A157983

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 5

HOWARD JARVIS TAXPAYERS ASSOCIATION, ET AL.

Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.

Respondents.

From the Grant of a Cross-Motion for Summary Judgment and
From the Denial of a Cross-Motion for Summary Judgment
by the Superior Court for the County of San Francisco,
Case No. CGC-18-568657, Hon. Ethan P. Schulman

APPELLANTS' OPENING BRIEF

Jonathan M. Coupal, SBN 107815
Timothy A. Bittle, SBN 112300
Laura E. Dougherty, SBN 255855
Howard Jarvis Taxpayers Foundation
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
Telephone: (916) 444-9950
Facsimile: (916) 444-9823

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CONSTITUTIONS

STATUTES

MISCELLANEOUS

Rule 8.204(a)(2) Statement

On August 3, 2018, Plaintiffs filed a complaint to invalidate a local special tax in San Francisco known as the "Early Care and Education Commercial Rents Tax." and known as "Proposition C" on the ballot. Like Proposition D on the same ballot, it was a commercial rents tax. At the June 5, 2018 election, the commercial rents tax received only 50.87% voter approval, but the City declared it passed. Plaintiffs contended that the commercial rents tax required two-thirds voter approval under the forty-year practice of Proposition 13 and the correlative practice of Proposition 218, both statewide voter initiatives. (Cal. Const., Art. XIII A § 4; XIII C § 2(d).) Defendant City contended that *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 changed the law as to citizens' initiatives — including those made by politicians — by reducing the margin to a simple majority.

Agreeing that the issues are matters of law, Plaintiffs and Defendants filed cross-motions for summary judgment. These motions were heard together on July 3, 2019. The trial court took the matter under submission. On July 5, 2019, the trial court issued an order granting Defendants' cross-motion and denying Plaintiffs' cross-motion, thereby validating the special tax with simple majority voter approval.

Plaintiffs filed a premature notice of appeal on July 8, 2019. On July 24, 2019, judgment was entered, with notice then given by Defendants on July 25,

2019. The trial court judgment is final and therefore appealable. (Code Civ. Proc., § 904.1(a)(1).) Plaintiffs appeal the grant of the City's cross-motion and the denial of the Plaintiffs' cross-motion. The special tax must be invalidated for lack of two-thirds voter approval.

Issues Presented

1. Where a City Charter Conveys to the Electorate the Same Powers as its Board of Supervisors has to Enact Special Taxes, may the Electorate Exercise Broader Power by Asserting That a Special Tax may be Approved by a Lower Margin?

2. Did the California Supreme Court's Discussion of a Two-thirds Vote Requirement on *State* Legislators for *all State* taxes in *Kennedy Wholesale* Properly Translate to the *Local* Two-thirds Voter Approval Margin for *Local Special Taxes* Required by Propositions 13 and 218?

3. Does the California Supreme Court's Decision in *Boling v. PERS* Here Reinforce the Application of the Two-thirds Voter Approval Margin Required by Propositions 13 and 218 Given that, in *Boling*, a "Procedural Requirement" Typically Inapplicable to a Voter Initiative Applied Afterall Because the Politicians Crafted the Voter Initiative?

Statement of Facts

In 2017, the San Francisco Board of Supervisors developed a special tax proposal. It would propose to tax the gross receipts of commercial rents to fund early childcare. (Appellants' Appendix at 132-135; 263-264; 267-269; 997; 999.) The County's Board Files #180058 and #180076 represent the culmination of these efforts. (AA at 380-658.) If the tax proposal in this case had been formally born of either of these Board Files, it is undisputed that two-thirds voter approval would have been necessary to pass the tax under the California Constitution according to Propositions 13 and 218. (AA at 995.) This was the case for a competing special tax measure from Board File #180075 known as "Proposition D", which would have funded affordable housing and homeless services. Both were called "the same tax" and the "same subject matter." (AA at 308-379; 661-662; 669-675.) Both proposals had also received the same analysis by the Office of the Controller, which called them "dedicated taxes" that "require voter approval, by a two-thirds majority." (AA at 291-307; 357-372; 436-451; 602-616.)

Instead, the City proposed a duplicate measure in the surrogate form of a citizens' initiative. (AA at 997-998.) This citizens' initiative, however, was sponsored by Supervisor Norman Yee, and was generally credited to Supervisors Yee and Kim. (AA at 138; 273-283; 997; 1000.) Supervisor Yee used his City Hall address, telephone number, letterhead, and staff to run the

initiative, even after withdrawing his signature from the Board version. (AA at 118-132; 170-199; 261-272; 996-998.) The only textual differences between the citizens' initiative version and the Board version were 1) the addition of "Section 6. Conflicting Measures," and 2) the first section describing the manner of presentation to the voters. In all other respects, the initiative was the exact same special tax proposal. (AA at 998.)

Though unprecedented in the history of special taxes that have all required two-thirds voter approval[1], the City held that its special tax proposal — as re-milled through the citizens' initiative process — would require only simple majority approval to pass, using extended interpretations from the 2017 Supreme Court decision, *California Cannabis Coalition v. City of Upland, supra,* 3 Cal. 5th 924. The Legislative Analyst's Office, however, disagreed, concluding in January 2018 following the *California Cannabis* decision that "Citizens initiatives that increase taxes must secure the same vote of the electorate — majority vote for general taxes and two-thirds vote for special taxes — as those placed on the ballot by local governing bodies." (AA at 965-968.)

The San Francisco Charter defines a citizens' initiative as "a proposal by the voters with respect to any ordinance, act or other measure which is within the powers conferred upon the Board of Supervisors to enact." (AA at

[1]This is excepting those taxes in *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197 and *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, which have since been distinguished as impermissible loopholes.

698-700.)

