Citizens for Fair REU Rates v. City of Redding

S224779

Supreme Court of California

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Reporter
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Citizens for Fair REU Rates, et al., Plaintiffs and Appellants vs. City of Redding, et al., Defendants and Respondents. Fee Fighter LLC, et al., Plaintiffs and Appellants vs. City of Redding, et al., Defendants and Respondents.

Type: Petition for Appeal

Prior History: Of a Published Decision of the Third Appellate District, Case No. C071906. Reversing a Judgment of the Superior Court of the State of California for the County of Shasta, Case No. 171377 (Consolidated with Case No. 172960). Honorable William D. Gallagher, Judge Presiding.

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Title

Petition for Review

Text

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

The City of Redding respectfully petitions for review of a published opinion of the Court of Appeal.

QUESTIONS FOR REVIEW

INTRODUCTION

This case presents an opportunity to answer significant questions pending in many lower courts considering Proposition 26. That 2010 initiative amendment to our California Constitution newly defines all revenue measures ″imposed″ by local governments as taxes requiring voter approval, with seven stated exceptions. (Cal. Const, art. XIII C, § 2, subd. (e).) It defines revenues imposed by the State as taxes requiring two-thirds approval of each legislative chamber, with **[*3]** five exceptions worded nearly identically to those provided for local government. (Cal. Const., art. XIII A, § 3, subd. (b).) [2]

Over Justice Duarte's dissent, the published opinion of the Third District (″the Opinion″) applies Proposition 26 to invalidate a payment in lieu of taxes (″PILOT″) first legislated by the Redding City Council in 1988 and last amended in 2005. This case raises important issues under Proposition 26, including:

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[2] There are very minor differences between article XIII C, section 1, subdivisions (e)(1) - (5) and XIII A, section 3, subd. (b)(1) - (5). None is material here.

- whether the measure prospectively invalidates earlier legislation affecting the cost of government services,
- the meaning of ″reasonable cost of service″ - which also appears in Proposition 218 (art. XIII D, § 6, subd. (b)(1) & (b)(3))- and
- remedies for violation of either measure.

Further, although this Court does not review mere error, the published Opinion contains numerous factual **[*4]** and legal errors - uncorrected on denial of competing petitions for rehearing. It has already been criticized by the Second District. (*Jacks v. County of Santa Barbara* (Feb. 26, 2015, No. B253474) Cal.App.4th (″*Jacks*″).) These facts counsel against delaying review to allow these issues to further develop in the lower courts. Absent review, the Opinion will mislead lower courts, the State, and local governments and waste public resources in duplicative litigation affecting many agencies - including 42 listed in footnote one to Justice Duarte's dissent which collectively represent the entire public power industry in California and which serve the great majority of its people.

The Opinion elevates form over substance by hinging its conclusion on the City's adoption of the PILOT by budget resolution rather than ordinance. Accordingly, under the Opinion, application of Proposition 26 depends on the form rather than the substance of earlier legislation. The Opinion assumes - without analysis of the language or intent of the City's legislation - the PILOT was temporary because it was included in recurring budget resolutions, despite uncontroverted evidence the **[*5]** City Council intended the PILOT to be permanent. This overlooks the canon of construction that re-adoption of legislative language is construed to continue earlier legislation, not to re-adopt it. The Opinion concludes the PILOT expired with the budget in effect on Proposition 26's effective date. Thus the Opinion invents a new rule of legislative formalism that will have widespread impacts for both State and local governments; for the construction of Proposition 26 and related Propositions 13, 62 and 218; and for the application of other constitutional amendments or preemptive legislation.

The Opinion's conclusion also disserves the plain intent of voters to grandfather pre-Proposition 26 legislation. By the Opinion's logic, many state and local laws that increase utility costs by subsidizing rates for the poor and the elderly - or requiring safety or environmental protections - do not survive Proposition 26, despite ballot argument assurances to the contrary.

The Opinion also clouds the meaning of ″reasonable cost of service″ under Proposition 26. (Cal. Const., art. XIII C, § 1, subds. (e)(1) - (3).) The Dissent concludes a PILOT is a reasonable cost of publicly-owned utility **[*6]** service, just as privately-owned utilities pay property taxes under Proposition 13. The Opinion holds otherwise, and erroneously concludes the PILOT itself must recover costs paid by the electric enterprise fund, as opposed to the cost of municipal services provided by the general fund.

The case also asks: under what circumstances is a charge for a government benefit or service ″imposed″ so as to trigger Proposition 26 - or Proposition 218, which uses the same term? The Opinion erred in finding that wholesale transactions between sophisticated entities with multiple power sources are subject to the same cost-of-service limitations of Proposition 26 as retail rates paid by customers who have no practical alternative to the City's utility. This published holding will have widespread impact on public power - effectively ceding that market to private parties unconstrained by Proposition 26.

Finally, this case presents the first opportunity to consider remedies under Proposition 62.

These questions are vital to the State and local governments alike. Moreover, each is pending in many lower courts. Review will allow this Court to authoritatively resolve these questions for the benefit **[*7]** of litigants, courts, and policymakers through California.

STATEMENT OF FACTS

From 1971 to 1988, the City implemented an operating transfer from Redding Electric Utility (″REU″) to the City's general fund. This was a fixed amount established by budget; unlike a PILOT, which is calculated like a property tax as a

percentage of the value of utility assets. (II AR Tab 37, p. 358; II AR Tab 42, pp. 379-380; III AR Tab 111, p. 640.) [3] The transfer was intended to compensate the general fund for benefits and services to the utility (for which a private utility would pay via property taxes and franchise fees for use of public rights of way) in addition to services not provided to a private utility, such as billing, finance, and fleet maintenance. (II AR Tab 37, p. 358; I AR Tab 5, p.133.)

