No. B240592

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COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, Division 3

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LEE SCHMEER, SALIM BANA,
JEFF WHEELER, CHRIS KUCMA and
HILEX POLY CO. LLC,
Petitioners and Appellants,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA; GAIL FARBER in her official capacity as Los Angeles Co. Director of Public Works; KURT FLOREN in his official capacity as Los Angeles Co. Director of the Dept. of Agricultural Commissioner/Weights and Measures; DR. JONATHAN FIELDING in his official capacity as Los Angeles Co. Director of Public Health,
Respondents and Appellees,

APPELLANTS' REPLY BRIEF

From Judgment by the Superior Court of Los Angeles County
Superior Court Case No. BC470705
Honorable James C. Chalfant

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I. INTRODUCTION

Proposition 26 states, plainly and simply, that before "*any* levy, charge, or exaction *of any kind*" (italics added) can be imposed by a local government, it must be approved by voters. (Cal. Const., art. XIII C, §§ 1, subd. (e); 2, subd. (b).) The County asserts, and the trial court ruled, that the words "of any kind" do not really mean "any kind" but, instead, are limited only to a levy, charge, or exaction that generates revenue for a local government, i.e., raises funds that are kept and used by a local government. This interpretation overlooks the nature of the changes made by Proposition 26 and ignores the historical context in which they were made. The wording changes adopted by the voters, and the reasons for the amendments, show that voters meant what they plainly said—before a local government can financially burden the public with the imposition of "any" levy, charge, or exaction "of any kind," including the 10 cent charge at issue in this case, the levy, charge, or exaction must be submitted to, and approved by, the voters.

This is what democracy is all about. Prior to the adoption of Proposition 26, voters repeatedly sought to limit the authority of government to impose financial burdens on the public. But governments repeatedly used clever ways to skirt the will of the voters—such as couching the burdens as fees and not taxes.

Proposition 26 was written and was adopted by voters to stop such tactics. It plainly requires that, before a local government burdens the public with a tax, meaning "any" levy, charge, or exaction "of any kind" (with limited exceptions specified in the Constitution), the local government must obtain voter approval to do so. To construe these words as limited only to a levy, charge, or exaction raising revenue for the local government would gut the phrase "of any kind" and frustrate the will of the voters. The language of Proposition 26 plainly shows the voters were concerned about where the levies, charges, or exactions come from—the public's wallets—not whether they raise revenue for local government or are used for another purpose. If local government wants to compel the public to open its pocket book, it must obtain voter approval to do so.

Telling on this point is the way in which Proposition 26 amended section 3 of article XIII A of California's Constitution. Prior to the amendment, this section applied to "any changes in State taxes enacted *for the purpose of increasing revenues* . . . ." (italics added). Proposition 26 amended the section to apply instead to any change "which results in any taxpayer paying a higher tax" (art. XIII A, § 3, subd. (a)) and further amended the section to define "tax" as meaning "*any* levy, charge, or exaction of *any kind* imposed by the State, except [those specified in subdivision (b) of the section]" (art.

XIII A, § 3, subd. (b), italics added). By deleting language that applied it to tax changes enacted for the purpose of increasing revenue, by expanding the section to apply to any change in a state statute that results in any taxpayer paying a "higher tax," and by defining "tax" as "any levy, charge, or exaction of any kind," Proposition 26 clearly provides that the words "levy, charge, or exaction" are not limited to taxes enacted for the purpose of generating revenue. The same intent is evident in Proposition 26's amendment of article XIII C, section 1, applying to taxation by local governments. Mirroring its amendment of the definition of a state tax within the meaning of article XIII A, section 3, Proposition 26 amended section 1 of article XIII C so that it applies to any "'tax' mean[ing] *any* levy, charge, or exaction *of any kind* imposed by a local government, except [those specified in subdivision (e) of the section]" (art. XIII C, § 1, subd. (e), italics added). Accordingly, a tax that a local government cannot impose, extend, or increase without approval by the electorate (art. XIII C, § 2, subd. (d)) is not limited to a tax imposed for the purpose of generating revenue; it applies to *any* levy, charge, or exaction *of any kind.*

Equally significant is the historical context in which Proposition 26 was adopted. Increasingly frustrated by state and local taxing policies, the people in 1978 (Proposition 13), 1986

(Proposition 62), and 1996 (Proposition 218) passed statewide initiatives to give themselves power over when and by what means state and local governments can reach into their wallets. These measures required a two-thirds vote of the Legislature to raise state taxes, and voter approval to raise local taxes. In response to each of these measures, local and state governments successfully asserted loopholes to end run the people's initiatives and impose a myriad of fees and charges on taxpayers who labored under the additional financial burdens. By 2010, the people had had enough and amended our Constitution by adopting Proposition 26 over the staunch opposition of elected officials across the state. In response to court decisions characterizing certain charges not as taxes that can be imposed only by a two-thirds vote of the Legislature or by voter approval, and instead ruling they were "regulatory fees" that can be imposed by a majority vote of a legislative body, Proposition 26 amended the Constitution to define a local tax in the broadest possible language: it means "*any* levy, charge, or exaction *of any kind*" imposed by local government. (Cal. Const., art. XIII C, § 1, subd. (e), italics added.) Unquestionably, the purpose of this intentionally broad definition of a local tax is to preclude local governments from continuing to use creative tactics to force the public to pay levies, charges, or exactions without voter approval.

Yet that is precisely what Los Angeles County did by imposing the 10 cent charge at issue in this case. It used yet another novel ploy in an effort to skirt the voter approval requirement of Proposition 26. This it could not do because of Proposition 26's intentionally broad definition of a local tax.

Construing Proposition 26 not in conformity with the plain, usual meaning and evident purpose of its words, but instead as the County urges, would allow local governments to burden the public with a myriad of charges in furtherance of government policies or objectives so long as a local government does not retain the money and instead directs a third party to keep it. In our opening brief we asked rhetorically, "Where would it end? $1 surcharges on eggs or soft drinks because they contain cholesterol and sugar?" (Appellants' Opening Brief ("AOB") at p. 46.) Since that brief was filed, city councils have placed measures on local ballots in Richmond and El Monte to tax sugar sweetened beverages to further the policy of discouraging soft drink consumption, but voters rejected both tax measures.[1] If this court wrongly adopts the

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[1] In Richmond, over 66% of voters rejected Measure N. (Contra Costa County General Elect. (Nov. 6, 2012), N-City of Richmond Business License, p. 18, at <http://results.enr.clarityelections.com/CA/Contra_Costa/42275/112861/en/summary.html> [as of Nov. 29, 2012].)

In El Monte, 76% of voters rejected Measure H. (Los Angeles County General Elect. (Nov. 6, 2012), El Monte City – Measure H, at

County's interpretation of Proposition 26, it takes no leap of imagination to see elected officials end run voter approval requirements by imposing charges on a multitude of disfavored consumer products to make them more expensive to consumers, thereby discouraging consumption, and directing retailers to keep the added revenue. For example, five dollars could be added to the price of a gallon of gas to reduce consumption and promote clean air. One dollar could be added to the price of cigarettes or chewing gum to reduce litter. The assault on the people's wallets could be endless, eviscerating Proposition 26 and defeating the voters' objective of protecting themselves from charges imposed by local governments without voter approval.

