S234148

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

SUPREME COURT
FILED

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Deputy

ON APPEAL FROM THE SUPERIOR COURT OF SAN BERNARDINO COUNTY

HONORABLE DAVID COHN, JUDGE

ANSWERING BRIEF ON THE MERITS

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ISSUES PRESENTED

The following are the issues presented by this case:

1. May a local government run by a Mayor and City Council hostile to a proposed initiative measure signed by at least fifteen percent of the voters of the City ignore and evade the mandatory provision of Elections Code Section 9214, which requires the City to conduct a special election, and delay a vote on the measure for almost two years?
2. Without benefit of an evidentiary hearing may a City Council and Mayor characterize a proposed fee for three currently non existent potential medical marijuana dispensaries as a tax in order deprive the proponents of the measure the "special election" benefit of Elections Code Section 9214?
3. Should the issue of tax verus fee be resolved prior to or after the election when prior to the election there is no one with standing to challenge the measure as being an invalid tax?

SUMMARY OF FACTS

Plaintiffs began their journey to enact a comprehensive local medical marijuana dispensary initiative on September 15, 2014, more than two years prior to the scheduled California statewide general election of November 8, 2016 (which statewide election would be consolidated with the City election where City Council members would also be elected). At the time the petition drive began there was also scheduled for June 7, 2016 the state

primary. Because so many persons rely upon medical marijuana to alleviate pain and nausea from various illnesses, the proponents of the subject measure wanted to move as quickly as possible. The City of Upland currently has a flat ban against medical marijuana dispensaries or any type of marijuana facility. The City received the Notice of Intent to circulate the initiative petition on September 15, 2014 and the City Attorney prepared the title and summary as required by the Elections Code and mailed it to Plaintiffs on October 10. 2014.

Plaintiffs circulated the Petition and obtained signatures from at least fifteen percent of the registered voters of the City of Upland. On February 9, 2015 the City Council accepted the certificate of sufficiency from the County Registrar of Voters. By virtue of the certification Elections Code Sections 1405 and 9214 required the City to set a special election no less than 88 nor more than 103 days after the order of the election.

The City Council obviously opposed the proposed measure because it had the option under Elections Code Section 9214 to adopt the proposed ordinance without alteration. See Elections Code Section 9214. Even in the absence of Elections Code Section 9214 the City Council and the Mayor of the City of Upland had the authority and still have the authority at any time to legalize medical marijuana dispensaries in the City of Upland

The purpose and intent of the proposed marijuana initiative petition is set forth in proposed Chapter 17.158, which provides as follows:

> "A. It is the purpose of this Chapter to establish criteria and standards for the establishment and conduct of marijuana dispensaries which will protect the public health, safety, and welfare, preserve locally recognized values of community

> appearance, minimize the potential for nuisances related to the operation of marijuana dispensaries, maintain local property values, and preserve the quality of urban life. Permitting well regulated marijuana dispensaries will enable Upland's numerous qualified patients to obtain safe access to a crucial, low-impact source of medication recommended by their doctors. These regulations are designed to assure that the operations of marijuana dispensaries are in compliance with California law and to mitigate the adverse effects from unregulated operation of marijuana dispensaries." (Clerk's Transcript, p. 20, hereinafter "CT").

As stated, the proposed marijuana initiative petition is extensive and far reaching and governs zoning and locational matters. The measure specifies where in the City of Upland a medical marijuana dispensary would be allowed. There are severe restrictions and limits on the establishment of medical marijuana dispensaries. Also, the proposed measure creates and establishes design and performance standards. The proposed measure sets up a permit approval system. The proposed measure sets forth a regulatory mechanism to govern the medical marijuana dispensaries that may be established under the measure (there being no more than three possibly). Administrative procedures and regulations would be established by the measure.

To frustrate the initiative process with respect to this measure the City Council segregated and unnecessarily focused on one paragraph dealing with a licensing and inspection fee. In particular, proposed Section 17.158.100 (a proposed amendment to the Upland Municipal Code) provides as follows:

> "In recognition that marijuana dispensaries may require greater oversight than other businesses in

> the City of Upland, an annual licensing and inspection fee of $75,000 (seventy-five thousand dollars) will be due from any dispensary that has been granted a business license and approved for operation by the City of Upland. The initial licensing and inspection fee shall be due within 10 days of the City's approval and issuance of the initial business license to the dispensary. Subsequent annual renewal fees of the licensing and inspection fee shall be due in two installments. For the subsequent annual renewal fee, the first installment of the annual licensing and inspection fee of $37,500 (thirty-seven thousand five hundred dollars) shall be due February 15th of the calendar year. The second installment of the annual licensing and inspection fee of $37,500 (thirty-seven thousand five hundred dollars) shall be due on June 31st of the calendar year." (CT 25)

As stated, the proposed section quoted above is one small part of a larger, comprehensive medical marijuana dispensary initiative petition to amend the Upland Municipal Code (proposed). (The entire measure is reprinted at CT 20-26).

On March 9, 2015 the City Council, without benefit of an evidentiary hearing, voted not to call a special election, contrary to the mandate of Elections Code Section 9214, but instead voted to place the measure on the regular municipal ballot of November 8, 2016 (consolidated with the statewide general election). (CT 102-103). The City did not even consider the more important election (statewide primary, June 7, 2016) with which the special city election could have been consolidated.

Plaintiffs tried as quickly as possible to get the matter resolved so that users of medical marijuana would be able to obtain medical marijuana at dispensaries to be established in the City of Upland where none currently exist. Plaintiffs filed this action

within ten days of the City Council's decision, March 19, 2015 (CT 7-27).

Plaintiffs acted as quickly as possible. They arranged for service of the Petition for Writ of Mandate upon the City, which filed an Answer (CT 53-64) and opposition (CT 65-84). Plaintiffs obtained a hearing in Court on May 19, 2015. They could not afford to wait for discovery. Various City departments had submitted a report to the City Council regarding certain aspects of the proposed initiative (CT 164-229).

The matter proceeded to Court in the form of a motion. Plaintiffs' motion for peremptory writ of mandate was filed on March 20, 2015 (CT 30-49). Plaintiffs had tried to obtain the hearing for April 21, 2015 but the Court's calendar was full on that day thereby necessitating a continuance from April 21 to May 19, 2015 (CT 25).

