SUPREME COURT OF CALIFORNIA

S252915

LESLIE T. WILDE,

Plaintiff, Appellant Below, Respondent

v.

CITY OF DUNSMUIR et al.,

Defendants, Respondents Below, Petitioners.

Court of Appeal, Third Appellate District, Case No. C082664
Superior Court, County of Siskiyou, Hon. Anne Bouliane
Civil Case No. SC CV PT 16-549

WILDE'S ANSWER TO BRIEF OF AMICI LOCAL GOVERNMENT ASSOCIATIONS

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INTRODUCTION

The City of Dunsmuir stipulated below, as it should have, that its water rates are property-related "fees" governed by article XIII D, section 6, not "taxes" governed by article XIII C, section 2. The City never raised article II, section 9 in any of its briefs, and the Court of Appeal assumed that, due to the parties' stipulation, article II, section 9 was not at issue.[1]

> "Wilde and the City agree Resolution 2016-02's water rate charges are fees rather than taxes. Based on the parties' agreement, we assume without deciding that a water service charge is a fee under California Constitution, article XIII D when it is imposed, as here, as an incident of property ownership. (See *Bighorn-Desert* [*View Water Agency v. Verjil* (2006) 39 Cal.4th 220] at p. 215.) Consequently, the prohibition on the use of referenda to challenge tax measures does not apply

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[1] Recently, a different panel of the same Court of Appeal sided with amici, parting from the Court below, creating a split of authority. In *Howard Jarvis Taxpayers Association v. Amador Water Agency* (June 14, 2019), 3d DCA No. C082079, 2019 Cal.App. LEXIS 543, the other panel ruled that, in 1911 when the referendum power was added to the constitution, "taxes" had a broad meaning that encompassed user fees such as water rates; therefore the people today have no power to referend water rate increases: "While user fees for water services are not "taxes" in the post-Proposition 13 era ... [t]he question is what does "tax" mean as used in the general referendum provision adopted in 1911." (*Id.* at 26-27.) "Because we conclude the term 'taxes' in the general referendum provision (Cal. Const., art. II, § 9) includes user fees for water services, Resolution 2015-19 is not subject to referendum." (*Id.* at 43.)

Undersigned counsel also represents plaintiffs Howard Jarvis *et al.* in the *Amador* case. At this writing, counsel is asking for a rehearing of *Amador* and, if it is denied, will be asking this Court to grant review. Therefore, *Amador* should not be considered final or authoritative at this time.

here. (*Id.* at p. 215.)" (*Wilde v. City of Dunsmuir* (2018) 29 Cal.App.5th 158, 172, fn. 3.)

Amici local government associations fault the Court of Appeal because, in their view, its reading of article II, section 9 was "too narrow." (Amicus Brief at 15.) They say, "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.'" (Amicus Brief at 19.) "*Tax* measures," in amici's view, include the price charged to customers for their consumption of water. (*Id.* at 20.)[2]

Amici are improperly trying to rewrite history. In 1911 when the constitution was amended to include the referendum power, the law already distinguished taxes from fees and benefit assessments. To suggest that those distinctions were created by Proposition 13 and its progeny is dishonest.

Although discussed in Wilde's Respondent's Brief, this Answer to the Amicus Brief contains more analysis, and more examples, of the state of the law and the voters' intent when they approved Proposition 7 at the 1911 General Election. First, however, it addresses the important question as to which rule of construction applies to this case.

ARGUMENT

I

ALL DOUBTS MUST BE RESOLVED IN FAVOR OF THE PEOPLE'S RESERVED REFERENDUM POWER

Amici inform this Court that it is "not required or even permitted" to consult the canons of interpretation which liberally construe the people's

[2] Unless noted otherwise, all emphasis is added.

referendum power and *narrowly* construe its exceptions, because, they say, the intent of article II, section 9 is "evident from our Constitution's text." (Amicus Brief at 13.) Amici then invite the Court to look *beyond* the constitution's plain text (excepting only "tax levies or appropriations for usual current expenses of the State") and to *liberally* construe the exception to include the price charged to customers for consumption of water. (Amicus Brief at 17.) They argue, "case law construes our Constitution's exemptions from the taxing power strictly – and against the taxpayer. Here, the referendum ... must give way to the taxing power upon application of the canons of construction to article II, section 9." (Amicus Brief at 13-14.)

Despite their introductory contention, then (that canons of construction need not be consulted), amici immediately ask the Court to apply a canon of construction (strictly construing exceptions to the taxing power – against taxpayers) to overcome the common definitions that differentiate the words "tax" and "fee."

This Court has never declared itself the jealous guardian of the government's taxing power. It repeatedly declares, rather, that it is the jealous guardian of the people's referendum power. (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1140; *Indep. Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1032.)

