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No. S127535

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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BIGHORN-DESERT VIEW WATER AGENCY,  
Plaintiff, Cross-Defendant, and Respondent,

v.

SHARON BERINGSON, as Interim Registrar of Voters, Etc.,  
Defendant and Cross-Defendant;

E.W. KELLEY,  
Real Party in Interest, Cross-Complainant, and Appellant.

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After a Decision by the Court of Appeal,  
Fourth Appellate District, Division Two  
(Case No. E033515)

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Superior Court of San Bernardino County  
Honorable Tara Reilly, Judge  
(Case No. SCVSS 097005)

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**PETITIONER'S OPENING BRIEF**

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**PETITIONER’S OPENING BRIEF**

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**INTRODUCTION**

This case calls on the Court to interpret Article XIII C, § 3 of the state constitution—which broadly grants the power of initiative over all local taxes, assessments, fees, and charges—and apply it to an initiative that would reduce the fees and other charges imposed by a local water agency. (Both the initiative and the constitutional provision are attached hereto pursuant to Rule of Court 14(d).) Ignoring the canons of construction developed by this Court in the initiative context, the courts below departed from the plain language of Article XIII C, § 3 by importing various exceptions and qualifications found in Article XIII *D*, a related but distinctly separate constitutional provision. In so doing, those courts failed to jealously guard the rights of the people.

## ISSUES PRESENTED FOR REVIEW

Adopted by the voters in 1996 as part of the “Right to Vote on Taxes Act” (Proposition 218), Article XIII C, § 3 of the California Constitution provides in broad and unconditional terms:

Notwithstanding any other provision of this Constitution . . . , 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 . . . .

In the teeth of this unqualified language, the Court of Appeal ruled categorically that “water rates, and . . . related charges, . . . are excluded from the . . . initiative provisions of Proposition 218.” Slip op. at 11; *accord* slip op. at 8 (holding that “water services are not subject to the initiative process”). The Court of Appeal also ruled that the initiative power granted by Article XIII C, § 3 “cannot be allowed to interfere with a *legislatively*-delegated function.” Slip op. at 10 (emphasis added). Thus, the issues presented for review are

1. Whether the constitutional grant of initiative power in Article XIII C, § 3 contains an *unwritten* exception for initiatives reducing, repealing, or otherwise affecting fees or charges related to *water service*.
2. Whether that *constitutional* grant of initiative power is limited by various pre-Proposition 218 doctrines that gave effect to *statutory* restrictions on the right of local initiative.

## **FACTS AND PROCEDURAL HISTORY**

### **A. Statement of Facts.**

Headquartered in Yucca Valley, Respondent the Bighorn-Desert View Water Agency (Agency) provides water to certain residents of San Bernardino County. Petitioner E.W. Kelley is the proponent of an “Initiative Measure to Be Submitted Directly to the Voters” of the Agency. Joint Appendix in the Court of Appeal (J.A.) at 41. The “Kelley Initiative,” as it has been cited in this litigation, has two substantive components: (1) reducing certain Agency water rates and charges to specified levels; and (2) requiring that “no increase in [Agency] water rates, fees or charges [shall be] enacted without the prior approval of voters at an election.” *Id.*

On October 24, 2002, after Mr. Kelley circulated the initiative among the voters of the Agency and obtained a sufficient number of signatures to put it on the ballot, Respondent Sharon Beringson, the Interim Registrar of Voters for San Bernardino County (Registrar), certified that the initiative was legally sufficient under Elections Code § 9309. *See* J.A. at 3. Under Elections Code § 9310(a), the Agency then had two choices: (1) adopt the Kelley Initiative as an Agency ordinance without alteration; or (2) submit the initiative to the Agency’s voters.

### **B. Statement of the Case.**

The Agency did neither. On November 20, 2002, the Agency instead filed this action for declaratory relief against the Registrar as defendant and

against Mr. Kelley as real party in interest. J.A. at 1-10. The Agency sought a declaratory judgment that the Kelley Initiative is both “impermissible under California law” and “beyond the power of [the Agency’s] electorate to enact.” J.A. at 6. Mr. Kelley answered the complaint and concurrently filed a motion for judgment on the pleadings along with a cross-petition for peremptory writ of mandate, which together sought to compel the Agency to discharge its mandatory duty under Elections Code § 9310(a) either by adopting the Kelley Initiative as an Agency ordinance or by submitting the initiative to the voters at a special election. *See* J.A. at 11-28 (motion), 29-50 (cross-petition).

The parties’ briefing narrowed their dispute to a single issue: “whether (as the Agency itself puts it) the Kelley Initiative ‘is invalid *on its face*.’” J.A. at 101. The parties agreed that because this issue “can be resolved as a matter of law,” this case is one of those relatively rare cases where “preelection review of [a] ballot measure[] is appropriate.” *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 389, *cert. denied*, 534 U.S. 892 (2001). *See* J.A. at 101. At a hearing on February 3, 2003, the trial court agreed with the parties that the case did present a single issue that could be resolved as a matter of law. After hearing argument (but without taking any testimony or other evidence), the court ruled in favor of the Agency. Thus, in its Judgment for Declaratory Relief issued on March 22, 2003, the court denied Mr. Kelley’s motion and cross-petition. *See* J.A. at 124. Rather, the judgment granted the relief sought by the Agency, declaring that “the Kelley Initiative is invalid on its face be-

cause [the Agency's] electorate lacks the power to reduce or otherwise affect, by means of initiative, the [Agency's] water rates, fees, and charges." *Id.*

On appeal, Mr. Kelley argued that his initiative was authorized by the plain text of Article XIII C, § 3, under which the "power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments." Because the natural and ordinary meaning of "fees" and "charges" surely includes the rates *charged* by the Agency for water as well as the "non-cap cost recovery *charge*," the "MWA Pipeline *charge*," and the various other "*fees and charges*" that are the subject of the Kelley Initiative, J.A. at 41 (emphasis added), the initiative is a straightforward exercise of the power granted by Article XIII C, § 3. Having conceded in the trial court that the foregoing "is a very powerful argument that . . . seemingly counters the Agency's position in this litigation," J.A. at 84, and having conceded in its appellate brief that Mr. Kelley was correct about the "natural and ordinary meaning" of the terms *fees and charges*, see Respondent's Brief at 23, the Agency argued that various provisions of a distinctly separate constitutional provision, namely, Article XIII *D*, mandated a contrary conclusion.

