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VIA HAND DELIVERY

December 20, 2012

SUPREME COURT
FILED

DEC 20 2012

Frank A. McGuire Clerk

Deputy

The Honorable Chief Justice Tani Cantil-Sakauye and
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4712

Re: Request for Depublication: *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2012) 210 Cal.App.4th 1006, Case No. S207173, F063849 (decision filed October 30, 2012) (Rules of Court 8.1125)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rules of Court, rule 8.1125, the League of California Cities ("League") respectfully requests that this Court depublish the Fifth District Court of Appeal's opinion in *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2012) 210 Cal.App.4th 1006, Case No. S207173, F063849 ("Opinion").

The League will separately file an amicus curiae letter in support of the Petitions for Review filed by the City of Sonora ("City") and Real Parties in Interest James Grinell and Wal-Mart Stores, Inc. Should the petitions be denied, the League seeks depublication for the reasons set forth below.

I. Interest of the League

The League of California Cities 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, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

II. Why the Opinion Should Not Remain Published

Courts have long recognized that the right of California voters to propose and adopt legislation, which has been guaranteed by the California Constitution since 1911, is "one of the most precious rights of our democratic process." (*Associated Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 591). Thus, this Court has noted that "statutory procedural requirements," such as those imposed by the California Environmental Quality Act ("CEQA"), generally do not apply to initiatives generated by the electorate. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 786.)

In a departure from these long-held principles, and in direct conflict with the decision in *Native American Sacred Site and Environmental Protection Association v. City of San Juan Capistrano* ("*Native American Sacred Site*"), ((2004) 120 Cal.App.4th 961, 966), the Opinion holds that a city must prepare an environmental impact report ("EIR") under CEQA whenever it chooses to adopt a proposed initiative without alteration pursuant to Elections Code section 9214. This conclusion ignores the careful balance struck in the Elections Code and effectively repeals the "direct adoption" or "indirect initiative" option, which has been a part of the local initiative power for over a century. For this reason, and for the additional reasons provided below, the Opinion should be depublished.

A. The Elections Code Governs the Implementation of the Electorate's Reserved Constitutional Power of Initiative.

The reserved power of initiative at the local level is secured in Article II, section 11 of the California Constitution, which states: "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide." (Cal. Const. art. II, § 11.) The procedures adopted by the Legislature for municipal initiatives are codified in sections 9200-9226 of the Elections Code. It is these procedures implementing the reserved initiative right – rather than statutory provisions found elsewhere in the California Code – that govern here.

In particular, section 9214 requires that a local governing body respond in one of three ways to an initiative petition signed by at least fifteen percent of the electorate: (a) by adopting it without alteration within 10 days; (b) by immediately ordering a special election; or (c) by ordering further study under Elections Code section 9212 and thereafter either adopting the ordinance or calling a special election within 10 days. (Elec. Code § 9214.) Section 9212 provides an abbreviated, 30-day period for review of the fiscal, environmental, and other impacts of a proposed initiative. (Elec. Code § 9212.)

These procedures "represent[] a legislative effort to balance the right of local initiative with the worthy goal of ensuring that elected officials and voters are informed about the possible consequences of an initiative's enactment." (*DeVita*, supra, 9 Cal.4th at 795 [discussing Elections Code section 9111, the equivalent of section 9212 for county elections].) The compressed timelines of Elections Code sections 9212 and 9214 ensure that review does not interfere with prompt action on an initiative petition submitted by voters under their reserved constitutional authority. (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 189.) Thus, generally applicable "statutory procedural requirements," such as those imposed by CEQA, must yield to the procedures and timelines contained in the Elections Code. (See *DeVita*, supra, at 794-795 [Instead of CEQA review, the Elections Code allows an inquiry into "the environmental impacts of a proposed initiative to the extent consistent with the time requirements of the initiative process"].)

B. The Opinion Effectively Repeals the Direct Adoption Option, Which Has Been an Integral Part of the Initiative Power Since 1911.

