Nos. A146901 and A148266

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

SAN DIEGO COUNTY WATER AUTHORITY,

Respondent and Cross-Appellant,

v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,

Appellant and Cross-Respondent.

Appeal From Judgments And Peremptory Writs of Mandate After Court Trials
Superior Court for the County of San Francisco,
Nos. CPF-10-510830 and CPF-12-512466
The Honorable Richard A. Kramer and Curtis E.A. Karnow

CROSS-APPELLANT'S REPLY BRIEF

KEKER & VAN NEST, LLP
JOHN W. KEKER - #49092
jkeker@kvn.com
DANIEL PURCELL - #191424
dpurcell@kvn.com
*DAN JACKSON - #216091
djackson@kvn.com
WARREN A. BRAUNIG - #243884
wbraunig@kvn.com
633 Battery Street
San Francisco, CA 94111
Telephone: (415) 391-5400
Facsimile: (415) 397-7188

SAN DIEGO COUNTY WATER AUTHORITY
MARK J. HATTAM – #173667
(General Counsel)
mhattam@sdcwa.org
4677 Overland Avenue
San Diego, CA 92123
Telephone: (858) 522-6791
Facsimile: (858) 522-6566

Attorneys for Respondent and Cross-Appellant
SAN DIEGO COUNTY WATER AUTHORITY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Court Rules

Other Authorities

I. INTRODUCTION

May a public water district overcharge for water delivery and then punish one of its member agencies for blowing the whistle? No, of course not. Yet that is exactly what cross-respondent Metropolitan Water District of Southern California ("Met") has done by enforcing its so-called "Rate Structure Integrity," or "RSI," clause against cross-appellant San Diego County Water Authority ("San Diego").

San Diego established in the trial court and in its opening brief on cross-appeal that Met's RSI clause violates the unconstitutional conditions doctrine, which prohibits Met from pursuing an unconstitutional goal by imposing conditions on "funds distributed by it to other governmental bodies." *Sonoma Cty. Org. of Pub. Emps. v. Cty. of Sonoma*, 23 Cal. 3d 296, 319 (1979). Met's unconstitutional goal was to avoid—and, if it could not avoid, then punish—challenges to its unconstitutional rates. The Honorable Curtis E.A. Karnow agreed with San Diego on the merits, but incorrectly held that San Diego lacks standing to assert the unconstitutional conditions doctrine. As San Diego demonstrated in its opening brief, Judge Karnow was right about the merits, but wrong about standing. This Court, therefore, should invalidate Met's RSI clause.

Nothing in Met's responding brief supports its argument that San Diego lacks standing. On the contrary, Met concedes that San Diego has standing under *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1

(1986), if Met's RSI clause infringes "structural constitutional rights." X-RB at 124. Met argues that the right to petition "is not a structural right but an individual right," *id.*, but the only case Met cites for that proposition, *Wolfgram v. Wells Fargo Bank*, 53 Cal. App. 4th 43 (1997), refutes it. The right to petition "results from the very nature and ***structure***" of our government, and the right to petition the courts, in particular, "is the right conservative of all other rights, and lies at the foundation of orderly government." *Id.* at 51, 53 (emphasis added) (citations omitted). If San Diego had not exercised that right in defense of orderly government, Met's unconstitutional rates "would have gone unchecked." *Star-Kist*, 42 Cal. 3d at 9. San Diego, therefore, has standing under *Star-Kist*; and, because San Diego has standing, "it wins on the merits of the claim," as Judge Karnow rightly held. 7-AA-1822.

Met's RSI clause also violates Civil Code section 1668, which prohibits contractual provisions that "have for their object, directly or indirectly, to exempt anyone from responsibility" for violating the law. Civ. Code § 1668. Met argues that "if a provision does not 'totally exempt' a party from liability, then section 1668 is inapplicable." X-RB at 138. But the California Supreme Court has rejected that argument: "statutory or constitutional rights may be transgressed as much by the imposition of undue costs as by outright denial." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 109 (2000). Because Met's RSI

clause penalizes efforts to hold Met responsible for its violations of law, its object, at least "'indirectly,'" is to exempt Met from such responsibility, and it is therefore "against public policy and may not be enforced." *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 383 (2014), *cert. denied*, 135 S. Ct. 1155 (2015) (quoting Civ. Code § 1668).

Finally, under section 5.2 of the parties' Exchange Agreement, San Diego is entitled to its attorneys' fees for the phase of this litigation specifically devoted to section 5.2 (Phase II). Met's contrary argument relies on cases holding that a party cannot obtain attorneys' fees for a dispute that has "nothing to do with" and "does not involve the obligation" at issue in the fees provision. *Paul v. Schoellkopf*, 128 Cal. App. 4th 147, 154 (2005); *Hasler v. Howard*, 120 Cal. App. 4th 1023, 1027 (2004). Here, however, the issue in Phase II was Met's contractual obligation to set its Price under section 5.2 based on applicable law. 22-AA-6137-38, § 5.2. Section 5.2 mandates attorneys' fees for the party prevailing in such a contest. *See id.* Because Phase II was such a contest, and San Diego prevailed in that contest, Judge Karnow abused his discretion in denying San Diego its attorneys' fees for Phase II. The amount of those fees is undisputed, and this Court should order Met to pay them.

Thus, as established in San Diego's opening brief and further demonstrated below, this Court should invalidate Met's RSI clause and order Met to pay San Diego's Phase II attorneys' fees.

II. UNDISPUTED FACTS

The facts material to San Diego's cross-appeal are undisputed.

First, as to Met's RSI clause, it is undisputed that Met required its member agencies, including San Diego, to agree as a condition of receiving subsidies funded by Met's Water Stewardship Rate that "if they file or participate in litigation or support legislation to challenge or modify [Met's] Existing Rate Structure, including changes in overall rates and charges that are consistent with the current cost-of-service methodology, Metropolitan may initiate termination of [the subsidy] agreement." 3-RA-822 § 8.2(a); *see also* X-RB at 122; 7-AA-1815. It is undisputed that Met enforced its RSI clause against San Diego because San Diego filed this lawsuit. *See* X-RB at 123. Judge Karnow held that Met's transportation rates—in particular, its Water Stewardship Rate, System Access Rate, System Power Rate, and wheeling rate—violate article 13C of the California Constitution (Proposition 26), Water Code sections 1810 *et seq*. (the Wheeling Statutes), Government Code section 54999.7(a), and the common law. 27-AA-7516. Nevertheless, Met continues to deny San Diego subsidies funded by Met's Water Stewardship Rate, while still charging San Diego that rate, because Met's RSI clause "makes no provision for restoring terminated benefits if a court upholds a recipient's challenge to MWD's rates and finds the challenged rates to be illegal." 4-RA-1026 Undisputed Fact 13.

