No. S252915

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LESLIE T. WILDE,
Plaintiff and Appellant,

v.

CITY OF DUNSMUIR et al.,
Defendants and Respondents.

After a Decision by the Court of Appeal
Third Appellate District, Case No. C082664

Superior Court of Siskiyou County
Superior Court Case No. SCCV-CVPT-2016-549
Honorable Anne Bouliane, Judge

APPLICATION OF JACK COHEN (IN HIS CAPACITY AS A PROPOSITION 218 DRAFTER) FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT LESLIE T. WILDE

JACK COHEN, SBN 123022
Attorney at Law
Post Office Box 6273
Beverly Hills, California 90212
(424) 202-0724

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.520(f) of the California Rules of Court, JACK COHEN (hereafter "Applicant") respectfully requests permission to file an amicus curiae brief in this case (Case No. S252915) in support of Plaintiff and Appellant Leslie T. Wilde. The proposed amicus curiae brief is combined with this application.

Applicant is an attorney and one of the drafters of Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added articles XIII C and XIII D to the California Constitution and was approved by California voters in November 1996. Applicant has a major interest in seeing that Proposition 218 is effectuated and interpreted consistent with its stated purposes and intent.

Applicant states there is nothing to identify or disclose under the provisions of Rule 8.520(f)(4) of the California Rules of Court.

Applicant is familiar with the legal issues involved in this case. Applicant believes there is a need for additional briefing because this case involves the interpretation of important constitutional provisions under Proposition 218 and how those constitutional provisions may limit the scope or application of the constitutional local referendum power (Cal. Const., art. II, §§ 9, 11). This, in turn, may impact the extent Proposition 218 constitutional provisions limit the scope of the constitutional local initiative power (Cal. Const., art. II, §§ 8, 11), which is especially significant in the wake of this court's controversial decision in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 [election consolidation requirement applicable to

general tax increases under Proposition 218 does not apply local tax initiatives pursued under the constitutional local initiative power].

Applicant believes the arguments contained in the proposed amicus curiae brief will assist the Court in resolving this case in a manner that effectuates the purposes and intent of both Proposition 218 and the constitutional local referendum power.

For the foregoing reasons, Applicant respectfully requests leave to file the proposed amicus curiae brief that is combined with this application.

Dated: May 17, 2019

Respectfully submitted,

Jack Cohen

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I. INTRODUCTION.

In November 1996, California voters approved Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added articles XIII C and XIII D to the California Constitution. This case (hereafter "*Wilde*") concerns issues relating to whether any provision of Proposition 218 silently repealed or otherwise limited the constitutional local referendum power (Cal. Const., art. II, § 11) to challenge local water charges for which the constitutional local initiative power under Proposition 218 (Cal. Const., art. XIII C, § 3) applies. Also at issue in *Wilde* is whether any exceptions or limitations applicable to the constitutional referendum power (Cal. Const., art. II, § 9) apply so as to legally preclude the exercise of that constitutional direct democracy power.

The Court of Appeal in *Wilde* concluded that Proposition 218 did not abridge the local referendum power. The Court of Appeal further concluded that: (1) the subject water rate charges were fees rather than taxes such that the prohibition on the use of referenda to challenge tax measures did not apply;[1] (2) the subject water charges were legislative in character as opposed to being an administrative act not subject to the referendum power; and (3) the essential government service exception applicable to the local referendum power did not apply. The Court of Appeal correctly decided these issues.

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[1] The parties agreed that the subject water rate charges were fees rather than taxes. (*Wilde v. City of Dunsmuir* (2018) 29 Cal.App.5th 158, 172, fn. 3.)

II. PROPOSITION 218 DOES NOT LIMIT THE LOCAL REFERENDUM POWER.

Proposition 218 does not limit or restrict the otherwise lawful exercise of the local referendum power. There is nothing in the language of Proposition 218 or the accompanying ballot pamphlet in support of a contrary conclusion. The Court of Appeal analysis of whether the local initiative power under Proposition 218 (Cal. Const., art. XIII C, § 3) "silently repealed voters' right to challenge by referendum the local levies for which they expressly preserved their power of initiative" is appropriate and necessary when dealing with a nontax levy outside the scope of the tax levy referendum exception (Cal. Const., art. II, § 9, subd. (a) [excepting statutes providing for tax levies or appropriations for usual current expenses from the referendum power]),[2] which is what the Court of Appeal concluded in *Wilde*. (*Wilde, supra*, 29 Cal.App.5th at pp. 163, 172, fn. 3.)

The conclusion by the Court of Appeal that Proposition 218 (section 3 of article XIII C in particular [initiative power to reduce or repeal local taxes, assessments, fees and charges]) does not limit the separate constitutional referendum power by the electorate is straightforward, especially in light of this court's recent (and controversial) decision in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 ("*California Cannabis*") holding that the election consolidation requirement

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[2] If the tax levy exception to the referendum power were to apply, the subject referendum would not be permitted on that basis, and it would not be necessary to address whether any of the provisions of Proposition 218 "silently repealed" the referendum power.

applicable to general taxes under Proposition 218 (a procedural election timing requirement) does not apply to the exercise of the constitutional local initiative power by the electorate.

In the absence of express language and intent, no provision of Proposition 218 is properly construed as silently repealing the exercise of the constitutional local referendum power, which represents a significantly more restrictive limitation on a direct democracy power than the procedural election timing requirement found not to apply in *California Cannabis*. Under *California Cannabis*, significantly more than mere "silence" is required for Proposition 218 to preclude a direct democracy power.

An analysis of the purposes of Proposition 218 does not support the "silent repeal" interpretation. Section 2 of Proposition 218 states: "This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838 ("*Apartment Association*") [quoting from Ballot Pamphlet].)

Construing Proposition 218 as precluding the referendum power in connection with the subject water charges would be inconsistent with the purposes of the measure which are to enhance voter consent and limit local government revenue. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 ("*Silicon Valley*") ["Proposition 218 specifically states that '[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer

consent.'" (quoting from Ballot Pamphlet)].) Rather than limiting local government revenues and enhancing voter consent, such an interpretation would instead enhance local government revenues and limit voter consent inasmuch as the approved water charges would go into effect without giving local voters an opportunity to adopt or reject the charges via the referendum power. This is the exact opposite of what Proposition 218 is all about.

A. Article XIII C of the California Constitution Does Not Limit the Local Referendum Power so as to Preclude the Exercise of that Power.

Proposition 218 contains one express reference to the referendum power set forth in section 3 of article XIII C. The constitutional language provides in relevant part: "Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge." (Cal. Const., art. XIII C, § 3.)

