



CALIFORNIA  
TAX FOUNDATION



**STOP** HIDDEN  
TAXES

**YES** on Prop 26

**Prop 26 stops politicians  
from raising taxes without  
a public vote**

Politicians are using a loophole to raise taxes. By calling them fees, they can pass or increase local taxes without a public vote. At the state level, Sacramento politicians pass hidden taxes with a bare majority vote. Prop 26 closes this loophole and forces the politicians to abide by our Constitution.

- ✓ Prop 26 protects our right to vote on taxes
- ✓ Prop 26 forces the politicians to "live with their means"
- ✓ Prop 26 closes the loopholes that allow politicians to



Prop 26 stops politicians from passing hidden taxes that hurt families and businesses and kill jobs.

Proposition  
**26** Taxpayer  
Summary

**Prop 26 will stop the  
hidden taxes.**

Politicians are using a lot  
instead of controlling waste and  
raise taxes on California families  
to raise taxes by calling  
them to raise taxes by calling  
constitution and avoid a local  
required for new or higher

Prop 26 your right to vote  
on this local  
taxes

★ Propositions  
**26** Taxes and Fees

# A LEGAL GUIDE TO PROPOSITION 26

NOVEMBER 13, 2023

Background, Statutes, Court Decisions, Pending Cases, Attorney General  
Opinions, and Subsequent Constitutional Amendments Relating to  
Article XIII A and Article XIII C of the California Constitution  
(Proposition 26 of 2010).



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## History of Proposition 26

Proposition 26 was approved by the California voters in 2010, but its origins trace back to 1978 with passage of the landmark property tax initiative, Proposition 13. In addition to providing property tax relief, Proposition 13 created a requirement that new state taxes be approved by at least a two-thirds vote of the Legislature and “special taxes” for cities, counties, and special districts be approved by at least two-thirds of the voters in a local election. The question of what constitutes a tax became vitally important under the new vote requirements of Proposition 13, and led to a 40-year fight in the Legislature, the courts, regulatory agencies, and at the ballot box. The distinction between the nature of a tax and that of a fee became much clearer with passage of Proposition 26.

The “Stop Hidden Taxes Initiative,” as Proposition 26 was known, settled many of the tax-vs.-fee debates in policy circles. Prior to Proposition 26, the Legislature or local governments would mask taxes as “fees” or “charges” to avoid the procedures required to approve true taxes. One of the landmark cases of the era that resulted in more tax-like “fees” circumventing the tax approval requirements was the *Sinclair Paint v. Board of Equalization* court decision.

In 1997, the Third District Court of Appeal heard a dispute arising from the 1991 Childhood Lead Poisoning Prevention Act, which requires fees to be paid by manufacturers “contributing to environmental lead contamination.” Following the passage of the legislation, the Sinclair Paint Company had a nearly \$100,000 fee imposed on its operations and it filed a complaint, and later the suit. Sinclair alleged these “fees” were hidden taxes that violated Article XIII A, under Proposition 13, because they hadn’t been approved by at least a two-thirds vote in the Legislature. The trial court agreed with Sinclair, but the Court of Appeal reversed the decision.

The Court of Appeal’s opinion established that these charges could not be considered taxes and instead were “regulatory fees,” because “the Legislature imposed the fees to mitigate the actual or anticipated adverse effects of the fee payers’ operations” and the amount was reasonable. The issue of whether the “fee” was fair or reasonable for paint companies was never at issue, even though some newer paint companies that never manufactured lead paint were still subject to the “fee.”

The *Sinclair Paint* ruling established principles for interpreting Proposition 13 when distinguishing between a tax and fee. The opinion set the standard for the approval of countless other “regulatory fees,” which require only a majority vote of the Legislature to be passed, instead of a two-thirds vote. Under these new *Sinclair Paint* principles, by the mid-2000s, dozens of hidden taxes were proposed and enacted by a majority vote of the California Legislature.

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The hidden taxes included tax-like “fees” on diapers, bicycles, prescription drugs, bottled water, phone bills, grocery bags, electric bills, batteries, recorded documents, computers, gaming tables, soda, long-term care facilities, shipping containers, healthcare programs, and cars. The increase in tax-like “fees” was not just at the state level. Local governments also found loopholes in the tax approval requirements.

The court’s ruling in *Sinclair* allowed state and local governments to impose taxes disguised as “fees” under the guise that the program receiving the revenue was a “mitigating negative externalities program” and was funded by “fees.”

