**No. B240592**

In The Court of Appeal, State of California

SECOND APPELLATE DISTRICT, DIVISION THREE

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**LEE SCHMEER, et al.**
*Petitioners and Appellants*

v.

**COUNTY OF LOS ANGELES, et al.**
*Respondents and Appellees.*

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Appeal from the Superior Court of the State of California,
County of Los Angeles, Case No. BC 470705,
Honorable James C. Chalfant, Judge Presiding

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# APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS

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## APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

**TO THE HONORABLE PRESIDING JUSTICE:**

Pursuant to rule 8.200, subd. (c) of the California Rules of Court, the League of California Cities and the California State Association of Counties ("Amici") respectfully request permission to file an amicus curiae brief in this case.

Each amicus is an organization that represents local governments that have a substantial interest in this case because they all are bound by the provisions of Proposition 26, article XIII C, section 1, subdivision (e) of the California Constitution. These local governments rely on revenues subject to that measure to fund essential services to their residents, businesses and property owners.

The trial court's conclusion in this case reinforced a principle of substantial importance to Amici and the public their members serve. Specifically, the statement of decision finds that economic regulations (like the price-control ordinance in issue here) are not "taxes" within the meaning of Proposition 26, as they do not provide revenue to the local governments imposing them. Such regulations are a common and useful complement to legislation with objectives beyond the marketplace. Indeed, a finding contrary to the trial court's would mark a sea change in the authority of representative legislatures at the State and local levels of which the voters who

approved Proposition 26 had no inkling. Amici believe they can aid the Court's review of this case by providing a broader legal framework for this issue than is provided by the parties' briefs.

Amici have a unity of interest and seek to submit the attached brief as amici curiae in this matter.

Amici's counsel have examined the briefs on file in this case and are familiar with the issues involved and the scope of the presentations. Amici respectfully submit that additional briefing would be helpful to clarify that Proposition 26 does not apply to the charge in question and that the challenged ordinance is a valid exercise of the police power conferred on Los Angeles County by our Constitution.

Therefore, and as further amplified in the Interest of Amici portion of the proposed brief, Amici respectfully request leave to file the brief combined with this application.

Dated: December 14, 2012

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## INTRODUCTION

It has been clear since the end of the *Lochner*[1] era that American governments at all levels are authorized to regulate private economic activity. They may impose a minimum wage; control rents; and cap, set a floor, or fix the prices of goods. In each of these instances, government exercises its police power to impose a financial obligation on a segment of the public to serve the common good. Given the broadly based personal and corporate income, payroll, sales and other taxes which fund various governmental entities, economic regulations necessarily also affect revenues to and expenditures by legislating governments.

In light of this well established police power, the fundamental problem with Appellants' argument is that it proves too much. If we must read "levy, charge, or exaction" as used in Proposition 26 without anchoring those terms in sources of government revenue, it is impossible to avoid the absurd conclusion that all financial obligations imposed by government are subject to voter approval. This would strip elected legislators, but not voters, of the power to regulate the economy for the common good that painful judicial experience established in the first part of the twentieth century. It

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[1]*Lochner v. New York* (1905) 198 U.S. 45 (striking wage and hour legislation as violating "freedom of contract" under 14th Amendment).

would transform California governments from representative democracies to nearly pure direct democracies, requiring an election every time it is necessary to adjust the myriad regulations of private economic activity. Nothing in the text or legislative history of Proposition 26 advised voters the measure would make this change; indeed, the ballot arguments assured voters that regulation to protect consumers and the environment would be unaffected. Accordingly, this Court ought not to read into Proposition 26 the libertarian utopia for commercial activity (and the dystopia for consumers and the environment) that plastic bag advocates seek.

What Proposition 26 **did** do was limit government's ability to collect revenue without voter approval. This crucial distinction between government revenue measures and economic regulations not only reflects precedent, but it also provides a workable rule to implement Proposition 26. Further, under this rule, Los Angeles County's Ordinance No. 2010-0059 (the "Ordinance") is valid as an ordinary price-control measure adopted pursuant to the police power to regulate economic activity. The Ordinance does not impose a "tax" within the meaning of Proposition 26.

## INTEREST OF AMICI

The League of California Cities (the "League") is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all

Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those of statewide or national significance. The Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation. Its membership consists of the fifty-eight California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsels' Association of California and overseen by the Association's Litigation Overview Committee, comprised of county counsels from throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

Amici have a common interest in this case in that the application or non-application of Proposition 26 to economic regulations like Los Angeles County's Ordinance affects all local governments in California. A ruling contrary to the trial court's would undermine local governments' police power to regulate economic activity for the common good.

## ISSUES PRESENTED — FACTS AND PROCEDURAL HISTORY

Amici adopt by reference the Statement of Facts and the Case set forth in the County's Respondents' Brief.

## ARGUMENT

The question in this case boils down to what the voters of California intended when they enacted Proposition 26 in 2010. The parties' briefs present two competing views:

- Did they intend Proposition 26 to require voter approval of any and all legislation that has the effect of raising consumer costs, even if the increased revenue does not flow to government?

Or

- Did they understand the phrase "any levy, charge, or exaction of any kind imposed by a local government" to apply only to measures that directly increase government revenues?

The text of Proposition 26 suggests the latter interpretation. Moreover, if evidence of voter intent beyond the constitutional text is required, ballot materials demonstrate that voters were expressly led to understand Proposition 26 would preserve important consumer and environmental protections—not displace them. Although the County's Ordinance was passed after Proposition 26

was enacted, the Ordinance's similarities to those pre-existing laws place it among the protections voters believed Proposition 26 would preserve. Voters had no intent to undermine government's ability to protect consumers and the environment.