Rather than limiting the scope or application of the constitutional referendum power, the language instead ensures that the referendum power not be construed by the courts as limiting the scope or application of the local initiative power thereunder. (See *Rossi v. Brown* (1995) 9 Cal.4th 688, 705-708 ("*Rossi*") [discussing line of decisions where the referendum power had been construed by the courts as limiting the scope of the initiative power in matters of local taxation].) There is no legal

basis of support or expression of voter intent for the proposition that voters would lose important constitutional rights under the local referendum power, to the extent those rights may exist independent of Proposition 218, merely because the targeted water charge can be reduced or repealed pursuant to the local initiative power under section 3 of article XIII C.

Proposition 218 also includes references to the referendum power that are not expressly stated. For example, section 2 of article XIII C states at the beginning of the section that the constitutional tax limitation provisions contained therein apply "[n]otwithstanding any other provision of this Constitution." (Cal. Const., art. XIII C, § 2.)[3] When language is intended to prevail over all contrary law, such an intention is typically signaled by using phrases like "notwithstanding any other law" or "notwithstanding other provisions of law." (*In re Greg F.* (2012) 55 Cal.4th 393, 406.)

Hence, the constitutional limitations contained in section 2 of article XIII C, including the voter approval requirements thereunder, are supposed to prevail over any contrary constitutional provisions including, but not limited to, the constitutional referendum power (Cal. Const., art. II, § 9). This is intended to ensure that the referendum power not be construed by the courts as limiting the scope and application of the

[3] Article XIII D contains a similar "notwithstanding" provision applicable to special benefit assessments and property-related fees and charges. (See Cal. Const., art. XIII D, § 1.)

constitutional provisions under section 2 of article XIII C.[4] This is completely different from Proposition 218 being construed as limiting the scope and application of the referendum power for which there is no supporting legal basis.

B. Article XIII D Provisions of the California Constitution are Not a Substitute for the Local Referendum Power so as to Preclude the Exercise of that Power.

The article XIII D process applicable to property-related fees and charges (Cal. Const., art. XIII D, § 6) is not a substitute for the referendum power with the resulting effect of excluding property-related fees and charges from the scope of the referendum power, as apparently argued by Defendants. Just like voter approval requirements for taxes are preconditions applicable to the imposition of taxes in distinguishing the referendum power (See *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 240-241), article XIII D requirements applicable to property-related fees and charges are also precondition requirements that are different from the referendum power. This type of precondition analysis under article XIII D in distinguishing the referendum power has already been applied to special assessments. (*Consolidated Fire Protection Dist. v.*

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[4] Properly interpreted, this would apply to other provisions of the California Constitution such as those pertaining to the initiative power, due process, and equal protection. Despite the clear and unambiguous "notwithstanding" language prefacing section 2 of article XIII C, the majority opinion in *California Cannabis* ignored this constitutional language without providing any legal justification or explanation.

Howard Jarvis Taxpayers' Assn. (1998) 63 Cal.App.4th 211, 225-226.) The same reasoning would also apply to property-related fees and charges under article XIII D.

Just because Proposition 218 gave precondition protections to local levies subject to article XIII D does not mean that those protections have the effect of precluding or limiting the local referendum power. There is no legal basis of support or expression of voter intent for the proposition that local voters would lose important constitutional rights under the referendum power merely because a levy is also subject to the requirements of article XIII D.

Article XIII D provisions and the exercise of the local referendum power are not mutually exclusive. This is especially the case regarding property-related fees and charges that are not subject to a mandatory election under article XIII D. (Cal. Const., art. XIII D, § 6, subd. (c) [property-related fees and charges for water, sewer, and refuse collection services are exempt from the election requirement].) The referendum power provides local voters with a discretionary tool legally separate from the article XIII D process for purposes of placing a property-related fee or charge on the ballot for approval or rejection by the voters. This is in addition to the protections contained in article XIII D.

Similar reasoning can also be applied to nontax levies that are <u>not</u> subject to article XIII D (e.g., fees and charges that are not "property-related"). For example, in the wake of this court's recent decision in *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal. 5th 1191 ("*United Water*"), groundwater

pumping charges are no longer deemed property-related fees or charges subject to the constitutional protections under article XIII D.[5] For such levies, article XIII D provisions are certainly not a substitute for the exercise of the local referendum power since article XIII D does not apply. There is no legal basis of support or expression of voter intent for the proposition that fees or charges that are property-related under article XIII D have lesser rights under the constitutional referendum power than fees or charges that are not property-related.

Properly recognized, the referendum power is an important legislative policy tool available to local voters when politicians approve nontax levies for which the electorate wants to have the final say in situations where an election precondition requirement is not mandated by law, including under Proposition 218.

C. In Contrast to the Referendum Power, the Voter Approval Requirements Under Section 2 of Article XIII C Provide an Example of a Proposition 218 Provision that Limits a Direct Democracy Power.

The voter approval requirements for taxes under Proposition 218 provide an example where there exist clear indications that those provisions restrict a direct democracy power (the local

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[5] *United Water* was the first case in the history of Proposition 218 in which this court disapproved a published Court of Appeal decision with the resulting effect of taking away Proposition 218 constitutional protections previously recognized by a California appellate court.

initiative power), which clear indications are not present in regard to the exercise of the local referendum power.[6]

Before the passage of Proposition 218 in 1996, the constitutional restrictions of Proposition 13 were applied to local initiatives that impose taxes.[7] In particular, the two-thirds voter approval requirement for local special taxes.[8] (Cal. Const., art. XIII A, § 4.) In *Altadena Library Dist. v. Bloodgood* (1987) 192 Cal.App.3d 585 ("*Altadena Library*"), the court held that an initiative parcel tax was subject to the two-thirds supermajority voter approval requirement for special taxes under Proposition 13 in concluding that a special tax on real property was being imposed by a "special district." (*Id.* at pp. 588-589.)

For purposes of ascertaining voter intent, this court has stated the following concerning the electors voting on a statewide initiative measure: "We assume the electorate is aware of relevant judicial decisions when it adopts legislation by initiative." (*People v. Hernandez* (2003) 30 Cal.4th 835, 867.) *Altadena Library* was good law at the time the California electorate approved Proposition 218, and it still remains good law today on the

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[6] General taxes are subject to majority voter approval (Cal. Const., art. XIII C, § 2, subd. (b)) while special taxes are subject to two-thirds voter approval (Cal. Const., art. XIII C, § 2, subd. (d)).

[7] Proposition 13 is the tax limitation initiative constitutional amendment that added article XIII A to the California Constitution and was approved by California voters during the June 1978 statewide election.

