S234148

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CALIFORNIA CANNABIS COALITION, a California Non Profit Corporation and NICOLE DE LA ROSA AND JAMES VELEZ, Plaintiffs & Appellants vs. THE CITY OF UPLAND, A Municipal Corporation and STEPHANIE MENDENHALL, CITY CLERK OF THE CITY OF UPLAND. Defendants & Respondents	Court of Appeal No. 4 Civil E063664 San Bernardino Superior Court No. CIVDS1503985

ON APPEAL FROM THE SUPERIOR COURT OF SAN BERNARDINO COUNTY

HONORABLE DAVID COHN, JUDGE

PLAINTIFFS' AND APPELLANTS' (CALIFORNIA CANNABIS COALITION, ET AL) CONSOLIDATED ANSWER TO MULTIPLE AMICI CURIAE BRIEFS

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I INTRODUCTION

Numerous letters were submitted by various persons in support of the City of Upland's Petition for Review in this case. This Court granted review on June 29, 2016 thereby vacating the published opinion by the Court of Appeal, California Cannabis Coalition v. City of Upland, 245 Cal.App.4th 970 (2016). Thereafter California Cannabis Coalition, et al, received copies of eight applications for permission to file

amicus curiae briefs and their accompanying proposed briefs. On November 8, 2016 (coincidentally the day of the national election and state and local elections) this Court granted permission with respect to seven applications for the filing of the amici curiae briefs. One was previously granted on September 6, 2016.

Of the eight applications that were granted by this Court seven support the City of Upland's refusal to comply with California law and refusal to set a special election for the marijuana initiative petition (known as Proposition U). The measure was rejected by the City of Upland's voters on November 8, 2016. It should have been considered at least a year earlier at a special stand alone election in accordance with the California Court of Appeal's decision. The following seven briefs (supporting reversal of the Court of Appeal) were accepted by this Court:

1. Jack Cohen;
2. Council on State Taxation;
3. California Taxpayer's Association;
4. The California League of Cities;
5. Pacific Legal Foundation;
6. The Public Interest Advocacy Clinic;
7. Nick Bailiwick (pro per) (application granted September 6, 2016).

The seven amici briefs mentioned above seek reversal by this Court of the Court of Appeal's decision which, had it been followed, would have allowed for a special election prior to November 8, 2016.

The best and most cogent amicus brief (supporting affirmance of the Court of

Appeal) was submitted in favor of the California Cannabis Coalition by the Chargers Football Company. The brief submitted by the Chargers Football Company (authored by the Law Firm of Munger, Tolles, and Olson) demolishes the arguments of the City of Upland, representation of which switched from Jones & Mayer to the Howard Jarvis Taxpayers Foundation. It was the Petition for Review filed by Howard Jarvis Taxpayers Foundation on behalf of the City of Upland that led this Court to grant review. This Court did not have the benefit of the brief of the Chargers Football Company written by Munger, Tolles and Olson. The Chargers Football Company brief completely destroys the arguments of the City of Upland and the supporting arguments of the seven amicus curiae.

California Cannabis Coalition and its counsel had no contact with any of the eight amici curiae including the Chargers Football Company and its counsel, Munger, Tolles & Olson. Neither California Cannabis Coalition or its counsel solicited any of the briefs including the one filed by the Chargers Football Company and its counsel, Munger, Tolles and Olson. California Cannabis Coalition did refer to the Chargers and their proposed tax measure to finance construction of their stadium at page 16 of its Answer to Petition for Review.

This brief is being filed pursuant to Rule 8.420(f)(7) of the California Rules of Court. This brief attempts to answer the seven amicus curiae briefs filed in support of the City of Upland. California Cannabis Coalition supports and accepts the brief of the Chargers Football Company and its counsel.

As the record in this case clearly establishes, California Cannabis Coalition acted

as promptly as possible to get the matter on the ballot and to get a judicial determination as soon as possible. The steps taken by California Cannabis Coalition are set forth in prior filings with the Superior Court, the Court of Appeal, and this Court. In brief, California Cannabis Coalition filed its action soon after the City of Upland denied its request for a special election notwithstanding it was entitled to such a special election. California Cannabis Coalition also obtained a very quick trial date and when it lost at the trial court appealed immediately and then filed its Opening Brief with the Court of Appeal soon after the record was filed with the Court of Appeal. California Cannabis Coalition also sought and was granted expedited review and advancement of oral argument. California Cannabis Coalition tried to take advantage of the reversal by the Court of Appeal. For example on February 22, 2016 the California Cannabis Coalition filed a motion with the Court of Appeal for the immediate issuance of the remittitur. No action was taken by the Court of Appeal. This Court's grant of review essentially stayed the ruling of the Court of Appeal depriving California Cannabis Coalition of its right to have a special stand alone speedy election.

This Court may take judicial notice of the election of November 8, 2016. Needless to say the ballot was filled with important matters including the election of the President, a U.S. Senator, numerous ballot propositions, and numerous local elections.

