No. S234148

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA CANNABIS COALITION et al.,
Plaintiffs and Appellants,

v.

CITY OF UPLAND et al.,
Defendants and Respondents.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Two, Case No. E063664

Superior Court of San Bernardino County
Superior Court Case No. CIVDS1503985
Honorable David Cohn, Judge

APPLICATION OF JACK COHEN (IN HIS CAPACITY AS A PROPOSITION 218 DRAFTER) FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANTS CITY OF UPLAND ET AL

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.520(f) of the California Rules of Court, JACK COHEN (hereafter "Applicant") respectfully requests permission to file an amicus curiae brief in this case (Case No. S234148) in support of Defendants and Respondents, City of Upland et al. The proposed amicus curiae brief is combined with this application.

Applicant is an attorney and one of the drafters of Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added articles XIII C and XIII D to the California Constitution and was approved by California voters in November 1996. Applicant has a major interest in seeing that Proposition 218 is effectuated consistent with its stated purposes and intent, including the constitutional provisions applicable to local government taxes contained in section 2 of article XIII C of the California Constitution.

Applicant states there is nothing to identify or disclose under the provisions of Rule 8.520(f)(4) of the California Rules of Court.

Applicant is familiar with the legal issues involved in this case. Applicant believes there is a need for additional briefing because this case involves the interpretation of important Proposition 218 constitutional protections affecting the imposition of local taxes that will impact millions of voters/taxpayers in California.

Applicant believes the arguments contained in the proposed amicus curiae brief will assist the Court in resolving this case in a manner that effectuates the purposes and intent of Proposition 218. The proposed amicus

curiae brief will focus only on the Proposition 218 issues presented, including whether section 2 of article XIII C constitutional restrictions apply to the subject "Licensing and Inspection fee" contained in a local initiative measure, and whether the "Licensing and Inspection fee," if a tax, is a general tax subject to the election consolidation requirement under Proposition 218.

For the foregoing reasons, Applicant respectfully requests leave to file the proposed amicus curiae brief that is combined with this application.

Dated: October 28, 2016

Respectfully submitted,

Jack Cohen

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I. INTRODUCTION.

In November of 1996, California voters adopted Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added articles XIII C and XIII D to the California Constitution. This case (hereafter "*Upland*") involves issues relating to whether the election consolidation requirement for general taxes under Proposition 218 (Cal. Const., art. XIII C, § 2, subd. (b))[1] applies to a $75,000 annual "Licensing and Inspection fee" contained in a local medical marijuana dispensary initiative measure in the city of Upland located in San Bernardino County.

The Court of Appeal in *Upland* concluded that the constitutional taxpayer protections under section 2 of article XIII C of the California Constitution do not apply to local initiatives that raise taxes. (Opn. at p. 2.).[2] In support of this conclusion, and with little legal basis of support, the court in *Upland* stated: "Taxation imposed by initiative is not taxation imposed by local government." (Opn. at p. 22.) Thus, because Proposition 218 is supposedly "silent" on imposing taxes by local initiative, and because taxation imposed by local initiative is supposedly not taxation imposed by local government, article XIII C constitutional restrictions do not apply.

Although the court in *Upland* was addressing the election consolidation requirement for general taxes, based on the court's reasoning in deciding the case, its highly questionable interpretations have effectively

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[1] The relevant constitutional language applicable to general tax elections under Proposition 218 states: "The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body." (Cal. Const., art. XIII C, § 2, subd. (b).)

[2] Opinion references are to the Court of Appeal opinion in *Upland* filed on March 18, 2016. A copy of the opinion can be found at < http://www.courts.ca.gov/opinions/revpub/E063664.PDF > [as of Oct. 26, 2016].

resulted in a judicially created loophole that will allow use of the initiative power to impose local taxes without compliance with the voter approval requirements under Proposition 218 (Cal. Const., art. XIII C, § 2). This has profound consequences affecting the imposition of local taxes in California.

The election consolidation requirement under Proposition 218 only applies to general taxes. (Cal. Const., art. XIII C, § 2, subd. (b).) Based on the court's conclusion in *Upland*, the court did not address whether the levy at issue was a "tax," and if so, a "general tax" subject to the election consolidation requirement.

This brief will focus only on the Proposition 218 issues presented, including whether section 2 of article XIII C constitutional limitations apply to the subject "Licensing and Inspection fee" contained in a local initiative measure, and whether the "Licensing and Inspection fee," if found to be a tax, is a general tax or a special tax under Proposition 218.

II. PROPOSITION 218 CONSTITUTIONAL PROVISIONS IN SECTION 2 OF ARTICLE XIII C APPLY TO LOCAL TAXES IMPOSED BY INITIATIVE.

The Court of Appeal in *Upland* stated, without citing authority in support thereof, that the "drafters, proponents, and voters of Propositions 13, 218 and 26 did not intend the language, 'imposed by local government,' to encompass taxes imposed by initiative." (Opn. at p. 24.) The history of this issue as it relates to Proposition 13,[3] and the constitutional language of Proposition 218 itself, fully supports the conclusion that the constitutional provisions in section 2 of article XIII C apply to local taxes imposed via the initiative power.

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[3] Proposition 13 hereafter refers to the Proposition 13 property tax initiative constitutional amendment approved by California voters during the June 1978 Primary Election.

A. Proposition 13 (1978) Constitutional Restrictions Have Previously Been Applied by the Courts to Special Taxes Imposed by Local Initiative.

Even before the passage of Proposition 218 in 1996, the constitutional restrictions of Proposition 13 have previously been applied to local initiatives that impose taxes. In particular, the two-thirds voter approval requirement for local special taxes which provides in relevant part that: "Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district." (Cal. Const., art. XIII A, § 4.)

In *Altadena Library Dist. v. Bloodgood* (1987) 192 Cal.App.3d 585 ("*Altadena Library*"), the court held that an initiative parcel tax receiving 61.8 percent voter support was subject to the two-thirds supermajority voter approval requirement for special taxes under Proposition 13 (Cal. Const., art. XIII A, § 4) in concluding that a special tax on real property was being imposed by a special district. (*Id.* at pp. 588-589.) The court in *Altadena Library* was clear that the case involved a local voter initiative seeking to impose a parcel tax. (*Id.* at p. 587 ["After watching this deterioration for several years, finally a group of Altadena citizens sought to restore the tax revenue loss which had forced these drastic cutbacks. On March 8, 1983, an initiative was put to a special election."].)[4]

The conclusion in *Altadena Library* that an initiative parcel tax was imposed by a "special district" was reached even though the term "special

