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

RESPONDENT'S BRIEF

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INTRODUCTION

Defendants City of Dunsmuir, et al. (City), posed the issue presented for review. It asks whether "property related fees under California Constitution, article XIII D, section 6" are subject to referendum "notwithstanding article II, section 9." Article II, section 9 does not, on its face, shield property-related fees from the referendum power. It provides an exception for "tax levies." In the Court of Appeal, "Wilde and the City agree[d] Resolution 2016-02's water rate charges are fees rather than taxes." (*Wilde v. City of Dunsmuir* (2018) 29 Cal.App.5th 158, 172 n.3.) The City now argues, however, that the term "tax levies" should be construed broadly to include property-related fees.[1] As the solemn guardian of the people's precious referendum power, this Court should reject the City's argument.

I

ARTICLE II, SECTION 9, MUST BE READ TOGETHER WITH ARTICLES XIII C AND XIII D

The City concedes that today the state constitution defines "taxes" in article XIII C, section 1(e), to exclude "property-related fees" (§ 1(e)(7)), which in turn are defined in article XIII D, section 2(e) to exclude taxes.

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[1] In the Court of Appeal, the City's brief never once mentioned article II, section 9. The City argued that "section 3 of article XIII C to the California Constitution silently *repealed* voters' right to challenge by referendum the same local levies for which they expressly preserved their power of initiative." (*Wilde*, 29 Cal.App.5th at 163; City's Opening Brief at 11.) Although the City petitioned for "review of a Court of Appeal decision" (CRC, Rule 8.500(b)), not a grant of original jurisdiction, and as to the former, "the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal" (*Id.*, Rule 8.500(c)(1)), the City has abandoned the theory that the Court of Appeal ruled on, and now argues for the first time that article II, section 9 *never* permitted the referendum of property-related fees.

(City's Opening Brief at 33.) Despite this clear differentiation between taxes and property-related fees in our current constitution, the City argues that these "modern definitions" cannot inform the Court's decision in this case because article II, section 9 "dates from the establishment of the direct democracy powers in 1911." (City's Opening Brief at 34.)

While article II, section 9 is the source of the referendum power, the thing that Dunsmuir voters wanted to referend was a property-related fee adopted pursuant to article XIII D. If the question is whether that fee is a "tax lev[y] ... for usual current expenses of the [City]," where should the Court turn? Article II, section 9 contains no definitions to assist the Court.

Article XIII D, however, explains that the thing sought to be referended here is "other than" a tax on property. (Art. XIII D, § 2(e).) It is a "user fee" (*id.*) for the use of water at the property. (*Id.*, § 6(c)). It cannot be appropriated "for usual current expenses" of the City (*cf.*, art. II, § 9) because no property-related fee "may be imposed for general governmental services." (Art. XIII D, § 6(b)(5).) This fee for water service can *only* be used to provide the water service ordered by private customers for their use. (*Id.*, § 6(b).) Unlike compulsory taxes, "[n]o fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." (*Id.*, § 6(b)(4).)

The City's request for this Court to ignore the constitution's "modern definitions" violates rules of construction that abhor compartmentalized interpretations and internal inconsistencies. "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. Eu* (1976) 18 Cal.3d 322, 328; *Serrano v. Priest*

(1971) 5 Cal.3d 584, 596; *Wallace v. Payne* (1925) 197 Cal. 539, 544.) "In construing the provisions of the Constitution each must be 'read in the context of the other provisions bearing on the same subject. The goal is to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in doing so to give effect to the scheme as a whole.'" (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1093 (quoting *Fields v. Eu*, 18 Cal.3d at 328 (ellipses & citations omitted).) Here, Proposition 218 (which added the term "property-related fee" to the constitution) and Proposition 26 (which defined the term "tax") bear on the same subject as article II, section 9, insofar as it withholds "tax levies" from the reach of the people's referendum power. That subject is, "what constitutes a 'tax,' and does it include a property-related fee?"

In a case attempting to limit the reach of the initiative power, decided shortly after the initiative and referendum provisions were added to the constitution, this Court ruled that the initiative power "must be interpreted in harmony with the other provisions of the organic law of this state of which it has become a part. To construe it otherwise would be to break down and destroy the *barriers and limitations which the constitution, read as a whole, has cast about legislation, both state and local.*" (*Galvin v. Bd. of Supervisors* (1925) 195 Cal. 686, 692.)[2] Propositions 218 and 26 are among "the barriers and limitations which the constitution, read as a whole, has cast about legislation, both state and local." The people's referendum power is not locked in a museum, unable to benefit from subsequent achievements the people have made in sharing control of government finances. It "must be interpreted in harmony with the other provisions."