The subject of this case, the medical marijuana dispensary initiative sponsored by the California Cannabis Coalition, was buried at the bottom of the ballot as "Proposition U." The measure was defeated but California Cannabis Coalition is pursuing this litigation because should it prevail in this Court it respectfully submits that this Court

should order the City of Upland to call a special election. Although this would not restore the Coalition's right to a speedy election it would still give it a special election where the voters of the City of Upland could concentrate just on the measure and not be distracted by other matters including the election of the President of the United States. Accordingly, this case is clearly not moot. While this Court cannot rewind the clock and give the Coalition its speedy election it can still provide some relief in the form of a separate special stand alone election. In ordering a stand alone special election as soon as possible this Court would be partially remedying the error it made in granting review. In Howard Jarvis Taxpayer's Association v. Padilla, 62 Cal.4th 486 (2016) this Court initially and effectively removed the Citizens United advisory vote from the 2014 November election but in its ruling on the merits reversed itself and ruled that it should have permitted the vote. The Legislature reinstated the Citizens United Measure (Proposition 59) for the November 8, 2016 election and the measure prevailed. Proposition 59 directs California elected officials to propose and ratify an amendment to the United States Constitution to overturn the United States Supreme Court decision in Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). While procedurally not identical this Court can still accomplish the effect mentioned above by ordering the City to conduct the special election that it previously denied the Coalition.

II ARGUMENT

A. INTRODUCTION

The California Cannabis Coalition (hereinafter "CCC") has advanced three separate arguments. The major argument advanced by CCC is that Article 13C(2) does

not apply in this case because the alleged tax in the initiative is not proposed and would not be imposed by the City. Article 13C(2) is a limit on City government, not a limit on the People's right of initiative. The excellent amicus brief filed by the Chargers Football Company strongly and persuasively advances this argument.

The Brief of the Chargers Football Company does not deal with the other two issues and this Court need not deal with those issues either if it agrees with the first argument advanced by CCC and agrees with the Chargers Football Company Brief.

Because of the number of briefs filed by the amici curiae the page limitation of the Rules of Court requires CCC to limit its response in the form of an Answer to the seven hostile briefs. Thus, there is no need for CCC to "Answer" the brief of the Chargers Football Company. CCC agrees wholeheartedly with the Brief of the Chargers Football Company. Thus, there is no need to "Answer" the Charger's Brief.

CCC will now proceed to respond to the hostile amici curiae briefs.

B. THE TAX, IF IT IS A TAX, WOULD BE IMPOSED BY THE PEOPLE ACTING UNDER THEIR RESERVED INITIATIVE AUTHORITY, AND WOULD NOT BE IMPOSED BY THE CITY'S GOVERNMENT (I.E., CITY COUNCIL) AND THEREFORE WOULD NOT BE SUBJECT TO ARTICLE 13(c)(2) OF THE CONSTITUTION

The California Taxpayers Association argues that if the Court of Appeal's decision in this case is allowed to stand in the future unethical City Councils and their respective Mayors will be able to partner with a special interest group, write an initiative regarding tax increases, obtain signatures from only ten percent of the city's registered voters and then skip the voters and adopt the ordinance directly under Elections Code Section 9215. Please see pages 11 through 15 of the California Taxpayers Association Amicus Curiae

Brief. The California Taxpayers Association argues that we have precedent for this activity. The Brief predicts that if the decision of the Court of Appeal is upheld the floodgates for more local taxes would be opened. See page 15. The Brief quotes from Elections Code Section 9214 and asserts that Elections Code Section 9214 is "inconsistent" with Article 13(c)(2)(b) of the California Constitution.

This is simply not true. No evidence has been offered by anyone that suggests that a City Council and its Mayor would become involved in a corrupt agreement to bypass the voters.

To disprove this unsupported assertion all we need do is review some of the other amicus letters in support of granting review in this case and also look at some of the amicus curiae briefs. The Public Interest Advocacy Clinic filed a brief that also refers to the San Diego Chargers ballot measure. The example provided by the Public Interest Advocacy Clinic disproves the very contention made by the California Taxpayers Association. Beginning at page 3 of its brief the Public Interest Advocacy Clinic refers to the Chargers drafting their own ballot measure in private. The brief asserts the Chargers paid for 110,000 signatures to qualify the San Diego Charger proposed tax measure for the San Diego ballot. The measure, which did qualify for the ballot in the City of San Diego, became known as "Measure C." The Mayor and the City Council of the City of San Diego did not vote to adopt Measure C. Instead the measure was considered by the San Diego Electorate. The measure was defeated by the voters.

The Public Interest Advocacy Clinic states that many "citizens" initiatives neither originate from nor benefit the citizens they impact. . . ." See page 8 of Public Interest

Advocacy Clinic Brief. It should be noted that the City Council in San Diego did not bypass the voters. In short, there is no evidence anywhere that the City Council and the Mayor of any particular city colluded with city employees to place measures on the ballot and then have the Mayor and Council vote to adopt the measure without a vote.

