No. S252915

In the Supreme Court of California

Leslie T. Wilde,
Petitioner and Appellee

vs.

City of Dunsmuir, et al.,
Defendant and Respondent.

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

Reversing a Judgment of Dismissal Following
an Order Denying a Writ of Mandate
Siskiyou County Superior Court, Case No. SCCV-PT-2016-549
Honorable Anne Bouliane, Presiding

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, AND LEAGUE OF CALIFORNIA CITIES

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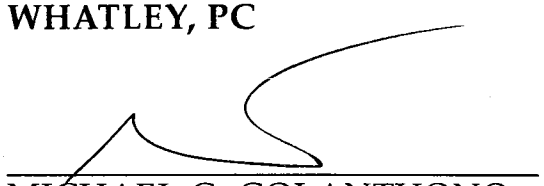
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.488 other than:

Customers of the City of Dunsmuir's water utility.

DATED: May 20, 2019

COLANTUONO, HIGHSMITH & WHATLEY, PC



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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Tani Cantil-Sakauye and Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.520(f), the Association of California Water Agencies ("ACWA"), the California Association of Sanitation Agencies ("CASA"), the California State Association of Counties ("CSAC"), the California Special Districts Association ("CSDA"), and the League of California Cities ("League") (collectively, "Amici") respectfully request permission to file the attached amicus curiae brief. This application is timely made within 30 days of the filing of the reply brief on the merits.

Counsel for Amici have reviewed the parties' briefs and believe additional briefing would assist the Court. Amici have a substantial interest in this case because all have local government members that depend on fees to fund such vital public services as water, sewer, and solid waste removal. The decision below will undermine their ability to do so, make their capital-intensive utilities less credit-worthy, invite lenders to impose risk premiums, and make public services more costly. Amici therefore have an interest in protecting their ability to fund their essential public services.

Amici write to emphasize the policy implications of the Court of Appeal's decision for local government organizations and to urge the Court to reverse that court and to affirm precedent barring

referenda of revenue measures, recognizing that Proposition 218 allows initiatives which have the same effect but give more notice to the agency and, therefore, more opportunity to avoid service disruptions.

IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

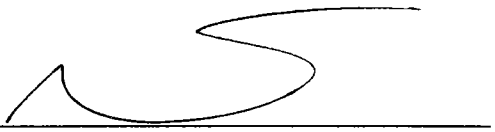
Amici represent local government entities with an interest in this case. ACWA is a California nonprofit public benefit corporation comprised of over 430 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts, and special purpose public agencies. CASA is a non-profit corporation comprised of more than 100 local public agencies, including cities, sanitation districts, community services districts, sewer districts, and municipal utility districts. CASA's members provide wastewater collection, treatment, water recycling, renewable energy and biosolids management services to millions of Californians. CSAC is a non-profit corporation having a membership consisting of the 58 California counties. CSDA is a non-profit corporation with a membership of nearly 900 special districts. CSDA's members provide a wide variety of public services to urban, suburban, and rural communities, including water, sewer, and waste removal services. The League is an association of 475 California cities dedicated to protecting and restoring local control to provide

for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians.

The Court of Appeal decision here undermines the ability of Amici's local government members to fund vital public services. It will add new costs and create unnecessary delay for government, ultimately harming the taxpaying public who depend on Amici's members for services necessary to everyday life. Amici believe this brief will aid the Court and respectfully request leave to file it.

DATED: May 20, 2019

COLANTUONO, HIGHSMITH & WHATLEY, PC



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INTRODUCTION

Respondent Leslie Wilde contends she may referend a rate resolution designed to fund necessary maintenance of the City of Dunsmuir's water utility. She and the Court of Appeal misread the referendum power. The Court of Appeal posed the issue as whether Proposition 218 "silently repealed voters' right to challenge by referendum the same local levies for which they expressly preserved their power of initiative." (*Wilde v. City of Dunsmuir* (2018) 29 Cal.App.5th 158, 163, review granted Jan. 30, 2019, S252915 ("*Dunsmuir*" or the "Decision.") The People's reserved power to referend local government decisions is limited, reflecting competing Constitutional values: the right of voters to check their representatives and the need for government to provide efficient and reliable public services.