Also lacking merit is the County's position, and the trial court's ruling, that the 10 cent charge imposed by Los Angeles County falls within the "specific benefit conferred or privilege granted" exception from the voter approval requirement. (Cal. Const., art. XIII C, § 1, subd. (e), par. (1).) In the County's view, the benefit conferred and privilege granted is "the right to buy and use paper bags" because the County could have outlawed this existing practice but declined to do so. The argument fails because it would be absurd to construe Proposition 26, a tax *limitation* initiative, to allow local government

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<http://rrccmain.co.la.ca.us/charts/0012/0012CTYELMHH.htm> [as of Nov. 29, 2012].)

to impose a levy, charge, or exaction based on the local government's failure to act, such as the County's decision not to forbid retailers from providing shoppers with paper bags to carry away the items they purchase. As a matter of common sense, the "specific benefit conferred or privilege granted" set forth in Proposition 26 must be a local government's affirmative act of conferring a benefit or granting a privilege that did not already exist. Contrary to the purpose of Proposition 26, the County's interpretation would expand, not restrict, a local government's ability to impose a tax without voter approval. Indeed, it would open the floodgates to more taxes by allowing a local government to charge taxpayers for engaging in existing lawful activities the local government believes are not in the public interest but declines to outlaw. For example, without voter approval, a local government could impose a per item charge for dry cleaning on the ground that dry cleaning is harmful to the environment and could be outlawed. Or a local government could impose a per item charge on the sale of alcohol, snack foods, or other disfavored products within its jurisdiction to discourage their consumption. The possibilities for local government levies, charges, and exactions based on government inaction are endless. This surely was not the intent of Proposition 26.

And the County is wrong in advancing its sky-is-falling argument that construing the 10 cent charge in this case as a tax will "cripple the ability of government entities to use their police powers to enact general regulations that, like the [County's] Ordinance, implement public policy and further a legitimate governmental purpose, but do not raise government revenue." (Opp. at p. 35.)[2] Simply stated, this lawsuit does not seek to preclude local governments from imposing any levy, charge, or exaction; it merely seeks to fulfill the will and intent of voters expressed plainly and simply in Proposition 26. Before the County of Los Angeles can impose a levy, charge, or exaction of any kind, including the 10 cent charge at issue in this case, voters must approve the imposition of such a financial burden. The County and the trial court are plainly and simply wrong in concluding otherwise.

II. PROPOSITION 26's BROAD NEW DEFINITION OF TAX ENCOMPASSES THE COUNTY'S BAG CHARGE

The power of initiative is the people's "'*battering ram* which may be used to tear through the exasperating tangle of traditional legislative procedure and strike directly toward the desired end.'" (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228-229 [italics original]

[2] The County's Respondents' Brief is sometimes referred to herein as "Opp."

[quoting Key & Crouch, The Initiative and the Referendum in Cal. (1939) p. 485].) The people exercised this power in 2010 when they passed Proposition 26 amending articles XIII A and C of the State Constitution. Article XIII C, section 1, subdivision (e), (hereafter "section 1(e)") as amended by Proposition 26, states in simple and understandable language that "any levy, charge, or exaction of any kind imposed by a local government" is a tax and must be approved by local voters. The County argues that Proposition 26 does not apply to *any* levy, charge, or exaction *of any kind* but instead covers such impositions only when a local government takes physical possession of the proceeds. But the County's argument is irreconcilable with the broad words of section 1(e) and would read the words "any" and "of any kind" out of the Constitution.

Article XIII C is titled "Voter Approval for Local Tax Levies." Proposition 26 added section 1(e) to Article XIII C, which reads, "As used in this article, 'tax' means *any* levy, charge, or exaction *of any kind* imposed by a local government [with seven specified exceptions]" (italics added). The County claims Appellants[3] seek a "hyperliteral" reading of the words of section 1(e), but that is nonsense. The words of section 1(e) are simple and understandable,

[3] Appellants include four individuals who were required to pay the bag charge at issue and object to it, and Hilex Poly LLC. The County's Respondents' Brief ignores the four individual appellants and refers only to Hilex.

and its definition of "tax" is clear and requires no interpretation. The words "any" and "of any kind" are extraordinarily broad and leave no doubt that *all* levies, charges and exactions *of any kind* imposed by local government must be submitted for voter approval. (*Lyons v. Superior Court* (1977) 73 Cal.App.3d 625, 627 [the term "of any kind" as used in a statute is "expansive language" indicating the intended scope to be "all encompassing"]; *Sarter v. Siskiyou County* (1919) 42 Cal.App. 530, 536-538 [statute providing a public officer's compensation shall be in full payment for services "of any kind" rendered by such officer is plain and unambiguous language, and the court cannot import into said section language it does not contain]; see also, *Do Sung Uhm v. Humana, Inc.* (9th Cir. 2010) 620 F.3d 1134, 1153 ["'read naturally, the word "any" has an expansive meaning . . . .'" (quoting *Ali v. Fed. Bureau of Prisons* (2008) U.S. 214, 219)]; *Fleck v. KDI Sylvan Pools Inc.* (3d Cir. 1992) 981 F.2d 107, 115 ["The word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive." (Internal quotation marks and citation omitted)].)

Regents of University of California v. East Bay Municipal Utility District (2005) 130 Cal.App.4th 1361, rejected an argument indistinguishable from the one the County makes here. The dispute concerned legislation which defined the term "capital facilities fee" to mean "any nondiscriminatory charge to pay the capital cost of a public utility facility" and forbade certain of such charges from being passed on to the University. (*Id.* at p. 1372.) The East Bay Municipal Utility District ("EBMUD") had incorporated charges for capital costs into its overall water rate and did not impose those charges separately. The Regents argued the statute applied to the portion of the overall rate attributable to capital costs; EBMUD argued the statutory definition should be narrowly construed to apply only to specific identifiable fees or charges specifically imposed with the purpose of paying capital facility costs. The appeals court rejected EBMUD's narrowing construction of the words "any nondiscriminatory charge," and instead resolved the statutory construction issue "on the plain language alone." (*Id.* at p. 1373.) Its words are applicable here:

> The word "charge" is relatively inclusive. (*Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 920 [16 Cal.Rptr.2d 226, 844 P.2d 545].) The pertinent dictionary definition of the term is "the price demanded for something" . . . .(Webster's 10th Collegiate Dict. (2001) p. 192, col. 1.) East Bay MUD contends that the word "charge" is ambiguous, and that the Legislature contemplated a narrower class of charges than asserted by the Regents. However, the statutory definition refers to "*any* nondiscriminatory charge." ([Cal. Gov. Code] § 54999.1, subd. (b), italics added.) In *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753, 789 P.2d 934] (*Delaney*), the Supreme Court held that the use of the word "any" in a voter-adopted constitutional provision relating to a

> newsperson's refusal to disclose "any unpublished information" meant that the statute unambiguously applied to all unpublished information, "without limit and no matter what kind." (See also [*Utility Cost Management v. Indian Wells Valley Water Dist.* (2001)] 26 Cal.4th [1185,] 1191 [use of the word "any" serves to "broaden the applicability" of a provision].) To restrict the statute to confidential information, as was suggested in the case, would "read the word 'any' out of the section" and violate the interpretative guideline that significance should be given to every word of an act. (*Delaney, supra,* 50 Cal.3d at p. 798.) Following *Delaney*, we conclude that "charge" as used in the definition of "capital facilities fee" refers to all nondiscriminatory charges, and not only those listed separately and exclusively dedicated to the payment of capital costs.

