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SUPREME COURT
FILED

MAY 29 2009

FREDERICK K. OHLRICH CLERK

No. S172199

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FORD GREENE,
Plaintiff and Appellant,
vs.

MARIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT,
Defendant and Respondent,

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

Interveners and Respondents.

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

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Appellant's Answer to the Petition for Review concedes that the issues in this case are important questions of first impression. (Answer at 22, 30). It acknowledges the Court of Appeal's opinion in this case ("the Opinion") is the first to interpret whether the voting secrecy requirement of article II, § 7 of the California Constitution[1] applies to a property related fee election under article XIII D, § 6(c), a provision of 1996's Proposition 218. (Answer at 30). The Answer also concedes that review is appropriate if this Court concludes either that the Opinion errs in its analysis or that the issues it addresses are worthy of authoritative resolution by this Court (Answer at 30). The District respectfully asserts that review is warranted on both counts.

Review is not requested, as the Answer argues, on the basis of an "alarmist" attack on Proposition 218 (Answer at 27). The District respects that the Proposition 218 is the law; rather, it contends the meaning of that initiative constitutional amendment requires authoritative clarification by this Court, and that the pending case provisions an appropriate occasion to

[1] All article and section references in this Reply are to articles and sections of the California Constitution unless otherwise specified.

do so. Indeed, just as in the recent decision regarding the validity of Proposition 8,[2] this case provides occasion for this Court to determine whether a recent initiative amendment to our Constitution is an exception to, or subordinate to, older constitutional principles. In *Strauss v. Horton*, the competing constitutional commitments were equal protection and opposite-sex marriage. Here they are voting secrecy and property-owner control of elections on property related fees.

II. FACTUAL ISSUES

The Answer raises a few factual issues worthy of note before we proceed to the central arguments raised by the petition for review in this case ("the petition").

First, Appellant did not conduct a legally meaningful recount of the challenged ballots in this matter with assistance from the County elections official, as the Answer claims. (Answer at 3) He submitted incompetent evidence in the Court of Appeal on this issue (Appellant's Appendix ("AA") at 98-108) to which the District timely objected (AA at 120, ¶ 31)[3]

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[2] *Strauss v. Horton*, California Supreme Court Case No. S168047 (filed May 26, 2009).

[3] The Court of Appeal declined to cite this evidence in its Opinion, although it did take judicial notice of the legislative history of the Omnibus Act at Appellant's request. Slip Op. at 2 n.5.

The District is prepared to prove, should it be given opportunity to do so, that elections officials handled the votes to avoid disclosing to Appellant the names, addresses and signatures on the ballots, but merely facilitated Appellant's review, they did not cooperate in a "recount." No legally meaningful recount has occurred.

Second, it is notable that Appellant concedes the District's procedures afforded ballot secrecy in this case (Answer at 12). Those procedures prohibit the disclosure of any property owner's vote or the creation of any report that would do so. (AA 73) However, Appellant argues the District's election procedures somehow violated Government Code § 53753(e)(1)'s requirement that *assessment* ballots "be treated as disclosable public records ... equally available for the inspection by the proponents and opponents of the proposed assessment" after they are tallied. (Answer at 12). Thus, although the Opinion faults the District for failing to afford secrecy to voters and Appellant argues this was the basis for his trial court action, the Answer concedes the District's procedures provided for secrecy, but argues that the promise of secrecy was "illusory" because of this assessment rule. (*Id.*)

Paradoxically, Appellant also argues application of Government Code § 53753 to this case is unconstitutional and that arguing otherwise is possible "[o]nly by disregarding [article II, § 7's] constitutionally mandated ballot secrecy." (Appellant's Supplemental Brief filed December 17, 2008, at 5). Similarly, the Court of Appeal found Government Code § 53753, a provision of the Proposition 218 Omnibus Implementation Act ("the

Omnibus Act"), which was adopted by a unanimous Legislature immediately following the adoption of Proposition 218, inapplicable to fee elections under article XIII D, § 6(c). (Slip Op. at 24; (2009) 171 Cal.App.4th 1458, 1481).

Thus, the Answer and the Opinion acknowledge the District's procedures called for ballot secrecy, find that promise of secrecy "illusory" because the Omnibus Act requires disclosure of *assessment* ballots, and conclude the Omnibus Act's rule for assessments cannot be applied to property related fee elections because of the voting secrecy mandate of article II, § 7. Surely, they cannot have it both ways! Either the District's promise of ballot secrecy was constitutionally required, and therefore not illusory; or it was not constitutionally required and any asserted conflict with the Omnibus Act is non-problematic.

