S140911

IN THE SUPREME COURT OF CALIFORNIA

FORD GREENE,

Plaintiff and Appellant,

v.

MARIN COUNTY FLOOD CONTROL DISTRICT,

Defendant and Respondent.

Review of a Decision by the Court of Appeal,
First Appellate District - Case No. A120228

APPLICATION FOR LEAVE TO FILE, AND BRIEF OF AMICUS, HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF PLAINTIFF/APPELLANT GREENE

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS

TO: THE HONORABLE CHIEF JUSTICE, RONALD M. GEORGE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amicus curiae Howard Jarvis Taxpayers Association ("HJTA") hereby requests permission, pursuant to Rule 8.520(f) of the California Rules of Court, to file the attached *amicus curiae* brief in support of plaintiff Ford Greene.

APPLICANT'S INTEREST

HJTA is a nonprofit public benefit corporation, comprised of over 200,000 California taxpayers, organized and existing under the laws of California for the purposes, among others, of advocating the reduction of taxes, and protecting the right to vote on taxes.

Two issues in this case, (1) whether Proposition 218 allows local governments to weight ballots in fee elections, and (2) whether local governments may require voters to identify themselves on their ballots in fee elections, are of vital importance to HJTA and its members, and to all taxpaying Californians.

HJTA was the sponsor and principal author of Proposition 218. It was HJTA's intent that fee ballots would not be weighted, and that the right to a secret ballot would be protected in fee elections.

HOW THIS BRIEF WILL ASSIST THE COURT

Although HJTA is aware that it is the voters' intent, not the drafters' intent that controls, there is no reason to conclude in this case that the two are inconsistent. HJTA believes the Court of Appeal correctly upheld the right to ballot secrecy, but erred by suggesting in dicta that local governments may manipulate elections by weighting fee ballots.

HJTA's brief will offer this Court a unique and reasoned perspective on these important issues, demonstrating that the voters' intent can be found within the four corners of Proposition 218, and reinforced by considering the measure's historical context and purpose. HJTA therefore hopes this Court will grant permission for the attached *amicus curiae* brief to be filed.

Dated: Nov. 30, 2009.

HOWARD JARVIS TAXPAYERS ASSOCIATION

By: _____
Timothy Bittle
Director of Legal Affairs

BRIEF OF AMICUS HOWARD JARVIS TAXPAYERS ASSOCIATION

I
PROPOSITION 218 DOES NOT AUTHORIZE LOCAL GOVERNMENTS TO MANIPULATE FEE ELECTIONS BY ASSIGNING WEIGHT TO THE BALLOTS

The Court of Appeal was asked to interpret the sentence in article XIII D, section 6(c) that provides: "An agency may adopt procedures similar to those for increases in assessments in the conduct of [fee] elections."

In ruling that the sentence does *not* mean local governments may require voters to identify themselves on their ballots, the Court apparently felt obliged to offer some gratuitous advice as to what the sentence *might* mean. Thus the Court in dicta suggested "for example, the provision might authorize the use of the mail balloting *and vote weighting* procedures." *Greene v. Marin Co. Flood Control Dist.* (2009) 171 Cal.App.4th 1458, 1473.[1]

The joint amicus brief filed by the Association of California Water Agencies, the League of California Cities, *et al.*, seizes this suggestion and argues that "a local agency may appropriately determine to weight property owner votes for approval of [a] fee in a manner similar to weighted votes for assessments." ACWA Brief at 11. It urges this Court to incorporate that idea in its published decision.

It is obvious why the local government organizations want the power to weight votes in fee elections. They could then tip the scales by loading the value of supporters' votes and diluting the value of opponents' votes, the way they do in assessment elections.

It is common for local agencies proposing an assessment, before fixing zone boundaries or setting assessment amounts, to first hire a consultant to

[1] Unless noted otherwise, all emphasis is added.

study the voters. A good consultant can identify geographical pockets of resistance for the purpose of diluting the value of their votes or excluding them from the district. He can also identify not just political supporters, but also vulnerable property owners (*e.g.*, developers and permit holders) whose votes can be influenced, for the purpose of increasing the value of their votes. In this way, the consultant can determine the maximum assessment amounts that a majority will accept, and advise the agency how to design the district and apportion the assessments to guarantee success. See, e.g., *Silicon Valley Taxpayers Assn. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 439.

Although routinely abused, a weighted protest procedure existed in several assessment statutes prior to Proposition 218 (e.g., *Knox v. City of Orland* (1992) 4 Cal.4th 132, 136 [Landscaping & Lighting Act of 1972]; *Harrison v. San Mateo Bd. of Supervisors* (1975) 44 Cal.App.3d 852, 859 [Municipal Improvement Act of 1913]), and was therefore carried forward in Proposition 218 (with the addition of certain new rules aimed at making the process fairer).

