S252915

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LESLIE T. WILDE,

Plaintiff and Appellant,

v.

CITY OF DUNSMUIR, et al.

Defendants and Respondents.

After a Published Decision of the Court of Appeal of the State of California
Third Appellate District, Case No. C082664

Reversing a Judgment of the Superior Court of the State of California
for the County of Siskiyou, Case No. SC CV PT 16-549
Honorable Anne Bouliane, Judge Presiding

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

Are property related fees under California Constitution, article XIII D, section 6 and other fees which fund essential government services subject to referendum notwithstanding article II, section 9 of the California Constitution?

INTRODUCTION

Defendants the City of Dunsmuir, et al ("City") ask this Court to affirm the trial court's rejection of plaintiff Leslie Wilde's ("Wilde") petition for writ of mandate alleging that the City wrongly refused to process her referendum against the City's increased water supply charge.

The Court of Appeal below erroneously construed California Constitution, article II, section 9 and articles XIII C and XIII D, the latter of which were adopted by 1996's Proposition 218.[1] Despite precedent interpreting article II, section 9 otherwise, the Court of Appeal's decision ("the Decision") (which remains published pending this Court's decision) applied the disruptive referendum power to revenues that fund essential governmental services. That Decision disregards article XIII C, section 3's express limitation on article II, section 9 as only to the initiative, leaving earlier law governing referenda intact.

The Decision mistook that section 3's silent affirmation of earlier precedent under that section 9 arising from the common canon of construction which goes by the weighty Latin label "expressio unius est exclusion alterius" — to say one thing is to exclude another. The City, the

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[1] All references in this brief to articles and sections of articles are to the California Constitution.

lower court and Wilde are in agreement on one thing — Proposition 218 changed the law as to initiative repeal or reduction of water rates, but changed nothing about earlier law on referenda that seek to do so. They disagree as to what that earlier law was. With respect, the City asserts the trial court got it right and the Court of Appeal erred.

Further, the Decision conflicts with the roles afforded registered voters, property owners and other fee payers under article XIII D, section 6, subdivisions (a) and (c) which specify when each has a voice in rate-making otherwise charged to legislators. This creates disharmony among these provisions. This Court may easily harmonize articles II and XIII C by maintaining earlier law.

Additionally, the Decision will result in needless disruption and impairment of public finance — the State's as well as local governments' — making it more difficult and costly to fund such essential government services as water supply.

The City Council properly made the rates challenged here in compliance with Proposition 218's procedural and substantive requirements. Wilde made two, unsuccessful, efforts to prevent these rates from taking effect. She organized a protest effort as article XIII D, section 6, subdivision (a) allows, but could not persuade a majority of her fellow rate-payers to participate. She then placed an initiative on the City's ballot to reduce the rates. This, the City did place on the ballot, but voters rejected it, apparently persuaded the City did, in fact, need additional funds to repair an aging water system. She need not be given a third.

This Court should affirm the trial court's denial of Wilde's petition for a writ to compel an election on her referendum, as article II, section 9 requires. As to referenda, Proposition 218 makes no change in that section. The City's ongoing effort to upgrade its water system to ensure a safe and adequate supply for domestic use and fire safety is a vital project which should not be made uncertain by an unauthorized referendum petition. If Wilde truly wants a third bite at this apple, she may propose another initiative under article XIII C, section 3. Nothing (except, perhaps, for the views of most of her neighbors) precludes her from doing so.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. THE CITY ADOPTS WATER RATES CONSISTENTLY WITH PROPOSITION 218

Dunsmuir is a general law city of fewer than 1,600 people on the upper Sacramento River in the Trinity Mountains along Interstate 5 in southern Siskiyou County. It attracts many tourists to fish, hike and otherwise enjoy the region's scenic, forested beauty. Many of its water mains and a water storage tank are more than 100 years old and must be replaced to maintain a reliable water supply. (CT 77.) These improvements would ensure water delivery at adequate pressures for domestic use and fire protection in major sections of the City — an urgent concern in light of recent disastrous fires in other communities at the urban-wildland interface, as Dunsmuir is. (CT 77.)

An Ad Hoc Water Rate Committee, including two council members and three citizens, met in public session six times. (CT 77.) The Committee

recommended the City Council increase water rates to fund the restoration project. (CT 77.) The proposed rates, implementing a water master plan and supported by a formal rate study, would raise approximately $15,000,000 over the five years permitted by Gov. Code, § 53756, subdivision (a) [Prop. 218 Omnibus Implementation Act]. The rate structure was of two parts. First, base (fixed monthly) rates were proposed such that, at the end of a five-year period, the City could find the minimum local share needed for federal grants to support the rehabilitation project. (CT 78.) Second, variable rates based on water consumption were set to meet funding requirements for the balance of the project. (CT 78.)

The City conducted the noticed hearing and protest proceeding required by article XIII D, section 6, subdivision (a)(2). Despite Wilde's concerted efforts, just 40 customers submitted protests. (CT 78.) Approximately 800 were needed for the majority which would bar the proposed rates under article XIII D, section 6, subdivision (a)(2). The City Council therefore unanimously adopted Resolution 2016-02 on March 3, 2016 to impose the increased water rates. (CT 78, 81-84.)