Proposition 218 of 1996 helped define assessments and reasonable property charges at the local level, but local governments found new paths to increase tax-like “fees.”

By 2010, the taxpayer community had experienced several notable defeats in the courts and felt that it was time to restore the intent of taxpayer safeguards. This led to Proposition 26, which followed several earlier attempts to restore taxpayer protections. The initiative was drafted by Eric Miethke and Greg Turner of the Sacramento-based law firm Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, and was co-sponsored by the California Taxpayers Association and the California Chamber of Commerce. The organizations were co-chairs of the Stop Hidden Taxes Coalition in the years leading up to Proposition 26, and had opposed many hidden taxes proposed in the Legislature.

Voters approved Proposition 26 in the November 2, 2010, election. The measure received 52.4 percent of the vote.

At the state level, Proposition 26 amended Article XIII A of the California Constitution to broaden the definition of “tax” to include “**any** levy, charge, or exaction of any kind imposed by the State,” with five explicit exceptions to this rule. The constitutional amendment also requires a two-thirds vote of the Legislature for “any change in state statute which results in any taxpayer paying a higher tax” (Art. XIII A, §3, subd. (a)).

For the local level, Proposition 26 added subdivision (e) to Article XIII C section 1 to define several terms, including “tax.” Similar to the statewide definition, the local definition includes “any levy, charge, or exaction of any kind imposed by a local government” (Article XIII C, § 1, subd. (e)). This section includes seven exceptions to what is considered a “tax” under its definition.

The passage of Proposition 26 has had lasting implications for taxpayers. The legislative counsel has actively advised lawmakers when a tax is a tax and a fee is a fee, and this has affected which bills advance during the legislative session. As a result, fewer tax-like “fees” are imposed.

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Thirteen years after the voters approved Proposition 26, some disagreements continue over what is considered a tax, whether charges fall under the enumerated exemptions, and if a two-thirds vote is required. However, the overall success of the proponents has achieved its primary objective: to stop hidden tax-like “fees” that make California less affordable or increase the cost of doing business.

The California Taxpayers Association's 2011 report, “Understanding Proposition 26: A Sponsor’s Guide to California’s New Tax Structure,” provided an overview of how the sponsors intended Proposition 26 to be interpreted. Some of these interpretations have stood up in court, while others have not.

The cases, statutes and opinions cited in this report provide an overview of major legal developments and the landscape of taxpayer protections since voters approved Proposition 26 – the Stop Hidden Taxes Initiative.

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## Text of Article XIII A Section 3

*[as amended November 2, 2010 (Proposition 26)]*

(a) Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

(b) As used in this section, "tax" means any levy, charge, or exaction of any kind imposed by the State, except the following:

(1) 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 State of conferring the benefit or granting the privilege to the payor.

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

(3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI.

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

(c) Any tax adopted after January 1, 2010, but prior to the effective date of this act, that was not adopted in compliance with the requirements of this section is void 12 months after the effective date of this act unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.

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(d) The State 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.

## **Text of Article XIII C Section 1**

*[as amended November 2, 2010 (Proposition 26)]*

Definitions. As used in this article:

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

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

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

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

(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

(1) 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.

(2) A charge imposed for a specific government service or product provided 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 providing the service or product.

(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.

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(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

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

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

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

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.

## Implementation of Proposition 26

### Case Decided:

- **Court of Appeal:**

*Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County*, 218 Cal. App. 4th 195, June 26, 2013.

A taxpayer challenged Brooktrails Township Community Services District's monthly base rates and standby charges under Proposition 218 of 1996 prior to the passage of Proposition 26. The taxpayer then placed a local ballot measure on Mendocino County's ballot, during the same election that Proposition 26 was to be voted on, that prohibits the district from imposing such fees. The local measure passed with a majority vote. The district challenged this measure based on the vote threshold it received, claiming that Proposition 26 was retroactive. The court observed that Proposition 26 made no provision directing that it would "impose new requirements for the validity of existing local government assessments," and that the authors of the statewide measure "knew how to specify when new rules would take effect," making the measure not retroactive.

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## Determining Whether a Two-Thirds Vote Is Required

### Cases Decided:

- **California Supreme Court:**

*California Building Industry Association v. State Water Resources Control Board*, 4 Cal. 5th 1032, May 7, 2018.