[4] As a newspaper article noted shortly following the initiative tax election, the Altadena Library District requested Los Angeles County to impose the parcel tax even though it failed to receive a two-thirds vote majority: "The outcome of the board's request could pave the way for special districts, municipalities and other taxing entities to levy taxes with the approval of a simple majority of voters rather than by the two-thirds majority required by Proposition 13." (*Trustees Resurrect Tax Plan for Library*, L.A. Times (Apr. 24, 1983) p. SG-1.)

district" under Proposition 13 (and the constitutional two-thirds voter approval requirement for local special taxes thereunder) was subject to a strict construction standard as a result of this Court's decision in *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197 [strictly construing the term "special districts" in section 4 of article XIII A] ("*Richmond*"). While the decision in *Altadena Library* was reached subject to the strict construction standard under *Richmond*, Proposition 218 constitutionally commands that its provisions "be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5, reprinted in *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006, 1022). This includes the Proposition 218 constitutional definition of "local government" (Cal. Const., art. XIII C, § 1, subd. (b)) which is broadly defined. This should also include the circumstances in which a local levy is being "imposed by local government" for purposes of Proposition 218, including under section 2 of article XIII C.

Thus, if an initiative measure seeking to impose a local tax can be subject to constitutional taxpayer protections under Proposition 13 (as concluded in *Altadena Library*), then such an initiative measure should also be subject to the even broader constitutional taxpayer provisions under Proposition 218.[5] The court in *Upland* never cited *Altadena Library*, and never explained how a local tax initiative can be subject to constitutional taxation provisions under Proposition 13 but not under the broader constitutional provisions of Proposition 218.

Furthermore, as this Court stated concerning the electors voting on a statewide initiative measure: "We assume the electorate is aware of relevant judicial decisions when it adopts legislation by initiative." (*People v. Hernandez* (2003) 30 Cal.4th 835, 867.) *Altadena Library* was good law at

[5] This assumes a local initiative tax measure proposed after the passage of Proposition 218.

the time the California electorate approved Proposition 218 in 1996, and it remains good law today on the applicability of Proposition 13 constitutional taxpayer protections to local taxation initiatives.

Proposition 218 is Proposition 13's progeny, and must be construed in that context. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838 ("*Apartment Association*").) Thus, California voters had every reason to believe when they approved Proposition 218 that the application of constitutional taxpayer protections to initiative tax measures under Proposition 13 (as concluded in *Altadena Library*) would also apply to the even broader constitutional taxpayer protections contained in Proposition 218.[6]

Subsequent to *Altadena Library*, this Court in *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245 ("*Kennedy Wholesale*") clarified the relationship between Proposition 13 constitutional limitations and the exercise of the state initiative power applicable to state tax increases. (*Id.* at pp. 248-253.) However, *Kennedy Wholesale* did not overrule or even cite *Altadena Library*. Unlike in *Altadena Library*, *Kennedy Wholesale* did not involve the applicability of Proposition 13 constitutional limitations to the exercise of the local initiative power to raise local taxes. The Court of Appeal in *Upland* did not cite *Kennedy Wholesale* in its opinion.

Furthermore, *Kennedy Wholesale* relied on the strict construction standard applicable to the two-thirds vote requirement under Proposition 13 in support of its conclusions in that case. (*Id.* at p. 252, fn. 6.) However, Proposition 218 constitutionally requires that its provisions be liberally

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[6] Even if Proposition 218 did not exist, *Altadena Library* still requires two-thirds local voter approval under Proposition 13 (section 4 of article XIII A) for any local tax initiative seeking to impose a special tax by a city, county, or a special district.

construed. (Prop. 218, § 5.) In addition, unlike with Proposition 13, section 2 of article XIII C contains express language that its provisions prevail over contrary constitutional provisions, including provisions applicable to the exercise of the local initiative power. (See pt. II.B., *post* pertaining to the "[n]otwithstanding any other provision of this Constitution" language prefacing section 2 of article XIII C.)

B. Section 2 of Article XIII C Provisions Apply to Taxes Imposed by Local Initiative Notwithstanding Any Other Provision of the California Constitution.

Altadena Library provides historical context under Proposition 13 regarding the application of constitutional limitations to local taxation initiatives. Additional language in Proposition 218 itself further supports the conclusion that the constitutional limitations under section 2 of article XIII C apply to local initiatives involving taxes.

Section 2 of article XIII C expressly states at the beginning of the section that the constitutional tax limitation provisions contained therein apply "[n]otwithstanding any other provision of this Constitution." (Cal. Const., art. XIII C, § 2.) When language is intended to prevail over all contrary law, such an intention is typically signaled by using phrases like "notwithstanding any other law" or "notwithstanding other provisions of law." (*In re Greg F.* (2012) 55 Cal.4th 393, 406.) Hence, the constitutional limitations contained in section 2 of article XIII C, including the election consolidation requirement applicable to general taxes in subdivision (b), prevail over any contrary constitutional provisions including, but not limited to, the constitutional provision applicable to the exercise of the local initiative power in cities and counties (Cal. Const., art. II, § 11, subd. (a)) and the exercise of the initiative power in general (Cal. Const., art. II, § 8).

The court in *Upland* never cited the "[n]otwithstanding any other provision of this Constitution" language, and did not explain how the "[n]otwithstanding any other provision of this Constitution" language prefacing section 2 of article XIII C can be reconciled with its conclusion that the constitutional restrictions contained therein do not apply to taxation imposed by initiative.

However, in deciding *Upland*, the Court of Appeal gave significant weight to provisions of the California Constitution relating to the exercise of the local initiative power, including noting that application of section 2 of article XIII C limitations would inappropriately "interfere" with the local initiative power. (Opn. at pp. 25-27.) Section 11 of article II of the California Constitution reserves the exercise of the local initiative power "by the electors of each city or county under procedures that the Legislature shall provide." (Cal. Const., art. II, § 11, subd. (a).) Charter cities are expressly excluded from this constitutional provision[7] (*Ibid.*), and local governments other than a city or a county (e.g., special districts) are not included within the constitutional language.

The practical effect of the "[n]otwithstanding any other provision of this Constitution" prevailing language contained in section 2 of article XIII C is to add an additional narrow limitation on the constitutional authority of the Legislature to adopt lawful statutory procedures for the exercise of the local initiative power under section 11 of article II. Such statutory procedures cannot be contrary to the prevailing constitutional limitations of section 2 of article XIII C.

[7] The city of Upland is a general law city. (See *Pacific Rock etc. Co. v. City of Upland* (1967) 67 Cal.2d 666, 668.)

C. Section 2 of Article XIII C is Properly Harmonized with Section 11 of Article II by Giving Effect to Both Constitutional Provisions.

Even if the "[n]otwithstanding any other provision of this Constitution" language set forth in section 2 of article XIII C did not exist, case law harmonizing the constitutional provisions of Proposition 218 with other provisions of the California Constitution supports application of section 2 of article XIII C limitations to taxes imposed by local initiative.