The Superior Court opened the session on May 19, 2015 by summarizing the issues presented to the Court. The Reporter's Transcript of Oral Proceedings of May 19, 2015 (hereinafter "RT") reveals the following:

> "THE COURT: Good morning, Mr. Diamond. Alright, well, the Petitioner claims that this is a - - $75,000 to be paid annually is a fee, not a tax. And if it is a fee, the Petitioner is entitled to have this specially set at a special election in June. The Respondents contend that it is a tax, and as a tax the constitution requires that it be considered at the general election, which would be in November. So that's the issue.
>
> Petitioner also contends, of course, as a secondary matter, that even if it is a tax under these particular circumstances where, if I understand the argument, since the moving entity to establish this tax is not the city but is the Petitioner by way of this initiative, that the constitutional prohibition or the constitutional requirement does not apply. So

> those are the two arguments." (RT 1- 2)

The Court added,

> "Obviously you want it heard today."
>
> MR. DIAMOND: Yes, Your Honor." (RT 3)

When the proceeding began there was some discussion about the City's report. Attorney Diamond on behalf of Plaintiffs said,

> "We believe that the . . . report submitted by the city with respect to the claim that the $75,000 fee is really a tax, we submit that that evidence is, on its face, defective and not worthy of support as a matter of law. . . ." (RT 4)

Attorney Diamond then discussed the possibility of a trial consisting of "competing experts. . . ." (RT 4).

To place the following question and answer in context Plaintiffs have discussed what occurred at the Courtroom argument. It was in this context that the Court asked Attorney Diamond,

> ". . . Mr. Diamond, you're satisfied that the court has all the evidence it needs before us. Correct?
> MR. DIAMOND: Yes." (RT 5)

The parties debated whether the $75,000 fee was a tax or a fee. The problem was that there was no experience in the City of Upland with respect to monitoring, supervising, and administering medical marijuana facilities since Upland has always totally prohibited such facilities. Attorney Diamond stated on behalf of his clients:

> "Well, when we decide what it costs, cost would include inspection. And what the City has done is artificially tried to lower the amount that the City

> claims it would need if the measure were adopted, the initiative measure were adopted. The City in an attempt to defeat the measure by postponing the election until November of 2016 simply unilaterally declares that it only takes, say, one code enforcement officer . . . ." (RT 6, lines 9-15)

The Court in referring to a report submitted by Plaintiffs to the City, stated that it would not cost the City $75,000 a year to administer the medical marijuana dispensary program. The Court said its calculation showed that it would be $66,000 and not $75,000.

Counsel for Plaintiffs then added,

> "[T]here's a cost of quarterly review, which is at page 12, $14,935. You cannot come up with an exact figure. You can't come up with a mathematical figure when you are talking about a future event.
>
> The real problem in this case is that the City has no standing to claim that the cost of administration and enforcement and issuing the permits and so forth is a particular amount. Because if the Court will look at the City's report, the Court will note or hopefully should note that the City has artificially tried to reduce whatever costs might be involved order to make the very argument that it's making before this Court, which is that this is really a minimal inspection procedure and that most of the money is a taxation measure.
>
> The way the City gets to that point is by artificially claiming that it won't need much in the way of inspection on an annual basis, that may be they'll have one code enforcement officer go out there for 20 minutes; and, therefore, that lowers or decreases the amount involved. In other words, the City controls - if the Court allows the argument to be successful, the City will have controlled the cost factors by artificially claiming that it will only need one officer two hours a day or an inspector

> one minute a month to do the inspection.
>
> We are the proponents of the measure. The marijuana dispensaries do not exist. There is nobody here to challenge whether it is a tax or a fee. The City is using this argument to defeat the right that my clients have to a special election as quickly as possible. If the City could get away with this in any particular measure, a city could simply artificially declare that the fee is really a tax, because we don't really need in the city that much enforcement time.
>
> . . ." (RT 8-9)

The Court then got to the heart of the matter also by acknowledging that everything was backwards. The Court acknowledged that Article 13c, Section 1 (e) (7) of the California Constitution provides as follows:

> "The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax . . ."

Referring to this provision the Court made the following comment,

> "Actually, before we do that, let's talk about this issue of the burden of proof, because this is a very weird situation. The statute says that the City has the burden of proving that this is not a tax. And that's, of course, the reverse of this situation. The City contends that it is a tax.
>
> So the question is, does the City have the burden of proof to show that this a tax? Do we just flip that statute? Or does the Petitioner have the burden of proof to show that this is a fee?" (RT 9-10)

Plaintiffs then tried to deal with this problem by reverting to the other argument - that Article 13c of the California Constitution did not apply because when citizens use the

electorate initiative process to adopt a tax measure the tax is not being imposed by the city government (RT 10).

Plaintiffs' attorney continued:

> "In this particular case it's our position, Your Honor, that the initiative itself declaring the matter to be a fee rather than a tax really ends the matter, because the City doesn't have standing to intervene and try to prevent an election by the tactic of claiming this is a . . . [tax]" (RT 10-11)

Plaintiffs' counsel argued further on the issue of standing and on the timing of the challenge:

> "Well, any potential taxpayer, anybody who potentially is subject to that tax would have standing to litigate that question. But here, there is no person with standing . . . because nobody is challenging this measure. Typically, these cases arise when a person hit by a fee says, wait a second, I don't have to pay that fee. That's a tax, and you didn't impose the tax in the correct way, and I am being injured by your attempt, Mr. City, to collect money from me under the false pretense that it is a fee. We don't have that situation here, because there is no medical marijuana dispensary that is challenging this. So who is being injured by this particular measure? It's not like there is a group of taxpayers out there who are potentially going to get hit once the measure passes and the tax is going to be or the fee is going to be imposed against them.
>
> So in this particular situation, we don't have anybody with a legitimate interest in challenging this. But assuming, hypothetically, that that happened then the person who is being asked to pay the money could simply have the court declare that the measure is invalid." (RT 11-12)

Counsel for Plaintiffs then urged that the election be set no later than 103 days from the requested court order (RT 13).

The argument regarding standing continued on.

The attorney for the City conceded the weirdness of the situation. Specifically, Mr. Touchstone stated,

> ". . . T[his] is a unique circumstance where this is not the city who was put in the position of being a proponent that this is not a tax. They're the ones who brought this initiative. They're the ones who qualified it for an election.
>
> The proper election is the general election. That being said, they're the ones who bear the burden of demonstrating that the fee, as they call it a fee, is not a tax. . . ." (RT 20-21)

Mr. Touchstone, the attorney for the City stated that the City was "between a rock and a hard place. . . ."(RT 22, line 17)

Mr. Touchstone continued:

> ". . . I'm either facing Mr. Diamond and the proponents of this initiative, or I'm standing against the disciples of Howard Jarvis on the other side of counsel table, if we were to put it on a special election, because it is unconstitutional...." (RT 22, lines 17-21)

Ironically, the Howard Jarvis organization is now representing the City. Howard Jarvis is on the same side of the table. See the Howard Jarvis explanation at page 1 of the City's Petition for Review.

