Case No. C082079

In the Court of Appeal, State of California
THIRD APPELLATE DISTRICT

Howard Jarvis Taxpayers Association, et al.,
Petitioners and Appellants
vs.
Amador Water Agency, et al.,
Respondents

Appeal from the Superior Court of the State of California
County of Amador, Case No. 16-CVC-9564
Honorable Don F. Howard, Judge Presiding

APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS; AMICUS CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND LEAGUE OF CALIFORNIA CITIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Constitution

Statutes

Uncodified Statutes

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to California Rules of Court, Rule 8.200(c), the Association of California Water Agencies ("ACWA"), the California Association of Sanitation Agencies ("CASA"), the California Special District Association ("CSDA"), the California State Association of Counties ("CSAC"), and the League of California Cities ("LCC") (collectively the "Local Government Amici") respectfully apply to this Court for permission to file the amicus curiae brief that is combined with this application in support of Respondent Amador Water Agency and its clerk and board of directors.

The brief of the Local Government Amici addresses a single question of law, whether the legislative action of a local government to establish a property-related fee is subject to referendum? As amplified in the brief accompanying this application, the Local Government Amici believe the answer to that question, both before and after the adoption of Proposition 218, was and is "no."

The Local Government Amici represent California local governments that collectively provide essential public services to the vast majority of California's population. ACWA is a California nonprofit public benefit corporation comprised of over 430 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts, and special purpose public agencies. CASA is a non-

profit corporation comprised of more than 100 local public agencies, including cities, sanitation districts, community services districts, 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. CSDA is a California non-profit corporation consisting of more than 1,000 special district members throughout California. These special districts provide a wide variety of public services to both suburban and rural communities, including water supply, treatment and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer, recycling and disposal; library; cemetery; mosquito and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. CSAC is a non-profit corporation having a membership consisting of the 58 California counties. LCC 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.

California's local governments sustain their operations largely through revenue sources such as taxes, assessments, and fees, including property-related fees like those at issue in this case. All of the members of ACWA, CASA, CSDA, CSAC, and LCC have a significant interest in ensuring the certainty of their respective revenues so they can stabilize their finances, plan for

and provide public services, and be worthy of the credit necessary to construct capital-intensive utility systems. For sound policy reasons, article II, section 8 of the California Constitution protects revenues for the usual and current expenses of government by excluding revenue actions of local governments from the scope of the people's right of referendum. The exclusion has been interpreted broadly, covering all types of revenues used to fund the operations of government. Historically, it has not been so limited as Appellants suggest. Furthermore, as to property-related fees such as those at issue in this case, the referendum process directly conflicts with the specific requirements for the imposition of new or increase of existing property-related fees specified by article XIII D of the California Constitution.

Each of the Local Government Amici has a process for identifying cases, such as this one, that warrant their participation. For example, 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. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California. The Program is overseen by a Litigation Overview Committee, comprised of county counsels throughout the state. CSAC's Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties. LCC is advised by its Legal

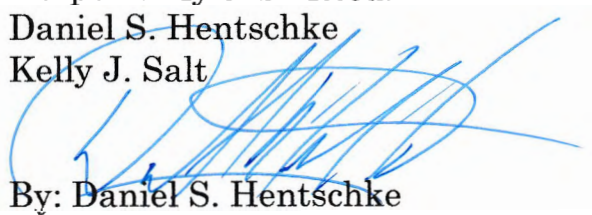
Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Legal Advocacy Committee monitors litigation of concern to municipalities, and identifies those cases, such as this one, that have statewide or nationwide significance. CASA and CSDA similarly monitor litigation of concern to their members and identify those cases that are of statewide significance. Likewise, CASA and CSDA have identified this case as being of major significance to their members.

For the reasons stated in this application and further developed in the proposed brief, ACWA, CASA, CSDA, CSAC, and LCC respectfully request leave to file the amicus curiae brief that is combined with this application. The issue pending in this case is also pending in *Monterey Peninsula Taxpayers' Association, et al. vs. Board of Directors of the Monterey Peninsula Water Management District, et al.*, Cal. Court of Appeal, 6th Dist., Case No. H042484.)

The application and amicus curiae brief were authored by Daniel S. Hentschke and Kelly J. Salt. ACWA contributed $2,500 toward the preparation of the brief. No other person made a monetary contribution to its preparation and submission.

