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 SUPPLEMENTAL BRIEF SUBMITTED PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520 (d)

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I. INTRODUCTION

Pursuant to California Rules of Court, Rule 8.520 (d) appellant Ford Greene hereby submits his supplemental brief that is limited to a discussion of the applicability of this Court's analysis in *People v. Kelly* (2010) 47 Cal.4th 1008 (hereinafter "*Kelly*") to certain issues raised in the instant case. As the briefs in the instant case were filed in 2009, *Kelly* constitutes new authority that was unavailable at the time appellant filed his prior briefs herein.

The Court in *Kelly* concludes that California Constitution article II, section 10, subdivision (c) [1]/ renders the Legislature powerless to act on its own to amend an initiative proved by the electorate. *Kelly* therefore applies to respondents' reliance on Government Code section 53753, subdivisions (c) and (e)(4) in support of respondents' contention that secret voting is not required in a property related fee election conducted pursuant to article XIII D, section 6, subdivision (c). Respondents rely on said statutory provisions to justify its local election rule that to require voters to sign their ballots in order that their vote not be disqualified is constitutionally lawful and does not violate article II, section 7's guarantee that voting shall be secret.

Under *Kelly* respondents' construction, however, constitutes a prohibited amendment to a lawfully enacted initiative, and is, therefore, erroneous.

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[1]/ California Constitution article II, section 10, subdivision (c) states: "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval."

II. *PEOPLE V. KELLY*

In *Kelly* this Court reviewed the question whether Health and Safety Code section 11362.77 constituted an amendment of the Compassionate Use Act (hereinafter "CUA"), Proposition 215, approved by the electorate in 1996, and was thereby prohibited by California Constitution article II, section 10, subdivision (c).

The CUA provides that a person who possesses or cultivates marijuana "for personal medical purposes . . . upon the written or oral recommendation or approval of a physician" shall not be subject to Health and Safety Code sections 11357 and 11358 which prohibit the possession or cultivation of marijuana, respectively.

Stating that that the possession or cultivation of marijuana must be for "personal medical purposes," the CUA does not specify an amount of marijuana that a patient may possess or cultivate. (*Kelly,* 47 Cal.4th at 1013.) In 1997 *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549, construed the CUA as establishing " that the quantity possessed by the patient or the primary caregiver, and the form and manner in which it is possessed, should be reasonably related to the patient's current's medical needs."

Subsequently, the Legislature enacted the Medical Marijuana Program (hereinafter "MMP") (Health and Safety Code § 11362.7 et seq.) In pertinent part, the MMP established baseline quantity limitations as to the amount of marijuana that a qualified patient could possess and set such limits at eight ounces of dried marijuana plus six mature or twelve immature marijuana plants. (Health and Safety Code § 11362.77 (a).)

In a prosecution for possession of marijuana for sale in violation of Health and Safety Code section 11359 and cultivation of marijuana in violation of Health and Safety Code section 11358, the trial court allowed the prosecutor to question witnesses concerning Health and Safety Code section 11362.77 quantitative limits and to argue to the jury that defendant possessed more than eight ounces of marijuana and did not have any physician's recommendation to possess more than such amount. The trial court, however, refused to include section 11367.77's quantity limitations in any jury instructions. (*Kelly,* 47 Cal.4th at 1019-1020.) The jury convicted Kelly of possession of more than one ounce of marijuana in violation of Health and Safety Code section 11357 (c) (a lesser included offense of section 11359) and cultivation of marijuana in violation of Health and Safety Code section 11358.

Kelly appealed.

The Court of Appeal reversed and held that section 11362.77 of the MMP, insofar as it limits the amount of marijuana that a qualified patient protected by the CUA may possess, constituted an amendment of the CUA in violation of California Constitution, article II, section 10, subdivision (c).

On review, this Court concluded that the Court of Appeal was correct that section 11362.77 constituted an amendment of the CUA, in violation of California Constitution, article II, section 10, subdivision (c).