Supervisor Yee's "citizens' initiative" version of the special tax proposal was placed on the June 5, 2018 ballot, which represented to voters that it required only 50% +1 votes to pass. (AA at 661.) The proposed tax received 50.87% voter approval. (AA at 995.) The City declared the measure passed. Appellants filed this case to enforce the constitutional right of Californians to be secure in the rule that special taxes will not be imposed upon them and/or their economy without two-thirds voter approval. Tax collections began January 1, 2019.

Standard of Review

Review is *de novo*. "On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." *(Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) The appellate court is " effectively assuming the role of a trial court, and applying the rules and standards that govern a trial court's determination of a motion for summary judgment." (*Building Industry Assn. of Bay Area v. City of San Ramon* (2016) 4 Cal. App. 5th 62, 73.) In this case, no objections to evidence were made. The relevant facts are undisputed and this case is a pure matter of law.

Argument

As a special tax, the commercial rents tax in this case required two-thirds voter approval under both Propositions 13 and 218. (Cal. Const., art. XIII A, § 4; Cal. Const., art. XIII C § 2(d).) But it received only 50.87% voter approval, and so is invalid under those provisions. The City has asserted that *California Cannabis Coalition v. City of Upland, supra*, 3 Cal.5th 924 changed these constitutional mandates. It has not.

I

The Self-limiting Charter: The Trial Court Erred by Finding that the San Francisco Charter Allows a Special Tax to Pass by Simple Majority Vote Because the Electorate's Power Equal to the Board of Supervisors' Power Includes Power "to Enact"

and Because the Charter Trumps Elections Code § 9217.

As the supreme law of the City, the Charter has granted the people only as much power as the Board has. The San Francisco Charter defines a citizens' initiative as "a proposal by the voters with respect to any ordinance, act or other measure which is *within the powers conferred upon the Board of Supervisors to enact*." (AA at 698-700, emphasis added.)

Accordingly, the courts have more than once explained that the charter

affords the people of San Francisco the "same power" and "no greater power" than the Board. *(City and County of San Francisco v. Patterson* (1988) 202 Cal. App. 3d 95; *Rossi v. Brown* (1995) 9 Cal.4th 688.) The Supreme Court's usage of the word "power" twice in reference to the ability to enact legislation indicates that it is not limited to the mere drafting of potential legislation.

In fact, it is already a given that the people cannot legislate beyond the subject matter of the Board because any charter already establishes the subject matter which can be handled by ordinance, no matter how any such ordinance may be presented to the voters. (See *McMahan v. City and County of San Francisco* (2005) 127 Cal.App.4th 1368, 1372 ["Under well-settled law, an ordinance cannot amend a city charter."]; see also *California Cannabis, supra,* 3 Cal.5th at p. 942 ["When a local government lacks authority to legislate *in an area*, perhaps because the state has occupied the field, that limitation also applies to the people's local initiative power."] Citations omitted, emphasis added.) Respondents' interpretation would render its own charter provision surplusage.

Respondents argue, as the trial court later found, that the "power" merely refers to the substance or drafting of the special tax proposal, and that the two-thirds voter approval requirement is merely procedural and outside the scope of the charter's metes and bounds of the people's power to legislate. This is illogical. First, the charter refers to the power "to enact." (AA at 698-

700.) This means, as *Patterson* and *Rossi* have indicated, the people have the same power as the Board to enact new legislation, and in so doing, they must adhere to the two-thirds voter approval requirement in Propositions 218 and 13 because that is how legislation is *enacted*. Whether viewed as procedural or substantive, the two-thirds voter approval requirement is a power "to enact," not merely a power to draft the proposed ordinance itself and keep its content within the scope of not requiring a charter amendment. Further, the substantive effect on the whole of the City is absolute. The correct voter approval margin determines whether the tax is imposed. (See also *Bank of Elk Grove v. Joliet* (Ill. Ct. App. 1988) 525 N.E.2d 569, 570-571 [rejecting classification of supermajority vote requirement as strictly "procedural," rather than "substantive," because to do so "would be a triumph of form over substance. The supermajority requirement encompasses no clear distinction between its procedural and substantive ramification."].)

Respondents and the trial court also misapplied *Kennedy Wholesale, Inc. v. State Board of Equalization* (1991) 53 Cal.2d 245 for the proposition that a two-thirds voter approval margin is a procedural requirement which may be avoided by the people under the Charter when a special tax proposal is re-cast in citizens' initiative form. In *Kennedy Wholesale*, our Supreme Court said that "procedural requirements *addressed to the Legislature's deliberations* cannot reasonably be assumed to apply to the electorate without evidence that such

was intended." (53 Cal.2d at p. 252, emphasis added.) But the two-thirds voter approval requirement is neither addressed to the legislative body nor to its deliberations. It is addressed to the voters and it occurs long *after* the legislative body's deliberations have ended. It represents the *voters'* deliberations. Moreover, in the sole case on which the City relies, *California Cannabis*, the Supreme Court noted that the voters meant "to impose a supermajority vote requirement *upon themselves*" in Propositions 13 and 218. (3 Cal.5th at p. 252, emphasis added.) In short, the supermajority vote requirement is *on the voters*.

The Charter, like Propositions 13 and 218, trumps general law. This includes trumping the simple majority voter approval margin in Elections Code section 9217, as the Supreme Court also noted in the same paragraph of *California Cannabis*. (*Ibid.*) And the hierarchy of our laws requires the Board and the Charter to follow Propositions 218 and 13. (*Amador Valley Joint Union School Dist. v. State Board of Equalization* (1978) 22 Cal.3d 208; see also *id.* at p. 228 [Supreme Court noted "nothing novel" about a two-third voter approval requirement, as it had been previously required in our Constitution].) Thus, without need of considering other arguments, the Charter itself provides a basis for decision that the two-thirds voter approval margin is required *to enact* any local special tax proposal in San Francisco. (See *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 761 ["We *further* conclude that the election was invalid under the San Diego City Charter" because it too required a two-thirds

vote for the special tax at issue there.]. Emphasis added.)