II. WILDE'S REFERENDUM

Wilde circulated a referendum to prevent the Resolution from taking effect. Given the small size of the City, few signatures were needed. (Elec. Code, § 9237 [lesser of 100 signatures or 25 percent of electorate in City with fewer than 1,000 voters sufficient to qualify a referendum].) Wilde obtained approximately 100 signatures, which the County Clerk-Registrar certified. The City took no action on the petition, interpreting article II,

section 9 and article XIII C, section 3 to allow rate challenges by initiative but not referenda.

III. WILDE SEEKS WRIT OF MANDATE

On May 12, 2016 Wilde sought a writ of mandate ordering City to conduct an election on her referendum, seeking to prevent the increased rates from becoming effective. (CT 1–54.) The writ alleged that the referendum complied with all statutory requirements of the Elections Code and that the County Registrar of Voters had verified the number of signatures, but the City had disregarded a claimed ministerial duty to conduct the election. The City opposed, arguing inter alia that article II, section 9 does not permit a referendum on such revenue matters as the rates adopted by Resolution 2016-02, and that nothing in Proposition 218 changes that. (CT 55–87.)

IV. VOTERS REJECT INITIATIVE TO CHANGE WATER RATES

While Wilde's writ was pending in the trial court, she circulated an initiative to reduce the City's water and sewer rates. (City's Motion in the Court of Appeal for Judicial Notice (City's DCA MJN), Declaration of John Sullivan Kenny, Exh. A.) The City submitted the Initiative to the voters. (City's DCA MJN, Exh. B.) On November 8, 2016, the voters rejected it by a substantial margin. (City's DCA MJN, Exh. D.) Thus, Wilde had two opportunities to persuade her neighbors to defeat the rates — in the majority protest proceeding required by article XIII D, section 6, subdivision (a) and at the polls in November 2016. She filed the subject writ of mandate for a third bite at the apple.

V. TRIAL COURT DECIDES PROPOSITION 218 PROVIDES ONLY FOR INITIATIVE POWER FOR WILDE'S CHALLENGE TO WATER RATES

The trial court heard the writ on July 1, 2016. It denied the writ, agreeing with the City's argument that Proposition 218 allows initiatives, but not referenda, as to property related fees. (RT 2–11; CT 131–132.) Wilde timely appealed. (CT 133–134.)

VI. COURT OF APPEAL REVERSES IN A PUBLISHED DECISION

The Third District reversed and remanded with instruction that the Superior Court issue a preemptory writ of mandate to compel the City to place the referendum on the City's next municipal ballot. Unless the City were to call (and pay for) a special election, this will occur in November 2020, delaying the vital repairs of the City's aging water supply system for almost two years. The City consolidates its elections with the statewide general elections pursuant to Elections Code, section 1301. The Decision concludes Proposition 218 did not abridge what it concluded was voters' earlier-established right to referend local revenue measures. The Decision also states that the essential government services exception to direct democracy powers does not apply here because the referendum does not undermine the City's future ability to study, develop and implement a new water rate master plan.

The Court of Appeal filed its Opinion on November 15, 2018. The City sought timely rehearing and the Court of Appeal denied that Petition on December 4, 2018.

The City filed its petition for review December 21, 2018 and this Court granted review on January 30, 2019.

STANDARD OF REVIEW

Independent judgment review applies to rate-making disputes under Proposition 218 under *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431 ("*Silicon Valley*"). However, such review is not de novo. First, the Court starts with an assumption the City acted appropriately: "In applying independent judgment, a trial court must accord a strong presumption of correctness to administrative findings, and ... the burden rests upon the complaining party to show that the administrative decision is contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816–817, internal quotations and citations omitted.)

This Court reviews the trial court's factual conclusions for substantial evidence. (*Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 916 ("Under that standard, 'the power of an appellate court begins and ends with the determination as to whether there is **any** substantial evidence, contradicted or uncontradicted, which will support the finding of fact [citation]." [applying Prop. 218]); *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1440 [applying Prop. 26].)

Of course, this Court's review of legal issues, including the meaning of Proposition 218, is de novo. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1176.)

Few facts are disputed here, as review is on an unchallenged administrative record and the question is one of pure statutory (or constitutional) construction.

This Court must not shrink from the requirements of Proposition 218. (*Silicon Valley, supra,* 44 Cal. 3d at p. 448.) Nor may it, however, expand them. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 936 [reading "local agency" under article XIII C, § 2 to exclude voters acting by initiative to harmonize Prop. 218 with the initiative power under Article II]); *City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191, 1207–1208 ("*Ventura*") [reading property related fee provisions of article XIII D, section 6 to exclude groundwater augmentation charges due to their regulatory purpose to serve the water conservation goal of article X, § 2].) This Court construes Proposition 218 as the voters approved it, without adding or subtracting language to fit ideological commitments.

LEGAL DISCUSSION

I. ALLOWING REFERENDUM OF WATER RATES WOULD DEFEAT PROPOSITION 218'S EXPRESS MECHANISM FOR NEW OR CHANGED PROPERTY RELATED FEES AND CHARGES

Proposition 13 was intended to provide effective tax and rate payer relief. Since Proposition 13 constrained local government's ability to raise property taxes, which had been the mainstay of local government finance, local governments relied on increasing other revenue tools to finance local

services, typically assessments and property-related fees. Proposition 218 was drafted to protect taxpayers by limiting the methods by which local governments exact this type of revenue from taxpayers without their consent. (*Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637, 640–642.)

