Case No. S219567

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHERRITY WHEATHERFORD,

Plaintiff/Appellant/Petitioner,

vs.

CITY OF SANTA RAFAEL, et al.,

Defendants/Respondents.

SUPREME COURT
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PETITIONER'S OPENING BRIEF

On Review of the Published Decision of the Court of Appeal, First District, Division One, *Wheatherford v. City of San Rafael* (May 22, 2014) 226 Cal.App.4th 460 [Petition for Rehearing Denied June 16, 2012]
Appellate Case No. A138949

On Appeal from the Judgement of the Superior Court of the State of California, County of Marin, the Honorable Roy Chernus, Judge, Presiding
Superior Court Case No. CIV 1300112

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INTRODUCTION

The taxpayer standing statute, Code of Civil Procedure section 526a (section 526a) provides in relevant part:

> An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. ....

The "primary purpose" of this statute, originally enacted in 1909, is to "'enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the [direct] standing requirement.'" (*Van Atta v. Scott* (1980) 27 Cal. 3d 424, 447 (*Van Atta*), quoting *Blair v. Ptichess* (1971) 5 Cal.3d 258, 267-268 (*Blair*).) The statute provides "a general citizen remedy for controlling illegal governmental activity." (*White v. Davis* (1975) 13 Cal.3d 757, 763 (*White*); *Van Atta, supra,* 27 Cal. 3d 424, 447.) "To achieve the `socially therapeutic purpose' of section 526a, `provision must be made for a broad basis of relief. Otherwise, the perpetration of public wrongs would continue almost unhampered.'" (*Van Atta, supra*, at p. 450.)

Here, the question whether plaintiff, appellant and petitioner Cherrity Wheatherford has taxpayer standing under section 526a tests the fundamental tenant that justice is to be accorded the rich and poor alike. (See, gen., *Griffin v. Illinois* (1956) 351 U.S. 12 [76 S.Ct. 585, 100 L.Ed. 891, 55 A.L.R.2d 1055].) The Court must determine whether section 526a applies broadly to all California taxpayers or is limited only to those wealthy enough or otherwise fortunate enough to own real property or a

business and pay taxes assessed thereon, to the exclusion of millions of poor and middle-class citizens who are not so wealthy or so fortunate and thus do not pay real property and business taxes, but do pay other forms of taxes assessed by state and local government, such as income, sales, gasoline and telephone taxes, as the Court of Appeal concluded in this case and has concluded in four previous cases decided over the past two decades.[1]

ISSUES PRESENTED FOR REVIEW

1. What type of taxes must a plaintiff pay, or be liable to pay, to have taxpayer standing under section 526a?

2. If section 526a is limited to payment, or liability for payment, of taxes assessed on owners of real property and retail businesses, and excludes other forms of tax payments, does the statute discriminate based on wealth in violation of due process and equal protection guarantees?

SUMMARY OF ISSUES AND ARGUMENT

Petitioner is 38 years old and a single mother of a daughter, age 20. Petitioner is a citizen and a long-time California resident and taxpayer, currently residing in the County of Marin, were she has lived with her daughter for most of the past decade. Petitioner and her daughter share a modest apartment in the City of San Rafael. Petitioner is gainfully

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See *Wheatherford v. City of San Rafael* (1st Dist., Div. 1, 2014) 226 Cal.App.4th 460 (*Wheatherford*), depublished on grant of review; *Torres v. City of Yorba Linda* (4th Dist., Div. 3, 1993) 13 Cal.App.4th 1035 (*Torres*); *Cornelius v. Los Angeles County etc. Authority* (2nd Dist., Div. 4, 1996) 49 Cal.App.4th 1761 (*Cornelius*); *Santa Barbara Co. Coalition Against Automobile Subsidies v. Santa Barbara Co. Assn. of Governments* (2nd Dist., Div. 6, 2008) 167 Cal.App.4th 1229 (*Santa Barbara Co.*); *Reynolds v. City of Calistoga* (1st Dist., Div. 5, 2014) 223 Cal.App.4th 865 (*Reynolds*).

employed and works very hard to support herself and her daughter. Petitioner considers herself a member of the middle class, not poor, but when it comes to home ownership in California, poor and middle class citizens are effectively indistinguishable as almost all of them are on the outside looking in at the wealthy. Like almost everyone in her income bracket, petitioner does not own and cannot afford to buy real property in the County of Marin or surrounding Bay Area, one of the highest priced real estate markets and most expensive places to live in California– indeed, the entire United States. As a result, petitioner does not pay real property taxes. Petitioner also cannot afford to buy or start a business, so she does not pay taxes imposed on business owners. Petitioner does, however, pay state and federal income taxes. And as a consumer of goods and services, she also pays sales, gasoline and telephone taxes, and other taxes and fees routinely imposed by state and local governments.

Petitioner claims standing as a taxpayer under section 526a to challenge unlawful government action. The specific challenge made in this case concerns the legality and constitutionality of the vehicle impoundment practices of defendants and respondents City of San Rafael and County of Marin under Vehicle Code section 14602.6, authorizing the 30-day impoundment of a vehicle operated by a person without a valid driver's license. Petitioner has not suffered vehicle impoundment and therefore does not have direct standing to sue. This action may proceed only if petitioner has standing as a taxpayer under section 526a based on her payment of income, sales, gasoline and telephone taxes.

Like home ownership in California, the Court of Appeal has concluded that when it comes to taxpayer standing under section 526a, the poor and the middle class are on the outside looking in at the wealthy.

In five cases spaced intermittently over a 20-year period, culminating with the decision in this case in September 2014, the Court of Appeal has held that the language of section 526a, requiring payment or liability for payment of an "assessed" tax, means that taxpayer standing is available only to those plaintiffs who have paid taxes assessed *directly on them* as real property or business owners.

Payment of sales and gasoline taxes does not suffice under section 526a, the Court of Appeal has reasoned, because such taxes are technically "assessed" on business owners, not consumers such as petitioner, though the business owners customarily pass those taxes on to consumers who pay them at the time of purchase. State income tax *is* assessed directly on individual taxpayers, but the Court of Appeal has nonetheless concluded that payment of state income tax is inadequate to satisfy section 526a. This is so, the Court of Appeal has found, because income taxes purportedly bear too tangential a relationship to local government funding, and because recognition of taxpayer standing based on payment of state income tax would mean that virtually everyone would qualify for taxpayer standing, giving rise to an undue risk of haphazard litigation against local government agencies and officials by taxpayers throughout the state.

The Court of Appeal has reached these conclusions despite that such a construction of section 526a defeats, rather than furthers the purpose of the statute by denying, rather than granting taxpayer standing to "a large body of the citizenry to challenge governmental" (see *Van Atta, supra*, 27 Cal. 3d 424, 447), as nearly all of the poor and a large portion of the middle-class would be excluded from section 526a. The Court of Appeal has so limited section 526a notwithstanding that this Court has found taxpayer standing on the part of plaintiffs who plainly did <u>not</u> pay real

property or retail business taxes and whose basis for standing was necessarily payment of some other kind of taxes, such as incomes, sales, gasoline and telephone taxes (see, e.g., *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069 (*Tobe*) [plaintiffs were homeless]; *Arrieta v. Mahon* (1982) 31 Cal.3d 381 (*Arrieta*) [plaintiffs had recently been evicted from their apartment]); and despite the obvious concern that limiting taxpayer standing to real property and retail business owners, who are generally the most wealthy taxpayers, constitutes wealth-based discrimination in violation of due process and equal protection guarantees.

In this case the Court of Appeal concluded that limiting taxpayer standing to taxpayers who own real property does not constitute wealth-based discrimination because some rich people do not own real property, having elected to rent rather than buy, and some poor people do own real property as they were lucky enough to have purchased a home years ago when prices were lower or to have inherited real property when a family member died. The Court of Appeal did not suggest that petitioner is one of the few poor and middle-class taxpayers fortunate enough to own real property. She is not. Petitioner is just 38 years old and is therefore too young to have purchased a home decades ago when prices were lower (20 years ago, petitioner was 18 years old and pregnant with her daughter) and petitioner has not been so "fortunate" (an oxymoron in this context) to have had a family member die, leaving her real property as an inheritance.

The Court of Appeal's reasoning– which mirrors the arguments of respondents and others who support their position on taxpayer standing– is extremely offensive to petitioner and smacks of an elitist detachment from reality. It invokes Marie Antoinette, "Qu'ils mangent de la brioche"— *If they are hungry, let them eat cake*. Or as modified to apply here: *If the poor*

are hungry for taxpayer standing, let them buy real property or inherent it on the death of a family member who has.

"There is no equality in a law prohibiting both rich and poor from sleeping under the bridges of Paris." (*Gebert v. Patterson* (1st Dist., Div. 4, 1986) 186 Cal.App.3d 868, 876.) And there is no equality between rich and poor in a law affording taxpayer standing only to those taxpayers who own real property or a business and pay taxes assessed thereon. Section 526a provides a unique and broad right of access to the courts in circumstances were direct standing is lacking. Due process and equal protection principles prohibit denial of that right based on the size of the taxpayer's pocket-book. (See, gen., *Griffin v. Illinois, supra,* 351 U.S. 12; *Serrano, supra,* 5 Cal.3d 584.)

While the issue of taxpayer standing arises here in the context of a challenge to local vehicle seizure practices, the Court's resolution of the issue will apply to government action of *any* kind. In other words, if taxpayer standing is found wanting here, petitioner and all other taxpayers like her will be barred from invoking the taxpayer standing statute *no matter what form of government action they seek to challenge.*

The plight of the homeless, the rights of tenants, funding for schools and the proper scope and limits of police activities are just a few of the many important issues which commonly divide the citizenry along lines of wealth and home and business ownership, and which have been addressed in cases of taxpayer standing decided by this Court without any suggestion that section 526a is limited to payment of real property and business taxes. (See, e.g., *Tobe, supra,* 9 Cal.4th 1069 [challenge to municipal ordinance effectively making it a crime to be homeless]; *Arrieta v. Mahon, supra,* 31 Cal.3d 381 [challenge to local eviction practices]; *Serrano, supra,* 5 Cal.3d

584 [unequal funding for public schools]; *White, supra,* 13 Cal.3d 757 [unlawful warrantless on-campus surveillance by police].) If section 526a is construed to require payment of real property or business taxes, the nature of the government action which is subject to challenge under the statute would generally be limited to issues commonly advanced by the wealthy, to the exclusion of many important causes commonly championed by the poor and middle class. And, if the wealthy do take up causes for benefit of the poor and middle-class, they will generally do so with less vigor and passion, and far less empathy, than would be found in litigation prosecuted by poor and middle-class taxpayers who have *personally* witnessed and experienced the negative affects of the challenged government action.

Our justice system will suffer immensely if we deny taxpayer standing to hard-working, citizen resident taxpayers like petitioner who are willing to stand up in court against the government and demand its compliance with the law, but are not wealthy enough or otherwise fortunate enough to own real property or a business. The language and intent of section 526a dictates a contrary result, as do fundamental principles of due process and equal protection. The Court of Appeal erred in concluding otherwise. This Court should rectify that error and reverse the decision of the Court of Appeal.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Petitioner filed a complaint for declaratory and injunctive relief on January 9, 2013. (CT 1-12.) The complaint challenges respondents' enforcement of the state's vehicle impound statute, Vehicle Code section 14602.6.[2] Petitioner is validly licensed to drive and has not suffered the

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The particulars of petitioners' substantive claims need not be explored

impoundment of a vehicle. She claims standing as a taxpayer under section 526a. Petitioner alleges in her complaint that "[t]he taxes [she has] paid ...include sales tax, gasoline tax, and water and sewage fees, and *other taxes*, charges and fees *routinely imposed by municipalities, counties and the state*[3], with the exception of property taxes" which she does not pay because she "does not own and cannot afford to buy real property in California[.]" (CT 1-2, italics added.)

Recognizing that petitioner's claim of taxpayer standing was barred in the trial court by the Court of Appeal decisions in *Torres, supra,* 13 Cal.App.4th 1035, and *Cornelius, supra*, 49 Cal.App.4th 1761, the parties stipulated to entry of a judgment of dismissal which reserved petitioner's right of appeal. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 399-402 [authorizing an appeal of a stipulated judgment which is designed to allow a party to challenge adverse appellate authority which is fatal to their position in the trial court].) Judgment was entered on April 22, 2013. (CT 13-15.) Petitioner timely filed a Notice of Appeal on June 11, 2013. (CT 21.)

On appeal, petitioner argued that *Torres* and *Cornelius* were wrongly reasoned and decided and that section 526a should be interpreted to provide

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because they are not germane to the threshold issue of taxpayer standing. For a discussion and assessment of identical claims in a parallel case prosecuted by petitioner's counsel at bar, see *Thompson v. City of Petaluma Police Department*, – Cal.App.4th –, A137981 [unpub. opn. issued Oct. 10, 2014; publication order issued Nov. 4, 2014; petition for review to be filed on finality of the decision in the Court of Appeal] (*Thompson*).