The City Council replaced the operating transfer with a PILOT upon adoption of the FY 1988-1989 budget. (II AR Tab 28, p. 319; **[*8]** III AR Tab 111, p. 640.) The PILOT was initially calculated by valuing REU's property, subtracting depreciation, and multiplying the result by Proposition 13's one percent property tax rate. (II AR Tab 42, p. 380.) The PILOT was amended to reflect evolving accounting practices three times - in 1991 (II AR Tab 70, pp. 446-447; II AR Tab 72, p. 450), 2001 (III AR Tab 126, pp. 693-694; III Tab 134, p. 738), and in 2005 (2 CT 530). The City has since implemented the PILOT without change.

In December 2010, the City Council adopted Resolution No. 2010-179 to increase electric rates by 7.84 percent, effective January 2011, and by another 7.84 percent effective December 2011. (IV AR Tab 163, p. 1041.) Although the utility's costs to generate electricity had increased significantly in earlier years; the City deferred rate increases, depleting reserves. (III AR Tab 140, pp. 797-800; IV AR Tab 159, p. 1031.) As a result, reserves fell significantly and staff warned that failure to raise raises would harm REU's credit rating and increase its borrowing costs. (IV AR Tab 165, p. 1060; IV Tab 166, p. 1077-1078.) Staff also recommended rate increases to reflect escalating costs and to honor **[*9]** bond covenants to maintain rates and cash reserves sufficient to ensure debt repayment. (IV AR Tab 158, p. 1028; IV AR Tab 159, pp. 1031-1033.)

The 2010 rate increases did not change the PILOT in any way. (TV AR Tab 163, p. 1041.) Nor were those increases necessary to fund the PILOT - REU's non-rate revenues are three to four times the PILOT amount. (IV AR Tab 145, p. 831; IV AR Tab 149, p. 873.) Thus, the PILOT can be funded from non-rate revenues. (IV AR Tab 145, p. 831; IV AR Tab 149, p. 873; XIII AR Tab 205, p. 2975.)

PROCEDURAL HISTORY

A. Two Writ Petitions

On February 4, 2011, Citizens for Fair REU Rates, an unincorporated association, sued the City and City Council of Redding (collectively, ″City″) in mandate and for declaratory and injunctive relief (Case No. 171377, ″Rate Case″), alleging rates adopted by Resolution No. 2010-179 are ″taxes″ requiring voter approval under Proposition 26 due to their inclusione of the PILOT. (1 CT 2.)

On August 29, 2011, Feefighter, LLC, a for-profit entity owned by Citizens' counsel, filed a second suit (Case No. 172960, ″Budget Case″) alleging Resolution No. 2011-111, which adopted the City's FY 2011-2013 budget, illegally **[*10]** reflected PILOT revenues and therefore violated Proposition 26. (2 CT 498.)

B. Trial Court Proceedings

The Superior Court tried the Rate Case November 8, 2011, ruling for the City. (3 CT 709.) The court concluded the PILOT was neither created nor altered by the December 2010 rate increase; Proposition 26 therefore does not apply to the PILOT, and cannot invalidate the rate increase. (3 CT 711.)

The court consolidated the two cases on February 2, 2012. (3 CT 719.)

On July 13, 2012, the Court issued judgment for the City in both cases. (3 CT 750.) The trial court concluded Proposition 26 does not apply retroactively to the PILOT, adopted in 1988. (3 CT 736, 739.) The trial court also concluded the PILOT is a lawful cost of service not displaced by Proposition 26. (3 CT 734-737.) [4]

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[3] Citations to the Administrative Record are in this form: [Volume] AR Tab [#], p. [#].

[4] A copy of the June 22, 2012 Memorandum of Decision is attached to this brief pursuant to California Rules of Court, rule 8.504, subd. (e)(1)(B).

Citizens for Fair REU Rates **[*11]** and Feefighter, LLC (collectively, ″Citizens″) appealed both judgments on August 20, 2012. (3 CT 760.)

C. The Opinion

The Opinion accepts the trial court's conclusion that Proposition 26 does not apply retroactively to local government charges adopted before its November 2010 effective date. (Opinion at p. 3.) [5] However, the Opinion determined the PILOT was subject to annual reauthorization by the City Council (*ibid.*), [6] and thus the PILOT grandfathered by Proposition 26 was the one adopted by the FY 2009-2011 budget - except any PILOT increase that may have resulted from the December 2010 rate increase. (Opinion at pp. 19-20.) The Opinion is thus ambiguous as to whether the PILOT became subject to Proposition 26 with the December 2010 rates (*ibid.*) or the June 2011 budget adoption. (Opinion at p. 19.) The City's petition for rehearing noted the ambiguity - to no effect. (Petn. for Rehg. at pp. 9-10.)
[*12]

The Opinion concludes the PILOT reflected in FY 2011-2013 and subsequent budgets is new, post-Proposition 26 legislation and therefore a tax requiring voter approval unless the City demonstrates it is limited to cost of service as article XIII C, section 1, subdivision (e)(2) requires. (Opinion at p. 20.) The Opinion declines to address whether the PILOT reflects a reasonable cost to the City for services to REU, and remands that issue for trial. (Opinion at pp. 20-23.) Citizens' petition for rehearing objected to that remand to no avail. (Citizens Petn. for Rehg. at pp. 2-12.) Finally, the Opinion rejected the trial court's factual finding that the PILOT is funded by non-rate revenues, without explanation why the PILOT must be viewed as funded by rates. (Opinion at p. 14.) The Opinion rejected the City's contention that prices for its wholesale **[*13]** power sales are not ″imposed″ under Proposition 26. (Opinion at p. 14.) The City unsuccessfully sought rehearing on this issue, too. (Petn. for Rehg. at pp. 10-11.)