The Opinion acknowledges a conflict between the timelines associated with initiative petitions and full-blown CEQA review, but inappropriately resolves this conflict by effectively repealing the direct adoption provision of Elections Code section 9214. In the Opinion's own words: "We acknowledge that our holding means the direct-adoption option of Elections Code section 9214, subdivision [(a)], will usually not be available for an initiative that would have a significant environmental impact." (Opinion at p. 26.) This cavalier attitude flies in the face of the long-standing principles that courts must jealously guard the people's reserved power of initiative and liberally construe the Elections Code to promote this power. (See *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 774 [discussing the related power of referendum].)

The Opinion's "solution" is especially imprudent because it treats the conflict between CEQA and the Elections Code as merely a matter of statutory construction. To the contrary, the right to bring an initiative petition is one the voters have reserved to themselves in the Constitution, and the ability of citizens to propose an ordinance for direct adoption has always been an essential feature of the local initiative power.

Proposition 7, which first established the reserved power of initiative in 1911, codified the initiative power in amended former Article IV, section 1 of the California Constitution. At the state level, the former Article IV, section 1 provided that the Secretary of State must transmit to the Legislature any initiative supported by at least five percent (5%) of the voters, "to be either enacted or rejected without change or amendment by the legislature, within forty days." (Cal Const. former art IV, § 1, as adopted October 10, 1911.) At the local level, Proposition 7 provided that the powers of

initiative and referendum would be governed by state statute. As originally adopted, the implementing statute for cities read, in pertinent part:

> Ordinances may be enacted by and for any incorporated city or town of the state in the manner following: Any proposed ordinance may be submitted to the legislative body of such city or town by a petition filed with the clerk of such legislative body after being signed by qualified electors of the city or town not less in number than the percentages hereinafter required. . . . If the petition accompanying the proposed ordinance be signed by electors not less in number than twenty per cent of the entire vote cast within such city or town for all candidates for governor of the state, at the last preceding general election at which such governor was voted for, and contains a request that such ordinance be submitted forthwith to vote of the people at a special election, then the legislative body shall either:
>
> (a) Pass such ordinance without alteration at the regular session at which it is presented and within ten days after it is presented; or,
>
> (b) Forthwith, the legislative body shall proceed to call a special election at which such ordinance, without alteration, shall be submitted to a vote of the electors of the city or town.

(Stats. 1911, Ex. Sess. 1911, ch. 33, § 1, pp. 131-132, a true and correct copy of which is attached as Appendix A to this brief.) A similar provision applicable to county initiative ordinances was adopted during the same year. (*Ex parte Zany* (1912) 20 Cal.App. 360, 364-365.)

Thus, contrary to the analysis of the Opinion, this case does not present yet another situation in which "statutes point in different directions and must be reconciled with one another." (Opinion at p. 26.) Rather, the statutory procedural requirements contained in CEQA must yield to the constitutionally protected rights of California voters to propose legislation to be adopted, without alteration, in a timely manner. The Court should depublish the Opinion to confirm this principle, which was correctly applied in *Native American Sacred Site.*

C. Requiring an EIR Prior to "Direct Adoption" of an Initiative Petition Would Not Serve the Purposes of CEQA.

Perhaps the most surprising aspect of the Opinion's choice to prioritize CEQA over the initiative power is that its decision does little to further the purposes of the CEQA review process. In short, the Opinion forces a square peg into a round hole.

The purposes of preparing an EIR are: (1) to identify the significant effects on the environment of a project; (2) to identify alternatives to the project; and (3) to indicate the manner in which those significant effects can be mitigated or avoided. (Pub. Res. Code § 21002.1, subd. (a).) Among the alternatives that an agency ***must*** consider is "the specific alternative of 'no project'." (CEQA Guidelines, § 15126.6, subd. (e).) In addition, "[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (Pub. Res. Code § 21002.1, subd. (b).)