The Court of Appeal decision in *Upland* is also inconsistent with recent cases that harmonized a Proposition 218 constitutional provision with another provision of the California Constitution to give proper effect to both constitutional provisions. These cases include *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 936-937 [Article X, section 2 is not at odds with article XIII D so long as water conservation is attained in a manner that does not exceed the proportional cost of the service attributable to the parcel] ("*Palmdale Water*") and *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1511 [Section 2 of article X and article XIII D work together to promote increased supplies of water].

Rather than harmonizing in a manner consistent with recent Proposition 218 cases and the liberal interpretation provision under Proposition 218 (Prop. 218, § 5), the court in *Upland* narrowly interpreted Proposition 218 with the resulting effect of excluding application of section 2 of article XIII C constitutional limitations to taxes imposed by local initiative. Consistent with recent case law harmonizing Proposition 218 constitutional provisions with other provisions of the California Constitution, taxation by local initiative under section 11 of article II is not at odds with section 2 of article XIII C so long as the local initiative power is exercised

subject to the limitations set forth in section 2 of article XIII C, including the election consolidation requirement for general taxes thereunder. (Cf. *Palmdale Water*, *supra*, 198 Cal.App.4th at pp. 936-937 [harmonizing California Constitution, article X, section 2 (water conservation) with article XIII D (requirements for property-related fees)].)

Furthermore, the preceding harmonization analysis assumes that constitutional provisions of equal dignity are involved. While the right to exercise the local initiative power in cities and counties is constitutional in nature, procedures for the exercise of that right are statutory in nature. (See *Associated Home Builders etc., Inc.* v. *City of Livermore* (1976) 18 Cal.3d 582, 594-595.) There exists no constitutional right under California law to have a special election in connection with a local initiative measure relating to a tax increase. That right exists pursuant to statute such as section 9214 of the Elections Code which applies to incorporated cities like the city of Upland. (Elec. Code, § 9214.)

Any statutory provisions relating to special elections must yield to the constitutional requirement under Proposition 218 that general tax elections be consolidated with a regularly scheduled general election for members of the governing body of the local government. (Cal. Const., art. XIII C, § 2, subd. (b).) The Legislature acting in a legislative capacity has no authority to exercise its discretion in a way that violates Proposition 218 constitutional provisions or undermines their effect. (Cf. *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 ("*Silicon Valley*") [local legislative discretion regarding the substantive constitutional requirements for special assessments contained in article XIII D].) In the specific context of *Upland*, statutory procedures applicable to the exercise of the local initiative power cannot be contrary to the constitutional election consolidation requirement for general taxes. This represents a

limited constitutional exception to the statutory right to have a special election in connection with a local initiative measure.

This Court's recent decision in *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029 ("*Tuolumne Jobs*") relating to local voter initiatives is inapposite. *Tuolumne Jobs* held that environmental review under the California Environmental Quality Act ("CEQA") was not required before a local city council could directly adopt a voter initiative without holding an election. (*Id.* at p. 1043.) *Tuolumne Jobs* involved the interpretation of statutory provisions of equal dignity. In particular, statutory procedures applicable to the exercise of the local initiative power versus the statutory environmental provisions under CEQA. However, *Upland* involves statutory procedures applicable to the exercise of the local initiative power versus the constitutional taxation limitations under Proposition 218. While the statutory election procedures prevailed in *Tuolumne Jobs*, in *Upland* the statutory election procedures for initiatives must yield to the constitutional requirements of Proposition 218.

The election consolidation requirement under Proposition 218 is narrowly tailored to apply only to general taxes. By requiring general tax elections to be consolidated with a regularly scheduled election for members of the governing body, several policies are advanced. First, the merits of a general tax measure become a legitimate campaign issue between the candidates. Second, how the candidates propose to spend unrestricted general tax proceeds is also another legitimate campaign issue. These policies are advanced irrespective of whether a general tax measure reaches the ballot by act of the governing body or by the voters exercising the local initiative power.

Proponents of a local initiative have available options to lawfully avoid the Proposition 218 election consolidation requirement by pursuing a

special tax which is not subject to the consolidation requirement. (Cal. Const., art. XIII C, § 2, subd. (d).) Furthermore, the election consolidation requirement does not apply if the local agency involved is a "special purpose district or agency" which has no power to levy general taxes (Cal. Const., art. XIII C, § 2, subd. (a)) or if the tax at issue is a tax imposed upon a parcel of property or upon a person as an incident of property ownership which must be levied as a special tax (Cal. Const., art. XIII D, § 3, subd. (a), par. (2)). A local initiative that imposes a levy that is not a tax (Cal. Const., art. XIII C, § 1, subd. (e) ["tax" definition under article XIII C]) is also not subject to the election consolidation requirement under Proposition 218.

D. Proposition 219 (1998) Provisions Support the Conclusion that Section 2 of Article XIII C Limitations Apply to Local Initiatives Relating to Taxation.

The passage of Proposition 219 during the June 1998 election provides additional support that the taxation provisions of Proposition 218 (Cal. Const., art. XIII C, § 2) apply to local initiatives that impose taxes. Proposition 219, in part, constitutionally prohibits local ballot measures that "contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure." (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1188-1189 ("*Roseville*").)

As noted in *Roseville*, the Analysis by the Legislative Analyst contained in the Ballot Pamphlet relating to Proposition 219 "reveals that the impetus for the measure was, in part, the recent behavior of a local government that had placed a measure before the voters providing that it would impose a general tax if approved by a majority or a special tax if

approved by two-thirds of the voters; thus, the analysis noted, 'a 'yes' vote could mean two different things.' The analysis of Proposition 219 went on to state that, if the proposition were approved, 'a ballot measure could not have one outcome if approved by a majority of voters and a different outcome if approved by a two-thirds vote.'" (*Id.* at p. 1189, quoting Voter Information Guide, Primary Elec. (June 2, 1998) analysis of Prop. 219 by the Legislative Analyst, p. 6.)[8]

Of significance is that the foregoing prohibition under Proposition 219 applies not only to local ballot measures proposed by the governing body of a city or county (Cal. Const., art. XI, § 7.5, subd. (a)(2)) but also to local city or county initiative measures (Cal. Const., art. II, § 11, subd. (c)) and the state initiative power in general (Cal. Const., art. II, § 8, subd. (f)). These constitutional provisions relating to the exercise of the initiative power were frequently cited by the court in *Upland* in support of its conclusions. (See, e.g., Opn. at pp. 25-27.)

