Case No. E055176

[Superior Court Case No. INC 1105569]

In the Court of Appeal of the State of California
FOURTH APPELLATE DISTRICT, DIVISION TWO

Mission Springs Water District,

Plaintiff and Respondent,

vs.

Kari Verjil, As Riverside County Registrar of Voters,

Defendant,

vs.

Tim Radigan Brophy, et al.

Real Parties in Interest, Appellants.

Appeal from an Order Denying a Special Motion to Strike by the
Superior Court of the State of California for the County of Riverside
Honorable Harold Hopp
Superior Court Judge

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF ON BEHALF OF PLAINTIFF AND RESPONDENT

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TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to Rule 8.200(c) of the California Rules of Court, the Association of California Water Agencies ("ACWA"), California Association of Sanitation Agencies ("CASA"), California State Association of Counties ("CSAC"), and the League of California Cities ("League") respectfully request permission to file the joint amici curiae brief combined with this application. Each applicant organization represents public agencies with a substantial interest in this case because each is a local government funded by local taxes, assessments, fees, or charges subject to initiative reduction or repeal pursuant to California Constitution article XIII C, § 3. Further, each proposed amicus represents agencies that provide water, sewer, or other public utility service subject to statutory and constitutional requirements for the setting of service fees and charges at issue in this case, including the requirements of California Constitution article XIII D, § 6. (See Cal. Const. art. XIII C, § 1 (b) and art. XIII D, § 2(a).) Also, each represents agencies that are generally subject to

adoption of initiative ordinances either by statute or initiative pursuant to Article XIII C, § 3. This case involves a challenge to the constitutionality of an initiative relating to the revenues — and consequently the fiscal integrity of a local government agency. Moreover, the issue presented — whether a pre-election cause of action for declaratory relief to test the legality of a proposed law is subject to a special motion to strike pursuant to the anti-SLAPP statute — is one of broad interest to public agencies, beyond the context of Proposition 218.

The applicants' attorneys have examined the briefs on file in this case[1] and are familiar with the issues involved and the scope of the briefing. The applicants respectfully submit that a need exists for additional briefing regarding the statewide impact of a decision by this Court on the correct interpretation of applicable statutes and the California Constitution.

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[1] The reply brief in this case was due May 29th and, as of the date this brief is completed, no such brief is reflected on the Court's on-line docket. Accordingly, applicants' counsel has reviewed the principal briefs, but not the (apparently non-existent) reply.

For the reasons stated in this application and further developed in the Introduction and Interest of Amici portion of the proposed brief, the applicants respectfully request leave to file the amicus curiae brief combined with this application.

The amici curiae brief was authored by the undersigned. No other party, person, or entity made a monetary contribution to fund its preparation or submission.

Dated: 6/4/12

Respectfully submitted:

COLANTUONO & LEVIN, P.C.

By: _____

Michael G. Colantuono
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AMICUS CURIAE BRIEF

I. INTRODUCTION AND INTEREST OF AMICI

The right of the people to adopt local ordinances by initiative is firmly established by the California Constitution. But the people's power to adopt local laws is subject to the all the limitations imposed on the local legislative bodies for which they act and additional limitations in some circumstances. This case involves an initiative that appears to violate constitutional limitations on initiatives identified by the California Supreme Court in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205. However, the case does not directly implicate substantive limitations on initiatives; rather, it involves the process by which the legality of an initiative ordinance may be tested before the expense and disruption of an election are incurred. As a general rule, courts are more willing to review challenges to an initiative **post**-election. Nevertheless, a **pre**-election challenge is appropriate (under a more demanding standard of judicial review) when an initiative is facially illegal. In such

circumstances, the courts have held a pre-election declaratory relief action is proper and is not subject to a special motion to strike because it tests only the legality of the ordinance and does not arise from expressive conduct of the initiative proponents. Because pre-election declaratory relief actions serve an important public purpose by allowing local agencies to seek judicial review of an initiative ordinance before incurring the expense (political, social, and fiscal) of an election to consider a potentially invalid law, amici write to support the trial court's decision and to urge this Court to follow existing precedent which is directly on point.

