NO. B297553

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

FOOD AND WATER WATCH
and CENTER FOR FOOD SAFETY,
Appellants,

v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, et al.
Respondents.

On Appeal from the Superior Court of Los Angeles
The Hon. Randolph M. Hammock, Presiding (Case No. BC720692)

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellants do not seek to prevent or enjoin the collection of any tax or fee, nor to recover any tax or fee paid. They do not allege that any tax or fee has been improperly approved or assessed. They do not challenge any tax or fee pursuant to section 526a of the Code of Civil Procedure, nor do they allege that any imposed tax or fee is in violation of any law, including Article XIII of the California Constitution.

Appellants do not challenge imposition of a tax, but rather an agency's authorization of bonded indebtedness—Metropolitan Water District of Southern California's (MWD) decision to incur debt, through the issuance of bonds, covering an estimated $10.8 billion, but without any specific ceiling or any clear off-ramp. They brought this challenge pursuant to California's validation statutes, which require that such actions be brought within 60 days of the agency's authorization of the indebtedness, even if the bonds have not yet been issued. MWD authorized bonded indebtedness that is secured by tax and/or fee increases that require voter approval, approval that has not been sought nor given. In other words, the agency has authorized a virtual blank check in debt that it has no lawful ability to repay.

The trial court observed that this case raises "very complicated issues" that the court "struggled with," and thus it invited appellate review of its decision to sustain the demurrers based on ripeness. (March 15, 2019, Transcript at p. 36.) By contrast, MWD and San Diego County Water Agency (SDCWA) evade most of the real issues on appeal, reframing and mischaracterizing this case as a premature taxpayer challenge to taxes and fees that Appellants fear will be imposed at a later date. They focus on California's "pay first, litigate later" rule for challenges to imposed taxes and fees, arguing that the only substantive challenge possible here is to recover taxes or fees that have not yet been assessed.

Repetition of this red herring cannot make it any truer. Respondents largely ignore that this is a validation challenge to an agency's authorization of bonded indebtedness, not a challenge to an already-imposed tax or fee. The authorization of indebtedness occurred; there is nothing prospective about this challenge. Rather than claiming that hypothetical future taxes or fees will violate Propositions 13 or 26, or the Metropolitan Water District Act, Appellants claim that there *is no possible way* that the taxes and fees that *will be required* to pay MWD's indebtedness can be lawfully

assessed without voter approval. And that under validation law, MWD cannot authorize this debt without a viable ability to repay it.

This is largely a case of first impression, notwithstanding useful precedents highlighted in Appellants' briefing. There are no reported decisions specifically addressing a validation action challenging an agency's authorization of bonded indebtedness on the basis that the required tax and fee increases that secure the debt were not approved by voters. No court has ever applied California's "pay first, litigate later" rule to curtail a reverse-validation action challenging an agency's authorization of bonded indebtedness.

This case also carries important statewide policy considerations. Can an agency authorize debt, secured by future fees or taxes, and even spend the borrowed money, without first obtaining otherwise-required voter approval for those future tax increases? MWD's challenged resolutions sought to finance a massive, environmentally consequential Delta conveyance project whose potential burden on the district was not even limited to its estimate exceeding $10 billion. Authorizing such a bottomless commitment will clearly have profound impacts on future government spending. By reversing the decision to sustain the demurrers as unripe, and

allowing the merits to be adjudicated, this Court can help ensure that MWD remains accountable under the law instead of using the debt authorization process to escape its legal responsibilities.[1]

ARGUMENT

I. This Is a Validation Action Challenging MWD's Authorization of Bonded Indebtedness.

This action challenges MWD's approval of Resolutions 9243 and 9244, which authorize MWD's bonded indebtedness. Resolution 9243 explicitly: (1) authorizes MWD to create the Joint Powers Authority (JPA); (2) authorizes the JPA to purchase the "Unsubscribed Capacity Interest" in the WaterFix project; (3) authorizes the JPA to issue bonds to pay for that purchase; (4) authorizes the repayment of those bonds by MWD; and (5) authorizes MWD to secure the bonds with its own future water revenues. (AA028-029 [Resolution 9243, Finding 3].) Resolution 9244, in turn, authorizes MWD's general

[1] Repeating the same mootness argument it unsuccessfully raised in its Motion to Dismiss before this Court, MWD argues that the Department of Water Resources "abandoned" California WaterFix (MWD brief at pp. 12, 48), without mentioning that MWD never rescinded its approval resolutions and may well still seek to rely on them, or that DWR continues to pursue a Delta conveyance project. See, e.g., Exhibit 5 to MWD's Motion to Dismiss at pp. 5-7. The flaws in MWD's mootness argument are extensively addressed in Appellants' opposition to MWD's Motion to Dismiss, and more briefly in section IV, *supra*.

manager to form a "Financing JPA" that may issue "bonds of its own" to be secured "with a lien on [MWD's] water revenues on such terms and conditions as the General Manager shall determine in his or her discretion." (AA034.)

Neither of the Resolutions "adopted [a] wholesale water service rate or property tax" (MWD Brief at p. 10), and "no rates or charges were imposed thereby." (SDCWA Brief at p. 8.) It should not be surprising that Appellants never claimed that the Resolutions did either of these things, nor should it be surprising that Appellants are not challenging the adoption of any water service rate or property tax in any manner. Instead, Appellants are challenging an agency's authorization of bonded indebtedness. Such challenges are properly, and exclusively, brought pursuant to California's validation statutes; in this case Government Code section 53511 and Code of Civil Procedure section 863.

SDCWA evades the fact that this is an action challenging MWD's authorization of bonded indebtedness, disingenuously describing MWD's action as merely authorizing future negotiation and execution of "agreements relating to financing the California WaterFix, but none are alleged to exist." (*Id*. at p. 10.) The words

"debt" and "indebtedness" never appear in SDCWA's brief, while the word "bond" appears only in reference to separate bonds authorized (and subsequently de-authorized) by the Department of Water Resources. (See SDCWA Brief at pp. 18-19.)