The fact that Proposition 219 provisions specifically apply to the exercise of the local initiative power (Cal. Const., art. II, § 11, subd. (c)) to preclude alternative or cumulative provisions relating to the majority vote general tax versus two-thirds vote special tax distinction, which distinction is specifically provided for in Proposition 218 (Cal. Const., art. XIII C, § 2), is a clear indication that section 2 of article XIII C constitutional provisions apply to local initiatives that impose taxes. Otherwise, if section 2 of article XIII C (setting forth the general tax versus special tax distinction regarding voter approval requirements) did not apply to the exercise of the local initiative power, then the Proposition 219 language contained in section 11

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[8] A copy of the official Ballot Pamphlet relating to Proposition 219 on the June 1998 California statewide election ballot can be found at < http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2142&context=ca_ballot_props> [as of Oct. 26, 2016].

of article II relating to the local initiative power (Cal. Const., art. II, § 11, subd. (c)) would be surplusage. Constitutional provisions should be interpreted so as to eliminate surplusage. (*Dahms v. Downtown Pomona Property & Business Improvement Dist.* (2009) 174 Cal.App.4th 708, 718.)

While the court in *Upland* frequently referred to section 11 of article II (local initiative power for cities and counties) in support of its decision, it never mentioned the Proposition 219 language contained in subdivision (c) thereof, and failed to explain why section 2 of article XIII C limitations didn't apply to local taxation initiatives notwithstanding the constitutional language of Proposition 219 (Cal. Const., art. II, § 11, subd. (c)) and the clearly articulated impetus for that measure, as set forth in the Ballot Pamphlet relating to Proposition 219. (See *Roseville, supra*, 106 Cal.App.4th at p. 1189.)

E. Section 2 of Article XIII C Provisions Have Previously Been Applied to a Local Initiative Relating to Taxation.

Notwithstanding the conclusions reached by the Court of Appeal in *Upland*, another appellate court in a Proposition 218 case did apply section 2 of article XIII C constitutional provisions to a local initiative measure relating to taxation. In *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374 ("*San Diego*"), the court applied the constitutional provisions of Proposition 218 (Cal. Const., art. XIII C, § 2, subd. (b)) to invalidate an initiative charter amendment (Proposition E on the March 2002 San Diego general municipal election ballot)[9] that would have required a two-thirds vote of San Diego voters prior to the City Council

[9] A city charter may be amended via the local initiative power. (Cal. Const., art. XI, § 3, subd. (b).)

levying a new general tax or increasing an existing general tax. (*San Diego, supra*, 120 Cal.App.4th at pp. 390-394.)[10]

Under Proposition 218, general taxes are subject to majority voter approval. (Cal. Const., art. XIII C, § 2, subd. (b).) In invalidating the initiative charter amendment, the court in *San Diego* stated: "Proposition E conflicts with article XIII C, section 2(b) by requiring that any new general tax or any increase in an existing general tax be approved by a two-thirds vote of the city's electorate, rather than by a majority vote as set forth in that section." (*San Diego, supra*, 120 Cal.App.4th at p. 394.) Hence, as concluded in *San Diego*, the constitutional requirement that general taxes be approved by a majority vote also served as a constitutional limitation precluding the enactment of a local initiative charter amendment requiring a supermajority vote requirement for general taxes. The court in *Upland* never cited *San Diego*, and did not explain how a local initiative relating to taxation is subject to Proposition 218 constitutional taxpayer provisions in *San Diego* but not in *Upland.*

F. Taxation Imposed by Local Initiative is Taxation Imposed by Local Government Under Proposition 218.

Section 2 of article XIII C contains constitutional conditions on the taxing authority of local governments in California. (*Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn.* (1998) 63 Cal.App.4th 211, 226.) The taxing authority of local governments is generally not

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[10] Proposition E was an initiative charter amendment. (*San Diego, supra*, 120 Cal.App.4th at p. 379 [Proposition E which had been placed on the ballot pursuant to certified petitions presented to the city council].) A copy of the Proposition E voter information pamphlet can be found at <https://www.sandiego.gov/sites/default/files/legacy/city-clerk/pdf/prope.pdf > [as of Oct. 26, 2016]. The text of the Proposition E initiative charter amendment can be found on the fourth page of the document.

inherent, but exists only to the extent granted by the Legislature, and the Legislature may validly prescribe the terms and conditions under which local governments may exercise that taxing power. (*Id.* at p. 225.) The voters themselves, through the initiative process such as by the passage of Proposition 218, may constitutionally impose conditions on the taxing power of local governments. (*Id.* at p. 226.) Such conditions on the local taxing power can include voter approval requirements, including supermajority voter approval for special taxes, as well as limiting election dates for certain taxes such as general taxes. (See, e.g., Cal. Const., art. XIII C, § 2.)

Unless the context clearly provides otherwise, local taxation initiatives are subject to the same constitutional limitations on the taxing power as the governing body of a local government. (Cf. *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674 [statutory initiative subject to the same state and federal constitutional limitations as are the Legislature and the statutes which it enacts] ("*Deukmejian*").) In the context of Proposition 218, this means that section 2 of article XIII C constitutional limitations apply to local taxation measures without regard to whether the legislative power is exercised by the governing body of a local government or by the voters exercising the local initiative power.

The practical effect of the Court of Appeal decision in *Upland* in concluding that local taxation initiatives are not subject to section 2 of article XIII C limitations is to create a judicial exemption for such local initiatives. However, Proposition 218 contains no exemption from its provisions regarding local taxation initiatives.

To the extent any exemptions exist under Proposition 218, whether partial or full, they are expressly set forth in the text of the constitutional language. For example, fees imposed as a condition of property development are exempt (Cal. Const., art. XIII D, § 1, subd. (b)), fees for the

provision of electrical or gas service are exempt as property-related fees (Cal. Const., art. XIII D, § 3, subd. (b)), and fees for water, sewer or refuse collection services are exempt from voter approval under article XIII D (Cal. Const., art. XIII D, § 6, subd. (c)). Where the language Proposition 218 is clear, and there is no suggestion of any conflicting voter intention, the courts have no authority to engraft an exception onto the constitutional provisions adopted in Proposition 218. (*Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 925.)

The procedures applicable to the exercise of the local initiative power in cities such as Upland provide for the enactment of ordinances by incorporated cities. (Elec. Code, § 9200.) If the voters approve a proposed initiative ordinance, the ordinance becomes a valid and binding ordinance of the city. (Elec. Code, § 9217.) Any city, including a charter city, is a "local government" under the constitutional definition contained in article XIII C. (Cal. Const., art. XIII C, § 1, subd. (b).)