The referendum:

> is the power of 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), emphasis added.)[1] It is "'one of the most precious rights of our democratic process'" and "'must be

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[1] References to "articles" are to the California Constitution.

construed liberally in favor of the people's right to exercise the reserved power[].'" (*Dunsmuir, supra,* (2018) 29 Cal.App.5th at p. 168.) Liberal construction, of course, does not license variation from the intent evident from our Constitution's text: "As a rule, a command that a constitutional provision or a statute be liberally construed 'does not license either enlargement or restriction of its evident meaning [citation].'" (*Apartment Ass'n. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 844 [construing Prop. 218].) Absent ambiguity, "no resort to this command is required or even permitted." (*Id.* at p. 845, internal quotation and citation omitted.)

The referendum power is limited by the very phrase that reserves it. Under that limitation, government's revenue power requires direct democracy to take the form of initiative, not referendum. "[T]he power of taxation for revenue purposes is probably the most vital and essential attribute of the government. Without such power it cannot function." (*Watchtower Bible & Tract Soc. v. Los Angeles County* (1947) 30 Cal.2d 426, 429.) Accordingly, case law construes our Constitution's exemptions from the taxing power strictly — and against the taxpayer. (E.g., *Cedars of Lebanon Hospital v. Los Angeles County* (1950) 35 Cal.2d 729, 734 [charitable exemption from property tax does not reach assessments].)

Here, the referendum power (but not the initiative) must give way to the taxing power upon application of the canons of

construction to article II, section 9 and to Proposition 218, articles XIII C and XIII D. Public policy demonstrates the voters who approved these constitutional provisions a century apart had a reasoned basis to choose as they did. Amici therefore urge this Court to reverse the Decision and to affirm the trial court's judgment denying Wilde's writ to compel an election on her petition to referend the City's 2016 water rates.

FACTUAL BACKGROUND

Amici adopt the City's Statement of Facts pursuant to California Rules of Court, rule 8.200(a)(5). Nevertheless, a few points bear emphasis.

Dunsmuir's City Council adopted Resolution 2016-02 to raise the $15 million needed to upgrade the City's 105-year-old water infrastructure. (*Dunsmuir, supra,* 29 Cal.App.5th at pp. 164–165.) The City held public meetings to determine its water infrastructure needs. (*Id.* at p. 164.) It held the majority protest proceeding required by article XIII D, section 6, subdivision (a) before adopting the rates challenged here. (*Id.* at p. 165.) Although Wilde attempted to persuade her neighbors to protest, the City received only 40 protests — 800 were needed to defeat the measure under article XIII D, section 6, subdivision (a)(2). (*Ibid.*) Wilde submitted a referendum, which the City Council rejected as improper. (*Ibid.*) Wilde then circulated an initiative petition to repeal the rate increase and to impose lower rates. The initiative qualified for the ballot, but a

"substantial margin" of Dunsmuir voters rejected it. (*Id.* at p. 165; Appellant's Opening Brief, p. 10.)

As these facts demonstrate, the law in effect before the Decision adequately preserves the people's right to legislate. Wilde resorted to both the majority protest procedure required by article XIII D, section 6, subdivision (a) and an initiative to prevent, and then to reverse, the water rate increase. Her neighbors were unpersuaded both times.

ARGUMENT

The Decision mistakenly held Dunsmuir's water rates are not protected from referendum by article II, section 9's exemption of legislation imposing taxes or appropriating funds for general government services. (*Dunsmuir, supra,* 29 Cal.App.5th at p. 172, fn. 3 ["the prohibition on the use of referenda to challenge tax measures does not apply here"].) The Decision interpreted article II, section 9 in the context of Proposition 218, an initiative restricting governments' ability to raise revenue. (*Id.* at p. 170.) Its reading is too narrow: case law before and after Proposition 218 gave broader meaning to article II, section 9's exemption for "statutes providing for tax levies or appropriations for usual current expenses of the State." Moreover, read together, article II, section 9 and article XIII C, section 3 demonstrate voters prioritize government's ability to raise necessary funds over their right to referend revenue measures.