Second, as to attorneys' fees, the parties agreed that Met's Price

under section 5.2 of the Exchange Agreement "shall be equal to the charge or charges set by Metropolitan's Board of Directors pursuant to applicable law and regulation," and that, after a five-year peace treaty, nothing in that agreement "shall preclude SDCWA from contesting in an administrative or judicial forum whether such charge or charges have been set in accordance with applicable law and regulation." 22-AA-6137-38, § 5.2. The parties further agreed that, in "the event that SDCWA contests a matter pursuant to the foregoing sentence, the prevailing Party shall be entitled to recovery of reasonable costs and attorneys fees incurred in prosecuting or defending against such contest." *Id.* Although Met disputes that Phase II of the case below was "such [a] contest," *id.*, Met does not dispute that, if Phase II was such a contest, San Diego is entitled to an additional $2,617,143.53 in attorneys' fees. *See* X-AOB at 105-07; X-RB at 140-43.

III. ARGUMENT

A. MET'S RSI CLAUSE IS INVALID.

1. San Diego has standing to challenge Met's RSI clause based on the unconstitutional conditions doctrine.

As San Diego demonstrated in its opening brief, Met violated the unconstitutional conditions doctrine by terminating subsidies funded by Met's Water Stewardship Rate in retaliation for San Diego petitioning for redress of Met's unlawful and unconstitutional rates. *See, e.g., Sonoma*, 23 Cal. 3d at 319; *Robbins v. Superior Court*, 38 Cal. 3d 199, 213 (1985);

Parrish v. Civil Serv. Comm'n of Alameda Cty., 66 Cal. 2d 260, 271 (1967); 6-AA-1397-99 ¶¶ 103-10; X-AOB at 94-102. Met argues that San Diego lacks standing to assert the unconstitutional conditions doctrine, yet concedes that, under *Star-Kist*, San Diego has standing to assert "structural constitutional rights." X-RB at 124. Met's standing argument, therefore, boils down to its contention that the right to petition "is not a structural right but an individual right." *Id.* Met is wrong.

a. The right to petition is a quintessentially structural right, which San Diego has standing to assert under *Star-Kist*.

Met's argument that the right to petition is not a structural right contradicts *Wolfgram*, the only case Met cites for it. *See* X-RB at 124. Precisely because the right to petition is a structural right, it "would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature and structure of its institutions," and it is "impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen." *Wolfgram*, 53 Cal. App. 4th at 51 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 998, at 707 (1833)). "The state right to petition has been called 'an essential attribute of governing'" under the California Constitution. *Id.* at 52 (quoting *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 907 (1979), *aff'd*, 447 U.S. 74 (1980)). "The right to petition

encompasses the right to sue," which "'is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.'" *Id.* at 53 (quoting *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907)). This fundamental right "'would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints,'" including "any penalty exacted after the fact." *Id.* at 56-57 (quoting *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967)).

Met's argument is also inconsistent with the text of the California Constitution. "The ***people*** have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." Const. art. 1, § 3(a) (emphasis added). "People" refers to "We, the People of the State of California." *Id.*, Preamble. "The sovereignty of the state resides in the people thereof," Gov't Code § 100, and the rights of the "people" are sovereign rights, not merely individual rights. *See id.*

Moreover, the right to petition should be evaluated in light of the other rights with which it is juxtaposed—the rights to assemble and instruct representatives. *See* Const. art. 1, § 3(a). As in the Federal Constitution, the "right ***of the people*** to assemble does not simply protect the ability of self-selected clusters of individuals to meet together; it is also an express reservation of the ***collective*** right of We the People" to "bring government

under control." AKHIL REED AMAR, THE BILL OF RIGHTS 26-27 (1998) (emphases in original). The same is clearly true of the people's right to instruct their representatives. *See id.* at 28-29.[1] Likewise, the right to petition is a structural right. *See id.* at 30. "To be sure, like its companion assembly clause, the petition clause also protects individuals," but "it is at least equally concerned with the danger of attenuated representation." *Id.* at 31. In other words, the right to petition protects "the collective right of the people to bring wayward government to heel." *Id.* at 26. Met's use of subsidies to secure its member agencies' acquiescence in unconstitutional rates is exactly the kind of "government self-dealing" abetted by "self-interested inaction" the right to petition guards against. *See id.* at 26-27.

Judge Karnow stated that neither he nor the parties had "found direct state law on the issue whether governmental actors have a First Amendment (or state equivalent) right to petition including the right to file in court." 7-AA-1820-21. In the Anti-SLAPP context, however, the law is clear that government agencies have "the right to petition government for grievances." *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1117 (1996). The notion that one government agency does not have the

[1] Although a right to instruct representatives was proposed for inclusion in the First Amendment, it "ultimately foundered on uncertainty over the effect to be given instructions, among other concerns," whereas our "state Constitution has codified a right to instruct since before statehood." *Howard Jarvis Taxpayers Assn. v. Padilla*, 62 Cal. 4th 486, 518 (2016); *see also* Const. art. 1, § 3(a).

constitutional right to petition against another "'understates the fragmentation of modern government into numerous units and entities, which each enjoy various degrees of independence and often feud with one another.'" *Id.* at 1118 (quoting Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229, 1260 (1991)); *see also, e.g.*, *Santa Barbara Cty. Coal. Against Auto. Subsidies v. Santa Barbara Cty. Ass'n of Gov'ts*, 167 Cal. App. 4th 1229, 1237 (2008) ("government agencies and their representatives have First Amendment rights").

Judge Karnow discounted this Anti-SLAPP jurisprudence, stating that the California Supreme Court, in *Vargas v. City of Salinas*, 46 Cal. 4th 1 (2009), "only approved these cases as a matter of statutory interpretation while expressly refusing to decide whether the First Amendment or Article I, § 2 of the California Constitution directly protects government speech." 7-AA-1819. But *Vargas* does not suggest that government agencies lack the right to petition under article 1, section 3. *See* 46 Cal. 4th at 17. And the Anti-SLAPP statute protects acts in furtherance of the "right of petition" under "the United States or California Constitution," indicating that government agencies' Anti-SLAPP petitioning rights must be grounded, ultimately, in the Constitution. Code Civ. Proc. § 425.16(b).[2]

[2] Judge Karnow also implied that San Diego's "*statutory* right to petition" is somehow inconsistent with its constitutional right to petition. 7-AA-

Furthermore, as the California Supreme Court recently emphasized in *Padilla*, even if "neither text nor precedent affords guidance, sometimes a 'page of history is worth a volume of logic.'" *Padilla*, 62 Cal. 4th at 505 (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). Petitions from government entities have always played an important structural role in our democracy. *See id.* at 500-04. Indeed, the same is true of the antecedents of our democracy, stretching back to thirteenth-century England, where "petitioners acted not just individually, but collectively," through "petitions sent from cities and shires." Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2170 (1998).