Dated: Nov. 15, 2016

Respectfully submitted:
Daniel S. Hentschke
Kelly J. Salt



By: Daniel S. Hentschke
Attorneys for the Local Government Amici

AMICUS CURIAE BRIEF

I. INTRODUCTION AND INTEREST OF AMICI CURIAE

Article II, section 9 of the California Constitution defines referendum as "the power of the electors 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." This case involves the exemption of "tax" levies from the referendum power, which has historically been interpreted broadly to include not only taxes imposed by the State, but all types of taxes, fees, charges, and other revenues imposed by local governments to fund their ongoing operations. The appellants seek to change this settled precedent.

As discussed below, local revenue measures are exempt from referenda because they pose a significant threat to a local government's ability to raise funds needed for current operating expenses. The exclusion of revenue measures from the reach of a referendum is grounded on article II, section 9 of the State Constitution and is not altered by article XIII C, section 3.

Furthermore, article XIII D establishes specific approval requirements for property-related fees, including a voter approval requirement for some, but not all, such fees.[1] Subjecting

[1] Appellant's downplay of the fiscal impact of a referendum also ignores the reality of the expensive and time consuming legislative process for the imposition of new or increases of existing property related fees, which includes retaining rate

property-related fees to referendum would be inconsistent with these requirements as interpreted by the California Supreme Court in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205.

All of the members of each Local Government Amici are local governments as defined in article XIII C. (Cal. Const. art. XIII C, § 1, subdiv. (b).) Some have broad powers that flow directly from the Constitution (e.g., Cal. Const. art. XI, § 7 [power of counties and cities to enact and enforce "local, police, sanitary, and other ordinances and regulations not in conflict with general laws"], § 9 [power of a municipal corporation to provide "public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication"].) Others are local governments with powers limited to those expressly stated or necessarily implied by the Legislature in either the general law or specific statute under which each is formed. (*See Turlock Irrigation Dist. v. Hetrick* (1999) 71 Cal.App.4th 948.)[2] Regardless of whether they are general purpose governments or

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consultants and cost of service experts, preparing and mailing detailed notices to property owners, a majority protest process and public hearing, not to mention lawyers at each step of the way reviewing the rates and procedures for compliance with article XIII D, section 6. Further, there is an additional election requirement for property-related fees that are not for water, sewer, or refuse collection services.

[2] Respondent Amador Water Agency is formed pursuant to the Amador Water Agency Act. (West's Annot. Cal. Wat. C. Append. ch. 95.) Under that Act, the powers of the agency are those enumerated in that and other powers as the law may provide. (*Id.* § 95-3.)

special purpose governments, whether their power is broad or narrow, or whether they provide many services and facilities or only one, all local governments represented by Local Government Amici have one thing in common — they all need revenue to function and even exist. By their nature, local governments exist pursuant to authority conferred by the Constitution or the Legislature and impose revenue measures pursuant to that same authority. Impairment of those revenues would frustrate the very purpose for which local governments exist.

In their opening brief, appellants mistakenly seem to suggest that subjecting local revenues to a referendum would have an insignificant effect on local government. (Appellants' Opening Brief, p. 14.[3]) Nothing could be further from the truth. A referendum, which is initiated by a petition signed by a relatively small percentage of the electorate, operates to suspend the effectiveness of a duly enacted legislative act that would otherwise go into effect of its own accord, posing a hazard of uncertainty for local fiscal affairs and impairment of essential governmental functions and services. Therefore, for the reasons stated below, the Local Government Amici urge the Court to reject appellants' invitation to abandon settled precedent and confirm that local revenue actions are not subject to referendum.

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[3] "Unlike an initiative, a referendum does not tie the Agency's hands regarding future rate making. It simply presents the current rate resolution to the voters. If they approve it, nothing changes. If they reject it, the Board must reconsider its budget priorities and bring back a different, hopefully better, proposal."

II. FACTS AND PROCEDURAL HISTORY

The facts and statements of the case are somewhat differently stated in the briefs of Appellants and Respondents. Local Government Amici must accept the case as they find it. However, neither Appellants nor Respondents appear to dispute that the fees at issue in this case were imposed to fund the operations of the Amador Water Agency, that they were adopted according to the procedure specified in article XIII D, section 6, and that following adoption they were the subject of a referendum petition.