The California Building Industry Association challenged the validity of a fee schedule for discharge permits adopted by the State Water Resources Control Board, alleging that the fees violated constitutional restrictions on regulatory fees under section 3 of Article XIII A and the burden of proof requirements set forth by Proposition 26. The Court of Appeal ruled that because appellants had relied on the framework established by Proposition 13 caselaw, which required a two-thirds vote to “impose ‘any state taxes enacted for the purpose of increasing revenues,’” and not Proposition 26, which restricts “any change in state statute,” the constitutional amendment does not apply retroactively. The California Supreme Court found that the appellants hold the burden of proof to establish evidence that the levy was an invalid tax, contrary to Proposition 26’s language because the plaintiffs had “forfeited that argument” by using pre-Proposition 26 framework in their trial briefs. The court also established that the board did not exceed reasonable costs of imposing the fee, so long as “there is a reasonable basis in the record for the manner in which the fee is allocated among those responsible for paying it... [and the fee was] reasonably allocated among different classes of permits.”

*California Cannabis Coalition v. City of Upland*, 3 Cal. 5th 924, August 28, 2017.

This case arose from a local initiative that would, among other things, require medical marijuana dispensaries to pay an annual “licensing and inspection fee.” The city of Upland projected that the “fee” would exceed the costs of issuing the license and thus would constitute a general tax, so the initiative must be placed before voters in the next general election, not a special election. The proponents sued to have the measure placed on a special-election ballot. The California Supreme Court held that Article XIII C does not constrain voters’ constitutional power to propose and adopt citizen initiatives. While the court noted that voters could impose vote requirements for taxes, the court did not believe that Proposition 26 applied to voter-led efforts to tax themselves. The court concluded: “Multiple provisions of the state Constitution explicitly constrain the power of local governments to raise taxes. But we will not lightly apply such restrictions on local

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governments to voter initiatives, ‘one of the most precious rights of our democratic process.’” While the case originated from a dispute over when a measure would go on the ballot, the ruling opened the door for local governments to claim that constitutional vote requirements don’t apply to measures placed on the ballot via the initiative process, even when elected officials are heavily involved.

The court also discussed the two-thirds vote disagreement in *Altadena Library District v. Bloodgood* (192 Cal. App. 3d 585). The court “found an initiative special tax to be subject to the two-thirds voter approval requirement for special taxes under Proposition 13.” This was the governing law for voter approval requirements prior to the decision issued in *Upland*. Though the *Upland* decision established an opposing viewpoint on vote-threshold requirements, *Altadena* is still recognized as citable case law with regard to the voter approval requirements for local initiative taxes. The law as it pertains to these kinds of taxes remains unsettled due to *Altadena* and *Upland*.

- **Court of Appeal:**

*Jobs and Housing Coalition v. City of Oakland*, 73 Cal. App. 5th 505, December 30, 2021.

A group of citizens placed a special parcel tax on the ballot, and the measure received 62.47 percent of the vote. Materials provided to voters stated that a two-thirds vote was needed for passage, but after the election, the Oakland City Council ruled that only a simple majority was needed, and enacted the tax. The First District Court of Appeal held that a citizen’s initiative imposing a special tax cannot be invalidated on the basis of ballot materials’ voting-threshold statements because the statements did not concern the measure’s substantive features, were not alleged to be intentionally misleading, and could not override the law governing the applicable voting threshold.

*City and County of San Francisco v. All Persons Interested in the Matter of Proposition G*, 66 Cal. App. 5th 1058, July 26, 2021.

The City and County of San Francisco filed a complaint to establish that Proposition G on the June 2018 ballot was valid, and resident Wayne Nowak answered this complaint, arguing that the measure is invalid because it failed to receive the two-thirds vote required under Article XIII A section 4. The court ruled that a local initiative imposing a special parcel tax was valid when enacted by majority vote because the supermajority vote requirements were intended to constrain only local government entities and did not displace the public’s power to enact initiatives by majority vote, even if the Board of Supervisors placed the measure on the ballot (as indicated in the *Upland* case on page 10).

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*Howard Jarvis Taxpayers Association v. City and County of San Francisco*, 60 Cal. App. 5th 227, January 27, 2021.

The Howard Jarvis Taxpayers Association sued the City and County of San Francisco to invalidate a local measure, Measure C, that was deemed approved with a simple majority vote in 2018. The plaintiffs argued that the measure, which implements an additional tax on certain commercial rents, is a special tax that required a two-thirds majority to pass. The court concluded that since the initiative was placed on the ballot by citizens (not a governmental entity), approval by a supermajority of voters was not required.

*City of Fresno v. Fresno Building Healthy Communities*, 59 Cal. App. 5th 220, December 17, 2020.