III. REVIEW IS REQUIRED TO SETTLE IMPORTANT QUESTIONS OF LAW

The essential question presented by the petition is whether the voting secrecy requirement of article II, § 7 applies to property-owner "voting" on a property related fee pursuant to article XIII D, § 6(c) or whether such voting may follow the non-secret assessment procedures of article XIII D, § 4. This question affects all local governments in California and their ability to impose assessments and property related fees for such important public purposes as flood control, water conservation, Clean Water Act

compliance, and implementation of legislative mandates regarding global warming.

The Opinion of the Court of Appeal creates uncertainty, rather than clarity, in several ways:

(1) It adopts without support a new and unbounded rule requiring that voters be affirmatively told that ballots will be secret.

(2) It gives no meaning to the last sentence of article XIII D, § 6(c) of Proposition 218, which empowers local governments to adopt procedures for fee elections which are "similar to" the non-secret procedures specified by article XIII D, § 4 for assessments, leaving local officials to wonder as to the scope of their rule-making power. How similar to assessment procedures must fee procedures be given the new secrecy rule applied here? What other rules applicable to traditional elections may be asserted in this context? May signatures be placed on separate, outer envelopes from those which contain ballots, as the Opinion suggests and as is the practice for absentee votes in voter elections? Or may local governments follow the model of article XIII D, § 4, and require signatures on ballots, as the District did here?

(3) The Opinion needlessly opens questions about the validating of the Omnibus Implementation Act's non-secret assessment procedures which mimic those of article XIII D, § 4.

(4) It applies the independent judgment standard of judicial review that this Court articulated in *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Authority*, 44 Cal.4th 431 (2008), as appropriate

for assessment determinations into the law of property related fees without explaining the basis in Proposition 218 for doing so.

(5) It suggests local governments may provide for secret elections on property related fees involving weighted or fractional ballots by relying on computer technologies banned by the Legislature. Are weighted ballots actually permissible in light of the Opinion in this case?

(6) Finally, it establishes judicial authority to set aside election results without evidence that asserted procedural errors actually affected the outcome, a standard established in the law of this state for most of California's history.

These multiple uncertainties will: (1) impair local governments' ability to access credit markets and to obtain favorable rates for debt at a time when credit is needed and credit markets are already characterized by historically high levels of uncertainty; (2) invite delay and litigation; and (3) undermine public confidence that local procedures comply with law, diverting public attention from the substance of what services should be provided and how they should be funded to procedural issues. If ever there were a time when California's decision-making should focus on what services government should provide and how they should be funded, and not on peripheral disputes about how those decisions ought to be made; this would seem to be that time.

IV. THE COURT OF APPEAL DECIDED THESE ISSUES INCORRECTLY

A. THE VOTERS DID NOT INTEND SECRECY TO APPLY TO FEE ELECTIONS AMONG PROPERTY OWNERS

As more fully detailed in the petition, the Opinion's conclusion that the voters who adopted Proposition 218 intended elections among property owners on fees under Article XIII D, § 6(c) is erroneous for at least five reasons.

First, contemporaneous construction of Proposition 218 indicates its framers viewed property related fees under article XIII D, § 6 and protests on assessments under article XIII D, § 4 as essentially the same. The property related fee provisions of the measure were added to avoid end-runs around its tax and assessment provisions by the creation of funding devices labeled fees or charges which the framers of the measure viewed as functionally taxes or assessments.[4] Both Proposition 218 and the Omnibus Proposition 218 Implementation Act of 1997 ("the Omnibus Act") require that assessment ballots not be secret. Article XIII D, § 4(d) states: "Each notice ... shall contain a ballot ... whereby the owner may indicate his or

[4] Respondent's Request for Judicial Notice ("Respondent's RJN") filed in the Court of Appeal on March 27, 2009, Exhibit B, at 13.

her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment." Government Code § 53753(c) states:

> Each notice ... shall contain an assessment ballot that includes ... a place where the person returning the assessment ballot may indicate his or her name, a reasonable identification of the parcel, and his or her support or opposition to the proposed assessment. Each assessment ballot shall be in a form that conceals its contents once it is sealed by the person submitting the assessment ballot. Each assessment ballot shall be signed .... Assessment ballots shall remain sealed until the tabulation of ballots ... commences ....

Given that ballot secrecy undisputedly does not apply to assessments protests under article XIII D, § 4, the Opinion's application of ballot secrecy to property-owner voting on fees under Article XIII D, § 6(c) is inconsistent with the close relationship between §§ 4 and 6 its framers intended. It is, also, of course, at variance with the express authority conferred on local governments by the last sentence of article XIII D, § 6(c) to adopt procedures for fee elections that are "similar to" those of article XIII D, § 4 for assessments.