III. ARGUMENT

A. UNDER SETTLED PRECEDENT, FEES THAT FUND THE OPERATION OF LOCAL GOVERNMENT ARE EXEMPT FROM THE REFERENDUM PROCESS AND NOTHING IN PROPOSITION 218 CHANGED THAT LAW

Government cannot function without the ability to raise revenue.[4] The California Constitution prevents impairment of essential governmental functions by excluding taxes and appropriations for ongoing expenses from the scope of the referendum power. Preventing the impairment of governmental functions is a fundamental principle that has guided judicial determination of the scope of the referendum power. This principle has been clearly stated by the California Supreme Court as follows:

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[4] (See *Watchtower Bible & Tract Society v. County of Los Angeles* (1947) 30 Cal.2d 426, 429 [The taxing power "is probably the most vital and essential attribute of the government. Without such power it cannot function."].)

> If essential governmental 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. One of the reasons, if not the chief reason, why the Constitution excepts from the referendum power acts of the Legislature providing for tax levies or appropriations for the usual current expenses of the state is to prevent disruption of its operations by interference with the administration of its fiscal powers and policies. The same reasoning applies to similar acts of a county board of supervisors .... Before the board can properly prepare a budget, it must be able to ascertain with reasonable accuracy the amount of income which may be expected from all sources, and, when it has adopted ordinances imposing taxes, it cannot make an accurate estimate unless it knows whether the ordinance will become effective.

(*Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832, 839-840 [citations omitted].)

Echoing this concern, the courts of this state have reasoned that while the constitutional referendum provision generally affords the electorate the authority to call for a referendum on any legislative act, the Constitution withholds the referendum power with regard to revenue measures (i.e., "tax levies or appropriations for usual current expenses") in recognition of the fact that when a legislative body determines its revenue requirements and imposes revenue measures to satisfy those requirements, the governmental entity must be able to rely on the receipt of those revenues and cannot have the viability of such measures continually placed in doubt by the possibility of a referendum. Significantly, this same concern has led California's courts to avoid a result that could disrupt fiscal planning of

government agencies by broadly construing the term "tax" to include other revenues, such as fees and charges, imposed to pay for the operation of government. (E.g., *City of Glendale v. Trondsen* (1957) 48 Cal.2d 93, 99-100 [refuse collection charge determined to be an excise tax], *City of Madera v. Black* (1919) 181 Cal. 306, 310-311 [sewer service charge determined to be a tax];[5] *Community Health Ass'n. v. Board of Supervisors* (1983) 146 Cal.App.3d 990, 994 [fees and charges for governmental services are "tax levies or appropriations for usual current expenses of the state."]; *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864, 868 ["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."]; accord, *City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466.)[6]

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[5] In *Madera,* the issue was whether a statute vesting in the superior court jurisdiction over cases involving taxes applied to a fee imposed for sewer service. The Supreme Court observed: "The general purpose ... obviously is to give to the sovereign power of the state, whether exercised generally or locally, the protection of having the legality of any exaction of money for public uses or needs cognizable in the first instance in the superior courts alone. In view of this purpose, it is apparent that the words used should be applied in their broadest sense with respect to moneys raised for public purposes or needs." (*City of Madera v. Black, supra,* 118 Cal. at 311.)

[6] The public policy underlying both the exemption of taxes from the scope of the referendum and the broad interpretation of the term tax, also applies in other contexts, such as the "pay first, litigate later" rule applicable to challenges to "any tax" found in article XIII, section 32 of the California Constitution. (*Water*

Relying on the language in *Geiger* quoted above, the California Supreme Court clearly explained the policy reasons that local revenues are exempt from the referendum. Unlike an initiative which, if adopted, makes new law prospectively, a qualifying referendum has the immediate effect of preventing a law from taking effect. Further, the legislative body must reconsider the ordinance or resolution and either repeal it or submit it to the voters. If the ordinance or resolution is submitted to the voters, it does not become effective unless a majority of the voters approve it. Therefore, if an action imposing a tax or other revenue measure were subject to referendum, a local government's ability to raise funds needed for current operating expenses would be delayed and might be frustrated. As a result, local governments would be unable to carry out their purposes, comply with the law, or to provide essential services to residents of the communities they serve. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 703.)