A. DESCRIPTION OF AMICI CURIAE

ACWA is a non-profit public benefit corporation organized and existing under the laws of the state of California since 1910. ACWA is comprised of over 450 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts and special purpose agencies. ACWA's Legal Affairs Committee, comprised of attorneys from each of ACWA's regional divisions throughout the State, monitors litigation

and has determined that this case involves issues of significance to ACWA's member agencies.

The California Association of Sanitation Agencies ("CASA") is a nonprofit mutual benefit corporation organized and existing under the laws of the State of California. CASA is comprised of 115 local public agencies, including sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, California water districts, municipal utility districts, and cities. CASA's member agencies provide wastewater collection, treatment, disposal, water reclamation and biosolids recycling services to millions of California residents, businesses, industries and institutions.

CSAC is a non-profit corporation. Its membership consists of all 58 California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsels' Association of California and overseen by the Association's Litigation Overview Committee, comprised of county counsels from throughout the state. The Litigation Overview Committee monitors litigation of

concern to counties statewide and has determined that this case is a matter affecting all counties.

The League of California Cities is an association of 469 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, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

B. AMICI HAVE A UNITY OF INTEREST BECAUSE THEIR MEMBERS ARE LOCAL GOVERNMENTS SUBJECT TO LAWS GOVERNING INITIATIVES AND TO ARTICLES XIII C AND XIII D OF THE CALIFORNIA CONSTITUTION

The local agencies represented by ACWA, CASA, CSAC, and the League have a significant interest in cases, such as this, that involve statutory and constitutional limitations on initiatives,

particularly those that affect the ability of local public agencies to establish budgets, allocate fiscal resources, and levy property related fees, and those concerning the procedures by which pre-election judicial review may be obtained. Amici organizations represent local public agencies throughout California that establish local taxes, assessments, fees, or charges that may be reduced or repealed by initiative pursuant to California Constitution article XIII C, § 3. This case involves a challenge to the constitutionality of an initiative relating to the revenues —and consequently the fiscal integrity — of a local government agency and therefore generates even greater concern for Amici's members. Moreover, the issue presented — whether a pre-election cause of action for declaratory relief to test the legality of a proposed initiative is subject to a special motion to strike pursuant to the anti-SLAPP statute— is one of broad interest to public agencies, even beyond the important issues of Proposition 218.

C. FACTS AND PROCEDURAL HISTORY

Amici adopt the description of facts as set forth in the Respondent's Opposition Brief at pages 4–7.

II. ARGUMENT

A. THE RATE-MAKING PROCESS

Regardless of whether a particular local agency member is a general purpose government, such as a city or county, or a special district responsible for providing water, sewer, refuse collection, or another utility service, each is fundamentally a resource management agency confronted with the complexity of managing scarce resources in furtherance of the public good in light of ever-changing regulatory requirements, consumer demands, and competing interests.

The scope and complexity of water resource management, and correspondingly, setting rates to pay for those activities, have been recognized as "unequalled by virtually any other type of activity presented to the courts." *Brydon v. East Bay Mun. Utility Dist*. (1994) 24 Cal.App.4th 178, 203 – 204. *Brydon* involved a challenge to a

pricing structure designed to conserve water and manage water resources, but other courts have recognized the dilemmas facing local agencies in the management of other resources and in raising funds to do so. (E.g., *Carlton Santee Corp. v. Padre Dam Muni. Wat. Dist.* (1981) 120 Cal. App. 3d 14, 28 [court acknowledges the serious dilemma facing a local agency in fairly distributing the cost of limited sewage treatment resources].) Public agencies manage complex water or sewer resource systems and provide these services as enterprise operations largely funded through service rates, fees, and charges. These agencies range from small (a few hundred or thousand customers) to large (several hundred thousand to more than a million customers), from predominately agricultural and rural districts to populous cities. Part of their responsibility as resource managers is to set rates that appropriately allocate the "full cost" of water, including not only costs to operate and maintain a water delivery system, but the full cost of sustaining the supply of water from day to day, season to season, year to year, and generation to generation.

To avoid inefficient and non-beneficial use of California's limited water resources and to avoid the risks to public health and safety that result from under-funded water systems, the Legislature has deemed it necessary to mandate that local governments set rates that are sufficient to meet revenue requirements. This is most often done in the context of statutes governing special districts. Some examples include:

- Water Code § 31007 (county water districts)
- Water Code § 43006 (water storage districts)
- Water Code § 71616 (municipal water districts)
- Public Utility Code § 12809 (municipal utility districts); and
- Public Utility Code § 16467 (public utility districts)).

