SUPREME COURT OF CALIFORNIA

S252915

LESLIE T. WILDE,

Plaintiff and Appellant,

v.

CITY OF DUNSMUIR et al.,

Defendants and Respondents.

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

ANSWER TO PETITION FOR REVIEW

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I

REVIEW SHOULD BE DENIED BECAUSE THE CITY HAS UNCLEAN HANDS

When presented with the Registrar's certification that a referendum petition has qualified for the ballot, the City Council has a ministerial duty under the Elections Code. "If the legislative body does not entirely repeal the ordinance against which the petition is filed, the legislative body shall submit the ordinance to the voters, either at the next regular municipal election ... or at a special election." (Elec. Code § 9241.)

The City Council "must take one action or the other, *but cannot refuse to do both*." (19 Ops.Cal.Atty.Gen. 94, 97 (1952).)[1] The people's right to call an election on a controversial ordinance cannot properly be impeded by a City Council's unilateral determination that the referendum is invalid, "even if supported by the advice of the city attorney." (*Farley v. Healey* (1967) 67 Cal.2d 325, 327; *Native American Sacred Site and Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, 966; *Goodenough v. Superior Court* (1971) 18 Cal.App.3d 692, 696.)

When an agency refuses to place an initiative or referendum on the ballot based on its own finding of invalidity, it unlawfully purports to "exercise adjudicative powers" (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 136) and thus "usurps the judicial power in this respect." (*Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1021 & n.4.)

> "The law is clear: A local government is not empowered to refuse to place a duly certified initiative on the ballot. What should a local government do if it believes an initiative measure is unlawful and should not be presented to the voters? A

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

> governmental body, or any person or entity with standing, may file a petition for writ of mandate, seeking a court order removing the initiative measure from the ballot. But such entity or person may not unilaterally decide to prevent a duly qualified initiative from being presented to the electorate." (*Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 149 (citations omitted).)

Under the decades of authority cited above, if the Dunsmuir City Council believed that its citizens had no legal right to vote on plaintiff's duly qualified referendum, the Council had a ministerial duty to place the referendum on the ballot, then utilize the expedited election writ procedure provided in the Elections Code (Elec. Code § 9295) pursuant to which a defective referendum can be judicially removed, but a valid referendum will remain on the ballot for which it qualified.

Rather than obey the law, the Dunsmuir City Council brazenly withheld plaintiff's referendum from the ballot and dared her to sue. Acting in pro per, plaintiff sought judicial relief and was finally vindicated by the Court of Appeal. The City is now petitioning this Court for review. But the City has unclean hands and should not benefit from its conduct. "[W]henever a party, who ... seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him." (*Katz v. Karlsson* (1948) 84 Cal.App.2d 469, 474-75 (and cases cited therein).)

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II

THE CITY'S "FEE = TAX" ARGUMENT, RAISED FOR THE FIRST TIME IN THIS PETITION, SHOULD BE IGNORED

"As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." (Cal. Rules of Court, Rule 8.500(c)(1).)

In the Court of Appeal, the City argued that plaintiff's appeal was moot; it argued that rate-setting is not a legislative act subject to the people's referendum power; and it argued that Proposition 218 permits user fees to be challenged only by initiative. (See generally, Respondents' Brief on appeal.)

After the Court of Appeal ruled in plaintiff's favor, certain local government associations filed a request for depublication, which is still pending before this Court. Their request is based on a new theory – that article II, section 9, of the California Constitution, which reserves the people's power to referend statutes and ordinances except for "tax levies or appropriations," should be read to also exclude user fees from the people's reach.

In its Petition for Review, the City has now borrowed that theory to attack the decision of the Court of Appeal: "The issue that the Opinion overlooks is whether the water rate revenues disputed here are 'tax levies or appropriations' under article II, section 9." (Petition for Review at 18.) Aside from the unfairness of criticizing the Court of Appeal for "overlooking" an argument that the City never raised, it is the policy of this Court to not review a question "that the petitioner failed to timely raise in the Court of Appeal." (Cal. Rules of Court, Rule 8.500(c)(1).) "As we have observed on numerous occasions, 'a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (*People v. McCullough* (2013) 56 Cal.4th 589, 593.)