Not so regarding fees, however. Prior to Proposition 218, fees could be imposed without any form of election or right to protest. Proposition 218 established a right to vote on new and increased fees. Fees must be "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." Cal. Const., art. XIII D, § 6(c).

This language is noticeably different from the language used for assessments, which refers to a weighted ballot "protest" procedure. It says, "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 ... weighted according to the proportional financial obligation of the affected property." *Id.*, § 4(e).

Amicus Howard Jarvis Taxpayers Association, the sponsor and principal author of Proposition 218, thus demonstrated that it knew how to describe weighted balloting when that was the intent. It was HJTA's intent that fee ballots would not be weighted.

The fee language in section 6 not only makes no reference to weighted ballots, but further distances itself from section 4's assessment protest procedure by clarifying that fees must be "*approved*" at an "election." In contrast, assessments must *survive* a "majority protest" proceeding. The protest procedure for assessments "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(e)(4). See also Elec. Code § 4000(c)(8).

This is crucial because elections bestow certain rights, including the equal protection right to *not* have one's vote diluted. Weighted balloting, on the other hand, necessarily involves diluting the value of some ballots. "A prime example of a violation of the equal protection clause through a burden on the right to vote is malapportioned districts, *i.e.*, those that violate the one-person, one-vote rule by having unequal populations. ... [D]istricts created predominantly on the basis of race presumably are another example." *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 686. "Our analysis of such a discrimination claim starts with the basic principle of 'one person, one vote' that the United States Supreme Court has derived from the equal protection clause of the Fourteenth Amendment of the federal Constitution. (*Reynolds v. Sims* (1964) 377 U.S. 533 ...). The 'one person, one vote' doctrine addresses (1) the dilution of one's vote in comparison to the vote of another and (2) the denial of a person's right to vote through eligibility criteria that

selectively distribute the franchise." *Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1314.

The ACWA brief argues that "a local agency may appropriately determine to weight property owner votes for approval of [a] fee in a manner similar to weighted votes for assessments." ACWA Brief at 11. That cannot be true, however, because any attempt to weight votes for or against a proposed fee would necessarily dilute some people's votes.

The approval processes for assessments and fees differ in part because of practical differences in the legal requirements for imposing them. Assessments are based on the "special benefit" that a public improvement confers upon a parcel of private property. Cal. Const., art. XIII D, § 4(a). An engineer is retained to apportion the assessable part of the project's cost according to the special benefit each parcel receives. *Id.* He looks only at the value of the project *to the parcel*, not its value to individuals living on the parcel. *Id.*; *Silicon Valley Taxpayers Assn.*, 44 Cal.4th at 452, 453. Individuals living on the parcel, therefore, cannot increase or decrease the amount of the assessment by their support or patronage of the project. For example, an assessment for the installation of sidewalks may be greater for a larger parcel with more front footage, even though the present occupant of the property may be handicapped and unable to use the sidewalk.

While the value of a proposed assessment, then, can be calculated with a measure of precision by an honest engineer, the same cannot be said for a proposed fee. For this reason, a weighted ballot can be fair for an assessment proceeding, but would be arbitrary if utilized in a fee election.

Fees are based on the consumption of a commodity or service by the individuals living on a parcel. *Rincon Del Diablo Mun. Water Dist.* (2004) 121 Cal.App.4th 813, 819. "[F]ees ... are charged only to the person actually

using the service; the amount of the charge is generally related to the actual goods or services provided." *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 597. "[A] user fee [is] a payment for a specific commodity purchased. ... Indeed, the utility customer's agreement to pay a certain rate for a certain usage of utilities is a contractual obligation, and is far removed from the revenue-raising devices of assessments." *Id.* See also *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 644-45; *Utility Audit Co. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 957; *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d at 162.

The amount of the commodity or service consumed on a parcel will differ from month to month, and from occupant to occupant, "thus making it impossible to now determine 'the proportional financial obligation of the affected property.'" *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 419. Since the financial obligation of a fee-payer is a moving target, it would be impossible for an agency to determine the dollar value of a person's vote for purposes of counting the votes in a fee election. Agencies could invent all sorts of assumptions to justify estimates that dilute the value of opponents' votes, thereby making every weighted fee election constitutionally suspect and practically guaranteeing that every election will end in litigation.

This is not what amicus intended in drafting Proposition 218, and it is certainly not what the voters intended in passing it.

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II

PROPOSITION 218 DOES NOT AUTHORIZE
LOCAL GOVERNMENTS TO REQUIRE VOTERS
TO IDENTIFY THEMSELVES ON THEIR FEE BALLOTS

As explained above, assessment proceedings are unique in their weighted protest approach, which is a product of historical statutory custom predating Proposition 218.