[3] The "other taxes" paid by petitioner include income and telephone taxes. While it would have been better for petitioner to have expressly alleged payment of those taxes, such is necessarily included within her allegation of payment of "other taxes routinely imposed[.]"

taxpayer standing to a plaintiff who has paid *any* type of tax assessed by state or local government, including income, sales and gasoline taxes, as well as real property taxes. Petitioner also claimed that limiting section 526a to payment of real property taxes would constitute wealth-based discrimination in violation of due process and equal protection guarantees.

Respondents countered each of petitioner's arguments. They also added payment of retail business taxes to the mix for the first time, citing *Santa Barbara Co., supra,* 167 Cal.App.4th 1229. In *Santa Barbara Co.*, the Second District Court of Appeal concluded that the plaintiff in that case had taxpayer standing under section 526a because the plaintiff had paid sales taxes assessed on its sale of T-shirts. The appellate court reasoned that a business owners who has paid sales tax satisfies the requirements of section 526a because sale tax is "assessed" *directly on* the plaintiff as retailer and business owner; whereas sales taxes paid by consumers do not satisfy section 526a because such taxes are technically not "assessed" on the consumer, though as practical matter retailers simply pass the tax on to consumers who pay it at the time of purchase. (167 Cal.App.4th at p. 1236, citing *Cornelius* and *Torres* with approval.) Respondents thus argued in this case that taxpayer standing is satisfied by payment of *either* real property or business taxes; and petitioner lacks taxpayer standing because she has not paid either of those taxes.

In reply, petitioner reiterated her original arguments and added that the she does not own and cannot afford to start her own business.

The First District Court of Appeal, Division One, issued a published opinion on May 22, 2014, affirming the judgment of dismissal based on plaintiff's lack of taxpayer standing, *Wheatherford, supra*, 226 Cal.App.4th 460. The Court of Appeal elected to follow *Torres, Cornelius,* and *Santa*

Barbara Co. and accordingly found that section 526 requires proof of payment of either real property or business taxes; payment of income, sales, gasoline and other taxes does not suffice. The Court of Appeal acknowledged that this Court has found taxpayer standing on the part of plaintiffs who plainly had not paid real property or business taxes, and whose taxpayer standing was necessarily based on payment of income, sales, gasoline or telephone taxes, such as *Tobe, supra,* 9 Cal.4th 1069, 1081-1086, involving two homeless plaintiffs, and *Arrieta v. Mahon, supra,* 31 Cal.3d 381, brought by several former renters who had been evicted from their apartments, and that this Court and the Court of Appeal have issued many dozens of other decisions which granted taxpayer standing to the plaintiff, or presumed it existed, without consideration of the specific type of taxes paid. The Court of Appeal said those decisions are not precedent on the point at issue here because in those cases this Court did not expressly consider and decide the question of what type of taxes qualify for taxpayer standing under section 526a.

The Court of Appeal rejected petitioner's claim that limiting taxpayer standing to payment of real property and business taxes would constitute wealth-based discrimination in violation of due process and equal protection guarantees. The appellate court said, in sum, that petitioner's "premise is flawed" because there are some rich people who do not own homes as they elect to rent rather than buy, and there are some poor people who do own homes because they were fortunate enough to buy real property decades ago when home prices were lower or they inherited real property on the death of a family member; and therefore a real property and business tax requirement does not limit standing to a select sub-group of the most wealthy Californians. The appellate court also said that lack of home

ownership has never been identified as a suspect class, so the perceived statutory limitation is subject to the rational basis test. A rational basis exists for limiting section 526a to real property and business taxpayers, the Court of Appeal found, because payment of such taxes vest the taxpayer with"a sufficiently personal interest in the illegal expenditure of funds by county officials to become dedicated adversaries." (*Blair, supra*, 5 Cal.3d at p. 270.)[4]

In closing, the Court of Appeal reasoned that recognition of petitioner's taxpayer standing based on payment of income, sales and gasoline taxes was unnecessary because respondents' vehicle impoundment practices may be challenged by aggrieved vehicle owners with direct standing to sue and by other taxpayers who have paid real property and business taxes and thus have standing under section 526a. Having said that, however, the Court of Appeal passingly acknowledged in its final footnote that the established rule applies to *any* challenge to government action, not simply vehicle impoundment cases (*Wheatherford, supra*, 226 Cal.App.4th 460 at fn. 7), and therefore *all* taxpayers who do not pay real property or business taxes are excluded from section 526a regardless of whether or not their substantive claims are likely to be championed by someone else who does have standing.

Petitioner timely filed a petition for rehearing or modification of the

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This Court said the exact same thing in *Van Atta, supra,* 27 Cal. 3d 424, 447-450, and said the same or similar things in numerous other decisions, without identifying the type of taxes the plaintiffs had paid. (See, e.g., *Harman v. City and County of San Francisco* (1972) 7Cal.3d 150, 159-160 (*Harman*).) So it is difficult to see how the quote from *Blair* can be said to be limited to payment of real property and business taxes as the Court of Appeal found– particularly when *Blair* itself suggests no such limitation.

Opinion. Petitioner asked the Court of Appeal to modify the Opinion to expressly state that petitioner's complaint alleges she does not own and cannot afford to buy real property in California, and that on appeal she also claimed to be unable to afford to own a business– critical facts which the Court of Appeal inexplicably left out of the Opinion. In light of the omission of these critical facts, petitioner asked the Court of Appeal to reconsider its assessment of the wealth-based discrimination claim.

Petitioner also asked the Court of Appeal to consider a recent appellate decision published after the close of briefing, *Sipple v. City of Hayward* (2nd Dist., Div. 2, April, 8, 2014) – Cal.App.4th – , 2014 WL 1371796 (Case No. B242893) (*Sipple*). *Sipple* held that a telephone company had standing to pursue recovery of a tax payment made to the City of Hayward, despite that the tax had been assessed *on the company's users*, not the company itself, which had collected the tax from the users by listing the tax on telephone bills and had paid the sums collected to the city. Petitioner argued that section 526a should be similarly construed to grant taxpayer standing based on petitioner's payment of sales, gasoline and other taxes which are technically assessed on businesses owners but are actually paid by consumers at the time of purchase.

The Court of Appeal summarily denied the petition for rehearing and modification of the opinion by order issued June 16, 2014. The decision of the Court of Appeal was final on June 21, 2014. Petitioner timely requested review in this Court. This Court granted review on September 10, 2014.

On November 4, 2014, the Court granted review in another First District Court of Appeal (Div. 2) case prosecuted by petitioner's counsel at bar presenting the same issue of taxpayer standing in the identical context of a challenge to local vehicle impoundment practices, *Dane v. City of*

Santa Rosa, First Dist., Div. 2, A138355 [non pub. opinion], S221341 (*Dane*). Later that same day, coincidentally, the First District Court of Appeal (Div. 4) issued an order publishing its earlier unpublished opinion in yet another mirror-image taxpayer case prosecuted by petitioner's counsel at bar. (*Thompson, supra,* – Cal.App.4th –, A137981.) In *Thompson*, the Court of Appeal allowed the taxpayer action to proceed based on a finding that the plaintiff has taxpayer standing to sue the City of Petaluma over its vehicle impoundment practices because, although the plaintiff does not reside in Petaluma, he does owns real property there and pays taxes assess thereon.

ARGUMENT

I.

THE STANDARD OF REVIEW IS DE NOVO

The de novo standard of review applies to the determination of petitioner's standing to sue as a taxpayer under section 526a as that question involves a pure issue of law based on the proper construction of the statute. (See *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724; *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

Like an order sustaining a demurrer, the stipulated judgment in this case is based on the presumed truth of the facts alleged in the complaint concerning petitioner's standing to sue as a taxpayer under section 526a. Therefore, as it would on review of a judgment of dismissal on demurrer, the Court reviews the complaint de novo and accepts as true "all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [The Court] also consider[s] matters which may be judicially noticed. Further, [the Court] give[s] the complaint a reasonable interpretation, reading it as a whole and its parts in their context. ...

[Ultimately, the Court must] determine whether the complaint states facts sufficient to constitute [taxpayer standing under section 526a] [and, if not,] ... whether there is a reasonable possibility that [that] defect can be cured by amendment ....” (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Ordinarily, a plaintiff who stipulates to entry of an appealable judgment of dismissal is not entitled to press for reversal on appeal based on new facts to be added to the complaint if leave to amend is afforded. In those circumstances it generally “must be presumed that the plaintiff has stated as strong a case as he can” and has effectively conceded that he cannot offer additional facts and claims to better the complaint. (See *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091.)

In this instance, however, the stipulated judgment was entered based on petitioner’s non-payment of *real property* taxes. *For the first time on appeal*, respondents raised payment of *business* taxes as grounds for standing under section 526a and suggested other unstated taxes “assessed” directly on a plaintiff would also suffice under the statute. It would be unfair for the Court to consider the claims which respondents raised for the first time on appeal without accepting petitioner’s representation that she can amend the complaint to expressly allege that she does not pay taxes imposed on retailers or business owners because she is not wealthy enough to own a business. (See *Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [a “party should not be required to defend for the first time on appeal against a new theory that ‘contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented [in the] trial [court].”].)

II.

OVERVIEW OF TAXPAYER STANDING UNDER SECTION 526a

The "primary purpose" of the taxpayer standing statute, section 526a, "originally enacted in 1909, is to 'enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.' [Citation.] [¶] California courts have consistently construed section 526a liberally to achieve this remedial purpose.' (*Blair*[, *supra*,] 5 Cal.3d 258, 267-268; ....) Thus, [unlike direct standing to sue, which requires an injury in fact,] 'under section 526a "no showing of special damage to the particular taxpayer [is] necessary"' for the taxpayer to prevent injury to the public. (*White*[, *supra,*] 13 Cal.3d 757, 764, quoting *Crowe v. Boyle* (1920) 184 Cal. 117, 152 [193 P. 111].)" (*Chiatello v. City and County of San Francisco* (1st Dist., Div. 2, 2010) 189 Cal.App.4th 472, 481-482 (*Chiatello*) [internal parallel citations omitted]; and see *Connerly v. State Personnel Bd.* (3rd Dist., 2001) 92 Cal.App.4th 16, 29-30 (*Connerly*) ["restrictive federal rules of justiciability" requiring an injury, or a real and direct threat of injury, to the plaintiff do not apply in state courts in taxpayer actions].)

"[I]f an action meets the requirements of section 526a, it presents a true 'case or controversy'" which is ripe for adjudication, despite that the taxpayer plaintiff has suffered no direct injury as a result of the challenged government action. (*Blair, supra,* 5 Cal.3d at p. 269, internal quotes added; *Van Atta, supra,* 27 Cal.3d at pp. 447, 451; *Harman, supra,* 7 Cal.3d 150, 159-160.) It is presumed that "taxpayers have a sufficiently personal interest in the illegal expenditure of funds by [state and local] officials to become dedicated adversaries" and that "the interest of government officials in continuing their programs is sufficient to guarantee a spirited

opposition. There is [thus] no danger ... that the court will be misled by the failure of the parties adequately to explore and argue the issues." (*Blair, supra,* 5 Cal.3d at p. 270; *Van Atta, supra,* 27 Cal.3d at pp. 447, 450.)

Though the intent of section 526a is to "enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts *because of the standing requirement*" (*Blair, supra*, 5 Cal.3d 258, 267-268, italics), a taxpayer need not present evidence that individuals with direct standing to sue have not filed suit to challenge the subject government action and are unlikely to do so in the future. A taxpayer action presents a true "case or controversy" ripe for adjudication *even if* individuals with direct standing could bring or actually have brought suit on their own. In those circumstances, "directly aggrieved parties and taxpayers have *concurrent standing* to bring suit to enjoin government action." (*Mendoza v. County of Tulare* (5th Dist. 1982) 128 Cal.App.3d 403, 415 (*Mendoza*) (italics added), citing *Van Atta, supra,* 27 Cal.3d at 447-450; and see *Blair, supra,* 5 Cal.3d 258, 267-270, 285-286 and fn. 21.)

The Court's decisions in *Blair* and *Van Atta* are highly instructive and we consider them now.

A. *Blair.*

In *Blair,* the taxpayer-plaintiffs brought suit to enjoin the use of law enforcement officers and other government employees to enforce the state's claim and delivery laws, which were alleged to be unconstitutional. The plaintiffs had not been subjected to the claim and delivery laws and did not claim to be personally aggrieved by their enforcement so as to have direct standing to sue. Based on the plaintiff's status as taxpayers and the government's use of paid law enforcement officers to enforce the claim and delivery laws, this Court found the plaintiffs had taxpayer standing under

section 526a to secure declaratory and injunctive relief against the enforcement of the challenged laws. (*Blair, supra,* 5 Cal.3d at pp. 267-270 and 285-286, fn. 21.)