Whether a city ordinance is enacted by the people via the local initiative power or by the governing body of the city (the city council), both involve the exercise of the legislative power of the city. This includes matters relating to taxation. When the initiative power is involved, it is the people who are enacting an ordinance. (See Elec. Code, § 9224 [enacting clause of ordinances submitted to the voters].) When the governing body is involved, it is the city council that enacts the ordinance. (See Gov. Code, § 36931 [enacting clause of ordinances by the city council].) The difference is the manner in which the legislative power of a city is exercised, but the end result of a successful enactment in each instance is an ordinance of the city. Thus, when voters of a city impose a tax by local initiative, that tax is being imposed by the city which is a "local government" under Proposition 218. (Cf. *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1328-

1329 [levies imposed by a local government under article XIII C are limited to charges payable to, or for the benefit of, a local government].)

Furthermore, if one were to apply the court's conclusion in *Upland* in similar constitutional contexts relating to local taxation, problematic outcomes will result. For example, under the California Constitution "[t]he Legislature may not impose taxes for local purposes but may authorize local governments to impose them." (Cal. Const., art. XIII, § 24, subd. (a).) The foregoing clause expressly confirms the Legislature's authority to grant local governments the power to impose local taxes. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 252 ("*Guardino*").) Just like section 2 of article XIII C, the constitutional language refers to local governments imposing local taxes and makes no reference to the initiative power.

If the *Upland* conclusion that taxation imposed by initiative is not taxation imposed by local government is applied to section 24 of article XIII, significant doubt arises regarding the authority of the Legislature to grant the power to impose taxes via the local initiative power. This is because section 24 of article XIII would be construed to authorize the imposition of taxes by local government but not taxes imposed by local initiative. If the levy at issue in *Upland* is a tax, whether general or special, the statutory authority (enabling authority) to impose that tax via the local initiative power would be in serious doubt since the constitutional provision confirming the Legislature's authority to grant the local taxation power would apply only to taxes imposed by local governments and not to taxes imposed by local initiatives.

It is unlikely an appellate court would construe the scope of section 24 of article XIII in the foregoing manner. In addition, unlike the broader language of Proposition 218 (section 2 of article XIII C), section 24 of article

XIII contains no liberal interpretation provision and is not prefaced with "notwithstanding any other provision of this Constitution" language. This provides another example that the court's conclusion in *Upland* regarding taxation imposed by initiative is not correct.

G. Cautionary Language Limiting Application of the Scope of Decision to Section 2 of Article XIII C is Requested From This Court.

The local initiative power under section 11 of article II is generally co-extensive with the legislative power of the local governing body. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775.) Application of the "co-extensive" rule can support the conclusion that the provisions of section 2 of article XIII C apply to tax measures placed on the ballot by the governing body of a local government and also to tax measures placed on the ballot using the local initiative power.

The co-extensive rule is a general rule and there are exceptions to that rule such as when a constitutional provision limits the powers of the voters but not the governing legislative body. (See, e.g., *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 583-584 [section 12 of article II of California Constitution limits only the power of the voters, not the Legislature].) The exceptions to the general co-extensive rule occur in situations where one party (typically the governing body) may exercise the legislative power in a particular instance but the other party (typically the voters via initiative) is legally precluded from exercising that same legislative power.

An exception to the co-extensive rule can also occur where voters may be constitutionally permitted to exercise the initiative power in a particular instance but the governing body of a local government may be

precluded from doing so due to legal constraints such as statutory restrictions.

In particular, section 3 of article XIII C (also part of Proposition 218) provides in relevant part: "*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, § 3, emphasis added.) The impartial analysis prepared by the Legislative Analyst concerning the sweeping scope of section 3 of article XIII C provides: "The measure states that Californians have the power to repeal or reduce any local tax, assessment, or fee through the initiative process." (See *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 212-213 [quoting ballot pamphlet] ("*Bighorn*").)

The broad constitutional reservation of the initiative power under section 3 of article XIII C supports an exception to the co-extensive rule[11] while no exception to the co-extensive rule appears to apply to section 2 of article XIII C. However, it is unclear whether application of the co-extensive rule is appropriate in *Upland.* There does not appear to be an issue over whether the subject "Licensing and Inspection fee" can be imposed via the local initiative power. Both the legislative body (city council) of the city of Upland and the voters via the initiative power appear to have the authority to impose the "fee." Rather, the issue is whether constitutional limitations on the exercise of the legislative power to impose the "fee" (section 2 of article XIII C) apply equally to the legislative body as well as the voters via the initiative power. Thus, it appears that *Deukmejian* more appropriately

[11] At some point, this Court must address to what extent a statutory limitation on the initiative power can effectively preclude local voters from exercising the broad constitutionally reserved local initiative power under Proposition 218 (Cal. Const., art. XIII C, § 3). This issue was not addressed in *Bighorn.*

addresses the issue. (*Deukmejian, supra*, 34 Cal.3d at p. 674 [initiatives subject to the same constitutional limitations as are the legislative body and the laws which it enacts].)

Regardless of whether this Court resolves the issues in *Upland* by applying the co-extensive rule to section 2 of article XIII C and/or by relying on *Deukmejian*, it is respectfully requested that cautionary language be included to the effect that the scope of decision be limited to section 2 of article XIII C and not to section 3 of article XIII C (local initiative power to reduce or repeal local government levies) which is not at issue in *Upland*. (See *Bighorn, supra,* 39 Cal.4th at p. 221 [similar section 3 of article XIII C cautionary language concerning issues not currently before this Court].) The local initiative in *Upland* does not seek to reduce or repeal a local government levy so as to bring that levy within the scope of section 3 of article XIII C.

III. IF ALL OR PART OF THE SUBJECT "FEE" IS A TAX, IT IS A SPECIAL TAX UNDER THE BROADENED PROPOSITION 218 CONSTITUTIONAL DEFINITION.

If this Court determines that the constitutional restrictions under section 2 of article XIII C apply to local initiatives that raise taxes, then in order to determine whether the election consolidation requirement applies, it is first necessary to determine whether the levy at issue is a "tax" (Cal. Const., art. XIII C, § 1, subd. (e)).[12] If the levy (or at least the excess

[12] This is now an issue under Proposition 26 which was approved by California voters in November 2010. Proposition 26 amended section 1 of article XIII C (part of Proposition 218) to include a broad constitutional definition of "tax" for purposes of article XIII C. Proposition 218 did not include a constitutional definition of "tax," but before the passage of Proposition 26, the term "tax" under article XIII C was generally broadly construed. (See *Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686 [Emergency Communication

revenue generated from the subject "fee") is a "tax,"[13] then it must be determined whether the levy is a special tax or a general tax. (Cal. Const., art. XIII C, § 2, subd. (a) [all taxes imposed by local governments are either general taxes or special taxes].) Only if the levy is a general tax (Cal. Const., art. XIII C, § 1, subd. (a) ["general tax" definition]) would the election consolidation requirement apply. (Cal. Const., art. XIII C, § 2, subd. (b).)

