S252915

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LESLIE T. WILDE,

Plaintiff and Appellant,

v.

CITY OF DUNSMUIR, et al.

Defendants and Respondents.

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

REPLY BRIEF ON THE MERITS

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*John Sullivan Kenny, SBN 39206
jskenny@lawnorcal.com
Linda R. Schaap, SBN 171945
lschaap@lawnorcal.com
KENNY & NORINE
1923 Court Street
Redding, CA 96001
Tel: (530) 244-7777
Fax: (530) 246-2836

Attorneys for Defendants and Respondents
City of Dunsmuir, et al.

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INTRODUCTION

Unable to defend the Opening Brief's arguments that Proposition 218's text evidences no intent to overrule *Dare v. Lakeport* and its language can easily be read to preserve that rule, HJTA resorts to artifice. It argues strawmen the City does not contest. It urges this Court to overrule the reasoning of *Rossi v Brown* and the expressio unius canon. The Court need not do so. Instead it can take the voters who approved Proposition 218 at their word, reading it to overturn the law with which it expressly disagrees and to preserve law it does not address — like the rule of *Dare* and *Rossi* allowing initiatives, but not referenda, to challenge revenue measures which fund essential government services.

DISCUSSION

I. HJTA ARGUES STRAWMEN

The parties agree that this Court must harmonize the various provisions of our constitution. (RB at p. 11.) However, that means giving every provision of the Constitution force, including article II, section 9, which limits the referendum power to preserve government's ability to engage in fiscal planning; article XIII, section C, which expressly limits this rule but only as to initiatives, to which it refers three times; and article XIII D, section 6, subdivisions (a) & (c) which require voter approval of most property-related fees but impose only a majority protest procedure on fees for water, sewer and trash services, which the voters who approved Proposition 218 apparently viewed as especially essential services to be protected from political disruption. The harmonization canon provides no basis to allow a referendum of a fee not permitted by the law in effect when

voters adopted Proposition 218 and which that measure left unaffected, even though it directly reversed the results of other finance case law.

That the law distinguished some fees from taxes in the late 1800s and early 1900s is not proof article II, section 9 bars the referendum as to "statutes providing for tax levies or appropriations for usual current expenses of the State." (RB at p. 12-14.) The City does not argue that tax and fee were synonymous a century ago, only that the detailed distinctions added to our Constitution in recent generations would not have been anticipated in 1911. (AOB at p. 19-20.) HJTA never engages the language of article II, section, completely ignoring its reference to "appropriations." Moreover, it does not persuade that an early distinction between licensing fees (and an observation that a city's 19th century power to provide sewer service did not extend to fees in excess of service cost) inform this Court's task in construing the language of article II, section 9. Its discussion of 19th century definitions of "assessments" is wholly inapt, as no party argues an assessment is in issue here. (RB at p. 13.)

People ex rel. Atty. Gen. v. Naglee (1850) 1 Cal. 232 holds that a licensing fee on alien (*i.e.*, Chinese) gold miners did not run afoul of federal rules prohibiting taxation of federal lands. A reminder of our racist history, it might still be good law as to the distinction between taxes and licensing fees for purposes of federal preemption despite the vastly different law governing taxation of activity on federal lands that now prevails. It does not, however, have anything to teach as to the intent of the voters who approved article II, section 9 in 1911 to reserve the referendum power

"except ... statutes providing for tax levies or appropriations for usual current expenses of the State," language HJTA never quotes, much less engages.

Similarly, *Plumas County v. Wheeler* (1906) 149 Cal. 758 teaches little relevant here. (RB at p.16.) That a license fee on shepherds was not a "tax" as the term was then understood tells us little about water and other service fees or what constitutes "tax levies or appropriations for usual current expenses of the State" within the meaning of article II, section 9. That the law distinguished between some fees and taxes for some purposes does not mean that other fees are not within the reach of article II, section 9's prohibition on referenda that disrupt public finance.