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

II

AT THE TIME ARTICLE II, SECTION 9, WAS ADDED, THE LAW ALREADY DISTINGUISHED FEES FROM TAXES

The City's attempt to conceal the modern definitions from view suggests that the modern definitions of "tax" and "fee" deviate significantly from the way those terms were historically used. But that is not true. The City's suggestion that in 1911, when article II, section 9 was added to the constitution, the term "tax levies" was understood to include fees is simply incorrect.

"[T]he language of Proposition 26 is drawn in large part from pre-Proposition 26 case law distinguishing between taxes ... on the one hand, and regulatory and other fees, on the other." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210.)

Today, the law recognizes three basic classifications of government charges: (1) taxes, (2) benefit assessments, and (3) fees. (Art. XIII D, § 3; *Silicon Valley Taxpayers' Assn. v. Santa Clara County. Open Space Auth.* (2008) 44 Cal.4th 431, 443.)

In 1911, when article II, section 9 was added to the constitution, the law recognized the same three basic classifications of government charges: (1) taxes, (2) benefit assessments, and (3) fees. First, the law distinguished taxes from benefit assessments:

> "Taxes are a public imposition, levied by authority of the government, upon the property of the citizen generally, for the purpose of carrying on the government, while the more restricted term 'assessment' is usually, as it was in the present case, induced by the request ... of a majority of the inhabitants

> of the assessment district, and is levied for the benefit of the property situated within the particular district; the assessment being an equivalent from the owner for the improvement made to the value of the property. Such assessments are not collected like public taxes, but generally, as in the case here, a particular mode of recovering the charge is pointed out by the statute." (*Wood v. Brady* (1885) 68 Cal. 78, 80.)

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

More importantly, the law in 1911, like the law today, distinguished taxes from fees. Today, the law recognizes different types of valid fees. "Regulatory fees," generally imposed in connection with business licensing and inspection, are an exercise of the police power to protect public health, safety and welfare. (*Cal. Assn. of Prof. Scientists v. Dept. of Fish & Game* (2000) 79 Cal.App.4th 935, 945.) Regulatory fees can become taxes if they exceed reasonable costs or are imposed for general revenue purposes. (Gov. Code § 50076; *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 438.)

"User fees" are collected when a local agency does business with citizens in its capacity as an enterprise or property owner. User fees are "charged only to those who use the goods or services. The amount of the

charge is related to the actual goods or services provided to the payer." (*San Marcos Water Dist. v. San Marcos Unified Sch. Dist.* (1986) 42 Cal.3d 154, 162; *Isaac v. City of L.A.* (1998) 66 Cal.App.4th 586, 597; *Utility Audit Co., Inc. v. City of L.A.* (2003) 112 Cal.App.4th 950, 957; *Bay Area Cellular Tel. Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 694.) User fees can become taxes if "(1) the fee exceeds the reasonable cost of providing the service ... or (2) the fee is levied for general revenue purposes." (*Isaac*, 66 Cal.App.4th at 597; *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 234.)

The water rates at issue in the case at bar are user fees. "Under California case law, water rates are considered user or commodity charges because they are based on the actual consumption of water." (*Rincon Del Diablo Mun. Water Dist. v. San Diego County Water Auth.* (2004) 121 Cal.App.4th 813, 819.)

The same legal distinction between taxes and fees was recognized in 1911 when the constitution was amended to include the referendum power. That regulatory licensing fees, imposed under the police power, were distinguished from taxes, imposed under the taxing power, is illustrated by this Court's 1850 decision in *People ex rel. Attorney General v. Naglee*, an action instituted to test the constitutionality of a law requiring foreigners to pay a regulatory license fee for the privilege of operating gold mines upon public lands in this State:

> "There can scarcely be a doubt that a State law imposing a *tax* upon the personal property of miners, such as their tools, machinery, provisions, and the gold extracted from the earth, would not amount to an usurpation, on the part of the State, of