Perhaps the most intellectually honest amicus brief filed in support of the City is the brief submitted by Jack Cohen who acknowledges at page 19 of his brief that whether Section 13c of the California Constitution invalidates Elections Code Section 9214 or whether the two measures can be harmonized "is unclear. . . ." The Jack Cohen amicus brief then concludes the subject at page 20 where he "respectfully" requests "that cautionary language be included . . ." in the Court's opinion to limit the application of the opinion to Section 2 of Article 13c and not to Section 3 of Article 13 c. The California Cannabis Coalition has no objection to a narrow decision by this Court that is limited to Section 2.

The discussion by amicus Jack Cohen of Legislature v. Deukmejian , 34 Cal.3d 658 (1983) is not on point. Mr. Cohen states that Legislature v. Deukmejian, supra, stands for the proposition that a statutory initiative is subject to the same state and federal constitutional limitations as are the Legislature and the statutes which it enacts. Cohen continues at page 15 to state that Proposition 218 requires Section 2 of Article 13c to apply to local taxation measures whether the Legislative power is exercised by the governing body of a local government or by the voters exercising the local initiative power. This is not true.

All one has to do is read Article 13c Section 2 to realize that it is a limitation on

local government. Indeed Section 2 begins with the following words:

"Local Government Tax Limitation."

Subparagraph (b) only applies to local government. It states,

> "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. . . ."

The Chargers noted at page 38 of their Brief :

> ". . . The requirements of Article 13c, by contrast, do not address the steps a local government must take before finalizing a tax's form; rather, they address the steps a local government must [take] after it is final but before the local government can impose it. The discretionary decision to adopt a properly proposed initiative is exactly the government yea-or-nay decision covered by Article 13c. Common sense and ordinary English dictate that when a tax initiative is 'adopted by the vote of the Legislative body . . . without submission to the voters (California Elections Code Section 9217), the government, not the people, has imposed the tax.' Thus, such a tax would be subject to Article 13c's procedural requirements, while a tax 'adopted by the voters' would not (Ibid.) Unlike with CEQA and its like, Article 13c still has a role to play after an initiative has been proposed but before it has been adopted by the people.
>
> In short, there is a reasonable reading of Article13c that both preserves the initiative power and addresses the city government's concerns. There is thus no incompatibility between this Court's 'solemn duty jealously to guard the sovereign people's initiative power' ...

> and the propositions' purpose of 'giv[ing] taxpayers the right to vote on taxes . . .' This Court can, should, and indeed must read Article 13c as imposing procedural limitations only on 'local governmental entities,' like city councils and not on the sovereign people."

(Amicus Brief by San Diego Chargers, page 38).

C. THERE IS NO CONFLICT BETWEEN ARTICLE 13C 2(b) OF THE CALIFORNIA CONSTITUTION AND CALIFORNIA ELECTIONS CODE SECTION 9214(b)

The California Taxpayer's Association argues at page 12 that there is a conflict between California Elections Code Section 9214 and Article 13c Section 2 of the California Constitution. This is not true. The California Taxpayer's Association improperly argues or implicitly asserts that Elections Code Section 9214(b) is unconstitutional. In order for the City of Upland to win this case it will have to convince this Court that Elections Code Section 9214(b) is unconstitutional and cannot be enforced in this case.

The California Taxpayer's Association is wrong. The recent decision by the Court of Appeal in Brookside Investments, Ltd., v. City of El Monte, ___ Cal.App.4th ___, 2016 DJDAR 11321 (November 15, 2016) supports the Cannabis Coalition argument that the two provisions are on equal footing and can be harmonized and reconciled. The status of Elections Code Section 9214 is elevated by the Court of Appeal in the Brookside Investments case because the Court of Appeal in that case correctly noted that Elections Code procedures adopted to implement the constitutional authority to conduct an initiative drive by placing a measure on the ballot for the voters to consider should be given great weight. The Court of Appeal stated, ___Cal.App.4th ___, 2016 DJDAR at page

11324:

> ". . . The considered judgment reflected in these statutory provisions concerning the scope of the Legislature's authority to establish procedures to implement the exercise of the initiative power is entitled to 'significant weight and deference by the courts.' (Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 180; accord Greene v. Marin County Flood Control and Water Conservation Dist.. (2010) 49 Cal.4th 277, 290-291 ['the presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with a relevant constitutional prescriptions clearly in mind'])."

In the case Brookside had argued that Elections Code Section 9222 conflicted with the California Constitution and in particular, conflicted with Article 2, Section 11 of the California Constitution.

The Court of Appeal in the Brookside case rejected the argument of Brookside that Elections Code Section 9222 conflicted with the initiative power of the California Constitution. The Court of Appeal stated, ___ Cal.App.4th ___, 2016 DJDAR at 11325:

> "In sum, far from withholding the power of local legislative bodies to independently proposed ballot measures affecting voter approved initiative ordinances, the 1911 constitutional amendments gave the Legislature the authority to establish procedures allowing such action. Moreover, to paraphrase the Supreme Court's language in Kelly, supra, 47 Cal.4th at page 1039, because any such city council - generated initiative proposal requires the Electorate's approval, Section 9222 and its predecessors 'carefully preserved Article 4's original strict safeguards,' thus in no way limiting or restricting the provisions of that

article or the powers it reserved to the voters."