Said the Court at pages 267-270 of the *Blair* opinion: "California courts have consistently construed section 526a liberally to achieve [its] remedial purpose. Upholding the issuance of an injunction, we have declared that it `is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds.' (*Wirin v. Parker* (1957) 48 Cal.2d 890, 894 [313 P.2d 844].) Nor have we required that the unlawfully spent funds come from tax revenues; they may be derived from the operation of a public utility or from gas revenues. (Citations.) A unanimous court in *Wirin v. Horrall* (1948) 85 Cal. App.2d 497, 504-505 [193 P.2d 470], held that the mere `expending [of] the time of the paid police officers of the city of Los Angeles in performing illegal and unauthorized acts' constituted an unlawful use of funds which could be enjoined under section 526a. (See also *Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18 [64 Cal. Rptr. 409, 434 P.2d 961].)

"We have even extended section 526a to include actions brought by nonresident taxpayers. (*Irwin*[,*supra,*] 65 Cal.2d 13, 18-20 [51 Cal. Rptr. 881, 415 P.2d 769].)[5] In *Crowe v. Boyle* (1920) 184 Cal. 117, 152 [193 P.

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In *Irwin, supra,* 65 Cal.2d 13, the issue of taxpayer standing was decided based on principles of equal protection. The Court noted that the plain language of section 526a authorizes a corporation to bring suit against a city or county agency if the corporation owns real property in that city or county, regardless of whether the corporation *resides* in that city or county. The Court could discern no rational reason why the same right should "be denied to a nonresident taxpayer who is a *natural person.*" (*Id.,* pp. 18-19, italics in the original.)

111], we stated: `In this state we have been very liberal in the application of the rule permitting taxpayers to bring a suit to prevent the illegal conduct of city officials, and no showing of special damage to the particular taxpayer has been held necessary.'

"Moreover, we have not limited suits under section 526a to challenges of policies or ordinances adopted by the county, city or town. If county, town or city officials implement a state statute or even the provisions of the state Constitution, an injunction under section 526a will issue to restrain such enforcement if the provision is unconstitutional. (Citations) ....

"It is clear that the present action was properly brought under section 526a. Plaintiffs have alleged, and by their affidavits have established, that they are residents and taxpayers of the County of Los Angeles. ... It appears from the complaint that plaintiffs seek to enjoin defendants, who admittedly are county officials, from expending their own time and the time of other county officials in executing claim and delivery process. If the claim and delivery law is unconstitutional, then county officials may be enjoined from spending their time carrying out its provisions (*Wirin v. Horrall, supra*, 85 Cal. App.2d 497, 504-505) even though by the collection of fees from those invoking the provisional remedy the procedures actually effect *a saving* of tax funds. (*Wirin v. Parker, supra*, 48 Cal.2d 890, 894.) [(Italics added).]

"Defendants argue nevertheless that, even if the instant action fulfills the requirements of section 526a, it was not properly cognizable by the trial court because it does not present a true case or controversy. They point out that there 'is no allegation that the plaintiffs were or may be parties to a claim and delivery action.' [fn. omitted] Defendants also contend that as sheriff and marshal, respectively, they merely carry out ministerial functions

in executing claim and delivery process and have, therefore, no real interest adverse to plaintiffs. They cite our recent statement that, '[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court. [Citations.]' (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912 [83 Cal. Rptr. 670, 464 P.2d 126].) They also draw our attention to the long series of United States Supreme Court decisions which have elaborated on the case or controversy requirement.

"We do not find those cases applicable here, for we conclude that if an action meets the requirements of section 526a, it presents a true case or controversy. As we noted before, the primary purpose of section 526a was to give a large body of citizens standing to challenge governmental actions. If we were to hold that such suits did not present a true case or controversy unless the plaintiff and the defendant each had a special, personal interest in the outcome, we would drastically curtail their usefulness as a check on illegal government activity. Few indeed are the government officers who have a personal interest in the continued validity of their officials acts.

"Furthermore, it has never been the rule in this state that the parties in suits under section 526a must have a personal interest in the litigation. We specifically stated in *Crowe v. Boyle, supra*, 184 Cal. 117, 152 that 'no showing of special damage to the particular taxpayer has been held necessary.' In *Wirin v. Parker, supra,* 48 Cal.2d 890, the plaintiff had no more immediate interest in enjoining the illegal wiretaps conducted by the police department than his status as a resident taxpayer. Similarly, in *Vogel v. County of Los Angeles, supra*, 68 Cal.2d 18, the defendant county officials who administered the loyalty oath to new county officials and employees certainly had no personal interest in the continued use of that oath. In both *Wirin* and *Vogel* the plaintiff prevailed, and no suggestion is

found in either opinion that the cases failed to present a true case or controversy.

"As the extensive briefs in this case demonstrate, taxpayers have a sufficiently personal interest in the illegal expenditure of funds by county officials to become dedicated adversaries. In the same manner, the interest of government officials in continuing their programs is sufficient to guarantee a spirited opposition. There is no danger in such circumstances that the court will be misled by the failure of the parties adequately to explore and argue the issues. We are satisfied that an action meeting the requirements of section 526a thereby presents a true case or controversy." (*Blair, supra,* 5 Cal.3d 258, 267-270; see also *Harman, supra,* 7 Cal.3d 150, 159-160.)

Having found the plaintiffs had taxpayer standing, the *Blair* court turned its attention to the plaintiffs' substantive claims and found the challenged statutes comprising the state's claim and delivery laws were unconstitutional on their face and as applied in various particulars not germane here. (*Blair, supra,* 5 Cal.3d 258, 271-285.) The *Blair* court then returned to the issue of standing under section 526a and summed up by "conclud[ing] that the trial court did not err in rendering ... judgment [for the plaintiffs] .... Plaintiffs' declarations ... establish that they are citizens and that they reside in the County of Los Angeles. Such declarations also show that within one year prior to the commencement of this action plaintiffs were assessed and paid real property taxes to the County of Los Angeles. Defendants have in their answer to the first amended complaint admitted that they are county officers and that they and their deputies execute claim and delivery process. As the preceding discussion has shown, the execution of claim and delivery process violates [various provisions of]

... the United States Constitution and ... California Constitution. Since defendants' activities [fn.][6] are directed to the enforcement and execution of claim and delivery process which has been shown to be violative of both the United States and California Constitutions, plaintiffs were entitled to ... judgment and to the issuance of an injunction under section 526a." (*Id.*, pp. 285-286, all other footnotes omitted; and see *Kehoe v. City of Berkeley* (1st Dist., Div. 3, 1977) 76 Cal.App.3rd 667, 669-671 (*Kehoe*) ["[Plaintiffs] allege that they are 'City of Berkeley citizens, residents, and taxpayers' and seek to prevent the unlawful issuance of permits by city officials. Under the principles enunciated in the *Blair* case, these allegations are sufficient to give [plaintiffs] standing pursuant to ... section 526a." The plaintiffs need not "show any personal or peculiar injury."].)

B. *Van Atta.*

In *Van Atta, supra*, 27 Cal.3d 424, the taxpayer plaintiffs challenged the constitutionality of the City and County of San Francisco's pretrial release and detention system in criminal cases. The Court found the plaintiffs had taxpayer standing despite that the plaintiffs had not been subjected to the pretrial release and detention system, and others who had been personally detained could have brought suit on their own. The Court said section 526a provides "a general citizen remedy for controlling illegal

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[Footnote 21 in the original text] "As we have shown above, the mere expenditure of the time of county officers is a sufficient expenditure of public funds to be subject to injunction under section 526a. (*Wirin v. Horrall, supra,* 85 Cal. App.2d 497, 504-505.) It is therefore unnecessary to establish the amount of county funds expended on execution of claim and delivery process or the amount of such costs defrayed by fees charged those who initiate claim and delivery procedure. (*Wirin v. Parker, supra*, 48 Cal.2d 890, 894.)"

governmental activity. (Citations.) California courts have consistently construed section 526a liberally to achieve its remedial purpose. Accordingly, the existence of individuals directly affected by the challenged governmental action– here pretrial detainees– has not been held to preclude a taxpayers' suit. Numerous decisions have affirmed a taxpayer's standing to sue despite the existence of potential plaintiffs who might also have had standing to challenge the subject actions or statutes. For example, in *Blair, supra*, 5 Cal.3d 258, this court permitted taxpayers to maintain an action challenging the claim and delivery statute even though aggrieved persons directly affected by its operation also had standing to sue. ... [¶] This court reaffirms that taxpayers may maintain an action under section 526a to challenge an illegal expenditure of funds even though persons directly affected by the expenditure also have standing to sue." (*Id*., pp. 447-448; accord, *Connerly, supra,* 92 Cal.App.4th 16, 29-31; *Mendoza, supra,* 128 Cal.App.3d 403, 415; *Cornblum v. Board of Supervisors* (4th Dist., Div. 1, 1980) 110 Cal.App.3d 976, 980-981 (*Cornblum*).)

III.

DESPITE HAVING FOUND, OR PRESUMED THE EXISTENCE OF, TAXPAYER STANDING IN DOZENS OF CASES, THIS COURT HAS NEVER EXPRESSLY ADDRESSED THE QUESTION OF THE SPECIFIC TAXES ONE MUST PAY TO HAVE TAXPAYER STANDING

In *Blair, supra*, 5 Cal.3d 258, presenting a taxpayer challenge to the constitutionality of the state's claim and delivery laws, the plaintiffs offered proof of payment of real property taxes (*id.*, p. 265, fn. 2) which this Court found adequate to establish taxpayer standing under section 526a. (See *id*, pp. 267-270 and 285-286, fn. 21.) So, too, in *Serrano v. Priest, supra*, 5

Cal.3d 584, 618, presenting a taxpayer challenge to the state's method of funding public schools; and in *Irwin, supra,* 65 Cal.2d 13, 18-19, where the Court applied equal protection principles to expand section 526a to reach a taxpayer who paid taxes assessed on real property he owned in the city against which suit had been brought, but did herself reside in that city. In none of those cases, however, did the Court state or even suggest that real property tax is the *only* tax which satisfies section 526a. The question of the specific taxes which satisfy section 526a was simply not considered.

The Court also did not pass on the issue in *Van Atta*, where the plaintiffs challenging jail detention policies were simply described as "taxpayers" (see *Van Atta, supra*, 27 Cal.3d at pp. 433 & 447-450), nor in *White v. Davis, supra*, 13 Cal.3d 757, where the plaintiff challenging on-campus warrantless surveillance by police was said to be "a professor of history at the University of California at Los Angeles and a resident taxpayer of the City of Los Angeles[.]" (*Id.*, p. 762; and see *id.*, pp. 762-765 [describing the plaintiff simply as a "taxpayer" and finding he had standing under section 526a].) Similar language is found in every other taxpayer standing case to reach the Court since section 526a was enacted in 1909, all of which appear to contain generic references to "taxpayers," "resident taxpayers" and "citizen taxpayers," without mention, much less substantive discussion of the specific type of taxes the plaintiffs had paid to deserve taxpayer standing– though in several of those cases it is apparent from the circumstances of the plaintiffs that they did <u>not</u> pay taxes on real property or a business, as reflected in the footnotes of this brief in the string citation to follow. (See, e.g., *Wirin v. Parker, supra,* 48 Cal.2d at 891 [the section 526a plaintiff was "a resident citizen taxpayer of the City of Los Angeles"]; *Lundberg v. County of Alameda* (1956) 46 Cal.2d 644, 647 [the plaintiff

found to have standing under section 526a was described only as "a citizen resident of defendant county and a taxpayer therein"]; *C.R. Drake v. City of Los Angeles* (1952) 38 Cal.2d 872, 873 ["The plaintiffs as taxpayers of the city of Los Angeles commenced this action under section 526a"]; *Simpson v. City of Los Angeles* (1953) 40 Cal.2d 271, 276 ["the plaintiffs are resident citizens and taxpayers of the city .... As such taxpayers, they are entitled to sue to prevent the alleged illegal expenditures. (Code Civ. Proc., 526a ....)"]; *Regents of University of California v. Superior Court* (*Karst*) (1970) 3 Cal.3d 529, 533, 542 ["Karst ... [and others] ... filed [this] taxpayers' action"]; *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335 [repeatedly describing the plaintiffs simply as "taxpayers"]; *Love v. Keays* (1971) 6 Cal.3d 339, 343 ["Plaintiffs, residents and taxpayers of Los Angeles County, brought this action under section 526a ...."]; *Harman, supra,* 7 Cal.3d 150 [describing the case as a "taxpayer suit" brought under section 526a by a San Francisco "taxpayer"]; *Adams v. DMV* (1974) 11 Cal.3d 146, 151 ["Petitioner Pineda joins in this action as a taxpayer challenging the constitutionality of the expenditure of public funds in enforcement of the garageman's lien law. (See Code Civ. Proc., §526a[.])"]; *Stanson v. Mott* (1976) 17 Cal.3d 206, 209, 223 [describing the action as a "taxpayer suit" under section 526a]; *Arrieta v. Mahon supra,* 31 Cal.3d 381 385-387 ["Arrieta also brought a taxpayer suit (Code of Civ. Proc. §526a) to enjoin the ... expend[iture] [of] public funds" to evict apartment tenants such as Arrieta who had not been named in the UD complaint or the writ of possession. "We adhere to the rule of *Blair* and *Van Atta* in this case" and conclude Arrieta has taxpayer standing.[7]]; *Folsom v. Butte County Assn. of*

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As Arrieta had recently been evicted from her apartment, it is safe to

Govts. (1982) 32 Cal.3d 668, 671-672 and fn. 2 ["Plaintiffs are resident taxpayers of Butte County" who "asserted standing under section 526a"]; *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 91 ["[T]he plaintiffs asserted standing as taxpayers under ... section 526a. ... [P]laintiffs have standing as taxpayers to challenge the legality of the [defendant] school district's actions"]; *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1137 ["the taxpayer plaintiff" did not have standing to sue under section 526a because he had not proven the challenged government conduct at issue resulted in the illegal waste or expenditure of taxpayer funds]; *Harbor v. Deukmejiian* (1987) 43 Cal.3d 1078, 1083 at fn. 4 ["The individual petitioners filed [suit] both in their individual capacities as AFDC recipients and as taxpayers under section 526a"[8]]; *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 869 ["Plaintiffs Jim Sands and Jean Bertolette are taxpayers residing within the [School] District. ... They proceeded under ... section 526a, which authorizes taxpayers' actions against local public entities to enjoin the unlawful expenditure of public funds."]; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 566-567 and fn. 2 [noting that in the proceedings before the Supreme Court the governmental defendants did not challenge the Court of Appeal's finding that the "taxpayer" plaintiffs had standing under section 526a]; *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1205 ["Plaintiff filed a taxpayer's suit (Code Civ. Proc., § 526a) ...."]; *Tobe, supra*, 9 Cal.4th 1069, 1081-1083, 1085-1086 [plaintiffs were

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assume her taxpayer standing was not predicated on payment of real property or business taxes.

