S234148

SUPREME COURT OF CALIFORNIA

CALIFORNIA CANNABIS COALITION, ET AL.

Plaintiffs and Respondents,

v.

CITY OF UPLAND, ET AL.

Defendants and Petitioners.

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

PETITIONERS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

The question of first impression in this case is whether taxes proposed by initiative are subject to the election date requirement (and other taxpayer protections) added to the California Constitution by Proposition 218.

Whether Proposition 218 applies to taxes proposed by initiative was the only question addressed by the Court of Appeal's decision. It was also the only question presented in the City's petition seeking review of the Court of Appeal's decision.

Yet Proponent's brief focuses chiefly on the two issues it designated, relegating the question of first impression to the last five pages of its 39 page brief. Because the City believes that the question of first impression is the question of primary importance to this Court, it will return to discussing that question first. The City apologizes for any confusion caused by the parties' failure to synchronize the order of their arguments.

I

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

The City, represented in this case by the drafters of Proposition 218, presented several reasons in its Opening Brief why Proposition 218 applies to all new taxes whether they are proposed by a resolution of the governing body or by an initiative petition.

A. The City's Case Summarized

The City argued that the people's right to legislate by initiative is

presumed to be "co-extensive with the legislative power of the local governing body" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775) "absent clear indications to the contrary" (*Id.* at 786). This presumption affects both the granting of power and the limiting of power. Thus it is presumed that powers granted by the State to local governments may be exercised by local voters. (*Id.*) It is also presumed that *limits* on the power of local government apply to both the governing body and the voters. (*Mission Springs Water Dist. v. Verjil*, (2013) 218 Cal.App.4th 892, 921; *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1210; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674.) Applied to the case at bar, the analysis begins with a presumption that the constitution's election date limitation applies to both the governing body and the voters absent some clear indication to the contrary.

The City then argued that the language of article 13C, section 2(b), contains no clear indication to exclude voter-proposed taxes from its election date limitation. To the contrary, the language of section 2(b) indicates the drafters' intent to apply the election date limitation to *all* taxes, including taxes proposed by initiative. For article 13C, section 2(b) imposes the election date requirement on "local government" taxes generally, but allows an exception to the election date requirement that can be invoked only by the "governing body."[1] To decipher the significance of these different terms, the City argued, the Court should turn to its own well-settled rules of construction where

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

general terms such as "local government" or "public agency" are weak indicators of drafter intent to exclude voter initiatives, but more specific terms such as "legislative body" or "governing body" suggest that the phrase in question was not intended to apply to voter initiatives. (*DeVita*, 9 Cal.4th at 776; *Totten v. Ventura County Bd. of Supervisors* (2006) 139 Cal.App.4th 826, 834.)

Construing article 13C, section 2(b) under these rules, all "local government" taxes, whether proposed by a voter initiative or a resolution of the governing body, must receive majority voter approval at a regularly scheduled candidate election. Only the "governing body" can, by a unanimous declaration of emergency, propose a tax at a special election.

Finally, looking beyond the four corners of article 13C, section 2(b), the City argued that Proponent's theory (adopted by the Court of Appeal) that taxes "imposed by the voters" are not "imposed by local government," sets up a false dichotomy for three important reasons. First, *every* local tax is imposed by the voters upon themselves since new taxes are not enacted "unless and until" they receive voter approval. (Cal. Const., art. 13C, § 2(b); *Santa Clara Co. Local Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 240.) Second, when voters act via initiative they are acting as legislators of the local government and are enacting legislation of the local government. (Elec. Code § 9200; *Perry v. Brown* (2011) 52 Cal.4th 1116, 1140; *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 782.) Third, "imposition" is not limited to enactment; a tax is "imposed" by government when it is collected and kept by the government, as would be done here in the case of Proponent's dispensary tax. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 823-24; *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310,

1326.)

B. Proponent's Failure to Respond Constitutes an Admission

Proponent's brief does not address any of the City's arguments! It ignores every one of them. Regarding the language of article 13C, section 2(b), Proponent does not address the significance of that section's differentiation between "local government" and "governing body." Proponent simply asserts repeatedly, with no supporting analysis, that the language of section 2(b) "clearly" applies only to taxes proposed by the city council. As the trial judge admonished, however, Proponent's repeated insistence that something is clearly so does not make it clearly so. (Reporter's Transcript ("RT") at 5:24.)