Accordingly, there is no conflict. The proposal submitted by the City of Upland and its Friends would require this Court to hold a particular provision of the Elections Code unconstitutional.

In any event, there is no need to reach this issue. In juggling the two provisions, Elections Code Section 9214 and Article 13c of the California Constitution the Court should keep in mind the importance of each one of these provisions. Elections Code Section 9214(b) requires a special election. This is important because it allows for the speedy adoption of measures by the initiative process. The allegedly applicable provision of the California Constitution allows for the vote to be delayed until there is an election for the Mayor and the City Council members of the City where the ballot measure was circulated.

It is more important that the Electorate be able to adopt a needed law as quickly as possible when people are suffering and need the benefit of the law than it is to combine such an election with an election for the Mayor and City Council members. The voters do not need the presence of the Mayor and City Council members on the ballot in order to decide whether to adopt or reject an initiative that is entitled to speedy consideration by the Electorate.

This is not a case where certain individual liberties are set forth in a particular constitutional provision that allegedly conflict with statutes that arguably ban certain conduct guaranteed by the constitutional provisions. This is not that type of constitutional case.

The various amici curiae who filed briefs in support of the City do not explain what Article 13c, Section 1 means. The provision states,

> "The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burden on, or benefits received from, the governmental activity."

Nowhere do the amici curiae explain what this provisions means. In what proceeding does the local government bear the burden of proving that something is not a tax. Here, in this case the City of Upland tried to prove that the fee was a tax. In trying to discern the intent of the drafters of Proposition 26 the amici curiae failed. What we have here is a series of confusing measures. Rather than trying to make sense of these provisions the judiciary should simply stick to the obvious provisions of the code sections involved. Everything is very straight forward. If a proponent of a ballot measure obtains the required 15 percent of the signatures the law is clear - a special election must be conducted. The special election provision of the Elections Code is a more specific section that governs over the more general - the provision in Article 13c(2) that applies only to general tax measures.

The League of California Cities argues at pages 7 and 8 that this Court should not reach the tax verses fee issue and should wait to address it in other cases. See page 8 of Brief of League of California Cities. The League makes this argument because the

League basically argues that it has discovered a flaw in the Coalition's argument. Basically the League argues that while the Court of Appeal did not deal with the issue of the direct adoption of a proposed ordinance under Elections Code Section 9214(a), that a city government could collude with its employee union to arrange to have an initiative petition circulated that gets 15 percent of the voters to sign and then adopts the ordinance under Section 9214(a). If this were to happen, the League reasons, this would be a direct violation of Article 13c, Section 2 (b). The Coalition's answer is that this would not occur. See discussion above. If and when such an unusual circumstance does occur a court in a properly presented case could decide that the adoption of the ordinance under Section 9214(a) would violate Article 13c, Section 2 of the California Constitution. The possibility that Section 9214 (a) of the California Elections Code is unconstitutional if applied in this way does not mean that Section 9214(b) must likewise be invalid. Essentially what the League of California Cities is arguing is that the potential invalidity of Section 9214(a) contaminates Elections Code Section 9214(b). The relative importance of the various provisions of Elections Code Section 9214 must be measured against the purpose and policy of Article 13c, Section 2 of the California Constitution.

This case does not deal with Section 9214(a) of the California Constitution. There may never be an issue with respect to Elections Code Section 9214(a). If Section 9214(a) is invalid either facially or as applied a court can make an appropriate ruling. This case certainly does not involve the situation where the City Council and the Mayor adopted the ordinance "without alteration."

The City Council did not order the special election under Section 9214(b). Instead,

it rejected the request for the special election and followed an inapplicable provision of Article 13c, Section 2 of the California Constitution.

This necessitates the consideration of the issue the League says this Court should not consider which is the so called tax verses fee issue. The conundrum postulated by the League only exists if the measure is deemed to be a tax. To deem it a tax in order to avoid Elections Code Section 9214(b), the City of Upland in this case misapplied Article 13c, Section 1 of the California Constitution. Essentially to avoid an alleged violation of the California Constitution by neither adopting the ordinance without alteration nor by ordering the special election, the City ignored the meaning and purpose of Article 13c, Section 1 (e)(7) of the California Constitution. This is the provision that requires "the local government" to bear "the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax. . . ."

This makes no sense. This cannot be squared with the application of Elections Code Section 9214 and Article 13c, Section 2 of the California Constitution, Essentially, the League is arguing that Section 9214(b) could not be followed because Section 9214(a) (a provision that does not apply in this case) could not be applied in a hypothetical situation not before the Court.

This Court can issue a narrow ruling that in a case where a city government is hostile to a particular provision it may not use the tax argument against the proponents of the measure. We might have had a different situation if the proposed initiative clearly admitted that the provision in question was a tax. Arguably the provision in question would apply in a case where the City is asserting what it normally asserts - that a fee is a

fee and not a tax. Essentially the City had no business in rejecting the request for the special election. All the City had to do was read the title to Section 13c(2) to conclude that it only applies to the City Council and Mayor, which are the local government. If it is not the local government imposing the tax or the fee that should end the matter. This case is similar to a situation where to fix a machine one disassembles it and then tries to put all the parts back together only to find out that some of the parts taken from the machine do not fit back into the machine.

