NO. B297553

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION THREE

FOOD AND WATER WATCH
and CENTER FOR FOOD SAFETY,

Plaintiffs and Appellants,
v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, et al.,

Defendants and Respondents.

On Appeal after Judgment in the
Superior Court of Los Angeles
Case No. BC720692
Randolph M. Hammock, Judge Presiding

RESPONDENT'S BRIEF OF SAN DIEGO COUNTY WATER AUTHORITY

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CERTIFICATE OF INTERESTED PARTIES

(Cal. Rules of Court, Rule 8.208)

San Diego County Water Authority knows of no entity or person that must be listed here under California Rule of Court 8.208(e)(1) or (2).

DATED: July 15, 2020

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I.

INTRODUCTION

Plaintiffs and Appellants, Food and Water Watch and Center for Food Safety ("Appellants"), filed a reverse validation action arising from Metropolitan Water District's ("Metropolitan's") approval of two resolutions authorizing its general manager to negotiate and execute agreements relating to potential future financing in support of the now abandoned water facility project proposed by the California Department of Water Resources north of the Sacramento-San Joaquin river delta, dubbed the "California WaterFix." Neither of the resolutions (hereinafter, the "WaterFix Authorization") were alleged by Appellants to authorize any particular agreements, and no rates or charges were imposed thereby.

Initially, Appellants conceded that ripeness was a threshold issue for their claims and alleged that the WaterFix Authorization violated provisions of California law "if deemed ripe for determination." Appellants alleged the WaterFix Authorization provided only "general direction" for negotiating

and executing the California WaterFix financing arrangements, with no specific limitations on actual cost. Appellants nevertheless asserted that Metropolitan's WaterFix Authorization violated various provisions of California law, including Proposition 26, California Constitution Article XIII C ("Proposition 26").

Respondent, San Diego County Water Authority (the "Water Authority"), demurred to Appellants' first cause of action which alleged a violation of Proposition 26, on the basis that Appellants failed to allege a specific levy, charge, or exaction imposed by Metropolitan's challenged action, and hence a Proposition 26 claim could not be stated. The trial court sustained the Water Authority's demurrer after finding, among other things, that Appellants did not plead a tax was imposed by Metropolitan's challenged action. Metropolitan's demurrer to the first cause of action was sustained on the same ground. Appellants now appeal a judgment dismissing the claims in their First Amended Complaint ("FAC") after demurrer.

The central question here is whether Appellants can state a Proposition 26 claim when no taxes of any kind have been imposed by the challenged agency action.[1] Proposition 26 amended the California Constitution to impose limitations on taxes imposed by local government. Appellants have not alleged that Metropolitan imposed any tax under the WaterFix Authorization, so no violation of Proposition 26 is pleaded. Specifically, the challenged resolutions authorize Metropolitan's general manager to negotiate and execute, at some time in the future, agreements relating to financing the California WaterFix, but none are alleged to exist. Therefore, any Proposition 26 claim as to the challenged Metropolitan action would not yet be ripe.

As explained in *Reid v. City of San Diego* (*Reid*) (2018) 24 Cal.App.5th 343, 368, actions enforcing Proposition 26 may only be brought *after* taxes or rates are actually imposed. Appellants

[1] Appellants also challenge the trial court's dismissal of the second, third, and fourth causes of action in the FAC in connection with Metropolitan's demurrer. (See AOB at p. 41.) The Water Authority only demurred to Appellants' first cause of action and will not address these additional claims on appeal.

acknowledge that their Proposition 26 claim would be unripe in the non-validation context, but argue that the court's reasoning in *Reid* does not extend to validation actions governed by Section 860, *et seq.*, of the Code of Civil Procedure. Appellants are mistaken.