In our system, the government is not sovereign; the people are. Any power of government to tax the people was granted to it by the people, for "[a]ll political power is inherent in the people." (Cal. Const., art. II, § 1.) "That grant of power is an essential prerequisite to all local taxation, because local governments have no inherent power to tax." (*Santa Clara County Local*

Transp. Auth. v. Guardino (1995) 11 Cal.4th 220, 248; *In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 73.)

While granting the power to tax, the people reserved the power to referend other legislation. Therefore, in choosing which canon of construction to apply, as the jealous guardian of the sovereign people's reserved power, the Court must apply the one that construes *narrowly* the exceptions to the referendum power.

> "Drafted in light of the theory that all power of government ultimately resides in the people, the [1911] amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[I]t has long been our judicial policy to apply a liberal construction to this power whenever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.' [Citations.] (*Indep. Energy Producers Assn. v. McPherson*, 38 Cal.4th at 1032.)

"In response to this broad constitutional reservation of power in the people, the courts have consistently held that the Constitution's initiative and referendum provisions should be liberally construed *to maintain maximum power in the people*. [Citations.] Any doubts should be resolved in favor of the exercise of these rights. [Citations.]." (*Carlson v. Cory* (1983) 139 Cal.App.3d 724, 728.)

Contrary to amici's suggestion, then, the Court must interpret article II, section 9 mindful of its "solemn duty" (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501) "to maintain maximum power in the people." (*Carlson v. Cory*, 139 Cal.App.3d at 728.) It must liberally construe the people's power to referend ordinances and "narrowly construe provisions that would burden or limit its exercise." (*Cal. Cannabis Coal. v. City of Upland* (2017) 3 Cal.5th 924, 946.) That includes the provision carving out an exception for "tax levies."

II

AT THE TIME ARTICLE II, SECTION 9, WAS ADDED, THE LAW ALREADY DISTINGUISHED FEES FROM TAXES, AND UNDER THAT LAW, THE CITY'S FEES ARE NOT TAXES

If anyone benefits from the plain words of article II, section 9 ("tax levies"), it is the taxpayers. Whether the Court looks at the way "tax" and "fee" are understood today, or how they were understood in 1911, they are not synonymous or interchangeable. They refer to different governmental actions, exercised under different governmental powers, for different governmental purposes.

As amici admit, the terms "tax," "fee," and "assessment" are today defined by voter initiatives that have amended the state constitution. (Amicus Brief at 17.) Today, the constitution in article XIII C, section 1(e) defines "tax" to exclude "fees," and in article XIII D, section 2(e) defines "fee" to exclude "taxes." The definition of "fee" in section 2(e) "includ[es] a user fee or charge for a property related service," such as water service. (*Bighorn - Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216-17.) "Assessments" are neither taxes nor fees (art. XIII D, § 3(a)), but are compensation for public improvements built and maintained to specially benefit certain private properties (*id.*, § 2(b)).

These lines of demarcation are not a new phenomenon. In 1911, when article II, section 9 was added to the constitution, the law recognized the same three basic classifications of government charges: (1) taxes, (2) benefit assessments, and (3) fees. First, the law distinguished taxes from benefit assessments:

> "Taxes are a public imposition, levied by authority of the government, upon the property of the citizen generally, for the purpose of carrying on the government, while the more restricted term 'assessment' is usually, as it was in the present case, induced by the request ... of a majority of the inhabitants of the assessment district, and is levied for the benefit of the property situated within the particular district; the assessment being an equivalent from the owner for the improvement made to the value of the property. Such assessments are not collected like public taxes, but generally, as in the case here, a particular mode of recovering the charge is pointed out by the statute." (*Wood v. Brady* (1885) 68 Cal. 78, 80.)

In fact, in the same year that article II, section 9 was added to the constitution, the Improvement Act of 1911 was added to the Streets and Highways Code, providing a procedure for property owners to propose and vote on the formation of assessment districts for the construction of public improvements that will specially benefit their private property, to be financed by assessments apportioned according to each parcel's benefit. (Sts. & Hwy. Code §§ 5000 *et seq.*)

More importantly, the law in 1911, like the law today, distinguished taxes from fees. Today, the law recognizes different types of valid fees. That

the law in 1911 also recognized these differences was more fully developed in Wilde's Respondent's Brief. Most relevant in answering amici is that the law in 1911 recognized "user fees" and distinguished them from taxes.

