No. S151370

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JIMMIE D. BONANDER, et al.,
Plaintiffs and Appellants,

v.

TOWN OF TIBURON, et al.,
Defendants and Respondents.

After a Decision by the Court of Appeal,
First Appellate District, Division Three, Case No. A112539

On Appeal from the Superior Court of Marin County
Superior Court Case No. CV 052703
Honorable James R. Ritchie, Judge

APPLICATION OF JACK D. COHEN FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS AND APPELLANTS JIMMIE D. BONANDER, ET AL.

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Supreme Court Pleading
POS 11/19

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.520 (f) of the California Rules of Court, JACK D. COHEN (hereafter "Applicant") respectfully requests permission to file an amicus curiae brief in this case in support of Plaintiffs and Appellants, Jimmie D. Bonander, et al. The proposed amicus curiae brief is combined with this application.

Applicant is an attorney, taxpayer, and one of the drafters of Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added Articles XIII C and XIII D to the California Constitution and was approved by California voters in November 1996. Applicant has a major interest in seeing that Proposition 218 is effectuated consistent with its stated purposes and intent.

Applicant is familiar with the legal issues involved in this case. While the parties have filed briefs, Applicant believes there is a need for additional briefing because the Court's decision in this case will impact the ability of taxpayers to effectively enforce the substantive constitutional protections contained in Proposition 218.

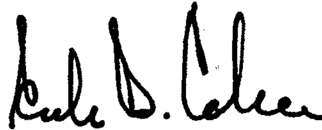
The proposed brief will focus on the issue of the appropriate standard for interpreting procedural requirements in cases alleging violations of the constitutional protections under Proposition 218.

Applicant believes the arguments contained in the amicus curiae brief will aid the Court in resolving this case in a way that effectuates the purposes and intent of Proposition 218.

For the foregoing reasons, Applicant respectfully requests leave to file the proposed amicus curiae brief that is combined with this application.

Dated: November 19, 2007

Respectfully submitted,



JACK D. COHEN

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I.
INTRODUCTION.

This case (hereafter "*Bonander*") focuses on the interaction between statutory procedural requirements and the substantive constitutional protections of Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" adopted by California voters in November 1996. Proposition 218 includes comprehensive special assessment reforms, as specifically contained in Article XIII D of the California Constitution.

After conducting an assessment ballot proceeding pursuant to Proposition 218 in which there was no majority protest (Cal. Const., art. XIII D, § 4, subd. (e)), the Town Council of Tiburon approved the assessment in the *Bonander* case. (Slip Opn. at p. 8.) However, the assessment ballot requirement of Proposition 218 is but one of the multiple reform provisions that a local government must comply with in order to impose a lawful special assessment under Proposition 218. (Cal. Const., art. XIII D, § 3, subd. (a), par. (3).)

Other special assessment reforms under Proposition 218 relevant to the *Bonander* case include: significantly tightening what constitutes a "special benefit" for purposes of special assessment financing (Cal. Const., art. XIII D, § 2, subd. (i)), requiring that general benefits be separated from special benefits and that only special benefits are assessable (Cal. Const., art. XIII D, § 4, subd. (a)), a proportionate special benefit requirement for assessments imposed upon specific parcels (*Ibid.*), and a burden of demonstration provision that shifts the burden from property owners to the local government in lawsuits challenging

assessments (Cal. Const., art. XIII D, § 4, subd. (f)). The interpretation of the substantive assessment reform provisions of Proposition 218 is currently before this court in *Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority* (2005) 130 Cal.App.4th 1295, review granted Oct. 12, 2005, S136468. The *Silicon Valley Taxpayers* case has been fully briefed and is currently awaiting oral argument.

The aforementioned reform provisions function together as an integrated package to help stop the imposition of *abusive* assessments (i.e., property levies that are really special taxes but are imposed as "assessments" with the resulting effect of circumventing the two-thirds registered voter approval requirement for special taxes under Proposition 13 (Cal. Const., art. XIII A, § 4)). This was recognized in the "Findings and Declarations" section of Proposition 218:

> "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 threatens 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." (Proposition 218, § 2.)

