Case No. S234148

In the SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

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Jorge Navarrete Clerk

Deputy

California Cannabis Coalition, et al.,
Plaintiffs and Respondents
vs.
City of Upland, et al.,
Defendants and Petitioners

Superior Court, County of San Bernardino,
Case No. CIVDS1503985
Court of Appeal, Fourth District, Division 2
Case No. E063644

APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND PETITIONERS; AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES

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TABLE OF CONTENTS

Page

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF 4

AMICUS BRIEF

I. INTRODUCTION.. 6

II. FACTS AND PROCEDURAL HISTORY 8

III. ARGUMENT

A. THE COURT OF APPEAL'S OPINION IS CONTRARY TO THE PLAIN LANGUAGE OF ARTICLE XIII C OF THE CALIFORNIA CONSTITUTION 8

B. THE COURT OF APPEAL'S OPINION IS CONTRARY TO THE INTENTION OF THE VOTERS IN ADOPTING PROPOSITIONS 218 AND 26...... 15

C. THE TRIAL COURT'S DETERMINATION THAT THE INITIATIVE PROPOSED A GENERAL TAX SHOULD NOT BE DISTURBED........................ 18

IV. CONCLUSION 20

WORD CERTIFICATION 22

PROOF OF SERVICE 23

TABLE OF AUTHORITIES

California Cases	**Page(s)**
Bighorn-Desert View Water Agency v. Vergil (2006) 39 Cal.4th 205	13
California Farm Bureau Federation v. State Water Resources Control Board (2011) 51 Cal.4th 421, 428, 442	*20*
DeVita v. County of Napa (1995) 9 Cal.4th 763, 775	*12*
Legislature v. Deukmejian (1983) 34 Cal.3d 658, 676	*12*
Rossi v. Brown (1995) 9 Cal. 4th 688	12
Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal.4th 866, 874	18
Voters for Responsible Retirement v. Board of Supervisors (1994) 8 Cal.4th 765, 779	12
Arnel Dev. Co. v. City of Costa Mesa (1981) 126 Cal.App.3d 330, 337	12
Mitchell v. County Sanitation Dist. Number One (1958) 164 Cal. App. 2d 133, 141-142	10, 11
California Constitution	
Article XIII C, sections 1 and 2	*passim*
Article XIII D, section 2	7
Statutes	
Government Code §§ 23003, 23004, 23005, 34000, 36501,37100	11
Secondary Materials	
Proposition 218 Ballot Materials UC Hastings Scholarship Repository, http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2137&context=ca_ballot_props	17

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Pursuant to California Rules of Court, Rule 8.520(f), the League of California Cities (the "League") respectfully seeks permission to file the attached amicus curiae brief in support of Defendant City of Upland and the members of its city council.

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Legal Advocacy Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. This is one of those cases.

The core issue in this case is whether a local tax measure proposed by a citizen of a municipal corporation (or other local government agency) through an initiative is subject to the same constitutional requirements as one proposed by the municipal corporation's governing body. The trial court held yes, but in an

unprecedented opinion the Court of Appeal held that article XIII C's requirements do not apply to taxes imposed through the initiative process. As a result, the League finds itself ironically aligned in this case with the Howard Jarvis Taxpayers Association, proponents of Propositions 218 and 26, in arguing that a proper interpretation of the Constitution does not countenance different treatment for local tax measures, regardless of their origin, and certainly does not create an exemption for initiatives that swallows all the rules created by Proposition 218.

The League seeks permission to file the amicus curiae brief that follows in order to lend its voice to that of the City of Upland in seeking reversal of the Court of Appeal's decision.

The application and amicus curiae brief were authored by Daniel S. Hentschke, Michael G. Colantuono, and Robin B. Johansen. No other person made a monetary contribution to its preparation and submission.

Dated: Oct. 19, 2016

Respectfully submitted:
Daniel S. Hentschke
Michael G. Colantuono
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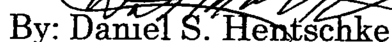

By: Daniel S. Hentschke

AMICUS CURIAE BRIEF

I. INTRODUCTION

The plain language of California Constitution article XIII C, sections 1 and 2 establishes three simple rules for imposition of local taxes. First, all new or increased taxes require voter approval. Second, general taxes require majority approval, but the approval must occur at the same general election when the voters are selecting members of the agency's governing body, subject to an emergency exception. Third, special taxes require two-thirds voter approval, but at either a special or general election.