(*Ibid.*)

The County wrongly asks this Court to ignore Proposition 26's very broad definition of "tax" and narrowly construe (actually, re-write) that definition to apply only when the County itself receives the levies, charges, or exactions. Nothing in the text of Proposition 26 supports such a crabbed reading of section 1(e), and the County points to none. The County argues (Opp. at p. 21) its proposed narrow construction of section 1(e) is consistent and in harmony with that section's overall statutory scheme including the other provisions of Proposition 26 and article XIII C, but that is incorrect. Prior to Proposition 26, section 3, subdivision (a) of article XIII A applied to "any change in State taxes enacted *for the purpose of increasing revenues* . . . ." (italics added). Proposition 26 deleted these words and amended the section to apply instead to any state statutory change "which results in any taxpayer paying a higher tax" (art. XIII A, § 3, subd. (a)); it also added a definition of "tax" as meaning "*any* levy, charge, or exaction of *any kind* imposed by the State, except [those specified in subdivision (b) of the section]" (art. XIII A, § 3, subd. (b), italics added). Thus, Proposition 26 deleted language that applied article XIII A to state tax changes enacted for the purpose of increasing revenue, expanded the section to apply to any change in a statute that results in any taxpayer paying a "higher tax," and defined "tax" as "any levy, charge, or exaction of any kind." Proposition 26 thus makes clear that the words "levy, charge, or exaction" are not limited to those enacted for the purpose of generating government revenue. The same purpose is evident in Proposition 26's amendment of article XIII C, section 1, applying to taxation by local governments. Mirroring its amendment of the definition of a state tax within the meaning of article XIII A, section 3, Proposition 26 amended section 1 of article XIII C so that it applies to any "'tax' mean[ing] *any* levy, charge, or exaction *of any kind* imposed by a local government, except [those specified in subdivision (e) of the section]" (art. XIII C, § 1(e), italics added).

The County's characterization of Appellants' position is wrong. The County claims Appellants' position is that Proposition 26 "creates a new, independent category of tax" and argues if that was its purpose, Proposition 26 should "have removed from the California Constitution the definition of special tax and general tax set forth in Article XIII C §1." (Opp. at p. 24.) This argument lacks merit, as does the County's claim that the bag charge cannot be a "general tax" or a "special tax" under article XIII C, section 1, subdivisions (a) and (d) (hereafter "section 1(a)" and "section 1(d)") because the County receives no bag charge proceeds. Neither section 1(a) nor section 1(d) contain any language requiring proceeds to flow into government coffers in order to be a tax; to the contrary, section 1(a) simply provides that a general tax is any tax imposed for "general government purposes," and section 1(d) provides that a special tax is one imposed "for specific government purposes." Proposition 26 inserted section 1(e) immediately following sections 1(a) and 1(d) and defines the term "tax" as it appears in those more general sections. There is no inconsistency whatsoever, nor was there any reason to remove sections 1(a) and 1(d) from the Constitution.

Finally, even if there was some inconsistency between sections 1(a), 1(d), and 1(e) [which there is not], section 1(e) would control. (*Woods v. Young* (1991) 53 Cal.3d 315, 324 ["a later, more specific statute controls over an earlier, general statute."]; *People v. Temple*

(1962) 203 Cal.App.2d 654, 657 ["It is a fundamental principle of statutory construction that the earlier enactment in point of time must yield to the later one . . . ."].) Thus, under Article XIII C as amended by Proposition 26, a general tax is *any levy, charge, or exaction of any kind imposed by a local government* for general governmental purposes, and a special tax is *any levy, charge, or exaction of any kind imposed by a local government* for specific purposes.[4] This is the natural reading of these sections.

The County refuses to recognize that Proposition 26 redefines what constitutes a tax in this state.[5] As broadly defined by Proposition 26, a tax is not just an exaction that raises revenue; a tax is "any levy, charge, or exaction of any kind" imposed by

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[4] This is also completely consistent with Article XIII C, section 2, subdivision (a), which provides "all taxes imposed by any local government shall be deemed to be either general taxes or special taxes."

[5] The County cites *National Federation of Independent Business v. Sebelius* (2012) 132 S.Ct. 2566 ("*NFIB*") for the proposition that an "essential feature" of any federal tax is that it produces revenue for the government. (Opp. at p. 1.) Of course, the State of California is free to adopt its own definition of tax, which is exactly what Proposition 26 did. It should also be noted that the County admits that it imposed the bag charge in order to change customer behavior and encourage the use of recyclable bags, and *NFIB* states "But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. See W. Brownlee, Federal Taxation in America 22 (2 ed. 2004); cf. 2 J. Story, Commentaries on the Constitution of the United States § 962, p. 434 (1833) ("the taxing power is often, very often, applied for other purposes, than revenue")." (*NFIB, supra,* 132 S.Ct. at p. 2596.)

government. The County's limited interpretation of Proposition 26 as applying only when the government receives money is inconsistent with the initiative's broad definition of a tax. And the County's interpretation would frustrate the people's will by sanctioning end runs around Proposition 26. Within a month after Proposition 26 was enacted, the County adopted the Ordinance at issue in this case. County staff reports advised that other jurisdictions, including Washington DC, had passed similar paper bag charges—calling them taxes—and retained the proceeds for government use. (Certified Record Submitted to the Superior Court ("CR") at pp. 0052-0053; 1425-1427.)

The County was thus well aware that if it kept the proceeds, Proposition 26 required a public vote. So instead, the Ordinance directs the retailers to keep the proceeds and further directs how the proceeds must be used. From the people's perspective, this is a distinction without a difference—the government requires them to pay 10 cents for each paper bag that they had previously received without separate charge, in circumvention of the simple wording of Article XIII C section 1(e). The fact that the Ordinance directs the money to be retained by retailers instead of the County makes no difference, as the government imposes on the people's wallets either way.[6]

Finally, it would be absurd to "construe" Proposition 26 as the County wants it—that the people in amending their Constitution were concerned with levies, charges, and exactions imposed on them by a local government *only* when the government takes physical possession of the proceeds, but not when the government exerts control over the proceeds by directing them to be spent in a specified manner by private third parties such as supermarket and drug store chains. Either way, the government imposes the charge and controls and directs who receives the proceeds and how they are to be used.

The County also benefits whether or not it takes possession of the proceeds, but disingenuously tries to have its cake and eat it too when discussing this. On the one hand, it argues "to the extent Hilex [Appellants] assert that the stores are generating revenues to further the County's governmental purposes, that is wrong." (Opp. at p. 27.) But just 15 pages later, the County argues "the Ordinance furthers the County purpose of enhancing the environment, reducing litter

[6] In an attempt to downplay the bag charge's impact on the people's collective pocketbook, the County argues the charges will decrease over time as fewer paper bags are used. (Opp. at p. 19.) But, as demonstrated in Appellants' Opening Brief, the bag charge cost the people over $71 million a year to start; and even assuming a 70% reduction in use over time, the cost would exceed $21 million per year. (AOB at p. 13, fn. 10.) The County has not disputed these figures.

and decreasing litter costs." (Opp. at p. 43.) By acknowledging that a purpose of the Ordinance was to save the County money, the County necessarily concedes the Ordinance, in effect, acts as a revenue device resulting in the County having more money to use for governmental services.