The general tax versus special tax determination not only has bearing on whether the election consolidation requirement applies, but also on the applicable voter approval requirement for the tax. A general tax is subject to majority voter approval (Cal. Const., art. XIII C, § 2, subd. (b)) while a special tax is subject to two-thirds voter approval (Cal. Const., art. XIII C, § 2, subd. (d)) under Proposition 218.

Hence, if a general tax is involved, the election consolidation requirement would apply and the tax is subject to majority voter approval. If a special tax is involved, the election consolidation requirement does not apply but the tax is subject to two-thirds voter approval. What this means is that if the subject initiative measure were to subsequently get majority voter approval but less two-thirds voter approval, a recurrence of the controversy between the parties can be expected which impacts mootness.[14] (See *Santa*

System Response Fee funding access to 911 services deemed a tax subject to voter approval].)

[13] Preelection review on the "tax" issue should be appropriate because the election consolidation requirement is an election procedural matter. (See *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1006.) Furthermore, the agency report authorized for local city initiatives (Elec. Code, § 9212) should be acceptable for purposes of a city determining whether a levy is a "tax" that may be subject to the Proposition 218 election consolidation requirement. (Cf. *Tuolumne Jobs, supra*, 59 Cal.4th at p. 1042 [section 9212 report available option for abbreviated environmental review under CEQA].) The city of Upland prepared such a report. (Opn. at pp. 4-6.)

[14] In this situation, it would still be necessary to determine whether section 2 of article XIII C applies to local taxation initiatives, whether the "fee" is a "tax" under article XIII C, and if a tax whether that tax is a general tax or a special tax.

Monica Baykeeper v. City of Malibu (2011) 193 Cal.App.4th 1538, 1548 [discretionary exceptions to mootness rules].)

In concluding that section 2 of article XIII C does not apply to local initiatives that impose a tax, the Court of Appeal in *Upland* did not decide whether the "fee" was a "tax," and if a tax, whether that tax was a general tax or a special tax. However, the trial court found that the "fee" qualified as a "tax" under article XIII C and that the election consolidation requirement applied.[15] (Opn. at p. 8.) The city of Upland also previously concluded that because the "fee" exceeded applicable costs it was a "tax," and because the "fee" did not provide any legally binding mandate for use of the "tax," the excess revenue would by default be deposited into the city's general fund and used for general governmental purposes as a general tax. (Opn. at p. 6.)

A. A Tax Placed Into the General Fund of a City Can Be a Special Tax Under the Broadened Proposition 218 Constitutional Definition.

Under the city of Upland's analysis of the general tax issue, as set forth in the Court of Appeal opinion, if the proceeds of a tax are placed into the general fund of a city, that tax is deemed a general tax under Proposition 218. (Opn. at p. 6.) The Court of Appeal opinion did not cite any authority for placing tax proceeds from the "fee" into the general fund. However, it appears that this is legally permissible. (See, e.g., Gov. Code, § 43400 [placement of city moneys into general fund].)

Under Proposition 218, "[a]ll taxes imposed by any local government shall be deemed to be either general taxes or special taxes." (Cal. Const., art. XIII C, § 2, subd. (a).) A general tax is defined as "any tax imposed for general governmental purposes." (Cal. Const., art. XIII C, § 1, subd. (a).) A

[15] The opinion did not expressly state whether the tax was a general tax or a special tax. The election consolidation requirement only applies to general taxes.

special tax is defined as "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." (Cal. Const., art. XIII C, § 1, subd. (d).) The Proposition 218 "special tax" definition is broader than the Proposition 13 "special tax" definition, as strictly construed by this court in *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 57 [taxes levied for specific purposes rather than a tax placed in the general fund to be utilized for general governmental purposes] ("*Farrell*"),[16] as also "including a tax imposed for specific purposes, which is placed into a general fund." (Cal. Const., art. XIII C, § 1, subd. (d).)

While this Court strictly construed the term "special tax" in *Farrell* in connection with Proposition 13, section 5 of Proposition 218 provides that "[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5.) Consistent with the liberal interpretation provision, a broad interpretation of the term "special tax" under Proposition 218 would serve to "limit local government revenue and enhance taxpayer consent." Relative to the majority vote requirement for general taxes, a broad interpretation of the "special tax" term would limit local government revenue (because of the significantly higher voter approval requirement it should generally be more difficult to pass a special tax relative to a general tax) and enhance the level of consent required to approve a local tax

[16] In *Rider v. County of San Diego* (1991) 1 Cal.4th 1 ("*Rider*"), this Court held that the *Farrell* rationale did not apply to special purpose districts or agencies whereby every tax levied by such entities would be a special tax under Proposition 13. (*Id.* at p. 15.) Proposition 218 constitutionalized the "special purpose districts or agencies" language set forth in *Rider*. (See Cal. Const., art. XIII C, § 2, subd. (a) [special purpose districts or agencies have no power to levy general taxes].) However, the *Farrell* rationale under Proposition 13 still applies to general purpose entities such as a city. (See *Neecke v. City of Mill Valley* (1995) 39 Cal.App.4th 946, 954.)

inasmuch as two-thirds voter approval would be required instead of majority voter approval.

Furthermore, when the term "including" is used as part of a Proposition 218 constitutional definition, it has been construed by this Court as a term of enlargement. (*Bighorn, supra*, 39 Cal.4th at p. 217 [section 2(e) of article XIII D definition of a property-related fee or charge as "including a user fee or charge for a property related service"].) Consistent with *Bighorn*, interpreting "including" as a term of enlargement would also apply to the "special tax" definition in article XIII C. This would represent an enlargement of the special tax term relative to the strict construction under Proposition 13 by this Court in *Farrell* as applying only to taxes levied and dedicated for specific purposes. (*Farrell, supra*, 32 Cal.3d at. p. 57.)

Under the expanded Proposition 218 "special tax" definition, the placement of tax proceeds into the general fund of a city no longer makes that tax a general tax as a matter of law. Prior to Proposition 218, when tax proceeds were lawfully placed into the general fund of a city, that tax was not a special tax subject to two-thirds voter approval under Proposition 13. (*Neecke v. City of Mill Valley* (1995) 39 Cal.App.4th 946, 954 ("*Neecke*").) However, under the express constitutional language of Proposition 218, a taxed placed into the general fund of a city would nonetheless be a special tax if that tax is imposed for specific purposes. On the other hand, a tax placed into the general fund of a city would be a general tax if that tax is not imposed for specific purposes but is instead imposed for "general governmental purposes" in accordance with the section 1(a) of article XIII C constitutional definition.

