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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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********** SUPREME COURT FILED

MAY 19 2009

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Deputy

FORD GREENE,

Plaintiff and Appellant,

vs.

MARIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT,

Defendant and Respondent;

FLOOD MITIGATION LEAGUE OF ROSS VALLEY AND FRIENDS OF THE CORTE MADERA CREEK WATERSHED,

Intervenors and Respondents.

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Review of Decision by the Court of Appeal for the First Appellate District
(Case No. A120228)

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Superior Court of the State for the County of Marin
Honorable Lynn Duryee, Judge Presiding
(Case No. CV 073767)

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ANSWER TO PETITION FOR REVIEW

****

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I. INTRODUCTION

The core issue central to the instant petition for review is whether or not this Court's opinion in *Silicon Valley Taxpayer's Ass'n v. Santa Clara County Open Space Authority* 2008 44 Cal.4th 431 (*Silicon Valley*) properly compels the conclusion of the Court of Appeal herein that article II, section 7's [1]/ command that "voting shall be secret" applies to the property-related fee election conducted by respondent [2]/ on June 25, 2007 pursuant to the authority conferred by article XIII D, section 6(c) enacted by the voter initiative called Proposition 218.

Here, as below in both the trial court and the court of appeal, the District conflates article XIII D, section 6(c) property-related fee election procedures with article 4 assessment majority protest procedures in order to seek the result it desires. By importing article 4 assessment majority protest procedures into an election controlled by article 6, the District continues its tiresome attempt to manufacture authority - where none exists – to justify its widespread violation of the voters' right to secretly vote.

By this conflation, the District attempts to import selective provisions of the Proposition 218 Omnibus Implementation Act. Thus, respondent persists in the erroneous analysis that the lower appellate court has meticulously parsed and soundly rejected.

The Opinion of the Court of Appeal reaches a common-sense result (since when is voting in an election not conducted secretly?) that is internally consistent with both the relevant constitutional and statutory provisions. The Opinion is not, however, consistent, with the desires of the District.

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[1]/ All article references are to articles of the California Constitution.

[2]/ Respondent Marin County Flood Control and Water Conservation District will also be referenced herein as the "District."

Because the Court of Appeal properly applies *Silicon Valley's* interpretation of Proposition 218, there is no institutional need for this Court's correction. This Court need not employ its resources to correct an error, which, in fact, does not exist.

II. STATEMENT OF THE CASE

A. Trial Court Proceedings

On August 9, 2007 appellant Ford Greene [3]/ brought a statutory election contest in Marin County Superior Court to challenge the imposition of a 20-year $40 million "fee" that the District obtained by means of a Proposition 218 election conducted pursuant to article XIII D, section 6. Pursuant thereto, the District promulgated election procedures which both identified voters by name, address and parcel number, and required that voters sign the face of their ballots next to where they cast their votes or suffer the sanction of vote invalidation for the failure to comply. (Appellant's Appendix ("AA") at 1-112)

The District also promulgated the rule that the ballots were not to be counted by proportional voting, but commanded "only one ballot will be counted for each Identified Parcel." (AA at 72)

When the Ross Valley Storm Drainage Fee mail ballot votes of the June 25, 2007 election were tallied, 1,708 ballots of 8,059 total ballots cast were invalidated, resulting in an astonishing failure rate of over 21%. There were 3,208 votes in favor of the fee and 3,143 against it. Thus, the fee passed by a most slim 65-vote majority. (AA at 84)

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[3]/ Appellant is Ford Greene, also referred to herein as "Greene."

After the Marin County Board of Supervisors certified the election on July 10, 2007 (AA at 87-88), appellant timely demanded a recount of the election. (AA at 13, 94-97)

On July 23, 2007, personally assisted by the Marin County Registrar of Voters and her assistant, Greene recounted the invalidated ballots. (AA at 13) 1,678 of the 1,708 ballots that were invalidated were because the voter has not signed his or her name as the election procedures required. (AA at 84, 13, 98-109) The result of counting only those ballots because of the lack of signatures on which were invalidated was that 736 were "Yes" and 942 were "No." Had the ballots which were rejected for a lack of signature been counted, the $40 million fee would have failed by 141 votes. (AA at 84, 13, 98-109)

On or about August 14, 2007, the District served and filed its Answer to Greene election contest. (AA at 117-124)

On August 28, 2007, the intervenors [4]/ filed their complaint for declaratory relief (AA at 140-149) which Greene answered on September 27, 2007. As his first pleaded affirmative defense Greene asserted that the signature requirement of the ballot violated article II, section 7 which guarantees "voting shall be secret." (AA at 195-196)

At a September 7, 2007 case management hearing, the parties waived any evidentiary hearing, agreed that the court could make its determination of Greene's election contest solely on the face of the ballot and pleadings. It set a briefing schedule. (Reporter's Transcript (RT) at 7:8-15:6)

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[4]/ Intervenors Friends of the Corte Madera Creek Watershed and Flood Mitigation League of Ross Valley have not formally sought review in this Court. Such intervenors have, however, have submitted a letter in support of review dated May 8, 2009.

On September 21, 2007 Greene filed his brief in support of the election contest. (AA at 170-194) He argued that the signature requirement violated Article 2, section 7 of the California Constitution (AA 179-180), [5]/ the equal protection clause of the United States Constitution (AA 181-186) and failed to comply with standards imposed by the California Election Code. (AA at 186-192). Greene asked the trial court to disqualify and set aside the election or order that the ballots disqualified because of the failure to sign the ballot be counted. (AA at 192-193)

In its October 1, 2007 opposition (AA at 198-212) the District in large part contended that there is a legal distinction between a "registered voter election" and a "property owner election" such that Article 2, section 7 of the California Constitution, the equal protection provisions of the United States Constitution, and the requirements of the Election Code did not properly apply to its election. (AA at 202-210) [6]/

Both the District and intervenors relied on article XIII D, section 6(c) and Government Code sections 53753(c) and (e)(4) to justify the requirement that the voter be identified and sign the ballot in order for it to be counted. (AA at 206, 220-221)

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[5]/ A record review of the District's claim that in the trial court Greene failed to raise the arguments that Proposition 218 did not abrogate secret voting and Government Code §§ 53753 (c) and (e)(4) violated article II, § 7 and article XIII D, §§ 4(c), 6(c) (Petition at 5) demonstrates such claim is palpably false. (AA at 195-196, 236-241) Moreover, the court of appeal directly confirms that "Greene clarified at oral argument, and [in] his appellate briefs, and the record of the trial court proceedings confirm, that his central legal argument in this litigation has always been that article II, section 7's secret voting requirement applies to an article XIII D, section 6(c) election." (Opinion at 29)

[6]/ Intervenors likewise filed an opposition brief. (AA at 213-226)

. . . the District established election procedures for a storm drainage fee pursuant to the requirements of California Constitution Article XIII D, Section 6, which specifically allows for property fee elections to mirror the requirements set forth for the conduct of elections in assessment fees. The conduct of elections in assessment fees makes clear that Article II, Section 7 does not apply to these types of elections.