This Court of Appeal made clear that "validation actions are not exempt from the traditional principle that a justiciable action must satisfy the requirements of both ripeness and standing." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 66.) Ironically, the taxation feared here would be imposed to finance a *now-abandoned project.*[2] Appellants nevertheless contend that applying *Reid* and the principles of justiciability here would place them "between a rock and a hard place" because the 60-day limitation for filing a validation complaint might expire before a tax is imposed. Appellants' concern is misplaced.

Requiring that a specific levy, charge, or exaction be *imposed* before it is subject to challenge under Proposition 26 is

[2] See the Request for Judicial Notice filed by the Water Authority herewith.

not only consistent with the language of Section 1 of Article XIII C of the California Constitution, it also provides an actual point in time from which a statute of limitations can run. Moreover, the *Reid* holding—which is dispositive here—actually resolves Appellants' purported dilemma because the court explains that a challenge under Proposition 26 is timely *after a tax is imposed*. In other words, there is no need for Appellants to prematurely file validation complaints alleging abstract violations of Proposition 26 "if deemed ripe for determination." After *Reid*, it is settled that the claim is not ripe for determination until the alleged tax is actually imposed.

Indeed, in recent litigation between the Water Authority and Metropolitan, the First District Court of Appeal disagreed with a similar argument that validation law precluded an attack on later rates and charges. It cited the California Supreme Court case *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 702-03, and held that "[f]ees and rates are 'subject to attack' when reenacted, even if they are essentially the

same as previous ones for which the statute of limitations has expired." (*San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1142.)

If Metropolitan takes an action based on the Waterfix Authorization that actually enacts some form of tax, under Proposition 26 a claim could then be brought as the matter would be ripe for adjudication. Validation actions are not exempt from the rules of justiciability, and the Water Authority's demurrer to the first cause of action was properly sustained on the ground of ripeness.

II.
STATEMENT OF FACTS

A. Appellants' Verified Complaint

On September 7, 2018 Appellants filed an *in rem* reverse validation complaint in the Superior Court of California, County of Los Angeles asserting four causes of action. [Water Authority's Appendix ("WAA") 4-29 ("Complaint").] The first cause of action

alleged that the WaterFix Authorization, "if deemed ripe for determination," violated Proposition 26. [*Id.* at ¶¶37-38.] The Water Authority demurred to the first cause of action in the Complaint on the ground that it failed to state of cause of action under Code of Civil Procedure section 430.10(e). Specifically, the Water Authority argued that Appellants' first cause of action was "based on an alleged violation of Proposition 26, yet the [Metropolitan] resolutions challenged in the Complaint do not impose any 'taxes' under Proposition 26, nor is there alleged a controversy ripe for judicial review." [WAA 35-36.] Metropolitan also demurred to all four causes of action in the Complaint. [WAA 30-34.] Before these demurrers were heard, on January 3, 2019, Appellants filed a First Amended Complaint (the "FAC"). [Appellants' Appendix ("AA") 8-39.]

B. Appellants' Verified First Amended Complaint

Appellants' FAC seeks a determination that the WaterFix Authorization was invalid based on violations of (1) Proposition 26; (2) Proposition 13; (3) Metropolitan's State Water Project

contract; and (4) the Metropolitan Water District Act (West's Water Code Appendix 109) and the Joint Exercise of Powers Act. The first cause of action in the FAC alleges the same inchoate Proposition 26 violation as before, but omits Appellants' prior allegation frankly acknowledging the ripeness issue. [Compare Complaint, ¶37, with FAC, ¶¶50-51.] On February 14, 2019, the Water Authority demurred to the first cause of action in the FAC. [AA 40-42.] On February 15, 2019, Metropolitan demurred to all four causes of action in the FAC. [AA 64-70.]

1. The Allegations Relevant to Appellants' First Cause of Action[3]

a. The Resolutions.