Until the Court of Appeal's decision in this case, it has been black letter law that those rules apply regardless of whether a tax originates with the local agency's elected governing body or with the electors themselves by way of initiative. Yet, despite the clear language of the Constitution, the Court of Appeal held that it was the will of the People to exempt taxes proposed by initiative from the constitutional limitations applicable to identical legislative actions taken by a city council. The Court of Appeal clearly erred in doing so.

Although the Court of Appeal's opinion focuses on the requirement that the election on a general tax be held at the same time that voters will be electing members of the local agency governing body, its reasoning inevitably encompasses all the other requirements of article XIII C, including that section's two-thirds voter approval requirement. It would also extend to the property-related fee and assessment requirements of article XIII D, because that article defines an "agency" to which it applies as "any local government as defined in subdivision (b) of Section 1 of Article XIII C." (Cal. Const. art. XIII D, § 2, subdiv. (a).) Thus, if the term "local government" does not include voters of a city, county, or special district acting through an initiative, then none of the substantive or procedural provisions of either article XIII C or article XIII D would apply to revenue measures adopted pursuant to local initiative. That cannot be the result intended by the voters when they added these articles to the Constitution.

Because the Court of Appeal's error in construing article XIII C is sufficient ground for reversal, the Court need not and should not go on to address the distinction between taxes and fees. Whether a particular revenue measure is a tax or fee is a

factually dependent inquiry under Proposition 26, and the record here is insufficient to allow the Court to develop the parameters of the taxing and fee-making powers of local government under article XIII C. Accordingly, the League respectfully urges the Court not to reach the tax-versus-fee issue on this record and to wait to address it in other cases currently pending before this Court.

II. FACTS AND PROCEDURAL HISTORY

The League adopts the facts and procedural history as set forth at pages 1-6 of the Petitioners' Opening Brief on the Merits.

III. ARGUMENT

A. THE COURT OF APPEAL'S OPINION IS CONTRARY TO THE PLAIN LANGUAGE OF ARTICLE XIII C OF THE CALIFORNIA CONSTITUTION

The core issue in this case turns on whether the voters who adopted Propositions 218 and 26 intended all local taxes to be subject to the same requirements for adoption, or as the Court of Appeal held, they intended to impose different requirements for taxes proposed by initiative petition than those proposed by the governing body of a local government.

As outlined above, the plain language of article XIII C establishes the following rules applicable to any "tax" imposed by any "local government":

- All new or increased taxes require voter approval. (Cal. Const. art. XIII C, § 2, subdivs. (b) and (d).)
- All local taxes are either general taxes or special taxes. (Cal. Const. art. XIII C, § 2, subdiv. (a).)
- All general taxes require majority voter approval. (Cal. Const. art. XIII C, § 2, subdiv. (b).)
- All special taxes require two-thirds voter approval. (Cal. Const. art. XIII C, § 2, subdiv. (d).)
- A measure imposing a local government general tax must be submitted to the voters at the general election when the voters are selecting members of the local government's governing body, subject to an emergency exception. (Cal. Const. art. XIII C, § 2, subdiv. (b).)[1]

[1] The Constitution does not specify when the election for a measure imposing a local government special tax must be held. Thus, the timing is governed solely by the elections code or, in some instances, local charter provision.

