S234148

SUPREME COURT OF CALIFORNIA

CALIFORNIA CANNABIS COALITION, ET AL.

Plaintiffs and Respondents,

v.

CITY OF UPLAND, ET AL.

Defendants and Petitioners.

Superior Court, San Bernardino County (Case No. CIVDS1503985)
Court of Appeal, Fourth District, Division 2 (Case No. E063664)

OPENING BRIEF ON THE MERITS

Jonathan M. Coupal, SBN 107815
Trevor A. Grimm, SBN 34258
Timothy A. Bittle, SBN 112300
Brittany A. Sitzer, SBN 304313
Howard Jarvis Taxpayers Foundation
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
Telephone: (916) 444-9950
Facsimile: (916) 444-9823

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

California Constitution

California Elections Code

California Government Code

California Rules of Court

ISSUES PRESENTED

Review was granted without an order specifying the issues to be briefed. Therefore, under CRC Rule 8.520(b), the issues presented are those stated in the Petition for Review and in the Answer, as follows:

1. Can the proponents of a new tax evade constitutional prerequisites by introducing the tax as an initiative rather than as a resolution of the governing body? (Petition for Review at 1.)

2. Is the proposed $75,000.00 annual "Licensing and Inspection Fee" a tax or a fee? (Answer at 18.)

3. Should the issue of tax versus fee be resolved prior to the election or after the election? (Answer at 24.)

RULE 8.204(a)(2) STATEMENT

A. Nature of the Action

This case was brought against defendant City of Upland ("City") by plaintiff California Cannabis Coalition, the proponent of a medical marijuana initiative ("Proponent"). The complaint challenged the City Council's decision to place Proponent's initiative on the City's next general election ballot pursuant to article 13C, section 2 of the California Constitution, even though, under the Elections Code, the initiative had garnered enough signatures for a special election.

B. Relief Sought in the Trial Court

Proponent sought a writ of mandate directing the City to call a special

election. The City countered that the initiative proposes a new general tax which, under article 13C, section 2, must be presented at a general election for City Council candidates. Proponent rejoined that the levy is a fee, not a tax, and even if it were a tax, taxes proposed by initiative are not subject to article 13C.

C. Orders Below

The trial court denied the writ, agreeing with the City that the initiative proposes a new general tax and that the constitution's specific election date requirement preempts the generally applicable statute in the Elections Code.

The Court of Appeal reversed. It accepted the trial court's finding that the proposed levy is a tax, but agreed with Proponent that taxes proposed by initiative are not subject to article 13C.

The City sought rehearing, which the Court of Appeal denied. The City then decided to cut its losses and accept defeat. But the appellate decision was so bad for taxpayers that the Howard Jarvis Taxpayers Foundation offered to take over the case pro bono. This Court has now granted review.

SUMMARY OF FACTS

The facts recited below are taken directly from the decision of the Court of Appeal since they are undisputed.

A. The Initiative

Plaintiff/Respondent California Cannabis Coalition ("Proponent") drafted and sponsored a proposed medical marijuana initiative. The key provisions would repeal an existing Upland city ordinance that bans medical

marijuana dispensaries, permit and establish standards for the operation of such dispensaries within the City, and require each dispensary to pay the City an annual "Licensing and Inspection Fee" of $75,000.

The initiative requested a special election. The signatures of at least 15% of registered voters are required to qualify any initiative for a special election. (Elec. Code § 9214.) The County Registrar counted the signatures and certified that Proponent's initiative had reached 15%. The City Council accepted the Registrar's certificate of sufficiency and ordered an Agency Report.

B. The Agency Report

The Agency Report concluded the initiative's $75,000 annual "Licensing and Inspection Fee" would exceed the estimated actual costs the City would incur from issuing a license for a medical marijuana dispensary and conducting annual inspections of the dispensary. The Report estimated the actual annual costs would total a little over $15,000. Because the $75,000 fee would exceed the City's anticipated costs, the Report found that the fee, to the extent of the excess, constituted a proposed tax.[1] The Report labeled the tax a "general tax" because the initiative did not specify how the excess revenue

---

[1] Cal. Const., art. 13C, § 1(e) ("'tax' means any levy, charge, or exaction of any kind imposed by a local government, except the following: ... (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits ... [provided] the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity").

should be spent.[2]

C. The Council Resolution

After receiving the Agency Report, the City Council adopted Resolution No. 6267, finding the initiative's $75,000 fee is actually a proposed general tax to the extent it exceeds the City's estimated actual licensing and inspection costs. Under article 13C, section 2, of the California Constitution, a proposed general tax "shall be consolidated with a regularly scheduled general election for members of the governing body of the local government." (Cal. Const., art. 13C, § 2(b).) Resolution No. 6267 therefore provided notice and direction for submitting the initiative to the voters at the next general election for city council members, *i.e.*, November 8, 2016.

D. The Lawsuit

Proponent filed a petition for writ of mandate in Superior Court, alleging that the initiative qualified for a special election under Elections Code section 9214, and the City's failure to call a special election therefore violated the Elections Code statute. Proponent also argued that the Elections Code statute is not preempted by the constitution's article 13C, section 2 (requiring general taxes to be presented at a general election for city council candidates) because the tax proposed by the initiative is not subject to article 13C, section 2, in that the tax would not be "imposed by a local government." Proponent prayed for a writ of mandate compelling the City Council and City Clerk to place the initiative on a special election ballot in compliance with Elections

---

[2] Cal. Const., art. 13C, § 1(a) ("'General tax' means any tax imposed for general governmental purposes").

Code section 9214.