Further, interpreting Proposition 26 as Appellants urge would sweep virtually all government regulation of economic activity into the domain of direct democracy, enacting "Mr. Herbert Spencer's Social Statistics" as the Fourteenth Amendment did not. (*Lochner v. New York* (1905) 198 U.S. 45, 75 (Holmes, J., dissenting).) Such a return to *Lochner*-era jurisprudence, so long discredited, would work such a fundamental change in our representative democracy as to constitute a revision beyond the scope of the initiative's power to amend, but not revise, the California Constitution. (Cal. Const., art. XVIII, §§ 2 (amendment or revision by Legislature or Convention), 3 (amendment by initiative). See *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 351–55 (Proposition 115 was an unconstitutional revision because it fundamentally altered the authority of the state judiciary).) Of course, this Court can and should adopt a more modest interpretation of Proposition 26 if the text of the measure permits such a reading. (Cf., *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 942 ("a statute which is reasonably susceptible of two constructions should be interpreted so as to render it constitutional").)

## I. Economic Regulation is Fundamental to Modern American Society

Economic regulations like the County's Ordinance are common, and two important policy considerations arise as a result. First, a judgment against the County in this case would necessarily extend beyond Los Angeles, undermining scores of local legislative priorities supported by similar laws. Second, the prevalence of price-control laws like the County's Ordinance demonstrates that this is a common approach to economic regulation, not an aberrant scheme to disguise a tax.

Indeed, price controls are often necessary complements to legislation serving other objectives. Here, the County's objectives are to curb the environmental impacts of disposable shopping bags. (3 JA 476, 521.) Plastic bags cause visible and well documented detriment to urban and marine environments. (3 JA 523–25, 538–40.) However, paper bags also have environmental consequences in the form of greenhouse gases emitted during their production and distribution and impacts on landfills when they are discarded. (3 JA 1470.) Beyond banning plastic bags, which have significant litter impacts, a ten-cent price on paper bags discourages the substitution of paper bags for plastic bags and encourages retailers and consumers alike to change their behavior for the collective good. (See CR 0052–0053, 1577.) On the other hand, omitting the ten-cent price fosters another argument leveled by plastic bag proponents

against laws which disfavor their product. (See *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155 (plaintiffs argued an EIR was required for a plastic bag ban ordinance without a fee on paper bags due to alleged impacts from substituted paper bag usage on a small city).)

It is true that the County **could** pursue its policy goals by imposing a tax to raise government revenues rather than legislating a price control. Logically, any minimum price requirement could be accomplished by a tax on sellers, just as any maximum price requirement could be accomplished by a subsidy for buyers. Indeed, and as Appellants note in their Opening Brief (at p. 46), under the District of Columbia's shopping bag ordinance—which imposes a five-cent fee on plastic and paper carryout bags—most fee revenue is remitted to the District. (See CR 0006, 0052, 1425–26, 1574.) However, absent a constitutional bar, the choice among regulatory strategies is for the legislator, not the Judge.

Proposition 26, like the 14th Amendment, does not eliminate price controls from the range of permissible regulations entrusted to elected legislators. Contrary to the District of Columbia's approach, the County did not choose to tax paper bags. Neither retailers nor customers remit revenue to the County. This simple distinction between taxes regulated by Proposition 26 and economic regulation entrusted to elected legislators is consistent with the text and legislative history of the measure, and it is respectful of our

Constitution's commitment to a broad and robust police power for local governments. Proposition 26 must be harmonized with article XI, section 7, which states:

> A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

Indeed, the law has long recognized that use of price signals (or other "market mechanisms") to accomplish social policy is a rational, lawful exercise of the police power. For example, it was this approach that animated the air pollution fees upheld in *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132 (air district's permit fee lawfully based on volume of air contaminants emitted by permittee) (*San Diego Gas & Electric*). While Appellants can be expected to distinguish that case as part of the line of cases following *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*), which was affected by Proposition 26, our point remains valid—the police power has long been understood to include the power to set minimum and maximum prices. Other examples are cited in part II.C. of this brief below.

Moreover, the fact that effective police power legislation reduces the cost of government does not convert every such law into a tax. (See Appellants' Reply Brief (Nov. 30, 2012) ("Reply Brief") at p. 18.) If this were the case, nearly every law that has sufficient

public purpose to be valid would be a tax because all can be viewed as reducing demands for government services. Littering ordinances would be taxes because they reduce the cost of sanitation; controls on illegal water and sewer connections would be taxes because they prevent unpaid use of utility services; domestic violence laws would be taxes because they reduce demand for tax-aided emergency shelters; et cetera. Similarly, that government policy is intended to affect social behavior does not make the law effecting it a tax. (Reply Brief at p. 34.) If this were not the case, then the Penal Code's proscriptions against homicide, rape, and assault would all require two-thirds legislative approval.

In short, the police power to regulate economic activity through price controls is well established and unaltered by Proposition 26. Because this power exists at the state level, it exists at the local level except where preempted by state law, as it is well established that state and local police powers are of equal extent. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140 "A city's police power ... can be applied only within its own territory and is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the Legislature itself."); *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885 (upholding school impact fees on development, quoting *Birkenfeld*); *Carlin v. City of Palm Springs* (1971) 14 Cal.App.3d 706,

711 (upholding ban on hotel signs which display room rates, citing what is now art. XI, §7).)