A local ballot measure that would impose a city park tax was supported by a simple majority in the city of Fresno. The city moved to have the measure declared valid, as did the measure's proponent, Fresno Building Healthy Communities. Howard Jarvis Taxpayers Association intervened, claiming that the measure imposed a special tax approved by less than two-thirds of the electorate. The trial court agreed with HJTA, stating that the initiative imposes a special tax and requires at least a two-thirds vote of the electorate. The Fifth District Court of Appeal reversed this decision, and ruled in favor of the validity of the city's action, opining that the two-thirds vote requirement in Article XIII A section 4 does not apply to local initiative measures. Because the term "local government" as defined in Article XIII C does not include the electorate and applied to all sections of the article, the proposed local tax was not considered a special tax imposed by a local government.

*City and County of San Francisco v. All Persons Interested in the Matter of Proposition C*, 51 Cal. App. 5th 703, 2020.

Sixty-one percent of San Francisco voters supported Proposition C in the November 2018 election. The measure imposed a special tax on businesses to fund homeless services. San Francisco sought to establish the initiative's validity in court, and was answered by three associations – the California Business Properties Association, the Howard Jarvis Taxpayers Association, and the California Business Roundtable – arguing that Proposition C is invalid because it is a special tax approved by less than two-thirds of the electorate. The court held that the supermajority vote requirement constrains only local governments, and does not displace the people's power to enact initiatives by majority vote. The court reasoned that since the language of Article XIII C and Article XIII D do not show an intent to restrict the initiative power of the public with the voter approval requirements, and because a majority vote is generally required to approve ballot measures, Proposition C was valid.

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*Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, 51 Cal. App. 5th 435, June 29, 2020.

A local ballot measure was placed on the 2018 ballot after SB 595 (2017) was signed by Governor Jerry Brown, requiring the Bay Area Toll Authority to place a measure on the ballot to impose toll increases on seven Bay Area bridges. SB 595 was approved with a majority vote of the Assembly and a two-thirds vote of the Senate. Regional Measure 3 was deemed approved with 55 percent of the vote. Plaintiffs filed suit arguing that the revenue from the toll increases will not be used for the benefit of those who use the bridges, but instead will benefit those who use other means of transportation, and therefore the “toll increase” is a special tax that requires approval by a two-thirds vote. The court ruled that the measure is valid because the toll increase fell within the exception to the general definition of “tax,” implemented by Proposition 26, for allowing entry onto or use of state-owned property. The court additionally ruled that the Legislature, not the Bay Area Toll Authority, imposed the increase, and that the amount of the increase does not exceed reasonable costs of providing services.

*California Public Records Research, Inc. v. County of Stanislaus*, 246 Cal. App. 4th 1432, April 28, 2016.

California Public Records Research sought a court order to compel Stanislaus County to decrease its copy fees, alleging that the fees exceeded the county’s cost of providing the service and therefore violated Article XIII C. The court ruled that the fees charged for copying official documents constitute a special tax requiring voter approval. In the published portion of the ruling, the court found that the county must “make findings under section 27366 [of the Government Code], supported by substantial evidence, as to the fee amount necessary to recover the direct and indirect costs of providing the copies.” Section 27366 gives the authority for a county board of supervisors to set fees for copies of documents that are in the recorder’s office. The ruling remanded the case to the trial court for consideration of the argument that the copying fees exceeded reasonable costs and are subject to voter approval.

- **Superior Court:**

*Alameda County Taxpayers Association v. County of Alameda*, Alameda County Superior Court No. RG20070495, July 7, 2022.

The trial court ruled that a special tax passed via initiative is considered legal even though it was not supported by at least two-thirds of the voters, citing the *Upland* opinion. Measure C on the March 2020 ballot

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was an initiative to impose a 0.5 percent sales tax. The county Board of Supervisors advocated for the creation of the tax as an initiative, with a county supervisor serving as the chief proponent. The Superior Court ruled that the tax was legal, stating that the court failed to see how the sponsorship and involvement of a single government official meant the county intentionally circumvented the two-thirds vote requirement.

- **Pending in Superior Court:**

*Alliance San Diego v. City of San Diego*, Case No. RG20070495, 2022.

This case, still making its way through the courts as of November 2023, examines whether a special tax is constitutional even though it has not been approved by two-thirds of the voters. In a 2020 election, the official ballot materials, city attorney, and city clerk explicitly told voters that a two-thirds vote was required for passage of Measure C, authorizing a hotel tax increase to pay for specific programs. The measure fell short of the two-thirds threshold, with 65.2 percent of the vote, but the city declared that it had been approved, citing the *Upland* decision.