The trial court sided with the City. Without separately addressing whether article 13C, section 2 applies to initiatives that propose a tax, the trial court denied Proponent's writ petition, finding that the $75,000 annual levy qualified as a tax and therefore the initiative was required to be placed on the next general election ballot.

E. The Decision of the Court of Appeal

The Court of Appeal reversed. The opinion is lengthy because it includes a lot of background and rebuttal. But the specific section addressing whether article 13C, section 2, applies to Proponent's initiative is short and contains little analysis. It states, "Article 13C, section 1(e) defines a tax as 'any levy, charge, or exaction of any kind *imposed by a local government*,' subject to seven specified exceptions. Article 13C, section 1(e) does not expressly include fees imposed by initiative. Because Article 13C is silent in this regard, we decline to construe Article 13C as applying to taxes imposed by initiative." (Slip Op., attached as Exhibit A, at 19 (citations omitted, emphasis in orig.))

The Court of Appeal did not limit its decision to the proper election date, nor could it logically do so. Rather, the Court ruled broadly that taxes "imposed by initiative" are exempt from the rules otherwise applicable to local government. Sometimes the opinion describes this as an exemption from "Article 13C, section 2" and sometimes as an exemption from all of "Article 13C." (*E.g.*, Slip Op. at 18 ("Article 13C, section 2 does not apply to the Initiative."); *id.* at 19 ("we decline to construe Article 13C as applying to taxes imposed by initiative."))

In either case, section 2 is the section of the constitution that requires voter approval of new taxes, including majority voter approval of general taxes and two-thirds voter approval of special taxes.

If section 2 does not apply to initiatives, then any proponent of a new tax–even the City Council–can circumvent the taxpayers' constitutional right to vote on the tax simply by proposing it in the form of an initiative.

ARGUMENT

I

THE CONSTITUTION'S TAXPAYER PROTECTIONS APPLY TO ALL NEW TAXES, INCLUDING THOSE PROPOSED BY INITIATIVE

It is important to note at the onset that this is not a case pitting the people's right of initiative against a resistant local government. Rather, this case pits two initiatives against each other: Proponent's local marijuana initiative, which requested a special election, versus Proposition 218, the statewide initiative that added article 13C to the California Constitution. The City in this case was only trying to obey Proposition 218's requirement that local general taxes be submitted to voters at a general election for members of the governing body. (Cal. Const., art. 13C, § 2.)

Applying familiar presumptions and rules of construction, it will be shown that the City's reading of article 13C, section 2 was correct. Article 13C, section 2 applies to all new taxes whether proposed by the governing body or by initiative. Although it will be shown that the wording of the constitutional text is unambiguous, even if one looks beyond the linguistics and considers the underlying purpose of the election date requirement, it still applies to all new taxes whether proposed by the governing body or by

initiative. Proponent's contrary interpretation, accepted by the Court of Appeal, confuses "imposed" with "proposed," misapprehends California's power-sharing arrangement between voters and government, and would lead to irreparable mischief.

A. Article 13C, § 2 Applies to Initiatives

Article 13C, section 2(b) provides as follows:

> "No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body." (Cal. Const., art. 13C, § 2(b).)

No one would dispute that a local governing body proposing a new general tax is required by this section to submit the tax for voter approval at a regularly scheduled general election for members of the governing body. The question is whether this section also applies to general taxes that are proposed by initiative.

The analysis begins with a well settled presumption that statutory and constitutional limits on the power of local government apply equally to local initiatives. The people's right to legislate by initiative is "generally

co-extensive with the legislative power of the local governing body." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775.) This principle of co-extensive power cuts both ways. For example, it is presumed that powers delegated by the State to local governments may be exercised by local voters. "When the Legislature enacts a statute pertaining to local government, it does so against the background of the electorate's right of local initiative, and the procedures it prescribes for the local governing body are presumed to parallel, rather than prohibit, the initiative process, absent clear indications to the contrary." (*DeVita*, 9 Cal.4th at 786.)

Similarly, it is presumed that *limits* on the power of government apply to both the governing body and the voters. For example, "[a] statutory initiative is subject to the same state and federal constitutional limitations as are the Legislature and the statutes which it enacts." (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674.) So too for local initiatives:

> "Thus, if the state Legislature has restricted the legislative power of a local governing body, that restriction applies equally to the local electorate's power of initiative. For example, in *deBottari v. City Council* (1985) 171 Cal.App.3d 1204 [etc.], we noted that Government Code section 65860 'prohibits enactment of a zoning ordinance that is not consistent with the general plan.' (*deBottari*, at p. 1210 [etc.].) We concluded that a local referendum which, if passed, would have caused a city's zoning ordinances to be inconsistent with the city's general plan, was invalid. (*Id.* at pp. 1210-1212 [etc.].) If the rule were otherwise, the voters of a city, county, or special district could essentially exempt themselves from statewide statutes." (*Mission Springs*

Water Dist. v. Verjil, (2013) 218 Cal.App.4th 892, 921 (holding that a statute requiring the board of directors to set rates at an amount sufficient to cover costs applied equally to the voters' ratesetting initiative).)

In sum, because the power of local voters to legislate by initiative is generally co-extensive with the legislative power of the local governing body, state law limitations applicable to the local governing body are presumed applicable to the voters "absent clear indications to the contrary." (*DeVita*, 9 Cal.4th at 786.)