"User fees" are collected when a local agency does business with citizens in its capacity as an enterprise or service provider. Unlike taxes, user fees are "charged only to those who use the goods or services. The amount of the charge is related to the actual goods or services provided to the payer." (*San Marcos Water Dist. v. San Marcos Unified Sch. Dist.* (1986) 42 Cal.3d 154, 162; *Isaac v. City of L.A.* (1998) 66 Cal.App.4th 586, 597; *Utility Audit Co., Inc. v. City of L.A.* (2003) 112 Cal.App.4th 950, 957; *Bay Area Cellular Tel. Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 694.)

The water rates at issue in the case at bar are user fees for the provision of a service, not taxes. "Under California case law, water rates are considered user or commodity charges because they are based on the actual consumption of water." (*Rincon Del Diablo Mun. Water Dist. v. San Diego County Water Auth.* (2004) 121 Cal.App.4th 813, 819.)

The same legal distinction between taxes and user fees was recognized in 1911. In the 1908 case of *City of South Pasadena v. Pasadena Land and Water Company* (1908) 152 Cal. 579, the City of South Pasadena sued to enjoin a private water company that served its citizens from selling the company's water rights and water works to the City of Pasadena. South Pasadena raised several objections and concerns, including whether one taxing authority could constitutionally collect revenue from the citizens of another taxing authority. This Court held that Pasadena would be acting as an enterprise:

> "[T]he rule is invoked that there cannot be two municipalities exercising the same powers at the same time within the same

> territory. But the two cities would not be of equal authority with respect to the use of water in South Pasadena. ... In the carrying on of the water service to the people of South Pasadena the City of Pasadena will not be acting in its political, public, or governmental capacity as an agent of the sovereign power equal in all respects to the city within which it operates. 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." (*Pasadena Land & Water* (1908) 152 Cal. at 592-93.)

Today, no property-related fee "may be imposed for general governmental services." (Art. XIII D, § 6(b)(5).) Dunsmuir's water service fees, for example, can *only* be used to provide the water service ordered by private customers for their use. (*Id.*, § 6(b).) User fees in general can be invalidated as unauthorized taxes to the extent "(1) the fee exceeds the reasonable cost of providing the service ... or (2) the fee is levied for general revenue purposes." (*Isaac*, 66 Cal.App.4th at 597; *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 234; *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 928.)

In 1911 it was similarly understood that user fees cannot exceed the cost of service so as to generate General Fund revenue, as explained in this Court's 1897 decision in *Fatjo v. Pfister* (1897) 117 Cal. 83. Plaintiff in that case, the executor of a decedent's estate, challenged a statute which set the County Clerk's fee for filing most documents at five dollars but set the fee for filing an appraised inventory of a decedent's estate at five dollars plus "one dollar for each additional thousand dollars of the appraised valuation in excess

of three thousand dollars." (*Fatjo*, 117 Cal. at 85.) This Court invalidated the "fee" to the extent it exceeded five dollars as being an unauthorized tax:

> "It is perfectly plain that the legislature has attempted by that portion of section one, above quoted, to levy a property tax upon all estates of decedents. ... The ad valorem charge for filing the inventory is in no sense a fee, or compensation for the services of the officer, which are the same, as respects this matter, in every estate, large or small. To call it a fee is a transparent evasion." (*Fatjo*, 117 Cal. at 85.)

This same distinction between taxes and fees is seen in this Court's 1906 decision in *County of Plumas v. Wheeler* (1906) 149 Cal. 758. *Wheeler* was an action by the County to recover from sheep ranchers a license fee for the operation of their business. The ranchers defended by arguing that the fee exceeded the reasonable cost to the County of regulating their business. In ruling for the ranchers, this Court said that, although the County was authorized to require a license and collect a fee, it was "well settled" – in 1906 – that "[t]he amount of the license fee, however, must not be more than is reasonably necessary for the purpose sought, *i.e.* the regulation of the business. If it is so great that the court can plainly see that the purpose of its imposition was to realize a revenue under the guise of regulating the business, the provision for the fee cannot stand as an exercise of the police power." (*County of Plumas v. Wheeler* (1906) 149 Cal. 758, 761-63.)

More specific to the case at bar, because it involved a user fee and because both parties rely on it, is *City of Madera v. Black* (1919) 181 Cal. 306, where this Court invalidated a sewer rate because it exceeded the cost of service. The City of Madera operated a public sewer system for which it

charged residential customers $1 per month. The City sued one of its customers to collect a delinquent bill. The defendant customer answered the complaint by alleging that the sewer fee was invalid because it was excessive and, to that extent, constituted an unauthorized tax.

Initially there was a question whether the Superior Court or the Recorder's Court had jurisdiction over the complaint. If the case involved the validity of a tax, then the Superior Court had jurisdiction. (*Madera v. Black*, 181 Cal. at 308.) Accepting the allegations in the customer's answer as true, the Court stated, "A tax, in the general sense of the word, includes every charge upon persons or property, imposed by or under the authority of the legislature, for public purposes." (*Id.* at 310.) That quote, in context, does not help amici or the City of Dunsmuir, yet they are very fond of reciting it.