III

THE EXCEPTION FOR "TAX LEVIES" DOES NOT APPLY TO USER FEES

Even if the City had argued in the Court of Appeal that user fees should be treated the same as tax levies for the purpose of excepting them from the people's referendum power, the argument fails.

The City admits that California's constitution today, as amended by Proposition 218, defines taxes to not include fees, and defines fees to not include taxes. (Petition for Review at 16.) Article XIII C, section 1(e) defines "tax" as "any levy ... except [among other things] property-related fees imposed in accordance with the provisions of Article XIII D." Article XIII D, in turn, defines a "'fee' ... including a user fee or charge for a property related service" such as water delivery, to mean a "levy other than ... a tax." (art. XIII D, § (2)(e).) The terms are thus mutually exclusive.

The City argues that "[t]hese modern definitions do not apply outside of articles XIII C and XIII D and in particular they do not apply to article II, section 9" wherein the people reserve to themselves the referendum power. (Petition for Review at 16.) But this theory is contrary to settled rules of constitutional construction. "It is a cardinal rule of construction that words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions of the Constitution bearing on the same subject." (*Fields v. March Fong Eu* (1976) 18 Cal.3d 322, 328; *Serrano v. Priest* (1971) 5 Cal.3d 584, 596; *Wallace v. Payne* (1925) 197 Cal. 539, 544.)

Here, Proposition 218 (which established various rights to vote on taxes and fees, and defines "taxes" to exclude user fees) bears on the same subject as article II, section 9 (excepting "taxes" from the right to vote via referendum). Proposition 218 expressly cross-references article II, section 9. (Cal. Const., art. XIII C, § 3.) Article II, section 2's exclusion of tax levies from the

people's right to vote, then, *should* be informed by the "modern definitions" contained in Proposition 218 when determining exactly what levies the people have placed outside their reach.

The City cites only one case for its novel theory that the constitution's provisions must be compartmentalized by date of adoption: *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205. But *Bighorn* is weak support.

Noting that section 2 of article XIII D (which contains the definition of a "fee," but not a "tax") begins with the words, "As used in this article," *Bighorn* states that article XIII D's "fee" definition "do[es] not *necessarily* apply outside of article XIII D .... On the other hand, when a word has been used in different parts of a single enactment, courts normally infer that the word was intended to have the same meaning throughout." (*Bighorn*, 39 Cal.4th at 213 (emphasis in original).) The Court then applied the definition *outside* of article XIII D.

Moreover, *Bighorn* said nothing about article XIII C's definition of "tax," which expressly excludes user fees. Article XIII C applies to "*All* taxes" (Cal. Const., art. XIII C, § 2(a)) and no court has suggested that article XIII C should not be harmonized with article II, section 9.

In any event, California law has long distinguished taxes from user fees even without the "modern definitions" that the City is trying to avoid:

> "Governmental levies against real property generally fall into three categories: (1) taxes, (2) special assessments, and (3) developmental and regulatory fees or 'user charges.' Each class of charge has particular characteristics, limitations, and purposes. Special assessments are made for the purpose of completing a specific public improvement [that] will benefit only certain properties. ... [A] special assessment is not really a

tax but a benefit to specific property that is financed through the public credit. ... In addition to special assessments, property may be charged with different types of fees. These include: (a) regulatory fees imposed under the government's police power, (b) developmental fees exacted in return for permits or other governmental privileges, and (c) user fees. ... [U]ser fees are those which are charged only to the person actually using the service; the amount of the charge is generally related to the actual goods or services provided. A user fee for an ongoing service is a monthly charge rather than a one-time payment. User fees are thus distinguishable from special assessments as well as special taxes." (*Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 595-97 (citations omitted).)