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As welfare recipients, the plaintiff's claim of taxpayer standing was not based on payment of real property or business taxes.

"taxpayers," one of whom owned a home, two of which were homeless; *all* had standing under section 526a[9]]; *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 856 ["plaintiff Lorraine Loder, a taxpayer, instituted the present taxpayer's suit to enjoin further expenditure of public funds relating to the drug testing program. (See Code Civ. Proc., § 526a.)"]; *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809 [while the issue of taxpayer standing was not before it, the Court noted the plaintiffs had claimed taxpayer standing under section 526a based on a complaint describing the plaintiffs only as "citizens, voters and taxpayers of the City of La Habra"]; *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061 ["Plaintiff Kendra O'Connell filed this taxpayer action (Code Civ. Proc, § 526a) ...."][10]; *Vasquez v. State* (2008) 45 Cal.4th 243, 248-249

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The homeless plaintiffs granted taxpayer standing plainly did not pay real property or business taxes.

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O'Connell was a taxpayer action prosecuted by petitioners's counsel at bar, successfully challenging the validity of a vehicle forfeiture ordinance. The case was decided on demurrer. The plaintiff, Ms. O'Connell, did not allege in her complaint that she had paid real property or business taxes– and in fact she had not paid such taxes. In the Court of Appeal decision on which review was granted, Ms. O'Connell was described as a "taxpayer," and her "taxpayer standing" under section 526a to enjoin *ongoing* expenditures of public funds was found adequate to defeat the governmental defendant's statute of limitation defense. (*O'Connell v. City of Stockton* (3rd Dist. 2005), formerly found at 27 Cal.Rptr.3d 696, depublished on grant of review.) In this Court's subsequent opinion, Ms. O'Connell's taxpayer standing was noted only in passing; the Court did not decide any issues related to it. (*O'Connell, supra,* 41 Cal.4th 1061; and see *Hernandez v. City of Sacramento,* formerly (3rd Dist. 2007) 54 Cal.Rptr.3d 98 [plaintiff who successfully challenged the city's vehicle forfeiture ordinance was described simply as a "taxpayer" proceeding under "section 526a"], depublished on grant of review, case held pending decision in *O'Connell*;

[noting that in the underlying litigation on the merits of Vasquez's substantive claims, from which the attorney's fee issue before the Court had arisen, "Vasquez [had] ... asserted standing as a taxpayer to prevent the waste of state property (Code Civ. Proc., § 526a)"][11].)

Curious as it seems, given the importance of section 526a and the frequency with which taxpayer standing actions have reached this Court and been decided on the merits in the 105 years since section 526a was enacted in 1909, the Court has never *expressly* decided the specific type of tax payment required for standing under section 526a

IV.

DISCUSSION OF COURT OF APPEAL CASES WHICH HAVE EXPRESSLY DECIDED THE QUESTION OF THE SPECIFIC TAXES WHICH SATISFY SECTION 526a

In four published decisions the Court of Appeal has expressly considered and decided the question of taxpayer standing at issue here and

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affirmed *sub nom* by *O'Connell*, *supra*, 41 Cal.4th 1061; appeal dismissed, S151356.)

The same is true with respect to another taxpayer standing case prosecuted by petitioner's counsel at bar challenging vehicle impound practices. (See *Samples v. Brown* (1st Dist., Div. 2, 2007) 146 Cal.App.4th 787 [The plaintiff, who prevailed in the trial court but lost on the merits on appeal, "filed th[e] action pursuant to section 526a ... as a tax-paying 'citizen interested in the government's compliance with constitutional requirements.' She did not allege, nor has she ever argued, that the [vehicle impoundment] statutes she challenges were applied to her or that she ... has suffered any damages."].)

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In the underlying apppellate decision, *Vasquez v. State* (2003) 105 Cal.App.4th 849, Vasquez was described as a "taxpayer" and the case was described as a "taxpayer action" under section 526a.

each time has answered it adversely to petitioner at bar. We now consider those appellate cases, pausing midstream to note the intervening decision of this Court in *Tobe*, *supra*, *supra*, 9 Cal.4th 1069, which *implicitly* answered the same question favorably to petitioner at bar by finding taxpayer standing on the part of two homeless taxpayers.

A. *Torres.*

The first case to address the specific type of tax which one must pay to have taxpayer standing under section 526a is the Fourth District case of *Torres, supra,* 13 Cal.App.4th 1035, decided in 1993. In *Torres*, the plaintiffs, Maria Torres and Maria Lara, filed a taxpayer action challenging the validity of a proposed redevelopment project by the City of Yorba Linda. The plaintiffs did not reside in Yorba Linda, which is located in the County of Orange. Rather, the complaint "allege[d] both plaintiffs currently live in Anaheim[, which is also located in the County of Orange]. Plaintiffs are interested in moving to Yorba Linda if they could find decent, safe, sanitary and affordable housing. Each plaintiff paid a *sales* tax to the City of Yorba Linda within one year before filing the action." (*Torres, supra,* 13 Cal.App.4th at p. 1039, italics added.)

In rejecting the plaintiffs' claim of taxpayer standing to challenge the redevelopment plan, the Court of Appeal looked to the language of section 526a which, as relevant here, provides standing to one "who is *assessed* for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein." (Italics added.) The appellate court read this language as requiring proof of payment of a tax assessed *directly on the plaintiff* seeking to invoke section 526a. The court found the non-resident plaintiffs lacked taxpayer standing to sue the City of Yorba Linda because in that city they had paid only sales tax, which is *technically* assessed

against the retailer, not the consumer– though as a practical matter the retailer simply passes the sales tax on to the consumer, who pays it at the time of purchase. (*Id.*, pp. 1047-1048.) "While the price of the goods plaintiffs purchased in Yorba Linda was increased by the amount of the sales tax, the tax was imposed on the person who sold the goods to them. Consequently, plaintiffs cannot assert standing as taxpayers in this case under either the common law or section 526a based on their purchase of goods within the City of Yorba Linda." (*Id.*, p. 1048.)

Having so held, the *Torres* court closed its opinion with a critical final footnote summarily stating: "Plaintiffs also claim that denying standing to them under section[] ... 526a violates their constitutional right to equal protection of the law. The argument is without merit. The case law clearly establishes plaintiffs are not similarly situated with others determined to have standing under these circumstances." (*Id.*, p. 1048, fn. 7.) The appellate court cited no authority for this statement, and petitioner's counsel's research has revealed no case law which "clearly establishes" that plaintiffs who do not pay real property taxes, but do pay other forms of taxes, are not similarly situated to those that do pay property taxes.[12]

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Earlier in the *Torres* opinion, addressing and rejecting the plaintiffs' claim of standing under Code of Civil Procedure section 863, which affords a private right of action challenging a redevelopment plan, the *Torres* court said: "<u>Torres owns property in the county and pays taxes on it</u>" by making "monthly payments to her father who uses the money to pay the mortgage and property tax bills. ... We consider the fact that Torres is a record owner of the property, and consequently liable to pay the property tax levy, sufficient to support her claim to be a taxpayer. The method by which she satisfied her tax obligation is not controlling. Thus, defendants' analogies to a tenant paying rent to a landlord and a customer making a purchase in a retail store are inapposite." (13 Cal.App.4th at 1041 and fn. 4, underlining

B. ***Tobe.***

Just 2 years later after *Torres* was decided, and without mentioning that case, this Court issued its opinion in *Tobe, supra*, 9 Cal.4th 1069. *Tobe* was a consolidated action involving the Tobe plaintiffs and the Zuckernick plaintiffs. The plaintiffs collectively challenged the constitutionality of the City of Santa Ana's no-camping ordinance, allegedly designed to keep the homeless out of sight and out of mind. (*Id.*, pp. 1081-1083, 1085-1086.) The Zuckernick plaintiffs were "persons who, having been charged with violating the ordinance, demurred unsuccessfully to the [criminal] complaints and thereafter sought mandate to compel the respondent municipal court to sustain their demurrers." (*Id.*, p. 1082.) In contrast, this Court said of the 3 *Tobe* plaintiffs that "two have never been cited under the

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added.) Later in the opinion, however, addressing the plaintiffs' taxpayer standing under section 526a, Torres' status as a *property* tax payer was inexplicably omitted from the discussion. The appellate court considered only the plaintiffs' payment of *sales* tax, and found it wanting. (*Id.*, pp. 1047-1048.) Thus, in deciding the critical issue of the Torres' taxpayer standing the *Torres* court plainly erred and wrongfully denied Torres the right to proceed with the action under section 526a based on his payment of *real property* taxes, which indisputably qualify one for taxpayer standing.

While this clear error is of no direct assistance to petitioner at bar because she has admittedly *not* paid real property taxes, the fact that the *Torres* court made such an obvious error on such a critical point and thereby denied taxpayer standing to a plaintiff who plainly qualified for it, should cause the Court to question the care with which the *Torres* court decided the case as a whole, and specifically the manner in which it passed on the core question of the type of taxes which qualify under section 526a. This is particularly true because of the exceedingly short shrift the *Torres* court gave to the important equal protection claim, summarily dismissing it in a passing footnote alluding to "clearly establish[ed]" case law adverse to the claim (see *id.*, p. 1048, fn. 7) which is not referenced anywhere in the opinion and has not been cited by any court since, and apparently does not exist.

ordinance and one is not a homeless person[.]" (*Id.*, p. 1086, bold added.) The two "homeless residents of Santa Ana ... [cannot] find affordable housing. The third plaintiff is a resident of Santa Ana. All are taxpayers." (*Ibid*; and see *id.*, p. 1081 [the *Tobe* plaintiffs are "homeless persons and taxpayers"].)

Unlike the Zuckernick plaintiffs who had been charged with violation of the no-camping ordinance and thus had direct standing to sue, the Tobe plaintiffs had not been charged with a violation of the ordinance and therefore sought standing as taxpayers. The Court agreed the Tobe plaintiffs had standing under section 526a. "In most cases a plaintiff ... must have a sufficient beneficial interest to have standing to prosecute the action[.] ... The requirement that a [plaintiff] be `beneficially interested' has been generally interpreted to mean that ... the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' (Citation.) We need not decide if the Tobe plaintiffs have such a beneficial interest even though two have never been cited under the ordinance and one is not a homeless person, **because as taxpayers they have standing under Code of Civil Procedure section 526a** to restrain illegal expenditure or waste of city funds on *future* enforcement of an unconstitutional ordinance or an impermissible means of enforcement of a facially valid ordinance. (*White v. Davis, supra,* 13 Cal.3d 757, 764.)" (*Tobe, supra*, 9 Cal.4th at 1086, bold added, italics in the original.)

While the Court did not describe the taxes which the Tobe plaintiffs had paid, such taxes obviously did not include real property taxes because the Tobe plaintiffs were said to be "homeless" and unable to find affordable housing. And, logically, those homeless individuals did not own a business

so as to have taxes assessed directly on them as retailers.