Petitions from towns were ubiquitous in the American colonies. *See* Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 150-54 & nn.49, 63, 72, 78-80, 88 (1986). "As the Revolution approached, the colonial assemblies themselves engaged in vigorous petitioning campaigns directed both to parliament and the king," which "drew punitive responses, but the mother

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1821 (emphasis in original) (citing Gov't Code § 945). Yet the same statute confirms individuals' constitutionally-protected petitioning rights, in order to "eliminate any doubt that might otherwise exist." Gov't Code § 945, Law Rev. Comm'n cmt. Thus, there is no inconsistency between statutory and constitutional petitioning rights. *See id.*; *cf. Star-Kist*, 42 Cal. 3d at 10 (citing statute providing for declaratory relief as "the Legislature's implicit recognition of the right to raise federal constitutional claims").

country imposed these sanctions against the colony or its officers, not against any person in his individual capacity." Norman B. Smith, "*Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1173 (1986). Not as individual persons, nor even as individual states, but as the United States of America, We declared that "Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people." THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776). To prevent such tyranny in the United States, the framers of its Constitution relied on the "executive and legislative bodies of each State" to act as "so many sentinels over the persons employed in every department of the national administration," if "only from the rivalship of power." THE FEDERALIST No. 84, at 516-17 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Likewise, San Diego has the structural right—if not the duty—to act as a "sentinel" over Met, *cf. id.*, to ensure that Met's unconstitutional actions are not "insulated from scrutiny." *Star-Kist*, 42 Cal. 3d at 9. As discussed above, the right to petition guarantees that such violations will not go unchecked, and Met cannot be allowed to "destroy or erode [those] guarantees by indirect restraints." *Wolfgram*, 53 Cal. App. 4th at 56. Thus, San Diego has standing to challenge Met's unconstitutional efforts to insulate itself from judicial scrutiny. *See Star-Kist*, 42 Cal. 3d at 9.

b. *Star-Kist*'s origins confirm that San Diego has standing.

Met disregards *Star-Kist*'s holding and its underlying concerns about preserving intra-governmental checks and balances, focusing instead on the dictum that a "'municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.'" *Star-Kist*, 42 Cal. 3d at 6 (quoting *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933)). The short answer is that San Diego is not invoking the Federal Constitution, or even the California Constitution, "in opposition to the will of its creator," *id.*, but enforcing the will of the State of California and its people against Met. The longer answer, below, refutes Met's hypocritical accusation that San Diego is merely "cobbling together cherry-picked phrases from *Star-Kist*." X-RB at 126.

The dictum the *Star-Kist* court quoted from *Williams* derives from *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), where the plaintiffs sought to reverse a judgment of the Supreme Court of Pennsylvania upholding that state's consolidation of the cities of Pittsburgh and Allegheny. The plaintiffs argued that the consolidation violated an implied contract with the state, but the Court held that municipal corporations "are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them," and nothing in their creation "constitutes a contract with the state

within the meaning of the Federal Constitution." *Id.* at 178. If the state did not violate its own Constitution—a question the Court disclaimed any power to decide contrary to the determination of the Supreme Court of Pennsylvania, *see id.* at 176—the state's decision to consolidate the two cities was "unrestrained by any provision of the Constitution of the United States." *Id.* at 179.

The Supreme Court followed *Hunter* in *City of Trenton v. State of New Jersey*, 262 U.S. 182 (1923), and followed *Trenton* in *Williams*. The issue in *Williams* was whether the Fourth Circuit properly overturned a Maryland statute in an action brought by the City of Baltimore. As to federal law, the Court said nothing beyond what was quoted in *Star-Kist*—that a "municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator"—for which the Court cited *Trenton* and other cases, but offered no further explanation. *Williams*, 289 U.S. at 40. The remainder of the case held that the statute at issue did not violate the Maryland Constitution, and the Court "assumed, without deciding, that the respondents, though without standing to invoke the protection of the Federal Constitution, will be heard to complain of a violation of the Constitution of the state." *Id.* at 47.

The Supreme Court later recognized, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), that *Hunter* and its progeny "are authority only for the

principle that no constitutionally protected contractual obligation arises between a State and its subordinate governmental entities solely as a result of their relationship," and that pronouncements that seem to go beyond that limited principle should be disregarded as dicta:

> Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. Thus, a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.

Id. at 343-44. Legal scholars have also criticized the *Hunter*-*Williams* dicta as "analytically muddled" and "inconsistently applied." Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 5 (2012) (footnotes omitted); *see also, e.g.*, Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389 (2013). Certainly nothing in the *Hunter* line of cases diminishes the rule at issue here: that "a constitutional power cannot be used by way of condition to attain an unconstitutional result." *Gomillion*, 364 U.S. at 347-48 (quoting *W. Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918)).

In California, before *Hunter*, our high court rejected the argument that "the legislative power is so transcendent that it may, at its will, take

away the private property" of a municipal corporation "or change the uses of its private funds acquired under the public faith.'" *Grogan v. City of San Francisco*, 18 Cal. 590, 613 (1861) (quoting *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 694 (1819)). A municipal corporation's rights, "'in this respect, rest not merely upon the Constitution, but upon the great principles of eternal justice, which lie at the foundation of all free governments.'" *Id.* (quoting *Benson v. City of New York*, 10 Barb. 223, 245 (N.Y. Sup. Ct. 1850)). "And though a municipal corporation is the creature of the Legislature, yet when the State enters into a contract with it, the subordinate relation ceases, and that equality arises which exists between all contracting parties." *Id.*

After *Hunter*, California municipal corporations have been limited in their ability to challenge state law based on the ***Federal*** Constitution. *See, e.g., Mallon v. City of Long Beach*, 44 Cal. 2d 199, 209 (1955). Nevertheless, under the ***California*** Constitution, municipal corporations continue to have rights against the state as to municipal property and affairs. *See id.* "Whatever may be the rule in other jurisdictions, or in regard to other political bodies, it has been the rule in California since 1861 that lands held by a municipal corporation in its proprietary capacity may not be taken from it by the State without the payment of just compensation." *People By & Through Dep't of Pub. Works v. City of Los Angeles*, 220 Cal. App. 2d 345, 351 (1963) (citing *Grogan*).

Most importantly here, post-*Hunter* limitations on political subdivisions' rights to ***challenge*** state law do not limit their rights to ***enforce*** state law against one another. *See, e.g.*, *Marin Cty. v. Superior Court*, 53 Cal. 2d 633, 639 (1960). In *Marin*, for example, a county disputed a municipal water district's right to condemn county roads to build a dam and reservoir. The water district argued that the county had no basis for opposing the water project because county roads "belong to the people of the entire state." *Id.* at 637. But the California Supreme Court rejected that argument. Although political subdivisions are limited in the claims they may assert against their creator, the county's dispute was not against the state, but against the water district. *See id.* at 639. In such a dispute, "the county stands in the place of the state to the extent that the powers of the state have been delegated to it." *Id.* Indeed, numerous cases the parties have cited in connection with Met's appeal make clear that government agencies have standing to enforce state law against one another.[3]

c. Not only *Star-Kist*, but numerous other cases further establish that San Diego has standing.