On July 10, 2018, Metropolitan adopted Resolutions 9243 and 9244 (the WaterFix Authorization). [AA 27-36 (FAC, Exhs. A, B); FAC ¶¶19-21.] Those resolutions authorized Metropolitan's general manager to negotiate and execute

[3] The Water Authority's demurrer only pertained to the First Cause of Action, and therefore this brief on appeal addresses only that cause of action.

agreements relating to financing the proposed California WaterFix. [FAC, ¶¶15, 17-33, Exhs. A, B.] However, the WaterFix Authorization provides only "general direction" for negotiating and executing the California WaterFix agreements, with no specific limitation on actual costs. [FAC, ¶20.] Instead, the resolutions provide a cap limiting Metropolitan's potential contribution under the authorization to no more than 64.4% of the California WaterFix project's estimated costs of around $10.8 billion. [FAC, ¶¶19, 20, 22, Ex. A.]

b. The First Cause of Action.

The gravamen of Appellants' first cause of action is that the WaterFix Authorization violates Proposition 26 because it authorizes actions that might lead to the imposition of unreasonable and disproportionate taxes or fees. [FAC, ¶¶50-52.] Specifically, Appellants allege it is unreasonable and disproportionate for Metropolitan to bear 64 percent of the total potential California WaterFix costs, and nearly all costs for the second tunnel included in the now-abandoned State project.

[FAC, ¶¶53-59.] Notably, Appellants do not allege that Metropolitan's challenged Water Fix Authorization actually imposed a levy, charge, or exaction.

C. The Order Sustaining the Water Authority's Demurrer and Judgment

The demurrers by the Water Authority and Metropolitan to the FAC were heard on March 15, 2019. At the hearing, the trial court adopted its tentative ruling sustaining both demurrers without leave to amend. [March 15, 2019 Transcript at p. 31:4-16.] The court clarified that this ruling was based only on the issue of ripeness. [*Ibid.* ["I'm going to adopt my tentative, but I want to make this clear. All right. Because I know they're going to appeal it. . . . I'm only doing it on this, basically the rightness [sic] issue. The rightness [sic] issue."].] The trial court found the first cause of action was not ripe because "there has been **no actual imposition** of a 'tax' but only the establishment of a framework for future rate raises and taxes." [AA 285, emphasis in original.] The order sustaining both demurrers was entered

April 9, 2019. [AA 276-290.] Judgment was also entered April 9, 2019. [AA 302-304.]

D. Appellants' Notice of Appeal

Appellants filed their Notice of Appeal on May 8, 2019. [AA 311-314.] The Notice of Appeal identifies the Water Authority and Metropolitan as Respondents.

E. The California Department of Water Resources Formally Abandons the California WaterFix

California WaterFix was a project proposed by the California Department of Water Resources (the "Department"). On July 21, 2017, the Department adopted resolutions authorizing bonds to fund a two-tunnel California WaterFix project design, and filed a complaint to validate those resolutions. [See Water Authority's Request for Judicial Notice, filed herewith ("RJN").] But on May 2, 2019, the Department rescinded the project approval of California WaterFix. [RJN, Exh. 1.] Then, on May 7, 2019, the Department's Director adopted a resolution rescinding the bond resolutions associated with California

WaterFix and the bond authorizations that the resolutions represented. [RJN, Exh. 2.] The Department promptly filed a request for dismissal of the moot California WaterFix validation action [RJN, Exh. 3], and an order dismissing the action was entered on June 3, 2019. [RJN, Exh. 4.]

III.
STANDARD OF REVIEW

A. The Legal Sufficiency of a Complaint is Reviewed de Novo

On appeal from an order of dismissal after an order sustaining a demurrer, the standard of review is de novo; i.e., this Court exercises its independent judgment about whether the complaint states a cause of action as a matter of law. (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.) In reviewing the complaint, this Court treats a demurrer as

admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. The Court must seek to give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) Finally, the Court is permitted to base a demurrer ruling on defenses appearing on the face of the complaint, as well as on judicial admissions. (*Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1515.)