## II. The County's Pricing Requirement for Paper Bags is Not a "Tax" Within the Meaning of Proposition 26

### A. Proposition 26's Legislative History Will Not Support Finding the County Ordinance to Impose a Tax

The ballot argument in support of Proposition 26 assured voters the measure would not impair government's power to enact and enforce environmental and consumer protection regulations:

> PROPOSITION 26 PROTECTS ENVIRONMENTAL AND CONSUMER REGULATIONS AND FEES *Don't be misled by opponents of Proposition 26.* California has some of the strongest environmental and consumer protection laws in the country. Proposition 26 preserves those laws and PROTECTS LEGITIMATE FEES SUCH AS THOSE TO CLEAN UP ENVIRONMENTAL OR OCEAN DAMAGE, FUND NECESSARY CONSUMER REGULATIONS, OR PUNISH WRONGDOING, and for licenses for professional certification or driving.

(3 J.A. 605 [emphases original].) Moreover, in their rebuttal to the "no" argument, Proposition 26's proponents characterized its opponents as pursuing **government** revenue. "Their interest is simple," the rebuttal stated; they want "more taxpayer money for

the politicians to waste." (3 J.A. 606.) The rebuttal also assured voters that Proposition 26 will protect "legitimate fees" and "WON'T ELIMINATE OR PHASE OUT ANY OF CALIFORNIA'S ENVIRONMENTAL OR CONSUMER PROTECTION LAWS." (*Ibid.* [emphasis original].) Although the County's Ordinance post-dates Proposition 26, it is of regulatory type that pre-dates that initiative, and which the voters did not wish to disturb.

Further, in the same November 2010 election at which they approved Proposition 26, voters rejected Proposition 23—a proposal to suspend the landmark greenhouse gas law enacted as A.B. 32 of 2006. The Legislative Analyst's Impartial Analysis summarized the fiscal impact of Proposition 23, in relevant part, as follows:

> - The suspension of AB 32 could result in a modest net increase in overall economic activity in the state. In this event, there would be an unknown but potentially significant net increase in state and local government revenues.
>
> - Potential loss of a new source of state revenues from the auctioning of emission allowances by state government to certain businesses that would pay for these allowances, by suspending the future implementation of cap-and-trade regulations.
>
> - Lower energy costs for state and local governments than otherwise.

(Motion for Judicial Notice ("MJN") Exh. A at p. 38.) Thus, A.B. 32 is yet another example of a police power measure to regulate economic activity to protect the environment, and voters were informed that it would affect government revenues and impose costs on business. The Legislative Analyst also informed voters such regulation could affect their own finances:

> Energy prices ... would be lower [if Proposition 23 passed] .... This is because the proposed cap-and-trade regulation, as well as the requirement that electric utilities obtain a greater portion of their electricity supplies from renewable energy sources, would otherwise require utilities to make investments that would increase the costs of producing or delivering electricity.

(*Id.* at p. 41.)

In rejecting Proposition 23, and refusing to suspend A.B. 32, voters understood they were upholding a law that forced utilities to pursue investments that would increase customer costs. Thus, at the same time they denied government "more taxpayer money for the politicians to waste" by approving Proposition 26, California's voters affirmed government's ability to enact laws that impose costs on businesses and consumers in the name of environmental protection by rejecting Proposition 23. Accordingly, legislative history of Proposition 26 and its historical context suggest that the interpretation urged by plastic bag proponents is wide of the mark.

### B. Nor Will Proposition 26's Legal Context Support the Interpretation Plastic Bag Proponents Give to Proposition 26

The final unnumbered paragraph of Proposition 26 regarding local government's burden of proof in challenges to its revenues (Cal. Const., art. XIII C, § 1, subd. (e)) is taken verbatim from *Sinclair Paint* and its progeny, as the Sixth District noted in the only published appellate authority to construe that measure. (*Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 996 ("This language repeats nearly verbatim the language of prior cases assessing whether a purported regulatory fee was indeed a fee or a special tax.").) As that court explained:

> Recently in *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 121 Cal.Rptr.3d 37, 247 P.3d 112 (*California Farm Bureau*), the Supreme Court was called upon to determine the validity of a fee imposed upon water appropriators by the State Water Resources Control Board. Although the case did not concern Proposition 26, the court analyzed the language that originated with *San Diego Gas & Electric* and was later adopted by the drafters of Proposition 26.

(*Ibid.*)

There is no question, therefore, that Proposition 26 aimed to affect the legal landscape created by *Sinclair Paint.* However, it is overly simplistic to argue, as Appellants do (Reply Brief at p. 33), that the initiative "overruled" it. For present purposes it is

noteworthy that *Sinclair Paint* and every case applying it involved fees collected and expended by government:

- *Sinclair Paint,* 15 Cal.4th at pp. 871–72: Fee collected by the State for use by the Department of Health Services.
- *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 428–33: Fee collected by the State for use by the State Water Resources Control Board.
- *Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326, 1330–36: Fees collected by San Francisco's Department of Building Inspection transferred to fire and housing departments.
- *California Assn. of Professional Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 939–40: Department of Fish and Game imposed and collected a fee to defray its costs to review local CEQA documents.
- *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 127–28: District collected fees to fund its own emission reduction projects.
- *San Diego Gas & Electric,* 203 Cal.App.3d at pp. 1135–36: District fees to fund its own permitting costs.

Thus, the fact that Proposition 26 was intended to affect fees authorized by *Sinclair Paint* and its progeny supports a view that its concern was government revenues, not police power regulation of private transactions.

Further, similar legislation existed prior to Proposition 26's passage and was not expressly displaced by it. These included San Francisco's 2007 ban on non-compostable plastic bags (MJN Exh. D, § 1703); a 2006 statute requiring stores to establish recycling programs for plastic bags (Stats. 2006, ch. 845, § 2); and a 2008 Manhattan Beach ban on plastic bags upheld by the California Supreme Court against plastic bag proponents' CEQA claims (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155). Although these pre-Proposition 26 laws did not incorporate a fixed charge for paper bags, their similarities to the County's Ordinance reinforce the notion that the Ordinance is part of a pre-existing regulatory trend which voters did not intend Proposition 26 to disturb.