II

The Confusing Coincidence of a Fraction: The Trial Court Confused the Two-Thirds Vote Requirement of State Legislators for State Taxes in *Kennedy Wholesale* with the Two-Thirds Voter Approval Margin for Local Special Taxes, Causing an Erroneous Application of *California Cannabis*.

The trial court's order allowing for simple majority approval of the special tax in this case takes *California Cannabis* and its reasoning from *Kennedy Wholesale* out of context. Specifically, it referred to a "distinction ... between limits on the substantive authority of the legislative body and procedural requirements governing its exercise of such power," citing *California Cannabis, supra*, 3 Cal. 5th at p. 942. (AA at 1036: Order at p. 5: 25-26.) It then cites *Kennedy Wholesale, Inc., supra,* 53 Cal.3d at p. 249 as follows: "while 'the voters' power is presumed to be coextensive with the Legislature's,' that does not mean that 'legislative *procedures*, such as voting requirements, apply to the electorate." (AA at 1037; *Id.* at p. 6:4-8, emphasis in original.) This mistakes the Legislature's voting procedures with the people's. This is because in *Kennedy Wholesale*, the tax at issue was a *state* tax, and the discussion about voting procedures concerned the state Legislature's duty to pass a tax by two-

thirds in each house. This is entirely different from voter approval of a local special tax proposal. It is pure coincidence that the fractions are both two-thirds.

Approval margins on legislators and on voters are mutually exclusive. For example, under Proposition 62, in Government Code section 53724(b), two-thirds of local legislators must approve a general tax proposal to trigger voter consideration. The voters, per section 53723, can then pass that general tax on a simple majority. By contrast, Proposition 218 does not require two-thirds of legislators to approve a general or special tax proposal before presenting it to the voters. (See *Trader Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 49, n. 3.) But it does require, like Propositions 13 and 62, that two-thirds of voters approve a local special tax and that a simple majority approves a general tax. That approval margins can differ as to the legislators proposing legislation and the voters finally approving it where it is their right, shows that these margins are separate requirements on separate people at separate stages.

This mutually exclusive nature of approval margins between the legislative bodies and the voters reveals the trial court's error. The trial court applied the *Kennedy Wholesale* dicta about two-thirds vote requirements as "procedural requirements" of legislators that could not be grafted on to the voters. Referring to Article XIII A section 3 which imposes the two-thirds

vote requirement on state legislators to pass state taxes, the *Kennedy Wholesale* court noted that "Plaintiff argues in the alternative that we should interpret section 3's requirement of a two-thirds vote to apply, implicitly, to the electorate." (53 Cal.3d at p. 251.) This it would not do for many reasons. The important point here is that this is a different context erroneously applied by the trial court.

While casting a ballot could technically be labeled a "procedure," Appellants here do not assert that a procedural requirement *on legislators* should be grafted onto voters, as plaintiffs asserted in *Kennedy Wholesale*. Here, the approval margin on the voters just happens to be the same fraction as the approval margin for state legislators passing state taxes referenced in *Kennedy Wholesale*. Correctly reviewed, the approval margin on the voters for local special taxes is a separate affair. And it is housed in not one, but three places established by statewide voter initiative: Propositions 13, 62, and 218.

> Proposition 13 states at Article XIII A, section 4:
> Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Proposition 62 states at Government Code section 53722:

No local government or district may impose any special tax unless and until such special tax is submitted to the electorate of the local government, or district and approved by a two-thirds vote of the voters voting in an election on the issue.

Proposition 218 states at Article XIII C, section 2(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.

Propositions 13 and 218 are constitutional. We may not "blink at" them, and must give effect to voter intent. (*City of San Diego v. Shapiro, supra,* 228 Cal.App.4th at p. 771, citing *Silicon Valley Taxpayers Assoc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 ["We ' "'must enforce the provisions of our Constitution and "may not lightly disregard or blink at … a clear constitutional mandate." ' " ' [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law."].) The two-thirds voter approval requirement

has never been extracted from citizens' initiatives, and the voter intent was never to create such absurdity in the passage of special taxes.

A. The Two-Thirds Voter Approval Margin on Local Special Taxes is not a "Procedural Requirement" per any Case Law.

California Cannabis held that under the former Elections Code section 9214, the City of Upland should have honored the request of citizen initiative proponents (who were not politicians) to set their proposal for a special election. Setting the proposal for a special election was the "procedure" at issue. Its place on the timeline of making law was *before* voter consideration. *California Cannabis* thus offers no precedent to support Respondents' revolutionary position that only a simple majority vote of the people *after the proposal was made* was necessary to pass the special tax in this case. Other than the technical definition of casting a ballot being a process a voter will use to demonstrate support or opposition to a measure, there is no case law declaring that voting is a "procedural requirement" in the sense necessary here.

/ / /

/ / /

/ / /

B. *Boling* Took a "Procedural Requirement" That Only Legislators can Perform and Imposed it on a Voter Initiative Despite the General Rule Against Doing So. Therefore, There can be no Blanket Rule Subsuming the Two-Thirds Voter Approval Margin of Propositions 13 and 218 as Merely "Procedural."

Respondents' argument and the trial court's error hinges on the notion that "procedural requirements" on legislators are not required of voters on a citizens' initiative. Ironically, the Supreme Court recently broke from this rule, so it is no longer an absolute. In other words, even if the "procedure" of voting is somehow a requirement of legislators not generally imposed upon the voters on a local special tax initiative, public policy (and here, voter intent) will trump any absurd results of applying this rule.