Proposition 218 (article XIII D, section 6) imposed procedural requirements and limitations on the imposition of property related fees, granting different roles to property owners and registered voters, respectively, preferring the former. Before adopting or increasing any property related fee, an agency must conduct a public hearing to receive protests. (Cal. Const., art. XIII D, section 6, subdivision (a)(2).) The hearing cannot be held sooner than 45 days after the mailing of notice of the proposed fee or charge to the record property owners or, if the agency determines, to its customers (*Ibid.*; Gov. Code, § 53755 [Prop. 218 Omnibus Implemental Action of 1997]; *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 290–291 [Omnibus Act good authority to construe Prop. 218].)). One protest is allowed for each property the City serves. (Cal. Const., art. XIII D, section 6, subdivision (a)(2).) If written protests received from a majority of property owners, the agency may not proceed with the rates. (*Ibid.*) If not, it may.

An additional requirement applies to all property related fees other than those to fund sewer, water, and refuse collection:

> Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.

(Article XIII D, section 6, subdivision (c).)

Thus, a simple majority of property owners can approve such a fee, but two-thirds of voters must do so, reflecting Proposition 218's preference for control by those who are obliged to pay a fee.

Article XIII established a new process for enacting rates and charges to protect rate-paying property owners. It mandates owner/rate payer involvement before enactment. It empowers owners/ratepayers to disapprove the imposition or increase of a property related fee charge and to require the agency to abandon its effort.

In treating sewer, water, and refuse collections differently than other property related fees, Proposition 218 recognized these services are essential to public health and safety.

As a further safeguard for those who must bear the cost of government services, Proposition 218 expanded the scope of the initiative process by limiting the force of article II's limitations on the referendum power, which case law had extended to initiatives with similar effect.

> Sec. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

(Article XIII C, sec. 3.)

Thus, this section 3 changes the force of article II, sections 8 and 9 as to "**the initiative power** ... in matters of reducing or repealing any local tax, assessment, fee or charge." (Emphasis added.)

Article XIII C, section 3 is silent as to the referendum power. The silence is not an oversight, nor could this Court add words to correct any oversight which might be found. (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 253.) The role of a referendum — to solicit the view of voters before a measure takes effect (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 241) — was afforded by article XIII D, section 6's prerequisites for a property related fee — opportunity for a majority protest of property owners, followed by an election of property owners or registered voters, except as to fees to fund

essential water, sewer and trash services. Allowing the referendum to forestall approval of rates and charges for water, sewer and trash charges would give little force to article XIII D, section 6, subdivision (c)'s exemption for the those fees.

To allow rates and charges imposed pursuant to Proposition 218 to be subject to referendum could lead to absurd consequences for fees not within section 6, subdivision (c)'s exception. Property-related flood control charges like that at issue in *Greene*, could survive a majority protest hearing, be approved by an election of a majority of property owners or two-thirds of registered voters and, under the Decision, still be subject to a referendum petition thereafter. Should Proposition 218 be interpreted to allow fees approved by two-thirds of voters to be forestalled by as few as 100 signatures and barred by a simple majority of voters? The Decision calls for process without end. And beyond reason.

Legislation, of course, should be interpreted to effectuate the purpose of the law and to avoid absurd results (*People v. Martinsen* (1987) 193 Cal.App.3d 843, 848; *People v. Pieters* (1991) 52 Cal.3d 894, 898–899.)

Use of referenda to challenge water rates erodes article II, section 9's limits on voters' reserved power to approve or reject laws by referendum. That section 9 prohibits referenda of "urgency statutes, statutes calling elections, and statutes providing for **tax levies or appropriations for usual current expenses of the State**." (Cal. Const., art. II, sec. 9, emphasis added.) The power — and its exception — apply to local legislation.

(*Rossi v. Brown* (1995) 9 Cal.4th 688, 703.) In singling out sewer, water, and refuse collection, Proposition 218 recognized that these are essential governmental services that should not be impaired by the referendum process.

Proposition 218 provides means by which property owners and voters may challenge an increase in property related fees. Its omission of the referendum power from article XIII C, section 3 then is purposeful — it provided other means to the same end. This Court can read article XIII C, section 3 as it was written — as limited to initiatives — and leave earlier law as to the referendum undisturbed.

Now we turn to what that law was — and is.

II. ARTICLE II, SECTION 9 PROHIBITS REFERENDA OF "STATUTES PROVIDING FOR TAX LEVIES OR APPROPRIATIONS" AND INCLUDES UTILITY FEES

As noted above, article II, section 9 reserves the referendum power — as to the State and local governments alike — but excludes it as to "statutes providing for tax levies or appropriations for usual current expenses of the State." (Cal. Const. art. II, § 9, subd. (a).)