MWD at least acknowledges that this action challenges its authorization of bonded indebtedness. (MWD Brief at pp. 28-38.) But it dismisses this as "an attempt to avoid the legal defects in [Appellants'] challenge to hypothetical service charges and property taxes" and then mostly dodges the question, slipping back to argue against the straw man taxpayer challenge to future taxes that Appellants did not bring. (*Id.* at p. 28.)

MWD makes four central points (to some extent repeated by SDCWA): (a) the Supreme Court, in *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1 ("*Redding*"), "confirmed that an agency's decision to incur a cost is not a tax subject to constitutional challenge" under Proposition 26 (MWD Brief at pp. 28-29); (b) validation procedure does not create a substantive legal right (*id*. at p. 31); (c) "The Resolutions do not authorize the issuance of Metropolitan bonds; they merely anticipate the issuance of bonds by a JPA" (*id*. at p. 33); and (d) "preventing immediate review" of MWD's

authorization of bonded indebtedness will not "immunize [MWD's] future service rates and/or property taxes from judicial scrutiny." (*Id*. at pp. 36-37.) These arguments are addressed in turn.

A. *Redding* Does Not Preclude a Validation Challenge to MWD's Authorization of Bonded Indebtedness.

MWD relies heavily on the Supreme Court's decision in *Redding* for support of its argument that a decision to incur a cost obligation is not challengeable under Proposition 26. (MWD Brief at pp. 28-30.) However, *Redding* does not address a validation action challenging an authorization of bonded indebtedness. Although the Supreme Court loosely uses the word "invalidate" to describe the plaintiffs' request ("Plaintiffs asked the court to invalidate the rate-increase resolution…"), there is no indication that the case was brought under validation law and nothing in the opinion mentions, much less analyzes, the validation statutes. (*Redding*, *supra*, 6 Cal.5th at p. 7.) Instead, the plaintiffs in *Redding* filed a writ petition and complaint challenging the decision by the city council to increase electricity rates, arguing that this increase in rates violated Article XIII C of the California Constitution (Proposition 26). (*Redding*, *supra*, 6 Cal.5th at p. 5.) It is a taxpayer challenge to imposed utility rates. It

therefore provides limited guidance, if any, for determining whether this validation action against MWD's authorization of bonded indebtedness is ripe.

To the extent *Redding* is of any utility, it regards the Supreme Court's defining the payment in lieu of taxes (PILOT) at issue there as a budgeted cost obligation to which Proposition 26 does not apply. (*Id*. at pp. 12-15.) MWD argues that its authorization of bonded indebtedness is "likewise" a cost obligation and therefore not subject to Proposition 26's requirements. (MWD Brief at p. 30.) But that overstates the Supreme Court's holding, which only goes so far: an important factor in the court's opinion was that the PILOT at issue was not passed through and imposed on taxpayers; the utility could pay the PILOT entirely with non-rate revenue. (*Redding* at pp. 17-18.)

Here, there should be no question that the payments on the bonded indebtedness authorized by MWD will be passed through to taxpayers in the form of increased water rates and thus are taxes subject to Proposition 26. First, this is a well-plead allegation contained in the FAC that must be treated as true for the purposes of this Appeal. (AA010 [FAC, ¶ 5]; AA015-16 [FAC ¶¶ 23-30];

Friedland v. City of Long Beach (1998) 62 Cal.App.4th 835, 842; MWD Brief at p. 12, fn. 1) Second, even if this were a fact needing to be proven for this Appeal, MWD bears the burden of proof. (Cal. Constitution, Article XIII C, § 1, subd. (e).) Third, even if this had been Appellants' burden, they have amply satisfied it. The Resolutions, while referencing a percentage of an estimated total, indisputably contain no ceiling on authorized debt, and no certainties for how it will be paid (AA029-30 [Resolution 9243, ¶ 3). MWD estimated the debt to be $10.8 billion, with payments of $515 million per year—a 33% increase over its current annual expenditures. (AA015-16 [FAC ¶¶ 22, 24].) In its briefing, MWD admits that "it would likely increase future wholesale rates" to pay the debt (MWD Brief at p. 15; AA015), and that it will not recover all of the unsubscribed costs from third parties, as it "planned to recoup *much* of its up-front contribution toward the Unsubscribed 33% either by selling or charging for the use of *some* of the additional capacity." (MWD Brief at p. 15, emphasis added.)

In summary, *Redding* is largely inapposite because it is does not address an action under the validation statute, nor a challenge to an agency's authorization of bonded indebtedness. To the limited extent

that its analysis of budgeted cost obligations is of use here, it is not in the way MWD asserts, since the PILOT at issue there bears little, if any, resemblance to the bonded indebtedness at issue here.

B. Validation Procedure Provides a Mechanism for Appellants to Challenge MWD's Authorization of Bonded Indebtedness.

MWD's counter to Appellants' argument that this is a validation action, not a taxpayer action, again misses the boat. MWD states that the validation statutes merely establish a procedure for testing the validity of certain agency actions under other substantive laws, and contends that because "Metropolitan did not take an action to raise revenue," there can be no violation of Propositions 13 or 26. (MWD Brief at p. 31.) Leaning into its straw man argument, MWD again ignores that this is a timely challenge to its authorization of bonded indebtedness, not a speculative challenge to future taxes.

The question is not whether future planned rate or tax increases violate Propositions 13, 26, and/or the Metropolitan District Act now, but rather whether an agency can authorize bonded indebtedness that is secured by, relies on, and is dependent on future tax increases that have not yet been authorized by voters as required by Propositions 13,

26, and/or the Metropolitan District Act. There is a big difference in those questions, once neither MWD nor SDCWA ever address.

MWD cites to *California Commerce Casino, Inc. v. Schwarzenegger,* (2007) 146 Cal.App.4th 1406, for support, but this case does not articulate the "procedural/substantive" distinction that MWD believes is so dispositive. (See MWD Brief at p. 31.) In fact, *California Commerce Casino* explicitly supports the proposition that an agency's authorization of bonded indebtedness not only may, but *must* be the subject of a timely validation challenge on the basis that the bond repayment plan, *if implemented in the future*, would violate California's Constitution.