B. Denial of Leave to Amend a Complaint is Reviewed for Abuse of Discretion

Where a demurrer is sustained without leave to amend, the reviewing court must determine whether the trial court abused its discretion in doing so. (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636.) Appellants never requested or provided the trial court with facts establishing leave to amend could cure the defects in their FAC. Appellants likewise failed to present any reasoned argument or authority on appeal to suggest that the defects in their complaint could be cured with an amendment.

IV.

THE FIRST CAUSE OF ACTION DOES NOT STATE A CLAIM FOR A VIOLATION OF PROPOSITION 26

A. Relevant Amendments to the California Constitution after Passage of Proposition 26

State voters passed Proposition 26 in 2010. The key portions of Proposition 26 amended Section 3 of Article XIII A of the California Constitution, which governs "taxes" by the State of California, and also Section 1 of Article XIII C of the California Constitution, which governs local agency "taxation." Only the latter is relevant to the FAC. The pertinent change was in Section 1 of Article XIII C which added the following (emphasis added):

> "(e) As used in this article, "tax" means any *levy, charge, or exaction of any kind imposed by a local government*, except the following:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local

government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

Under these provisions, the local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

B. The Trial Court Correctly Determined that the Proposition 26 Claim is not fit for Judicial Determination

"'A controversy is 'ripe' when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.' [Citation.]" (*Pacific Legal Foundation v. California Coastal Com.* (*Pacific Legal Foundation*) (1982) 33 Cal.3d 158, 169.) "Validation actions are not exempt from the requirement of ripeness." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 66.) In evaluating ripeness, the California Supreme Court applied the following two-factor analysis:

> [I]t is fair to say that [the ripeness

> doctrine's] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

(*Pacific Legal Foundation,* 33 Cal.3d at 171, quoting *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148-49.)

Under the first prong of this analysis, "the courts will decline to adjudicate a dispute if 'the abstract posture of [the] proceeding makes it difficult to evaluate . . . the issues' [citation], if the court is asked to speculate on the resolution of hypothetical situations [citation], or if the case presents a 'contrived inquiry' [citation]." (*Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 502.)

Under the second prong, "courts generally will not consider issues based on speculative future harm." (*Metropolitan Water*

District of Southern California v. Winograd ("*Winograd*") (2018) 24 Cal.App.5th 881, 893.) "This is particularly true where the complaining party will have the opportunity to pursue appropriate legal remedies should the anticipated harm ever materialize." (*Ibid.*)

1. Appellants' Proposition 26 Claim is Too Abstract to Adjudicate

The abstract posture of Appellants' Proposition 26 claim renders it too uncertain for a justiciable controversy. (See *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 542.) Metropolitan is not pled to have yet developed, approved or executed any of the hypothetically problematic agreements authorized by the WaterFix Authorization, let alone articulate the material terms of any agreements or proposed rates to pay the costs that may be incurred to pay for such future commitments. Rather, the gravamen of Appellants' first cause of action is that Metropolitan *authorized* its general manager to negotiate and execute

contracts that "will necessarily not bear a fair and reasonable relationship to the burdens on or benefits to [Metropolitan] customers . . . ." [FAC, ¶52.] As Appellants concede, this authorization provides only "general direction" to enter into contracts in the future and fund "*up to* 64.6% of total project costs" and "*up to* $86 million for further contributions . . . ." [FAC, ¶¶19-20, emphasis added.] Moreover, even the 64.6 percent commitment ceiling does not fix the "actual costs" to Metropolitan, nor determine the manner in which those costs might be allocated to Metropolitan's member agency customers or passed on to their ratepayers. [FAC, ¶20.] How could one even know if any impositions are proportional to benefits or services under Proposition 26 when under the challenged agency action no impositions were made?