This exception is intended to stabilize government finance by preventing disruptive referenda of budgets, other appropriations, and the means to fund them. As this Court explained in *Geiger v. Board of Sup'rs of Butte County* (1957) 48 Cal.2d 832, 839–840:

> One of the reasons, if not the chief reason, why the Constitution excepts from the referendum power acts of the

> Legislature providing for tax levies or appropriations for the usual current expenses of the state is to prevent disruption of its operations be interference with the administration of its fiscal powers and policies. The same reasoning applies to similar acts of a county board of supervisors .... An essential function of a board of supervisors is the management of the financial affairs of county government, which involves the fixing of a budget to be used as the basis for determining the amount and rate of taxes to be levied. Before the board can properly prepare a budget, it must be able to ascertain with reasonable accuracy the amount of income which may be expected **from all sources**, and, when it has adopted ordinances imposing taxes, it cannot make an accurate estimate unless it knows whether the ordinances will become effective. These are some of the reasons why the people have entrusted to their elected representatives the duty of managing their financial affairs and of prescribing the method of raising money. (Emphasis added.)

The logic of this discussion, and especially the emphasized phrase, encompasses other revenues which fund essential government services. In the post-Proposition-13 era of reduced taxes and increased reliance on fees, case law extended the constitutional principal to fees as detailed below.

Proposition 218 sought to reduce that protection for stable municipal finance, to a limited extent. Its article XIII C, section 3 extends the

initiative— but not the referendum — into territory from which article II, sections 8 and 9 previously precluded. Interestingly, it includes exception to both sections 8 [initiative] and 9 [referendum] of article II:

> Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, **the initiative power** shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge.

(Cal. Const., art. XIII C, sec. 3.) (Emphasis added.)

Thus, the voters power to — prospectively — reduce or repeal taxes is immune from attack under article II, section 9's prohibition of fiscal referenda, given the case law described infra extending its rule to initiatives. It also prevents question of such initiative proposals under section 8's limits on initiatives — apparently including its single-subject rule. (Cal. Const., art. II, § 9, subd. (d).)[2] It is also noteworthy that article XIII C, section 3 speaks only not just to taxes but "any local tax, assessment, fee or charge." This can be read to confirm that its framers understood earlier law to protect all of these from initiative repeal by virtue of the limits on referenda in article II, section 9.

By specifying that local revenue measures shall not be immune from "the initiative power," the voters who approved Proposition 218 are understood to maintain the earlier prohibition on such referenda under the

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[2] Article II, section 8, subdivisions (e) and (f) were added to the Constitution by Proposition 219 on the same ballot as Proposition 218. Thus, those provisions arguably apply to initiatives authorized by article XIII c, section 3 as the electorate adopted both on the same day.

canon of construction known as *expressio unius est exclusio alterius*. (E.g., *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105.)

The word "referendum" appears nowhere in articles XIII C and XIII D. Under the *expressio unius est exclusio alterius* rule, article XIII C, section 3's authorization of initiatives — but not referenda — evidences both understanding that referenda were prohibited by earlier law and intent to maintain that prohibition. (E.g., *Le Francois*, *supra*, 35 Cal.4th at p. 1105.) *Citizens Association of Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, reached a similar conclusion — citing Sherlock Holmes' dog that did not bark — to find Proposition 218's silence as to earlier rules regarding city annexations evidenced intent to maintain those rules. *(Citizens Association of Citizens Assn. of Sunset Beach*, *supra*, 209 Cal.App.4th at p. 1191 ["there is much in the very structure of Proposition 218 that, if it had been intended to apply to annexations, should have been there, but isn't"].)

Proposition 218's exception to article II, section 9's prohibition on referenda as to "statutes providing for tax levies or appropriations" for initiatives allows voters and ratepayers the opportunities to control what they pay for government services via either a prospective initiative or the procedural requisites for new or increased fee given by article XIII D, section 6, subdivisions (a) and (c)".

III. ARTICLE II, SECTION 9'S LIMIT ON REFERENDA REACHES FEES AND OTHER REVENUES THAT FUND ESSENTIAL GOVERNMENT SERVICES

Proposition 218 adopted positive law summarizing earlier case law on a variety of points, including Proposition 13's distinction of general from special taxes. (Cal. Const., art. XIII C, section 1, subds. (a) & (d); art. XIII A, section 4 [two-thirds voter approval required for local special taxes under Prop. 13]; see *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 57 [defining "special taxes" in article XIII A, section 4 "to mean taxes which are levied for a specific purpose rather than ... a levy placed in the general fund to be utilized for general governmental purposes"].) Thus, Proposition 218 reiterated Proposition 13's requirement that special taxes be approved by two-thirds of voters. (Compare Cal. Const., art. XIII C, § 2, subd. (d) [Prop. 218]; with *Id.*, art. XIII A, § 4 [Prop. 13]) and Proposition 62's requirement that general taxes be approved by a majority of voters (compare *Ibid.*. at art. XIII C, § 2, subd. (b) [Prop. 218] with Gov. Code, § 53723 [Prop. 62].)