In *Rossi*, the court found the citizens of San Francisco could reduce or repeal a local tax ordinance by means of an initiative. Prior to *Rossi*, California courts consistently held that the power of initiative and referendum did not extend to the repeal of local government revenues, citing the Constitutional provision forbidding referenda on taxes (currently California Constitution article II, section 9, subdivision (a)) and reading this restriction

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Replenishment Dist. of So. Cal. v. City Cerritos (2013) 220 Cal.App.4th 1450, 1470 [applying the "pay first, litigate later" rule to a Proposition 218 challenge to a local groundwater extraction assessment].)

as implicit in authority for initiatives. (E.g., *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832 [refusing writ to compel election on measure to referend a County sales and use tax]; *Hunt v. Riverside* (1948) 31 Cal.2d 619 [same as to charter city which adopted referendum power as provided by general law]; *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864 [barring from ballot initiative to cap sewer rates of dependent special district]; for a summary of these cases see *Fenton v. City of Delano* (1984) 162 Cal.App.3d 400, 404–407 [barring initiative repeal of general law city's utility users tax].) But the *Rossi* Court was very careful to distinguish the initiative power and its impacts from the referendum power and its impacts, and its opinion left intact the exclusion of local revenues from the reach of the referendum power.

Following *Rossi*, Proposition 218 added article XIII C, section 3 to the California Constitution, which reads:

> 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. (Emphasis added.)

Importantly, there is no mention in this provision of any expansion of the **referendum** power at all, much less to local government taxes, assessments, and fees and charges. Under the usual canon of construction labeled "*expressio unius est exclusio*

alterius" (to say one thing is to exclude another), the meaning of article XIII C, section 3 is plain – initiatives may affect government revenues, but referenda may not. (E.g., *Howard Jarvis Taxpayers Association v. Padilla* (2016) 62 Cal.4th 628, 645 [citing the expressio unius rule]; *Kaplan v. Superior Court* (1989) 216 Cal.App.3d 1354, 1359-1360 ["[a]ccording to the doctrine of *expression unius est exclusio alterius,* a statutory grant of power or expression of how such power is to be exercised implies that no other power passes and that no other mode of exercise is permitted."].)

In its *Text of Proposition 218 With Analysis*, the Howard Jarvis Taxpayers Association, drafters of Proposition 218, explain the purpose of article XIII C, section 3 as follows:

> 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.[7]

Thus, even the Howard Jarvis Taxpayers Association has recognized that Proposition 218 does not alter the scope of the referendum power or affect the court decisions consistently holding that the referendum power does not extend to local government revenues. Had the drafters intended to alter the Constitution in this regard they would have explicitly so stated, as they did with regard to the initiative power. The absence of

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[7] This document can be found at http://www.hjta.org/propositions/proposition-218/text-proposition-218-analysis/ <last visited October 25, 2016>.

any of such language clearly demonstrates that neither did the drafters intend, nor did the voters understand and express their support for the referendum power to be available for those purposes. To paraphrase the Court of Appeal in *Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission* (2012) 209 Cal.App.4th 1182, 1191, "[i]n short, there is much in the very structure of Proposition 218 that, if it had been intended to apply to [the referendum power], should have been there, but isn't. Just as the silence of a dog trained to bark at intruders suggests the absence of intruders, this silence speaks loudly. It is indicative of a lack of voter intent to affect [referendum] law." (Citations omitted.)

Article II, section 8 establishes the initiative power.[8] Article II, section 9 establishes and defines the referendum power as follows: "The referendum is the power of the electors 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**." (Cal. Const. art. 9, subdiv. (a), emphasis added.) Thus, by definition, and as discussed above, the referendum power is limited and this limitation applies to local government ordinances and state statutes alike. (*Fenton v. City of Delano* (1984) 162 Cal.App.3d 400 [no referendum of city general tax].) Reading article XIII C, section 3 to allow taxpayers to repeal a

[8] "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const. art. II, § 8, subdiv. (a).)

local government tax, assessment, fee, or charge by a referendum would essentially eliminate the express restrictions contained in article II, section 9, something no court has done. Notably, in its decision clarifying that Proposition 218 allows voters to reduce water rates through an initiative, the California Supreme Court expressly noted that "tax measures" were not subject to a referendum. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 212 fn.3.)

