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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF LOS ANGELES

14 LEE SCHMEER, SALIM BANA, JEFF
15 WHEELER, CHRIS KUCMA, and HILEX
POLY CO. LLC,

16 *Petitioners/Plaintiffs,*

17 vs.

18 COUNTY OF LOS ANGELES,
19 CALIFORNIA; GAIL FARBER in her
official capacity as Los Angeles Co.
20 Director of Public Works; KURT
21 FLOREN in his official capacity as Los
22 Angeles Co. Director of the Dept. of
Agricultural Commissioner/Weights and
23 Measures; DR. JONATHAN FIELDING
in his official capacity as Los Angeles Co.
24 Director of Public Health; and DOES 1-
10,

25 *Respondents/Defendants.*
26
27
28

Case No.: BC470705

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITIONERS' MOTION FOR WRIT
OF MANDATE (CCP § 1085)**

DATE: March 15, 2012

TIME: 9:30 a.m.

DEPT: 85

JUDGE: Hon. James C. Chalfant

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1 **I. INTRODUCTION**

2 The ordinance before the Court violates Article XIIC of the California Constitution.
3 Weary of local legislative bodies imposing one creative fee after another and asserting such
4 fees were not taxes and voter approval was unnecessary, California's voters in November
5 2010 passed Proposition 26 to amend Articles XIHA and XIIC and put an end to such
6 practices. Proposition 26 defines "tax" to mean "any levy, charge, or exaction of any kind
7 imposed by a local government." With exceptions not applicable here, no such tax may be
8 imposed without local voter approval.

9 The ordinance was enacted by the County Board of Supervisors. To promote the use
10 of reusable carryout bags and discourage customers from relying on retail stores to provide
11 carry-out plastic and paper bags, the ordinance forbids stores from providing customers
12 plastic bags and requires those stores to charge customers \$.10 for each paper bag
13 provided.

14 Prior to the ordinance's passage, customers were routinely provided plastic and
15 paper bags without any separate charge. The ordinance-mandated \$.10 per paper bag
16 charge imposed on customers and added to their bills, is a "levy charge or exaction of any
17 kind" imposed by the County. It was not approved by local voters, and thus is a manifest
18 violation of Article XIIC.

19 The motion for writ of mandate pursuant to Code of Civil Procedure § 1085 should
20 be granted. In striking down another governmental charge for violating another voter-
21 passed measure, Proposition 218, the California Supreme Court has unanimously held that
22 "[A] local agency acting in a legislative capacity has no authority to exercise its discretion in
23 a way that violates constitutional provisions or undermines their effect."¹ The ordinance in
24 question does both.

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28 ¹ *Silicon Valley Taxpayers Assn. Inc. v Santa Clara County Open Space Authority* ("SVTA")
(2008) 44 Cal.4th 431, 448. SVTA was also a mandate case.

1 **II. STATEMENT OF FACTS**

2 There are no disputed material facts (and none were raised in the previously-filed
3 motion papers in Dept. 17). The Ordinance was adopted by the County Board of
4 Supervisors on November 23, 2010. (Certified Record ("Record") at 0025.) It became
5 operative as to large retail stores (approx. 67 in number) on July 1, 2011, and as to smaller
6 retail stores (approx. 1,024 in number) on January 1, 2012. (Record at 0021, 0018-0019
7 [L.A. Co. Code §§ 12.85.070 and 12.85.010(J)(1) - (3)].) As discussed herein, it requires retail
8 stores to charge customers 10¢ for each carryout paper bag provided. Petitioners have paid
9 this charge and oppose and object to it. Prior to passage of the Ordinance, they had not
10 been separately charged for plastic or paper carryout bags. (See Petitioners' Appendix
11 ("Pet. Appendix") filed herewith [Decs. of Schmeer, Kucma, Wheeler , Rozenski and
12 Bana].)

13 **III. THE CHALLENGED ORDINANCE VIOLATES THE CALIFORNIA**
14 **CONSTITUTION AS AMENDED BY PROPOSITION 26**

15 **A. Prior Voter Enactments Restricting Local Tax Increases—**
16 **Propositions 13, 62 and 218**

17 Proposition 13. Thirty four years ago, in 1978, voters adopted Proposition 13
18 amending the State Constitution to restrict property tax increases. Proposition 13 also
19 gave local voters greater control over decisions to raise special taxes at the local level to
20 prevent local governments from replacing lost property tax revenues by raising other
21 taxes.² Nonetheless, local governments in subsequent years sought to circumvent the
22 restrictions on imposing or increasing local taxes contained in Proposition 13.³

23 Proposition 62. In response, voters in 1986 sought to exert further control by
24 qualifying for the ballot and adopting Proposition 62, a statutory initiative which sought to
25 require local special taxes to be approved by two-thirds of local voters, and local general
26 taxes to be approved by a majority of local voters. Despite the adoption of these two ballot

27 _____
28 ² See Cal. Const., art. XIII A, § 4 [requiring cities, counties, and specials districts to obtain two-thirds voter approval prior to imposing any special tax].

³ See *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 76.

