Case No. S219567

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHERRITY WHEATHERFORD,

Plaintiff and Appellant/Petitioner,

v.

CITY OF SAN RAFAEL, et al.,

Defendants and Respondents.

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

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

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INTRODUCTION

Petitioner Cherrity Wheatherford seeks to have this Court rewrite Code of Civil Procedure section 526a and overturn more than a century of established statutory and case authority. She asks the Court to disregard the plain statutory language of section 526a limiting standing to persons who have been assessed taxes, and have paid or are liable to pay such assessed taxes, and grant her and others who are not assessed taxes standing to challenge governmental expenditures. It is not the province of the Courts to rewrite legislation or to review Legislative decisions. The expansive interpretation petitioner seeks is unsupported by the plain language of the statute and Legislative intent, and disregards the rules of statutory construction.

Petitioner attempts to circumvent rules of statutory construction by arguing that requiring assessed taxes for standing under section 526a results in unlawful wealth-based discrimination and violates equal protection. Her attempt to couch the issue in terms of equal protection and wealth-based discrimination is simply mistaken, as section 526a does not implicate such concerns. Section 526a does not affect a protected class of persons or impinge on fundamental rights, and absolute equality is not required. Petitioner cannot meet her burden to show that no rational relation exists between requiring assessed taxes and standing to challenge governmental illegal expenditure or waste to justify judicial revision of section 526a. (*Heller v. Doe by Doe* (1993) 509 U.S. 312, 319-321; *see also D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 17.)

Petitioner also incorrectly represents that if section 526a standing is not extended to persons who merely pay consumer taxes, less wealthy people, including middle-class taxpayers, "who have *personally* witnessed and experienced the negative affects of the challenged government action"

will be left with no judicial recourse. (Petitioner's Opening Brief, p. 7, italics in original.) Persons assessed taxes within the meaning of section 526a are afforded standing to challenge government action, irrespective of whether they are wealthy, less-wealthy, middle-class or poor. Significantly, persons who "*personally*" "experienced the negative affects" of some challenged government action continue to have standing to sue given that they are personally aggrieved, regardless of property ownership or lack thereof. Section 526a does not take away or in any way affect the standing rights of persons personally aggrieved as petitioner suggests, and the statute has never been interpreted by any court in such manner.

Petitioner ignores that while section 526a is intended to afford a large body of the citizenry standing to challenge government waste, it was not intended to confer unfettered access to everyone to challenge any government action. Section 526a, by its express terms, is limited to actions challenging illegal expenditure or waste of public funds. It does not involve widespread access to courts generally, or broadly deny less wealthy persons far-reaching court access as petitioner implies.

The California Appellate Courts uniformly hold that the mere payment of sales, gasoline and other consumer tax is insufficient to confer taxpayer standing under Code of Civil Procedure section 526a and that assessed taxes are required. This interpretation is consistent with the plain language of section 526a, and comports with legislative intent and general standing principles. That section 526a requires more than mere payment of sales tax by anyone with a tenuous relation to the municipality could not be more clear. Requiring assessed taxes ensures that persons initiating actions challenging municipal spending have a real interest in the outcome of the litigation. Drastically expanding section 526a standing to permit anyone who happens to pay a sales tax somewhere in the state to challenge the

actions of local entities everywhere essentially eviscerates any standing requirement and renders section 526 superfluous and nugatory.

The expansive interpretation petitioner seeks is unsupported by any Supreme Court or Appellate Court authority, is inconsistent with the plain language of the statute and the Legislature's intent, is contrary to the basic tenets of standing, and would render section 526a entirely superfluous and meaningless. Section 526a was not intended to confer standing on virtually anyone in the state, as the Legislature would have stated as much in the 105 years since the statute was enacted. Petitioner offers no authority to warrant this Court's denouncement of longstanding taxpayer requirements and creation of new taxpayer standing requirements not encompassed in the language of section 526a. The Court of Appeal decision that payment of sales, gasoline or other consumer taxes is insufficient, and liability for or payment of assessed taxes is required for standing under section 526a, should be affirmed.

STATEMENT OF ISSUES

The issues presented as specified in petitioner's petition are:

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

2. Did the trial court err in dismissing plaintiff's complaint for lack of taxpayer standing? (Petition for Review, p. 5.)

PROCEDURAL HISTORY

Petitioner filed this action against the City on January 9, 2013 for declaratory and injunctive relief, challenging the City's policies and practices concerning impoundment of vehicles for 30-days under Vehicle Code section 14602.6. (CT 13.) Petitioner conceded Veh. Code, § 14602.6 had not been applied against her, and she asserted standing to challenge the City's implementation of § 14602.6 as a taxpayer under Code Civ. Proc.,

§ 526a. (CT 2.) Petitioner further conceded she had not paid any real property taxes in the City, and that, under controlling authority, she was required to pay property taxes for taxpayer standing to attach. (CT 2, 13.) The parties thus stipulated to entry of a judgment of dismissal, reserving petitioner's right of appeal as to the issue of taxpayer standing. (CT 13-14.) The stipulated order and judgment of dismissal was entered on April 22, 2013. (CT 13-16.)

The trial court's judgment of dismissal was affirmed on appeal, and the appellate court's opinion was filed on May 22, 2014. (*See Wheatherford v. City of San Rafael* (2014) 226 Cal.App.4th 460, 171 Cal.Rptr.3d 912, *superseded by grant of review herein*, 332 P.3d 1186 (2014).) The Court of Appeal rejected petitioner's claim that payment of sales and gasoline taxes sufficed for standing under section 526a and held that "payment of an assessed property tax is required in order for a party to have standing to pursue a taxpayer action." (*Wheatherford*, 171 Cal.Rptr.3d at 914.) Petitioner timely filed a petition for rehearing or modification of the appellate court opinion, which the Court of Appeal denied on June 16, 2014.[1] The decision of the Court of Appeal became final on June 21, 2014.

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[1] Petitioner sought reconsideration asking the Court of Appeal to consider the decision in *Sipple v. City of Hayward* (2014) 225 Cal.App.4th 349, *review denied* (July 23, 2014).) Petitioner's reliance on *Sipple* as somehow affording her taxpayer standing is misplaced, as that case did not involve issues of taxpayer standing under section 526a. *Sipple* presented "unique circumstances," and the court there held New Cingular, an internet service provider, had standing to seek tax refunds on behalf of its customers because it was directly involved in overcharging its customers internet access taxes and paid those taxes to the defendant public entities; it had a direct interest in seeking the refunds from the entities because it was sued by its customers for the improper charges and settled the case by agreeing to obtain the tax refunds from the entities and refund its customers; and no refunds would be retained by New Cingular. (*Id.* at 361-362.) New Cingular was contractually obligated to seek the refunds and remained

Petitioner then filed a petition for review in this Court on June 26, 2014. This Court granted review on September 10, 2014. Petitioner's Opening Brief was filed on December 9, 2014.

