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September 15, 2017

VIA TRUEFILING

The Hon. Tani Cantil-Sakauye,
Chief Justice, and Associate Justices
Supreme Court of California
350 McCallister Street
San Francisco, CA 94102

Re: *San Diego County Water Authority v. Metropolitan Water District of Southern California*, Case No. S243500

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Defendant and Appellant Metropolitan Water District of Southern California ("Metropolitan") respectfully requests leave to file this letter in response to letters submitted to the Court by *amici curiae* in support of the Petition for Review filed by Plaintiff and Appellant San Diego County Water Authority ("San Diego").[1] The letters attempt to make the Court of Appeal's correct decision on a limited fact-specific issue seem worthy of this Court's review. But while large in number, they add little in substance: *amici*'s arguments largely rehash arguments raised by San Diego in its Petition for Review and are otherwise in error. The Court should disregard the letters and deny the Petition for Review.

First, the *amicus curiae* letters submitted by certain San Diego surrogates—including the San Diego Regional Chamber of Commerce, the County of San Diego, the City of National City, and the Otay Water District—merit little discussion. The interest of all four entities is strictly financial and

[1] The letters were submitted by the County of San Diego, the California Taxpayers Association (CalTax), the City of Rio Vista, the County of Solano, the Solano County Water Agency, the San Diego Regional Chamber of Commerce, Contra Costa County, Contra Costa County Water Agency, the County of San Joaquin, the County of Yolo, the Board of Supervisors of the County of Sacramento, Gary D. Libecap, the Otay Water District, the North San Joaquin Water Conservation District, and the City of National City.

derivative of San Diego's own interest in this case. Notably, the Otay Water District, which submitted the only *amicus curiae* letter attempting to offer any detail or analysis of its positions (which echo San Diego's arguments in its Petition), is the second-largest purchaser of San Diego's wholesale water supplies. (*See, e.g.*, "Comprehensive Annual Financial Report" at 116 <https://www.sdcwa.org/sites/default/files/files/finance-investor/CAFR/Final%20BOOKCAFR 2016.pdf> [as of Sept. 11, 2017].)[2] Like San Diego, none of these *amici* mention that Metropolitan provided San Diego with well over $1 billion in consideration in return for San Diego's agreement to pay an Exchange Agreement price equal to Metropolitan's transportation rates, nor that San Diego requested this arrangement.

Second, a few *amici*, ignoring the Court of Appeal's thoughtful analysis, suggest that the decision below will pave the way for water agencies to include water supply costs in wheeling rates.[3] Not so. The Court of Appeal made a highly fact-specific ruling finding substantial evidence to support Metropolitan's ratemaking determinations that (1) the State Water Project, all of whose costs are contractually assigned to contractors like Metropolitan, is properly considered part of Metropolitan's integrated system; and (2) Metropolitan's State Water Project transportation costs are costs incurred for the transportation rather than the purchase of water. These determinations are based on facts distinctive to both Metropolitan (*e.g.*, Metropolitan's legislative mandate to deliver State Water Project water or blend water supplies, as reasonable and practical) and the State Water Project (*e.g.*, its contractors' unique contractual obligation to pay all the costs of the Project). Thus, the Court of Appeal's decision is not likely to have any effect on wheeling rates set by other agencies that must make their own fact-specific determinations of "fair compensation" for use of their facilities under the Wheeling Statutes.

Third, CalTax urges the Court to grant review to consider various issues relating to Proposition 26, such as "whether hidden charges can be built into the cost of a government service."[4] This case does not concern any "hidden charges"; Metropolitan's ratemaking process and cost of service analysis, including the allocation of Metropolitan's State Water Project transportation costs to Metropolitan's transportation rates, are completely transparent. And, although CalTax refers to unspecified "conflict with recent cases interpreting and applying voter-approved limitations on government rate settings" warranting review, it fails to identify a single case in conflict.[5] Nor does

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[2] The San Diego Regional Chamber of Commerce amplifies San Diego's appeal to patriotism and national security by repeatedly mentioning the military presence in San Diego. As set forth in Metropolitan's Answer, Camp Pendleton—although one of San Diego's member agencies—generates its own substantially self-sustaining water supply. (*See* Answer at p. 41, fn. 11.)