The Court of Appeal issued a tentative opinion in the Agency's favor. After oral argument, the court filed a nearly identical opinion for publication on January 13, 2004, affirming the superior court's judgment for the Agency. Mr. Kelly thereafter filed a petition for review. On April 28, 2004, this Court granted the petition and transferred the matter to the Court of Appeal "with

directions to vacate its decision and reconsider the cause in light of’ *Richmond v. Shasta Community Services District*, 32 Cal. 4th 409 (2004). After further briefing but without additional oral argument, the Court of Appeal on July 20, 2004 issued a published opinion that “again affirm[ed] judgment in favor of [the Agency].” Slip op. at 2. Neither party filed a petition for rehearing. This Court granted Mr. Kelley’s second petition for review on October 27, 2004.

**C. The Court of Appeal’s Ruling.**

After framing its decision as part of a hypothesized “ongoing judicial struggle to interpret and apply Proposition 218,” and after giving us some of the “historical background” of that measure, slip op. at 4, the Court of Appeal finally arrived at the text at the heart of this case, namely, Article XIII C, § 3 of the California Constitution. But no sooner had the court quoted that provision than the court dismissed it as “govern[ing] special and general taxes, which are not at issue here.” Slip op. at 5. No, what interested the Court of Appeal was Article XIII *D*, which the court asserted “governs certain types of fees and charges.” *Id.*

From this assertion, the court launched into an extended discussion of various provisions of Article XIII D, including whether “water service provided by [the Agency] is a ‘property-related service’ or a ‘levy . . . imposed by an agency upon a parcel or upon a person as an incident of property ownership’ ” within the meaning of § 2(e) of Article XIII D. Slip op. at 6. In the course of this discussion, the court did briefly address the *Richmond* decision

as ordered by this Court. The Court of Appeal ultimately dismissed as “dicta” *Richmond*’s seemingly simple and categorical statement that “[a] fee for on-going water service through an existing connection is imposed ‘as an incident of property ownership’ ” within the meaning of § 2(e) of Article XIII D. Slip op. at 8 (quoting *Richmond*, 32 Cal. 4th at 427).

“But,” added the Court of Appeal, *even if* it were to actually give effect to the quoted statement from *Richmond*, it “would still decide that Proposition 218’s power of initiative does not operate [here].” Slip op. at 9. The basis for this new decision was “the exception from voter approval requirements stated in Article XIII D, section 6.” *Id.* Specifically, the “plain language” of Article XIII D, § 6(c) “ ‘specifically excludes “charges for . . . water . . . .” ’ from the requirement for voter approval.” *Id.* (quoting *Howard Jarvis Taxpayers Association v. City of Los Angeles*, 85 Cal. App. 4th 79, 83 n.1 (2000)). Because “Article XIII D plainly makes an *exception* for fees or charges for water services,” reasoned the court below, the Agency’s “rates and charges for water services can be imposed without voter approval and *are not subject to Proposition 218’s voter initiative power.*” *Id.* (emphasis added). By this reasoning, the Court of Appeal finally returned to Article XIII C, § 3, essentially ruling that the initiative power granted by that provision was subject to “the exception stated in Article XIII D, section 6.” Slip op. at 10. Only by interpreting Article XIII C, § 3 to have this exception, opined the court, could it achieve “the goal [of] a harmonious, not an unreasonable, result.” *Id.*

Finally, the Court of Appeal purported to find support for its ruling in this Court’s pre-Proposition 218 decision in *DeVita v. County of Napa*, which held in relevant part:

The presumption in favor of the right of initiative is rebuttable upon a definite indication that the Legislature, as part of the exercise of its power to preempt all local legislation in matters of statewide concern, has intended to restrict that right. . . . Accordingly, we have concluded that the initiative and referendum power could not be used in areas in which the local legislative body’s discretion was largely preempted by statutory mandate.

9 Cal. 4th 763, 776 (1995), *quoted in slip op.* at 10. Notwithstanding that Article XIII C, § 3 is a *constitutional* provision, the Court of Appeal concluded that the initiative power granted thereby was “preempted by *statutory* mandate” because the board of directors of the Agency “is authorized and required by legislative mandate to fix water rates and charges at a sufficient amount.” *Slip op.* at 10. “In this situation,” concluded the court, “the initiative process cannot interfere with a legislatively-delegated function.” *Id.*

In this vein, the Court of Appeal also purported to find support in other pre-Proposition 218 decisions, which held that the “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.” *Dare v. Lakeport City Council*, 12 Cal. App. 3d 864, 869 (1970) (quoting *Simpson v. Hite*, 36 Cal. 2d 125, 134 (1950)), *quoted in slip op.* at 10-11. Having stated the obvious point that the Agency “must charge water users the amounts necessary to meet its operating costs and other

expenditures,” slip op. at 10, the court did not bother to explain why or how the “inevitable effect” of the Kelley Initiative would be to prevent the Agency from so charging and, consequently, “greatly . . . impair or wholly destroy” the Agency’s ability to provide water service.

### **SUMMARY OF ARGUMENT**

1. Article XIII C, § 3 provides without exception that “[t]he power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments.” The natural and ordinary meaning of these words encompasses the Kelley Initiative, which seeks to reduce and otherwise affect the rates *charged* by the Agency for water, along with other “*fees and charges*” imposed by the Agency.

The Court of Appeal departed from the plain language of this constitutional provision in defiance of several canons of construction, including this Court’s admonition that courts are not to read into a constitutional provision exceptions or qualifications not supported by the provision’s language. The Court of Appeal justified this interpretive departure by asserting the need to “harmonize” Article XIII C, § 3 with Article XIII *D* and thereby avoid an “unreasonable” result. But until the Court of Appeal mangled them, the two constitutional provisions needed no harmonizing. Moreover, by curtailing the constitutional power of initiative in a “substantial” and “far-reaching” manner, the court created the very unreasonable result it had hoped to avoid.