D. The Dissent

Justice Duarte dissented (″Dissent″), agreeing with the Opinion's conclusions the PILOT was readopted after November 2010 and therefore subject to Proposition 26. (Dissent at p. 2.) However, she concluded the PILOT is a ″reasonable″ cost allowed by article XIII C, section 1, subdivision (e)(2) because it reflects the property tax on private utilities limited by Proposition 13. (Dissent at p. 2.) As property taxes may be funded by rates of regulated private utilities, a public utility may do the same under Proposition 26. (Dissent at p. 4.) The Dissent finds ″legally-compelled″ the trial court's conclusion the PILOT is a reasonable cost of service under article XIII C, section 1, subdivision (e)(2). (Dissent at pp. 4-5.)

E. Denial of Both Petitions for Rehearing

Both parties sought rehearing. The City identified factual errors, misstatements of the City's arguments, and errors of law. Citizens objected to remand and to the conclusion the PILOT models the property tax. The Court of Appeal denied **[*14]** both petitions on February 19, 2015 and ordered the Opinion modified to address one of the City's legal arguments and to correct a typographical error, but without change in judgment. This timely Petition follows.

I. REVIEW IS NECESSARY TO RESOLVE IMPORTANT QUESTIONS AFFECTING THE STATE AND ALL LOCAL GOVERNMENTS

The Opinion addresses important questions that affect every legislative body's power to make or maintain revenue measures under Propositions 13, 218, and 26. It misstates settled law, the facts of the case, and misinterprets Proposition 26. Review is necessary to correct these errors. Moreover, this Court should not await further appellate authority before addressing these questions, because the Opinion provides lower courts inappropriate guidance on pressing public finance

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[5] As required by California Rules of Court, rule 8.504, subd. (e)(1)(A), copies of the Opinion and the Dissent are attached to this brief, along with the Order Denying Rehearing.

[6] The Opinion contains a factual error on this point, in that the City's budgets are adopted every two years. This error was brought to the Court of Appeal's attention in the City's Petition for Rehearing. The modified Opinion maintains the error.

matters affecting not only the public power industry, but all state and local rate-making. Thus the Opinion's errors must be corrected now to avoid unnecessary disruption and litigation that may take years to resolve.

A. Guidance Is Needed on Retroactive Application of Proposition 26

Nearly all publicly owned utilities provide general fund support like that challenged here. (See Brief **[*15]** of Amicus Curiae California Municipal Utility Association ("CMUA Brief") at pp. 6-7; See also Dissent at p. 1, fn. 1.) Such transfers are so common the Legislature requires:

> All city-owned electric utilities shall report on the periodic bill the amount expected to be transferred from the utility to the general fund, and to any special funds, of the city on a no less than annual basis.

(Pub. Util. Code, § 9606.)

Electric utilities must also comply with many other legislatively imposed costs, including environmental regulation, safety requirements, and greenhouse-gas-reduction goals. Most were legislated before Proposition 26's adoption in 2010, but - because that measure limits rates for public services to the cost of service - continued vitality of these laws depends on whether Proposition 26 applies to pre-existing legislation.

It is plain that Proposition 26 is not retroactive as to local governments. [7] All four judges to review this case - the trial court, the majority and the dissent - agree on this point. (3 CT 736, 739; Opinion at p. 17, citing *Brooktrails Township CSD v. Board of Supervisors (2013) 218 Cal.App.4th 195, 205-207;* see **[*16]** also Dissent at p. 2, fn. 2.) However, it is less clear whether rate-making after Proposition 26 may account for costs to comply with legislation that predates it - the facts here. Thus, the State and all local governments need guidance as to the continuing validity of those earlier laws.

Grandfathered costs under Proposition 26 are disputed in many lower courts. To cite but two significant examples:

- 2006's A.B. 32, the greenhouse gas law, is subject to a Proposition 26 challenge to fees imposed by the California Air Resources Board to implement the law. (See Motion for Judicial Notice ("MJN"), Exh. A at pp. 44-64 [8] [Opening Brief in*California Chamber of Commerce v. California Air Resources Board,* Third District Court of Appeal Case No. **[*17]** C075930]; see also MJN, Exh. B at pp. 132-137 [Appellant's Opening Brief in *Morning Star Packing Co. v. California Air Resources Control Board,* Third District Court of Appeal Case No. C075954.)
- California's gun registration fees under Penal Code section 28225 are challenged as exceeding the cost of regulation under art. XIII A, § 3, subd. (b)(3). (MJN, Exh. C, at p. 155 [2nd Amended Complaint in*Bauer v. Harris,* E.D. Cal. Case No. 11 CV 01440].)

Thus, guidance on the scope of Proposition 26 will assist resolution of important questions pending in lower courts, secure uniformity of decisions among the appellate courts, and save myriad governments fees to litigate these and the cases predicted by the Dissent's footnote one.

Application of Proposition 26 to legislatively-imposed costs that predate it would prohibit using rate revenue to fund:

- programs **[*18]** to reduce greenhouse gases under 2006's A.B. 32 (Health & Saf. Code §§ 38550-38551);
- "green" power development (Pub. Util. Code § 387.5);
- solar energy mandates (Pub. Resources Code §§ 25780 et seq.);
- renewable energy mandates (Pub. Util. Code § 399.11); and,
- discounted rates for the poor and elderly.

(IV AR Tab 142, p. 817; IV AR Tab 145, p. 830; IV AR Tab 148, pp. 869-870.)

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[7] Article XIII A, section 3, subdivision (c) provides limited retroactivity as to the State. Article XIII C, section 1, subdivision (e) provides no similar language as to local government - suggesting no retroactivity as to local government was intended.

[8] Citations to the MJN exhibits are to Bates-stamped pagination, not original document pagination (e.g., MJN00044-MJN00064).