The simple truth is that in passing Proposition 26, the people sought to restrain local government from extracting money from them without voter approval; it is immaterial whether the people's money, once taken from them, is retained by the imposing government or by a private party blessed by the government to receive it. In fact, it would be the ultimate elevation of form over substance, and indeed makes no sense, for the County to argue that the people in passing Proposition 26 intended a result where government impositions could avoid voter approval merely by funneling the money to private supermarkets and drug stores. *That* is absurd.

III. THE COUNTY'S ARGUMENT THAT PREFATORY UNCODIFIED LANGUAGE OVERRIDES THE PLAIN MEANING OF ARTICLE XIII C SECTION 1(e) IS WITHOUT MERIT

To support its theory that section 1(e) must be construed to apply only if the County retains the proceeds of the bag charge, the County relies on *Arias v. Superior Court* (2009) 46 Cal.4th 969. (Opp. at pp. 16-20.) The County omits mentioning, however, that

Arias acknowledges the cardinal rule of construction that the words of an initiative provide the most reliable indicator of voter intent and there is no is no need for construction when those words are clear and unambiguous. (*Id.* at p. 979; *Silicon Valley Taxpayers Assn. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444 ("*SVTA*") ["If the language [of a constitutional amendment] is clear and unambiguous, the plain meaning governs."]; *Prof. Engineers in Cal. Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 ["'Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure (citation) and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.'" (quoting *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543)].)

Here, the definitional language of section 1(e) is clear and unambiguous, and the County has established no ambiguity in the words of that section.

Arias provides no help to the County. At issue in *Arias* was a provision of Proposition 64 that amended Business and Professions Code section 17203 to provide that a private party may pursue a class action under the unfair competition law only if the party complies with Code of Civil Procedure section 382. (*Arias, supra*, 46 Cal. 4th at p. 978.) The plaintiffs argued that the amendment did not require a plaintiff to bring a class action as section 382 "makes no mention of the words 'class action.'" (*Ibid.*) The Court rejected this argument as its decisions had long interpreted section 382 as authorizing class actions. The Court also reviewed the voter information guide regarding Proposition 64 and found it "leaves no doubt" that one purpose of Proposition 64 was to impose class action requirements on private plaintiffs' representative section 17203 actions, citing direct, affirmative statements to this effect in the Attorney General's Title & Summary ["requires private representative claims to comply with procedural requirements applicable to class action lawsuits"] and the Legislative Analysts' Analysis [Proposition 64 would impose on persons filing unfair competition lawsuits "the additional requirements of class action lawsuits . . . ."]. (*Id.* at pp. 979-980.) Finding this "strong evidence of voter intent," the Court rejected plaintiffs' claim that it need not comply with class action requirements. (*Ibid.*) Thus, *Arias* does not authorize what the County seeks here—construing the simple and unambiguous words of Proposition 26 differently than their plain meaning.

The County also is wrong when it says that applying the plain meaning of section 1(e) would "frustrate the manifest purpose" of Proposition 26. The Supreme Court stated very clearly in *Arias* and

SVTA, as well as dozens of other cases, that the best proof of the voters' purpose is in the words they enacted. (E.g., *Arias, supra*, 46 Cal. 4th at p. 979 ["We look first to the words of the initiative measure, as they generally provide the most reliable indicator of the voters' intent."]; *SVTA, supra*, 44 Cal.4th at p. 444 ["If the language is clear and unambiguous, the plain meaning governs."].) Here, the words of section 1(e) are broad. The County has pointed to nothing in the words enacted by Proposition 26 that support the County's attempt to limit it to situations where the County retains the proceeds of charges it imposes.

Instead, the County relies on one statement in Proposition 26's Findings and Declarations to support the its argument that ruling the bag charge violates Proposition 26 would "frustrate the manifest purpose" of the initiative. The argument fails. It is based on one subsection of prefatory and uncodified language that discusses the "recent phenomenon" where the Legislature and local governments have disguised new taxes as fees in order to extract even more money from California taxpayers. (Opp. at pp. 18-19.) This phrase indicates nothing more than the fact that one of the reasons for Proposition 26 was to put a stop to such practices; it does *not* declare that was the only purpose. The purposes of Proposition 26 are determined by the words it enacted and those words are broad and simple. The people were tired of government taking money out of their wallets and using new and creative devices to end run prior voter-passed initiatives. So they passed the broadly worded Proposition 26 to stop the seemingly endless flow of money out of their pockets without voter approval. The County's attempt to narrowly define the people's "purpose" in passing Proposition 26 to dovetail with its legal position in this case is unavailing.

Furthermore, an uncodified preamble or statement of purpose cannot be used to create doubt or uncertainty about the meaning of a law that is plain on its face. In *Yeager v. Blue Cross of California* (2009) 175 Cal.App.4th 1098, 1101, the statute at issue stated that insurance companies "shall offer coverage for the treatment of infertility." The preamble, however, stated that infertility was no different from any other medical illness and "should be treated for purposes of insurance the same as any other body dysfunction." (*Id.* at p. 1103.) Relying on the statement in the preamble, the plaintiff argued her insurer was required to offer coverage for infertility treatments on the same terms as other medical conditions. (*Id.* at pp. 1102-1103.) The court rejected this argument. While acknowledging "legislative findings and statements of purpose in a statute's preamble can be illuminating if a statute is ambiguous," the Court found that "a preamble is not binding in the interpretation of the statute. Moreover, *the preamble may not overturn the statute's language*." (*Id.* at p. 1103, italics added.)

To the same effect is *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 480, which stated: "The fact the Legislature expressed a concern in the statute's preamble with lawsuits brought 'primarily' to chill First Amendment rights does not mean that a court may add this concept as a separate requirement in the operative sections of the statute."

Sutherland is also in accord: "The preamble can neither limit nor extend the meaning of a statute which is clear. Similarly, *it cannot be used to create doubt or uncertainty*." (Sutherland, Statutes and Statutory Construction (7th ed. 2007) vol. 2A, § 47.4, p. 295 [italics added].) "It is often declared that aids to interpretation can be used only to resolve ambiguity and never to create it." (*Id.* at § 46.4, p. 179.)

Here, Proposition 26's definition of a "tax" is plain and unambiguous. A tax is broadly defined as *any* levy, charge, or exaction of *any* kind. The initiative's preamble expressing concern with government impositions aimed at increasing revenues cannot be read to limit the broad language that codified the definition of a tax. As *Yeager*, *Damon*, and Sutherland make clear, the County is improperly relying on an uncodified subsection of Proposition 26's preamble to overwrite the plain meaning of the operative sections of the initiative. Accordingly, the County's attempt to infuse uncertainty and ambiguity into the language of Proposition 26 should be rejected.

The County also attempts to buttress its "construction" argument because no post-Proposition 218 or 26 cases have found a government measure to be a tax where the proceeds were not retained and spent for specified projects. (Opp. at p. 26, citing *Neecke v. City of Mill Valley* (1995) 39 Cal.App.4th 946 and *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178.) This argument proves nothing. The broad definition of "tax" was amended into article XIII C by Proposition 26 just two years ago, and the issue before the Court regarding its application is one of first impression.