2. Prior to the addition of Article XIII C, § 3 to the Constitution in 1996, the right of initiative in local matters was subject, without significant exception, to the Legislature’s plenary power over matters of statewide concern. Consistent with that structural allocation of authority, courts fashioned various doctrines restricting the right of local initiative when necessary to effectuate the Legislature’s intent. But with the adoption of Article XIII C, § 3 by the people, those statutorily based doctrines must yield to the constitutional grant of initiative in all matters affecting local fees and charges. The Court of Appeal thus erred in ruling that the “legislative mandate” of the Agency’s organic act could restrict the initiative power exercised by the Agency’s voters.

In both these regards, the Court of Appeal committed reversible error.

### **ARGUMENT**

In adding Article XIII C, § 3 to the California Constitution as part of Proposition 218 in the November 1996 election, the voters thought they had given themselves (in the words of the Legislative Analyst) “the power to repeal or reduce *any* local tax, assessment, or fee through the initiative process.” <http://vote96.ss.ca.gov/Vote96/html/BP/218analysis.htm> (emphasis added). To make certain that the courts respected this power, the voters decreed that Article XIII C “shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.” Art. XIII C, preceding § 1.

Casting aside this decree and several other canons of construction, the Court of Appeal unjustifiably fettered the constitutional power of initiative as to water service provided by local public agencies. In so doing, the court held that this constitutional power could be “preempted” by a mere statutory mandate. These manifest errors—which disregard the “judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right to local initiative . . . be not improperly annulled,” *DeVita v. County of Napa*, 9 Cal. 4th 763, 776 (1995)—demand a reversal by this Court.

**I. The Constitutional Grant of Initiative Power Set Forth in Article XIII C, § 3 Contains No Unwritten Exception for Initiatives Affecting Fees or Charges for Water Service.**

Mr. Kelley first addresses the text of Article XIII C, § 3, followed by the Court of Appeal’s unjustified departure from that text.

**A. The Plain Language of Article XIII C, § 3 Authorizes the Kelley Initiative.**

This Court has opined that “the role of the court is to apply a statute or constitutional provision according to its terms, not to read into it exceptions or qualifications that are not supported by the language of the provision.” *Rossi v. Brown*, 9 Cal. 4th 688, 694 (1995). Accordingly, in considering whether a particular initiative is within the electorate’s authority, one should begin with “the plain language of the constitutional . . . provisions which govern exercise of the initiative power in the [jurisdiction].” *Id.* at 694-95. In this case, that language is Article XIII C, § 3 of the California Constitution:

Notwithstanding any other provision of this Constitution, . . . 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 . . . .

The plain text of the Constitution applies to the Kelley Initiative: that initiative “reduce[s]” local fees and charges, and the power of initiative “shall not be prohibited or otherwise limited in such matters.” Art. XIII C, § 3. To the contrary, the power to “affect” fees and charges, including by requiring that no increase in fees or charges shall take effect without the prior approval of the voters at an election, “shall be applicable” to entities like the Agency. *Id.*<sup>1</sup>

The specific question disputed in the present case is whether the water rates and charges imposed by the Agency are “local taxes, assessments, fees and charges” within the meaning of Article XIII C, § 3. That question should be resolved under the principle enunciated by this Court in *City & County of San Francisco v. County of San Mateo*, 10 Cal. 4th 554, 562 (1995), namely: “A constitutional provision should be construed according to the natural and ordinary meaning of its words.” The natural and ordinary meaning of “fees” and “charges” surely includes the rates *charged* by the Agency for water, as well as the “non-cap cost recovery *charge*,” the “MWA Pipeline *charge*,” and

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<sup>1</sup> A self-described “special act agency” created by the Legislature, J.A. at 1, the Agency does not disagree that is a “local government” for purposes of this provision. See Art. XIII C, § 1(b), (c) (defining terms “Local government” and “Special district” to include entities like the Agency).

the other “*fees and charges*” that are the subject of the Kelley Initiative. J.A. at 41 (emphasis added).

Indeed, this Court has referred to a “fee for ongoing water service” and other “water service charges.” *Richmond v. Shasta Community Services District*, 32 Cal. 4th 409, 427 (2004); accord *Howard Jarvis Taxpayers Association v. City of Roseville*, 97 Cal. App. 4th 637, 645 (2002) (addressing “sewer, water and refuse collection fees and charges”); 80 Op. Cal. Att’y Gen. 183, 186 (1997) (opining that “each water fee or charge must be examined individually in light of” Proposition 218). Therefore, standing alone, Article XIII C, § 3 grants the Agency’s voters authority to “reduc[e]” or to otherwise “affect” the Agency’s water rates, fees, and charges by means of the Kelley Initiative.

**B. To Escape This Plain Language, the Court of Appeal Impermissibly Imported Exceptions and Qualifications from Outside Article XIII C, § 3.**

Unfortunately, the Court of Appeal did not heed the interpretive principles set forth by this Court. As described above, the Court of Appeal could not be bothered to grapple with the actual text of Article XIII C, § 3. Instead, the court looked outside of § 3—to Article XIII *D*—to ascertain the meaning of that provision. In particular, the court read Article XIII C, § 3 as having “an *exception* for fees or charges for water services.” Slip op. at 9 (emphasis added). The bases for this (unwritten) exception were various limitations and restrictions to be found in Article XIII *D*. See slip op. at 5-9 (discussing Art. XIII *D*, §§ 1, 2(e), 2(g), 2(h), 6(c)).

This interpretive method cannot be reconciled with either the opinion or the result in *Rossi v. Brown*. First of all, “[w]here the language is clear, it should be followed.” 9 Cal. 4th at 695. Among other things, this means that a court is “not to read into [a constitutional provision] exceptions or qualifications that are not supported by the language of the provision.” *Id.* at 694. Nothing in the language of Article XIII C, § 3 supports reading an exception or qualification for water services into the operative term “local taxes, assessments, fees and charges.” Nothing in the applicable definitions, namely, § 1 of Article XIII C, does either. In *Rossi v. Brown*, a challenge to a local initiative to repeal a utility tax, this Court found compelling the fact that “[n]othing in the constitutional reservation of the initiative power expressly precludes exercise of the initiative to repeal a tax measure.” 9 Cal. 4th at 696.

