
No. S127535

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BIGHORN-DESERT VIEW WATER AGENCY,
Plaintiff, Cross-Defendant, and Respondent,

v.

SHARON BERINGSON, as Interim Registrar of Voters, Etc.,
Defendant and Cross-Defendant;

E.W. KELLEY,
Real Party in Interest, Cross-Complainant, and Appellant.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two
(Case No. E033515)

Superior Court of San Bernardino County
Honorable Tara Reilly, Judge
(Case No. SCVSS 097005)

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. Issue One: The Proper Interpretation of the Term “Fees and Charges” in Article XIII C, § 3	2
A. The Agency Does Not Seriously Dispute that the Plain Language of Article XIII C, § 3, Standing Alone, Authorizes the Kelley Initiative	2
B. The Agency Advances No Good Reason to Depart from this Plain Language by Importing Exceptions and Qualifications from Outside Article XIII C, § 3	3
1. The First Sentence of Article XIII D, § 1	5
2. The Goal of Harmonizing Related Provisions	7
3. Statutes <i>in Pari Materia</i> Must Be Reconciled	10
C. If the Canon of “Liberal Construction” Means Anything, It Must Be Applied Here	10
D. Section 1(d) of the Kelley Initiative Does <i>Not</i> Conflict with Article XIII D, § 6(c)	12
II. Issue Two: The Continuing Viability of Statutorily Based Doctrines Limiting the Local Initiative Power	14
A. The Agency’s Characterization of Mr. Kelley’s Position Is Grossly Inaccurate	14
B. The Agency’s Interpretation Treats Article XIII C, § 3 as a Nullity	15
C. The Agency’s Speculations Are Not Ripe	16
CONCLUSION	17
CERTIFICATE OF WORD COUNT	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page
Cases	
<i>American Federation of Labor v. Eu</i> , 36 Cal. 3d 687 (1984)	14
<i>Apartment Association of Los Angeles County, Inc. v. City of Los Angeles</i> , 24 Cal. 4th 830 (2001)	2-3, 12
<i>Fields v. Eu</i> , 18 Cal. 3d 322 (1976)	8
<i>Howard Jarvis Taxpayers Association v. City of San Diego</i> , 120 Cal. App. 4th 374 (2004)	13
<i>In re Gerald J.</i> , 1 Cal. App. 4th 1180 (1991)	8
<i>In re Marriage of Pinto</i> , 28 Cal. App. 3d 86 (1972)	10
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	16
<i>People v. Wilson</i> , 95 Cal. App. 4th 198 (2002)	6
<i>People v. Woodhead</i> , 43 Cal. 3d 1002 (1987)	4-5, 8
<i>Richmond v. Shasta Community Services District</i> , 32 Cal. 4th 409 (2004)	4-5
<i>Rossi v. Brown</i> , 9 Cal. 4th 688 (1995)	passim
<i>Voters for Responsible Retirement v. Board of Supervisors</i> , 8 Cal. 4th 765 (1994)	15

Constitutional Provisions

California Constitution Article II, § 11 16

 Article XIII C passim

 preceding § 1 11

 § 1 4

 § 2 13

 § 3 passim

 Article XIII D passim

 § 1 5, 7

 § 2 passim

 § 3 3

 § 6 3, 9, 12-14

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PETITIONER’S REPLY BRIEF

Petitioner E.W. Kelley (“Mr. Kelley”) respectfully submits this brief in reply to the brief of Respondent Bighorn-Desert View Water Agency (“the Agency”). For the reasons stated in this brief and Petitioner’s Opening Brief (“Opening Br.”), the judgment of the Court of Appeal should be reversed, and the Kelley Initiative should (at long last) be ordered on the ballot.

ARGUMENT

The two issues presented for review concern (1) the proper interpretation of the term “fees and charges” in Article XIII C, § 3 of the Constitution; and (2) the continuing viability vel non of statutorily based doctrines limiting the local initiative power. These issues are discussed in turn.

I. Issue One: The Proper Interpretation of the Term “Fees and Charges” in Article XIII C, § 3.

A. The Agency Does Not Seriously Dispute that the Plain Language of Article XIII C, § 3, Standing Alone, Authorizes the Kelley Initiative.

In his opening brief, Mr. Kelley carefully explained how the plain language of Article XIII C, § 3 authorizes his initiative. *See generally* Opening Br. at 11-13. In particular, he pointed out that the

natural and ordinary meaning of “fees” and “charges” surely includes the rates *charged* by the Agency for water, as well as the “non-cap cost recovery *charge*,” the “MWA Pipeline *charge*,” and the other “*fees and charges*” that are the subject of the Kelley Initiative.