Under Elections Code 9214, as *Native American Sacred Site* correctly recognized, a city has a ministerial duty to adopt the initiative without alteration or order a special election. (*Native American Sacred Site*, supra, 120 Cal.App.4th at 969.) It cannot take "no action" on the petition. Nor may it propose alternatives or take any other steps that would mitigate or avoid the environmental impacts of the proposed initiative. Unlike an agency-generated ballot measure, a city has no discretion to make adjustments to the proposed law following completion of an EIR. (See *San Bernardino Associated Governments v. Superior Court* (2006) 135 Cal.App.4th 1106, 1122 [CEQA applies when an agency is responsible for *shaping* a project].) In other words, preparing an EIR prior to action under Elections Code section 9214 would be largely an exercise in futility.

The only benefit that could arise from requiring an EIR is the identification of significant environmental effects of the initiative. In the context of voter-sponsored initiatives, however, the Legislature has already selected the means by which this interest can be served by enacting Elections Code section 9212. Again, the compressed timelines contained in section 9212 "represent[] a legislative effort to balance the right of local initiative with the worthy goal of ensuring that elected officials and voters are informed about the possible consequences of an initiative's enactment." (*DeVita*, supra, 9 Cal.4th at 795.) To the extent Tuolumne Jobs and Small Business Alliance desires a different balance of these competing interests, its recourse is with the Legislature, not "legislation by judicial fiat." (*Ibid.*)

The fact that past "attempts to amend the Elections Code to subject voter-sponsored initiatives to CEQA control have failed," does not justify the Opinion's decision to nullify a significant portion of the reserved right of initiative. (*Id.* at 794.) To the contrary, "[w]hile only limited inferences can be drawn from bills the Legislature failed to enact [citation], the defeat of attempts to impose more stringent environmental review requirements on [. . .] initiatives provides additional corroboration that the Legislature did not intend such requirements to obstruct the exercise of [the initiative power]." (*Id.* at p. 795; see also *Native American Sacred* Site, supra, 120 Cal.App.4th at 968.)

D. The Opinion Should Not Remain Published Because It Creates Uncertainty for Local Governing Bodies Presented With Initiative Petitions.

The Opinion expressly creates a conflict among the Courts of Appeal on the issue of whether CEQA applies to direct adoption of an initiative ordinance under Elections Code section 9214, subdivision (a). (Opinion at pp. 2-3 ["[W]e publish the portion of our opinion dealing with this issue because it creates a split of authority, as we respectfully decline to follow [*Native American Sacred Site*]."].) As explained in the League's letter in support of the Petitions for Review filed by Real Parties in Interest James Grinell and Wal-Mart Stores, Inc., the uncertainty created by the Opinion creates a significant quandary for local agencies. The Opinion should be depublished to resolve this conflict and to allow the correctly-reasoned decision in *Native American Sacred Sites* to govern.

III. Conclusion

In holding that the City must prepare an EIR under CEQA prior to adopting a voter-sponsored initiative, the Opinion sweeps aside the careful balance of competing interests that the Legislature struck in the Elections Code. Far from providing a liberal construction to the provisions of the Elections Code implementing the people's reserved power of initiative, the Opinion adopts a reading that effectively nullifies a key provision in Elections Code section 9214. By doing so, the Opinion demands that the City engage in a futile exercise that would vindicate neither the interests of the public nor the purposes of CEQA. Accordingly, the League respectfully requests depublication of the Opinion.

Sincerely,

Randy Riddle
Albert Yang

AY/rr

APPENDIX A

THE

STATUTES OF CALIFORNIA

AND

AMENDMENTS TO THE CONSTITUTION

PASSED AT THE

EXTRA SESSION OF THE THIRTY-NINTH LEGISLATURE

1911

BEGAN ON MONDAY, NOVEMBER TWENTY-SEVENTH, AND ENDED ON SUNDAY, DECEMBER TWENTY-FOURTH, NINETEEN HUNDRED AND ELEVEN

SACRAMENTO

FRIEND WM. RICHARDSON - - - SUPERINTENDENT STATE PRINTING

1912

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SEC. 2. This act is not intended to apply to those cities having a freeholders' charter, adopted under the provisions of section 8 of article XI of the constitution, and having in such charter provision for the recall of elective officials by the electors. Application of act to chartered cities.

