S172199

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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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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APPELLANT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This case raises and directly confronts the question whether - when the voters of the State of California enacted the constitutional initiative, "The Right to Vote on Taxes Act" (Proposition 218) - they intended to eliminate the right to vote in secret [1]/ in the elections which the initiative required and authorized.

Pursuant to Proposition 218, Respondent Marin County Flood Control and Water Conservation District ("District") sponsored and conducted a mail ballot, one-parcel-one-vote, election in which it sought voter approval of a 20-year, $40 million charge which it characterized as a "property related fee."

As an absolute condition for the counting of the property owner votes, the District promulgated an election rule which required each voter sign his or her ballot under penalty of perjury. Pursuant to the District's rule, the failure to sign one's ballot authorized the District to not count it.

When the ballots were counted, out of 8,059 ballots cast, 1,708 were disqualified. The disqualification rate was 21%. The measure passed by 65 votes.

Appellant, Ford Greene ("Greene"), conducted a recount of the disqualified votes (which the District disputes) which determined had the votes which the District disqualified for the failure of the voter to sign her/his name been counted, the voters would have rejected the $40 million fee by 141 votes.

The District contends that the voters who enacted Proposition 218 intended to give two meanings to the term "election." One meaning of "election" would protect the

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[1]/ California Constitution, article II, § 7.

right to vote in secret. The other meaning, which is, of course, the meaning that the District would have this Court apply to this case, would not.

Sophistry in the conduct of elections authorized by the California Constitution is not what the voters intended or required either in Proposition 218, or its antecedent, Proposition 13. From the outset, the District's position in this case has been, as it is here, an effort aimed at "circumventing taxpayer protection by manipulating the label of the levy."

STATEMENT OF THE CASE AND FACTS

A. Trial Court Proceedings

On August 9, 2007, Greene 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. [2/]

Pursuant thereto, the District promulgated its own election procedures.

The procedures specified that the "election shall be by mail ballot only" (Appellant's Appendix ("AA") at 71) and that "only one ballot will be counted for each Identified Parcel." (*Id.* at 72.) No weighted voting was involved in the election process.

Central to the issues raised here, the District enacted four rules.

[2/] All article references are to articles of the California Constitution. Except when made to Government Code section 53753 or Elections Code section 4000, all section references are to section 4 or section 6 of article XIII D of the California Constitution.

First, it required the separate identification of each voter by name, address and parcel number on the face of the ballot. (*Id.*, at 73.)

Second, the District dictated "[I]n order to be counted, a ballot must be signed by the Record Owner or current owner of an Identified Parcel." (*Id.*, at 72.)

Third, "[t]he Clerk will not accept a ballot . . . that does not contain an original signature." (*Id.*, at 73.)

Fourth, before and after the election the ballots were to be kept secret. (*Id.*, at 74.)

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 a 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. (*Id.*, at 84)

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

On July 23, 2007, personally assisted by the Elaine Ginnold, the Marin County Registrar of Voters and her assistant, Melvin Briones, Greene recounted the invalidated ballots. (*Id.*, 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. (*Id.* 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. (*Id.*, at 84, 13, 98-109)

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

On August 28, 2007, the intervenors filed their complaint for declaratory relief (*Id.*, 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." (*Id.*, at 195-196)

At a September 7, 2007 case management hearing, the parties waived any evidentiary hearing, and stipulated 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)

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 (*Id.*, 179-180), [3]/ the equal protection clause of the United States Constitution (AA., 181-186) and failed to comply with standards imposed by the California Election Code. (*Id.*, at 186-192). Greene asked the trial court to disqualify and set aside the election or order that the ballots which had been disqualified because of the failure to sign the ballot be counted. (*Id.*, at 192-193)

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[3]/ A record review of the District's consistent 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 for Review at 5) demonstrates such claim is palpably false. (AA, at 195-196, 236-241) Moreover, the court of appeal directly confirmed 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." (Slip Op. at 29)

In its October 1, 2007 opposition (*Id.*, 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. (*Id.*, at 202-210) [4]/

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 requirements that the voter be identified and sign the ballot in order for it to be counted. (*Id.*, at 206, 220-221)

> . . . 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 that the ballot be signed and exempts the property owner ballot process from the requirements of Article II of the California

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[4]/ Intervenors likewise filed an opposition brief. (*Id.*, at 213-226)

Constitution. Accordingly, Article II, Section 7 does not apply to the Storm Drainage Fee Election.

(*Id.*, at 206:4-18; bold in original.)

In turn, Intervenors tracked and clarified the District's argument (*Id.*, 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."

(*Id.*, at 220:24-28; underline added.)

On October 9, 2007, Greene filed his reply memorandum (*Id.*, 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 (*Id.*, at 236-238);

2. 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. Government Code sections 53753(c) and (e)(4) both violated article II, section 7 and article XIII D, section 6(c). (*Id.*, 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."

(*Id.*, at 276-277)

On December 17, 2007, Greene filed his notice of appeal. (*Id.*, at 279-281) [5]/

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[5]/ The District persists in inaccurately tagging this date stating that Greene filed his notice on January 8, 2008. (Respondent's Opening Brief ("ROB") at 9.)

B. Litigation in the Court of Appeal

In his opening brief on appeal ("AOB") Greene identified that the Court should employ the independent standard of review (*Id.*, 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 (*Id.*, 21-26),

2. Government Code sections 53753(c) and (e)(4) fatally conflict with articles II, section 7 and XIII D, section 6(c) (*Id.*, at 26-28); and

3. 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. (*Id.*, at 28-34)

The District agreed that the Court should employ the independent standard of review (Respondent's Brief ("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." [6]/ and

2. The 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. (*Id.*, at 22-25, 30)

On July 14, 2008, this Court filed its opinion in *Silicon Valley Taxpayers' Association v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 432 ("*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, Potter* and *Not About Water* line of cases on which the District had relied. (*Id.*, at 4-8; fn. 6, above.)

In addition, Greene pointed out that respondent had completely failed to address his 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

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[6]/ 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." (*Id.*, at 18-22)

contention that section 6 fee related elections were "outside the purview of Article II, section 7, and the Elections Code." (*Id.*, 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 (AA at pp. 71-74) – was there any breach of voting secrecy in this election?" [7]/

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

The District also insisted that, pursuant to the assessment laws, Proposition 218 incorporated the distinction that property elections are different from general elections, as discussed in *Alden*, *Tarpey* and *Martinelli*, each of which was extant prior to the voters' enactment of 218. (*Id.*, at 3-5.) [8]/

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[7]/ 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." (*Id.*, at p. 74)

[8]/ 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.

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." (*Id.*, 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" (*Id.*, 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." (*Id.*, at 10.)

In appellant's 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* required that courts enforce both Proposition 218's procedural and substantive requirements over the power of the Legislature, which could not constrain the exercise of such procedural and substantive rights. Greene argued that *Silicon Valley* prohibited any legislative constriction of secret voting, and that neither the 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. (*Id.*, at 1-6.)

Greene also made the point that the District's prohibition of any disclosure of any individual voter's vote (AA at 74) ran contrary to the express language of Government Code section 53753(e)(1) (on which the District relied) 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.)

Greene 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" (AA. 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 53753(e)(1) promulgated the ballots were public records, 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. (*Id.*, 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. (*Id.*, at 8-10.)

In an unanimous, published decision, the Court of Appeal reversed the trial court's decision, annulled and set aside the results of the election, directed entry of judgment for Greene, and awarded costs. (Slip Op. at 32.)

ARGUMENT

I. ARTICLE II, SECTION 7, OF THE CALIFORNIA CONSTITUTION, GUARANTEES THE RIGHT TO VOTE IN SECRET IN ALL ELECTIONS

The California Supreme Court has declared that the "'right to a secret ballot ... is the very foundation of our election system.'" (*Scott v. Kenyon* (1940) 16 Cal.2d 197, 201 (*Scott*).) It is the "right to vote one's conscience without fear of retaliation." (*McIntyre v. Ohio Elections Comm'n* (1995) 514 U.S. 334, 343; see *Burson v. Freeman* (1992) 504 U.S. 191, 200-207, plur. op. of Blackmun, J. [describing problems of intimidation and electoral fraud that led to adoption of secret ballot by all 50 states].) The right 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." (*Robinson v. McAbee* (1923) 64 Cal.App. 709, 714 (*Robinson*).) The right to secrecy encompasses not only the right to cast one's vote in private (*Peterson v. City of San Diego* (1983) 34 Cal.3d 225, 230; *Wilks v. Mouton* (1986) 42 Cal.3d 400, 408, superseded by statute on other grounds as stated in *Escalante v. City of Hermosa Beach* (1987) 195 Cal.App.3d 1009, 1019; *Scott* at p. 201), but also the right to maintain the confidentiality of one's vote following an election (*Scott,* at pp. 201, 203; *Patterson v. Hanley* (1902) 136 Cal. 265, 269-270; *Robinson,* at p. 714).

Primarily, at issue on review is whether the right to vote in secret applies to the "election" the District conducted pursuant to article XIII D, section 6(c) to approve its $40 million property related fee.