Before Proposition 26, courts looked to pre-Proposition 218 case law to determine whether a levy was a fee or a tax.[3] For example, *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1041–1044, applied *Sinclair Paint* to determine a levy assessed to recover the costs to administer a rental unit business tax was a tax because its primary purpose

[3] This Court decided *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 after voters adopted Proposition 218, but did not address it there. (*Sinclair Paint Co., supra*, 15 Cal.4th at p. 873.)

was revenue-raising. (See also *id.* at p. 1035 [noting "cases decided under Proposition 13 have been used in analyzing the provisions of Proposition 218, with which we are primarily concerned here"].) Similarly, the Court of Appeal applied *Sinclair Paint* and other pre-Proposition 218 cases to find a fee imposed on telephone lines to fund 911 emergency services to be a tax subject to voter approval rather than a service fee. (*Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 692–695; see also *id.* at p. 693 ["cases decided under Proposition 13 have been used in analyzing the provisions of Proposition 218"].) Thus, Proposition 218 distinguishes special from general taxes by reference to earlier common law.

Our Constitution included no definition of "tax" before 2010's Proposition 26 added subdivision (b) to article XIII A, section 3 and subdivision (e) to article XIII C, section 1. Proposition 13 and Proposition 218 do not define "taxes," but rely on earlier case law. In *Sinclair Paint Co.*, *supra*, 15 Cal.4th 866, this Court helpfully summarized the state of the law when Proposition 218 was adopted in 1996 as follows:

> The cases recognize that "tax" has no fixed meaning, and that the distinction between taxes and fees is frequently "blurred," taking on different meanings in different contexts. (*Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1504; *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 905; *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 660;

County of Fresno v. Malmstrom (1979) 94 Cal.App.3d 974, 983–984.) In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 240; *County of Fresno, supra*, 94 Cal.App.3d at p. 983 ["Taxes are raised for the general revenue of the governmental entity to pay for a variety of public services."].) Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges. (*Shapell Industries, Inc., supra*, 1 Cal.App.4th at p. 240; *Russ Bldg. Partnership, supra*, 199 Cal.App.3d at p. 1505–1506; see *Terminal Plaza Corp., supra*, 177 Cal.App.3d at p. 907.) But compulsory fees may be deemed legitimate fees rather than taxes. (See *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1424.)

(*Sinclair Paint Co., supra*, 15 Cal.4th at p. 874.)

That pre-Proposition 218 common law extended article II, section 9's tax exemption reaches beyond taxes to fees and other revenue measure that fund essential government services. (*Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864.) *"Dare* affirmed the trial court's refusal to issue a writ to compel the Lakeport City Council to conduct an election on an initiative proposal to restrict the Council's power to establish sewer service

fees. It did so in a relatively brief decision citing several limits on the power of initiative, including the rule of article II, section 9:

- What is now article II, section 9 (12 Cal.App.3d at 867);
- The conclusion of *Myers v. City Council of City of Pismo Beach* (1966) 241 Cal.App.2d 237, 243–244 that "A proposed initiative ordinance cannot be used as an indirect or backhanded technique to invoke the referendum process against a tax ordinance of a general law city ... ." (*Ibid.*)."
- Its conclusion that sewer rate-making "must reasonably be considered a taxation function," citing *Yosemite Lumber Co. v. Industrial Acc. Commission of Cal.* (1922) 187 Cal. 774, 783, *City of Madera v. Black* (1919) 181 Cal. 306, 310–311, and *County of Los Angeles v. Southern Cal. Gas Co.* (1960) 184 Cal.App.2d 169, 180. (*Id.* at p. 868.)
- The source of sewer rate-making power in what was then article XI, section 12 authorizing local taxes. (*Id.* at p. 869.)
- The rule that disfavors initiative when statute confers the power to act on the legislative body of an entity, not the entity or generally. (*Dare, supra,* 12 Cal.App.3d at p. 869.) It provides no cite for the rule, but its presence in our law is clear. (E.g., *Committee of Seven Thousand Superior Court* (1988) 45 Cal.3d 491, 509.)
- The rule that the initiative may not be employed to impair an essential governmental power, citing *Simpson Hite* (1950) 36 Cal.2d 125, 134. (*Dare, supra,* 12 Cal.App.3d at p. 869.)

So clear was the law that article II, section 9's prohibition on tax referenda extended to tax initiatives that the Courts of Appeal uniformly struck down 1986's Proposition 62's statutory requirement of voter approval of general taxes. (*City of Woodlake v. Logan* (1991) 230 Cal.App.3d 1058 ("*Woodlake*"); *City of Westminster v. County of Orange* (1988) 204 Cal.App. 623 ("*Westminster*"); cf. 73 Cal.Ops.Atty.Gen. (1990) 111, 13–114 [applying same theory to opine statute requiring voter approval of a tax was unconstitutional].)

This law, of course changed. First with *Rossi, supra*, 9 Cal.4th at p. 709, upholding a San Francisco initiative to repeal that City's utility user tax, concluding that the initiative repeal of a tax did not offend article II, section 9, dismissing the rule of *Myers* followed by *Dare* as dictum. Then with *Santa Clara County Local Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 246 & fn. 17 ("*Guardino*"), disapproving *Woodlake* and distinguishing *Westminster* and the Attorney General's opinion cited above to uphold Proposition 62 some 9 years after its adoption. It is telling, however, **how** this Court overruled *Woodlake* and distinguished *Dare*:

> This court reasoned in *Rossi, supra*, that the foregoing policy is not violated by an initiative prospectively repealing an existing tax: by definition the repeal comes too late to affect the planning that went into the local government's current budget, and in planning future budgets the local government officials will be on notice that they cannot rely on the tax until the electors vote on the initiative. (*Rossi, supra*, 9 Cal.4th at

p. 703–704.) "Therefore, the potential for disruption of local government services by qualification of a referendum petition on a newly enacted tax measure is not present in the procedures leading to possible passage of an initiative which prospectively repeals an existing tax." (*Id.* at p. 704.)