Constitutional amendments are presumed to maintain existing laws absent unmistakable evidence that voters intended to preempt or impliedly repeal them. (*Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1038–39.) Accordingly, Proposition 26 does not preempt laws similar to the County's Ordinance; the legislative history suggests a contrary intent, and it is

possible to harmonize Proposition 26 with those laws by limiting it to impositions which generate government revenue. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1192 ("courts are required to try to harmonize constitutional language with that of existing statutes if possible") [pet'n rev. pending].)

### C. The Police Power is Co-Equal with Proposition 26 and Authorizes Local Economic Regulations Like the County's Ordinance

As a price control, the County's Ordinance is akin to such disparate economic regulations as:

- rent controls (*Birkenfeld v. Berkeley* (1976) 17 Cal.3d 129);
- minimum prices for agricultural goods (*Nebbia v. New York* (1934) 291 U.S. 502);
- minimum and prevailing wage laws (*State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547);
- World War II-era wage- and price-controls (*Hughes v. City of Torrance* (1946) 77 Cal.App.2d 272; *Barkett v. Brucato* (1953) 122 Cal.App.2d 264);
- anti-gouging laws that set price ceilings on vital goods during emergencies (Penal Code, § 396 (misdemeanor to spike prices of essential goods and services during emergency); Bus. & Prof. Code, § 17568.5 (10% cap on

hotel and motel price increases in month following emergency)); and,

- maximum prices for motor vehicle fuels (Bus. & Prof. Code, § 13470.1).

Courts have upheld such measures even though all impose financial obligations on private actors and many have direct or indirect economic impacts on government. For example, minimum wage laws increase both payrolls and payroll taxes, and price controls affect sales tax receipts and governments' own expenditures. Indeed, given the pervasiveness of sales, income, and payroll taxes in our modern society, virtually any change in economic behavior can be said to have **some** impact on government finance. If the County's Ordinance is invalid under Proposition 26, therefore, so are these other measures. However, nothing warned voters that Proposition 26 would prevent price controls, invalidate minimum wage laws, or otherwise strip government of power to regulate the economy to protect consumers and the environment. Accordingly, this Court should be reluctant to reach the dramatic result the plastic bag proponents seek, especially in light of the ballot arguments to the contrary discussed above.

Moreover, if Proposition 26 **did** seek to invalidate these well established exercises of the police power, this would invalidate the initiative. By dramatically reducing the power of state and local legislators, Proposition 26 would have revised the California

Constitution rather than simply amending it. (Compare *Strauss v. Horton* (2009) 46 Cal.4th 364, 386 (Proposition 8 was not a revision of the Constitution) with *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349 (Proposition 115 was).) This Court, of course, is obliged to give Proposition 26 a construction that will protect its constitutionality if its text will bear it.

## III. The Text of Proposition 26 Does Not Require the Result Plastic Bag Proponents Seek

### A. Proposition 26's Crucial Undefined Terms Allow the County's Construction and do not Require the Plastic Bag Proponents'

Proposition 26 provides that "tax" means "any levy, charge, or exaction of any kind imposed by a local government," but does not define any of these terms. Appellants focus on the words "any" and "of any kind." (Reply Brief at p. 1 (referring to Cal. Const., art. XIII C, § 1, subd. (e)).) However, they ignore "levy, charge, or exaction" and "impose." Thus, although Proposition 26 states that anything within a particular range of government actions (i.e., levies, charges and exactions) imposed by government constitutes a "tax," it does not define what that range includes.

### 1. The County's Ordinance Does not "Impose" the Paper Bag Fee

Proposition 26, like Proposition 218[2] which it amends, does not define "impose." However, courts have done so. The Fourth District recently held that a tax is "imposed" for purposes of article XIII C when it is first legislated, not when it is later extended to new territory by virtue of an annexation to a city. (*Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Com'n*, *supra*, 209 Cal.App.4th at 1194 law definitions, the dictionary defines "impose" as "to lay on or set as something to be borne, end.) In the related context of development impact fees, the First District found "to impose" generally means "to establish or apply by authority or force." (*Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1770.) Consonant with these case ured, obeyed, fulfilled, paid, etc.: *to impose taxes*." (Dictionary.com, available at <http://dictionary.reference.com> (as of Dec. 8, 2012).)

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[2]Adopted in November 1996, Proposition 218 adopted articles XIII C and XIII D of the California Constitution. (E.g., *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 (fee on landlords to fund housing code enforcement was not a property related fee subject to Prop. 218).) Proposition 26 added a new definition of "tax" to article XIII C and therefore must be interpreted in light of its framers' decision to place its text there.

Under the County's Ordinance, a 10-cent-per-paper-bag fee is due only when a retailer voluntarily chooses to make paper bags available to its customers, and a consumer voluntarily chooses to purchase one. (L.A. County Code, § 12.85.040; 3 J.A. 464–73, 592.) In this sense, it is comparable to the result in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, in which Justice Mosk's majority opinion concluded that a fee on landlords collected via the property tax roll to fund housing code enforcement was not a property related fee subject to Proposition 218 because landlords were not obliged to use their properties as rental housing. The County's Ordinance requires a ten-cent price for paper bags, but no customer need buy and no retailer need sell them.