[3] *See, e.g.*, Ltr. from North San Joaquin Water Conservation District at pp. 1-2.

[4] Ltr. from CalTax at p. 1.

[5] *Id.* at p. 2.

CalTax mention the fact that Metropolitan's water rates are not a tax "imposed" for purposes of Proposition 26, as Metropolitan is a voluntary cooperative of member agencies and the member agencies voted for the rates in question, or that, even if the rates were a tax, they were approved by more than a two-thirds vote of the relevant electorate. These facts make this case a poor vehicle for resolution of any questions concerning Proposition 26.

Finally, a number of *amici* jump on the bandwagon of San Diego's new argument that the Court of Appeal's decision below will somehow adversely affect the Sacramento-San Joaquin Delta region's ecosystem.[6] This argument is baseless. The Court of Appeal's decision simply affirms that a specific cost allocation to a specific rate was supported by substantial evidence. Nothing in that decision contradicts legislative policy favoring protection of the Delta ecosystem. And, like San Diego, *amici* proffer nothing but unsupported speculation to suggest otherwise.

For example, these *amici* argue that the Court of Appeal's decision "jeopardizes [San Diego's] efforts to reduce its reliance on imported Delta water to meet its water supply needs, as required by the Delta Reform Act."[7] Yet there is nothing in the decision that prohibits San Diego from continuing its current consumption patterns, paying reduced transportation rates (as a result of other aspects of the Court of Appeal's decision) to exchange Imperial and canal lining water, or from shifting resources to the conservation or development of additional local resources or alternative conveyance facilities. The Delta-region *amici* also repeat the erroneous "understand[ing]" that Metropolitan's transportation rates cause San Diego to pay "nearly twice as much" to obtain Imperial water as it pays to purchase Metropolitan's full-service water,[8] extrapolating that San Diego and other unspecified water agencies will prefer to purchase Metropolitan water supplies imported from the Delta. In fact, the decision below is not the source of this price differential: San Diego would still pay more for its Imperial water supplies than for Metropolitan's full-service imported water even if Metropolitan allocated its State Water Project transportation costs to supply.[9] In any

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[6] These *amici* include the City of Rio Vista, the County of Solano, Contra Costa County, Contra Costa County Water Agency, the County of San Joaquin, the North San Joaquin Water Conservation District, the County of Yolo, and the Board of Supervisors of the County of Sacramento. The letters submitted by the Delta-region *amici* are clearly part of an organized campaign as they contain very similar and sometimes identical verbiage.

[7] *See, e.g.*, Ltr. from Contra Costa County and the Contra Costa County Water Agency at p. 3.

[8] *See, e.g.*, Ltr. from the County of Yolo at p. 2.

[9] *See, e.g.*, Answer at pp. 37-38. Even factoring in the increased cost of Metropolitan's full-service water if Metropolitan's State Water Project transportation costs were allocated to supply rates, purchasing water from Imperial would *still* be more expensive for San Diego than purchasing Metropolitan's full-service imported water supplies. At trial, San Diego's Assistant General (footnote continued)

event, however, *amici*'s speculation that demand for Delta water supplies will increase is based on the erroneous premise that water agencies purchase water supplies based on price alone when, in fact, water agencies—including San Diego—may choose more expensive water supplies for reasons other than price, such as decreasing dependency on particular imported water sources or complying with legislative policy directives. As explained, San Diego has chosen to pay more for Imperial supplies, and to exchange that Colorado River water with Metropolitan supplies from any source, including the State Water Project. As another example, San Diego committed to purchase desalinated water for the next thirty years for approximately $2100 to $2300 per acre-foot (plus inflation), prices far higher than it pays Metropolitan for imported water supplies or even for Imperial water supplies.[10] *Amici*'s speculation that the Court of Appeal's decision will cause water agencies to disregard legislative policy directives to buy the cheapest available water supply does not comport with the realities of public water agency management and does not weigh in favor of review.