Id. at 12-13. Mr. Kelley also pointed out that this Court, the Court of Appeal, and the Attorney General have all used “fees” and “charges” in reference to charges for water service of the kind imposed by the Agency. *See id.* at 13 (citing authorities).

In response to this argument—which the Agency conceded below was “very powerful,” J.A. at 84—what does the Agency offer? Only the conclusory—and in light of the foregoing paragraph, transparently false—assertion that Mr. Kelley has provided “no authority other than his own interpretation that the terms [*fees and charges*] ‘surely include’ the Agency’s consumption-based water rates.” Resp. Br. at 26. Indeed, the Agency cannot be bothered to discuss the text of Article XIII C, § 3, preferring instead to discuss judicial decisions that construe *other* provisions of Proposition 218, such as “section 6 of article XIII D.” *Apartment Association of Los Angeles County, Inc. v. City*

of Los Angeles, 24 Cal. 4th 830, 833 (2001). *See generally* Resp. Br. at 14-21 (discussing the “incident of property ownership” language found in §§ 2(e), 3(a), 3(b), 6(b)(3), and 6(b)(5) of Article XIII *D*). If this is the very best the Agency can muster, the point must be taken as established: *standing alone*, Article XIII C, § 3 grants the Agency’s electorate the authority “reduc[e]” or otherwise “affect” the Agency’s water rates, fees, and charges by means of the Kelley Initiative.

B. The Agency Advances No Good Reason to Depart from this Plain Language by Importing Exceptions and Qualifications from Outside Article XIII C, § 3.

But the Agency does not want Article XIII C, § 3 to stand alone. No, the Agency’s entire argument is premised on “applying the article XIII *D* definition of ‘fees’ and ‘charges’ to the article XIII *C* initiative provision.” Resp. Br. at 22 (emphasis added); *see also id.* at 23 (contending that “the Court of Appeal was correct in applying article XIII *D*’s definition to article XIII *C*”). This definition is, of course, the one set forth in § 2 of Article XIII *D*:

SEC. 2. Definitions. As used in this article:

....

(e) “Fee” or “charge” means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

The very first thing to observe about this definition is the express limitation on its scope: it applies when—and only when—the term *fee* or *charge*

is “used in *this article*,” namely, Article XIII D. Accordingly, the definition is, by its very own terms, *inapplicable to Article XIII C, § 3*. To govern this case, therefore, the restrictive Article XIII D definition must affirmatively be “read into” Article XIII C, § 3. *Rossi v. Brown*, 9 Cal. 4th 688, 694 (1995). Of course, that interpretive move is precisely what this Court found in *Rossi* to be incompatible with the proper judicial function: “the role of the court is to apply a statute or constitutional provision according to its terms, not to read into it exceptions or qualifications that are not supported by the language of the provision.” *Id.*, *discussed in* Opening Br. at 14, 16. Moreover, to rely on the inapplicable-by-its-terms definition of Article XIII D, § 2(e) even though it was deliberately left out of Article XIII C is to flout the “settled axiom that when the drafters of a statute have employed a term in one place and omitted it in another, it should not be inferred where it has been excluded.” *People v. Woodhead*, 43 Cal. 3d 1002, 1010 (1987), *discussed in* Opening Br. at 16-17.¹

What does the Agency say about the proper “role of the court” set forth in *Rossi* or about the “settled axiom” restated in *Woodhead*? What does the Agency say about the reasoning in *Richmond v. Shasta Community Services*

¹ There is nothing to suggest that the omission from Article XIII C of a restrictive definition of “‘Fee or ‘charge’ ” like that found in Article XIII D, § 2(e) was anything but deliberate. Certainly, it cannot have been the intent of the drafters that Article XIII D supply the definitions for both articles, for Article XIII C contains its own definitions, and the definitions in both articles are limited by their terms to their own spheres. *See* Art. XIII C, § 1 (“As used in this article”); Art. XIII D, § 2 (“As used in this article”).

District, 32 Cal. 4th 409 (2004), that when a constitutional provision does not include “express exemptions” from a generally applicable requirement, “the implication is strong” that such requirement applies without any qualification? *Id.* at 427, *discussed in* Opening Br. at 15-16. In a word, *nothing*. That is, the Agency’s argument as to whether “it is proper to apply Article XIID’s definition to Article XIIC’s initiative power,” Resp. Br. at 21 (section heading)—the issue that is the at very heart of this case—utterly fails to confront these canons of construction. In fact, that section of the Agency’s brief, *see* Resp. Br. at 21-26, refers not even once to *Rossi* or *Richmond*, and cites *Woodhead* only in a different context.