A. Historical Background of Proposition 13

When this Court held that Proposition 13 was constitutional, it stated "It should be borne in mind that notwithstanding our continuing representative and republican form of government, the initiative process itself adds an important element of direct, active, democratic contribution by the people." (*Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, 228) ("*Amador Valley*") ". . .[T]he sovereign people [may] themselves act directly to adopt tax relief measures of this kind, [and are not compelled to] defer to the Legislature, their own representatives." (*Id.* at 229)

Twenty-three years after acknowledging power the voters mustered in Proposition 13 to limit the state's imposition of taxes, and as against the decisions of their own elected representatives, this Court placed article XIII D, § 4 assessments in historical perspective.

> Proposition 218 can best be understood against its historical background, which begins in 1978 with the adoption of Proposition 13. 'The purpose of Proposition 13 was to cut local property taxes. [Citation.]' [Citation.] Its principal provisions limited ad valorem property taxes to 1 percent of a property's assessed valuation and limited increases in the assessed valuation to 2 percent per year unless and

until the property changed hands. (Cal. Const., art. XIII A, §§ 1, 2.)

To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. (Cal. Const., art. XIII A, § 4; *Rider* v. *County of San Diego* (1991) 1 Cal.4th 1, 6-7.) It has been held, however, that a special assessment is not a special tax within the meaning of Proposition 13. (*Knox* v. *City of Orland* (1992) 4 Cal.4th 132, 141, and cases cited.) Accordingly, a special assessment could be imposed without a two-thirds vote.

In November 1996, in part to change this rule, the electorate adopted Proposition 218, which added articles XIII C and XIII D to the California Constitution. Proposition 218 allows only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge. (Cal. Const., art. XIII D, § 3, subd. (a)(1)-(4); see also [*id.*], § 2, subd. (a).) It buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges." (*Howard Jarvis [v. City of Riverside], supra,* 73 Cal.App.4th 679, 681-682.)

(*Apartment Association of Los Angeles v. City of Los Angeles* (2001) 24 Cal.4th 830, 836-837)

"Proposition 218 is Proposition 13's progeny. Accordingly, it must be construed in that context. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 301.) Specifically, because Proposition 218 was designed to close government-devised loopholes in Proposition 13, the intent and purpose of the latter informs

our interpretation of the former."

(*Id.*, 24 Cal.4th at 838-839) [9]/

In *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 422, this Court acknowledged the rule of construction "that when a term has been given a particular meaning by a judicial decision, it should be presumed to have the same meaning in later-enacted statutes or constitutional provisions." Likewise, i the Legislature has provided an express definition of a term, that definition is ordinarily binding on the courts. (*Id.*, at 423.)

There is nothing which the history and context of Proposition 13 present which would support any inference that when the voters of the state exercised their power of initiative and enacted Proposition 13 they intended to eliminate the right to vote in secret. It is in this context which the voters subsequent enactment of The Right to Vote on Taxes Act must be examined so as to determine whether in Proposition 218 the voters authorized any departure from established voting rights and traditional voting practices, particularly any departure from the right to vote in secret.

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[9]/ "The power to tax is the power to oppress, and people have rebelled against that power ever since taxes have been imposed. The California voters are no different, and in November 1996, they passed Proposition 218, known as the "Right to Vote on Taxes Act." They demanded, and received, the right to approve any increase of a local tax before it goes into effect." (*AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 752)

B. Standard of Review

The scope of review in an election contest is no different from that in other appeals: the Court reviews factual findings for substantial evidence and questions of law de novo. (*Gooch v. Hendrix* (1993) 5 Cal.4th 266, 278-279 (*Gooch*).) Here, the trial court determined that the election contest raised pure questions of law and decided the case based on briefing and argument without holding an evidentiary hearing. Therefore, the Court's review is de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-800; see also *Apartment Assn., supra,* 24 Cal.4th at p. 836, [interpretation of article XIII D is question of law]; *Silicon Valley, supra.,* 44 Cal.4th at 443-450.)

The District has previously contended that the independent standard of review does not apply here. [10]/

The District is wrong.

In *Silicon Valley*, this Court stated:

> Before Proposition 218 was passed, courts reviewed quasi-legislative acts of local governmental agencies, such as the formation of an assessment district, under a deferential abuse of discretion standard. [citations omitted] Because it was

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[10]/ Greene notes that in its ROB the District directs the Court to no standard of review. In the Court of Appeal, however, the District contended "nothing in *Silicon Valley's de novo* standard of review undermines the principle in pre-Proposition 218 cases, and section 53753, that property elections are distinct from ordinary elections and therefore, they fall outside the scope of constitutional provisions related to voting in general elections, such as the right to vote in secret." (ASB at 5)

In its Petition for Review ("PFR") in this Court, the District "notes that the independent standard of review announced by *Silicon Valley* is inapplicable to a property-related fee under § 6. Rather, the case involved judicial review of factual determinations made by local governments regarding assessments." (PFR at 43, fn. 64.)

recognized that 'the establishment of a special assessment district takes place as a result of a peculiarly legislative process grounded in the taxing power of the sovereign,' the scope of judicial review of such actions was "quite narrow." [citation omitted]

(*Silicon Valley,* 44 Cal.4th 443-444.)

The scope of constitutional review the Court announced in *Silicon Valley,* however, is not limited to a narrow reading limited only to assessments.

It applies to all Proposition 218 cases. [11]/

Silicon Valley changed the applicable standard of review. It compels courts in Proposition 218 cases to employ the independent standard of judicial review in the place of other deferential standards including the "deferential abuse of discretion standard" as formerly set forth in *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 684-685 and *Knox v. City of Orland* (1992) 4 Cal.4th 132, pre-Proposition cases. (*Silicon Valley* 44 Cal.4th at 444-450)

In footnote 6, *Silicon Valley* specifically disproved *Not About Water Com. v. Board of Supervisors* (2002) 95 Cal.App.4th 982, which had required that review of the creation of a special assessment district be conducted pursuant to an abuse of discretion standard (*Id.* at pp. 994-995) or substantial evidence standard (*Id.* at p. 986).

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[11]/ The Court of Appeal addressed this point when it applied *Silicon Valley* to the case at bar. (Slip Op. at 17-20.)

Silicon Valley explained:

However, a valid assessment under Proposition 218 must not only be approved by a weighted majority of owners under the procedural requirements in article XIII D, section 4, subdivisions (c), (d), and (e), but must also satisfy the *substantive* requirements in section 4, subdivision (a). (Art. XIII D, § 4, subds. (a), (c)-(e).) These substantive requirements are contained in constitutional provisions of dignity at least equal to the constitutional separation of powers provision. (Cal. Const., art. III, § 3.) Before Proposition 218 became law, special assessment laws were generally *statutory,* and the constitutional separation of powers doctrine served as a foundation for a more deferential standard of review by the courts. But after Proposition 218 passed, an assessment's validity, including the substantive requirements, is now a constitutional question. "There is a clear limitation, however, upon the power of the Legislature to regulate the exercise of a constitutional right." (*Hale v. Bohannon* (1952) 38 Cal.2d 458, 471.) "'[A]ll such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it.'" (*Ibid.*) Thus, a local agency acting in a legislative capacity has no authority to exercise its discretion in a way that violates constitutional provisions or undermines their effect.

We " ' "must ... enforce the provisions of our Constitution and 'may not lightly disregard or blink at ... a clear constitutional mandate.'" '" (*State Personnel Bd. v. Department of Personnel Admin.* (2005) 37 Cal.4th 512, 523.) In

so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. (*Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1355.)

(*Id.*, 44 Cal.4th at 447-448; underline added.)

Based on the decision in *Silicon Valley*, the District's reliance on *Not About Water Co. v. Board of Supervisors* (2002) 95 Cal.App.4th 982; *So. Cal. Rapid Transit District v. Bolen* (1992) 1 Cal.4th 654; *Alden v. San Luis Obispo* (1963) 212 Cal.App.2d 764, *Martinelli v. Morrow* (1916) 172 Cal. 472, or any other cases, [12]/ in order to assert that a deferential or substantial evidence standard of review controls in the interpretation of the constitutional protections Proposition 218 mandates is no longer constitutionally viable.

Based on the Court's decision in *Silicon Valley* that "courts should exercise their independent judgment in reviewing whether assessments that local agencies impose violate article XIII D" (*Silicon Valley,* 44 Cal.4th at 450) and because the instant case arises out of the re-labeling a XIII D, section 6, property-related fee as a XIII D, section 4, assessment in an attempt justify the District's ballot signature requirement, this Court must exercise its independent review and not defer to the District's decision to require voters to sign their ballots in order for their votes to be counted.

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[12]/ *Silicon Valley* states: "Neither the separation of powers nor property owner consent justifies allowing a local legislative body or property owners (both bound by the state Constitution) to usurp the judicial function of interpreting and applying the constitutional provisions that now govern assessments." (*Silicon Valley*, 44 Cal.4th at 449.)

C. The Scope Of The Last Sentence Of Article XIII D, § 6(c) Authorizes that Proposition 218 Elections To Be Conducted By Mail And Does Not Abrogate the Right To Vote In Secret

1. The Structure of Respondent's Argument

The District urges that this Court adopt it's conclusion that the property related fee elections authorized by article XIII D, § 6 (c), do not have to comply with article II, §7's voting secrecy requirement.

