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Our File No. 99904.1191

December 5, 2018

VIA TRUEFILING

The Honorable Chief Justice Tani Cantil-Sakauye
Honorable Associated Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Wilde v. Dunsmuir* (2018) __ Cal.App.5th __, 2018 WL 5994224 (Third Appellate District, Case No. C082664) — Request for Depublication (Cal. Rules of Court, rule 8.1125(a)(1))

Honorable Chief Justice Cantil-Sakauye and Associate Justices:

Introduction. The California Association of Sanitation Agencies (“CASA”), California State Association of Counties (“CSAC”), the California Special Districts Association (“CSDA”) and the League of California Cities (“League”) (collectively, “Amici”) respectfully request decertification of the published opinion in this case. The Opinion filed November 15, 2018 misconstrues *Rossi v. Brown* (1995) 9 Cal.4th 688 (*Rossi*) to allow referenda to challenge local government fees despite the contrary rule of article II, section 9 of our Constitution¹ and case law construing that section. Although **initiatives** may reduce or repeal local government fees under *Rossi* and article XIII C, section 3, our Constitution has barred fiscal **referenda** for at least 52 years. The Opinion erred to conclude otherwise. It may have been uninformed by briefing in another case pending in that court raising the same issue in which Amici participated. (*Howard Jarvis Taxpayers Association et al. v. Amador Water Agency et al.*, Third DCA Case No. C082079 (appeal filed May 20, 2016, fully briefed November 3, 2016).

Interest of Amici. CASA is a non-profit corporation comprised of more than 100 local public agencies, including cities, sanitation districts, community services districts,

¹ References to “articles” are to the California Constitution.

sewer districts, and municipal utility districts. CASA's member agencies provide wastewater collection, treatment, water recycling, renewable energy and biosolids management services to millions of Californians. CSAC is a non-profit corporation having a membership consisting of the 58 California counties. CSDA is a non-profit corporation with a membership of nearly 900 special districts. CSDA's member districts provide a wide variety of public services to urban, suburban, and rural communities, including water, sewer, and waste removal services. 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 local government members of Amici depend on fees to fund such vital public services as water, sewer, and solid waste removal. If left published, the Opinion will undermine their ability to do so, make their capital-intensive utilities less credit-worthy, invite lenders to impose risk premiums, and make public services more costly.

Argument. The Opinion correctly states that ratemaking is a legislative act. (*Wilde v. City of Dunsmuir* (November 15, 2018, C082664) __Cal.App.5th__ [p. 17]; accord *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 2016, 277.) However, the Opinion erred to conclude ratemaking is subject to referendum. This seems especially true as to property related fees governed by article XIII D, section 6 — which specifies how fee-payers may participate in decisions to impose or increase such a fee. (Cal. Const., art. XIII D, § 6, subds. (a) [majority protest proceeding for all property related fees], (c) [property-owner or registered-voter election on such fees for services other than water, sewer and refuse removal].)

Article II, section 9 reserves voters' power to approve or reject statutes by referendum, except those "providing for tax levies or appropriations for usual current expenses of the State." This exception applies to local as well as state referenda. (*Rossi, supra*, 9 Cal.4th at p. 698 ["The restrictions found in article II, section 9, are applicable to local referenda ... except to the extent that charter cities are exempted"].) *Dunsmuir* is a general law, not a charter, city.

The Constitution prohibits referenda on "tax levies or appropriations" to prevent disruption of government operations and finances. (*Rossi, supra*, 9 Cal.4th at p. 703.) A referendum suspends — immediately upon certification of petition signatures — a challenged statute or ordinance until voters approve it. (*Ibid.*) "Therefore, if a tax measure were subject to referendum, [an agency's] ability to adopt a balanced budget

and raise funds for current operating expenses through taxation would be delayed and might be impossible.” (*Ibid.*) Courts have generally construed “tax levies and appropriations” as used in article II, section 9 broadly to avoid such disruptions to local government, no matter the revenue source in issue. *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864, 868 (“*Dare*”) states:

The imposition and collection of fees for the use of the facilities of Lakeport Municipal Sewer District No. 1 must reasonably be considered a taxation function. “Taxes” are defined as burdens imposed by legislative power on persons or property to raise money for public purposes.

In *Rossi*, this Court distinguished referenda from initiatives due to the disruption of government finance and service delivery referenda threaten and that our Constitution seeks to avoid. (*Rossi, supra*, 9 Cal.4th at p. 697 [“The referendum, by contrast, applies only to newly enacted legislation and is subject to express constitutional limitations”].) Initiatives operate prospectively, take effect only after an election, and give government months’ — possibly years’ — notice before a funding source is lost or reduced.

Like *Rossi*, Article XIII C, adopted by 1998’s Proposition 218, allows initiatives to do what referenda may not: “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.” (Emphasis added.) This language is silent as to the referendum power and that silence is consequential. (E.g., *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182 [concluding Prop. 218 did not impliedly repeal city annexation statutes, citing *expressio unius* rule and Sherlock Holmes’ “dog that did not bark”]; *Center for Community Action & Environmental Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th 689, review denied Nov. 28, 2018 [statute allowing referendum of development agreement impliedly excluded initiative].)