Proponent also offers no answer to any of the City's three separate arguments that taxes "imposed by the voters" are taxes "imposed by local government," and vice versa, because (1) *every* local tax is imposed by the voters upon themselves given that new taxes are not enacted "unless and until" they receive voter approval; (2) when voters act via initiative they are acting as legislators of the local government and are enacting legislation of the local government; and (3) taxes collected and kept by the government are imposed by the government regardless of the route their enactment took.

Proponent's failure to respond to the City's arguments can and should be deemed an implicit concession that the arguments have merit. (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1164; *In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1351.)

C. Proponent's Case Summarized and Rebutted

Although Proponent chose not to respond to any of the City's arguments, it did raise two arguments of its own. First, Proponent argued that the drafters of Proposition 218 would not have wanted the election date requirement to apply to voter-proposed taxes because the drafters only "feared the imposition of taxes by the government. ... The two, local government and the voters, are at opposite ends of the spectrum. What the electorate fears is governmental power. The electorate does not fear itself." (Respondent's Brief at 35.)

This is an unsophisticated theory that again ignores arguments the City raised in its Opening Brief. The "electorate" obviously is not a single-minded unit. It is a diverse compilation of people with different motivations, including people who make up "the government." Because the electorate and the government overlap in this way, the City warned of the collusion that would quickly follow should this Court rule that Proposition 218 does not apply to voter-proposed taxes. Government officials, their subordinates and supporters, *as voters*, would be able to propose every new tax in the form of an initiative, thereby avoiding all of the taxpayer protections contained in Proposition 218, essentially rendering that hard-fought piece of our constitution obsolete.

Proponent did not argue that the threat of collusion is unfounded. It said only that this Court should close its eyes to the threat until an actual case of collusion arises in the future. (Respondent's Brief at 36.) Proponent did not explain, however, what the Court could do at that time to fix the problem, short of overturning its own decision in this case. Proponent did suggest that a city council's adoption of an initiative in lieu of holding an election, as authorized by Elections Code section 9214(a), could convert the voter-proposed tax to one "imposed by local government." (Respondent's Brief at

36.) But that would upend decades of caselaw holding, in other contexts, that initiatives do *not* need to comply with procedures such as land use planning and environmental review that the Legislature has imposed only on governing bodies. (See, e.g., *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1036 & 1042 ("legislative history supports the conclusion that CEQA does not apply to any ordinances enacted by initiative, whether through an election *or direct adoption.*"))[2]

In fact, if Proponent's theory became law, hostile governing bodies could *defeat* such initiatives by "adopting" them without an election, then through an ally challenging them in court for failure to comply with applicable procedures on the theory that the governing body's adoption converted the initiative to a government act.

Returning to Proponent's argument that the drafters of Proposition 218 would not have wanted the election date requirement to apply to voter-proposed taxes because "[w]hat the electorate fears is governmental power ... [t]he electorate does not fear itself," the City also argued that the drafters of Proposition 218 *would* have wanted the election date requirement to apply to voter-proposed taxes because two of the three purposes underlying the election date requirement are served when applied to voter-proposed taxes. Proposition 218 requires that general tax proposals appear on the ballot at a General Election for candidates seeking a seat on the local governing board. (Cal. Const., art. 13C, § 2.) As applicable to voter-proposed taxes, this requirement permits voters to ask all candidates where they stand on the tax measure so that voters can intelligently cast their vote for like-minded candidates. It also

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

prevents stealth elections; that is, single-measure special elections held on an atypical date, which consequently don't attract a lot of public attention, allowing the special interest group behind the election to dominate voter turn-out by mobilizing its members and supporters.

Proponent's brief does not dispute that the purposes underlying Proposition 218's election date requirement are served when applied to voter-proposed taxes. In fact, Proponent agrees that placing its initiative on the General Election ballot probably affected "the outcome of the vote" (Respondent's Brief at 35) and therefore asks this Court "to order a new election if the initiative ... is defeated on November 8, 2016." (Respondent's Brief at 25.)