Based on a clever, but ultimately strained and uninformed reading of the last sentence of article XIII D, § 6(c), [13]/ the District's reasoning would eliminate secrecy in voting.

The District states the Court must ignore any other import of this sentence if the Court were to approve secret voting in property related fee elections because the sentence necessarily implicates non-secret voting in § 6(c) majority vote property owner elections. (ROB at pp. 26-27)

Without it's interpretation of that one sentence, the District's entire argument fails.

The District's analysis limits the scope of reference of that sentence to mean that a § 6(c) property owners' "election," and § 4(e) property owners' "majority protest," both mean the same thing. (*Id.*, at 27) Because the District concludes that the procedure of obtaining taxpayers approval is the same under both § 6 and § 4, it concludes that

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[13]/ The last sentence of § 6(c) reads: "An agency may adopt procedures similar to those in increases for assessments in the conduct of elections under this subdivision."

authorizing secret voting in § 6 elections will read the last sentence of § 6(c) out of the Constitution because §4 majority protests involve weighted voting. (*Id.*, at 24-34)

In order to reach this conclusion, the District must disregard decades of consistent legal usage of the word "election." It presents an unique definition which redefines what the word, "election," means. The District *splits the meaning* of "election" to mean secret voting in an "election" submitted to a "two-thirds vote of the electorate residing in the affected area," and to mean non-secret voting in an "election" submitted to a "majority vote of the property owners of the property subject to the fee." (*Id.*, at 27-29).

Because it limits the scope of reference of "An agency may adopt procedures similar to those in increases for assessments in the conduct of elections under this subdivision" to mean *only proportional voting*, and then concludes proportional voting can only be public, the District contends secret voting in § 6 property owner elections was not authorized by the voters. (*Id.*, at 30-34.)

Such a result, the District concludes, would generate intra-Constitutional conflict with respect to secret voting in § 6(c) elections because "[w]hat the Constitution says an agency may do, Greene argues it may not." (*Id.*, at 27)

> The District contends that voters who adopted Proposition 218 intended to apply ballot secrecy to votes of 'the electorate residing in the affected area' under § 6 (c), but to apply non-secret procedures 'similar to' the assessment ballot procedures of article XIII D, § 4 to property owner voting under article XIII D, § 6 (c).

(*Id.*, at 29)

The District's reasoning is flawed in a number of regards. In order to scrutinize its flaws, however, it is first necessary to examine the plain words of the two constitutional provisions of Proposition 218 that are under this Court's review.

2. As to Assessments: Article XIII D, section 4

Article XIII D, § 4 requires detailed and calculated relationships of costs, proportionality and special benefits supported by a engineers report that an assessment must meet before a government agency may impose it. (Art. XIII D, § 4(a) (b).) [14]/

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[14]/ Sec. 4. Procedures and Requirements for All Assessments. (a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

(b) All assessments shall be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each 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.

Section 4 authorizes a majority protest procedure to be conducted by mail. (art. XIII D, § 4(c).)

The mail-in majority protest procedure requires written notice that the existence of a "majority protest" will result in the assessment not being imposed (*ibid*) and that the agency provide a ballot on which the owner may indicate "his or her support or opposition to the proposed assessment." (Art. XIII D, § 4(d.)

The mail-in protest procedure requires a public hearing not less than 45 days after mailing the notice of the proposed assessment, requires the agency to consider all protest

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(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

(f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e).

against the proposed assessment, to tabulate the ballots and determine if there is a "majority protest." "A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment." (Art. XIII D, § 4(e).)

Finally, § 4 requires in the tabulation of the ballots that they "shall be weighted according to the proportional financial obligation of the affected property." (*Ibid.*)

3. As to Property Related Fees: Article XIII D, section 6

Section 6 [15]/ requires identification of the parcels upon which the fee is proposed to be imposed and the calculation of the amount of the fee to be imposed on each parcel. (Art. XIII D, § 6(a) (1).)

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[15]/ Sec. 6. Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

Section 6 requires written notice by mail of the proposed fee to the owner of record, the fee amount, the basis of calculation therefor, the reason for the fee together with the date, time and location of a public hearing on the proposed fee. (*Ibid.*)

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

The public hearing on the proposed fee must be no less that 45 days after the mailing of the notice. At the hearing, the agency shall consider all protests against the proposed fee and not impose the fee only if written protests against the proposed fee "are presented by a majority of owners of the identified parcels." (art. XIII D, § 6 (a)(2).)

If written protests by a majority of owners are not presented, the proposed fee shall not be imposed or increased "unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. *An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.*" (art. XIII D, § 6 (c); italics added.)

3. Section 4 and Section 6: Substantive Differences

While there are superficial similarities between the two sections, there are substantial, and substantive, differences between what § 4 and § 6, respectively, require and authorize.

Section 4 requires a ballot be included with the written mail notice (Art. XIII D, §4 (d)) while § 6 requires no such ballot.

Section 4 explicitly authorizes proportional voting (Art. XIII D, §4 (e)) while § 6 does not.

Imposition of a § 4 assessment is explicitly and necessarily contingent on a "majority protest" to be determined by calculating only the ballots of those who respond, and by not counting the ballots of those who fail to respond. (Art. XIII D, §4 (d).)

In order for written protests to stop a proposed fee under § 6, a majority of the identified property owners must submit their protest, not a majority of the persons who respond. Thus, under this scheme each failure to vote is counted as a "yes" vote. (Art. XIII D, §6 (a) (2).)

Unlike § 4 assessments, the determination of a § 6 fee is not necessarily contingent on written protests submitted by a majority of the property owners. (Art. XIII D, §6 (c).)

Instead, pursuant to section 6(c), the approval of the fee is necessarily contingent upon an election that may be conducted at the agency's option from one of two specified electorates, each one of which applies a different standard of success. In the identified property owner electorate, the standard is a majority vote of the property owners subject to the fee. In the electorate of registered voters residing in the affected area, the standard is two-thirds. (*Ibid.*)

Nothing in § 6(c) explicitly authorizes either election to be conducted by mail.

Section 6(c) links itself to § 4 by in its final sentence stating "*An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.*"

This link does not authorize the elimination of the right to vote in secret in §6(c) elections. It does authorize the agency, however, to conduct either of those two elections by mail. [16]/

4. The Final Sentence of Section 6(c) Authorizes All-Mail Elections and Says Nothing of Eliminating The Right to Vote in Secret.

The District contends that

"[t]his sentence . . . expresses that property-owner proceedings under article XIII D, §6(c) are not intended to be traditional elections for at least two reasons. First, no meaning can be given to this sentence other than to allow use of procedures "similar to" assessment protest proceedings under article XIII D, § 4. . . . Second, there would be no need to empower 'an agency' – defined by article XIII D, § 2(a) as a local government – to adopt election procedures 'similar to' those for assessment protests if traditional elections were intended." (ROB at 32; underline added.)

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[16]/ The most prominent pre-enactment opponent and highly informed post-enactment interpreter of Proposition 218 (see Appellant Request for Judicial Notice ("AJN"), Ex. 2 at pp. 2, 77-79, Ex. 12b at pp. 1-14, Ex. 15 at pp. 3-4, 6-7, 10, 12, 14, 17-18, 20) confirmed that as to property related fees enactments and increases, "voter approval" that included a "majority protest and an election are required." (AJN, Exhibit 2 at 73-74) Noting article XIII D, § 6(c),

Mr. Colantuono observed a "mailed ballot election" was authorized (*Id.*, at 78). Moreover, after the voters enacted Proposition 218, Mr. Colantuono observed that property related fee "elections can be conducted by mailed ballot in much the same way the measure requires for the approval of assessments as discussed below." (AJN, Exhibit 12b at 10; underline added) No mention was made then of the double-standard between the two § 6 electorates. That double-standard is what the District now urges.

The District is wrong.

It would have a better chance of being right if "traditional elections" had been conducted by mail. At the time the voters enacted Proposition 218, traditional elections had never been conducted by mail. Registered voters could choose to vote by absentee ballot, but entire elections were never conducted by mail. The electoral innovation of all-mail elections was a prominent feature of the initiative.

Article XIII D, § 6(c) references an "election" whose scope and result are determined by either "a majority vote of the property owners of the property subject to the fee" or "by a two-thirds vote of the electorate residing in the affected area."

Section 6(c) *does not state by what means such an election is to be conducted* except it does say that "An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under that subdivision."

Greene submits that the sentence refers to the constitutional authorization by which §6 elections may be conducted by mail.

When examined in context, the sentence cannot and does not transform an election where the voter can secretly cast her ballot, as the District imagines, into a public majority protest where she can't.

Most importantly, it does not mean that, what had otherwise been prominent features of elections, such as the right to vote in secret, no longer applied.

It does not eliminate secret voting. [17]/

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[17]/ Despite missing the mark, the District's position cleverly attempts to meet what may be the Court of Appeal's most devastating observation regarding the District's contention that secret voting does not apply in §6 property owner elections. It is:

The qualifying statement authorizes the use of procedures similar to those for

II. THE VOTERS WHO ENACTED PROPOSITION 218 DID NOT INTEND TO ELIMINATE SECRET VOTING IN SECTION 6(c) PROPERTY OWNER ELECTIONS.