In *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898, San Diego's Mayor Jerry Sanders created a "citizen's initiative" charter amendment to eliminate traditional pensions for new hires and replace them with 401(k)-style plans. (5 Cal.5th at p. 904.) As with San Francisco initiatives, a San Diego initiative charter amendment may be placed on the ballot either by the city's governing body or by citizens achieving a minimum number of signatures on an initiative petition. (*Id.* at p. 905.) Sanders first pursued two

pension reforms as city proposals, but in 2010 "chose to pursue further pension reform through a citizens' initiative instead of a measure proposed by the city." (*Ibid.*) He did so expressly to avoid a procedural requirement, in his case a statutory "meet-and-confer process" he feared would result in "compromises." (*Ibid.*) He and the city attorney represented themselves as "acting in the public interest, but as private citizens." (*Id.* at p. 906.) Supervisor Yee, his staff, and the Mayor of San Francisco have represented themselves in precisely the same way as to the special tax here: a public official who happens to be acting as a private citizen. (AA at 15, Answer at ¶ 10; 103: lines 11-12; 676-697; 709, line 3:19 ["His proposed initiative..."]; 752-754; 996-1000.)

The Supreme Court's decision shows that there are times when procedural requirements on legislators *actually do* apply to citizen's initiatives. In *Boling*, the "meet-and-confer" process was mandated on local governments by the Meyers-Milias-Brown Act. So Mayor Sanders created the citizens' initiative version of his pension reform measure for the purpose of avoiding that requirement, just as Supervisor Yee did here to avoid the two-third voter approval requirement, but the California Supreme Court did not approve. This must have come as a surprise to the City Attorney and the Court of Appeal. Likely following the rule summarized in *Kennedy Wholesale*, "City Attorney Goldsmith had responded [to demand letters for the meet-and-confer] that state election law required the city council to place the Initiative on the ballot

without modification, so long as the proponents met the procedural requirements for a citizens' initiative." (5 Cal. 5th at p. 908.) The Court of Appeal had likewise found the city's obligation to put the initiative on the ballot "purely ministerial" and did not trigger the meet-and-confer requirement because the initiative was not proposed by the "governing body." (*Id.* at pp. 910; 916.)

The Supreme Court found it imperative to assure consent as a higher general purpose, even though technically the meet-and-confer requirement was a procedural requirement of the governing body, not possible to achieve by the initiative proponents as citizens. (*Id.* at pp. 918-919.) Technical evasions of public officials, it said, "would seriously undermine the policies served by the [relevant law]." (*Ibid.*) It does not matter that this procedural mandate was statutory. It was a procedural mandate upon public officials, and it applied even though the measure was proposed in citizens' initiative form. Applied here, this means that even if the two-third voter approval requirement on voters *is* a procedural requirement of legislators, it cannot be assumed that a blanket rule eliminates that requirement. Where public policy and voter intent are imperative, they will supersede the general rule that procedural requirements *on legislators* for *their deliberative process* will not be required in the case of a proposal formatted as a citizens' initiative.

C. *Altadena Library*, Among Other Historical Indicators, Demonstrates the Voter Intent in Proposition 218 to Continue the Two-thirds Voter Approval Margin for All Local Special Taxes.

Altadena Library Dist. v. Bloodgood (1987) 192 Cal.App.3d 585 demonstrates historical understanding and voter intent that the two-thirds voter approval margin applies to all local special tax proposals. In this mid-1980s case, "a group of Altadena *citizens*" brought an initiative for a $29 annual parcel tax to restore program operations and to re-open a closed library. (*Id.* at p. 587, emphasis added.) The initiative received a 61.8% vote. Much as the court sympathized with the worthy cause of library funding, it was clear that two-thirds voter approval was required by Article XIII A, section 4 and not attained. This was an understanding based on Proposition 13 alone. (See also *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 203 ["The constitutionality of the requirement for an extraordinary majority [under Prop 13] is not in question."].)

The Supreme Court later approved *Altadena* in *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, where it described the Altadena initiative as "a proposal to impose a special tax for library purposes [which] obtained a majority but not the two-thirds voter approval required by Proposition 13." (*Guardino*, 11 Cal.4th at p. 258.) *Altadena* has never since been

questioned or criticized. It was briefed to the California Supreme Court in *California Cannabis*, but not overturned or even distinguished. Thus, to date, the Supreme Court applies the two-thirds voter approval margin to all special taxes.

Historically, voters have decided, and continued applying the decision, that local special taxes require two-thirds voter approval. This runs from Proposition 13 to date. Further, since the voters are presumed "aware of existing law" when enacting an initiative, *California Cannabis, supra,* 3 Cal.5th at p. 934, they were presumed aware of both *Altadena* and Proposition 13 when they passed Proposition 218 in 1996. Proposition 218, like Proposition 13, requires the two-thirds voter approval margin for passage of a local special tax. At no time did the voters, after the publishing of *Altadena*, declare that special taxes proposed by voter initiative are an exception.

Likewise, before the passage of Proposition 218, came *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264. In *Dublin*, by simple majority, the voters added the Alameda County Waste Reduction and Recycling Act of 1990 known as Measure D, imposing a $6 surcharge on each ton of material deposited in county landfills. "Measure D was enacted by initiative and thus by the citizens of Alameda County." (*Id.* at p. 290, Stein, J., dissenting.) Thus, Measure D can be presumed another example of a true citizens' initiative like the special library tax in *Altadena*. The trial court found Measure D to be a

special tax and thus invalid for lack of a two-thirds vote under Proposition 13. (*Id.* at p. 274.) On appeal, the majority found Measure D to be a regulatory fee instead of a special tax, and so the lack of a two-thirds vote did not invalidate it. But had the trial court's finding stood, so too would the two-thirds voter approval requirement of Proposition 13. (*Id.* at pp. 280-281.) In dissent, Justice Stein noted a relevant objective of Proposition 13 as "the curtailment of government spending." (*Id.* at p. 289.) That objective is present here as well. Moreover, Justice Stein considered the fact that an initiative ordinarily requires only a majority vote — the very argument advanced today by the City in concert with the notion that *California Cannabis* removes citizens' initiatives from Proposition 13 and 218 for all purposes —, but said that in this case of a special tax, it would have required a two-thirds vote under Proposition 13. The court noted county control as a significant reason. (*Id.* at pp. 290.) Similarly here, the Respondents are already controlling the funds of the commercial rents tax. The *Dublin* majority never countered these points though they were raised and foresaw exactly the argument of this case today. Thus, as with *Altadena*, the voters on Proposition 218 were also presumed aware of the law expressed in *Dublin*.