To be sure, the definition of “‘fee’ or ‘charge’” in Article XIII *D* does contain a limitation: it encompasses only levies that are “imposed . . . as an incident of property ownership.” Art. XIII D, § 2(e). But because the quoted definition applies by its terms only to Article XIII *D*, *see* § 2 (“As used in *this* article . . . .” (emphasis added)), the limitation is inapplicable by its terms to Article XIII C, § 3.<sup>2</sup> *Cf. Santa Clara County Local Transportation Authority*

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<sup>2</sup> Even if the definition in Article XIII D, § 2(e) were applicable here, the fees and charges affected by the Kelley Initiative would satisfy that definition. Despite the Court of Appeal’s willful attempt to ignore it, *see slip op.* at 8, this Court’s decision in *Richmond v. Shasta Community Services District* is crystal clear on the point: a “fee for ongoing water service through an existing  
(continued...) ”

*v. Guardino*, 11 Cal. 4th 220, 240 (1995) (hereafter *Guardino*) (distinguishing two provisions because, notwithstanding their “superficial similarities . . . , a close reading of their terms reveals their essential differences”).

Likewise, while § 6(c) of Article XIII D has an exception for “fees or charges for sewer, water, and refuse collection services,” it is an exception to a particular rule, namely, the rule that “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.” This Court examined precisely this language in *Richmond v. Shasta Community Services District*. The Court reasoned that “[b]ecause article XIII D does not include similar express exemptions from the other requirements that it imposes on property-related fee[s] and charges, the implication is strong that fees for water, sewer, and refuse collection services *are subject to those other requirements*.” 32 Cal. 4th at 427 (emphasis added).

Because Article XIII C, § 3 also does not include express exemptions from the

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<sup>2</sup> (...continued)

connection is imposed ‘as an incident of property ownership’ ” for purposes of Article XIII D, § 2(e). 32 Cal. 4th at 427. The Kelley Initiative, of course, proposes to reduce three such fees: the basic per-hundred-cubic-foot “water rate,” the monthly “Non-cap cost recovery charge,” and the monthly “MWA Pipeline charge.” See J.A. at 41 (§ 1(a)-(c) of initiative).

In any event, it is wholly unnecessary in the present case to address the “incident of property ownership” issue. As explained in the text, the proper interpretation of Article XIII C, § 3 does not depend on anything in Article XIII D, including whether the fees reduced by the Kelly Initiative are imposed as an incident of property ownership.

requirements that *it* imposes on local governments—making “[t]he power of initiative to affect local taxes, assessments, fees and charges . . . applicable to all local governments”—the implication is just as strong that fees and charges for water services are subject to those requirements. Indeed, the requirements imposed by Article XIII C, § 3 apply “[n]otwithstanding any other provision of this Constitution.”

The situation was similar in *Rossi v. Brown*. Section 9 of Article II of the state constitution “exclude[d] tax measures from the *referendum* power of the voters,” but there existed “no express exclusion of tax measures from the *initiative* [power]” set forth in § 8 of Article II. 9 Cal. 4th at 694 (emphasis added). As noted above, this Court refused to import into § 8 the exclusion contained in § 9, and so it *upheld* the initiative power as to tax measures. In this case, of course, the Court of Appeal did just the opposite. In so doing, it contradicted not only the principles of *Rossi v. Brown* but also other important canons of construction.

First among these canons is the “settled axiom that when the drafters of a statute have employed a term in one place and omitted it in another, it should not be inferred where it has been excluded.” *People v. Woodhead*, 43 Cal. 3d 1002, 1010 (1987). Here, the drafters of Proposition 218 employed various limitations and exclusions in Article XIII *D* but pointedly omitted them from Article XIII C, § 3. To paraphrase this Court: “Had the authors of [Article XIII C, § 3] intended to [exclude water services from] the scope of [that pro-

vision], it is fair to assume that they would have expressed that intention in terms as clear and unmistakable as they used in [Article XIII D] enacted at the same time.” 43 Cal. 3d at 1010. As the appellate courts have explained many times: “Where a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provision is *not applicable* to the statute from which it was omitted.”<sup>3</sup> Under these precepts, the lower court erred in importing Article XIII D’s limitations and exclusions into Article XIII C, § 3.

If the foregoing were not enough, the Court of Appeal wholly ignored this Court’s repeated admonition that “the initiative power must be construed liberally so as to promote the democratic process established by inclusion of the initiative and referendum in the Constitution.” *Rossi v. Brown*, 9 Cal. 4th at 711. Moreover, “all presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient.” *Legislature v. Eu*, 54 Cal. 3d 492, 501 (1991), *cert. denied*, 503 U.S. 919 (1992). Consequently, it is “the duty of the courts to jealously guard this right of the people,” and it “has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right to local initiative . . . be not improperly annulled.” *DeVita v. County of Napa*, 9 Cal. 4th at 776.

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<sup>3</sup> *In re Gerald J.*, 1 Cal. App. 4th 1180, 1186 (1991) (emphasis added) (quoting *In re Connie M.*, 176 Cal. App. 3d 1225, 1240 (1986) (itself quoting *Marsh v. Edwards Theatres Circuit, Inc.*, 64 Cal. App. 3d 881, 891 (1976))), *cited in In re Marquis D.*, 38 Cal. App. 4th 1813, 1827 (1995).

As noted above, the drafters of Article XIII C wrote this principle into the constitution expressly: “LIBERAL CONSTRUCTION. The provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.” Art. XIII C, preceding § 1. But the Court of Appeal did not jealously guard the right of the people; instead, the court construed the power of initiative granted by Article XIII C, § 3 in a way that enhances local government revenue and limits taxpayer consent, just the opposite of the liberal construction mandated both by this Court’s decisions and by the text of the constitution.