The plaintiffs in the *Bonander* case filed a lawsuit seeking to invalidate the approved assessment on their properties based, in part, on alleged violations of Proposition 218. (Slip Opn. at p. 9.) Without a resolution on the merits, the trial court dismissed the action for failure to comply with the procedural requirements set forth in the validation

statutes (Code Civ. Proc., § 860 et seq.). (Slip Opn. at pp. 12-13.) The Court of Appeal affirmed the judgment of dismissal. (*Id.* at p. 34.)

The *Bonander* case highlights a growing trend of taxpayers seeking to enforce their Proposition 218 constitutional protections in the courts only to have their cases disposed of on technical *procedural* grounds without resolution of the substantive constitutional issues raised under Proposition 218. Examples of other cases where this has happened include: *Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809; *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 87 Cal.App.4th 878; and *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 79 Cal.App.4th 242. Even when taxpayers eventually prevail on procedural issues, it results in significant delays in the resolution of the substantive Proposition 218 issues such as in the recent cases of *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86 and *Unfair Fire Tax Committee v. City of Oakland* (2006) 136 Cal.App.4th 1424.

The foregoing cases represent the tip of the iceberg concerning the scope of the problem as unpublished appellate court cases and cases disposed of at the trial court level without appeal are not included.

While procedural requirements can serve legitimate public policy purposes, they can also be used as instruments to thwart the constitutional protections under Proposition 218. Due to the *constitutional* status of Proposition 218 and its liberal interpretation provision (Proposition 218, § 5), it is appropriate for this court to ensure that applicable procedural requirements, whether enacted by the Legislature or by local governments,

are interpreted and applied so as not to "narrow or embarrass" the constitutional taxpayer protections under Proposition 218. (*Hale v. Bohannon* (1952) 38 Cal.2d 458, 471.)

This brief will focus on developing an appropriate standard for interpreting and applying procedural requirements in cases alleging violations of the constitutional protections under Proposition 218. The resulting standard will serve to effectuate the purposes and intent of, and not to "narrow or embarrass," the constitutional provisions of Proposition 218.

II.

IN CASES ALLEGING VIOLATIONS OF PROPOSITION 218, APPLICABLE PROCEDURAL REQUIREMENTS MUST BE INTERPRETED AND APPLIED IN FAVOR OF RESOLVING PROPOSITION 218 ISSUES ON THEIR SUBSTANTIVE MERITS RATHER THAN ON MERE TECHNICALITIES OF PROCEDURE.

The proper standard for interpreting language affecting constitutional taxpayer protections is an important issue that is sometimes overlooked. (See *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 202.) "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.'" (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 212.)

Section 5 of Proposition 218 contains its own constitutional rule of interpretation that applies specifically to the provisions of Proposition 218: "The provisions of this act shall be liberally construed to effectuate

its purposes of limiting local government revenue and enhancing taxpayer consent." (Proposition 218, § 5.)

In *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, the Section 5 liberal interpretation provision was relied upon to strictly construe an exception to the taxpayer protections of Proposition 218 with respect to a storm drainage fee: "We must keep in mind, however, the voters' intent that the constitutional provision be construed liberally to curb the rise in 'excessive' taxes, assessments, and fees exacted by local governments without taxpayer consent. [citation] Accordingly, we are compelled to resort to the principle that exceptions to a general rule of an enactment must be strictly construed, thereby giving 'sewer services' its narrower, more common meaning applicable to sanitary sewerage." (*Id.* at pp. 1357-1358.)