#### 2. The Minimum Paper Bag Fee is Not a "Levy, Charge, or Exaction" Under Proposition 26

No court has yet defined the Proposition 26 terms "levy, charge, or exaction," but *Citizens Ass'n of Sunset Beach* and *Ponderosa Homes* demonstrate that dictionary definitions are appropriate to determine the voters' intent. Black's Law Dictionary provides relevant definitions of two of these crucial terms:

- Levy: "The imposition of a fine or tax; the fine or tax so imposed. — Also termed *tax levy*." (Black's Law Dict. (9th ed. 2009.)

- Charge: "An encumbrance, lien, or claim <a charge on property>. … Price, cost, or expense <free of charge>." (*Ibid.*)

Exaction, as used in the context of government finance, refers to a legal requirement that one donate land or pay money to government in connection with development of land. (E.g., *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 (applying takings analysis to "monetary exaction imposed … as a condition of approving plaintiff's request that the real property in suit be rezoned to permit the construction of a multi-unit residential condominium"); *Grupe v. California Coastal Com.* (1985) 166 Cal.App.3d 148, 160 ("examin[ing] the Coastal Commission's constitutional and statutory mandate to exact access dedications as a condition of development").)

Standard dictionaries more accessible to lay voters than Black's provide similar definitions:

- "Levy" means "an imposing or collecting, as of a tax, by authority or force;"
- "Charge" means "expense or cost," or "a fee or price charged," or "a pecuniary burden, encumbrance, tax, or lien; cost; expense; liability to pay;"
- "Exaction" means "the act of exacting, esp. money" or "a sum or payment exacted."

(Dictionary.com <http://dictionary.reference.com> (as of Dec. 9, 2012).)

None of these dictionary definitions can be understood to encompass a price requirement established for private economic activity in a regulated marketplace. While regulated private actors

may "impose" a "charge," a legislative price control does not—no one must pay a price control by virtue of the control alone. A private, voluntary decision to purchase a product—here a paper bag—triggers the payment.

Thus, broad as Proposition 26's language is, it does not include the County's Ordinance or other police power regulations of private economic activity. Rather, the average voter would understand its language, especially in light of the ballot arguments, as limited to government actions which require private parties to give money or other things of value to government.

### B. Proposition 26's Exemptions Are Limited to Government Revenues and Expenditures, Suggesting Its Scope is Also So Limited

The seven exemptions to Proposition 26—the great majority of its text—all speak to **government** revenues and expenditures. These exemptions are for:

- "benefit conferred or privilege granted" by government (Cal. Const., art. XIII C, § 1, subd. (e)(1));
- "service or product" provided by government (*id.* at subd. (e)(2));
- "reasonable regulatory costs to a local government" (*id.* at subd. (e)(3));
- "charge imposed for entrance to or use of local government property" (*id.* at subd. (e)(4));

- "fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law" (*id.* at subd. (e)(5));
- "charge imposed as a condition of property development" (*id.* at subd. (e)(6)); and,
- "[a]ssessments and property-related fees imposed [by a local government] in accordance with the provisions of Article XIII D" (*id.* at subd. (e)(7)).

Exceptions to a rule obviously shed light on what it does not except. Were it otherwise, revenues which do not flow to government would be subject to Proposition 26, but exceptions the voters approved when they adopted the measure. This would produce results voters obviously did not intend. As one example: If the San Diego Gas & Electric Company's utility rates become "charges" under Proposition 26 because the San Diego Air Pollution Control District imposes regulations which have the effect of increasing those "charges," voter approval is required for the utility to increase rates because the exception of article XIII C, § 1, subd. (e)(2) is limited to "a charge imposed for a specific **government** service or product." (Emphasis added.) This, of course, can hardly have been the voters' intent—why exempt government utility rates from Proposition 26, but not those of investor-owned utilities? As the legislative history suggests no reason for this counter-intuitive

result, the Court should be reluctant to construe Proposition 26 to require it.

Thus, because each of its exceptions applies only to government revenue measures, it is sensible to interpret Proposition 26's use of the terms "levy, charge, or exaction" to be similarly limited to measures that directly fund government. Similar reasoning animates *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, which found that a water connection charge on new development was not a property related fee subject to Proposition 218 because the district could not know whom to provide notices required by article XIII D, section 6, subd. (a)(1). Proposition 218 does not require impossible clairvoyance and Proposition 26, too, can be interpreted so as to avoid absurd results.

This logic of the relationship of the operative terms of article XIII C to its express exemptions animates an aspect of the trial court's statement of decision which the plastic bag proponents criticize. (Reply Brief at p. 35.) The trial court reasoned that, if the paper bag fee were deemed to be a government charge subjected to Proposition 26, then the retailer must be acting as an agent of government in imposing and collecting the fee. (3 J.A. 688.) If the retailer is a government agent for the purpose of revenue collection, it must also be a government agent for the purpose of product provision (*ibid.*); otherwise, the scope of Proposition 26 and its exceptions would not be parallel and absurdities would result like

the required voter approval of private, but not public, utility rates hypothesized above.

In criticizing Judge Chalfant's reasoning, Appellants apply the retailer-as-government-agent analogy only so far as suits their purposes rather than taking it to its logical conclusion. They see retailers as County agents to find a tax, but they refuse to see retailers as County agents in providing paper bags—thus avoiding the exception of article XIII C, section 1, subd. (e)(1). In short, Appellants refuse to apply the text of Proposition 26 consistently and in light of its apparent intent. Their construction therefore fails.

### C. Proposition 26 Preserves Price Controls, Including the County's Ordinance

In a curious phrase, Proposition 26 preserves local power over "agricultural marketing orders." Among the measure's exception is the third, for regulatory fees:

> (e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:
>
> ....
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, **enforcing agricultural marketing orders**, and the administrative enforcement and adjudication thereof.