That Respondents now desire a different understanding of the voter approval requirement does not justify changing it through the courts. "The fact that social, economic, and political conditions in this state have undergone

great changes since the adoption of our present Constitution, resulting in an enlargement of the functions of municipal corporations to meet the requirements of changed conditions, would not justify a construction of this provision which would in effect result in its *amendment by the courts and not by the people*." (*Anderson-Cottonwood Irrigation Dist. v. Klukkert* (1939) 13 Cal.2d 191, 197, emphasis added.) Perhaps the political and social preferences of San Francisco are different now than they were in 1978 and 1996, or even were different from the preferences of the statewide electorate in those years, but that does not change the fact that only the voters of California should be altering Propositions 13 and 218 if they so desire.

Proposition 218 continued and strengthened the voter intent to require two-thirds voter approval on all local special taxes. In *Shapiro*, the Court of Appeal took judicial notice of the entire 1996 ballot pamphlet materials on Proposition 218 so as to interpret the class of voters on a special tax proposal requiring the two-thirds vote. (*City of San Diego v. Shapiro, supra,* 228 Cal.App.4th at p. 779, n. 20.) The same text cited by *Shapiro* is applicable here. The Official Title and Summary Prepared by the Attorney General declared that Proposition 218 "*reiterates* that two-thirds [of voters] must approve special tax." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), p. 72, emphasis added.) The voters were given no indication that a citizens' initiative format would trigger a voter approval requirement less than two-thirds. Rather, the language simply

applies to all "special tax." This can be the only conclusion as to the voters' understanding.

In fact, the Supreme Court has cautioned against "consider[ing] Proposition 13 apart from its context and history." (*Kennedy Wholesale, supra,* 53 Cal.3d at p. 249.) The same is true of Proposition 218. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838 ["Proposition 218 is Proposition 13's progeny. Accordingly, it must be construed in context."]; see also *California Cannabis, supra*, 3 Cal.5th at p. 933 ["we first analyze provisions' text in their relevant context, which is typically the best and most reliable indicator of purpose."].) There are simply no grounds for finding any different historical understanding of the voters who implemented Propositions 13 and 218, but that the two-thirds voter approval requirement applies to all special taxes. Consistent with this understanding, even the Legislative Analyst's Office found that all special taxes still require two-thirds voter approval, even after *California Cannabis* and the San Francisco City Attorney's position to the contrary. (AA at 965-968.)

In *Apartment Association*, the Supreme Court said that "because Proposition 218 was designed to close government-devised loopholes in Proposition 13, the intent and purpose of the latter informs our interpretation of the former." (24 Cal.4th at p. 839.) Not only do the historical intents and purposes of Propositions 13 and 218 guide this case, but the City's attempt

here to reduce the voter approval threshold from those constitutional mandates is precisely one such "government-devised loophole."

III

The Politically Crafted Nature of the Initiative: The Trial Court Erred by Ignoring *Boling* Which Governs this Case Because the Commercial Rents Tax was Undisputedly Crafted by Politicians.

The San Francisco City Attorney's extension of *California Cannabis* is an attempt at a "government-devised loophole" to avoid the two-thirds voter approval requirement on a special tax. (*Ibid.*) And it is not a new concept for politicians to seek ways to evade taxation rules. (See *Thomas v. City of East Palo Alto* (1997) 53 Cal.App.4th 1084, 1089, 1091 ["municipalities have an obvious incentive ... to evade those provisions" ... "through the subterfuge of ... labeling such taxes something they are not.".) In this case, the politicians of San Francisco simply re-labeled and re-cast the special tax proposal as a citizens' initiative by gathering the necessary signatures in advance of the election. Helpfully, the day after Appellants filed their complaint, the Supreme Court handed down a decision explaining that public officers may not use citizens' initiatives to avoid duties they must otherwise obey, *Boling v. PERS*, *supra*, 5 Cal.5th 898.

Respondents will argue that the initiative power must be liberally construed, but that means the opposite of allowing politicians to exploit it. Respondents' interpretation would only give politicians *more* power to tax, which is obviously the opposite of voter intent in Propositions 13 and 218. Here, it is undisputed that City powers and resources were used to draft, promote, and support the commercial rents tax (AA at 996-1000) and created public understanding to that effect. (*Ibid.*) In principle and reality, there was no significant difference between this special tax proposal and one placed on the ballot by the Supervisors, except that a number of supportive signatures were pre-gathered.

Boling, discussed earlier to show that procedural requirement normally on the legislators might sometimes also apply to a citizens' initiative, is again critical. As discussed, in *Boling*, San Diego's mayor created a "citizens' initiative" to eliminate traditional pensions for new hires and replace them with 401(k)-style plans. (*Boling*, *supra*, 5 Cal.5th at p. 904.) Mayor Sanders had pursued two pension reforms as a city proposal, but after failing in those endeavors, "chose to pursue further pension reform through a citizens' initiative instead of a measure proposed by the city." (*Ibid.*) He did so expressly to avoid a statutory "meet-and-confer process" he feared would result in "compromises" to his intended reforms (*Ibid.*) He and the city attorney represented themselves as "acting in the public interest, but as private

citizens." (*Id.* at p. 906.) Supervisor Yee, his staff, and the Mayor of San Francisco have represented themselves in precisely the same way as to the commercial rents tax here. (AA at 103, lines 11-12; 676-697; 709, line 3:19; 752-754; 996-1000.) It does not pass muster.

The California Supreme Court found that Sanders had the same duty to satisfy the "meet-and-confer process" whether he crafted the pension reform at issue as a citizens' initiative or a city proposal. The Court called out Sanders for the attempted evasion, finding:

> Mayor Sanders conceived the idea of a citizens' initiative petition reform measure, developed its terms, and negotiated with other interested parties before any citizen proponents stepped forward. He relied on his position of authority and employed his staff throughout the process. He continued using his powers of office to promote the Initiative after the proponents emerged.
>
> (*Boling*, *supra*, 5 Cal.5th at p. 916.)