[8] The applicable constitutional language provides: "Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district." (Cal. Const., art. XIII A, § 4.)

application of Proposition 13 constitutional taxpayer protections to local taxation initiatives.[9] Proposition 218 is Proposition 13's progeny, and must be construed in that context. (*Apartment Association, supra*, 24 Cal.4th at p. 838.) Accordingly, based on voter reliance on *Altadena Library* which represented the contemporary understanding of the law at that time, the voter approval language used in section 2 of article XIII C, as approved by the electorate in 1996, was legally sufficient to make local tax initiatives subject to article XIII C voter approval requirements.

In further contrast to the local referendum power where there exists no clear indication that Proposition 218 restricts the exercise of that power, the passage of Proposition 219 during the June 1998 election provides additional support that the voter approval restrictions of Proposition 218 (Cal. Const., art. XIII C, § 2) apply to local initiatives that impose taxes. Proposition 219, in relevant part, constitutionally prohibits local ballot measures that "contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure." (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1188-1189 ("*Roseville*").)

As noted in *Roseville*, the Analysis by the Legislative Analyst contained in the Ballot Pamphlet relating to Proposition 219 "reveals that the impetus for the measure was, in part, the

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[9] In the *California Cannabis* case, *Altadena Library* was brought to the attention of this court on multiple occasions, including by the drafters and sponsors of Proposition 218. This court in *California Cannabis* did not disapprove or otherwise criticize *Altadena Library*.

recent behavior of a local government that had placed a measure before the voters providing that it would impose a general tax if approved by a majority or a special tax if approved by two-thirds of the voters; thus, the analysis noted, 'a 'yes' vote could mean two different things.' The analysis of Proposition 219 went on to state that, if the proposition were approved, 'a ballot measure could not have one outcome if approved by a majority of voters and a different outcome if approved by a two-thirds vote.'" (*Id.* at p. 1189, quoting Voter Information Guide, Primary Elec. (June 2, 1998) analysis of Prop. 219 by the Legislative Analyst, p. 6.)[10]

Of legal significance is that the foregoing constitutional prohibition under Proposition 219 applies to local initiative measures[11] (Cal. Const., art. II, § 11, subd. (c)), and the constitutional amendment restricting the local initiative power recognizes that some local tax initiative measures (initiative special taxes) require two-thirds supermajority voter approval.

The fact that Proposition 219 provisions specifically apply to the exercise of the local initiative power (Cal. Const., art. II, § 11, subd. (c)) to preclude alternative or cumulative provisions relating to the majority vote general tax versus two-thirds supermajority vote special tax distinction, which distinction is specifically

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[10] A copy of the official Ballot Pamphlet relating to Proposition 219 on the June 1998 California statewide election ballot can be found at < https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2165&context=ca_ballot_props > [as of May 17, 2019].

[11] The relevant constitutional language provides: "A city or county initiative measure may not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure." (Cal. Const., art. II, § 11, subd. (c).)

provided for in Proposition 218 (Cal. Const., art. XIII C, § 2), is a clear indication the electorate intended that the section 2 of article XIII C voter approval requirements apply to local initiatives that impose taxes.

As the court in *Roseville* stated regarding the relationship between Propositions 218 and 219:

> "When Proposition 219 is read along with Proposition 218, the result is clear. When a local government asks the voters to approve a tax, it must decide whether to ask for a general tax or a special tax. If it asks for a general tax, only majority approval is required; but the local government must forgo any electoral advantage that might be gained from limiting the use of revenues to specific purposes. If the local government asks the voters to approve a special tax, it might gain an electoral advantage; but a two-thirds vote is required for approval. Such a measure must be placed before the voters on an all-or-nothing basis. Accordingly, if a special tax fails to gain a two-thirds voter approval, it is not approved and the measure can be given no effect." (*Roseville, supra*, 106 Cal.App.4th at p. 1189.)

These Proposition 219 provisions also expressly apply to the local initiative power (Cal. Const., art. II, § 11, subd. (c)), so the foregoing statement is also true regarding local tax measures placed on the ballot by the electorate exercising the local initiative power.

Furthermore, if section 2 of article XIII C (setting forth the general tax versus special tax distinction regarding voter approval requirements) did not apply to the exercise of the local initiative power, then the Proposition 219 constitutional amendment language contained in section 11 of article II relating to the local initiative power (Cal. Const., art. II, § 11, subd. (c)) would be surplusage. However, constitutional provisions are supposed to be interpreted so as to eliminate surplusage. (*Dahms v. Downtown Pomona Property & Business Improvement Dist.* (2009) 174 Cal.App.4th 708, 718.)

The preceding examples relating to the voter approval requirements for taxes under Proposition 218 illustrate instances where there are clear indications that Proposition 218 provisions restrict a direct democracy power. However, there are no such comparable clear indications that any provision of Proposition 218 has the legal effect of precluding or otherwise limiting the lawful exercise of the local referendum power.

In the vernacular of *California Cannabis*, regarding the voter approval requirements for taxes under Proposition 218 and constraints imposed upon the local initiative power, the voters tied themselves to the proverbial mast as Ulysses did to resist the siren song of power. (*California Cannabis*, *supra*, 3 Cal.5th at p. 931.) The Proposition 219 constitutional amendment to the local initiative power made that crystal clear. However, regarding

Proposition 218 and the local referendum power, the voters made no such clear choice to tie themselves to the proverbial mast.[12]

III. THE "TAX LEVIES" EXCEPTION TO THE REFERENDUM POWER IS LIMITED ONLY TO "TAXES" AND DOES NOT APPLY TO NONTAX LEVIES SUCH AS THE SUBJECT WATER CHARGES.

"The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." (Cal. Const., art. II, § 9, subd. (a).) The foregoing exceptions are generally applicable to local referenda. (*Geiger* v. *Board of Supervisors* (1957) 48 Cal.2d 832, 836 ("*Geiger*").)