The plaintiffs in *California Commerce Casino* alleged that Assembly Bill 687 was unconstitutional because it authorized the issuance of up to $1.5 billion in bonds to fund state budget deficits, to be paid back "exclusively with moneys paid by the Five Tribes under the Amended Compacts;" a plan that *would* violate Proposition 58 when implemented. (*California Commerce Casino, supra*, 146 Cal.App.4th at p. 1415.) The court ruled that because such a challenge was subject to validation, it had to be brought within the 60-day statute of limitations period of the validation statutes. (*Id*. at pp.

1430-31.) The court also pointed out that the amended compacts that were the subject of Assembly Bill 687 "are inextricably intertwined with the state's intended use of the income stream created by them and with the bonds to be issued at a later date," and therefore subject to validation—even though the repayment plan that the plaintiffs alleged to be unconstitutional had not yet been implemented. (*Id*.)

SDCWA attempts to distinguish *California Commerce Casino* by claiming that MWD's authorization "provides only general guidance" in contrast to the "certain terms" that were present in the authorization at issue in *California Commerce Casino*. (SDCWA Brief at p. 36.) SDCWA goes to observe that MWD's authorization "merely provides a cap limiting Metropolitan's potential contribution 'up to 64.6% of total project costs'." (*Id*. at p. 37.) Reference to this percentage figure as a "cap" is misleading, since it only applies to an *estimated* total that has no specific ceiling, and may prove to be significantly higher even than MWD's $10.8 billion estimate. (AA 09, 015; Appellants' Opening Brief, at p. 10.) Furthermore, the fact that the Resolutions do not contain a hard dollar amount or specify particular repayment terms does not change the fact that the Resolutions authorize bonded indebtedness that even using MWD's

own estimates will require tax hikes. With their lack of a ceiling on the amount of money MWD can borrow, no other conclusion is possible other than that they authorize debt that will require tax increases to pay off. The fact that MWD imprudently authorized what may amount to a blank check makes the problem worse, not better.

The facts in *California Commerce Casino* are directly analogous to those in this Appeal. MWD has authorized bonded indebtedness that *relies on a repayment plan* (rate and/or tax increases) that violates the California Constitution and its own District Act, because MWD failed to first secure voter approval. The laws governing taxpayer challenges seeking to declare a specific tax illegal, enjoin the collection of taxes, or recover taxes that were already collected, like Code of Civil Procedure 526a or section 32 of Article XIII of the Constitution—and the cases brought pursuant to those "procedural laws," like *Redding*, *Reid*, and *Webb*, all cited by MWD (MWD Brief at p. 31)—are inapposite to this action, which seeks to invalidate an agency's authorization of bonded indebtedness pursuant to Code of Civil Procedure section 863 and Government Code section 53511.

As discussed in Appellants' Opening Brief, neither *Reid v. City of San Diego* ((2018) 24 Cal.App.5th 343) nor *Redding* are validation actions. (*Redding*, *supra*, 6 Cal.5th at p. 7.) The same is true of *Webb v. City of Riverside*, which involved a petition for writ of mandate alleging constitutional violations in the City of Riverside's transfers of funds from its electric utility reserve fund to its general fund. (*Webb v. City of Riverside* (2018) 23 Cal.App.5th 244, 248.) While no reported decision regards a validation action that challenges bonded indebtedness on the grounds that the debt is secured by tax and rate revenue that lack required voter approval, this Court must follow the holding of *California Commerce Casino*. The challenge to the repayment plan in that case, found to be subject to validation, is closely analogous to the challenge to the repayment plan here.

C. MWD Authorized Bonded Indebtedness.

MWD devotes six pages to its argument that "Appellants' statutory basis for invoking validation jurisdiction does not apply to the Resolutions," because "[t]he Resolutions do not authorize the issuance of Metropolitan bonds; they merely anticipate the issuance of bonds by a JPA." (MWD Brief at p. 33.) Government Code section

53511, which MWD acknowledges is the statute cited by Appellants that invokes validation here, states:

> (a) A local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations ***or evidences of indebtedness*** pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.

(Government Code § 53511, subd. (a) (emphasis added).)

Nowhere in MWD's six pages of argument is there discussion of how the Resolutions do not qualify as "evidences of indebtedness" by MWD. Instead, MWD focuses exclusively on defending its smoke-and-mirror scheme of setting up a JPA to issue the bonds. (MWD Brief at p. 32 ["The Resolutions authorize Metropolitan's increased participation in a JPA that *itself* was expected to issue bonds under its own authority" (emphasis in original)]; p. 34 ["Again [the Resolutions] expressly anticipate that any bonds will be issued by a JPA—not Metropolitan"]; p. 38 ["Neither of these arguments, however, demonstrates that Metropolitan's Resolutions authorized issuance of any bond or that any other basis exists for finding a ripe subject for validation."].)

Section 53511 does not limit validation actions to bonds, warrants, or contracts; it expressly permits validation actions for

"evidences of indebtedness." (Government Code § 53511.) The Resolutions clearly authorize evidence of indebtedness: "The District would secure its obligations to make installment payments with a lien on its water revenues." (AA028.) There should be no question that section 53511 permits this action against MWD's approval of the Resolutions. As the trial court stated during the hearing, "I'm not buying their argument that since they're not issuing the bonds they can't be held responsible." (March 15, 2019, Transcript at p. 11.)