Therefore Proponent's first argument, that the drafters of Proposition 218 would not have wanted the election date requirement to apply to voter-proposed taxes, is unfounded.

Proponent makes one other argument to support its theory that Proposition 218 does not apply to voter-proposed taxes. It argues that in this case, applying the General Election requirement of article 13C, section 2, to voter-approved taxes creates a conflict with Elections Code section 9214(b), the special election statute. Courts have a duty to harmonize conflicting provisions of law, Proponent argues, and the only way to harmonize these two provisions is to find article 13C, section 2, inapplicable to voter-proposed taxes. (Respondent's Brief at 36.)

Proponent's theory, however, does not harmonize the two provisions. To harmonize the provisions, both must be able to *operate* without conflicting. (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 986 (and cases cited

therein).) Proponent's theory simply acknowledges the apparent conflict, then proposes that the constitution yield to the statute rather than the statute yielding to the constitution.

There are two answers to Proponent's theory. First, "[t]he California Constitution is 'the supreme law of our state'." (*California Logistics, Inc. v. State*, (2008) 161 Cal.App.4th 242, 250.) If a statute truly conflicts with the constitution, it is the statute that must yield.

Second, the Legislature has codified a rule of construction for interpreting statutes and the constitution that requires "when a general and particular provision are inconsistent, the latter is paramount to the former." (Code of Civ. Proc. § 1859.)

Applying these principles to the apparent conflict between article 13C, section 2, and Elections Code section 9214(b), if the two truly conflict, the statute must yield. However, the two can be given effect by recognizing that Elections Code section 9214(b) is a general rule that has effect unless a more particular provision creates an exception. Here, article 13C, section 2, is a particular (and paramount) provision relating only to initiatives that propose to enact or increase a general tax. As to those initiatives, they must be presented to the voters at a general election for candidates of the applicable governing body.

It is not unusual for one provision of law to create an exception in another otherwise generally applicable provision of law. In fact, Elections Code section 9214(b) itself is subject to at least one other exception. For although section 9214(b) calls for a special election when an initiative petition is signed by at least 15% of the voters, Elections Code section 1415(b)

provides that if the initiative proposes an amendment to a city charter, then it *cannot* be set for a special election but must be voted on "at the next regularly scheduled general municipal election ... or at any established statewide general or statewide primary election," even if the petition is signed by 15% of the voters. (Elec. Code § 1415(b).)

Proponent's two attempts to support its theory that voter-proposed taxes are exempt from Proposition 218 therefore fail. The City's multi-faceted defense of Proposition 218's application to all new taxes, including those proposed by initiative, was left unchallenged by Proponent's brief. The City's arguments are therefore conceded. They are also sound and should be adopted by this Court in reversing the Court of Appeal.

II

THE TRIAL COURT DID NOT ERR IN RULING THAT THE INITIATIVE'S $75,000 ANNUAL LEVY IS PARTLY A TAX

One of the issues designated for review by Proponent is whether the trial court erred in ruling that the initiative's $75,000 annual levy on marijuana dispensaries is partly a tax. (Answer to Petition for Review at 18.) The trial court was called upon to weigh the facts and determine whether the levy was just a licensing and regulatory fee or partly a tax in order to resolve the parties' dispute regarding the election date. For Proposition 218 does not require licensing or regulatory fees to be approved by voters at a general candidate election. That requirement applies only to taxes.

At the trial and in this Court, Proponent agreed that article 13C, section 1(e), added to the constitution in 2010 by Proposition 26, controls the analysis of whether a levy is a tax or a fee. In this Court, Respondent's Brief states: "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." (Respondent's Brief at 26-27.)

In the Points and Authorities that Proponent filed in the trial court, it quoted the definition of a tax contained in article 13C, section 1(e), then framed the issue before the trial court as follows: "The $75,000 payment is not imposed upon anybody other than the medical marijuana dispensary and it clearly *does not exceed the reasonable cost to local government* of conferring the benefit of operating as a medical marijuana dispensary in Upland." (CT, vol. 1 at 42:17.)[3]

This, then, was the factual question that the trial court was asked to decide: Does the $75,000 annual payment exceed the reasonable cost to the City of licensing and regulating a marijuana dispensary? The trial judge found that it does exceed the City's cost and is therefore partly a tax that must be voted on at a general candidate election. (RT at 27:9.)