Moreover, there is evidence the voters who approved Proposition 218 intended article XIII C, section 3 to codify *Rossi*: The Howard Jarvis Taxpayers Association, drafter of what became Article XIII C, circulated an analysis of Proposition 218 during the campaign which may have informed voters’ view of it. (Text of Prop. 2018 With Analysis <<https://www.hjta.org/propositions/proposition-218/text-proposition-218-analysis/>> [as of Nov. 27, 2018]. That analysis states of article XIII C, section 3: “This

section merely ‘constitutionalizes’ the principles of *Rossi v. Brown*, (1995) 9 Cal.4th 688, a recent decision of the California Supreme Court upholding the right of the electorate to use the local **initiative power** to reduce or eliminate government imposed levies via the initiative power.” (Emphasis added.) (*Carmen v. Alvord* (1982) 31 Cal.3d 318, 331, fn. 10 [contemporaneous statement of initiative drafter may inform its construction]; but see *Johnson v. County of Mendocino* (2018) 25 Cal.App.5th 1017, 1031 (declining notice of post-election article by HJTA leader expressing view of Prop. 218’s intent].)

In any event, the Opinion itself observes article XIII C, section 3 was intended to preserve “voters’ prerogative to decide on local taxes, assessments, and fees **by initiative**.” (*Wilde, supra*, at p. 11 (emphasis added).)

Accordingly, the Opinion errs to characterize the issue here as whether “section 3 of article XIII C to the California Constitution silently repealed voters’ right to challenge by referendum the local levies for which they expressly reserved their power of initiative.” (*Wilde*, at p. 2.) There **was** no referendum power over taxation when voters approved article XIII C in 1996. *Rossi* and *Dare* were the law then and are the law still. Article XIII C addresses only initiatives because well-settled law makes clear that local levies — taxes, assessments, and fees of various kinds — are not subject to referendum because referenda have different consequences for public finance than do initiatives. The Opinion is correct that Article XIII C had no effect on “voters’ ability to challenge local legislation by referendum” (*Wilde* at p. 13), but mistakes that earlier law.

The Opinion also errs to refashion the “essential government functions” exception to both the referendum and — pre-Proposition 218 — initiative powers stated in *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832, 839–840. *Geiger* found the “management of the financial affairs of county government” was an “essential function of the board of supervisors” immune from direct democracy. (*Id.* at p. 840.) It did not analyze whether a particular funding source related to an “essential government function.” (*Id.* at p. 839.) Likewise, *Rossi* treats adopting revenue measures, calling elections, and appropriating funds alike as “essential government functions.” (*Rossi, supra*, 9 Cal.4th at p. 703.) It does not test the urgency of a particular tax; it concluded taxation in general is an essential government function exempt from referendum. (*Ibid.*) The Opinion goes too far by creating a new test asking whether water service is an “essential government function.” (*Wilde*, at p. 20.) Moreover, distinguishing those services the political branches choose to fund by taxes or fees as between those which

are essential and those which are not seems a value-laden, legislative task rather than a standard fit for judicial application.

Nor is the outcome Amici assert problematic from the perspective of those who value direct democracy in local government finance. Proposition 218 details the role for those who pay

- taxes — requiring registered-voter elections under article XIII C, section 2;
- assessments — requiring a mailed ballot protest among assessed property owners akin to an election under article XIII D, section 4, subdivisions (d) & (e); and,
- property related fees — requiring majority protest proceedings and, for all services but water sewer and trash removal, a registered voter election, too, under article XIII D, section 6, subdivisions (a) and (c).

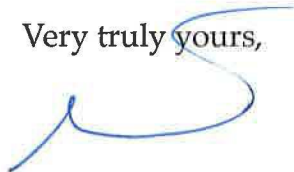
Still further, article XIII C, section 3 preserves the initiative power — to which Ms. Wilde unsuccessfully resorted here. Thus, she had two opportunities to pursue her view of Dunsmuir's water rates and could not muster the necessary support of her neighbors, most of whom are more willing than she to fund a safe and reliable water supply. No majority protest appeared in the City's compliance with article XIII D, section 6, subdivision (a) and Ms. Wilde's initiative to rescind the disputed rates was handily defeated at the polls.

Conclusion. The Opinion impairs local governments' ability to fund necessary infrastructure like upgrades to Dunsmuir's 100-year-old water system. The Opinion correctly states the City Council's resolution was legislative in character, and that Proposition 218 did not change earlier law as to the application of the referendum power to fiscal measures. However, it mistook that earlier law to find article II, section 9's exception from the referendum power for "tax levies and appropriations" not to encompass the water fees in issue here.

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Accordingly, Amici respectfully ask this Court to decertify the Opinion for publication unless it should grant review of this case on the City's expected petition or sua sponte.

Very truly yours,



Michael G. Colantuono
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MGC:cwh
Enclosure Proof of Service

PROOF OF SERVICE

Leslie T. Wilde v. City of Dunsmuir, et al.

Supreme Court Case No. _____

Third District Court of Appeal Case No. C082664

Siskiyou County Superior Court Case No. SCCVPT16549

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. My email address is: ALloyd@chwlaw.us. On December 5, 2018, I served the document(s) described as **REQUEST FOR DECERTIFICATION OF THE PUBLISHED OPINION** on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **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 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 December 5, 2018, at Grass Valley, California.


Ashley A. Lloyd

SERVICE LIST

Leslie T. Wilde v. City of Dunsmuir, et al.

Supreme Court Case No. _____

Third District Court of Appeal Case No. C082664

Siskiyou County Superior Court Case No. SCCVPT16549

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