Presented with estimated charges in hypothetical future contracts with unknown terms, the Court is given the impossible task of determining whether Proposition 26's prescription that the charges "be fixed in an amount that is 'no more than

necessary to cover the reasonable costs of the governmental activity,' and . . . that 'the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity'" is satisfied. (*City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191, 1214, citing Cal. Const., art. XIII C, § 1, subd. (e).) Because the authorization provides only general—rather than specific—direction on contract negotiation and execution, any number of undetermined contractual terms could materially affect final costs, as well as how, when and whether unreasonable or disproportionate costs might be imposed on Metropolitan's customers through rates.

The abstract posture of Appellants' Proposition 26 claim is now compounded by the State's abandonment of the California WaterFix. Appellants allege that the WaterFix Authorization violated Proposition 26 because a future agreement might impose 64 percent of California WaterFix project costs—including nearly all the costs of the then-envisioned *second* tunnel—on

Metropolitan customers, which Appellants allege is an unreasonable and disproportionate burden. However, the proposed two-tunnel project pleaded in the FAC has been formally dropped. Any estimated costs associated with a possible smaller, single-tunnel project concept are not pleaded in the FAC. Indeed, no such project has been formally proposed by the Department. The doctrine of justiciability exists to prevent the premature adjudication of precisely these kinds of conjectural controversies.

2. Appellants do not Allege a Rate "Increase" Under Proposition 26

Appellants speculate that Metropolitan will recover WaterFix Authorization agreement costs through its wholesale water rates, which will "lead to corresponding retail rate increases." [FAC, ¶¶24-26.] These allegations are insufficient to state a claim under Proposition 26, which requires an actual present tax imposition by the challenged agency action. (*Reid*, 24 Cal.App.5th at 368-69.) Appellants fail to allege that the

WaterFix Authorization actually increases any of its particular charges to anyone. Without an actual decision on fees, rates or charges being alleged in the challenged agency action, the first cause of action raises only an abstract dispute regarding a potential future Proposition 26 violation rather than a decision which can be validated. (See *Pacific Legal Foundation*, 33 Cal.3d at 172, 174 [speculative nature of possible projects and possible conditions on project permits pursuant to challenged guidelines made declaratory relief inappropriate]; *Sanctity of Human Life Network v. California Highway Patrol* (2003) 105 Cal.App.4th 858, 871-72.)

C. The Proposition 26 Claim is Improper because no "Levy, Charge, or Exaction" of any kind has been Imposed by the challenged action

Appellants cannot state a claim for violation of Proposition 26 unless the challenged resolutions impose a specific "levy, charge, or exaction." (See Cal. Const., art. XIII C, § 1.) Here, Appellants contend the WaterFix Authorization violates Proposition 26 because it authorizes actions that *might* impose

unreasonable and disproportionate taxes or fees. [FAC, ¶50-52.] Specifically, Appellants allege it is unreasonable and disproportionate to impose 64 percent of the total California WaterFix costs, and nearly all costs for a second tunnel, on Metropolitan customers, ratepayers, and member agencies. [FAC, ¶¶53-59.] *However, the challenged action by Metropolitan did not adopt any schedule of rates, charges, or taxes based on incurring costs for California WaterFix, and no such action is alleged*. Appellants may fear that Metropolitan will impose disproportionate rates in violation of Proposition 26. However, the Metropolitan WaterFix decision attacked here effects no imposition that is challengeable under Proposition 26 as a "tax."

The WaterFix Authorization is comprised of two Metropolitan resolutions, attached as Exhibits "A" and "B" to the FAC. In these resolutions—which are the only actions challenged by the FAC—there is no setting of any rates, fees, charges, or taxes at all. There is simply no "levy, charge, or exaction of any

kind imposed by a local government" in the actions at issue here, as is required for Proposition 26 to apply.