1 measures in eight years providing local taxpayers a voice, local legislators continued to
2 devise ways to end-run voters by claiming that voter approval requirements for a multitude
3 of charges were inapplicable.⁴

4 Proposition 218. Acting to protect themselves from ever-increasing escalations in
5 novel and creative taxes and charges at the local level, the state's voters in 1996 qualified
6 for the ballot and passed Proposition 218, The Right to Vote On Taxes Act, adding Articles
7 XIII C and D to the State Constitution. It forbade any local general tax (one imposed for a
8 general governmental purpose) from being imposed without approval by a majority vote of
9 the electorate in the affected jurisdiction, and any local special tax (one imposed for a
10 specific governmental purpose) from being imposed without approval by a two-thirds vote
11 of the electorate.⁵ As stated in the arguments in support of Proposition 218, those
12 requirements were added to the Constitution in order to "guarantee" Californians the
13 "right to vote on local tax increases—even when they are called something else, like
14 'assessments' or fees'." These restrictions were required because local politicians sought to
15 exploit an apparent loophole in the law "that allow[ed] them to raise taxes without voter
16 approval by calling taxes 'assessments' and 'fees'."⁶ As the ballot argument in favor of
17 Proposition 218 observed, "Once this loophole was created, one lawyer working with
18 politicians wrote, assessments "are now limited only by the limits of human imagination."⁷

19 Proposition 218 did not explicitly define what constituted a "tax" and was subject to
20 the measure's local voter approval requirements. Disagreements ensued regarding the
21 difference between, for example, regulatory fees and taxes—the former arguably not
22 subject to voter approval requirements, while the latter certainly were. The California

23
24 ⁴ See Petitioners' Request for Judicial Notice ("Pet. RJN"), filed herewith, at Ex. 2 [Ballot
25 Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 218, stating: "After voters passed
26 Proposition 13, politicians created a loophole in the law that allows them to raise taxes without
27 voter approval by calling taxes 'assessments' and 'fees'"]. Prop 218 §2, Findings and Declarations
states: "...local governments have subjected taxpayers to excessive tax, assessment, fee and charge
increases" that frustrate the purpose of Prop 13's voter approval provisions. (Pet. RJN at Ex. 2, p.
108.)

⁵ Cal. Const., art. XIII C, § 2.

⁶ Pet. RJN at Ex. 2, p. 76 [Ballot argument in favor of Prop. 218].

⁷ *Id.*

1 Supreme Court in *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866,
2 ruled that certain charges were “regulatory fees” and not taxes; and thus could be enacted
3 at the local level without a vote of the people (or, at the state level, without a 2/3 vote of the
4 Legislature). By expanding the scope of regulatory fees and thereby narrowing what had
5 been understood to be a tax, the decision gave local legislative bodies another avenue to
6 impose fees and other charges without satisfying the voter approval requirements of
7 Propositions 13, 62 and 218. Such fees and charges became rampant, even though they
8 were in reality disguised or hidden taxes. To avoid voter approval, many were labeled as
9 “regulatory” but exceeded the costs of actual regulation and licensing and/or were merely
10 imposed to raise additional revenues.⁸

11 **B. Proposition 26 Was Enacted In November 2010 and Broadly**
12 **Defines a Local Tax As “Any Levy, Charge, or Exaction of Any**
13 **Kind Imposed by a Local Government”**

14 The people’s response was Proposition 26—which represents the culmination of
15 three decades of efforts by California citizens to restrain local legislators from imposing
16 taxes and charges without a vote of the people. The measure’s findings and declarations of
17 purpose declared, “Since the enactment of Proposition 218 in 1996, the Constitution of the
18 State of California has required that increases in local taxes be approved by the voters” but
19 nevertheless “California taxes have continued to escalate,” which can be attributed in large
20 part to “the recent phenomenon whereby the Legislature and local governments have
21 disguised new taxes as ‘fees’ in order to extract even more revenue from California
22 taxpayers without having to abide by these constitutional voting requirements.”⁹

23 At the local level, Proposition 26 resolved the “hidden tax” problem (e.g., taxes mis-
24 labeled as “fees”) by broadly defining what is a tax for the purposes of Proposition 218’s

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28 ⁸ Pet. RJN at Ex. 3, p. 114 [Ballot Pamp., Gen. Elec. (Nov. 2, 2010) Proposition 26, § 1, Findings and Declarations of Purpose].

⁹ *Id.*

1 local voter approval requirements.¹⁰ Proposition 26 added section 1(e) to Article XIII C
2 which reads:

3 As used in this article, ‘tax’ means *any levy, charge, or exaction of any*
4 *kind* imposed by a local government... [with only 7 limited exemptions,
discussed below] (Emphasis added.)

5 This definition—that a tax is any levy, charge, or exaction of any kind imposed by a local
6 government—could hardly have been broader.

7 Proposition 26’s broad definition of a “tax” applies to all levies, charges or exactions
8 of any kind “except the following:”¹¹

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

12 (2) *A charge imposed for a specific government service or product provided*
13 *directly to the payor that is not provided to those not charged, and which*
14 *does not exceed the reasonable costs to the local government of providing*
the service or product.

15 (3) *A charge imposed for the reasonable regulatory costs to the local*
16 *government for issuing licenses and permits, performing investigations,*
17 *inspections, and audits, enforcing agricultural marketing orders, and the*
administrative enforcement and adjudication thereof.

18 (4) *A charge imposed for entrance to or use of local government property,*
19 *or the purchase, rental, or lease of local government property, except*
20 *charges governed by Section 15 of Article XI.*

21 (5) *A fine, penalty, or other monetary charge imposed by the judicial branch*
22 *of government or a local government, as a result of a violation of law.*

23 (6) *A charge imposed as a condition of property development.*

24 (7) *Assessments and property-related fees imposed in accordance with the*
25 *provisions of Article XIII D.*¹²

26 None of these seven exemptions applies to the bag charge, as discussed below.

27 The ballot arguments in the State voter handbook in support of Proposition 26 were
28 direct in expressing the measure’s sentiment. The arguments in support stated that “tax
increases at the local level require voter approval,” but that “local politicians have been

¹⁰ Cal. Const., art. XIII C, § 1(e).