The Court of Appeal attempted to justify its departure from the above-described canons of construction by asserting that to apply the plain language of Article XIII C, § 3 “would violate the rules of statutory construction, the goal being a harmonious, not an unreasonable, result.” Slip op at 10 (citing *Fields v. Eu*, 18 Cal. 3d 322, 328 (1976)). In the court’s view, applying this plain language would yield an unreasonable result because “it would make the voter-approval exception for water services meaningless, since Article XIII C would always permit a voter-initiated challenge that would overcome the exception stated in Article XIII D, section 6.” Slip op. at 9-10. In other words, the court could not imagine that fees and charges for water services might be treated differently under different provisions of Articles XIII C and XIII D.

With all due respect, this failure of imagination cannot be reconciled with *Richmond v. Shasta Community Services District*. There, this Court re-

cognized that there are several different “requirements that [Article XIII D] imposes on property-related fee[s] and charges”—*only one* of which is the “voter approval requirements” of § 6(c). 32 Cal. 4th at 427. The Court further recognized that it was perfectly reasonable that a particular category of fees and charges (like those for water services) be “exclude[d]” from the voter approval requirements while remaining “subject to those other requirements.” *Id.* Indeed, it is the opposite conclusion—the one reached by the lower court—that is unreasonable and meaningless: “*There would be no point* in specifically exempting . . . water . . . fees and charges from this one requirement of article XIII D . . . if they were not subject, at least in some respects, to article XIII D’s other requirements for property-related fees or charges.” *Howard Jarvis Taxpayers Association v. City of Roseville*, 97 Cal. App. 4th at 645 (emphasis added), *cited with approval in Richmond*, 32 Cal. 4th at 427.

*Richmond*’s reasoning is readily applied here. It is perfectly reasonable for water-related fees and charges to be excluded from the voter approval requirements of Article XIII D, § 6 while remaining subject to the other rules for fees and charges imposed by Article XIII C, § 3, namely, that “the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing” fees or charges imposed by local governments like the Agency. There is nothing unreasonable or meaningless in imposing a “voter approval” requirement for some fees and charges, Art. XIII D, § 6(c), a “written protest” procedure for others, Art. XIII D, § 6(a)(1), and a “power of initiative” for all

of them, Art. XIII C, § 3. To the contrary, it is quite logical to craft a constitutional scheme under which some kinds of local government levies are subject to stringent requirements (such as voter preapproval), while all such levies are subject to the safety valve of initiative. *Cf. Rossi v. Brown*, 9 Cal. 4th at 693 (upholding a scheme in which tax-related ordinances were exempted from the referendum power but remained subject to the initiative power);

In its answer to the petition for review, the Agency relied heavily on an assertedly offsetting “cardinal rule of construction,” namely, that “words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions of the Constitution bearing on the same subject.” Answer at 18 (quoting *Fields*, 18 Cal. 3d at 328). This rule of construction cannot salvage the Court of Appeal’s decision. The goal of reading words or phrases “in context” is “to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in so doing to give effect to the scheme as a whole.” *Fields*, 18 Cal. 3d at 328. As explained in the preceding paragraph, reading Article XIII C, § 3 to apply its plain language without exception or qualification certainly gives effect to Proposition 218 as a whole. It is the contrary reading by the Court of Appeal and by the Agency—which imports an exception or qualification into Article XIII C, § 3 without any textual basis for doing so—that actually results in “distorting [the] apparent meaning” of that provision in violation of the *Fields* cardinal rule of construction.

The Agency also invokes the canon that “[w]hen statutes are *in pari materia*, the interpretation of similar phrases or sentences in one control[s] the interpretation of virtually the same phrases or sentences in the other.” Answer at 21 (quoting *In re Marriage of Pinto*, 28 Cal. App. 3d 86, 89 (1972)). No doubt this canon is true as a general matter; however, it obviously must yield to more specific principles like the “settled axiom that when the drafters of a statute have employed a term in one place and omitted it in another, it should not be inferred where it has been excluded.” *People v. Woodhead*, 43 Cal. 3d at 1010, *discussed supra* pp. 16-17.

For these many reasons, the Court of Appeal erred in departing from the plain language of Article XIII C, § 3 and in refusing to give effect to the initiative power granted therein. That constitutional grant of power contains no unwritten exception for initiatives reducing, repealing, or otherwise affecting fees or charges related to water service. The Court of Appeal’s ruling to the contrary is “inconsistent with the cherished and favored role that the initiative process occupies in our constitutional scheme,” *Senate of the State of California v. Jones*, 21 Cal. 4th 1142, 1158 (1999), and reversal is warranted.

## **II. In Matters Affecting Local Fees and Charges, Statutorily Based Doctrines Limiting the Local Initiative Power Must Yield to Article XIII C’s Constitutional Command.**

The Court of Appeal also justified its departure from the plain text of Article XIII C, § 3 by relying on several pre-Proposition 218 decisions. In so

doing, the court erred because those decisions embody statutorily based doctrines that must yield, in matters affecting local fees and charges, to the constitutional command of Article XIII C, § 3.

**A. The Exclusive Delegation Doctrine and the Legislative-Administrative Dichotomy.**

The Court of Appeal ruled that the “rate-setting function delegated by the Legislature to [the Agency’s] board of directors is an administrative duty not subject to initiative.” Slip op. at 10. This ruling implicates two doctrines that appear frequently in this Court’s discussions of the local initiative power. The first might be called the doctrine of “exclusive delegation.” As noted in *DeVita*, this doctrine applies in situations where “the Legislature did not intend to restrict local legislative authority but rather to delegate the exercise of that authority exclusively to the governing body, thereby precluding initiative and referendum.” 9 Cal. 4th at 776 (citing *Committee of Seven Thousand v. Superior Court*, 45 Cal.3d 491, 511 (1988) (hereafter *COST*)). In *COST*, for instance, the Court concluded “the Legislature intended to delegate authority to enact ordinances establishing [certain transportation-related] programs exclusively to the Orange County Board of Supervisors and the city councils of cities within Orange County,” thus precluding use of initiative in this arena. 45 Cal. 3d at 509.