The Court then turned to the merits: "The respondent's main argument is that the charge ... is an ordinary debt owed by the defendant to the plaintiff for services performed by plaintiff for the defendant in carrying away sewage from his premises. ... If the argument of the respondent, that it is a debt, is tenable, it must be upon the theory that the city, in its proprietary capacity, is the owner of the sewer and that it was operating the same in that capacity. (*Id.* at 311-12.)

> "It has been held that the power to construct and maintain sewers is possessed by cities ... 'as incident to the general and express power to construct and maintain streets.' [Citations.] But it is obvious that the power to construct and maintain sewers does not include authority to raise revenue for general purposes. ... [T]he power to maintain a sewer may carry by implication the additional power to levy a monthly charge to raise money for

the repairs and upkeep of such sewer. But the rates here imposed upon the sewer users were obviously for purposes additional to that of paying the expenses of repairs and maintenance. The sum of $ 40,734.92 has been raised in this manner. More than three-fourths of this sum has been transferred to other funds and used for purposes other than repairs to the sewers and expenses of their maintenance. More than half of it has been paid out for the general expenses of the city government. ... It must therefore be presumed that the high rates were imposed in order to bring about the known and inevitable result -- that is, the accumulation of a fund for the general benefit of the city and thereby enable it to fix a lower rate of taxes for general purposes. ... This would be an unjust discrimination and an unfair burden upon those who used the sewer, and it is clearly beyond any power possessed by the city. It follows that the charges were excessive and unreasonable. They were imposed upon the persons concerned without their consent .... A court cannot apportion the charge or ascertain and allow such portion as it might find reasonable ... The entire charge must therefore be declared invalid." (*Madera v. Black*, 181 Cal. at 313-15.)

Another user fee case was *Henderson v. Oroville-Wyandotte Irrigation District*, where water customers who lived outside the boundaries of an Irrigation District that served them with water sued the District for charging them rates that were higher than the rates paid by resident members of the District. The District defended the suit by arguing that the residents actually bore the same net cost because, in addition to their water rates, they also paid taxes to the District. The Court rejected this defense:

> "[The alleged] cost of water to the members of the district, however, includes the revenues from taxes and assessments paid by the members of the district in addition to the acre-foot rate charged all water users. The weak link in the district's argument is that the revenues raised by taxes and assessments are not wholly and perhaps not at all used for the purpose of furnishing and delivering water to the users thereof." (*Henderson v. Oroville-Wyandotte Irr. Dist.* (1931) 213 Cal. 514, 532; see also *Rutherford v. Oroville-Wyandotte Irr. Dist.* (1933) 218 Cal. 242, 244-45.)

In *Shelton v. City of Los Angeles*, another case near the time of the referendum amendment, a taxpayer sued to enjoin the City from selling bonds, without voter approval, that exceeded the City's debt limit under article XI, section 18, of the state constitution. The bonds were for the repair and construction of water works, to be repaid exclusively from water rates for the sale of water. The sole question before the Court was whether the bonds created an indebtedness to be satisfied out of revenues derived by the City "from the exercise of the power of taxation." The Court rejected the theory:

> "[T]his obligation or 'liability,' as the latter term is used in the constitution, is not a financial one in default of which the city would be required to disburse the general funds of the city or other moneys derived from taxation. The argument that the obligation of the legislative body of the city to safeguard the credit of the city by approving adequate water rates would amount to a 'liability' within the constitutional section is not persuasive." (*Shelton v. City of Los Angeles* (1929) 206 Cal. 544, 551.)

It is clear from the cases above that, around the time the constitution was amended to include the referendum power, the law separated fees from taxes and required that fees not exceed the cost of the service for which they were charged; they had to be separately accounted for in their own fund, not commingled with the General Fund. Contrary to amici's claim, then, the law at that time did not use the term "tax" or "tax levies" loosely to refer to all financial transactions between individuals and the government, at least not in cases where the distinction between taxes and fees was at issue.

Fully aware of the law at that time, the drafters of the referendum provision used terminology that described taxes, but not fees: "tax levies ... for usual current expenses of the State." (Art. II, § 9.)

Besides the word "tax," the exception adds "for usual current expenses of the State." While *taxes* are collected to pay "usual current expenses" for the government's general operations, from police and fire to streets and parks, *user fees* then and now cannot be appropriated for "usual current expenses" of the government. The cases above, *Fatjo v. Pfister* (1897) 117 Cal. 83, *County of Plumas v. Wheeler* (1906) 149 Cal. 758, and *City of Madera v. Black* (1919) 181 Cal. 306, illustrated that user fees could only pay for the specific service requested by a customer, they could not be padded to generate revenue for "usual current expenses" of the government.