Government Code Section 53753(c) requires that each assessment ballot be signed. It also provides: "The majority protest proceedings described in this subdivision, **shall not constitute an election or voting for purposes of Article II of the California Constitution or of the California Elections Code.**" Govt. Code § 53753(e)(4). The enabling language contained in California Constitution Article XIII D, section 6(c) authorizes the District to adopt procedures consistent with Section 53753, which both requires [sic] that the ballot be signed and exempts the property owner ballot process from the requirements of Article II of the California Constitution. Accordingly, Article II, Section 7 does not apply to the Storm Drainage Fee Election.

(AA at 206:4-18; bold in original, underline added)

In turn, Intervenors tracked and clarified the District's argument (AA at 219:15-221:8):

It is important to note that, unlike the two-step approval procedures mandated for the approval of property-related "fees," the balloting with respect to proposed new or increased "assessments" under Article XIII D, § 4 occurs prior to a protest hearing. Therefore, the assessment voting procedure incorporated by reference

into the section 6 "fee" balloting procedures relate to the assessment balloting prior to a protest hearing. Greene's brief argues that the protest balloting for assessments is irrelevant to second-step voting for fee elections, but his argument is contrary to the text of Art. XIII D, § 6(c), which incorporates the pre-protest hearing assessment balloting procedures into the procedures for post-protest hearing fee balloting."

(AA at 220:24-28; underline added.)

On October 9, 2007, Greene filed his reply memorandum (AA at 235-245) in which he argued that (1) no language in article XIII D, sections 4 or 6 suggests an abrogation of the secrecy requirement of article II, section 7 (AA at 236-238), (2) that an "assessment ballot proceeding" was not an "election" because Elections Code section 4000, concomitantly enacted with Government Code section 53753 as the Proposition 218 Omnibus Implementation Act, explicitly distinguished between "assessment ballot proceedings" and an "election" such that a mail ballot election must be conducted pursuant to absentee voting procedures (AA at 238:21-239:23), and (3) that Government Code section 53753(c) and (e)(4) violated article II, section 7 and article XIII D, section 6(c). (AA at 239:25-241:14)

On October 15, 2007, the trial court rejected Greene's election contest "in its entirety." In pertinent part, the Court's written ruling stated:

> Plaintiff's contest to the election approving annual storm drainage fees to fund the Ross Valley Flood Protection and Watershed Program – Flood District 9, passed and adopted by the County Board of Supervisors on July 10, 2007, is rejected in its entirety.

The property fee election ballot sent to identified property owners, fully complied with the applicable law (i.e. California Const. Art. XIII D, and its implementing legislation Govt. Code § 53753), requiring voters to sign their ballots in order to be counted.

Plaintiff's reliance on California Const. Art. II, § 7, and the Election Code requirements for ballots in other types of election, is misplaced. (See Govt. Code § 53753(e)(4).)

. . .

Finally, this property fee election was conducted pursuant to Cal. Const. Art. XIII D and its implementing legislation, Govt. Code § 53753. Contrary to plaintiff's contention, it was not an election governed by the Election Code (Elec. Code § 318) and the form of the property fee ballot was not required to conform to the conditions for absentee ballots (Elec. Code § 3000 et seq.) or any other election governed by the Election Code. (Elec. Code § 13100, et seq.)

Moreover, the directions printed on the ballot provided the voters with adequate notice. They must sign their ballots in order to be valid, just as plaintiff did."

(AA at 276-277)

On December 17, 2007, Greene filed his notice of appeal. (AA at 279-281) [7]/

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[7]/ The petition erroneously states Greene filed his notice on January 8, 2008. (Petition at 5)

B. Litigation in the Court of Appeal

In his first brief on appeal (hereinafter AOB) Greene identified that the Court should employ the independent standard of review (AOB at 19-20); and, as he had below, argued that (1) Proposition 218 did not abrogate the right to secretly vote because it did not employ any language suggesting any such abrogation (AOB 21-26), (2) Government Code sections 53753(c) and (e)(4) fatally conflict with articles II, section 7 and XIII D, section 6(c) (AOB at 26-28) and (3) that the difference in language between an "assessment ballot proceeding" and an "election" as employed in Elections Code section 4000 - concomitantly enacted with Government Code section 53753 as part of the Proposition 218 Omnibus Implementation Act – did not treat article XIII D, section 4 assessment ballot proceedings in the same way as it did an article XIII D, section 6(c) property-related fee election. (AOB at 28-34)

The District agreed that the Court should employ the independent standard of review (Respondent's Brief, hereinafter "RB" at 13-14) but contended that (1) "property elections" were "special types of elections [that] do not fall within the purview of regular elections by general governmental powers, and are not subject to provisions in the California Constitution." [8]/ and that (2) provisions of article XIII D, section 4(d) and Government Code sections 53753(c) and (e)(4) with respect to assessments control article XIII D, section 6 property-related fee elections. (RB at 22-25, 30)

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[8]/ Respondent claimed that *Martinelli v. Morrow* (1916) 172 Cal. 472, *Southern Cal. Rapid Transit v. Bolen* (1992) 1 Cal.4th 654, *Tarpey v. McClure* (1923) 190 Cal. 593, *Potter v. Santa Barbara* (1911) 160 Cal. 349, *Alden v. San Luis Obispo* (1963) 212 Cal.App.2d 764 and *Not About Water v. Solano County Board of Supervisors* (2002) 95 Cal.App.4th 982 established "an irrefutable presumption that section 53753 is facially valid [because] [s]ection 53753 clarifies that assessment protest proceedings, and by consequence property fee elections, are outside the purview of Article II, section 7, and the Elections Code." (RB at 18-22)

On July 14, 2008, this Court filed its opinion in *Silicon Valley*. In his reply brief (ARB), filed two days later, Greene argued that in footnote 6 *Silicon Valley* explicitly disapproved the deferential standard of review set forth in the *Martinelli, Bolen, Tarpey, Alden* and *Not About Water* line of cases on which the District had relied. (ARB at 4-8.)