Because this was a pre election dispute not caused by Plaintiffs, the roles became reversed, something the legal system should avoid. This breeds conflicts of interest. The

law should not be developed by parties if their roles are reversed and they advocate on the "wrong side."

It is like a football game where ordinarily it is in the interest of the offense to claim that the pass receiver legitimately caught a pass gaining a lot of yards. A dispute could arise if it is not clear whether the ball was caught or not. The offense ordinarily will argue the ball was caught by the receiver and the defense will argue the pass was incomplete.

However, if after possibly catching the pass the receiver gets hit by the defensive player and "fumbles" the ball and the defense recovers the fumble then it is in the interest of the offense to claim that the receiver dropped the ball and that it was never a completed pass. In that way the fumble recovery would be negated. What we have is a situation where the roles are reversed with respect to whether it was a completed pass or not. The role reversal was explained by attorney Diamond at the end of the argument:

> ". . . Throughout the City's report the City talks about how little the city will need in terms of time and effort to supervise medical marijuana dispensaries. So they have gone out of their way, the city has gone out of its way to minimize the inspection process and the supervision that the city would want with respect to medical marijuana dispensaries."
>
> That type of analysis is just defective. How can the City state with a clear conscience, for example, at p. 32 that they are recommending the Fire Department inspections twice a year? The City is, by declaring that this is - the fee is too much, they're just unilaterally declaring that they are going to do minimal inspections.
>
> We would anticipate from the medical marijuana dispensary side that the City Police Department would want to conduct more inspections. And Fire

> Department would want to conduct more, the Health Department, all these city agencies, the Planning Department. The City says at page 35, the costs do not include any potential charges related to application to Planning Commission or City Council.
>
> So in their report they've eliminated certain items that would clearly elevate the cost factor to around $75,000 and we can't hit the figure exactly dollar per dollar. That's what it is. And this is not the appropriate forum to litigate a fee when the person who is going to have to pay the fee doesn't exist. That person would only be born, so to speak, if the measure passes.
>
> So right now there is no pool of potential taxpayers who have any incentive to challenge this particular measure, and it can't be challenged because there is no severability clause. So its not like after this measure passes, if it does pass, that some medical marijuana dispensary is going to come in and say, well, we don't like the $75,000 fee. It's too much. And have a court throw that out. That can't happen here, because no severability clause was put into this measure on purpose to make sure that nobody said during the campaign or in court, well, this is just a sneaky way to allow a medical marijuana dispensary to be created by an initiative and then have the dispensary come into a court later on and knock out the $75,000 fee." (RT 23-24)

Mr. Diamond concluded:

> "So if the court thinks there is a fact in dispute - and I suppose the court could set it down for an early trial date. But I think as a matter of law, the report of the city is inherently defective, because it's just not appropriate for the city to artificially tell a court in order to defeat our lawsuit that it is only going to require one police officer a year to inspect for ten minutes. That's in essence what they did." (RT 24-25).

At the conclusion of argument the Court denied the Petition (RT 25). Counsel for the City stated that he would prepare the proposed judgment (RT 26). This occurred on Tuesday May 19, 2015. Three days later, on May 20, 2015, Plaintiffs filed their Notice of Appeal (CT 425).

Plaintiffs did everything they could to expedite the appellate process. As soon as the record on appeal was filed with the Court of Appeal Plaintiffs filed their Opening Brief and thereafter moved for expediting the appeal and seeking a calendar preference. The Court of Appeal granted their request.

The Court of Appeal reversed the judgment of the Superior Court on March 18, 2016 in a published opinion, California Cannabis Coalition v. City of Upland, 245 Cal.Ap.4th 970 (2016).

According to the City's Opening Brief on the Merits, the City decided to cut its losses and accept defeat after the Court of Appeal handed down its decision, but the Howard Jarvis Taxpayers Foundation came to the rescue of the City and allegedly took over this case "pro bono." The Howard Jarvis Taxpayer Foundation and the Howard Jarvis organization in general are no strangers to lawsuits on behalf of taxpayers to invalidate improper or unlawful taxes. They are usually fighting cities in cases where the particular city involved has allegedly enacted an unlawful tax in a case where the city is arguing that it is not a tax but a fee and Howard Jarvis is claiming the contrary, that the charge is really a tax, not a fee, and is therefore invalid because it was not voted on by the people. Here, we have the opposite. We have the City arguing in favor of a proposition that a particular charge is a tax, not a fee. The City, therefore, has been put in the reverse position. Moreover, we do not

have any medical marijuana dispensary appearing in Court to challenge the fee. More important, we do not have any evidence as to what the real cost is for the City to administer the marijuana dispensary program.

ARGUMENT

A.. Introduction

Significantly missing from the City's Petition for Review and the City's Opening Brief on the Merits is any discussion of Elections Code Section 9214. The City has surgically removed Elections Code Section 9214 from the body of California law that deals with the election process and, in particular, with respect to the initiative process. The genius of the Court of Appeal's opinion is that the Court of Appeal's solution is to construe the term "local government" as applying to the Mayor and City Council members of the particular city involved. Also critical is the word "imposed."

The Court of Appeal correctly interprets Article 13c, Section 2(b) of the California Constitution and appropriately limits it to measures placed on the ballot by the government. This Court has approved of the process by which the government may place measures on the ballot for the electorate to consider. See Howard Jaravis Taxpayers Association v. Padilla, 62 Cal.4th 486 (2016).

The interpretation placed on Article 13c, Section 2(b) is the correct interpretation because it harmonizes with Elections Code Section 9214. The judicial branch should reject disharmony if it can reconcile two seemingly contradictory provisions that are not in fact contradictory upon further analysis.

What apparently caught this Court's attention and motivated it to grant review was

the claim by the Howard Jarvis organization and some local taxpayer groups that filed letters with this Court urging review that some unethical or sneaky Mayor and City Council members could conspire with public employee unions to place a tax measure on the ballot and then bypass the voters by adopting the proposed ordinance. See Section 9214(a) of the Elections Code. It is that fear which motivated the Howard Jarvis group to get involved and which motivated the other taxpayer organizations to get involved. That situation, however, is not this case. That is a hypothetical case that can be dealt with in the future.

If the drafters of Article 13c2 of the California Constitution left a loop hole it can be plugged by either an initiative , state legislation, or by city ordinances in those cities that are governed by a charter.

That there is some hypothetical possible misuse of the initiative process by unethical Mayors and City Council members does not mean that the right granted by Elections Code Sections 1405 and 9214 for a special election should be torn from the law books. Plaintiffs' solution (adopted by the Court of Appeal) makes sense and avoids having to declare Elections Code Section 9214(b) unconstitutional as applied to a so called tax measure.