MWD attempts to distinguish *California Commerce Casino*, contending that the case "does not support Appellants' view that the validity of all future bond authorizations by a separate, independently authorized JPA can or must be determined immediately through a challenge to Metropolitan's board action." (MWD Brief at p. 34.) The legislation at issue in *California Commerce Casino* approved tribal compacts that created a separate agency that would issue bonds; the court held that this was all part of a financing scheme that had to be challenged under validation at the time of the legislation's authorization. (*California Commerce Casino*, *supra*, 146 Cal.App.4th at p. 1413.) This is directly analogous to the facts here. Moreover, MWD once again mischaracterizes Appellants' claim. Appellants are

not challenging the JPA's future bond authorizations, they are challenging MWD's current authorization of bonded indebtedness that became effective when MWD approved the Resolutions. (See Code Civ. Proc., § 864.) Just as the plaintiffs in *California Commerce Casino* should have timely challenged the Legislature's authorization of the compacts after they were authorized (i.e., when the legislation was enacted), Appellants needed to (and did) challenge the authorization of MWD's evidences of indebtedness when MWD authorized it.

MWD next points to *Rider v. City of San Diego* and *San Diegans for Open Government v. City of San Diego*. (*Rider v. City of San Diego* (1998) 18 Cal.4th 1035 (*Rider*); *San Diegans for Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416 (*SDOG*). MWD's reliance on *Rider* is misplaced, as it misses the actual holding of the case. *Rider* is a validation action brought against the City of San Diego for its creation of a JPA that will issue bonds to finance a convention center. (*Rider*, *supra*, 18 Cal.4th at p. 1040.) This is superficially similar to the facts at issue here, and based on this similarity, MWD describes the *Rider* court as holding "that the JPA was a separate legal entity and its action could not be invalidated by

attacks to the city's legal limitations." (MWD Brief at p. 35.) But the reason the city was found to not be liable under validation for authorizing a financing scheme involving a JPA was not because the JPA was a "separate legal entity," but rather (a) because the constitutional violation claimed in the validation action, under Article XVI, section 18, explicitly does not apply to JPAs, and (b) because the "financing arrangements in this case insulate the City in a real economic sense from prohibited 'indebtedness'." (*Rider*, *supra*, 18 Cal.4th at pp. 1043-44.)

The clear implication of *Rider* is that, had Article XVI, section 18 applied to JPAs, and had the city's debt obligation not been limited to a lease agreement that would end if the city stopped renting the facility, a validation action against the city would have been proper. (*Id*. at pp. 1042-49.) Here, the use of a JPA to issue bonds does not insulate the agency from the requirements of Propositions 13 and 26. (See *id*. at p. 1044, citing and distinguishing *Rider v. County of San Diego* (1991) 1 Cal.4th 1, 11.) And MWD's debt obligation is much greater and more dangerous than a lease agreement. The Resolutions fully and completely secure the bonds in their entirety, with no ceiling on the total amount of indebtedness. (AA009 [FAC, ¶ 9].)

MWD's reliance on *SDOG* is similarly misplaced. While MWD describes that court as having "concluded that a city charter provision limiting debts for public projects only governed bonded indebtedness of the *city*, not the anticipated debts of a finance JPA," *SDOG*, like *Rider*, is a validation action alleging violations of Article XVI, section 18 of the California Constitution. (MWD Brief at p. 35; *SDOG*, *supra*, 242 Cal.App.4th at p. 442.) Just as in *Rider*, the fact that section 18 explicitly does not apply to JPAs was fatal to the plaintiffs. (*SDOG*, supra, 242 Cal.App.4th at p. 432.)

The plaintiff in *SDOG* attempted to distinguish *Rider* by claiming that there was "more governance overlap" between the JPA and the city than in *Rider*, and that this "incestuous" relationship somehow got around the obstacle of section 18's inapplicability to JPAs. (*Id*. at pp. 435-436.) The court rejected this argument, concluding that "None of SDOG's attempts to distinguish *Rider* is well taken. The City presumably uses the Financing Authority to avoid the two-thirds vote requirement [of Article XVI, section 18], but doing so is legal." (*Id*. at p. 442, citing *Rider*, *supra*, 18 Cal.4th at p.1055.) Just like its reliance on *Rider*, MWD's reliance on *SDOG* backfires: if anything, *SDOG* supports a validation action against

MWD for its authorization of the Resolutions. That the JPA is a separate legal entity does not immunize MWD from liability. What matters is the nature of the debt obligation MWD has authorized.

D. *San Diego County Water Authority v. Metropolitan Water District of Southern California* Does Not Preclude this Validation Action Challenging MWD's Authorization of Bonded Indebtedness.

MWD points to *San Diego County Water Authority v. Metropolitan Water District of Southern California* ((2017) 12 Cal.App.5th 1124 (*San Diego*)) to support the notion that "the validity of Metropolitan's wholesale rates and charges is subject to review when they are adopted, not when the expected revenues are pledged generally to debt service." (MWD Brief at p. 37.) SDCWA makes a similar argument. (SDCWA Brief at pp. 34-35.) But, again, this Appeal does not contest the validity of MWD's wholesale rates or charges. It contests the validity of MWD's authorization of bonded indebtedness. *San Diego* involves the inverse of the facts of this Appeal: there, SDCWA challenged MWD's water rates, and MWD argued that such a challenge should have been brought against previously-issued bonds that the water rates were paying off. (*San Diego*, *supra*, 12 Cal.App.5th at pp. 1141-42.) The *San Diego* court

found that the action filed by SDCWA challenged the validity of the newly-enacted water rates, "not the validity of the earlier bond issuance," and therefore was not time-barred. (*Id*. at p. 1143.) This does not mean that a validation challenge to the earlier bond issuance, had one been brought, would have been improper.

The court in *San Diego* looked at the relationship between the bonds and the subsequent water rates that SDCWA challenged, finding that even though the bonds were "'payable from and secured by a pledge of' net operating revenue from water sales," the "bond contract [was] not premised on a particular charge, rate, or rate structure." (*Id*. at pp. 1142-43.) The court found that "the sufficiency of that revenue [was] not threatened by [SDCWA's] lawsuits, which do not dispute Metropolitan's right to recover the cost of service through its rates," and that "[m]odification of the rate structure … should not affect Metropolitan's net revenue." (*Id*. at p. 1143.) In other words, the court in *San Diego* analyzed the relationship between the bonds and MWD's subsequent water rate changes, determining that the water rate decision stood on its own and was not immune from attack due to the validity of the earlier bond authorization.