In the case at bar, the Court of Appeal held that state law procedures governing the election date and voter approval of new taxes apply *only* to the governing body; they do *not* apply equally to the voters. But according to this Court in *DeVita*, to reach that conclusion the Court of Appeal needed "clear indications" that the applicable state law was not intended to apply to voters. The Court of Appeal, however, identified only one indicator: silence. It said that article 13C "does not expressly include fees imposed by initiative. Because Article 13C is silent in this regard, we decline to construe Article 13C as applying to taxes imposed by initiative." (Slip Op. at 19.)

The City submits that silence is not a "clear indication" one way or the other. The City also submits, however, that article 13C is *not* silent, but in fact contains a "clear indication" that it was intended to apply to all taxes, whether proposed by voter initiative or by resolution of the governing body.

To overcome the presumption of co-extensive authority and co-extensive limitations on that authority, courts look at the applicable statutory or constitutional language to determine whether there is an intent to exclude

voter initiatives. Under well-settled rules of construction, one of the "paramount factors" is the terminology employed when referring to the entity. General terms such as "local government" or "public agency" are extremely weak indicators of intent to exclude voter initiatives. In the middle of the scale, terms such as "legislative body" or "governing body" are stronger. The strongest indicator of an intent to exclude voter initiatives is specific terminology such as "city council" or "board of supervisors." (*DeVita*, 9 Cal.4th at 776; *Totten v. Ventura County Bd. of Supervisors* (2006) 139 Cal.App.4th 826, 834.)

This judicially created rule of construction interprets the term "local government" as clearly *including* the electorate, "city council" as clearly *excluding* the electorate, and "governing body" as *possibly* excluding the electorate depending on the circumstances. The rule is aided in this case by codified definitions. Article 13C itself defines "local government" broadly and generally without any reference to specific elected or representative bodies. It simply says, "'Local government' means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity." (Cal. Const., art. 13C, § 1(b).) While article 13C does not contain its own definition of "governing body," the Legislature has supplied one. The "Proposition 218 Omnibus Implementation Act" is contained within Part 1 of Division 2 of Title 5 of the Government Code, under the heading "Powers and Duties Common to Cities, Counties, and Other Agencies." In the definitions section of that part, there is a definition of "governing body" as follows: "'Governing body' means the board of supervisors in the case of a county or a city and county, the city council or board of trustees in the case of a city, and the board of directors or other

governing body in the case of a special district." (Gov. Code § 53232(a).)

Here, article 13C, section 2 uses two different terms in the very paragraph that is the focus of this case, illuminating the voters' intent – contrary to the holding of the Court of Appeal – that taxpayer protections should apply equally to all proposed taxes, regardless of who proposes them. It states:

> "No ***local government*** may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. ... The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the ***governing body of the local government***, except in cases of emergency declared by a unanimous vote of the ***governing body***." (Cal. Const., art. 13C, § 2(b).)[3]

The specific reference to "the *governing body* of the local government" stands in contrast to the more inclusive term "local government," inferring that "local government" *includes* the electorate acting by initiative. Thus, all "local government" taxes, whether proposed by a voter initiative or a resolution of the governing body, must receive majority voter approval at a regularly scheduled candidate election. Only the "governing body" can, by a unanimous declaration of emergency, propose a tax at a special election.

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

---

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

gravely erred, and its ruling should be reversed.

B. Proponent's Theory Confuses "Impose" with "Propose"

The Court of Appeal based its ruling on Proponent's theory that "[t]axation imposed by initiative is not taxation imposed by local government." (Slip Op. at 25.) Apparently unmindful of the cases cited above which hold that "local government" includes the electorate legislating by initiative, the Court of Appeal found all of article 13C inapplicable to the electorate because, by its own terms, it applies only to taxes "imposed by local government." (*Id.* at 3, 18, 19.)

The Court erred, not only because "local government" includes the electorate, but also because in each case the language in article 13C uses the word "impose," not "propose." They are not the same. While a distinction can be drawn between the two methods of *proposing* a tax; that is, a tax can be proposed by the City Council via resolution or it can be proposed by the voters via initiative, it is impossible to draw a distinction between taxes "*imposed* by local government" and taxes "*imposed* by voters." It is impossible because, under California's constitutional plan, local government cannot impose taxes without voter approval – which means that *all taxes* are imposed by the voters. Similarly, when voters act via initiative they are acting as legislators of the local government, so *all taxes*, even taxes proposed by initiative, are taxes of the local government.

1. Every local tax is "imposed by voters" upon themselves.

Article 13C, section 2, provides, "No local government may impose, extend, or increase any general tax *unless and until* that tax is submitted to the

electorate and approved by a majority vote." In other words, the tax is not enacted "unless and until" the voters approve it. That was the express holding of this Court in *Santa Clara County Local Transportation Authority v. Guardino*:

> "[T]he sections prescribing the voter approval requirements of the measure declare that no local entity may 'impose' a general or special tax 'unless and until' the tax is 'submitted to ... and approved by' the required proportion of the electorate. *It is apparent that if a tax is not deemed 'imposed'– which in this context means enacted – 'unless and until' it is 'approved' by the voters, the approval is a precondition to such enactment.* Without that approval, the measure will not take effect – in other words, will not become law." (*Santa Clara County Local Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 240 (citations omitted).)

Since no local taxes can be "imposed – which in this context means enacted" under California's constitutional plan "unless and until" they are approved by the local voters, it is clear that *all local taxes*, whether *proposed* by Council resolution or voter initiative, are "imposed" by the voters upon themselves. The Court of Appeal erred in purporting to draw a distinction between taxes "imposed" by voters and taxes "imposed" by local government.