However, the Legislature's policy also applies to cities and counties operating under general laws. For example, the Revenue Bond Law of 1941, applicable to the water, sewer, solid waste and other enterprises of many local agencies, including cities and counties,[2]

[2] This statute also applies to the respondent agency here. Water C. § 31030 (applying Revenue Bond Law of 1941 to county water districts).

expresses the Legislature's policy that public enterprises be operated efficiently, economically and maintained in good repair and working order, (Gov't Code §§ 54513, 54516), at the lowest cost consistent with sound economy, prudent management and security of bond holders (Gov't Code § 54514), and that rates and charges be set at levels sufficient to pay debt service, meet bond covenants, and pay current maintenance and operation expenses and other obligations. (Gov't Code § 54515.)

Local agencies frequently fund utility operations from a variety of revenue sources, including capacity charges,[3] connection charges,[4] standby charges,[5] investment earnings, tax revenues if the

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[3] A capacity charge or fee is a charge used to accumulate capital to provide capital facilities necessary to provide ongoing utility service. (*San Marcos Water Dist. v. San Marcos Unified Sch. Dist*. (1986) 42 Cal.3d 154 (characterizing capacity charges for purposes of local governmental immunity from property taxes).)

[4] A connection charge is a one-time fee imposed on the developer of a new building for the establishment of new service to that building. Such charges are not subject to Proposition 218. (*Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409.)

[5] A standby charge is a charge imposed on property to recover the cost of facilities necessary to make service available to that property on demand. (Gov't Code §§ 54984 et seq. (Uniform Standby Charge

agency has tax authority (or benefits from property taxes because it had tax authority prior to the adoption of Proposition 13 in 1978), as well as rate revenue. The portion of the revenue required by an agency to provide safe, adequate and lawful service (its so-called "revenue requirement") that must be satisfied by rates is determined by:

1. totaling budgeted costs of the enterprise operation (operating and maintenance expenses, debt service, capital needs to be funded on a pay-as-you-go basis, changes in reserves, etc.),
2. deducting the revenue expected to be generated by other sources such as investment income, taxes, standby charges, and capacity charges, and
3. spreading the required revenue over the level of service or volume of commodity expected to be sold during the relevant rate period.

Procedures Act), under Proposition 218 a standby charge is treated as an assessment. Cal. Const. art. XIII D, § 6 (b)(4)).

To ensure sufficient revenues and avoid "rate shock" by smooth rate ramps (either up or down),[6] obtain access to the bond market (which demands reserves to ensure repayment), meet bond covenants (*i.e.*, contractual promises to lenders to impose rates sufficient to ensure repayment of debt and maintenance of the capital facilities which secure that debt), and guard against unforeseen circumstances, public agencies must establish reserve accounts, while ensuring their bills can be paid when due.

Moreover, setting water rates amounts to predicting the weather, as the volume of water sold varies with the weather. In wet seasons, few water their lawns. In dry seasons, most do.

Accordingly, rate-setting involves the reasoned exercise of discretion to establish appropriate rates that will meet the

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[6] Rate-makers often use rate-smoothing devices, like loans to a utility fund in one year, to be paid back in another, or flows into and out of a rate-smoothing reserve, to protect customers from "rate shock" that would arise if rates changed suddenly and significantly when the agency's costs do — a major water tank, for example, might need to be replaced in one year, but it would not be good rate-making practice to spike user rates in that year sufficient to cover the cost of that capital facility with a long service life. Moreover, equity counsels spreading the cost of a long-lived facility over the ratepayers who benefit from it and not just those in the year it is built.

obligations of an agency without exceeding the cost of service. It is a legislative act. (E.g., *Carlton Santee Corp. v. Padre Dam Mun. Water Dist.* (1981) 120 Cal.App.3d 14, 18–19.)[7]

The power to set water rates arises from a public agency's "proprietary and quasi-public capacity." (*County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 161.) Public agencies that operate their water systems as prudent business owners have historically recovered **all** costs incurred in providing water to their customers; including the costs of building, maintaining, operating, administering, and improving their systems.[8] Rate setting, which must be based on cost of service principles, is essentially a "zero sum game"[9] and each customer or customer class is directly affected by the rates charged to others. Although limited in the post-

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[7] A local agency's adoption of a budget is also a legislative act. (*County of Orange v. Barratt American, Inc.* (2007) 150 Cal.App.4th 420, 437.)