As illustrated by the *Salinas* case, the constitutional provisions of Proposition 218 are "construed liberally to curb the rise in 'excessive' taxes, assessments, and fees exacted by local governments without taxpayer consent." (*Ibid.*) Consistent with the foregoing, when issues of interpretation or application of procedural requirements arise in the context of cases alleging violations of Proposition 218, a liberal construction of Proposition 218 would support an implicit policy in favor of resolving Proposition 218 issues on their substantive merits. This is also consistent with the policy of the law that cases should be tried on their merits. (*Manning v. Wymer* (1969) 273 Cal.App.2d 519, 528.)

To the extent that a case is favorably resolved on its substantive merits, this will result in the enforcement of a Proposition 218 protection

that will generally have the effect of "limiting local government revenue and enhancing taxpayer consent" (Proposition 218, § 5), such as in the case of an unlawful assessment that the provisions of Proposition 218 were intended to preclude. (See e.g., *Ventura Group Ventures, Inc. v. Ventura Port. Dist.* (2001) 24 Cal.4th 1089, 1105-1108.) In the *Bonander* case, a violation of the proportional special benefit requirement of Proposition 218 (Cal. Const., art. XIII D, § 4, subd. (a)) is alleged. (Slip Opn. at p. 9.) The proportional special benefit requirement is a critical reform element that separates legitimate assessments under Proposition 218 from unlawful "assessments" that are properly imposed as *special taxes* subject to two-thirds registered voter approval (Cal. Const., art. XIII A, § 4; Cal. Const., art. XIII C, § 2, subd. (d).)

From the perspective of the taxpayer seeking to enforce constitutional protections under Proposition 218, procedural requirements represent additional hurdles that must be successfully navigated in order to secure a decision on the merits. Failure to clear even a single procedural hurdle can be fatal to a case even in situations where the substantive Proposition 218 claims are meritorious. Thus, procedural requirements have the effect of limiting the ability of taxpayers to successfully enforce legitimate constitutional violations of Proposition 218. While not all allegations of Proposition 218 violations will necessarily be meritorious, there will be cases where legitimate constitutional violations of Proposition 218 will *not* be rectified by the courts due to technicalities of procedure.

These procedural requirements are not contained in the constitutional language of Proposition 218 itself, but rather are contained

in statutes enacted by the Legislature and ordinances adopted by local governments. It is no secret that these entities of government are not supporters of constitutional taxpayer protection initiatives such as Propositions 13 and 218. Indeed, with respect to constitutional taxpayer protection initiative measures such as Proposition 13, the courts have noted: "The Legislature is not always enamored with initiative measures enacted by the voters. The Legislature ought not to be able to frustrate the intent of the electorate by enacting statutes that frustrate the popular will." (*Hoogasian Flowers, Inc. v. State Bd. of Equalization* (1994) 23 Cal.App.4th 1264, 1277.)

Furthermore, the responsibility for enforcing the constitutional provisions of Proposition 218 is effectively on the shoulders of *private* parties such as taxpayers and organizations that represent taxpayers like the Howard Jarvis Taxpayers Association. When a local government agency is alleged to have violated Proposition 218, there isn't any state agency or department, such as the Attorney General, coming to the rescue of taxpayers to enforce and defend the constitutional provisions of Proposition 218. Thus, pursuing legal action in the courts by private parties is essentially the only available means to enforce the constitutional provisions of Proposition 218. Under such circumstances, legal actions by taxpayers to enforce the provisions of Proposition 218 should not be unduly burdened by procedural barriers that can thwart such enforcement actions without an appropriate resolution on the merits.

Article XIII D of the California Constitution does include some express references to procedural provisions. In particular, a burden of demonstration provision applicable to special assessments:

> "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." (Cal. Const., art. XIII D, § 4, subd. (f).)

A similar provision applicable to property-related fees and charges also exists under Proposition 218:

> "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." (Cal. Const., art. XIII D, § 6, subd. (b).)

