S234148

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CALIFORNIA CANNABIS COALITION, a California Non Profit Corporation and NICOLE DE LA ROSA AND JAMES VELEZ, Plaintiffs & Appellants vs. THE CITY OF UPLAND, A Municipal Corporation and STEPHANIE MENDENHALL, CITY CLERK OF THE CITY OF UPLAND, Defendants & Respondents	Court of Appeal No. 4 Civil E063664 San Bernardino Superior Court No. CIVDS1503985

ON APPEAL FROM THE SUPERIOR COURT OF SAN BERNARDINO COUNTY

HONORABLE DAVID COHN, JUDGE

ANSWER TO PETITION FOR REVIEW OF DECISION OF COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO REVERSING JUDGMENT OF SUPERIOR COURT

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I INTRODUCTION

The Court of Appeal below rendered a very narrow but correct decision regarding the right of initiative proponents to secure a special city election for a proposed ballot initiative pursuant to the California Constitution and a specific statute which explicitly promise a special election for those ballot measure petitions that secure signatures from at least fifteen percent of the registered voters of the City. The Court of Appeal properly

ruled that the proposed marijuana dispensary initiative which is the subject of this case qualified for the special election in accordance with Article II, Sections 8 and 11 of the California Constitution and Elections Code Sections 1405 and 9214.

Appellants California Cannabis Coalition, the sponsor, and the ballot proponents, Nicole De La Rosa and James Velez (all hereinafter referred to as "CCC") brought this mandamus action to compel the City of Upland and the City Clerk to place the measure on a special election ballot rather than waiting until the then far off general election of November 8, 2016. The proposed ballot measure qualified for the Upland special election ballot in March of 2015. Unfortunately, the City of Upland misconstrued the law and disregarded its duty to place the measure on a special election ballot and the Superior Court mistakenly agreed. The Court of Appeal properly reversed in a limited ruling but an important ruling which would have altered the results in two similar cases in Orange County Superior Court had the decision of the Court of Appeal in this case been in existence when the Orange County Superior Court in the two unrelated cases ruled in favor of the City of Costa Mesa and against the initiative proponents in those two cases. The two cases are Webster v. City of Costa Mesa, Orange County Superior Court No. 30-2015-00776402 and Robert Taft v. City of Costa Mesa, Orange County Superior Court No. 30-2015-00776202. Both of those cases were defended by the same law firm, Jones & Mayer, which represented the City of Upland in this case in the Superior Court and in the Court of Appeal (recently replaced by the Howard Jarvis Taxpayer's Foundation, allegedly pro bono). Had the decision of the Court of Appeal below been published earlier the proponents of the marijuana measures in the Webster and Taft cases in Costa

Mesa would have had their measures considered in a timely fashion as required by California law. Accordingly, it is extremely important that the decision below remain published to stand as a precedent for future ballot measure proponents.

This case is a very limited case involving the timing and setting of special elections.

This case involves the direct application of Elections Code Section 9214 which is quoted directly by the Court of Appeal below (pp. 11 and 12 of the Slip Opinion). See also California Cannabis Coalition v. City of Upland, 245 Cal.App.4th at 990.

In their Petition for Review, the City and its clerk do not address the significance of Elections Code Section 9214. The Court of Appeal below stated in its penultimate paragraph,

> "Here, the Initiative qualifies under Elections Code Section 9214 for a special election, since the Initiative petition was signed by at least fifteen percent of the city voters and the initial Initiative petition contained a request that the Initiative be submitted immediately to a vote of the people at a special election. Therefore, the city is required to place the Initiative on a special election ballot. . . ."

Without specifically addressing the fifteen percent provision that guarantees the special election, the City and its clerk focus only on a different portion of the law, Article 13 C, Section 2 of the California Constitution, which the City and its clerk argue requires the subject ballot measure to be considered only at the next general election of November 8, 2016. The interpretation placed upon Article 13 C, Section 2 of the California Constitution directly contradicts the special election provision cited above.

Without expressly admitting it, the City's position would require the judiciary to disregard Elections Code Section 9214. The City's argument places Section 9214 in direct conflict with Article 13 C, Section 2. However, there need not be a conflict. The Court of Appeal's decision below allows for a reconciliation of the two provisions. Specifically, Article 13 C, Section 2, with respect to the calling of a special election, does not apply in this circumstance. The decision of the Court of Appeal below says nothing about the need for a majority or two-thirds vote to approve the measure.