Instead, voters reserved the rights to majority protest and voter approval of certain levies, and initiative repeal of all levies.

This Court found voters reserved the initiative power as to taxes. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 700 ("*Rossi*") ["When the statewide initiative power was added to the Constitution in 1911 as part of newly adopted article IV, section 1, taxation was not only a permitted subject for the initiative, but was an intended object of that power"].) Proposition 218 confirmed that ruling:

> Sec. 3. **Initiative** Power for Local Taxes, Assessments, Fees and Charges. 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. 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**.

(Cal. Const., art. XIII C, § 3 [emphases added].)

The article uses the word "initiative" four times and states its rule "notwithstanding" the provisions of article II governing the

referendum, but otherwise does not mention it. As detailed below, that omission is deemed intentional under the *expressio unius* canon.

I. DUNSMUIR'S WATER RATE INCREASE IS WITHIN ARTICLE II, SECTION 9'S EXCEPTION FOR "TAX LEVIES OR APPROPRIATIONS"

The phrase "tax levies or appropriations" in article II, section 9 is not limited to property taxes as Wilde suggests. (Respondent's Brief, p. 10.) Before the complex initiative restrictions on government finance effected by

- 1978's Proposition 13 (art. XIII A),
- 1986's Proposition 62 (Gov. Code, § 52730 et seq.),
- 1996's Proposition 218 (arts. XIII C & XIII D), and
- 2010's Proposition 26 (art. XIII A, § 3; art. XIII C, § 1, subd. (e)),

"tax" was an encompassing term meaning a "charge, [usually] monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue." (Black's Law Dict. (10th ed. 2014).) For example, in *City of Madera v. Black* (1919) 181 Cal. 306, 310 (*Madera*) this Court used "tax" to refer to a range of revenue measures, including the fee to fund sewer services challenged there. Similarly, discussing a refuse collection charge, this Court stated, "'an excise tax is any tax which does not fall within the classification of a poll tax or a property tax, and embraces

every form of burden not laid directly upon persons or property.'" (*City of Glendale v. Trondsen* (1957) 48 Cal.2d 93, 103–104 (*Trondsen*).)

More recently, *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 660, found "tax" "may be construed narrowly or broadly depending on its particular context and the purposes for which the definition is used. [Citations.] In its broadest sense, a tax includes all charges upon persons or property for the support of government or for public purposes." This Court agreed. *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874, cited *Mills* and acknowledged "that 'tax' has no fixed meaning, and that the distinction between taxes and fees is frequently 'blurred,' taking on different meanings in different contexts."

The framers of our modern tax-limiting initiatives found it necessary to define their terms — but did so only for purposes of the articles and statutes they adopted. (E.g., art. XIII C, § 1, subd. (e) [defining "tax" "**as used in this article**"] and art. XIII D, section 2 [same]; contra Respondent's Brief, p. 9.) Cases decided since voters approved those initiatives still use "tax" to refer to many kinds of levies. (E.g. *Apartment Ass'n. of Los Angeles County, Inc., supra,* 24 Cal.4th at p. 837 ["'Proposition 218 allows only four types of **local property taxes**: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge'"], emphasis added, quoting *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679; see *Community Health Assn. v. Board of Supervisors*

(1983) 146 Cal.App.3d 990, 991 [ban on "license fees, permit fees, charges and/or assessments" falls within article II, section 9's exception for tax levies and appropriations].)

Dunsmuir enacted new water rates to pay for vitally needed upgrades to its 105-year-old utility and to qualify for a federal grant. (*Dunsmuir, supra,* 29 Cal.App.5th at p. 165.) The Decision correctly found the new "water service charge is a fee under article XIII D," but erred to conclude article II, section 9's "prohibition on the use of referenda to challenge tax measures does not apply here." (*Id.* at p. 172, fn. 3.) Given the considerable breadth this and other courts have understood "tax" to convey, this reading is too stinting. Courts have found each of these to be "taxes" (outside of the context of the modern tax-limiting statutes):

- a sewer service fee charge (*Madera, supra,* 181 Cal. at p. 310; accord *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864, 868);
- a refuse collection charge (*Trondsen, supra,* 48 Cal.2d at p. 104);
- motor vehicle license fees, unemployment insurance taxes, business license fees, and workers' compensation act charges. (*Crawford v. Herringer* (1978) 85 Cal.App.3d 544, 549–550 [collecting cases and distinguishing a charge to print argument in election pamphlet].)

