S234148

SUPREME COURT OF CALIFORNIA

CALIFORNIA CANNABIS COALITION, ET AL.

Plaintiffs and Respondents,

v.

CITY OF UPLAND, ET AL.

Defendants and Petitioners.

After Issuance of a Writ of Mandate and
the Denial of a Petition to Rehear a Published Decision
of the Court of Appeal, Fourth District, Division 2 (Case No. E063664)

REPLY TO RESPONDENTS' ANSWER

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I
THE DECISION BELOW IS *NOT* NARROW

In its answer, Respondents California Cannabis Coalition, *et al.* ("CCC") chose to not grapple with the assignments of error raised in the City of Upland's petition for review. It either ignores them or shrugs them off as unimportant.

Instead of discussing the assignments of error, CCC tries to reassure this Court that the decision below is not worth reviewing because it is just a "narrow" ruling (Answer at 1, 3, 4) affecting only a "procedural dispute" (Answer at 17-18). Yet CCC fails to explain how a decision can be characterized as "narrow" and merely "procedural" when it opens a route for government officials to raise taxes without the voter consent required by our constitution.

The decision below strips California taxpayers of their constitutional right to vote on taxes. The right to vote on taxes is found in article 13C, section 2, of the state constitution, and the Court of Appeal expressly and repeatedly ruled that article 13C, section 2 does not apply to taxes proposed by initiative. (Slip Op. at 3, 13, 18-19.)

The petition for review explained how easy it will be under this new ruling for government officials to deprive taxpayers of their right to vote on any tax increase by simply soliciting the assistance of some union, contractor, or other beneficiary of government spending to collect the signatures needed to propose the tax as an initiative rather than as a resolution of the governing body. Once the signatures are verified, the governing body can lawfully adopt the tax without a vote under Elections Code section 9118 (counties), 9215 (cities), or 9311 (special districts).

CCC acknowledges that collusion will be possible under the decision

below, allowing government officials to team up with special interests to introduce new taxes in the form of initiatives and thus deprive taxpayers of their right to vote on taxes. In fact, CCC gives this a name: "the Tuolumne tactic," citing *Tuolumne Jobs and Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029. (Answer at 15.) As CCC admits, a ruling in the *Tuolumne* case that voter initiatives are not subject to the California Environmental Quality Act has been exploited by local government officials to escape environmental review of controversial development approvals. But CCC sees nothing wrong with this. It says, "CCC does not see anything wrong with the citizens resorting to the initiative process to obtain results." (Answer at 16.)

Hopefully this Court sees something wrong with a published decision that fosters similar collusion to exploit the local initiative power as a means of evading state law–the state law in this case being the constitutional right to vote on taxes. As this Court noted in *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, "the right to vote may be the most fundamental [right] of all." (3 Cal.4th at 913.)

II

THE DECISION BELOW IS *NOT* A VICTORY FOR THE INITIATIVE POWER

CCC portrays this as a case pitting the people's initiative power against the government. "The two, local government and the voters," it argues, "are at opposite ends of the spectrum. What the electorate fears is governmental power. The electorate does not fear itself." (Answer at 11.)

This case is more complex than CCC's unsophisticated description. It is not a contest between CCC's local marijuana initiative and a resistant local governing body. Rather, it is a contest between two voter initiatives. In one corner is CCC's local initiative, which garnered signatures totaling 15% of the

City's voters, but contains a $75,000 annual tax. In the other corner is Proposition 218, a statewide initiative that amended the California Constitution to control local taxation. While Elections Code section 9214 generally allows a special election for initiatives bearing signatures totaling 15%, Proposition 218 contains a specific requirement for local general tax proposals. Such proposals must obtain voter approval at a General Election for candidates seeking a seat on the local governing board. (Cal. Const., art. 13C, § 2.)