IV. THE COUNTY'S "SKY IS FALLING" ARGUMENT ABOUT THE POLICE POWER IS WITHOUT MERIT

The County argues that the Ordinance must be upheld as a good faith exercise of its police power, and selectively quotes from *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129 ("*Birkenfeld*") to support the proposition that legislation regulating prices is within that power. (Opp. at pp. 36-45.) The argument is unpersuasive.

Birkenfeld held that a city could use its police power to limit high rents charged by landlords (*Birkenfeld, supra*, 17 Cal.3d at p. 140); it did not hold the police power could be used by local governments to order price increases of everyday goods in retail stores—a much different proposition. This would be an extraordinary and unprecedented usurpation of power by a local government, and would raise serious constitutional questions. Appellants are aware of no case holding a local government has the authority under the police power to mandate increases in the retail price of goods such as paper bags. But even assuming the County had such authority under the police power, it would nevertheless be subject to the California Constitution. The County's Opposition conveniently omits a key *Birkenfeld* determination—that a local government's exercise of its police powers is trumped by a contravening general state law: a local law "cannot be given effect to the extent that it conflicts with general laws either directly or by entering a field which general laws are intended to occupy to the exclusion of municipal regulation." (*Id.* at p. 141 [multiple citations omitted].) And in the case at bench, the Ordinance does just that—it violates Article XIII C as amended by Proposition 26. The simple and irrefutable fact is that even if the Ordinance is a legitimate exercise of the police power, it does not give the County leave to violate the California Constitution.

While this completely disposes of the County's police power argument, we briefly discuss several other related claims advanced by the County.

First, the County spills considerable ink extolling the environmental and economic benefits of the plastic bag ban provisions of the Ordinance. (Opp. at pp. 37-38.) This is a red herring because the plastic bag ban is analytically separate and distinct from the legal issues raised by Appellants that the bag charge violates Article XIII C as amended by Proposition 26. Appellants have not challenged the plastic bag ban provisions of the Ordinance (except indirectly to assert the bag charges are not severable).

The County also argues that Appellants challenge the "wisdom" of the Ordinance. (Opp. at p. 44.) It is true Appellants are troubled that the Ordinance requires customers to pay 10 cents for a carryout bag and then directs the proceeds to be kept by private supermarket chains and retail operators. This is an unprecedented imposition which benefits the pocketbooks of powerful supermarket and retailer interests who supported the Ordinance's passage. And it is disturbing to Appellants that in addition to directing supermarkets and other retailers to retain the bag charge proceeds, the Ordinance does not require them to remove what the County freely admits are the previously embedded charges for the cost of the bags, resulting in an obvious windfall. So, yes, Appellants do question the wisdom and fairness of the bag charge, but that is not the issue raised by this lawsuit. The issue is whether the bag charge violates the California Constitution.

Finally, there is no merit to the County's suggestion that striking down the bag charge would cripple the exercise of its police powers.[7] The Constitution is the supreme law of this state and is replete with provisions that supplant the exercise of the police power by local government. Further, it is not as though imposing additional charges on retail goods has been a staple use of the police power. Prior to the enactment of the Ordinance at bench, the County has pointed to no example of any other local government imposed charge to increase the amount a consumer was required to pay for goods or commodities, and direct the proceeds to a private third party.

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[7] In the Superior Court, the County made the sky-is-falling argument that a ruling in favor of Appellants would cripple the police power, "undermine the structure of local government," and "threaten the continued vitality of representative government." (Joint Appendix In Lieu of Clerk's Transcript ("JA") at pp. 0278-0279.) The California Supreme Court has rejected such arguments. (*Amador Valley*, *supra*, 22 Cal.3d at pp. 228-229.)

V. THE VOTERS' INTENT IS FOUND IN THE UNAMBIGUOUS TEXT OF PROPOSITION 26

It is telling that the County does not dispute the extensive discussion in Appellants' Opening Brief as to the rules governing voter intent. (AOB at pp. 35-40.) The County does not dispute that in passing Proposition 26, the people are presumed to have read and understood its language (*Amador Valley, supra*, 22 Cal.3d. at pp. 243-244), or that the plain meaning of the words in Proposition 26 govern and a court "'may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.'" (*Prof. Engineers, supra*, 40 Cal.4th at p. 1037 [quoting *Lesher Communications, supra*, 52 Cal.3d at p. 543)].) Rejecting a similar attempt to construe an initiative more narrowly than its text, *Wright v. Jordan* (1923) 192 Cal. 704, 713 ("*Wright*") concluded the measure "has been adopted by a majority vote of the people, who must be assumed to have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered, regardless of any insufficient recitals in the instructions to voters or the arguments pro and con of its advocates or opponents accompanying the text of the proposed measure."[8]

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[8] The *Wright* Court rejected the argument that it should narrowly construe the initiative's broad language that it applied to all

In their opening brief (AOB at pp. 38-39), Appellants cited *Amwest Surety Insurance Co. v. Wilson* (1995) 11 Cal.4th 1243, 1260-1261, which rejected a narrow interpretation of a voter-passed constitutional amendment, much as the County proposes here. The County opposition does not mention *Amwest*, but it is not so easily ignored. *Amwest* addressed Proposition 103, an insurance measure that by its wording "appl[ies] to all insurance on risks or on operations in this state . . . ." (*Id.* at p. 1248.) The surety company contended that Proposition 103 should be narrowly construed so as not to apply to surety insurers on the theory that the people did not intend such application. (*Id.* at p. 1260.) Because the voter materials did not specifically mention surety insurance, the company argued it was unlikely that voters intended the initiative to apply, despite Proposition 103's use of the words "all insurance." (*Id.* at p. 1260.) The Court rejected this argument and focused on the broad, enacted words of the measure, which did not exempt surety insurance. (*Id.* at p. 1260-1261.) In doing so, the Court noted the similarity of the surety company's position to an unsuccessful argument made in *Wright*, where the Court had previously rejected

annexations or consolidations "under this section or *any other section* of the constitution." (*Wright, supra*, 192 Cal. at p. 713, italics added.) That language is indistinguishable from the Proposition 26 language the County argues the Court should narrowly construe in this case.

the claim that "voters intended a constitutional amendment passed by initiative to have a narrower scope than would follow from its broad language." (*Ibid.*) "Regardless whether the voters understood that surety insurance specifically would be regulated by Proposition 103, they knew that the initiative was not limited to a few forms of insurance, but instead was intended to apply broadly to large classes of insurance." (*Id.* at p. 1264.) The Court thus recognized and gave effect to the fact that "The voters intended that Proposition 103 have broad application to various types of insurance. Limiting the scope of the initiative . . . would not further the purposes of Proposition 103's broad reform of the insurance regulations . . . ." (*Ibid.*)

The words of article XIII C section 1(e), that local voters must approve "any levy, charge, or exaction of any kind imposed by a local government," should be accorded their ordinary and commonsense meaning, just as similar words were accorded their plain meaning in *Amwest*.