The scope of the "tax levies" exception is an important issue in this case. Before determining the proper scope of the "tax levies" exception to the referendum power, it is critical for this court to examine and ascertain the standard of construction that is

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[12] Ulysses would be disappointed to know that in the subsequent case of *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898 ("*Boling*"), concerning application of statutes involving government labor management relations to a local pension reform initiative measure, this court did not apply (or even cite) *California Cannabis* in reversing the Court of Appeal's conclusion that the statutory provisions did not apply to a duly qualified citizen-sponsored initiative on the ballot. Furthermore, not one word was mentioned in *Boling* whether the electorate exercising the local initiative power was a "public agency" under the Meyers-Milias-Brown Act so as to trigger possible application of the meet and confer requirement thereunder. The Court of Appeal decision in *Boling* (10 Cal.App.5th 853), which predated *California Cannabis* by about four months, was consistent with this court's analysis of the initiative power in *California Cannabis*.

proper in this instance where a precious constitutional direct democracy is involved. That is what this court similarly said and did in regard to interpreting the constitutional language of Proposition 13. (*Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 202 [critical to determine the standard of construction that is proper in interpreting the constitutional language of Proposition 13].)[13]

Language in *Geiger* also raises the issue whether the "tax levies" exception is further qualified by the requirement that the "tax levy" must also be for "usual current expenses" in order to be exempt from referendum. (*Geiger*, *supra*, 48 Cal.2d at p. 836, fn. *.)[14] In other words, whether the words "for the usual current expenses of the State" in the applicable constitutional language refer only to "appropriations" or whether they also apply to "tax levies."[15] As further noted in *Geiger*, the foregoing question has never been directly passed upon by this court, but it had been assumed in several appellate cases that tax levies must also be for "usual current expenses" in order for the referendum exception to apply. (*Ibid.*)

In one related case, the phrase "usual current expenses of the state" was interpreted to mean "the common, ordinary,

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[13] This court noted in *Richmond* that the critical issue had not been raised by the parties in the case. It is being raised here for purposes of this case. No excuses.

[14] A footnote number was not used in the opinion.

[15] The Court of Appeal did not discuss, and the "appropriations for the usual current expenses of the state" exception is not an issue in this case. That particular exception appears to apply to matters of appropriations (e.g., referendum on adopted budgetary items) which are not the subject of the referendum measure in this case.

regular, and necessary expenses of the various departments of the state government. It is plain that they do not include the unusual, the extraordinary, the uncommon or the exceptional. 'Usual' is defined by Webster as 'such as occurs in ordinary practice or in the ordinary course of events; customary; ordinary, habitual; common.' According to the same authority, 'current' means 'now passing as time; as the current month; common, as current history.'" (*McClure v. Nye* (1913) 22 Cal.App. 248, 250-251 [interpreting applicable section 1 of article IV language, as adopted by the voters on October 10, 1911].)

The foregoing issue referenced in *Geiger* appears to be appropriate for resolution in this case and would have particular bearing on levies that are generally not considered to be taxes subject to voter approval under Proposition 218, particularly legitimate property-related fees under article XIII D. This is because such levies do not appear to constitute "usual current expenses" of a local government under the applicable constitutional language. Thus, it is possible that even if such levies constituted "tax levies," the referendum exception would still not apply because those "tax levies" are not for "usual current expenses."

A. The Scope of the "Tax Levies" Exception Under the Referendum Power Must at a Minimum Not Be Broadly Construed and Should Be Narrowly Construed.

The key issue presented is whether the "tax levies" exception to the referendum power makes a distinction between tax levies

and other levies that are not taxes (e.g., utility fees and charges). Such a distinction is legally proper and appropriate inasmuch as exceptions to a general rule of an enactment are supposed to be strictly construed. (*Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358 [strict construction applied to election exemptions under Proposition 218]. Furthermore, since a constitutional direct democracy power is implicated, the courts narrowly construe provisions that would burden or limit the exercise of that precious power. (*California Cannabis, supra,* 3 Cal.5th at p. 936.)

Unlike in *California Cannabis* where only a procedural election timing issue was involved, if the water charges in this case were found to be subject to the "tax levies" exception to the referendum power, it would be the death sentence for the measure. It could not legally be placed on the ballot no matter how many signatures were obtained, and even if it were to appear on the ballot, the measure would be invalidated even if it received 100% approval from the voters.[16] Thus, this is literally a life or death issue for the referendum measure.

At a minimum, the foregoing should mean that what constitutes a "tax levy" for purposes of the referendum exception must at least not be broadly construed. Under standards of interpretation applicable to exceptions in general and direct democracy powers in particular, the "tax levy" exception should be narrowly construed, but a broad interpretation of the "tax levy"

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[16] In some local jurisdictions, even if it received more than 100% approval from the voters.

exception under the referendum power has a legally weak basis of support and must be rejected. This is especially the case in the wake of the recent *California Cannabis* decision by this court.

A distinction must also be made between the application of legal principles and the application of policy in resolving the "tax levies" issue. This issue is properly resolved based on principles of law. Policy arguments can be made both in support and in opposition to application of the "tax levies" exception in this case. However, policy arguments are a matter properly considered by the legislative branch of government and not the courts.

B. A "Property-Related" Fee Under Proposition 218 is Not Subject to the "Tax Levies" Exception Under the Referendum Power.

The Court of Appeal noted that the parties in this case agreed that the subject water charges were fees and not taxes. (*Wilde, supra*, 29 Cal.App.5th at p. 172, fn. 3.) Based on that agreement, the Court of Appeal assumed the subject water charges were "property-related" fees imposed "as an incident of property ownership" under article XIII D of the California Constitution. (*Ibid.*) Independent of the Court of Appeal assumption, the subject water charges do indeed appear to be "property-related" fees under article XIII D, as that term was interpreted by this court in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 ("*Bighorn*").

A legitimate property-related fee under article XIII D is not subject to the "tax levies" exception under the referendum power.

The constitutional definition of a "property-related" fee under article XIII D expressly excludes taxes. (Cal. Const., art. XIII D, § 2, subd. (e) ["any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service"].)[17] In addition, a legitimate "property-related" fee under article XIII D cannot be imposed for general governmental services (e.g., police, fire, ambulance, or library) where the service is available to the public at large in substantially the same manner as it is to property owners. (Cal. Const., art. XIII D, § 6, subd. (b), par. (5).) Also, a legitimate "property-related" fee under article XIII D is not a "tax" subject to voter approval under article XIII C. (Cal. Const., art. XIII C, § 1, subd. (e)(7) [excepting "assessments and property-related fees imposed in accordance with the provisions of Article XIII D" from the "tax" definition].)

Furthermore, because "in administering a public utility, such as a water system, even within its own limits, a city does not act in its governmental capacity, but in a proprietary and only quasi-public capacity." (*City of South Pasadena v. Pasadena Land and Water Co.* (1908) 152 Cal. 579, 593.) This is in contrast to a local government acting in a governmental capacity and raising substantial revenues from taxes for the usual current expenses of

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[17] Under Proposition 218, the only permissible taxes that may be imposed by a local government upon any parcel of property or upon any person as an incident of property ownership are ad valorem property taxes and special taxes receiving two-thirds voter approval. (Cal. Const., art. XIII D, § 3, subd. (a).)

the government, which is the apparent focus and scope of the "tax levies" exception under the referendum power.

