No. S194708

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SIERRA CLUB,
Petitioner,

v.

SUPERIOR COURT OF ORANGE COUNTY,
Respondent;

COUNTY OF ORANGE,
Real Party in Interest.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Three, Case No. G044138

Superior Court of Orange County
Superior Court Case No. 30-2009-00121878-CU-WM-CJC
Honorable James J. Di Cesare, Judge

APPLICATION OF JACK COHEN FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER SIERRA CLUB

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.520(f) of the California Rules of Court, JACK COHEN (hereafter "Applicant") respectfully requests permission to file an amicus curiae brief in this case (Case No. S194708) in support of Petitioner, the Sierra Club. The proposed amicus curiae brief is combined with this application.

Applicant is an attorney, taxpayer, and one of the drafters of Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added Articles XIII C and XIII D to the California Constitution and was approved by California voters in November 1996. Proposition 218 deals extensively with levies affecting parcels, particularly article XIII D of the California Constitution relating to special assessments and property-related fees. In order to impose a lawful special assessment under Proposition 218, a local government must comply with detailed special benefit and proportionality requirements relating to specific parcels of property. (See Cal. Const., art. XIII D, § 4.) Similar detailed requirements relating to specific parcels also exist for property-related fees. (See Cal. Const., art. XIII D, § 6.) I use geographic information system ("GIS") databases obtained from government agencies to help ensure government agency compliance with the constitutional requirements of Proposition 218.

Applicant has a major interest in the outcome of this case as it relates to monitoring compliance with the constitutional requirements of Proposition 218. Whether or not a GIS database is a disclosable public

record under the California Public Records Act has a major bearing on the extent to which the public can *effectively* have access to important GIS database information relating to the conduct of the people's business, including monitoring public agency compliance under Proposition 218.

Applicant states that there is nothing to identify or disclose under the provisions of Rule 8.520(f)(4) of the California Rules of Court.

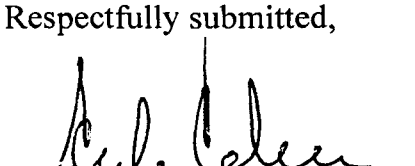
Applicant is familiar with the legal issues involved in this case. Applicant believes there is a need for additional briefing because this case involves the interpretation of important legal issues that will significantly impact the ability of taxpayers to monitor and to help ensure public agency compliance with Proposition 218.

Applicant believes the arguments contained in the proposed amicus curiae brief will assist the Court in resolving this case in a way that will allow reasonable public access to government agency GIS databases in a manner consistent with the purposes and intent of the California Public Records Act and the constitutional right of access provisions of Proposition 59. The proposed amicus curiae brief will focus on the relationship between the constitutional right of access provisions of Proposition 59 and the California Public Records Act.

For the foregoing reasons, Applicant respectfully requests leave to file the proposed amicus curiae brief that is combined with this application.

Dated: March 2, 2012

Respectfully submitted,



Jack Cohen

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I. INTRODUCTION.

This case (hereafter "*Sierra Club*") concerns whether a geographic information system ("GIS") database in a GIS file format is a disclosable public record under the California Public Records Act (Gov. Code, § 6250 et seq., hereafter "CPRA").[1] If a GIS database is a disclosable public record, then a government agency must generally provide a copy of the GIS database to any person requesting a copy, typically subject only to payment of the direct costs of duplication and without restrictions or limitations on the use or subsequent disclosure of the data. (Gov. Code, § 6253, subd. (b).) On the other hand, if a GIS database is not a disclosable public record under the CPRA by virtue of being deemed "computer software," as concluded by the Court of Appeal, then a government agency can sell, lease or license the GIS database (Gov. Code, § 6254.9, subd. (a)), typically at an *exorbitant* price and subject to legal restrictions on the use and/or subsequent disclosure of the data.[2] Hence, whether or not a GIS database is a disclosable public record under the CPRA has a major bearing on the extent to which the public can *effectively* have access to important public agency GIS database information relating to the conduct of the people's business.

The Court of Appeal decision in the *Sierra Club* case is not consistent with another appellate decision relating to the public record status of GIS

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[1] "Geographic information systems (GIS) are a class of information technology that has been widely adopted throughout government and business sectors to improve the management of location-based information." (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1309, fn. 1.)