Nowhere in the language the constitutional provisions use, nowhere in the analysis of the initiative by the Legislative Analyst's Office, nowhere in the Voter's Ballot Pamphlet and nowhere in any of the other relevant legislative history materials, can one word be found which suggests that in Proposition 218 the voters intended to eliminate the right to vote in secret.

A. The Language of Proposition 218 Does Not Authorize The Elimination of Secret Voting in the Conduct of Elections.

In particular, when construing Proposition 218 cases this Court has clearly established the first applicable rule of interpretation.

> When interpreting a provision of our state Constitution, our aim is "to determine and effectuate the intent of those who enacted the constitutional provision at issue." (*Richmond, supra,* 32 Cal.4th at p. 418.) When, as here, the voters enacted

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increases in assessments in the "conduct of *elections* under this subdivision." (Art. XIII D, § 6(c), italics added.) Article XIII D, section 6(c) describes two types of elections: "a majority vote of the property owners of the property subject to the fee or charge *or,* at the option of the agency, [ ] a two-thirds vote of the electorate residing in the affected area." (*Ibid.,* italics added.) 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. This startling consequence strongly suggests that "similar to" in the qualifying statement of section 6(c) only authorizes the use of the section 4 assessment balloting procedures if the procedures are compatible with the "election" requirement. (Slip Op. at p. 14.)

the provision, their intent governs. (*Delaney v. Superior Court* (1 990) 50 Cal.3d 785, 798.) To determine the voters' intent, "we begin by examining the constitutional text, giving the words their ordinary meanings." (*Richmond, supra,* at p. 418.) (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 223-224)

". . .we apply the familiar principles of constitutional interpretation, the aim of which is to "determine and effectuate the intent of those who enacted the constitutional provision at issue." (citation omitted.) "The principles of constitutional interpretation are similar to those governing statutory construction." (citation omitted.) If the language is clear and unambiguous, the plain meaning governs. (citation omitted.)

(*Silicon Valley,* 44 Cal.4th at 444.)

As summarized above, article XIII D, section 6 prescribes a two-step process for approval of a property-related fee: (1) a noticed public hearing at which affected property owners may submit written protests, and if no majority protest occurs at that hearing, (2) an "election" on the fee.

The voters did not intend by the following language to eliminate the right to vote in secret in property related fee elections.

"*Voter Approval for New or Increased Fees and Charges.* [With exceptions not relevant here], no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved *by a majority vote* of

the property owners of the property subject to the fee or charge or, at the option of the agency, *by a two-thirds vote of the electorate* residing in the affected area. The *election* shall be conducted not less than 45 days after the public hearing. *An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.*"

(Art. XIII D, § 6, subd. (c), italics added.)

The plain language of article XIII D, section 6(c) is silent on the issue of whether voting in an election under that subdivision must be secret. Section 6(c), however, uses the terms "voter approval," "majority vote," "vote of the electorate," "election," and "elections."

By way of comparison, article XIII D, section 6, subdivision (a), which sets forth the requirements for majority protest proceedings on a proposed fee (which is the only voter approval requirement for sewer, water, and refuge collection fees, and is the first phase of voter approval for other property-related fees), does not use any of these terms. Other provisions of Proposition 218 use "election" and "vote" to refer to votes by the general electorate that presumably are governed by article II. (Art. XIII C, § 2, subds. (b), (c), (d); see *Bighorn, supra,* 39 Cal.4th at pp. 213-214, ["[W]hen a word has been used in different parts of a single enactment, courts normally infer that the word was intended to have the same meaning throughout"].) Similarly, Proposition 13, the predecessor of Proposition 218, uses the word "election" in that sense. (art. XIII A, § 4; see *Apartment Assn., supra,* 24 Cal.4th at pp. 838-839 ["Proposition 218 is Proposition 13's progeny ... [and] must be construed in that context"].) When used in the context of real property

taxation elections, the terms "vote" and " election" connote a secret ballot election of the sort used to elect candidates or pass initiatives.

Secret voting maintains a core position in our democratic system. (*Scott,supra.*, 16 Cal.2d at 201.) It is inconceivable to think that voters would eliminate it without saying so.

B. Extrinsic Evidence Provides No Basis Upon Which to Conclude That The Voters Intended to Eliminate the Right to Vote in Secret.

If the language of the constitutional provisions to be construed "is ambiguous," the Court may consider extrinsic evidence in determining voter intent, including the Legislative Analyst's analysis and ballot arguments for and against the initiative. (*Silicon Valley,* 44 Cal.4th at 444-445;.)

In *Silicon Valley* the Court reviewed the ballot materials in connection with Proposition 218. It held:

> Proposition 218 specifically states that "[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Ballot Pamp., *supra,* text of Prop. 218, § 5, p. 109; Historical Notes, *supra,* p. 85.) Also, as discussed above, the ballot materials explained to the voters that Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from

taxpayers without their consent.

(*Silicon Valley,* 44 Cal.4th at 448; *Richmond v. Shasta Community Services District, supra.*, 32 Cal.4th at 420 ["[T[he aim of Proposition 218 [is] to enhance taxpayer consent."].)

1. Article XIII D, Section 6(c) Must Be Construed In Light of Article II, Section 7.

Discussing the interpretation of a constitutional provision, the Supreme Court has explained: "It is a cardinal rule of construction that words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions of the Constitution bearing on the same subject. [Citation.] The goal, of course, is to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in so doing to give effect to the scheme as a whole. [Citations.]" (*Fields v. Eu* (1976) 18 Cal.3d 322, 328; see also *Serrano v. Priest* (1971) 5 Cal.3d 584, 596, ["where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted"]; *Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 866 ["It is well settled that a constitutional amendment is to be construed in harmony with the existing framework of which it forms a part, so as to avoid a conflict"].)

A coequal article of the California Constitution, which governs voting and elections, provides, "Voting shall be secret." (Art. II, § 7.) "Voting" is not limited in article II, section 7 to make it inapplicable to a fee election, and "election" and "vote" are not limited in article XIII D, section 6(c) to make article II, section 7 inapplicable. On

their face, therefore, article XIII D, section 6(c) and article II, section 7 are most easily harmonized by construing the "election" required by article XIII D, section 6(c) to be a secret-ballot election.

Likewise, the last sentence of section 6(c) is most easily harmonized as authorizing its elections to be conducted entirely by mail.

2. The Aims of Proposition 218 Must Be Implemented By A Liberal Construction

Proposition 218 itself provides guidance for the interpretation of ambiguous provisions of the initiative. Section 5 (an uncodified section of the initiative measure) provides, "The provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5, Ballot Pamp., General Election, *supra,* text of Prop. 218, § 5, p. 109; see *Silicon Valley, supra,* 44 Cal.4th at p. 448 [relying in part on Prop. 218, § 5 for guidance in construing article XIII D].) Section 2 (also uncodified) elaborates on the measure's purpose:

> The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from

taxpayers without their consent.

(Ballot Pamp., General Election, *supra,* text of Prop. 218, § 2, p. 108; *Silicon Valley,* at p. 446, [relying in part on Prop. 218, § 2 ("Proposition 218's preamble") for guidance in construing article XIII D].)

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.) 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, a liberal construction of Proposition 218 to further its purposes means that the terms "election" and "voting" mean secret voting.

3. The Language of the Ballot Pamphlet Supports Secret Voting

If the words of a constitutional provision are ambiguous, resort may be had to the provision's legislative history for evidence of the enacting party's intent, which, in the case of a voter initiative, is the ballot pamphlet. (*Silicon Valley, supra,* 44 Cal.4th at pp. 444-445; *City and County of San Francisco v. County of San Mateo,* (1995) 10 Cal.4th

554, 563; *Amador Valley* 22 Cal.3rd at 245-246.)

In the ballot pamphlet for Proposition 218, both the Legislative Analyst's analysis and the ballot arguments communicated to voters that the initiative both implicated their *voting rights* and that there was no indication that the right to a secret ballot would be eliminated.

The Legislative Analyst's analysis of the initiative used the words "election" and "vote" for both the assessment balloting procedure prescribed by article XIII D, section 4, and for the fee election required by article XIII D, section 6(c). (Ballot Pamp., General Election, *supra,* analysis of Prop. 218 by the Legislative Analyst, pp. 73-74.) In contrast to existing law, which "generally require[d] local governments to reject a proposed assessment if more than 50 percent of the property owners *protest[ed] in writing,*" Proposition 218 would require local governments to "hold a mail-in *election* for each assessment. Only property owners and any renters responsible for paying assessments would be eligible to *vote. Ballots* cast in these elections would be weighted...." (*Id.* at p. 73-74, italics added.) On property related fees the analyst wrote that under Proposition 218 local governments would first have to "mail information about the fee to every property owner, reject the fee if a majority of the property owners *protest in writing* " and, if not, "hold an *election* on the fee...." (*Id.* at p. 73, italics added.) In sum, the Legislative Analyst contrasted "written protest" procedures, which were applicable to assessments before Proposition 218 and that would be applicable to initial fee approval under Proposition 218, to the "election" and voting that would be required for final approval of assessments *and* fees (with some exceptions) under the initiative. That is, the initiative would establish taxpayer voting rights with respect to assessments as well as

fees.