Turning to *Star-Kist* itself, the question there was "whether counties and municipalities may challenge the constitutionality of a statute

[3] *See, e.g.*, *Newhall Cty. Water Dist. v. Castaic Lake Water Agency*, 243 Cal. App. 4th 1430 (2016); *City of Palmdale v. Palmdale Water Dist.*, 198 Cal. App. 4th 926 (2011); *San Luis Coastal Unified Sch. Dist. v. City of Morro Bay*, 81 Cal. App. 4th 1044 (2000).

exempting from ad valorem taxation business inventories of foreign origin or destination which are transshipped through the state; and if so, whether such exemption violates the commerce clause." *Star-Kist*, 42 Cal. 3d at 4. After quoting the *Williams* dictum that a municipal corporation has "'no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator,'" the court noted that the application of that dictum "beyond Fourteenth Amendment and contract clause challenges remains unsettled." *Id.* at 6 (quoting *Williams*, 289 U.S. at 40). In other words, the California Supreme Court, like the United States Supreme Court in *Gomillion*, refused to apply the "seemingly unconfined dicta of *Hunter* and kindred cases" beyond the "concrete situations that gave rise to them." *Gomillion*, 364 U.S. at 344.

The *Star-Kist* court went on to reject the analysis—or lack of it—in *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980). In *South Lake Tahoe*, the Ninth Circuit did what *Gomillion* warned against, unreflectively relying on the overbroad *Williams* dictum as if it established "a per se rule." *Star-Kist*, 42 Cal. 3d at 7.[4] Wisely, the California Supreme Court turned, instead, to cases that

[4] The *Star-Kist* court also cited the opinion of the Justices who would have granted certiorari in *South Lake Tahoe* because its "*per se* rule is inconsistent with" *Board of Education v. Allen*, 392 U.S. 236 (1968), "in which one of the appellants was a local board of education." *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 449 U.S. 1039, 1042 (1980) (White & Marshall, JJ., dissenting from denial of certiorari).

"provide meaningful insight," *id.—Rogers v. Brockette,* 588 F.2d 1057 (5th Cir. 1979), and *San Diego Unified Port District v. Gianturco*, 457 F. Supp. 283 (S.D. Cal. 1978), *aff'd*, 651 F.2d 1306 (9th Cir. 1981).

In *Rogers*, the Fifth Circuit held that a school district had standing to challenge a state law based on the Supremacy Clause, citing *Gomillion* for the proposition that the *Hunter* line of cases does not "hold that a municipality never has standing to sue the state of which it is a creature. In fact, correctly interpreted, these cases do not deal with 'standing,' in the sense in which we use the term, at all." *Rogers*, 588 F.2d at 1068. Rather, "they adhere to the substantive principle that the [Federal] Constitution does not interfere with a state's internal political organization." *Id.* at 1070.

Similarly, in *Gianturco*, the court held that a local government agency had standing to challenge a state regulation under the Supremacy Clause, which "establishes a structure of government which defines the relative powers of states and the federal government." 457 F. Supp. at 290. If political subdivisions were barred from asserting such challenges, invalid "legislation and regulation often would go unchecked even though expressly prohibited by the Constitution. It makes no sense to prevent subdivisions of state government from acting to ensure state compliance with the commands of a constitutional provision that establishes the basic federal system of our government." *Id.*

Consistent with *Rogers*, the *Star-Kist* court held that the term

"standing" in this context does not refer to "traditional notions of a plaintiff's entitlement to seek judicial resolution of a dispute, but to a narrower, more specific inquiry focused upon the internal political organization of the state: whether counties and municipalities may invoke the federal Constitution to challenge a state law which they are otherwise duty-bound to enforce." 42 Cal. 3d at 5-6 (footnote omitted). The *Star-Kist* court concluded that counties and municipalities have standing to challenge state law under the Commerce Clause because it "resembles the supremacy clause in that it, albeit indirectly, 'defines the relative powers of states and the federal government.'" *Id.* at 9 (quoting *Gianturco*, 457 F. Supp. at 290). "State action cannot be so insulated from scrutiny that encroachments on the federal government's constitutional powers go unredressed." *Id.* Yet there was "a real possibility that the constitutionality of the Legislature's scheme of differential taxation of business inventories would have gone unchecked absent challenge by those entities charged with administration of the program," whose "interest in testing the constitutionality of the statute is unmistakable." *Id.*

In *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (2006), the court further examined the so-called "no-standing rule" and the exceptions to it discussed in *Star-Kist*, and explained that a "second line of cases establishes an exception to the no-standing rule for situations in which the claim of a city or county is best understood as a practical means of asserting

the individual rights of its citizens." *Id.* at 674. "The point of the no-standing rule is to prevent local governments, whether as plaintiffs or defendants, from using certain provisions of the federal Constitution to obtain invalidation of laws passed by their creator, the state." *Id.* at 676. "This notion has no application where the truly interested parties—citizens or constituents of the local government entity—undisputedly do have standing and the entity merely asserts rights on their behalf." *Id.*; *see Cent. Delta Water Agency v. State Water Res. Control Bd.*, 17 Cal. App. 4th 621, 629-30 (1993); *Selinger v. City Council*, 216 Cal. App. 3d 259, 270-71 (1989); *Drum v. Fresno Cty. Dep't of Pub. Works*, 144 Cal. App. 3d 777, 783-85 & n.2 (1983).

Of those cases, *Central Delta* is particularly apropos here because it held that water agencies have standing to sue on behalf of their constituents without naming any of their constituents as plaintiffs:

> Where a water district or agency is expressly authorized under its enabling statute to sue on behalf of its constituent water users, it may do so even without naming any of those users as party plaintiffs. Moreover, a political subdivision of the State may challenge the constitutionality of a statute or regulation on behalf of its constituents where the constituents' rights under the challenged provision are inextricably bound up with the subdivision's duties under its enabling statutes. Under the statutes cited by the agencies, it is clear that the agencies' duties are bound up with a determination whether the challenged provisions violate the rights of the agencies' constituent water users. We conclude the agencies have standing to pursue their claims.

17 Cal. App. 4th at 629-30 (citations and quotation marks omitted).

Central Delta relied, in turn, on *Orange County Water District v. City of Riverside*, 173 Cal. App. 2d 137 (1959), which held that the power of a state water agency "to undertake the representation in the courts of interests common to great numbers of its inhabitants, though the particular character and extent of their water rights may greatly differ as between themselves, is generally recognized." *Id.* at 169.