2. Initiatives are legislation of the local government.

Another reason it is impossible to draw a distinction between taxes "imposed by voters" and taxes "imposed by local government" is that voters acting by initiative are exercising the same legislative power exercised by

elected officials, and are adding to the same body of law. Ordinances enacted by initiative become part of the local Municipal Code just as if they were passed by elected officials. That is because the voters are acting *as legislators of the local government.*

Division 9, Chapter 3, article 1 of the Elections Code, which governs initiatives proposed by city voters, begins with this statement: "Ordinances may be enacted *by and for* any incorporated city pursuant to this article." (Elec. Code § 9200.) In other words, when city voters pass an initiative, it is an ordinance "enacted *by* [the] city."

As this Court stated in *Perry v. Brown*, the initiative power reserved by the voters is "the authority to *directly* propose and adopt" statutes and ordinances. (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1140 (emphasis in orig.).) Voters acting by initiative are exercising "legislative authority." (*Id.*, 52 Cal.4th at 1156.) *Widders v. Furchtenicht* held likewise: "The initiative process 'is not a public opinion poll. It is a method of enacting legislation.'" (*Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 782.)

Thus, the Court of Appeal's attempt to distinguish between taxes "imposed by voters" and taxes "imposed by local government" sets up a false dichotomy. Taxes imposed by local voters *are* taxes imposed by local government. And vice versa.

3. ***Taxes collected by government are imposed by it.***

Either of the above two reasons is sufficient to defeat Proponent's theory that taxes imposed by initiative are not imposed by local government. But there is even a third reason. This Court in *Howard Jarvis Taxpayers Assn.*

v. City of La Habra held that taxes *collected* by government are "imposed" by government. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 823-24.) The Court of Appeal here, in holding that taxes imposed by initiative are not taxes imposed by local government, must have realized it was creating an apparent conflict with this Court's decision in *La Habra*, for it spent three pages trying to distinguish that case. But the conflict remains.

La Habra involved a utility tax that was being collected by the City of La Habra despite having never been approved by voters. The voter approval requirement applicable to La Habra's utility tax was found in Proposition 62, the statutory predecessor to Proposition 218 which added article 13C to the constitution. Like article 13C today, Proposition 62 provided: "No local government ... may impose any general tax unless and until such general tax is ... approved by a majority vote of the voters." (Gov. Code § 53723.)

Taxpayers sued to invalidate the tax, but the City demurred on the theory that a three-year statute of limitations applied and more than three years had elapsed since the City first "imposed" the tax. (*La Habra*, 25 Cal.4th at 813.) This Court, however, ruled that every monthly collection of the tax constituted an "imposition" of the tax without voter approval.

> "[T]he City appears to contend that Proposition 62 can be violated only at the time a tax ordinance is first enacted because, in the City's view, all Proposition 62 prohibits is 'imposition' of a tax without voter approval, and imposition is limited to the time of initial enactment. *Both premises are faulty.* ... Clearly the intent of Proposition 62's enactors was not merely to preclude enactment of a tax ordinance without voter approval,

> but to preclude *continued imposition or collection* of such a tax as well." (*La Habra*, 25 Cal.4th at 823-24.)

As a statute of limitations case, *La Habra* had no occasion to discuss lawmaking by initiative. Nevertheless, *La Habra* reveals an additional flaw in the Court of Appeal's attempted distinction between taxes "imposed by the voters" and taxes "imposed by the local government." For if taxes are imposed every time the tax is collected, then it is irrelevant whether the tax was originally proposed by a resolution of the City Council or by voter initiative. Beginning with its first collection by the city, and with every collection thereafter, the tax is "imposed by the local government."

Schmeer v. County of Los Angeles is similar. In determining whether a grocery bag charge was "imposed by local government" for purposes of article 13C, the *Schmeer* court held that the dispositive question was, "who gets to collect and keep the money?" The court ruled that the charge in that case, which was collected and kept by grocers, was not a tax because "[t]he term 'tax' in ordinary usage refers to a compulsory payment made to the government or remitted to the government." (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1326.) Similar to *La Habra*, then, *Schmeer* would hold that a tax collected and kept by the city is "imposed by local government."

For these three reasons, then, there is no merit to Proponent's theory, adopted by the Court of Appeal, that taxes imposed by the voters are not "imposed by local government." First, *every* local tax is imposed by the voters upon themselves since new taxes are not enacted "unless and until" they receive voter approval. Second, when voters act via initiative they are acting

as legislators of the local government and are enacting legislation of the local government. Third, "imposition" is not limited to enactment; a tax is "imposed" by the government when it is collected and kept by the government. Finally, as explained in Part A above, the wording of article 13C, section 2(b) itself differentiates between the inclusive term "local government" and the exclusive term "governing body," revealing the voters' intent that it apply to all taxes, whether proposed by the governing body or by initiative.

C. Proponent's Interpretation Invites Mischief

The Court of Appeal accepted Proponent's reading of the term "local government" to mean the elected governing body of the local government. The Court also accepted Proponent's reading of the term "impose" as synonymous with "propose." Since the phrase "imposed by local government" appears throughout article 13C, section 2, the Court ruled that taxes imposed by initiative are exempt from all of article 13C, section 2. It could not logically limit its decision to just the election date for Proponent's initiative. Having accepted Proponent's translation of these terms, the Court was forced to rule that taxes imposed by initiative are free from all of the rules otherwise applicable to local government in article 13C, section 2. (*E.g.*, Slip Op. at 18 ("Article 13C, section 2 does not apply to the Initiative."); *id.* at 19 ("we decline to construe Article 13C as applying to taxes imposed by initiative."))