In addition Greene pointed out that respondent had completely failed to address Greene's argument that the differentiation in Elections Code section 4000 between "assessment ballot proceedings" on one hand, and "an election" on the other, belied respondent's contention that section 6 fee-related elections were "outside the purview of Article II, section 7, and the Elections Code." (ARB at 8-18.)

With a December 18th oral argument date pending, on December 5, 2008, the court of appeal ordered supplemental briefing. It requested the parties respond in ten pages to multiple issues as expressed in several questions:

1. Would it be proper for the Court to take "judicial notice of the committee reports of Senate Bill No. 55 (1997-1998 Reg. Sess.), as filed September 22, 1998, and Senate Bill No. 1477 (1999-2000 Reg. Sess.) as filed August 22, 2000"?

2. Did the Supreme Court's decision in *Silicon Valley* hold that "the deferential standard of review employed by courts to review the substantive validity of assessments and fees before the passage of Proposition 218 is no longer justified in light of the language in the initiative" so as to undermine the authority of *Alden v. Superior Court, Martinelli v. Morrow, Tarpey v. McClure, Potter v. Santa Barbara* and *People v. Sacramento Drainage District* holding "that Article II,

section 7 does not apply to assessment elections because the imposition of an assessment is a purely legislative act?"

3. "In light of the election procedures adopted by the board of supervisors of Respondent district – which designate certain persons to conduct the election, require that ballots remain sealed in their envelopes until tabulation of the ballots, provide that only designated personnel shall have access to the ballots, and prohibit the disclosure of any voter's vote (App.Appx. at pp. 71-74) – was there any breach of voting secrecy in this election?" [9]/

4. If there was no such breach, "and assuming a secret voting requirement applies, was there nevertheless a violation of voting rights that is cognizable under Election Code section 16100, subdivision (e) because the voters apparently were provided no assurances on the ballot or in the accompanying materials that their votes would remain confidential?" (App.Appx. at pp. 63, 76-78)

In response, the District contended that *Silicon Valley* was not relevant to a constitutional evaluation of Proposition 218 or its implementing legislation "because section 53753 was enacted by the Legislature with the particular constitutional provisions of Article II, section 7 in mind and therefore, it enjoys 'significant weight and deference

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[9]/ In addition to the election procedures the court of appeal identified, respondent's Election Procedures prohibited the production and maintenance of any reports "in such a manner that would disclose how any voter voted." (AA. at p. 74)

by the courts.' (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.)" (RSB at 1-3)

The District also insisted that Proposition 218 incorporated the distinction that property elections are different from general elections pursuant to the assessment laws, as discussed in *Alden*, *Tarpey* and *Martinelli,* extant prior to the voters' enactment of 218. (RSB at 3-5.) [10]/

The District contended that the election procedures it adopted were sufficient to prevent any breach in voting secrecy and its identification and signature requirements were justified "in order to ensure the ballots were completed by property owners rather than renters of the property or others not directly responsible for paying the fee, and that ballot owners were properly voting on the fee to be charged to their parcel." (RSB at 5-8.)

The District's final contention was that election contest procedures set forth in Elections Code section 16100 "failed to provide a cognizable basis upon which to challenge the underlying election" (RSB at 8) and that Greene "has utterly failed to plead or prove any facts demonstrating a nexus" between the lack of confidentiality and the election's results." (RSB at 10.)

In his supplemental brief (ASB) Greene argued that the policy of the law was to preserve the secrecy of the ballot. He pointed out that *Silicon Valley's* requirement that courts enforce both Proposition 218's procedural and substantive requirements over the power of the legislature to regulate or constrain the exercise of such procedural and substantive rights prohibited any legislative constriction of secret voting; that neither the

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[10]/ Respondent did not directly address the argument set forth in Greene's reply brief that *Silicon Valley*'s explicit disapproval in footnote 6 of *Not About Water* was fatal to its position.

legislature nor local government possess the power to infringe upon the right reserved by the people in the Constitution to guarantee secret voting in a section 6 election. (ASB at 1-6.)

Greene also made the point respondent's procedure prohibiting the disclosure of any individual voter's vote (AA at 74) ran contrary to the express language of Government Code section 53753(e)(1) which, in pertinent part, states "[d]uring and after the tabulation, the assessment ballots shall be treated as disclosable public records, as defined in Section 6252, and equally available for inspection by the proponents and the opponents of the proposed assessment." (ASB at 6; underline added.)

He noted that respondent's prohibition against disclosure was, and is, therefore, not legally enforceable and provided an illusion of ballot secrecy protection. He argued that by statutory definition such "protection" is inadequate to protect public records from disclosure. Moreover, Greene noted that the District's election rule prohibiting the production of any report to "be maintained in such a manner that would disclose how any voter voted" (App. Appx. at 74) was similarly illusory because by law the public record ballots could be obtained and then compiled into a report by anyone. Greene concluded that because assessment ballots are public records under Government Code section 53753(e)(1) and Government Code section 6252, respondent would have no legal basis upon which to resist any private demand for disclosure of the ballots. (ASB at 6)

Because the Government Code section 357353(e)(1) promulgated the ballots were public records, and because article XIII D, section 4 (c) commands that "[e]ach notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to

subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed" (underline added), Greene argued the failure to give assurance would make no practical difference and to provide such assurance would constitute an affirmatively inaccurate representation of fact. (ASB at 7-8.)

Finally, Greene argued that an election contest under Elections Code section 16100(e) authorized the court of appeal to invalidate the election on constitutional grounds because respondent's non-secret ballot election procedures denied eligible voters right to vote in accordance with the laws of the state. (ASB at 8-10.)

C. The Court of Appeal Opinion

In substantial part agreeing with Greene, the court of appeal set aside the district's election results because voters' names were printed on the ballots which ballots had to be signed and because the voters were provided no assurance that their votes would be kept secret. (*Greene v. Marin County Flood Control & Water Conservation District* (2009) 171 Cal.App.4th 1458, 1462-1463; hereinafter "Opinion.")