In this particular case the burden of proof provision of Article 13c, Section 1 of the California Constitution does not fit this case. We should never have a case where the City needs to misapply the burden of proof provision in order to prevail on the tax verses fee issue.

Nowhere does the League explain what the particular provision means or how it is to be applied in any particular case. The Coalition respectfully suggests that Article 13c, Section 2 of the California Constitution is not relevant to the setting of the special election. It cannot be the case that the City of Upland may get away with the assumption of the burden of proof to prove that something is a tax. The section in Article 13c (e)(7) destroys the symmetry and explanation of the League.

The judiciary assumes without a basis for doing so that every regulatory scheme or provision of law may be harmonized so that one may extract the overall intent of the Electorate or the legislative body that enacted the laws. It just so happens that sometimes there is chaos and no planning and no thinking by those in charge of either drafting statutes adopted by the Legislative Branch or drafting initiatives adopted by the

Electorate. Here, the provision regarding the burden of proof with respect to whether something is a tax or not is really like the part that is removed when one is repairing the equipment that cannot be put back.

Courts should only decide narrow issues that are presented to them. They should not avoid ruling in favor of one side because of a hypothetical possibility that in a different circumstance involving different evidence a particular principle may not be applicable. Amicus Jack Cohen relies heavily upon Altadena Library Dist. V. Bloodgood, 192 Cal.App.3d 585 (1987) which struck down an initiative which imposed a special property tax to support libraries because the measure failed to obtain two-thirds super majority vote. The Court of Appeal did not deal with Article 13c (2) of the California Constitution. In footnote 1 at page 592 the Court of Appeal said its opinion was "confined" to a specific issue. Thus, the case does not help the City of Upland. The City of Upland did not cite the case. If the City of Upland did not cite the case, why does Cohen cite it. The City of Upland was aware of the Altadena case because Cohen cited it in his May 13,2016 letter to the Court, which Cohen mailed to Upland's attorneys on the same day. Yet Upland ignored the case when Upland filed its Opening Brief on the Merits on July 29, 2015. If Upland did not cite it the Altadena decision is obviously not on point.

The Brief of the League of California Cities is interesting because the League ordinarily supports municipal arguments designed to give cities the greatest amount of authority. In many situations a city's Mayor and Council will adopt an ordinance to raise revenue. In the ordinary case a city would side with the authority of a city to raise

revenue. The initiative process is the anthesis of municipal government. Proponents of ballot initiatives resort to the initiative process when the governing body is not responsive to the demands of the Electorate or so it is thought. The League of California Cities does not really support cities when the issues have to do with laws passed by the initiative. In such a situation it is expected that the League will be against the initiative. In this particular case the League has exposed its hostility to the initiative process by siding with the city government in this particular case.

The League argues at pages 14 and 15 that the term "local government" means the voters. Nothing could be further from the truth. The voters who signed petitions and who vote for measures on the ballot are not considered to be part of the government. They are the opposite of the government. They are the watch dogs of the government. The League consists of city governments. By definition a city government consists of the Mayor and City Council members. They are usually the targets of initiative petitions because if they were doing their jobs according to the will of the Electorate there would be no need to engage in the initiative process.

This case is filled with irony. One of the ironies is that city governments are contending that something is a tax when outside of the initiative petition world the City would be taking a position opposite of what it is taking here. The League argues that the drafters of Propositions 26 and 218 "knew how to write initiatives." The irony here is that the League of California Cities and the various taxpayer groups including the Jarvis people are on the same side. This is so because the Jarvis group, which ordinarily favors initiatives when they serve the purpose of the Jarvis group, essentially is an anti tax

organization, not a pro democracy organization. In the past the Jarvis Group has used the initiative process to try to keep taxes as low as possible. They use the initiative process for this purpose but they do not really favor the initiative process - they favor low taxes or low fees. The Jarvis Group is really an anti tax group, not a pro democracy group. Here we have the irony that the Jarvis Group is lined up with the League of California Cities because of the fee provision. The League says the drafters knew how to write initiatives but if that were true the defect in Article 13c, Section 1 regarding burden of proving something is or is not a tax would not exist.

The League requests this Court not decide the tax verses fee issue. This Court must decide the issue because it was directly raised by the Coalition in the Superior Court and in the Court of Appeal. We are dealing here with a facial question. The Coalition respectfully submits that the City had no authority to make its decision on the basis that the regulatory fee in this case ($75,000.00) was a tax. The issue of tax verses fee is not ripe in situations where the City is asserting that a particular fee is a tax. In such a circumstance the City does not have standing to assert that a fee is really a tax. Article 13c, Section 2 (b) does not apply in this particular case because no local government is imposing a tax. Article 13c, Section 2(b) only applies to a situation where the Government is imposing a tax. No tax was submitted to the Electorate. The Section includes the following language:

> ". . . The election required by this subdivision should 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."