The pamphlet arguments in support of and in opposition to the initiative focused on the issue of voting rights. Proponents of the measure argued that the initiative would "guarantee[ ] your right to vote on local tax increases-even when they are called something else, like 'assessments' or 'fees'...." (Ballot Pamp., General Election, *supra,* argument in favor of Proposition 218, p. 76.) After describing how local politicians had used assessments to create loopholes in Proposition 13's requirement of voter approval for taxes, the proponents argued, "TAXPAYERS HAVE *NO RIGHT TO VOTE ON* THESE TAX INCREASES AND OTHERS LIKE THEM [i.e., assessments] UNLESS PROPOSITION 218 PASSES!" (*Ibid.*) The proponents repeatedly argued that the initiative "gives taxpayers the right to vote on taxes." (*Id.* at p. 77.) Opponents of the measure focused on voting rights, too, but alleged that those rights would be infringed because of the property qualification for voting on assessments and the weighting of assessment ballots. The opponents did not suggest that voting rights would be further infringed by the absence of a secret ballot. Neither did the proponents. Voters reading these ballot arguments would conclude that "voting rights" were at issue and that those rights arguably were infringed by limiting one's voting rights according to property qualifications and weighted ballots. In other respects, however, voting rights were at least preserved, if not enhanced.

Thus, the ballot pamphlet strongly communicated 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. The pamphlet gave no

indication that the right to a secret ballot would be infringed and consequently communicated it would be preserved. The ballot pamphlet, therefore, supports a construction of article XIII D, section 6(c) to require secret voting.

4. Contemporaneous Construction of Proposition 218 By The Howard Jarvis Taxpayers Association and Other Interested Parties Support Secret Voting in Proposition 218 Elections.

The District resorts to a reading of one annotation by the Howard Jarvis Taxpayers Association (HJTA) dated September 5, 1996. According to the HJTA, the purpose of section 6 was to prevent the type of "exploitation" of fees which governmental agencies had used assessments. HJTA sought to prevent "circumventing taxpayer protections by manipulating the label of the levy." The District, however, concludes:

> Ultimately, the framers of Proposition 218 viewed property-related fees and assessments as essentially the same, especially in terms of a property owner's relationship with government. Consequently, application of ballot secrecy to property-owner voting on fees under article XIII D, §4, disserves this intent to equate the two revenue types. (ROB at 36.)

This view is at odds with every opinion in the legislative history of the enactment.

Moreover, the District ignores another HJTA Statement of Intent which it issued in January, 1997. Therein, with respect to section 4 assessment ballots, it stated:

Ballot: The ballot should remain sealed with all pertinent property owner information on the outside of the envelope so that both the signature and the information can be verified by the tabulator before the envelope is opened. The envelope should include parcel number, signature, address, sworn declaration, etc. The ballot should include the agency's address (or a self-addressed envelope, stamp as agencies discretion) for return of the ballot.

(AJN, Exhibit 6a at 12)

In connection with a September 26, 1996 joint hearing, staff for the Senate Committees on Local Government and Revenue and Taxation prepared a report on Proposition 218. (AJN, Exhibit 2) As to assessments, the introductory section of the materials noted that given the Proposition's July 1, 1997 deadline which required "local agencies to obtain voter approval on non-voter approved assessments . . . Proposition 218 will result in many new elections on existing assessments or in the elimination of many assessment levies." (AJN , Exhibit 2 at 14)

The legislative history materials noted that Proposition 218 presented similar constraints as to property related fees. "Before officials can approve or increase a fee or charge, ***Proposition 218*** requires the agency to get the approval of either a majority vote of the affected property owners of [sic] a 2/3 vote of the electorate residing in the affected area." (AJN , Exhibit 2 at 17; original italics/bold) Fees were also subject to the July 1, 1997 deadline. (*Ibid.*)

In its September 24, 1996 publication, "Overview of Proposition 218," the Legislative Analyst's Office ("LAO") noted that property related fees "would be subject

to voter approval." (AJN, Exhibit 3a at 3) Three months later, the LAO noted that before the voters enacted Proposition 218, "California residents or property owners could object to these taxes or charges at a public hearing or during a statutory protest procedure, but these taxes or charges were not placed on the ballot." (AJN, Exhibit 3b at 6) The LAO confirmed that in order to enact a property related fee, the agency must "hold an election." (*Id.*, at 17)

5. The Legislative History of Proposition 218 Uses Electoral Language Consistently

As noted above, the District's argument first artificially posits that secret voting in section 6 elections would "read out" of the last sentence of §6(c). The District's argument then employs the post-218 enactment of Government Code section 53753 to establish that said enactment constitutes an expression of voter intent. [18]/

Relying on the procedures for assessments that section 53753 established, the District draws a distinction between "Election Language" and an "Election Proceeding" even though it does not define either. The District apparently uses the section 53753-based distinction between assessment majority protest proceedings and pre-Proposition 218 traditional voter elections to organize and present its criticism of the Court of Appeal's reliance on ballot material in support of its conclusion that secret voting applies to section 6 property related fee elections. The District states:

> With respect, the District believes this interpretative approach is ill-suited to products of the initiative process such as Proposition 218. Proposition 218 and its

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[18]/ Greene will address this argument at Section III, *infra.*

legislative history use the words "vote" and "election" so inconsistently and imprecisely that they shed little light on its intent. Rather than parse the many uses of electoral language to refer to assessment protest proceedings (which the Legislature has declared in §53753(e)(4) are not elections) and of non-electoral language to refer to tax elections and initiatives (which plainly are elections) via text, it is more economical to present this information in the following table:"

(ROB at 48)

Upon examination, the District's table appears to be nothing more than an attempt to continue to generate ambiguity where there is none, and present it as though such artificially generated ambiguity possesses the weight of fact.

The District's interpretation set forth on its chart generates four columns: "Document," "Text," "Election Language," and "Election Proceeding." Its first three columns with the respective labels are accurate.

The fourth, however, is misleading. It is misleading because it reflects the District's reliance on § 53753(e)(4)'s definition that assessment majority protests are not elections. Then, into its characterization of what is an Election Proceeding, the District annexes its conclusion that secret voting does not apply to property owner fee related elections.

Thus, it concludes that the information presented to the public before the voters enacted Proposition 218 stacked up as follows [19]/

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[19]/ By its nature, the chart makes any analysis in writing problematic. The manner which Greene has derived to isolate the claims which the chart purports to communicate

- LAO says §4 assessment mail-in election is not an election proceeding (ROB at p. 49, **fn. 46**; RJN, Ex. A at 3-4);

- LAO says §6 fee mail-in protest is not an election proceeding (ROB at p. 49, **fns. 47-48**, RJN, Ex. A at 3);

- LAO says §4 assessment mail-in election is not an election proceeding (ROB at 49-50, **fn. 49**, RJN, Ex. A at 4);

- LAO says §2 tax election is an election proceeding (ROB at 50, **fns. 50-51**, RJN, Ex. A at 4);

- LAO says §2 tax election is an election proceeding while §4 assessment protest proceeding is not. (ROB at 50, **fns. 52-53**, RJN, Ex. A at 5 [note: the District's Brief inaccurately states the RJN page number as 4].);

- Proponent says §4 and § 6 right to vote does not constitute an election proceeding. (ROB at 51, **fn. 54**, RJN, Ex. A at 6);

- Opponents' use of "FEWER VOTING RIGHTS," "WILL HAVE NO VOTE," "banned from voting" and "gives non-citizens voting rights" implicate election

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is to identify the relevant page number, tag each row set forth on the chart by its respective footnote and then cite to the source of the relevant language.

language but not election proceeding. (ROB at 51-52, **fns. 55-59**, RJN, Ex. A at 6);

- Opponents' use of "PROPOSITION 218 DILUTES VOTING RIGHT," "REDUCES YOUR VOTING POWER," NON-CITIZENS GAIN VOTING POWER, MORE VOTING POWER THAN HOMEOWNERS, "corporation gets 1000 times more voting power than you," "denies voting rights," and "Reducing American citizens' Constitutional rights" implicate election language but not election proceeding. (ROB at 51-52, **fns. 60-65**, RJN, Ex. A at 7);

- Proponents use of "Proposition 218 expands your voting rights. It CONSTITUTIONALLY GUARANTEES your right to vote on taxes" implicates election language and an election proceeding. (ROB at 53, **fn. 66**, RJN, Ex. A at 7);

- Proponents' reference to "tax elections" refers to an election proceeding (ROB at 53, **fn. 67**, RJN, Ex. A at 7)

- Proponents say pre-Proposition 218 assessment procedures do not implicate election language or an election proceeding. (ROB at 53, **fn. 68**, RJN, Ex. A at 7)

Relying on the self-serving labeling of its chart, the District claims all but one "element of the ballot materials [conflate] elections and non-electoral assessment

proceedings and [use] electoral terms such as 'vote,' 'ballot,' and 'election' regarding both." (ROB at 53.) By such ploy, the District persists in employing linguistic tactics aimed at "circumventing taxpayer protection by manipulating the label of the levy" to support the elimination of secret voting rights in section 6(c) elections.

In sum, aside from its own strained interpretations, whether by chart or in plain English, not one word in the legislative history of Proposition 218 supports the District's position.