C. *Cornelius.*

In 1997, just 1 year after *Tobe* was decided, and, inexplicably, without mentioning that case, the Second District Court of Appeal issued its opinion in *Cornelius, supra,* 49 Cal.App.4th 1761, holding that property tax payment is the *only* tax which satisfies section 526a. Like *Torres* had before it, the *Cornelius* court concluded the language of section 526a, requiring payment or liability for payment of an "assessed" tax, means the tax must be assessed *directly on* the plaintiff who claims standing. Payment of real property taxes qualifies because such taxes are assessed directly on the property owner. Payment of sales tax by a consumer does not qualify under section 526a because, as *Torres* found, such taxes are technically assessed on business owners, not consumers, through the owners customarily pass the tax on to consumer who pay it at the time of purchase. For the same reason, the *Cornelius* court also rejected payment of gasoline tax as grounds for standing under section 526a, as that tax is technically not imposed on consumers, though they indisputably pay it at the pump. (*Id.*, pp. 1776-1778.)

As for income taxes, the appellate court found such taxes are not within the gambit of section 526a, at least for purposes of taxpayer actions against city and county agencies and official. This is so, reasoned the Court of Appeal, because income taxes are paid to the state and generally have very little tangential relationship to the funding of local government, and if payment of income taxes is recognized as grounds for taxpayer standing to sue local agencies and officials, virtually everyone would have standing to do so– "it would be sound public policy to permit the haphazard initiation of lawsuits against local public agencies based only on the payment of state

income taxes." (*Cornelius, supra*, 49 Cal.4th at pp. 1778-1779.)

The *Cornelius* court added that, in its view, taxpayer standing need not and should not be stretched beyond payment of real property taxes because in most instances there will be someone available with direct standing to sue to challenge the government action at issue. The *Cornelius* court acknowledged this view is contrary to the opinion of this Court expressed in *Blair, supra*, 5 Cal.3d at pp. 267-268 (as well *Van Atta, supra,* 27 Cal.3d at pp. 447-448, which the *Cornelius* court did not mention), but said that "once we move beyond the section 526a areas clearly defined by case law such as property owner sues city and state taxpayer sues state official, the prudential limitation on the exercise of federal jurisdiction to hear a constitutional claim– the requirement that the plaintiff has suffered injury as a result of the challenged policy (citation.)– takes on greater significance and should, we believe, be a factor to be considered in determining whether standing under section 526a has been established." (49 Cal.App.4th at pp. 1778-79 and fn. 8.) "Any further extension of the concept of taxpayer standing must come from our state Supreme Court." (*Id*., p. 1779, fn. omitted.)

This Court denied the plaintiff's petition for review and thus did not accept the *Cornelius* court's invitation to take up the case to resolve the issue of taxpayer standing. (See *ibid* at fn. 8.)

D. *<u>Connerly.</u>*

In 2003, more than 15 years after *Cornelius* was decided, the Third District Court of Appeal issued its opinion in *Connerly, supra,* 92 Cal.App. 4th 16, strongly criticizing *Cornelius*' legal reasoning and distinguishing its holding as factually inapposite. (Id., pp. 29-31.) But in so doing the *Connerly* court failed to describe the specific type of taxes which the

plaintiff, Ward Connerly, had paid, referring to him only as a "taxpayer," and did not expressly address *Cornelius*' finding that proof of property tax payment is required by section 526a, and payment of gasoline, sales and income taxes does not suffice.

E. *Santa Barbara County Co.*

In 2008, the Court of Appeal addressed the issue in *Santa Barbara Co., supra,* 167 Cal.App.4th 1229. The Court of Appeal found the plaintiff had taxpayer standing under section 526a because it had sold T-shirts and paid the sales taxes. The appellate court agreed with *Torres* and *Cornelius* that sales tax paid by consumers does not satisfy section 526a because such taxes are imposed on the retailer, not the consumer. The court found the plaintiff had taxpayer standing because it was a T-shirt retailer upon whom sales tax was directly assessed. (*Santa Barbara Co., supra,* 167 Cal.App.4th at p. 1236.)

F. *Reynolds.*

In February 2014 the issue was addressed by the First District Court of Appeal (Div. 5) in *Reynolds, supra*, 223 Cal.App.4th 865. The plaintiff in *Reynolds* brought suit against the City of Calistoga to challenge its water-use and control practices which were allegedly causing harm to those downstream along the Napa River which flows through the City. Reynolds claimed standing to sue the City as a taxpayer under section 526a. He conceded that he did not live or own real property in Calistoga and thus did not pay real property taxes in Napa County. He claimed taxpayer standing based on his payment of sales taxes in Calistoga as a consumer. Citing *Torres*, *Cornelius* and *Santa Barbara Co.*, the Reynolds court rejected the claim because sales tax is technically imposed on the retailer, not the consumer. (*Reynolds, id.*, pp. 871-872.)

G. *Wheatherford.*

The First District Court of Appeal (Div. 1) issued its decision in this case in May 2014. The Court of Appeal agreed with *Torres*, *Cornelius* and *Reynolds* and held that petitioner's payment of income, sales and gasoline taxes does not satisfy section 526a, and therefore petitioner lacks taxpayer standing and her action was properly dismissed in the trial court.

Petitioner now explains why this Court should construe section 526a differently to afford petitioner taxpayer standing.

V.

GOVERNING RULES OF STATUTORY CONSTRUCTION

When interpreting statutory language, such as that found in section 526a, "[the court] begins with the fundamental rule that [its] primary task is to determine the lawmakers intent." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798; accord, *Calif. Teachers Assoc. v. Governing Board of Rialto Unified School District* (1997) 14 Cal.4th 627, 632 (*Calif. Teachers*); *Klein v. United States of America* (2010) 50 Cal.4th 68, 77 (*Klein*).)

As Division 2 the First District Court of Appeal recently explained with reference to the standard of review articulated by this Court: "Courts have established a process of statutory interpretation to determine legislative intent that may involve up to three steps. (Citations.) ... [T]he key to statutory interpretation is applying the rules of statutory construction in their proper sequence. We have explained this three-step sequence as follows: `we first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction." (*Alejo v. Torlakson* (1st Dist., Div. 2, 2013) 212 Cal.App.4th 768, 786-787 (*Alejo*).)

"The first step in the interpretive process looks to the words of the

statute themselves." (*Id.*, p. 787, citing *Delaney, supra*, 50 Cal.3d at p. 798.) "We look first to the words of the statute, because the statutory language is generally the most reliable indicator of legislative intent." (*Klein, supra*, 50 Cal.4th at p. 77.) "Unless the statute specifically defines the words to give them a special meaning, we give the words of the statute 'a plain and commonsense meaning.' (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 577 (*Flannery*).) 'Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction. [Citation.] Nonetheless, a court may determine whether the literal meaning of a statute comports with its purpose. [Citation.] We need not follow the plain meaning of a statute when to do so would "frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results."' (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340 [(CSEA)].) 'Thus, although the words used by the Legislature are the most useful guide to its intent, we do not view the language of the statute in isolation. [Citation.] Rather, we construe the words of the statute in context, keeping in mind the statutory purpose. [Citation.]'[Citation.]" (*Alejo, supra*, 212 Cal.App.4th at p. 787, all parallel citations omitted.)

"If the interpretive question is not resolved in the first step, we proceed to the second step of the inquiry. [Citation.] In this step, courts may `turn to secondary rules of interpretation, such as maxims of construction, "which serve as aids in the sense that they express familiar insights about conventional language usage."' [Citation.] We may also look to the legislative history. (Flannery, supra, 26 Cal.4th at p. 579.) `Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.' (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379,

1387.)" (*Alejo, supra*, 212 Cal.App.4th at p. 787, all parallel citations omitted.)

"`If ambiguity remains after resort to secondary rules of construction and to the statute's legislative history, then we must cautiously take the third and final step in the interpretive process. [Citation.] In this phase of the process, we apply "reason, practicality, and common sense to the language at hand." [Citation.] Where an uncertainty exists, we must consider the consequences that will flow from a particular interpretation. [Citation.] Thus, "[i]n determining what the Legislature intended we are bound to consider not only the words used, but also other matters, `such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy and contemporaneous construction.' [Citations.]" These "other matters" can serve as important guides, because our search for the statute's meaning is not merely an abstract exercise in semantics. To the contrary, courts seek to ascertain the intent of the Legislature for a reason– "to *effectuate the purpose* of the law."' [Citation.]" (*Alejo, supra,* 212 Cal.App.4th 768, 787-788.)

We now apply this standard of review to section 526a.

VI.

IN ORDER TO EFFECTUATE THE INTENT OF SECTION 526a– TO ALLOW A "LARGE BODY" OF THE CITIZENRY TO CHALLENGE UNLAWFUL GOVERNMENT ACTION-- THE STATUTE SHOULD BE READ BROADLY TO APPLY TO ALL FORMS OF TAXES ASSESSED BY STATE AND LOCAL GOVERNMENTS

The words used in section 526a are plain when considered individually, but discerning their overall meaning is made difficult by the

manner in which the words are parsed: a taxpayer action may be maintained against a city or county "by a citizen resident therein, ... who is *assessed* for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein." (§ 526a, italics added.)

The Court of Appeal has read the word "assessed" to limit section 526a to taxes assessed *directly on the taxpayer-plaintiff.* Under that construction of the statute, the Court of Appeal has said that only taxes imposed on real property and business owners qualify under section 526a.[13] (See *Torres, supra,* 13 Cal.App.4th at pp. 1047-1048; *Cornelius, supra*, 49 Cal.App.4th at pp. 1775-1779.) Such a construction, however, defeats the purpose of section 526a which is "to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the [direct] standing requirement." (*Van Atta, supra,* 27 Cal. 3d 424, 447.) As read by the Court of Appeal, section 526a would apply only to the smaller subset of the citizenry which is wealthy enough or otherwise fortunate enough to own real property or a business and pay taxes assessed directly thereon, to the exclusion of all other taxpayers.

To further the intent of the statute the term "taxpayer" should not be restricted to those few taxes which as a matter of law and technical niceties

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Income taxes are also assessed directly on taxpayers, but under the Court of Appeal's construction of section 526, income taxes haves been excluded from the statute's reach for other reasons. (*Cornelius, supra*, 49 Cal.App.4th at pp. 1775-1779.) Telephone taxes are another tax assessed directly on taxpayers, though the phone companies list the tax on customers' monthly statements and collect the tax and pass it on to the government. (*Sipple, supra,* – Cal.App.4th – , 2014 WL 1371796.) The Court of Appeal has not considered whether telephone taxes fall within section 526a. We address these issues later herein.

are assessed *directly on the plaintiff*, such as taxes imposed on real property and businesses. The statute should also reach those taxes which are not assessed directly on the taxpayer-plaintiff but are nonetheless paid by the plaintiff, such as gasoline and sale taxes which are passed on to consumers who pay it at the time of purchase. This construction of the statute is consistent with the dictionary definition of "taxpayer": "one that pays or is liable for a tax" (Merriam-Webster Online Dictionary, www.merriam-webster.com <as of November 22, 2014>); "a person who pays a tax or is subject to taxation." (Dictionary.com <as of November 22, 2014>.)[14] Indeed, because a retailer passes the sales and gasoline taxes on to consumers, who pay it at the time of purchase, then in point of fact the retailer has not paid a tax at all and it is he, not consumers such as petitioner, who Respondents and the Court of Appeal should describe as a "non-taxpayer." It is the consumer who pays the tax, not the retailer who simply collects the tax from the consumer as agent of the Board of Equalization, who is more aptly considered a "taxpayer" and member of the "general citizenry" which section 526a is intended to reach.

The Court of Appeal here rejected this construction of section 526a, finding it strays too far from the literal language of the statute requiring payment, or liability for payment, of an "assessed" tax. But as the First District Court of Appeal recognized in *Chiatello, supra,* 189 Cal.App.4th 472, 482, the Court of Appeal and this Court have repeatedly strayed beyond the literal language of section 526a to further its remedial purpose

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"When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 29 Cal.Rptr.3d 262, 269.)

of enabling "a large body of the citizenry to challenge governmental action[.]" (*Van Atta, supra,* 27 Cal. 3d 424, 447.)

"Notwithstanding the plain language of section 526a identifying the plaintiff as 'a citizen resident,' [the statute] can be invoked by nonresident taxpayers. (*Irwin, supra*, 65 Cal.2d 13, 18-20." (*Chiatello, supra,* 189 Cal.App.4th 472, 482; and see *Blair, supra*, 5 Cal.3d 258, 268, 285 at fn. 19; *Thompson, supra,* – Cal.App.4th –, A137981.) In so construing the statute in *Irwin*, this Court said it was "clear that the bare language of section 526a" would render a non-resident natural person "without legal capacity to maintain [a] ... [taxpayer] lawsuit." (*Irwin, supra*, 65 Cal.3d at 18-19.) However, since the plain language of statute allows non-resident *corporations* to bring suit, the Court concluded the same rule must apply to *natural people* in order to satisfy equal protection guarantees. (*Id.,* p 19.)

As applied here, the same reasoning would counsel the equal application of section 526a to similarly situated taxpayers, such as those who own real property or a retail business and pay taxes assessed directly thereon, and those who do not but do pay sales, gasoline and income taxes as consumers and income earners.