The City is relying upon a newspaper article (Exhibit B) and a newsletter (Exhibit C) to support its Petition for Review. The San Diego Union Tribune (Exhibit B) acknowledges in a quote that the opinion "is a very narrow decision." The same San Diego Union Tribune article quotes Patrick Whitnell, General Counsel for the California League of Cities, describing the decision as "narrow." The quotation refers to Jonathan M. Coupal's statement that the opinion is "narrow." Mr. Coupal is on the cover of the Petition for Review as lead counsel. The exhibits are improperly presented in violation of Rule 8.504(e)(1).

The decision below is so narrow that it only deals with one issue. CCC argued in the Superior Court and in the Court of Appeal additional reasons for the granting of a writ of mandate against the City. Specifically, CCC argued that the proposed medical marijuana dispensary initiative petition is not a tax measure. Rather, the $75,000.00 annual fee to be paid by any medical marijuana dispensary that might get started under the initiative would be a regulatory fee, not a tax. The opinion of the Court of Appeal below did not deal with the tax versus fee issue. Moreover, the Superior Court and the Court of

Appeal both ignored the argument that it was premature for the City to reach the issue of whether the measure could be considered to be a taxation measure. If the measure is defeated the tax issue would be moot and if the measure succeeds then there would an opportunity to examine the validity of the $75,000.00 annual fee proposed by the initiative petition.

In short, there is no need to grant review in this matter. The opinion of the Court of Appeal is correct and should remain published. If review is granted this Court should also consider the tax versus fee issue and the timing issue (i.e., when should the tax versus fee issue be decided, before or after the election?).

The Petition begins with the declaration:

> "The importance of this case to taxpayers cannot be overstated. . . ."

This is not true. The Petition does overstate its importance.

II SUMMARY OF FACTS

The facts are comprehensively set forth in the opinion of the Court of Appeal and by the City in its Petition for Review. CCC wishes to reiterate the important point that the so called tax portion of the proposed medical marijuana initiative petition is a very small part of the overall measure. Moreover, it is not a tax.

The purpose and intent of the proposed marijuana initiative petition is set forth in proposed Chapter 17.158, which provides as follows:

> "A. It is the purpose of this Chapter to establish criteria and standards for the establishment and conduct of marijuana dispensaries which will protect the public health, safety, and welfare,

> preserve locally recognized values of community appearance, minimize the potential for nuisances related to the operation of marijuana dispensaries, maintain local property values, and preserve the quality of urban life. Permitting well regulated marijuana dispensaries will enable Upland's numerous qualified patients to obtain safe access to a crucial, low-impact source of medication recommended by their doctors. These regulations are designed to assure that the operations of marijuana dispensaries are in compliance with California law and to mitigate the adverse effects from unregulated operation of marijuana dispensaries.

As stated, the proposed marijuana initiative petition is extensive and far reaching and governs zoning and locational matters. The measure specifies where in the City of Upland a medical marijuana dispensary would be allowed. There are severe restrictions and limits on the establishment of medical marijuana dispensaries. Also, the proposed measure creates and establishes design and performance standards. The proposed measure sets up a permit approval system. The proposed measure sets forth a regulatory mechanism to govern the medical marijuana dispensaries that may be established under the measure (there being no more than three possibly). Administrative procedures and regulations would be established by the measure.

To frustrate the initiative process with respect to this measure the City Council segregated and unnecessarily focused on one paragraph dealing with a licensing and inspection fee. In particular, proposed Section 17.158.1 00 (a proposed amendment to the Upland Municipal Code) provides as follows:

> "In recognition that marijuana dispensaries may

require greater oversight than other businesses in the City of Upland, an annual licensing and inspection fee of $75,000 (seventy-five thousand dollars) will be due from any dispensary that has been granted a business license and approved for operation by the City of Upland. The initial licensing and inspection fee shall be due within 10 days of the City's approval and issuance of the initial business license to the dispensary. Subsequent annual renewal fees of the licensing and inspection fee shall be due in two installments. For the subsequent annual renewal fee, the first installment of the annual licensing and inspection fee of $37,500 (thirty-seven thousand five hundred dollars) shall be due February 15th of the calendar year. The second installment of the annual licensing and inspection fee of $37,500 (thirty-seven thousand five hundred dollars) shall be due on June 3 pt of the calendar year."

As stated above, the proposed section quoted above is one small part of a larger, comprehensive medical marijuana dispensary provision of the Upland Municipal Code (proposed).