III. GOVERNMENT CODE SECTIONS 53753 (C) AND (E)(4) CONSTRAIN, CONFLICT AND FRUSTRATE THE INTENT OF THE VOTERS AS EXPRESSED WHEN THEY ADOPTED PROPOSITION 218.

A. On Their Face Section 53753 (c) and Section 53753 (e)(4) Do Not Apply To Property Related Fee Elections.

Generally, legislative implementation of constitutional amendments adopted by initiative are traditionally accorded considerable weight by courts construing the amendments. (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 693; *Delaney v. Lowery* (1944) 25 Cal.2d 561, 568-569.) A cornerstone of this deference is evidence that the construction by the Legislature is "contemporaneous" with the initiative. (*Amador Valley, supra,* 22 Cal.3d at pp. 245-246 (citing cases).)

The Legislature, however, 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 p. 448.) [20]/

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[20]/ Similarly, Evidence Code section 664 ("It is presumed that official duty has been regularly performed") (ROB at 64) does not assist the District. (*California Advocates For*

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.*) [21]/

Therefore, Proposition 218, and the lead case evaluating it, *Silicon Valley,* present a fundamental shift in the role of courts vis-a -is real property fees passed by local government.

The District argues that the Legislature interpreted article XIII D, section 6(c) *not* to require secret voting when it enacted and subsequently amended Government Code section 53753 as part of the Proposition 218 Omnibus Implementation Act ("Act"). (Stats.1997, ch. 38, Legis. Counsel's Digest, § 1.) Greene disagrees. Government Code section 53753 addresses only assessment procedures, not fee elections under article XIII D, section 6(c), and the Act otherwise is either silent on the conduct of such elections or it suggests they should be conducted with secret voting.

As relevant here, the Act amended section 4000 of the Elections Code and added two articles to the Government Code: article 4.3 (section 53739), and article 4.6 (sections 53750, 53753, and 53753.5). (Stats.1997, ch. 38, §§ 2, 4, 5.) Effective January 1, 2008, a new section was added to Government Code article 4.6 (section 53755).

Nursing Home Reform v. Bonta (2003) 106 Cal.App.4th 498, 505 ["principles of separation of powers and respect for agency expertise" do not require "substantial deference" to "its determination that its rulemaking fully complies" with higher authority.])

[21]/ Greene has already discussed the adverse impact of this Court's *Silicon Valley* decision as to the deference courts used to afford discretionary decisions of local agencies. (Section I.B, above.)

Government Code section 53750 defines many terms "[f]or purposes of Article XIII C and Article XIII D of the California Constitution and this article [4.6]." (Gov.Code, § 53750.) The statute refers to taxes, assessments, and fees. (*Ibid.*) Some of its subdivisions are expressly applicable to taxes and fees (*Id.*, subds.(e), (h)(2)), some to taxes, assessments, and fees (*Id.*, subds. (h)(1), (h)(3)), and some to assessments and fees (*Id.*, subds. (g), (i)). All three subdivisions of Government Code section 53739 expressly apply to taxes, assessments, and fees. (Gov.Code, § 53739, subds. (a), (b)(1), (b)(2).)

In contrast, Government Code sections 53753 and 53753.5, which address the notice, protest, and hearing requirements for assessments under article XIII D, section 4, expressly apply only to assessments. (Gov.Code, §§ 53753, 53753.5.) They do not refer to fees at all. 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, one would have expected its Act to have said so.

Moreover, Elections Code section 4000 draws a distinction between "election [s]" and "*assessment* ballot proceeding[s]" conducted under Proposition 218. (Elec.Code, § 4000, subd. (c)(8), italics added.) It provides that an "election or assessment ballot proceeding required or authorized by Article XIII C or XIII D of the California Constitution" may be conducted by mail. (*Ibid.*) The quoted phrasing is significant for two reasons.

First, it confirms that the Legislature intended the ballot proceeding described in section 53753 to apply only to assessments. This intent is unmistakable because, the amendment further provides: "when an assessment ballot proceeding is conducted by

mail pursuant to this section, the following rules apply: [¶] (A) The proceeding shall be denominated an 'assessment ballot proceeding' *rather than an election.* [¶] (B) Ballots shall be denominated 'assessment ballots.' " (Elec.Code, § 4000, subd. (c)(8), italics added.)

Second, the phrasing of Elections Code section 4000, subdivision (c)(8) acknowledges two types of procedures that are required or authorized under Proposition 218 that could be conducted by a mailed ballot: elections and assessment ballot proceedings. It emphasizes the fact that those procedures are different because it imposes requirements on an "assessment ballot proceeding" that do not apply to an "election." Thus, the purpose of those additional requirements appears to expressly *distinguish* an "assessment ballot proceeding" from an election to voters. A subdivision of Government Code section 53753 likewise distinguishes an assessment ballot proceeding (there denominated a majority protest proceeding) from an election: "The majority protest proceedings described in this subdivision [i.e., the tabulation of the ballots] shall not constitute an election or voting for purposes of Article II of the California Constitution or of the California Elections Code." (Gov.Code, § 53753, subd. (e)(4).)

Both at the time the Act was first passed and at the time of the District fee election at issue, the only voter approved procedure discussed in the Act relating to Proposition 218 real property fees was an "election." (Elec.Code, § 4000, subd. (c)(8).) Other than to provide that it may be conducted by mail, the conduct of an article XIII D,

section 6(c), fee election is not addressed in the Act. (Elec.Code, § 4000, subd. (c)(8).) [22]/

B. The Legislative History of the Act Supports Secret Voting

Article XIII, §6(d) commands that "Beginning July 1, 1997, all fees or charges shall comply with this section." The Ballot Pamphlet states "By July 1, 1997, local governments would be required to reduce or repeal existing property-related fees and assessments that do not meet the measure's restrictions." (RJN, Ex. A at 4)

On September 24, 1996, the Legislative Analyst's Office estimated that adoption of Proposition 218 would result in "local government revenue reductions statewide . . . likely exceed $100 annually in the short run." (AJN, Ex. 3a at 5) The report to the September 1996 Senate Local Government Committee and Senate Revenue and Taxation Committee concurred: "Proposition 218 affects existing assessments too. Specifically the initiative requires local agencies to obtain voter approval on non-voter approved assessments by July 1, 1997" (AJN, Ex. 2, at 14; original underline)

In December 1996, the Legislative Analyst's Office noted that Proposition 218 altered "the state's role and responsibilities regarding local government in several important ways" and that "local governments are likely to ask for urgency legislation . . . because the deadline for compliance with some Proposition 218 provisions is July 1,

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[22]/ Even if the Act "eliminated the need to comply with both Prop. 218 and the different notice and protest requirements of the assessment statutes," (AJN, Ex. 12b at 10), aside from distinguishing between assessment ballots and an election in Election Code section 4000 (c)(8), it does not mention article XIII D, § 6(c) property owner elections.

1997." (AJN, Ex. 3b at 7.) Subsequently, the Court of Appeal confirmed that article XIII D, §6(d) "means what it says." (*Howard Jarvis Taxpayers Association v. City of Fresno* (2005) 127 Cal.App.4th 914, 924.)

The League of California Cities and the LAO requested the introduction of what became Senate Bill 919. (Appellant's Request for Judicial Notice in Court of Appeal ("COAJN"), Ex. 7a at API-1) With respect to developing what became the Proposition 218 Omnibus Implementation Act, the LAO stated "[o]ur hope throughout this process has been to get a consensus bill enacted in sufficient time to assist local governments in their efforts to meet their July 1, 1997 Proposition 218 deadlines." (*Id.*, Ex. 12 at A-49)

Therefore, the Legislature's enactment of the Act, at least in part, was because it was under the constitutional gun whereby the voters aimed for compliance with respect to assessments and fees by July 1, 1997.

Among the issues the Legislature addressed was the issue of secrecy in voting.

Early drafts of the proposed consensus legislation were circulated that contained explicit references that "protest forms" were "public records subject to inspection" and that "the secrecy of ballots shall not apply." (*Id.*, at Exhibit 12, pp. A-77 [proposed 53753 (c)]) and A-92 [proposed 4000])

On February 27, 1997, Senator Rainey introduced Senate Bill No. 919 as an "act to amend Section 4000 of the Elections Code, and to add . . . Article 4.6 (commencing with Section 53750) . . . of the Government Code, relating to local government taxes, changes and assessments." (*Id.*, at Exhibit 1, at 1) In part, the senate bill stated:

> Section 4000 of the Elections Code is amended to read: 4000. Any local, special, or consolidated election may be conducted wholly by mail provided that all of the

following conditions apply: (a) The governing body for the local agency authorizes the use of mailed ballots for the election. (b) The election does not occur on the same date as a statewide primary of statewide general election. (c) The election is one of the following: . . . .(9) *Any election or majority protest proceeding required or authorized by Article XIII C or Article XIII D of the Constitution. However, when a majority protest proceeding is conducted by mail pursuant to this section, the following rules shall apply: (A) The proceeding shall be denominated a majority protest proceeding rather than an election. (B) Ballots shall be denominated majority protest forms.* ***(C) the provisions of this code regarding secrecy of ballots shall not apply and majority protest forms shall be deemed public records as that term is defined by Section 6252 of the Government Code.***" (bold added; *Id.*, at Exhibit 1A, at. 2-3) [23]/