The Supreme Court saw through this, declaring:

> Allowing public officials to purposefully evade the meet-and-confer requirements of the [relevant law] by officially sponsoring a citizens' initiative would seriously undermine the policies served by the statute.

(*Id.* at p. 918.)

Given that Sanders was "deeply involved"; was "assisting in the signature-gathering effort"; signed ballot arguments as "Mayor Jerry Sanders"; and "used city resources and employees to draft, promote, and support the Initiative," the Court found "[t]he City's assertion that his support was merely that of a private citizen does not withstand objective scrutiny." (*Id.* at p.919.)

Objective scrutiny here leads to the same result. Supervisor Yee was so "deeply involved" in the same ways as Sanders was in *Boling* that the commercial rents tax was never a true citizens' initiative. At best, it was a citizens' initiative abused by politicians for the deliberate purpose of avoiding the two-thirds voter approval margin. The record shows by admission it was the Board's creation. Thus, the two-thirds voter approval requirement is not to be legally evaded without seriously undermining the Constitution and the San Francisco Charter.

The facts here are uncanny in similarity to *Boling*, and stronger since there were two identical Board versions of the commercial rents tax to start. With the exception of the non-substantive introductory and concluding paragraphs, the "citizens' initiative" version of the commercial rents tax is identical to the Board versions in Files #180058 and #180076. (AA at 998.) The Supervisors, with the Mayor and the Controller's Office, supported and developed the tax well before the "citizens' initiative" petition. (AA at 997-

999.) Like Sanders in *Boling*, Supervisor Yee signed his name to the ballot argument as "Supervisor Norman Yee," as did four other Supervisors. (AA at 663-664; 998-999.) He not only assisted with gathering signatures, but gathered the signatures himself. (AA at 752-754; 998.) He signed and submitted the petition to the Department of Elections, completed other facilitating documents, and received correspondence all as "Supervisor Norman Yee" at his City Hall address and telephone number. (AA at 996-998.) He ran the campaign. (AA at 676-697; 999.) And the day after withdrawing his name from the last remaining identical Board version of the tax (Board File #180076), he again referred to the tax as "our legislation" and "Our Proposition," *explaining "the intent of the Board"* to the Ballot Simplification Committee on his Supervisor letterhead. (AA at 120-126; 262-262; 998.) First 5 San Francisco and the Office of Early Care and Education then publicly declared that he and Supervisor Jane Kim had "led the charge." (AA at 1000.) It is beyond question that Supervisor Yee used city resources to attempt to evade the two-thirds voter approval requirement on the commercial rents tax just as Sanders used city resources in *Boling* to evade the meet-and-confer requirement on his pension reform proposal.

Appellants submit that it is impossible for someone in public office to act in their individual capacity with respect to a ballot measure in any regard. But where the title of "Supervisor" is added before one's name, and a public

service address, public service telephone number, and Supervisor letterhead are used before, during, and after the legislative process, it is clear that the tax was never a true citizens' initiative. It was the Board's creation, just as the pension reform was Sanders', and on that additional basis, the two-thirds voter approval requirements of Propositions 13 and 218 applied.

The Board was fully cognizant of this, given that it described the competing Proposition D as "the same tax,"and the "same subject matter," and applied the two-thirds voter approval requirement to it, (AA at 660-670; 995-996), as it has done with all other local special taxes before, in compliance with Propositions 13 and 218. The commercial rents tax here qualifies for no different treatment than any other local special tax.

At hearing, however, the trial court erred by declaring that it would hear no discussion of whether City Supervisors sought to evade the two-thirds voter approval margin of Propositions 13 and 218. (RT at pp. 6:21-9:15.) Specifically, the trial court erred by distinguishing *Boling* as a purely statutory matter. It is true that *Boling* did not specifically consider Propositions 13 or 218, but the Supreme Court cast down an obvious attempt to evade a duty by the same tactic used here: turning a political initiative into a voter initiative.

The Supreme Court has called out obvious intentional evasions of both statutory and constitutional duties. In *Boling*, it looked to the local government's apparent purpose of evading a statutory duty under the Meyers-

Milias-Brown Act. In *Rider v. County of San Diego* (1991) 1 Cal.4th 1, it pointed out the local governments' apparent purposes of evading Proposition 13 itself. Clearly, the Supreme Court does not approve of deliberate evasions of Proposition 13, and does not approve of using citizens' initiatives as end-runs.

In *Rider*, the court analyzed "the validity of a taxation scheme enacted for the *apparent* purpose of avoiding the super-majority voter approval requirement imposed by a 1978 initiative measure (Prop. 13) with respect to any 'special taxes' sought to be imposed by 'cities, counties and special districts,' [citing Cal. Const., art. XIII A, § 4]." (1 Cal.4th at p. 5, emphasis added.) Whether San Francisco's Supervisors had an apparent purpose to avoid Propositions 13 and 218's super-majority vote requirements for the special tax in this case should be treated no differently.

In fact, *Rider* begins by noting that the question of "a taxation scheme enacted for the apparent purposes of avoiding the super-majority voter approval requirement" was a question raised but left open in *Los Angeles County Transportation Com. v. Richmond*. (31 Cal.3d. at p. 208 [court noted, but did not need to reach, the issue of whether "wholesale avoidance of the purpose of article XIII A" would occur, "allowing them to adopt a 'special tax' by majority vote" ... "We cannot assume that the Legislature will attempt to avoid the goals of article XIII A by such a device. In any event, that problem can be dealt with if and when the issue arises."].) The question arose formally in *Rider*,

and now here.