Similarly unhelpful is *Henderson v. Oroville-Wyandotte Irr. Dist.* (1931) 213 Cal. 514. There, this Court enforced a contractual commitment of an irrigation district, required by the Railroad Commission's consent to allow an investor-owned water utility to sell its asserts to the district on a promise to maintain service without distinguishing between in-district customers and out-of-district customers served by the utility to be acquired. In so doing, it made a factual finding that the district did not — in fact — use its property taxes to subsidize water service to in-district customers so as to justify a higher fee on outsiders in violation of its contract. (*Id.* at p. 532–533) That this was a factual ruling, and not a statement of law is evident from *Rutherford v. Oroville-Wyandotte Irr. Dist.* (1933) 218 Cal. 242, which HJTA also cites. (RB at 17.)

So, too, *Shelton v. City of Los Angeles* (1929) 206 Cal. 544, which post-dates article II, section 9 by a generation and concluded the debt limitation of article XI, section 18 did not encompass revenue bonds which pledge only proceeds of utility charges, sheds little light on the meaning of article II, section 9. (RB at pp. 17–18.) The Court noted that article XI, section 18 does not apply to charter cities like Los Angeles. (*Shelton*, *supra*, 206 Cal. at p. 549.) Its conclusion that article XI, section 18's reference to "the income and revenue provided for such year" was limited to "the ordinary revenues of the city" and did not include utility revenues teaches little about the intent of article II section 9. Again, that the law distinguished taxes from fees in the first part of the 20th century for some purposes does not prove the intent of the votes who adopted article II, section 9.

Thus, HJTA tactically oversimplifies to argue the law distinguished taxes from fees a century ago "in largely the same way it does today." (RB at p. 19.) That some distinction between these concepts existed a century ago does not persuade that the refined distinctions among taxes, fees, and fees article XIII A, section 4 and article XIII D, section 6 deem taxes because they exceed the cost of service animated article II, section 9. The argument is historical and therefore unhelpful in discerning the intent of article II, section 9 and how it may be harmonized with article XIII C, sections 3 and 6.

The City does not contest the special place the direct democracy powers of recall, referendum and initiative have in our Constitutional order.

(RB at p. 25.) However, the cases discussing the referendum and initiative speak of them in tandem and jealously guard the pair. HJTA cites no case touching on distinctions between those two powers and overlooks that the initiative power concededly applies here. Thus, that direct democracy is entitled to a preferred place in our system of government tells us little about which of those powers can be invoked here – Wilde's unsuccessful initiative or her unpermitted referendum.

II. ARTICLE II, SECTION 9 IS NOT LIMITED TO "TAX LEVIES" AS WE NOW UNDERSTAND THOSE TERMS

HJTA's contention that the City did not argue this case in light of article II, section 9 below is irrelevant. (RB at p. 9, fn. 1.) This Court construes the law in light of all legal arguments and there is no doubt the essential issue here – the availability of a referendum to challenge water rates – was asserted below. HJTA does not attempt to prove prejudice in light of the City's newly considered legal arguments here.

The goal of construction is to discern and implement the intent of the law giver when the law was given. The precise legal categories among special and general taxes, assessment, property related fees, and other types of fees added to our law in 1978 (Prop. 13), 1986 (Prop. 62), 1996 (Prop. 218) and 2010 (Prop. 2010) can tell us little of the intent of those who voted to adopt what is now article II, section 9 more than a century ago. HJTA errs to argue (RB at p. 10) the meaning of 1911's article II, section 9 reference to "tax levies or appropriations for usual current expenses" in light of Proposition 26's distinction – adopted 99 years later—prohibition

of funding "general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners" by a property related fee (a class of fees it newly defines). (Cal. Const., art. XIII D, section 6, subd. (b)(5).) Different words used 99 years apart need not have comparable meanings.