¹¹ *Id.*

¹² *Id.*

1 calling taxes 'fees' so they can bypass voters and raise taxes without voter permission."
2 Further, the arguments in support reassured voters that "PROPOSITION 26 CLOSES THIS
3 LOOPHOLE" by requiring politicians "to meet the same vote requirements to pass these
4 Hidden Taxes as they must to raise other taxes, protecting California taxpayers and
5 consumers."¹³ The rebuttal to the argument against Proposition 26 explained that
6 "Proposition 26 fixes a loophole that allows politicians to impose new taxes on businesses
7 and consumers by falsely calling them 'fees'" and that what "Prop. 26 really does" is simply
8 require "a POPULAR VOTE TO PASS LOCAL HIDDEN TAXES disguised as fees, just like
9 the Constitution requires for most other local tax increases."¹⁴

10 In describing Proposition 26, the Legislative Analyst's Office ("LAO") stated the
11 measure's intent was to expand the definition of "tax" to bring additional types of charges
12 under the scope of Proposition 218's voter approval requirements:

13 *Over the years, there has been disagreement regarding the difference*
14 *between regulatory fees and taxes, particularly when the money is raised to*
15 *pay for a program of broad public benefit. In 1991, for example, the state*
16 *began imposing a regulatory fee on businesses that made products containing*
17 *lead. The state uses this money to screen children at risk for lead poisoning,*
18 *follow up on their treatment, and identify sources of lead contamination*
19 *responsible for the poisoning. In court, the Sinclair Paint Company argued*
20 *that this regulatory fee was a tax because: (1) the program provides a*
21 *broad public benefit, not a benefit to the regulated business, and (2) the*
22 *companies that pay the fee have no duties regarding the lead poisoning*
23 *program other than payment of the fee.*

24 *In 1997, the California Supreme Court ruled that this charge on businesses*
25 *was a regulatory fee, not a tax. The court said government may impose*
26 *regulatory fees on companies that make contaminating products in order to*
27 *help correct adverse health effects related to those products. Consequently,*
28 *regulatory fees of this type can be created or increased by (1) a majority vote*
of each house of the Legislature or (2) a majority vote of a local governing
body.¹⁵ (Emphasis added.)

¹³ Pet. RJN at Ex. 3, p. 60 [Ballot argument in favor of Prop. 26].

¹⁴ *Id.* at p. 61 [Rebuttal to argument against Prop. 26].

¹⁵ Pet. RJN at Ex. 3, p. 57 [Ballot Pamp., analysis of Prop. 26 by the Leg. Analyst].

1 The LAO pointed out that Proposition 26 would override the *Sinclair Paint*¹⁶
2 decision and broaden the definition of “tax” so that “public benefit” fees and any other local
3 exactions not specifically exempted would be subject to voter approval:

4 *This measure broadens the definition of a state or local tax to include many*
5 *payments currently considered to be fees or charges. As a result, the*
6 *measure would have the effect of increasing the number of revenue*
7 *proposals subject to the higher approval requirements...Generally, the types*
8 *of fees and charges that would become taxes under the measure are ones that*
9 *government imposes to address health, environmental, or other societal or*
10 *economic concerns.*¹⁷ (Emphasis added.)

11 Ballot arguments and the Legislative Analyst’s analysis in the statewide voter
12 handbook constitute legislative history of a statewide ballot measure. (*Amador Valley*
13 *Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208,
14 245; *People v. Superior Court (Henkel)* (2002) 98 Cal.App.4th 78, 82.)

15 **C. Proposition 26 Also Changed the Law To Put The Burden of Proof**
16 **on The County**

17 Proposition 26 enacted another key taxpayer protection: it changed the law to
18 require that a local government (i.e., the County herein) seeking to impose a levy, charge or
19 exaction of any kind has the burden of proof by a preponderance of the evidence to
20 establish it is not a tax. Proposition 26 added Article XIII C § 1(e), which states:

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

27 **D. It is Well Settled That The Courts Are Duty Bound to Jealously**
28 **Guard the People’s Right of Initiative And May Not Blink At**
Proposition 26’s Clear Constitutional Mandate

“Declaring it ‘the duty of the courts to jealously guard this right of the people,’ the
courts have described the initiative and referendum as articulating ‘one of the most
precious rights of our democratic process.’ It has long been our judicial policy to apply a

¹⁶ *Sinclair Paint, supra*, 15 Cal.4th 866.

¹⁷ Pet. RJN at Ex. 3, p. 58 [Ballot Pamp., analysis of Prop. 26 by Leg. Analyst].

1 liberal construction to this power whenever it is challenged in order that the right be not
2 improperly annulled.” (*Independent Energy Producers Assn. v. McPherson* (“IEP”)
3 (2006) 38 Cal.4th 1020, 1032.)

4 These same principles govern judicial application of measures passed by the voters.
5 In striking down an assessment for open space as a tax violating Proposition 218 because it
6 did not receive voter approval, a unanimous Supreme Court stated, “If the language is clear
7 and unambiguous, the plain meaning governs.” (*SVTA, supra*, 44 Cal. 4th at 444.) Here,
8 the language of Proposition 26 could not be more plain—a tax is defined to mean *any* levy,
9 charge or exaction imposed by local government for any purpose. As *SVTA* made clear,
10 “We must enforce the provisions of our Constitution and ‘may not lightly disregard or blink
11 at ...a clear constitutional mandate.’ (Citation)” (*Id.* at 448.)

12 Further, constitutional amendments and statutes adopted by the voters must be
13 construed liberally in favor of the people’s power of initiative. “When interpreting a
14 provision of our state Constitution, our aim is “to determine and effectuate the intent of
15 those who enacted the constitutional provision at issue. When, as here, the voters enacted
16 the provision, their intent governs.” (*Bighorn-Desert View Water Agency v. Verjil* (2006)
17 39 Cal.4th 205, 212; *Paland v. Brooktrails Township Community Services Dist. Bd. of Dir.*
18 (2009) 179 Cal.App.4th 1358, 1368-69 [internal citations omitted]; see also *Cal.*
19 *Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 267-68 [voiding statute for
20 violating Prop 22, adopted 11/2/2010].)