SEC. 3. Section one (1) of an act entitled "An act adding three new sections to an act entitled 'An act to provide for the organization, incorporation and government of municipal corporations,' approved March 13, 1883, to be numbered 10, 11 and 12 and relating to the government of municipal corporations and providing for the recall, initiative and referendum," and approved March 14th, 1911, is hereby repealed. Repeal of former law.

CHAPTER 33.

An act to provide for direct legislation by cities and towns, including initiative and referendum.

[Approved January 2, 1912.]

The people of the State of California do enact as follows:

SECTION 1. Ordinances may be enacted by and for any incorporated city or town of the state in the manner following: Any proposed ordinance may be submitted to the legislative body of such city or town by a petition filed with the clerk of such legislative body after being signed by qualified electors of the city or town not less in number than the percentages hereinafter required. The signatures to the petition need not all be appended to one paper. Each signer shall add to his signature his place of residence and occupation, giving street and number, where such street and number, or either, exist, and if no street or number exist, then such a designation of the place of residence as will enable the location to be readily ascertained. Each such separate paper shall have attached thereto an affidavit made by a qualified elector of the city or town, and sworn to before an officer competent to administer oaths, stating that the affiant circulated that particular paper and saw written the signatures appended thereto; and that according to the best information and belief of the affiant, each is the genuine signature of the person whose name purports to be thereunto subscribed, and of a qualified elector of the city or town. Within ten days from the date of filing such petition, the clerk shall examine, and from the records of registration, ascertain whether or not said petition is signed by the requisite number of qualified electors, and he shall attach to said petition his certificate showing the result of said examination. If by the clerk's certificate the petition is shown to be insufficient, it may be supplemented within ten days from the date of such certificate by the filing of additional papers, duplicates of the Direct legislation by municipal corporations. Initiative; ordinance proposed by electors.

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original petition except as to the names signed. The clerk shall, within ten days after such supplementing papers are filed, make like examination of the supplementing petition, and if his certificate shall show that all the names to such petition, including the supplemental papers, are still insufficient, no action on the petition shall be mandatory on the legislative body; but the petition shall remain on file as a public record; and the failure to secure sufficient names shall be without prejudice to the filing later of an entirely new petition to the same or similar effect. If the petition shall be found to be sufficient, the clerk shall submit the same to the legislative body at its next regular session. If the petition accompanying the proposed ordinance be signed by electors not less in number than twenty per cent of the entire vote cast within such city or town for all candidates for governor of the state, at the last preceding general election at which such governor was voted for, and contains a request that such ordinance be submitted forthwith to a vote of the people at a special election, then the legislative body shall either:

(*a*) Pass such ordinance without alteration at the regular session at which it is presented and within ten days after it is presented; or,

Election.

(*b*) Forthwith, the legislative body shall proceed to call a special election at which such ordinance, without alteration, shall be submitted to a vote of the electors of the city or town.

If the petition be signed by electors not less in number than ten per cent of the entire vote cast for all such candidates for governor at the last preceding election when such candidates for governor were voted for, and the ordinance petitioned for is not required to be, or for any reason is not, submitted to the electors at a special election, and is not passed without change by said legislative body, then such ordinance, without alteration, shall be submitted by the legislative body to a vote of the electors at the next regular municipal election.

Ballots used at elections.

The ballots used when voting upon said proposed ordinance shall have printed thereon the words "Shall the ordinance (stating the nature thereof) be adopted?" Opposite such proposition to be voted on, and to the right thereof, the words "Yes" and "No" shall be printed on separate lines, with voting squares. If an elector shall stamp a cross (X) in the voting square after the printed word "Yes," his vote shall be counted in favor of the adoption of the ordinance, and if he shall stamp a cross (X) in the voting square after the printed word "No," his vote shall be counted against the adoption of the same. If a majority of the qualified electors voting on said proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city or town, and be considered as adopted upon the date that the vote is canvassed and declared by the canvassing board, and go into effect ten days thereafter. Such ordinance shall have the same force and effect as one passed by the legislative body of the city or town, except that no ordinance proposed by

