IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S252915

LESLIE T. WILDE,
Plaintiff and Appellant,

v.

CITY OF DUNSMUIR, et al.
Defendants and Respondents.

After a Published Opinion by the Court of Appeal of the State of California
Third Appellate District, Case No. C082664
Appeal from Superior Court of the State of California, County of Siskiyou
The Honorable Anne Bouliane, Judge Presiding
Civil Case No. SC CV PT 16-549

REPLY IN SUPPORT OF PETITION FOR REVIEW

KENNY & NORINE
*John Sullivan Kenny, SBN 39206
Linda R. Schaap, SBN 171945
1923 Court Street
Redding, CA 96001
jskenny@lawnorcal.com
Tel: (530) 244-7777
Fax: (530) 246-2836

Attorneys for Respondents
City of Dunsmuir, et al.

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I. INTRODUCTION

The Constitutional issue presented for review here is whether fees which fund essential government services are subject to referendum notwithstanding article II, section 9 of the California Constitution. The question is concededly worthy of this Court's review and this case is an ideal vehicle to address the issue, with competent counsel on both sides and ample amicus participation.

II. ARGUMENT

A. Wilde Silently Concedes This Case Merits Review

Wilde's opposition makes no effort to argue the case does not warrant review. As The City points out, the question presented is of great importance, affecting every California local government's funding of essential services. Review is necessary to secure uniform application of article II, section 9 as to referenda and the relationship of that section to article XIII C, section 3 (reserving only the initiative power as to revenue measures) and article XIII D, section 6, subdivision (c) (exempting water, sewer and trash fees from elections required of other property related fees). Local governments need stable, predictable finances to provide reliable services at efficient cost. Uncertainty in the law related to referenda power deprives them of that and requires repeated, costly litigation — at the expense of the very ratepayers for whom Wilde and her counsel at the Howard Jarvis Taxpayers Assocation (HJTA) claim to sue.

B. Wilde Ignores That This Question Arises Repeatedly

Wilde's opposition is silent as to the Petition's demonstration that the question has arisen repeatedly in every corner of our state in recent years. As HJTA has been among the litigants in those cases, it would rather ignore the need for guidance on this issue than concede that this Court's review is warranted. HJTA prefers the benefit of a decision rendered in a case decided without amicus participation or counsel for one party rather than

this Court's considered decision. In fact, the docket in *HJTA v. Amador Water Agency*, pending in the Third Appellate District, shows that an oral argument waiver notice was just sent on January 11, 2019 and that notice issued immediately after HJTA gave that court notice of the Opinion in issue here.

Wilde is now represented by HJTA in this case. This petition is well-briefed, rendering the question it presents both suitable for review and timely.

C. Wilde's Merits Arguments Do Not Persuade

Wilde asserts Proposition 218 impliedly amended article II, section 9 to introduce "modern definitions" of "tax" into that provision of our Constitution dating from the 1911 amendments implementing Progressive-era reforms. This is unlikely. Why would the voters who approved Proposition 218 wish to **expressly** limit the reach of article II, sections 8 and 9 to initiatives and only **impliedly** change their application to referenda? Were any change intended as to the latter it, too, would be express. This is but an ordinary application of the *expressio unius* rule—an application that Wilde's opposition does not address. *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1191 (applying *expressio unius* rule to find Prop. 218 does not impliedly preempt city annexation statutes).

Indeed, Wilde does not attempt to argue the intent of voters who adopted article II, section 9 in 1911 or case law applying it since. Instead, she merely asserts that there are definitions of "tax" and "fee" that should apply everywhere in our Constitution, to provisions added in 1911 and those added in 1996 alike. As this Court explained in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, however, the term "tax" had no consistent meaning in California law when this Court decided that case two decades ago. 2010's Proposition 26 was required to provide such a

definition. Pre-Proposition 26 cases construing what is or is not a "tax" for one purpose or other must be applied with attention to the context of each. A "tax" for purposes of Proposition 13 is not necessarily a "tax" for purposes of the much older article II, section 9.

Similarly, Wilde errs to suggest that Prop. 26 has made obsolete this Court's observation in *Rossi v. Brown* (1995) 9 Cal.4th 688 that referenda are forbidden in municipal finance because of the disruptive effect of their immediate suspension of legislation when the requisite signatures are gathered. It is true that new or increased taxes now require voter approval under article XIII C, section 2, subdivisions (b) and (d) and therefore local governments know better than to plan on those revenues until the voters have spoken. However, Wilde overlooks that article XIII C, section 3 expressly allows initiative repeal or reduction of existing taxes already reflected in municipal budgets.

Moreover, the idea that referenda are not disruptive because they involve prospective, not current, revenues would read article II, section 9 out of the Constitution, as that is always true of legislation subject to referendum. We referend newly adopted laws; not those long on the books.