The courts of this State have recognized that the term "tax" is a term without fixed definition. As aptly described in *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 660:

> The word may be construed narrowly or broadly depending on its particular context and the purpose for which the definition is to be used. In its broadest sense, a tax includes all charges upon persons or property for the support of government or for public purposes. In narrower contexts, the word has been construed to exclude charges to particular individuals which do not exceed the value of the governmental benefit conferred upon or the service rendered to the individuals. (Citations omitted.)

(See also *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 874 [a "'tax' has no fixed meaning, and … the distinction between taxes and fees is frequently 'blurred,' taking on different meanings in different contexts."].) In the context of exclusion of taxes from the scope of the referendum power, the courts have concluded that fees imposed to generate revenue to pay the operating expenses of the local government are "taxes." (*Fenton v. City of Delano, supra,* 162 Cal.App.3d at 405-406; *Community Health Ass'n. v. Board of Supervisors, supra,* 146

Cal.App.3d at 994; *Dare v. Lakeport City Council, supra,* 12 Cal.App.3d at 868.)

Reversing this settled precedent, as Appellants seek to do, would shake the foundations of local government utility financing and operation in California. This result would constitute an unlawful impairment of an essential government function, *i.e.*, an enterprise operation (here a water system) in contravention of established California law. (*See Simpson v. Hite* (1950) 36 Cal.2d 125, 134 [issuing writ of mandate to omit from the ballot an initiative ordinance repealing Los Angeles County resolutions for siting a courthouse and designating a different site, reasoning that "[t]he initiative or referendum is not applicable where the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential"].)

On the other hand, continuing to construe the Constitution to preclude referenda to all types of revenues used to fund local government makes sense for the policy reasons stated so clearly by the Supreme Court in *Rossi*, and continues to make sense in the context of a property-related fee subject to articles XIII C and D.[9]

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[9] In 2010, California's voters adopted Proposition 26, amending the Constitution by adding definitions of the term "tax" for the purposes of the restrictions established by California Constitution article XIII A, section 3 on the process for adopting statutory changes that result in any taxpayer paying a higher state tax and article XIII C's restrictions on local taxes. (Cal. Const. art. XIII A, § 3, subdiv. (b); Cal. Const. art. XIII C.) But, application of these added definitions is limited to articles XIII A

Appellants contend that they do not rely on article XIII C as the basis for their argument that the referendum power applies to fees imposed by local governments to fund the services they provide. However, the case law prior to the adoption of article XIII C by Proposition 218 precludes the use of the referendum power to affect local government revenues. Appellants cite no case to the contrary. Appellants also argue the case law contrasting fees, assessments, and taxes. Local Government Amici acknowledge that case law, but contend it is irrelevant in the context of this case, which involves the interpretation of the meaning of "taxes" for the purposes of the Constitutional preclusion of referenda to revenue measures.

B. SUBJECTING PROPERTY-RELATED FEES TO REFERENDUM IS INCONSISTENT WITH THE EXPRESS PROVISIONS OF ARTICLE XIII D, SECTION 6

In *Bighorn*, the court wrote, "[t]hat the voters who enacted Proposition 218 did not intend to authorize initiative measures imposing voter-approval requirements on future water delivery charge increases is confirmed by an examination of section 6 of California Constitution article XIII D." As discussed below, the examination of section 6 also leads to the conclusion that the referendum power does not extend to property-related fees.

Subjecting property-related fees to referendum would be inconsistent with the approval process established by article XIII D, section 6, subdivisions (a), (b) and (c). Subdivision (a)

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and C. Accordingly, the use of the term "tax" in article II continues to be governed by common law.

establishes a notice and protest process before the governing body of a local government may take action to impose a new or increase an existing property-related fee.[10] Subdivision (b) specifies certain substantive limitations for property-related fees.[11] Subdivision (c) then provides for voter approval of some, but not all property-related fees as follows:

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[10] Cal. Const. art. XIII D, § 6, subdiv. (a)'s procedural requirements include:

> (1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.
> (2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

[11] Cal. Const. art. XIII D, § 6, subdiv. (b)'s substantive limitations include:

> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

> Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.