This entire problem would not have been created had the City not ignored its duty to call a special election. The City of Upland in this case had to stretch quite a bit to use an argument that it normally would resist as have many cities previously. In other words, typically a city government passes an ordinance that could or could not be either a fee or a tax. Typically the taxpayer lines up to oppose the measure by suing to invalidate the provision in the ordinance that allows for a fee or a tax. The typical taxpayer argues that the

measure is a tax and therefore should have been submitted to a vote of the people. Here the only ones with standing to challenge this tax would be marijuana dispensaries created by the measure. Accordingly, the Superior Court below should have granted the writ to compel the special election. If the measure failed that would have been the end of the matter. If it passed then a challenge could have been launched.

It made more sense to let the special election go forward. The initiative process is important. The issue of whether a particular measure is a tax or a fee should never be decided before an election. It basically makes it impossible for initiative sponsors to run the measure or sponsor a measure that involves the levying or setting of any fee. If the sponsors of the measure want to make sure that city voters are not afraid to authorize a medical marijuana dispensary the fee should be set high enough so that the voters would not be afraid that they would be imposing a cost burden on themselves. In such a circumstance the drafter of the proposed medical marijuana initiative would want to set a high fee so that the voters did not vote against the measure out of fear that they would end paying for the costs caused by medical marijuana dispensary. They may want a medical marijuana dispensary but they may not want to pay for its collateral costs. It is only fair that the one who benefits from the measure should pay its fair share to the City to reimburse the City for its police and administrative costs.

However, if the drafter of the proposed initiative sets a very high fee to avoid the argument that the fee is too low and therefore the voters are going to have to pay for the marijuana dispensary we would have the situation we have here in this case which is the City falsely claiming that the fee is too high to be a real fee. This is something totally within the

control of the City by its so called report. What is to stop the City from saying that it would need to employ one officer or six officers or ten officers. The cost of conducting an administrative hearing is huge. So long as the "fee" is limited to the marijuana dispensary created by the very measure why should city politicians be able to defeat the right to have a speedy election by pretending to be concerned about a tax. The issue of whether it is a tax or a fee should be resolved after the election when there will be experience of what it costs to regulate and police medical marijuana dispensaries. If the debate occurs pre election then all we have are city officials speculating with no evidence. Predictions are not evidence. This Court should hand down a decision holding that these types of challenges may only be made after the special election and by a taxpayer injured by the "tax."

In addition to raising the three major issues orally before the Superior Court, Plaintiffs also raised the same arguments in their written motion filed with the Superior Court (CT 33-49). The City responded to each of the three arguments in its opposition filed with the Superior Court (CT 65-84).

In their Reply Memorandum filed with the Superior Court Plaintiffs described their effort to get the hearing on April 21, 2015 (CT 414, lines 3-4).

It is not disputed that the City Council did not conduct a hearing to determine whether the initiative included a tax measure or a fee measure. The alleged determination that the $75,000 fee would be a tax was made by the City Council pursuant to Elections Code Section 9212 which only authorizes a report from the City agency. There was no evidentiary hearing conducted in this case and none authorized by Elections Code Section 9212.

Plaintiffs did the best they could by submitting their own written materials to the City but there was no hearing afforded Plaintiffs on the issue of the tax versus fee. It was undisputed that Plaintiffs were not permitted to attend any meeting of the City staff with respect to its alleged analysis of whether the proposed measure would be a tax or a fee (CT 417, lines 22-25).

Plaintiffs pressed the same arguments in the Court of Appeal. See Appellants' Opening Brief and Appellants' Reply Brief filed with the Court of Appeal. Plaintiffs clearly preserved all three issues. Plaintiffs did everything in their power to try to get the measure considered at a special election including a special election to be consolidated with the California statewide primary of June 7, 2016.

The decision by the California Court of Appeal, California Cannabis Coalition v. City of Upland, 245 Cal.App.4th 970, 977 (2016) acknowledged the effort of Plaintiffs to get the matter heard as quickly as possible, but the Court of Appeal noted that it might be too late for the June 2016 ballot. The Court of Appeal acknowledged, 245 Cal.App.4th at 979 that Plaintiffs requested "expedited review and calendar preference. . . ."

The Court of Appeal reached one of the three issues and concluded in favor of Plaintiffs that the initiative petition was not an act of local government to impose a tax. Accordingly, the Court of Appeal did not reach the other two issues - (1) whether the issue of tax versus fee should be decided after the special election if the measure passes and (2) whether the fee is really a tax.

Both sides agreed that Plaintiffs' appeal was not moot. 245 Cal.App.4th at 978. The City is not urging mootness now. All three issues should be resolved by this Court because

Plaintiffs very carefully preserved the issues at all stages of the proceedings and the City addressed all three issues in the Superior Court and in this Court.

B. THE TAX VERSUS FEE ISSUE WAS NOT PROPERLY RESOLVED BEFORE THE ELECTION REVIEW

The City concedes at page 25 of its Opening Brief on the merits that "recent cases have caused confusion," but erroneously asserts that ". . . the tax versus fee question was properly resolved before the election." This is not true.

Plaintiffs were entitled to a speedy, specially set election by virtue of Elections Code Sections 1405 and 9214. It was not disputed that Plaintiffs obtained the required number of signatures for the special election. That should have been dispositive. Speedy, special elections are important when the beneficiaries of the proposed initiative need early relief from an illness or physical condition that the proposed measure would provide. We are talking about cancer patients and other infirm persons who need medical marijuana for their unfortunate condition. Time is of the essence when health is the subject.

Here, the City violated Elections Code Sections 1405 and 9214 by refusing to call the special election to consider the measure. The Court of Appeal in Goodenough v. Superior Court, 18 Cal.App.3d 692 (1971) ordered the Superior Court to grant a writ of mandate directing the City of Coronado to call a special election. The Superior Court had initially denied the writ sought by the proponents of the initiative measure, but the Court of Appeal overturned the denial.

The Petitioner here, the City of Upland, had no right to refuse to follow Elections Code Sections 1405 and 9214. If there were a claim that the required number of signatures was not obtained there might have been a reason to seek a judicial determination as to the

number of signatures. The issue of the signatures arguably would be an appropriate subject for pre election review. The issue would implicate neutral City interests. See generally, Mapstead v. Anchundo, 63 Cal.App.4th 246 (1998).

Here, however, the City Council of Upland played politics by sabotaging an initiative petition that was and is facially valid. The City Council purported to determine whether a particular fee was really a tax without any evidentiary support and, more important, without participation by the interested parties, i.e., the taxpayers or fee payaers who would be subject to the tax or fee.