III ARGUMENT

A. REVIEW SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEAL CORRECTLY STATES THE LAW

In the Court of Appeal below CCC argued that the proposed initiative ordinance was not a tax. See CCC's Opening Brief filed in Court of Appeal beginning at page 19. CCC also argued it was premature for the City Council to decide prior to the election whether the measure was a tax or a regulatory fee (CCC's Opening Brief filed with the Court of Appeal, p. 26). The Court of Appeal did not deal with either one of these two

issues. Instead the Court of Appeal below agreed with the other argument made by CCC, that Article 13C did not apply because Article 13C Section 2 was a limitation on local government authority, not on the initiative process.

The Court of Appeal below correctly decided the issue that it chose to address.

This Court has repeatedly held that the right of initiative in California is a precious right that was reserved by the people to themselves. The California Constitution and, in particular, Article 2, Section 1 recognizes that political power is inherent in the people. The provision also recognizes the distinction between the people and their government. Article 2, Section 1 provides as follows:

> "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."

The right of initiative for statewide matters is set forth in Article 2, Section 8 of the California Constitution. Statutes may be adopted by initiative. In addition, the California Constitution can be amended by the initiative process. In addition to statewide initiative measures established by Article 2, Section 8 of the California Constitution, electors of cities may also utilize the initiative process for direct democracy. Article 2, Section 11(a) provides, in part, as follows:

> "(a) Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. Except as provided in subdivision (b) and (c), this section does not affect a city having a charter."

The City of Upland does not have a charter so the initiative process set forth by the California Constitution and the State Elections Code applies. Section 1107 of the Upland Municipal Code contemplates that ordinances may be adopted from time-to-time by the initiative process.

Elections Code Sections 9200 et.seq., cover the procedures to be followed in connection with the solicitation of signatures on initiative petitions and the submission of the proposed measures to the electorate for its consideration. Elections Code Section 9214 requires the City Council when presented with an initiative petition signed by at least 15% of the registered voters to either adopt the ordinance, immediately order a special election, or order a report pursuant to Section 9212. In general Section 9214 requires the calling of the special election.

Also applicable to this case is Elections Code Section 1405 which requires municipal special elections that qualify pursuant to Elections Code Section 9214 to be considered at a special election conducted not less than 88 nor more than 103 days after the date of the order of election.

It is clear from the foregoing authorities that unless there is an exception to the process set forth above the City of Upland and its officials are required to call a special election and to submit the proposed medical marijuana dispensary initiative petition to a vote of the people of the City of Upland at that special election. City officials contend that notwithstanding the foregoing provisions Article 13C of the California Constitution trumps the provisions of Article 2, Section 11(a) of the Elections Code and requires that the measure that has qualified for the ballot be considered at the general election on

November 8, 2016. The City attempts to apply Section 13c, Section 2 of the California Constitution to the current initiative measure because the City claims that it is essentially a tax measure and tax measures are governed by the particular provisions of Article 13c, Section 2 of the California Constitution.

It is significant that Section 2 of Article 13c begins with a reference to "Local Government Tax Limitation."

The section further provides as follows:

> "All taxes imposed by any local government should be deemed to be either general taxes or special taxes .... "

The initiative which is the subject of this lawsuit is not "imposed by any local government." Article 13c, Section 2(b) begins with the following:

> "No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. . .. The election required by this subdivision shall be consolidated with the regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body."

The language quote above makes it abundantly clear that Article 13c, Section 2 of the California Constitution is a limitation on local government, not a limitation on the right of initiative. Placing the initiative measure on a special election ballot does not ignore Article 13C, Section 2.

It is clear that Article 13c, Section 2 only prohibits the City Council from placing a

measure on a special election ballot. The so called election required by the subdivision would be an election on a ballot measure placed on the ballot by the City Council. The proponents of Proposition 218 and Proposition 26, together of which comprise Article 13c, feared the imposition of taxes by the government. Indeed, as stated earlier, Article 13c, Section 1 refers to local government as being any city. Local government obviously would be the City Council. The electorate exercising its right of the initiative, is not local government. The two, local government and the voters, are at the opposite ends of the spectrum. What the electorate fears is governmental power. The electorate does not fear itself. Section 2 of Article 13c was placed on the statewide ballot because of fear that local government would dominate. Initially the restriction on local government came from Proposition 13 and was later expanded.