Thus, *Rossi* and *Guardino* preserve the prohibition on referenda on local revenues while eliminating it on referenda precisely because referenda — which suspend legislation as soon as signatures (just 100, here) are certified — are more disruptive than initiatives, which take effect only after an election which cannot be accomplished in fewer than several months and might be two years away.

If, as *Wilde* argues, article II, section 9's limitation on the referendum power never extended beyond taxes, why were *Rossi* and *Guardino* so careful to distinguish rather than overrule *Dare*? In *Rossi*, this Court wrote:

> The earliest of the post-*Myers* decisions relied on by the Court of Appeal, *Dare*, *supra*, 12 Cal.App.3d 864, 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. The court cited the *Myers* rule in dictum. The holding, however, was that the initiative was not available to amend the ordinance in question because the Legislature had

vested the local legislative body with the power to fix those fees. *Dare*, *supra*, 12 Cal.App.3d at p. 869.)

(Rossi, supra, 9 Cal.4th at p. 709.)

Why did the framers of Proposition 218 find it necessary to make an exception to article II, section 9 to allow initiative repeal of taxes, assessments and fees if — as Wilde contends — fees were never within the reach of the section to begin with?

In short, Wilde cannot persuasively account for the reasoning of *Guardino* and *Rossi* nor for the historical development of the law recounted here. The trial court's understanding of article II, section 9 fits these cases better.

IV. THE RESOLUTION INCREASING WATER RATES IS NOT SUBJECT TO REFERENDUM BECAUSE IT FUNDS ESSENTIAL GOVERNMENT SERVICES

The referendum does not reach laws funding government's usual, current expenses. (Cal. const., art. II, § 9, subd. (a).) The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State. (*Ibid.*) These exceptions apply to local referenda. (*Rossi*, *supra*, 9 Cal.4th at p. 698.)

The rates in issue here fund an essential governmental service — water supply. The Court of Appeal recently affirmed a water district's refusal to conduct an election on an initiative to reduce its service charges.

The initiative there would have rendered the district insolvent, violating the rights of its bondholders. (*Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 900–901, 921.)

Moreover, Proposition 218 does not authorize referenda of property-related fees, but rather initiatives to repeal or reduce them. (Cal. Const., art. XIII C, § 3.) The distinction is of constitutional significance. *Santa Clara County Local Transportation Authority*, *supra*, 11 Cal.4th 220 upheld Proposition 62's statutory requirement for voter approval of new taxes because it acted as an initiative rather than a referendum. (*Id.* at p. 240.)

The charge challenged here funds the City's "usual current expenses" to supply water via upgrading its existing 100-year old storage tank and outdated infrastructure. (CT 81-86, rate Resolution 2016-02 and 2016 Water Master Plan estimated service life map.) Its repeal would compel the City to default on obligations backed by the charge and frustrate its legislative mandate to protect the City's water supplies. "The City's current rates are necessary to address the City's dated water system, and disruption of those rates would jeopardize the City's financing of the project and ability to qualify for future grant funding." (CT 76-78 [Deutsh Declaration p. 3:19-21].) Although the record here is not replete with information about the financial consequences of a successful referendum on the finances of the City's water utility, such was not the case in *Mission Springs*. As a general matter, if permitted, referenda will threaten at least some utility finances, as this Court foresaw in *Bighorn*. "[B]y exercising the initiative power voters may decrease a public water agency's

fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without prior voter approval. Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound." *Bighorn-Desert View Water Agency v. Verjil, supra,* 39 Cal.4th at p. 220. As such, this Referendum violates article II, section 9.

V. ALLOWING REFERENDA TO CHALLENGE REVENUE REQUIRED FOR ESSENTIAL GOVERNMENT SERVICES WILL IMPEDE THE GOVERNMENT'S ABILITY TO PERFORM ESSENTIAL FUNCTIONS DISRUPTING GOVERNMENT OPERATIONS

This Court distinguished rather than disapproved *Dare* in *Rossi*, it stated its reliance on the *Myers* rule was dicta and that the case turned on the *Committee of Seven Thousand* rule that statutes may delegate authority to elected legislators alone. (*Rossi, supra*, 9 Cal.4th at p. 707.) *Rossi* did not consider another of *Dare*'s multiple bases for decision — the rule that the powers of direct democracy are not construed to defeat essential governmental powers. (E.g., *Simpson*, *supra*, 36 Cal.2d 125 (1950) Cal.2d 125.) That rule also justifies the trial court decision here.