[8] The Legislature has defined "water" for the purposes of Proposition 218 as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Wat. Code § 53750, subd. (m).)

[9] Zero sum game is defined as "a situation in which a gain by one must be matched by a loss by another." American Heritage College Dictionary (3rd Ed. 2000).

Proposition 218 era, *Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1181, establishes the unsurprising principle that rates must satisfy the revenue requirement of a public water service.[10] Post-Proposition 218 cases acknowledge this principle as well. (*Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 922 ("Cities are still entitled to recover all of their costs for utility services through user fees."); *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637, 647-648) *(same).* However, the courts in *Roseville* and *Fresno* held that Proposition 218 precluded

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[10] *Hansen* states, "Revenue requirements are allocated to various classes [of customers] based on each group's proportionate use of the system, including use of physical plant facilities and consumption of water, among other elements. A preliminary step in determining revenue requirements is the establishment of appropriate classes among which costs will be allocated. The next step is to calculate the costs which properly should be assessed each group. For this analysis, two alternative methods exist: the cash basis and the utility basis. Very generally, the cash method sets revenue requirements based on actual operating and maintenance expenses plus allowable charges for system replacement, debt principal repayment, and other capital costs. The utility method also considers actual operating and maintenance expenses, but instead of looking to cash expenses such as system replacement and debt principal repayment, the method focuses on depreciation attributable to outside use and on rate of return on investment." (*Hansen v. San Buenaventura*, 42 Cal.3d at 1181.)

agencies from relying on *Hansen* to support the diversion of enterprise revenue to purposes unrelated to enterprise activities. But, otherwise, the substantive cost-of-service law is consistent before and after Proposition 218.

The cost of administering a public utility is, of course, a proper cost to be recovered from rates under these authorities. Of necessity, a single-purpose public agency's cost to administer a utility service includes the cost of governance, including elections. Accordingly, were the trial court to have allowed the plainly invalid measure in issue here to go to a vote, the cost of that election would be a charge against rates.[11] Plainly, the rate-payers of the respondent District have in interest in avoiding the cost of pointless elections on plainly illegal initiative proposals.

[11] The costs of such an election in the instant case are detailed by the General Manager's declaration at Appendix Volume I, pp. 182–190.

B. THE TRIAL COURT CORRECTLY DETERMINED THAT A PRE-ELECTION DECLARATORY RELIEF ACTION TO TEST THE VALIDITY OF A PROPOSED INITIATIVE MEASURE IS NOT SUBJECT TO AN ANTI-SLAPP MOTION

It is settled law that a declaratory relief action to test the validity of a proposed ordinance is not subject to special motion to strike under Code of Civil Procedure section 425.16 ("anti-SLAPP motion"). (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69 ("*Cotati"*); *City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582 ("*Stansbury*").)[12] Were the law otherwise, given the expressive nature of our democratic process for the adoption of laws, all lawsuits seeking to test the validity of legislation would be subject to

[12] *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43 is not to the contrary. Although the underlying facts of the cases consolidated in that appeal involved initiative ordinances, the factual similarity to the instant case (or to *Cotati* and *Stansbury*) ends there. As the Court of Appeal in *Stewart* clearly noted — to avoid inconsistency with the Supreme Court's holding in *Cotati* — the cross-complaint that Court found to be subject to the anti-SLAPP statute arose from the cross-complaint's protected act of filing litigation and, further, was not filed to determine the constitutionality of the initiative itself but to resolve a dispute over Pasadena's failure to certify the results of the election on the measure. (*Id*. at 74.)

anti-SLAPP motions.[13] As succinctly stated by the Supreme Court in *Cotati*, "That the constitutionality of an ordinance can be a proper subject for declaratory relief is without doubt." (*Cotati*, 29 Cal.4th at 79.) And as the Supreme Court points out, it is the existence of an actual and present controversy over an ordinance's validity that triggers a cause of action declaratory relief action, nothing else. (*Id*. at 80.) If the Legislature had intended actions challenging the facial validity of an ordinance to be within the scope of the anti-SLAPP statute, it would have said so, but it did not. (*See Navellier v. Sletten* (2002) 29 Cal.4th 82, 91-92 [decided by the Supreme Court on the same day as *Cotati* and in which the Court declared that the anti-SLAPP statute was plainly written and that a suit for breach of a covenant not to sue was subject to the statute because it arose from protected activity].)[14]

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[13] As this Court previously noted, the distinction between an ordinance proposed by an initiative and any other ordinance is a "distinction without a difference." (*City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582, 1591.)