A. The Proposition 26 Ballot Materials Do Not Support The County's Claim That The Voters' "Manifest Purpose" Was That The Measure Applies Only When A Local Government Takes Possession of The Proceeds Of Any Levy, Charge, Or Exaction It Imposes

The County argues that if Proposition 26 is not construed to apply only to levies, charges, or exactions where proceeds are kept by local government, it would be "overbroad and vague." (Opp. at pp. 29-34.) This bald assertion is the launching pad for the County's claim that the words "any levy, charge, or exaction of any kind" are "not otherwise defined," and thus contain an ambiguity that justifies resorting to ballot materials to "interpret" them. This is bootstrap logic at its worst. The words "any levy, charge, or exaction of any kind" have plain, commonsense, and dictionary meanings and are not at all vague. The County cites no authority to support its contrary claim. To construe article XIII C, section 1(e) to apply only when the County keeps the proceeds of a levy, charge, or exaction would write the words "*any*" and "*of any kind*" out of the Constitution. Because those words are not vague, they must be applied according to their plain meaning, and the County's invitation that the Court use ballot materials to "construe" Proposition 26 must be rejected.

In any event, the ballot materials do not support the County's erroneous claim that the "manifest purpose" of the voters in passing Proposition 26 was solely to require a vote of the people on measures which result in the government taking physical possession of any levy, charge, or exaction it imposes. The broad words of article XIII C, section 1(e) certainly express no such "manifest purpose." The County quotes several passages in the ballot arguments favoring

Proposition 26 and argues they "suggest[] that even the proponents of Proposition 26 had intended to target revenue generation measures." (Opp. at pp. 30-31.) Of course, a mere "suggestion" is nowhere close to a statement of a manifest purpose. And while the County is correct that revenue generation measures were a target of Proposition 26, its words are not limited to such measures. As shown in Appellants Opening Brief, Proposition 26 targeted government impositions on the people's pocketbooks without regard to where the money went. (AOB at p. 42-43 [e.g., "DON'T LET THE POLITICIANS CIRCUMVENT OUR CONSTITUTION TO TAKE EVEN MORE MONEY FROM US"].)

The County also points to language in the Legislative Analyst's Analysis indicating that Proposition 26 would have the effect of restricting government revenue generation measures such as fees on hazardous materials and alcohol retailers. (Opp. at pp. 32-33.) Restricting such fees was part of Proposition 26, but the County is wrong in claiming that it is limited to such fees. As the Analysis also states, Proposition 26 expanded the scope of what is a state or local tax to include charges that "government imposes to address health, environmental or other societal or economic concerns." (JA at pp. 0251-0252.) The County freely concedes that it imposed the bag charge to address such concerns. (See, e.g., Opp. at p. 38.)

Nothing in the County-cited ballot pamphlet passages establishes the purpose of Proposition 26 was solely to restrict government revenue generation, let alone that that was the "manifest purpose" of the measure with such compelling certainty that it would override the plain language of article XIII C, section 1(e). "It is often declared that aids to interpretation can be used only to resolve ambiguity and never to create it." (Sutherland, Statutes and Statutory Construction, *supra*, at § 46.4, p. 179.)

VI. THE COUNTY CONCEDES THE BAG CHARGE ATTEMPTS TO REGULATE FUTURE CONDUCT; THUS, IT IS A REGULATORY CHARGE AND ILLEGAL UNDER PROPOSITION 26

There is no dispute that one purpose of Proposition 26 was to overrule the decision in *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866 ("*Sinclair*"), which determined that a Legislature-imposed charge on paint manufacturers was a regulatory fee and not a tax.[9]

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[9] Proposition 26 did this by limiting the definition of a "regulatory fee," which *Sinclair* had expanded to include mitigation of past, present, and future harm and modification of future behavior. Proposition 26 limited this definition mechanically by adopting an all-encompassing definition of "tax," and then creating a very limited exception for: "(3) A charge imposed for the *reasonable regulatory costs* to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof." (Cal. Const., art. XIII C, § 1(e), par. (3), italics added; see also *Sinclair*, *supra*, 15 Cal.4th at pp. 876-877.)

The bag charge at issue in this case is analogous to the type of fee deemed "regulatory" by *Sinclair* because the admitted purpose of the bag charge is to change the future behavior of those on whom it is imposed by creating an economic incentive for them not to use paper bags. *Sinclair* had two elements: (1) broadening the definition of a "regulatory fee" to include mitigation of "past, present or future harm," and (2) creating an economic incentive for the payers to change their future behavior and develop alternatives to the use of lead in paint products:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate. *Moreover, imposition of "mitigating effects" fees in a substantial amount . . . also "regulates" future conduct by deterring further manufacture, distribution or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products.* (Citations omitted, italics added.)

(*Id.* at p. 877.)

The bag charge was imposed to change the future behavior of retail customers by discouraging them from using paper bags and incentivizing them to find alternative ways to carry their groceries and other items home. The County freely concedes this purpose and the Court below acknowledged it:

> *The purpose of the 10-cent charge is to modify consumer behavior---to discourage the use of paper carryout bags by requiring customers to pay for something they had previously been provided for free.* Banning the use of plastic bags *and making it more expensive to use paper bags, the 10 cent charge promotes the use of reusable carryout bags.* Furthering this goal, the Ordinance authorizes retail stores to retain the proceeds from the paper bag charge for, among other things, educational material "encouraging the use of reusable bags" by customers. (Italics added.)

(JA at p. 0703.)

The bag charge is admittedly being imposed to modify future conduct and thus is a regulatory fee under *Sinclair*, which Proposition 26 overruled. The bag charge is an illegal tax under Proposition 26 because it was not submitted for voter approval.

VII. THE BAG CHARGE IS NOT SAVED BY THE EXCEPTION CONTAINED IN ARTICLE XIII C SECTION 1(e), PARAGRAPH (1)

The superior court was wrong in concluding the bag charge is exempt from the definition of tax under section 1(e), paragraph (1) (hereafter "section 1(e)(1)"); and the County's logic in attempting to defend that erroneous ruling would eviscerate Proposition 26.

Section 1(e)(1) excludes from the definition of tax:

> A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

This exception is inapplicable for reasons that follow.

The County failed to carry its burden to establish that the exception applies. Proposition 26 places the burden of proof on the County to demonstrate that it satisfies each element of the exception. Immediately after listing the seven narrow exceptions to the definition of "tax," Proposition 26 states:

> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

(Cal. Const., art. XIII C, § 1(e)(1).)

The County, however, failed to offer any evidence whatsoever that (1) the bag charge was imposed in return for a specific government benefit or privilege, (2) the 10 cents per bag charge did not exceed the cost to the local government, and (3) the alleged benefit or privilege is not provided to those not charged.

Further, as a matter of law, the bag charge does not satisfy this exception because no governmental benefit is conferred and no governmental privilege is granted to retail customers in return for the dime per bag charge. The section 1(e)(1) exception provides that a local government may impose a charge for its reasonable cost of conferring specific governmental benefits or granting governmental privileges. That exception is inapplicable here because the County did not provide any specific government benefit or privilege to retail customers in ordering them to pay 10 cents for a paper bag. Nor does it cost the County 10 cents for every paper bag provided to retail customers. To put it another way, the Ordinance does not confer any specific benefit nor grant any privilege to retail customers, and there are no costs *to the local government* of conferring any benefit or granting any privilege. On its face and as a matter of law, the bag charge does not satisfy section 1(e)(1).