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petition as in this section provided, and thereafter passed by the vote of the legislative body of the city or town without submission to a vote of the people, or voted upon and adopted by the people, shall be repealed or amended except by a vote of the people, unless provision otherwise be made in the ordinance itself. Any number of proposed ordinances may be voted upon at the same election in accordance with the provisions of this statute; *provided*, that there shall not be held under this statuto more than one special election in any period of six months. If any measure be submitted upon an initiative petition of registored voters, as hereinbefore provided, the persons filing said petition shall have the right, if they so choose, to present and file therewith a written argument in support thereof not exceeding three hundred words in length, which argument shall be printed upon the sample ballot issued for said election. Upon the same ballot shall also be printed any argument of not exceeding three hundred words in length in opposition thereto which may be prepared by the legislative body. If the provisions of two or more ordinances adopted at the same election conflict, then the ordinance receiving the highest number of affirmative votes shall control. The legislative body of the city or town may submit to the people, without a petition therefor, a proposition for the repeal of any adopted ordinance, or for amendments thereto, or for the enactment of any new ordinance, to be voted upon at any succeeding regular or special municipal city or town election, and if such proposition so submitted receive a majority of the votes cast thereon at such election, such ordinance shall be repealed, amended or enacted accordingly. Whenever any ordinance or proposition is required by this statute to be submitted to the voters of a city or town at any election, the clerk of the legislative body shall cause the ordinance or proposition to be printed and he shall mail a copy thereof, enclosed in an envelope with a sample ballot to each voter at least ten days prior to the election. All the provisions of this statute are to be liberally construed for the purpose of ascertaining and enforcing the will of the electors. The enacting clause of an ordinance passed by the vote of the electors shall be substantially in the following form: "The people of the city (or town) of ——— do ordain as follows:". When a special election is to be called under the terms of this section, it shall be held not less than thirty nor more than sixty days after the date of the presentation of the proposed ordinance to the legislative body, and shall be held as nearly as may be in accordance with the election laws of the state; *provided, however*, that, to avoid holding more than one such election within any six months, the date for holding such special election may be fixed later than sixty days, but at as early a date as practicable after the expiration of such six months; *provided, further*, that when under any of the terms of this statute fixing the time within which a special election shall be held it is made possible to hold the same within six months prior to a regular munic-

Arguments.

Reference to people by legislative body without petition.

Copies sent to voters.

Time of holding elections.

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ipal election, the legislative body may in its discretion, submit the proposed ordinance at such regular election instead of at a special election. Except an ordinance calling or otherwise relating to an election, no ordinance passed by the legislative body of a city or town, except when otherwise specially required by the laws of the state, and except an ordinance for the immediate preservation of the public peace, health or safety, which contains a declaration of, and the facts constituting its urgency and is passed by a four-fifths vote of the legislative body of a city or town, and no ordinance granting a franchise shall go into effect before thirty days from its final passage; and if, during said thirty days, a petition, signed by qualified voters of the city or town equal to ten per cent of the entire vote cast therein for all candidates for governor of the state at the last preceding general election at which a governor was voted for, protesting against the passage of such ordinance, be presented to the legislative body, the same shall thereupon be suspended from going into operation, and it shall be the duty of the legislative body to reconsider such ordinance. If said legislative body shall thereupon not entirely repeal said ordinance, it shall submit the same to a vote of the electors either at a regular municipal election or a special election to be called for the purpose, and such ordinance shall not go into effect or become operative unless a majority of the voters voting upon the same shall vote in favor thereof. Such petitions and the provisions of the law relative to the duty of the clerk in regard thereto and the manner of voting thereon, shall conform to the rules provided herein for the initiation of legislation by the electors.

Submission to people of ordinance passed by legislative body.