In Alliance For A Better Downtown Millbrae v. Wade, 108 Cal.App.4th 123 (2003) the Superior Court issued a writ of mandate compelling the City Clerk to certify an initiative petition after the Clerk initially refused to do so on the alleged ground the petition was circulated in violation of state law. The Court of Appeal ruled that the City's appeal was not moot and affirmed the judgment.

There are numerous cases which disfavor or condemn pre election review of ballot measures. See, e.g., Costa v. Superior Court, 37 Cal.4th 986 (2006); Brosnahan v. Eu, 31 Cal.3d 1 (1982); Independent Energy Producers Assn v. McPherson, 38 Cal.4th 1020 (2006).

A pre election review of the tax versus fee issue was inappropriate given the provisions of Article 13c, Section 1 of the California Constitution, which provides, in part, as follows:

> "The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax. . . ."

If the electorate which adopted the language quoted above had wanted pre election

litigation regarding the tax versus fee issue they never would have placed the burden of proof upon the City to prove the levy, charge, or exaction was not a tax. Obviously this language contemplates a post election lawsuit by a taxpayer or fee payer against the City where the taxpayer or fee payer is claiming something is an illegal tax because it was adopted by the City Council without a vote of the electorate. The provision makes no sense when a pre election lawsuit is filed against the City by the petition proponent. The Superior Court below commented on the weirdness of the situation.

A post election challenge would include an assertion by the City that the provision was not a tax in order for the City to defend the ordinance.

The whole idea behind Election Code Sections 1405 and 9214 is to allow for an early election or separate, special election. This would benefit persons who need speedy relief. Sick and diseased people who need medical marijuana did not want to wait over two years to legalize medical marijuana dispensaries. They have a right under California law to expedite the process. Legislative bodies have the means to expedite the process by adopting urgency measures. What Plaintiffs attempted to do here was to utilize the initiative process to enact an urgency measure. There was no harm to the City in holding a special election prior to November 8, 2016. Indeed, Plaintiffs exposed the hypocrisy of the City when they tried to get the measure considered in a consolidated election to be combined with the California statewide primary on June 7, 2016. Consolidating the special election in Upland with the California statewide primary on June 7, 2016 would obviously have not cost the taxpayers any more than the cost of putting it on the November 8, 2016 statewide general election ballot. The City opposed the request.

The Howard Jarvis Taxpayers Association and the Howard Jarvis Taxpayers Foundation are both well aware of the damage they inflicted upon the California electorate by persuading this Court initially to take a statewide advisory measure off the statewide ballot. See Howard Jarvis Taxpayers Association v. Padilla, 62 Cal.4th 486 (2016). Although it came too late for the November 2014 election, this Court fortunately realized later that it was wrong to remove the legislative sponsored advisory measure from the statewide ballot. It may be considered on November 8, 2016.

At page 22 of its Answer to the Petition for Review Plaintiffs urged this Court to decide the issue. Plaintiffs were worried about the delay caused by the Petition for Review because the filing of the Petition stayed the issuance of the remittitur by the Court of Appeal. By doing this the City essentially obtained a further temporary stay.

Unfortunately, erroneously granted temporary stays can cause irreparable damage. Our courts should be mindful of the need for speed in election cases. Here, Plaintiffs did everything in their power to expedite the process in the Superior Court as well as the Court of Appeal. The Court of Appeal did belatedly grant Plaintiffs' motion for calendar preference, but refused to treat its Opening Brief as a Petition for Writ of Mandate.

One more comment on judicial irony is appropriate here. While Howard Jarvis Taxpayers Association did get an undeserved stay in the Proposition 49 litigation, it suffered an injustice in Howard Jarvis Taxpayers Assn., v. Bowen, 192 Cal.App.4th 110 (2011) when its successful appeal from the denial by the trial court of its mandate petition was too late for it to enjoy. The Court of Appeal reversed the adverse judgment, but then remanded with instructions to dismiss on mootness grounds. Here, both sides agree this case is not moot.

Plaintiffs are aware that they could have filed an original Petition directly with the Court of Appeal or this Court but there never is any guarantee that the Court of Appeal or this Court will entertain an original writ petition under its jurisdiction. See, e.g., Diamond v. Allison, 8 Cal.3d 736 (1973), where this Court initially issued an alternative writ to assume jurisdiction over an election matter only later to discharge the alternative writ because this Court felt the writ proceeding was not an appropriate method given the factual dispute. The issue involved the order in which the candidates' names would appear on the ballot. Later, in Gould v. Grubb, 14 Cal.3d 661 (1975) this Court affirmed the judgment of the trial court after an evidentiary trial.

Plaintiffs submit that the trial court should have ordered the measure to be considered at the earliest possible election and then, if it was approved the tax issue could be litigated if necessary. This would give more time to the parties . The tax versus fee issue does involve disputed evidence but the issue can be resolved after the election. The overwhelming presumption should be in favor of putting it on the special ballot and letting the voters decide. Chief Justice Cantil-Sakuauye discussed the issue in her dissenting opinion with respect to the interim stay requested by Howard Jarvis Taxpayers Association. The Chief Justice Cantil-Sakuauye was of the opinion that Proposition 49 should not have been removed from the ballot. Citing and quoting Brosnahan v. Eu, 31 Cal.3d 1 (1982), this Court in Independent Energy Producers Association v. McPherson, 38 Cal.4th 1020 1029 (2006), stated,

> "It is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt electoral process by preventing the exercise of the People's franchise, in the absence of some

clear showing of invalidity."

In the instant case if the measure passed or does pass there would be an opportunity for any medical marijuana dispensary to participate in litigation to determine whether the annual fee is really a tax or a fee. In the instant case there was no opportunity for Plaintiff to participate in an evidentiary hearing. No hearing was afforded Plaintiffs. The City Council members just took it upon themselves to unilaterally decide that the measure contained a tax provision and therefore it did not qualify for the special ballot.

Essentially the City obtained a temporary stay without even asking for one. The City simply refused to place the measure on a special election ballot and then provided phony figures to the trial court upon which the trial court could base a decision that the regulatory fee was set too high. We are not talking here about existing taxpayers getting hit with a huge tax bill. Here, no medical marijuana dispensary needs to be established. If somebody does not want to pay $75,000.00 to the City for the privilege of operating a medical marijuana dispensary he or she does not have to open one up.

The judiciary should be very careful before it grants stays in election cases. History will judge the stay granted in Bush v. Gore, 531 U.S. 1046, 121 S.Ct. 512 (2000). The so called irreparable harm to the country is difficult to see but five justices on the U.S. Supreme Court felt the need to grant a stay of the counting of the votes in the historic presidential election.