In short, any government agency that has legislatively mandated costs to achieve public policy goals beyond the cost of generating, transmitting, storing and distributing power - or the comparable costs of other government services - needs guidance whether that legislation survived Proposition 26. Thus Proposition 26's retroactivity is of wide-spread and immediate importance and affects dozens of laws of pressing social and environmental import.

B. Guidance Is Needed on the ″Reasonable Costs″ Standard of Articles XIII A and XIII C and the ″Proportionate Cost″ Standard of Article XIII D

Article XIII A, section 3, subdivision (b)(2) and article XIII C, section 1, subdivision (e)(2) refer identically to ″reasonable costs″ of services. However, there is yet no case interpreting **[*19]** that Proposition 26 standard. Proposition 218 imposes an analogous burden on property related fees via article XIII D, section 6, subdivisions (b)(1) and (b)(3).

Proposition 26's ″reasonable cost″ requirement could be the Proposition 13 standard applied in *Sinclair Paint Co. v. Board of Equalization (1997) 15 Cal.4th 866.* That case and its progeny-recognize that the distinction between a regulatory fee and a special tax turns on whether a payor's charge bears a fair and reasonable relationship to that payor's burdens on or benefits from the regulated activity. (*Id. at p. 878,* citing *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist (1988) 203 Cal.App.3d 1132,1145-1146.)* The few cases interpreting Proposition 26 to date have noted that its article XIII A, section 3, subdivision (d) and final, unnumbered paragraph of article XIII C, section 1, subdivision (e) are paraphrases of *Sinclair Paint.* (See, e.g. *Schmeer v. County of Los-Angeles (2013) 213 Cal.App.4th 1310,1326* [citing *Sinclair Paint* to construe Proposition 26].) However, Proposition 26 was a reaction to *Sinclair Paint* **[*20]** and intended to alter its rule in some respects. (*Id.* at p. 1322; see also 1 CT 276 [legislative analyst's summary of Prop. 26].)

Thus, if the *Sinclair Paint* reasonableness standard applies under Proposition 26, as *Schmeer, supra,* Cal.App.4th 1310 suggests - and Justice Duarte would hold here - charging Redding's electric utility for general governmental services via a PILOT measured by the property tax investor-owned utilities pay is ″fair and reasonable,″ and the PILOT is a lawful cost of service. (Dissent at pp. 4-5.)

What constitutes adequate record evidence showing rates do not exceed the proportional cost of services as demanded by Proposition 218 (art. XIII D, § 6, subd. (b)(3)) confounds rate makers and courts. Because Proposition 26 was intended to build upon Proposition 218 (*Schmeer, supra, 213 Cal.App.4th at p. 1322),* the two are in pari materia and decision here will assist resolution of Proposition 218, too.

Proposition 218 disputes abound as well, and include:

- *City of Palmdale v. Palmdale Water Dist (2011) 198 Cal.App.4th 926* [insufficient record to show tiered retail water rates reflect proportional **[*21]** cost of service];
- *Capistrano Taxpayers Assn. v. City of San Jan Capistrano* [4th DCA No. G048969, testing same issue] (MJN, Exh. D at p. 163 (Appellant's Opening Brief));
- *Glendale Coalition for Better Government v. City of Glendale* [L.A. Super. Ct. No. BS153253, testing same issue] (MJN, Exh. E at p. 252 (Complaint));
- *Sweetwater Authority Ratepayers Association, Inc. v. Sweetwater Authority* [San Diego Super. Ct. No. 37-2014-00029611-CM-MC-CTL, testing same issue] (MJN, Exh. F at p. 280 (Complaint));
- *City of San Buenaventura v. United Water Conservation District* [2d DCA No. B251810, testing the same issue as to groundwater augmentation charges] (MJN, Exh. G at p. 302 (Respondent's Brief));
- *Great Oaks Water Co. v. Santa Clara Valley Water District* [Sixth Appellate District Case No. H035885, same] (MJN, Exh. H at p. 452 (Amicus Brief));

Capistrano, Ventura, and *Great Oaks* were submitted by separate panels of the 2nd, 4th and 6th District Courts of Appeal since December.

Further, a very recent decision construes Article XIII C, section 2's requirement for voter approval of ″taxes″ as applied to a city's franchise **[*22]** fee on a private power utility. *Jacks, supra,* Cal.App.4th . It is significant here for a further reason

- it expressly criticizes and declines to follow the Opinion as to Proposition 218's application to charges associated with electric service. (*Id*., Slip Op. at 5 & fn. 4.)

These four Proposition 218 cases - *Capistrano, Ventura, Great Oaks,* and *Jacks* - will all be decided within a few weeks and it seems unlikely these decisions can inform one another. This creates a risk of confusing, uncoordinated decisions. Thus, review here can inform developments under Proposition 218, too, to the extent Articles XIII C and XIII D impose similar cost-of-service requirements.

C. Guidance Is Needed as to When Revenue Measures Are ″Imposed″ so as to Trigger Propositions 218 and 26

Propositions 218 and 26 apply to revenue measures ″imposed″ by government. (Cal. Const., art. XIII C, § 2 and art. XIII D, § 6 [Prop. 218]; Cal. Const., art. XIII A, § 3 and art. XIII C, § 1, subd. (e) [Prop. 26].) The meaning of that term is therefore crucial to governments' authority to fund services. However, there is little case authority on this issue, the text **[*23]** is silent, and legislative history opaque. *Citizens Ass'n of Sunset Beach v. Orange County Local Formation Com'n (2012) 209 Cal.App.4th 1182* ruled that ″impose″ as used in Proposition 218 ″refers to the first enactment of a tax, as distinct from an extension through operation of a process such as annexation″, (at p. 1194) That framework is unhelpful as to other disputes under Proposition 218.