In cities or towns having a mayor (or like officer), with the veto power, the passage of an ordinance petitioned for by the electors, followed by its veto by the mayor (or like officer) and the failure of the legislative body to pass the same over such veto, shall be deemed and treated as a refusal of the legislative body to pass the ordinance, within the meaning of this statute; and a vote of the legislative body in favor of the repeal of an ordinance previously passed (but protested against by the electors as herein provided for) followed by a veto of such repeal by the mayor (or like officer) and the failure of the legislative body to pass said repeal over said veto, shall be deemed and treated as a refusal to repeal the ordinance so protested against. In such city or town the date of approval of an ordinance by the mayor or like officer (or of the expiration without his action thereon of the time within which he may veto the same, if such expiration of time for his action without his approval or veto has the effect of making the ordinance a law) shall be deemed the date of final passage of the ordinance by the legislative body, within the meaning of this statute. Any duty herein in terms, or by reasonable implication, imposed upon the legislative body in regard to calling an election, or in connection therewith, shall be likewise imposed upon any mayor, or any other officer having any duty to per-

Effect of veto by mayor.

Date of final passage.

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form connected with the elections, so far as may be necessary to fully carry out the provisions of this statute.

Application of act to charter cities.

SEC. 2. This act is not intended to apply to those cities having a freeholders' charter adopted and ratified under the provisions of section 8 of article XI of the constitution, and having in such charter provision for the direct initiation of ordinances by the electors.

Repeal of former law.

SEC. 3. Sections 2 and 3 of the act approved March 14th, 1911, entitled "An act adding three new sections to an act entitled 'An act to provide for the organization, incorporation and government of municipal corporations,' approved March 13, 1883, to be numbered 10, 11 and 12 and relating to the government of municipal corporations and providing for the recall, initiative and referendum," are hereby repealed.

CHAPTER 34.

An act to amend an act entitled "An act to provide for the organization and government of irrigation districts and to provide for the acquisition or construction thereby of works for the irrigation of lands embraced within such districts, and, also, to provide for the distribution of water for irrigation purposes," approved March 31, 1897, by adding a new section thereto to be numbered 28½, and providing for the recall of elective officers of irrigation districts.

[Approved January 2, 1912.]

The people of the State of California do enact as follows:

Irrigation districts.

SECTION 1. A new section is hereby added to an act entitled "An act to provide for the organization and government of irrigation districts and to provide for the acquisition or construction thereby of works for the irrigation of the lands embraced within such districts, and, also, to provide for the distribution of water for irrigation purposes," approved March 31, 1897, to be numbered 28½ and to read as follows:

Recall of officers.

Section 28½. The holder of any elective office of any irrigation district may be removed or recalled at any time by the electors; *provided,* he has held his office at least six months. The provisions of this section are intended to apply to officials now in office, as well as to those hereafter elected. The procedure to effect such removal or recall shall be as follows: A petition demanding the election of a successor to the person sought to be removed shall be filed with the secretary of the board of directors of such district, which petition shall be signed by registered voters equal in number to at least twenty-five per cent of the highest vote cast within such district for candidates for the office, the incumbent of which is sought to be removed, at the last general election in such district at

Petition for removal.

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PROOF OF SERVICE

I, Rochelle Redmayne, declare:

I, the undersigned, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 350 Sansome Street, Suite 300, San Francisco, California, 94104.

On December 20, 2012, I served the **Letter Requesting Depublication**

By Mail: by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail at San Francisco, California, addressed as set forth below. I am readily familiar with my firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business.

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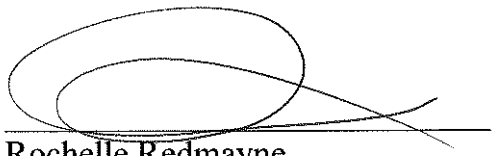
Respondent Superior Court

Clerk of the Superior Court
Tuolumne Superior Court
41 West Yaney Avenue
Sonora, CA 95370

Clerk, Court of Appeal
Fifth District
2424 Ventura Street
Fresno, CA 93721

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 20, 2012, at San Francisco, California.



Rochelle Redmayne