(Cal. Const., art. XIII C, § 1, subd. (e)(3) (emphasis added).) However, local governments have no role in "enforcing agricultural marketing orders" under current law; these orders—which commonly set minimum prices for farm products—are the province of the state and federal governments. (E.g., *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 476–79 (denying First Amendment challenge to California Plum Marketing Program and discussing federal and state statutory bases of such orders).)

It is tempting to ignore this language as mere surplusage resulting from too slavish a parallel to article XIII A, section 3, subdivision (b)(3)—the provision of Proposition 26 governing state legislation. However, this Court may not read this language out of the Constitution, but must find some meaning in it. Perhaps it is meant to be triggered should state legislation ever delegate to local governments a role with respect to agricultural marketing orders as the federal government has to states. (*Ibid.*) If so, however, this language demonstrates that the voters who approved Proposition 26 did not intend to preclude enforcement of minimum price requirements in particular and did intend to protect local government's police power to regulate economic activity in general. For that, as discussed above, is what the ballot arguments led voters to expect.

## IV. Related Case Law Supports the Trial Court's Interpretation of Proposition 26 as Regulating only Government Revenues

In *California Taxpayers' Association v. Franchise Tax Board* (2010) 190 Cal.App.4th 1139, 1148–49, the Third District distinguished a late penalty from a tax that requires two-thirds approval of each chamber of the Legislature under article XIII A, section 3. While this discussion construes the language of that section before Proposition 26 amended it, it is part of the background law of our State the voters are understood under *Penziner* to have preserved absent unmistakable contrary intent. Accordingly, its discussion is helpful. The case involved Revenue and Taxation Code section 19138, which imposes a 20 percent penalty on late corporate taxes and was projected to generate some two billion dollars for the state in the first year of its application.

> The question of whether an imposition is a "tax" is not simply a question of raising revenue. A penalty, of course, directly raises revenue by imposing penalties. A penalty, as well, regulates conduct (and indirectly raises revenue) by deterring those tempted not to pay their taxes fully. One way to measure the relative importance of revenue versus regulation is to track the revenues the imposition brings in. Over time, a tax will generally yield relatively stable revenues (with a relatively stable economy and tax rate, a tax being a compulsory collection of revenues for governmental purposes), but a penalty, if it is enforced effectively, will generally decrease in direct revenue amount. …

This view of section 19138 as a penalty, and not a tax, is also supported by three other observations.

First, as the trial court aptly recognized, "there is one important distinction between a penalty and a tax: while a tax raises revenue if it is obeyed, a penalty raises revenue only if some legal obligation is disobeyed." In line with being a penalty, section 19138 directly raises revenue only if a corporate taxpayer has disobeyed a legal obligation (by understating its actual tax liability by over $1 million). Furthermore, the continuous decline, over time, in projected revenue from section 19138 concretely illustrates this aspect of a penalty: As more corporations fully pay their taxes to avoid the penalty, the penalty revenue declines.

A second observation, and one that carries a certain irony, is found in the language of article 13A, section 3 itself, the very provision that CalTax relies upon to claim section 19138 is unconstitutional here. Article 13A, section 3, stated that "any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto *whether by increased rates or changes in methods of computation* must be imposed by an Act passed by [at least two-thirds of the Legislature]." (Italics added.) Section 19138 imposes a penalty for understating tax liability. It does not impose an increase in the tax rate or a change in the method of tax computation.

... CalTax argues that the primary purpose of section 19138 was to raise revenue to balance that budget. Again, though, CalTax has focused on the mere raising of revenue to conclude that section 19138 is a tax. The question of whether an imposition is a tax, as we have seen, is not simply a question of raising revenue, but *how* that revenue is raised. The projected

> revenues from section 19138's first year of operation are significant, but thereafter these projections decline steeply and continuously. Again, this is the mark of a penalty, not a tax. If death and taxes are the only two things certain in life, section 19138 is much more death than tax, given this rate of dissipation.

(*California Taxpayers' Association v. Franchise Tax Board*, *supra*, 190 Cal.App.4th at pp. 1148–49 (original abridgment and emphasis).)

Thus, taxes are intended to raise revenue, while penalties are intended to change behavior. Tax revenues can be expected to be stable over the long term, while penalty proceeds should fall over time as regulated parties change their behavior. Finally, labels are not determinative, but they do matter. (*Id.* at p. 1147 ("We begin with the language of section 19138. The section says it is a "penalty." While this legislative label is not the end of the matter, it certainly is a start.").)

These indicia all weigh against finding Los Angeles County's paper bag fee to be a tax. It is not so labeled; it is not intended to raise funds for government, but rather to change consumer (and retailer) behavior; and its revenues to retailers from the ten-cent charge are anticipated to decline as those behaviors change. The record demonstrates that these revenues are intended to, and likely will, fall over time as the Ordinance is enforced. (See 2 J.A. 289; 1 C.R. 52–53; 6 C.R. 1577.)

As Appellants point out, government cannot delegate a power it does not have. (Appellants' Opening Brief at p. 31 (citing *Howard*

*Jarvis Taxpayers' Assn. v. Fresno Metropolitan Projects Authority* (1995) 40 Cal.App.4th 1359, 1376).) However, government **can** regulate private economic activity. The County did not empower retailers to tax paper bags; it required them to stop hiding the cost of paper bags in the price of groceries because of the environmental and other consequences of this practice. Effectively, this is an anti-tying rule comparable to those governed by antitrust regulations—paper bags must be priced separately from groceries so consumers can choose whether to avoid the environmental and other consequences of paper bag production, transportation and disposal. (Cf. *Morrison v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514 (anti-tying provisions of California's Cartwright Act as applied to cable television provider were not preempted as price controls under federal Cable Television Consumer Protection and Competition Act).)

