

S252915

SUPREME COURT  
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA <sup>Deputy</sup>

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LESLIE T. WILDE,

*Plaintiff and Appellant,*

v.

CITY OF DUNSMUIR, et al.

*Defendants and Respondents.*

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After a Published Decision of the Court of Appeal of the State of California  
Third Appellate District, Case No. C082664

Reversing a Judgment of the Superior Court of the State of California  
for the County of Siskiyou, Case No. SC CV PT 16-549  
Honorable Anne Bouliane, Judge Presiding

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**RESPONSE TO BRIEF OF AMICUS CURIAE  
JACK COHEN**

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## **I. INTRODUCTION**

The City of Dunsmuir (City) responds to the Brief of Amicus Curiae Jack Cohen to address the essential government services issue he raises. This Court need not reach this issue; the question on this appeal is whether property related fees under Proposition 218 and other fees which fund essential government services are subject to referendum notwithstanding article II, section 9 of the California Constitution. However, if the Court elects to decide the issue, preserving the essential government exception to the referendum power will stabilize municipal finance as the voters who added that power to our Constitution intended.

The balance of Cohen's brief addresses issues well addressed by the parties' principal briefs. The City therefore does not burden this Court with repetitive briefing on the appropriate harmonization of article II, section 9 and article XIII C, section 3.

## **II. ARGUMENT**

### **A. EXCEPTIONS TO THE REFERENDUM POWER APPLY TO ANY FEE-SETTING RESOLUTION**

The Court of Appeal's decision (Decision) in *Wilde v. City of Dunsmuir* (2018) 29 Cal.App.5th 158, 176 agreed that "legislation is not subject to referendum if it precludes the functioning of essential government services." However, the Decision held that, since the referendum if approved would not prevent the City to again study, plan, or implement a new water rate plan, the referendum did not "undermine the City's ability to provide essential government services ... ." (*Id.* at p. 177–

179.) The Decision considered only whether the referendum undermined the City's administration of its budget for current expenses. The Decision does not hold that supplying water to the City's residents is not an essential government service, finding the City had not raised that issue. (*Id.* at p. 175, fn 5.) The Decision acknowledges that the referendum, if voters approved it, would rescind the City's infrastructure plan, but overlooked that the City's antiquated water system is in dire need of an upgrade to ensure reliable, safe water service. An upgrade, of course, required funding. Fiscal management and maintenance of a safe and reliable water supply to residents are equally essential government services.

Article II, section 8 and article II, section 9 serve different purposes and have different impacts. The former reserves to voters the initiative power to propose statutes and amendments to the Constitution and to adopt or reject them. The latter reserves to voters the power to approve or reject statutes or parts of statutes, except:

- urgency statutes,
- statutes calling elections, and
- statutes providing for tax levies or appropriations for usual current expenses of the State.

A referendum halts action taken as soon as signatures are certified and, if approved, defeats an existing legislative measure without proposing a substitute. While referenda do not legally compel an agency not to proceed as it has, political imperatives and the logic of democracy do. This is why the voters who reserved the referendum power in 1911 exclude from its

reach urgency statutes and those governing elections, taxes and appropriations for usual current expenses. Absent these exceptions, the immediate effect of a referendum proposal would disrupt public finance in a way that initiatives, which take effect only after a campaign, an election, and certification of the result, do not.

This Court articulated this distinction in *Rossi v. Brown* (1995) 9 Cal.4th 688, 703 (*Rossi*), holding:

[I]f a tax measure were subject to referendum, the county's ability to adopt a balanced budget and raise funds for current operating expenses ... would be delayed and might be impossible. As a result, the county would be unable to comply with the law or to provide essential services to residents of the county ... . If essential government functions would be seriously impaired by the referendum process, the courts, in construing the applicable constitutional and statutory provisions, will assume that no such result was intended.

This is as true in Dunsmuir now as in San Francisco when this Court decided *Rossi* in 1995. Indeed, given the small size of the City and the relatively large share of its finances that water rates represent, perhaps more so here than there. Suspension of the water rates imposed by Resolution 2016-02 halts repair of the City's water infrastructure. With no other means by which to fund the repairs, the City's ability to reliably serve an adequate and safe supply of water to its residents is threatened. The risk is not theoretical. News reports suggest as many as a million Californians do

not have access to reliable supplies of water safe to drink precisely due to rural California's relative lack of resources and diseconomies of small scale. As the Legislative Analyst recently wrote:

[The State Water Resources Control Board] has identified a total of 331 water systems that it or [Local Primacy Agencies] regulate that are in violation of water quality standards. These water systems serve an estimated 500,000 people throughout the state. The number of water systems with 14 or fewer connections that are currently in violation of water quality standards is unknown, but estimated to be in the thousands by SWRCB. Of the 331 systems identified by SWRCB, 68 have violations associated with nitrates (and in some cases, additional contaminants).

(Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 200, as amended May 17, 2019, p. 4 (Monning, D – Monterey), <[www.leginfo.ca.gov](http://www.leginfo.ca.gov), 201920200SB200\_Senate%20Floor%20Analyses\_.pdf> (last viewed June 25, 2019).) The obligation to provide water services necessarily includes necessary repairs to infrastructure, not wait for it to fail and then adopt a resolution to obtain funding to fix it months later. (Cf. *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683 ["fix it when it breaks" plan of water system maintenance triggers inverse condemnation liability], disapproved on another point by *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 447–451.) The referendum here, then, impairs an essential government function.

*Rossi* did not turn on whether the expenditures for an essential government service are planned for prospective improvements or to maintain existing services, but rather on whether the referendum would impair the ongoing provision of essential government services, such as financial management, a safe and reliable water supply, or both. To read it otherwise is to ignore article II, section 9's exclusions of urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations. The fiscal exceptions have long been understood as intended to prevent disruption of an agency's management of its finances. (E.g., *Geiger v. Board of Sup'rs of Butte County* (1957) 48 Cal.2d 832, 839–840 (*Geiger*.)

**B. PROPOSITION 218 DID NOT CHANGE THE LAW ON REFERENDUM OR DEFINE WATER, SEWER AND TRASH SERVICES AS NON-ESSENTIAL**

To allow a referendum here is at odds with the requirement of article XIII D, section 6, subdivision (c) that fees for sewer, water and refuse collection services can be imposed without the election it requires of fees for other, apparently less essential, purposes. Allowing a ratepayer to referend water rates negates this exemption, requiring the very election the voters approved Proposition 218 found unnecessary. Proposition 218 thus treats water, sewer and refuse collection as essential government services not to be impaired by referendum process, providing other means to protect ratepayers from government overreach. (E.g., Cal. Const., art. XIII C, § 3 [allowing initiative, but not referendum, to repeal or lower fees], art.

XIII D, § 6, subd. (a) [allowing majority protest to defeat a new or increased fee].) Petitioner Wilde, of course, unsuccessfully pursued both.

The Third District has newly decided in a published opinion that the right to referend water rates never existed. (*Howard Jarvis Taxpayers Associations v. Amador Water Agency* (2019) \_\_\_ Cal.App.5th \_\_\_, 2019 WL 2482624) at p. \*14 (“*Amador*”).) It also concludes that Proposition 218 authorizes the initiative power, but not the referendum power, as to water, sewer and other service fees. (*Ibid.*)

*Amador* applied *Rossi* and *Geiger* to uphold the Water Agency there’s refusal to conduct an election on a petition to referend water rates increased to provide ongoing service, citing the exception to the referendum power that prevents impairment of essential government functions. (*Amador, supra*, 2019 WL 2482624 at p. \*10 [citing *Simpson v. Hite* (1950) 36 Cal.2d 125, 134.]) Thus, it addresses the subject of Jack Cohen’s amicus brief as well as the larger issues in this case.

Just as in *Amador*—the Resolution here found that the improvements to the City’s water delivery system it would fund are necessary to ensure ongoing, reliable water delivery. Thus, the increase in fees is necessary to meet the City’s obligation to provide this essential function.

*Amador* notes its disagreement with the Decision. Justice Murray, who signed both opinions, seeks to distinguish the two, noting the referendum in *Amador* challenged only new rates, while Wilde’s petition challenged rates and the infrastructure plan they fund. With respect, the

City asserts this is a distinction without a difference. The revenue derived from the new rate plan in *Amador* is for maintenance, upgrades and repairs to the existing water utility, just as are the rate increases here. The scope of the reserved powers of direct democracy turns on constitutional substance, not mere accidents of the form of local legislation. Rate-making is legislation regardless of its label as an infrastructure plan, a rate ordinance, or both. The end result is the same. The goal of the exception from the referendum power to stabilize municipal finance applies to any fee-setting resolution whether or not to fund existing services or to improve or repair infrastructure.

Indeed, an infrastructure plan might be less amendable to referendum if it is understood as an administrative action, rather than legislation. (*Amador, supra*, 2019 WL 2482624 at p. \*10 [citing *Simpson* for the limitation of referendum to legislative, rather than administrative acts]; *Simpson, supra*, 36 Cal.2d at p. 131.)