The second doctrine might be labeled the “legislative-administrative dichotomy.” Thus, *DeVita* made reference to “the formulation of a general

dichotomy between a governing body’s legislative acts, which are subject to initiative and referendum, and its administrative or executive acts, which are not.” 9 Cal. 4th at 776 (citing *Yost v. Thomas*, 36 Cal. 3d 561, 569-70 (1984)). The important point about the legislative-administrative dichotomy is that, for the most part, it addresses the same concerns as the exclusive delegation doctrine. *COST* explored this point:

In explaining why the Legislature may bar local initiatives in matters of statewide concern, courts have sometimes resorted to an awkward and confusing characterization of the *delegated power* as “administrative.” Thus it has been said that when a local legislative body acts pursuant to a *power delegated to it by state law*, “the action receives an ‘administrative’ characterization, hence [it] is outside the scope of the initiative and referendum.”

45 Cal.3d at 511 (emphasis added) (quoting *Hughes v. City of Lincoln*, 232 Cal. App. 2d 741, 745 (1965)). Under this characterization, “acts are deemed administrative . . . ‘which, in a purely local context, would otherwise be legislative.’” *Id.* (quoting *Yost*, 36 Cal. 3d at 570).

It is apparent that the Court of Appeal was resorting to this “awkward and confusing characterization” when it concluded that the “rate-setting function” of the Agency’s board was an “administrative duty not subject to initiative.” Slip op. at 10. The court’s conclusion did not rest on anything in the nature of rate-setting *per se*; it rested, instead, on the Court’s perception that the setting of the Agency’s water rates was a “function *delegated* by the Legislature to Bighorn’s board of directors.” *Id.* (emphasis added). Indeed, the

court reiterated the point: the Agency's board was "authorized and required by legislative mandate to fix water rates and charges," such that fixing rates and charges was a "legislatively-delegated function." *Id.*

What is the foundation of the exclusive delegation doctrine (as supplemented by the legislative-administrative dichotomy)? Quite simply, the bar to "local exercise of initiative and referendum as to matters which have been specifically and exclusively delegated to a local legislative body" is founded on the "state's plenary power over matters of statewide concern." *Voters for Responsible Retirement v. Board of Supervisors*, 8 Cal. 4th 765, 779 (1994). In particular, "the Legislature's power to restrict *local* referendum [and also initiative] derives not only from the exceptions found implicitly in article II, section 11, but also from its power to enact general laws of statewide importance that override local legislation." *Id.*; *cf.* Cal. Const. Art. II, § 11(a) ("Initiative and referendum powers may be exercised by the electors of each city and county *under procedures that the Legislature shall provide.*" (emphasis added)). Therefore, in matters of statewide concern, the Legislature "may if it chooses preempt the entire field to the exclusion of all local control"; if the Legislature "chooses instead to grant some measure of local control and autonomy, it has authority to impose procedural restrictions on the exercise of the power granted, including the authority to bar the exercise of the initiative and referendum." *COST*, 45 Cal. 3d at 511.

The foregoing leads us back to the second issue presented for review. If the exclusive delegation doctrine and the legislative-administrative dichotomy rest on the Legislature's power under Article II, Section 11 and its power to "enact general laws of statewide importance," then it should be clear that these doctrines can play no part "in matters of reducing or repealing any local tax, assessment, fee or charge" or (more generally) matters "affect[ing] local taxes, assessments, fees and charges." Article XIII C, § 3. The unqualified grant of initiative power over all such matters applies "[n]otwithstanding any other provision of this Constitution." With respect to local fees and charges (like the Agency's water rates and charges), the Legislature's power is decidedly *not* plenary.

Accordingly, in matters affecting local fees and charges, therefore, it makes no sense to "struggle[] with the question whether a statutory reference to action by a local legislative body indicates a legislative intent to preclude action on the same subject by the electorate," i.e., to delegate that power exclusively to the local body. *COST*, 45 Cal. 3d at 501. The question is simply irrelevant when (as here) Article XIII C, § 3 applies.<sup>4</sup>

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<sup>4</sup> Divorced from the issue of delegation, the legislative-administrative dichotomy might retain some relevance even in matters governed by Article XIII C, § 3. In a decision this Court cited for "the usual test for determining whether a measure is administrative or legislative," the Court of Appeal used the term "intrinsically legislative" to refer to a legislative decision that "retains that character even in the presence of a state law authorizing or setting limits on the particular field of action." *Hughes*, 232 Cal. App. 2d at 745, *cited in* (continued...)

## **B. The Impairment of Essential Governmental Power Doctrine.**

The Court of Appeal also cited *Simpson v. Hite*, 36 Cal. 2d 125, 134 (1950), and *Dare v. Lakeport City Council*, 12 Cal. App. 3d 864, 869 (1970), for the proposition that the initiative power may not be exercised “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.” Slip op. at 10-11. As explained below, however, this “impairment of essential governmental power” doctrine is simply a species of the more general search for legislative intent—a search that has no relevance in situations governed by Article XIII C, § 3.

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<sup>4</sup> (...continued)

*COST*, 45 Cal. 3d at 511. To some extent, the dichotomy may inhere in the “nature” of the initiative power. See *Chase v. Kalber*, 28 Cal. App. 561, 566 (1915) (referring to “matters of legislative cognizance which in their nature are strictly legislative”); *American Federation of Labor v. Eu*, 36 Cal. 3d 687, 714 (1984) (stating that “an initiative which seeks to do something other than enact a statute . . . is not within the initiative power reserved by the people”).

That fascinating issue can be left for another day, for setting generally applicable rates and charges on a prospective basis is clearly an “intrinsically” or “strictly” legislative act rather than an administrative act. This Court has opined that “ratemaking is an essentially legislative act.” *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 277 (1994) (quoting *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 371 (1989)), *cert. denied*, 513 U.S. 1153 (1995). Also, the use of initiatives to set rates is common and non-controversial. See, e.g., *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208, 220 (1978) (sustaining Proposition 13, the well-known statewide initiative that “impose[d] a limitation on the tax rate applicable to real property”); *Rossi v. Brown*, 9 Cal. 4th 688, 702 n.4 (1995) (cataloging uses of the initiative power to set tax rates).