"Tax" and "local government" are both defined terms as used in Article XIII C. A "local government" is a "county, city, city and county, including a charter city or county, any special district, **or any** other local or regional **governmental entity**." (Cal. Const. art. XIII C, § 1, subdiv. (a) (emphasis added).) This definition, which considers the entity as a whole, is consistent with the common law of municipal corporations. Under common law:

> A municipal corporation is a public corporation, created for public purposes. San Francisco v. Canavan, 42 Cal. 541, 558 (1872) (citing Payne & Dewey v. Treadwell, 16 Cal. 220, 234 (1860)). The state may create, expand, diminish or abolish municipal corporations and other public corporations subject only to the state's own laws and the California Constitution. Weber v. City Council, 9 Cal. 3d 950, 957; 109 Cal. Rptr. 553; 513 P.2d 601 (1973). "[A] municipal corporation is a body politic and corporate, possessing a legal entity and name, a seal by which to act in solemn form, a capacity to contract and be contracted with, to sue and be sued, a persona standi in judicio, to hold and dispose of property, and thereby to acquire rights and

incur liabilities, with power of perpetual succession, inhabitants and territory." McQuillin Municipal Corporations, §§ 2.07a (3d ed).

(*Mitchell v. County Sanitation Dist. Number One* (1958) 164 Cal. App. 2d 133, 141-142.)

A tax, the definition of which was added to article XIII C by Proposition 26, means "any levy, charge, or exaction of any kind **imposed by a local government**" (subject to enumerated exceptions). (Cal. Const. art. XIII C, § 1, subdiv. (e).)[2]

As is the case with private corporations, municipal corporations must act through people empowered to exercise a power vested in the entity. For example, in the case of general law cities, the government of the city is vested in a city council which may enact ordinances not inconsistent with the Constitution or general law. (Gov't Code §§ 34000, 36501, 37100.) Likewise, counties are bodies corporate and politic with governmental power vested in a board of supervisors. (Gov't Code §§ 23003, 23004, 23005.)

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[2] The question whether the initiative in this case proposed a tax involves application of the exceptions, a factual determination. However, for the purposes of this argument, the League treats the initiative as imposing a tax.

The initiative process, however, establishes a power-sharing arrangement in California whereby the powers of local voters to legislate by popular initiative are generally coextensive with those of the local legislative body. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775.) With certain exceptions not applicable here,[3] it is well settled that "the initiative process may not be used to do that which the Legislature may not do." (*Legislature* v. *Deukmejian* (1983) 34 Cal.3d 658, 676.)

Thus, like city councils, voters cannot legislate by initiative on matters preempted by the state (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 779) or that transcend constitutional requirements (*Rossi v. Brown* (1995) 9 Cal.4th 688, 696, fn. 2), or are beyond the local government's power. (*Arnel Dev. Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 337 ["The city's authority under the police power is no greater than otherwise it would be simply because the subsequent rezoning was accomplished by initiative."].)

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[3] *See Rossi v. Brown* (1995) 9 Cal.4th 688, 715-716 (unlike a legislative body, the people acting by initiative may bind future legislative bodies other than the people themselves).

Article XIII C, section 2 establishes clear and simple requirements for taxes imposed by a local government (i.e., any California "county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity"). Article XIII C does not differentiate between local government taxes that are proposed by the entity's governing body or those that are proposed by a small number of its citizens who sign an initiative petition. And article XIII C, section 2 begins by stating that its requirements apply, "Notwithstanding any other provision of this Constitution." (Cal. Const. art. XIII C, § 2 (opening sentence).)

Rather than relying on the plain language of the Constitution, as it must,[4] the Court of Appeal, with little analysis, said:

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[4] In another case interpreting the provisions of Proposition 218, the Court stated:

> When interpreting a provision of our state Constitution, our aim is "to determine and effectuate the intent of those who enacted the constitutional provision at issue." When, as here, the voters enacted the provision, their intent governs. To determine the voters' intent, "we begin by examining the constitutional text, giving the words their ordinary meanings."

Bighorn-Desert View Water Agency v. Virjil (2006) 39 Cal. 4th 205, 212.

> Article 13C, section l(e) defines a tax as "any levy, charge, or exaction of any kind *imposed by a local government,* subject to seven specified exceptions. Article 13C, section l(e) does not expressly include fees imposed by initiative. Because Article 13C is silent in this regard, we decline to construe Article 13C as applying to taxes imposed by initiative.

(Slip Op. at 19 [citations omitted, emphasis orig.])[5]

Thus, the Court of Appeal held that because article XIII C, section 1(e) "does not expressly include fees imposed by initiative," such fees, even if they constitute taxes within the meaning of Proposition 26, are not imposed by the local government and therefore not subject to the requirements of article XIII C. In so doing, the Court of Appeal effectively added the words "except when imposed by initiative" or similar words to that effect, to the Constitution. This it cannot do.