Although apparently suggested in dicta, one court has stated that since electrical rates represent a charge for nontraditional services rather than a tax, constitutional restrictions applied to the use of the direct democracy process for tax measures do not apply. (*Bock v. City Council* (1980) 109 Cal.App.3d 52, 58 ("*Bock*").) The reasoning in *Bock* incorporates a more traditional definition of a tax that would exclude legitimate fees and charges from the tax levies exception. The issue in *Bock* was analyzed in the context of the validity of a local initiative measure, but did include specific citation to the referendum power (Cal. Const., art. II, § 9, subd. (a)) as a result of constitutional restrictions under the referendum power in matters of taxation also being applied to initiative measures involving taxation. (See *Myers* v. *City Council of Pismo Beach* (1966) 241 Cal.App.2d 237, 243-244 ("*Myers*") [an initiative cannot be used as an indirect or backhanded technique to invoke the referendum process against a tax].)[18]

If a local levy such as the subject water charge is not a "tax" under Proposition 218, which constitutionally commands a liberal construction (*Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 699 [referencing Prop. 218 liberal interpretation requirement in the context of a tax]), it should not be deemed a "tax levy" under the referendum exception which is supposed to be more narrowly construed as an exception to a direct

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[18] That particular aspect of *Myers*, as applied to the initiative power only, has since been disapproved by this court in *Rossi*. (*Rossi, supra*, 9 Cal.4th at pp. 705-709.)

democracy power. This reasoning would apply regardless of whether the subject water charge is a property-related fee under article XIII D so long as the water charge is not deemed a tax under Proposition 218.

In the absence of express constitutional language or clear legislative/voter intent to the contrary regarding what constitutes a "tax" for purposes of the referendum power exception, it would be legally anomalous if a local levy would not constitute a "tax" under a liberal interpretation of that term (Proposition 218) but would constitute a "tax" under what should be a narrower interpretation (tax levy exception to referendum power). Both express constitutional language and clear legislative/voter intent are lacking in support of a broad interpretation of the "tax levies" exception to the local referendum power.

In recent years, and despite the constitutional command of a liberal interpretation, this court has been more narrowly construing what constitutes a "tax" for purposes of the voter approval requirements under Proposition 218.[19] Examples of such cases include *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 [surcharge on an electric utility's gross receipts from the sale of electricity] and *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1 [payment in lieu of taxes (PILOT) transfer from a municipal electric utility to the city's general fund].

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[19] In what is now apparently ancient history, this court stated the following in the 2008 *Silicon Valley* case concerning Proposition 218 constitutional provisions: "We must enforce the provisions of our Constitution and may not lightly disregard or blink at . . . a clear constitutional mandate." (*Silicon Valley*, *supra*, 44 Cal.4th at p. 448.)

Taxpayers have often legally challenged local levies that are believed to be "taxes" under Proposition 218 and subject to voter approval thereunder. When a court concludes otherwise that a levy is not a "tax" subject to a mandatory election under Proposition 218, voter approval is generally not required. To the extent this occurs, voters should not be legally precluded from qualifying a measure for the ballot regarding such nontax levies by virtue of that levy being deemed a "tax" under the referendum exception. This would deny the voters an opportunity to vote because the levy would not be a tax under Proposition 218 but would be a tax under the "tax levy" exception to the referendum power. This outcome must not occur unless there exists clear and unmistakable legal basis of support for such an outcome. By all accounts, such support does not exist.

C. For Purposes of this Case, it is Not Necessary to Interpret the Exact Meaning of the "Tax Levies" Exception Under the Referendum Power.

The preceding analysis does not suggest that the definition of a "tax" for purposes of the tax levies exception to the referendum power is the same as the definition of a "tax" for purposes of the voter approval requirements of Proposition 218.[20] Rather, it provides guidance that there exists at least some local levies that are not subject to the tax levies exception, such as a legitimate

[20] Proposition 218 did not include a constitutional definition of a "tax" under article XIII C. However, Proposition 218 was amended in 2010 by the passage of Proposition 26 which added a broad constitutional definition of a "tax" for purposes of the voter approval requirements of Proposition 218. (Cal. Const., art. XIII C, § 1, subd. (e).)

property-related fee under article XIII D, without necessarily having to define the exact meaning of that exception.

This is precisely the approach this court took in the *Bighorn* case. In *Bighorn*, the issue was whether a "property-related" fee under article XIII D was a "fee" or "charge" under section 3 of article XIII C for purposes of exercising the local initiative power thereunder. This court responded in the affirmative and noted the following: "For present purposes, it is unnecessary to arrive at an exact definition of the terms 'fee' and 'charge' as used in article XIII C. It is sufficient to conclude that a public water agency's charges for ongoing water delivery, which are fees and charges within the meaning of article XIII D [citation], are also fees within the meaning of section 3 of article XIII C." (*Bighorn*, *supra*, 39 Cal.4th at p. 216.) Like in *Bighorn*, resolving the issue whether the subject water charge in *Wilde* is subject to the "tax levies" exception to the referendum power does not require this court to arrive at the exact meaning or scope of the "tax levies" exception.

D. If the "Tax Levies" Exception Under the Referendum Power Were Intended to Include Nontax Levies Such as Fees and Charges, Express Language to that Effect Would Have Been Included in the Constitutional Provision Like it was in Section 3 of Article XIII C.

To see what a direct democracy constitutional provision looks like if it also applied to nontax levies such as fees and charges, in addition to taxes, one need only examine the constitutional language in section 3 of article XIII C which

provides in relevant part: "Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, *assessment, fee or charge.*" (Cal. Const., art. XIII C, § 3, italics added.)

The foregoing is an example of clear and unmistakable constitutional language setting forth application of nontax levies (assessments, fees or charges) to a direct democracy constitutional provision. This is in contrast to the "tax levies" exception to the constitutional referendum power which contains no express reference to nontax levies such as assessments, fees or charges.

Not surprisingly, this court in *Bighorn* construed the language in section 3 of article XIII C as applying to assessments, fees, and charges and not just to local taxes. (*Bighorn*, *supra*, 39 Cal.4th at p. 213.)[21] However, if the section 3 language had only referred to "taxes" but did not include any express reference to "assessments, fees or charges," it would be extremely unlikely that this court, even with the constitutional command that Proposition 218 provisions be liberally construed, would have interpreted the term "tax" to also include assessments, fees or charges.