Litigants commonly cite *Ponderosa Homes, Inc. v. City of San Ramon (1994) 23 Cal.App.4th 1761* which interprets ″impose″ as used in the Fee Mitigation Act (Gov. Code § 66000 et seq.): ″The phrase 'to impose' is generally defined to mean to establish or apply by authority or force, as in 'to impose a tax.'″ (*Ponderosa Homes, supra, 23 Cal.App.4th at p. 1770.)* Under this view, voters' intended Propositions 26 and 218 to reach only fees which government requires someone to pay, either by ″authority or force,″ or by the absence of alternatives to the service for which a fee is charged.

The Opinion concludes Redding's retail power customers lack viable alternatives to its electric service, despite the City's reference to solar, wind and other sources. **[*24]** (Opinion at p. 13.) However, the Opinion goes further to apply Proposition 26 to voluntary transactions between sophisticated wholesale power customers - like Enron and other public- and investor-owned utilities - which participate in a free market for power, and choose to purchase it from REU on terms negotiated at arm's length. (Opinion at p. 14.) The trial court concluded the PILOT was not funded from retail rates, but could be funded three times over from wholesale revenues -which are not subject to constitutional limitations. (See 3 CT 741 [trial court Memorandum of Decision].) The Opinion rejected that finding without analysis, suggesting it is irrelevant. (Opinion at P-14.)

The Opinion's refusal to distinguish retail from wholesale rates dramatically expands the reach of Propositions 218 and 26, far beyond what the text or legislative history of either supports. It does so without citation to authority or detailed analysis. Nor is there any indication the voters who enacted Propositions 13, 218, and 26 sought to protect voluntary, wholesale customers of publicly-owned enterprises. While Redding might need protection from the likes of Enron, the reverse is hardly true **[*25]** and cannot have been the concern of voters who adopted Propositions 218 and 26.

This published Opinion will have repercussions throughout California. Extending Propositions 218 and 26 to commercial enterprises that purchase surplus power from REU and other public utilities will force those utilities to unnecessarily lower wholesale rates, raising costs for retail customers - the antithesis of what those measures intended. If this profound and unexpected conclusion is the law, this Court should say so.

Precisely because the Opinion lacks meaningful analysis on this point lower courts and utility policy makers lack guidance how to apply it. As revenue measures are commonly pledged to serve debt to fund expensive capital facilities that have useful lives of many years, uncertainty is fatal to the efficient operation of California's service enterprises. Bond lawyers do not give clean opinions on doubtful law and bond markets impose a risk premium for the resulting uncertainty. This Court can and should dispel this uncertainty for the benefit of every public utility in our state and the millions who depend on them for essential services.

D. Guidance is Needed on Remedies for Invalid [*26] Government Revenue Measures

Citizens seek double recovery - they sue for refunds under the Government Claims Act (Gov. Code § 905 et seq.) **and** for a writ to mandate reduction of property taxes payable to the City under Proposition 62, a 1987 statutory initiative (Gov.

Code § 53020 et seq.). (See AOB at pp. 31-32.) No published case or - to the knowledge of counsel for both parties here who together have many decades of experience in public finance disputes - any other case has ever applied this property tax reduction remedy. Nor does the Opinion address it, instead remanding the issue for decision if Redding is unable to prove the PILOT reflects the cost of services its general fund provides REU. Review here would allow guidance on this important issue, too.

Although no published appellate authority squarely addresses remedies for violation of Propositions 218 or 26, one recent case provides helpful dicta. (See, e.g. *Water Replenishment District of Southern California v. City of Cerritos (2013) 220 Cal.App.4th 1450, 1464* [applying ″pay first, litigate later rule″ and observing that likely remedy upon final judgment is refund of difference between fee **[*27]** paid and what lawful fee would have been].) In general, however, Proposition 218 authorities are silent as to monetary relief. Examples from this Court are:

- *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 457-458* (invalidating open space assessment);
- *Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 217* (invalidating water-rate initiative).

Government Code section 53728 requires a county auditor-controller to withhold from a city's share of property tax equal to the proceeds of a tax collected in violation of Proposition 62's requirement of voter approval post-August 1985. (Gov. Code, § 53727.) This remedy is unworkable here.

Proposition 62, largely supplanted by Proposition 218, required voter approval of local ″taxes″ without altering the pre-existing common law definition of the term, which did not encompass utility charges. (*Hansen v. City of San Buenaventura (1986) 42 Cal.3d 1172, 1182* [water rates not taxes even though non-city customers charged more than cost of service].) Moreover, utility rates were understood not to be taxes when **[*28]** Proposition 62 was adopted in 1986. (*Arcade County Water Dist. v. Arcade Fire Dist. (1970) 6 Cal.App.3d 232, 240* [″A charge for services rendered is in no sense a tax.″].) Nor was a PILOT a ″tax″ before adoption of Proposition 218 (as to water and sewer utilities) and Proposition 26 (as to electric and gas utilities). (*Howard Jarvis Taxpayers Ass'n v. City of Fresno (2005) 127 Cal.App.4th 914, 927* [″An exaction imposed on any particular ratepayer in an amount established in the discretion of the utility department is not an exercise of the city's taxing power″ despite *Oneto v. City of Fresno (1982) 136 Cal.App.3d 460* [upholding same PILOT under Prop. 13].) Thus, the PILOT was not a ″tax″ when Proposition 62 was adopted and nothing in that measure indicates intent to change that rule, as Propositions 218 and 26 later did.

In addition, the remedy required by Proposition 62 is ill defined. It does not require a county auditor-controller to reduce the 1 percent property tax authorized by Proposition 13 (art. XIII A, § 1); nor does it state how property taxes withheld from an offending city should be allocated. No law specifies what **[*29]** becomes of property taxes withheld under Government Code section 53728. Is it a windfall to the county? Escheat to the State? Become a windfall to all taxing agencies other than the offending city? Clearly, a county may not simply keep the taxes because that would violate Proposition 13's directive that ″[t]he one percent (1%) tax [is] to be collected by the counties and apportioned according to law to the districts within the counties.″ (Art. XIII A, § 1, emphasis added.)