STATEMENT OF FACTS

Petitioner's complaint sought declaratory and injunctive relief challenging the City's practice of imposing a 30-day impoundment of vehicles pursuant to Vehicle Code section 14602.6, primarily applied to vehicles operated by drivers driving with a suspended or revoked license or without having ever had any license. (Clerk's Transcript on appeal, hereinafter "CT," 3.) Petitioner alleged that in many cases the driver whose conduct caused the impoundment was not the sole owner of the vehicle, and the 30-day impoundment resulted in loss of use of the vehicle for other owners and users of the vehicle. (*Id.*) Petitioner acknowledged she never had her vehicle impounded pursuant to § 14602.6, and she did not allege she was in any way affected by implementation of § 14602.6. Rather, petitioner asserted standing to bring the action as a taxpayer under Code of Civil Procedure section 526a. (CT 2-3.) She conceded she had not paid any property taxes, but claimed she had taxpayer standing because she paid sales and gasoline tax, and water and sewage fees and other taxes routinely imposed by municipalities. (CT 1.) Petitioner acknowledged that the controlling case authority required payment of property taxes for taxpayer standing under § 526a and she conceded her claims were precluded under existing law. (CT 13.) The parties entered a stipulation for an order and judgment of dismissal, reserving petitioner's rights of appeal. (CT 13-14.) Judgment was entered on April 22, 2013. (CT 16.)

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liable to repay the refund amounts. Thus, New Cingular had "a concrete and actual interest in seeking the refunds." (*Id.* at 362.)

LEGAL ARGUMENT

I. STANDARD OF REVIEW

"Statutory interpretation is a question of law that [the Court] reviews de novo." (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724; *Am. Nurses Ass'n. v. Torlakson* (2013) 57 Cal.4th 570, 575; *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794.) Petitioner challenges the interpretation and application of section 526a, and whether it may be read expansively to afford taxpayer standing to persons who pay only a sales, gasoline or income tax. De novo review, therefore, applies in this case.

II. REQUIRING ASSESSED TAXES AS A PREREQUISITE TO SECTION 526a STANDING EFFECTUATES LEGISLATIVE INTENT TO CONFER STANDING ON A LARGER BODY WHILE STILL RETAINING FUNDAMENTAL PRECEPTS OF STANDING

Code of Civil Procedure section 526a provides in part that:

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

The primary purpose of section 526a "is to 'enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirements.'" (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268.) Section 526a relaxes traditional standing requirements because no showing of special damage to the particular taxpayer is necessary for standing to apply. (*Id.* at 270.) "The courts have liberally construed the standing requirement for taxpayers ...

Nonetheless, a plaintiff must establish he or she is a taxpayer to invoke standing under section 526a." (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 873; *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1047.) The courts notably have not extended taxpayer standing to the entire citizenry, and in the 105 years since section 526a was enacted no case has found taxpayer standing exists for persons who merely pay sales, gasoline, telephone or income taxes.

In ascertaining the legislative intent in enacting section 526a the Court must consider that section 526a was enacted against the backdrop of well-established, traditional standing requirements. "*To have standing, a party must be beneficially interested in the controversy*; that is, he or she must have 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' [Citation.] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical." [Italics and brackets in original.] (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 599, citing *Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314-315.) California Code of Civil Procedure § 367, enacted in 1872 (approximately 37 years before section 526a was first enacted), provides that "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."

Section 526a provides an exception to the usual standing requirements specifically for persons assessed taxes, such that no showing of special interest or particular right over and above the public interest at large is necessary, while it still retains some basis to ensure a real, beneficial interest in the action. Extending section 526a standing to include anyone passing through municipal boundaries who happens to pay sales tax on a minimal purchase of goods to then have standing to challenge the

spending practices of that municipality eliminates all traditional standing principles, and renders the particular designation for taxpayer standing in section 526a superfluous. Limiting the meaning of the term "assessed" taxes as used in section 526a to its ordinary, commonsense, accepted meaning upholds the general principles of standing while giving effect to the purposes of section 526a to enable a large body of the citizenry to challenge governmental waste which would otherwise go unchallenged, yet also avoids the absurd result of conferring standing to challenge municipal expenditure to virtually everyone.

This Court's opinion in *Blair, supra*, supports the rule that payment of sales or other consumer tax or income tax is insufficient to confer standing under section 526a. In *Blair*, plaintiffs sought to enjoin county officials from expending time in executing claim and delivery process, and they alleged they were residents and taxpayers of the county. This Court found plaintiffs had standing as taxpayers under section 526a, explaining, "taxpayers have a sufficiently personal interest in the illegal expenditure of funds by [public] officials to become dedicated adversaries. ... There is no danger in such circumstances that the court will be misled by the failure of the parties adequately to explore and argue the issues. We are satisfied that an action meeting the requirements of section 526a thereby presents a true case or controversy." (*Blair*, 5 Cal.3d at 270.) *Blair* demonstrates that general standing principles still apply, and it does not advocate elimination of basic standing requirements altogether. Rather, the Court's opinion in *Blair* supports the interpretation that assessed taxes for purposes of standing under section 526a requires something more substantial than mere payment of consumer or income tax to ensure a sufficiently personal interest in litigation claiming illegal expenditure of funds.

Moreover, the courts have been careful to note that section 526a has its limits. "Regardless of liberal construction, the essence of a taxpayer

action remains an illegal or wasteful expenditure of public funds or damage to public property. ... The taxpayer action must involve an actual or threatened expenditure of public funds." [Emphasis added] (*Humane Soc. Of U.S. v. State Bd. Of Equilization* (2007) 152 Cal.App.4th 349, 355.) "Section 526a does not allow the judiciary to exercise a veto over the legislative branch of government merely because the judge may believe that the expenditures are unwise, that the results are not worth the expenditure, or that the underlying theory of the Legislature involves bad judgment." (*Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138 (*en banc*).) For purposes of section 526a, "waste" is defined as a "useless expenditure of funds." (*Id.*) "Waste does not encompass the great majority of governmental outlays of money or the time of salaried governmental employees, nor does it apply to the vast majority of discretionary decisions made by state and local units of government." (*Thompson v. Petaluma Police Dept.* (2014) 231 Cal.App.4th 101, 108[2]; *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 482.) As this Court, *en banc,* explained in *Sundance*:

> The term 'waste' as used in section 526a means something more than an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion. To hold otherwise would invite constant harassment of city and county officers by disgruntled citizens and could seriously

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[2] Plaintiff in *Thompson, supra,* had standing under section 526a because he was a nonresident who nevertheless paid property taxes in the City of Petaluma. His complaint challenging implementation of the same Vehicle Code § 14602.6 petitioner challenges here failed to state a claim for relief under the limited bases to which section 526a standing applied. The impound scheme under Veh. Code § 14602.6 did not violate due process and was not illegal. Thompson's claims that City taxpayer funds are used to pay police officers to implement § 14602.6 failed to show waste, as the use of funds for police purposes was a matter involving the exercise of legislative discretion with which the courts will not interfere. (*Thompson,* 231 Cal.App.4th at 108.)

> hamper our representative form of government at the local level. Thus, the courts should not take judicial cognizance of disputes which are primarily political in nature, nor should they attempt to enjoin every expenditure which does not meet with a taxpayer's approval.

(*Sundance*, 42 Cal.3d at 1138-1139.) The limited subject matter to which section 526a applies demonstrates that widespread application to myriad types of lawsuits was not intended. Relaxing basic standing requirements for a particular group of persons having some personal interest in the litigation, yet not requiring special injury, does not affect standing generally or preclude less wealthy persons from broad judicial access.

While section 526a provides an exception to ordinary standing requirements by conferring standing to challenge illegal government expenditure or waste absent the usual "showing of special damage to the particular [plaintiff]," taxpayer standing is still premised on the taxpayer plaintiff having a sufficiently real interest in the litigation. Section 526a allows a party who is assessed taxes to challenge the manner in which the monies assessed by the municipality are utilized. In other words, a plaintiff who has actually paid or been assessed a tax has a sufficient personal interest in how those monies they are liable to pay are being spent by the municipality, even though the plaintiff has not sustained any actual injury as a result of municipal action. By contrast, persons with no real connection to the municipality, who happen to pay sales tax on the purchase of goods as they pass through municipal boundaries, have no similar personal interest in how the municipality spends taxes that may have been assessed against others. Nothing in the language of section 526a or the Court's opinion in *Blair* suggests that section 526a was intended to eliminate standing requirements for virtually the entire citizenry.