Although these cases pre-date Proposition 218 and 26, they nevertheless demonstrate the background law of which the voters who approved those initiatives are charged with notice. Accordingly, absent evidence of voters' intent to change that law, it governs construction of article XIII C.

Dunsmuir's water charges fit neatly among these. In *Trondsen*, this Court compared water charges to sewer and refuse charges in its discussion of the police power to impose levies for government services. (*Trondsen*, 48 Cal.2d at p. 101.) The Decision erred to hold Dunsmuir's water rate increase falls outside the definition of "tax levies and appropriations" as used in article II, section 9.

II. TAX LEVIES AND APPROPRIATIONS ARE EXEMPT FROM REFERENDUM, BUT SUBJECT TO INITIATIVE

The Decision states, and no party disputes, that "taxes" are exempt from referendum. (*Dunsmuir*, *supra*, 29 Cal.App.5th at p. 170 ["From *Myers* through *Rossi*, there was no dispute that tax measures were not subject to **referendum**," original emphasis]; accord *Hunt v. Mayor and Council of City of Riverside* (1948) 31 Cal.2d 619, 623–624 [art. II, § 9 bars referendum on sales tax] and *Geiger v. Board of Sup'rs of Butte County* (1957) 48 Cal.2d 832, 836 [same].) However, *Dare*, *supra*, 12 Cal.App.3d 864, and *Rossi*, *supra*, 9 Cal.4th 688 warrant further discussion because they illuminate the relationship of direct legislation to fiscal measures.

Dare disputed sewer fees. A city ordinance set "varying maintenance charges[] in accordance with the relative difficulty or cost to the District" of treating sewage from various classes of customers. (*Dare*, 12 Cal.App.3d at p. 866.) Voters attempted to change this formula by initiative to relate sewer fees to water consumption. (*Ibid.*)

The Court of Appeal affirmed the trial court's refusal to mandate an election on the measure, concluding the City's ordinance was a "tax" within the meaning of article II, section 9 and therefore immune from referendum and, under the law of that era, immune from initiatives which have the effect of referenda, too. (*Dare, supra*, 12 Cal.App.3d at p. 868.) It cited what is now article II, section 9 and *Myers v. City Council of Pismo Beach* (1966) 241 Cal.App.2d 237 for the rule barring initiatives to repeal or reduce taxes. (*Id.* at p. 867.)

Dare cited *Geiger* and *Hunt*, cases barring referendums on sales taxes, to conclude that fees for government services are exempt from referenda and initiatives with comparable effect to carry out the policy of what is now article II, section 9. Otherwise, the initiative power would provide an end-run around that provision's public-finance-stabilizing policy. (*Dare, supra*, 12 Cal.App.3d at p. 867, citing *Geiger, supra*, 48 Cal.2d at pp. 839-840 ["One of the reasons, if not the chief reason, why the Constitution excepts from the referendum power acts of the Legislature providing for tax levies or

appropriations ... is to prevent disruption of its operations by interference with the administration of its fiscal powers and policies"] and *Hunt, supra,* 31 Cal.2d at p. 629 [city charter "cannot reasonably be construed as contemplating that the council, in making up the annual city budget and in levying permissible taxes to assist in providing necessary city revenue, should be hampered by the uncertainty and delay of referendum proceedings"].)

Thus, when *Dare* was decided, the law read the constitutional prohibition on referendums on taxes to exclude initiatives as well. Respondents dismiss as dicta *Dare's* discussion of the sewer fee initiative as a de facto referendum on a tax. (Respondent's Brief at p. 23; contra *Rossi,* 9 Cal.4th at p. 708.) However, that rationale is central to *Dare*'s legal analysis — because a referendum against Lakeport's sewer fees was barred by article II, section 9, an initiative with the same effect could not evade that Constitutional proscription lest it be meaningless.