The weighted protest approach makes ballot identification a necessary evil for assessments. Assessment ballots are weighted "according to the proportional financial obligation of the affected property." Cal. Const., art. XIII D, § 4(e). To count an assessment ballot, then, the ballot must be matched to a parcel, so that the dollar amount of the assessment for that parcel may be applied to the ballot.

Fees, on the other hand, must be approved in an "election" by a simple one-man, one-vote majority of the affected property owners or two-thirds of the electorate. Every ballot in a fee election has the same value. There is no need, therefore, to match ballots to the parcel or property owner casting the ballot, and thus no need for the ballots themselves to carry identification.

There being no compelling governmental need to identify voters with the ballot that shows how they voted, there can be no justification for denying voters the ballot secrecy otherwise guaranteed by the state constitution. Cal. Const., art. II, § 7 ("Voting shall be secret"). *Bridgeman v. McPherson* (2006) 141 Cal.App.4th 277, 284 ("The right to vote is, of course, fundamental, and restrictions on exercise of the franchise will be strictly scrutinized and invalidated unless promotive of a compelling governmental interest").

ACWA argues that the "later enacted provisions of Proposition 218 must prevail over the earlier adopted provisions of article II, section 7." ACWA Brief at 14 (caps omitted). ACWA admits, however, that a later-

enacted provision of the constitution is deemed to impliedly repeal an older provision only when the two provisions are in irreconcilable conflict. *Id.* at 15.

> "All presumptions are against a repeal by implication. Absent an express declaration of legislative intent, we will find an implied repeal 'only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation."' The same standards apply in [evaluating] a constitutional amendment .... '[S]o strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, "[i]n order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first."'" *Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 816-17 (quoting *Board of Retirement v. Superior Court* (2002) 101 Cal.App.4th 1062, 1067-68, citations omitted).

Here, Proposition 218 can be easily harmonized with article II, section 7, simply by not assuming that weighted balloting is included in the sentence "An agency may adopt procedures similar to those for increases in assessments in the conduct of [fee] elections." Cal. Const., art. XIII D, § 6(c). There are plenty of other "procedures" to which this sentence can and does apply. For example, fee elections can be conducted by mailed ballot; tenants can be treated as "property owners" entitled to cast a ballot if the election is limited to property owners; ballots can be tabulated by agency staff at a public hearing rather than by the county registrar of voters, etc.

The ACWA brief argues that Proposition 218 should be considered "a revision of the entire subject" of fees and assessments. ACWA Brief at 14. While that may be true, the question is whether the voters also intended Proposition 218 to entirely revise the guarantee of voter secrecy, which is the subject of a different provision of the constitution that Proposition 218 did not amend. Where Proposition 218 was thought to affect other provisions of the constitution, those provisions were mentioned by name. For example, article XIII C, section 3 states: "Notwithstanding ... Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge." Since Proposition 218 never mentions article II, section 7, or secret versus weighted voting in the context of fees, the Court cannot say with confidence that the presumption against implied repeals has been rebutted by an unmistakable indication of voter intent.

The ACWA brief also argues that voter identification is necessary to "reduce the potential for voter fraud." ACWA Brief at 20. The easy answer to this argument is that the potential for voter fraud presents itself as much, if not more, at the traditional polling place, yet there is no requirement that voters identify themselves on their ballots as a condition of voting.

Perhaps a better answer, however, is that ACWA's concern about voter fraud can be fully addressed without trampling people's right to vote their conscience in private. This can be done by following the existing statutory procedure for absentee voting where the voter's identifying information appears only on the envelope he uses to deliver his ballot. Elec. Code § 3011. In fact, one of the "procedures similar to those for increases in assessments" that agencies can borrow to *protect* voter secrecy is the one that requires the ballot itself to "be in a form that conceals its contents once it is sealed by the

person submitting [it]," and to "remain sealed until the tabulation of ballots ... commences." Gov. Code § 53753.

In this way, the agency can verify the voter's eligibility using the information on the envelope. At the same time, voters' privacy is protected because the ballots can be separated from their envelopes by the impartial tabulator at the conclusion of the hearing, unsealed and commingled, then run through the counting machine.

In sum, then, there is no compelling interest justifying a deprivation of the right to ballot secrecy since Proposition 218 can be harmonized with article II, section 7 and ACWA's concerns regarding voting fraud can be easily addressed by utilizing the existing statutory procedure for absentee voting.

CONCLUSION

For the reasons above, this Court should affirm the Court of Appeal to the extent that court safeguarded the constitutional guarantee of voting secrecy for fee elections, but should disapprove that court's dicta suggesting that fee elections may be conducted using weighted ballots.

DATED: November 30, 2009.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify that this brief, including footnotes, but excluding the caption page, tables, and this certification, as measured by the word count of the computer program used to prepare the brief, contains 2,522 words.

DATED: November 30, 2009.

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TIMOTHY A. BITTLE