Second, the Omnibus Act represents a consensus among the Legislature, local governments, and taxpayer advocates regarding the

meaning of Proposition 218 and further demonstrates that ballot secrecy in property-owner fee elections under article XIII D, § 6(c) was not intended. The Omnibus Act specifically states that assessment protest proceedings "shall not constitute an election for voting purposes of Article II of the California Constitution or of the Elections Code." Government Code § 53753(e)(4). Combined with the last sentence of article XIII D, § 6(c) allowing local governments to adopt rules governing elections on property related fees "similar to" those established by Proposition 218 for assessments, this statute persuasively demonstrates that ballot secrecy does not apply to property owner voting on property related fees. The Opinion, however, mistakenly concludes otherwise.

Third, transparency and accountability in weighted, property-owner balloting is inconsistent with ballot secrecy and the Opinion's struggle to reconcile the two are perhaps its most obvious weakness. Although it is true that the District used equally weighted ballots in this case, the petition asks the meaning of a constitutional provision applicable to a broader range of facts than arise in a single case. There is still a need to resolve this question for government agencies which do choose to weight ballots, either to allow multiple owners to each be heard (as a husband and wife who hold their home as community property) or to allow large beneficiaries and funders of a property related service such as flood control to be given proportionally greater votes than owners of smaller parcels who will pay less.

Fourth, as demonstrated by the petition (at 32-39), the legislative history and text of Proposition 218 use electoral language – "election" and "vote" – so inconsistently that this language simply sheds no light on what the voters intended with respect to the secrecy of votes in fee elections under article XIII D, § 6(c). The Opinion's reliance on that language to discern voter intent led to error.

Finally, Proposition 218 plainly distinguishes property owner elections on fees under article XIII D, § 6(c) from traditional elections among voters on taxes and, at the option of a local agency, such traditional elections among voters for property related fees. This evidences intent to retain property-owner control of decisions on this issue, especially given the two-thirds voter approval required if this decision is taken away from property owners. Nothing in this deference to property-owner control is inconsistent with the long-standing practice of this state to require non-secret voting procedures among property owners to allow weighting of votes without sacrificing the transparency of tallies. This distinction also ensures property-owner control of fee elections without interference from election requirements such as the one-person-one-vote rule.

B. THE OPINION AND THE ANSWER TO THE PETITION BOTH READ THE LAST SENTENCE OF ARTICLE XIII D, § 6(C) OUT OF THE CONSTITUTION

> The last sentence of article XIII D, § 6(c) states:
> "An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision."

Neither the Opinion nor the Answer gives any meaning to this provision. Indeed, the Answer acknowledges the point (Answer at 24) but, like the Opinion it defends, gives no meaning to this last sentence of article XIII D § 6(c). This silence speaks volumes.

C. THE OPINION AND THE ANSWER PROVIDE NO PRACTICAL MEANS TO BALANCE SECRECY WITH ACCOUNTABILITY

The Answer also makes no effort to refute the District's observation that ballot secrecy cannot be made consistent with transparent recounts of elections. Nor does the Answer attempt to rehabilitate the Opinion's flawed suggestions that Californians rely on computers to provide secrecy while continuing to link a ballot to the person who cast it (Slip. Op. at 13-14; *supra*, 171 Cal. App. 4th at 1472) or that the only means to test the

validity of government tallies of property owner votes under article XIII D, § 6(c) be formal election challenges filed in court. (*Id.*) The suggestion that information relating to the weighting of ballots be "hidden within the computer data bank" conflicts with the recent decertification of electronic voting systems lacking a paper trail (*American Ass'n of People with Disabilities v. Shelley* (C.D. Cal. 2004) 324 F.Supp.2d 1120, 1123) or the prohibition on the use of such systems by Elections Code § 19250(a). Similarly, the requirement of a formal election challenge contradicts Government Code § 53753(e)(1)'s mandate that assessment ballots "shall be treated as disclosable public records...equally available for inspection by the proponents and the opponents of the proposed assessment" and the last sentence of article XIII D, § 6(c) allowing local governments to adopt rules for property owner elections on fees that are similar to these non-secret procedures for assessments. Again, the Answer's silence is instructive.