There is dispositive caselaw that mandates the granting of this demurrer. In *Reid*, the plaintiffs sought declaratory relief challenging a procedural ordinance because it "*imposed* an illegal tax" in violation of Proposition 26. (24 Cal.App.5th at 343, 368-69, emphasis added.) Among other things, the ordinance "create[d] a framework and procedure for the City to . . . levy assessments by resolution of the City Council." (*Id.* at 368.) *However, just as here, nothing in the ordinance set the rate or term of any assessment or identified those who were assessed.* (*Ibid.*) Instead, the rates and terms were set by a City Council resolution the plaintiffs failed to timely challenge. (*Id.* at 368-69.) The Court of Appeal found the demurrer to the Proposition 26 claim was properly sustained because "creating a mechanism by which the charge *can be* imposed" is not an *imposition* for purposes of Proposition 26. (*Ibid.*) The *Reid* court held that

Proposition 26 "*applies only to those taxes 'imposed by a local government*.'" (*Id.* at 368, emphasis added.)

As with the ordinance in *Reid*, the WaterFix Authorization in this case provides, at most, a basis on which charges *could be* imposed. As pleaded in both the original complaint and FAC, the WaterFix Authorization provides only "general" guidance regarding future agreements Metropolitan *could* enter into, and even the 64.6 percent commitment ceiling would not fix the "actual costs" Metropolitan might impose upon ratepayers. [Complaint, ¶13; FAC, ¶20.] Because the FAC is not challenging an act of Metropolitan that imposes a "tax" under Proposition 26, it cannot state a Proposition 26 claim.

D. Appellants will not incur any Hardship from Delaying Review of the Proposition 26 Claim

Appellants' Proposition 26 claim does not satisfy the first prong of the ripeness test because the alleged violation is hypothetical and too abstract to constitute a justiciable controversy. (See *Winograd*, 24 Cal.App.5th at 893.) This claim also fails to meet the second "hardship" prong of the ripeness test,

namely, that Appellants will incur hardship if the court withholds consideration of their Proposition 26 claim. (See *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582.)

Appellants will not incur any hardship because Proposition 26 claims can be asserted *after* taxes or rates are actually imposed. Under the second prong, it is "particularly true" that courts will not consider issues based on speculative future harm "where the complaining party will have the opportunity to pursue appropriate legal remedies should the anticipated harm ever materialize." (*Winograd*, 24 Cal.App.5th at 893.) As discussed *ante*, the *Reid* holding makes clear that a challenge under Proposition 26 does not become ripe until *after* the alleged tax is actually imposed.

The limitations period for validation statutes is therefore inapplicable to this challenged agency action because it only applies "to matters which have been or which could have been adjudicated in a validation action." (*McLeod v. Vista Unified*

School District (2008) 158 Cal.App.4th 1156, 1166, citing *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 846-47.) Here, the alleged violation of Proposition 26 could not have been adjudicated in Appellants' validation complaint for the simple reason that the allegations as to the challenged agency action do not present a ripe controversy, which is a prerequisite to adjudicate the claim. (*Pacific Legal Foundation*, 33 Cal.3d 158 at 170 ["In any event, a basic prerequisite to judicial review of administrative acts is the existence of a ripe controversy."].)

For example, in *San Diego County Water Authority v Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124 (*SDCWA*), the court rejected a similar argument that the validation law precluded an attack on later rates and charges. In that case, the Water Authority asserted that Metropolitan's adopted water rates violated Proposition 26, among other things. (*Id.* at 1152-53.) Metropolitan argued that the Water Authority's claims were time-barred under validation law but the court disagreed, holding that "[f]ees and rates are

'subject to attack' when reenacted, even if they are essentially the same as previous ones for which the statute of limitations has expired." (*Id.* at 1141-43, citing *Barratt*, 37 Cal.4th 685, 702–03). Citing the California Supreme Court's holding in *Barratt*, the *SDCWA* Court explained that if the validation statutes barred rate challenges before the rates were even adopted, "'there would be no effective enforcement mechanism to ensure that local agencies' base rates on the cost of service." (*Id.* at 1142-43, citing *Barratt*, 37 Cal.4th 685, 703.) Similarly, here, the challenged agency action does not actually impose any rates or charges, so the statute of limitations did not begin to run when Metropolitan approved the WaterFix Authorization. Metropolitan's actual rate enactments can, of course, be timely challenged.