Not only is that the inverse of the facts here, but the facts are plainly different. In *San Diego* there was no question that MWD would be able to pay the bonds from its net operating revenue, regardless of the outcome of any subsequent attack on water rate decisions. (*Id*.) But here, the scale of MWD's authorization of bonded indebtedness, causing an estimated increase of 33% to MWD's current expenditures, leaves no question that water rate and/or property tax increases will be required, necessarily implicating the voter approval requirements of Propositions 13, 26, and the Metropolitan District Act. (AA016 [FAC, ¶ 24].) MWD knew this when it approved the Resolutions, making it clear that it expected residential ratepayers' bills to increase by at least $4.80 per month to pay off the debt (an estimate others viewed as too low). (AA016 [FAC, ¶ 24-25].) The fact that there is no ceiling to this debt authorization cements this conclusion. The likelihood of future fee or tax increases being required to pay back the debt must be assessed by considering what has actually been authorized; in this case, not only a debt estimated by others to be much more than MWD's public estimates, but technically, and legally, a *limitless* amount of debt.

Yet MWD points to *San Diego* to reassure Appellants that they will be free to challenge MWD's "future revenue measures … under applicable law if and when they are adopted." (MWD Brief at p. 37.) SDCWA makes a similar argument. (SDCWA Brief at pp. 33-38.) These arguments mistakenly assume that such a procedural opportunity will exist in the future, when that is by no means clear. (See Appellants' Opening Brief at pp. 32-33; March 15, 2019, Transcript at p. 21.) They also ignore Appellants' concern that if they are thwarted from adjudicating the merits of this validation challenge, MWD's authorization of bonded indebtedness could be used to argue that subsequent increases to water rates cannot be challenged under validation law because they are mere "cost obligations," and thus exempt from the voting requirements of Proposition 26. (See Opening Brief at pp. 29-31.) Neither MWD nor SDCWA address these concerns, focusing instead on how a hypothetical future challenge to hypothetical future rate or tax increases could be brought.

MWD, however, admits that in approving the Resolutions, MWD "planned a cost obligation" similar to the one discussed in *Redding* that was immune from validation challenge. (MWD Brief at p. 30, citing *Redding*, *supra*, 6 Cal.5th at pp. 4-5, 12.) Appellants

explain how validating MWD's authorization bonded indebtedness could similarly give rise to an argument by MWD that any subsequent tax increases enacted to pay this debt are immune from validation challenge, per the terms of its State Water Project long-term contract. (Opening Brief at pp. 31-32.) MWD admits that such tax increases may be immune from later challenge per the terms of its State Water Project contract but dismisses "Appellants' unsupported arguments" on this issue as "premature" since property taxes have not yet been raised. (MWD Brief at p. 27, see also p. 37.) SDCWA's confidence that its victory in *San Diego* will allow future challenges to rate or tax increases to pay the debt authorized by the Resolutions is misplaced, since there was no "budgeted cost obligation" issue raised in that case, and SDCWA never addresses this concern. (See SDCWA Brief at pp. 34-35.)

II. MWD's Authorization of Bonded Indebtedness Is Invalid Because the Debt Is Secured by Water Rate Increases and/or Property Tax Increases that Have Not Been Approved by Voters.

Appellants allege that the bonded indebtedness authorized by MWD relies on and is dependent on fee and/or tax increases that require voter approval. (See AA020 [FAC ¶ 50, re: Proposition 26];

AA021 [FAC ¶ 61, re: Proposition 13], AA024 [FAC ¶ 74, re: Metropolitan District Act].) These allegations form the basis for Appellants' First, Second, and Fourth causes of action.

In addition to the arguments addressed in Section I. above, MWD and SDCWA make two other substantive arguments against Appellants' claims. First, MWD argues that Appellants' arguments are "hypothetical and speculative" as no rate has yet been set, and without any specific rate having been set, "any effort to evaluate the lawfulness of service rates … is inherently unripe and seeks an impermissible advisory opinion." (MWD Brief at pp. 25-26.) SDCWA makes a similar argument, arguing that Appellants' claims are "too abstract to adjudicate." (SDCWA Brief at pp. 25-28.) Second, MWD argues that its only ratepayers are its member agencies, and thus Appellants cannot argue that the benefits of WaterFix are not in proportion to the costs to Metropolitan's ratepayers. (MWD Brief at pp. 26-27.) These arguments are addressed in turn.

A. MWD's Authorization of Bonded Indebtedness, With No Upper Ceiling or Limit, is Not Hypothetical or Speculative, Nor Is it Too Abstract to Litigate.

The main problem with MWD's and SDCWA's arguments about the speculative nature of any future rate hikes is that Appellants are not challenging a specific water rate increase, they are challenging MWD's authorization of bonded indebtedness. (See Section I above.) There is nothing abstract, hypothetical, or speculative about MWD's authorization of indebtedness. The Resolutions explicitly authorize MWD's bonded indebtedness for "up to 64.6%" of the costs of WaterFix, but specify no ceiling to the dollar amount of that commitment. (AA010 [FAC, ¶ 4], AA015 [FAC, ¶ 22]; see MWD Brief at p. 25.) SDCWA sees this as being "only general—rather than specific—direction on contract negotiation and execution" (SDCWA Brief at p. 27), but adjudicating the merits of MWD's debt authorization does not require a specific dollar amount; what matters is the scope of the authorization of indebtedness—what *could* occur as a result of the authorization.

The only limit to MWD's authorization is the language in the Resolutions limiting MWD's financial commitment to "up to 64.6%" of WaterFix's costs. (AA010 [FAC, ¶ 4], AA015 [FAC, ¶ 22]; see

MWD Brief at p. 25.) WaterFix's costs are not set in MWD's Authorization and there is no ceiling to this commitment. In fact, many organizations, including the Los Angeles Office of Public Accountability, the Delta Counties Coalition, and even Appellee SDCWA itself, stated that MWD's estimates of its WaterFix costs were too low, and that the actual costs will be much higher. (AA015-16 [FAC ¶¶ 22, 26].)