In this particular case the City rejected the request that the matter be considered at a special election and instead consolidated the election (for measure U) with the November 8, 2016 general election. The election, however, was not "required by this subdivision. . . ." Nowhere does it state in Article 13c, Section 2 that a special election is prohibited. One is at a loss to determine what election was "required by this subdivision. . . ."

Section 2 (b) of Article 13c says,

> '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. . . ."

With all due respect to the League of California Cities, the sentence immediately quoted above is not a "requirement."

At most Section 2(b) of Article 13c would have allowed a Court at some proceeding to invalidate that small portion of the initiative that purported to impose the $75,000.00 regulatory fee. That would raise a different issue but probably not in this case. In other words, if Measure U on the Upland ballot for November 8, 2016 had passed the $75,000.00 regulatory fee portion of the measure may not have had any effect. It could have been struck down if the City is correct. The initiative measure was not a tax measure but even if it was at most the tax portion of the initiative could have been set aside. Here, the City became a contortionist and improperly asserted without authority that the entire measure could not be considered at an early special election. All the City

had to do was declare that the so called "tax" portion of the measure be stricken. The City possibly could have brought a declaratory relief action to have a court declare that if the measure were adopted at a special election the single provision dealing with the fees or taxes could be or would be struck down in advance of the election. There was no need to use a sledgehammer when a fly swatter would have been sufficient. In other words, if Measure U had been properly submitted to the voters at a special election and had it been adopted the one small portion dealing with the $75,000.00 fee could have been invalidated.

This Court in In re Attorney Discipline System, 19 Cal.4th 582 (1998) had no problem in declaring that a State Bar fee that it itself created and imposed was a fee and not a tax. This Court held that it had the inherent authority to impose a regulatory fee upon all attorneys for the purpose of supporting an attorney discipline system. This Court conducted no evidentiary hearing.

The job of the courts is to save statutes and laws to the extent possible. The policy of the law is to favor elections and decision making. The only real exception to this would be where someone is hurt by a particular measure. Here no existing person would have been taxed or have been required to pay a fee upon the adoption of Measure U, which was defeated on November 8, 2016. This is a unique case. Upland has no medical marijuana dispensaries. They are currently banned in the City of Upland. Measure U would have only authorized the creation and establishment of no more than three medical marijuana dispensaries which would have been required to pay a reasonable annual inspection fee. This is clearly not a tax. The regulatory fee would only be imposed

on those choosing to be created by virtue of the authority of the measure. No existing business would have been affected in any way by the adoption of Measure U.

The act of the City of Upland in this case to declare the fee to be a tax was without authority and was clearly designed to exclude from the ballot a measure that would have legalized marijuana in Upland. The judicial system should function in a way that preserves law. Moreover, the judicial system should respect and honor the initiative system, which is the basic form of self government.

The League concludes its Brief by stating,

> "The core issue in this case is whether a local tax measure proposed by the citizens of a local government is subject to the same constitutional requirements as one proposed by the local government's governing body. . . ."

This is not the core issue. The core issue is whether a politically motivated City Council and Mayor, hostile to marijuana, can deprive the proponents of the ballot measure the right to a special election because one small portion of the measure contains a regulatory fee to be imposed only on no more than three medical marijuana dispensaries that do not currently exist and could only exist if the measure is adopted. The Coalition does not concede that the $75,000.00 regulatory fee is a tax at all and that issue must be decided by this Court. This Court is in a position to decide the issue. This Court knows that a hostile city can always claim that something would cost less to regulate than that which is provided for in the measure.

If the Mayor and City Council were truly upset with the allegedly excessive fee for the dispensary the Mayor and City Council could have adopted a supplemental ordinance

providing for a lower fee and to become effective only if a court were to strike down the $75,000.00 regulatory fee imposed by the initiative. The Mayor and City Council could have voted to place a supplemental measure on the ballot for the voter's consideration.

As stated earlier, imposing a $75,000.00 regulatory fee on currently non existent businesses does not create any danger that a target taxpayer is being assessed any fee or tax. This situation differs from that in In Re Attorney Discipline System, 19 Cal.4th 582 (1998) wherein existing attorneys were being assessed a fee by this Honorable Supreme Court.

The Council on State Taxation presents a parade of horribles with respect to future taxes imposed by city government without a vote the people. If hypothetically such conduct arguably could violate the Constitution (and therefore the measure would be invalid), the conduct has never occurred. The Council on State Taxation argues at page 10:

> "The possibility of California localities targeting large businesses for new taxes is of particular concern. . . ."

That has not happened. Indeed, the Council on State Taxation lists a number of ballot measures regarding tax increases. The Council on State Taxation must have access to these records because it refers to a number of cities that add measures on their respective ballots regarding various tax increases. Some were approved and some were disapproved. But no example was given regarding the bypassing of the voters by a Mayor and City Council who adopt the tax increase proposed by initiative. As far as it can be determined the hypothetical postulated by the amici has never occurred. There is

no reason to believe that if the Court of Appeal's decision stands these hypothetical possibilities will actually occur. If and when such a circumstance occurs the judicial system can resolve it. The judicial branch would be able to determine whether a vote by the Mayor and the Council members of a particular measure proposed by initiative could be adopted without a vote of the people. As far as it can be determined this problem has never occurred.