Here, as in *Central Delta* and *Orange County*, San Diego is authorized to sue on behalf of itself and its water users, and in challenging Met's RSI clause, San Diego asserts rights that are inextricably intertwined with the rights of its constituents. *See* Water Code App. § 45-5; Gov't Code § 945; 6-AA-1397-99 ¶¶ 103-10. Unlike in the *Hunter* line of cases, San Diego is not challenging state law or arguing that the state has a merely implied, yet federally-protected, contractual obligation to San Diego "solely as a result of their relationship." *Gomillion*, 364 U.S. at 343. On the contrary, San Diego seeks declaratory relief regarding a provision of its written contracts with Met, pursuant to which Met first sought to prevent, and then penalized, San Diego's efforts to enforce state law on behalf of its constituents. *See* 6-AA-1397-99 ¶¶ 103-10.

If San Diego had not sued to invalidate Met's unlawful and unconstitutional rates, they "would have gone unchecked." *Star-Kist*, 42 Cal. 3d at 9. For Met to "be so insulated from scrutiny," *id.*, undermines the very "foundation of orderly government.'" *Wolfgram*, 53 Cal. App. 4th

at 53 (quoting *Chambers*, 207 U.S. at 148). And to hold that San Diego lacks standing under *Star-Kist* would turn a federal policy of non-interference with states' internal political order into a state policy of internal disorder, preventing government agencies from petitioning the courts to keep one another in line. That is not the law. *See id.*; Const. art. 1, § 3(a); *Star-Kist*, 42 Cal. 3d at 5-10; *Marin*, 53 Cal. 2d at 637-39; *Sanchez*, 145 Cal. App. 4th at 671-77; *Cent. Delta*, 17 Cal. App. 4th at 629-30; *Orange Cty.*, 173 Cal. App. 2d at 166-70.[5]

d. Met's other arguments about standing likewise fail.

None of the cases on which Met relies support its argument that San Diego lacks standing. Met primarily relies on *Star-Kist*, but as already discussed, *Star-Kist* fully supports San Diego's argument, not Met's. Met

[5] *See also State Pers. Bd. v. Dep't of Pers. Admin.*, 111 Cal. App. 4th 839, 4 Cal. Rptr. 3d 284, 301-03 (2003), *aff'd*, 37 Cal. 4th 512 (2005). The California Supreme Court's grant of review in that case, though resulting in affirmance, had the effect of automatically depublishing the court of appeal's opinion under the rules then in force. But under the current rules, the court of appeal's decision would be citable, and is worth noting here. *See* Rule of Court 8.1115(e)(2). The court of appeal held that one governmental entity may assert constitutional claims against another "if the claims involve matters that relate to collective rights affecting the structure, jurisdiction, or ***relative power of a competing political entity***." 4 Cal. Rptr. 3d at 302 (emphasis added). In particular, the State Personnel Board had standing to challenge contracts under a provision of the California Constitution that "serves a dual purpose," protecting "the personal rights of civil service employees and the collective rights of the State and its citizenry." *Id.* (citing Cal. Const. art. 7, § 3(a)). As discussed above, the right to petition likewise serves dual purposes, protecting both individuals and the "people" collectively. Const. art. 1, § 3(a).

also relies on *Santa Monica Community College District v. Public Employment Relations Board*, 112 Cal. App. 3d 684, 690 (1980), *Los Angeles County v. Superior Court*, 128 Cal. App. 522, 526 (1933), and *Board of Supervisors v. McMahon*, 219 Cal. App. 3d 286, 296 (1990), but those cases involved attempts to invalidate state law based on the right to due process. San Diego, however, does not seek to invalidate state law, but to enforce it; and San Diego does not assert the right to due process, but the right to petition. As discussed above, the right to petition is a collective, sovereign, and structural right of the "people," Const. art. 1, § 3(a), whereas the right to due process belongs to a "person," *id.* § 7(a). Moreover, the plaintiff in *Santa Monica* did not even assert a constitutional violation, 112 Cal. App. 3d at 690, so the court there merely added its own dictum to "the seemingly unconfined dicta of *Hunter* and kindred cases." *Gomillion*, 364 U.S. at 344. These cases provide no support for Met's standing argument.

Met also relies on *Native American Heritage Commission v. Board of Trustees*, 51 Cal. App. 4th 675 (1996), but the plaintiff there, a state agency, was allowed to enforce California law against the defendant, another state agency. *See id.* at 677. The issue of "standing" arose only because the defendant sought to invalidate the state law the plaintiff sought to enforce, based on the constitutional prohibition against state establishment of religion. *See id.* at 683-86. This case has nothing to do with religion; and, again, San Diego seeks to enforce, rather than invalidate,

California law. Thus, *Native American Heritage* is inapposite.

Although Met does not dispute that San Diego has standing to protect "the individual rights of its citizens," *Sanchez*, 145 Cal. App. 4th at 674, Met argues that "San Diego's constituents have no rights at all in these private contracts between San Diego and Metropolitan." X-RB at 126-27. But that would sanction any impairment of constitutional rights "so long as it was cloaked in the garb" of contracts between "political subdivisions." *See Gomillion*, 364 U.S. at 345. The people's right to representatives that will petition for redress of constitutional violations cannot "'thus be manipulated out of existence.'" *See id.* (quoting *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926)); Const. art. 1, § 3(a). San Diego must be "given standing to raise the issue," which otherwise "will be effectively removed from judicial review." *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.*, 11 Cal. App. 4th 1513, 1519 (1992); *accord, e.g.*, *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 371 (2007); *cf. Nadel v. Regents of Univ. of Cal.*, 28 Cal. App. 4th 1251, 1262-63 (1994) ("[I]n some cases governments may be virtually the only entities with resources willing to present a particular side of a public issue.") (quoting MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 46 (1983)).

Finally, Met argues that San Diego failed to assert the rights of its constituents in its complaint. X-RB at 127. But San Diego specifically alleged that it sought declaratory relief to protect the rights of "its

ratepayers." 6-AA-1398-99 ¶ 108. Met argues that this was insufficient, but the court in *Orange County* rejected such an objection as "overtechnical." 173 Cal. App. 2d at 167. As a matter of law, San Diego is "empowered to represent" its constituents "in the courts," and was not required to belabor that point further in its complaint. *See id.* at 167-69; Water Code App. § 45-5.

For all of these reasons, San Diego has standing to challenge Met's RSI clause based on the unconstitutional conditions doctrine.

2. On the merits of the unconstitutional conditions doctrine, Met's RSI clause is invalid, as Judge Karnow correctly determined.

Judge Karnow correctly determined that "if San Diego does have standing, it wins on the merits of the claim." 7-AA-1822. Met fails to offer any valid reason for this Court to hold otherwise. *See* X-RB at 128-38.

First, Met argues that the unconstitutional conditions doctrine only applies where such conditions are imposed on "public benefits," and that the subsidies Met funds through its Water Stewardship Rate do not provide such benefits because they are the subject of "contracts between two government agencies." *Id.* at 129. But that contradicts *Sonoma*, where the California Supreme Court held that the unconstitutional conditions doctrine applies to funds a government agency distributes "to other governmental bodies." 23 Cal. 3d at 319. Met's argument also contradicts the principle that the use of public funds "must be confined to public purposes," *Albright*

v. City of S. San Francisco, 44 Cal. App. 3d 866, 869 (1975), and Met's contrary suggestion amounts to yet another admission that its Water Stewardship Rate is unconstitutional. *See id.*; X-AOB at 55-59.