At page 32 of the Opening Brief on the Merits the City creates the false impression that Plaintiffs were satisfied with the state of the record. The City ignores the fact that Plaintiffs were rushing to get the case presented as soon as possible. Plaintiffs had one eye

on the record and one eye on the calendar. If Plaintiffs had told the trial court that the record was not adequate the trial court would have postponed the trial to allow the parties to engage in discovery. The truth is the record was not adequate in terms of the decision ultimately rendered by the trial court. Plaintiffs were facing a dilemma. The making of a better trial court record would have simply caused substantial delay in the proceedings. Plaintiffs were forced to proceed with the record that was not the result of an evidentiary hearing. Indeed, there was no hearing in front of the City Council. Plaintiffs simply submitted their own materials and City staff provided some speculation regarding future anticipated costs. Plaintiffs had no opportunity to depose or cross examine city witnesses.

Naturally, if the measure was considered at a special election and defeated that would have ended the matter. Had the measure gone on a special election ballot and won challengers such as medical marijuana dispensaries not wanting to pay the $75,000 fee could have filed an action. The figures provided by various city officials could have been challenged. As between proceeding with an inadequate record in order to get expedited review versus delay to develop a better record Plaintiffs had to choose the former. Time was of the essence.

Analysis of the Opening Brief submitted by the City reveals a lack of confidence in its own position. The City acknowledges and essentially admits that there have been abuses with respect to the initiative process and those abuses have been committed by governmental officials seeking to block access to the ballot.

In conclusion, this Court is respectfully requested to order a new election if the initiative measure which is the subject of this case is defeated on November 8, 2016. A

defeat at the November 8, 2016 election will not render the case moot. If Plaintiffs were deprived of their special election this Court could and should order a special election where the electorate could reconsider the matter. If the measure wins on November 8, 2016 the Court should still decide the issues presented. See Independent Energy Assn v. McPeherson, 38 Cal.4th 1020, 1029 (2006). This Court acknowledged that ballot measures steal attention from other ballot measures. In this particular case an earlier stand alone special election would not have had to compete with the numerous ballot measures that will be on the November 8, 2016 ballot. When there are fewer measures on the ballot more attention can be given by the voters to each measure. The argument of the City that an invalid measure steals time and attention from a valid measure assumes that the Plaintiffs' measure would be invalid. The Plaintiffs had an interest in having their measure submitted at an earlier special election so that the voters could focus on the measure. The City argues that special elections result in low voter turnout but the converse is that a special election means the voters interested in that particular measure have the opportunity to focus on that particular measure without distraction. The argument works both ways.

C. THE TRIAL COURT ERRED IN RULING THAT THE INITIATIVE MEASURE WAS A TAX MEASURE

The Court of Appeal below did not reach the issue of whether the $75,000 annual fee should be considered a tax or a fee. As stated earlier, the better procedure would have been to delay judicial review until after the election if the measure were adopted. If it were necessary to decide the issue of tax versus fee the Superior Court should have decided that issue in favor of Plaintiffs.

It is clear from reviewing the standards set forth in Article 13c, Section 1 of the

California Constitution that the $75,000 fee is not a tax. It is clear that the Constitution contemplates the imposition of fees for regulatory purposes and that is precisely what the $75,000 per year fee was designed for. 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. .. " 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.

The sponsors and those who signed the petition clearly contemplated that the $75,000 fee would be reasonable. They would not want to tax medical marijuana dispensaries because no one wants to pay taxes that are not necessary. The City simply has no standing to complain that the fee schedule is not fair. Does anyone really believe that the City Council cares about the medical marijuana dispensaries that would be legal under the initiative. If the City Council felt that it wanted to legalize medical marijuana dispensaries in the City of Upland it could have done so by ordinance.

Appellants submitted evidence demonstrating that the $75,000 fee was accurately characterized as a regulatory fee. The City government has no right under the guise of protecting the electorate from itself to restrict the people's right of initiative. If proposed

Section 17.158.100 is really an impermissible tax and not a fee then someone with standing to complain presumably could bring an action to invalidate the provision. The City itself as a city government has no standing to complain about the fee. The City has no right to try to protect the electorate from itself. The voters are presumed to know what they are voting for and what they are voting against. The voters do not need the paternalistic assistance of city government.

In short, the City should have considered and accepted the Plaintiffs' evidence and representation and just accepted facially the language of the proposed measure.

In this particular case the initiative measure itself declared that the $75,000 annual fee was a fee. That statement should have been accepted as conclusive evidence that the $75,000 was a fee and not a tax. The City was not free to go beyond the initiative's declaration. That is so because this is an unusual case. The "taxpayers" who would be subject to the $75,000 fee do not exist. This is a hypothetical "injury" with no victim. This is a special case because the only person subject to the "fee" or "tax" would be created by the very same measure. It cannot be the case that a measure is deemed to be a tax when the only one subject to the payment is simultaneously created at the time the "tax" is also established.

We would have a different case if the enactment of the provisions were done in steps. In other words, if on day one the ballot measure only authorized the creation of medical marijuana facilities and a later measure then purported to impose a fee arguably the medical marijuana dispensary that was previously created under the authority of an earlier measure might have a reason to complain. In that situation there would be an established marijuana

dispensary being hit by a new fee or tax. But this situation is unique and calls for special analysis. Specifically - when a measure both creates the taxpayer or fee payer and also imposes a tax or a fee we have a unique situation.

It does not make any sense to subject the fee to the tax versus fee analysis when the only conceivable person who might have to pay the fee or the tax was not created until the same measure that created the tax or the fee was also established.

If the City is correct initiative measures cannot both authorize the creation of something new and provide for its economic viability. Authors of these sorts of measures would have an impossible time calculating the precise cost of future events. If the fee is set too low the measure will not pass because the voters will worry that they will have to pay for the cost of administering the medical marijuana dispensary or whatever entity is created by the measure. If one sets the fee too high one is blamed for establishing a tax. Thus, Plaintiffs propose the following rule - when the same initiative measure includes both the fee for administering the program and the creates the program itself it is inappropriate to try to determine immediately whether the fee is really a tax.

The City simply came up with a way to defeat this measure by refusing to honor the Elections Code with respect to the setting of special elections.

The City failed to respect the sponsors and proponents of the measure. They clearly indicated in the measure that the $75,000 annual fee is not a tax. The measure recognizes the need for "oversight." It is clear that medical marijuana dispensaries are extremely controversial. One argument against medical marijuana dispensaries is their cost to the public. The police typically will yell and scream that a medical marijuana dispensary will

impose all sorts of law enforcement tasks upon the poor Police Department. Had Plaintiffs not included the $75,000 annual fee to be paid by medical marijuana dispensaries political opponents most assuredly would have argued against the measure by contending it would cost local government too much to administer. Plaintiffs could not make the $75,000 annual fee a voluntary donation to the City because the political process would have destroyed such a measure. Plaintiffs would have been ridiculed by the press and by city politicians opposing medical marijuana dispensaries in general.