It is clear that the City government in this case misused Article 13C, Section 2 to its own advantage. It is politically opposed to medical marijuana and is concerned about the outcome of the vote. Accordingly, the City Council politically decided to delay the election for as long as possible and to place it on the general election ballot, but that general election would only be required for ballot measures put on the ballot by the City Council, not for citizen driven initiative petitions. The phrase, "the election required by this subdivision," clearly refers to an election that would be required if the City Council wanted to raise taxes and place a tax increase measure on the ballot for the voters to consider. It would be that election that would have to be consolidated with the regularly scheduled general election.

The decision of the Court of Appeal below is consistent with the decisions of this

Court regarding the initiative process. When arguably the initiative process has conflicted with other laws the initiative process has been given priority. This Court dealt with the issue of zoning by the initiative process. The Opinion of this Court in San Diego Building Contractors Association v. City Council, 13 Cal.3d 205 (1974) begins with the statement of the issue presented:

> "In this case we must determine whether the voters of San Diego, and, more generally, the electors of any Charter City in California, may validly enact a zoning ordinance through the initiative process. . . ." Id. At 207.

This Court rejected the argument that its prior decision in Hurst v. City of Burlingame, 207 Cal. 134 (1929) required this Court to invalidate the San Diego zoning ordinance adopted by the initiative process.

This Court followed the San Diego Building Contractors Association v. City Council decision with its later decision in Associated Home Builders v. City of Livermore, 18 Cal.3d 582 (1976). The Associated Home Builders case involved the validity of initiative ordinance enacted by the voters of the City of Livermore which prohibited the issuance of further residential building permits until local educational, sewage disposal, and water supply facilities complied with specified standards. In the Associated Home Builders case this Court expressly overruled its prior case in Hurst v. City of Burlingame, 207 Cal. 134 (1929). This Court stated, 18 Cal.3d at 588:

> ". . . We have concluded, however, that Hurst was incorrectly decided; the statutory notice and hearing provisions govern only ordinances enacted by City Council action and do not limit the power of municipal electors, reserved to

> them by the state constitution to enact legislation by initiative. We therefore reverse the trial court holding on this issue."

The Associated Home Builders v. City of Livermore case is strikingly similar in many respects with the instant case involving the marijuana initiative in Upland. Specifically, the Court of Appeal below agreed with CCC that there is no real conflict between the special election procedure governing city initiatives and the California law dealing with conducting of the election. CCC argued below that there was no conflict between Elections Code Section 9214 and a portion of Article 13 C, Section 2 regarding the general election. There is no need to declare a conflict and choose one over the other. Both can be given effect.

The City had argued below that there is a conflict and that given the conflict Article 13 C, Section 2 of the California Constitution should take priority over a mere provision of the Elections Code, Section 9214. This Court in the Associated Home Builders v. City of Livermore case gave proper respect to the initiative procedure set forth in the initiative law. This Court gave the initiative law governing municipal elections "constitutional" stature by pointing out that the initiative right is guaranteed by the Constitution. This Court stated the following the Associated Home Builders v. City of Livermore case at p. 594-595:

> "In the second place, Hurst, in treating the case as one involving a conflict between two statutes of equal status - the zoning law and the initiative law - overlooked a crucial distinction: that although the procedures for exercise of the right of initiative are spelled out in the initiative law, the right itself is guaranteed by the

> constitution. The 1911 constitutional amendment, in reserving the right of initiative on behalf of municipal voters, stated that 'This section is self - executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved."...

In Associated Home Builders v. City of Livermore, 18 Cal.3d at 594, note 10, this Court quoted from an earlier Court of Appeal case,

> "The fundamental test as to whether statutes are in conflict with each other is the legislative intent. If it appears that the statutes were designed for different purposes, they are not irreconcilable, and may stand together."

CCC respectfully submits that the state law (based on the California constitution) is not in conflict with Article 13 C2 of the California Constitution. They are reconcilable and the Court of Appeal reconciled them.

The City cites Santa Clara County Local Transportation Authority v. Guardino, 11 Cal.4th 220 (1995). In this case this Court held a sales tax proposed by a local transportation agency for the funding of certain transportation projects unconstitutional because it was enacted by a less than two-thirds majority. This Court held the tax was invalid under Proposition 62 because the super majority requirement of Government Code Section 53722 (special tax imposed by local government or district must be submitted to Electorate and approved by two-thirds vote) was applicable to the tax because the transportation agency was a district and the tax was a special tax.

This case did not involve an ordinance adopted by the initiative process. The decision (five to two with former Chief Judge Lucas and current Justice Werdegar

dissenting), does not deal with the issue currently before this Court - the right of a City Council to frustrate the special election provision of law by denying the proponents of the measure the special election procedure of California law.

