challenging assessments is first to exhaust one's administrative remedies during the local government's proceedings. If the government is not informed of the objections, it has no opportunity to address the merits of the protest and to modify the assessments accordingly. If this Court were to allow property owners to sit back and wait until after the assessments were imposed, the Court would promote inequitable and potentially inconsistent results, and would undermine the purpose of Proposition 218 to ensure the adoption of lawful assessments with property owners' consent.

In addition, confirming that the exhaustion doctrine applies to such legislative challenges will foster the development of better records, and hence thorough decisions, and preserve the separation of powers, as discussed next.

5. Application of the Exhaustion Doctrine Will Foster Development of Better Records and Preserve the Separation of Powers.

When a party challenges the validity of a public agency's legislative or quasi-legislative action, the relevant evidence is confined to the record of proceedings before the legislative body (AKA, the "Administrative Record"). (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573-74 and fn. 4; see also *San Joaquin Local Agency Formation Com'n v. Superior Court* (2008) 162 Cal.App.4th 159, 167

["[a]n unbroken line of cases holds that, in traditional mandamus actions challenging quasi-legislative administrative decisions, evidence outside the administrative record (extra-record evidence) is not admissible"]; *Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1269 [same]; *SN Sands Corp. v. City & Cnty. of San Francisco* (2008) 167 Cal.App.4th 185, 191 [same].)[6] Thus, if suit is filed to challenge the adoption of assessments under Proposition 218, the local government will generally be limited to the administrative record in defending against the suit. (See also *Silicon Valley*, 44 Cal.4th at 441, 450 [noting that administrative record provided the relevant evidence, and holding that courts must exercise independent judgment in reviewing whether assessments satisfy Proposition 218]; *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1499 fn. 5, 1501-04 [reviewing administrative record to determine whether property-related fees satisfied Proposition 218].)

The rationale for the rule limiting the evidence to that contained in the administrative record is grounded in the separation of powers doctrine. (*Western States*, 9 Cal.4th at 573.) If extra-record evidence were admissible, the courts would violate the doctrine by adjudicating the validity of legislative determination based—at least in part, perhaps in large part—on evidence that the legislative body had no opportunity to consider.

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[6] In addition, evidence that was before the public agency at the time it took action may be judicially noticed. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 147, superseded by Proposition 218 regarding standard of review as discussed in *Silicon Valley* 44 Cal.4th at 441 ["Under *Dawson, supra*, 16 Cal.3d 676, we confine our review in this [assessment] case to the record before the city and judicially noticed facts"]; see also *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 374-75 fn. 4; *Western States*, 9 Cal.4th at 573 fn. 4.)

(*Id.* at 573 and fn. 4.)[7]

With respect to litigation challenging assessments under Proposition 218, "the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question." (Cal. Const., art. XIII D, § 4(f).) The court will independently review whether the local government meets its burden, rather than applying the deferential substantial evidence standard. (*Silicon Valley*, 44 Cal.4th at 450.)

If objections raised in court had been presented to the local government, as required by the exhaustion doctrine, the local government would have an opportunity to address the objections, e.g., by producing additional supporting evidence prior to taking action. In addition, requiring objections to be presented to the local government will better develop the record with respect to positions plaintiffs take. Records will be better developed—with evidence both supportive of and disputing the legality of the assessments—for the court independently to determine whether local governments met their evidentiary burden.

Moreover, to hold that the exhaustion doctrine does not apply would encourage litigants in assessment cases to offer extra-record evidence, such as expert evidence and rebuttals produced after the local government took

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[7] As this Court has observed, some commentators have proposed several exceptions to the rule precluding extra-record evidence to challenge legislative decisions, regarding "evidence relevant to (1) issues other than the validity of the agency's quasi-legislative decision, such as the petitioner's standing and capacity to sue, (2) affirmative defenses such as laches, estoppel and res judicata, (3) the accuracy of the administrative record, (4) procedural unfairness, and (5) agency misconduct." (*Western States*, 9 Cal.4th 559 at 575 fn. 5.) None of these proposed exceptions is at issue in this case.

action, to buttress their respective cases. Such efforts to expand the scope of the evidentiary record before the court would create wasteful evidentiary battles, e.g., "battles of the experts."[8] Rather than review the sufficiency of the evidence, including expert evidence, considered by the local governments, courts will be asked to become fact finders and to substitute their judgment for that of the local governments with respect to these legislative decisions. The preservation of the separation of powers between the judiciary and legislative bodies will thus be better preserved by this Court's ruling that the exhaustion doctrine applies.

III. CONCLUSION

Local Government *Amici* respectfully request that this Court affirm the Court of Appeal and hold that the exhaustion doctrine applies to challenges to special assessments.

Dated: March 29, 2021 BURKE, WILLIAMS & SORENSEN, LLP

By: */s/ Kevin D. Siegel*
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[8] Some of these evidentiary battles would likely be over shortcomings in the explanations regarding benefit calculations, rather than in the conclusions themselves. Thus, misunderstandings or lack of sufficient detail, which could have been addressed if the plaintiff had exhausted administrative remedies, might be the subject of wasteful litigation.

CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204

We hereby certify that, under rules 8.520(b)(1) and 8.204(c)(1) of the California Rules of Court, this *Amicus* Brief is produced using 13-point type and contains 6,329 words including footnotes, but excluding the application for leave to file, tables and this Certificate, fewer than the 14,000 words permitted by the rules. In preparing this Certification, we relied upon the word count generated by Microsoft Word.

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PROOF OF SERVICE

Supreme Court for the State of California, Case No. S263734

Hill RHF Housing Partners, L.P. vs. City of Los Angeles, et al.
Second District Court of Appeal, Division 1, Case No. B295181
Los Angeles County Superior Court Case No. BS170127

Mesa RHF Partners, L.P. vs. City of Los Angeles, et al.
Second District Court of Appeal, Division 1, Case No. B295315
Los Angeles County Superior Court Case No. BS170352

I, the undersigned, declare:

I am employed in the County of Alameda, State of California. I am over the age of 18, and not a party to the within action. My business address is 1901 Harrison Street, Suite 900, Oakland, California, 94612-3501. On **March 29, 2021**, I served the document(s) described as **LEAGUE OF CALIFORNIA CITIES, ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION'S APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENTS CITY OF LOS ANGELES ET AL.; *AMICI CURIAE* BRIEF** on the interested parties in this action addressed as follows:

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

Executed on **March 29, 2021**, at Brentwood, California.

Laura A. Montalvo

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