The holding in *California Commerce Casino, Inc. v. Schwarzenegger* (*California Commerce Casino*) (2007) 146 Cal.App.4th 1406, does not compel a different conclusion. As a preliminary matter, the *California Commerce Casino* court did not address ripeness or consider whether a challenge under

Proposition 26 should have been brought as a validation action. In any event, the hypothetical future contracts that might arise from the WaterFix Authorization are unlike the contracts in *California Commerce Casino*, which marked the beginning of a financing to which the validation statutes might apply. (*California Commerce Casino*, 146 Cal.App.4th at 1431; See AOB at pp. 16, 18.) In contrast to the approved contracts with certain terms in *California Commerce Casino*, the WaterFix Authorization provides only general guidance regarding undefined contracts Metropolitan *could enter into in the future*. (See *Hollywood Park Land Co., LLC v. Golden State Transportation Financing Corp.* (2009) 178 Cal.App.4th 924, 937 ["[F]or purposes of a validation proceeding, contracts are deemed to be in existence when the governing body of the public agency adopts a resolution" authorizing the contract's execution *and* approving the contract].)

In addition, Appellants cannot demonstrate they will suffer hardship for a refusal to entertain their claim because the alleged

future harm to their members is only speculative. "Under the second [prong of the ripeness] test, courts generally will not consider issues based on speculative future harm." (*Winograd*, 24 Cal.App.5th at 893.) Appellants allege that 64 percent of the total costs of the now-abandoned State project—and nearly all the costs of the second tunnel—might be unreasonably and disproportionately imposed on their members. [FAC, ¶¶1-2, 53-59.] However, the Waterfix Authorization merely provides a cap *limiting* Metropolitan's potential contribution "*up to* 64.6% of total project costs". [FAC, ¶¶19, 20, 22, Ex. A.] Furthermore, the Waterfix Authorization does not define the terms for these future contracts or determine the manner in which those costs might be allocated to Metropolitan's member agency customers or passed on to their ratepayers. Thus, Appellants' contention that a future contract might impose unreasonable and disproportionate taxes or fees on their members is conjecture and fails to demonstrate any "actual" hardship. (See *Winograd*, 24 Cal.App.5th at 893 [finding no "actual hardship for a refusal to entertain

[appellant's] claim that [Metropolitan] *may potentially in the future* utilize" a disfavored comparative analysis procedure], emphasis added.)

Accordingly, the Water Authority's demurrer to Appellants' first cause of action was properly sustained. (See *Otay Land Co. v. Royal Indemnity Co.* (2008) 169 Cal.App.4th 556, 562-63.)[4]

V.

THE TRIAL COURT CORRECTLY SUSTAINED THE DEMURRER WITHOUT LEAVE

The challenged acts of Metropolitan are what they are and no amendment to the FAC will change them.

It is Respondent's burden to establish an abuse of discretion has occurred by the trial court in refusing to grant leave to amend. (See *Badie v. Bank of America* (1998) 67

[4] The issue of whether Proposition 26 applies to Metropolitan rate-setting is an issue on which the Water Authority and Metropolitan disagree. However, both agreed that this issue was not being addressed by the demurrers that are before this Court on appeal. [See WAA 46-49 ("Limited Response to Metropolitan's Demurrer"); AA 86, fn 4.] Of course, if the Proposition 26 claim were remanded then that would be a future issue for the trial court to decide; but that should not occur because this appeal is not well taken.

Cal.App.4th 779, 784-85 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]"]; *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655.] If the appellant does not satisfy these basic requirements, the appellant forfeits the argument on appeal. (*Keyes,* 189 Cal.App.4th at 655; *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051, fn. 9.)