Article 13C, section 2 includes not only the election date requirement, but also the general requirement of voter approval as a condition of new taxes, including majority voter approval of general taxes and two-thirds voter approval of special taxes. Proponent's theory that initiative taxes are exempt from Section 2, if affirmed by this Court, would create a loophole making it

easy for any public agency to impose a new tax, or increase an existing tax, with no fear that the voters will turn it down – because the voters would never get to vote on the tax.

Here's how the loophole would work. Imagine you're a City Council and, to repay your public employee unions for their campaign support, you want to accept their contract proposal for a raise in employee salaries. To fund it, you want to increase the utility tax paid by city residents. So you call a meeting of the unions and they agree to mobilize city employees to collect signatures on an initiative proposing the tax increase. The employees will pitch the measure as the "Green Parks and Clean Water Initiative" since all city departments will benefit, including Parks and Water. Once all city employees sign the initiative and collect enough additional signatures to reach a mere ten percent of the City's registered voters (Elec. Code § 9215), the initiative can be turned in to the Registrar of Voters for verification. Then, as soon as the Registrar verifies the signatures, you the City Council can act on the initiative. Elections Code section 9215 provides:

> [T]he legislative body shall do one of the following:
> (a) Adopt the ordinance, without alteration [or]
> (b) Submit the ordinance, without alteration, to the voters.

By choosing Option (a), you the City Council can adopt the tax increase yourselves, in lieu of holding an election. Even though the California Constitution requires an election, that requirement does not apply to taxes proposed by initiative, if one accepts Proponent's theory.

Proponent's theory is unsound and would kill the constitutional right of California taxpayers to vote on new taxes. This Court should rule, therefore,

that the taxpayer protections contained in article 13C, section 2 apply to all new taxes, including those proposed by initiative.

D. The Purpose of Proposition 218's Election Date Is Served Here

The specific taxpayer protection at issue here is Proposition 218's requirement that general tax proposals appear on the ballot at a General Election for candidates seeking a seat on the local governing board. (Cal. Const., art. 13C, § 2.) There are three reasons for this General Election requirement. First, it forces an incumbent seeking reelection to face the voters on the same ballot as any tax proposal he or she may have supported. Second, it permits voters to ask all candidates where they stand on any tax measure (regardless of who proposed it) so that voters can intelligently cast their vote for like-minded candidates. Third, it prevents so-called "stealth elections" on tax proposals. Stealth elections are single-measure special elections held on an atypical date, often as a mail-ballot-only election, which consequently don't attract a lot of public attention. The special interest group behind the election can dominate voter turn-out by mobilizing its members and supporters.

The latter two of the above three reasons apply to Proponent's initiative. This election date controversy, then, is more than just an academic question. In fact, the City argued below that one of its main concerns (besides complying with the law and avoiding the high cost of a special election) is that the initiative should "be voted on by a more representative group of electors at a general election." (Respondent's Brief on Appeal at 26-28.)

///

II

THE $75,000 ANNUAL LEVY PROPOSED BY THE INITIATIVE IN THIS CASE IS NOT FULLY A "FEE," BUT IS IN PART A "TAX"

Proponent designated, as an additional issue for review, the question of whether its proposed $75,000 annual levy on marijuana dispensaries is a tax or a fee. (Answer at 18.) The parties' dispute on this issue was purely a factual one, and the trial judge, as the fact finder, found in the City's favor.

As the Court of Appeal recited, "the trial court denied [Proponent's] writ petition and motion, finding that the $75,000 fee imposed by the Initiative qualified as a tax and therefore the Initiative was required to be placed on the next general election ballot." (Slip Op. at 10.) The Court of Appeal did not disturb the trial court's finding. Instead, it adopted Proponent's alternative theory that, even assuming the levy is a tax, taxes proposed by initiative are not subject to the taxpayer protections contained in the state constitution.

This Court should not disturb the trial court's finding either. The purpose of the $75,000 annual levy was a question that hinged entirely on a factual dispute between the parties as to the City's actual and estimated costs to license and inspect a marijuana dispensary.

The parties agreed on the law; they disagreed only on the facts. In the Memorandum of Points and Authorities that Proponent filed in the trial court to support its motion for issuance of a peremptory writ of mandate, Proponent quoted the definition of a tax contained in article 13C, section 1(e) of the California Constitution, along with the exceptions it believed might apply:

"As used in this article, 'tax' means any levy, charge, or

exaction of any kind imposed by a local government, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof." (Clerk's Transcript ("CT"), vol. 1 at 41:7.)

Proponent then framed the issue before the trial court as follows:

"The $75,000 payment is not imposed upon anybody other than the medical marijuana dispensary and it clearly *does not exceed the reasonable cost to local government* of conferring the benefit of operating as a medical marijuana dispensary in Upland. The benefit conferred by the City of Upland would not be conferred upon anyone other than the medical marijuana dispensaries. The fee again *does not exceed the reasonable cost*

> *to local government* of conferring the benefit of operating as a medical marijuana dispensary in Upland. It is expensive for a city to regulate medical marijuana dispensaries. Substantial law enforcement personnel would have to be assigned the task of inspecting and regulating and surveilling the medical marijuana dispensaries." (CT, vol. 1 at 42:17.)

Thus, the issue before the trial court, in Proponent's words, was a factual one – whether the $75,000 annual levy would "exceed the reasonable cost to local government of conferring the benefit of operating as a medical marijuana dispensary in Upland" (*i.e.*, licensing) and "inspecting and regulating and surveilling the medical marijuana dispensaries."