Geiger v. Board of Sup'rs of Butte County (1957) 48 Cal.2d 832 may no longer describe the policy consequences of allowing initiative repeal, but not referenda to bar adoption, of taxes (RB at 27) but it does illuminate what the voters who approved article II, section 9 had in mind. That their intent has different policy consequences a century later need not blind us to what that intent was. Moreover, *Rossi* is a modern case — adopted after Proposition 13 distinguished general from special taxes, requiring two-thirds voter approval of the latter and limited fees to service cost lest they be deemed taxes (art. XIII A, section 4; *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866.) It also post-dates Proposition 62, a statutory initiative which required voter approval of even general taxes of counties, general law cities, and special districts. (Gov. Code, § 53720 et seq; *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220. Nor does HJTA persuade to argue taxes should not have the protection from referendum that article II, section 9 concededly affords because they now require voter approval as they did not in 1911. (RB at p. 27–28.) The voters have yet to repeal article II, section 9 and this Court must give it meaning in light of its apparent intent. Having no answer

to *Rossi's* explanation of the purpose of article II, section 9 to prevent the disruption referenda bring to government finance, HJTA is content to ignore it.

Dare v. Lakeport is good law. HJTA devotes much of its brief to arguing that *Dare* was wrongly decided. It has no rejoinder, however, to the Opening Brief's principal argument from *Dare* – that it was the law when Proposition 218 was approved in 1996 and, although that measure reverses other case law (and codifies *Rossi*), it evidenced no intent to undermine *Dare*.

Indeed, the City's reading of article XIII C, section 3 comports with what HJTA circulated before the measure was adopted. Its pre-election annotation of the measure is reprinted as an appendix to the League of California Cities Guide to Propositions 218 and 216. As to article XIII C, section 3, HJTA stated during the 1996 campaign:

"This section merely 'constitutionalizes *Rossi v. Brown*, 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 moped levies via the initiative power. It proves a 'last resort' remedy." (League of California Cities (LCC) Guide, Appendix A at pp. 128–129; see Request for Judicial Notice, Exh. A filed with Opening Brief.) The "earlier resort," presumably are the majority protest proceeding required by article XIII D, section 6, subdivision (a), the election required for non-water, sewer, and trash fees by article XIII D, section 6, subdivision (c), the property owner

approval of assessments required by article XIII D, section 4, and the voter approval of taxes required by article XIII C, section 2.

Even a post-election annotation of Proposition 218 — which cannot evidence voter intent (*Carman v. Alvord* (1982) 31 Cal.3d 318, fn10) — which provides an elaborate defense to fears that the initiative power preserved by article XIII C, section 3 might undermine bonds — speaks only of the initiative power, making no mention of referenda. (LCC Guide at p. 144–146; available at: http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Proposition-26/LCC-218-26-Guide-2017-FINAL.aspx.) HJTA's position here, then, seems a post-1996 revelation.

It is true that *Dare* is a Court of Appeal decision, not binding here. (RB at p. 22.) That is also true of *Rossi*, a decision of this Court. That is not sufficient to persuade this Court to abandon these precedents, as the voters who approved Proposition 218 might have done — but give no evidence they intended to do so.

HJTA grasps at straws to argue that *Dare* involved an initiative, not a referendum and therefore is unhelpful here. (RB at p. 22, 24.) The law at the time equated the two for purposes of article II, section 9. (E.g., *Geiger.*) Though that distinction was abandoned in *Rossi*, that does not undermine *Dare's* reasoning by a court then bound by *Geiger*. *Dare's* rationale applied equally to initiatives and referenda. Cases, of course, are not cabined to their facts, but extend to the reach of their logic. (*Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 666 ["The Palsgraf rule, for example, is not

limited to train stations."], disapproved on other grounds by *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557 fn. 8).)