The Assembly amended Senate Bill 919 again on June 24, 1997, one week before the July 1, 1997 deadline which Article XIII D, section 6 (d) imposed, and which the Proposition 218 Omnibus Implementation Act sought to address. It struck out the language in Elections Code section 4000 (c)(9) which the three previous iterations had maintained, i.e., "***(C) the provisions of this code regarding secrecy of ballots shall not apply and majority protest forms shall be deemed public records as that term is defined by Section 6252 of the Government Code.***" (*Id.*, at Exhibit 1D, at 1-3)

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[23] / The proposed amendment to Elections Code section 4000 (C)(9) remained unchanged in the Senate amendments submitted on April 14, 1997 (*Id.*, at Exhibit 1B, at 2-3), and the Assembly amendments of May 23, 1997. (*Id.*, at Exhibit 1C, at 2-3)

The last Assembly amendment was on June 30, 1997, the day before the XIII D, § 6 (d) deadline. The final amendment maintained the deletion of Elections Code section 4000 (c)(9)(C). (*Id.*, at Exhibit 1E, at 1-3) That day SB 919 was delivered to Governor Wilson to authorize. (*Id.*, at Exhibit 10, at AP2-51) [24]/

On July 1, 1997 the Governor approved Senate Bill 919. (COAJN at Exhibit 1F, at 257-258)

During the last month before the legislation was enacted, interested parties raised the issue that Proposition 218 did not mandate "that the voter's . . . signature appear on the ballot and further remove secrecy provisions or that the balloting procedure was not an election" (*Id.*, at Exhibit 7A, at API-36 to API-37), violated Article 2, section 7 of the California Constitution (*Id.*, at Exhibit 7A, at API-39), that "the Secretary of State's Elections Division is informally advising that the necessary statutory and constitutional procedures for a formal election are missing from the ballot and protest process" (*Id.*, at Exhibit 7A, at API-41), that the protest "provisions fly in the face of the rules officials use for regular elections," (*Id.*, at Exhibit 7B, at M-1), that the "process raises some unique problems such as: How can you verify the vote actually cast by the voter? Unlike an absentee ballot, the property owner's signature, can't be easily checked" *Id.*, at Exhibit 7B, at M-2), that "Mail-in ballots . . . lack the confidentiality of conventional votes. The

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[24]/ Through its counsel, the District is aware that Omnibus Act was legislation that presented "a new chapter of the Elections Code to clarify and implement the initiative provisions of Prop. 218." (RJN, Ex. 12b at 6.) Steadfastly, from the trial court to the Court of Appeal and now in this Court (see ROB at Table of Authorities, p. vi), the District continues to refused to acknowledge and thus consistently has denied the applicability of Elections Code § 4000 in examining its claim that a one-parcel-per-vote §6 election is the same as a §4 weighted-ballot assessment majority protest. (See AA at 239; AOB at 32-33; and PSB at p. 3, fn. 1, p.5, fn. 2 and 7.)

ballot often comes in the form of a postcard, showing the voter's name and address next to the boxes to be checked" (*Id.*, at Exhibit 7B, at M5), and that non-confidential "ballots could be used to manipulate elections because it could be known how the vote is tilting and who is tilting it before the final tally is in." (*Id.*, at Exhibit 7B, at M9)

In the month prior to the bill's enactment, and apparently in response to the secrecy issues, the LAO working group started to circulate amendments "making the assessment ballot process secret" and asked the question "should the ballots be kept secret . . .?" (*Id.*, at Exhibit 12, at A-4 to A-5, A-10 ["Should the Prop 218 election be secret?"])

Less than one week before the July 1, 1997 deadline, the Assembly Committee on Local Government summarized the situation as follows:

> The last amendments deleted the language that specified that assessment ballots are public records. Thus, the bill is silent on whether ballots are public records or secret. **The LAO consensus group is now generally in agreement that ballots should be secret, but sufficient time is not available to come to agreement on how this should be done.** Senator Rainey has stated that he is willing to carry trailer legislation. (*Id.*, at Exhibit 8, at 2; emphasis added).

The legislative history of Government Code section 53753 and Elections Code section 4000 thus indicates that secret voting was included in the consensus that drove the legislation, but that consensus with respect thereto occurred too late for inclusion in the legislation. The legislative history establishes that in the process of promulgating of Government Code sections 53753 (c) and (e)(4), the LAO Proposition 218 Working

Group did not intend to do away with secret voting; they simply ran out of the time that Proposition 218 imposed to deal with it.

IV. SECTION 6(C) ELECTIONS IN GENERAL, AND THE DISTRICT'S ELECTION, IN PARTICULAR, REQUIRE SECRECY, NOT TRANSPARENCY

Both article XIII D, §6 and Elections Code section 4000 (c)(8) differentiate between a § 4 assessment majority protest/assessment ballot proceeding and a §6 property related fee election.

Because in the §6(c) election at issue "only one ballot [was] counted for each Identified Parcel" (Appellant's Appendix at 72) and such ballot was labeled a "Property Owner Ballot" (*Id.*, at 78) **none** of the issues the District raises as to secrecy in section 4 assessment majority protests apply to section 6 elections.

This is consistent with the League of California Cities' Proposition 218 Implementation Guide (2007) which notes in §6(c) elections there is a "one parcel, one vote system for property owner elections on fees and charges." The author notes:

> There is one ballot per parcel if an agency uses a property owner vote. . . . Unlike the assessment procedure, there is no authority or requirement to weight the ballots according to the financial obligation of the affected property. *Compare* Cal.Const., art. XIIID, §4(e) ("in tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.") *with* Cal.Const., art. XIIID, §6(c) (requiring a majority vote of the property owners of the property subject to the fee or charge.

(League of California Cities' Proposition 218 Implementation Guide (2007) at 68)

Notwithstanding that it's §6(c) election did **not** involve weighting voting, the District contends "Transparent Tallies of §6(C) Elections Cannot Be Accomplished if Ballots Are Secret." (ROB at 42) Clearly, the District again engages in "circumventing taxpayer protection by manipulating the label of the levy."

The District states:

> Neither article XII D, § 6 nor the Omnibus Act defines what constitutes a "majority vote," i.e., whether a majority is determined per capita, one vote-per-parcel, or by votes weighted according to the financial obligations of property owners – the standard for assessments under article XII, § 4."

(*Id.*, at 43)

Again with the help of the legislative history of Proposition 218, the District's position runs directly contrary to the September 5, 1996 Annotation of Proposition 218 prepared by the Howard Jarvis Taxpayers Association on which the District, itself, herein relies. (*Id.*, at 34-37.)

> As to article XIII D, § 4(e), the drafter of Proposition 218 states:
> *Annotation: Under Proposition 218, assessments may not be imposed without majority approval of property owners. Ballot are weighted according to financial obligation.*

(RJN (Respondent's Judicial Notice), Ex. B at 10)

As to article XIII D, § 6(a)(2), the drafter of Proposition 218 states:

Annotation: Votes on property fees are not weighted in the same manner as assessments because to do so would be administratively costly. A simple majority of fee payers can stop a fee proposal.

(RJN, Ex. B at 14)

In no way did the HJTA second expression of intent, Drafters' Statement of Intent published in January 1997, as it pertained to article XIII D, § 6 (a)(2) change that there is no weighted voting under §6.

It states:

Comment: Votes on property taxes and charges are not weighted in the same manner as assessments. Because fees can vary according to the usage of the service, there is no workable methodology to apportion votes of the service users. Thus, the issue of a fee increase will be determined by a simple majority of property owners or fee payers.

(AJN. Rx. 6a at 17)

Because weighted voting is not authorized by §6, and because weighted voting was not used in the District's election, it is not an issue here. While the Court of Appeal, in dicta, discussed the application of ballot secrecy to weighted voting, (Slip Op. at 13-14), neither the facts nor the law necessarily raised that issue, then or now.

If the Court desires to reach the issue whether or not secret voting protections apply to §4 assessment protest ballots, the answer may as simple as No. [25]/

Therefore, the District's citations to *American Association of People with Disabilities v. Shelley* (2004) 324 F.Supp.2nd 1120 and California Elections Code section 19250 are impertinent to an article XIII D, section 6(c) analysis of the applicability of article II, section 7's guarantee of the right to vote in secret. *A fortiori*, the District's claim that "[w]eighted ballots, however, make secrecy problematic, if not impossible" (ROB at 56) is completely irrelevant to section 6 elections.

V. ARTICLE XIII D, SECTION 6(c) MAIL ELECTIONS SHOULD BE CONDUCTED PURSUANT TO THE ABSENTEE BALLOT PROCESS.

Because a §6(c) election is not an assessment ballot proceeding (Election Code § 4000 (c)(8)), it is controlled by Elections Code section 4100. Section 4000 states, "[e]xcept as otherwise provided in this chapter, mail ballot elections shall be conducted in accordance with Chapter 1 (commencing with Section 3000) of Division 3."