MWD admits that it has not secured any commitments from any other agency or water user to help pay this debt obligation, no matter what the actual dollar amount. (MWD Brief at p. 25.) Yet MWD also states that Appellants have "no basis to believe that Metropolitan would increase service rates until the question of other financial contributions and Metropolitan's actual commitment to pay was resolved." (*Id*. at pp. 25-26.) In other words, MWD claims that Appellants cannot challenge its debt authorization at this time because Appellants do not know if service rates will actually increase, since MWD may possibly find partners who will buy the excess water and pay off the debt.

Of course, by MWD's own estimate, with its debt commitment totaling at least $10.8 billion, water rates will increase by $4.80 per

month per residential ratepayer. (AA016 [FAC ¶ 16].) But this analysis cannot be limited to that $10.8 billion estimate; it must necessarily focus on what was actually authorized by the Resolutions. When what was authorized is limitless, with no upper ceiling, it is not only logical but necessary to conclude that tax and/or fee increases will be required for repayment. After all, it is possible, under MWD's authorization, for not just $10 billion of bonded indebtedness to be incurred by MWD, but $20 billion, $40 billion, or even $100 billion or more. MWD has an exceedingly difficult burden to prove that it can feasibly repay the unbounded debt authorized by the Resolutions without resorting to tax and/or fee increases; there obviously is some amount that no other agency or water user will pay, forcing MWD to turn to its ratepayers and taxpayers. With no ceiling, the Resolutions have in fact authorized that "hypothetical" amount without ensuring any effective off-ramp. Thus, tax and/or fee increases that require voter approval are far from being too abstract, too hypothetical, or too speculative for the purposes of this validation challenge; they are exactly what need to be considered in assessing the validity of the Resolutions. The dangers are rooted in MWD's authorizations, rather than Appellants' timely effort to challenge them.

B. MWD Is Subject to Proposition 26.

MWD claims that its only "ratepayers" are its member agencies, and as such "it is not for Appellants to second guess the wisdom of Metropolitan's Board in selecting projects to serve its members." (MWD Brief at p. 27.) MWD raises this argument in the context of the proportionality requirement in Proposition 26—that a "levy, charge, or exaction of any kind imposed by a local government" is subject to the voter requirements of Proposition 13, unless they are "imposed for a specific benefit conferred … which does not exceed the reasonable costs to the local government of conferring the benefit…" (Art. XIII C, section 1, subd. (e)(1); see also subd. (e)(2).)

Appellants claim that MWD's authorization of bonded indebtedness is dependent on future rate increases that cannot and will not be in proportion to the benefits conferred on MWD's ratepayers. (*Id*. at pp. 26-27, citing Opening Brief at 29 and Transcript at pp. 324-325.) This is because MWD authorized bonded indebtedness not just for its share of the WaterFix project, but also for the "Unsubscribed 33%" of the project that is far in excess of MWD's possible needs or use. (FAC, ¶¶ 3-4, 17, 20, 22, 29-31, 52-59; MWD Brief at pp. 14-15.)

MWD implies that the water rates charged by MWD somehow do not qualify as levies, charges, or exactions under Proposition 26 because the rates are borne by other agencies, not the general public, and therefore the voter requirements of Proposition 13 do not apply to MWD's water rates. (MWD Brief at p. 27.) This argument was not raised below; the nature of MWD as a water wholesaler was raised only in the context of Appellants' standing (where it is addressed in more detail below, in response to similar arguments made by MWD before this Court). MWD provides no authority for this new proposition other than citations to the Metropolitan Water District Act. (MWD Brief at p. 27.) Ultimately, the question should not give much pause. As Appellants allege in their First Amended Complaint, *any* increase in water rates made in order to pay the debt associated with the Unsubscribed 33% will *necessarily* "exceed the reasonable costs to [MWD] of conferring the benefit" of water service. (FAC, ¶¶ 3-4, 17, 20, 22, 29-31, 52-59.) And those costs, as well as the benefit, are necessarily borne by the ratepayers, as the costs, like the water, are passed through the member agencies directly to the customers.

C. Appellants' Fourth Cause of Action Articulates a Cognizable Claim.

MWD claims that Appellants' Fourth Cause of Action fails to articulate a cognizable claim, because section 200 of the Metropolitan Water District Act (the basis for the Fourth Cause of Action) regards decisions by MWD to incur bonded indebtedness yet "the Resolutions did not authorize any bond; it expressly anticipated future issuance of bonds by a JPA." As is made clear in the FAC, Appellants' Opening Brief, and in this Reply, Appellants are challenging MWD's approval of resolutions that authorize MWD's bonded indebtedness. It makes no difference that that indebtedness is in the form of bonds to be issued by a JPA; MWD has still authorized its own bonded indebtedness by approving the Resolutions.

MWD next argues that section 200 does not apply here because one of its prerequisites is that contributions must not come from "ordinary revenue." (MWD Brief at p. 39.) MWD cites to no authority defining the meaning of "ordinary revenue" in the context of section 200, citing only to MWD's plan to fund its debt obligations from wholesale water rates. (*Id*.) But there is nothing ordinary about a 33% increase in annual expenditures and concomitant increases in

water rates. Moreover, there is nothing ordinary about MWD raising property taxes to cover its debt burden, which Appellants also clearly allege. (AA010-11 [FAC ¶¶ 5-6], AA015 [FAC ¶ 23], AA018, [FAC ¶ 38], AA019 [FAC ¶ 44-46], AA062 [FAC ¶ 62].)

Appellants' Fourth Cause of Action was never abandoned and it articulates a cognizable claim, closely resembling the First and Second Causes of Action: MWD authorized bonded indebtedness that is dependent on and relies on rate and/or tax increases that require voter approval, without having first obtained that voter approval.