After discussing the core place and meaning secret voting holds in our democracy (*Id.* at 1468), the Opinion frames the issue:

> At issue here is whether the right to secrecy in voting applies to an "election" to approve a property-related fee conducted pursuant to article XIII D, section 6(c). More specifically, by passing Proposition 218 and therefore voting to require an "election" before agencies could impose certain types of property-related fees -

with the important qualification that the agencies could use procedures similar to those for increases in assessments - did the electorate intend that voting would be secret? For the reasons discussed below, we conclude they did.

(*Ibid.*)

Having determined *de novo* to be the appropriate standard of review (*Ibid.*), the Opinion ultimately concludes that:

> The plain language of Proposition 218 requires an "election" and voting for approval of new or increased property-related fees (with exceptions not relevant here). (Art. XIII D, § 6(c).) "Election" is used in other parts of Proposition 218 and its predecessor Proposition 13 to refer to voting by the general electorate that inferentially is conducted by secret ballot. A secret ballot election is also the meaning of "election" that is most familiar to the voters who passed the initiative. [for the full discussion, see *Id.* at 1462, 1469-1474]
>
> In an important qualifying statement, article XIII D, section 6(c) permits agencies to use "procedures similar to those for increases in assessments in the conduct of elections under this subdivision." "[P]rocedures ... for increases in assessments" refers to the assessment procedures in article XIII D, section 4, subdivisions (c) to (e), and those procedures do not clearly require or permit nonsecret balloting. Section 6(c) authorizes procedures "similar to," not "the same as," those in section 4 and it authorizes such procedures not only for property owner fee elections but also for general electorate fee elections. We determine this language permits the use of procedures such as mail balloting and vote weighting that are not inconsistent with the "election" requirement of section 6(c),

and not to authorize nonsecret voting. [for the full discussion see *Id.* at 1470-1473]

A coequal provision of the constitution, article II, section 7 provides, "Voting shall be secret," and is most reasonably harmonized with article XIII D, section 6(c) by construing "election" in article XIII D, section 6(c) to require secret voting. [for the full discussion, see *Id.* at 1474] The initiative itself directs us to construe the statute liberally to further its purposes, which include enhancing taxpayer consent and restricting government's ability to extract revenue from property owners. [for the full discussion, see *Id.* at 1477-1478] These interpretive aids support a construction of section 6(c) to require secret voting. The ballot materials also support that interpretation. They emphasized the fact that the initiative implicated voting rights and qualified the ordinary understanding of those rights only by explaining that voting in some circumstances could be limited to property owners and weighted by the burden of an exaction on those property owners. No mention was made of a nonsecret ballot. [for the full discussion, see *Id.* at 1479-1480] Finally, the implementing legislation for Proposition 218 does not authorize the use of nonsecret voting in an article XIII D, section 6(c) fee election. [for the full discussion, see *Id.* at 1480-1482]

Having considered the plain language of the initiative, a coequal provision of the California Constitution, and extrinsic aids to our interpretation of the constitutional provisions, we conclude the voters who approved Proposition 218 intended the voting in an article XIII D, section 6(c) fee election to be secret. (*Id.* at 1483.)

In reaching the conclusion that the protections of secret voting apply to the District's election, the Opinion discusses in detail and rejects the District's position that article II does not apply to assessment elections. The Opinion bases this conclusion on Proposition 218 and *Silicon Valley*, which have undermined the legislative-function rationale for the District's position that it is entitled to deferential review pursuant to *Tarpey v. McClure, supra.*, 190 Cal. at 606; *Potter v. Santa Barbara, supra.*, 160 Cal. at 355-356; *Sayler Land Co. v. Tulare Water District* (1973) 410 U.S. 719, 728; *Southern Cal. Rapid Transit v. Bolen, supra.*, 1 Cal.4th at 665; *Alden v. Superior Court, supra.* 212 Cal.App.2d at 766-770; *Dawson v. Town of Los Also Hills* (1976) 16 Cal.3d 676, 683-684 (*Id.* at 1475-1477)

> The District specifically relies on article XIII D's requirement that assessment balloting (and authorization that fee elections) be limited to property owners, which ordinarily would violate article I, section 22. (See *Potter, supra,* 160 Cal. at p. 355, 116 P. 1101 [approving property qualification despite constitutional prohibition]; *Tarpey, supra,* 190 Cal. at p. 606, 213 P. 983 [same].) These *express* article XIII D provisions limiting balloting or voting to property owners, however, *expressly* provide that article I, section 22 does not apply to article XIII D assessment balloting or fee elections despite the new constitutional status of the ballot and election requirements. Article XIII D is *silent* as to voting secrecy. Thus, the constitutional "election" requirement in article XIII D, section 6(c) is unqualified as far as voting secrecy is concerned. The *Tarpey* line of cases is irrelevant: the cases shed no light on whether nonsecret voting is

constitutionally permissible in the new post-Proposition 218 context of constitutional voter approval requirements, just as the *Dawson* and *Knox* cases are no longer helpful in determining the appropriate standard of review on the substantive standard for assessments under Proposition 218. (See *Silicon Valley, supra,* 44 Cal.4th at p. 450.)

We conclude that article XIII D, section 6(c) and article II, section 7 are best harmonized by construing "election" in article XIII D, section 6(c) as a secret ballot election.

(*Id.* at 1477; original italics.)

Requiring secret voting furthers Proposition 218's twin purposes of limiting the government's power to exact revenue and to enhance taxpayer consent. In an article XIII D, section 6(c) fee election, the agency conducting the election is a proponent of the proposed fee. Conflict is not unlikely between public officials' desire to finance costly services and taxpayers' resistance to the financial burden of such fees. (See *Ventura Group Ventures, Inc. v. Ventura Port Dist.* (2001) 24 Cal.4th 1089, 1103, ["Proposition 13 put local government on a strict budget and thus required it to make painful choices"]; *Apartment Assn., supra,* 24 Cal.4th at pp. 838-839, ["Proposition 218 is Proposition 13's progeny ... [and] must be construed in that context"].) Secrecy in voting enhances free taxpayer consent to approve or reject a proposed fee in the face of local controversy about its merits and it makes it more difficult for government to extract revenue from unwilling taxpayers. Therefore, in liberally construing Proposition 218 to further its purposes, we construe the terms "election" and "voting" to mean secret voting.

(*Id.* at 1478.)