Thus, a significant issue left unresolved by the Opinion is the appropriate remedy for violation of Proposition 218 or Proposition 26.

II. REVIEW IS NECESSARY TO CORRECT SIGNIFICANT ERRORS IN A PUBLISHED APPELLATE DECISION

Although this Court does not grant review merely to correct error, review should be granted to address significant legal errors in a published decision that will bind lower courts and constrain the State and local governments.

A. Proposition 26 Does Not Retroactively Invalidate the PILOT

The Opinion and Dissent agree Proposition 26 is not retroactive. (Opinion at p. 17; Dissent at p. 2, fn. 2.) However, neither correctly characterizes the legislation by which the City **[*30]** adopted the PILOT or identified any reason to treat budgetary

resolutions adopting and maintaining a PILOT differently from ordinances or other resolutions. Properly understood, the PILOT was intended to be permanent.

I. Proposition 26 does not apply to earlier legislation

Proposition 26 was adopted November 2, 2010 to amend the California Constitution to provide the first legislative definition of the ″taxes″ for which voter approval is required by Propositions 13 (art. XIII A, § 4) and 218 (art. XIII C, § 2). Proposition 26 includes a limited retroactivity clause for state taxes, but not for local taxes. (Compare art. XIII A, § 3, subd. (b) with art. XIII C, § 1, subd. (e).) Thus, it lacks the necessary ″express language of retroactivity″ to overcome the presumption of prospective application. (*Myers v. Philip Morris Co. (2002) 28 Cal.4th 828, 844;* see also *Gikas v. Zolin (1993) 6 Cal.4th 841, 852* [″*Expressio unius est exclusio alterius.* The expression of some things in a statute necessarily means the exclusion of other things not expressed″].) Accordingly, Proposition 26 applies only to local legislative actions affecting fees, **[*31]** charges and taxes taken on or after November 3, 2010. [9]

Legislative history supports this conclusion. The Impartial Analysis informed voters the measure would apply only prospectively: ″[M]ost other fees or charges in existence at the time of the November 2, 2010 election would not be affected unless … [t]he … local government later increases or extends the fees or charges.″ (1 CT 277 [City's RJN, Exh. J].) The argument in favor of Proposition 26 disclaims any retroactive effect assuring voters it would have no impact on environmental laws, consumer protection laws, or other public policies. (1 CT 279-280.) The framers apparently feared retroactivity would reduce the likelihood of voter approval. That the voters who narrowly approved Proposition 26 also rejected Proposition 24 to suspend A.B. 32's greenhouse gas law suggests that was an accurate view of voter sentiment.

Thus, both the text and the **[*32]** legislative history of Proposition 26 demonstrate it was not intended to apply retroactively. (*Brooktrails, supra, 218 Cal.App.4th at pp. 206-207.)*

2. Redding's PILOT is prior legislation that survived adoption of the FY 2011-2013 budget

The trial court found the PILOT had been a component of REU's budget for over 20 years when Proposition 26 was adopted in November 2010. (3 CT 736, 739). The trial court also found the December 2010 rate increase did not affect the PILOT, which was funded by other revenues. (3 CT 736-737.) The record supports these findings. (IV AR Tab 163, p. 1041; IV AR Tab 145, p. 831; IV AR Tab 149, p. 873; IV AR Tab 145, p. 831; IV AR Tab 149, p. 873; XIII AR Tab 205, p. 2975.) The trial court concluded the PILOT survives Proposition 26. (See 3 CT 737.)

The Opinion and Dissent agree the PILOT was adopted by legislation and that Proposition 26 does not apply to legislation predating it. (Opinion at p. 19; Dissent at p. 2, fn. 2.) Both the Opinion and Dissent err, however, in concluding the PILOT expires with each biennial budget.

General law cities like Redding have no duty to adopt a budget at all - much less to do **[*33]** so in any particular form - and one resolution may legislate appropriations limited to a fiscal year, enact permanent fiscal policies like the PILOT, or both. (Gov. Code § 53901 [alternate reporting in absence of budget].) The 1988 adoption of the PILOT by a budget resolution was legislation. (See *Scott v. Common Council (1996) 44 Cal.App.4th 684, 698* [budget legislation subject to narrow judicial review].)

The canons of statutory construction apply to interpretation of municipal legislation. (*City of San Diego v. Shapiro (2014) 228 Cal.App.4th 756, 789* [interpreting city charter and Props. 13 and 218]; *C-Y Development Co. v. City of Redlands (1982) 137 Cal.App.3d 926, 929* [ordinances]; *City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 911* [municipal ordinances and resolutions ″are clearly legislative in nature″].) Thus, interpreting Redding's fiscal legislation is an ordinary question of statutory construction that begins with the language of the measure and seeks to accomplish legislative intent. (*People v. Allegheny Casualty Co. (2007) 41 Cal.4th 704, 708-709.)* This the **[*34]** Opinion did not do.

The central task is to ascertain the intent of the City Council to effectuate its purpose. (*Schmeer, supra, 213 Cal.App.4th at p. 1316.)* Legislative intent is evidenced first and foremost by the words of the legislation - the City's resolutions

[9] Constitutional amendments take effect the day after approval. (Art. XVIII, § 4.)

involving the PILOT. (*Ibid.;* Renee J. v. Superior Court (2001) 26 Cal.4th 735, 754.) Only if legislative language is vague or ambiguous may a court consider extrinsic evidence of intent. (Schmeer, supra, 213 Cal.App.4th at p. 1317.) In addition, subsequent legislation can - in some circumstances - demonstrate legislative intent. (Southern California Edison Company v. Public Utilities Commission (2014) 227 Cal.App.4th 172,191 [legislative authority for PUC's public goods charge evidenced by subsequent, related legislation which did not displace it].) The question, therefore, is: what did the City Council intend when it adopted the PILOT in 1988 and amended it most recently in 2005 - a temporary fiscal policy or a continuing revenue transfer?