If the Agency cannot be bothered by the canons of construction briefed by Mr. Kelley, on just what does it base its plea that courts import the definition in Article XIII D to narrow the scope of Article XIII C, § 3? The Agency advances essentially three reasons, none of which has merit.

1. The First Sentence of Article XIII D, § 1.

Section 1 of Article XIII D begins: “*Notwithstanding any other provision of law*, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority” (emphasis added). A deathbed convert to the primacy of “plain language,” *see* Resp. Br. at 14, the Agency seizes on the emphasized phrase to assert:

This language clearly evidences that the voters who adopted Proposition 218 intended the provisions of article XIID, including its careful definition of “fees” and “charges” [in § 2(e)] to apply to all “assessments, fees and charges” . . . notwithstanding any other provision of law, which is to say notwithstanding any other provision of article XIIC.

Resp. Br. at 15. This assertion is a giant non sequitur.

In the first place, the obvious import of the “notwithstanding” clause is that, *when applicable*, the provisions of Article XIII D supply the governing rule in place of whatever provision might otherwise govern. *See, e.g., People v. Wilson*, 95 Cal. App. 4th 198, 202 (2002) (“The legislative command that a statutory provision be applied ‘notwithstanding any other law’ most likely means that the provision, *when applicable*, takes the place of whatever law would otherwise determine [the result].” (emphasis added)). But as pointed out above—and never disputed by the Agency despite Mr. Kelley’s repeated emphasis of the point, *see, e.g.,* Opening Br. at 14—Article XIII D’s restrictive definition of “‘fee’ or ‘charge’ ” applies by its very terms only to Article XIII D itself.

Second, Article XIII C, § 3 begins with a “notwithstanding” clause of its own: “Notwithstanding any other provision of this Constitution,” In the Agency’s reasoning, this language evidences that the voters who adopted Proposition 218 intended that the broad provisions of that section—including its grant of initiative power to reduce or repeal “*any* local tax, assessment, fee or charge” (emphasis added)—apply notwithstanding any other provision of

the Constitution, which is to say notwithstanding the restrictive definition of Article XIII D, § 2(e).

Finally, the Agency's assertion that the definitions in Article XIII D, § 2 "apply to *all* 'assessments, fees and charges'" as a result of the "notwithstanding any other provision of law" clause in Article XIII D, § 1, Resp. Br. at 15 (emphasis added), cannot logically be limited to Article XIII C, § 3. In other words, if those definitions apply to Article XIII C, § 3, then they must logically apply to every "other provision of law" that uses any of those three terms. As enumerated in the margin, that category includes nearly forty provisions of the Constitution alone, not to mention several thousand provisions of the California statutes.² Can the Agency possibly be right that definitions that by their terms govern only when "used in this article [XIII D]" were intended to be applied to every "other provision of law"? No, it cannot, and the Agency's newfound reliance on "plain language" is misplaced.

2. The Goal of Harmonizing Related Provisions.

As did the Court of Appeal, the Agency relies on the rule that "words or phrases are not to be viewed in isolation; instead, each is to be read in the

² Cal. Const. Art. IV, § 5(d); Art. V, § 14(d); Art. VI, § 17; Art. X B, § 6; Art. XI, §§ 11(a), 15(a), 15(b); Art. XII, § 4; Art. XIII, §§ 3(g), 3.5, 9, 11(a), 11(e), 11(g), 12(b), 15-16, 18-19, 26(d), 27, 28(f)(3), 28(g); Art. XIII A, §§ 1(b), 2(a), 2(d), 8(e)(2)(B); Art. XIII B, §§ 2(a)(2), 2(b), 3(b), 8(c), 9(e)(3); Art. XV, § 1; Art. XVI, §§ 16(a), 16(b), 19; Art. XIX, §§ 2, 7; Art. XX, § 22.