21 Applying these principles, *Shaw v. Chiang* (2009) 175 Cal.App.4th 577, 596, stated:

22 Statutes and constitutional provisions adopted by the voters must be
23 construed liberally in favor of the people’s right to exercise the reserved
24 powers of initiative and referendum.... If doubts can reasonably be resolved
25 in favor of the use of this reserve power, courts will preserve it. (Quoting
Rossi v. Brown (1995) 9 Cal.4th 688, 694–695 [internal citations and
26 quotations omitted, emphasis added].)

27 These principles apply with particular force to Proposition 26, the culmination of
28 over thirty years’ worth of efforts by California voters to exercise a degree of influence over
their local governments’ tax decisions. They have gone from requiring a public vote for

1 local special taxes (Prop. 13), to requiring a public vote for all local taxes (Prop. 62), to
2 enshrining in the Constitution the requirement for a public vote on all local taxes (Prop.
3 218), to defining “tax” in the Constitution itself—in the broadest possible terms [any levies,
4 charges, or exactions *of any kind*] so that there can be no doubt as to when the local voter
5 approval requirements are triggered (Prop. 26). There is really nothing left that the voters
6 can say or do to guarantee to themselves the right to vote on local tax increases.

7 **E. The Challenged Ordinance Was Enacted After the Effective**
8 **Date of Proposition 26 and Imposes a 10¢ Carryout Paper**
9 **Bag Charge, Which is a Levy, Charge or Exaction and Thus a**
10 **Tax Under Proposition 26**

11 Culminating several years of analysis, on November 23, 2010—20 days after
12 Proposition 26 went into effect—the Los Angeles County Board of Supervisors (“County”)
13 adopted Ordinance No. 2010-0059 (the “Ordinance”).¹⁸

14 The Ordinance implements the County’s purpose of promoting reusable bags by
15 discouraging the use of plastic and paper carryout bags, which retail stores have
16 historically provided to customers without a separately stated charge. (Record at 1609
17 [hearing on Ordinance on 11/16/2010]; Pet. Appendix [Rozenski Decl. at ¶4; Kucma Decl.
18 at ¶4; Wheeler Decl. at ¶4].) It prohibits retail stores from providing customers with
19 plastic carryout bags¹⁹ and requires stores to impose a 10 cent (\$0.10) “charge” on
20 customers for each paper carryout bag.²⁰

21 The purpose of the 10 cent paper bag charge is to modify consumer behavior—to
22 discourage the use of paper carryout bags by requiring customers to pay for something
23 they had previously been provided for free—without a separate charge.²¹ The 10 cent

24 ¹⁸ A true and correct copy of the Ordinance is reproduced at Bates Nos. 0015-0025 to the
25 Record. It added Ch. 1285 to Title 12 of the Los Angeles County Code (“L.A. Co. Code”).

26 ¹⁹ L.A. Co. Code § 12.85.020(A) states, “No store shall provide to any customer a plastic
27 carryout bag.” (Record at 0019.)

28 ²⁰ L.A. Co. Code § 12.85.040(A) states, “Any store that provides a recyclable paper carryout
bag to a customer must charge the customer 10 cents (\$.10) for each bag provided...” (*Id.*)

²¹ A November 3, 2010 County-commissioned Economic Impact Analysis of the proposed
Ordinance by AECOM Technical Services (“AECOM”) recognized this purpose of the bag tax: “In a
no-charge scenario (where plastic bags are banned but paper bags are free), customers have little
incentive to switch to reusable bags because paper bags appear to be provided free of
charge...Under the proposed ordinance that imposes a 10-cent charge, consumers would explicitly

1 charge accomplishes the County's goal in the same way an insurance copayment charge
2 reduces the consumption of health care, simply by making it more expensive to the
3 consumer. By banning the use of plastic bags and making it more expensive to use paper
4 bags, the 10 cent charge promotes the use of reusable carryout bags,²² a corollary goal of
5 the Ordinance.²³

6 Kobe Skye, the program director for the single use bag reduction program of the Los
7 Angeles County Department of Public Works, testified before the Board that "the inclusion
8 of the 10 cent charge on paper bags is expected to have a measurable positive impact on
9 consumer behavior and encourage most consumers to use reusable bags or to avoid using
10 any bags." (Record at 1603 [Board hearing Ordinance on 11/16/10].) The County's AECOM
11 study confirmed this, saying "Under the proposed ordinance, we expect a decrease in use of
12 carryout paper bags and an increase in use of reusable bags..." (Record at 1512.)²⁴
13 Furthering this goal, the Ordinance also authorizes the proceeds from the paper bag
14 "charge" to be retained by stores for, among other things, providing educational materials
15 "encouraging the use of reusable bags" by customers.²⁵

16
17 assume the cost of the paper bags...*it is anticipated that a charge placed on each paper bag would*
18 *lead to a shift in consumer behavior towards reusable bags due to the desire to avoid the charge.*
(Record at 1507-1508 [emphasis added].)

19 ²² The Ordinance defines "reusable bag" in complex detail to include a bag specifically
20 designed and manufactured to carry 22 pounds 125 times over a distance of 175 feet, minimum
volume of 15 liters, and is machine washable or made of material that can be cleaned or disinfected.
(Record at 0017-0018 [L.A. Co. Code § 12.85.010.I].)