Rossi ultimately held that the initiative was not the "functional equivalent of a referendum" such that exercise of the initiative power should be limited by implication from the prohibition of referenda on taxes. (*Rossi,* 9 Cal.4th at p. 711.) In *Rossi,* the Court not only had no occasion to address *Dare*'s conclusion the sewer charge was a "tax levy" under article II, section 9, its discussion of policies underlying what it labelled "the *Myers* rule" supports a conclusion that all fiscal measures are protected from referenda. (*Id.* at p. 705–

711.) *Rossi* reaffirms that the public interest in fiscal planning and stable funding of essential services bars voters from referending government levies but that initiatives are meaningfully different — they allow more notice to government and thus are less destabilizing to public finances.

Rossi addressed an initiative to repeal a San Francisco utility tax and to prohibit the Board of Supervisors from enacting such taxes subsequently. (9 Cal.4th at p. 694.) *Rossi* carefully distinguished initiatives from referenda, noting article II, section 9 exempts taxes only from the latter. (*Id.* at p. 703.) This Court reaffirmed *Geiger's* observation that the Constitution prohibits referenda on tax measures to protect government operations from disruption. (*Ibid.*, quoting *Geiger, supra*, 48 Cal.2d at pp. 839–830.) *Rossi* found initiatives, unlike referenda, do not raise similar concerns because they are not immediately effective. (*Id.* at pp. 703–704.) They must receive sufficient signatures to qualify for the ballot, go before the local board or council for review, and are submitted to voters at the next election. (*Id.* at p. 704.) A local government has ample time to prepare for the electoral outcome. (*Ibid.*)

III. READ TOGETHER, THE CONSTITUTION'S TAX ARTICLES DO NOT ALLOW REFERENDA OF REVENUE MEASURES

The Court of Appeal here correctly found that Proposition 218 did not affect case law holding tax levies exempt from referendum.

Article XIII C, section 3, quoted above, makes that plain. Furthermore, the canons of construction, when applied to article II, section 9 and article XIII C, section 3, as well as XIII D, section 6 (providing approval procedures for property related fees like that contested here), support the conclusion that the initiative power extends to government revenue measures which fund essential services, but the referendum power does not.

One such canon is that sections of law should be harmonized if possible. (E.g., *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955 ["A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions"].) Accordingly, the Court should read article II, section 9 and the Constitution's tax articles to give meaning to each. Amici's reading of the Constitution does so, while Wilde's reading adds language to article XIII C, section 3 and strips article XIII D, section 6, subdivisions (a) and (c) of much of their force.

Article XIII C, section 3 explicitly provides for voter initiatives — the power to initiate legislation — on local taxes, assessments, fees, and charges, but omits reference to referenda — the power to reject what a legislative body has wrought. Article XIII D, sections 4 and 6 dovetail with that omission, creating alternative procedures for those who bear the cost of government services — protest proceedings for assessments (§ 4, subds. (c)–(e), (g)) and property

related fees or charges (§ 6, subd. (a)(2)), and voter approval of property related fees or charges for services other than water, sewer and refuse removal (§ 6, subd. (c)). These provisions accommodate article II, section 9 by allowing property owners and fee-payors means to block new or increased assessments and fees while respecting its prohibition on referenda. Thus, Proposition 218 provided protest procedures as the way to reject what a legislative body has initiated before, not after, it does so. It respected *Rossi's* distinction between the disruption of an immediately effective referendum and an initiative which provides more notice to government.

In contrast, Respondent's reading inserts "referenda" into Article XIII C, section 3 and curtails the power assigned to property owners, legislators, and voters by XIII D, sections 4 and 6. (Respondent's Brief, p. 29.) Why bother organizing a majority protest under either section 4 or section 6 if a referendum has the same effect and can be accomplished in a city the size of Dunsmuir with just 100 signatures? (Compare art. XIII D, § 4, subd. (e) ["The agency shall not impose an assessment if there is a majority protest" by property owners] and *id.*, § 6, subd. (a)(2) ["If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge"] with Elec. Code, § 9237 [referendum requires signatures

of 10 percent of voters unless city has 1,000 or fewer voters, in which case the lesser of 25 percent or 100 voters suffices].)