To assist in the interpretation of what it means to "impose a tax for specific purposes which is placed into a general fund," it is very important to review and consider the historical context of this issue as it relates to local

governments avoiding the two-thirds vote requirement for special taxes under Proposition 13 in the wake of *Farrell*. Concerning the relationship between Proposition 218 and Proposition 13, this Court previously stated that "Proposition 218 is Proposition 13's progeny. Accordingly, it must be construed in that context." (*Apartment Association, supra*, 24 Cal.4th at p. 838.)

In *Coleman v. County of Santa Clara* (1998) 64 Cal.App.4th 662 ("*Coleman*"), the court held that a general fund sales tax accompanied by a companion advisory measure in which the voters expressed their preference that the sales tax revenues be spent on specified transportation projects was not a special tax subject to the two-thirds vote requirement under Proposition 13.[17] (*Id.* at pp. 668-673.) *Coleman* noted that there had previously been a sales tax dedicated to specific transportation projects adopted by the Santa Clara Local Transportation Authority and approved by a simple majority (but not two-thirds) of the voters. That sales tax was subsequently invalidated by this Court in *Guardino*. (*Id.* at p. 666, fn. 5.)

The court in *Coleman* held that *Farrell* controls the analysis. Since the county was a "general purpose entity" that placed the tax proceeds into the general fund for general governmental purposes, the sales tax was not a special tax subject to the two-thirds vote requirement under Proposition 13. (*Id.* at pp. 668-673.) However, the court in *Coleman* stated the following: "We readily acknowledge that as a result of our decision, ballot bifurcation makes it possible for cities and counties to raise new tax revenue by simple majority and then spend it on a specific list of projects." (*Id.* at p. 672.) As a

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[17] The court in *Coleman* did not determine whether the subject sales tax was a general or a special tax under Proposition 218. The sales tax in *Coleman* was approved during the same election (November 1996) that Proposition 218 was approved. However, the voter approval provisions of Proposition 218 contained in article XIII C went into effect the day after the election. (Cal. Const., art. XVIII, § 4 [when constitutional amendments go into effect].)

practical matter, *Coleman* allowed Santa Clara County to impose a sales tax for transportation purposes by a simple majority vote and avoid the two-thirds vote that would have been required following this Court's decision in *Guardino*.

In *Neecke*, the City of Mill Valley attempted to pass a special tax for street repairs but was unable to muster the necessary two-thirds voter approval. After two unsuccessful attempts, the local city council was advised on various options to fund street repairs, including a general municipal services tax. The city council was informed that the proceeds of such a tax had to be deposited into the general fund of the city to avoid the two-thirds vote requirement for special taxes under Proposition 13. (*Neecke, supra*, 39 Cal.App.4th at pp. 951-952.) The trial court found that Mill Valley deliberately circumvented Proposition 13 by "(1) failing to win voter approval of any of the ordinances by a two-thirds vote of the electorate; (2) categorizing the tax as a general tax; (3) depositing it in the general fund; and (4) using all or almost all of the tax money for a specific purpose: to fund Mill Valley's street improvement program." (*Id.* at p. 952.) Thus, the trial court concluded that the general municipal services tax was a special tax under Proposition 13.

The Court of Appeal in *Neecke* reversed on the special tax issue in stating that "[s]ince we have concluded that the 'general fund' exception found in *Farrell* remains viable in cases, like this one, where a tax is levied by a general purpose agency and the proceeds are deposited into its general fund, there can be no doubt that the tax at issue here is not a special tax subject to the requirements of section 4." (*Id.* at p. 959.) Thus, the tax was a general tax not subject to two-thirds voter approval under Proposition 13 even though the city had a specific purpose in mind and used all or almost all of the tax money for a specific purpose (a street improvement program).

In *City of Oakland v. Digre* (1988) 205 Cal.App.3d 99 ("*Digre*"), the court held that a tax deposited into the general fund of a city was a general tax not subject to the two-thirds vote requirement under Proposition 13 even though the primary purpose of the tax was to fund specified city services.[18] (*Id.* at p. 104.)

As the preceding cases illustrate, cities and counties (as general purpose entities) were able to evade the two-thirds vote requirement for special taxes under Proposition 13 by taking advantage of *Farrell* in imposing taxes that were lawfully deposited into the general fund (whereby the tax proceeds were legally unrestricted) even though the city or county had one or more specific purposes in mind for imposing the tax. This was done through such mechanisms as a companion advisory measure or legally nonbinding intent language.

Under pre-Proposition 218 cases, if a city levied a tax that was not legally dedicated for specific purposes, it would not be a special tax subject to two-thirds voter approval under Proposition 13. Under the *Farrell* rationale, placing tax proceeds into the general fund of a city was legally dispositive of the issue. (*Neecke, supra*, 39 Cal.App.4th at p. 954.)

The court in *Neecke* also noted that "although all parties have cited numerous authorities, they do not cite and we have not found any case where a court has declared a tax levied by a general purpose entity the proceeds of which were deposited into its general fund to be a 'special tax'." (*Neecke, supra*, 39 Cal.App.4th at p. 957.) The broadened "special tax" constitutional definition contained in Proposition 218 provides the legal authority found lacking in the pre-Proposition 218 cases. (Cf. *Silicon Valley, supra*, 44 Cal.4th at p. 446 [Prop. 218 burden of demonstration provision in article XIII

[18] While the tax in *Digre* was not invalidated under Proposition 13, it was invalidated under the uniformity of taxation provision of the California Constitution (section 1 of article XIII). (*Digre, supra*, 205 Cal.App.3d at p. 111.)

D provides legal basis for a more rigorous standard of review for special assessments where legal basis found lacking in pre-Prop. 218 cases].)

Given the historical context of the special tax issue as it relates to cities and counties avoiding the two-thirds vote requirement for special taxes under Proposition 13 following *Farrell* (e.g., *Coleman*, *Neecke*, and *Digre* cases), the interpretation of "including" in Proposition 218 constitutional definitions as a term of enlargement (*Bighorn, supra*, 39 Cal.4th at p. 217), and the Proposition 218 liberal interpretation provision (Prop. 218, § 5), the phrase "tax imposed for specific purposes, which is placed into a general fund" contained in the broadened "special tax" constitutional definition under Proposition 218 (Cal. Const., art. XIII C, § 1, subd. (d)) means an unrestricted tax (resulting from lawfully placing the tax proceeds into the general fund) where a "general purpose entity"[19] such as a city has one or more specific purposes in mind in imposing the tax.

With such a broadened special tax, the expectation of voters approving the tax is that the tax is being imposed for specific purposes even though the tax proceeds are placed into the general fund of a city and are not legally restricted for those specific purposes. This also means that a city tax can be a special tax under Proposition 218 (article XIII C) even though that tax may not be a special tax under Proposition 13 (article XIII A) as a result of the restrictive judicial interpretation in *Farrell* and its progeny.