21 ²³ The first prefatory paragraph of the Ordinance acknowledges this, stating it "relat[es] to
22 regulating the use of plastic carryout bags and recyclable paper carryout bags and promoting the
use of reusable bags within the County unincorporated area." (Record at 0016)

23 ²⁴ Supervisor Molina acknowledged this purpose of the Ordinance, stating "[S]o it's time for
24 consumers to start changing their shopping habits by bringing reusable bags to the grocery store.
And if you're anything like me all I do is walk around with them I put them in my trunk in the
25 backseat of my car and I always forget when I go into the grocery store. But if I'm going to be
charged 10 cents I think for every single bag, I think that's going to have me change my habit and
26 remind myself that I have to pull out my reusable bag..." (Record at 1690 [hearing on Ordinance
on 6/28/11].)

27 ²⁵ L.A. Co. Code § 12.85.040(D) states, "All monies collected by a store under this chapter
will be retained by the store and may be used only for any of the following purposes: (1) costs
28 associated with complying with the provisions of this Chapter, (2) actual costs of providing
recyclable paper carryout bags, or (3) costs associated with a store's educational materials or
campaign encouraging the use of reusable bags, if any." (Record at 0020.)

1 Under the Ordinance, retail *customers*, not retail *stores*, are legally burdened with
2 the \$0.10 per paper bag charge. Retail stores are merely tasked with collection under the
3 Ordinance. Section 12.85.040(A) requires retail stores to “charge the *customer* 10 cents”
4 for each bag provided. The fact that the charge is imposed on the customer has been
5 confirmed by the State Board of Equalization, which concluded that:

6 Some cities and counties have enacted ordinances that prohibit certain
7 retailers from providing plastic bags to customers. In addition to the ban on
8 providing plastic bags, under certain ordinances, the customer is generally
9 required to pay the retailer a specific amount for each paper bag the customer
10 is provided. These ordinances typically impose the charge upon the customer.
11 Some of these ordinances specifically require that the retailer indicate on the
12 customer’s receipt the number of paper bags provided and the total amount
13 charged for the paper bags.

14 *Under these circumstances, this charge is imposed by the local jurisdiction
15 upon the customer, not the retailer. As such, this charge is not included in
16 the retailer’s gross receipts and is not subject to sales or use tax.*²⁶
17 (Emphasis in original.)

18 There is no escaping the fact that the Ordinance prohibits stores from supplying
19 plastic bags and imposes the \$0.10 paper bag “charge” on customers for the same reason—
20 to promote reusable bags. It is simple economics that charging for an item that was
21 previously provided without a separately stated charge, will disincentivize its use, leaving
22 customers with only one option to carry their groceries home—reusable bags. Other
23 provisions of the Ordinance reinforce this purpose. Stores, for example, are “strongly
24 encouraged” to educate their staff “to promote reusable bags and to post signs encouraging
25 customers to use reusable bags.”²⁷ This intent is further recognized by the County
26 Counsel’s digest for the Ordinance, which states that it relates “to regulating the use of
27 plastic carryout bags and recyclable paper carryout bags and promoting the use of reusable
28 bags within the County unincorporated area.”²⁸

26 Pet. RJN at Ex. 4 [Bd. of Equalization, Special Notice: “Sales Tax Does Not Apply to City
and County Paper Bag Surcharges” (June 2011)]. The Ordinance, too, requires retailers to “indicate
on the customer receipt the number of recyclable paper carryout bags provided and the total
amount charged for the bags.” (Record at 0019 [L.A. Co. Code § 12.85.040(C)].)

27 Record at 0020 [L.A. Co. Code § 12.85.050(B)].

28 Record at 0015.

1 Further, the Ordinance delegates to the Director of Los Angeles County Department
2 of Public Works the primary responsibility for enforcing the 10 cent paper carryout bag
3 “charge.”²⁹ The Department of Public Works itself has itself expressly acknowledged that
4 “[t]he intent of the ordinance is to promote the use of reusable bags over single use plastic
5 and paper carryout bags in order to reduce the negative economic and environmental
6 impacts associated with single use bags.”³⁰

7 Prior to enactment of the Ordinance, retail stores provided customers with carryout
8 paper bags free of any separate charge. The Department of Public Works’ Kobe Skye
9 acknowledged this to the Board of Supervisors, testifying “paper bags...are being provided
10 free to customers now.” (Record at 1609 [hearing on 11/16/2010]; Pet. Appendix
11 [Rozenski Decl. at ¶4; Kucma Decl. at ¶4; Wheeler Decl. at ¶4].)

12 The 10 cents-per-bag charge will cost retail customers many millions of dollars per
13 year.³¹

14 The Ordinance was *not* submitted to nor approved by the voters of Los Angeles
15 County. (Record at 0025 [adopted by vote of Board of Supervisors]; Pet. Appendix
16 [Rozenski Decl., ¶4].)

17 **F. The 10¢ Paper Bag Charge Does Not Fall Within Any of the Seven**
18 **Specified Exemptions Under Proposition 26**

19 **1. The paper bag charge is a levy, charge, or exaction of any**
20 **kind**

21 As a legally required monetary payment, the \$0.10 paper bag “charge” is plainly
22 “any levy, *charge*, or exaction of any kind” under Proposition 26. The fact that the

23 ²⁹ Record at 0021 [L.A. Co. Code § 12.85.080(A)].

24 ³⁰ Record at 1684 [Dept. Public Works (<http://dpw.lacounty.gov/epd/aboutthebag/>),
25 accessed Nov. 6, 2011].]

26 ³¹ The EIR estimates that the 67 large grocery stores subject to the Ordinance provide
27 customers 4700 to 10,000 plastic bags per day, and the 1024 smaller stores provide customers
28 2500-5000 plastic bags per day. (Record at 0082, 0224-0225 & 0230-0231 [EIR at pp. 3.1.15, 4-
14, 4-19].) Taking the lowest end of the ranges, the 67 large stores @ 4700 bags per day plus the
1024 smaller stores @ 2500 bags per day = 2,874,900 plastic bags per day. The EIR says a paper
bag holds as much as 1.46 plastic bags (Record at 1315 [tables 13-3 and 13-4]); discounting the
2,874,900 plastic bags per day by 1.46 = 1,969,109 paper bags per day x \$.10 = \$196,911 per day, or
\$71,872,515 per year. Even assuming the bag tax reduces usage by 70%, the annual paper bag tax
would exceed \$21.5 million.