III. STATUTORY ANALYSIS OF CODE OF CIVIL PROCEDURE § 526a SHOWS THAT A PLAINTIFF MUST HAVE PAID OR BE LIABLE TO PAY AN ASSESSED TAX TO QUALIFY FOR TAXPAYER STANDING

The fundamental rule of statutory construction is to ascertain and effectuate the intent of the Legislature in enacting the statute. (*Bruns*, 51 Cal.4th at 724; *Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227.) The Court begins "by examining the statutory language because it generally is the most reliable indicator of legislative intent." (*Allen*, 28 Cal.4th at 227; *Bruns*, 51 Cal.4th at 724.) The language is given "a plain and commonsense meaning. [The Court does] not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Bruns*, 51 Cal.4th at 724; *Allen*, 28 Cal.4th at 227.) "[W]hen statutory language is clear and unambiguous, resort to the legislative history is unwarranted." (*Bonnell v. Medical Bd. Of Cal.* (2003) 31 Cal.4th 1255, 1263.) The Court will "presume the Legislature meant what it said and the plain meaning of the statute governs." (*Id.* at 1261.)

"If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Bruns*, 51 Cal.4th at 724.) "Ultimately [the Court will] choose the construction that comports most closely with the apparent intent of the lawmakers with a view to promoting rather than defeating the general purpose of the statute. ... Any interpretation that would lead to absurd consequences is to be avoided." [Citations omitted.] (*Allen*, 28 Cal.4th at 227.)

1. The Plain Language of Section 526a Precludes Petitioner's Expansive Reading

The language of section 526a does not support extending taxpayer standing beyond persons who have been assessed taxes. The first step of statutory construction is for the courts to give the words of the statute "a plain and commonsense meaning." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 577.) Section 526a provides standing to challenge illegal public expenditures to one who "**is assessed for and is liable to pay, or within one year before the commencement of the action, has paid, a tax therein**." Section 526a thus provides standing to two classes of individuals who have been assessed taxes: (1) a person who is assessed for and is liable to pay a tax, and (2) a person who within one year before commencement of the action is assessed for and has paid an assessed tax.[3]

The meaning of the term "assessed" means more than simply reimbursing a retailer for its payment of sales or gasoline taxes; it requires that the tax be imposed on a person who is legally bound to pay it. An "assessment" is the "Imposition of something, such as a tax or fine, according to an established rate." (Black's Law Dict. (10th ed. 2014) p. 139, col. 2.) "As the word is more commonly employed, an assessment consists of two processes, listing persons properly to be taxed, and of estimating the sums which are to be the guide of an apportionment of the tax between them." (*Abrams v. City and County of San Francisco* (1941) 48 Cal.App.2d 1, 6, *citing Flinn v. Zerbe* (1919) 40 Cal.App. 294, 296.)[4]

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[3] Petitioner's attempt to construe section 526a in the disjunctive to confer standing on persons who merely "paid a tax," irrespective of the term "assessed," is untenable. "Plainly the word 'or' is intended to provide an alternative to the clause 'is liable to pay.'" (*Wheatherford*, 171 Cal.Rptr. at 916.)

[4] *See also* Report of the Senate Interim Committee on State and Local Taxation, 1953 Regular Session, January 1953, Part Four, *A Legal History*

Under the general definition of the term "assessed," "A tax is assessed when the county assessor prepares the role listing all properties subject to taxation and their assessed value. (Rev. & Tax. Code §§ 401, 109, 601.)" (*Hagman v. Meher Mount Corp.* (2013) 215 Cal.App.4th 82, 90, *citing Allen v. McKay* (1898) 120 Cal.332, 334.)

The ordinary definition of the term "assessed" thus requires both valuation of property and imposition of a tax based on the property value. California's property tax statutory scheme illustrates that this is the intended definition of the term "assessed." Local governments primarily are supported by the general property tax on real property and tangible personal property; such "tax is imposed by the local subdivision (county or city or both) in which the property is located." (9 Witkin, Summary of California Law, (10th ed. 2005) *Taxation*, at p. 164, § 114.)

Use of the term "assessed" in other statutes likewise makes clear that the term is intended to apply to real and personal property. California Gov. Code § 43000 provides that "By ordinance the city legislative body shall provide a system for the assessment, levy and collection of city taxes." For purposes of city taxes, assessed value is defined as a specified percentage of

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of Property Taxation in California, Div. III, Assessment and Equalization of Property. As stated therein,

> Broadly speaking, an assessment is the process of officially listing and valuing property. (*Ferris v. Cooper* (1858) 10 Cal.589, 633.) As said in 51 Am. Jur. 615:
>
> "While strictly speaking, the 'assessment' of a tax is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district, the word as commonly employed refers to the processes of listing the persons, property, etc., to be taxed, and the valuation of the property."

(*Id.*, at p. 11.)

the full value of the property. (Cal. Gov. Code § 43004.5.)[5] Further, "Taxes assessed ... are liens on the property assessed. Taxes upon personal property are liens upon the owners' real property..." and the liens may be enforced by a sale of the real property or an action to foreclose the liens. (Cal. Gov. Code §§ 43001 and 43003.) The term "assessed" as it specifically relates to city taxes plainly refers to real or personal property. It does not refer to gasoline, sales, telephone or income tax.

Liable is defined as being "[r]esponsible or answerable in law; legally obligated" or being "subject or likely to incur." (Black's Law Dict. (10th ed. 2014) p. 155, col. 2.) The standard definition of the term "pay" with respect to taxes is "to discharge indebtedness for" or to "discharge a debt or obligation." ("pay," Merriam-Webster Online Dictionary, 2015, http://www.merriam-webster.com/dictionary/pay (19 Feb. 2015).)

Section 526a provides standing to an individual "who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein." The plain language of section 526a confers taxpayer standing only upon individuals who have had a tax *assessed* against them. The appellate court correctly summarized standing conferred by section 526a as follows: "the statute gives standing to two classes of persons who have been assessed for taxes: (1) those who are liable to pay an assessed tax but who have not yet paid, and (2) those who paid an assessed tax within one year before the filing of the lawsuit." (*Wheatherford*, 171 Cal.Rptr. at 916-917.) The meaning of the term "assessed" is unambiguous and cannot be construed to mean payment of income, sales, gasoline or telephone taxes, especially since consumer taxes

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[5] *See also* Cal. Const. art. XIII, § 1, and Rev. & Tax. Code § 201, all property is taxable and must be taxed in proportion to its full value unless exempted; 9 Witkin, Summary of California Law, (10th ed. 2005) *Taxation*, at p. 253, § 163.

are levied upon the vendor of goods, not the consumer, and are administered and collected by the State Board of Equalization, not the local governmental entity against which standing is sought. (*See, e.g.*, Rev. & Tax. Code §§ 6051, 7051, *et seq.*, 7361.)