The City agreed. In its Opposition, the City quoted the exact same excerpt of article 13C, section 1(e), and drew the same conclusion as Proponent: "Thus, two *questions of fact* are plainly implicated in each exception above: The first is *what will be the cost to the local government* for conferring a benefit or privilege (subdivision (e)(1)), providing a service or product (subdivision (e)(2)), or for issuing licenses and permits and performing administrative enforcement work (subdivision (e)(3)). The second is whether the amount is reasonable based on actual costs." (CT, vol. 1 at 75:10.)

The parties' dispute was over the amount of the City's costs. Both sides introduced evidence in the record regarding the City's actual and estimated costs. At the hearing, the trial judge framed the "tax versus fee" issue as a factual inquiry: "Mr. Diamond, what is the evidence that this $75,000 is a reasonable estimate of what this would cost the City?" (Reporter's Transcript

("RT") at 7:19.) Mr. Diamond, the attorney for Proponent, responded by attacking the City's evidence as a pretext serving a political objective. The Judge interrupted to draw the argument back to the factual dispute: "Let me interrupt you for a second. The City has some evidence of what this will cost. Now, you may argue that that evidence is not credible. But my question to you is different. What is *your* evidence that it will cost 75,000?" (RT at 8:17.) Mr. Diamond outlined Proponent's evidence, dollar by dollar. The Judge commented that it did not add up to $75,000. Mr. Diamond answered, "That is correct." (RT at 10:9.)

At the conclusion of the hearing, the Judge ruled that the $75,000 levy exceeded a reasonable estimate of the City's costs to license and regulate a medical marijuana dispensary, commenting that Proponent's evidence was inadequate and, in any event, the City's evidence was more persuasive: "[E]ven if I do assign the burden of proof to the City, I think it is in a better position to determine how much it's going to cost to regulate this industry and these facilities. I appreciate what [Proponent is] saying about how the City may have a motivation to downplay that, but I found its analysis to be persuasive. I look at the analysis of [Proponent's] CPA, and it just doesn't get to $75,000, however you cut it. So I think that this is a tax. It is not a fee. And it needs to go on the ballot in the general election in November." (RT at 27:9.)

The Judge did not err by looking beyond the "fee" label given to the levy in Proponent's initiative. "The determination of whether the actual purpose of an ordinance is regulatory or revenue-raising in nature is a *question of fact.* In its determination, the court will look to the substantive provisions of the ordinance and not merely its title and form." (*United Bus. Com. v. City*

of San Diego (1979) 91 Cal.App.3d 156, 165; *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1422.)

"When a court's finding is attacked on the ground that it is not supported by the evidence, the power of an appellate court begins and ends with the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding or verdict. Questions of credibility must be resolved in favor of the fact finder's determination, and when two or more inferences can reasonably be drawn from the evidence, a reviewing court may not substitute its deductions for those of the trier of fact." (*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 62; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)

Here, the trial court had before it the Agency Report which contained an analysis detailing the City's reasonably foreseeable costs to license, inspect and regulate medical marijuana dispensaries. (CT at 115; 196; 198-99; 206-07; 213-14.) The Report provides substantial evidence to support the trial court's finding of fact that the $75,000 levy would exceed the City's costs and therefore contains an embedded tax. That finding should not be disturbed by this Court.

III

IN THIS CASE, THE TAX VERSUS FEE QUESTION WAS PROPERLY RESOLVED BEFORE THE ELECTION

Finally, Proponents designated as an additional issue for review the question of pre- and post-election challenges to voter initiatives: should a resolution of the "tax versus fee" question have been postponed until after the election? (Answer at 24.)

The City agrees that recent cases have caused confusion in this area and that guidance from this Court would be welcome. The City will lay out below its understanding of the law, and explain why in this case, the tax versus fee question was properly resolved before the election.

A. The Legislature Established Procedures Protecting Initiatives

In reserving their right to make and repeal laws by initiative, the people entrusted the Legislature with the task of establishing the procedures by which initiatives would be proposed and processed: "The Legislature shall provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors." (Cal. Const., art. 2, § 10(e).)

In carrying out its mandate, the Legislature demonstrated concern that the people's right of initiative not be handicapped by delay. It set short deadlines for public officials to act. (*E.g.*, Elec. Code § 9203 (15 days for City Attorney to prepare title and summary), § 9308 (30 days for Registrar to verify signatures), §§ 9212, 9215 (within 40 days of Registrar's certification City Council must set an election date).) It provided that approved initiatives take effect promptly, unlike the Legislature's own acts, which are delayed until the first of the year. (*E.g.*, Elec. Code §§ 9217, 9320 (initiatives take effect 10 days after vote certified).) The Legislature also placed strict limits on the type and timing of lawsuits seeking to keep an initiative off the ballot. (*E.g.*, Elec. Code §§ 9295, 9380 (must petition for writ or injunction within 10-day public examination period, and conclude suit before ballots go to print).)

It is apparent from these statutes that the Legislature has established an exclusive, expedited process for presenting initiatives to the voters. A City Attorney could not decide, for example, to take 60 days instead of 15 days to

prepare an initiative's title and summary. A City Council could not decide to study a proposed initiative for 90 days instead of 40 days before calling an election. In the same way, the Legislature established an exclusive, expedited right of action for litigating pre-election challenges to prevent litigation from impeding the election on a voter initiative.

B. Agencies Have a Duty to Adopt Initiatives or Call an Election

When presented with the Registrar's certification that an initiative has qualified for the ballot, the governing body has a ministerial duty:

> "the legislative body *shall* do either of the following:
>
> (a) Adopt the ordinance, without alteration, at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented.
>
> (b) Submit the ordinance, without alteration, to the voters ...." (Elec. Code § 9215.)