In its Respondent's Brief, Proponent essentially asks this Court to re-try the evidence. It argues that the City's evidence regarding the time and manpower required to license and inspect each dispensary should be rejected

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[3] Under article 13C, section 1(e), "'tax' means any levy, charge, or exaction of any kind imposed by a local government" unless it fits one of five exceptions. Proponent relies on the first exception: "A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." Section 1(e) further requires that "the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. 13C, § 1(e).)

because the City could "arbitrarily set a very low price" (Respondent's Brief at 31) and had an incentive for doing so because the City Council opposes legalizing medical marijuana dispensaries in the City of Upland. (*Id.* at 27.) As to its own evidence, Proponent admits that even its own accountant's estimate did not justify a $75,000 levy (*Id.* at 34 ("[Proponent's] cost estimate came in a few thousand dollars lower than perhaps it should have"), but argues that its evidence was good enough to show that "[t]he $75,000 payment ... clearly does not exceed the reasonable cost to local government" (*Id.* at 27) because the City could always make up the difference: "If the Police Department wants to it could provide undercover officers to go in every day to monitor marijuana dispensaries and conduct inspections." (*Id.* At 30.)

Proponent's brief does not address the City's Opening Brief argument that retrying the evidence is not the job of an appellate court. The City argued that "[t]he determination of whether the actual purpose of an ordinance is regulatory or revenue-raising in nature is a *question of fact.*" (*United Bus. Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 165; *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1422.) "When a [trial] court's finding is attacked on the ground that it is not supported by the evidence, the power of an appellate court begins and ends with the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding or verdict. Questions of credibility must be resolved in favor of the fact finder's determination, and when two or more inferences can reasonably be drawn from the evidence, a reviewing court may not substitute its deductions for those of the trier of fact." (*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 62; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)

Here, the trial court had before it the Agency Report which contained an analysis detailing the City's reasonably foreseeable costs to license, inspect and regulate medical marijuana dispensaries. (CT at 115; 196; 198-99; 206-07; 213-14.) The Report provides substantial evidence to support the trial court's finding of fact that the $75,000 levy would exceed the City's costs and therefore contains an embedded tax. The trial judge considered Proponent's argument here regarding the credibility of the City's evidence, that the City Council is biased against legalizing marijuana in Upland. The trial judge stated:

> "I think [the City] is in a better position to determine how much it's going to cost to regulate this industry and these facilities. I appreciate what [Proponent is] saying about how the City may have a motivation to downplay that, but I found its analysis to be persuasive. I look at the analysis of [Proponent's] CPA, and it just doesn't get to $75,000, however you cut it. So I think that this is a tax. It is not a fee. And it needs to go on the ballot in the general election in November." (RT at 27:9.)

That finding should not be disturbed by this Court. By not answering the City's argument, Proponent has conceded (and it is settled law) that this Court should not retry the evidence.

Proponent next argues it should not have been required to present *any* evidence: "[T]he initiative measure itself declared that the $75,000 annual fee was a fee. That should have been accepted as conclusive evidence that the $75,000 was a fee and not a tax." (Respondent's Brief at 28.) This theory is based on the argument that "Authors of these sorts of measures ... 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 .... If one sets the fee too high one is blamed for establishing a tax." (Respondent's Brief at 29.)

The easy answer to this theory and Proponent's purported dilemma is that it could have drafted the initiative to give the City authority to levy a reasonable licensing and regulatory fee in an amount to be determined by the City based on its actual costs.

Finally, Proponent argues that, to the extent the $75,000 levy exceeds the City's costs, the excess should be overlooked under the "primary purpose" test in *Sinclair Paint Co. v. Board of Equalization* (1997) 15 Cal.4th 866. Proponent quotes *Sinclair* as follows: "if regulation is the primary purpose, the mere fact that revenue is also obtained does not make the imposition a tax." (*Sinclair*, 15 Cal.4th at 880; Respondent's Brief at 32.)