The Court of Appeal's conclusion is especially puzzling because it ignores the fact that section 2, subdivision (b) differentiates between a local government and its governing body,

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[5] The Court of Appeal slip opinion is attached as Exhibit A to the Opening Brief on the Merits.

saying that "[t]he election required by this subdivision shall be consolidated with a regularly scheduled general election for members *of the governing body of the local government*[.]" (Cal. Const. art. XIII, § 2, subdiv. (b) [emphasis added].) This language makes clear that the "governing body" is not the same as the "local government," in recognition of the fact that since 1911, the voters of this State have reserved to themselves the power to enact ordinances for their local government. Thus, under Proposition 218, a "local government" may pass a tax in two different ways: The governing body of the local government may place a tax on the ballot for voter approval pursuant to Elections Code 9222 and article XIII C or the voters may propose and pass a tax by popular initiative. Either way, article XIII C's requirements apply.[6]

B. THE COURT OF APPEAL'S OPINION IS CONTRARY TO THE INTENTION OF THE VOTERS IN ADOPTING PROPOSITIONS 218 AND 26

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[6] The League notes that the Court of Appeal quoted the League's Proposition 26 Implementation Guide, but only for the proposition that collecting a tax is not the same as imposing a tax within the meaning of Propositions 218 or 26. (Slip Op. at 15-16.) The League does not understand the court's reliance on its Guide as suggesting that the League concurs in the court's analysis with respect to the definition of "local government" as it is used in Proposition 218.

As it appeared before voters in 1996, Prop. 218 included language requiring that it be "liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5.) While article XIII C specifies when elections on general taxes may be held and the approval requirements for general and special taxes, it otherwise leaves much of election law intact, although it does lower the signature requirement to place a measure before voters to repeal or reduce any tax, assessment, fee or charge. (Cal. Const., art. XIII C, § 3 [applying constitutional standard for initiative – 5% of voters who participated in last gubernatorial election].)

Proposition 218 added article XIII C to the California Constitution. Proposition 26 amended section 1 of article XIII C as previously adopted by Proposition 218 by adding a new definition of "tax," but otherwise left Proposition 218 intact. The drafters of Propositions 218 and 26 knew how to write initiatives. Had they intended to make local taxes proposed by initiative subject to different election and voter approval requirements than those proposed by a local governing body, they would have said so, but they did not. Instead they included provisions that

plainly defined local governments and established plain requirements for imposition of local taxes.

Moreover, nothing in the ballot materials for Proposition 218 suggested that it did not apply to taxes imposed by initiative. To the contrary, the first bullet in the Attorney General's title and summary for Proposition 218 said that the measure does the following:

> Limits authority of local governments to impose taxes and property-related assessments, fees, and charges. Requires majority of voters approve increases in general taxes and reiterates that two-thirds must approve special tax.[7]

In addition, the Legislative Analyst's Analysis told voters that Proposition 218 would require "all future local general taxes, including those in cities with charters, must be approved by a majority vote of the people." (*Id.*) Neither the Attorney General's statement nor that of the Legislative Analyst would have been correct if Proposition 218 did not apply to taxes proposed by initiative.

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[7] UC Hastings Scholarship Repository, http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2137&context=ca_ballot_props.

Rather than following the voter intent plainly apparent from the words submitted to them in Propositions 218 and 26, the Court of Appeal implied from words not written or used an exemption that is not apparent either from the language of the measures themselves or the ballot materials that described them.

C. THE TRIAL COURT'S DETERMINATION THAT THE INITIATIVE PROPOSED A GENERAL TAX SHOULD NOT BE DISTURBED

The record does not support reversing the trial court's determination that the Upland marijuana levy would be a general tax, not a regulatory fee. The distinction between taxes and fees has always been a highly fact-dependent exercise,[8] and that is still true under article XIII C, section 1, subdivision (e).