Section 6 of California Constitution article XIII D embodies "the electorate's intent as to when voter-approval should be required, or not required, before existing fees may be increased or new fees imposed, and the electorate chose not to impose a voter-approval requirement for increases in water service charges." (*Bighorn-Desert View Water Agency v. Verjil, supra,* 39 Cal.4th at 219.) In *Bighorn*, the Supreme Court determined that article

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> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
> (5) No fee or charge may be imposed for 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.

XIII C, section 3's authorization of initiatives to prospectively reduce or repeal a property-related fee did not also authorize initiatives imposing a voter-approval requirement for future fee increases:

> 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.

(*Id.* at 220.)

Thus, under article XIII D, property-related fees for water, sewer, and refuse collection service are expressly exempt from any voter pre-approval, while property-related fees for other purposes cannot be imposed absent approval by local voters. Because a referendum operates to suspend a fee from taking effect without later voter approval, the corollary to the rule that local voters cannot establish a voter approval requirement by initiative is that they likewise cannot subject a fee to voter approval by referendum. As the Supreme Court stated in *Bighorn*, "the electorate chose not to impose a voter-approval requirement for increases in water service charges." (*Id.* at 219.)

IV. CONCLUSION

The courts of this state have consistently protected local government revenues from uncertainty and on that principle

have found that the power of referendum does not extend to local government revenues such as the fees at issue in this case. Proposition 218 does nothing to change the pre-existing limitations on the referendum power. And while Proposition 218 does say that the power to prospectively reduce local revenues through an **initiative** cannot be limited, that provision merely parrots the holding of *Rossi v. Brown*, which clearly explains that while the Constitution limits the power of referendum to affect local revenues, those limits do not, by negative implication, apply to initiatives. Thus, the historically broad interpretation of the term "tax" as used in article II, section 9's referendum limitation has no bearing on the determination of whether a revenue measure is a "tax" for the purposes of articles XIII C and XIII D. The definitions of "tax" in article XIII C, section 1 and the definitions of "assessment" and property related "fee" or "charge" in article XIII D, section 2 are expressly for the purposes and limited to the application of the approval procedures and substantive limitations established by those articles.

In consequence, while fees imposed to fund the core purposes of a local agency are not subject to referendum, they may require pre-approval by the voters for other reasons (e.g., a statutory or constitutional pre-approval requirement), except that property-related fees for water, sewer, or refuse collection services are exempt from any Constitutional requirement for voter pre-approval (Cal. Const. art. XIII D, § 6, subdiv. (c)), and they may also be altered by initiative. (Cal. Const., art. XIII C, §

3.) In sum, an initiative, not a referendum, is appellants' remedy here.[12]

Accordingly, the Local Government Amici urge this Court to affirm the trial court's conclusion in the case at bar that the attempt to referendum the fees to fund the Respondent Amador Water Agency could not succeed.

Dated: Nov. 15, 2016

Respectfully submitted:
Daniel S. Hentschke
Kelly J. Salt

By: Daniel S. Hentschke
Attorney for Local
Government Amici

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[12] Such an initiative would itself be subject to some limitations, but as observed by the Fourth District Court of Appeal in a case in which it invalidated an improper initiative aimed at reducing water service fees and limiting future fee increases:
". . . Proposition 218 also provides that, before increasing any fee or charge, a local governmental entity must give affected property owners notice and an opportunity to protest. If a majority of them do protest, "the agency shall not impose the fee or charge." (Cal. Const., art. XIII D, § 6, subd. (a)(2).) This gives the voters substantial protection against rate increases that, in their opinion, are due to extravagant costs. In this case, the District followed this procedure scrupulously; however, only about one out of every 500 property owners filed a protest. Finally, the voters always have the remedy of booting the members of the water district board out of office.
(*Mission Springs Water District v. Vergil* (2013) 218 Cal.App.4th 892, 921.)

WORD CERTIFICATION

I, Daniel S. Hentschke, counsel for amicus curiae the Association of California Water Agencies, the California Association of Sanitation Agencies, the California Special District Association, the California State Association of Counties, and the League of California Cities, in reliance on a word count by Microsoft Word, the program used to prepare the foregoing

APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS; AMICUS CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND LEAGUE OF CALIFORNIA CITIES

certify that it contains 5,686 words including footnotes (excluding caption, tables, and this certification).

Dated: Nov. 16, 2018

Daniel S. Hentschke