A LEXIS search of California statutes for "text (assessments or fees or charges)" generates an error message: "This search . . . has been interrupted because it will return more than 3000 results."

context of the other provisions of the Constitution bearing on the same subject”; the goal of such a reading is “to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in so doing to give effect to the scheme as a whole.” Resp. Br. at 23 (quoting *Fields v. Eu*, 18 Cal. 3d 322, 328 (1976)). The Agency is correct, of course, that “harmony” in a statutory system is the theme of many decisions of both this Court and the Court of Appeal. See, e.g., *Woodhead*, 43 Cal. 3d at 1009 (construction should “achieve harmony among the parts” of a statute); *In re Gerald J.*, 1 Cal. App. 4th 1180, 1188 (1991) (construction should ensure that “the various elements of the overall scheme are harmonized”), cited in Resp. Br. at 24.³

Mr. Kelley has already explained at length how applying the plain language of Article XIII C, § 3—without importing the exceptions contained in Article XIII D, § 2(e)—results in *perfect harmony*. See Opening Br. at 18-20. Although the Agency asserts to the contrary that Mr. Kelley’s interpretation

³ In this context, the Agency criticizes Mr. Kelley for calling Articles XIII C and XIII D “distinctly separate constitutional provisions” and ignoring the “interrelationship” between them. Resp. Br. at 22 (citing Opening Br. at 1). Actually, Mr. Kelley stated that vis-à-vis Article XIII C, Article XIII D is “a *related but* distinctly separate constitutional provision.” Opening Br. at 1 (emphasis added).

In any event, that the two articles were adopted at the same time and possess a “unifying theme” of “voter and taxpayer control over local taxes,” Resp. Br. at 22, is not disputed. What is disputed is whether the courts will nourish that theme by giving the voters of the Agency control over local fees and charges or instead thwart it.

“defies logic and common sense,” the only basis of this assertion is the notion that such interpretation “would allow [Article XIII C, § 3] to trump [Article XIII D, § 6],” in that the Kelley Initiative “may subject to a vote of the electorate water rates and charges that Article XIII D, section 6(c) would exempt from voter approval.” Resp. Br. at 25. In Part III of its Argument, *see id.* at 29-30, the Agency calls this an “inconsistency” within Proposition 218. As explained below, however, the asserted inconsistency is spurious.

Section 6(c) of Article XIII D (“Voter Approval for New or Increased Fees and Charges”) provides in relevant part:

Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.

The plain language of this subdivision surely affords local governments a limited exemption from a duty otherwise imposed on them *by that subdivision*. But this plain language just as surely does *not* give local governments an affirmative, overriding right to impose or increase water fees and charges without the intervention of the voters. In other words, to say that a particular fee or charge is exempt from the voter pre-approval requirement imposed by Article XIII D, § 6(c) is not to say (as a matter of either language or logic) that it is exempt from the requirements imposed by other legal authority, like Article XIII C, § 3. There is no conflict here, and the former provision supplies no

reasoned basis for departing from the plain language of the latter in the guise of “harmonizing” the two.

3. Statutes *in Pari Materia* Must Be Reconciled.

Finally, the Agency invokes the canon that “[s]tatutes *in pari materia* should be construed together and reconciled so as to uphold both of them if it is reasonably possible to do so.” Resp. Br. at 25 (quoting *In re Marriage of Pinto*, 28 Cal. App. 3d 86, 89 (1972)). Mr. Kelley has already argued that this generalized canon must yield to more specific principles that are applicable here. See Opening Br. at 21. He will add only that, because Articles XIII C and XIII D are already in “harmony,” they do not need to be “reconciled.” In addition, it is Mr. Kelley’s interpretation that would “uphold” all provisions of Proposition 218, while the Agency’s interpretation would necessarily repudiate Article XIII C, § 3 in significant part.

For these reasons, it is clear that the Agency has adduced no good reason for the courts to depart from the plain language of Article XIII C, § 3 by importing exceptions and qualifications from Article XIII D, § 2(e).

C. If the Canon of “Liberal Construction” Means Anything, It Must Be Applied Here.

In this case, Mr. Kelley has often invoked the Court’s repeated admonition that “the initiative power must be construed liberally so as to promote the democratic process established by inclusion of the initiative and referendum in the Constitution.” *Rossi v. Brown*, 9 Cal. 4th at 711. He has often pointed

out that the drafters of Article XIII C wrote this principle into the constitution expressly: “LIBERAL CONSTRUCTION. The provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.” Art. XIII C, preceding § 1. *See also* Opening Br. at 17-18. The lower courts ignored this canon, and now the Agency asks this Court to ignore it, too. *See* Resp. Br. at 26-27. But if this canon of liberal construction is to be anything other than an empty slogan, it must be applied here.