Noting that *Silicon Valley* prohibits the Legislature from legislating "in conflict with a constitutional provision where the meaning of that provision is clear. (*Silicon Valley, supra,* 44 Cal.4th at p. 448)", the Opinion determines

> the passage of Proposition 218 entrusts to the courts heightened obligations to *assess* whether a "local agency acting in a legislative capacity ... exercise[s] its discretion in a way that violates constitutional provisions or *undermines their effect.*" (*Silicon Valley, supra,* 44 Cal.4th at p. 448, italics added.) Since *Silicon Valley,* courts cannot " ' " ' "lightly disregard" ' " ' " this " ' " ' "clear constitutional mandate." ' " ' " (*Ibid.*) Therefore, Proposition 218 and the lead case evaluating it, *Silicon Valley,* present a fundamental shift in the role of courts vis a vis real property fees passed by local government.

(*Id.* at 1480-1481; original italics.)

The Opinion rejects the District's contention "that a lack of secrecy in the election is not a ground for setting aside the election results pursuant to Elections Code section 16100, subdivision (e), which was the basis for Greene's election contest." (*Id.* at 1484.) It states:

> [t]he power of the court to invalidate a ballot measure on constitutional grounds is an exception to [the statutory] limitation on election contest proceedings." (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 192 & fn. 17; *Canales v. City of Alviso* (1970) 3 Cal.3d 118, 131, (*Canales*).) The grounds for invalidating an election that are enumerated in Elections Code section

16100 must be construed to include violations of citizens' constitutional secret voting rights "if the judiciary is to remain available for the vindication of the fundamental rights at stake." (*Canales,* at p. 131.)

(*Id.* at 1484-1485.)

The Opinion continues:

Because the trial court held that secret voting was not required under article XIII D, section 6(c), it never reached the factual issue of whether the election as conducted by the District preserved secrecy in voting. We note that the District's Election Procedures provided that only designated persons would have access to the ballots, required the ballots to remain under seal until tabulation, and expressly barred the disclosure of any individual's vote absent a court order. *These procedures, if followed, might have been sufficient to preserve the secrecy of the voting. However, insofar as the record indicates, voters were not provided any assurances that their votes would remain confidential both before and after tabulation of the ballots.* Although the Election Procedures were public documents, they were not mailed to voters and the materials provided to voters to describe the election procedures (and included in the record) did not assure them of voting secrecy. [fn. omitted] Voters who are required to cast their votes on ballots that disclose their names and identify the property they own and that must be signed to be counted, and who are not provided assurances that their votes will be kept permanently confidential, may reasonably be said to have been "denied their right to vote" (Elec.Code, § 16100, subd. (e)) as that right is protected by article II, section 7. That is, they have been denied their right to vote freely with

the confidence that their votes will remain secret before and after tabulation of the ballots.

(*Id.* at 1485; italics added.)

Relying on this Court's decision in *Gooch v. Hendrix* (1993) 5 Cal.4th 266, the Opinion addresses Elections Code requirements for an election contest that "An election shall not be set aside on account of eligible voters being denied the right to vote, unless it appears that a sufficient number of voters were denied the right to vote as to change the result." (Elec.Code, §§ 16204, 16402.5 [identical statutes].) (*Ibid.*)

In utilizing the phrase "it appears," we think the Legislature contemplated circumstances, such as those at hand, in which illegal votes cannot be attributed to any one candidate, but nevertheless "appear" sufficient in number or effect to have altered the outcome of the election. (*Gooch, supra,* 5 Cal.4th at pp. 282-283, [construing former Elec.Code, § 20024].)

In *Gooch,* the Court concluded that 930 illegal ballots had been cast in five school board races and as to each race the illegal ballots could have affected the outcome of the election. (*Id.* at pp. 270, 276.) Because the illegal ballots had been mixed in with the legal ballots, however, it was impossible to identify them and determine if those specific ballots had actually changed the results of the election. (*Id.* at p. 276.) The Court nevertheless concluded that in light of "widespread illegal voting practices that permeated th[e] election" on behalf of the winning candidates, the election results should be set aside. (*Id.* at p. 285; see also *id.* at p. 282; see also *Canales, supra,* 3 Cal.3d at pp. 126-128 [relying on circumstantial evidence that illegalities affected outcome to set aside an election].)

(*Id.* at 1485-1486.)

The Opinion concludes

> . . . the lack of secrecy in the District's fee election was a widespread violation of a constitutional safeguard of free elections. Although the record does not demonstrate that particular votes were affected by the lack of secrecy in a manner that changed the outcome, such a showing is unnecessary under *Gooch.* (*Gooch, supra,* 5 Cal.4th at p. 282.) Our conclusion is consistent with a long line of cases recognizing that violations of *mandatory* provisions of election laws vitiate an election, and even violations of merely directory provisions vitiate an election where it can be shown that the violation affected the outcome or "injuriously affected" the "rights of the voters" or where the violation was so severe as to allow unfairness to be presumed. (*Rideout v. City of Los Angeles* (1921) 185 Cal. 426, 430; *Tebbe v. Smith* (1895) 108 Cal. 101, 111-112; *Atkinson v. Lorbeer* (1896) 111 Cal. 419, 422; see *Gooch,* at p. 278, fn. 7, [explaining that *Rideout* principle has been incorporated into Election Code as to statutory violations].) The constitutional violation at issue here is analogous to a mandatory statutory requirement (see *Atkinson,* at p. 422, 44 P. 162 [Australian ballot system is in many respects mandatory]; *Burson, supra,* 504 U.S. at pp. 202-203 [explaining Australian system was designed to secure secrecy in voting]), and it deprived every voter of his or her right to vote freely with the knowledge that his or her vote would remain confidential.

(*Id.* at 1486.)

Employing an appropriate analysis of the relevant constitutional and statutory provisions that is clear, precise and exacting in its detail, the Opinion draws a bright line [11]/ with respect to property-related fee elections conducted pursuant to article XIII D, section 6(c) by requiring that local governments respect the election right to vote in secret. The Opinion annuls the District's election for its failure to have done so.

The Opinion resolves solely [12]/ an elector's challenge to an article XIII D, section 6(c) election, as to which the Opinion vindicates the protections conferred by article II, section 7 with respect to the right to vote in secret.

III. THE PETITION FOR REVIEW

As it must be - at least at the outset - the District's first issue for review is legitimate:

> "Does the voting secrecy requirement of California Constitution, art. II, § 7 apply to property-owner 'voting' on a property-related fee pursuant to art. XIII D, § 6(c)?"