Neither party gives sufficient attention to the tax/fee distinction here. Although petitioners note the trial court had before it an analysis detailing the City's reasonably foreseeable costs (AOB, p. 24), respondents do not engage this evidence beyond admitting it exists. (Answer Brief, p. 5.) Respondents' Answer Brief claims, without citation to evidence, that the levy "clearly does not exceed the reasonable cost to local government

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[8] *See, e.g., Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874.

of conferring the benefit of operating as a medical marijuana dispensary in Upland" (Answer Brief, p. 27), argues "the City should have considered and accepted the Plaintiffs' evidence and representation and just accepted facially the language of the proposed measure" (id. at p. 28) without deciding whether it was a fee or tax, and speculates on the political pressures facing the City in its tax/fee determination. (*Id.* at p. 30.) The brief does not, however, discuss the evidence either side submitted on the tax/fee question or where the trial court erred in determining that the measure included a tax.

As a result, the record here is woefully insufficient to allow this Court to develop the parameters of the taxing and fee-making powers of local government under article XIII C. That issue arises in other cases pending before this court: *Citizens for Fair REU Rates v. City of Redding*, Case No. S224779; *Jacks v. City of Santa Barbara*, Case No. S225589; and *City of San Buenaventura v. United Water Conservation Dist*rict, Case No. S226036.

Whether a particular initiative measure proposes a tax, and if so, whether the tax is general or special, is an important determination as to the timing of the election and the voter

approval required. However, the core issue here is whether the requirements of article XIII C apply at all. That is an issue of law that may be resolved on the record presented.

The resolution of the fact-specific secondary issues relating to the meaning of the term "tax" under article XIII C, section 1, subdivision (e) should await a better vehicle. This Court can avoid a premature pronouncement of the law on this point by noting Respondents' failure to make a record of the City's costs, thus waiving its claim, or by remanding the issue to the lower courts for a decision on a better-developed record, as this Court did in *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 428, 442 [Prop. 13 challenge to SWRCB regulatory fees].

IV. CONCLUSION

The core issue in this case is whether a local tax measure proposed by the citizen of a local government is subject to the same constitutional requirements as one proposed by the local government's governing body. The League of California Cities, agreeing with Petitioners, believes that the answer is clearly yes and urges this Court to hold accordingly.

Dated: Oct. 19, 2016

Respectfully submitted:

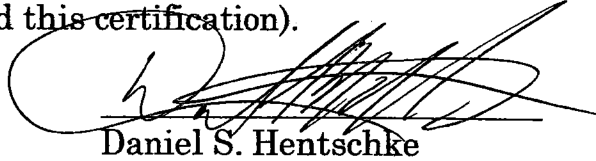
Daniel S. Hentschke
Michael G. Colantuono
Robin B. Johansen
Attorneys for Amicus Curiae
League of California Cities

By: Daniel S. Hentschke

WORD CERTIFICATION

I, Daniel S. Hentschke, counsel for amicus curiae League of California Cities, in reliance on a word count by Microsoft Word, the program used to prepare the foregoing APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND PETITIONERS; AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES certify that it contains 3282 words including footnotes (excluding caption, tables, and this certification).

Dated: Oct. 16, 2016



Daniel S. Hentschke

PROOF OF SERVICE

California Cannabis Coalition v. City of Upland
Supreme Court Case No. S234148
Fourth Appellate District, Division Two Case No. E063664
San Bernardino County Superior Court Case No. CIVDS1503985

I, Ashley A. Lloyd, declare:

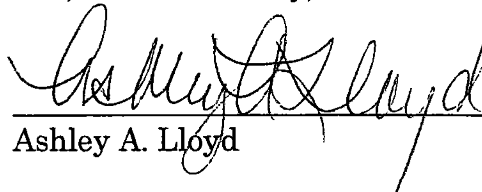
I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. On October 25, 2016, I served the document(s) described as **APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND PETITIONERS; AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES** on the interested parties in this action addressed as follows:

SEE ATTACHED LIST

✓ **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Grass Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 25, 2016, at Grass Valley, California.



Ashley A. Lloyd

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California Cannabis Coalition v. City of Upland
Supreme Court Case No. S234148
Fourth Appellate District, Division Two Case No. E063664
San Bernardino County Superior Court Case No. CIVDS1503985

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