[2] This case does not address the issue of whether any such exorbitant charges would be a "tax" under Proposition 26, which was recently approved by California voters in November of 2010 (See Cal. Const., art. XIII C, § 1, subd. (e)). Any new tax, tax increase, or tax extension levied by a local government requires voter approval pursuant to Proposition 218. (Cal. Const., art. XIII C, § 2.) Such a charge also appears to be subject to reduction or repeal via the local initiative power under Proposition 218 (Cal. Const., art. XIII C, § 3), which would represent a potential legislative remedy at the local level.

databases. In *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301 ("*Santa Clara*"), a county was required to disclose a copy of its GIS basemap, including parcel data, in response to a request under the CPRA. The court in *Santa Clara* concluded that the requested GIS basemap was a public record subject to disclosure under the CPRA without conditions or limitations. (*Id.* at pp. 1335-1336.) Also contrary to the *Sierra Club* decision by the Court of Appeal, the California Attorney General has opined that parcel boundary map data maintained in an electronic format is subject to public inspection and copying under the CPRA. (88 Ops.Cal.Atty.Gen. 153 (2005).)

This brief will focus on the relationship between the constitutional right of access provisions of Proposition 59 (2004) and the CPRA with the objective of resolving this case in a manner that will allow reasonable public access to government agency GIS databases *consistent* with the purposes and intent of the CPRA and the constitutional right of access provisions of Proposition 59.

II. EXAMPLES OF THE NEED FOR PUBLIC ACCESS TO PUBLIC AGENCY GIS DATABASES RELATING TO THE CONDUCT OF THE PEOPLE'S BUSINESS.

Public access to GIS databases is of particular interest to taxpayers, especially as it relates to local government compliance issues under Proposition 218 ("Right to Vote on Taxes Act"), an initiative constitutional amendment approved by California voters in November 1996. Proposition 218 deals extensively with levies imposed upon real property such as special assessments. The imposition of a lawful special assessment under Proposition 218 by a local government involves compliance with stringent special benefit and proportionality requirements applicable to specific

parcels of real property. (Cal. Const., art. XIII D, § 4.)[3] For example, close proximity of a public improvement to a specific parcel can constitute a special benefit for purposes of imposing a special assessment on real property under Proposition 218. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 452, fn. 8 (hereafter "*Silicon Valley*").) The proximity of a large number of parcels from one or more public improvements can be quickly and accurately calculated (and verified by the public for purposes of Proposition 218 compliance) using information from GIS databases obtained from government agencies.

GIS databases are also used by the public in the analysis of real property taxes as a function of geographic location. For example, a GIS analysis can quickly identify unusual aberrations in real property tax rates in certain geographic areas such as those in the City of Bell in Los Angeles County. The identification of such aberrations using GIS databases can lead to the exposure of highly questionable, and in some cases unlawful, activities by public agencies.

In some instances, use of GIS databases by public agencies may be of *necessity* in the conduct of the people's business. The recently enacted state responsibility area fire "fee" provides an example (Stats. 2011, First Ex.

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[3] The level of detail required to comply with the special assessment proportionality requirement of Proposition 218 is at issue in another case currently pending before this court. (See *Concerned Citizens for Responsible Government v. West Point Fire Protection District* (Case No. S195152) [case fully briefed Jan. 10, 2012].) GIS databases enable local governments to more fully and accurately comply with the stringent special benefit and proportionality requirements under Proposition 218, which generally must be done at the parcel specific level. (See Cal. Const., art. XIII D, § 4, subd. (a).) The failure of a local government to use one or more reasonably available GIS databases could result in a level of compliance *insufficient* to satisfy the stringent special benefit and proportionality requirements under Proposition 218.

Session 2011-12, ch. 8, § 1).[4] This legislation requires the identification of habitable structures on literally hundreds of thousands of parcels located within "state responsibility areas" in connection with the levying of a fire prevention "fee." (Pub. Resources Code, § 4212.)[5] In determining the amount of the "fee" applicable to a specific parcel, reductions are also included in areas where a local agency provides fire protection services. (Cal. Admin. Code, tit. 14, § 1665.7.) As a practical matter, it is not feasible to identify the specific parcels subject to the fire "fee" and determine the applicable "fee" amount for each specific parcel *without* the use of GIS databases. While the government has obvious access to such GIS databases, the public also needs fair and reasonable access to those same GIS databases to verify that the law was properly followed with respect to the hundreds of thousands of parcels subject to the state fire "fee."[6]

III. PROPOSITION 59 CREATED A NEW CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION CONCERNING THE CONDUCT OF THE PEOPLE'S BUSINESS.

The *Sierra Club* case presents issues relating to the interaction between the constitutional provisions of Proposition 59 and the CPRA. Proposition 59, a legislative constitutional amendment approved by California voters in November 2004, created a *new constitutional right* of

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[4] This discussion does not address the issue of whether the state responsibility area fire "fee" is an unlawful state "tax" under the recently approved Proposition 26 (See Cal. Const., art. XIII A, § 3, subd. (b)).