D. There Is No Equitable Bar To Review Here

Wilde errs to accuse the City of unclean hands. The case law is split as to the duty of government officials when confronted with plainly unlawful initiatives and referenda. Wilde cites cases that such officials must seek judicial relief from their otherwise ministerial duties to conduct elections. (Opposition at pp. 6-7.) A competing lines of cases note that the law will not compel idle and unlawful acts and therefore allow local governments to put the onus on proponents of unlawful initiatives to seek judicial assistance. E.g. *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491.

Even were the law less divided than Wilde claims, no case prevents this court from deciding issues important to the development of California law because a litigant chose one of two competing branches of case law or even erred as to law tangential to the issues on review. Wilde also ignores the fact that voters rejected her initiative to challenge the water rates which her referendum also attacks. Thus, the City did not, as Wilde claims, do nothing as to Wilde's opposition to the rates in issue here. The City concluded article II, section 9 precluded Wilde's referendum because article XIII C, section 3 limits its force only as to initiatives, not referenda, but placed her initiative on the ballot to allow voters to determine its — unsuccessful — outcome.

Nor did the City raise a new argument for the first time in its petition for review. This case has always concerned the availability of a referendum here. It is immaterial that the City sharpened its legal arguments in response to the Court of Appeal's decision and with the support of amici altered to the case by the publication of the Opinion. Wilde can show no prejudice from this new legal argument, as it involves no facts that were not already of record. *People v. Braxton* (2004) 34 Cal.4th 798, 809.

III. CONCLUSION

Accordingly, the City urges the Court to grant its petition for review to settle this pressing question for the benefit of all California governments and the residents and businesses who depend on the services they provide.

Respectfully submitted,

Dated: January 17, 2019

KENNY & NORINE

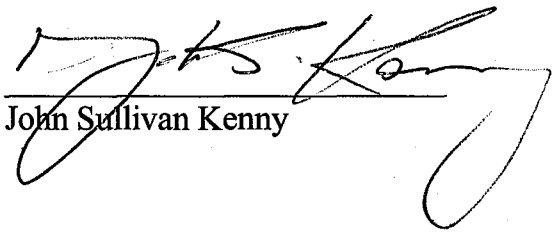
JOHN SULLIVAN KENNY
LINDA R. SCHAAP
Attorneys for Respondents
CITY OF DUNSMUIR, et al.

CERTIFICATE OF WORD COUNT

The foregoing Reply in Support of Respondents' Petition for Review contains 1,311 words (including footnotes, but excluding the tables and this Certificate) and is thus within the limit of 4,200 words established by California Rules of Court, rule 8.504(d)(1). In preparing this Certificate, I relied on the word count generated by Microsoft Word version 2010 word-processing program used to generate this Petition.

Dated: January 17, 2019

KENNY & NORINE



John Sullivan Kenny

RE: *Wilde v. City of Dunsmuir, et al.*
Siskiyou County Superior Court Case No. SCCVPT 16-549
Court of Appeal Case No. C082664
Supreme Court Case No. S252915

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Timothy A. Bittle (TrueFiling)
Howard Jarvis Taxpayers Foundation
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
Attorneys for Appellant Leslie T. Wilde

Clerk/Executive Officer (Mail)
California Court of Appeal
Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Michael G. Colantuono (Courtesy Copy)
Colantuono Highsmith & Whatley PC
420 Sierra College Drive, Suite 140
Grass Valley, CA 95945

Clerk of the Court, Civil Division (Mail)
Siskiyou County Superior Court
311 4th Street
Yreka, CA 96097

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Tamara Warren
TAMARA WARREN

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **WILDE v. CITY OF DUNSMUIR**
Case Number: **S252915**
Lower Court Case Number: **C082664**

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John Kenny Kenny & Norine 39206	jskenny@lawnorcal.com	e-Service	1/18/2019 8:13:08 AM
Linda Schaap Kenny & Norine 171945	lschaap@lawnorcal.com	e-Service	1/18/2019 8:13:08 AM
Michael Colantuono Colantuono, Highsmith & Whatley, PC 143551	MColantuono@chwlaw.us	e-Service	1/18/2019 8:13:08 AM
Michael Colantuono Colantuono, Highsmith & Whatley, PC 143551	mcolantuono@chwlaw.us	e-Service	1/18/2019 8:13:08 AM
Tamara Warren Kenny & Norine	twarren@lawnorcal.com	e-Service	1/18/2019 8:13:08 AM
Timothy Bittle Howard Jarvis Taxpayers Foundation 112300	tim@hjta.org	e-Service	1/18/2019 8:13:08 AM
Timothy Bittle Howard Jarvis Taxpayers Association 112300	tim@hjta.org	e-Service	1/18/2019 8:13:08 AM

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1/18/2019

Date

/s/John Kenny

Signature

Kenny, John (39206)

Last Name, First Name (PNum)

Kenny & Norine

Law Firm