> the constitutional power of Congress to make rules and regulations respecting the public lands. ... But we are of the opinion that [this charge] should rather be viewed in the light of an Act prescribing certain conditions, upon compliance with which, foreigners are to be permitted to reside in a given locality, and pursue a particular branch of business. It is, in truth, what it purports to be, a *license* law. It was decided in *Holmes v. Jennison* (14 Pet. 540), in *Grove v. Slaughter* (15 Pet. 449), and in *Prigg v. The Commonwealth of Pennsylvania* (16 Pet. 625), that the people of the several States of the Union had reserved to themselves the power of expelling from their borders any person, or class of persons, whom they might deem dangerous to the peace, or likely to produce a physical or moral evil. ... Viewed in this light, it may be regarded as a *police* regulation, and therefore valid within the principles laid down in *Milne v. New York* (11 Peters, 132), and fortified by the views of the Court in the License cases (5 Howard, 504), and in the New York and Boston Passenger cases (7 Howard, 283)." (*People ex rel. Atty. Gen. v. Naglee* (1850) 1 Cal. 232, 241-44; see also *People v. McCreery* (1868) 34 Cal. 432, 448 ("[*Naglee*] held that ... the statute did not levy or assess a tax upon property, but required a certain license fee to be paid by those of the specified class, who should pursue the designated business."))

Cases near the turn of the 20th Century when article II, section 9, was added to the constitution, like cases today, distinguished taxes from fees not only as to the source of their power, but also as to the purpose of their expenditure. "Taxes" raise revenue that is unrestricted in its expenditure and

may be appropriated from the General Fund for the general operation of the government. Not so with valid "fees." Services offered by government "must, according to current case law on the subject, provide for a fee which 'does not exceed the reasonable cost of providing the service for which the fee is charged.'" (*Bixel Assocs. v. City of L.A.* (1989) 216 Cal.App.3d 1208, 1215.) "An excessive fee that is used to generate general revenue becomes a tax." (*Cal. Farm Bureau Fed'n*, 51 Cal.4th at 438.)

In 1911 it was similarly understood that fees cannot exceed the cost of service so as to generate General Fund revenue, as explained in this Court's 1906 decision in *County of Plumas v. Wheeler*. *Wheeler* was an action by the County to recover from sheep ranchers a license fee due for the operation of their business. The ranchers defended by arguing that the fee exceeded the reasonable cost to the County of regulating their business:

> "Can the ordinance now before us be sustained as a valid exercise of the power of the county to regulate the business of raising, herding, grazing, and pasturing sheep? The principles affecting the right of legislative bodies in the exercise of what is known as the 'police power,' to place restrictions upon the conduct of lawful pursuits and occupations, are well settled. ... It is also well settled that the power to regulate a business may be exercised by means of a license fee or charge. The amount of the license fee, however, must not be more than is reasonably necessary for the purpose sought, *i.e.* the regulation of the business. If it is so great that the court can plainly see that the purpose of its imposition was to realize a revenue under the guise of regulating the business, the provision for the fee cannot

stand as an exercise of the police power." (*County of Plumas v. Wheeler* (1906) 149 Cal. 758, 761-63.)

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

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

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

City "from the exercise of the power of taxation." The Court rejected the theory:

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

The law today, developed long before the "modern definitions" of "tax" and "fee" were added to the constitution, considers two factors especially important in determining whether a charge is a tax or a fee. Unlike fees that pay for a specific use or service provided at the behest of the payor, "generally speaking, a tax has two hallmarks: (1) it is compulsory, and (2) it does not grant any special benefit to the payor. [¶] First, 'The word tax, in its common acceptation, *denotes some compulsory exaction*, which a government makes upon persons or property within its jurisdiction, for the supply of the public necessities.' [¶] Second, as Witkin succinctly puts it, '*no compensation is given to the taxpayer* except by way of governmental protection and other general benefits.' Taxation 'promises nothing to the person taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good.'" (*Cal. Chamber of Commerce v. State Air Res. Bd.* (2017) 10 Cal.App.5th 604, 640-41 (ital. in orig., citations omitted).) "Indeed, '[n]othing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its

expenditure, and who are not responsible for the condition to be remedied.'" (*Bay Area Cellular*, 162 Cal.App.4th at 695; quoting *Knox v. City of Orland* (1992) 4 Cal.4th 132, 142.)

These same factors were considered hallmarks of a tax at the turn of the century when the referendum power was included in our constitution. It was the 1850 mining license case of *People ex rel. Atty. Gen. v. Naglee*, quoted earlier, which stated:

> "The word tax, in its common acceptation, denotes some compulsory exaction, which a government makes upon persons or property within its jurisdiction, for the supply of the public necessities. It is ordinarily assessed beforehand at stated periods, and collected at appointed times. Its payment is enforced ... by the sale of property. The law in question, however, partakes of none of these qualities. It does not require the exaction, at all events, of anything. The foreigner may pay, or need not pay, the specified amount, depending upon his own option whether he will, or will not, engage in mining operations. ... It is in the nature of a fee." (*Naglee*, 1 Cal. at 253.)