1 Ordinance labels the 10 cent monetary demand as a “charge” in and of itself should end
2 any inquiry regarding Proposition 26’s application. Further, it is evident that the phrase
3 “any levy, charge, or exaction of any kind” covers the broadest possible range of labels that
4 might be placed on an imposition by government for the payment of money.

5 In dictionary terms, “levy” is defined as “To impose or assess (a fine or a tax) by
6 legal authority”;³² “an imposing or collecting, as of a tax, by authority or force”;³³ and as
7 “the imposition or collection of an assessment.”³⁴ “Charge” is defined as “Price, cost or
8 expense”;³⁵ “expense, cost, the price demanded for something”;³⁶ and “to impose or ask as
9 a price or fee, to hold liable for payment; enter a debit against.”³⁷ “Exaction” is defined as
10 “The act of demanding more money than is due”;³⁸ “a fee, reward, or contribution
11 demanded or levied”;³⁹ and “the act of exacting, an amount or sum exacted.”⁴⁰

12 Here, the 10 cent paper bag charge is a “collection” imposed by the “authority and
13 force” of the Ordinance. It is also an “expense” or a “cost” borne by retail consumers for
14 the use of paper carryout bags. It is a “price demanded” by the Ordinance and a “debit
15 entered against” consumers. It is a without doubt a *levy, charge, or exaction of any kind*,
16 and thus is a tax under Proposition 26 unless it satisfies one of seven exemptions, which it
17 does not.

18 **2. The paper bag charge does not fit within any of the seven**
19 **specified exemptions from Proposition 26’s definition of a**
20 **local tax**

21 Cal. Const., art. XIII C, 1(e) defines “tax” to mean “any levy, charge or exaction of
22 any kind imposed by a local government, except the following” which consist of seven
23 narrow exemptions contained in §§ 1(e)(1-7).⁴¹ The bag charge does not come close to

24 ³² Black’s Law Dictionary, 7th Edition.

25 ³³ <http://dictionary.reference.com/browse/levy>.

26 ³⁴ <http://www.merriam-webster.com/dictionary/levy>.

27 ³⁵ Black’s Law Dictionary, 7th Edition.

28 ³⁶ <http://www.merriam-webster.com/dictionary/charge>.

³⁷ <http://dictionary.reference.com/browse/charge>.

³⁸ Black’s Law Dictionary, 7th Edition.

³⁹ <http://www.merriam-webster.com/dictionary/exaction>.

⁴⁰ <http://dictionary.reference.com/browse/exaction>.

⁴¹ The text of all seven exemptions is set forth verbatim in section II.B., above.

1 fitting within any of these exemptions.

2 The first exemption is for “a charge imposed for a specific benefit conferred or
3 privilege granted by a local government directly to the payor that is not provided to those
4 not charged, and which does not exceed the reasonable costs to the local government of
5 conferring the benefit or granting the privilege to the payor.” This exemption is
6 inapplicable as no governmental benefit is conferred and no governmental privilege is
7 granted to retail customers in return for the dime-per-bag charge. To the extent that retail
8 customers arguably may be said to benefit from the charge in the form of a reduction in the
9 “negative economic and environmental impacts associated with single use bags,” that
10 benefit is enjoyed by all residents of Los Angeles County—not just those paying the
11 charge.⁴² The 10 cent bag charge does not qualify for the first exemption.

12 The second exemption is for “a charge imposed for a specific government service or
13 product provided directly to the payor that is not provided to those not charged, and which
14 does not exceed the reasonable costs to the local government of providing the service or
15 product.” This exemption is inapplicable because the County provides no service or
16 product to customers in return for the 10 cent charge.⁴³ And here again, to the extent that
17 the County is providing a service in the form of reducing the “negative economic and
18 environmental impacts associated with single use bags” or in underwriting educational
19 campaigns supporting the use of reusable nonpaper carryout bags, that service is provided
20 to all residents of Los Angeles County—not just those paying the charge.

21 The third exemption is for “a charge imposed for the reasonable regulatory costs to
22 the local government for issuing licenses and permits, performing investigations,
23 inspections, and audits, enforcing agricultural marketing orders, and the administrative
24 enforcement and adjudication thereof.” This is inapplicable as customers paying the
25 charge are issued no licenses or permits and are subject to no audits, investigations, or
26 inspections.

27 ⁴² See Record at 1684.

28 ⁴³ Also, the California State Board of Equalization has concluded that the \$.10 charge is not
consideration paid to the market for the purchase of the paper bag. (Pet. RJN at Ex. 4.)

1 The fourth exemption is for “a charge imposed for entrance to or use of local
2 government property, or the purchase, rental, or lease of local government property.” The
3 bag charge obviously does not qualify.

4 The fifth exemption is for “a fine, penalty, or other monetary charge imposed by the
5 judicial branch or a local government, as a result of a violation of law.” This is inapplicable
6 as the 10 cent bag charge is not imposed as a result of a violation of law.

7 The sixth exemption is for “a charge imposed as a condition of property
8 development.” This exemption plainly does not apply.

9 The seventh exemption is for “assessments and property-related fees imposed in
10 accordance with the provisions of [Cal. Const., art. XIII D].” The bag charge is not an
11 assessment or property-related fee imposed per Cal. Const., art. XIII D, so the seventh
12 exemption does not apply.