HJTA also argues that *Dare* misreads *City of Madera v. Black* (1919) 181 Cal. 306 (*Madera*), which concluded that city had exceeded its authority to fund sewer service by using fee proceeds for other purposes. (RB at p.22.) Such use would make the fee a tax under modern law. (Cal. Const., art. XIII A, § 4; Gov. Code, § 50076 [implementing Prop 13]; Cal. Const., art. XIII D, § 6, subd. (b)(1) [Prop. 218]; Cal. Const., art. XIII C, § 1, subd. (e)(2) [Prop. 26].) It did not make it so in 1919. *Madera* invalidated the fee there as exceeding the city's statutory authority, not because the sewer fee contested there was a tax. Rather, *Madera* defined the sewer fee as a "tax, impost or toll," (*Madera* at p. 310-311.) speaking imprecisely in modern terms but reflecting the law of the time. It was for this that *Dare* cited it (*Dare* at p. 868.) – and properly so. HJTA indicts *Dare* by law not conceived when it was decided. *Dare* also cites *Los Angeles County v. Southern Cal. Gas Co.* (1960) 184 Cal.App.2d 169, which similarly read *Madera* to define sewer fees as a "tax, impost, or toll" for purpose of determine the appropriate court of initial jurisdiction, an issue in *Madera*. If *Dare* misreads *Madera* too broadly, then it is not alone in doing so.

III. THE CITY'S CONSTRUCTION OF PROPOSITION 218 IS NOT MERE "POLICY ARGUMENT."

HJTA dismisses as an unpersuasive "policy argument" the City's observation that Proposition 218 carefully allocates power among voters,

property owners and elected officials as to property related fees. (RB at p. 24, 29.) Article XIII D, section 6, subdivisions (a) & (c) require only a majority protest proceeding as to water, sewer and trash fees, otherwise empowering elected officials to impose them consistently with the substantive requirements of that section's, subdivision (b). An election is also required of other property related fees, which is governed by a majority of property owners or two-thirds of registered voters. (Cal. Const., art. XIII D, section 6, subd. (c).) Taxes by contrast always require voter approval, either a simple majority for general taxes or two-thirds for special taxes. (Cal. Const., art. XIII C, section 2, subds. (b)&(c).) The initiative power alone is preserved "in matters of reducing or repealing any local tax, assessment, fee or charge." (Cal. Const., art. XIII C, section 3.)

From these provisions, the Opening Brief argues two primary canons of construction. HJTA pays lip service to one, and impliedly argues the other should not apply.

A. The harmonization canon is noted at the outside

HJTA agrees it applies. (RB at p. 11) but applies it to add words to article XIII C, section 3 to extend it beyond initiatives and to allow article II, section 9, subdivision (a)'s reservation to the People of the referendum power to defeat that subdivisions own exception for "statutes providing for tax levies or appropriations for usual current expenses of the State." It also allows its reading of article II, section 9 to trample the allocation of authority among voters, property owners and elected officials in articles XIII C and XIII D. Yet, the harmonization principle gives effect to every

provision as written and does not prefer one to another. The City's reading, allowing the initiative to repeal or reduce taxes, but not the referendum, better harmonizes these provisions, given each force, and adding or subtracting nothing.

B. The expression unius canon

The Opening Brief cites it to preserve the allocation of power among property owners, voters and registered voters effected by articles XIII C and XIII D. HJTA dismisses the argument as giving force to unduly arduous majority protest requirements. (RB at pp. 29–30.) HJTA never engages the language of article II, section 9 or of article XIII C, section 3. That latter section's three references to the initiative power must be given meaning. This court is not at liberty to add "or referendum" as HJTA's construction requires. That the expressio unius rule applies to Proposition 218 alike with other law is plain. (E.g., *Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230; *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182.)