Petitioner's expansive interpretation of section 526a to include payment of sales and gasoline taxes as grounds for section 526a taxpayer standing does not comport with the plain language of the statute. Her interpretation requires the Court to disregard the word "assessed" as used in the statute, and in its ordinary, commonsense usage, as consumers are not "assessed" sales and gasoline taxes. Such interpretation renders the term "assessed" superfluous and is directly contrary to the rules of statutory construction. (*Klein v. United States of America* (2010) 50 Cal.4th 68, 80; Courts must give meaning to every word in a statute, and not construe it so as to render words superfluous.) Moreover, requiring "assessed" taxes as the basis for taxpayer standing ensures that a plaintiff claiming taxpayer standing has a sufficiently personal stake – a beneficial interest – in litigation challenging a municipality's expenditure of public funds. Plaintiffs who have paid or are liable to pay assessed taxes have a real and personal interest in the manner in which the municipality collecting the tax spends the monies collected or assessed. Petitioner identifies no legal basis to disregard the Legislature's particular use of the term "assessed," or to redefine the term to mean the mere payment of sales or gasoline taxes by anyone passing through the boundaries of a public entity.

Petitioner's argument, that the language of section 526a should be read to include payment of sales and gasoline taxes to any entity (government, retailing or property owner) where the money paid potentially may be used to pay off a tax assessed against the entity passing the tax on to the consumer, is unavailing. (Petitioner's Opening Brief, pp. 38-39.) Her argument that this construction is consistent with the dictionary

definition of "taxpayer" as "one who pays or is liable for a tax" is unavailing because the term "taxpayer" does not appear in section 526a. Her definition also does not contemplate the situation here, where a consumer merely pays an increased price on goods to defray the cost of doing business for the entity actually assessed the tax and legally responsible to pay the tax.

2. The Legislature Intended to Limit Application of Section 526a to Persons Subject to Payment of Taxes on Real or Personal Property

Requiring liability to pay or payment of an assessed tax is consistent with the primary purpose of section 526a, which is to remove the traditional barriers to standing and "enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts." (*Blair*, 5 Cal.3d at 267.) For example, in this case, property and business owners in the City who are assessed taxes may challenge the City's vehicle towing policy *even if they have not had a vehicle towed or had the municipal ordinance otherwise enforced against them.* Persons who are actually aggrieved by the ordinance – those who have had vehicles impounded for lack of a valid license, owners and users of vehicles who lost use of vehicles – of course, have standing to challenge the practice. Allowing persons who have been assessed or paid assessed taxes in the City to <u>also</u> challenge the practice enables a larger body of the citizenry than those actually aggrieved by the ordinance to challenge the towing policy. Persons who have been assessed taxes in the City have a sufficient beneficial interest in the manner in which the City utilizes the resources it collects to vigorously pursue such action. While the Legislature intended to relax the standing requirements to permit a larger body of persons to challenge governmental actions, it did not intend to dispense with standing requirements altogether. The requirement that a plaintiff seeking taxpayer

standing have been assessed taxes on property or a business within the City, versus merely paying sales or gasoline tax, ensures the individual is sufficiently interested in the action regarding the manner in which the particular entity utilizes public funds, which satisfies the fundamental purposes of standing absent actual injury. The Legislature is presumed to have meant what it said by its particular use of the term "assessed." Section 526a was never intended to confer taxpayer standing to everyone who merely purchased gasoline or candy while passing through the City of San Rafael or the State of California.

Further, the historical context in which the Legislature passed section 526a demonstrates that it could not have intended the statute to apply to the payment of sales or gasoline taxes, as such taxes did not exist in 1909. Indeed the first state sales tax in the country was enacted in West Virginia in 1921; the State of California did not enact its first sales tax until July 31, 1933, through the Retail Sales Tax Act, well after section 526a was enacted. (*See Roth Drugs v. Johnson* (1936) 13 Cal.App.2d 720 at 729-730.) The Legislature thus could not have contemplated gasoline or sales tax as valid bases to confer standing under section 526a.

Petitioner argues that because real property taxes were the only tax imposed in 1909 when section 526a was enacted, the Legislature would have expressly stated section 526a was limited to payment of real property taxes if it intended such limitation, and because it did not so state, section 526a should be read expansively to now include income, sales, gasoline and telephone taxes that did not exist at the time. Petitioner's convoluted construction is untenable and defies the rules of statutory construction. The Legislature cannot be said to have intended to include circumstances that did not exist and were not contemplated, or even imagined at the time, merely because it failed to expressly exclude circumstances that did not yet exist.

Petitioner's reliance on *Santa Barbara Co. Coalition Against Automobile Subsidies v. Santa Barbara Co. Assn. of Governments* (2008) 167 Cal.App.4th 1229 for the proposition that section 526a was intended to include consumer payment of sales tax as a basis for standing ignores the dissimilar circumstances of that case and the basis for the court's ruling. In that case, a *county retailer* that paid sales taxes on the sale of T-shirts had standing under § 526a because it "established liability to pay a tax assessed by Santa Barbara County." [Emphasis added.] (*Id.* at 1236.) Petitioner's argument again ignores the language of section 526a and specific use of the phrase "assessed" on which section 526a standing is based.

Notably, section 526a has been amended only twice, first in 1911 and lastly in 1967. Neither amendment altered relevant portions of the statute, and did not expand the bases for standing. The Legislature's amendment, without elimination of the term "assessed" or further elaboration, implies tacit approval of the state of the law at the time of the last amendment.

This Court's decision in *Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13 was issued a year before the Legislature's last amendment of section 526a. The *Irwin* decision reaffirmed the plain language and commonsense interpretation of section 526a, finding Irwin was entitled to standing under section 526a because she was a property owner and taxpayer in the City of Manhattan Beach. Although she was not a resident of the City, Irwin paid a tax that was assessed directly on her by the City, thus standing under section 526a applied.

The Legislature's reenactment of section 526a shortly thereafter demonstrates its approval of the Court's interpretation that section 526a requires payment of or liability for an assessed tax. "When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts,

the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." (*People v. Bouzas* (1991) 53 Cal.3d 467, 475.) Most significantly, the Legislature has continued to utilize the limiting phrase "assessed," even after implementation of sales, gasoline, telephone and income taxes, continuing to limit taxes qualifying for section 526a standing to those "assessed," and not merely remitted as reimbursement to the individual or business ultimately liable or actually assessed a tax. The Legislature's intent to limit the right to sue to persons who paid or are liable to pay taxes assessed directly against them is evinced in the plain language of the statute, the Legislative history and historical circumstances surrounding the original enactment of section 526a.

3. Disregarding the Term "Assessed" Defies Common Sense and Leads to Absurd Consequences

Eliminating the requirement that standing under section526a requires "assessed" taxes, either actually paid or having liability to pay, results in absurd consequences and does not comport with the intent of the Legislature. (*Bruns*, 51 Cal.4th at 724; *Allen*, 28 Cal.4th at 227.) Reason, practicality and common sense dictate that section 526a should not be read so expansively to allow essentially every individual within the State of California, or passing through the State of California, to challenge the polices and practices of a municipal entity anywhere in the state. The expansive application of section 526a that petitioner seeks renders the specific statutory language limiting standing to persons against whom taxes have been "assessed" entirely superfluous, and the statute itself a nullity. Without the limitation of assessed taxes bearing some relation to a business, real or personal property within the municipality, there is no connection at all for individuals asserting taxpayer standing to have any "personal stake in the outcome" to vigorously present the case, and the fundamental precepts of standing will be eliminated. Such an application would lead to

absurd results that are inconsistent with longstanding concepts of standing, and will result in overburdening limited resources of the Courts and governmental entities by permitting limitless actions by disinterested persons challenging governmental actions. The qualifier that taxes referenced in section 526a must be "assessed" does not conflict with the intent of section 526a to "enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged." Limiting standing to persons who are assessed taxes still allows persons who have not personally sustained any real or actual injury from the disputed expenditure to challenge such expenditures – a larger population of the citizenry than those having standing under ordinary standing requirements. Had the Legislature intended to afford standing to anyone passing through the municipality, it would not have included the particular term "assessed" or limited standing to persons who paid or were liable to pay assessed taxes, and would simply have said challenges to municipal expenditures could be brought by anyone. The particular language selected in drafting section 526a does not support this inapposite interpretation.