There is literally no limit on what the fee could have been. The police can always say that the more money the police have available the more money could be used for monitoring purposes.

It is common knowledge that medical marijuana dispensaries cause the diversion of police and local resources. If the fee in this case had been set too low (at $500 or $5,000) the politicians and political opponents campaigning against the measure would most assuredly have argued that the burden imposed on the residents would be far greater than the "small" fee imposed by the measure. The opponents would complain the fee was set too low. Thus, Plaintiffs were dammed if they did and dammed if they did not. There was no way to win this point.

The City offered no evidentiary hearing where Plaintiffs could prove the cost of the measure to the City. In a case like this the plaintiffs should have been able to impose whatever they deemed suitable.

If the Police Department wants to it could provide undercover officers to go in every day to monitor marijuana dispensaries and conduct inspections. This would justify a

$75,000 regulatory fee. The problem facing the proponents of any initiative measure that both authorizes a brand new industry or business and attempts to create and finance a regulatory system is the danger of setting the fee too low or too high.

As a matter of law this Court can read the proposed initiative measure and based on logic and judicial experience this Court can determine that if a city wants to spend $75,000 a year monitoring a medical marijuana dispensary it can do so. The monitoring of a medical marijuana dispensary is obviously a task that has no limits with respect to government oversight. What the City has done here is arbitrarily set a very low price for running a medical marijuana dispensary. If somebody runs a new initiative for medical marijuana dispensaries and sets a much lower fee in order to avoid the problems encountered by Plaintiffs in this case marijuana opponents would campaign on the ground that the fee was set too low and that a higher fee should have been set. In other words one cannot win in a battle with City Hall.

The Supreme Court's decision in Sinclair Paint Company v. State Board of Equalization, 15 Cal.4th 866 (1997) supports Plaintiffs. The Superior Court granted the taxpayers request to invalidate a particular fee that was labeled a tax by the taxpayer. The Superior Court ruled that the fee imposed by the State Legislature was really a tax and was enacted in violation of the California constitution. There was no trial. The taxpayer prevailed in its successful motion fore summary judgment. The Court of Appeal affirmed the Superior Court that the measure was a tax and not a fee and therefore invalid in violation of Article 13, Section A of the California Constitution. The taxpayer was an ongoing paint business that caused lead contamination.

Notwithstanding the foregoing, this Court reversed the judgment of the Court of Appeal that had held that the fees assessed by the Legislature were taxes. Rather, this Court ruled that the fees imposed could be bona fide regulatory fees. This Court held that the regulatory fee in the case could be a regulatory fee and not a tax. The summary judgment was reversed and the case was remanded.

This Court stated in Sinclair Paint Co. V. State Board of Equalization, 15 Cal.4th at 880:

> ". . . Quoting with approval from an earlier decision, the court noted that, if revenue is the primary purpose, and regulations merely incidental, the imposition is a tax, but if regulation is the primary purpose, the mere fact that revenue is also obtained does not make the imposition a tax. . . .."

The City argues in the middle of p. 37 that Plaintiffs acknowledged that the City should be in a better position to conduct an analysis of the fee versus tax issue. The City refers to the Reporter's Transcript at p. 14 where the Superior Court asked counsel for Plaintiffs,

> ". . . Wouldn't the city be in a better position than your client to know how much enforcement is required?" (Transcript, May 19, 2015, p. 14, lines 1-2).

Counsel for Appellants stated,

> "They should. But the credibility is suspect, because the City has a motive to defer the election until November of 2016."

The point of this quotation is to show that what Plaintiffs said was that the City should be in a better position. Plaintiffs very carefully did not say that the City was in the

best position. The quotation by the City in its Brief at p. 37 creates the misimpression that Plaintiffs were agreeing with the City's ability to analyze the costs in determining whether the $75,000 fee is truly a fee or a tax.

The City says that Plaintiffs made no showing that the City's estimate was not reasonable. The case should not have been decided on self-serving estimates. No medical marijuana dispensary was involved. There was no history of regulation. In the Sinclair Paint case the taxpayer sued for a refund after it had been in operation. It paid $97,825.26 in fees for which it claimed were taxes. The litigation was based on business activity after the statute was enacted. Justice Chin wrote the opinion for a unanimous Court. This Court believed the public should not have to pay for the damage caused by lead paint produced by the party seeking a refund. If Sinclair Paint pollutes the environment it, not the taxpayers, should pay for the damage.

The City has taken too rigid a position on this issue. The proponents' $75,000 fee determination should have been given some deference since they are the proponents of the measure. Moreover, fees are open ended. The City could have very well simply said that there is no limit as to what a fee could be because additional inspection and surveillance costs could always be incurred. The City's position is contrary to the very fundamental purpose of the initiative process which is to give citizens the right to propose their own laws.

The city could have said that additional new police officers would be hired to monitor the dispensary. The City could have very easily said that it would hire two new officers whose sole purpose would be to monitor the dispensaries to make sure that minors do not go inside and to make sure that all medical marijuana patients have the appropriate

documentation. The cost estimate of the City was unreasonably low to accomplish a political purpose. The City criticizes Plaintiffs because their cost estimate came in a few thousand dollars lower than perhaps it should have. But all of this is speculation. The City's speculation was designed to defeat the measure

D. THE COURT OF APPEAL CORRECTLY RULED THAT EVEN IF THE PROPOSED FEE IS A TAX IT IS NOT BEING IMPOSED BY LOCAL GOVERNMENT

It is significant that Section 2 of Article 13c begins with a reference to "Local Government Tax Limitation.

The section further provides as follows:

> "All taxes imposed by any local government should be deemed to be either general taxes or special taxes .... "

The initiative which is the subject of this lawsuit is not "imposed by any local government." Article 13c, Section 2(b) begins with the following:

> "No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. . .. The election required by this subdivision shall be consolidated with the regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body."

The language quote above makes it abundantly clear that Article 13c, Section 2 of the California Constitution is a limitation on local government, not a limitation on the right of initiative. Placing the initiative measure on a special election ballot does not ignore Article 13c,Section 2.