Respondent's reading of our Constitution does not merely duplicate Proposition 218's majority protest process, it undermines their utility to promote the dialog between government and those it serves that this Court envisioned. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 220, 220–221 (*Bighorn*) ["The notice and hearing requirements of subdivision (a) of section 6 of California Constitution article XIII D will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive"], fns. omitted.)

Just as courts must harmonize the various provisions of our Constitution, they must also "give significance to every word, phrase, sentence, and part of an act." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83, internal quotations omitted.) Courts "do not construe statutes in isolation, but rather read" the law as a whole. (*Ibid.*, internal quotations omitted.) Wilde violates this canon by ignoring the language of both article II, section 9 and article XIII C, section 3, allowing only initiatives to challenge revenue measures. Her reading would also disregard article XIII D, section 6, subdivision (c)'s partial exemption for water, sewer, and trash fees from the election requirement.

As applied to article XIII C, the *expressio unius* canon also supports the conclusion that revenue measures are exempt from referendum. Proposition 218 specifically addresses article II, section 9 (and, for good measure, section 8's reservation of the initiative power.) (Cal. Const., art. XIII C, § 3 ["Notwithstanding any other provision of this constitution, including, but not limited to, Sections 8 and 9 of Article II ..."].) It does not leave to implication its effect on these earlier provisions — preserving only the initiative power — using the word four times. (*Ibid.*) Under the *expressio unius* canon, had the voters who approved Proposition 218 intended to reach referenda, that word would appear in article XIII C, section 3. Its omission is therefore understood as intentional. (E.g., *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 514 ["the explicit mention of some things in a text may imply other matters not similarly addressed are excluded"].)

Other omissions from article XIII C have likewise been found purposeful. (E.g., *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1191 [concluding Proposition 218 did not impliedly repeal city annexation statutes, citing the *expressio unius* canon and Sherlock Holmes' "dog that did not bark"]; *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1328–1329 [Proposition 26 limited to fees which fund government]; cf. *Center for Community Action & Environmental Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th

689, 699 [statute allowing referendum of development agreement impliedly excluded initiative].)

The Legislative Analyst's analysis of Proposition 218 clearly discusses initiatives but makes no mention of referenda. (Understanding Proposition 218 (1996), reprinted in League of California Cities, Propositions 26 and 218 Implementation Guide (May 2019), p. 155, at <http://www.cacities.org/Prop218andProp26> [as of May 13, 2019].) Similarly, the Howard Jarvis Taxpayers Association, a sponsor of Proposition 218, published an annotation of the measure circulated during the campaign that might constitute legislative history. It agrees article XIII C, section 3 did not affect the referendum power, but "merely 'constitutionalizes' *Rossi v. Brown*, a recent decision of the California Supreme Court upholding the right of the electorate to use the local initiative power to reduce or eliminate government imposed levies via the initiative power. It provides as 'last resort' remedy." (Howard Jarvis Taxpayers Association, Right to Vote On Taxes Act (Proposition 218) [Annotated as of September 5, 1996], reprinted in League of California Cities, Propositions 26 and 218 Implementation Guide (May 2019), pp. 162–163, at <http://www.cacities.org/Prop218andProp26> [as of May 13, 2019]; *Carmen v. Alvord* (1982) 31 Cal.3d 318, 331, fn. 10 [contemporaneous statement of initiative drafter may inform its construction]; but see *Johnson v. County of Mendocino* (2018) 25 Cal.App.5th 1017, 1031

[declining notice of Howard Jarvis Taxpayers Association leader's post-election article expressing view of Prop. 218's intent].) As discussed above, *Rossi's* holding applies only to the initiative power; thus, any codification of that holding is similarly limited.

The voters who adopted Proposition 218 have already decided how to allocate decision making power as to revenue measures among property owners, other fee-payors, and legislators. To read into article XIII C, section 3 a new voter approval requirement voters did not adopt would rewrite these allocations. (Cf. *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, 392 [invalidating charter amendment requiring two-thirds voter approval of general taxes as article XIII C, § 2, subd. (b) requires only majority approval].) Nothing in the text of article II, section 9 or article XIII A, XIII C, or XIII D suggests assessments, charges, or fees are subject to referendum. Read together, the provisions limit voters' power in some instances and government's power in others. As voters have struck that balance, courts have but to discern and respect that intent, not alter it to serve Wilde's policy preferences.