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

Moreover, the wording they did choose to describe the referendum exception signals a conscious decision to limit the exception to taxes, not fees. The exception applies only to "tax *levies*." In 1911, California had no income

tax or sales tax, but it had a property tax. (https://lao.ca.gov/2007/tax_primer/tax_primer_040907.aspx.) Today, as then, property taxes for the year become a lien on the taxed property as of January 1st. (http://www.boe.ca.gov/proptaxes/pdf/pub29.pdf at 10.) If property taxes are not timely paid, the property is "levied" through foreclosure and sale. (*Id.* at 13.) That was the sense of the word in 1911. "The word 'levy' ... in its usual sense means the obtaining of money by seizure and sale of property. (2 Bouvier's Dictionary, 194; Standard Dictionary; Webster's Dictionary; *State v. Camp Sing*, 18 Mont. 145, [56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516].)" (*Hayne v. San Francisco* (1917) 174 Cal. 185, 195.)

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

The law in 1911, like today, recognized these sharp contrasts between taxes and fees. The drafters of the referendum provision used terminology ("[1] tax [2] levies ... [3] for usual current expenses") applicable to taxes, but inapplicable to fees. Fees were not classified as taxes, but were distinguished from taxes by the courts at that time. Fees were not secured by property that could be levied. Fees were not compulsory, as taxes are, but were triggered by the payor's volition. And fees were limited in their use to the regulation, use or service provided to the payor. They could not be used for "usual current expenses" of the public agency.

The City's argument, then, that the "modern definitions" should be ignored because article II, section 9, as originally drafted, was intended to

exempt user fees, is historically inaccurate and should be rejected. But even if the City's water fees were viewed through a 1911 lens, they would not qualify as "tax levies." Water fees are not automatically secured by property that can be levied. Water fees are not compulsory, but become due only if the payor first establishes a connection, then consumes water. Water fees are not fixed without regard to whether the payor receives a benefit. To the contrary, the amount owed is directly related to the level of service requested and the volume of water consumed. And water fees cannot be deposited in the City's General Fund and used for its usual current expenses. They can be used only to provide water service to service subscribers, and cannot exceed the costs attributable to the individual payor. Then and now, water fees are not tax levies exempt from the referendum power.

III

DARE v. LAKEPORT CITY COUNCIL DID NOT ESTABLISH A CONTRARY BINDING PRECEDENT

According to the City, *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864 held that "article II, section 9's tax exemption reaches beyond taxes to fees and other revenue measure[s] that fund essential governmental services." (City's Opening Brief at 24.) The City cites no other case for this proposition. It says, "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* [*v. City of Delano*] 162 Cal.App.3d at p. 405 barred referendum of a utility users tax that city had denominated a 'fee.'" (City's Opening Brief at 34.)

Fenton does not help the City, however, for the very reason the City noted. *Fenton* involved a *tax*, and article II, section 9, clearly exempts taxes.

The question in the case at bar is whether it exempts user fees. *Fenton* does not speak to that question. Thus, *Dare* does in fact stand alone.

However, *Dare* is not a binding precedent for several reasons. First, *Dare* was a decision of the Court of Appeal. This Court is not bound by "tribunals exercising inferior jurisdiction." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Second, *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.)

To its credit, *Dare* did consult a turn-of-the-century case as to whether sewer charges were considered "tax levies." Unfortunately, it misread the case. It read *City of Madera v. Black* (1919) 181 Cal. 306 as precedent that a monthly sewer charge 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.) To the extent it paid for sewer service, the charge was a "fee." It was a tax only insofar as it exceeded the cost of service. Applied to the City's water rates here, which do not exceed the cost of service, *Black* holds that they are fees, not taxes.

Having concluded (incorrectly) that under *Madera v. Black* sewer fees are "tax levies" exempt from the referendum power, *Dare* 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*, was later overruled by this 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*, this Court (1) corrected *Dare*'s mischaracterization of sewer charges as "tax levies," and (2) found that *Dare*'s discussion of the scope of the term "tax levies" was just dictum:

> "*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. 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. (*Rossi*, 9 Cal.4th at 708.)