The Howard Jarvis Taxpayers Association (HJTA) circulated an analysis of Proposition 218 during the campaign on the measure which might be said to be part of its legislative history. ("Right to Vote on Taxes

Act (Proposition 218) (Annotated as of September 5, 1996) reprinted in League of California Cities, Propositions 26 and 218 Implementation Guide (May 2017) at p. 126 et seq., < http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Proposition-26/LCC-218-26-Guide-2017-FINAL.aspx> (as of Feb. 26, 2019) but see, *Carman v. Alvord* (1982) 31 Cal.3d 318, 331 fn. 10 [post-election declaration of Howard Jarvis not legislative history of Prop. 13].)[4] In that annotation, the HJTA states of article XIII C, section 3:

> Annotation: This section merely "constitutionalizes" Rossi v. Brown, a recent decision of the California Supreme Court upholding the right to the electorate to use the local initiative power to reduce or eliminate government imposed levies via the initiative power. It provides "last resort" remedy.

Thus, to the extent the HJTA annotation evidences the understandings debated in the campaign on Proposition 218, it suggests it intended to preserve *Rossi*, including its distinction of referenda and initiatives on fiscal matters, rather than to change it.

In any event, the text of Proposition 218 suggests voters added article XIII C, section 3 to our Constitution only to allow initiative to

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[4] Thus, the post-election version of the HJTA Annotation is not useful in construing the measure. It, too, is reprinted in the League Guide. (Howard Jarvis Taxpayers Association, Proposition 218 Right to Vote on Taxes Act Statement of Drafters' Intent (January 2, 1997) reprinted in League of California Cities, Propositions 26 and 218 Implementation Guide (May 2017) at p. 141 et seq., < http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Proposition-26/LCC-218-26-Guide-2017-FINAL.aspx> (as of Feb. 26, 2019).

reduce or repeal fiscal measures. It effectively codified *Rossi, supra*, 9 Cal.4th 688, which reasoned that article II, section 9's prohibition of referenda on "tax levies or appropriations" stabilizes government finances and prevents the abrupt disruption of government operations and finances a referendum would cause. (*Rossi, supra*, 9 Cal.4th at p. 703.) Allowing referenda that immediately suspends a government's authority to collecting revenue to fund essential services defeats the purpose of section 9's exclusions.

Our Constitution also bars referenda that would disrupt essential governmental operations. (*Geiger, supra*, 48 Cal.2d at p. 839–840 [article II, § 9 exception "to prevent disruption of ... operations by interference with the administration of ... fiscal powers and policies"].) The general rule requiring that referendum provisions should be liberally construed to uphold the power is therefore inapplicable here. (*Rossi, supra*, 9 Cal.4th at p. 703; see also *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 143 ["initiative or referendum measures to repeal local tax levies have indicated a policy of resolving any doubts in the scope of the initiative or referendum in a manner that avoids interference with a local legislative body's responsibilities for fiscal management"].) Courts have barred referenda like that here. (See *Fenton v. City of Delano* (1984) 162 Cal.App.3d 400, 405–406 [referendum challenging utility tax]; *Dare, supra*, 12 Cal.App.3d at p. 868 *Gilbert v. Ashley* (1949) 93 Cal.App.2d 414, 415.) To the extent *Rossi* and *Guardino* address these cases, they distinguish rather than disapprove

them. (*Rossi, supra*, 9 Cal.4th at p. 705; *Santa Clara County Local Transportation Authority, supra*, 11 Cal.4th at p. 246.)

A contrary rule would disrupt government finance. (*Geiger, supra*, 48 Cal.2d at p. 839–840.) This Court acknowledged in *Rossi* that a referendum immediately suspends legislation upon certification of petition signatures (here, just 100 in a town of 1,600) and is therefore more disruptive of fiscal administration than a prospective reduction in revenue by initiative:

> [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 and might be impossible. As a result, the county would be unable to comply with the law or to provide essential services to residents of the county.... If essential government functions would be seriously impaired by the referendum process, the courts, in construing the applicable constitutional and statutory provisions, will assume that no such result was intended.

(*Rossi, supra*, 9 Cal.4th at p. 703.)

As *Rossi* also clarified, the **impact** of a proposed ballot measure is the decisive factor under article II, section 9, not whether a revenue source is a "tax" as later defined in article XIII C, section 1, subdivision (e) [2010's Proposition 26] or a "fee" as later defined by article XIII D, section 2, subdivision (e) (1996's Proposition 218). These definitions are not to be interchanged with "tax levies or appropriations" used in article II, section 9

— which dates from the establishment of the direct democracy powers in 1911. These modern definitions do not apply beyond articles XIII C and XIII D and in particular they do not apply to article II, section 9. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 213.) To argue otherwise is to ignore history, a fraught approach for one who would persuade a Court that is a creature of precedent. Precedent broadly construes "tax levies or appropriations" as used in article II, section 9 to avoid the disruptions of which *Geiger* warns and to include revenues that fund essential government services, of whatever type. (*Dare*, *supra*, 12 Cal.App.3d at p. 868.) *Dare* found the imposition and collection of fees for the Lakeport Municipal Sewer District a "tax" within the meaning of article II, section 9. (*Ibid.*) While it is true that *Rossi* later characterized *Dare* as an application of the direct-delegation rule of *Committee of Seven Thousand*, that is not the most obvious reading of *Dare*. While *Dare* is the crispest statement of the rule that "tax levies or appropriations" as used in article II, section 9 reaches other government revenues, it is not alone. *Fenton*, *supra*, 162 Cal.App.3d at p. 405 barred referendum of a utility users tax that city had denominated a "fee."