This court in *Bighorn* also briefly referenced the scope of the "tax levies" exception to the referendum power in stating the

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[21] The Court of Appeal in *Bighorn* had construed the applicable language in section 3 as only applying to local taxes notwithstanding the clear language to the contrary. Even the local public agency involved in the case offered no argument in support of the Court of Appeal's puzzling construction of the constitutional language. (*Bighorn*, *supra*, 39 Cal.4th at p. 213.)

following concerning the definition of the referendum power: "Under this definition, tax measures are exempt from referendum." (*Id.* at p. 212.) *Rossi* was also cited in support of the foregoing statement. (*Rossi*, *supra*, 9 Cal.4th at p. 697.) This language appears to suggest that the "tax levies" exception is limited to legitimate "tax measures" and that measures not involving legitimate taxes are excluded.

E. Examples Abound of Referendum Measures that Have Included Nontax Levies.

A review of statewide referendum measures that appeared on the ballot revealed numerous instances where a nontax levy was included as part of the measure. This includes, but is not limited to, the following statewide referendum measures:[22]

- Proposition 67 on the November 2016 ballot [plastic bag fee];
- Proposition 72 on the November 2004 ballot [state health insurance fee];
- Proposition 5 on the November 1939 ballot [oil conservation charges];
- Proposition 4 on the November 1939 ballot [fees associated with the regulation of personal property brokers];
- Proposition 3 on the November 1939 ballot [fees associated with the regulation of personal property brokers];

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[22] The ballot measure data were obtained from the California Ballot Measures Database at the UC Hastings Law Library website <https://www.uchastings.edu/academics/library/ca-ballots/> [as of May 17, 2019].

- Proposition 8 on the November 1928 ballot [vehicle registration fees for road work]; and
- Proposition 3 on the November 1926 ballot [oleomargarine fees].

The fact that multiple referendum ballot measures including nontax levies such as fees and charges have appeared on the statewide ballot in California, literally spanning a time period of nearly a century, is yet another indicator that the tax levies exception to the referendum power excludes nontax levies such as fees and charges from that exception. Concerning the scope of the tax levies exception to the referendum power, there should be no difference between a statewide referendum measure and a local referendum measure. (*Geiger*, *supra*, 48 Cal.2d at p. 836 [statewide referendum exceptions apply to local referendum measures].)

F. Truth or *Dare*: Disapproving Old Cases that are Inconsistent with Contemporary Direct Democracy Jurisprudence of this Court.

There exists case law that could be construed as applying a broad definition of "tax levies" to include most fees and charges for purposes of the exception to the referendum power. The main case is *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864 ("*Dare*"). Although *Dare* involved a local initiative measure relating to sewer maintenance fees, under *Myers* the court needed to interpret the scope of the "tax levies" exception to the referendum power for purposes of determining the validity of the initiative measure.

Relying on a very broad definition of what constitutes a "tax," the court in *Dare* held that the sewer fees were considered a taxation function. (*Id.* at p. 868.)

While the court in *Dare* relied on older cases providing a very broad definition of what constitutes a "tax," the court in that case never explained why a broad definition of "tax" was legally appropriate in the specific context of the "tax levies" exception to the referendum power. The cited cases in *Dare* setting forth a broad definition of "tax" did not pertain to the exercise of the referendum power.

While a broad definition of what constitutes a "tax" may be applied in some contexts, it has not been applied by the courts in other contexts. For example, the courts have certainly refused to apply a broad definition of "tax" in regard to the taxpayer protection provisions of Proposition 13 approved by California voters in 1978.[23] In fact, a local initiative measure that sought, in a manner similar to the broad "tax" interpretation in *Dare*, to broadly define a "special tax" under Proposition 13 for purposes of the two-thirds voter approval requirement thereunder was invalidated, in part, as an unlawful attempt to impair essential governmental functions through interference with the administration of a City's fiscal powers. (*City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466.) The court even cited *Dare* in support of invalidating the initiative measure. (*Id.* at p. 470.)

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[23] This has led to the qualification and passage of subsequent taxpayer protection initiative constitutional amendments such as Proposition 218 in 1996 and Proposition 26 in 2010.

A second case, which followed *Dare*, also appears to have relied upon a broad definition of "tax levies" in invalidating a local initiative measure which would have imposed significant limitations on the power of the board of supervisors of Humboldt County to levy or increase various fees, charges, and assessments. (*Community Health Assn. v. Board of Supervisors* (1983) 146 Cal.App.3d 990 ("*Community Health*").)[24] As in *Dare*, the court in *Community Health* never explained why a broad definition of "tax" was legally appropriate in the specific context of the "tax levies" exception to the referendum power.

The apparent broad definition of "tax" both in *Dare* and in *Community Health* for purposes of the "tax levies" exception is not consistent with the contemporary direct democracy jurisprudence of this court in which provisions that burden or limit the exercise of precious direct democracy powers are narrowly construed. (*California Cannabis*, *supra*, 3 Cal.5th at p. 936.) Specifically concerning the referendum power, a more limited scope of the "tax levies" exception is legally appropriate and proper. (See pt. III, *ante*, analysis pertaining to a more limited scope of the "tax levies" exception.)

Accordingly, it is time to turn out the lights and put the *Dare* and *Community Health* cases to bed for good. Both *Dare* and *Community Health* (and any other related cases) need to be DISAPPROVED by this court, at least to the extent they stand for

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[24] Counsel for Defendants and Respondents in this case was amicus counsel in *Community Health* more than 35 years ago, and supported the parties seeking invalidation of the initiative measure in that case.

the proposition that the "tax levies" exception applicable to the referendum power is broadly construed to include levies that are not legitimate taxes.

IV. THE ESSENTIAL GOVERNMENT SERVICE EXEMPTION TO THE REFERENDUM POWER IS A JUDICIALLY CREATED EXEMPTION THAT MUST BE LIMITED TO ONLY THE MOST EXTRAORDINARY OF CIRCUMSTANCES.

Following a detailed and extensive discussion of the issue, the Court of Appeal in *Wilde* concluded that the essential government service exemption applicable to the local referendum power does not apply to the subject water charges. (*Wilde, supra*, 29 Cal.App.5th at pp. 175-179.) The essential government service exemption is a judicially created exception to a direct democracy power for which there is no such express exemption contained in the California Constitution. As a result, and especially in the wake of this court's recent decision in *California Cannabis*, the essential government service exemption must at least be limited to apply only in the most extraordinary of circumstances.