[14] Responding to the dissent, the Supreme Court majority distinguished *Cotati,* stating:

In 2007, this court decided *Stansbury*, which followed *Cotati* and plainly held that a pre-election declaratory relief action to test the constitutionality of a proposed initiative is not within the anti-SLAPP statute.[15] What this court said then applies squarely now:

> Contrary to the dissent, moreover, Navellier in this action seeks more than"'a declaration of [Navellier]'s rights as to the controversy raised [by Navellier] in the [federal] suit'" (dis. opn., post, at p. 100); Navellier seeks damages for Sletten's allegedly having raised additional, independent claims in the earlier suit. Finally, Navellier's complaint, unlike the City of Cotati's complaint in *Cotati* and contrary to the dissent's assertion, expressly refers to activity protected under the anti-SLAPP statute: Sletten's negotiation and signing of the release and his pleading of counterclaims in the federal action.

Navellier v. Sletten, 29 Cal.4th at 90.

[15] Two initiative cases decided after *Stansbury* confirm this holding. In *Lin v. City of Pleasanton* (2009) 176 Cal.App.4th 408, 424–425 the court noted that Stansbury "rejected the argument that the city's preelection lawsuit challenging the constitutionality of an initiative measure arose from protected activities by the initiative's proponents," but then assumed the applicability of § 425.16 and went on to affirm the denial of the motion on the second prong. In *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 783–784 the appellant had appealed the trial court's determination an pre-election declaratory relief action did not arise out of protected activity (based on *Stansbury*), but the Court of Appeal did not address this issue, finding that the motion was properly denied on the second prong.

> By its declaratory relief action, the City was simply asking for guidance as to the constitutionality of the proposed initiative. Indeed, the City did nothing to limit respondents' activities in connection with the initiative, nor did the City, by its action, otherwise impact respondents' First Amendment rights. Moreover, it was proper for the City to initiate its declaratory relief action as a means of disputing, in a preelection challenge, the validity of the initiative.

Stansbury, 155 Cal.App.4th at 1590-1591.

The core language of Code of Civil Procedure § 425.16, subdivision (b)(1) reads today as it did when the Supreme Court decided *Cotati* and this Court decided *Stansbury*:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff

has established that there is a probability that the plaintiff will prevail on the claim.

(CCP § 425.16 (b)(1) quoted in *Cotati*, 29 Cal.4th at 73 and *Stansbury,* 155 Cal.App.4th at 1589.)

The Legislature is presumed to know of court decisions construing statutes (E.g., *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609 [Legislature deemed to be aware of judicial decisions construing statutes and to amend statutes in light of such decisions].) Had the Legislature intended the law to be as suggested by Appellants, it would have changed the statute. (*Id*.) But nothing has changed. Accordingly, neither should the opinion of this Court.

This Court has previously identified the benefits of pre-election challenges to facially invalid initiatives:

> On the question of whether it is appropriate for a court to address a preelection challenge of a proposed initiative, we observed that "if an initiative ordinance is invalid, no purpose is served by submitting it to the voters. The costs of an election—and of preparing the ballot materials necessary for

each measure—are far from insignificant. [Citation.]

Proponents and opponents of a measure may both expend large sums of money during the election campaign. Frequently, the heated rhetoric of an election campaign may open permanent rifts in a community. That the people's right to directly legislate through the initiative process is to be respected and cherished does not require the useless expenditure of money and creation of emotional community divisions concerning a measure which is for any reason legally invalid."

(*Stansbury*, 155 Cal.App.4th 1582 at 1592-1593, citing *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1024.)

These observations are as compelling today as they were in 2007 and are even more so in the context of an initiative that strikes at the heart of a public agency, its fiscal integrity.