As Judge Karnow correctly noted, when the term "public benefit" is used in statements of the unconstitutional conditions doctrine, it generally means "a benefit conferred by the government, as opposed to a benefit conferred by a private actor." 7-AA-1822 (citing *Robbins*, 38 Cal. 3d at 213). In response, Met cites a federal case for the notion that the doctrine "applies even to benefits conferred by private entities if government action caused the imposition of the condition." X-RB at 130 (citing *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1999)). But the key is "government action," *id.*, not whether such action is "cloaked in the garb" of arrangements between "political subdivisions." *See Gomillion*, 364 U.S. at 345-48; *Sonoma*, 23 Cal. 3d at 319.

Second, Met argues that San Diego "knowingly and voluntarily waived its right to petition." X-RB at 131. But California's unconstitutional conditions doctrine applies "***however well-informed and voluntary that waiver***." *Parrish*, 66 Cal. 2d at 271 (emphasis added). None of the cases Met cites for its contrary argument—almost all of which are federal—hold otherwise. *See* X-RB at 131-36. As Judge Karnow noted, the issue is not whether "constitutional rights can be waived; of course they can. The unconstitutional conditions doctrine focusses rather

on the sacrifice of public benefits threatened in order to ***extract*** that waiver." 7-AA-1824 (emphasis in original) (footnote omitted). California law is clear, moreover, that while a party "may waive the advantage of a law intended solely for his benefit," a "law established for a public reason cannot be contravened by a private agreement." Civ. Code § 3513.[6]

Third, Met argues that Judge Karnow "improperly purported to resolve material disputes of fact without a trial," X-RB at 137, but Judge Karnow neither "purported" to do, nor did, anything of the kind. *See* 7-AA-1824-28. It was Met's heavy burden to show that (1) conditioning "water stewardship" subsidies on member agencies' non-exercise of their petitioning rights was reasonably related to the purposes of those subsidies; (2) the public value of imposing that condition manifestly outweighed its detriment; and (3) there are no less restrictive means to achieve the purposes of the subsidies. *See Robbins*, 38 Cal. 3d at 213; 7-AA-1824; X-RB at 136-37. Met failed to carry those burdens, and failed to establish any material disputes of fact. *See* 7-AA-1824-27.

Met contends that it established a material factual dispute about whether its RSI clause is reasonable because it "protects the stability of Metropolitan's rate structure." X-RB at 137. But Met did not and does not

[6] Note also that, contrary to Met's assertion that "San Diego entered into these contracts without any purported reservation of rights," X-RB at 122, San Diego reserved its right to challenge Met's RSI clause. *See*, *e.g.*, 1-ARA-31:23-32:4 (Cushman).

dispute that it "will still be able to fund conservation and local supply programs even if San Diego prevails in this rate challenge, although Metropolitan may have to revise its rates and other agencies may have to pay more." 7-AA-1825. As Met undisputedly told its bondholders:

> [T]o the extent that a court invalidates Metropolitan's adopted rates and charges, Metropolitan will be obligated to adopt rates and charges that comply with any mandates imposed by the court. Metropolitan expects that such rates and charges would still recover Metropolitan's cost of service. As such, revenues would not be affected. If Metropolitan's rates are revised in the manner proposed by SDCWA in the complaint, other member agencies may pay higher rates unless other actions are taken by the board.

Id.; *accord* 4-RA-881, Undisputed Fact 9; 5-AA-1118.

Moreover, as a matter of law, "rate stability" is no justification for unconstitutionality. *See, e.g.*, *Palmdale*, 198 Cal. App. 4th at 934-38. Nor can Met excuse its RSI clause with euphemisms about "water stewardship." As the court aptly stated in *Capistrano Taxpayers Ass'n, Inc. v. City of San Juan Capistrano*, 235 Cal. App. 4th 1493 (2015), "designating something a 'conservation rate' is no more determinative than calling it an 'apple pie' or 'motherhood' rate." *Id.* at 1515; *see also id.* at 1510-11; *Newhall*, 243 Cal. App. 4th at 1449. As a matter of law, therefore, Judge Karnow was correct in holding that preserving Met's Water Stewardship Rate in particular, and its "rate structure" more generally, is not a "substantial benefit, and certainly not a ***public*** benefit." 7-AA-1826 (emphasis in original).

Met's contrary argument is further refuted, once again, by

Wolfgram. There, the court emphasized that restraints on the right to petition, whether direct or indirect, "cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil." *Wolfgram*, 53 Cal. App. 4th at 56 (emphasis omitted) (quoting *United Mine Workers*, 389 U.S. at 222). Whatever the merits of preserving the stability of Met's rate structure—and there are no such merits, as Judge Karnow rightly held—they cannot justify penalizing San Diego for challenging Met's rates. *See id.* at 56-57.

Met also falsely asserts that Judge Karnow "weighed competing evidence regarding whether the RSI provision is narrowly tailored," X-RB at 137, but Met did not introduce any such evidence, as Judge Karnow noted. 7-AA-1827. Instead, Met repeated its mantra about preserving its "rate structure," but made "no showing that preserving the existing rate structure is a worthy end in and of itself." *Id.* Again, Met's unconstitutional "rate structure" is unworthy of preservation, and certainly cannot justify Met's restraints on the right to petition. *See id.*; *Newhall*, 243 Cal. App. 4th at 1449; *Capistrano*, 235 Cal. App. 4th at 1510-11; *Palmdale*, 198 Cal. App. 4th at 934-38; *Wolfgram*, 53 Cal. App. 4th at 50-57.

In sum, because San Diego has standing to assert the unconstitutional conditions doctrine, and because Judge Karnow correctly determined that San Diego "wins on the merits" of that doctrine, 7-AA-

1822, this Court should hold that Met's RSI clause is invalid.

3. Met's RSI clause is also invalid under Civil Code section 1668.

Met's RSI clause is also invalid because all "contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own . . . violation of law, whether willful or negligent, are against the policy of the law." Civ. Code § 1668. It is undisputed that Met's ***direct*** object in imposing its RSI clause on its member agencies was to deter them from filing lawsuits challenging Met's illegal rates. *See* X-RB at 139-40. Yet Met contends that it did not have—and, as a matter of law, could not have had—even the ***indirect*** object to exempt itself from responsibility for those illegal rates. *See id.*; *cf.* Civ. Code § 1668. That is nonsense, and the California Supreme Court refuted it in *Armendariz*, among other cases.