In conducting its analysis, the Court first set forth the general context defining the nature of constitutional amendments as to which legislative bodies may not, or may,

legislate when the People have enacted a constitutional amendment. The Court states that:

> "The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' [Citations.]" (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484, 76 Cal.Rptr.2d 342 (*Proposition 103 Enforcement Project*).) In this vein, decisions frequently have asserted that courts have a duty to " ' "jealously guard" ' " the people's initiative power, and hence to " ' "apply a liberal construction to this power wherever it is challenged in order that the right" ' " to resort to the initiative process " ' "be not improperly annulled" ' " by a legislative body. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776, 38 Cal.Rptr.2d 699, 889 P.2d 1019 [construing analogous right to enact initiative county ordinances under Cal. Const., art. II, § 11, as governed by Elec.Code, § 9125]; see also *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, 135 Cal.Rptr. 41, 557 P.2d 473, and cases cited [construing analogous right to enact initiative city ordinances under what is presently Cal. Const., art. II, § 11].)
>
> At the same time, despite the strict bar on the Legislature's authority to amend initiative statutes, judicial decisions have observed that this body is not thereby precluded from enacting laws addressing the general subject matter of an initiative. The Legislature remains free to address a " 'related but distinct area' "

(*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 830, 81 Cal.Rptr.3d 461 (*San Diego NORML*); see also *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 43, 41 Cal.Rptr.2d 393 (*Mobilepark West Homeowners Assn.*) [construing the related initiative power of city voters under Cal. Const., art. II, § 11, and Elec.Code, § 9217]) or a matter that an initiative measure "does not specifically authorize *or* prohibit." (*People v. Cooper* (2002) 27 Cal.4th 38, 47, 115 Cal.Rptr.2d 219, 37 P.3d 403 (*Cooper*); see *San Diego NORML, supra,* 165 Cal.App.4th at p. 830, 81 Cal.Rptr.3d 461.)

With these considerations in mind, we turn to the case law addressing what constitutes an "amendment" for purposes of article II, section 10, subdivision (c). Although some decisions contain broad definitions of the amendment process in this context, [fn. omitted] for purposes of resolving the issue in the present case we need not endorse any such expansive definition. [fn. omitted.] It is sufficient to observe that for purposes of article II, section 10, subdivision (c), an amendment includes a legislative act that changes an existing initiative statute by taking away from it. (*Cooper, supra,* 27 Cal.4th 38, 44, 115 Cal.Rptr.2d 219, 37 P.3d 403; *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22, 26 Cal.Rptr.3d 687 (*Knight*); *Proposition 103 Enforcement Project, supra,* 64 Cal.App.4th 1473, 1484-1486, 76 Cal.Rptr.2d 342; *Mobilepark West Homeowners Assn., supra,* 35 Cal.App.4th 32, 40, 41 Cal.Rptr.2d 393 [construing the related initiative power of city voters under Cal. Const., art. II, § 11, and Elec.Code, § 9217]; *Cory, supra,* 80 Cal.App.3d 772, 776, 145 Cal.Rptr. 819.)

(*Kelly,* 47 Cal.4th at 1025-1027.)

In an exhaustive and erudite survey, the Court canvassed and reviewed the legislative power exercised both in other states, and in California, to amend constitutional provisions that the People have by initiative enacted. The Court concluded that California maintains a singularly strict limit on the exercise of legislative power that is amendatory of constitutional provisions enacted by initiative. (*Kelly,* 47 Cal.4th at 1030-1042)

The Court noted, "[I]n the present case, the CUA – unlike many other initiative measures in recent decades – did not grant the Legislature authority to amend [fn. omitted] Nor did the Legislature merely propose the MMP and submit it to the electorate for approval. Instead, the Legislature adopted that scheme on its own, *without seeking ratification by the electorate.*" (*Kelly,* 47 Cal.4th at 1042-1043; italics added.)

In light of the case law on constitutional amendments, and consistent with the history of article II, section 10, subdivision (c), the Court concluded that by imposing quantity limits on "qualified patients" and "primary caregivers," the Legislature amended the CUA because the quantifying language "effectuates a change in the CUA that takes a away from rights granted by the initiative statute. [citations omitted.] In this sense, section 11362.77's quantity limitations conflict with - and thereby substantially restrict - the CUA's guarantee that a qualified patient may possess and cultivate *any amount of marijuana reasonably necessary for his or her current medical condition.* In that respect, section 11362.77 improperly amends the CUA in violation of the California Constitution." (*Id.*, 47 Cal.4th at 1043.)

The Court's analysis noted that even though

"commissions and commentators have urged that the California Legislature *should* have the same authority possessed by the legislatures of all other states to directly amend an initiative statute in order to correct errors, clarify application, or simply make alterations that have been proved by experience to be warranted. [fn. omitted.] And yet, as demonstrated by the history and case law set forth above, the flexibility to make desirable or even *necessary* adjustments to initiative statutes long has been, and remains, foreclosed by article II, section 10, subdivision (c), and its predecessor incarnations.