When first adopted in 1988, the PILOT replaced an earlier, ongoing operating transfer. (See IAR 4, pp. 119-124 [Jan. 7, 1987 Finance **[*35]** Director Memorandum]; II AR 37, p. 358, pp. 379-380 [″city's long standing policy of transferring funds from its water, sewer, solid waste and electric systems to the General Fund in amounts characterized as 'In Lieu Taxes.'″]; III AR 111, p. 640 [Jan. 18, 1999 City Attorney Memorandum re: In Lieu Taxes],) As the City implemented the PILOT in every year from 1988 to those litigated here, it periodically acknowledged the PILOT'S ongoing effect. (See, e.g. II AR 70, pp. 446-447 [1992 Finance Director memorandum].) These record references demonstrate the City's understanding that the PILOT is permanent and intended to continue beyond any biennial budget.

The City Council's recognition of the PILOT in every budget since 1988 evidences its intent to maintain the PILOT as ongoing policy. When the Council wished to change the PILOT, it has done so expressly, most recently in 2005. (2 CT 530.) Moreover, it is a fundamental canon of statutory construction that amending part of a law but restating another does not reenact the part restated:

> Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. **[*36] The portions which are not altered are to be considered as having been the law from the time when they were enacted;** the new provisions are to be considered as having been enacted at the time of the amendment; and the omitted portions are to be considered as having been repealed at the time of the amendment.

(Gov't Code § 9605 (emphasis added); see, e.g., *State Dept. of Public Health v. Superior Court of Sacramento County* (Feb. 19, 2015, Case No. S214679, Cal.4th , 2015 WL 690809 at p. *14; Garat v. City of Riverside (1991) 2 Cal.App.4th 259, 288 fn. 21 [applying rule to local legislation], disapproved on other grounds by Morehart v. County of Santa Barbara (1994) 7 Cal.4th 725, 743 fn. 11.)

The City adopted its FY 2011-2013 budget on June 22, 2011 by Resolution No. 2011-111. (XI AR 203, pp. 2466-2469.) This budget is the subject of the second of the mandate actions here. Resolution No. 2011-111 reconfirmed ″previously approved legislative direction of the present and former City Councils to employ cost accounting formulas and methodologies carried forward from budget to budget including … a **[*37]** payment-in-lieu of property tax (PILOT) from the Redding Electric Utility (REU) to the General Fund ....″ (XI AR 203, p. 2466.) This recognizes the PILOT as a continuing legislative act; it does not create it anew. Thus, when Proposition 26 was adopted, the PILOT had been permanent legislation for over 22 years, and it has not since been newly adopted or increased so as to trigger Proposition 26. (Cf. AB Cellular LA, LLC v. City of Los Angeles (2007) 150 Cal.App.4th 747 [″a change of administrative methodology″ constituted tax ″increase″ requiring voter approval under Prop. 218].)

The Opinion does not interpret the City's resolutions, but summarily concludes the PILOT expires with each budget. (Opinion at p. 18.) The Opinion supports this conclusion by noting the ″record shows changes to the method of calculating the PILOT were made in 1992, 2002, and 2005.″ (Opinion at p. 18.) However, no law or logic holds that amendments by themselves demonstrate the impermanence of the amended legislation, especially when the expressed intent of the legislative body is to the contrary. By that standard, nearly every California statute is intended to be temporary because most **[*38]** have been amended since adoption.

Furthermore, the Opinion cites no language from Resolution No. 2009-61 (adopting biennial budget for FY 2009-2011) or Resolution No. 2011-111 (adopting biennial budget for FY 2011-2013) stating the earlier resolution expired or that a later budget repealed and replaced the earlier. The Opinion simply assumes the PILOT is ″reenacted″ with each budget. (See Opinion at p. 18.) However, as all budget resolutions maintain the same language regarding the PILOT, the Opinion

disregards the well-established canon of construction that legislation which readopts prior language is read to continue it, not to reenact it. (See *In re White (2008) 163 Cal.App.4th 1576, 1581-1582* [unchanged provisions interpreted as continuously in force], citing *Bear Lake & River Waterworks & Irrigation Co. v. Garland (1896) 164 U.S. 1, 11-12.)*

As the trial court correctly recognized, the reenactment theory does not comport with Proposition 26's intent either:

> Proposition 26 was not intended to require an election every time a local government adopts a budget that includes pre-existing components so long as that budget does not impose **[*39]** new or increased fees or charges or change the manner in which those fees are calculated. … The adoption of Resolution 2011-111 adopting the City of Redding's budget, that included the budget of REU and the PILOT, does not impose, extend, or increase a tax, and Proposition 26 does not apply.

(3 CT 739.)

The Opinion cites only one case for its reenactment theory - *Barratt American Inc. v. City of Rancho Cucamonga (2005) 37 Cal.4th 685* - which has been applied by only one other reported case and only in the specific context of land use statutes of limitations. (See *Arcadia Development Co. v. City of Morgan Hill (2008) 169 Cal.App.4th 253, 261-262.)* These cases reflect their statutory contexts and do not abandon the rule that restating legislation continues it rather than legislates it anew.

The Opinion thus renders Proposition 26 retroactive by concluding the viability of a revenue measure depends on the form of legislation which enacted it, rather than legislative intent. This draws an illogical distinction between PILOTs established by budget resolution and those by ordinance or charter provision. The application of Proposition 26 **[*40]** cannot turn on accidents of legislative form, as legislative meaning does not.