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[25]/ Government Code section 53753 (e)(4) states that "[t]he majority protest proceedings described in this subdivision shall not constitute an election or voting for the purposes of Article II of the California Constitution or of the California Elections Code." Because a fee related election is not an assessment majority protest, the foregoing section does not apply to fee related elections. Moreover, Government Code section 53753 (e)(1) states that "assessment ballots are treated as disclosable public records, as defined in Section 6252." Because Elections Code section 4000 (c)(8) clearly differentiates between an "assessment ballot" and "assessment ballot proceeding" on one hand, and an "election" on the other, Government Code sections 53753 (c) and (e)(4) constraints do not restrict article II, section 7's protection of article XIII D, section 6(c) property owner elections. Therefore, any words of assurance of secrecy by the District would mean nothing; the District's conduct in respecting secret voting is what the Constitution commands.

Elections Code section 3000 authorizes the procedure of absentee voting. There is no reason why a §6(c) property related election, which requires one-vote-per-ballot, and does not raise the issues that generated by weighted voting and ballots, cannot be conducted by the absentee ballot process. The absentee process would simply confirm the voter's identity by means of both information and the voter's signature on the envelope containing the ballot within. (Elections Code § 3011.)

Thus, the secrecy of the ballot itself would remain, as it should have in the District's election, protected.

VI. THE COURT SHOULD UPHOLD GREENE'S ELECTION CONTEST BECAUSE THE DISTRICT'S WHOLESALE VIOLATION OF THE VOTER'S CONSTITUTIONALLY PROTECTED RIGHT TO VOTE IN SECRET CORRUPTED THE INTEGRITY OF THE ENTIRE ELECTION.

The District's election for the $40 million, 20-year Annual Storm Drainage Fee resulted in a phenomenal 21% rate of voter disqualification, when the ordinary rate ran at 1%. (Appellant's Appendix at 3) Had the votes so disqualified been counted, the District's measure would have lost by 141 votes. (*Id.*, at 3, 97-112) Because of the violation of the voters' right to vote in secret, the measure passed by 65 votes. (*Id.*, at 84-85)

As discussed above, the District seriously violated the central constitutional principle guaranteeing the right to vote in secret. Moreover, it failed to comply with statutory requirements that compel the use of absentee voting procedures in article XIII D, § 6(c) property owner, mail-ballot elections.

Elections Code section 16100 (e) provides that an election contest may be based

on the ground "[t]hat eligible voters who attempted to vote in accordance with the laws of the state were denied their right to vote."

The purpose of an election contest is "to ascertain the will of the people at the polls, fairly, honestly and legally expressed." (*Friends of Sierra Madre v. City of Sierra Madre,* (2001) 25 Cal.4th 165, 192; underline added.) The election contest must address "illegalities recognized by the Elections Code . . . that affect the integrity of the elections process that an elections contest seeks to protect and preserve." (*Ibid.*) "[T]he court's authority to invalidate an election is limited to the bases for contest specified in Elections Code section 16100." (*Ibid.*)

However, **"[t]he power of the court of the court to invalidate a ballot measure on constitutional grounds is an exception to this limitation on election contest proceedings."** (*Id.,* 25 Cal.4th at 192, fn. 17; bold added.)

Moreover,

> "It is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible; that is to say, the election must be held valid unless plainly illegal. [citation omitted] Accordingly, a distinction has been developed between mandatory and directory provisions in election laws; a violation of a mandatory provision vitiates the election . . . [citation omitted]"

(*Rideout v. Superior Court* (1921) 185 Cal. 426, 430; underline added.)

> "Even mandatory provisions must be liberally construed to avoid thwarting the fair expression of popular will. [Citations.] In addition, there is an express

legislative policy requiring liberal construction of absentee ballot provisions in favor of the absent voter. [Citation omitted] The contestant has the burden of proving the defect in the election by clear and convincing evidence."

(*Hardeman v. Thomas* (1989) 208 Cal.App.3d 153, 165-166)

"Whether or not a provision the observance of which is not expressly declared by law to be essential to the validity of the election, is mandatory or merely directory, depends upon the character of the act prescribed. If the act enjoined goes to the substance or necessarily affects the merits or results of the election, it is mandatory; otherwise directory. [citation omitted] Provisions prescribing minor details in regard to the form of ballots are held to be in a large measure directory, in so far as the voter is concerned, upon the theory that, where there are errors on the part of those entrusted with the preparation of ballots, the disenfranchisement of voters for these violations of the law over which they have no control would result in defeating the will of the people by technicalities, unless it appears that the mistakes in fact operated to prevent a free, fair and honest election. [citation omitted]

(*Rideout v. Superior Court, supra.,* 185 Cal. 426 at 430-431, underline added; see also *Canales v. Alviso,* (1970) 3 Cal.3d 118, 127; *Hardeman v. Thomas* (1993) 208 Cal.App.3d 266, 177-178; *Gooch v. Hendrix* (1993) 5 Cal.4th 266, 277-279.)

No policy "**has been invoked to uphold an election in the face of illegalities which affected the result - a situation in which the will of the people may be thwarted by upholding an election.**" (*Canales v. Alviso, supra.,* Cal.3d at 127; bold added.)

> . . . equally important is the principle that "**preservation of the integrity of the election process is far more important in the long run than resolution of any one particular election.**

(*Hardeman v. Thomas, supra.,* 208 Cal.App.3d at 177, citing *Fair v. Hernandez* (1981) 116 Cal.App.3d 868, 881 (Kaufman, J., concurring). *See Scott, supra.* 16 Cal.2d 197.)

There is no mistaking the depth and extent of the constitutional violation that took place here. Neither is there any excusing it.

As reflected by the 21% voter disqualification rate, the District's widespread violation of article II, section 7's guarantee of the right to vote in secret goes to the heart of the integrity of electoral politics in general and the instant election in particular.

Because such widespread violation does go to the heart of the integrity of the District's election, that election is vitiated. [26]/

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[26]/ The trial court ordered "the maintenance of the ballots pending appeal." (RT at 26:13-27:4) Should for some reason this Court remand this case for any sort of evidentiary hearing as the District suggests (ROB at 64), Greene respectfully requests that an official count be conducted of all legitimate votes without any disqualification based on the voter's failure to sign his or her ballot.

CONCLUSION

Based on the analysis and argument set forth herein, appellant, Ford Greene, respectfully submits that the decision of the Court of Appeal filed herein on March 11, 2009, should be affirmed.

DATED: October 8, 2009

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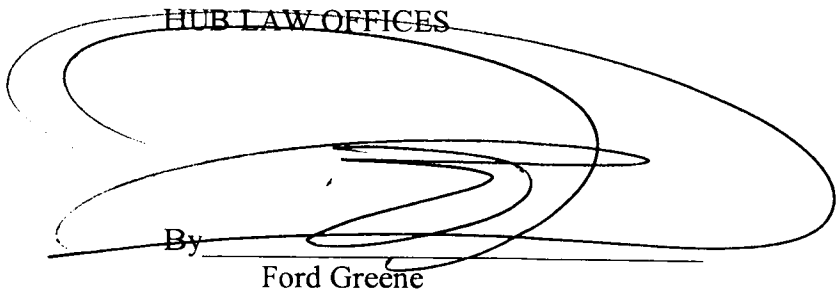

By _____
Ford Greene
Appellant In Pro Per

CERTIFICATION OF WORD COUNT
(Cal.Rules of Court, Rule 8.204(c)(1)

The text of this brief consists of 14,234 words as calculated by the Word 2000 version word processing program by means of which the brief has been written

DATED: October 8, 2009

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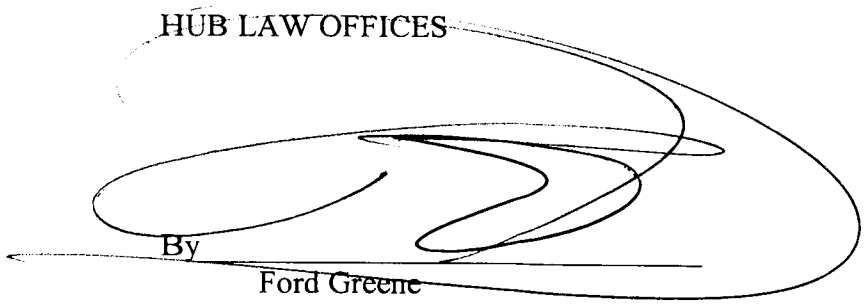

By
Ford Greene
Appellant In Pro Per

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:

APPELLANT'S ANSWER BRIEF ON THE MERITS

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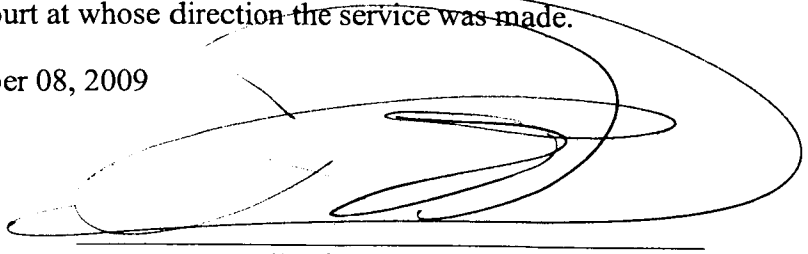
[X] (By Mail) I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Anselmo, California.

[] (Personal Service) I caused such envelope to be delivered by hand to the person of the addressee.

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

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

DATED: Thursday, October 08, 2009



Ford Greene