IV. APPELLATE COURT CASE AUTHORITIES UNANIMOUSLY REQUIRE PAYMENT OF OR LIABILITY TO PAY DIRECTLY ASSESSED TAXES FOR STANDING UNDER SECTION 526a

No appellate court or Supreme Court case in the 105 years since section 526a was enacted has held that payment of fees, sales, gasoline, income, or any tax other than an assessed tax, suffices to confer standing under section 526a. No authority supports petitioner's argument that because all taxes fund government action "all forms of tax payment satisfy section 526a." (Petitioner's Opening Brief pp. 43-44.) The consistent Court of Appeal and Supreme Court decisions show that expansively reading section 526a to include "all forms of tax payment" was not contemplated by the Courts or Legislature and is improper.

1. Sales And Gasoline Taxes

Sales and gasoline taxes are not assessed directly against consumers, but rather, are taxes imposed upon businesses. "Under California sales tax law, the taxpayer is the retailer, not the consumer." (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1103.) "The sales tax is imposed on retailers 'for the privilege of selling tangible personal property at retail.' ([Cal. Rev. & Tax. Code] § 6051.) The *retailer* is the taxpayer, *not* the consumer. 'The tax relationship is between the retailer only and the state; and is a direct obligation of the former.' (*Livingston Rock & Gravel Co. v. De Salvo* (1955) 136 Cal.App.2d 156, 160, 288 P.2d 317; see also 9 Witkin, Summary of California Law, (10th ed. 2005) *Taxation*, at p. 497, § 344; 56 Cal.Jur. 3d (2011) Sales and Use Taxes, § 10, p. 22.)" [Italics in original.] (*Loeffler*, 58 Cal.4th at 1104.) A sales tax "is not a property tax on the buyer, but an excise or privilege tax on the retail seller based on the gross receipts of retail sales of tangible personal property in California." (9 Witkin, Summary of California Law, (10th ed. 2005) *Taxation*, at p. 497, § 344; *see also* Rev. & Tax. Code 6051.)

Gasoline taxes likewise are imposed against retailers, vendors, and distributors, but not consumers. (*See* Rev. & Tax. Code §§ 7360, *et seq.*, 8733; *see also Standard Oil Co. v. Johnson* (1938) 10 Cal.2d 758, 767-768; Rev. & Tax. Code §§ 7351 [fuel tax is imposed on the distributor] and 8733 [fuel tax is debt owed by vendor]; *People v. Sonleitner* (1960) 185 Cal.App.2d 350, 366 [intent of gas tax law is to levy tax upon distributor of gasoline who can recapture the money from consumer].)

Sales and gasoline taxes are not assessed against individuals like petitioner. Such taxes are levied against a *retailer*, and are insufficient to confer taxpayer standing under § 526a to an end *consumer*. Appellate Court cases addressing this specific issue consistently hold as such.

In *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, plaintiffs were neither city residents nor city property tax payers and did not qualify for standing under § 526a. Plaintiffs sought to challenge the City's redevelopment project, claiming they could not afford to live in the City but were interested in moving there. They argued payment of sales tax on the purchase of a few items in the City within the one year before sufficed for standing under § 526a. Rejecting the argument, the court reiterated, "a sales tax is a levy imposed on the retailer, not the consumer." (*Id.* at 1047, *citing* Rev. & Tax. Code § 6051, "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers ..." *Western Lithograph Co. v. State Board of Equalization* (1938) 11 Cal.2d 156, 162.) The retailer, in turn, may or may not choose to pass on the burden to the consumer. (*Torres*, 13 Cal.App.4th at 1047.) While the price of goods purchased in the City was increased by the amount of the sales tax, "the tax was imposed on the person who sold the goods to them," and payment of sales tax on the goods did not confer section 526a standing on plaintiffs. (*Id.* at 1048.)

In *Cornelius v. Los Angeles Co. Metro Transp. Auth.* (1996) 49 Cal.App.4th 1761, a non-resident sought to challenge the constitutionality of an affirmative action program for awarding contracts. He did not own real property or pay real property taxes in the county, but claimed taxpayer standing because he paid sales and gasoline taxes and public transportation fares. The appellate court specifically defined the issue before it as "what type of tax the plaintiff must pay in order to have standing under Code of Civil Procedure section 526a." (*Id.* at 1775.) Reviewing the language of section 526a, the Court concluded the phrase "assessed" was "consistent with ad valorem property taxes, be that on real property or personal property." (*Id.*) Claims that payment of sales taxes, gasoline taxes and transportation fares conferred taxpayer standing were rejected. (*Id.* at

1777-1778 and fn. 6.) Plaintiff did not have taxpayer standing because (1) he did not pay any property taxes directly to the county; (2) the sales and gasoline taxes he paid were taxes imposed on the retailer, not the consumer; and (3) payment of state income taxes were insufficient to confer standing to bring suit against a county agency. (*Id.* at 1775-1780.)

In *Santa Barbara Co. Coalition Against Automobile Subsidies v. Santa Barbara Co. Assn. of Governments* (2008) 167 Cal.App.4th 1229, a *county retailer* that paid sales taxes on the sale of T-shirts had standing under section 526a because it "established liability to pay a tax assessed by Santa Barbara County." (*Id.* at 1236.) As the party directly assessed the sales tax, the retailer could properly challenge a local county taxing measure. "Even if a merchant passes the tax on to the consumer ... a sales tax is considered a tax on the retailer." (*Id., citing Cornelius, supra*, 49 Cal.App.4th at 1777-1778.) Accordingly, a county retailer who actually remits a sales tax levied upon the goods he vends may assert taxpayer standing, but the customer to whom the retailer may or may not pass on the tax burden may not.

In *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, Reynolds challenged the City's operation of a reservoir and its use of Napa County sales tax revenues, claiming standing under section 526a based on payment of sales tax as a consumer buying retail products in the County. (*Id.* at 867, 871.) The appellate court found Reynolds lacked standing as a taxpayer within the meaning of section 526a, and again reiterated that "payment of sales tax, as a consumer buying retail products in Napa County, is insufficient because sales tax is imposed on the retailer, not the consumer." (*Id.* at 872.)

The appellate court's decision in the instant case likewise rejected petitioner's claim to section 526a standing based on payment of sales, gasoline and income taxes, and held "payment of an assessed property tax

is required in order for a party to have standing to pursue a taxpayer action." (*Wheatherford*, 171 Cal.Rptr. at 914.) The court did not hold that "sales taxes are not used to fund city and county law enforcement efforts and therefore petitioner's payment of sales tax is [in]adequate [sic] to confer standing on her under section 526a" as petitioner represents. (Petitioner's Opening Brief, p. 43.) The Court of Appeal did not even discuss whether sales taxes were used to fund city or county law enforcement efforts.

These cases addressing the issue of sales and gasoline taxes uniformly find payment of sales and gasoline taxes insufficient for standing under section 526a and are consistent with the definition of "assessed" taxes. No valid basis exists to eliminate the word "assessed" from the statute or to redefine it.