This Court concluded in *Bighorn-Desert View Water Agency*, *supra*, 39 Cal.4th 205, that although article XIII C, section 3 grants local voters the initiative power to reduce the water rates, it did not grant them a "right to impose a voter-approval requirement on all future adjustments of water delivery charges, and that the proposed initiative at issue [t]here was properly withheld from the ballot because it included a provision to impose

such a requirement." (*Id.* at p. 209.) Thus, *Bighorn-Desert* demonstrates that the initiative power conferred by article XIIIC, section 3 is not unlimited and must be harmonized with the remaining provisions of Proposition 218, our Constitution and our common law, just as *Sunset Beach* concluded as to other provisions of Proposition 218.

Proposition 218 did not repeal article II, section 9's language prohibiting referenda on taxes, or even amend it. It merely displaced that rule for a stated class of measures — initiatives to reduce or repeal local government revenues. It has no impact on *Dare*'s conclusion that article II, section 9 prohibits referenda on taxes and fees alike.

Were there need to resort to legislative history, it supports this view. The Legislative Analyst described article XIII C, section 3 in these terms: "The measure states that Californians have the power to repeal or reduce any local tax, assessment, or fee through the initiative process." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 74.) The Legislative Analyst makes no mention of the referendum power because Proposition 218 does not.

"Thus, the Legislative Analyst appears to have also read section 3 of article XIII C as applying to fees as well as to special and general taxes and so described it to the voters who enacted it." (*Bighorn-Desert View Water Agency*, *supra*, 39 Cal.4th at p. 212–213.) Voters evidenced no desire to overturn earlier law deeming the referendum unnecessary and disruptive as to of all municipal revenues. The protest hearing required by article XIII D, section 6, subdivision (a) allows rate-payers to prevent undesired rate

increases. (*Mission Springs Water Dist., supra*, 218 Cal.App.4th at p. 921.) Voters chose not to impose an election requirement for water rate increases. (Cal. const., art. XIII D, § 6, subd. (c); *Bighorn-Desert View Water Agency, supra*, 39 Cal.4th 205.) Thus, article XIII C, section 3 must be understood as purposely limited to the initiative power.

The Decision acknowledges, as *Bighorn-Desert* and *Rossi* require, that voters cannot be allowed to throw government finances into chaos by vitiating regularly budgeted expenditures for essential government services. (Decision, *Wilde v. City of Dunsmuir* (2018) 29 Cal.App.5th 158, 177.) Yet, it misconstrues article XIII C, section 3 and article II, section 9 to allow a referendum the former does not mention and the latter forbids.

In *Rossi, supra*, 9 Cal.4th 688, this Court distinguished from initiative, finding the referenda precluded for taxes, but not initiatives. (*Rossi, supra*, 9 Cal.4th 688; see also *Santa Clara County Local Transportation Authority, supra*, 11 Cal.4th 220 [upholding Proposition 62, overruling *Woodlake*].) Proposition 218 narrowly extended the power of initiative for reducing or repealing a local tax, assessment, fee or charge. (Cal. Const., art. XIII C, sec. 3; *Bighorn-Desert View Water Agency, supra*, 39 Cal.4th 205.) There is no similar extension of the power of referenda in Proposition 218 for good reason.

CONCLUSION

Dunsmuir's City Council adopted the water rates challenged here in accordance with Proposition 218. Wilde exercised her right to seek to repeal those rates by initiative under article XIII C, section 3, but she did

not persuade her neighbors to pass the measure. She exercised her right under article XIII D, section 6, subdivision (a)(2) to seek to block the rates by a majority protest, but was similarly unpersuasive. She has no right to try a third time, extending uncertainty about this small City's ability to fund replacement of an aging water distribution system for still more months and years.

There is no right to exercise referendum power under Proposition 218 for water rates. The Decision's contrary conclusion defeats the intent of article II, section 9, and article XIII D, section 6, subdivision (c) and gives article XIII C, section 3 a force its words do not allow and voters did not intend. The City's ability to plan its finances to ensure essential services are adequately funded must be maintained without the disruptive effect of referenda.

For all these reasons, the City respectfully requests this Court to affirm the trial court's judgment denying the writ of mandate.

Respectfully submitted,

Dated: February 27, 2019

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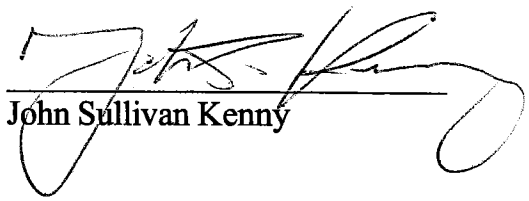
CERTIFICATE OF WORD COUNT

The foregoing Opening Brief on the Merits is within the limit of 14,000 words in compliance with California Rules of Court, rule 8.520(c)(1). In preparing this Certificate, I relied on the word count generated by Microsoft Word version 2010 word-processing program used to generate this Opening Brief.

Dated: February 27, 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

PROOF OF SERVICE

I am employed in the County of Shasta, State of California, I am over the age of eighteen years and not a party to the foregoing action, my business address is 1923 Court Street, Redding, California 96001. On the date set forth below, I served the within **OPENING BRIEF ON THE MERITS** on all parties in said action in the manner and/or manners described below and addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 2019, at Redding, California.

Tamara Warren
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