This Court has also "applied section 526a to agencies of the state, even though only local governmental units and officers are named in the statute's text. (*Serrano*[, *supra*,] 5 Cal.3d 584, 618, fn. 38; *Blair, supra*, 5 Cal.3d 258, 268; ....)" (*Chiatello, supra,* 189 Cal.App.4th 472, 482.) In so doing, this Court cited with approval the decision in *Ahlgren v. Carr* (3rd Dist. 1962) 209 Cal.App.2d 248, 252-254, in which the appellate court endorsed the expansive application of section 526a to the State, stating: "'The taxpayers' suit must then be understood as not only a means of vindicating individual rights but as a governmental device to safeguard the

legal restrictions on state and local governments, which, if not subjected to the careful scrutiny of individual taxpayers, might well become dead letters.'" (*Id.*, p. 253, quoting 50 Harvard Law Review 1276, 1283.) It was thus the purpose of section 526a, not its literal language, which dictated its application to the State.

By parity of reasoning, section 526a may properly be construed to apply to petitioner's payment of sales, gasoline and income taxes, even if the literal language of the statute does not so provide, because such a construction furthers the statute's purpose by allowing a large body of the general citizenry to bring suit to challenge unlawful government action.

In addition, while "[s]ection 526a permits a taxpayer action 'to obtain a judgment ... *restraining* and *preventing* any illegal expenditure' of public funds (italics added)[,] [which] ... language clearly encompasses a suit for injunctive relief, taxpayer suits have not been limited to actions for injunctions. Rather, in furtherance of the policy of liberally construing section 526a to foster its remedial purpose, [this Court] ha[s] permitted taxpayer suits for declaratory relief, damages, and mandamus." (*Van Atta, supra,* 27 Cal.3d 424, 449-450, italics in the original, all footnotes and internal citations omitted.) Thus, once more, the purpose of the statute was given preference over its literal language; just as is appropriate here if the actual words used in section 526a would not otherwise reach petitioner's payment of sales, gasoline and income taxes.

Further, though section 526a literally states that a taxpayer action may be maintained by a "citizen" or "corporation," the statute has been read broadly to allow such suits by *representative organizations*, "if that organization represents members who, as individuals, would have standing to personally bring [a] [taxpayer] action." (*Taxpayers for Accountable*

School Bond Spending v. San Diego Unified School Dist. (4th Dist., Div. 1, 2013) 215 Cal.App.4th 1013, 1032-1033, citing *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1st Dist., Div. 1, 1992) 11 Cal.App.4th 1513, 1517.) Here, again, the literal words of section 526a gave way to the furtherance of the statute's purpose, just as they should here.

The statute has similarly been read broadly to provide the Attorney General with taxpayer standing to seek relief "on behalf of [a] [c]ity ... [to remedy] ... government waste, even if the [c]ity does not [itself] meet the standing requirements for a taxpayer action under ... section 526a." (*People ex rel. Harris v. Rizzo* (2nd Dist., Div. 2, 2013) 214 Cal.App.4th 921, 938; and see *id.* at pp. 945-947.) Thus, once more, the statute's purpose prevailed over the statute's literal language, as is also appropriate here.

Against this century-old line of authority liberally construing section 526a to further its remedial purpose, the Court should not interpret section 526a restrictively in accordance with Respondents' and the Court of Appeal's misguided view of the meaning and intent of the statute's plain language. The Court must consider how to best construe the statute to further its purpose– to enable *a large body of the citizenry* to challenge governmental action which might otherwise go unchallenged in the courts because of the direct standing requirement. As has been stated, petitioner's liberal construction of the statute furthers its purpose by affording taxpayer standing to ordinary citizens who pay sales, gasoline and income taxes, but are not wealthy enough to own real property or a retail business and pay taxes assessed directly thereon. Respondents and the *Torres* and *Cornelius* courts' restrictive construction of the statute does just the opposite and would remove a large body of the citizenry from section 526a, leaving only a small subset of taxpayers who are wealthy enough or otherwise fortunate

enough to own real property or a business.

Moreover, the Court of Appeal's overly-restrictive construction of section is at odds with the true nature of real property taxes, which under Proposition 13 are not assessed by cities or counties but by the state. Property taxes are collected by the counties and thereafter passed on to the state to be apportioned to state and local government in accordance with constantly-evolving state laws. (See *California Redevelopment Assn v. Matosantos* (2011) 53 Cal.4th 231, 242-243.) It is thus a misnomer to say, as the Court of Appeal has, that property taxes are paid directly to cities and counties and are used to fund local government and for that reason they satisfy the requirements of section 526a in a taxpayer action such as this brought against a city and county.

Equally true, it is a misnomer to suggest, as the Court of Appeal has, that sales taxes are not used to fund city and county law enforcement efforts and therefore petitioner's payment of sales tax is adequate to confer standing on her under section 526a to challenge respondents' vehicle impound practices. In 2005, San Rafael residents voted to approve local Measure S which imposed a half-cent sales tax to help fund City agencies, including the police department. (*San Rafael sales tax measure generates $6 million for city*, Marin Independent (12/31/07) available at marinij.com/sanrafael/ci_7851046 <as of 11/22/14>.) The police department's expenditures for enforcement of Vehicle Code section 14602.6, at issue here, is therefore directly related to petitioner's payment of sales tax in the City.

Such a nexus undoubtedly also exists with respect to income tax and gasoline and telephone taxes, portions of which invariably wind up in the City and County's budgets and are used in part for law enforcement, be it

by direct allocation, trickle-down budgeting, state and federal grants funded by such taxes, or state and local bonds paid for with such taxes. (See, e.g., *Cornelius, supra*, 49 Cal.App.4th at p. 1778 [noting that the MTA's funding comes in part from gasoline tax and bonds, and state income tax goes into the General Fund which pays the interests on the bonds].)

In the end, no matter their form, all taxes ultimately fund government action at the state and local level. It would necessarily follow, then, that all forms of tax payment satisfy section 526a. This construction of the statute advances its purpose to allow a *large body* of the general citizenry to challenge unlawful government action.

VII.

THE LEGISLATIVE HISTORY OF SECTION 526a WOULD ALLOW THE STATUTE TO REACH ALL FORMS OF TAXES ASSESSED BY STATE AND LOCAL GOVERNMENT

There is scant legislative history for section 526a, which was enacted in 1909 and appears to have been amended just once, in 1967, to add the second sentence of the statute[15]– which is not germane here. There appears to be no legislative history directly on point to guide the Court's consideration of the taxpayer standing issue now before it. However, as just explored, for 105 years the Court has construed section 526a liberally to achieve its remedial purpose– to allow a *large body* of the general citizenry to challenge unlawful government activity. (*Van Atta, supra,* 27 Cal. 3d

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Which states: "This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities."

424, 447.)

Respondents are wrong to suggest that the Legislature could not have intended section 526a to apply to the payment of income, sales, gasoline and telephone taxes because such taxes did not exist when the statute was enacted in 1909– real property taxes were the only tax imposed at that time in this state. If the Legislature had intended to limit section 526a to payment of real property tax, it would have said so expressly. Instead, in enacting section 526a the Legislature employed the generic term "tax," which allows section 526a to apply to *all* forms of taxation– those in existence in 1909 and those subsequently enacted.

If it were otherwise, then *Santa Barbara Co., supra,* 167 Cal.App.4th 1229, 1236, would be wrongly decided, as that case found taxpayer standing for an association which sold T-shirts to advance its cause and paid the sales taxes assessed on the sale of the shirts– a tax which was not in existence when section 526a was enacted in 1909. Having cited and relied on *Santa Barbara Co.* in their appellate briefs and secured the Court of Appeal's approval of *Santa Barbara Co.*, Respondents may not now make the contrary claim that consideration of the legislative history of section 526a reveals it is limited to real property taxes. Indeed, elsewhere in their appellate briefs Respondents correctly claimed that the term "tax" as used in section 526a is not limited to real property taxes but applies broadly to taxes assessed on *all* forms property– "real, personal, and mixed, capable of private ownership." (Rev. & Tax. Code sec. 103.)

If the Legislature intended to restrict taxpayer standing to payment of real property and retail business taxes, it had the opportunity to say so expressly when it amended section 526a in 1967. At that time, numerous decision from this Court had found taxpayer standing, or presumed its

existence, on the part of the plaintiff appearing therein without mention of the specific type of taxes paid– referring to the plaintiffs simply as "taxpayer"– and without suggesting that the specific nature of the tax payment is pertinent to the question of standing under section 526a. (See, e.g., *Lundberg, supra,* 46 Cal.2d 644, 647; *Wirin, supra,* 48 Cal.2d at 891; *C.R. Drake, supra,* 38 Cal.2d 872, 873; *Simpson, supra,* 40 Cal.2d 271, 276.) That the Legislature elected not to impose a contrary rule when amending the statute in 1967 is an indication of the Legislature's acquiescence to the existing rule. (See *Harris v. Capital Growth Investors* (1991) 52 Cal.3d 1142, 1156-1159; *People v. Escobar* (1992) 3 Cal.4th 740, 750-751.)

It was not until 1993, 26 years after the 1967 amendment of section 526a, that the *Torres* court issued the first opinion finding the statute is limited to payment of real property taxes and does not include sales tax paid by a consumer. Two years hence, the *Cornelius* court followed suit and also excluded income and gasoline taxes as grounds for taxpayer standing. The Legislature cannot be said to have acquiesced to these decisions because it has not subsequently amended section 526a (see *Harris, supra,* 52 Cal.3d 1142, 1156-1159; *People v. Escobar, supra,* 3 Cal.4th 740, 750-751), and because in the intervening period between *Torres* and *Cornelius* this Court issued its opinion in *Tobe, supra*, 9 Cal.4th at 1081-1086, affording taxpayer standing to 2 homeless plaintiffs who plainly did not own real property or a retail business and who standing was necessarily based on payment of some other form of tax. The Legislature would rightly presume this Court establishes the law of this state and therefore *Tobe* controls. The Legislature would accordingly find no need to amend section 526a in response to *Torres* and *Cornelius*, particularly because the

Cornelius court inexplicably failed to mention *Tobe* and thus did not announce that it was departing from this Court's holding on the issue of taxpayer standing.

Certainly, nothing the Legislature has said or done rules out the liberal construction of the taxpayer standing statute which petitioner has advanced.

VIII.

INCOME TAXES ARE ASSESSED DIRECTLY ON PETITIONER AND HER PAYMENT OF THOSE TAXES SHOULD AFFORD HER STANDING UNDER SECTION 526a

While the Court of Appeal has said that the plain language of section 526a controls and dictates the conclusion that taxpayer standing is available only for those who have paid, or are liable to pay, a tax assessed *directly on them*, the Court of Appeal has broken its own rule and refused to extend taxpayer standing based on payment of income taxes which are assessed *directly on* taxpayers. (*Cornelius, supra*, 49 Cal.App.4th at 1776-1779.) *Cornelius* relied primarily on 3 factors in holding that payment of income taxes is insufficient for taxpayer standing under section 526a. The Court should reject each of those factors and conclude that payment of income tax qualifies one for taxpayer standing under section 526a.

A. This Court has never required proof of a tangential relationship between the specific taxes paid by the taxpayer-plaintiff, on the one hand, and the funding used to pay for the challenged government action, on the other.

Cornelius found taxpayer standing based on payment of state income taxes is properly denied where there is only a "tangential relationship between the taxes paid and the policy contested" by the taxpayer-plaintiff. (49 Cal.App.4th at 1778.) *Cornelius* cited no authority for this finding,

because there is none. This Court has never suggested that section 526a requires proof of a nexus between the specific taxes paid by the plaintiff and the funding used to pay for the challenged government action, nor has any other appellate court suggested such a rule is appropriate. To the contrary, this Court has said that taxpayer standing under section 526a lies even if the challenged government action is <u>not</u> funded by taxes and is instead derived from such things as "the operation of a public utility or from gas revenues"[16] (*Blair, supra,* 5 Cal.3d at 268), and even if the challenged government action results in a *savings* of taxpayer funds because the revenue generated from the action exceeds expenditures to pay for it. (*Blair, supra,* 5 Cal.3d 258, 267-270, 285-286 and fn. 21.)

The *Blair* plaintiffs' payment of real property taxes, which this Court found adequate to support taxpayer standing under section 526a, bore no apparent nexus to the funding for the claim and delivery laws which the plaintiff's successfully challenged as unconstitutional. To the contrary, the governmental defendants in *Blair* said the fees imposed by local agencies on those invoking the claim and delivery laws provided *more* revenue than was needed to fund the enforcement of those laws. This Court did not disagree but nonetheless found that section 526a applied because its purpose is to remedy unlawful government action, not effect an overall savings of taxpayer funds. (*Ibid.*)

Similarly, in *Tobe, supra*, 9 Cal.4th at 1081-1086, the Court found taxpayer standing on the part of the plaintiffs– to of whom were homeless

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It is on this passage from *Blair* that petitioner has relied to assert her payment of water and sewage fees as an additional basis for taxpayer standing.

and thus did not pay real property taxes– without an analysis of the relationship between the specific taxes paid by the plaintiffs (whatever taxes they may have been– the opinion does not say) and the funding for Santa Ana's enforcement of the no-camping ordinance which the *Tobe* plaintiffs were found to have taxpayer standing to challenge.