"A city's duty to adopt a qualified voter-sponsored initiative, or place it on the ballot, is ministerial and mandatory." (*Native American Sacred Site and Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, 966.) Upon receiving the Registrar's certification of sufficiency, an agency has "a clear legal duty to call a special election within [the time set by statute]." (*Goodenough v. Superior Court* (1971) 18 Cal.App.3d 692, 696.) When an agency unilaterally refuses to place an initiative on the ballot based on its own finding of invalidity, it unlawfully purports to "exercise adjudicative powers" (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 136) and thus "usurps the

judicial power in this respect." (*Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1021 & n.4.) The authority of governing bodies and election officials "is limited to the ministerial function of ascertaining whether the procedural requirements for submitting an initiative measure have been met. It is not [their] function to determine whether a proposed initiative will be valid if enacted or whether a proposed declaration of policy is one to which the initiative may apply. These questions may involve difficult legal issues that *only a court* can determine. The right to propose initiative measures cannot properly be impeded by a decision of a ministerial officer, even if supported by the advice of the city attorney, that the subject is not appropriate for submission to the voters." (*Farley v. Healey* (1967) 67 Cal.2d 325, 327.)

C. After Calling an Election, a Writ May Be Sought in Limited Cases

Once the agency carries out its ministerial duty of placing the qualified initiative on the ballot, there is an exclusive, expedited procedure for challenging whether it belongs on that ballot, or on any ballot. The Registrar makes a copy of the proposed initiative available for public examination "for a period of 10 calendar days immediately following the filing deadline for submission of those materials." (Elec. Code § 9295(a).) Then, during the 10-day public examination period, "any voter of the jurisdiction" (*e.g.*, a Council member, the City Clerk, the City Manager, the City Attorney, a proponent of the initiative, or any voter) "or the elections official, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the materials to be amended or deleted." (Elec. Code § 9295(b)(1).)

The writ procedure authorized by this section is designed for prompt

resolution, so that opponents of an initiative cannot, by simply filing a lawsuit with alarming claims, prevent the initiative from appearing on the ballot for which it qualified. First, the action must be commenced "no later than the end of the 10-calendar-day public examination period." (*Id.*) Then, an expedited briefing and hearing schedule must allow the court to rule quickly enough to not "interfere with the printing or distribution of official election materials as provided by law." (Elec. Code § 9295(b)(2).) "The action or appeal shall have priority over all other civil matters." (Elec. Code § 13314(a)(3).)

D. A Pre-Election Writ Will Issue Only for "Jurisdictional" Defects

Given the haste with which a pre-election writ petition must be litigated, and the strong public policy against obstructing or delaying the people's right of initiative, this Court has limited the *types* of claims that may be presented in a pre-election challenge.

The Court has often warned litigants and lower courts that it is "more appropriate to review constitutional and other challenges to ballot propositions or initiative measures *after* an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise." (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 1005; *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1029; *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4.)

The only time pre-election review is appropriate is when "[t]he question raised is, in a sense, jurisdictional." (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 696.) That is, the suit contends that some *pre-election procedure* necessary for ballot placement is unsatisfied or being violated (*e.g., Costa v. Superior Court*, 37 Cal.4th at 1006) or that the initiative is *beyond the*

scope of local legislation because, for example, it is preempted by state or federal law, or is not legislative in character. (*e.g., Independent Energy Producers*, 38 Cal.4th at 1029.)

When the challenge claims that "the *substantive* provisions of the measure are unconstitutional" it must wait until *after* the election to be filed. (*Independent Energy Producers*, 38 Cal.4th at 1029; *American Federation of Labor*, 36 Cal.3d at 695; *Brosnahan v. Eu*, 31 Cal.3d at 4.)

This Court has thus streamlined pre-election review, limiting it to just questions of a "jurisdictional" nature that can be decided quickly before the ballots must go to print. These holdings implicitly recognize that the Legislature has enacted an exclusive, expedited procedure for handling initiatives, one that respects and balances both the challenger's right to petition for redress and the electorate's right to vote on an initiative at the election for which it qualified. These cases also comport with the doctrine of judicial restraint, "that a court not adjudicate an issue until it is clearly required to do so. If the measure passes, there will be ample time to rule on its validity. If it fails, judicial action will not be required." (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 666.)

E. Despite These Statutes and Cases, Abuse Occurs

Despite the efforts of the Legislature and this Court to require prompt action by public agencies and to limit pre-election litigation, an unfortunate line of cases has grown up in the Courts of Appeal approving a tactic by some public agencies whereby they disobey their duty to either adopt the initiative or place it on the ballot, and they instead withhold the initiative from the ballot. This enables them to ignore the Elections Code requirement that

initiative challenges be brought as writ petitions and be concluded before the ballots are printed. Since the initiative was not placed on the ballot, the public agency has all the time in the world. It can bring a leisurely action for declaratory relief against the proponents and run them out of money while the delay kills their initiative. Or, worse yet, the agency can simply do nothing and wait to see if the proponents have the savvy and resources to bring their own lawsuit.