Thus, *Dare* is neither binding, nor a referendum case, nor a case correctly defining sewer fees as taxes, nor a case that discussed sewer fees as taxes outside of dictum. Its actual holding is irrelevant to the case at bar, and its dictum is a ghost from the now dead *Myers* line of cases.

Another case decided in 1970 (the same year *Dare* was decided), *Arcade County Water Dist. v. Arcade Fire Dist.* (1970) 6 Cal.App.3d 232, specifically addressed whether fees for *water* service (the exact service involved here) 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 are exempt from taxation. The Court of Appeal rejected this 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.)

Although *Arcade* was not a referendum case, it illustrates a consistent pattern from the 1800's to today discriminating between user fees and taxes, with no interruption to the pattern in 1970.

IV

THE CITY'S REQUEST TO ENLARGE THE TAX LEVIES EXCEPTION FOR "POLICY REASONS" MUST BE REJECTED

The City asks this Court to enlarge the referendum exception for "tax levies" to include user fees for two "policy reasons." It argues that referenda are more "disruptive" than initiatives, and it argues that referenda are inconsistent with the design of Proposition 218. Neither reason has merit. Moreover, public policy favors a narrowed, not enlarged, construction of any exception to the people's initiative or referendum powers.

A. All Doubts Must be Resolved in Favor of the Referendum Power

Under article 2, section 1, of the California Constitution, which states that "[a]ll political power is inherent in the people," the people's direct sovereignty precedes all forms and actions of delegated government. While the people have set up governmental structures, elected bodies, and procedures

for making laws, they have reserved to themselves "the right to alter or reform [them] when the public good may require." (Cal. Const., art. 2, § 1.) One of the powers of alteration reserved by the people is the referendum power by which they can, if they so choose, vote on a law passed by their elected representatives.

"Declaring it 'the duty of the courts to jealously guard the right of the people,' this Court has described the initiative and referendum as articulating 'one of the most precious rights of our democratic process.' '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserved power, courts will preserve it.'" (*Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 (citations omitted).) Accordingly, courts must "narrowly construe provisions that would burden or limit the exercise of that power." (*Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 936.)

In the 40 years since this Court first articulated the rule of liberally construing the initiative and referendum powers, resolving all doubts in favor of their exercise, and construing exceptions narrowly, the Court has not retreated from it in the least. (See *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241; *Legislature v. Eu* (1991) 54 Cal.3d 492, 501; *Rossi v. Brown*, 9 Cal.4th at 695; *Santa Clara County Local Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 253; *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1032; *Perry v. Brown* (2011) 52 Cal.4th 1116, 1140; *Cal. Cannabis Coalition v. City of Upland*, 3 Cal.5th at 936.)

Therefore, in approaching the City's request to enlarge the "tax levies" exception for supposed policy reasons, this Court must remain mindful that the

superior policy consideration is that the people reserved the referendum power as a check and balance for times when a significant number of voters question whether a decision of their representatives truly represents them. When the questioned decision involves the amount of money that the government is going to demand from them for a necessity of life that the government has monopolized, the people's right to vote on that decision should not be sacrificed merely to prevent government "disruption."

B. Referenda Are No More Disruptive Than Initiatives

The City argues that the "tax levies" exception should be enlarged to include user fees 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." (City's Opening Brief at 27.) The City cites *Rossi v. Brown* and *Geiger v. Board of Supervisors of Butte County* (1957) 48 Cal.2d 832 for their explanation of why taxes for the usual current expenses of the state were withheld from the referendum power.

> "[Tax levies and appropriations for usual current expenses] are measures having special urgency, a delay in the implementation of which could disrupt essential governmental operations. County ordinances fixing the amount of money to be raised by taxes and those fixing the tax rate therefore go into effect immediately, while the effective date of other ordinances is delayed. (Elec. Code, § 9141- 9143.) When a referendum petition qualifies prior to the effective date of a county ordinance, the ordinance is suspended pending reconsideration and repeal of the ordinance by the board of supervisors or submis-

> sion of the measure to the voters at a regular or special election. The ordinance does not become effective unless and until a majority of the voters approves it at the referendum election. (Elec. Code, § 9144, 9145.) Therefore, if a tax measure were subject to referendum, the county's ability to adopt a balanced budget and raise funds for current operating expenses through taxation would be delayed and might be impossible." (*Rossi*, 9 Cal.4th at 703.)

The premise underlying this explanation was true when *Rossi* was decided, prior to the voters' adoption of Proposition 218, but it is no longer true 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.