3. Retroactive invalidation of Redding's PILOT imperils other legislation

The Opinion suggests the PILOT would survive Proposition 26 if it had been enacted by ordinance, but articulates no standard for other forms of legislation that survive it. Thus, the State and local governments cannot know whether Proposition 26 retroactively invalidates other rate components that reflect earlier legislative concern for issues other than service cost. For example, as noted above, the Opinion threatens REU's discounted rates for the poor and the elderly - as well as a wide variety of public goods charges. (IV AR Tab 142, p. 817; IV AR Tab 145, p. 830; IV AR Tab 148, pp. 869-870.) Although many of these costs are imposed by statute, and presumably satisfy the Opinion's standard for legislative permanence, the Opinion does not confirm that safe harbor or provide logic for it. Thus the Opinion invites additional litigation, as rate challengers seek to identify which legislative forms are permanent and which transitory. [10] **[*41]**

Moreover, while local legislation governing the public is typically adopted by ordinance to facilitate enforcement, internal governance policies - like budgets - are often adopted by resolution. Yet the Opinion suggests the Council was required to predict the coming of Proposition 26, and to use a specific form of legislation to enact and amend its PILOT to survive the measure. Surely these important policy choices cannot depend on an accident of form and a failure of such unlooked-for prescience.

The law has long held the intent of the legislative body governs legislative construction and adherence to that rule here would avoid these consequences, and would allow current laws and policies affecting public utility rates to remain in place until those laws change.

B. The PILOT Complies with Proposition 26

As the trial court found, the PILOT was intended to defray the costs to the City for the use of its rights of way, police and fire protection of utility assets, and other services and benefits the City provides REU and to avoid penalizing the general

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[10] The Public Utilities Commission interpreted Proposition 26 narrowly to allow its own pre-Proposition 26 Electric Program Investment Charge - which replaced A.B. 1890 after the sunset of that public goods charge legislation - to survive Proposition 26. (CPUC Decision 13-01-016 at 3-4.)

fund for the City's decision to municipalize electric service. (See 3 CT 736; II AR Tab 37, p. 358.) Thus the City established **[*42]** the PILOT to approximate the 1% tax an investor-owned utility pays for the same benefits. Such transfers were common when the Redding City Council first adopted the PILOT in 1988. (See I AR Tab 4, pp. 119-124; I AR Tab 5, pp. 133-135.) As Justice Duarte concluded in her Dissent, the PILOT's purpose and rate are reasonable as a matter of law. (Dissent at p. 2.)

Furthermore, even if the PILOT were newly established, the mere existence of the PILOT does not mean REU's retail electric rates exceed the cost of service and therefore constitute taxes under Proposition 26. As the trial court found, ″there is no evidence that that the PILOT is paid out of customers' rates.″ (3 CT 741.) This is because REU has multiple sources of revenue, including:

. The challenged retail rates;

. proceeds of wholesale transactions, the prices of which no one has challenged and which are not ″imposed″ so as to be subject to Proposition 26;

. interest on investments; and

. grants and donations.

(IV AR Tab 145, p. 831; XIII AR Tab 205, p. 2975.)

It is undisputed that REU's non-retail sources of revenue exceed the PILOT by more than three times. (XIII AR Tab 205, p. 2975; **[*43]** XIII AR Tab 205, p. 2975.) Therefore, even if REU's compliance with the PILOT is not a cost of service that may be funded by rates, the PILOT nevertheless survives Proposition 26 because it is funded by non-rate revenues.

Finally, the trial court's findings that the December 2010 rate increase neither funded nor affected the PILOT are supported by the record and Appellants offered nothing to contradict them. The Opinion acknowledges this finding of fact and provides no factual or legal rebuttal, but merely overrules it. (See Opinion at p. 14.) The Opinion therefore erred in reaching a contrary conclusion without support in the record or in law. Review is warranted to correct this error in a published appellate decision addressing these issues of statewide concern for the first time.

CONCLUSION

This case merits review to resolve the retroactive application of Proposition 26 to local legislation, the application of Propositions 218 and 26 to wholesale market transactions, interpretation of the ″reasonable cost of service″ standard common to both Propositions 218 and 26, and appropriate remedies for violation of those measures. Moreover, many pending disputes in lower courts **[*44]** will benefit from review here, which would provide guidance on issues of concern to the State, all local governments, the 38 million Californians they serve and those who litigate public finance issues. For all these reasons, the City respectfully submits that this case warrants review.

DATED: March 2, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC

/s/ [Signature]
MICHAEL G. COLANTUONO
MICHAEL R. COBDEN
AMY C. SPARROW

Attorneys for Petitioner
CITY OF REDDING

CERTIFICATION OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.504(D)

Pursuant to Rule 8.504, subdivision (d) of the California Rules of Court, the foregoing Petition for Review contains 7,861 words (including footnotes, but excluding the tables and this Certification) and is within the 8,400 word limit set by the rule. In preparing this Certification, I relied upon the word count generated by Microsoft Word 2010.

DATED: March 2, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC

/s/ [Signature]
MICHAEL R. COBDEN
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CITY OF REDDING

PROOF OF SERVICE

I, Ashley L. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over **[*45]** the age of 18 and not a party to the within action. My business address is 11364 Pleasant Valley Road, Penn Valley, California 95946. On March 2, 2015 I served the document(s) described as **PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

BY MAIL: The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Penn Valley, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on March 2, 2015 at Penn Valley, California.

/s/ [Signature]

Ashley L. Lloyd

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[SEE ATTACHMENT 1 (CAL. RULES OF COURT, RULE 8.204(D)) IN ORIGINAL]

[SEE ATTACHMENT 1 (CAL. RULES OF COURT, RULE 8.204(D)) IN ORIGINAL]

[SEE ATTACHMENT 2 (CAL. RULES OF COURT, RULE 8.204(D)) IN ORIGINAL]

[SEE ATTACHMENT 3 (CAL. RULES OF COURT, RULE 8.204(D)) IN ORIGINAL]