The court below ruled, and the County argues, that a specific privilege has been conferred on the payor—the right to buy and use paper bags—and that the 10 cents charged by the store is the actual reasonable cost of providing the paper bag. (Opp. at pp. 46-48.) The County is reaching for straws here. First, it is undisputed that customers had the right to receive paper bags from retailers before the Ordinance was enacted, therefore that was not a right or privilege granted by the Ordinance. Second, section 1(e)(1) is not concerned with the cost of the paper bags to the retail stores, it is concerned with the cost to the County of providing such bags. As the burden of proof language of section 1(e) quoted above makes clear, the County has the burden of proving that the amount of the bag charge "is no more than necessary to cover the reasonable costs of the *governmental activity* . . . ." (Italics added.) But the County failed to meet this burden — it has no costs because it does not provide the bags. Indeed, the County concedes, as it must, that the 10 cent charge "wholly benefits the stores" and thus does not reimburse any costs incurred by the County. (Opp. at p. 27.) The County's attempt to fit within the exception fails.[10]

By no stretch of the imagination can it be said that the County has conferred a benefit or privilege, "the right to buy and use paper bags," because the County could have outlawed this existing practice but declined to do so. Indeed, it would be absurd to construe Proposition 26, a tax *limitation* initiative, to allow local government to impose a levy, charge, or exaction based on the local government's failure to act, such as the County's decision not to forbid retailers from providing shoppers with paper bags to carry away the items

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[10] Neither the County nor the court below provide any authority whatsoever for their bald conclusion that because "the County is imposing the charge by using retail stores as the County's agent then it follows that has conferred a specific privilege to the ultimate payor – the right to buy and use paper bags." (Opp. at p. 46-47.) Nor did the superior court provide any explanation or justification for its characterization of Appellants' argument that the County had conferred no governmental privilege upon customers as "disingenuous." (JA at p. 0706.) The court's *ipse dixit* logic cannot hide the fact that the bag charge was not imposed in exchange for a specific governmental privilege or benefit, and cannot excuse the County's failure to satisfy its burden of proof as required by Proposition 26.

they purchase. As a matter of common sense, the "specific benefit conferred or privilege granted" set forth in Proposition 26 must be a local government's affirmative act of conferring a benefit or granting a privilege that did not already exist. Contrary to the purpose of Proposition 26, the County's interpretation would expand, not restrict, a local government's ability to impose a tax without voter approval. Indeed, it would open the floodgates to more taxes by allowing a local government to charge taxpayers for engaging in existing lawful activities the local government believes are not in the public interest but declines to outlaw. For example, without voter approval, a local government could impose a per item charge for dry cleaning on the ground that dry cleaning is harmful to the environment and could be outlawed. Or a local government could impose a per item charge on the sale of soft drinks or potato chips within its jurisdiction to discourage their consumption. The possibilities for local government levies, charges, and exactions based on government inaction are endless. This surely was not the intent of Proposition 26.

Furthermore, the County's claim that the section 1(e)(1) exception applies on the novel theory the County is providing the paper bags would eviscerate Proposition 26. Under the County's reasoning (and that of the court below), the County would be able to require retailers to charge an additional 10 cents on any item (e.g., a paper bag, can of soda, or cube of butter) and require retailers to deliver the proceeds to the County. Notwithstanding that the County received the proceeds, the charge would fall within the section 1(e)(1) exception to a tax because the County, and not the retailer, was "providing" the bag, soda, or cube of butter. If the County's strained argument is accepted, local governments could impose additional charges on retail goods and keep the proceeds on the legal fiction that the local government, and not the retail store, is providing the goods to the customer. This would create a huge loophole in Proposition 26, allow the section 1(e)(1) exception to literally swallow the definition of tax, and completely frustrate the will of the voters.[11]

Appellants did not waive their argument that the exception is inapplicable. The County also incorrectly argues "the trial court noted that Appellants failed to timely and properly brief why section 1(e)(1) did not apply." (Opp. at p. 45) In fact, contrary to the County's misleading assertion, Appellants made the same argument in its moving papers below that it makes here.[12] The Court below

[11] It is telling that Appellants made this same argument in their opening brief (AOB at p. 48, fn. 28), and the County failed to respond to it, thereby conceding its accuracy.

[12] In its memorandum of points and authorities in support of its motion, Appellants affirmatively stated that exception 1(e)(1) did

incorrectly ruled Appellants waived the argument that the County had not met its burden of proof that the 10 cent bag charge did not exceed the reasonable costs to the County of conferring the benefit or granting the privilege (JA at p. 0706), but that ruling was erroneous. First, Appellants did argue that none of the seven exceptions applied and quoted and argued each one. (JA at pp. 0203-0205.) At that time, Appellants had a 20-page briefing limit and did not know which if any of the seven exceptions the County might argue were applicable or what proof the County might offer to support such argument. As stated in the opening brief (AOB at pp. 49-50), Appellants were not required to anticipate and address every conceivable contention the County might have made. Moreover, as demonstrated in footnote 12 above, Appellants clearly asserted that the exception did not apply because the Ordinance conferred no governmental benefit and granted no governmental privilege in return for the dime per bag charge. Appellants properly raised this argument, and the Court below and the County are mistaken when they claim otherwise.

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not apply (JA at pp. 0203-0205), and argued "This exemption is inapplicable as no governmental benefit is conferred and no governmental privilege is granted to retail customers in return for the dime per bag charge." (JA at p. 0204.) Additionally, Appellants Verified Complaint below specifically quoted the section 1(e)(1) exception and alleged that the bag charge does not fall within it or any of the other exceptions to the definition of "tax" in Proposition 26. (Verified Complaint ¶¶ 28-29; JA at pp. 0006-0007.)

Additionally, as discussed above, Proposition 26 changed the burden of proof and placed it directly on the County to prove "by a preponderance of the evidence that a levy, charge, or exaction is not a tax, [and] that the amount is no more than necessary to cover the reasonable costs of the governmental activity . . . ."(Cal. Const., art. XIII C § (1)(e).) Thus, the County had the burden to prove all of the elements of the section 1(e)(1) exception. The County did not meet this burden. It did not prove that the bag charge was imposed for a specific government benefit or privilege, that the alleged benefit or privilege is not provided to those not charged, or that the 10 cent per bag charge did not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege. On this latter element, the County cites to no proof that 10 cents is no more than necessary to cover *County* costs. Instead, it merely points to evidence in the record below showing 10 cents is the approximate cost to *retailers* of paper bags, a fact that is wholly irrelevant to section 1(e)(1).[13] (Opp. at pp. 42-43, 45, fn. 11.)

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13 Below, the County in a section of its opposition titled "The Ten Cents Charged Is The Reasonable Cost Of Paper Bags," made the unanticipatable and bogus argument that the cost of bags to retailers should be deemed the County's cost for purposes of satisfying section 1(e)(1). (JA at pp. 0279-0280.) Appellants were entitled in their reply below to respond to this argument and properly did so. (JA at pp. 0429-0430; *Fratessa v. Roffy* (1919) 40 Cal.App. 179, 188-189; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal § 723, p.791 [rule against raising issue for first time on reply "inapplicable where

The burden of proof established by Proposition 26 was intended to make it more difficult for a local tax to be upheld in a court proceeding. The County seeks to trivialize this provision by implying it merely mirrors Evidence Code § 500 (Opp. at p. 15), but courts "may not lightly disregard or blink at" a clear provision of the Constitution. (*State Personnel Bd. v. Department of Personnel Admin.* (2005) 37 Cal.4th 512, 523; *SVTA, supra,* 44 Cal.4th at p. 448.) Contrary to the County's suggestion, the court below made no finding of fact that it costs *the County* 10 cents for each paper bag provided to retail customers. But even if it had made such a finding as a basis for its erroneous conclusion the County had satisfied the exception in section 1(e)(1), that finding would be subject to independent, *de novo* review as it would be a mixed question of fact and law that implicates a constitutional right. (*People v. Cromer* (2001) 24 Cal.4th 889, 894; *SVTA, supra,* 44 Cal.4th at pp. 449-450.)