These constitutional provisions place the burden on the *local agency* to demonstrate compliance with the various requirements of Article XIII D and, pursuant to the language thereof, are applicable to "any legal action." The burden of demonstration provisions reflect a strong constitutional policy of requiring the *local agency* to prove compliance with the law in cases alleging violations of Proposition 218. Implicit in such a requirement is a policy in favor of resolving Proposition 218 issues on their substantive merits inasmuch as a substantive resolution occurs when, pursuant to the constitutional mandate of the burden of demonstration provisions, the local agency must demonstrate compliance with the applicable requirements of Proposition 218.

This is also consistent with what the Legislative Analyst noted in the impartial analysis of Proposition 218 that the burden of demonstration provisions shift the burden of proof in assessment and property-related fee

lawsuits from the taxpayer to local government. "As a result, it would be *easier* for taxpayers to win lawsuits, resulting in reduced or repealed fees and assessments." (Ballot Pamp., Proposed Amends. to Cal. Const. with analysis of Proposition 218 by the Legislative Analyst and arguments to voters, Gen. Elec. (Nov. 5, 1996) p. 74, italics added.)

However, when Proposition 218 cases are disposed of on technical procedural grounds without a resolution on the merits, the underlying policy behind the burden of demonstration provisions is frustrated. Thus, a policy of the law that favors a resolution of Proposition 218 issues on the merits will also serve to effectuate the burden of demonstration provisions, as *local agencies* would then have to demonstrate compliance with the requirements of Proposition 218 instead of prevailing by default due to one or more technicalities of procedure.

In addition to the foregoing, use of the language "any legal action" in the burden of demonstration provisions indicates that the remedies for enforcing the provisions of Proposition 218 are not necessarily limited to in rem actions such as under the validation statutes. Under the Section 5 liberal interpretation provision of Proposition 218 (Proposition 218, § 5), use of the language "any legal action" does not mean that in rem actions were intended to be the exclusive remedy for enforcing the assessment and property-related fee provisions of Proposition 218. Indeed, use of the language "any legal action" would indicate that other enforcement remedies were intended to be available and apply, including the various in personam causes of action.

A.

Consistent With the Standard of Interpretation Favoring a Resolution of Proposition 218 Issues on the Merits, Statutes Authorizing Application of the Validation Statutes Must be Narrowly Construed.

The validation statutes (Code Civ. Proc., § 860 et seq.) do not specify the matters to which they specifically apply. Other statutes determine the scope of matters subject to validation under the validation statutes. (*Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 31.)

The assessment in the *Bonander* case is levied under the Municipal Improvement Act of 1913 (Sts. & Hy. Code, § 10000 et seq.) The applicable statute thereunder invoking application of the validation statutes is Section 10601 of the Streets and Highways Code which provides:

> "An action to determine the validity of the assessment, bonds, contract, improvement or acquisition may be brought by the legislative body or by the contractor pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure. For such purpose an improvement or acquisition shall be deemed to be in existence upon its authorization and an assessment upon its confirmation. Notwithstanding any other provisions of law, the action authorized by this section shall not be brought by any person other than the legislative body or the contractor, nor except when permitted by Section 10400 shall the action be brought after the date fixed for the beginning of work." (Sts. & Hy. Code, § 10601.)

The Court of Appeal noted that Section 10601 of the Streets and Highways Code represents the sole statutory basis for invoking application of the validation statutes in the *Bonander* case. (Slip Opn. at pp. 17-18, fn. 6.) Thus, if Section 10601 were found not to apply in the

case at bar, and no other statutory authority invoking application of the validation statutes can be found, the special procedural requirements set forth in the validation statutes would not apply and the judgment of dismissal would be in error.

The standard of interpretation that favors resolving alleged violations of Proposition 218 on the merits applies when procedural issues arise in a lawsuit. The standard applies in the *Bonander* case because Section 10601 of the Streets and Highways Code, the underlying authority for invoking the validation statutes, is ambiguous concerning its scope and thereby requires judicial construction, and because application of the "good cause" exception set forth in the validation statutes (Code Civ. Proc., § 863) rests in the discretion of the courts. (*City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 347.)