In May 2022, the San Diego County Superior Court ruled that Measure C needed a two-thirds vote, and that the adoption of subsequent resolutions changing the vote threshold was fundamentally unfair and violated due process. However, the Fourth District Court of Appeal reversed that ruling, opining in August 2023 that Measure C required a simple majority vote because it was placed on the ballot via an initiative, and voters' due process was not violated because the misinformation regarding the vote threshold did not strike "at the measure's very purpose." The appellate court left the door open for a lower court to overturn the measure, however. The court noted that one of the primary proponents of Measure C was a member of the Board of Directors of the San Diego Convention Center Corporation – a wholly owned subsidiary of the city – and advertised her position during campaign events, so a trial court must determine whether Measure C truly was an initiative under the law.

## **Statutory Enactments:**

- **2016:**

Chapter 381 (AB 2196, Low)

- A retail transaction and use tax ordinance may be adopted if the electors voting on the measure vote in accordance with Article XIII C of the California Constitution to authorize its enactment at a special election called for that purpose by the Santa Clara Valley Transportation Authority Board of Directors.



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- **2018:**

Chapter 771 (AB 2920, Thurmond)

- Provides that the city of Berkeley may impose a transactions and use tax for general purposes at a rate not exceeding 0.5 percent, according to the Transactions and Use Tax Law. The implementation of such a tax may occur only if the proposed ordinance is submitted to the electorate and is approved by the voters pursuant to Article XIII C.

### **Attorney General Opinions:**

- No. 13-403, January 15, 2016, 99 Ops.Cal.Atty.Gen.1

The opinion draws into question whether Proposition 26 requires voter approval for a county board of supervisors to enact an ordinance requiring a cable television provider to pay a fee equal to 1 percent of the provider's gross revenue. The attorney general concludes:

- Proposition 26 does not require voter approval for a county board of supervisors to require a franchise holder to pay a "public, educational, and governmental access fee," equal to 1 percent of the "holder's gross revenues," to the county as authorized under California's Digital Infrastructure and Video Competition Act.
- Such a fee does not constitute a tax, as it is not a "levy, charge, or exaction ... imposed by a local government" under the California Constitution.

### **Determining if a Local Charge Is a Tax or Fee**

#### **Cases Decided:**

- **Court of Appeal:**

*City of Buena Ventura v. United Water Conservation District*, 79 Cal. App. 5th 110, May 26, 2022.

The United Water Conservation District manages the groundwater for the city of Buena Ventura (better known simply as Ventura). The city pumps the groundwater from the district's territory, and the district collects fees from the city. The city challenged the district's fees, claiming the charges were unauthorized taxes under Article XIII C. The court held that a water district's groundwater extraction charge,

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where there was a 3:1 ratio between municipal and industrial rates and agricultural rates, is unconstitutional because the challenged rates did not bear a reasonable relationship to the burdens on or the benefits of the district's conservation activities according to the exceptions under Article XIII C.

*San Diego County Water Authority v. Metropolitan Water District of Southern California*, 12 Cal. App. 5th 1124, June 21, 2017.

San Diego County Water Authority alleged that the water district's rate for transporting water violates Article XIII C, and the trial court agreed. The court held that a district's rate for transporting water must comply with constitutional requirements under Article XIII C, as the regional water agency provides a specific service directly to the payer and the cost must not exceed "the reasonable costs of providing the service." The court reasoned that since water rates are not "imposed," but adopted by water agencies, the rates are not tax levies that are subject to voter approval but instead are service charges that do not exceed the reasonable costs of providing the service.

*California Public Records Research, Inc. v. County of Yolo*, 4 Cal. App. 5th 150, October 14, 2016.

The Yolo County Board of Supervisors set fees relating to the cost of producing copies of official documents. California Public Records Research, Inc., contended that the recorder's copy fees violate Proposition 26, as the fees exceed reasonable costs to make copies. The county argued that the fees are set in an amount to cover direct and indirect costs, including employee salaries and benefits. The Fifth District Court of Appeal held that there was no violation because Proposition 26 does not prescribe specific guidelines for setting or imposing new taxes and "does not impose a ministerial duty" that the courts must order the counties to perform.

*616 Croft Ave. LLC v. City of West Hollywood*, 3 Cal App. 5th 621, September 23, 2016.