The essential government service exemption apparently first appeared in the 1915 Court of Appeal decision in *Chase v. Kalber* (1915) 28 Cal.App. 561, 569-570 ("*Chase*"). *Chase* involved "peculiar circumstances" which by itself would favor a narrow application of that decision. (See *Id.* at pp. 563-564.) Of particular significance in establishing the essential government service exemption in *Chase*, there was no citation to any case law, no citation to any constitutional or statutory provision, and no

citation to the ballot pamphlet or any other specific legislative history for purposes of establishing a sound legal foundation for such an exemption. (*Id.* at. pp. 569-570.)

Since a constitutional direct democracy power is implicated, and since there is no express essential government service exemption in the California Constitution, to the extent the essential government service exemption remains judicially recognized it must at least be applied only in the most extraordinary of circumstances.

For example, there should generally be no significant essential government service problems by the mere qualification and placement of a referendum measure on the ballot. If the referendum passes and becomes law, there should also generally be no significant essential government service problems. Only if the referendum measure does not pass (and thereby does not become law) could there be any potential significant problems.

Even if that were to happen, the exemption should not be automatically applied. Essential government service problems must be more than merely speculative or have the potential to occur in the future. (Cf. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 238-242 [similar discussion in the context of impairment of contracts and Proposition 13].) Problems cannot be assumed or merely alleged. They must be real, substantial, and proven to the satisfaction of the courts.

In addition, only after all reasonable alternatives or options have been exhausted without acceptable result should application

of the essential government service exemption be seriously considered by the judiciary. (Cf. *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068 ("*Bushey*") [allowing the local referendum power where a local government has other means available to make the zoning ordinance and general plan consistent].)

As a practical matter, the constitutional "tax levies" exception applicable to the referendum power addresses and incorporates any essential government service policy concerns with regard to levies that are legitimate taxes. However, for nontax levies outside the scope of the tax levy exception, there appears to be no independent constitutional basis for the essential government service exemption. It was created by the courts with the resulting effect of precluding the exercise of constitutional direct democracy powers without any specific constitutional legal foundation. If the voters of California wanted an "essential government service" exemption concerning a particular direct democracy power, they would have said so with express language to that effect in the California Constitution. The voters have not done so, and to the extent the courts have created an extraconstitutional exemption in that regard, that exemption must be applied only in the most extraordinary of circumstances.

In addition to the foregoing, if a local agency is acting in a proprietary capacity such as by operating a local utility and imposing utility rates, there is an additional issue whether the essential government service exemption (which applies to governmental functions) should even apply.

A. Application of the *Bighorn* Power-Sharing Arrangement to the Essential Government Service Exemption.

This court in *Bighorn* set forth a template (a power-sharing arrangement) for dealing with the situation where a significant local initiative passes under section 3 of article XIII C that reduces utility rates to the point where a violation of a state statute requiring certain service levels may occur. As stated by this court:

> "[B]y exercising the initiative power voters may decrease a public water agency's fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without prior voter approval. Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. [Citation.] We presume local voters will give appropriate consideration and deference to a governing boards judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and we assume the board, whose members are elected [Citation.] will give appropriate consideration and deference to the voters expressed wishes for affordable water service. (*Bighorn, supra*, 39 Cal.4th at p. 220.)

The power-sharing arrangement described in *Bighorn* can and should also be applied in the context of the essential government service exemption applicable to the referendum power, especially whenever a referendum measure does not pass and thereby does not become law.[25] This approach is also consistent with recent direct democracy cases by this court such as *California Cannabis* and *Bushey* which seek to preserve direct democracy powers whenever possible.

B. The Essential Government Service Exemption Does Not Apply in this Case.

In addition to the discussion of this issue by the Court of Appeal in concluding that the essential government service exemption does not apply, at least at this stage of the referendum process it definitely would not apply. The subject referendum has yet to even be placed on the ballot for the local electorate to either approve or reject. Any arguments about possible adverse impacts to essential government services are merely speculative at this point. The Court of Appeal even noted that "[t]he City does not develop its argument by connecting the essential government service exception to the facts of this case. Indeed, the City's argument on this issue does not contain a single citation to the appellate record. This sort of undeveloped and unsupported

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[25] The *Bighorn* power-sharing arrangement was also recently applied in *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174 [subvention requirement under the Gann spending limit]. As of the date of this brief, a petition for review in the case is currently pending before this court (Case No. S255512).

argument generally warrants the argument being deemed forfeited." (*Wilde, supra*, 29 Cal.App.5th at p. 175, fn. 5.)

The subject referendum should at least be given an opportunity to appear on the ballot. If on the ballot, the measure could be approved by the voters and become law. However, even if it were rejected by the voters and not become law, the principles announced by this court in the recent *Bushey* case (allowing the local referendum power where a local government has alternative means available) should apply, and in addition, the power-sharing arrangement of the type described in *Bighorn* should also be applied and given an opportunity to run its course. This would be consistent with the principle that the courts narrowly construe provisions that would burden or limit the exercise of direct democracy powers.

V. THE SUBJECT WATER CHARGES INVOLVE A LEGISLATIVE ACT.

Following a detailed discussion of the issue, the Court of Appeal in *Wilde* correctly concluded that the subject water charges involved a legislative act as opposed to an administrative act for which the referendum power would not apply. (*Wilde, supra*, 29 Cal.App.5th at pp. 172-175.)

Citing *20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, 277 [ratemaking is an essentially legislative act], the Amicus Letter in Support of Petition for Review in this case filed by statewide local government interest groups also agreed that the Court of Appeal opinion in *Wilde* "correctly states that ratemaking

is a legislative act."[26] (Amicus Letter at p. 2.) Thus, both local government interest groups and taxpayer interests are in agreement on this issue. It is highly unlikely that top experts on both sides are wrong, and if this court were to conclude otherwise, the legal basis in support of such a conclusion must be strong.

In further support, water charges subject to the local initiative power under Proposition 218 (Cal. Const., art. XIII C, § 3) implicate legislative acts by virtue of being subject to the constitutional provision, the character of which should not change if a water charge becomes the subject of a local referendum measure. This does not mean that every local levy (e.g., a special tax) subject to the local initiative power under section 3 of article XIII C will be subject to the local referendum power. Rather, the statement applies only to the legislative characterization of the local levy.

Finally, since a constitutional direct democracy power is implicated, the courts are supposed to narrowly construe provisions that would burden or limit the exercise of that power which should be the case in regard to administrative acts. (*California Cannabis*, *supra*, 3 Cal.5th at p. 936.) An act should not be deemed administrative in nature, which would bring it outside the scope of the referendum power, unless it is clearly an administrative act. Any doubts must be resolved in favor of a legislative act.

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[26] The Amicus Letter in Support of Petition for Review was dated December 28, 2018, and filed on behalf of the California Association of Sanitation Agencies, the California State Association of Counties, the California Special Districts Association, and the League of California Cities.