As observed earlier, beginning almost immediately after adoption of the initiative provision in 1911, and continuing through a number of efforts in recent decades, various proposals have been advanced, and legislative attempts have been made, to change California's constitutional system in order to bring the state in line with our sister jurisdictions. These efforts have aimed to eliminate the strict limitation on the power of the Legislature (or at least to moderate that power) by, for example, allowing amendments that "further the purpose" of the original initiative measure, or allowing amendments after a moratorium of years, or allowing amendments by a supermajority vote of both houses. And yet all such efforts have failed.

Over the course of the decades during which California has had the initiative process, the sole substantive alteration to the governing constitutional provision

> occurred in 1946, when it was changed to allow the Legislature at least to *propose* an amendment to an initiative statute, subject to ratification by the statewide electorate at the ballot. That minor adjustment to the strict rule of nonamendability highlights and reinforces the closely circumscribed limits of the Legislature's authority in this regard: the Legislature is powerless to act *on its own* to amend an initiative statute. Any change in this authority must come in the form of a constitutional revision or amendment to article II, section 10, subdivision (c). Therefore, we are compelled to conclude that section 11362.77 impermissibly amends the CUA and, as we explain below, is unconstitutional as applied in this case.

(*Id.*, 47 Cal.4th at 1045-1046.)

Kelly therefore demonstrates that after the People by their initiative power have enacted constitutional provisions, unless the initiative authorized the Legislature to enact any amendment, and said amendment is presented to the People for approval or rejection, the Legislature may not amend the provisions of the initiative. It does not matter that any proposed legislative amendment may be entirely needed and appropriate. In California, article II, section 10, subdivision (c) prohibits the Legislature from doing so.

Such is the case here.

Relying on Government Code section 53753, subdivisions (c)and (e)(4), the District contends there is reason to justify the imposition of a ballot signature requirement that each voter was compelled to satisfy in order that his or her vote be counted. In light

of the language of Proposition 218, however, the existence of any reason is irrelevant and shall not compromise, constrain, or even temper, the rights that the electorate has arrogated to itself. Such reliance in a property-related fee election is therefore insufficient to justify the elimination of the right to vote in secret.

III. GOVERNMENT CODE SECTION 53753, SUBDIVISION (C), AND SUBDIVISION (E)(4), AS APPLIED IN THIS CASE, CONSTITUTES AN IMPERMISSIBLE AND UNCONSTITUTIONAL AMENDMENT OF ARTICLE XIII D SECTION 6, SUBDIVISION (C).

Turning to the case at bar, the District and Intervenors argued in the trial court, [2]/ the Court of Appeal [3]/ and here [4]/ that the imposition of the election rule requirement in the instant case that voters sign their ballots in order for their votes to be counted was authorized by Government Code sections 53753 (c) (requiring a ballot signature) and 53753 (e)(4) (removing assessment majority protest procedures and by implication property owner fee elections from the scope of California Constitution article II), notwithstanding that section 53753 by its terms applies only to the approval of assessments.

Assuming arguendo, that section 53753 does apply to property related fee elections conducted under article XIII D, section 6, subdivision (c), and therefore authorizes the imposition of a ballot signature requirement and removes such elections from the scope of article II, section 7's guarantee that voting shall be secret and from the

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[2]/ Appellant's Appendix at 204, 206, 216, 220

[3]/ Respondent's Opposition Brief in Court of Appeal at pp. 1-2, 4-6, 12-13 15-25; Respondent's Supplemental Brief in Court of Appeal at pp. 1, 3, 5, 7, 9.)

[4]/ District's Petition for Review at pp. 12, 18, 22-24; District's Reply to Answer to Petition for Review at pp. 7-9; District's Opening Brief at pp. 37-40; District's Reply Brief at pp. 6-7; District's Answer Brief to Amicus Curiae Briefs at 1516.)

scope of the Elections Code, such statutory authorization constitutes an impermissible amendment under article II, section 10, subdivision (c). Indeed, under the District's view, Government Code section 53753 would remove property owner fee elections from article II, section 10, subdivision (c)'s prohibition that legislative bodies may not act on their own to amend a constitutional initiative approved by the lectorate.

First, as with Proposition 215, the 1996 Compassionate Use Act, there is no language in Proposition 218, the 1996 Right to Vote on Taxes Act, that authorizes the Legislature to amend the provisions of the Act. Neither Act authorized any amendment of its provisions by the Legislature. Thus, as applied to an article XIII D, section 6, subdivision (c) election, such as it at issue here, Government Code section 53753 violates terms of article II, section 10, subdivision (c) that "[t]he Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval."