More recent decisions of this Court also militate in favor of this Court's denial of the Petition for Review. In a unanimous decision authored by Justice Corrigan, this Court in Tuolumne Jobs and Small Business Alliance v. Superior Court, 59 Cal.4th 1029 (2014) held that the municipal initiative process trumped state environmental law. As Justice Corrigan noted in the initial paragraph of her discussion,

> "This case explores the intersection the constitutional power of voters to enact laws by initiative and the environmental review generally required for laws potentially having a significant environmental impact."

This Court unanimously held in the Tuolumne Jobs and Small Business Alliance case that the Elections Code and in particular its provisions regarding the initiative process, trumped state environmental quality laws. This Court stated, 59 Cal.4th at 1040:

> ". . . Here, legislative history confirms that ordinances enacted by initiative, either directly or by election, are not subject to CEQA review."

The City submits as Exhibit C to its Petition for Review an article from the California Planning and Development report that blames this Court's decision Tuolumne Jobs and Small Business Alliance v. Superior Court, supra, as being the impetus for the construction of football stadiums in California. The California Planning and Development report (Exh. C) refers to this Court's decision as "the Tuolumne tactic."

The report refers to the decision as being "the end-run of the California Environmental Quality Act sanctioned two years ago by [this] . . . State Supreme Court. . . ." The California Planning and Development Report refers to the procedure as being a "trick." The report refers to the Opinion and the "Tuolumne tactic" as "a pretty direct assault on 1970's and 80's left wing California environmentalism."

The report goes on to say that medical marijuana advocates are using the same initiative process for medical marijuana dispensaries that proposed football stadium proponents are allegedly using to build stadiums. Indeed, the City of Carson allegedly used the process to try to induce the San Diego Chargers and the Oakland Raiders to move to Carson and currently the City of San Diego is somehow using the tactic to authorize the building of a new football stadium for the Chargers in San Diego. Likewise, the Rams, having just moved to Los Angeles from St. Louis, allegedly resorted to the tactic in qualifying a measure for the Inglewood ballot.

CCC does not see anything wrong with the citizens resorting to the initiative process to obtain results. The decision by this Court in Tuolumne Jobs and Small Business Alliance v. Superior Court, supra, built upon its prior decision in DeVita v. County of Napa, 9 Cal.4th 763 (1995) which upheld the right of county voters to amend the county's general plan by an initiative. Justice Werdegar was in the majority.

In this case the City of Upland's Petition has been taken over by the Howard Jarvis Taxpayer's Foundation. See cover of Petition and see page 1 of Petition. Apparently sometimes the Howard Jarvis Taxpayer's Foundation litigates as the attorneys and sometimes it represents itself. Cases where they have represented themselves include

Howard Jarvis Taxpayer's Association v. Bowen, 192 Cal.App.4th 110 (2011) and Howard Jarvis Taxpayer's Association v. Padilla, 62 Cal.4th 486 (2016). The involvement of the Howard Jarvis Taxpayer's Foundation and Howard Jarvis Taxpayer's Association is ironic given the fact that Howard Jarvis himself led the ballot measure known as Proposition 13, the statewide measure designed to limit property taxes. The measure was marketed as a property relief tax measure for residential property owners but the reality was Proposition 13 was sponsored by commercial and industrial property owners to get their property taxes reduced. The homeowners were thrown into the pile for political reasons. The Howard Jarvis group appears to be motivated by its fear of political power in the hands of lower income people. The Howard Jarvis Taxpayers Association took action to prevent the consideration by the California electorate of an advisory question as to whether there should be a constitutional convention to overturn the United States Supreme Court's decision in Citizens United v. Federal Election Commission, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). See Howard Jarvis Taxpayers Assn.,v. Padilla, 62 Cal.4th 486 (2016). It is difficult to see how the taxpayers would have been injured by having the question on the ballot. Nevertheless, five justices of this Court voted to take Proposition 49 off the November 2014 ballot. Only the Chief Justice dissented. See August 11,2014 Minutes of this Court in case number S220289 and Chief Justice Cantil-Sakauye's concurring opinion in Howard Jarvis Taxpayers Assn.,v. Padilla, 62 Cal.4th at 523.

This case involves a procedural dispute . Neither Elections Code Section 9214 nor Article 13C 2 of the California Constitution involves substance. They

are both procedural measures and they both can be reconciled with each other.

The decision of the Court of Appeal should stand.