C. BIGHORN PRECLUDES INITIATIVES THAT INTERFERE WITH FUTURE RATE-SETTING, REGARDLESS OF THE MEANS OF THAT INTERFERENCE

1. A Proposition 218 Initiative May Not Alter the Process for Setting New Rates

Proposition 218, of course, did not create or redefine the initiative power. Instead, it merely eliminated a previous constitutional bar to the application of that power to legislation providing for government revenues. Article XIII C, § 3 reads:

> Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

In construing this provision of our Constitution, we must start with its text. "The initiative power" as previously defined in our law "shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge."[16] Thus, as a general matter, an initiative may reduce or repeal a water fee. In addition, such initiatives are subject to a much lower signature threshold than that applicable to initiatives generally. Elections Code § 9310 requires initiatives in the special districts to which that statute applies[17] to bear the valid signatures of 10% of all registered voters of the District to reach the ballot. Article XIII C, § 3, read together

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[16] As the Supreme Court has observed, Proposition 218 uses the terms "fee" and "charge" interchangeably. *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 214 fn. 4.

[17] Elections Code §§ 9300 – 9342 establish procedures for the exercise of the initiative in special districts identified in § 9300, generally those which have the power to act by ordinance. Although Article XIII C, § 3 now demands the existence of initiative procedures as to all special districts which impose taxes, assessments and property related fees within the reach of its language, the Legislature has yet to do so. The Proposition 218 Omnibus Implementation Act of 1997, chapter 38 of the Statutes of 1997, amended Elections Code § 4000 regarding assessment protest proceedings; it made no other changes to the Elections Code.

with Article II, § 8, subd. (b) and Elections Code § 9035, imposes a much lower signature requirement of 5% of the number of voters of the District who participated in the last gubernatorial election. As gubernatorial turnouts are commonly about 40% of the electorate,[18] this means just 2% of the voters of a district need sign a petition to qualify for the ballot an initiative to reduce or repeal a tax, assessment or property related fee (5% of 40% = 2%).[19]

Notwithstanding the availability of fiscal initiatives under Article XIII C, § 3, however, they retain the fundamental attributes of the initiative power established by Article II, § 8 added to our

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[18] The Secretary of State's report of turn-outs in statewide elections appears at http://www.sos.ca.gov/elections/sov/2010-general/04-historical-voter-reg-participation.pdf and shows a 43.74% turn-around, statewide in the 2010 gubernatorial election, 39.29% in 2006, 36.05% in 2002, and 41.43% in 1998.

[19] This assumes, however, that the initiative proposal in question does nothing more than propose an initiative to affect a local revenue measure. As the Attorney General has explained, Article XIII C, § 3 changed one aspect of initiative law and not the balance, which remains in place as to issues not governed by that section. 85 Ops. Cal. Att'y Gen'l 151 (2002) (special election on initiative to reduce local government revenue was not authorized by Article XIII C, § 3, but by Elections Code § 9214 and, therefore, 15% of registered voters must sign petition in compliance with that latter section to compel special election).

Constitution by the Progressive Movement in 1911 and of the body of case law developed to construe that amendment. Local initiatives, of course, may not amend the State Constitution, as that process is governed by Article XVIII and, while initiative amendments are authorized, they require the participation of the statewide electorate, not just the residents served by the respondent District.
Article XVIII, § 3 (initiative amendment of Constitution permitted), Article II, § 8, subd. (b) (initiative constitutional amendment may be proposed by 8% of the number of registered voters who participated in last gubernatorial election).

This, of course, means that the respondent District's voters have no power to alter the requirements of Proposition 218 for the adoption of water rates by the respondent District, a point the California Supreme Court made clear in the very case that clarified that ordinary water service rates are property related fees subject to Proposition 218:

> Kelley's initiative measure would do more than roll back the Agency's water rate and other charges, however. It would also

> require the Agency's board of directors to obtain voter approval before increasing any existing rate or charge or imposing any new rate or charge. Nothing in section 3 of California Constitution article XIII C authorizes initiative measures that impose voter-approval requirements for future increases in fees or charges.

Bighorn, 39 Cal.4th at 217-18.