IV. PUBLIC POLICY SUPPORTS ALLOWING MAJORITY PROTESTS AND INITIATIVES, BUT NOT REFERENDA, ON WATER RATES

Allowing referenda on funding measures impairs fiscal planning. A referendum delays implementation of the challenged resolution immediately upon certification of signatures (*Rossi, supra,*

9 Cal.4th at p. 697), as is presently true of a new bail reform statute, Senate Bill 10, chapter 244 of the Statutes of 2018, which can become law only if voters approve at the 2020 election. The impact of a referendum on government's ability to plan efficient service delivery is plain.

"[I]f a tax measure were subject to referendum, the county's ability to adopt a balanced budget and raise funds for current operating expenses through taxation would be delayed and might be impossible. As a result, the county would be unable to comply with the law or to provide essential services to residents of the county." (*Rossi*, 9 Cal.4th at p. 703.) Respondent dismisses *Rossi*'s as an outdated concern, noting that taxes now require voter approval. (Respondent's Brief, p. 27.) However, that was also true, albeit to a lesser extent, when this Court decided *Rossi*. (Cal. Const., art. XIII A, § 4 [requiring voter approval of special taxes]; Gov. Code, §§ 53722 & 53724 [requiring voter approval of all taxes imposed by counties, special districts, and general law cities]; *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 240 [Proposition 62's requirement for voter approval of taxes is not invalid as a de facto referendum in violation of article II, § 9]; *Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 46–47 [Proposition 62 inapplicable to charter cities because a statutory, not constitutional, initiative].)

Therefore, liberal construction of the referendum power does not defeat its express exemption for "tax levies and appropriations" or require narrow construction of those terms to exclude other revenue measures which fund essential services.

Furthermore, *Dunsmuir* misread *Rossi* to ask whether the City's water rates were "essential" to its functioning, establishing a new and amorphous standard inviting courts to evaluate the degree to which particular services are "essential." If water supply — a necessity of life itself — is not essential, what is? Such line-drawing exercises are fundamentally legislative and, therefore, assigned by our constitutional order to the politically responsive branches. *Rossi* only established that revenue measures were subject to initiative despite article II, section 9 exempting them from referenda. It did not provide criteria to determine whether particular levies are sufficiently "essential" to constitute "tax levies and appropriations" immune from referenda. This Court should reverse the Decision and respect the Constitution's language exempting revenue measures "for usual current expenses" — language which seems far more encompassing than "essential." That reading provides the stability and credit-worthiness for government finance the voters who adopted the language of what is now article II, section 9 intended a century ago.

Moreover, the Decision's holding needlessly creates a chicken-and-egg problem for municipal budgets: "Rather than invalidating

the regular expenditure of **previously budgeted funds** for essential services, Wilde's referendum would have **prospectively cancelled** the City's newly **adopted master plan** to spend $15 million on infrastructure and reallocation of water costs." (*Dunsmuir*, 29 Cal.App.5th at pp. 177–178, emphasis added.) This gets *Rossi*'s teaching about the impacts of referenda and initiatives precisely backward. Wilde's referendum would have caused an immediate halt to long-delayed, vital improvements to Dunsmuir's water utility. The unsuccessful initiative did not have the immediate and disruptive effect.

Case law has recognized that voters cannot defund essential government services. (*Mission Springs v. Virgil* (2013) 218 Cal.App.4th 892, 921 [statute forbids district to set rates below cost; neither may voters by initiative]; cf. *Bighorn, supra*, 39 Cal.4th at p. 220 ["We presume local voters will give appropriate consideration and deference to a governing board's 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"].) The referendum proposed here would prevent the City from funding its water utility, of which infrastructure maintenance is an essential part. Under *Mission Springs*, voters have no such power. (Cf. *Simpson v. Hite* (1950) 36 Cal.2d 125, 134 ["The initiative or referendum is not

applicable 'where the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential'"].)