B. IF THIS COURT SHOULD GRANT REVIEW, REVIEW SHOULD INCLUDE A DECISION REGARDING THE QUESTION OF WHETHER THE $75,000.00 ANNUAL FEE IS A FEE OR A TAX

By virtue of Rule 8.504 of the California Rules of Court, this Court may decide to review additional issues. Rule 8.504(c) provides as follows:

> "An answer that raises additional issues for review must contain a concise, non argumentative statement of those issues, framing them in terms of the facts of the case but without unnecessary detail.:

Rule 8.500(a)(2) provides as follows:

> "A party may file an answer responding to the issues raised in the petition. In the answer, the party may ask the court to address additional issues if it grants review."

The additional issue is whether the proposed $75,000.00 annual regulatory fee is a tax or a fee.

The $75,000.00 fee is not a tax.

Section 1 of Article 13c of the California Constitution defines a general tax as any tax imposed for general governmental purposes. Subdivision (e) of Article 13c, Section 1 states,

> "As used in this article, 'tax' means any levy, charge, or exaction of any kind imposed by a local government, except the following:
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the

> benefit or granting the privilege.
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs of local government of providing the service or product.
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections and audits ... and the administrative enforcement and adjudication thereof .... "

Article 13c, Section 1 also has the following additional language:

> "The local government bears the burden of proving by a preponderance of the evidence that levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burden on, or benefits received from, the governmental activity. "

It is apparent from the last paragraph quoted above that what the sponsors of Proposition 218 and later Proposition 26 (both of which comprise Article 13c of the California Constitution) feared was local government imposing taxes on a hostile citizenry. The fear was that city councils would be imposing taxes. It is clear that Propositions 218 and 26 are "anti tax" measures designed to limit local government. Here, the city government of Upland has taken a reverse position and is claiming that something is a tax when ordinarily it would be arguing the opposite point. Ordinarily the City would be expected to argue that something is not a tax in order to justify revenue

collection. Here, the City Council is so political that it is taking the opposite position in order to avoid putting the measure on the ballot at the special election. That we have this strange alignment in terms of the position advocated by the City is some evidence that the City is misapplying law. It is clear from reviewing the standards set forth in Article 13c, Section 1 of the California Constitution that the $75,000 fee is not a tax. It is clear that the Constitution contemplates the imposition of fees for regulatory purposes and that is precisely what the $75,000 per year fee was designed for. The $75,000 payment is not imposed upon anybody other than the medical marijuana dispensary and it clearly does not exceed the reasonable cost to local government of conferring the benefit of operating as a medical marijuana dispensary in Upland.

The benefit conferred by the City of Upland would not be conferred upon anyone other than the medical marijuana dispensaries. The fee again does not "exceed the reasonable cost to local government. .. " It is expensive for a city to regulate medical marijuana dispensaries. Substantial law enforcement personnel would have to be assigned the task of inspecting and regulating and surveilling the medical marijuana dispensaries.

The sponsors and those who signed the petition clearly contemplated that the $75,000 fee would be reasonable. They would not want to tax medical marijuana dispensaries because no one wants to pay taxes that are not necessary. The City simply has no standing to complain that the fee schedule is not fair. Does anyone really believe that the City Council cares about the medical marijuana dispensaries that would be legal under the initiative. If the City Council felt that it wanted to legalize medical marijuana

dispensaries in the City of Upland it could have done so by ordinance.

CCC submitted evidence demonstrating that the $75,000 fee was accurately characterized as a regulatory fee. The City government has no right under the guise of protecting the electorate from itself to restrict the people's right of initiative. If proposed Section 17.158.100 is really an impermissible tax and not a fee then someone with standing to complain presumably could bring an action to invalidate the provision. The City itself as a city government has no standing to complain about the fee. The City has no right to try to protect the electorate from itself. The voters are presumed to know what they are voting for and what they are voting against. The voters do not need the paternalistic assistance of city government.

In short, the City should have considered and accepted CCC's evidence and representation and just accepted facially the language of the proposed measure.

While not directly on point, the Court of Appeal's recent decision in Schmeer v. County of Los Angeles, 213 Cal.App.4th 1310 (2013) is helpful.

The case involved a new county ordinance that prohibited retail stores from providing plastic carry-out bags. The measure required stores to charge customers ten cents for each paper carry-out bag provided. A lawsuit filed by tax payers and manufacturers of plastic bags was filed in the L.A. County Superior Court challenging the ten cent charge. The tax payers and manufacturers claimed that the ten cent charge was a tax and was not approved by the voters.