13 In sum, the 10 cent bag charge fits within none of the limited exemptions to
14 Proposition 26’s definition of a local tax. Thus it is a tax and required voter approval.

15 **3. The fact that the Ordinance directs the proceeds from the**
16 **paper bag charge to be retained by retail stores rather than**
17 **the County creates no exemption from Proposition 26**

18 That the Ordinance authorizes retail stores to retain the proceeds from the 10 cent
19 paper bag tax does not allow the County to avoid Proposition 26’s voter approval
20 requirement. The definition of “tax” in Proposition 26 focuses on levies, charges and
21 exactions *imposed* by local government, not who retains the resulting revenue. As drafted
22 by its proponents and approved by the voters, the language of Proposition 26 makes this
23 clear by broadly defining what is a “tax.” Because the 10 cent charge falls within the broad
24 definitional net cast by Article XIIC, sec. 1(e), it is a tax unless it falls within one of seven
25 narrow exemptions and the burden of proving the applicability of an exemption rests with
26 the County. Proposition 26 contains no exemption for the situation where the government
27 imposes the levy, charge or exaction, but allows or requires the revenue to be kept by a
28 third party. Had the drafters of Prop 26 wished to include such an exemption, they could

1 have, but they did not. Moreover, as noted above, the reimbursement and/or enrichment
2 of a private enterprise (e.g., a retail store) is clearly not one of the seven exceptions.

3 The 10 cent tax is imposed by the Ordinance on retail store customers. The County
4 could deposit the revenues raised in its own coffers or it could, as it has done in this
5 instance, allow private parties to use the revenues according to the County's directions.
6 The undeniable substance of what is going on is that the County has required the
7 imposition of the tax and controlled how it is to be spent. Nothing in Proposition 26
8 requires the paper bag charge to be received and directly spent by the government in order
9 to be a tax.

10 The County cannot circumvent Proposition 26 by forcing private parties to do that
11 which the County itself is prohibited by the Constitution from doing. Nor can the County
12 claim with a straight face that the charge is being imposed by the stores. Deputizing retail
13 stores as both the County's tax collector and the administrator of its program of promoting
14 reusable carryout bags does not make the tax any less impermissible under Proposition 26
15 than if the County carried out those functions directly. "The thing which the Legislature is
16 forbidden to do, it cannot delegate to another to do, unless such power of delegation is
17 given by the constitution itself." (*Howard Jarvis Taxpayers Assoc. v. Fresno*
18 *Metropolitan Projects Authority ("HJTA")* (1995) 40 Cal.App.4th 1359, 1375.)

19 **G. Proposition 26 Controls This Case**

20 Proposition 26 ushered in new rules governing local tax increases. California voters
21 through the exercise of their initiative powers are constitutionally entitled to nullify prior
22 judicial precedent and any attempt by the County to defend the paper bag tax based on
23 pre-Proposition 26 law must be rejected. The plain language of Proposition 26 supersedes
24 any previous articulations of the definition of a "tax" and establishes a new authoritative
25 one in their place. The Legislative Analyst recognized this in the ballot handbook by
26 acknowledging⁴⁴ that Proposition 26 would nullify the Supreme Court's *Sinclair Paint*

27
28

⁴⁴ Pet. RJN at Ex. 3, p. 57 [Ballot Pamp., analysis of Prop. 26 by Leg. Analyst].

1 decision, which had previously been used by local governments to justify enacting a myriad
2 of fees and charges without voter approval.⁴⁵

3 It is well settled that judicial decisions applying or construing statutes and
4 constitutional provisions may be overturned or nullified by the people through the
5 initiative power. *People v. Engert* (1982) 31 Cal.3d 797, 808, explained that Proposition
6 17, passed in 1972, was intended to, and did, cancel the holding of *People v. Anderson*
7 (1972) 6 Cal.3d 628. The Court recognized that “The clear intent of the electorate in
8 adopting section 27 [part of Proposition 17] was to circumvent *Anderson* by restoring the
9 death penalty *to the extent permitted by the federal Constitution.*” (*Id.* [italics in original];
10 see also *People v. Frierson* (1979) 25 Cal.3d 142, 184.) In accord is *People v. Garcia* (1986)
11 183 Cal.App.3d 335, 342. ([Holding that Proposition 8 passed in 1982 overrode *People v.*
12 *Hall* (1980) 28 Cal.3d 143]; see also *People v. Valentine* (1986) 42 Cal.3d 170 [same];
13 *People v. Mickle* (1991) 54 Cal.3d 140 [Proposition 115 adopted in 1990 “effectively
14 overturns” the decision in *People v. Mattson* (1984) 37 Cal.3d 85].)

15 The people likewise have the right to reverse judicial precedent on tax law. In *SVTA*,
16 *supra*, 44 Cal.4th 431, 437, an assessment for open space was struck down as violating
17 Proposition 218. The Court held Proposition 218 targeted and overturned the deferential
18 standard of review of the validity of assessments established by *Knox v. City of Orland*
19 (1992) 4 Cal.4th 132 and *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676. (*SVTA*
20 at 441, 448.) Furthermore, the Court held that since Proposition 218 “made several
21 changes to the definition of special benefits” the “pre-Proposition 218 cases ... *are not*
22 *instructive in determining whether a benefit is special under Proposition 218.*”⁴⁶ (*Id.* at
23 452.)

24
25
26 ⁴⁵ *Sinclair Paint, supra*, 15 Cal.4th at 866.

27 ⁴⁶ See also *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49
28 Cal.4th 277, 298. ([“Our review [in *SVTA*] of the arguments in favor of Proposition 218 indicated
that *this provision was intended to overturn the line of cases, most recently our decision in Knox*
v. City of Orland, supra, 4 Cal.4th 132, that held a deferential review of local government
assessments was required” (emphasis added)].)