Petitioner's argument that her payment of sales tax should suffice because the City of San Rafael imposes a half-cent sales tax to fund City agencies, including the police department, is misplaced. (Petitioner's Opening Brief, p. 43.) That the police department's expenditure for enforcement of Veh. Code section 14602.6 may be directly related to the half-cent sales tax is not a basis for standing under section 526a. Petitioner's reasoning ignores the general definition of "assessed" and its use in section 526a. The determining factor is not how taxes collected ultimately are used, but rather who was liable to pay the taxes. The sales tax is assessed against retailers in the City, not petitioner; retailers may or may not pass the tax onto consumers like petitioner but the retailer ultimately remains liable for the assessed tax.

Petitioner's argument as to which entity purportedly imposed a particular sales tax likewise is unavailing. The primary inquiry is whether the person or entity invoking standing under section 526a was assessed a tax against them. It is immaterial that some entity may have assessed taxes

against unrelated persons, or how the taxes ultimately are allocated and utilized if the person invoking standing was never assessed taxes.

Petitioner erroneously argues that her payment of gasoline taxes to a distributor entitles her to standing under section 526a because "a nexus undoubtedly exists" between gasoline taxes and City budgets used for law enforcement because the distributor's payment of such taxes eventually will "trickle down" or be allocated to the City. (Petitioner's Opening Brief, p. 43.) Her argument again misapprehends the language of section 526a. The issue is whether gasoline tax was assessed against petitioner. Section 526a contains no language conferring standing on persons who pay taxes assessed against someone else, regardless of how those assessed taxes ultimately are distributed.

2. Payment of Income Taxes Does Not Confer Section 526a Standing

Petitioner's complaint did not assert payment of income taxes as a basis for standing, and the issue was not considered or included in the judgment of dismissal. Petitioner waived her right to consideration of the issue of income taxes on appeal and she can not properly raise the issue for the first time on appeal. (*Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1399; California courts "ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived.") Petitioner also failed to specify in what city or county she purportedly works and is taxed. (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795; "to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity.") Even if the issue of income taxes was before the Court, petitioner is not entitled to taxpayer standing based on payment of income taxes.

The City is statutorily prohibited from levying or collecting income tax on any person. California Rev. & Tax. Code section 17041.5 provides that "Notwithstanding any statute, ordinance, regulation, rule or decision to the contrary, no city, ... whether incorporated or not or whether chartered or not, shall levy or collect or cause to be levied or collected any tax upon the income, or any part thereof, of any person, resident or nonresident." Income taxes bear no relationship to the City. Conferring standing on persons based on payment of state income tax renders section 526a a nullity, as persons paying income tax anywhere in California would have standing to challenge the expenditures of governmental entities throughout the state, notwithstanding the lack of any real interest in such practices.

The Court in *Cornelius*, *supra*, 49 Cal.App.4th 1761 addressed the precise issue of whether payment of state income taxes satisfied the requirements of § 526 and concluded it did not based on several factors. First, the relationship between income taxes paid and the policy being contested was tangential. State income taxes were only a partial and indirect source of funding for the defendant MTA. Second, the ramifications of permitting taxpayer standing based on payment of state income taxes were significant. Granting standing under such circumstances could subject any state-implemented program, which to any degree is directly or indirectly financed by the state income tax, "to a legal challenge by any resident in any of our state's 58 counties as long as the resident pays state income taxes. We do not believe it would be sound public policy to permit the haphazard initiation of lawsuits against local public agencies based only on the payment of state income taxes." (*Cornelius*, 49 Cal.App.4th at 1778-1779.) Third, it was unnecessary to further the purposes underlying § 526a. "Our Supreme Court has stated that while standing under that section is to be construed liberally, the reason to do so is to allow a challenge to governmental action which would otherwise go

unchallenged because of the stricter requirement of standing imposed by case law." (*Id.* at 1779.) Under the circumstances, there was "no need to expand the concept of statutory taxpayer standing beyond that already recognized by law." (*Id.* at 1779.)

Petitioner's belatedly asserted payment of income tax is insufficient to confer taxpayer standing against the City. She does not allege the City assessed any income tax or that she paid any income tax to it, and there are no allegations that the City is the functional equivalent of a state agency or that it relies exclusively on state taxes to fund itself. Extending the concept of taxpayer standing to include income taxes would unnecessarily allow any person who paid income tax anywhere in California to challenge governmental practices throughout in the state, encouraging "haphazard initiation of lawsuits against local public agencies." Notably, the haphazard initiation of lawsuits undermines the purposes of section 526a, which is to "enable a large body of the citizenry to challenge governmental action," while at the same time maintaining some basis to ensure a "sufficiently personal interest" that litigants will be "dedicated adversaries" to vigorously pursue the matter and "present[] a true case or controversy." (*Blair*, 5 Cal.3d at 270.) Petitioner's assertion that extending standing to persons who pay state income tax will not result in haphazard litigation because *she* resides in the City and is not a "mere interloper who visited the City and County and paid a nominal tax of some kind" with no real interest in local affairs is irrelevant and hollow. (Petitioner's Opening Brief, p. 50.) As petitioner repeatedly points out, residence in the City, or within the boundaries of any municipality, is not a requirement or limitation on standing. (*Irwin v. City of Manhattan Beach* (1965) 65 Cal.2d 13, 19-20.) Petitioner presents no basis in law or sound reasoning to extend section 526a taxpayer standing against local municipalities based on payment of state income taxes.

3. Telephone Taxes

Petitioner only now raises the issue of telephone taxes for the first time in her opening brief. Telephone taxes were not asserted as a basis for standing in her complaint or in the appellate court and should not be considered for the first time here. (Cal. Rules of Court, Rule 8.500(c)(2); *Marriage of Goddard* (2004) 33 Cal.4th 49, 53, fn. 2; *Jacob B. v County of Shasta* (2007) 40 Cal.4th 948, 952.) Even under petitioner's purported catchall of taxes "routinely imposed by municipalities," the issue of telephone taxes is not properly before the Court. Petitioner included no allegations in her complaint or citation to authority that telephone taxes are routinely imposed by cities or specifically by the City of San Rafael, and nothing in the record indicates petitioner paid or was assessed telephone taxes. Her assertion that telephone taxes generally are assessed directly on consumers by cities and counties is unsupported by authority. Petitioner does not allege or cite a legal basis to suggest the City of San Rafael imposed a surcharge or tax on telecommunication users or on petitioner. The City of San Rafael Municipal Code in fact contains no ordinance taxing telecommunications utility users. There is no basis to construe telephone taxes as taxes "assessed" against petitioner by the City sufficient to confer section 526a standing.

4. Payment Of Municipal Fees Is Insufficient

Although petitioner's underlying complaint also claimed standing based upon payment of "water and sewage fees," it appears she has since abandoned such claims. The payment of fees does not comport with the plain language of section 526a, and cannot support taxpayer standing. In contrast to taxes that serve to raise general revenue, fees are not assessed, are voluntarily given and "do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes." (*Sinclair Paint Co. v. State Bd.*

Of Equalization (1997) 15 Cal.4th 866, 874, 876; *Cornelius,* 49 Cal.App.4th at 1777, fn. 6.) Payment of fees does not confer standing under section 526a.