The seminal decision in this line of cases was *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, a case where bad facts truly made bad law. An initiative was presented to the Riverside City Council which would have denied public funds for AIDS programs and patients, and required divestiture from any organization that condones homosexuality. (1 Cal.App.4th at 1019-20.) The City Council should have followed the Elections Code by first placing the initiative on the ballot, then petitioning the court for a writ removing the initiative. Had it followed the Elections Code, the City would have achieved the desired result since the initiative, being in conflict with state law, was beyond the power of local voters to enact. (1 Cal.App.4th at 1023, fn.5.) Instead, the Council simply refused to call an election, then waited to see if the proponents would sue. When they did sue, the Court of Appeal approved the Council's tactic, justifying it as follows: "Where a court is faced with deciding a difficult issue of validity within a few days, it may be prudent to resolve doubtful cases in favor of submitting an initiative to the electorate but we have already expressed our discomfort with the attempt to insist that complex constitutional issues be resolved posthaste." (1 Cal.App.4th at 1022.)

Other cases that have followed *Citizens*' lead include *Mission Springs*

Water District v. Verjil (2013) 218 Cal.App.4th 892, 918-19, and *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 780.

F. The Tax v. Fee Issue Was Appropriate for Pre-election Review

The case at bar is not one of the abusive cases described above. This case was commenced not by the City in an attempt to block the initiative, but by the initiative proponent itself to challenge the election date set by the City when the City carried out its ministerial duty to place the initiative on the ballot. Proponent sought a writ of mandate compelling the City to call a special election for the initiative to be held at an earlier date. Proponent cited a procedural requirement in the Elections Code (section 9214) which it contended was being violated because the initiative had been placed on the wrong ballot.

This is the type of claim that is appropriate for pre-election review because it alleges noncompliance with a *pre-election procedure* and prays for a remedy (an earlier election date) that can be granted *only* before the election. It's like the admonition of a wedding officiant to "speak now or forever hold your peace." Proponent's complaint (that voters should decide the measure on a different date) must be made before the voters decide the measure, because once they have decided the measure it is too late to change the election date.

Although pre-election claims should usually involve pure questions of law, it is sometimes necessary (as here) to make a factual determination in order to answer the legal question. If it can be done speedily so that the case does not interfere with the printing and distribution of ballots (Elec. Code § 9295), while at the same time protecting each party's right to present and rebut evidence, then it may properly proceed as a pre-election case.

Here Proponent, as the plaintiff, alleged in its Complaint that the legal question (proper election date) hinged on a factual dispute between the parties, and laid out their competing factual contentions: "The paragraph quoted above [containing the $75,000 levy] is not a tax. It is neither a general tax nor special tax. [¶] The City of Upland and its City Clerk erroneously contend that this particular section ... renders the measure a general tax and therefore precludes it from being considered at a special election, but rather must only be considered at a general election on November 8, 2016." (CT at 13:15.)

Proponent's Complaint also alleged that the evidence necessary to resolve this factual dispute was fully contained in the administrative record. (CT at 16:7.) At the hearing, the trial judge asked Proponent's counsel, Mr. Diamond, if the court had all of the evidence it needed to decide the case:

> THE COURT: "Mr. Diamond has now stated that all of the evidence that he needs is before the Court, produced by the respondent. I've got all that. And if that's correct, then I just want to confirm that both sides agree this matter can be resolved on the merits today by virtue of this motion. Mr. Diamond, you got all the evidence you need before the Court?"
>
> MR. DIAMOND: "Yes, your Honor." (RT at 3:23.)

In sum, then, this case was brought as a writ petition, it alleged noncompliance with a pre-election procedure, and sought a remedy (an earlier election date) that could be granted only before the election. It presented a question of law (the proper election date) which, although it hinged on a disputed fact (the City's costs to license and regulate dispensaries) could be resolved promptly without a trial because all of the evidence was already in the

record. Therefore this was an appropriate matter for pre-election review.

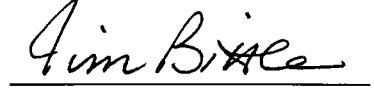
CONCLUSION

The first question presented is whether the proponents of a new tax can evade constitutional prerequisites by introducing the tax as an initiative rather than as a resolution of the governing body, and the answer is no. The second question is whether the $75,000 annual levy includes a tax, and the answer is yes. The last question is whether the issue of tax versus fee was properly considered prior to the election, and the answer is yes. For these reasons, the decision of the Court of Appeal should be reversed.

DATED: July 28, 2016.

Respectfully submitted,

JONATHAN M. COUPAL
TREVOR A. GRIMM
TIMOTHY A. BITTLE
BRITTANY A. SITZER

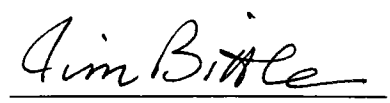


TIMOTHY A. BITTLE
Counsel for Petitioners

WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that this brief, including footnotes, but excluding the caption page, tables, signatures, and this certification, as measured by the word count of the computer program used to prepare this pleading, contains 8,878 words.

DATED: July 28, 2016.



TIMOTHY A. BITTLE
Counsel for Petitioners

PROOF OF SERVICE

SUPREME COURT OF CALIFORNIA

I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is: 921 11th Street, Suite 1201, Sacramento, California, 95814. On July 29, 2016, I served the attached document described as: **OPENING BRIEF ON THE MERITS** on the interested parties below, using the following means:

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

Roger Jon Diamond, Esq.
2115 Main Street
Santa Monica, CA 90405
(Attorney for California Cannabis Coalition, Nicole De La Rosa, and James Velez)

Hon. David Cohn, Dept. S37
San Bernardino Superior Court
247 West Third Street, Second Floor
San Bernardino, CA 92415
(Trial Court Case Number: CIVDS1503985)

Krista MacNevin Jee
Jones & Mayer
3777 North Harbor Boulevard
Fullerton, CA 92835

California Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501
(Court of Appeals Case Number: E063664)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 29, 2016, at Sacramento, California.

LORICE A. STREM