1 **H. The 10¢ Paper Bag “Charge” is Null and Void Because it Was Not**
2 **Approved by County Voters**

3 The paper bag charge is “tax” under Cal. Const., art. XIII C, § 1(e)—added by
4 Proposition 26. As such, the Ordinance could not be enacted by the Board of Supervisors,
5 and was required to be approved by county voters. The local electorate must approve any
6 general tax by a majority vote, and any special tax by a two-thirds vote. Cal. Const., art.
7 XIII C §§ 2(b) and 2(d). A “general tax” is any tax imposed for general governmental
8 purposes and a “special tax” is any tax imposed for specific purposes. Cal. Const., art. XIII
9 C, §§ 1(a), 1(d). The paper bag tax is unconstitutional because it was never submitted to
10 the voters for approval.

11 **I. The Illegal Bag Tax Is Not Severable**

12 The Ordinance’s central purpose is to “promot[e] the use of reusable bags within the
13 County unincorporated area.”⁴⁷ The Ordinance accomplishes this by prohibiting plastic
14 bags and imposing a 10 cent tax on paper carryout bags to discourage and reduce their use.
15 As demonstrated in § III.E. above, the County was well aware that imposition of the paper
16 bag tax would greatly reduce the use of paper bags, and intended that result. Conversely, it
17 was aware that a plastic bag ban without an accompanying paper bag tax would greatly
18 increase paper bag usage. It was clearly not the intention of the Ordinance to substantially
19 increase the use of paper bags via a stand-alone plastic bag ban. Thus the imposition of the
20 paper bag tax is absolutely critical to the entire Ordinance. The tax’s demise as
21 unconstitutional means that the entire Ordinance must fall with it.

22 In determining whether unconstitutional or unenforceable portions of a statute or
23 ordinance are severable, the invalid provision(s) must be grammatically, functionally, and
24 volitionally separable in order to permit the remainder to stand as valid law. (*Gerken v.*
25 *Fair Pol. Practices Com.* (1993) 6 Cal.4th 707, 714; *Calfarm Ins. Co v. Deukmejian* (1989)
26 48 Cal.3d 805, 821.) The California Supreme Court, in *Jevne v. Superior Court* (2005) 35
27 Cal.4th 935, explained the test as follows:
28

⁴⁷ Record at 0016 [first prefatory paragraph of Ordinance].

1 An invalid part can be severed if, and only if, it is “grammatically,
2 functionally and volitionally separable.” It is “grammatically” separable
3 if it is “distinct” and “separate” and, hence, “can be removed as a whole
4 without affecting the wording of any” of the measure’s “other
5 provisions.” It is “functionally” separable if it is not necessary to the
6 measure’s operation and purpose. And it is “volitionally” separable if it
7 was not of critical importance to the measure’s enactment.

8 (*Jevne, supra*, 35 Cal.4th at 960-61 [internal citations omitted].)

9 Here, the Ordinance contains a severability clause,⁴⁸ but that is not controlling, and
10 neither is the fact that the paper bag tax could arguably be grammatically severed from the
11 remainder of the Ordinance. Severability clauses are not conclusive, and such a clause plus
12 the ability to grammatically sever the invalid part does not dictate such a result. (*Hotel*
13 *and Rest. Employees Int. v. Davis* (1999) 21 Cal.4th 585, 613 [striking entire law, despite
14 presence of severability clause, as invalid portions not functionally or volitionally
15 severable]; *Gerken, supra*, 6 Cal.4th at 714; *Palmer/Sixth St. Properties, L.P. v. City of Los*
16 *Angeles* (2009) 175 Cal.App.4th 1396, 1412.)

17 The paper bag tax, and the added expense it imposes on consumers to discourage
18 the use of paper bags, are central to the Ordinance. Without the paper bag tax, there is no
19 disincentive on the use of paper carryout bags; all consumers and stores would do in
20 reaction to the ban on plastic bags would be to consume an unlimited number of “free”
21 paper bags. The drafters and supporters of the Ordinance were well aware of this, as
22 documented in the legislative history. That legislative history acknowledges that a ban on
23 plastic bags, without a tax on paper bags, would result in a huge increase in the number of
24 paper bags being provided by stores to customers without separate charge. And the
25 legislative history further explains that such an increase in the distribution of paper bags
26 would have serious adverse environmental impacts, including increases in greenhouse gas
27 emissions by 19,700 metric tons per year.⁴⁹

28 The paper bag tax is critical to the Ordinance; without it, the premise of the
Ordinance is undermined. Provisions relating to the bag tax are not functionally severable

⁴⁸ Record at 0023-0024 [L.A. Co. Code § 12.85.090].

⁴⁹ Record at 0146 [Environ. Impact Report at 3.3-20].

1 because they are necessary to the Ordinance's function and purpose. It cannot be said with
2 confidence that once the provisions related to the paper bag tax are stricken, the remaining
3 portion of the Ordinance is complete in itself and would have been adopted by the Board of
4 Supervisors had the supervisors understood the bag tax was illegal and would result in
5 substantially increased usage of paper bags.

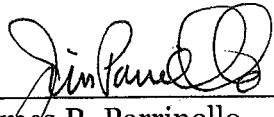
6 Since the bag tax is inseverable from the remainder of the Ordinance, the Ordinance
7 is invalid in its entirety.

8 **IV. CONCLUSION**

9 In sum, the ten cent bag charge is a "levy, charge, or exaction of any kind" imposed
10 by the Ordinance without approval of County voters, and is unconstitutional.

11
12 Dated: February 16, 2012

NIELSEN MERKSAMER PARRINELLO
GROSS & LEONI LLP

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14
15 By: 
16 _____
17 James R. Parrinello
18 *Attorney for Petitioners*

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