"The court in *Solvang Mun. Improvement Dist. v. Board of Supervisors* (1980) 112 Cal.App.3d 545 [189 Cal.Rptr. 391], discussed the difference between a property tax and a special assessment: 'An ad valorem tax on real property ... is the tax levied by a county to pay for general expenditures, such as fire and police protection ... which are deemed to benefit all property owners within the taxing district, whether or not they make use of or enjoy any direct benefit from such expenditures. ... In contrast, a special assessment, sometimes described as a local assessment, is a charge imposed on particular real property for a local public improvement of direct benefit to that property, as for example a street improvement. ... In contrast to a special assessment, a usage fee typically is 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. The usage fee for an ongoing service would normally be a monthly charge rather than a one-time charge." (*San Marcos Water Dist. v. San Marcos Unified Sch. Dist.* (1986) 42 Cal.3d 154, 161-62 (citations omitted).)

The *Solvang* and *San Marcos* cases pre-date the "modern definitions" that the City is trying to avoid, yet they distinguish taxes from fees in the same way, judicially recognizing the clear demarcation between the two and holding that taxes and user fees have different characteristics, serve different purposes, and are subject to different rules.

Another case predating modern definitions, *Arcade County Water Dist. v. Arcade Fire Dist.* (1970) 6 Cal.App.3d 232, specifically addressed whether fees for water service could be considered taxes. *Arcade* involved a dispute between public water districts and public fire departments over whether the fire departments were required to pay for hydrant water they used to fight fires. The fire departments argued that they should not be required to pay water fees because they were exempt from taxation. The Court of Appeal rejected the attempt to equate fees and taxes: "Defendants' characterization of plaintiffs' charges as a 'tax' is unfounded. A charge for services rendered is in no sense a tax (see *City of Oakland v. E. K. Wood Lumber Co.* (1930) 211 Cal. 16, 25 [292 P. 1076, 80 A.L.R. 379]). The defendant fire districts are liable to the water districts for the services supplied." (*Arcade Cty. Water Dist.*, 6 Cal.App.3d at 240.)

Bighorn-Desert View Water Agency v. Verjil, relied on by the City, actually assists plaintiff in clarifying that water rates are not taxes, but fees. The Court held that "a public water agency's charges for ongoing water delivery, which are *fees and charges* within the meaning of article XIII D ... are also *fees* within the meaning of section 3 of article XIII C." (*Bighorn*, 39

Cal.4th at 216; see also *Brooktrails Township Comm. Services Dist. v. Bd. of Supervisors* (2013) 218 Cal.App.4th 195, 207 ("the money property owners were required to pay [for water service] did not qualify as a tax requiring a two-thirds vote, or even as an assessment that required a simple majority vote ... the money exacted was a fee").)

To support its theory that user fees are tax levies, the City cites *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864. *Dare* was not a referendum case. At issue was an *initiative* that would have required the City to charge commercial sewer customers a volumetric fee rather than a flat fee for sewer service. (12 Cal.App.3d at 866-67.)

The Court viewed *City of Madera v. Black* (1919) 181 Cal. 306 as supposed precedent that a monthly sewer fee is a "tax." (*Dare*, 12 Cal.App.3d at 868.) *Madera v. Black*, however, set no such precedent. It held unremarkably that a monthly charge, over half of which was deposited not in the sewer fund, but in the City's general fund for expenditure on non-sewer public purposes, was partly a tax. (*Black*, 181 Cal. at 310-11.)

Having concluded (incorrectly) that under *Madera v. Black* sewer fees are "tax levies" exempt from the referendum power, the *Dare* Court then relied on *Myers v. City Council of Pismo Beach* (1966) 241 Cal.App.2d 237 for the now-defunct principle that initiatives "cannot be used as an indirect or backhanded technique to invoke the referendum process against a tax ordinance." (*Dare*, 12 Cal.App.3d at 867.)

The *Myers* line of cases, including *Dare v. Lakeport City Council*, was later overruled by the California Supreme Court in *Rossi v. Brown* when it held that initiatives are not "backhanded" referenda. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 705 *et seq.*)

Notably, in the process of disapproving *Dare*, the Supreme Court corrected *Dare*'s mischaracterization of sewer charges as tax levies: "*Dare* ...

did *not* involve a charter city *or repeal of a tax*. The disputed initiative would have amended a city ordinance to fix the maintenance *fees* charged users for operation of the municipal sewage system." (*Rossi*, 9 Cal.4th at 708.) Thus, *Dare* is neither a referendum case, nor a case correctly defining sewer fees as taxes, nor good law.