Moreover, *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982 also suggests Appellants read Proposition 26 too broadly when they seek to undermine the County's police power to regulate economic activity. In that case, the court noted that housing code enforcement fees were not subject to articles XIII C or XIII D under *Apartment Association of Los Angeles v. City of Los Angeles* (2001) 24 Cal.4th 830, and rejected the claim that Proposition 26 was intended to change that result. (*Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 995–96 ("Petitioner acknowledges *Apartment Assn.* but argues that Proposition 26 was enacted to undermine that

ruling. We do not read Proposition 26 as affecting the *Apartment Assn.* analysis.").)

## V. Proposition 26's Changes to Language Governing Enactment of State Taxes Shed No Light Here

For the first time in their Reply Brief, Appellants argue the relevance of the fact that Proposition 26 removed the phrase "for the purpose of increasing revenues" from article XIII A, section 3's requirement that State taxes be approved by two-thirds of each chamber of the Legislature. (See Reply Brief at pp. 2–3, 12–13.) However, the rules for state taxes and local taxes have differed since Proposition 13 first adopted article XIII A in 1978. Indeed, the two have always been governed by different articles of the Constitution. (Compare Cal. Const., art. XIII A, § 3 (state taxes require two-thirds vote of each chamber of Legislature, but no vote of the people) with art. XIII C, § 2 (local taxes require simple majority of legislative body and voter approval).) The framers of Proposition 218 supplemented Proposition 13, but did not amend it. The framers of Proposition 26 amended both, without changing the distinctions between them.

Proposition 26's amendment of article XIII A, section 3 to replace "for the purpose of increasing revenues" to "which results in any taxpayer paying a higher tax" did not have the implications for the local government provisions of article XIII C that Appellants would find. Rather, this amendment was intended to resolve a state legislative debate about whether a bill lowering some taxes and

raising others was subject to the two-thirds legislative vote required by article XIII A, section 3. As the Legislative Analyst wrote in her Impartial Analysis of Proposition 26:

> The State Constitution currently specifies that laws enacted "for the purpose of increasing revenues" must be approved by two-thirds of each house of the Legislature. Under current practice, a law that increases the amount of taxes charged to some taxpayers but offers an equal (or larger) reduction in taxes for other taxpayers has been viewed as not increasing revenues. As such, it can be approved by a majority vote of the Legislature. ... The measure [Proposition 26] specifies that state laws that result in *any* taxpayer paying a higher tax must be approved by two-thirds of each house of the Legislature.

(3 J.A. 603–604 (original emphasis).)

Removing the words "increasing revenues" therefore did not eliminate the concept that taxes necessarily involve revenue generation. It merely addressed the scenario described in the Impartial Analysis: where a measure decreases taxes for some taxpayers but increases taxes for others. The effect (and the only effect) was to provide that, even if a law results in a net decrease in revenue generation to the State, it still requires two-thirds legislative approval if any taxpayer's liability increases.

Further, by contrast to this language affecting the State Legislature alone, the balance of Proposition 26 states essentially

identical[3] tax rules and exceptions to define both state and local taxes. (Compare Cal. Const, art. XIII A, § 3, subd. (b) with art. XIII C, § 1, subd. (e).) Indeed, the parallels are so strong that the curious provision in article XIII C, section 1, subd. (e)(3) regarding agricultural marketing orders discussed above arises.

Given the virtually identical language of the seven exemptions stated in article XIII A, section 3 and in article XIII C, section 1, subd. (e), any deviations must be assumed to have meaning under the expressio unius rule:

> Under the maxim expressio unius est exclusio alterius, that is, the expression of certain things in a statute necessarily involves exclusion of other things not expressed, which applies only in the event of statutory ambiguity or uncertainty, the enumeration of acts, things, or persons as coming within the operation or exception of a statute will preclude the inclusion by implication in the class covered or excepted of other acts, things, or persons.

(58 Cal.Jur.3d (2012) Statutes, § 127 (footnotes collecting cases omitted).)

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[3]There are a very few minor distinctions to which it may be hard to give meaning. For example, article XIII A, section 3, subd. (b)(3) refers to "regulatory costs to the State incident to issuing licenses and permits." Article XIII C, section 1, subd. (e)(3) uses this same language, except that "incident to" is replaced with "for."

Accordingly, the decision of Proposition 26's framers not to replicate in article XIII C, section 1 the language of article XIII A, section 3 "which results in any taxpayer paying a higher tax" necessarily means this test does not apply to local governments.

That intention is sensible because no such definition was needed for local governments. The Proposition 218 Omnibus Implementation Act of 1997[4] had already provided a similar restriction. Government Code section 53750, subd. (h) defines "increase" with respect to taxes (approved by voters under article XIII C, § 2), assessments (approved by property owners under article XIII D, § 4), and property related fees (subject to a property owner protest under article XIII D, § 6) as follows:

> (h)(1) "Increased," when applied to a tax, assessment, or property-related fee or charge, means a decision by an agency that does either of the following:
>
> (A) Increases any applicable rate used to calculate the tax, assessment, fee or charge.

---

[4]The Supreme Court found this statute, enacted as urgency legislation by a unanimous Legislature in the wake of the adoption of Proposition 218 to aid implementation of the measure, to reflect the voters' intent in approving it. (*Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 227, 291 (applying Gov. Code § 53753 to construe article XIII D, § 4's provisions regarding assessments).)