Respondent's reading of our Constitution will impair local government's ability to borrow. The immediate loss of funding authority when a referendum petition is certified as containing the requisite signatures (just 100 here), accompanied by a delay of up to two years to resolve the challenge (Elec. Code, § 9241), will make local governments less credit-worthy. Allowing voters to referend revenue measures creates risk to lenders that will increase the cost of financing infrastructure projects like Dunsmuir's. Any attempt to estimate the costs and risks of a project will have to account for the possibility voters might interrupt the project's revenue source, limiting local governments' ability to negotiate favorable terms.

Proposition 218, which expanded the initiative power to tax measures, was careful to limit voter initiatives from interfering with government's financial agreements. The Howard Jarvis Taxpayers Association found it necessary to update its pre-election annotation of Proposition 218 shortly after its approval to, inter alia, rebut arguments the measure had undermined local governments' ability to borrow by imputing to lenders risk of initiative repeal of revenues once bonded. (Howard Jarvis Taxpayers Association, Proposition 218: Right to Vote on Taxes Act, Statement of Drafters' Intent (Jan. 2, 1997), reprinted in League of California Cities, Propositions 26 and

218 Implementation Guide (May 2019), pp. 178–180, at <http://www.cacities.org/Prop218andProp26> [as of May 13, 2019] [arguing Prop. 218 does not affect government's ability to issue bonds].) Coming after the election as it did, this annotation cannot speak to the intent of voters who acted two months before, but it does indicate that even the sponsors of Proposition 218 understood 20 years ago that utility services are essential and, as capital-intensive enterprises, require access to borrowed capital.

In any event, the Proposition 218 Omnibus Implementation Act of 1997 quickly provided that lenders are not charged with knowledge that bond revenue for debt service might be subject to initiative. (Gov. Code, § 5854; *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 291 [Omnibus Act good authority to construe Prop. 218].)

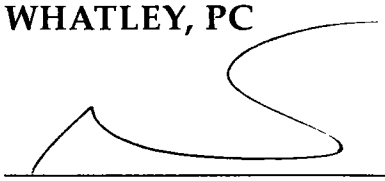
Thus, the Legislature and the courts have expressed our constitutional commitments to direct democracy and to limits on those reserved powers to maintain government's power to fund essential services. Nothing in article II, section 9 or article XIII C, section 3 requires a change in that long-standing policy. Proposition 218 establishes the power of initiative to repeal or reduce a tax, assessment or property related fee, but it does not alter the earlier rule that such revenue measures are not subject to referendum.

CONCLUSION

The Decision misconstrued article II, section 9's exception to the referendum power, intended to stabilize funding for public services. Its reading disserves the language of the relevant constitutional provisions, the canons of construction, and the policy choices evident in our Constitution. *Rossi*'s observation of the differences between initiatives and referenda for fiscal stability remains persuasive. Accordingly, Amici urge this Court to reverse the Court of Appeal and affirm the trial court judgment denying Wilde's petition for mandate to compel an election on her referendum against rates twice approved by Dunsmuir's residents. Should she wish a third bite at the apple, she may propose another initiative.

DATED: May 20, 2019

COLANTUONO, HIGHSMITH & WHATLEY, PC



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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(b) and 8.204(c), the foregoing Brief of Amicus Curiae contains 5,296 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000-word limit of rules 8.520(b) and 8.204(c). In preparing this certificate, I relied on the word count generated by Microsoft Word for Office 365, included in Microsoft Office 365 ProPlus.

DATED: May 20, 2019

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PROOF OF SERVICE

Leslie T. Wilde v. City of Dunsmuir, et al.
Supreme Court Case No. S252915
Third District Court of Appeal Case No. C082664
Siskiyou County Superior Court Case No. SCCVPT16549

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. My email address is: ALloyd@chwlaw.us. On May 21, 2019, I served the document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, AND LEAGUE OF CALIFORNIA CITIES** on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST FOR METHOD OF SERVICE

☒ **BY MAIL**: The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Grass Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION**: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on

the service list on May 21, 2019 from e-mail address: ALloyd@chwlaw.us. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

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

Executed on May 21, 2019, at Grass Valley, California.

Ashley A. Lloyd

SERVICE LIST

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Supreme Court Case No. S252915
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