In sum, the Court is faced with a constitutional provision whose plain language admits of no exceptions; it is asked, in defiance of several specific canons of construction, to depart from that language by importing a restrictive definition that is inapplicable by its own terms. If those considerations are not dispositive in Mr. Kelley’s favor, if the Agency’s textual argument and pleas to “harmonize” and “reconcile” Proposition 218 have any traction at all, then certainly the best that can be said for the Agency is that the question is close. But if the question is close, then the canon of liberal construction (if it means anything) must resolve the case in favor of the power of initiative, in favor of the right of Agency voters to reduce or repeal “*any* local tax, assessment, fee or charge” by means of the Kelley Initiative and others like it. Art. XIII C, § 3 (emphasis added). *That* outcome would effectuate Proposition 218’s purposes of limiting local government revenue and enhancing taxpayer consent”; but

upholding the Agency's obstruction of the Kelley Initiative would accomplish just the opposite.⁴

D. Section 1(d) of the Kelley Initiative Does *Not* Conflict with Article XIII D, § 6(c).

Section 1(d) of the Kelley Initiative provides: “Notwithstanding any other provision of law, Agency Ordinance, Resolution or Policy there shall be no increase in water rates, fees or charges, or any new water rate, fee or charge enacted without the prior approval of the voters at an election.” J.A. at 41. The Agency argues that this provision “violates the California Constitution . . . by seeking to impose by local initiative a voter approval requirement different than [sic] that set forth in Proposition 218.” Resp. Br. at 27-28. More specifically, the Agency contends that Section 1(d) “seeks to repeal the first phrase of [Article XIII D, § 6(c)] within the boundaries of the Agency.” *Id.* at 28. This contention, which essentially rehashes the Agency's “harmonize” argument, *see supra* Part I.C.2 (pp. 7-10), is meritless.

As quoted above (p. 9), § 6(c) of Article XIII D imposes a voter pre-approval requirement for property-related fees or charges, *except for* “fees or charges for sewer, water, and refuse collection services.” In other words, as the Agency has consistently argued in this litigation, and as Mr. Kelley has

⁴ Mr. Kelley acknowledges the Court's ruling in *Apartment Association* that “[l]iberal construction cannot overcome the plain language of Proposition 218 limiting [its] scope.” 24 Cal. 4th at 844, *quoted in* Resp. Br. at 27. But, as emphasized in Mr. Kelley's briefs, *the Agency* is the party that is attempting to “overcome the plain language” of the measure.

consistently acknowledged, § 6(c) simply does not cover the Agency. On the other hand, the plain language of § 6(c) does not preclude the Agency from *voluntarily* submitting its water rates and charges to the voters for approval. Nor does that language preclude the electorate, acting by initiative, from requiring the Agency to submit its rates and charges to the voters for approval. The Agency would read § 6(c) to begin something like: “Except for property-related fees or charges other than sewer, water, and refuse collection services, no fee or charge may be submitted to the voters for approval before it takes effect.” The Agency offers no basis for such a reading, and Proposition 218’s command that it be liberally construed to enhance taxpayer consent militates against it.

The recent decision in *Howard Jarvis Taxpayers Association v. City of San Diego*, 120 Cal. App. 4th 374 (2004), is not to the contrary. The Court of Appeal in that case ruled that a local initiative “requiring a *two-thirds* vote to approve a new general tax or an increase in an existing general tax,” *id.* at 389 (emphasis added), violated Article XIII C, § 2(b), which provides: “No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a *majority* vote” (emphasis added). The decision rested on the very sensible notion that approval by a two-thirds vote and approval by a majority vote are “separate and distinct voting requirements” that cannot co-exist with respect to the same general tax. *Id.* at 393. Section 1(d) of the Kelley Initiative and Article XIII D, § 6(c), by

contrast, *can* co-exist, for the simple reason that they cover *different* fees and charges: the “water rates, fees or charges” affected by the initiative, J.A. at 41, are the exempted from § 6(c) as “fees or charges for . . . water.”

II. Issue Two: The Continuing Viability of Statutorily Based Doctrines Limiting the Local Initiative Power.

A. The Agency’s Characterization of Mr. Kelley’s Position Is Grossly Inaccurate.

It is useful to begin with a statement of the second issue presented for review:

Whether that *constitutional* grant of initiative power [in Article XIII C, § 3] is limited by various pre-Proposition 218 doctrines that gave effect to *statutory* restrictions on the right of local initiative.