D. THE ANSWER DEMONSTRATES THAT REVIEW IS APPROPRIATE TO RESOLVE WHETHER SILICON VALLEY TAXPAYERS ASS'N V. SANTA CLARA COUNTY OPEN SPACE AUTHORITY APPLIES TO FEES

This Court recently concluded that Article XIII D, § 4's provisions require courts to review legislative decisions regarding assessments under an independent judgment standard. *Silicon Valley Taxpayers Ass'n v. Santa*

Clara County Open Space Authority (2008) 44 Cal.4th 431. Specifically, article XIII D, §§ 4(a) and (f) require a local government to determine that a facility or program of services provides the special benefit to justify assessment financing and that the cost of the facility or program is allocated among benefitted property owners in proportion to their relative special benefit. Under *Silicon Valley*, these determinations are no longer reviewed with the deference courts traditionally afford legislative decisions. (44 Cal.4th at 448-449) Rather, independent judicial review is required. (*Id.* at 450)

The Opinion (Slip Op. at 18-19; *supra*, 171 Cal. App. 4th at 1476-1477) and the Answer (at 23-24), however, ignore this Court's analysis in *Silicon Valley*, which turns on the particular and novel provisions of Article XIII D, § 4 regarding what constitutes special benefit in the assessment context, and read the case as an invitation to apply independent judicial review, wholesale, to all legislative decisions regarding taxes, assessments, fees and charges under Proposition 218. In doing so, they provide no support in the language of Proposition 218's provisions regarding taxes (article XIII C) and fees (article XIII D, § 6).

This broader reading of *Silicon Valley* is not the most obvious, but the fact that these arguments are made, and the Opinion's broad-brush discussion of the case, suggest review is also warranted to settle this issue.

E. THE OPINION OVERTURNS AN ELECTION WITHOUT EVIDENCE THAT BALLOT SECRECY WAS NOT PRESERVED

Neither the Opinion nor the Answer cites any evidence that ballots were not secret in this case or that voters were not told their ballots would be secret. Indeed, the record includes no such evidence. Judicially noticeable facts as to the rules adopted by the District and the documents by which it conducted the election are to the contrary. (AA at 63-81; Respondent's RJN filed in the Court of Appeal on December 15, 2008, Ex. A) Yet, the Opinion nevertheless overturns the outcome of the underlying property related fee election, substituting the decision of three appellate justices for that of the affected property owners. Surely a functioning judicial system and the rule of law require courts to overturn election results on an appropriate showing. However, this Court's precedents, as cited in the petition (at 42-46) afford this remedy only on a substantial evidentiary showing that the result is not a reliable indicator of the electorate's will because procedural error actually affected the outcome. The Opinion's failure to follow precedent on this point, too, is error.

Like the Opinion, the Answer essentially admits the absence of evidence that ballot secrecy was violated. It argues only that the disqualification of 21% of ballots which lacked a signature is itself evidence that: (i) ballots were not secret; (ii) voters were not told ballots would be secret; and (iii) this asserted lack of secrecy caused voters to fail

to sign their ballots (Answer at 28). Drawing these conclusions from the bare fact that 21% of voters failed to sign their ballots requires Olympian leaps of logic. Moreover, the Answer admits the District's rules promised secrecy (Answer at 12), but argues that this secrecy was "illusory" because Government Code § 53753(e)(1) mandates release of assessment protests– a statute the Opinion finds to be unconstitutional as applied to these facts (Slip Op. at 24).

F. NEITHER THE OPINION NOR THE ANSWER CITES ANY SUPPORT FOR THE NEWLY DECLARED OBLIGATION TO INFORM VOTERS THAT VOTES WILL BE SECRET

The Court of Appeal "set aside the District's fee election because the voters ... were given no assurances that the ballot would be kept confidential (Opinion 31-32). Yet the Opinion is devoid of any precedent for this new-found rule. Indeed, the Opinion does not justify its new rule; it merely assumes it to be the case. The Answer does not cure this void of authority. It cites no evidence or authority to support this new rule. This silence, too, is instructive.

V. CONCLUSION

As the Answer acknowledges, the petition for review in this case raises important questions of first impression. Those questions concern all local governments in California and those who depend on them for public services. Accordingly, the District respectfully requests that this Court grant the petition to settle important questions of law, provide certainty to all with a stake in local government finance, and to resolve the questions opened by the Opinion without needless delay and protracted litigation.

DATED: May 29, 2009

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 3,793 words, as counted by the Word version 2007 word-processing software program used to generate the brief.

DATED: May 29, 2009

Respectfully submitted,

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PROOF OF SERVICE
Ford Green v. Marin County Flood Control District, et al.
Court of Appeal *Case No. A120228*

I, Kimberly Nielsen, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 555 West 5th Street, 31st Floor, Los Angeles, California 90013. On May 29, 2009, I served the document(s) described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

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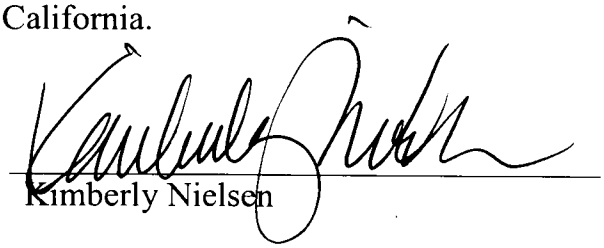

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