Second, after the enactment of Proposition 218, and as to assessment proceedings, the Legislature imposed both a ballot signature requirement and also deemed "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." In the context of property related fee elections authorized by article XIII D, section 6, subdivision (c), such legislation clearly took away – and therefore unconstitutionally amended – the right to a "majority vote of the property owners subject to the fee or charge" or "by a two-thirds vote of the electorate residing in the affected

area" because there is no language in section 6 (c) that states that either such "vote" or "election" included the elimination of article II, section 7's guarantee that voting shall be secret.

After Mr. Colantuono's entry into the case to address the Court of Appeal's opinion annulling the District's alection, the District started to shift its position. Instead of primarily relying, as to that point it had, on section Government Code section 53753 to justify its violation of the right to vote in secret, the District started to assert that the electorate employed the language "vote" and "election" in article XIII D, section 6, subdivision (c) so as to split the meaning of those terms to generate differing types of protection regarding the right to vote in secret. Thus, instead of relying on Government Code section 53753, the District now seems primarily to argue that because article XIII D, section 6, subdivision (c) authorizes that "[a]n agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision," the voters necessarily intended to eliminate secret voting when the "election" was by a "majority vote of the property owners subject to the fee or charge," but also necessarily intended to maintain secret voting when the "election" was "by a two-thirds vote of the electorate residing in the affected area."

IV. CONCLUSION

While the District's construction that the use of the terms "election" and "vote" as used in article XIII D, section 6, subdivision (c) necessarily means two types of voting and elections, one where voting is secret and the other where it is not, is beyond the scope of the Court's holding in *People v. Kelly*, it's reliance on section 53753 to accomplish the

result it seeks is not.

Therefore, because section 53753 constitutes an impermissible and unconstitutional amendment of article XIII D, section 6, subdivision (c), it ought to be removed from the Court's inquiry, investigation and decision with respect to the present case on review.

DATED: March 26, 2010

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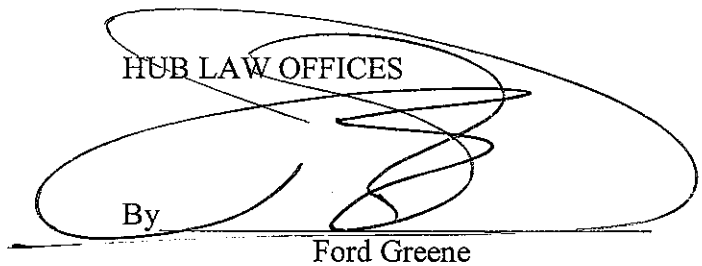

By

Ford Greene
Appellant In Pro Per

CERTIFICATION OF WORD COUNT

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

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DATED: March 26, 2010

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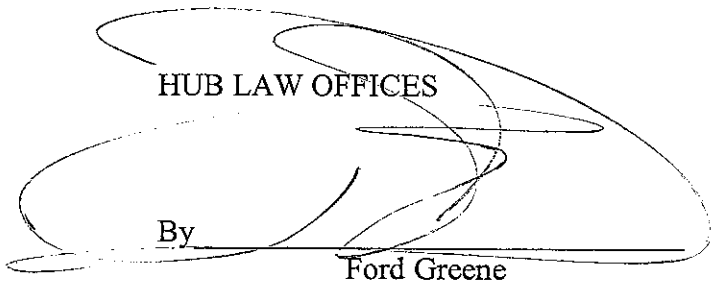

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PROOF OF SERVICE

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

APPELLANT'S SUPPLEMENTAL BRIEF SUBMITTED PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520 (d)

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

See attached service list

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[]	(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.
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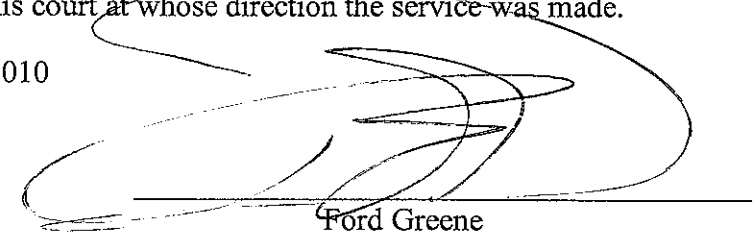
DATED: March 26, 2010



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