Plaintiffs, including 616 Croft Ave. LLC, argued they were entitled to a refund of fees the city collected when the company applied for building permits, because the collection of the in-lieu housing fees was invalid. The court concluded that "special taxes" under Article XIII C do not include fees that relate to property development, including the in-lieu housing fee, because the nature of a special tax must increase the revenue of a local government or entity, but property development for affordable housing will not increase local revenue. The court found that the city of West Hollywood complied with Proposition 26.

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*Great Oaks Water Company v. Santa Clara Valley Water District*, 170 Cal. App. 4th 956, March 26, 2015.

Great Oaks Water Company challenged a fee for drawing water from wells on its property, claiming that this was a violation of Proposition 218, as it should not be a property-related charge, but instead a regulatory fee under Proposition 26. The court held that the fee is a property-related charge under Article XIII D, and thus the power to impose such a fee is given to the Santa Clara Valley Water Management District. Additionally, the court ruled that the fee is a charge for a water service and therefore is exempt from the voter-approval requirements.

*Lee Schmeer v. County of Los Angeles*, 213 Cal. App. 4th 1310, March 11, 2013.

In November 2010, Los Angeles County adopted a local ordinance prohibiting plastic carryout bags but allowing recyclable paper carryout bags if the retailer charges the customer 10 cents per bag. The plaintiffs, including Lee Schmeer, filed a complaint arguing that the paper carryout bag charge is a special tax that requires two-thirds voter approval, according to the definition of “tax” in Article XIII C. The court held that because the paper bag charge is paid to the retailer and the retailer does not remit the revenue to the county – but rather is required to use the funds to supply other paper carryout bags – the charge is not a “tax” under Article XIII C, and therefore the voter-approval requirements were inapplicable.

- **Superior Court:**

*California Taxpayers Association v. Office of Emergency Services*, Sacramento County Superior Court No. 2016-80002357, 2016.

Legislation approved by the Legislature with a majority vote (SB 84, Chapter 25, Statutes of 2015 – see page 20) imposed a tax-like “fee” on some owners of hazardous materials transported by rail into the state of California. The state argued that the fee was an exempt charge under Article XIII A of the California Constitution because the revenue would be used to clean up hazardous material after train derailments or other accidental spills. Hazardous material transported by truck or other means into California was not subject to the fee. The plaintiff argued that because the revenue collected provided a benefit to those who were not charged, and since not all payors would receive a benefit from hazardous waste cleanup activities, the charge was actually a tax that required approval by a two-thirds majority of the Legislature.

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Though the case was dismissed, the same issue was presented at the federal level in *BNSF Railway Company v. California Department of Tax and Fee Administration* for seeking to tax rail transit activities in violation of the Commerce Clause (904 F.3d 755). The Ninth U.S. Circuit Court of Appeals held that the tax implemented through SB 84, for any transport of hazardous materials via railway, preempts the provisions set forth in the California Constitution.

### **Statutory Enactment:**

- **2013:**

Chapter 377 (AB 433, Gordon)

- This law allows the California State Fire Marshal to establish and collect reasonable fees necessary to implement the regulations that he or she deems necessary to ensure fire safety in buildings and structures, as long as the fees remain consistent with Article XIII A of the California Constitution.

### **Attorney General Opinion:**

- No. 09-903, December 27, 2011, 94 Ops. Cal Atty Gen. 75
  - The opinion concludes that charges required to be collected by cities and counties under the California Health and Safety Code are valid fees and do not constitute a tax. The attorney general opined that Proposition 26 applies only to taxes adopted after January 1, 2010, and therefore is not applicable to this question.

## **Government-Imposed “Fees”**

### **Cases Decided:**

- **California Supreme Court:**

*Citizens for Fair REU Rates v. City of Redding*, 6th Cal. 5th 1, August 27, 2018.

A dispute arose in the city of Redding when it made an annual budget transfer from the Redding Electrical Utility to the city's general fund in an amount equivalent to an ad valorem tax, which Redding describes as a payment in lieu of taxes (PILOT). Plaintiffs argued that the transfer required approval by two-thirds of voters under Article XIII C. The court ruled that an annual transfer of funds from a municipal electric utility to the city's general fund was not a “tax” under Article XIII C section 1,

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because the utility had more than enough non-rate revenue to cover the transfer, and thus it was not necessarily passed through and imposed on ratepayers. Additionally, this did not result in a tax because the higher rate did not exceed the reasonable costs of providing service under Article XIII C section 2, the court ruled.