The same is true in every other taxpayer standing case decided by this Court since section 526a was enacted in 1909. (See, e.g., cases cited at pages 24-29, *ante*.) Respondents have not yet cited and petitioner's counsel has not located a single case which lends support to *Cornelius'* requirement of a direct relationship between the taxes paid by the plaintiff and funding for the challenged government action.

Without saying so, it appears the *Cornelius* court erroneously applied rules applicable to taxpayer actions in *federal* court, wherein "a plaintiff must allege a direct injury caused by the expenditure of tax dollars; the pleadings of a valid taxpayer suit must 'set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity.'" (*Cantrell v. City of Long Beach* (9th Cir. 2001) 241 F.3d 674, 683, internal citations omitted.) But as been noted, this Court has expressly held that the restrictive federal rules of standing do not apply to taxpayer actions under section 526a brought in *state* court. (See *id.*, pp. 682-683, citing, among others, *Blair, supra*, 5 Cal.3d 258, 268; and see *Connerly, supra,* 92 Cal.App.4th 16, 29-31.)

B. This Court has not expressed concern that recognition of state income tax payment as grounds for standing under section 526a would result in "haphazard" initiation of taxpayer lawsuits against cities and counties.

The *Cornelius* court found that a "haphazard initiation" of taxpayer lawsuits against city and county agencies by non-residents would ensue if

payment of income taxes is recognized as grounds for taxpayer standing in actions against cities and counties. (*Cornelius, supra*, 49 Cal.4th at pp. 1778-1779.) For this finding the *Cornelius* court cited no authority, because, once again, there is none.

This Court has never expressed or implied that taxpayer standing should be curtailed in actions against local government agencies and officials. To the contrary, the Court has consistently interpreted and applied section 526a broadly to permit such actions to proceed so that ordinary citizens may challenge government action which might otherwise go unchallenged as a result of the direct standing requirement. (*Blair, supra,* 5 Cal.3d 258, 267-270, 285-286 and fn. 21.)

The so-called "haphazard" litigation against of cities and counties by taxpayers who do *not* reside therein, which *Cornelius* concluded should be avoided, is expressly authorized by this Court's decision in *Irwin, supra,* 65 Cal.2d 13, 18-20, where, based on equal protection principles, the court found that natural persons must be permitted to bring suit against cities and counties in which they do not reside, just as corporations are permitted to do under section 526a. The *Cornelius* court was not at liberty to question the wisdom of the this Court's jurisprudence or to depart from it.

Morever, petitioner *is* a resident of the City of San Rafael and County of Marin against which this action is brought. Petitioner is not a mere interloper who visited the City and County and paid a nominal tax of some kind and now seeks to litigate without a personal interest in local affairs. Petitioner lives in San Rafael and pays a substantial amount in income taxes (as well as sales, gasoline and telephone taxes) which are ultimately used in part to fund both state and local government. Petitioner is precisely the type of taxpayer for whom section 526a is intended– a *local*

resident taxpayer who seeks to challenge unlawful *local* government action.

C. **This Court has expressly rejected the notion that taxpayer standing may be defeated by the availability of directly aggrieved individuals who have standing to bring suit on their own.**

As its third and final reason for rejecting income tax payment as grounds for taxpayer standing under section 526a, the *Cornelius* court found there was no need to confer taxpayer standing on the plaintiff in that case who had *not* been subjected to the challenged affirmative action program implemented by the State, because "there is no reason to believe that a party who fulfills the case law requirement of actual injury cannot come forward to challenge the program." (*Cornelius, supra,* 49 Cal.App.4th at 1779.) As discussed earlier herein, this Court has expressly rejected the view that taxpayer standing may be defeated by the presence of individuals with direct standing to sue to challenge the subject to government action. (*Blair, supra,* 5 Cal.3d 258, 267-268; *Van Atta, supra,* 27 Cal.3d 424, 448-449 ["This court reaffirms that taxpayers may maintain an action under section 526a to challenge an illegal expenditure of funds even though persons directly affected by the expenditure also have standing to sue."]; accord, *Cornblum, supra,* 110 Cal.App.3d 976, 980-981; *Mendoza, supra*, 128 Cal.App.3d 403, 415; *Connerly, supra,* 92 Cal.App.4th 16, 29-31.)

Most recently, *Van Atta* was applied by the Sixth District Court of Appeal in *County of Santa Clara v. Sup. Ct.* (6th Dist. 2009) 171 Cal.App.4th 119. There, the taxpayer plaintiffs brought suit under section 526a to challenge the governmental defendants' noncompliance with the California Public Records Act. The Court of Appeal found the plaintiffs had taxpayer standing, notwithstanding that individuals who had been denied access to public records could bring suit on their own. (*Id.*, at 129.)

As a matter of law, under *Blair* and *Van Atta*, if a taxpayer has standing under section 526a, such standing is not defeated by the fact that other individuals with direct standing to sue may bring suit on their own to challenge the subject government action. *Cornelius* was wrong to conclude otherwise. (See, e.g., *Thompson, supra,* – Cal.App.4th –, A137981 [plaintiff had taxpayer standing to sue the City of Petaluma over its vehicle impoundment practices though the plaintiff had not suffered impoundment]; *Samples v. Brown, supra*, 146 Cal.App.4th 787 [same as to lawsuit against County of Sonoma and State of California]; *O'Connell, supra,* 41 Cal.4th 1061 [same with respect to action against City of Stcokton challenging its vehicle forfeiture ordinance].)

E. Payment of income tax satisfies section 526a.

The *Cornelius* court did not reference anything in section 526a's language, legislative history or purpose which supports the policy assessments which the *Cornelius* court made when it decided that payment of income taxes does not satisfy section 526a despite that income taxes are "assessed" *directly on* taxpayers just the same as taxes imposed on real property and business owners. (See 49 Cal.App.4th at 1778-79.) The *Cornelius* court thus improperly *made* the law, rather than interpreting it. (See *Johnathan L. v. Sup. Ct.* (2008) 165 Cal.App.4th 1074, 1083.)

As this Court has made clear over the years, the wisdom of legislative policy decisions is not for the court to decide when construing and applying a statute. The court's job is to ascertain legislative intent. (*Calif. Tchrs. Assn., supra*, 14 Cal.4th at 632-633; *People v. Daniels* (1969) 72 Cal.2d 1119, 1128; *People v. Knowles* (1950) 35 Cal.2d 175, 182-183 [whether the arrangement of words in a statute "was wisdom or folly, it was wittingly undertaken and not to be disregarded [by the courts]. [¶] ...

[C]ourt[s] [are] not at liberty to seek hidden meanings not suggested by the statute or by the available extrinsic aids."].) The Court should disapprove *Cornelius* and find that section 526a is satisfied by payment, or liability for payment, of income taxes (if not also sales, gasoline and telephone taxes).

IX.

TELEPHONE TAXES ARE ASSESSED DIRECTLY ON PETITIONER AND HER PAYMENT OF THOSE TAXES SHOULD AFFORD HER STANDING UNDER SECTION 526a

In *Dane*, *supra*, First Dist., Div. 2, A138355 [non pub. opinion], review granted and case held pending finality of this case, S221341, the League of California Cities and California State Association of Counties filed an amicus brief supporting the position of the defendants and respondents in that case, the City of Santa Rosa and County of Sonoma– which mirrors exactly the position take by respondents in this case. Attempting to defeat the plaintiff's wealth-based discrimination claim, amicus argued that poor and middle-class taxpayers have ample means to secure taxpayer standing through payment of only a nominal tax assessed *directly on them* as *Cornelius* and *Torres* require. Amicus referenced a number of types of taxes which it claimed would fit the bill, and telephone taxes would be among them.

Telephone taxes are assessed directly on consumers. However, because those taxes are quite small, the cities and counties which impose them require the telephone companies to collect the tax by listing it on their bills. The funds so collected are later passed on to the cities and counties which assessed the tax. (See *Sipple, supra,* – Cal.App.4th – , 2014 WL 1371796.) As telephone taxes are technically assessed *directly on* consumers, not the telephone companies, it necessarily follows that

payment, or liability for payment, or telephone taxes satisfies section 526a under the reasoning of *Torres*, *Cornelius*, *Santa Barbara Co.* and *Reyonolds*. If, as those courts found, sales and gasoline taxes do not satisfy section 526a because those taxes are technically imposed on retail business owners, not consumers, even though consumers pay the tax at the time of purchase, then, *a fortiori*, telephone taxes must satisfy section 526a because they are assessed directly on consumers and paid by consumers– the telephone company is simply the middle-man who collects the tax and forwards it on to the government.

It is not the province of the Court of Appeal to rewrite the statute to limit its reach to certain taxes "assessed" on the taxpayer-plaintiff, such as real property and business taxes, to the exclusion of other taxes equally "assessed" on the taxpayer-plaintiff but which the Court of Appeal believes are not deserving of recognition under section 526a, such as income and telephone taxes. The Court should find that an "assessed" tax under section 526a includes telephone taxes, as well as income taxes (if not also sales and gasoline taxes).

X.

THE OVERLY-RESTRICTIVE CONSTRUCTION OF SECTION 526a ADVANCED BY RESPONDENTS AND ACCEPTED BY THE COURT OF APPEAL CONSTITUTES WEALTH-BASED DISCRIMINATION IN VIOLATION OF DUE PROCESS AND EQUAL PROTECTION GUARANTEES

The construction given section 526a by respondents and the Court of Appeal constitutes wealth-based discrimination in violation of due process and equal protection guarantees. It is a "familiar rule of construction that statutes should be interpreted in a manner which avoids constitutional

difficulties." (*Hutnick v. United States Fidelity and Guaranty Co.* (1988) 47 Cal.3d 456, 466; accord, *BC Cotton, Inc. v. Voss* (3rd Dist. 1995) 33 Cal.App.4th 929, 950.)

Reading section 526a to require payment of real property or business taxes would in effect impose on the petitioning process a "poll tax" of sorts, affording broad taxpayer standing under section 526a only to those citizens who are wealthy enough or otherwise fortunate enough to own their own home or business and pay taxes imposed thereon. (Cf. *Harper v. Virginia Bd. of Elections* (1966) 383 U.S. 663, 668 [16 L.Ed.2d 169, 173, 86 S.Ct. 1079] [invalidating the Virginia poll tax, the court stated: "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."].) Such wealth-based classifications are subject to strict scrutiny and raise significant constitutional concerns. (See, e.g., *Serrano v. Priest, supra,* 5 Cal.3d 584 [finding California's wealth-based system for funding public school was unconstitutional].) If, as this Court found in *Serrano*, as a matter of constitutional law a California resident's "address may not determine the weight to which his ballot is entitled" or "the quality of his child's education" (*id.*, at p. 613), surely the fact that he rents rather than owns the property found at that address should not determine his right as a taxpayer under section 526a to petition the court for relief from illegal government action.

"A [judicial] system priding itself on *'equal* justice under law' does not flower when [standing to bring a civil] action is determined by a [plaintiff's] wealth. The inevitable consequence of such a result is to create and perpetuate two rules of law– one applicable to wealthy [plaintiffs], and another standard pertaining to [plaintiffs] who are poor or who have modest

means." (See *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 618 (Richardson, J., diss., joined by Clark, J., and Manual, J.).) To borrow from the words of former Chief Justice Bird, offered in the analogous context of the impermissible imposition of fees on public school students who cannot afford to pay them: "[T]o permit wealth-based inequalities in [the judicial system]– one of few institutions with the potential to bring rich and poor together on a nonhierarchical basis– would be to disrupt the role of [the courts] in promoting social cohesion [and justice]." (See *Hartzell v. Connell* (1984) 35 Cal.3d 899, 924, 927 (Bird, C.J., conc. in her own lead opn.).)

Further support for this conclusion is found in such venerable cases as *Boddie v. Connecticut* (1971) 401 U.S. 371 [28 L.Ed.2d 113, 91 S.Ct. 780] [denial of divorce based on petitioner's inability to pay the required filing fee classifies based on wealth and is unconstitutional], *Earl v. Sup. Ct.* (1978) 6 Cal.3d 109 [same, citing *Boddie* and various California Supreme Court cases of a similar vein], *Harper v. Virginia State Bd. of Elections, supra*, 383 U.S. 663, 666-668 [flat fee, imposed as a precondition of voting, classifies on the basis of wealth and is unconstitutional], *Griffin v. Illinois, supra,* 351 U.S. 12 [states may not deny adequate appellate review to the poor while granting such review to all others. Indigent criminal defendants are entitled to a free reporter's transcript and other trial court records necessary for full and fair appellate review], and *Douglas v. California* (1963) 372 U.S. 353 [same as to appointment of counsel on appeal], and a lesser-known case from the First District Court of Appeal (Div. 4), *Gebert v. Patterson, supra,* 186 Cal.App.3d 868 [equal protection and due process guarantees were violated by the City of San Francisco in imposing a $500 fee for publication of a ballot argument and refusing to waive the fee for those without means to pay it].)