Application of the validation statutes in a particular case represents "an additional procedural restriction" on a lawsuit. (*Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1195.) This court has referred to the publication requirements under the validation statutes as an "elaborate in rem procedure." (*City of Ontario v. Superior Court, supra*, 2 Cal.3d at p. 345.) For taxpayers seeking to enforce constitutional protections under Proposition 218, the validation statutes can be particularly harsh in their consequences for failure to timely or properly comply. As this court observed in *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335:

> "The practical consequence of this statutory scheme should be clearly recognized: an agency may indirectly but effectively 'validate' its action by doing nothing to validate it; unless an 'interested person' brings an action of his own

> under section 863 within the 60-day period, the agency's action will become immune from attack whether it is legally valid or not. Indeed, in the case at bar the City concedes this to be so. Thus a statute which begins by providing a remedy to be pursued by public agencies, expressly declaring it to be 'in the nature of a proceeding in rem' (§860), concludes by making it unnecessary for such agencies to do anything at all, and the incidental or derivative remedy of an 'interested person' turns out to be controlling. This is truly a case of the tail wagging the dog." (*Id.* at pp. 341-342.)

Hence, to the extent that the validation statutes apply to actions enforcing the provisions of Proposition 218, local agencies can literally get away with violating Proposition 218 unless an "interested person" timely and properly takes legal action under the validation statutes. This represents a substantial procedural barrier that can prevent a resolution of Proposition 218 cases on the merits. This is also contrary to the policy underlying the burden of demonstration provisions contained in Article XIII D of the California Constitution (Cal. Const., art. XIII D, § 4, subd. (f); Cal. Const., art. XIII D, § 6, subd. (b)) that place the burden on *local agencies* to prove compliance with the law in legal actions contesting the validity of assessments and property-related fees under Proposition 218.

In light of the foregoing, application of the standard of interpretation favoring a resolution of Proposition 218 issues on the merits results in a narrow construction of statutes, such as Section 10601 of the Streets and Highways Code in the case at bar, that authorize application of the validation statutes. For various other policy reasons, the courts have narrowly construed similar authorizing statutes with the resulting effect of limiting the scope of application of the validation statutes. (Cf. *City of Ontario v. Superior Court*, *supra*, 2 Cal.3d at pp. 343-344 [setting forth reasons for a narrow construction of the term "contracts" in Section 53511

of the Government Code]; *Kaatz v. City of Seaside, supra,* 143 Cal.App.4th at pp. 40-48 [narrow construction of the term "contracts" in Section 53511 of the Government Code in the context of a land disposition agreement with a developer].)

Consider an example of a narrow interpretation in the context of Section 10601 of the Streets and Highways Code. Section 10601 applies to "[a]n action to determine the validity of the assessment." (Sts. & Hy. Code, § 10601.) However, it is unclear whether the term "assessment" in Section 10601 applies to any assessment levied under the Municipal Improvement Act of 1913 (Sts. & Hy. Code, § 10000 et seq.) or just to assessments related to the issuance of bonds.

Section 10601 is included in Chapter 7 of the Municipal Improvement Act of 1913 which is entitled "Improvement Bonds" and contains statutory provisions relating to the issuance of improvement bonds. If the term "assessment" in Section 10601 were intended to have a broader application to include any assessment levied under the Municipal Improvement Act of 1913, logically one would expect the statute to be included in a chapter of broader application such as under Chapter 5 entitled "Levying and Collecting the Assessment." Chapter 5 does include Section 10400 which sets forth a 30 day period for challenging an assessment "levied under this division." (Sts. & Hy. Code, § 10400.) Broader language of this nature is not included in Section 10601. This would support a narrower interpretation that Section 10601 only applies to assessments related to the issuance of bonds under Chapter 7 of the Municipal Improvement Act of 1913.