The other side of this coin is that taxes *are* imposed for the "usual current expenses" of the government. While property-related fees can *only* be used to provide the service ordered by customers for their use (art. XIII D, § 6(b)), and can *not* be imposed "for general governmental services" (*id.*), and can *not* be imposed "unless that service is actually used by, or immediately available to" the payer (*id.*), these limitations do not apply to taxes. Taxes can

and do pay "for general governmental services." They can be exacted whether or not those services are "actually used by, or immediately available to" the tax payer.

Accordingly, the law considers two factors especially important in determining whether a charge is a tax or a fee. Unlike fees that pay for a specific commodity or service provided at the behest of the payer:

> "[G]enerally speaking, a tax has two hallmarks: (1) it is compulsory, and (2) it does not grant any special benefit to the payor. [¶] First, 'The word tax, in its common acceptation, *denotes some compulsory exaction*, which a government makes upon persons or property within its jurisdiction, for the supply of the public necessities.' [¶] Second, as Witkin succinctly puts it, '*no compensation is given to the taxpayer* except by way of governmental protection and other general benefits.' Taxation 'promises nothing to the person taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good.'" (*Cal. Chamber of Commerce v. State Air Res. Bd.* (2017) 10 Cal.App.5th 604, 640-41 (ital. in orig., citations omitted).)

"Indeed, '[n]othing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.'" (*Bay Area Cellular*, 162 Cal.App.4th at 695; quoting *Knox v. City of Orland* (1992) 4 Cal.4th 132, 142.)

These same factors were considered hallmarks of a tax at the turn of the century when the referendum power was included in our constitution:

> "The word tax, in its common acceptation, denotes some *compulsory exaction*, which a government makes upon persons or property within its jurisdiction, for the supply of the *public* necessities. It is ordinarily assessed beforehand at stated periods, and collected at appointed times. Its payment is enforced ... by the sale of property. The law in question, however, partakes of none of these qualities. ... It is in the nature of a fee." (*People ex rel. Atty. Gen. v. Naglee* (1850) 1 Cal. 232, 253.)

In sum, when article II, section 9, was added to the constitution in 1911, the law at that time differentiated between taxes and fees in largely the same way it does today. If the drafters of the referendum provision wanted to include fees, they could have added the word "fees" or used more generic terminology. They didn't.

Moreover, the wording they did choose to describe the referendum exception signals a conscious decision to limit the exception to taxes, not fees. The exception applies only to "tax *levies*." In 1911, California had no income tax or sales tax, but it had a property tax. (https://lao.ca.gov/2007/tax_primer/tax_primer_040907.aspx.) Today, as then, property taxes for the year become a lien on the taxed property as of January 1st. (http://www.boe.ca.gov/proptaxes/pdf/pub29.pdf at 10.) If property taxes are not timely paid, the property is "levied" through foreclosure and sale. (*Id.* at 13.) That was the sense of the word in 1911. "The word 'levy' ... in its usual sense means the obtaining of money by seizure and sale of property. (2 Bouvier's Dictionary, 194; Standard Dictionary; Webster's Dictionary; *State v. Camp Sing*, 18 Mont. 145, [56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516].)" (*Hayne v. San Francisco* (1917) 174 Cal. 185, 195.) "Taxes are a public imposition, levied by authority of the government, *upon the property of the citizen* generally, for

the purpose of carrying on the government." (*Wood v. Brady* (1885) 68 Cal. 78, 80.) Their "payment is enforced ... *by the sale of property*." (*People ex rel. Atty. Gen. v. Naglee* (1850) 1 Cal. 232, 253.)

With a user fee such as water rates, there is no automatic lien created on the customer's property. In fact, one need not own the property where he resides to have water service. Half the water customers in a typical California city are renters who own nothing the city could levy. If they don't pay their bill, the city simply turns off the service.

Informed of these many distinctions between taxes and fees, the drafters of the referendum provision used terminology ("[1] tax [2] levies ... [3] for usual current expenses") applicable to taxes, but inapplicable to fees. Fees were not classified as taxes, but were distinguished from taxes by the courts at that time. Fees were not secured by property that could be levied. Fees were not compulsory, like taxes, but were triggered by the payer's volition. And fees were limited in their use to the regulation, commodity or service provided to the payer. They could not be used for "usual current expenses" of the public agency.