In sum, no existing precedent holds that user fees for water service are "tax levies" excepted from the people's referendum power. But a multitude of precedent holds that taxes are not user fees, and vice versa. Thus, the City is mistaken when it claims that California courts interpret "broadly" the tax exception to the referendum power (Petition for Review at 16). That claim is also inconsistent with the applicable rule for interpreting exceptions to the referendum power:

> "Our duty is to 'jealously guard' the referendum and initiative powers, and to liberally construe those powers so that they 'be not improperly annulled.' 'We resolve doubts about the scope of the initiative power in its favor whenever possible, and we *narrowly* construe provisions that would burden or limit the exercise of that power.'" (*City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1078 (applying narrow construction to referendum exception (citations omitted)); see also *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 936; *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.)

Giving respect to the constitution's modern definitions, and to the many cases, new and old, that distinguish taxes from fees, and to the Court's solemn duty to construe narrowly the exception for "tax levies," the City's water fees are not tax levies exempt from the people's referendum power. The Court of Appeal did not err. Review should be denied.

IV

THE CITY'S "IMMEDIATE SUSPENSION" ARGUMENT IS ILLOGICAL

Tacitly recognizing that its position lacks support, the City resorts to a policy argument. It argues that there ought to be an exception from the referendum power for user fees because "a referendum immediately suspends legislation upon certification of petition signatures ... and is therefore more disruptive of fiscal administration than a prospective reduction in revenue by initiative." (Petition for Review at 15.) The City then quotes *Rossi v. Brown* where the Court explains why taxes can be repealed by initiative even though they are excepted from the referendum power: "[I]f a tax measure were subject to referendum, the county's ability to adopt a balanced budget and raise funds for current operating expenses ... would be delayed." (*Rossi*, 9 Cal.4th at 703.)

That argument may have held water when *Rossi* was decided, prior to the voters' adoption of Proposition 218, but it makes no sense today. Today, taxes are no longer protected from the delay that a referendum election would entail, because taxes are *automatically* required to be presented to the voters at an election for their approval or rejection.

> "All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. ... 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. ... No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote." (Cal. Const., art. XIII C, § 2.)

In other words, 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 from delayed implementation that taxes have. But its argument is built on sand because taxes no longer have that protection.

Even before the adoption of Proposition 218, the City's theory was debatable. One could argue that an initiative repealing an existing tax that the City's budget relies upon would cause more disruption than the referendum of a proposed new increase that the City is currently operating without.

In any event, the City is lobbying this Court to cloak user fees with an immunity that even taxes do not enjoy. Unlike taxes, fees for water service are exempt from the automatic voter approval requirement (Cal. Const., art. XIII D, § 6(c)), but only because they *are* "fees," defined as a "levy *other than* ... a tax." (Art. XIII D, § 2(e).) The City cannot have its cake and eat it too. It cannot treat its water rates as *fees* in order to avoid the voter approval requirement that applies to taxes, but then treat its rates as *taxes* in order to avoid acting on plaintiff's referendum petition. Fees are fees. They are not automatically subject to voter approval, but they can be referended if enough voters sign a petition.

V

PROPOSITION 218 DID NOT IMPLIEDLY LIMIT RATEPAYERS TO ONLY THE INITIATIVE POWER

The City's final argument is that the referendum power over fees was impliedly negated by Proposition 218's failure to expressly preserve it. The Court of Appeal did such a thorough job refuting the City's argument, plaintiff simply asks this Court to reread pages 8-13 of the opinion.

CONCLUSION

For the reasons above, the City's petition for review should be denied. The request for depublication should also be denied. The decision of the Court of Appeal, protecting the people's precious referendum power,

should not be disturbed.

DATED: January 10, 2019.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached petition and memorandum, including footnotes but excluding the caption page, tables, verification, and this certification, as measured by the word count of the computer program used to prepare this pleading, contains 3,319 words.

DATED: January 10, 2019.

/s/ *Timothy A. Bittle*
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STATE OF CALIFORNIA
Supreme Court of California

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