5. Property Taxes

Petitioner incorrectly argues that requiring assessed taxes is "overly-restrictive" and that even assessed property taxes would not satisfy the current construction of section 526a. She argues that under Proposition 13, property taxes are assessed by the state, not cities or counties, and that property taxes are then collected by counties and passed on to the state for apportionment to state and local governments. California's property tax system was introduced as part of the state's original constitution in 1849. (1849 Cal. Const., art. XI.) The initial objective was to "raise revenue for all government purposes, both state and local. [B]ut after 1910 it was basically devoted, as it still is, to the support of local governments." (Ehrman & Flavin, Taxing Cal. Property (4th ed. 2011) § 1:5, p. 1-10.) Property taxes continue to be assessed by, and distributed to local governments. (*See* Cal. Const., art. XIII, § 14, "All property taxed by local government shall be assessed in the county, city and district in which it is situated."]; Cal. Cost., art. XIII A, §1, subd. (a) [declaring "[t]he one percent (1%) [ad valorem tax on real property] to be collected by the counties and apportioned according to law to the districts within the counties."].) Since the passage of Proposition 13, property tax revenues collected are pooled at the county level and distributed as directed by the Legislature among local agencies based on approximate shares each agency received in the past. (Gov. Code section 26912; *Amador Valley Joint Union High School Dist. v. State Bd. Of Equilization* (1978) 22 Cal.3d 208, 226-227.) Proposition 13 "does not by its terms empower the Legislature to direct or control local budgetary decisions or program or service priorities," and the Legislature has made clear its "intention to preserve

home rule and local autonomy respecting the allocation and expenditure of real property tax revenues." (*Amador*, 22 Cal.3d at 226.)

An individual's payment or liability to pay assessed real property taxes thus still supports standing under section 526a against the taxing entity. (See *Irwin*, *supra*, 65 Cal.2d at 18-20, city nonresident who owned and paid property taxes within the City had standing to sue the City under section 526a; *Blair*, *supra*, 5 Cal.3d at 269, residents who were assessed and paid real property taxes within the county had standing under section 526a.)

V. LIMITING STANDING TO PERSONS WHO PAID OR ARE LIABLE TO PAY AN ASSESSED TAX DOES NOT VIOLATE DUE PROCESS AND EQUAL PROTECTION

This Court recognizes that "Our jurisprudence directs that we avoid resolving constitutional questions if the issue may be resolved on narrower grounds." (*Loeffler*, *supra*, 58 Cal.4th at 1101.) A statute should be construed, whenever possible, so as to preserve its constitutionality. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1374; *Dept. of Corrections v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 197, 207.) Petitioner attempts to create a constitutional issue by arguing section 526a constitutes wealth-based discrimination in violation of due process and equal protection and should be subject to strict scrutiny. Requiring an assessed tax to qualify for standing under section 526a does not discriminate on the basis of wealth and, in any event, lack of wealth is not a protected class subject to strict scrutiny.

It is well established that in evaluating equal protection claims, the Court "must decide, first, whether (state legislation) operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. ... If not, the (legislative) scheme must still be

examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination." [Emphasis added.] (*Maher v. Roe* (1977) 432 U.S. 464, 470.)

Limiting taxpayer standing under section 526a to persons who are assessed taxes involves no discrimination against a suspect class. Petitioner's argument that the requirement of "assessed" taxes unlawfully discriminates against persons who cannot afford to own property or a business is unfounded. Persons who cannot afford to buy property, being less wealthy, working middle-class or even indigent are not suspect classes. The U.S. Supreme Court specifically stated it "has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." (*Id.* at 471.) In *Maher,* plaintiffs claimed a welfare department policy excluding nontherapeutic abortions from a state welfare program subsidizing medical expenses incident to pregnancy violated equal protection rights. The Supreme Court disagreed and explained,

> An indigent [person] does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis. (*Maher*, 432 U.S. at 470-471.)

The Supreme Court "has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny." (*San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 29.) "We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account

alone be subjected to strict equal protection scrutiny." (*Kadrmas v. Dickinson Public Schools* (1988) 487 U.S. 450, 458.)

Petitioner does not claim she is indigent, but merely that she cannot afford to purchase real property in California and is "very poor" in comparison to some of her Bay Area neighbors. That she cannot afford to purchase real property despite working and paying income taxes does not implicate a suspect class, and limiting taxpayer standing to persons who paid or are liable to pay an assessed tax does not discriminate against any suspect class or require strict scrutiny of section 526a. "The Constitution does not provide judicial remedies for every social and economic ill." (*Lindsey v. Normet* (1972) 405 U.S. 56, 74.)

Petitioner also cites no authority showing a fundamental right to sue every public entity to challenge expenditure of public monies, irrespective of any ties to the entity or concrete interest in the outcome of the litigation. Her reliance on *Serrano v. Priest* (1971) 5 Cal.3d 584 is misplaced, as that case involved the right to education in the public schools, which is recognized as a fundamental right. As the appellate court below noted, that case involved plaintiffs who were indigent, not persons who cannot afford to own real property in California, and the public school financing system itself inequitably affected a fundamental right. (*Wheatherford*, 226 Cal.App.4th at 468; *Serrano*, 5 Cal.3d at 589, 597-598.) Limiting taxpayer standing under section 526a to persons who paid or are liable to pay an assessed tax does not implicate any suspect class or affect a fundamental right. Strict scrutiny thus is inapplicable.

Petitioner does not cite a single authority holding that "lack of wealth" – or even indigency – is in itself a suspect class subject to strict scrutiny, or that taxpayer standing is a fundamental right. Her cited authorities involve suspect classes and fundamental rights, and wealth-

based classifications in those circumstances, and such cases are inapposite and unavailing here.

In *Harper v. Virginia* (1966) 383 U.S. 663, 668 a Virginia poll tax impinged on the fundamental right to vote as guaranteed by the U.S. Constitution, thus any wealth-based qualification was subject to strict scrutiny. Petitioner's attempt to liken the requirement of an assessed tax as a prerequisite to standing under section 526a to the poll tax precluding voting ignores that taxpayer standing to challenge municipal spending is not a fundamental right. Her reliance on *Harper* is misplaced.

Sindell v. Abbott Laboratories (1980) 26 Cal.3d 588, 618 is cited out of context and is inapposite. (Petitioner's Opening Brief, p. 55.) Petitioner's citation is to Justice Richardson's dissenting opinion, and the issue there involved relaxing *causation* requirements under the "deep pocket" theory of liability in a class action lawsuit against multiple potential defendants (drug manufacturers), where causation was unclear, but one defendant might be more financially able to bear the cost of an adverse judgment, thereby increasing a defendant's burden to defend itself. No fundamental rights were involved, and no issues of standing, discrimination, protected classes or even plaintiffs' access to courts were involved, as petitioner's liberally-modified quotation suggests. Petitioner's modified quote gives the cited section a vastly different meaning than it appears in the dissenting opinion.

Hartzell v. Connell (1984) 35 Cal.3d 899, like *Serrano, supra,* involved the fundamental right to public education, and requiring payment of certain school fees violated the Constitutional guarantee of free education.

Boddie v. Connecticut (1971) 401 U.S. 371 involved mandatory court fees to obtain a divorce. Marriage involves interests of basic importance in society and is regulated by the state, and dissolution requires

state approval. Parties seeking dissolution are compelled to use the judicial process, and the state cannot restrict access based on wealth or ability to pay. No *rational basis* existed for refusing to waive the dissolution fee for persons who could not pay, thus the requirement violated due process. Similarly in *Earl v. Superior Court* (1978) 6 Cal.3d 109, persons seeking dissolution required court approval, and denying access to the court because of inability to pay court fees denied actually aggrieved parties access to courts.