Viewed through a 1911 lens, then, the City's water rates here do not qualify as "tax levies." They are not secured by property that can be levied. They are not compulsory, but become due only if the payer first establishes a connection, then consumes water. They are not fixed without regard to whether the payer receives a benefit. To the contrary, the amount owed is directly related to the level of service requested and the volume of water consumed. And they cannot be deposited in the City's General Fund and used for its usual current expenses. They can be used only to provide water service to service subscribers, and cannot exceed the costs attributable to the individ-

ual payer. Today, as in 1911, water fees are not tax levies exempt from the referendum power.

III

THE POST-1911, PRE-PROP. 218 CASES CITED BY AMICI ARE NOT INDICIA OF VOTER INTENT IN 1911, OR CURRENT LAW

Amici's theory, that article II, section 9's exception from the referendum power for "tax levies or appropriations for usual current expenses of the State" also exempts the price charged to customers for water consumption, is built entirely on cases decided generations *after* the voters amended the constitution to reserve the referendum power and *before* voters amended the constitution to differentiate taxes from fees.

Amici cite a 1957 case, *City of Glendale v. Trondsen* (1957) 48 Cal.2d 93, a 1970 case, *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864, a 1980 case, *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, and the pre-Proposition 218 regulatory fee case, *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866. (Amicus Brief at 17-19.)

Regardless of what these cases may say, they did not exist at or around the time the voters approved Proposition 7 at the 1911 General Election, adding the referendum power to the constitution. They are not evidence of the state of the law at that time, or indicators of voter intent. Voters are presumed to be aware of "existing law" (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 420), which includes "*contemporaneous* case law" (*People v. Lopez* (2005) 34 Cal.4th 1002, 1008).

The cases Wilde cites herein from 1850, 1885, 1897, 1906, 1908, 1917 and 1919 are relevant to show the existing state of the law, knowledge of

which is imputed to the drafters and voters of Proposition 7. Reliable indicia of voter intent can also be found in the ballot materials, especially the impartial title and summary. The summary of Proposition 7 read:

> "A resolution to propose to the people of the State of California an amendment to the constitution of said state, by amending section 1 of article 4 thereof, relating to legislative powers, and reserving to the people of the State of California the power to propose laws, statutes and amendments to the constitution and to enact the same at the polls, independent of the legislature and also reserving to the people of the State of California the power to approve or reject at the polls *any* act or section or part of *any* act of the legislature." (https://ballotpedia.org/California_Initiative_and_Referendum,_Proposition_7_(October_1911).)

The absence of any mention of exceptions in the official summary is another reason to *narrowly* construe the exception for tax levies.

If this Court wants to consult modern cases to determine whether taxes and fees are the same thing, it will find a host of cases ruling that user fees are not taxes. (E.g., *San Marcos Water Dist. v. San Marcos Unified Sch. Dist.* (1986) 42 Cal.3d 154, 162; *Isaac v. City of L.A.* (1998) 66 Cal.App.4th 586, 597; *Utility Audit Co., Inc. v. City of L.A.* (2003) 112 Cal.App.4th 950, 957; *Bay Area Cellular Tel. Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 694; *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 234.)

As this Court recently held, "Proposition 26 ... specifically defined 'tax.' However, the new definition has seven exceptions. *A charge that satisfies an exception is, by definition, not a tax.*" (*Citizens for Fair REU*

Rates v. City of Redding (2018) 6 Cal.5th 1, 11.) One of those exceptions is for "property-related fees imposed in accordance with the provisions of Article XIII D" (Cal. Const., art. XIII C, § 1(e)(7)), *i.e.*, water rates. (*Bighorn - Desert View Water Agency*, 39 Cal.4th at 216-17.) Like the case law that was concurrent with the 1911 amendment, then, modern case law holds that user fees are not tax levies. Dunsmuir's water rates are not tax levies exempt from the people's referendum power.

IV

WATER RATES ARE SUBJECT TO REFERENDA BECAUSE THEY DO NOT TAKE IMMEDIATE EFFECT

In amici's Argument II, they concede that the people reserved for themselves the power to repeal, via initiative, fees that a public agency has long budgeted and come to rely upon – but argue that the people withheld from themselves the power to referend user fees before they take effect, because such referenda are more "disruptive" than initiatives. (Amicus Brief at 20.)

Wilde adequately addressed the "disruption" argument in her Respondent's Brief at pages 26-28 where she explained that taxes are automatically subject to a "referendum" of sorts in that they cannot take effect "unless and until" they receive voter approval in an election. (Art. XIII C, § 2.) The City is arguing that user fees should have the same protection that taxes have against a referendum delaying their implementation. But its argument is built on sand because taxes do not have that protection.

One point not made in Wilde's Respondent's Brief which bears mentioning is that user fees such as water rates *can* be referended before they take effect, from a timing standpoint, because they are not in the class of "urgency legislation" that takes effect immediately upon the ordinance passing.