(Petition at 1)

However, the District's approach otherwise on review is largely the same as it has been in the lower courts and which the Opinion rejects. The District persists in relying on its tiresome conflation that article XIII D, section 6 authorizes nonsecret voting as to property-related fee elections by using the last sentence of section 6(c) ("An agency may adopt procedures similar to those for increases in assessments in the conduct of elections

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[11]/ The District refers to this as "one-size-fits-all." (Petition at 41)

[12]/ The Opinion expressly does not "decide whether secret voting is required in assessment balloting under article XIII D, section 4." (*Id.* at 1472, fn. 12; see also *Id.* at 1479, fn. 14.)

under this subdivision") to import the entirety of both article XIII D, section 4 and the Government Code assessment procedures set forth in section 53753(c) (requiring signed ballots) and (e)(4) (assessment elections are not governed by article II, § 7 or the Elections Code) into its analysis. Only by this means can the District justify and excuse its "widespread violation of a constitutional right of free elections" by conducting its election "with a lack of secrecy." (Opinion at 1486.)

After its legitimate framing of the first issue presented for review, the District immediately resorts to such conflation as it proceeds to frame its second issue:

> "Does the voting secrecy requirement of California Constitution, art. II, § 7 apply to property-owner 'ballots' on assessments subject to art. XIII D, § 4 notwithstanding the contrary direction of subdivision (d) of that § 4 and of Government Code § 53753[.]"

(Petition at 2.)

The petition again asserts that Proposition 218 treats "property-related fees ands assessments as essentially the same . . . Consequently, the Opinion's application of ballot secrecy to property-owner voting on fees under art. XIII D, § 6(c), but not necessarily to assessments under art. XIII D, § 4, disserves [the intent of the voters who enacted the initiative]." (Petition at 21-22)

Amazingly, the petition claims "that the independent standard of judicial review announced in *Silicon Valley* is inapplicable to a property-related fee under § 6. Rather, that case involved judicial review of factual determinations made by local governments regarding assessments." (Petition at 43, fn. 64) The petition contends that the Proposition 218 Omnibus Implementation Act "is entitled to greater deference than the Court of

Appeal afforded it." (petition at 23)

But Opinion's reliance on this Court's decisions in *Silicon Valley* (the Legislature has no power to legislate in conflict with a constitutional provision where the meaning of that provision is clear (*Silicon Valley, supra.*, 44 Cal.4th at 448; Opinion at 1480, fn. 15) and in *Amador Valley Joint Union High Sch. Dist. V. State Board of Equalization* (1978) 22 Cal.3d 208, 245-246 (*Amador Valley*) is appropriate. In *Amador Valley* this Court construed Proposition XIII and countenanced a "reasonable, common-sense approach [in construing constitutional initiatives]" so as to give "appropriate weight . . . to the contemporaneous construction of the legislative and administrative bodies changed with its enforcement . . ." (*Id.* at 248) Consistent with *Amador Valley* and *Silicon Valley* the Opinion concludes there has been "a fundamental shift in the role of the courts vis a vis real property fees passed by local government." (Opinion at 1481.)

It is the result of the application of such a shift of the judicial role - so as to effectuate the will of the electorate rather than the will of the public agency - which in this case the District strives to deny.

The District demands that the Court of Appeal "give effect to the Act's provisions allowing non-secret balloting for assessments or to the last sentence of art. XIII D, § 6(c), which provides that those non-electoral, assessment procedures may be the basis of locally adopted, 'similar' rules for elections on property-related fees." (Petition at 23-24)

Although in the instant case "only one ballot [was] counted for each Identified Parcel" (AA at 72), the petition cries "[b]allot secrecy frustrates that intent [of promoting elections] by preventing weighted voting, for weighting requires the identity of the voter to be discernable from the ballot itself; otherwise recounts are impossible." (Petition at

28) The District urges continued conflation instead of the precise reasoning of the Opinion.

It is clear that the only way that the District can reach any issues that pertain to weighted voting is by relentlessly conflating article XIII D, section 6, with XIII D, section 4. The District must thereby annex considers to be the advantage of assessment protest ballots authorized by Government Code section 53753 to property-related fee elections.

The petition develops its ultimate reliance on Government Code section 53753 in Section II. A. 4 of its petition which is headlined "Transparent Tallies Of § 6(c) Elections Cannot Be Accomplished If Ballots Are Secret." (Petition at 28-31)

In an effort to distort voter intent in enacting Proposition 218, the table which the District presents at 33-38 suffers from the same defect. Applications of the labels in column three (Election Language) and column four (Election Proceeding) are inaccurate and self-serving. For example, the table categorizes a property-related fee election as no "election proceeding" while ignoring the language ". . . local governments must . . . hold an election." (Petition at 33-34) Likewise, it categorizes the right to vote on a property-related fee not to be an "election proceeding" while ignoring the language "Proposition guarantees your right to vote on local tax measures – even when they are called something else, like . . . 'fees'." (Petition at 35-36)

The District largely ignores the details and reasoning process embodied in the Opinion's discussion upon which the Opinion bases its conclusion that having "considered the plain language of the initiative, a coequal provision of the California Constitution, and extrinsic aids to our interpretation of the constitutional provisions, we

conclude the voters who approved Proposition 218 intended the voting in an article XIII D, section 6(c) fee election to be secret." (Opinion at 1469-1483) [13]/

Ultimately it is ironic that in its effort to justify review the District relies on the Howard Jarvis Taxpayers Association's Annotation of Proposition 218 to ultimately conclude that the initiative intended to do away with secret voting in article XIII D, section 6(c). The annotation states:

> The purpose of this of this section is to prevent the exploitation of 'fees' as a means to avoid the new restrictions on assessments. Because flat rate parcel taxes have avoided the strictures of Proposition 13 simply by being called 'assessments,' the drafters are concerned that the same will happen with 'fees' – that is, circumventing taxpayers protections by manipulating the label of the levy.

(Petition at 21; underline added.)

Only by means of its intransigent denial that article XIII D, section 4 and article XIII D, section 6 are not the same can the District continue its effort to "circumvent taxpayer protections." It does so by its ongoing "manipulation of the label of the levy" in both constitutional and statutory contexts.