C. HJTA's Policy Argument Contradicts *Rossi* and Proposition 218

HJTA argues that the referendum power is not more disruptive than the initiative in light of the requirement for voter approval of taxes. This argues with Rossi, which persuasively explains the contrary. It is also untrue. Initiative measures tax effect when adopted — after an election campaign of at least months and perhaps two years, a fact, of which HJTA

complains. (RB at p. 26; AOB at p. 27.) Referenda suspend the force of legislation as soon as minority of voters (here, just 100) are certified to have signed a petition to do so. (AOB at p. 27.) The disruptive effect of immediate suspension is plainly greater than the loss of a revenue measure after months' or years' notice. True, some referenda may attack relatively new revenues before an agency has come to depend on them. (RB at p. 28.) This does not undermine the force of the distinction between referenda and taxes that *Rossi* explains.

HJTA also errs to contend that an initiative can only repeal a tax once adopted. (RB at p. 30.) *Rossi* itself makes clear an initiative can head off a proposed tax.

HJTA's complaint that the majority protest proceeding is too difficult addresses the wrong audience. (RB at p. 29.) HJTA is among the drafters of Proposition 218. It cannot be heard to argue the measure should evade the usual canons of construction because the majority protest proceeding will not commonly preclude large agencies form imposing fees. The voters adopted what was presented them. If HJTA regrets its drafting choices, the initiative process remains open to it, as it has demonstrated over the course of Propositions 13, 62 and 218 — and failed measures like 1990's Proposition 134 besides.

CONCLUSION

The Court's task here is focused – what meaning ought it give to article XIII C, section 3's express reservation of the power to initiative the reduction or repeal of revenue measures given its silence as to referenda?

Given that *Dare* provided that referenda were not permitted as to fees for essential utility services and the voters who approved Proposition 218 might have — but did not — alter that rule, the answer is simple. This Court should construe Proposition 218 and article II, section 9 as they are written and not add words to the former or delete words from the latter to serve the contemporary policy perspective of HJTA who apparently had other concerns when it presented Proposition 218 in 1996.

Accordingly, the City respectfully urges the Court to reverse the Court of Appeal and affirm the judgment dismissing Wilde's petition for a writ to compel an election on her referendum petition. She has had two bites at the anti-water-fee apple – failing to persuade her neighbors to institute a majority protest against the fee or to reduce them by initiative. She need not have a third absent a fresh initiative petition which, of course, she is free to propose.

Respectfully submitted,

Dated: April 19, 2019

KENNY & NORINE

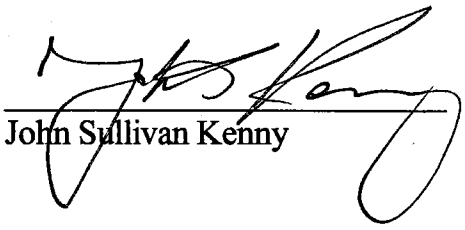
JOHN SULLIVAN KENNY
LINDA R. SCHAAP
Attorneys for Respondents
CITY OF DUNSMUIR, et al.

CERTIFICATE OF WORD COUNT

The foregoing Reply Brief on the Merits is within the limit of 8,400 words in compliance with California Rules of Court, rule 8.520(c)(1). In preparing this Certificate, I relied on the word count generated by Microsoft Word version 2010 word-processing program used to generate this Reply Brief.

Dated: April 19, 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 **REPLY BRIEF ON THE MERITS** on all parties in said action in the manner and/or manners described below and addressed as follows:

Timothy A. Bittle
Howard Jarvis Taxpayers Foundation
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
Attorneys for Appellant Leslie T. Wilde

Clerk/Executive Officer (Mail)
California Court of Appeal
Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Michael G. Colantuono (Courtesy Copy)
Colantuono Highsmith & Whatley PC
420 Sierra College Drive, Suite 140
Grass Valley, CA 95945

Clerk of the Court, Civil Division (Mail)
Siskiyou County Superior Court
311 4th Street
Yreka, CA 96097

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 19, 2019, at Redding, California.

Tamara Warren
TAMARA WARREN