(B) Revises the methodology by which the tax, assessment, fee or charge is calculated, **if that revision results in an increased amount being levied on any person or parcel.**

(2) A tax, fee, or charge is not deemed to be "increased" by an agency action that does either or both of the following:

(A) Adjusts the amount of a tax or fee or charge in accordance with a schedule of adjustments, including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996.

(B) Implements or collects a previously approved tax, or fee or charge, so long as the rate is not increased beyond the level previously approved by the agency, and the methodology previously approved by the agency is not revised so as to **result in an increase in the amount being levied on any person or parcel**.

(3) A tax, assessment, fee or charge is not deemed to be "increased" in the case in which the actual payments from a person or property are higher than would have resulted when the agency approved the tax, assessment, or fee or charge, if those higher payments are attributable to events other than an increased rate or revised methodology, such as a change in the density, intensity, or nature of the use of land.

(Gov. Code § 53750, subd. (h) (emphasis added).)

Thus, the change to article XIII A, section 3 on which Appellants rely did not eliminate revenue generation from the definition of "tax," nor was it intended to apply to local government. Even if it were, however, there would still be a need to limit the phrase "which results in any taxpayer paying a higher tax" to a

"levy, charge, or exaction" that funds government. Otherwise, Proposition 26 would have absurd breadth, transforming our representative democracy into a direct democracy in which election season can never end. In light of the discussion above, we need cite but one example.

If Proposition 26 meant as the plastic bag proponents wish, an increase in the minimum wage would require a two-thirds vote of the Legislature, as higher payrolls generate higher payroll taxes for at least one taxpayer. The phrase "which results in any taxpayer paying a higher tax," added to article XIII A but not to article XIII C, does not change the basic issue here—the phrase "levy, charge, or exaction" cannot be understood to reach government regulation of private economic activity without absurd results voters plainly did not intend.

## VI. Appellants' Parade of Horribles Cannot Justify Reading Proposition 26 More Broadly than Voters Intended

Also in their Reply Brief, Appellants cite soda-tax ballot measures in Richmond and El Monte. These measures were presented to the voters as taxes, and they were defeated by ample industry spending. (Reply Brief at p. 5, and fn. 1.) The Richmond measure proposed that proceeds from the tax would be "placed in the City's general fund" to be used "for any lawful city purpose," especially including "sports fields, recreation, and health

education." (MJN Exh. B at pp. 20, 22.) The El Monte measure also would have placed tax proceeds into the general fund to fund services including "park and street maintenance, recreational programs, the restoration of emergency reserves and public safety and emergency response services." (MJN Exh. C.) Thus, these measures shed no light here; they were plainly taxes rather than economic regulations.

Appellants' general point is no more persuasive. That a power might be abused, and that a remedy in equity may be needed to correct the abuse, does not mean the power does not exist. "Denial of existence of a municipal power should not be predicated solely upon suppositious evil which might conceivably result from an abuse of that power." (*Manteca Union High School Dist. v. City of Stockton* (1961) 197 Cal.App.2d 750, 754.) The courts need not ascribe the worst motives to the elected branches, but they reserve their equitable powers to address such misconduct as may occur.

## CONCLUSION

Appellants' argument proves too much. If Proposition 26 means that direct democracy must be employed each and every time government seeks to affect economic relationships among private actors, then it sought to fundamentally restructure California government. Because initiatives may not revise the California Constitution, but may only amend it, Appellant's intepretation would invalidate Proposition 26.

Moreover, this Court need not read Proposition 26 as Appellants urge because voters were never warned of such a reading and cannot be understood to have intended it. The County's Ordinance is a commonplace exercise of the police power to regulate economic activity—a well established government authority that Proposition 26 did not seek to undermine. Because the County receives no revenue from the pricing provision for paper bags it establishes, the Ordinance does not impose a tax.

Dated: December 14, 2012

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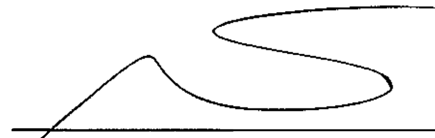

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114297.4

## CERTIFICATION OF WORD COUNT

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

The text of this brief consists of 8,476 words, as counted by the Word version 2007 word-processing software program used to generate the brief.

Dated: December __14__, 2012

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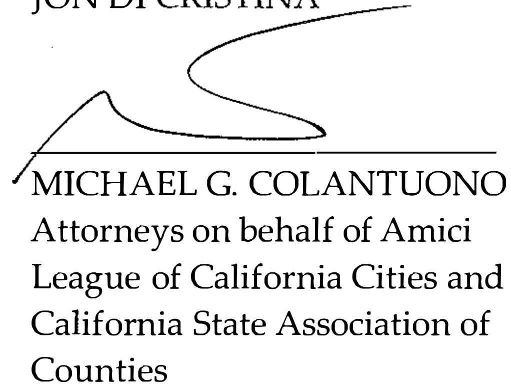

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**CERTIFICATE OF SERVICE**

Court of Appeal, Second Appellate District, Division Three

*Lee Schmeer, et al., v. County of Los Angeles, et al.*

Case No. B240592

I, Ashley A. Lloyd, declare:

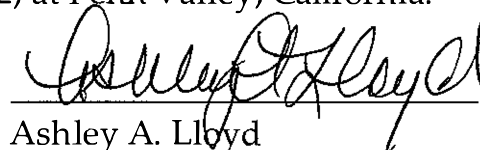
I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 11364 Pleasant Valley Road, Penn Valley, California 95946. On December 14, 2012, I served the document described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF REPONDENTS** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

**SEE ATTACHED LIST**

X **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Penn Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 14, 2012, at Penn Valley, California.



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