There are three reasons for Proposition 218's General Election requirement. First, it requires an incumbent seeking reelection to face the voters on the same ballot as any tax proposal he or she may have supported. Second, it permits voters to ask all candidates where they stand on any tax measure (regardless of who proposed it) so that voters can intelligently cast their vote for like-minded candidates. Third, it prevents so-called "stealth elections" on tax proposals. Stealth elections are single-measure special elections held on an atypical date, oftentimes as a mail-ballot-only election, which consequently don't attract a lot of public attention. The special interest group behind the election can dominate voter turn-out by mobilizing its members and supporters.

The latter two of the above three reasons apply to CCC's initiative. Aside from the glaring right-to-vote-on-taxes problem, then, even the election date controversy is more than just an academic question.

The Court of Appeal erred in ruling that the election date is governed by the Elections Code, not Proposition 218, for two reasons. First, in the hierarchy of law, the constitution is the supreme law of the state; where it contradicts a statute such as Elections Code section 9214, the latter must yield. (*Wright v. Compton Unified Sch. Dist.* (1975) 46 Cal.App.3d 177, 183.) CCC argues that Elections Code section 9214 deserves constitutional dignity as

well, because it implements the initiative power reserved in article 2, sections 8 and 11. (Answer at 8-9.) Even if one accepts that argument, however, the introduction to article 13C, section 2 expressly states the voters' intent that it prevail "[n]otwithstanding any other provision of this Constitution."

A second reason article 13C, section 2 controls over Elections Code section 9214 is that, under well-settled rules of construction, "later enactments supersede earlier ones, and more specific provisions take precedence over more general ones." (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960 (citations omitted).) Here, Elections Code section 9214 relates to initiatives in general, whereas article 13C, section 2 is specific to tax proposals. Article 13C, section 2 was also enacted more recently than either the Elections Code statute or the constitutional initiative provisions it implements.

Thus, Proposition 218 was meant to apply to CCC's initiative, and under the rules of construction discussed above, preempts the Elections Code as to CCC's initiative. The Court of Appeal in ruling otherwise disabled not only Proposition 218's election date requirement, but along with it the entire right to vote on taxes.

In holding that Proposition 218 does not apply to taxes proposed by initiative, the decision below does not score a victory for the people's initiative power. It deals a staggering blow to the people's initiative power by punching a large hole in the taxpayer protections that were added to the state constitution by Proposition 218, a statewide voter initiative.

III

THE DECISION BELOW IS *NOT* A CORRECT STATEMENT OF THE LAW

CCC claims that review is unwarranted because the decision below

"correctly states the law." (Answer at 7.) With no citation to any case law, CCC then just repeats the same oversimplified logic accepted by the Court of Appeal. It says:

> "The initiative which is the subject of this lawsuit is not 'imposed by any local government.' Article 13C, Section 2(b) begins with the following: '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 election required by this subdivision shall be consolidated with the 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.' The language quote above makes it abundantly clear that Article 13C, Section 2 of the California Constitution is a limitation on local government, not a limitation on the right of initiative." (Answer at 10.)

This, however, is not a correct statement of the law. It is not "abundantly clear" that the term "local government" excludes the electorate acting by initiative. To the contrary, as explained in the City's petition for review, "local government" legally includes the electorate acting by initiative. (*City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 279-80.) As provided in Elections Code section 9200, "[o]rdinances may be enacted *by and for* any incorporated city pursuant to [voter initiative]." When voters pass an ordinance by initiative, they are acting as legislators of the local government. (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1140, 1156.) "The initiative process 'is not a public opinion poll. It is a method of enacting legislation.'" (*Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 782.) Thus, CCC's theory, accepted by the Court of Appeal, that taxes "imposed by voters" are not taxes

"imposed by local government" sets up a false dichotomy. Taxes imposed by local voters *are* taxes imposed by local government. CCC's Answer completely ignores the City's argument and authorities on this point.

CCC also ignores the cases cited by the City which, contrary to the Court of Appeal here, hold that the voters' power to legislate is co-extensive with the legislative power of the governing body (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775); therefore voters acting by initiative are subject to the same constitutional limitations imposed on governing bodies. (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674; *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1210-1212.) "Thus, if [state law] has restricted the legislative power of a local governing body, that restriction applies equally to the local electorate's power of initiative." (*Mission Springs Water Dist. v. Verjil*, (2013) 218 Cal.App.4th 892, 921.)