The case did not involve an initiative measure designed to collect money to reimburse the government for regulation. Instead it was simply an ordinance adopted by

the County but the case is relevant because it concluded that the ten cent charge was not a tax and therefore it did not have to be approved by county voters. The Court of Appeal in affirming the judgment of the Superior Court concluded that the ten cent charge was not a tax. Likewise here the 1, 2, or possibly 3 at the most medical marijuana dispensaries that may be established pursuant to the Upland initiative would not be paying taxes to the City but they would in fact be the only entities required to pay anything at all. The imposition of the regulatory fee in this case cannot by any stretch of the imagination be considered a tax. The City ignored CCC's evidence to the contrary. Also noteworthy is the fact that no hearing was actually provided to CCC where it could present its evidence. CCC did it by written submission but no hearing was afforded it and no findings were made based on any evidence that was submitted at a public hearing,

In summary, review should be granted should the Court deal with the tax versus fee issue. In the alternative, this Court may wish to consider only issue C below.

C. THIS COURT, IF IT GRANTS REVIEW, SHOULD DECIDE WHEN THE TAX VERSES REGULATORY FEE ISSUE SHOULD BE RAISED AND DECIDED

The City should have allowed the measure to go on the ballot and if it failed the matter would have been rendered moot. If it succeeded there would have been plenty of time to litigate the question as to whether it was a fee or a tax and if so when it should have been considered. Indeed, there may still be time. Unfortunately, the Rules of Court make it difficult to get speedy justice. Here, the remittitur still has not been issued and has been automatically stayed by the Petition for Review filed by the Howard Jarvis Taxpayers Foundation on behalf of its new client. Thus, the Foundation has obtained the

functional equivalent of a temporary stay, just like the stay it obtained in the Padilla case (renamed from the earlier reference to respondent Debra Bowen, Secretary of State).

Unfortunately, erroneously granted temporary stays can cause irreparable damage. Our courts should be mindful of the need for speed in election cases. Here, CCC did everything in its power to expedite the process in the trial court as well as the Court of Appeal. The Court of Appeal did belatedly grant CCC"s motion for calendar preference, but refused to treat its Opening Brief as a Petition for Writ of Mandate. The Court of Appeal said there was no authority to consider the appeal as a writ proceeding, but there does appear to be authority for considering an appeal as a writ. See Woody's Group v. City of Newport Beach, 233 Cal.App.4th 1012, 1020 (2015).

One more comment on judicial irony is appropriate here. While Howard Jarvis Taxpayers Association did get an undeserved stay in the Proposition 49 litigation, it suffered an injustice in Howard Jarvis Taxpayers Assn., v. Bowen, 192 Cal.App.4th 110 (2011) when its successful appeal from the denial by the trial court of its mandate petition was too late for it to enjoy. The Court of Appeal reversed the adverse judgment, but then remanded with instructions to dismiss on mootness grounds. Here, both sides agreed this is not moot.

CCC is aware that it could have filed an original Petition directly with the Court of Appeal or this Court but there never is any guarantee that the Court of Appeal or this Court will entertain an original writ petition under its jurisdiction. See, e.g., Diamond v. Allison, 8 Cal.3d 736 (1973), where this Court initially issued an alternative writ to assume jurisdiction over an election matter only later to discharge the alternative writ

because this Court felt the writ proceeding was not an appropriate method given the factual dispute. The issue involved the order in which the candidates would appear on the ballot. Later, in Gould v. Grubb, 14 Cal.3d 661 (1975) this Court affirmed the judgment of the trial court after an evidentiary trial.

This discussion brings CCC to suggest that if review is granted the following issue should also be considered: should the issue of a tax versus a fee be resolved prior to the election or after the election?

CCC respectfully urges this Court, if it grants review at the request of the City, to decide the appropriate time to allow for judicial review.

CCC respectfully submits that the trial court should have ordered the measure to be considered at the earliest possible election and then, based upon the result of the election, the issue could be litigated if necessary. This would give more time to the parties . The tax versus fee issue does involve disputed evidence but the issue can be resolved after the election. The overwhelming presumption should be in favor of putting it on the ballot and letting the voters decide. Chief Justice Cantil-Sakuauye discussed the issue in her dissenting opinion with respect to the interim stay requested by Howard Jarvis Taxpayers Association. The Chief Justice Cantil-Sakuauye was of the opinion that Proposition 49 should not have been removed from the ballot. Citing and quoting Independent Energy Producers Association v. McPherson, 38 Cal.4th 1020 (2006), the Court stated,

> "It is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt electoral process by preventing the exercise of the People's

> franchise, in the absence of some clear showing if invalidity."