Griffin v. Illinois (1956) 351 U.S. 12 involved the constitutionally guaranteed fundamental right to a fair trial. Denying indigent criminal defendants a free reporter's transcript infringed on that fundamental right, and there was no rational basis for requiring payment of fees upfront. *Douglas v. California* (1963) 372 U.S. 353 similarly involved a criminal defendant's guaranteed right of first appeal. Unlike subsequent discretionary review, the state could not impose wealth requirements on his one and only guaranteed appeal. Significantly, the *Douglas* court did not preclude wealth-based distinctions, and noted that even in criminal cases where liberty interests were at stake, "Absolute equality is not required, lines can be drawn and we often sustain them." [Emphasis added.] (*Douglas*, 372 U.S. at 357.)

Gebert v. Patterson (1986) 186 Cal.App.3d 868 and *Knoll v. Davidson* (1974) 12 Cal.3d 335 also are inapposite. These cases involved fundamental rights regarding elections and equal access to the political arena.

Petitioner cites no basis to apply strict scrutiny analysis of section 526a, which neither involves a protected class nor implicates a fundamental right. Rather, section 526a is evaluated under the rational basis test, which requires that a statute "should be sustained if [the court] find[s] that its classification is rationally related to achievement of a legitimate state

purpose." (*Western & Southern Life Ins. Co. v. State Bd. Of Equalization* (1981) 451 U.S. 648, 657.) As the U.S. Supreme Court has made clear:

> [R]ational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. ... Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. ... For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. ... Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. ... Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification... Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."...
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. ... A statute is presumed constitutional, ... and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," ... whether or not the basis has a foundation in the record. ... A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" [Internal citations omitted.]

(*Heller v. Doe by Doe* (1993) 509 U.S. 312, 319-321.) "[T]he burden of demonstrating the invalidity of a challenged classification "rests squarely upon the party who assails it." [Italics in original.] (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 17.) Any conceivable governmental purpose or policy should be considered by the courts in upholding the statute, including "rational speculation unsupported by evidence or empirical data." (*FCC v. Beach Communication, Inc.* (1993) 508 U.S. 307, 313.) The party challenging the constitutionality of a state

law must "negative every conceivable basis which might support it." (*Lehnhausen v. Lake Shore Auto Parts Co.* (1973) 410 U.S, 356, 364.)

The limitation of taxpayer standing under section 526a to persons who paid or are liable to pay an assessed tax is rationally related to general standing requirements. It is well established that a fundamental principle of standing is that the plaintiff "must be beneficially interested in the controversy" and the beneficial interest "must be concrete and actual, and not conjectural or hypothetical." (*Teal, supra*, 60 Cal.4th at 599.) "[T]axpayers have a sufficiently personal interest in the illegal expenditure of funds by [public] officials to become dedicated adversaries. ... an action meeting the requirements of section 526a thereby presents a true case or controversy." (*Blair*, 5 Cal.3d at 270.) Taxpayers who pay property tax, business tax or are assessed a tax within the jurisdiction are sufficiently interested in the expenditure of public funds in the jurisdiction to become dedicated adversaries. Petitioner acknowledges that section 526a is "far removed from the normally-applicable requirement of proof of direct injury to the plaintiff," and requiring assessed taxes maintains some real connection to the limited scope of a section 526a action, which is only to challenge the illegal governmental expenditure of funds and waste. Limiting taxpayer standing to payment or liability for an assessed property or business tax thus is rationally related to general standing requirements and does not violate equal protection.

VI. ONLY THE LEGISLATURE MAY REWRITE SECTION 526a TO EFFECTUATE PETITIONER'S EXPANSIVE INTERPRETATION OF TAXPAYER STANDING

The "court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. [The] court is limited to interpreting the statute, and such interpretation must be based on the language used." (*Seaboard Acceptance Corp. v. Shay* (1931) 214

Cal.361, 365.) The "office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." (*Id.* at 366.) The separation of powers doctrine (Cal. Const., art. III, Section 3) obliges the judiciary to respect the separate constitutional roles of the Executive and the Legislature. (*Butt v. State of California* (1992) 4 Cal.4th 668, 695.) The core function of the Legislative branch includes passing laws, levying taxes, making appropriations, and determining legislative policy. (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 299.) Except as to the powers of initiative and referendum reserved for the people, the entire lawmaking authority of the state is vested in the Legislature. (*Fitts v. Superior Court* (1936) 6 Cal.2d 230, 234.)

Where the Legislature has acted, unless that action is unconstitutional, the courts are not a proper means to attempt an end-run against enacted law. (*See Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1740.) In matters of statutory construction, "courts are examining the act of a coordinate branch of the government, the legislative, in a field in which it has paramount authority ... Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guarantees. ... [U]nder the doctrine of separation of powers neither the trial nor appellate courts are authorized to 'review' legislative determinations. The only function of the court is to determine whether the exercise of legislative power has exceeded constitutional limitations." (*Lockhard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462.)

Accordingly, whether section 526a should be revised to afford standing to persons anywhere in the state to challege governmental expenditure throughout the state, or revised to eliminate any limitation to assessed taxes, are matters that "are properly directed to the Legislature,

which is free to amend the terms of the [statute] in any constitutional manner it deems appropriate." (*General Motors Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 773, 792, fn. 14.)

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeal.

Dated: February 23, 2015

BERTRAND, FOX, ELLIOT, OSMAN & WENZEL

By: _____
Thomas F. Bertrand

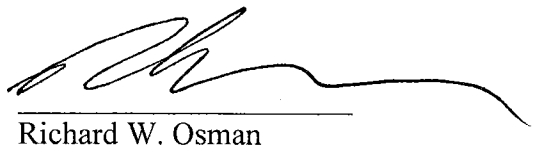
By: _____
Richard W. Osman

Attorneys for Defendant/Respondent
CITY OF SAN RAFAEL

CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 8.504(d))

In compliance with California Rules of Court, Rule 8.504(d), I certify that the number of words in this answer is 11,755 as determined by Microsoft Word software.

Dated: February 23, 2015



Richard W. Osman

PROOF OF SERVICE

I, the undersigned, declare:

1. I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 2479 Hyde Street, San Francisco, California 94109.

2. On the 23rd day of February, 2015, I served the foregoing document described as

ANSWER BRIEF ON THE MERITS

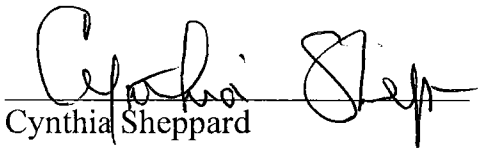
on the interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope, addressed as follows:

Mark T. Clausen Attorney at Law 769 Carr Avenue Santa Rosa, California 95404	Attorney for Plaintiff
Earl Warren Building 350 McAllister Street San Francisco, CA 94102 (Original and 8 copies)	High Court
Clerk of the Court of Appeal, Div. 1 Earl Warren Building 350 McAllister Street San Francisco, CA 94102 (Via E-Filing Only)	Court of Appeal
Renee G. Brewer, Deputy County Counsel Office of Marin County Counsel 3501 Civic Center Drive, Suite 275 Marin San Rafael, CA 94903	Attorneys for Defendant and Respondent County of Marin
Marin County Superior Court PO Box 4988 San Rafael, CA 94913	Trial Court

3. I caused such envelopes designated above as being sent via U.S. Mail, with postage thereon fully prepaid, to be placed in the United States mail at San Francisco, California, on said date.

I declare that I am employed in the office of a member of the bar of this court, at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. EXECUTED this 23rd day of February, 2015 at San Francisco, California.



Cynthia Sheppard