In *Rider*, the County of San Diego declared approval of a sales tax for construction of justice facilities on 50.8% voter approval. To do so, it had created a special agency it claimed to be exempt from Proposition 13's two-thirds voter approval requirement on the grounds that it was not a "special district" under Proposition 13. The trial court found "Proposition 13 has been purposefully circumvented," and invalidated the sales tax. (1 Cal.4th at p. 8.) The Court of Appeal reversed, even though it too found the agency to be nothing but an "empty shell." (*Ibid.*) As here with the San Francisco Board of Supervisors' commercial rents tax proposal, the County Board of Supervisors in *Rider* had likewise contemplated the sales tax before the election at issue. (*Id.* at p. 9.) The Supreme Court reversed the Court of Appeal, finding that the agency was a "special district" under Proposition 13 because "[t]o hold otherwise clearly would create a wide loophole in Proposition 13." (*Id.* at p. 10.) So by answering the question left open in *Richmond* as to whether a taxation scheme could deliberately evade Proposition 13's two-thirds voter approval requirement, the Supreme Court discussed whether the agency created was the "alter ego" of the County. (*Id.* at pp. 10-12.) It found "the evidence that the Agency was created to raise funds for county purposes and thereby circumvent Proposition 13 was strong," and provided several factors for determining whether the County had "essential control," which provides

one manner of "inferring an intent to circumvent Proposition 13." (*Id.* at pp. 11-12.) In this case, the Board created the citizens' initiative, so like "formation of the agency" in *Rider*, the tax proposal here was formed by the Board. Inferring intent to circumvent Proposition 13, and now also Proposition 218, is easily done given the Board formation and involvement presented as undisputed material facts. The parties agree that the tax is a special tax. (AA at 995.) Therefore, the intent to circumvent the two-thirds voter approval requirement is all that need be recognized.

The liberal construction of Proposition 13 in *Rider* was then consistent with what the voters approved again five years later: Proposition 218, which specifically included a liberal construction clause. Justice Kruger reminded in *California Cannabis*: "Proposition 218 instructs that its provisions must 'be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.'." (3 Cal.5th at p. 957, Kruger, J., dissenting, citing Prop. 218, § 5, reprinted at Historical Notes, 2B West's Ann. Cal. Const. (2013 ed.) foll. art. XIII C, § 1, p. 363.) While the majority in *California Cannabis* applied liberal construction to assert that the citizens' initiative therein should have been set for the soonest possible election date under then-statutory law, liberal construction here leads only to the conclusion that the two-thirds voter approval requirement applies to all special taxes. Liberal construction enhancing taxpayer consent assures that more taxpayer

consent is necessary where some members of the public will be burdened with providing a benefit to a select group of others. Reducing the voter approval threshold to a simple majority would reduce the need for taxpayer consent.

IV

The Absurd Result: The Law does not Favor Absurd Results, but the Trial Court's Decision Produces One — a Three-tiered System of Approval Margins on Local Special Taxes: Two-Thirds, Simple Majority, and No Vote at All. This System Creates Grounds for Abuse Across California.

As with all constitutional provisions, absurd results should be avoided with Propositions 13 and 218. '"The literal language . . . may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers . . .' and the language used must 'receive a liberal, practical common-sense construction...'" (*Los Angeles County Transportation Com. v. Richmond* , *supra*, 31 Cal.3d at p. 203, citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization*, *supra*, 22 Cal.3d at pp. 245-246.) Respondents contend that the continued application of the two-thirds voter approval requirement is an absurd result, while Appellants contend that creation of a three-tiered system would be the absurd result.

Respondents' contention, as the trial court found based on *California*

Cannabis, is that "the 'procedural' two-thirds vote requirement in articles XIII A, section 4, and XIII C, section 2(d) of the California Constitution that limit the Board of Supervisors' authority to impose new taxes does not apply to the voters' initiative power, either directly under those provisions or indirectly under the San Francisco Charter." (AA at 1039, Order at p. 8:19-22, emphasis added.) First, this is beyond the holding of *California Cannabis*. Second, it produces an absurd three-tiered system of voter approval margins that no voter on Proposition 13 or 218 could have intended.

The trial court's application of *California Cannabis* rests on its notation that "the Court concluded that "local government" as that term is used in article XIII C does not include the electorate." (AA at 1036, Order at p. 5: 10-11.) In other words, since these portions of Propositions 13 and 218 refer to "local government," the two-thirds voter approval requirement does not apply to a citizens' initiative. As to this case, however, this is inapplicable dicta because the issues actually involved and actually decided were not those to be decided here. So the Respondents' arguments are a speculative extension, not an application, of *California Cannabis*.

Even Supreme Court cases may not be used to extend rules beyond their reach. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 [supreme court decision regarding right to recover attorney fees under Civil Code section 1717 in context of contract law inappropriately extended to actions sounding in tort,

even though both involved voluntary pretrial dismissals, because attorney fees under tort law were not considered, citing *Childers v. Childers* (1946) 74 Cal.App.2d 56, 61 and *Trope v. Katz* (1995) 11 Cal.4th 274, 284; *People v. Knoller* (2007) 41 Cal.4th 139, 155 [court of appeal erred in relying on two supreme court cases for applicable definition of "implied malice" because they did not encompass the question of the instant case, whether implied malice (as a mental state) could be based on awareness of risk of serious bodily *injury* rather than only on risk of *fatality*, even though both cases involved murder, because the two cases defined implied malice in the context of an act instead of in the context of a mental state].) In other words, supreme court holdings may not be applied outside their context, and context is narrowly construed. Even an exact phrase such as "implied malice" may carry different definitions in different contexts or sub-contexts.