In *Gebert v. Patterson, supra,* 186 Cal.App.3d 868, 876, the First District Court of Appeal found unconstitutional a San Francisco ordinance which required the proponent of a ballot argument to pay a fee before it is published, and afforded no relief from the requirement to those who could not afford to pay the fee. The *Gebert* court looked to the California Supreme Court's decision in *Knoll v. Davidson* (1974) 12 Cal.3d 335, in which the high court struck down an analogous fee clause in the Election Code. The clause required a candidate for office to pay a fee to have his "statement of qualifications" printed in the voter handbook, a necessary prerequisite to be on the ballot and a viable candidate for office. The plaintiff was indigent and unable to pay the fee, so he was denied the opportunity to run for office. Our Supreme Court held: "It is impermissible for the state or local agency involved to deny this opportunity solely on the basis of wealth, thereby giving an unfair advantage to the affluent and invidiously discriminating against those unable to afford the substantial fees ...." (*Id.*, 12 Cal.3d at p. 352.) The *Gerbert* court said *Knoll v. Davidson* "makes clear" the equal protection clause mandates that access to the ballot– be it as a candidate or a proponent or opponent of an initiative measure– "not be conditioned upon wealth." (*Gebert, supra,* 186 Cal.App.3d 868, 876.) "By permitting individuals to submit ballot arguments for publication in the voter's information pamphlet, the City and County of San Francisco has created a forum for the exercise of political expression. But [the] San Francisco [ordinance] limits admission to this forum to those who pay $500. By doing so, the ordinance denies equal access to a political arena as guaranteed by the equal protection clause of the Fourteenth Amendment, [and] also impedes free expression as guaranteed by the First Amendment." (*Ibid.*)

Granted, these and other cases like them generally apply to extremely poor folk who cannot afford to pay relatively small fees of $10-$500 as a condition of exercising a constitutional right, and petitioner is not poor in that sense. But when viewed against the out-of-control real estate market in California, particularly the Bay Area where petitioner resides, petitioner is very "poor" as are millions of other Californians like her who work hard and pay taxes but cannot afford to buy real property in this state. If section 526a requires proof of payment of real property taxes or business taxes, the Legislature will have effectively excluded the vast majority of poor and middle-class taxpayers from the broad standing available under the statute. Equal protection and due process guarantees would thereby be violated, compelling the Court to strike down the wealth-based classification as unconstitutional.

This constitutional claim was summarily rejected by the 4th District Court of Appeal in *Torres, supra*, 13 Cal.App.4th 1035, which stated in passing in its final footnote: "Plaintiffs also claim that denying standing to them under sections 863 and 526a violates their constitutional right to equal protection of the law. The argument is without merit. The case law clearly establishes plaintiffs are not similarly situated with others determined to have standing under these circumstances." (*Id.*, p. 1048 at fn. 7.) But as earlier explored, the *Torres* court did not cite any case law to support its summary conclusion, no such case law has since been referenced by the Court of Appeal in its other decisions on the issue of taxpayer standing, and petitioner's counsel has located no authority which can remotely be described as "clearly establish[ed]" case law holding that taxpayers who do not pay real property taxes are not similarly situated to those that do for purposes of equal protection analysis.

Petitioner is similarly situated to other taxpayers who pay all of the same taxes as petitioner does (income, sales, gasoline, and telephone taxes), but also pay property taxes or taxes imposed on them as owner of a business. (See, e.g., *People v. Holfsheier* (2006) 37 Cal.4th 1185, 39 Cal.Rptr.3d 821, 829-830 [explaining how to determine who is "similarly situated" and finding that, though the crimes are different, "persons convicted of oral copulation with minors and persons convicted of sexual intercourse with minors 'are sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment.'"]; *Irwin, supra,* 65 Cal.2d 13, 18-19 [under section 526a individual taxpayers are similarly situated to corporate taxpayers and there is no rational basis for disparate treatment of the two. Therefore each must be afforded taxpayer standing on the same basis, notwithstanding contrary language in section 526a]; *Serrano v. Priest, supra*, 5 Cal.3d at 615 [students in wealthy and poor areas are similarly situated for equal protection purposes and a funding mechanism which allocates greater resources to schools in wealthier areas is unconstitutional].)

The question, then, is whether the government can "bear[ ] the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (*Serrano v. Priest, supra*, 5 Cal.3d at 597; accord, *People v. Olivas* (1976) 17 Cal.3d 236, 243-244.) The Court should answer that question in the negative for all of the reasons presented herein. A petitioning process which grants taxpayer standing to the most wealthy, to the exclusion of almost all of the poor and middle-class, would plainly be unconstitutional as devoid of a compelling state interest and wholly

unnecessary to further the purpose of section 526a to afford *broad* standing to *a large body* of the *general* citizenry to bring action to challenge illegal government conduct.

It is true that California is not required by the Federal or State Constitution to provide taxpayer standing under section 526a under rules which are far removed from the normally-applicable requirement of proof of direct injury to the plaintiff. But that is not to say that having granted such standing under section 526a, the State can do so in a way that discriminates against some taxpayers on account of their lack of wealth and corresponding lack of real property ownership and payment of real property taxes. As we have seen from the preceding discussion, taxpayer standing has now become an integral part of the California civil justice system, forming the basis for countless cases and published appellate opinions on subjects of all kinds.[17] Consequently in civil proceeding such as this, the federal and state Due Process and Equal Protection Clauses protect persons like plaintiff from invidious discrimination based on wealth. (See *Griffin v. Illinois, supra*, 351 U.S. at 18 [so holding in the context of free trial

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Section 526a also allows challenges to perceived inadequacies in the *penal* justice system. (See, e.g., *Van Atta, supra*, 27 Cal.3d 424 [taxpayer action challenging pretrial release and detention system]; *White v. Davis, supra*, 13 Cal.3d 575 [warrantless on-campus police surveillance]; *Tobe, supra*, 9 Cal.4th 1069 [ordinance making it a criminal offense to camp without a permit]; and see *Ames v. City of Hermosa Beach* (2nd Dist., Div. 4, 1971) 16 Cal.App.3d 146, 150-151 ["We have been cited to no authority, nor have we found anywhere a distinction drawn for the purpose of [taxpayer standing] between penal and nonpenal statutes. (Citation.) Indeed, it would strain the plain meaning of [section 526a] to construe it so that an expenditure to enforce an unconstitutional penal statute was not similarly 'illegal' [and thus subject to remedy by an injunction]."].)

transcripts for indigent defendants in criminal appeals].) "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (*Ibid*; accord, *Douglas v. California, supra*, 372 U.S. at 355 [so stating in the context of free counsel on appeal for indigent criminal defendants].) "The State is not free to produce such a squalid discrimination. If it has a general policy of allowing [taxpayer standing], it cannot make lack of means an effective bar to the exercise of this opportunity." (See *Griffin v. Illinois, supra*, 351 U.S. at p. 24 (Frankfurter, J., conc.).)

Along the same lines, equal protection guarantees prohibit a construction of section 526a which grants taxpayer standing to a retail business owners against whom sales and gasoline taxes are directly assessed (see *Santa Barbara Co., supra,* 167 Cal.App.4th 1229, 1236), but denies taxpayer standing to a consumer such as petitioner who actually pays those taxes at time of purchase, as passed on to them by the retailer. (See *Cornelius, supra,* 49 Cal.App.4th 1761; *Torres, supra,* 13 Cal.App.4th 1035.) Such a result is entirely arbitrary and devoid of any rational justification. (See, gen., *Irwin, supra,* 65 Cal.2d 13, 18-20 [finding no rational basis for treating corporate taxpayers differently from natural persons under section 526a].) Indeed, in such circumstances, by any reasonable measure, the consumer is the "taxpayer," while the retail business owner is simply the tax **collector**– a mere agent of the Board of Equalization.

In response to these arguments the Court of Appeal in this case said there is no equal protection violation to be found here because some rich people do not own real property, having elected to rent, and some poor people do own real property because they purchased it some time ago when

real estate was cheaper or they inherited it on the death of a family member. The obvious fallacy in the appellate court's reasoning is that far more people who are wealthy own real property and retail businesses than do members of the poor and middle-class; and petitioner and millions of other taxpayers like her are not among the few members of the poor and middle class who, despite their lack of wealth, are somehow fortunate enough to own real property or a retail business. The end result is a wealth-based classification which excludes petitioner and others citizens like her from taxpayer standing under section 526a on the sole basis of their limited economic status– because they are *too poor* to own real property or a retail business on which taxes are directly assessed.

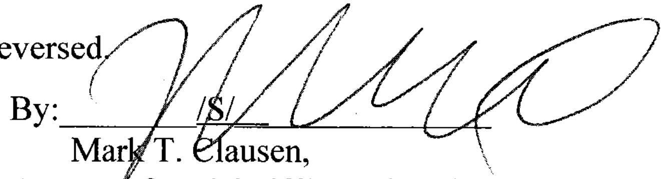
In addressing a similar assertion by the government of content-neutrality in reference to a parade ordinance, the Ninth Circuit Court of Appeal reasoned that "however neutral the government's intentions in enacting a law, the operation of that law may have a vastly uneven impact. There is no equality in a law prohibiting both rich and poor from sleeping under the bridges of Paris; there is no equality in a law prohibiting anonymous pamphleteering by both popular and unpopular groups, [citation]...." (*N.A.A.C.P., Western Region v. City of Richmond* (9th Cir.1984) 743 F.2d 1346, 1356.) The First District Court of Appeal echoed that sentiment in *Gebert v. Patterson, supra,* 186 Cal.App.3d 868, 876, and it is equally applicable here. There is no equality been rich and poor in a construction of section 526a which limits it reach to citizens who own real property or a business and are generally among the wealthiest Californians, to the exclusion of those who do own real property or a business and are generally far less wealthy and less fortunate than their counter-parts, though each pays their fair share of taxes.

Home prices in California have been outrageously high for at least 30 years. The Court of Appeal did not explain how petitioner might have afforded to buy a home decades ago considering that she is just 38 years old today. Petitioner's mother owns a home and perhaps one day it will pass to petitioner. But it is insulting and callous for the Court of Appeal to tell petitioner in effect that she should look forward to the day her mother dies and leaves her a home so that she may finally be afforded taxpayer standing on equal footing with more wealthy taxpayers.

California is a diverse state, joining people from all walks of life, and all income brackets. It is not in keeping with Californian's inclusive spirit and the California Constitution's due process and equal protection guarantees to exclude the vast majority of the poor and middle-class from taxpayer standing under section 526a. The Court should interpret the statute in way that avoids constitutional difficulties by extending its reach to petitioner and other taxpayers like her who are not wealthy enough or otherwise fortunate enough to own a home or business and pay taxes assessed thereon, but do pay other forms of taxes used to fund state and local government, such as income, sales, gasoline and telephone taxes.

CONCLUSION

For the reasons stated the Court should find that petitioner has taxpayer standing under section 526a and the decision of the Court of Appeal must therefore be reversed.



Date: November 24, 2014 By: /S/

Mark T. Clausen,
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I, Mark T. Clausen, do hereby certify that the word count for this brief is 18,719 words as determined by WordPerfect software. All margins are set at 1.5 inches and line spacing is set at 1.5, with the exception of blocked text. A motion to file excess word brief will be filed separately.

/S/
Mark T. Clausen

PROOF OF SERVICE

I, Mark T. Clausen, do hereby declare:

I am over the age of 18 and not a party to the above-entitled action. My business address is 769 Carr Avenue, Santa Rosa, California, 95404. On the date indicated below true copies of the attached document (Petitioner's Opening Brief)– were placed in a sealed envelope, postage prepaid, and deposited in the United States Mail, address as follows:

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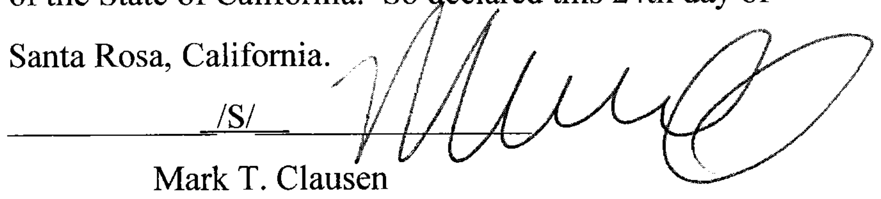
(BY HAND DELIVERY)

Plaintiff/Appellant/Petitioner

ACLU of Northern California (BY EMAIL ONLY) — Courtesy Copy

I declare that the foregoing is true and correct under penalty of perjury of the laws of the State of California. So declared this 24th day of November 2014 in Santa Rosa, California.



_/S/_

Mark T. Clausen