Likewise, only by such denial can the District ignore that to require "secret voting furthers Proposition 218's twin purposes of limiting the government's power to exact revenue and to enhance taxpayer consent." (Opinion at 1478) Indeed, because of the

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[13]/ The District in no detail discusses the Opinion's observation that the logical conclusion of the District's position would require nonsecret voting in "the general vote of the electorate." (Opinion at 1473.) The Opinion concludes that such result would be a "startling consequence." (*Ibid.*) The Opinion states, "If we construe "similar to" to authorize an agency to conduct a section 6(c) election using the procedures for increases in assessments in article XIII D, section 4, and if we conclude those procedures do not include a secret vote, section 6(c) would appear to authorize an agency to conduct a general vote of the electorate in that manner." (*Ibid.*)

intensity of its interest in subverting secret voting, the District cannot see the nature of the Opinion's description of the Districts role in its election. (Opinion at 1478 regarding the value of secret voting in the context of the likely conflict between public officials' desire to finance costly services and taxpayers' resistance to the financial burden of such fees.)

Concomitantly, in attempting to bolster its conflated position, the District resorts to alarmism which features a parade of imagined horrible consequences if this Court denies review. Such alarmism flies in the face of adjudicating attacks on a constitutional initiative which the voters have enacted. (see *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 ["Analysis of the problems which may arise respecting the interpretation or application of particular provisions of the act should be deferred for future cases in which those provisions are more directly challenged."]

Instead of recognizing the Court of Appeal bright-line distinction between section 6 property-related fee elections and section 4 assessment protest proceedings, it uses the conflation to up the ostensible ante, i.e. threatens financing of public services (Petition at 3), the current "fiscal crisis" (Petition at 15), adverse impact on lenders (Petition at 16), and the ability to address global warming mandates. (Petition at 17.)

The District's third and fourth grounds for review similarly reply on the same conflation (Petition at 2), but in no detail discuss the Opinion's consideration regarding assurances of secrecy:

> The constitutional violation at issue here is analogous to a mandatory statutory requirement (see *Atkinson,* at p. 422, 44 P. 162 [Australian ballot system is in many respects mandatory]; *Burson, supra,* 504 U.S. at pp. 202-203

[explaining Australian system was designed to secure secrecy in voting]), and it deprived every voter of his or her right to vote freely with the knowledge that his or her vote would remain confidential.

We set aside the District's fee election because the voters were instructed to cast signed ballots with their names and addresses printed on the face of the ballots and were given no assurances that the ballot would be kept confidential. The votes cast were not a reliable expression of the popular will. (See *Canales, supra,* 3 Cal.3d at p. 127; *Gooch, supra,* 5 Cal.4th at p. 284) [fn. omitted.]

(Opinion at 1486-1487)

In this regard, and in addition to its consistent incorporation into its analysis of the conflation of assessment protest proceedings with property-related fee elections, the District states "[t]his record contains *no* evidence to support the remedy the Court of Appeal granted." (Petition at 43; original italics)

But the District ignores the fact that the election procedures drove a 21% disqualification rate.

Minimizing a profound constitutional violation by re-labeling it a "procedural error" (Petition at 44), the District cites, but does not apply, the rule of *Rideout v. City of Los* Angeles (1921) 185 Cal. 426, 430) that "a violation of a mandatory provision vitiates the election." (Petition at 44)

On this issue, the Opinion states:

Here, the lack of secrecy in the District's fee election was a widespread violation of a constitutional safeguard of free elections. Although the record does not demonstrate that particular votes were affected by the lack of secrecy in a manner

that changed the outcome, such a showing is unnecessary under *Gooch.* (*Gooch, supra,* 5 Cal.4th at p. 282.) Our conclusion is consistent with a long line of cases recognizing that violations of *mandatory* provisions of election laws vitiate an election, and even violations of merely directory provisions vitiate an election where it can be shown that the violation affected the outcome or "injuriously affected" the "rights of the voters" or where the violation was so severe as to allow unfairness to be presumed. (*Rideout v. City of Los Angeles* (1921) 185 Cal. 426, 430, 432; *Tebbe v. Smith* (1895) 108 Cal. 101, 111-112; *Atkinson v. Lorbeer* (1896) 111 Cal. 419, 422; see *Gooch,* at p. 278, fn. 7 [explaining that *Rideout* principle has been incorporated into Election Code as to statutory violations].)

(Opinion at 1486)

IV. REVIEW IS NOT REQUIRED IN THIS CASE

This Court may order review of an Court of Appeal decision "when necessary to secure uniformity of decision or to settle an important question of law." (California Rules of Court, Rule 8.500 (b)(1).)

This Court, therefore, has the discretion

. . . to supervise and control the opinions of the several District Courts of Appeal, each of which is acting concurrently and independently of the others, and by such supervision to endeavor to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law, a uniform rule of decision throughout the state, a correct and uniform construction of the Constitution, statutes, and charters, and in some instances a final decision by the court of last resort of some doubtful or disputed question of law.

(*People v. Davis* (1905) 147 Cal. 346, 347-348)

In the instant case, because the Opinion is the first to interpret whether or not an article XIII D, section 6(c) property-related fee election requires the application of article II, section 7 which commands that "voting shall be secret," uniformity of decision does not need to be secured; there is no conflict among the Courts of Appeal. Therefore, the only issue on review is whether the Opinion presents an "important question of law" with respect to which the Court of Appeal's opinion, if doubtful, would necessitate this Court's intervention.

Clearly, because the Opinion of the Court of Appeal upholds the application of article II, section 7's guarantee of secret voting in the context of article XIII D, section 6(c) elections, it is the first time an appellate court has addressed this issue.

Thus, in the event that this Court were to determine that the Court of Appeal erred in its analysis, or in the event that this Court desired to affirm the Court of Appeal's opinion as California's paramount statement of the law, granting review would be appropriate.

The precise, comprehensive, detailed and well-reasoned opinion of the Court of Appeal, however, renders such review unnecessary. In both *Amador Valley* and *Silicon Valley* this Court has underscored the constitutional respect which courts must give to the initiative power of the people in order to promote the democratic process. (*Amador Valley, supra.* 22 Cal.3d at 219; *Silicon Valley, supra,* 44 Cal.4th at 448.)