Under Government Code section 36937, every city ordinance is delayed in taking effect for 30 days after the City Council passes it, unless the ordinance provides for a later effective date. An ordinance takes effect immediately only if it is an urgency ordinance, such as an ordinance relating to an election, or an ordinance levying "taxes for the usual and current expenses of the city." Any other ordinance may be referended if a petition containing sufficient signatures is filed within the 30 day period before the ordinance takes effect. (Elec. Code § 9237.)

Water rate increases are not urgency ordinances. In fact, they typically phase in their increases over a five year period (Gov. Code § 53756(a)), which means that much of a planned increase does not take effect for years. Even then, "[n]otice of any adjustment pursuant to the schedule shall be given pursuant to subdivision (a) of Section 53755, not less than 30 days before the effective date of the adjustment." (Gov. Code § 53756(d).)

Moreover, a city can immediately respond to a successful referendum of a proposed rate increase by enacting a different increase, but must wait until the next biennial election cycle to seek voter approval to change a reduced rate or reinstate a repealed fee where the voters acted via initiative. (*Bighorn - Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 219.) Amici's disruption argument is therefore without merit.

V

PROPOSITION 218 DID NOT IMPLIEDLY REPEAL THE PEOPLE'S POWER TO REFEREND USER FEES

In their third argument, amici begin by stating, "The Court of Appeal here correctly found that Proposition 218 did not affect case law holding tax levies exempt from referendum." (Amicus Brief at 23.) But then amici argue

that, because Proposition 218 bolstered the initiative power over taxes, assessments and fees, but not the referendum power, it must mean the people do not have the power to referend fees. (Amicus Brief at 24, 27.) They also argue that Proposition 218 provided a protest procedure as a substitute for the referendum power. (Amicus Brief at 24, 26.) In other words, they argue, Proposition 218 *did* affect referendum case law.

Pages 12-24 of this brief demonstrated that, in 1911 when the referendum power was added to the constitution, fees for the purchase of goods and services were not considered "tax levies" so as to be exempt from the referendum power. If that is true – and it is – then the people could lose their power to referend fees only if Proposition 218 repealed it.

Repeals by implication are highly disfavored. This Court recently rejected the idea that Proposition 218 impliedly repealed the right of initiative proponents to a special election under Elections Code section 9214, even though Proposition 218 expressly provides that "[t]he election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government." (Cal. Const., art. XIII C, § 2(b).)

> "[Proposition 218's] requirement that a general tax be submitted to the voters at a general election does not apply to taxes that are imposed by initiative after securing the electorate's approval in a manner consistent with section 9214. [Citation.] A contrary conclusion would work an implied repeal of section 9214, something against which we have a strong presumption. [Citation.] Without an unambiguous indication that a provision's purpose was to constrain the initiative power, we will not construe it to

impose such limitations. Such evidence might include an explicit reference to the initiative power in a provision's text, or sufficiently unambiguous statements regarding such a purpose in ballot materials. The concurring and dissenting opinion queries 'by what authority' we require clear evidence of an intended purpose to constrain exercise of the initiative power. (Conc. & dis. opn., post, at p. 957.) Our answer is rooted firmly in the long-standing and consistent line of cases emphasizing courts' obligation to protect and liberally construe the initiative power [Citation.] and to narrowly construe provisions that would burden or limit its exercise. [Citation.] Those cases underscore the centrality of direct democracy in the California Constitution, and the status of our presumption liberally construing the initiative power as a paramount structural element of our Constitution." (*Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 945-46.)

Of course, the referendum power is entitled to the very same protection against implied repeals. As explained by the Court of Appeal, Proposition 218 reinforced the initiative power "[n]otwithstanding ... Sections 8 and 9 of Article II" because it was responding to the line of cases starting with *Myers v. City Council of Pismo Beach* (1966) 241 Cal.App.2d 237, which held that the *initiative* power was not available to reduce or repeal taxes because it constituted a "backhanded technique to invoke the *referendum* process against a tax." (*Id.* at 243.) Proposition 218's article XIII C, section 3, reinstated the initiative power against taxes "notwithstanding" article II, section 9's prohibition against *referending* a tax. Nothing in Proposition 218's fortification of the initiative power was intended to repeal the referendum power over fees.

The availability of other options under Proposition 218 for contesting a proposed property-related fee, such as mounting a majority protest under article XIII D, section 6(a), or resorting to the local initiative power under article XIII C, section 3, provides no legal justification for denying the separate constitutionally guaranteed referendum power. As explained on pages 28-30 of Wilde's Respondent's Brief, there are situations where a referendum is a preferred option, not just from the ratepayers' perspective, but from a public policy perspective as well.