A similar analysis was performed by this court in the *City of Ontario* case in support of a more narrow construction of the term "contracts" in Section 53511 of the Government Code:

> "[S]ection 53511 was enacted as part of chapter 3 of part 1, division 2, title 5, of the Government Code. Chapter 3 is entitled 'Bonds,' and deals exclusively with the power of local agencies to sell their bonds, replace defaced or lost bonds, and pledge their revenues to pay or secure such bonds. If section 53511 was intended to be a provision of general application, logically it should have been placed in article 4 ('Miscellaneous') of chapter 1 ('General') of the same part, in which a group of such unrelated matters are collected." (*City of Ontario v. Superior Court, supra*, 2 Cal.3d at p. 343.)

Even in situations where compliance with the validation statutes is required, a policy of resolving alleged violations of Proposition 218 on the merits would still have application in the context of the "good cause" exception set forth in Section 863 of the Code of Civil Procedure. This code section provides in relevant part: "If the interested person bringing such action fails to complete the publication and such other notice as may be prescribed by the court in accordance with Section 861 and to file proof thereof in the action within 60 days from the filing of his complaint, the action shall be forthwith dismissed on the motion of the public agency unless good cause for such failure is shown by the interested person." (Code Civ. Proc., § 863.)

In deciding any applicable issues relating to determining whether "good cause" exists under Section 863 of the Code of Civil Procedure, a court would apply the policy that favors a resolution of alleged violations of Proposition 218 on the merits. The practical effect of applying such a

policy would be to increase the likelihood that "good cause" will be found to exist which will result in more Proposition 218 cases being decided on the merits.

III.
CONCLUSION.

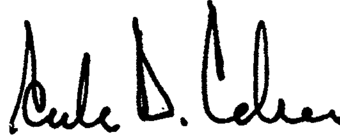
The Court of Appeal acknowledged that dismissal of the complaint in the *Bonander* case based on the facts presented may seem "harsh." (Slip Opn. at p. 33.) Such "harsh" consequences for failure to comply with procedural requirements are becoming a more frequent occurrence for taxpayers seeking to enforce Proposition 218 constitutional protections in the courts only to have their cases disposed of on technical procedural grounds without a decision on the merits.

A standard of interpretation that favors a resolution of alleged violations of Proposition 218 on the merits in connection with procedural issues furthers the purposes and intent of Proposition 218, and is consistent with what this court noted in the *City of Ontario* case: "[T]he power vested in trial courts . . . should be freely and liberally exercised to the end that cases shall be disposed of according to their substantial merits rather than upon mere technical matters of procedure . . . " (*City of Ontario v. Superior Court, supra*, 2 Cal.3d. at p. 347.)

The judgment of dismissal by the Court of Appeal must be reversed to permit a resolution on the merits of the alleged constitutional violations of Proposition 218 in this case.

Dated: November 19, 2007

Respectfully submitted,



JACK D. COHEN
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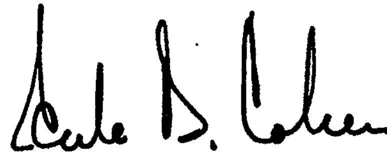
CERTIFICATE OF WORD COUNT

I certify that the foregoing amicus curiae brief, as measured by the word count of the computer program used to prepare the brief, contains 4,004 words.

Dated: November 19, 2007



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Proof of Service
State of California, County of Los Angeles

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is: 11835 W. Olympic Blvd., Ste. 1215, Los Angeles, CA 90064.

On November 19, 2007, I served the foregoing APPLICATION OF JACK D. COHEN FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS AND APPELLANTS JIMMIE D. BONANDER, ET AL. by depositing true copies thereof in the United States mail in Beverly Hills (County of Los Angeles), California, enclosed in sealed envelopes with the postage thereon fully prepaid, and addressed as follows:

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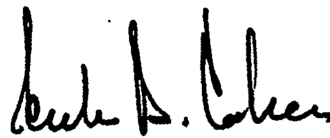
I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 19, 2007, at Beverly Hills, California.



Jack D. Cohen