The bag charge was imposed to increase the cost of paper bags and thereby discourage consumers from using them. The charge does not come within the section 1(e)(1) exception because it was not imposed in exchange for a specific government benefit conferred or

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point made is in answer to one made in respondent's brief"]; *Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 711.) The court below plainly erred in finding this argument was waived.

privilege granted to retail customers, and the 10 cents bag charge exceeds any cost to the County of conferring a benefit or privilege.[14] The County's argument that *it* is providing the bags, and that the cost of the bags to retailers should be deemed to be the *County's* cost, must fail.

VIII. THE BAG CHARGE IS NOT SEVERABLE

The final issue before the Court is whether the bag charge is severable from the remainder of the Ordinance. An invalid provision "can be severed if, and only if, it is 'grammatically, functionally and volitionally separable'" from the remaining provisions. (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 960-961.) While the bag charge can be mechanically separated, it is a much closer question as to whether it is functionally or volitionally separable.

An invalid provision is functionally separable "if it is not necessary to the measure's operation and purpose" and it is volitionally separable "if it was not of critical importance to the measure's enactment." (*Ibid.*) The bag charge is integral to the Ordinance's operation and purpose, and thus not severable, because

[14] As no governmental privilege or special benefit was conferred, the element of section 1(e)(1) that the benefit or privilege must *not* be provided to those not charged is immaterial. Nonetheless, it must be said that the County offered no proof that this element was met, either. Section 12.85.060 of the Ordinance specifically requires stores to provide paper bags free of charge to some retail customers, which is yet another reason the exception is inapplicable. (L.A. County Ord. No. 2010-0059.)

without it (i.e., with a stand-alone plastic bag ban), the County's environmental analyses showed without doubt that shoppers who had previously used plastic bags would make a wholesale switch to paper bags (CR at pp. 0006, 0756, 0776, 1460-1461, 1507-1508, 1603, and 1684), thereby thwarting the Ordinance's purpose of causing consumers to switch to reusable bags.

The bag charge is also not volitionally separable. The Board of Supervisors was well aware from the environmental analyses that banning plastic bags on a stand-alone basis would drastically increase the use of paper bags in lieu of plastic and reusable bags, and would have serious adverse environmental impacts including increasing greenhouse gas emissions by almost 20,000 metric tons per year. (CR at p. 0146.) Furthermore, the Board considered and rejected the option of banning plastic bags on a stand-alone basis, i.e., without also imposing a charge on paper bags: "The Board of Supervisors finds that specific economic, legal, social, technological, or other considerations make this alternative infeasible and therefore rejects this alternative . . . because it would not limit the issuance of paper carryout bags." (CR at p. 1461.) Thus, the Board itself has concluded that the bag charge was of critical importance to the Ordinance's enactment.

IX. CONCLUSION

Proposition 26 amended California Constitution article XIII C to require voter approval of "any levy, charge, or exaction of any kind imposed by a local government." The bag charge imposed by Los Angeles County falls within the plain meaning of these words. The County's strained arguments to the contrary must give way to the California Supreme Court's compelling words about the people's power to amend their constitution:

> Because the role of the court is to apply a statute or constitutional provision according to its terms, not to read into it exceptions or qualifications that are not supported by the language of the provision (*Vallerga v. Dept. Alcoholic Bev. Control* (1959) 53 Cal.2d 313, 318 [1 Cal.Rptr. 494, 347 P.2d 909]), we begin with what appears to be the plain language of the constitutional and charter provisions which govern exercise of the initiative power in the City and County of San Francisco. Where the language is clear, it should be followed. (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 38 [283 Cal.Rptr. 584, 812 P.2d 931].)
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> These constitutional and charter provisions must be construed liberally in favor of the people's right to exercise the reserved powers of initiative and referendum. The initiative and referendum are not rights "granted the people, but . . . power[s] reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.'"

> (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41, 557 P.2d 473], fn. omitted; see also *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241 [186 Cal.Rptr. 30, 651 P.2d 274].)

(*Rossi v. Brown* (1995) 9 Cal.4th 688, 694-695.)

It is respectfully requested that the judgment entered below be reversed and the bag charge and/or entire Ordinance declared null and void.

Dated: November 30, 2012

NIELSEN MERKSAMER PARRINELLO GROSS & LEONI LLP

By: ______________________

James R. Parrinello
Attorney for Appellants

CERTIFICATION OF BRIEF LENGTH

James R. Parrinello, Esq., declares:

1. I am licensed to practice law in the state of California, and am one of the attorneys of record for *Petitioners and Appellants*, Lee Schmeer, Salim Bana, Jeff Wheeler, Chris Kucma and Hilex Poly Co. LLC, in this action. I make this declaration to certify the word length of the Appellants' Reply Brief.

2. I am familiar with the word count function within the Microsoft Word software program by which the Appellants' Reply Brief was prepared. Applying the word count function to the Appellants' Reply Brief, I determined and hereby certify pursuant to California Rules of Court, Rule 8.204(c), that this Appellants' Reply Brief contains 11,272 words, and is within the word count limit imposed by Rule 8.204(c).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and of my own personal knowledge except for those matters stated on information and belief and, as to those matters, I believe them to be true. If called as a witness, I could competently testify thereto.

Executed on November 30, 2012, at San Rafael, California.

James R. Parrinello, Declarant

Schmeer, et al. v. County of Los Angeles, et al.
Court Of Appeal Of The State Of California
Second Appellate District, Division 3, Case No. B240592

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States employed in the County of Marin. I am over the age of 18 and not a party to the within cause of action. My business address is 2350 Kerner Blvd., Suite 250, San Rafael, CA 94901. I am readily familiar with my employer's practices for collection and processing of correspondence for mailing with the United States Postal Service and for pickup by Federal Express.

On November 30, 2012, I served a true copy of the foregoing APPELLANTS' REPLY BRIEF on the following parties in said action, by serving:

Albert Ramseyer, Esq. Truc Moore, Esq. Office of the County Counsel County of Los Angeles 648 Kenneth Hahn Hall of Admin. 500 West Temple Street Los Angeles, CA 90012 (213) 974-4334 Attorneys for Respondents/Appellees	Los Angeles County Superior Court Attn: Hon. James C. Chalfant Dept. 85 111 N. Hill Street Los Angeles, CA 90012 (213) 974-5889
	California Supreme Court Office of the Clerk, First Floor 350 McAllister Street San Francisco, CA 94102 (415) 865-7000 Via e-submission

__X__ **BY U.S. MAIL:** By following ordinary business practices and placing for collection and mailing at 2350 Kerner Blvd., Suite 250, California 94901 a true copy of the above-referenced document(s), enclosed in a sealed envelope; in the ordinary course of business, the above documents would have been deposited for first-class delivery with the United States Postal Service the same day they were placed for deposit, with postage thereon fully prepaid.

Executed in San Rafael, California, on November 30, 2012.

I declare under penalty of perjury, that the foregoing is true and correct.

Paula Scott

Paula Scott