Armendariz held that arbitration clauses violate section 1668 to the extent they impose unreasonable costs on claims that advance the public interest, because "statutory or constitutional rights may be transgressed as much by the imposition of undue costs as by outright denial." 24 Cal. 4th at 100, 109. Under *Armendariz*, "it is an insufficient judicial response to hold that [a party] may be able to cancel these costs at the end of the process through judicial review." *Id.* at 110. If a contractual provision "chills the exercise" of statutory or constitutional rights affecting the public interest, or "serves as a significant deterrent" to the enforcement of such rights, it is invalid. *Id.* at 110-11; *accord, e.g., Little v. Auto Stiegler, Inc.*,

29 Cal. 4th 1064, 1081 (2003) (prohibiting such "de facto waiver of unwaivable rights contrary to Civil Code sections 1668 and 3513").

Similarly, the California Supreme Court held in *Iskanian* that section 1668 prohibits the waiver of representative actions under the Private Attorney General Act (PAGA). *Iskanian*, 59 Cal. 4th at 383. PAGA actions "augment the limited enforcement capability of the Labor and Workforce Development Agency by empowering employees to enforce the Labor Code as representatives of the Agency." *Id.* Waiving such actions would not completely exempt the employer from liability because the Agency could still sue, and employees could still assert non-PAGA claims. Nevertheless, because "an agreement by employees to waive their right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing the Labor Code," it "has as its object, ***indirectly***, to exempt the employer from responsibility for its own violation of law," contrary to section 1668, and therefore "may not be enforced." *Id.* (emphasis added) (internal quotation marks, ellipses, and brackets omitted).

Thus, Met's argument that "if a provision does not 'totally exempt' a party from liability, then section 1668 is inapplicable," X-RB at 138, is wrong as a matter of law. Met cites *Lagatree v. Luce, Forward, Hamilton & Scripps*, 74 Cal. App. 4th 1105 (1999), for that erroneous proposition, but *Lagatree* does not support it. On the contrary, *Lagatree* merely held that a compulsory arbitration clause does not violate section 1668 "ipso

facto." 74 Cal. App. 4th at 1136. And the court of appeal's opinion in *Lagatree* must be sprinkled with salt from the California Supreme Court's subsequent opinions in *Armendariz*, *Little*, and *Iskanian*—which, again, held that an arbitration clause violates 1668 to the extent it "serves as a significant deterrent" to claims affecting the public interest, even if it does not totally exempt a party from liability. *Armendariz*, 24 Cal. 4th 111; *see also Little*, 29 Cal. 4th at 1081; *Iskanian*, 59 Cal. 4th at 383.

Moreover, the court in *Lagatree* acknowledged that an arbitration clause, or any other contractual provision, is invalid if it contravenes the public interest, such as an agreement to "participate in an illegal price-fixing scheme." *Lagatree*, 74 Cal. App. 4th at 1128 (citing *Tameny v. Atl. Richfield Co.*, 27 Cal. 3d 167 (1980)). Met's RSI clause is no different. It is a blatant violation of the public interest because it punishes any member agency that dares to advocate the public interest by challenging Met's illegal rates. *See* 3-RA-822 § 8.2(a); 7-AA-1815.

Met also relies on *Farnham v. Superior Court*, 60 Cal. App. 4th 69 (1997), but that case was distinguished in *Health Net of California, Inc. v. Department of Health Services*, 113 Cal. App. 4th 224 (2003), for reasons equally applicable here. "*Farnham*'s enforcement of a 'sole remedy' clause in the context of a common law tort claim in a transaction not affecting the public interest cannot guide our analysis of an exculpatory clause covering statutory and regulatory violations in a transaction affecting the public

interest." *Id.* at 241. Met tries, unsuccessfully, to distinguish *Health Net*, but does not dispute that "a public interest is present" here. X-RB at 140.

As a public utility delivering water to "an area with nearly 19 million residents," AOB at 23, Met does not and cannot deny that its RSI clause affects the public interest as defined in *Tunkl v. Regents of University of California*, 60 Cal. 2d 92 (1963). In *Tunkl*, the California Supreme Court held that while the "public interest" cannot "be contained within the four corners of a formula," certain characteristics tend to "stamp a contract as one affected with a public interest," including that it involves an important public service provided by an entity that has a bargaining advantage, uses contracts of adhesion, provides no other options, and imposes risks on others. *Id.* at 98-101.

Although Met contends that San Diego has relatively equal bargaining power, it is undisputed that Met imposed its RSI clause over San Diego's objections, "thereby satisfying the purpose underlying" the bargaining-advantage and contracts-of-adhesion factors. *Health Net*, 113 Cal. App. 4th at 238. Moreover, although Met likes to refer to itself as a "voluntary cooperative," Judge Karnow found that San Diego has no choice but to pay Met's rates. *See* 27-AA-7499. Met's own documents, in fact, establish that the people of Southern California, including millions of people in San Diego County, are "captive within Metropolitan's system." 1-RA-201. Indeed, when San Diego asked to "be relieved of paying the

Water Stewardship Rate," given Met's enforcement of its RSI clause, "Metropolitan's response to that was no, that's not optional. You pay." 28-RT-1375:7-21 (Cushman).

In any event, even if San Diego had equal bargaining power, which it does not, that would not be dispositive. *See Tunkl*, 60 Cal. 2d at 98-101; *Health Net*, 113 Cal. App. 4th at 236-39. Met's RSI clause indisputably affects the public interest because it was imposed by a public agency providing the literally vital service of water delivery. The California Supreme Court's concluding words in *Tunkl* resonate powerfully here:

> We must note, finally, that the integrated and specialized society of today, structured upon mutual dependency, cannot rigidly narrow the concept of the public interest. From the observance of simple standards of due care in the driving of a car to the performance of the high standards of hospital practice, the individual citizen must be completely dependent upon the responsibility of others. The fabric of this pattern is so closely woven that the snarling of a single thread affects the whole. . . . [Met], too, is part of the social fabric, and prearranged exculpation from its negligence must partly rend the pattern and necessarily affect the public interest.

60 Cal. 2d at 104.

For all of these reasons, and those in San Diego's opening brief, this Court should hold that Met's RSI clause is invalid and unenforceable.

B. SAN DIEGO IS ENTITLED TO $2,617,143.53 IN FEES FOR PHASE II.

With regard to attorneys' fees, Met asks this Court to hold that section 5.2 of the parties' Exchange Agreement, which provides that the prevailing party "shall be entitled" to fees, does not apply to Phase II of the

litigation in the trial court. *See* X-RB at 140-43. Yet Phase II was when the parties contested whether Met breached that very same section 5.2. *See* 34-AA-9461-85. Because San Diego achieved an unqualified victory, *see id.*, Judge Karnow had "no discretion to deny attorney fees" to San Diego for Phase II. *Hsu v. Abbara*, 9 Cal. 4th 863, 877 (1995).