The Opinion's painstaking and meticulously reasoned analysis comports with all applicable standards of constitutional and statutory construction. It identifies the central place that secret voting hold in our democracy (Opinion at 1468) and sets forth the proper

standard of review. (*Ibid.*) It construing the plain language of article XIII D, section 6(c), it specifically evaluates the constitution's use of the terms of art, "election," "majority vote" "voter approval," "similar to" and "conduct of elections" to conclude with respect to secret voting in elections, article XIII D, section 6(c) is ambiguous. (Opinion at 1469-1474)

In light of that ambiguity, the Opinion evaluates article II, section 7 as a coequal article of the California Constitution, analyzes the applicability of article II, section 7 to fees and assessments before this Court's decision in *Silicon Valley* (Opinion at 1474-1476) and discusses how *Silicon Valley* has altered the legal landscape which previously deferred to the legislative function that created and governed assessments to "conclude that article XIII D, section 6(c) and article II, section 7 are best harmonized by construing "election" in article XIII D, section 6(c) as a secret ballot election." (Opinion at 1476-1477.)

Relying in large part on *Silicon Valley* the Opinion liberally construes Proposition 218 to conclude that secret voting furthers the proposition's "twin purposes of limiting government's power to extract revenue and to enhance taxpayer consent" (Opinion at 1478.) Given the likelihood of conflict between "public officials' desire to finance costly services and taxpayers' resistance to the financial burden of such fees [citations omitted]" (Opinion at 1478) and consistent with the right to secretly "vote one's conscience without fear of retaliation [citations omitted]" which is "an important and valuable safeguard for the protection of the voter, and particularly the humble citizen, against the influence which wealth and situation may be supposed to exercise [citations omitted]," (Opinion at 1468), the Opinion concludes "Secrecy in voting enhances free taxpayer consent to

approve or reject a proposed fee in the face of local controversy about its merits and it makes it more difficult for government to extract revenue from unwilling taxpayers." (Opinion at 1478)

In aid of its interpretation, the Opinion carefully examines the ballot pamphlet materials for evidence of the voters' intent in enacting Proposition 218. Because "the ballot pamphlet strongly suggested to voters that the impact of Proposition 218 was to enhance the voting power of taxpayers, with the sole qualification that votes on property assessments and fees could be limited to property owners and weighted by the impact of the exaction on each individual voter," and because "[t]he pamphlet gave no indication that the right to a secret ballot would be infringed and consequently suggested it would be preserved," the Opinion concludes "[t]he ballot pamphlet, therefore, supports a construction of article XIII D, section 6(c) to require secret voting." (Opinion at 1480)

As to the impact of the Proposition 218 Omnibus Implementation Act, the Opinion notes that Government Code sections 53753 and 53753.5 apply only to assessments and "do not refer to fees at all." (Opinion at 1481) "The logical conclusion is that the Legislature did not intend these sections to apply to fees in addition to assessments. If the Legislature believed the assessment balloting procedure was sufficient for the conduct of an article XIII D, section 6(c) fee election, we would have expected the Act to say so." (*Ibid.*) Moreover, the Opinion notes that the provisions of Elections Code section 4000 "expressly *distinguish* an 'assessment ballot proceeding' from an election to voters." (Opinion at 1481-1482) It concludes "the conduct of an article XIII D, section 6(c) fee election is not addressed in the Act, other than to provide that it may be conducted by mail. (Elec.Code, § 4000, subd. (c)(8).)" (Opinion at 1482)

Finally, the Opinion concludes that the constitutional magnitude of the of the District's abrogation of secret voting in the election was analogous to a violation of a mandatory statutory requirement, concluded that the "votes cast were not a reliable expression of the popular will" and annulled the District's election. (Opinion at 1484-1486)

V. CONCLUSION

The Court of Appeal opinion properly employs accepted methods of constitutional and statutory construction to reach its result. Therefore, the result it obtains is neither novel nor doubtful. For all the reasons set forth herein, appellant Ford Greene respectfully submits the Opinion does not merit this Court's grant of review.

DATED: Monday, May 18, 2009

Respectfully submitted:
HUB LAW OFFICES

By _____
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CERTIFICATION OF WORD COUNT

The text of this brief consists of 8,390 words, as counted by Microsoft Word, the word processing program utilized to produce the brief.

DATED: Monday, May 18, 2009

Respectfully submitted:
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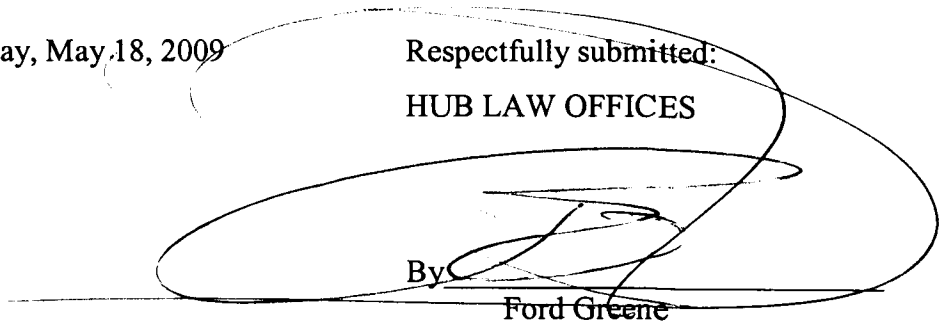

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PROOF OF SERVICE

I am employed in the County of Marin, State of California. I am over the age of eighteen years and am ~~not a~~ party to the above entitled action. My business address is 711 Sir Francis Drake Boulevard, San Anselmo, California. I served the following documents:

ANSWER TO PETITION FOR REVIEW

on the following person(s) on the date set forth below, by personal delivery at the indicated addresses at my direction:

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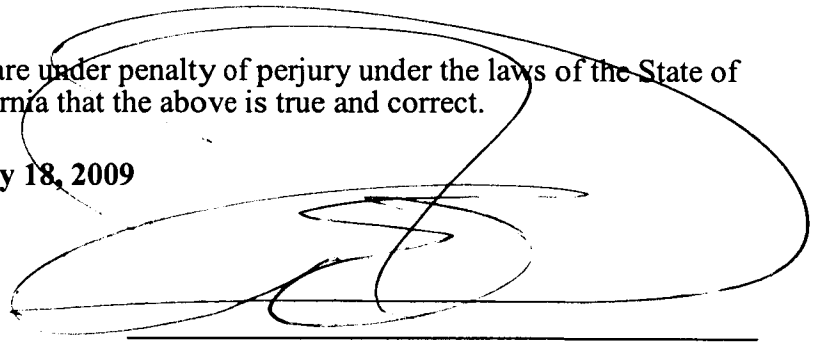
[X] (By Mail) I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Anselmo, California.

[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

DATED: Monday, May 18, 2009



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