Amicus Jack Cohen argues the essential government services exception to the referendum power must be read narrowly in light of this Court's recent decision in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 ("*California Cannabis*"). *California Cannabis* is not helpful. The issue there was whether article XIII C restricts voters' authority to impose taxes via initiative; it does not examine the scope of the initiative and referendum powers as reserved by the people.

Cohen also cites *Chase v. Kalber* (1915) 28 Cal.App. 561, apparently to show the age of the essential government service exception.

The issue in *Chase* was whether the referendum power applied to the imposition of assessments to fund street improvements. *Chase* held that if the referendum impaired or destroyed the efficacy of an essential governmental power “the courts may and should assume that the people intended no such result to flow from the application of those powers, and that they do not so apply.” (*Id.* at p. 569–570.) *Chase* determined the street improvement assessments met this criteria because streets are “indispensable, to the convenience, comfort, and well-being of the inhabitants.” (*Ibid.*) Thus, the case involves a legislative act to fund an essential government service. Even if, as Cohen argues, *Chase* applies the administrative / legislative distinction narrowly (it is not clear the case does), water service is more essential than street improvements; water is, of course, a biological necessity. Cohen argues *Chase* was without citation to authority. (Amicus Brief at pp. 37–38.) However, courts have consistently followed its reasoning and some case, of course, must be the first to construe the direct democracy amendments of 1911.

Cohen’s reliance on *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208 is not persuasive as that concerns Proposition 13’s limitations on real property taxation. Petitioners there argued it would impair various contractual obligations of local agencies. This Court determined it cannot assume that no alternative revenue sources might be found to prevent the feared contractual defaults so as to strike down Proposition 13 as necessarily leading to that unconstitutional end. (*Id.* at p. 240.) Here, the City adduced evidence of the

need for upgrades to the water system are real and increased rates are needed, too, to provide the local match for a federal grant. (CT 77–78.) Moreover, Wilde adduced no evidence of other reasonable alternatives to be exhausted, distinguishing this case from *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068 [referendum may challenge ordinance to make zoning consistent with general plan]. Having the City start over and propose a second water infrastructure maintenance plan and rates to fund it, and repeat Proposition 218’s notice and protest requirement, as the Decision proposes, would invite iterative challenges to the City’s effort to improve its antiquated water delivery system.

### **III. CONCLUSION**

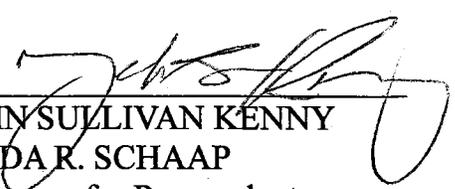
Prohibiting a challenge to the City’s Resolution to increase water service rates by referendum serves the intent of article II, section 9 to stabilize the City’s financial planning so it can fund reliable and safe water service to the residents, property owners, and visitors it services. To allow a referendum not required by the language of article II, section 9 is not necessary to achieve the intent of article XIII C, section 3, which speaks only of initiatives, and is consistent with the long-standing rule that the referendum power may not be invoked to interfere with essential

government functions. Amicus Jack Cohen's contrary argument simply does not persuade.

Dated: June 27, 2019

Respectfully submitted,

KENNY & NORINE



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## CERTIFICATE OF WORD COUNT

The foregoing Response to Brief of Amicus Curiae Jack Cohen is within the limit of 14,000 words in compliance with Cal. Rules of Court, 8.520,(b) and 8.204(c). In preparing this Certificate, I relied on the word count generated by Microsoft Word version 2010 word-processing program.

Dated: June 27, 2019

KENNY & NORINE

  
John Sullivan Kenny

RE: *Wilde v. City of Dunsmuir, et al.*  
Siskiyou County Superior Court Case No. SCCVPT 16-549  
Court of Appeal Case No. C082664  
Supreme Court Case No. S252915

PROOF OF SERVICE

I am employed in the County of Shasta, State of California, I am over the age of eighteen years and not a party to the foregoing action, my business address is 1923 Court Street, Redding, California 96001. On the date set forth below, I served the within **RESPONSE TO BRIEF OF AMICUS CURIAE JACK COHEN** on all parties in said action in the manner and/or manners described below and addressed as follows:

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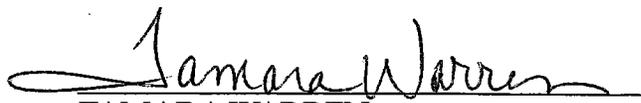
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Executed on June 27, 2019, at Redding, California.

  
TAMARA WARREN

**SERVICE LIST**

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

Supreme Court Case No. S252915

Third District Court of Appeal Case No. C082664

Siskiyou County Superior Court Case No. SCCVPT 16-549

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