The two cases Met relies on for its contrary argument, *Paul* and *Hasler*, confirm that San Diego is entitled to its Phase II fees. In *Paul*, the court held that "a provision for attorney fees in escrow instructions limited to fees incurred by the escrow company in collecting for escrow services does not apply to other disputes between the buyer and seller over their land sale contract." *Paul*, 128 Cal. App. 4th at 149-50. The reason for that holding was simple: the dispute between the buyer and seller "had nothing to do with the performance of escrow services." *Id.* at 154. Similarly, the court in *Hasler* held that a provision for fees in disputes over a broker's commission did not apply in an action that did "not involve the obligation to pay the broker's commission." *Hasler*, 120 Cal. App. 4th at 1027.

In relying on these cases, Met is essentially arguing that San Diego's Phase II claim that Met breached section 5.2 by charging an unlawful Price had "nothing to do with" and did not "involve" a contest over "whether such charge or charges have been set in accordance with applicable law and regulation." *Paul*, 128 Cal. App. 4th at 154; *Hasler*, 120 Cal. App. 4th at 1027; 22-AA-6137-38, § 5.2. But San Diego's contract claim had

everything "to do with," and certainly "involve[d]," Met's obligation to set a lawful Price. *See Paul*, 128 Cal. App. 4th at 154; *Hasler*, 120 Cal. App. 4th at 1027. The absurdity of Met's argument, therefore, is laid bare simply by framing it in the terms of the cases on which it is mistakenly based.

Further, Met's argument fails because, in Phase II, ***Met itself*** challenged its contractual obligation to set rates in accordance with the laws on which Judge Karnow's Phase I decision was based. It is well established that Civil Code section 1717 mandates attorneys' fees for the prevailing party when the defendant challenges its contractual obligations, as well as when the plaintiff asserts those obligations. *See, e.g.*, *Hsu*, 9 Cal. 4th at 870. The purpose of section 1717 is to ensure the "full mutuality" of fees provisions. *Id.* Thus, section 1717 applies where, as here, the action "involves" an agreement with a fees provision—*i.e.*, where the action "arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement." *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.*, 211 Cal. App. 4th 230, 242 (2012); *accord, e.g.*, *Eden Twp. Healthcare Dist. v. Eden Med. Ctr.*, 220 Cal. App. 4th 418, 427 (2013).

For example, in *IMO Development Corp. v. Dow Corning Corp.*, 135 Cal. App. 3d 451 (1982), the court of appeal reversed the trial court for denying the appellant the attorneys' fees it incurred refuting an affirmative defense the respondent asserted in a claim separate from the appellant's

primary claim. The defensive claim was "inextricably intertwined" with the primary claim, so the trial court erred—as here—in awarding fees for one but not the other. *Id.* at 463. Similarly, the court in *Finalco, Inc. v. Roosevelt*, 235 Cal. App. 3d 1301 (1991), rejected the argument that a provision for attorneys' fees incurred collecting on a note did not apply to fees incurred in connection with a separate, yet intertwined, claim regarding the validity of the underlying sale. *Id.* at 1306-08; *see also, e.g.*, *City & Cty. of San Francisco v. Union Pac. R.R. Co.*, 50 Cal. App. 4th 987, 1000 (1996) (rejecting argument that contractual fees provision did not apply to determination of rights under that contract as "patently absurd"); *Amtower v. Photon Dynamics, Inc.*, 158 Cal. App. 4th 1582, 1602 (2008) (rejecting similar argument as "disingenuous, at best").

Here, Met repeatedly argued in Phase II—and, indeed, still argues on appeal—that it set its Exchange Agreement Price in accordance with applicable law and regulation under section 5.2, Judge Karnow's Phase I decision notwithstanding. *See, e.g.*, 27-AA-7672; 33-AA-9188-90; 33-AA-9386-87, 9398-9420; AOB at 120-26; X-RB at 103-111. For example, Met argued in Phase II that Judge Karnow's "ruling in Phase I does not mean a breach occurred here because SDCWA, knowing the facts and law, had agreed to pay what Met charged." 33-AA-9188. According to Met, therefore, its Price under section 5.2 was "set pursuant to 'applicable law and regulation'" after all. 33-AA-9190 (quoting 22-AA-6137-38, § 5.2).

Most of Judge Karnow's Phase II decision was devoted to rejecting various iterations of that argument, and Judge Karnow was right to do so, as San Diego demonstrated in its opening brief. *See* 34-AA-9465-72, 9478-84; X-AOB at 77-80, 83-84. Judge Karnow was wrong, however, to deny San Diego its Phase II attorneys' fees based on Met's counterfactual assertion that the parties were not "contesting," in Phase II, "whether such charge or charges have been set in accordance with applicable law and regulation." 22-AA-6137-38, § 5.2. The record is clear that Met contested exactly that in Phase II, as did San Diego. *See*, *e.g.*, 33-AA-9188-90.

Because San Diego undisputedly achieved "a simple, unqualified victory" in that contest, Judge Karnow had "no discretion to deny attorney fees" to San Diego for Phase II. *Hsu*, 9 Cal. 4th at 877; *see also* 22-AA-6137-38, § 5.2. Met does not dispute the amount of those Phase II fees: $2,617,143.53. *See* X-AOB at 105-07; X-RB at 140-43. This Court, therefore, should order Met to pay that additional amount.

IV. CONCLUSION

For all of the foregoing reasons, and those in San Diego's opening brief, this Court should invalidate Met's RSI clause, and order Met to pay San Diego an additional $2,617,143.53 in attorneys' fees for Phase II.

Respectfully submitted,

Dated: October 28, 2016

KEKER & VAN NEST, LLP

By: /s/ *Dan Jackson*
DAN JACKSON

Attorneys for Respondent and Cross-Appellant
SAN DIEGO COUNTY WATER AUTHORITY

CERTIFICATE OF WORD COUNT

(Cal. Rule of Court 8.204(c)(4))

This brief contains 10,293 words, not including the portions of the brief excluded from the word limit by California Rule of Court 8.204(c)(3).

Respectfully submitted,

Dated: October 28, 2016

KEKER & VAN NEST LLP

By: /s/ *Dan Jackson*
DAN JACKSON

Attorneys for Respondent and Cross-Appellant
SAN DIEGO COUNTY WATER AUTHORITY

PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest LLP, 633 Battery Street, San Francisco, CA 94111-1809.

On October 28, 2016, I served the following document(s):

CROSS-APPELLANT's REPLY BRIEF

☑ by **ELECTRONICALLY POSTING** to TrueFiling the website of the State of California, Court of Appeal. The Court performed service electronically on all ECF-registered entities in this matter.

☑ by **FEDEX**, by placing a true and correct copy in a sealed envelope addressed as shown below. I am readily familiar with the practice of Keker & Van Nest LLP for correspondence for delivery by FedEx Corporation. According to that practice, items are retrieved daily by a FedEx Corporation employee for overnight delivery.

Clerk for the Honorable Curtis E.A. Karnow
Superior Court of California
County of San Francisco
Civic Center Courthouse
400 McAllister Street
San Francisco, CA 94102-4514

Executed on October 28, 2016, at San Francisco, California.

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

Maria S. Canales