Here, like the phrase "implied malice," one cannot extend the phrase "local government" to local special tax procedures, no less to voter approval requirements because *neither* was *California Cannabis's* context. *California Cannabis*'s context was a local group of citizens (not politicians) seeking to put a general tax (not a special tax) to special election as soon as possible. The Supreme Court focused on the duty "to act expeditiously on initiatives." (*Id.,* 3 Cal.5th at p.935, citing *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.) It expressly did *not* decide any voter approval

threshold questions. It even noted, "[w]e decline to take up what would happen" if a "hypothetical city council" were to "collude with a public employee union to place a levy on the ballot as a means of raising revenue for a goal supported by both," and if "the city council [were to] meet with the union, and [if] the union [were to] mobilize city employees[2] to collect signatures on an initiative proposing the tax increase." (*California Cannabis, supra,* 3 Cal.5th at p. 947.) So before *Boling*, any speculation as to such scenarios could not be useful to the Respondents here, and existing law was binding. In *California Cannabis*, the Supreme Court made it clear that it did not decide the issue posed by City politicians here and now. The negative tone presages that such a tactic would fail, but the Supreme Court expressly declined to formally say so until *Boling*.

If dicta from *California Cannabis* shall be applied to this case, however, the Supreme Court's clear distaste for political end-runs around the will of the people supports invalidation of the commercial rents tax. Citing the Proposition 218 ballot materials in its discussion of "local government," the Supreme Court quoted them as follows: "['Proposition 218 simply gives taxpayers the right to vote on taxes and stops *politicians'* end-runs around Proposition 13' (italics added)]." (*California Cannabis, supra*, 3 Cal.5th at p. 940.)

---

[2]It's worth noting that this hypothetical does not even assume the city council member would collect the signatures himself like Supervisor Yee did here. It only assumes that city council members will direct a union to direct its employees to collect signatures.

So whatever "local government" is argued to mean in *this* case, it could not mean that politicians can circumvent Proposition 13 or 218.

California Cannabis's closest reference to the two-thirds voter approval requirement for a special tax actually *supports* the conclusion that it would not be reduced, even for a true citizens' initiative. In fact, the opinion's only mention of the voting requirement is that "the voters explicitly imposed a procedural two-thirds vote requirement *on themselves* in article XIII C, section 2, subdivision (d)." (*California Cannabis, supra,* 3 Cal.5th at p. 943, emphasis added.) This dicta would indicate that the two-thirds voter approval requirement remains enforceable in the minds of the opinion's majority. Justice Kruger's dissent at footnote 7 (*Id.*, 3 Cal.5th at p. 956, n. 7) confirms that the opinion does not set forth any new rule to apply to a voter approval threshold question even if properly presented, because the implications have been neither presented nor properly discussed. In short, the voter approval margin on a special tax was not involved, decided, or even thoroughly discussed in *California Cannabis.*

Following the trial court's non-liberal construction of constitutional mandates, however, there will be three different voter approval thresholds. Special taxes proposed by "local government" only will require two-thirds voter approval to pass. Of special taxes proposed by citizens' initiatives — even those controlled by politicians — some will require simple majority.

(Elec. Code, § 9217.) And some will require no vote at all. (Elec. Code, § 9215; see also *California Cannabis, supra,* 3 Cal.5th at p. 947 ["Once enough signatures are collected-15 percent under section 9214 or 10 percent under section 9215-the city council could simply adopt the ordinance without submitting the tax increase to the voters. Thus, the city council could effectively skirt article XIII C, section 2, subdivision (b)'s command..."].) This is obviously not consistent with the "spirit" of Proposition 13 per *Rider,* 1 Cal.4th at p. 14, nor the liberal construction clause of Proposition 218 that taxpayer consent be enhanced and local government revenues limited. In fact, it would entirely gut the two-thirds voter approval requirement of Propositions 13 and 218 as more and more local governments catch on. And once the simple majority method is approved, it will lay the groundwork for no vote at all under Elections Code section 9215. This is an absurd result.

/ / /

/ / /

/ / /

/ / /

Conclusion

For the reasons above, the trial court's granting of the City's cross-motion for summary judgment should be reversed, and its denial of the Plaintiffs' cross-motion for summary judgment should be reversed. The special tax must be invalidated for lack of two-thirds voter approval according to Propositions 13 and 218.

DATED: December 16, 2019

Respectfully submitted,

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/ Laura E. Dougherty
LAURA E. DOUGHERTY
Counsel for Appellants

Word Count Certification

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached brief, including footnotes, but excluding the caption page, tables, the application to file, and this certification, as measured by the word count of the computer program used to prepare the brief, contains 8,508 words.

DATED: December 16, 2019

/s/ Laura E. Dougherty
LAURA E. DOUGHERTY
Counsel for Appellants

STATE OF CALIFORNIA California Court of Appeal, First Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, First Appellate District

Case Name: **Howard Jarvis Taxpayers Association et al. v. City and County of San Francisco**
Case Number: **A157983**
Lower Court Case Number: **CGC18568657**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **laura@hjta.org**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF - APPELLANTS OPENING BRIEF	Appellants' Opening Brief
APPENDIX - APPELLANTS APPENDIX	Appellants' Appendix Volume 1 of 4, Pages 0001-0283 of 1057
APPENDIX - APPELLANTS APPENDIX	Appellants' Appendix Volume 2 of 4, Pages 0284-0570 of 1057
APPENDIX - APPELLANTS APPENDIX	Appellants' Appendix Volume 3 of 4, Pages 0571-0749 of 1057
APPENDIX - APPELLANTS APPENDIX	Appellants' Appendix Volume 4 of 4, Pages 0571 of 0749 of 1057

Service Recipients:

Person Served	Email Address	Type	Date / Time
Laura Dougherty Howard Jarvis Taxpayers Association 255855	laura@hjta.org	e-Serve	12/16/2019 4:54:22 PM
Wayne Snodgrass San Francisco City Attorney's Office 148137	wayne.snodgrass@sfcityatty.org	e-Serve	12/16/2019 4:54:22 PM
Clerk of the Court	San Francisco Superior Court, 400 McAllister Street, Room 103 San Francisco, CA 94102	Mail	12/16/2019 4:54:22 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/16/2019

Date

/s/Kiaya Heise

Signature

Dougherty, Laura (255855)

Last Name, First Name (PNum)

Howard Jarvis Taxpayers Foundation

Law Firm