III. Appellants Have Standing.

MWD challenges Appellants' standing on the same two grounds they raised before the trial court: (1) that Appellants did not allege that they or their members paid or wholesale water service rate or a property tax and (2) that Appellants lack organizational standing. (MWD Brief at pp. 40-48.) These arguments are anticipated and addressed in Appellants' Opening Brief, pp. 34-40. Like it did before the trial court, MWD claims that "section 863 does not establish an independent basis for standing," without citing any authority. (MWD Brief at p. 43.) But Code of Civil Procedure section 863 is nothing if not a standing statute, explicitly conferring standing to "any interested

person," who "may bring an action within the time and in the court specified by Section 860 to determine the validity of such matter." (Code Civ. Procedure § 863.)

Section 863 provides for unusually broad standing: "any interested person," even though this phrase "has been narrowly construed" to mean "a person having a direct, and not a merely consequential, interest in the litigation." (*Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1042, quoting *Associated Boat Industries v. Marshall* (1951) 104 Cal.App.2d 21, 22.) As the *Torres* court observed (*Torres*, *supra*, 13 Cal.App.4th at pp. 1043-44), courts have found many types of plaintiffs to have standing under section 863, including "citizens, residents and taxpayers of the city covered by an existing redevelopment plan and who owned property assessed for taxes by the county," (*id*., citing *Card v. Cmty Redevelopment Agency* (1976) 61 Cal.App.3d 570; 574); "individuals who were residents and taxpayers of the city and who owned real property assessed for taxes by the county and other taxing agencies, and an unincorporated association consisting of city residents," (*id*., citing *Regus v. City of Baldwin Park* (1977) 70 Cal.App.3d 968, 972); and an unincorporated association consisting of individuals who were

residents, landowners or voters of the city or the territories," as well as "several individuals" who were "challenging the validity of a city's efforts to annex several territories." (*Id*., citing *Citizens Against Forced Annexation v. Cty. of Santa Clara* (1984) 153 Cal.App.3d 89, 95.). Based on these prior cases, the court in *Torres* found the plaintiffs there to not have standing under section 863. (*Id.* at p. 1043 ["Both plaintiffs are residents of Anaheim, not Yorba Linda. Neither one pays property taxes in that city or is otherwise beneficially interested in the area covered by the amended redevelopment plan. While each alleges an 'interest' in moving to Yorba Linda they apparently have filed similar validation proceedings challenging redevelopment projects in several other communities."].) Subsequent to *Torres*, the court in *Meaney v. Sacramento Housing & Redevelopment Agency* found school districts whose future tax bases might be affected by unspecified future financing authorized by a redevelopment plan to have standing. (*Meaney v. Sacramento Housing & Redevelopment Agency* (1993) 13 Cal.App.4th 566, 573-574.)

Here, Appellants have alleged clear interests in the validity of MWD's authorization of bonded indebtedness. They are

organizations with "members living within MWD's service area, including taxpayers and ratepayers in that area" (AA011 [FAC ¶ 8, re: Food & Water Watch], AA012 [FAC ¶ 9, re: Center for Food Safety].) Being an organization with members who are taxpayers and ratepayers within the service area of a public agency that can take actions that directly affect utility rates and can raise taxes is sufficient to confer "interest" to Appellants under the broad language of section 863. There should be no question of these organizations' standing to bring this action.

MWD counters this argument with citations to several cases, none of which involve section 863. (MWD Brief at pp. 41-43.) *Chiatello v. City and County of San Francisco* regards a taxpayer action under Code Civil Procedure § 526a, not section 863 or validation law. (*Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 477.) *Reynolds v. Calistoga* regards a plaintiff that the court determined "lacks standing under § 526a." (*Reynolds v. Calistoga* (2014) 223 Cal.App.4th 865, 873.) *Loeffler v. Target Corp.* regards an action brought under Business & Professions Code § 17200 and Civil Code § 1750, governed by Revenue and Taxation Code provisions. (*Loeffler v. Target Corp* (2014) 58 Cal.4th 1081.) *Delta*

Airlines, Inc. v. State Board of Equalization regards an action brought under Revenue & Taxation Code § 6933. (*Delta Airlines, Inc. v. State Board of Equalization* (1989) 214 Cal.App.3d 518.) *Water Replenishment Dist. of So. Cal. v. City of Cerritos* regards an action under Business & Professions Code § 17200. (*Water Replenishment Dist. of So. Cal. v. City of Cerritos* (2013) 200 Cal.App.4th 1450.) None of the standing statutes at issue in these cases confer standing in the same manner as section 863.

MWD also cites to *County Inmate Telephone Services Cases* (2020) 48 Cal.App.5th 354 (*County Inmate*). The plaintiffs in *County Inmate* sought a refund of fees they contended were prohibited by Proposition 26. (*Id*. at pp. 359, 361.) The court found that "nothing in Proposition 26, or anything plaintiffs have cited, suggests that taxes under Proposition 26 are to be treated differently from taxes under any other statute or constitutional provision *when a refund of those taxes are sought*." (*Id*. at p. 362, emphasis added.) Here, of course, Appellants do not seek a refund of any taxes, they seek a ruling that MWD's authorization of bonded indebtedness was invalid.

The inmate plaintiffs paid third-party telephone service providers for phone service and the service providers then paid the

county defendants the fees the plaintiffs sought to have refunded. (*Id*. at p. 357.) The court found that the form of the action and the relief sought—the refund of telephone fees—dictated the need for the plaintiffs to directly pay the fees in order to have standing to seek a refund of them. (See *id*. at p. 364 ["Plaintiffs have not paid a tax directly to a taxing authority."]; p. 367 ["no precedents support plaintiffs' claim that a consumer who pays charges to a third party vendor … has standing to seek a refund of those charges from the taxing authority."].) MWD argues that this logic precludes Appellants' First Cause of Action (concerning MWD's wholesale water rates) because Appellants' members will not pay the rates directly to MWD. (MWD Brief at pp. 45-46.) But the critical difference is that Appellants do not seek a refund of any water rates they paid to a third party. They seek a finding of invalidity of MWD's authorization of bonded indebtedness. The "general rule" on which *County Inmate* is decided, "that a person may not sue to recover excess taxes paid by someone else, 'who pays the tax by design or mistake'," does not apply here. (*County Inmate*, *supra*, 48 Cal.App.5th at p. 360, quoting *Grotenhuis v. County of Santa Barbara* (2010) 182 Cal.App.4th 1158, 1165.)