In *Simpson* itself, the concern about governmental power was raised in the midst of a discussion whether the proposed initiative would “nullify . . . legislative policy,” “prevent execution of the [statutory] duty imposed upon the board of supervisors,” “repeal provisions of . . . state law,” frustrate “compliance with the requirements of the general law,” and accord with the “state act specif[ying] the steps to be taken by a local body in enacting legislation.” 36 Cal. 2d at 133-34. Subsequent decisions have confirmed that *Simpson* is best interpreted to implicate the considerations discussed in the prior section, namely, the Legislature’s plenary power over matters of statewide concern.

Thus, *DeVita* characterized *Simpson* as a decision in which this Court “concluded that the initiative and referendum power could not be used in areas in which the local legislative body’s discretion was largely preempted by statutory mandate.” 9 Cal. 4th at 776. *COST* likewise characterized *Simpson* as having “concluded that [state] legislation conflicted with and rendered invalid a proposed initiative that would have repealed a resolution designating a site for court buildings.” 45 Cal. 3d at 502. *Associated Home Builders, Inc. v. City of Livermore* called *Simpson* a decision that “bar[s] the use of the initiative and referendum in a situation in which the state’s system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the state.” 18 Cal. 3d 582, 596 n.14 (1976). *Dare v. Lakeport City Council* has faced similar treatment. See *Rossi*, 9 Cal. 4th at 708 (characterizing *Dare* as “holding . . . that the initiative

was not available to amend the ordinance in question because the Legislature had vested the local legislative body with the power to fix [sewer] fees”).

As above, it makes no sense to inquire into these *statutory* issues when the matter is governed by a clear *constitutional* command. In light of Article XIII C, § 3, the “legislative policy” on the Agency’s rates and charges, “the [statutory] duty” imposed on the Agency’s board, and the “requirements of the general law,” *Simpson*, 36 Cal. 2d at 133-34, have no bearing on whether the right of initiative applies. That policy, that duty, and those requirements have been supplanted by the *constitutional* mandate that “the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge.” Art. XIII C, § 3.

Even if the impairment doctrine is not a dead letter in these matters—or a dead letter generally, *see Guardino*, 11 Cal. 4th at 253 (calling it an “exception that *some courts* have recognized” (emphasis added))—the doctrine’s very demanding requirements cannot be satisfied in this case. As this Court explained in *Brosnahan v. Brown*, 32 Cal. 3d 236 (1982), a person who seeks to invalidate an initiative using this doctrine must show that “the *inevitable* effect [of the initiative] would be greatly to impair or wholly destroy the efficacy of some other governmental power”; “mere speculative consequences are insufficient.” *Id.* at 258 (emphasis in original); *accord Guardino*, 11 Cal. 4th at 254 (“But in order for the [impairment doctrine] to apply the power must not only be ‘essential,’ its serious impairment or wholesale destruction must

also be ‘inevitable.’”). Just as crucially, the alleged impairment must appear “on the face of” the challenged initiative. *Brosnahan*, 32 Cal. 3d at 259.

Nothing on the face of the Kelley Initiative—which would reduce the Agency’s water rates and charges to specified dollar amounts—shows that the *inevitable* effect of the initiative will be to wholly destroy the Agency.<sup>5</sup> The Court of Appeal’s unsupported insinuation that “public water service might cease because [the Agency] could not afford to supply it,” slip op. at 10, is the very kind of rank speculation condemned in *Brosnahan* and dismissed out of hand in *Guardino*. It is also a condescending slap at the Agency’s electors, who must be presumed sensible enough not to vote to destroy their own water service. The proper arena for any arguments about the financial effect of the Kelley Initiative is the political one. After all, Mr. Kelley does not seek the Court’s aid to impose the terms of his initiative. Rather, he seeks merely the opportunity to place his duly qualified initiative before his fellow citizens for the exercise of their “reserved power” to adopt it or (if the Agency’s board is more persuasive) to reject it.

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<sup>5</sup> At the petition stage, the parties argued over the percentage by which the Kelley Initiative would reduce the Agency’s basic water rate. *Compare* Petition at 24 (alleging 13%), *with* Answer at 4 n.2 (alleging 50%). Although Mr. Kelley stands by his calculation—which was based on the Agency’s own averments in this case, *see* J.A. at 4, ¶ 13(i)—the necessity of looking *outside* the initiative only highlights that the fact that the *face of* the initiative yields no answer about the Agency’s future finances, let alone whether the Agency faces inevitable financial destruction. In any event, the Agency has never put forward even a plausible argument for essential impairment, nor did it even cite *Simpson* or *Dare* in its answer to the petition for review.

For these reasons, the Court of Appeal erred in relying on *statutorily* based doctrines as grounds for limiting and restricting the *constitutional* grant of initiative power adopted by the people in Article XIII C, § 3. In matters affecting local fees and charges (like the Agency’s water rates and charges), those doctrines must yield to Article XIII C’s constitutional command.

### CONCLUSION

Hundreds of the state’s public agencies and political subdivisions have predicted that the Court of Appeal’s decision will have “substantial” and “far-reaching” impacts. *See* Petition at 2-3. One of those impacts is the serious and unjustified abridgement of the constitutional power of initiative set forth so plainly and broadly in Article XIII C, § 3. Because that abridgement cannot be reconciled with “the duty of the courts to jealously guard this right of the people,” this Court must act to ensure that the right to local initiative is “not improperly annulled.” *DeVita*, 9 Cal. 4th at 776.

The judgment of the Court of Appeal should be reversed.

DATED: December 17, 2004.

Respectfully submitted,

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Eric Grant

Attorney for Petitioner E.W. KELLEY

## **CERTIFICATE OF WORD COUNT**

I, Eric Grant, certify that the foregoing brief contains 7,468 words, as calculated pursuant to Rule of Court 29.1(c).