It is clear that Article 13c, Section 2 only prohibits the City Council from placing a measure on a special election ballot. The so called election required by the subdivision would be an election on a ballot measure placed on the ballot by the City Council. The proponents of Proposition 218 and Proposition 26, together of which comprise Article 13c, feared the imposition of taxes by the government. Indeed, as stated earlier, Article 13c, Section 1 refers to local government as being any city. Local government obviously would be the City Council. The electorate exercising its right of the initiative, is not local government. The two, local government and the voters, are at the opposite ends of the spectrum. What the electorate fears is governmental power. The electorate does not fear itself. Section 2 of Article 13c was placed on the statewide ballot because of fear that local government would dominate. Initially the restriction on local government came from Proposition 13 and was later expanded.

It is clear that the City government in this case is misusing Article 13c, Section 2 to its own advantage. It is politically opposed to medical marijuana and is concerned about the outcome of the vote. Accordingly, the City Council politically decided to delay the election for as long as possible and to place it on the general election ballot, but that general election would only be required for ballot measures put on the ballot by the City Council, not for citizen driven initiative petitions. The phrase, "the election required by this subdivision," clearly refers to an election that would be required if the City Council wanted to raise taxes and place a tax increase measure on the ballot for the voters to consider. It would be that election that would have to be consolidated with the regularly scheduled general election.

The City was able to obtain a number of friend of the court letters urging review because of an issue that this case does not present. Specifically, the City and the amicus take issue with the statement of the Court of Appeal that Article 13c, Section 2 does not apply to initiatives. The City claims that the Court of Appeal created a giant loophole. The City claims that the Mayor and Council members of a particular city can avoid the requirement that the voters approve tax increases by conspiring with the public employee union of a particular city to run an initiative to raise taxes and then the Mayor and the City Council would adopt the ordinance proposed by the initiative without a vote of the people. That has not occurred in this case. If and when such an event should occur and is brought to the attention of the judicial branch the Courts can consider what to do. The issue is not before this Court and was not before the Court of Appeal or the trial court. Depending upon the facts of the particular case a court could invalidate an ordinance adopted without a vote of the people. The adoption of the ordinance under Section 9214 (a) may or may not be considered as being imposed by local government. The Court of Appeal correctly decided the narrow issue presented by this case. This case only deals with the subject of a special election not the adoption of an ordinance under Section 9214(a).

The construction of the interplay between Article 13c, Section 2 of the California Constitution and Elections Code Section 9214 makes sense. The provisions are reconciled. Under the City's theory the Court is asked to repeal by judicial fiat Section 9214 (b). Plaintiff's construction harmonizes the various provisions. The City's position would require a Court to ignore Section 9214(b).

The Court of Appeal correctly decided the issue and this Court should adopt its

decision.

The City relies heavily upon Howard Jarvis Taxpayers Assn., v. City of La Habra, 25 Cal.4th 809 (2001) and DeVita v. County of Napa, 9 Cal.4th 763 (1995), but ignores Friends of Sierra Madre v. City of Sierra Madre, 25 Cal.4th 165 (2001).

Friends of Sierra Madre is important because it highlights the importance of the initiative process in California. The Plaintiffs exercised their right of initiative guaranteed by Article 2, Section 11; and Article 11, Section 7 of the California Constitution, and also followed Elections Code Sections 1405 and 9214. So important is the right of initiative that any statutory conditions that might weaken in any way the initiative process are inapplicable.

For example, if a City Council votes to place a proposed ordinance (not an initiative petition) on a ballot to allow the electorate to vote yes or no, the City must still comply with the California Environmental Quality Act and provide an environmental assessment of the proposed measure. However, the same measure placed on the ballot by a citizen initiative petition signed by the requisite number of registered voters is exempt from the CEQA requirement that there be an environmental assessment.

Likewise, this Court in DeVita v. County of Napa, supra, held that the electorate could utilize the initiative process to collect signatures for an initiative petition and place a measure on the ballot to amend the general plan without going through the otherwise mandatory process imposed upon the City Council or Board of Supervisors, i.e., conduct duly noticed public hearings.

This Court stated, 9 Cal. 4th at 786:

> "These cases exemplify the rule that statutory
> procedural requirements imposed on the local

> legislative body generally neither apply to the electorate nor are taken as evidence that the initiative or referendum is barred. The rule is corollary to the basic presumption in favor of the electorate's power of initiative and referendum. 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.

These cases reveal the special place the citizen sponsored signature initiative petition has in our democracy. The initiative process is all powerful and cannot be limited.

The case cited by the City, Howard Jarvis Taxpayers Assn., v. City of La Habra, supra, is not to the contrary.

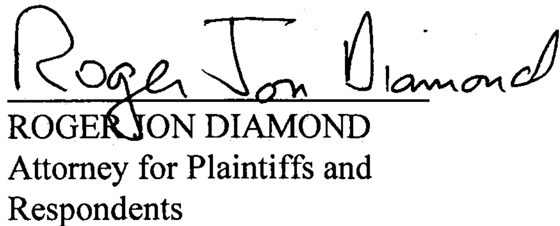
The case clearly supports Plaintiffs' view here. First, it should be noted that the case did not involve a question regarding the timing of an election. Second, and more to the point, the case stands for the proposition that taxpayers may sue to invalidate tax measures that are improperly enacted and may also claim refunds for taxes already paid pursuant to invalid tax measures. Likewise, in the instant case the City Council should have placed the measure on a special election ballot for voter consideration pursuant to the initiative process. If the voters approve the initiative a marijuana dispensary subject to the fee could bring an action to invalidate the fee on the ground that it is allegedly a tax. If the dispensary should prevail in such a hypothetical action the tax or fee would be invalidated. The Howard Jarvis case involved a challenge to a tax because it was not approved by the voters. Here, we do not have a situation involving voter approval or disapproval. Rather, the instant case is a very narrow case involving the timing of the election. If Plaintiffs are wrong but the voters

approve the measure in a special election (not a general election) a taxpayer or fee payer such as a medical marijuana dispensary could bring an action to invalidate the fee as being a tax.

IV CONCLUSION

This Court is respectfully requested to uphold the judgment of the Court of Appeal. In the alternative, should this Court disagree with the analysis of the Court of Appeal this Court should reach the other two issues that were not decided by the Court of Appeal or remand the remaining issues to the Court of Appeal for further consideration.

Respectfully submitted,



ROGER JON DIAMOND
Attorney for Plaintiffs and Respondents

S234148

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed Answering Brief on the Merits is produced using 13-point Roman type and contains approximately 11,373 words which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 9, 2016

Respectfully submitted,

ROGER JON DIAMOND
Attorney Plaintiffs & Respondent

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2115 Main Street, Santa Monica, California 90405.

On the date shown below I served the foregoing document described as: **ANSWERING BRIEF ON THE MERITS** the interested parties in this action by personal service placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Santa Monica, California on August 10, 2016.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was executed at Santa Monica, California on the 10 day of August 2016.

Judith A. Burgdorf