In the instant case if the measure passed or does pass there would be an opportunity for any medical marijuana dispensary to participate in litigation to determine whether the annual fee is really a tax or a fee. In the instant case there was no opportunity for CCC to participate in an evidentiary hearing. No hearing was afforded CCC. The City Council members just took it upon themselves to unilaterally decide that the measure contained a tax provision and therefore did not qualify for the special ballot.

The City can play games with the process by merely claiming that less money is needed to regulate a medical marijuana dispensary and therefore any excess money collected from the dispensary would make the measure a tax measure. Nothing would prevent a city from claiming that a medical marijuana dispensary does not need the kind of supervision that some people may claim. Here, for example, if the regulatory fee were set too low a lot of voters might vote against the measure on the theory that the taxpayers would bear the cost imposed on the City by the marijuana dispensary. The City in this case basically felt free to adjust the figures any way it saw fit to force the regulatory fee to look like a tax because of its alleged excessiveness.

Essentially the City was able to thwart the democratic, initiative process by making a political decision.

If review is granted in this case this Court should declare that the presumption is in the favor of ballot measures that reach the ballot by the initiative process. Time is usually of the essence in election cases. It is fundamentally unfair for the political process

to take over and wreck the initiative. By definition there is hostility between the political figures on the one hand and the initiative proponents on the other. If there were harmony there would be no need for the initiative.

Essentially the City obtained a temporary stay without even asking for one. The City simply refused to place the measure on a special election ballot and then provided phony figures to the trial court upon which the trial court could base a decision that the regulatory fee was set too high. We are not talking here about existing taxpayers getting hit with a huge tax bill. Here, no medical marijuana dispensary needs to be established. If somebody does not want to pay $75,000.00 to the City for the privilege of operating a medical marijuana dispensary he or she does not have to open one up.

The judiciary should be very careful before it grants stays in election cases. History will judge the stay granted in Bush v. Gore, 531 U.S. 1046, 121 S.Ct. 512 (2000). The so called irreparable harm to the country is difficult to see but five justices on the U.S. Supreme Court felt the need to grant a stay of the counting of the votes in the historic presidential election.

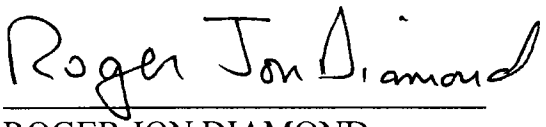
CCC does acknowledge a legitimate interest in not wasting money on an election that may not be necessary. A possible solution would be for the proponent of the measure to post a bond to cover the cost of the election should the measure fail. See also provisions for the payment of a fee for a recount in a disputed election.

IV CONCLUSION

California Cannabis Coalition and the proponents respectfully ask this Honorable Court to deny the Petition for Review. If review is granted the additional issues should be

considered.

Respectfully submitted,



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Attorney for Plaintiffs and Appellants

S234148

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CALIFORNIA CANNABIS COALITION, a California Non Profit Corporation and NICOLE DE LA ROSA AND JAMES VELEZ, Plaintiffs & Appellants vs. THE CITY OF UPLAND, A Municipal Corporation and STEPHANIE MENDENHALL, CITY CLERK OF THE CITY OF UPLAND, Defendants & Respondents	Court of Appeal No. 4 Civil E063664 San Bernardino Superior Court No. CIVDS1503985

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d) of the California Rules of Court, the enclosed Answer to Petition for Review is produced using 13-point Roman type and contains approximately 7,206 words which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 4, 2016

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Attorney Appellants

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 the within action; my business address is 2115 Main Street, Santa Monica, California 90405.

On the date shown below I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW OF DECISION OF COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION TWO, REVERSING JUDGMENT OF SUPERIOR COURT** on the interested parties in this action by personal service placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Clerk
Court of Appeal
Fourth Appellate District
Division Two
3389 12th Street
Riverside, CA 92501

Clerk
Superior Court
Department S37
247 West Third Street
San Bernardino, CA 92415-0240

Jonathan M. Coupal
Howard JarvisTaxpayers Foundation
921 Eleventh St., Suite 1201
Sacramento, CA 95814

I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Santa Monica, California on May 6, 2016.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was executed at Santa Monica, California on the 6 day of May 2016.

Judith A. Burgdorf