[5] The implementing regulations defining "state responsibility area" specifically refer to digital maps maintained by the California Department of Forestry and Fire Protection for purposes of showing those lands located in a state responsibility area. (See Cal. Admin. Code, tit. 14, § 1665.2.)

[6] In providing public access to a GIS database, nothing in this argument should be construed as suggesting that a government agency is obligated under the CPRA or Proposition 59 to also provide GIS software to process or analyze a GIS database.

access to information concerning the conduct of the people's business which had previously only been a *statutory* right. (See Gov. Code, § 6250.) "With the passage of Proposition 59 effective November 3, 2004, the people's right of access to information in public settings now has state constitutional stature." (*Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 597.) This new constitutional right, which must be appropriately recognized in order to achieve its intended effect, provides as follows: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).)

With respect to the foregoing constitutional access provision under Proposition 59, this court "must enforce the provisions of our Constitution and 'may not lightly disregard or blink at . . . a clear constitutional mandate.' [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. [Citation.]" (*Silicon Valley, supra*, 44 Cal.4th at p. 448 [recognizing the new *constitutional* protection provisions of Proposition 218 applicable to special assessments which had previously only been *statutory* in nature prior to the passage of Proposition 218].)

For purposes of ascertaining voter intent, the ballot argument in support of Proposition 59 clearly stated what the constitutional amendment was intended to accomplish:

> "It will create a new civil right: a constitutional right to know what the government is doing, why it is doing it, and how. It will ensure that public agencies, officials, and courts broadly apply laws that promote public knowledge. It will compel them to narrowly apply laws that limit openness in government—including discretionary privileges and exemptions that are routinely invoked even when there is no need for secrecy. It will

> create a high hurdle for restrictions on your right to information, requiring a clear demonstration of the need for any new limitation. It will permit the courts to limit or eliminate laws that don't clear that hurdle. It will allow the public to see and understand the deliberative process through which decisions are made. It will put the burden on the government to show there is a real and legitimate need for secrecy before it denies you information." (Ballot Pamp., Argument in Favor of Proposition 59, Gen. Elec. (Nov. 2, 2004) p. 14.)

The impartial Analysis by the Legislative Analyst also made it clear that Proposition 59 "create[s] a constitutional right for the public to access government information." (Ballot Pamp., Proposed Amends. to Cal. Const. with analysis of Proposition 59 by the Legislative Analyst, Gen. Elec. (Nov. 2, 2004), p. 13.)

While the foregoing constitutional right of access is certainly not absolute, it should at least mean that if a decision on an issue concerning public access to government information is a close call, one should come down on the side of allowing access to a public record. This should also include issues related to the cost associated with providing a copy of a public record pursuant to a proper request under the CPRA.

It is acknowledged that a government agency may incur significant costs in the development and/or maintenance of a GIS database.[7] However, GIS databases are typically created *using public funds to facilitate the conduct of the people's business*. Furthermore, government agencies are not in the business of creating and selling (or leasing or licensing) GIS databases for profit like a commercial business in the private sector. If the public, in seeking access to information concerning the conduct of the people's

[7] There is nothing in the CPRA that requires a government agency to create a GIS database. (See *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661, 668 [CPRA "does not undertake to prescribe what type of information a public agency may gather, nor to designate the type of records such an agency may keep."].)

business cannot have access to GIS databases at a *reasonable* cost, then this would *frustrate* the people's constitutional right of "access to information concerning the conduct of the people's business" under Proposition 59. (Cal. Const., art. I, § 3, subd. (b)(1).)

IV. PURSUANT TO PROPOSITION 59, THE "COMPUTER SOFTWARE" EXCLUSION UNDER SECTION 6254.9 OF THE GOVERNMENT CODE, INCLUDING WHAT CONSTITUTES A "COMPUTER MAPPING SYSTEM," MUST BE NARROWLY CONSTRUED.

Under Proposition 59, a statute in effect on the effective date of the constitutional provision "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2).) In the specific context of the *Sierra Club* case, this means that what constitutes a "public record" (Gov. Code, § 6252, subd. (e)), including inspection and copying rights applicable to "public records" (Gov. Code, § 6253), must be *broadly* construed since these provisions further the people's right of access. On the other hand, the exclusion from "public record" status of "computer software" (Gov. Code, § 6254.9, subd. (a)) must be *narrowly* construed since it limits the right of access.[8]

In Section 6254.9,[9] for purposes of the computer software exclusion, the term "computer software" was not precisely defined by the Legislature. While Proposition 59 constitutionally requires the term "computer software" to be *narrowly* construed, even a *plain meaning* construction of the term "computer software" as a "set of instructions, known as code, that directs a

[8] All of the foregoing statutory provisions were in effect on the effective date of Proposition 59 which was November 3, 2004. (See Cal. Const., art. XVIII, § 4.)