Moreover, if applied to water fees, the *Geiger/Rossi* hypothesis is certainly debatable. One could argue that an initiative reducing an existing rate that the City has come to rely upon would cause more disruption than the referendum of a proposed new rate increase that it is currently operating without, especially considering that the City can immediately respond to a successful referendum by enacting a different increase, but must obtain voter approval to change a reduced rate set by initiative. (*Bighorn - Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 219.)

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 charge "*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.

C. ***Referenda Are Not Inconsistent With Proposition 218***

Finally the City portrays itself as the champion of Proposition 218 and argues that allowing the referendum of water rate increases would "defeat" Proposition 218's design. (City's Opening Brief at 13.)

The City argues as follows: "The role of a referendum – to solicit the view of voters before a measure takes effect – was afforded by article XIII D, section 6's prerequisites for a property-related fee – opportunity for a majority protest of property owners." (Opening Brief at 16.) "As a further safeguard

for those who must bear the cost of government services, Proposition 218 expanded the scope of the initiative process." (*Id.* at 15.) Thus, "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." (*Id.* at 18.)

The availability of other options under Proposition 218 for contesting a proposed property-related fee, such as mounting a majority protest under article XIII D, section 6(a), or resorting to the local initiative power under article XIII C, section 3, provides no legal justification for denying the separate constitutionally guaranteed referendum power. In certain instances, the referendum power may be a preferred option, not just from the ratepayers' perspective, but from a public policy perspective as well.

For example, for water, sewer, and refuse collection fees, which are exempt from Proposition 218's election requirement applicable to other property-related fees (Cal. Const., art. XIII D, § 6(c)), the protest hearing is the only *required* procedural step that gives ratepayers an opportunity to object to an unfair rate increase. To mount a majority protest, however, an absolute majority of all ratepayers must turn in written protests. (*Id.*, § 6(a)(2).) In a city the size of Sacramento, San Francisco, or Los Angeles, that is an impossible task. In large cities, then, the majority protest procedure does *not* fill the role of a referendum as the City claims. A referendum does not require an absolute majority of all voters to qualify the referendum, but only ten percent. (Elec. Code § 9237.) Even once it's on the ballot, a referendum does not require an absolute majority of all voters to defeat the rate increase, but only a majority of those who actually cast votes. (Elec. Code § 9241.)

As another example of when a referendum may be preferred, a local initiative petition under section 3 of article XIII C can be circulated only after the objectionable rate increase has become law. Since initiatives must be placed on the ballot for a regularly scheduled municipal election (Elec. Code §§ 9215(b), 1405(b)), it could be several years before voters can actually vote to reduce or repeal an unfair rate increase. They must pay the increase while they wait for the election. By the time of the election, the City may have pledged the increased funds for some obligation, such as a union contract granting employee benefits, or a private contract to purchase equipment or remodel a facility. By delaying the opportunity for public input, ratepayers are irreparably harmed and contract impairment issues could arise. Moreover, the City will have adopted one or more budgets relying on the increased funds. A successful initiative would be much more disruptive at that point than a referendum which would have quickly determined whether the additional funds were approved or not.

For these reasons, Proposition 218 cannot be viewed as already providing equivalent means for objecting to unfair rate increases. To the extent the City is again arguing that the referendum power over fees was impliedly repealed by Proposition 218's failure to expressly preserve it, the Court of Appeal did such a thorough job refuting that argument, plaintiff simply asks this Court to reread pages 8-13 of the opinion.

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CONCLUSION

For the reasons above, the decision of the Court of Appeal, protecting the people's precious referendum power, should be affirmed.

DATED: March 29, 2019.

Respectfully submitted,

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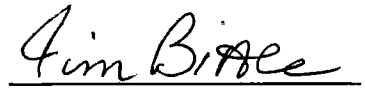

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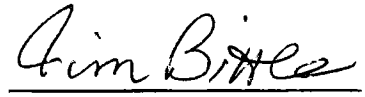
WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached 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 6,509 words.

DATED: March 29, 2019.



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PROOF OF SERVICE
SUPREME COURT CALIFORNIA

I, Kiaya Heise, declare:

I am employed in the County of Sacramento, California. I am over the age of 18 years, and not a party to the within action. My business address is: 921 11th Street, Suite 1201, Sacramento, California 95814. On April 1, 2019, I served **RESPONDENT'S BRIEF** on the interested parties below, using the following means:

SEE ATTACHED SERVICE LIST

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

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 1, 2019, at Sacramento, California.

Kiaya R. Heise

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