That quote is taken out of context. This Court was not authorizing government to exceed its actual costs when setting the fees that businesses must pay to operate – to add a pound of flesh for good measure that the government could then skim off and deposit in the General Fund for other purposes. To the contrary, this Court explained what it meant when it said "the mere fact that revenue is also obtained does not make the imposition a tax." It said, "*all* regulatory fees are necessarily aimed at raising 'revenue' to defray the cost of the regulatory program in question, but that fact does not automatically render those fees 'taxes.'" (15 Cal.4th at 880.) As to the amount of revenue that a legitimate fee can raise, this Court held as follows:

"If a business imposes an unusual burden on city services, a municipality may properly impose fees pursuant to its police powers to assure that the persons responsible 'pay ***their fair share of the cost of government***.' (*City of Oakland v. Superior Court*, supra, 45 Cal.App.4th [740] 761 [etc.].) The [Oakland] court concluded that 'The ordinance's primary purpose is regulatory – to create an environment in which nuisance and criminal activities associated with alcoholic beverage retail establishments may be reduced or eliminated. Thus, the fee imposed ... is not a tax imposed to pay general revenue to the local governmental entity, but is a regulatory fee intended to defray the cost of providing and administering the hearing process set out in the ordinance. [Citation.]' (*Id.* at p. 762 [etc.].) The court in *United Business* [*Com. v. City of San Diego* (1979) 91 Cal.App.3d 156] applied the 'regulation/ revenue' distinction to conclude that sign inventory fees adopted to recover the city's cost of inventorying signs and bringing them into conformance with law were regulatory fees, not revenue-raising taxes. The court observed that, under the police power, municipalities may impose fees for the purpose of legitimate regulation, and not mere revenue raising, ***if the fees do not exceed the reasonably necessary expense of the regulatory effort***. (*United Business*, supra, 91 Cal.App.3d at p. 165 [etc.].)" (*Sinclair*, 15 Cal.4th 879-80.)

Thus, *Sinclair Paint* does not support Proponent's theory that businesses can be overcharged so long as the "primary purpose" is regulation.

Moreover, *Sinclair Paint* was decided before the voters of California added a definition of "tax" to their constitution. Today, this Court need not look back to *Sinclair Paint* to find guidance for determining whether a levy is a tax or not. The answer is now found in the definition of "tax" added to article 13C, section 1, by Proposition 26. In the ballot materials for Proposition 26, the Legislative Analyst stated, "Over the years, there has been disagreement regarding the difference between regulatory fees and taxes," and cited *Sinclair Paint*. The Analyst then said, "This measure expands the definition of a tax and a tax increase so that more proposals would require approval by two-thirds of the Legislature or by local voters." (Official Voter Guide, 2010 General Election, at 57.)

Under Proposition 26, "'tax' means any levy, charge, or exaction of any kind imposed by a local government," unless it fits one of the five exceptions, each of which are applicable only if "the amount is no more than necessary to cover the reasonable costs of the governmental activity, and ... the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. 13C, § 1(e).)

Thus, Proponent is mistaken when it argues that because its "primary purpose" was regulation, the $75,000 charge is not partly a tax for exceeding the City's reasonable costs. Under both *Sinclair Paint* and Proposition 26, the $75,000 charge is partly a tax to the extent it exceeds the City's reasonable costs. The trial court was correct in so ruling.

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III

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

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

In its Opening Brief, the City pointed out that recent cases have caused confusion in this area and that guidance from this Court would be welcome. (Opening Brief at 29-31.) Proponent agrees that "recent cases have caused confusion," but disagrees with the City's conclusion that a pre-election determination of the tax-versus-fee question was proper in this case. (Respondent's Brief at 19.)

Unfortunately, this is another example where Proponent never confronts the argument the City made in its Opening Brief. In its Opening Brief, the City argued that the tax-versus-fee question was put at issue by Proponent's lawsuit. (See Proponent's Petition for Writ of Mandate, CT at 13:1-25.) This case was *not* brought by the City in an attempt to block the initiative from the ballot. It was brought by Proponent to challenge the election date set by the City when the City carried out its ministerial duty to place the initiative on the ballot. Proponent sought a writ of mandate compelling the City to call a special election for the initiative to be held at an earlier date.