That *amici* fail to identify any credible conflict between the Court of Appeal's decision below and Delta-related legislative policy is not surprising, given that some *amici* have submitted letters for an ulterior purpose that has nothing to do with the issue San Diego asks this Court to review. After San Diego directly solicited the participation of some or all of the Delta-region *amici*,

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Manager Dennis Cushman testified that, to the best of his recollection of San Diego's own calculations, San Diego's cost of purchasing Metropolitan's imported water supplies would have increased by approximately 15% if all of the challenged transportation rates were moved to supply. (*See* 40-RT-2459:5-2460:23, 2493:10-27.) In 2014, for example, Metropolitan's Tier 1 rate for untreated, full service water was $593 per acre-foot. (The Metropolitan Water Dist. of So. Cal., Annual Report 2016, Table 7-1, p. 132 <http://www.mwdh2o.com/PDF_Who_We_Are/2016_AnnualReport .pdf> [as of Sept. 11, 2017] ("Metropolitan Annual Report").) Even increasing the entire 2014 full-service water rate by 15%, by San Diego's own estimates, Metropolitan's full service rate in 2014 would have been $681.95, still less than the $737 per acre-foot of water San Diego would have paid for Imperial water supplies in 2014 had all rate elements challenged by San Diego been excluded from Metropolitan's transportation rates. (*See* 21-AA-5988 [setting 2014 contract price for Imperial water supplies at $594 per acre-foot]; Metropolitan Annual Report, *supra*, at p. 132 [listing Metropolitan's transportation rates for 2014, which, combined, total $445 per acre-foot]; 40-RT-2509:22-24 [testimony, proffered by San Diego and accepted by the superior court in awarding damages, that Metropolitan's transportation rates in 2014 overcharged by $302 per acre-foot, meaning $143 of Metropolitan's 2014 transportation rates were undisputed].) If San Diego is motivated solely by price as *amici* posit, the Court of Appeal's decision below is immaterial because Metropolitan's imported water supplies would be cheaper regardless of which party prevails.

[10] *See, e.g.*, Hiltzik, M., "Desalination plants aren't a good solution for California drought," *Los Angeles Times* (Apr. 24, 2015) <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150426-column.html> [as of Sept. 11, 2017].

the County of San Joaquin solicited support from hundreds more contacts in an email, noting San Diego's "vocal oppo[sition to] the Governor's California WaterFix – Twin Tunnels Project" (opposed by the County of San Joaquin and other Delta-region *amici*) and arguing that, "[w]hile this case is not directly related to WaterFix Project financing, if overturned by the Supreme Court, the Tunnels financing support from agencies within [Metropolitan] could diminish[.]"[11] *Amicus* support driven by a political agenda regarding an unrelated issue should be given no weight.

Amici have failed to show that San Diego's Petition for Review raises any issue warranting review by this Court. The Petition should be denied.

Very truly yours,

Kathleen M. Sullivan

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[11] Email from C. Winn, Chairman of County of San Joaquin Board of Supervisors, dated Aug. 11, 2017 at 3:20 p.m.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 865 South Figueroa Street, 10th Floor, Los Angeles, CA 90017-2543.

On September 15, 2017, I served true copies of the following document(s) described as **LETTER IN RESPONSE TO AMICI CURIAE LETTERS** on the interested parties in this action as follows:

SEE ATTACHED LIST

BY ELECTRONICALLY POSTING to the TrueFiling website and requesting service on the following registered individuals or entities:

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

Executed on September 15, 2017, at Los Angeles, California.

/s/ Valerie Roddy

Valerie Roddy

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