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[19] Under Proposition 218, "special purpose districts or agencies" (including school districts), have no power to levy general taxes. (Cal. Const., art. XIII C, § 2, subd. (a).) Accordingly, special purpose districts or agencies may only levy special taxes. (See *Rider, supra*, 1 Cal.4th at p. 15.)

B. Application of the Levy in *Upland* to the Broadened "Special Tax" Definition Under Proposition 218.

The specific language from the initiative measure imposing the "fee" in *Upland* provides as follows:

> "17.158.100 Annual Licensing and Inspection Fee
>
> In recognition that Marijuana Dispensaries may require greater oversight than other businesses in the City of Upland, an annual Licensing and Inspection fee of $75,000 (seventy-five thousand dollars) will be due from any dispensary that has been granted a business license and approved for operation by the City of Upland. The initial Licensing and Inspection Fee shall be due within 10 days of the City's approval and issuance of the initial business license to the dispensary. Subsequent annual renewal fees of the Licensing and Inspection Fee shall be due in two installments. For the subsequent annual renewal fee, the first installment of the annual Licensing and Inspection Fee of $37,500 (thirty-seven thousand five hundred dollars) shall be due February 15th of the calendar year. The second installment of the annual Licensing and Inspection Fee of $37,500 (thirty-seven thousand five hundred dollars) shall be due on June 31st of the calendar year." (Initiative, § 17.158.100 <http://www.sbcountyelections.com/Portals/9/Elections/2016/1108/Measures/U_CityofUpland/Ordinance_CityOfUpland.pdf> [as of Oct. 26, 2016].)

There is nothing in the language of the initiative text indicating that to the extent any of the "fee" proceeds are a "tax," those proceeds would be placed into the general fund of the city of Upland and thereafter be expended for any or all general governmental purposes.[20] For example, it is not likely that the voters approving the tax would conclude from the initiative text that the "fee" proceeds (to the extent those proceeds are a "tax"), will be spent on such unrelated general governmental purposes as libraries, parks, or streets.

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[20] The initiative does not specifically provide for the placement of the "fee" proceeds into a special fund where those proceeds would be legally restricted for the specific purposes for which the "fee" is imposed.

A more reasonable interpretation of the initiative text language is that to the extent the "fee" is a "tax," that tax will be spent on the specific purpose set forth in the code section. In particular, for the specific purpose of providing greater oversight of marijuana dispensaries, including the licensing and inspection of such dispensaries. Under the broadened "special tax" definition, it would not matter if the tax proceeds are placed into the general fund or a special fund because the tax would still be imposed for specific purposes under Proposition 218.

Instead of the existing initiative language, if the initiative text had expressly stated something to the effect that to the extent the "fee" proceeds exceed costs, the excess revenues would be placed into the general fund of the city and be expended for any or all general governmental purposes, then it would be more reasonable to conclude that the tax is a general tax and not a special tax imposed for specific purposes that is placed into the general fund. In this situation, it would be much more reasonable for the voters approving the tax to conclude that the excess revenues would be spent on general government purposes unrelated to the specific purposes for which the "fee" is actually being imposed. However, the text of the subject initiative was not written in this manner.

Accordingly, applying the broadened "special tax" definition under Proposition 218, if the "fee" is found to be a "tax" (including if excess revenues above costs are deemed a "tax") that tax would be a special tax. As a special tax, the election consolidation requirement would not apply but two-thirds voter approval would be required for the tax. (Cal. Const., art. XIII C, § 2, subd. (d).)

IV. ADDITIONAL GUIDANCE LANGUAGE REGARDING THE INTERPRETATION OF PROPOSITION 218 CONSTITUTIONAL PROVISIONS IS REQUESTED FROM THIS COURT.

This is not the first time the appellate division that decided *Upland* (Fourth District, Division Two) has decided a Proposition 218 case in a questionable manner. In *Bighorn*, this Court addressed the validity under Proposition 218 of a proposed local initiative that would have, in part, reduced water rates.[21] This Court noted in *Bighorn* that "Article XIII C, section 3 of the California Constitution expressly states that the initiative power cannot be limited or prohibited when an initiative proposes to reduce or repeal 'any local tax, assessment, fee or charge.'" (*Bighorn, supra*, 39 Cal.4th at p. 212.)

Despite the clear and unequivocal language that the foregoing constitutional provision applies to assessments, fees and charges, the Court of Appeal in *Bighorn* concluded that "Article XIII C governs special and general taxes, which are not at issue here." (*Id.* at p. 212.) This Court concluded otherwise in *Bighorn* in promptly disposing of the issue: "Because the Agency offers no argument in support of the Court of Appeal's assertion that article XIII C applies only to special and general taxes, and not to fees, we will not belabor the point. We conclude that article XIII C, section 3, applies to assessments, fees, and charges and not just to special and general taxes." (*Id.* at p. 213.)

It is apparent that some lower courts would benefit from additional guidance from this Court in the interpretation of Proposition 218 constitutional provisions. Accordingly, it is respectfully requested that this Court provide additional guidance to the lower courts to better enable those

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[21] The Fourth District, Division Two decided *Bighorn* at the Court of Appeal level (Case No. E033515).

courts to interpret Proposition 218 in a manner more consistent with its stated purposes and intent. (See, e.g., *Silicon Valley, supra*, 44 Cal.4th at p. 448 [articulating Proposition 218 purposes and intent in deciding standard of review issue under article XIII D].)

V. CONCLUSION.

The constitutional requirements in section 2 of article XIII C apply to local taxes imposed via the local initiative power. Under the broadened Proposition 218 "special tax" definition, to the extent the subject "fee" is a "tax," that tax is a special tax in which the election consolidation requirement does not apply but two-thirds voter approval is required for the tax. (Cal. Const., art. XIII C, § 2, subd. (d).)

Dated: October 28, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that the foregoing amicus curiae brief, as measured by the word count of the computer program used to prepare the brief, contains 9,897 words.

Dated: October 28, 2016

JACK COHEN
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Proof of Service
State of California, County of Los Angeles

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is: Post Office Box 6273, Beverly Hills, CA 90212.

On October 28, 2016, I served the foregoing APPLICATION OF JACK COHEN (IN HIS CAPACITY AS A PROPOSITION 218 DRAFTER) FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANTS CITY OF UPLAND ET AL by depositing true copies thereof in the United States mail in Los Angeles (County of Los Angeles), California, enclosed in sealed envelopes with the postage thereon fully prepaid, and addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 28, 2016, at Beverly Hills, California.

Jack Cohen