If it should occur the Courts will deal with the problem. There is no reason to deal with that hypothetical possibility in this particular case which should be decided on the basis of the narrow facts presented.

At page 11 of the Brief of the Council and State Taxation the Council states that a locality would want to skip the voter election requirement of Article 13c, Section 2.

As stated previously, the prohibition in Article 13c, Section 2 is against "local government." Local government is not involved when the voters adopt measures submitted by the initiative process. While possibly the adoption of an ordinance under Section 9214(a) might not be possible given Article 13c, Section 2 of the Constitution, it does not follow from that the City may avoid calling a special election for an initiative.

The Council is plainly wrong at page 13 when it asserts that the term "local government" has a broader meaning than "governing body." The governing body is not the electorate acting by initiative.

The Council on State Taxation cites a few cases in footnote 2 at the bottom of page 7 of its Brief. The first case is Santa Clara County Local Transportation Authority v. Guardino, 11 Cal.4th 220 (1995). The Council on State Taxation contends that the cases

cited in footnote 2 including the first one validate the argument that taxes collected by a government are imposed by government. That does not make sense here because the Santa Clara County case did not involve an initiative measure. The issue was a sales tax proposed by a local transportation agency. The measure was approved by a majority of the Electorate but less than two-thirds. This Court determined that the tax was invalid. The Council refers us to page 240 where there is a discussion of the meaning of the word "imposed." The case does not deal with the issue presented by this case.

The Council's reference to Widders v. Furchtenicht, 167 Cal.App.4th 769, 782 (2008) is puzzling. There does not appear to be any issue related to the case at hand. Coincidentally, there is discussion at page 782 that undercuts the argument of other amici curiae in this case. In particular an argument has been advanced to support the City of Upland's position in this case that the voters have an interest in voting for all of the initiative matters as well as the Mayor and City Council at the same election. In this way argues the City of Upland the candidates will be forced to explain their position on the ballot measures that are simultaneously being considered. The Court of Appeal stated at page 782 that the right to petition the government by circulating an initiative petition does not include the right "to compel candidates to take a position on a particular matter so that the Electorate may determine whom it wishes to favor with its vote. . . ."

It is not a valid municipal purpose and it is not a legitimate municipal interest to compel candidates to appear on certain ballots at certain elections. Voters are simply asked to vote yes or no on particular ballot measures. It is not a legitimate argument that the taxpayers have the right to force candidates for public office to be on the same ballot

that includes initiative measures which authorize taxes.

The Cannabis Coalition does not understand the reference by the Council on State Taxation to Perry v. Brown, 52Cal.4th 1116, 1140 (2011). The opinion of this Court at page 1140 says,

> ". . . The primary purpose of the initiative was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt. . . ."

Here, it is not true that the purpose behind requiring tax measures to be put on the same ballot containing the Mayor and City Council races is to force the officials running for election or reelection to take a position on the ballot measures. The ballot measures are independent of the candidates. They stand or fall on their own. Accordingly, there is no compelling reason to force the initiative vote to be conducted on the same day or at the same time as the election for Mayor and City Council. To the extent there may be some minimal social value in doing that it is far out weighed by the right of the initiative proponents to qualify the measure for the ballot and to have the election as soon as possible especially in cases like this where people's health is an important consideration.

The Council on State Taxation refers the Court to Howard Jarvis Taxpayers Association v. City of La Habra, 25 Cal.4th 809 (2001). The case is not on point. The Cannabis Coalition distinguished the case at pages 38 and 39 of its Answering Brief on the Merits. Article 13c, Section 2 (a) refers to taxes "imposed by any local government" but that local government is not the Electorate. That this is so is supported by Article 13c, Section 2(b) because the word "imposed" precedes the reference to the tax being

"submitted to the Electorate and approved by a majority vote..." The imposition of the tax does not occur at the time of the election. The key to under-standing these provisions is focusing on the term "local government." As stated earlier in this Brief local government cannot possibly be the Electorate. The Electorate is not government. The government is run by the elected officials and those are the persons from whom the Electorate needs protection.

Finally, the Council on State Taxation refers to Schmeer v. County of Los Angeles, 213 Cal.App.4th 1310 (2013). The case is clearly not on point because the Court of Appeal concluded that the "charge" in the case was not a "tax" for the purposes of California Constitution Article 13, Section c.