The Court recognized the possibility for conflict between the power of voters to initiate reductions of property related fees, the duty of local governments to impose fees sufficient to fund a safe and adequate water supply, and the power of local governments to increase rates consistently with the property related fee provisions of Proposition 218, *i.e.*, Article XIII D, § 6. It provided this guidance for disputes such as that here:

> We have concluded that under section 3 of California Constitution article XIII C, local voters by initiative may reduce a public agency's water rate and other delivery charges, but also that **section 3 of article XIII C does not**

authorize an initiative to impose a requirement of voter preapproval for future rate increases or new charges for water delivery. In other words, by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, **but the agency's governing board may then raise other fees or impose new fees without prior voter approval.** Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. (See *DeVita v. County of Napa*, supra, 9 Cal.4th at pp. 792–793 ["We should not presume … that the electorate will fail to do the legally proper thing."].) We presume local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and we assume the board, whose members are elected [citation], will give

> appropriate consideration and deference to the voters' expressed wishes for affordable water service. The notice and hearing requirements of subdivision (a) of section 6 of California Constitution article XIII D will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive.

Bighorn, 39 Cal.4th at 220–21 [emphases added].

Although sufficient to establish this point, our Supreme Court's ruling in *Bighorn* is not the sole authority available to guide this Court. Division 1 of this District confronted the same issue in another dispute involving the taxpayer advocacy group at bar. *Howard Jarvis Taxpayers Association v. City of San Diego* (2004) 120 Cal.App.4th 374 ("*San Diego*") involved Proposition E, an initiative amendment to San Diego's city charter to require two-thirds voter approval for the adoption of general taxes. This provision conflicted

with the requirement of Proposition 218 (Article XIII C, § 2(b)) that such taxes be approved by a simple majority of voters. Division 1 of this Court had little difficulty finding the charter amendment invalid:

> In sum, Proposition E conflicts with article XIIIC, section 2(b) by requiring that any new general tax or any increase in an existing general tax be approved by a two-thirds vote of the city's electorate, rather than by a majority vote as set forth in that section. Because the two-thirds voting requirement is the central provision of Proposition E, Proposition E is not reformable.

(*Id*. at 394.)

2. AN INITIATIVE THAT PURPORTS TO LIMIT FUTURE RATE-MAKING IS ENTIRELY INVALID AND MAY NEITHER BE SEVERED NOR REFORMED

Because the initiative in issue here included as an essential provision a provision limiting future rate increases to the increase in the Consumer Price Index, the entire initiative fails. Courts lack the power to reform initiatives. The language quoted above from the *San Diego* case makes that point. Nor may a court rely on a severability

clause to save such a measure. *Bighorn* proves this point, as the Supreme Court invalidated the entire measure at issue there rather than severing the offending provision. (*Bighorn*, 39 Cal.4th at 221 ["When a significant part of a proposed initiative measure is invalid, the measure may not be submitted to the voters."].)

Other cases explain why this is so. Although courts commonly sever portions of legislation when doing so serves legislative intent, voters are meaningfully different from legislators — courts are ill equipped to discern which provisions of a multi-part measure motivated its approval. Indeed, it is for this reason that ballot measures must be limited to a single subject by Article II, § 8, subdivision (d) of the State Constitution. As our Supreme Court explained, "to submit the measure to the voters without redrafting would confuse the electorate and mislead many voters into casting their ballot on the basis of provisions which had already been found invalid." (*Am. Fed'n of Labor v. Eu* (1984) 36 Cal.3d 687, 716.)

In the earliest years of our experience with the initiative, the First District explained that applying judicial power to reform or

sever invalid portions of an initiative would disserve the democratic role of the initiative because doing so "would be directing something to be placed on the ballot which the hundreds of voters did not petition for at all" thus transferring power from voters to courts. (*Bennett v. Drullard* (1915) 27 Cal.App. 180, 186.) This a court may not do.

3. Fiscal Initiatives are Subject to All Other Restrictions on the Initiative Power

As observed above, Article XIII C, § 3 does not alter the fundamental character of the initiative power, it simply obviates the restriction of Article II, §§ 8 and 9 against the use of the power to repeal revenue measures and imposes a low signature requirement. Accordingly, all the restrictions our Constitution and our case law impose on the initiative power apply to fiscal initiatives. These include:

- A local initiative may not conflict with state legislation. (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491 [Gov't Code § 66484.3 delegated to local legislative body, not electorate, power to impose transit development fee]);