The decision in *Keyes* is instructive. In that case, the appellate court was asked to review de novo a judgment following demurrer that was sustained without leave to amend. (*Keyes,* 189 Cal.App.4th at 654-55.) However, despite the review being de novo, the Court of Appeal held that the appellate rules still place the burden on an appellant to establish trial court error. (*Id.* at 655 ["The fact that we examine the complaint de novo does not mean that plaintiffs need only tender the complaint and hope we can discern a cause of action. It is plaintiffs' burden to show either that the demurrer was sustained erroneously or that the

trial court's denial of leave to amend was an abuse of discretion. [Citations.]"].)

The court reiterated that the trial court's judgment is presumed to be correct, and the appellant has the burden to prove otherwise by presenting legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited. (*Keyes,* 189 Cal.App.4th at 655-56.) As further noted by the court, "[i]t is the appellant's responsibility to support claims of error with citation and authority; this court is not obligated to perform that function on the appellant's behalf." (*Id.* at 656, internal citation omitted.)

Furthermore, an appellant may not attempt to rectify their omissions and oversights for the first time in their reply briefs because this deprives the opposing party of an opportunity to respond. (*Keyes,* 189 Cal.App.4th at 656; *SCI Cal. Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 573, fn. 18 [matters argued for the first time in reply brief

will not be considered].) It is the appellant's burden to provide a coherent legal argument, with citations to legal authority and the record and factual analysis on each point made. (*Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 282; see also *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44 ["Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend."].) Appellants have failed to identify what facts could have been alleged to state a valid Proposition 26 claim—particularly in light of the verified allegations in their two complaints—and have therefore waived the challenge on appeal.

VI.
CONCLUSION

The WaterFix Authorization does not itself impose a tax on Metropolitan customers. Rather, Appellants' Proposition 26 claim is based on resolutions *authorizing* the negotiation and

execution of contracts that *might* someday lead Metropolitan to need funding, which then *might* lead its Board to then *possibly* impose a tax to help finance a non-existent project. Importantly, Appellants do not allege that the WaterFix Authorization approved such a contract or actual tax imposition, and because the California WaterFix—identified with great precision in the resolutions—has been abandoned, such a contract or ensuing possible tax cannot plausibly arise from the WaterFix Authorization. As a result, Appellants cannot allege a violation of Proposition 26 and there is no Proposition 26 claim or controversy ripe for judicial review based on the challenged agency action. Furthermore, Appellants have failed to establish they should have been provided leave to amend, because Metropolitan's challenged acts cannot implicate Proposition 26, and thus no amount of re-pleading could solve that problem.

The Water Authority respectfully requests that the judgment of the trial court be affirmed.

DATED: July 15, 2020

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: /s/ Greg V. Moser
Greg V. Moser
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SAN DIEGO COUNTY
WATER AUTHORITY

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c), I certify this RESPONDENT'S BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 5,907 words.

DATED: July 15, 2020

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 "B" Street, Suite 2200, San Diego, California 92101. On July 15, 2020, I served the within document(s):

1. RESPONDENT'S BRIEF of SAN DIEGO COUNTY WATER AUTHORITY
2. RESPONDENT SAN DIEGO COUNTY WATER AUTHORITY'S APPENDIX, VOL. 1 OF 1, PAGES 1-53

☑ **BY U.S. MAIL** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

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☑ **BY E-MAIL OR ELECTRONIC SERVICE (Per CRC 8.60(f))** based upon court order or an agreement of the parties to accept service by electronic transmission, by electronically mailing the document(s) listed above to the e-mail address(es) set forth below, or as stated on the attached service list and/or by electronically notifying the parties set forth below that the document(s) listed above can be located and downloaded from the hyperlink provided. No error was received, within a reasonable time after the transmission, nor any electronic message or other indication that the transmission was unsuccessful.

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

Executed on July 15, 2020, at San Diego, California.

/s/ Liz Bojorquez
Liz Bojorquez

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