The Brief of the Pacific Legal Foundation complains about loopholes in certain previous ballot measures. See pages 10 and 11 of the Brief of Pacific Legal Foundation. While the Pacific Legal Foundation does not expressly argue Elections Code Section 9214(a) is a loophole, other amici curiae do argue that although the Court of Appeal below did not directly deal with the issue by inference the amici curiae argue that a corrupt city could avoid a vote altogether by organizing an initiative petition, getting the required signatures, and then adopting the ordinance without an election. While such a circumstance has apparently never occurred and the hypothetical is extremely remote, the ready answer to this hypothetical argument is that Article 13c, Section 2 of the California Constitution would prohibit resort to Section 9214(a). In other words, the legislative body of the City should be barred from adopting the ordinance without submitting it to a vote. An attempt to adopt the ordinance without a vote of the people would run a foul of

Article 13c, Section 2 of the California Constitution. The issue in this case is not Elections Code Section 9214(a) but rather Elections Code Section 9214(b). Although not necessary to a ruling by this Court, this Court could say that as between Article 13c, Section 2 and Elections Code Section 9214(b), the latter prevails, but with respect to the relationship between Article 13c, Section 2 of the California Constitution and Elections Code Section 9214(a), the Constitution would prevail. In other words, if necessary this Court could declare Elections Code Section 9214(a) to be inapplicable or to be invalid in light of Article 13c, Section 2. There would be a partial invalidation of the Elections Code. The remaining portion would stand.

It must be kept in mind that the effort being expended to litigate and understand the meaning and relationships between Article 13c of the California Constitution and Elections Code Section 9214 is not necessary. All this Court need do is declare that the regulatory fee and the measure is not a tax. The other issue would not have to be decided.

D. A SPECIAL TAX IS ENTITLED TO BE CONSIDERED AT A SPECIAL ELECTION BECAUSE ARTICLE 13c(2) ONLY APPLIES TO GENERAL TAXES

The amicus brief of Jack Cohen asserts that even if the proposed marijuana initiative measure imposes a special tax it still must be restricted to a general election. Essentially ignoring the literal language of Article 13c, Section 2 (b) of the California Constitution, Mr. Cohen argues that the proposed measure was correctly placed by the City upon the general election ballot. Article 13c, Section 2 (b) only refers to a "general tax." It does not apply to a special tax. Cohen relies upon Article 13c, Section 2 (d) of the California Constitution which still has a reference to "no local government. . . ."

Article 13c, Section 2 (d) of the California Constitution does not refer to a general election.

Cohen apparently concedes that the so called tax measure which is the subject of this lawsuit would not need to be consolidated with the general election. However, Cohen argues that the measure here would still require two-thirds vote as a special tax.

The narrow issue, however, facing the trial court, the Court of Appeal, and now this Court, is whether the consolidation procedure in Article 13c, Section 2 (b) of the California Constitution covers the measure. As to how many votes (majority or two-thirds) that the measure would be required to obtain in order to prevail that would be a matter for a different time. Perhaps on remand to the Superior Court a determination could be made as to the necessity for a majority vote verses a two-thirds vote.

Of course, if the measure does not impose a tax at all then it cannot be determined whether it is a general or special tax. No tax cannot be special or general. It is simply not a tax.

The subject of whether something is or is not a tax is extremely complicated and would justify an evidentiary hearing because the statutory and constitutional scheme contemplate some sort of a hearing where the City would have the burden of proving by preponderance of the evidence that the subject measure is in fact a tax. As to whether something is a tax or not was the subject of a major debate between the majority and dissenting justices in Nat. Fedn. Of Indep. Business v. Sebelius, ___ U.S. ___, 132 S.Ct. 2566 (2012). In that case in order to save President Obama's Patient Protection and Affordable Care Act, Chief Justice Roberts and four concurring justices concluded that

although the federal law adopted by Congress to revise the health care laws of the United States did not mention the word "tax," Justice Roberts nevertheless concluded that the penalty one would have to pay for not obtaining health care would be a tax. The majority of the Supreme Court was tasked with the job of finding a valid constitutional basis for the Obama health care law. Four of the justices were willing to find support in the Commerce Clause but a fifth vote was needed and that fifth vote was provided by Chief Justice Roberts, who while rejecting the Commerce Clause theory nevertheless found constitutional support for the law in the authority of Congress to impose taxes. Naturally, the discussion of taxes in the Supreme Court's decision would not control the outcome of this case because the issue here is purely one of state law, not federal law.

IV CONCLUSION

For the foregoing reasons and the reasons expressed by California Cannabis Coalition and Amicus Curiae the San Diego Chargers, it is respectfully requested that this Court affirm the judgment of the Court of Appeal and remand the matter to that Court with instructions to direct the trial court to order the City to set a special election.

Respectfully submitted,

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Appellants

S234148

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CALIFORNIA CANNABIS COALITION, a California Non Profit Corporation and NICOLE DE LA ROSA AND JAMES VELEZ, Plaintiffs & Appellants vs. THE CITY OF UPLAND, A Municipal Corporation and STEPHANIE MENDENHALL, CITY CLERK OF THE CITY OF UPLAND, Defendants & Respondents	Court of Appeal No. 4 Civil E063664 San Bernardino Superior Court No. CIVDS1503985

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed Consolidated Answer to Multiple Amici Curiae Briefs is produced using 13-point Roman type and contains approximately 8,571 words which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 1, 2016

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Attorney Plaintiffs & Respondent

PROOF OF SERVICE

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)
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 the within action; my business address is 2115 Main Street, Santa Monica, California 90405.

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was executed at Santa Monica, California on the _____ day of December 2016.

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