CCC also ignores the City's textual argument that the language employed in article 13C, section 2 reveals the voters' intent that it apply broadly to all local taxes, whether proposed by the governing body or by voter initiative. Section 2 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 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. 13C, § 2(b).)

The specific references to "the *governing body* of the local government" stand in contrast to the more inclusive term "local government," clarifying that "local government" *includes* the electorate acting by initiative. (*City of Dublin*

v. County of Alameda, 14 Cal. App. 4th at 280.) Thus, all "local government" taxes, whether proposed by a voter initiative or a resolution of the governing body, must receive majority voter approval at a regularly scheduled candidate election. Only the "governing body" can, by a unanimous declaration of emergency, propose a tax at a special election.

The holding of the Court of Appeal turned article 13C, section 2 on its head by ruling that the election date and voter approval requirements do *not* apply to voter initiatives, but that voters *can* propose a tax at a special election.

The decision below is not a correct statement of the law. It is a serious blunder. The conflict between it and decades of published case law will lead to confusion and litigation. Not only will the courts be burdened, but taxpayers will be fleeced as local politicians gleefully exploit this new ruling that taxes are exempt from Proposition 218 if they are proposed in the form of an initiative. Taxes enacted without voter approval will become the new normal, unless this Court acts.

IV

EVEN CCC WOULD BENEFIT FROM REVIEW

A significant percentage of CCC's Answer asks this Court, if it grants review, to also decide two other issues: (1) whether the $75,000 annual payment required by CCC's initiative is a fee or a tax (Answer at 18), and (2) whether the tax versus fee issue was properly considered by the courts prior to the election (Answer at 22.)

Neither the City nor its pro bono counsel, Howard Jarvis Taxpayers Foundation, object to this request. Although CCC levels a patently false *ad hominem* attack on the Jarvis organization, describing us as a front for "commercial and industrial property owners" who are "motivated by [our] fear

of political power in the hands of lower income people" (Answer at 17)[1], the truth is that over 90% of our members are ordinary homeowners, many of whom are on a fixed income. They worry about losing their homes if they can't afford their taxes. Our members are terrified by the ruling below, which opens wide the door to tax increases without voter approval. But the Jarvis organization and our client, the City of Upland, would also welcome additional guidance from this Court on the two questions raised by CCC.

Whether or not the Court chooses to include CCC's additional issues, it is of utmost importance to the taxpayers of California that the Court grant review of the issue presented in the City's petition for review: "Can the proponents of a new tax evade constitutional prerequisites by introducing the tax as an initiative rather than as a resolution of the governing body?"

CONCLUSION

For the reasons above, this Court should grant review.

DATED: May 19, 2016.

Respectfully submitted,

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[1] "*Ad hominem* arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names ... only shows the paucity of your own reasoning." (*Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1430.)

WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached petition and memorandum, including footnotes, but excluding the caption page, tables, and this certification, as measured by the word count of the computer program used to prepare this pleading, contains 2,278 words.

DATED: May 19, 2016.

Tim Bittle

TIMOTHY A. BITTLE
Counsel for Petitioners

PROOF OF SERVICE

SUPREME COURT OF CALIFORNIA

I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is: 921 11th Street, Suite 1201, Sacramento, California, 95814. On May 19, 2016, I served the attached document described as: **REPLY TO RESPONDENTS' ANSWER (CALIFORNIA CANNABIS COALITION V. CITY OF UPLAND)** on the interested parties below, using the following means:

BY UNITED STATES MAIL I enclosed the documents in a sealed envelope or package addressed to the interested parties at the addresses listed below. I deposited the sealed envelopes with the United States Postal service, with the postage fully prepaid. I am employed in the county where mailing occurred. The envelope or package was placed in the mail at Sacramento, California.

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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 May 19, 2016, at Sacramento, California.

LORICE A. STREM