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Eric Grant

Attorney for Petitioner E.W. KELLEY

**INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO THE VOTERS**

**Notice of Intention to Circulate Initiative Petition**

Notice is hereby given of the intention of the person whose name appear hereon of their intention to circulate the petition within the Bighorn-Desert View Water Agency for the purpose of reducing water rates, fees and charges. A statement of the reasons for the proposed action as contemplated in the petition is as follows:

Whereas the board of directors has failed to control spending as passed by the voters, and

Whereas the board of directors has raised water rates, fees and charges because they failed to restrict spending as proposed by the voters, and

Whereas the board of directors has deceived the customers with false promises of controlling their spending, and

Whereas the board of directors has raised water rates, fees and charges far beyond the revenue necessary to meet the spending limits imposed by the voters, and pursuant the initiative rights granted under Article XIII, § 3 and Election Code §9300 only the voters can fix these problems by restricting revenue to the levels needed to operate and maintain the agency and meet its debt requirements.

Proponent: /s/ E.W. Kelley 55934 Songbird Lane Yucca Valley, CA 92284

TO THE BOARD OF DIRECTORS OF THE BIGHORN-DESERT VIEW WATER AGENCY: We the undersigned qualified voters of the District, hereby propose to limit water rates, fees and charges sufficient to meet the spending limits imposed by the voters and meet the debt service obligations and petition the Board to submit the same to the voters of the Agency for their adoption or rejection at the next succeeding general election or special election held prior to the general election or otherwise provided by law. THE PEOPLE OF THE BIGHORN-DESERT VIEW WATER AGENCY DO ORDAIN AS FOLLOWS:

**SECTION 1. REDUCTION IN WATER RATE, FEES AND CHARGES**

(a) Notwithstanding any other provision of law, Agency Ordinance, Resolution or Policy the water rate shall be reduced to \$2.00 (two dollars) per hundred cubic feet.

(b) Notwithstanding any other provision of law, Agency Ordinance, Resolution or Policy the "Non-cap cost recovery" charge shall be reduced to \$2.50 (two dollars and fifty cents) per month.

(c) Notwithstanding any other provision of law, Agency Ordinance, Resolution or Policy the "MWA Pipeline" charge shall be reduced to \$11.50 (eleven dollars and fifty cents) per month.

(d) Notwithstanding any other provision of law, Agency Ordinance, Resolution or Policy there shall be no increase in water rates, fees or charges, or any new water rate, fee or charge enacted without the prior approval of voters at an election.

**SECTION 2. SEVERABILITY**

If any provision of this measure, or application thereof to any person or circumstance is held invalid by a court of law, that invalidity shall not effect other provisions or applications of the measure which can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

**NOTICE TO THE PUBLIC: THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK.**

All signers must be registered to vote in the Bighorn-Desert View Water Agency.

		Official Use Only	
	PRINT YOUR NAME	RESIDENCE ADDRESS ONLY	
	YOUR SIGNATURE AS REGISTERED TO VOTE	CITY	ZIP
	PRINT YOUR NAME	RESIDENCE ADDRESS ONLY	
	YOUR SIGNATURE AS REGISTERED TO VOTE	CITY	ZIP
	PRINT YOUR NAME	RESIDENCE ADDRESS ONLY	
	YOUR SIGNATURE AS REGISTERED TO VOTE	CITY	ZIP
	PRINT YOUR NAME	RESIDENCE ADDRESS ONLY	
	YOUR SIGNATURE AS REGISTERED TO VOTE	CITY	ZIP

DECLARATION OF CIRCULATOR

CALIFORNIA CONSTITUTION  
ARTICLE 13C (VOTER APPROVAL FOR LOCAL TAX LEVIES)

SECTION 1. Definitions. As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the State, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

CALIFORNIA CONSTITUTION  
ARTICLE 13C (VOTER APPROVAL FOR LOCAL TAX LEVIES)

SEC. 2. Local Government Tax Limitation. Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

CALIFORNIA CONSTITUTION  
ARTICLE 13C (VOTER APPROVAL FOR LOCAL TAX LEVIES)

SEC. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

CALIFORNIA CONSTITUTION  
ARTICLE 13D (ASSESSMENT AND PROPERTY-RELATED FEE REFORM)

SECTION 1. Application. Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this article or Article XIIIIC shall be construed to:

- (a) Provide any new authority to any agency to impose a tax, assessment, fee, or charge.
- (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.
- (c) Affect existing laws relating to the imposition of timber yield taxes.

CALIFORNIA CONSTITUTION  
ARTICLE 13D (ASSESSMENT AND PROPERTY-RELATED FEE REFORM)

SEC. 2. Definitions. As used in this article:

- (a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIIIIC.
- (b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."
- (c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.
- (d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.
- (e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.
- (f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.
- (g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.
- (h) "Property-related service" means a public service having a direct relationship to property ownership.
- (i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

CALIFORNIA CONSTITUTION  
ARTICLE 13D (ASSESSMENT AND PROPERTY-RELATED FEE REFORM)

SEC. 3. Property Taxes, Assessments, Fees and Charges Limited. (a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.

(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.

(3) Assessments as provided by this article.

(4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

CALIFORNIA CONSTITUTION  
ARTICLE 13D (ASSESSMENT AND PROPERTY-RELATED FEE REFORM)

SEC. 4. Procedures and Requirements for All Assessments. (a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

(b) All assessments shall be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed

assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

(f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e).

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SEC. 5. Effective Date. Pursuant to subdivision (a) of Section 10 of Article II, the provisions of this article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all existing, new, or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4:

(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets,

sewers, water, flood control, drainage systems or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in those assessments shall be subject to the procedures and approval process set forth in Section 4.

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SEC. 6. Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(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.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

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

(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. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. 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. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

## CERTIFICATE OF SERVICE

I, Eric Grant, certify as follows.

I am an active member of the State Bar of California and not a party to this cause. My business address is Eric Grant, Attorney at Law, 8001 Folsom Boulevard, Suite 100, Sacramento, California 95826. On December 17, 2004, I served the foregoing document, namely:

### PETITIONER'S OPENING BRIEF

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