[9] Unless otherwise indicated, all further statutory references are to the Government Code.

computer to perform specified functions or operations" (*Microsoft Corp. v. AT&T Corp.* (2007) 550 U.S. 437, 447 (hereafter "*Microsoft*")) does *not* include data within its scope.

Section 6254.9 specifies certain terms that are at least included within the "computer software" definition pursuant to the statute: "computer mapping systems," "computer programs," and "computer graphics systems." (Gov. Code, § 6254.9, subd. (b)). Neither of the foregoing terms of inclusion were specifically defined by the Legislature in the statute. However, also under the constitutional mandate of Proposition 59, *each* of these terms of inclusion must be *narrowly* construed in a manner *consistent with a narrow construction of the primary term "computer software"* since they all have the resulting effect of limiting the right of access to public records. (Cal. Const., art. I, § 3, subd. (b)(2).)

For example, a *narrow* construction of the term "computer programs" in Section 6254.9 could limit its scope to source code (i.e., "Software in the form in which it is written and understood by humans." (*Microsoft, supra*, 550 U.S. at p. 448, fn. 8.)) "To be functional, however, software must be converted (or 'compiled') into its machine-usable version, a sequence of binary number instructions typed 'object code.'" (*Ibid.*) A *narrow* construction of the term "computer mapping systems" would refer to the *functional* version of such mapping software (object code) while *excluding* any GIS databases.[10] The foregoing would be consistent with the narrow construction constitutional mandate of Proposition 59 and would avoid a superfluous construction of the statute. (See *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.)

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[10] The term "computer software" in Section 6254.9 would include both source code and object code while excluding data. This would allow the primary term "computer software" to include object code other than that associated with mapping or graphics systems, as specified in the terms of inclusion in subdivision (b) of Section 6254.9.

Proposition 59 also provides: "This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records." (Cal. Const., art. I, § 3, subd. (b)(5).) The previous interpretation does not repeal or nullify the computer software exclusion under Section 6254.9. Rather, it results from application of the constitutional requirement of *narrowly construing* existing statutes that limit the right of access to public records. (Cal. Const., art. I, § 3, subd. (b)(2).) The computer software exclusion still exists, but it must be *narrowly* construed in accordance with the constitutional mandate of Proposition 59.

A. Pursuant to Proposition 59, a "Computer Mapping System" Should Not Include GIS Databases Within Its Scope Under Section 6254.9 of the Government Code Unless There Was a Clear and Unambiguous Intention of the Legislature to Do So.

Consistent with the Proposition 59 constitutional mandate of narrowly construing statutes that limit the right of access to public records (Cal. Const., art. I, § 3, subd. (b)(2)), a "computer mapping system" should not include a GIS *database* within its scope under Section 6254.9 unless there was a clear and unambiguous intention of the Legislature to do so. If there is reasonable uncertainty regarding the intention of the Legislature on this point, access should be provided as a public record pursuant to the constitutional right of access under Proposition 59. Very simply, if a GIS database is to be included in the definition of "computer software," which is contrary to the plain meaning construction of "software" (*Microsoft, supra*, 550 U.S. at p. 447) and contrary to the narrow construction mandate of

Proposition 59 (Cal. Const., art. I, § 3, subd. (b)(2)), then the intention of the Legislature on this point must be clear and unambiguous.[11]

"[R]eading the tea leaves of legislative history is often no easy matter. Even assuming there is such a thing as meaningful collective intent, courts can get it wrong when what they have before them is a motley collection of authors' statements, committee reports, internal memoranda and lobbyist letters. Related to this problem are the facts that legislators are often 'blissfully unaware of the existence' of the issue with which the court must grapple, and, as mentioned above, ambiguity may be the deliberate outcome of the legislative process. In light of these factors, the wisest course is to rely on legislative history only when that history itself is unambiguous." (*J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1578.)

The Court of Appeal opinion included a reference to a memorandum by the City of San Jose, the sponsor of the bill that resulted in the enactment of Section 6454.9 (Stats. 1988, ch. 447, § 1, p. 1836), for purposes of ascertaining the legislative history of the statute. (Slip. Opn. at pp. 9-10.). Statements in the memo may well represent the intentions of the City of San Jose, but they shed little light on the intent of the *Legislature* in interpreting the term "computer mapping systems" under Section 6454.9. (Cf. *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 689 [opinion of sponsors of an initiative is not relevant since such opinion does not represent the intent of the electorate].)