*Jacks v. City of Santa Barbara*, 3 Cal. 5th 248, June 29, 2017.

The plaintiffs challenged Santa Barbara's imposition of a 1 percent surcharge on an electric utility's gross receipts from the sale of electricity. The city transferred the surcharge revenue to the city, and contended this charge was a fee paid by the utility for the privilege of using city property in connection with the delivery of electricity. The California Supreme Court held that charges that constitute compensation for the use of government property are not subject to voter approval based on Article XIII C, section 1, subdivision (e), which provides an exception for a "charge imposed for entrance to or use of local government property ... or lease of local government property."

- **Court of Appeal:**

*John Humphreville v. City of Los Angeles*, 58 Cal. App. 5th 115, December 3, 2020.

John Humphreville sued the city of Los Angeles, alleging that the Los Angeles Department of Water and Power collects fees and transfers its surplus revenue to the city's general fund. The court found that transferring the "surplus" from citywide utility charges in the utility's revenue fund to the city's general fund does not constitute a tax. The court stated that the definition of "tax" implemented by Proposition 26 excludes "a charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged." Therefore, it is only when a charge for a specific service or product exceeds reasonable costs to the local government of providing the service or product that the charge is a tax, the court ruled.

*Templo v. State of California*, 24 Cal. App. 5th 730, May 17, 2018.

The appellants, a couple who filed a complaint for damages relating to a car accident, claimed that a statute requiring litigants to pay a nonrefundable fee to secure a jury trial is unconstitutional and constitutes an improper tax under Article XIII A. The court found that the "jury demand fee" is used to fund trial court operations, and is not an improper tax. The court held that under Proposition 26, as long as the state or local government demonstrates that any charge, levy, or assessment is used to fund trial court operations, it is not a tax.

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*Webb v. City of Riverside*, 23 Cal. App. 5th 244, May 4, 2018.

The court held that transferring utility reserve funds to the general fund was not a tax increase through a revised methodology of calculation, and an absence of an increase in billing charges. Under the Proposition 26 exceptions from the definition of “tax,” a levy, charge, or exaction is exempt from voter-approval requirements if the charge for a service or product does not exceed the reasonable cost to the local government providing it, the court ruled.

### **Statutory Enactments:**

- **2015:**

Chapter 25 (SB 84, Senate Budget and Fiscal Review Committee)

- Established a schedule of regulatory “fees” determined by the director of the Governor’s Office of Emergency Services, assessed on the owners of hazardous waste at the time the waste is transported by rail or surface transportation. Passed by a simple majority, the “fee” revenue funded a state program for responding to rail and surface transportation hazardous waste spills. Under Proposition 26, regulatory fees must be limited to administrative costs and cannot be used to fund mitigation or other broad societal benefits.

### **Exemptions Under Articles XIII A and XIII C**

#### **Cases Decided:**

- **California Supreme Court:**

*Zolly v. City of Oakland*, 13 Cal. 5th 780, August 11, 2022.

Oakland approved two contracts granting private waste haulers the right to “transact business, provide services, use the public street and/or other public places, and to operate a public utility” for waste collection services. As “consideration for the special franchise right,” the waste haulers agreed to pay fees to the city. The fees were challenged, and the court held that the city did not show that the fees were exempt from Article XIII C’s voter-approval requirements that apply to taxes imposed by local government.

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- **Court of Appeal:**

*Newhall County Water District v. Castaic Lake Water Agency*, 243 Cal. App. 4th 1430, January 19, 2016.

The court held that a water rate increase imposed by Castaic Lake Water Agency was in violation of Article XIII C. Proposition 26 defines any local government, levy, charge, or exaction as a tax requiring voter approval unless “it is imposed for specific government service or product provided 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 providing the service or product.” The water rates do not meet the requirements of this exception because “the Agency based its wholesale rate for imported water in substantial part on Newhall’s use of groundwater, which was not supplied by the Agency,” the court ruled.

*Harold Griffith v. City of Santa Cruz*, 207 Cal. App. 4th 982, October 10, 2012.

The plaintiff sought to invalidate a Santa Cruz ordinance calling for annual inspections of all residential rental properties, with “inspection fees” charged to the owners. The plaintiff claimed that the ordinance imposed a tax in violation of Article XIII D and Article XIII C. The court held that the ordinance did not impose a tax in violation of Proposition 218 and Proposition 26, holding that the inspection fees do not exceed the reasonable cost of providing the service. The court found that the fees are “reasonably related to the payors’ burden upon the inspection program,” and therefore are “expressly exempted from the Proposition 26 definition of ‘tax.’”