VI. IF THIS COURT PRECLUDES THE EXERCISE OF THE REFERENDUM POWER IN THIS CASE, THEN THE LOCAL INITIATIVE POWER UNDER PROPOSITION 218 MUST BE BROADLY CONSTRUED IN ACCORDANCE WITH ITS PLAIN LANGUAGE.

In the event this court were to preclude exercise of the local referendum power in this case in favor of the availability of the local initiative power under section 3 of article XIII C as an option, it is critical that the local initiative power thereunder be broadly interpreted and applied in accordance with the clear constitutional language and supporting intent. This includes at least providing clarification that the electorate exercising the local initiative power is a "local government" at least for purposes of section 3 of article XIII C. (See pt. VI.A, *post*.)

It doesn't do a local electorate much good if the courts were to claim that the local initiative power under section 3 of article XIII C is an available option and then turn around and significantly limit the scope and application of that initiative power in other cases. The decision in *Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892 ("*Mission Springs*"), which is inconsistent with the analysis of the local initiative power in *California Cannabis*, particularly comes to mind, as that case is now a prime candidate for disapproval by this court in the wake of *California Cannabis*.[27] It is also no secret that the same local government interests who argue for preclusion of the referendum

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[27] Of course, this assumes that this court is consistent in the application of the law.

power in this case in favor of the exercising the local initiative power in section 3 of article XIII C have also argued for the significant curtailment of the local initiative power thereunder in other cases such as *Bighorn* and *Mission Springs*.

The language of the local initiative power under section 3 of article XIII C is very broad and crystal clear in stating that: "*Notwithstanding any other provision of this Constitution*, including, but not limited to, Sections 8 and 9 of Article II, the *initiative power shall not be prohibited or otherwise limited* in matters of reducing or repealing *any* local tax, assessment, fee or charge." (Cal. Const., art. XIII C, § 3, italics added.) The foregoing constitutional language is clear that it applies to "any" local tax, assessment, fee or charge. "[T]he word 'any' means without limit and no matter what kind. [Citation.]" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [construing term "any" in context of the shield law under section 2(b) of article I].)

The Proposition 218 ballot pamphlet also makes it clear that the scope of the local initiative power thereunder applies to *any* local government tax, assessment, fee or charge. The impartial analysis prepared by the Legislative Analyst stated: "The measure [Proposition 218] states that Californians have the power to repeal or reduce *any* local tax, assessment, or fee through the initiative process." (*Bighorn, supra*, 39 Cal.4th at pp. 212-213, italics added [quoting from Ballot Pamphlet].)

There are no exceptions or qualifications applicable to the local initiative power under section 3 of article XIII C, and none should be inferred. "Where the language of the proposition is clear

and there is no suggestion of any conflicting voter intention, we have no authority to engraft an exception . . . onto the constitutional provisions adopted in Proposition 218." (*Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 925.)

A. Clarification is Needed that the Electorate Exercising the Local Initiative Power is a "Local Government" at Least for Purposes of Section 3 of Article XIII C.

This court's interpretation of "local government" in *California Cannabis* as possibly excluding the electorate exercising the initiative power from the provisions of article XIII C of the California Constitution has cast a legal cloud over the continued availability of the local initiative power under section 3 of article XIII C. This is because the local initiative power thereunder only applies to "local governments" under the express constitutional language.

The relevant constitutional language from section 3 of article XIII C is as follows:

"The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all *local governments* and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to

statewide statutory initiatives."[28] (Cal. Const., art. XIII C, § 3, italics added.)

If under *California Cannabis* the electorate exercising the initiative power is not a "local government" under article XIII C (which includes the local initiative power in section 3), then the initiative power under section 3 of article XIII C would not be available because it only applies to "local governments."

There appears to be little indication that *California Cannabis* was intended to overrule *Bighorn* in upholding the exercise of the local initiative power under section 3 of article XIII C. However, because *California Cannabis* was unclear on this point,[29] the legal cloud remains and it would be appropriate for this court to provide clarification that the electorate exercising the initiative power is a "local government" at least for purposes of the local initiative power under section 3 of article XIII C. Such a result would be consistent with this court's decision in *Bighorn*.

VII. CONCLUSION.

Consistent with the principle that this court resolves doubts about the scope of a direct democracy power in its favor whenever possible and narrowly construes provisions that burden or limit the exercise of that power, the Court of Appeal got it right in this case.

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[28] In *Bighorn*, this court construed the term "affect" in the cited constitutional language as only applying to the reduction or repeal of local levies. (*Bighorn*, *supra*, 39 Cal.4th at p. 218.)

[29] In *California Cannabis*, both local government and taxpayer interests had requested clarification of the court's decision on multiple points which this court unfortunately declined to provide.

Proposition 218, including the property-related fee and local initiative power provisions thereunder, does not restrict or preclude the otherwise lawful exercise of the local referendum power under the California Constitution. The "tax levies" exception to the referendum power does not apply to nontax levies such as the subject water charges. The subject water charges involve a permissible legislative act as opposed to an administrative act for which the referendum power would not apply. Finally, the essential government service exemption applicable to the local referendum power does not apply to the subject water charges.

Accordingly, and for the reasons set forth herein, it is respectfully urged that the judgment of the Court of Appeal be **affirmed**.

Dated: May 17, 2019

Respectfully submitted,

JACK COHEN
Attorney at Law

CERTIFICATE OF WORD COUNT

I certify that the foregoing amicus curiae brief, as measured by the word count of the computer program used to prepare the brief, contains 10,074 words.

Dated: May 17, 2019

JACK COHEN
Attorney at Law

Proof of Service
State of California, County of Los Angeles

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is: Post Office Box 6273, Beverly Hills, CA 90212.

On May 17, 2019, I served the foregoing APPLICATION OF JACK COHEN (IN HIS CAPACITY AS A PROPOSITION 218 DRAFTER) FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFF LESLIE T. WILDE by depositing true copies thereof in the United States mail in Beverly Hills (County of Los Angeles), California, enclosed in sealed envelopes with the postage thereon fully prepaid, and addressed as follows:

Timothy A. Bittle, Esq.
Howard Jarvis Taxpayers Foundation
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
Attorneys for Plaintiff and Appellant
Leslie T. Wilde

John Sullivan Kenny, Esq.
Kenny & Norine, a Law Corporation
1923 Court Street
Redding, CA 96001
Attorneys for Defendants and Respondents
City of Dunsmuir et al.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 17, 2019, at Beverly Hills, California.

Jack Cohen