The legislative history cited by the Court of Appeal opinion also included two references to *commercial* use of "computer software" for *profit-making* purposes. One reference was a Senate staff analysis that noted a "number of private parties have requested use of the city's [San Jose]

[11] One way of increasing clarity is to include a statutory definition of a "computer mapping system" in Section 6254.9 which the Legislature did not do.

software under the [Act] for *profit-making* purposes." (Slip Opn. at p. 11, italics added.) A second reference was a Republican analysis for the Assembly Governmental Organization Committee which noted that "[p]assing such costs along to those who will use them for *business-oriented purposes* is in the taxpayers' best interest." (Slip Opn. at p. 12, italics added.)

The concerns addressed by the foregoing do not appear related to the initial access to a public record in connection with matters relating to the conduct of the people's business. Rather, the concerns relate to *subsequent commercial distribution* of "computer software" for profit-making purposes. In the specific context of a GIS database, there is a distinction between a member of the public requesting public access to a GIS database relating to the conduct of the people's business and a commercial business in the private sector seeking use of a GIS database for subsequent commercial distribution in connection with a profit-making enterprise.

The constitutional right of access provisions under Proposition 59 (Cal. Const., art. I, § 3, subds. (b)(1) & (2))[12] should *at least* require low cost initial public access to government agency GIS databases in connection with matters relating to the conduct of the people's business. This is consistent with the spirit and intent of Proposition 59 and the CPRA. However, the constitutional right of access provisions of Proposition 59 may not necessarily extend to any subsequent commercial distribution of GIS databases in a profit-making enterprise.

At least one court in another jurisdiction has recognized this distinction with respect to providing public access to GIS databases at a low

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[12] This includes the constitutional right of access to information concerning the conduct of the people's business under subdivision (b)(1) and pursuant to subdivision (b)(2) the narrow construction of existing statutes such as Section 6254.9 that limit the right of access.

cost. The South Carolina Supreme Court has held that limitations on the fee structure for providing copies of public records are applicable only to those copies that are provided in keeping with the spirit of the state public records law (initial access to a public record), and *not* to subsequent commercial distribution of public records for profit. (See *Seago v. Horry County* (2008) 378 S.C. 414, 428 [663 S.E.2d 38, 45-46].)[13]

V. CONCLUSION.

The CPRA was intended to safeguard the accountability of government to the public. (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 475.) As this court has observed regarding the CPRA: "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.) This right of access to information concerning the conduct of the people's business has now been *constitionalized* by the passage of Proposition 59 in 2004. (Cal. Const., art. I, § 3, subd. (b)(1).)

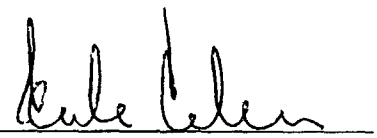
Public agencies extensively use GIS databases to facilitate the conduct of the people's business, and such use will only grow in the future. This is precisely what the CPRA and Proposition 59 are designed to address in providing the people with a legal right of access to information relating to the conduct of the people's business. It would frustrate these legal rights of access if, as the Court of Appeal decision in *Sierra Club* would allow through an inappropriate expansive interpretation of the "computer software" exclusion under Section 6254.9, government agencies could impose

[13] The *Seago* case involved a request for GIS data under the public records law in South Carolina.

prohibitively expensive fees or charges that would *effectively preclude access* to GIS databases to the vast majority of the public. Accordingly, the decision of the Court of Appeal should be reversed.

Dated: March 2, 2012

Respectfully submitted,



JACK COHEN
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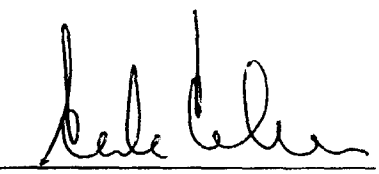
CERTIFICATE OF WORD COUNT

I certify that the foregoing amicus curiae brief, as measured by the word count of the computer program used to prepare the brief, contains 3,874 words.

Dated: March 2, 2012



JACK COHEN
Attorney at Law

Proof of Service
State of California, County of Los Angeles

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is: Post Office Box 6273, Beverly Hills, CA 90212.

On March 2, 2012, I served the foregoing APPLICATION OF JACK COHEN FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER SIERRA CLUB by depositing true copies thereof in the United States mail in Beverly Hills (County of Los Angeles), California, enclosed in sealed envelopes with the postage thereon fully prepaid, and addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 2, 2012, at Beverly Hills, California.

Jack Cohen