Proposition 26 is an issue in this case, as Appellants allege that MWD will necessarily raise water rates in a way that violates Proposition 26 in order to pay its debt obligations (and thus should have secured voter approval prior to approving debt that depends on and relies on those rates), but that does not mean that *County Inmate* applies, let alone that it makes this claim meritless. The cases Appellants site, including *Card*, *Regus*, *Citizens Against Forced Annexation,* and *Meaney,* are much more useful for determining whether Appellants have an interest in MWD's authorization of bonded indebtedness than any of the non-section 863 cases MWD relies on. (See Opening Brief at pp. 34-38.)

Finally, MWD challenges Appellants' organizational standing, hyperbolically claiming that "Appellants' construction of their own organizational purposes would appear to grant them standing to raise any legal claim imaginable." (MWD Brief at p. 47.) Appellants addressed their organizational standing in their Opening Brief. (Opening Brief at pp. 38-39.) MWD's argument comes down to its own opinion that Appellants' organizational purposes cited in the Opening Brief do not "show their members have any shared interest in policing public finances." (MWD Brief at p. 47.) Appellants

disagree: an interest in "a democracy that improves people's lives and protects our environment" quite clearly shows an interest in policing a public agency's finances. (AA011 [FAC ¶ 8].) Same with working "to protect human health and the environment by promoting sustainable agriculture." (AA011 [FAC ¶ 9].) But "policing public finance" is not even the relevant inquiry. The question is whether these two organizations have sufficiently direct interests in MWD's authorization of billions of dollars of bonded indebtedness to pay for the construction of the California WaterFix project in order to vigorously prosecute this action. (*Regus v. City of Baldwin Park*, *supra*, 70 Cal.App.3d at pp. 972.) They do.

IV. The Appeal Is Not Moot.

MWD repeats its argument, made in its May 21, 2020, Motion to Dismiss (that was denied by this Court), that this Appeal is moot because the State is not currently pursuing California WaterFix project (the configuration of Delta conveyance DWR favored when MWD approved its resolutions); and because its General Manager made informal statements at a MWD meeting claiming that this mooted the Resolutions. MWD fails to mention that it never rescinded its approval resolutions and may well still seek to rely on them, or that DWR continues

to pursue a Delta conveyance project. (See, e.g., Exhibit 5 to MWD's Motion to Dismiss at pp. 5-7.)

For the reasons extensively detailed in their Opposition to Motion Dismiss, dated June 5, 2020, this Appeal is not moot and cannot be dismissed on that ground. Moreover, even if MWD had presented stronger grounds for mootness, the Court should still proceed to decide the appeal because it is of substantial and continuing public interest. See Appellants' Opposition to Motion to Dismiss, p. 23.

CONCLUSION

Appellants challenge MWD's authorized bonded indebtedness on the grounds that MWD has no lawful means of repaying the debt. The debt is of such a massive scale, and the authorization so clearly lacking any defined ceiling, so as to necessitate future water rate increases and/or property tax increases for which MWD has not secured voter approval. Appellants' challenge was properly brought as a timely reverse-validation action following MWD's approval of authorizing resolutions.

MWD and SDCWA urge this Court to affirm the trial court's decision that Appellants' action was not ripe, as no tax or rate has yet

been imposed that may violate Propositions 13, 26, or the Metropolitan Water District Act. But such a ruling will carve a massive loophole in Proposition 26. Contrary to the purposes of this Constitutional provision, agencies and municipalities would no longer need to secure voter approval of utility or service rate hikes; they could merely authorize bonded indebtedness, spend the borrowed money, and then later enact the rate hikes, with no need for voter approval. And with regards to spending related to the State Water Project, agencies would be able to perform the same work-around of Proposition 13 with tax hikes.

There is no reason to sanction these loopholes. An agency's authorization of bonded indebtedness is challengeable under validation law, and the basis for that challenge can be that the debt was approved before the agency secured voter approval for its repayment. Such a position is in fact mandated by validation law, which requires all legal challenges to an agency's decision to incur debt to be brought within 60 days of that decision. And it is consistent with Propositions 13, 26, and the Metropolitan District Act, which require public agencies to seek and obtain voter approval of certain tax and fee increases, but by no means limit the applicability of that

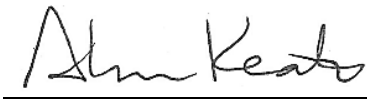
requirement, or the ability of the public to cite that requirement, to taxpayer actions to recover taxes previously paid.

MWD will have to raise property taxes and/or water rates to pay for its authorization of bonded indebtedness of $10.8 billion, and possibly much more. It must comply with the directives of Propositions 13, 26, and its own District Act and obtain voter approval for those tax hikes before borrowing and spending that amount of money.

For these reasons, and those detailed in Appellants' Opening Brief, Appellants respectfully request that this Court determine that Appellants' action is ripe for adjudication and remand the matter to the trial court for trial on the merits.

RESPECTFULLY SUBMITTED,

DATED: September 9, 2020

BY: 
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CERTIFICATE OF COMPLIANCE

Pursuant to CRC Rule 8.204(c)(1), this brief contains 8453 words, according to the word count feature of Microsoft Word.

/s/ Adam Keats

PROOF OF SERVICE

I, Adam Keats, am over eighteen years of age and not a party to this action. I am employed in the county where the service took place. My business address is 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111.

On September 9, 2020, I caused to be served the following documents:

Appellants' Reply Brief

on the parties in this action, whose attorneys are listed in the True-Filing service directory for this matter, by utilizing the e-filing service offered by True-Filing.

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

Executed this 9th day of September, 2020, in San Francisco, California.

By:_____
Adam Keats