- A fiscal initiative may not "affect law relating to the imposition of fees or charges as a condition of property development." (*See* Cal. Const. Art. XIII D, § 1, subd. (b).
- An initiative may not impair contracts. (*Citizens Against Rent Control v. City of Berkeley* (1980) 27 Cal.3d 819; *County of San Bernardino v. Way*, (1941) 18 Cal.2d 647, 661; *see also* Gov't Code § 5854 [enacted as part of the Proposition 218 Omnibus Implementation Act of 1997, Stats. 1997, c. 38, § 3 (S.B. 919), declaring, "Section 3 of Article XIII C of the California Constitution, as adopted at the November 5, 1996, general election, shall not be construed to mean that any owner or beneficial owner of a municipal security, purchased before or after that date, assumes the risk of, or in any way consents to, any action by initiative measure that constitutes an impairment of contractual rights protected by Section 10 of Article I of the United States Constitution."]).
- An initiative may not impair essential governmental functions. (*City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466,

Dare v. Lakeport City Council (1970) 12 Cal.App.3d 864; *Simpson v. Hite* (1950) 36 Cal.2d 125.)

- An initiative may not accomplish a non-legislative act, such as directing administrative action or attempting to adjudicate. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763 [initiative extends only to legislative acts].)
- An initiative may not direct local legislators to legislate, but must do so directly. (*Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504.)
- An initiative may not address subjects as to which state law has preempted local legislation. (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765.)
- An initiative may not violate individual rights protected by the state and federal Constitutions, as by being arbitrary or discriminatory. (*Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013 [anti-gay-rights initiative violated equal protection]; *Hawn v. County of Ventura* (1977) 73

Cal. App. 3d 1009 [initiative that irrationally discriminated between city and county voters violated equal protection].)

Thus, the respondent District's concerns regarding the impact of the proposed initiative on its ability to honor its bond covenants and other contracts and to fulfill the statutory mandate of Water Code §§ 31007 and 31040 that it impose rates sufficient to fund a safe and adequate water supply are well taken. Such concerns raise difficult questions of constitutional and other law. However those questions can readily be avoided by imposing the plain requirement of Proposition 218 as explained in *Bighorn* and *San Diego* that a measure which purports to restrict the power of a local government to set the rate of a property related fee under Article XIII D, § 6 is invalid and cannot be reformed or severed by a court.

Furthermore, to the extent the constraint on future revenue generation precludes respondent District from recovering its costs of operation, it is tantamount to dissolving the agency and is an invalid attempt to avoid the mandatory statutory procedure established by the Legislature for doing so. (Cortese-Knox-Hertzberg Local

Government Reorganization Act of 2000, Government Code §§ 56000 et seq.)

This resolves this case and justifies affirming the decision of the trial court below.

III. CONCLUSION

Proposition 218 allows initiatives to reduce or repeal a local government's tax, assessment or property related fee and authorizes a reduced signature requirement for measures limited to such subjects. However, Proposition 218 also establishes the manner by which local governments exercise their revenue powers and no local initiative can alter its provisions. A measure which purports to do so is wholly invalid, and cannot be saved by the judicial powers to sever and reform legislation.

Pre-election review to enforce these rules is authorized by law and appropriate to avoid the significant disruptions that can arise from *ultra vires* proposals — as the disruption of the respondent District's efforts to obtain a low-interest state loan here. Accordingly, such review does not constitute a Strategic Lawsuit against Public Participation subject to a special motion to strike.

For all these reasons, Amici respectfully request that this Court affirm the trial court's ruling denying Appellant's special motion to strike and its demurrer.

Dated: 6/4/12

Respectfully submitted:

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CERTIFICATION OF BRIEF LENGTH

[Cal. Rules of Court, rules 8.204(c), 8.520(c)]

The text of this brief is generated in 13-point Palatino Linotype print type and consists of 6,678 words as counted by the Microsoft Word 2007 word-processing program used to generate this brief.

Dated: 6/4, 2012

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PROOF OF SERVICE

Court of Appeal, Fourth Appellate District, Division Two
Mission Springs Water District v. Kari Verjil; Tim Brophy, et al.
Case No. E055176
Trial Court Case No. 1105569

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 11364 Pleasant Valley Road, Penn Valley, California 95946. On JUNE 5, 2012, I served the document(s) described as **APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF AND AMICUS BRIEF** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

See Attached Service List

X **BY MAIL:** 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 Penn 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 JUNE 5, 2012, at Penn Valley, California.

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