With respect to the two restrictions on which the court below relied—the exclusive delegation doctrine (as supplemented by the legislative-administrative dichotomy) and the impairment of essential governmental power doctrine—Mr. Kelley answered this question in the negative. *See* Opening Br. at 21-30. At the same time, Mr. Kelley acknowledged that certain pre-Proposition 218 doctrines “may inhere in the ‘nature’ of the initiative power.” *Id.* at 26 n.4. He recognized, for example, that “an initiative which seeks to do something other than enact a statute . . . is not within the initiative power reserved by the people.” *Id.* (quoting *American Federation of Labor v. Eu*, 36 Cal. 3d 687, 714 (1984)). If Mr. Kelley did not expressly say that an initiative “is subject to the same state and federal constitutional limitations as are the Legislature

and the statutes which it enacts,” *Rossi v. Brown*, 9 Cal. 4th at 696 n.2, it is because that principle goes (or ought to go) without saying.

In this light, it is irresponsible for the Agency to assert that Mr. Kelley “contends the adoption of the initiative power in article XIII C, section 3 has wiped out *any* limitation on that power, as it may be used to impact ‘taxes, assessments, fees and charges.’” Resp. Br. at 31 (emphasis in original). Likewise, the notion that Mr. Kelley “argues . . . that the fiscal initiative knows no constitutional bounds and is a law unto itself,” *id.* at 32, is demonstrably false. As the Agency itself admits, its characterization of Mr. Kelley’s position is “plainly a straw man.” *Id.* at 31.

B. The Agency’s Interpretation Treats Article XIII C, § 3 as a Nullity.

The Agency does not contradict Mr. Kelley’s demonstration that the exclusive delegation doctrine and the essential governmental power doctrine are grounded in the “state’s plenary power over matters of statewide concern” or, more specifically, the Legislature’s “power to enact general laws of statewide importance that override local legislation.” *Voters for Responsible Retirement v. Board of Supervisors*, 8 Cal. 4th 765, 779 (1994). The Agency’s view is simply that such power can (and, regarding the Agency, did) override the constitutional grant of initiative power in Article XIII C, § 3. In essence, the Agency reads that section as if it contained the following sentence at the end: *Provided, however, that the Legislature may decree to the contrary.*

Whatever the meaning of the drafters' comment that Article XIII C, § 3 "merely constitutionalizes the principles of *Rossi v. Brown*," Resp. Br. at 32, the text of the section adopted by the statewide electorate simply cannot bear the Agency's nullifying interpretation. Indeed, if the initiative power granted Article XIII C, § 3 is construed as being subject to legislative control, then the section's adoption was literally pointless, for local government voters *already had* the right of initiative subject to legislative control. *See, e.g., Cal. Const. Art. II, § 11(a)* ("Initiative and referendum powers may be exercised by the electors of each city and county *under procedures that the Legislature shall provide.*" (emphasis added)). Finally, Mr. Kelley cannot help but observe that the Agency's position effectively makes a mockery of the archetypal proposition that "the constitution is superior to any ordinary act of the legislature." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

C. The Agency's Speculations Are Not Ripe.

Although the Agency appears to have abandoned its explicit reliance on the "impairment of essential governmental power" doctrine—and for good reason, *see* Opening Br. at 28-29—the Agency renews its cries of wolf under the rubric of "administrative acts." *See* Resp. Br. at 39-40. Thus, it speculates that "an initiative such as the one at issue in this case could make it impossible for the Agency to comply with its legislated duty to set rates at an adequate level." *Id.* at 40. Such speculation should be discounted to zero: any kind of initiative *could* violate higher law in its application. But whether a particular

initiative in fact does so is necessarily the subject of an *as-applied* (and thus *post-election*) challenge. But the present case is a facial challenge, initiated by the Agency before the electorate even had an opportunity to consider the Kelley Initiative. *See* J.A. at 1-10, 101.

CONCLUSION

For the reasons set forth above and in Petitioner's Opening Brief, the judgment of the Court of Appeal should be reversed.

DATED: February 17, 2005.

Respectfully submitted,

Eric Grant

Attorney for Petitioner E.W. KELLEY

CERTIFICATE OF WORD COUNT

I, Eric Grant, certify that the foregoing brief contains 4,168 words, as calculated pursuant to Rule of Court 29.1(c).

Eric Grant

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CERTIFICATE OF SERVICE

I, Eric Grant, certify as follows.

I am an active member of the State Bar of California and not a party to this cause. My business address is Eric Grant, Attorney at Law, 8001 Folsom Boulevard, Suite 100, Sacramento, California 95826. On February 17, 2005, I served the foregoing document, namely:

PETITIONER'S REPLY BRIEF

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