In its Opening Brief the City argued, "This is the type of claim that is appropriate for pre-election review because it alleges noncompliance with a *pre-election procedure* and prays for a remedy (an earlier election date) that

can be granted *only* before the election. It's like the admonition of a wedding officiant to "speak now or forever hold your peace." Proponent's complaint (that voters should decide the measure on a different date) must be made before the voters decide the measure, because once they have decided the measure it is too late to change the election date." (Opening Brief at 31.)

Proponent never responds to the City's argument. As mentioned twice before, Proponent's failure to respond to the City's argument should be deemed an implicit concession that the argument has merit. (*In re Aurora P.*, 241 Cal.App.4th at 1164; *In re Ramone R.*, 132 Cal.App.4th at 1351.)

Instead of confronting the City's argument, Proponent tries to recast this case as an attempt by the City to invalidate the initiative on grounds that its fee is an illegal tax. Proponent then argues that the City does not have standing to challenge the fee because the City is not the fee payor. Since only a payor would have standing, Proponent continues, the question of whether this is a valid fee or an illegal tax must wait until after the election to be decided, should someone with standing choose to challenge it. This argument begins at the start of Respondent's Brief where Proponent purports to revise the Issues Presented. One of the issues presented, Proponent claims, is "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?" (Respondent's Brief at 1.) The argument continues throughout. (See Respondent's Brief at 9-10, 16-17, 20-21.)

This argument, in debate terminology, is known as a "straw man," erected for the purpose of knocking it down. In other words, Proponent is attributing to the City a position it does not occupy and an argument it has not

made, then successfully battling that imaginary contest instead of confronting the City's actual argument in the actual case at bar. (See *Third Eye Blind, Inc. v. Near North Entertainment Insurance Services, LLC* (2005) 127 Cal.App.4th 1311, 1319.)

The actual case at bar is not a case about standing. Proponent argues, "these types of challenges may only be made after the special election and by a taxpayer injured by the 'tax.'" (Respondent's Brief at 17.) The City is not the challenger, and the thing allegedly causing injury is not the tax. The Proponent is the challenger, and the thing allegedly causing injury is the election date. A challenge to the election date must be brought before the election. Otherwise the court cannot grant an effective remedy! Proponent argues, "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." (Respondent's Brief at 16.) Who would have launched a challenge if the voters passed the measure? On what grounds? Even if the fee was partly a general tax, once it receives majority voter approval it becomes a valid, legal tax. Proponent's argument makes no sense, and it has nothing to do with this case.

The issue in this case is the proper election date for an initiative that proposes a new general tax. Proposition 218 controls that question, creating an exception to the general rule in the Elections Code. For a court to consider the question at all, it had to consider it before the election, and it had to make a factual finding as to whether the initiative's self-titled "fee" actually proposed a tax. The trial court did not err.

CONCLUSION

For the reasons stated herein and in the City's Opening Brief, the decision of the Court of Appeal should be reversed.

DATED: September 30, 2016. Respectfully submitted,

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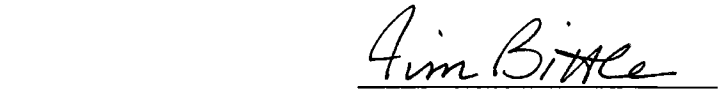

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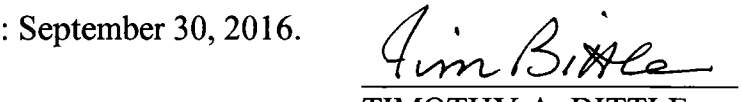
WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that this brief, including footnotes, but excluding the caption page, tables, signatures, and this certification, as measured by the word count of the computer program used to prepare this pleading, contains 5,180 words.

DATED: September 30, 2016.



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PROOF OF SERVICE

SUPREME COURT OF CALIFORNIA

I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is: 921 11th Street, Suite 1201, Sacramento, California, 95814. On September 30, 2016, I served the attached document described as: **PETITIONERS' REPLY BRIEF ON THE MERITS** on the interested parties below, using the following means:

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

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3777 North Harbor Boulevard
Fullerton, CA 92835

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 30, 2016, at Sacramento, California.

LORICE A. STREM