VI

THE SUPERIOR PUBLIC POLICY IS TO PROTECT THE REFERENDUM FROM AMICI

The local government amici's final argument is that public policy favors protecting the government's power to set fees from the people's power to veto an inhumane fee increase and send it back to the drawing board via referendum. Amici argue that allowing the people access to their reserved, but seldom utilized, referendum power could "impair[] fiscal planning." (Amicus Brief at 29.)

This Court should bear in mind that we're talking about the price local governments charge for water. For over a century California courts have recognized that access to water is not a luxury or an option, but is a necessity. "To quench thirst and for household purposes, water is absolutely indispensable. In civilized life ... these wants must be supplied, or both man and beast will perish." (*Lux v. Haggin* (1886) 69 Cal. 255, 406.) "Few if any commodities are more essential to life or more certain to be consumed by every citizen than drinking water." (*National Paint & Coatings Assn. v. State of Cal.* (1997) 58 Cal.App.4th 753, 762.)

Accordingly, when a governmental agency, such as the City here, monopolizes the provision of water, the price that the City charges for this indispensable resource is of vital concern to its customers – especially those on low or fixed incomes – because every customer has no choice but to pay what the City demands, even if it means sacrificing other important budget items such as heat, air conditioning, home security or telephone service.

Cities can be very creative in their "fiscal planning." Because utility enterprises such as water, sewer, and garbage collection are enterprises that fully pay for themselves through customer fees, there is a strong financial incentive for cities to transfer to the enterprise budgets as much of the city's expenses as possible, if there is any plausible justification for charging the enterprise with those expenses. Because the enterprises are self-funding, there is also little incentive for city councils say no when the public employees who work for the enterprise want increases in their salaries, pensions or benefits – especially if the union representing those employees donates to the council members' campaigns.

The people reserved the referendum power to protect themselves when government officials fail to protect them by, for example, charging unaffordable rates for a necessity of life that the government has monopolized. The people's right to vote on such matters should not be sacrificed merely to prevent government "disruption" in "fiscal planning."

When the referendum power won election by over 76% of the vote in 1911, the Ballot Argument in Favor of Proposition 7 advocated for the referendum power with these words:

> "It will be unsafe and profitless for legislators to bargain with private interests, or to violate the people's rights; because the

> people have the power of ratification or rejection. ... Washington's words of wisdom still hold true, 'The people will always be nearer right than those who have a selfish interest in controlling them.' In the last analysis the thing upon which we may finally depend, under our form of government, is the judgment of the people. These amendments are not opposed to our form of government, not opposed to the ideals of the fathers of the republic, and are not contrary to the spirit of our institutions. Exactly the opposite is true. The town meeting of New England trained our fathers in the principles of self-government. ... The people realized that they were, and have made themselves the source and foundation of power. ... They are the creators of legislatures. They are the employers, and they must be clothed with the power to issue commands, to exact obedience and to negative and nullify the acts of their agents and servants, if they violate the wish or the will of their employers or the spirit of their employment." (https://ballotpedia.org/California_Initiative_and_Referendum,_Proposition_7_(October_1911).)

The superior public policy to be promoted and protected in this case is the policy that jealously guards the people's precious referendum power, liberally construing its availability and narrowly construing its exceptions.

///

CONCLUSION

For the reasons above, the decision of the Court of Appeal should be affirmed.

DATED: June 26, 2019.

Respectfully submitted,
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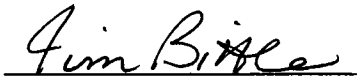

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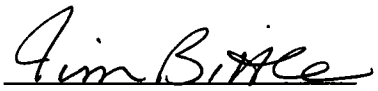
WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached brief, including footnotes but excluding the caption page, tables, and this certification, as measured by the word count of the computer program used to prepare this pleading, contains 7,228 words.

DATED: June 26, 2019.



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PROOF OF SERVICE
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I, Kiaya Heise, declare:

I am employed in the County of Sacramento, California. I am over the age of 18 years, and not a party to the within action. My business address is: 921 11th Street, Suite 1201, Sacramento, California 95814. On June 26, 2019, I served **WILDE'S ANSWER TO BRIEF OF AMICI LOCAL GOVERNMENT ASSOCIATIONS** on the interested parties below, using the following means:

SEE ATTACHED SERVICE LIST

_X_ **BY UNITED STATES MAIL** I enclosed the document in sealed envelopes or packages addressed to the respective addresses of the parties stated above and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Sacramento, California.

_X_ **BY ELECTRONIC MAIL** I electronically transmitted the following document(s) in a PDF or Word processing format to the persons listed below with prior approval of recipients at their respective electronic mailbox addresses.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 26, 2019, at Sacramento, California.

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