## **Statutory Enactments:**

- **2013:**

Chapter 552 (AB 483, Ting)

- Expands the criteria for when a local charge may not need to be put to a two-thirds vote under Article XIII C. Specifically, the legislation allows a charge to be exempt from a vote for specific government services, including “but not limited to” maintenance, landscaping, marketing, events, and promotions. Also exempts a charge from vote requirements if it is for a “specific benefit.”

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- **2019:**

Chapter 685 (AB 872, Aguiar-Curry)

- Allows for a property tax change-in-ownership exclusion in the case of a parent-to-child transfer of stock in a qualified corporation following the last surviving parent's death, provided that the residence has continuously served as the child's home, and the property's assessed value does not exceed \$1 million, according to assessment guidelines in Article XIII A.

### **Attorney General Opinion:**

- No. 09-305, December 20, 2010, 93 Ops.Cal.Atty.Gen.117

This opinion concludes:

- Under the state Education Code, a newly merged school district is "liable for all of the outstanding indebtedness" previously incurred by its constituent former districts and the taxing authorities are directed to reallocate and reapportion the burden of paying the former districts' outstanding indebtedness by levying a tax supporting payment of that indebtedness upon all the taxable property within the boundaries of the merged district.
- This statutory directive does not violate the voter-approval provisions of Article XIII A. The opinion finds that under Article XIII A section 1(b), there are "three types of indebtedness that are excluded from the one percent limitation," and under section 35573 of the Education Code, this applies to all of the real property within the boundaries of a merged school district.

### **The Future of Taxpayer Protections**

As described in the case summaries above, since the passage of Proposition 26 in 2010, several landmark cases have created loopholes and eroded the protections that the "Stop Hidden Taxes Act" can provide to taxpayers. These decisions and changes in California's legal landscape have been the driving factors behind calls by taxpayers to revisit Proposition 26 and strengthen the protections that taxpayers have against efforts by those calling for more taxes.

The California Supreme Court's 2017 opinion in *California Cannabis Coalition v. City of Upland* is the most notable case. While the decision involves the timing of when a tax measure should go before voters (at a special election or during general election), the case contained several arguments that have led a few



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city attorneys to conclude that a tax placed on the ballot via an initiative is not considered a tax imposed by a local government, and needs a simple majority vote rather than a two-thirds vote.

With some local governments now using a modified vote requirement to allow citizen groups to impose taxes, taxpayers have considered how to strengthen the vote requirements contained in Proposition 26.

In 2018, the California Business Roundtable sponsored an initiative, the Tax Fairness, Transparency and Accountability Act, that would have strengthened taxpayer protections by clarifying the definition of a tax and the procedures for how taxes are imposed. At the local level, the definition of a “tax” would be expanded to include all taxes and tax-like impositions – including taxes proposed by the people via the initiative process. The measure also would have required all local taxes to be approved by a two-thirds vote. A supermajority vote of a board of supervisors, city council, or other local governing board would be required before an initiative can appear on a ballot.

The 2018 initiative, which was withdrawn from the ballot prior to the election, would have effectively overturned the *Upland* decision by applying the definition of tax to any change in local law by a county, city, special district, or electorate when exercising the initiative power. Any change that results in a taxpayer paying a higher tax from an ordinance or other legal authorities was going to require approval by two-thirds of the electorate.

Six years later, Howard Jarvis Taxpayers Association, California Business Roundtable, and California Business Properties Association plan to return to the ballot, sponsoring a measure to appear on the ballot in November 2024– the Taxpayer Protection and Government Accountability Act.

The purpose of the new measure is similar to the 2018 ballot measure – to modify voter-approval requirements for tax increases and other government revenue increases. The Taxpayer Protection Act intends to clarify the intent of the voters when they passed Proposition 13 (1978), Proposition 218 (1996), and Proposition 26 (2010). The measure would reaffirm the two-thirds vote threshold for local special taxes, and every tax increase at the state and local level would require voter approval.

The Taxpayer Protection Act redefines terms the courts have modified over time. The initiative would reaffirm the requirement that local taxes must be approved as a general tax or special tax, subject to a 50 percent vote or a two-thirds vote.

The effort to maintain safeguards against higher taxes likely will be an ongoing issue as voters seek to evaluate the procedural steps that government and citizen’s groups must take prior to raising revenue.





