No. S281977

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LEGISLATURE OF THE STATE OF CALIFORNIA; GAVIN NEWSOM, in his official capacity as Governor of the State of California; and JOHN BURTON,

Petitioners,

v.

SHIRLEY N. WEBER, Ph.D., in her official capacity as Secretary of State of the State of California,

Respondents,

THOMAS H. HILTACHK,
Real Party in Interest.

APPLICATION OF EDMUND G. BROWN, JR. FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), Edmund G. Brown, Jr. respectfully applies for this Court's permission to file the accompanying *amicus curiae* brief in support of Petitioners the Legislature of the State of California, Gavin Newsom in his official capacity as the Governor of the State of California, and John Burton, in their pending emergency petition against Respondent Shirley N. Weber, Ph.D., in her official capacity as Secretary of State of the State of California.

RULE 8.520(f)(4) DISCLOSURE

Consistent with California Rule of Court 8.520(f)(4), *amicus curiae* states that no party or any counsel for any party authored this *amicus curiae* brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than *amicus curiae* and his counsel made a monetary contribution to fund the preparation or submission of the brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Edmund G. Brown, Jr. served as a law clerk to Justice Mathew Tobriner of this Court from 1964 to 1965; as member of the Los Angeles Community College Board of Trustees from 1969 to 1971; as Secretary of State of California from 1971 to 1975; as Mayor of Oakland, California from 1999 to 2007; as Attorney General of California from 2007 to 2011; and as Governor of California from 1975 to 1983 and 2011 to 2019. Governor Brown's many years of service in state and local government have given him an unprecedented understanding of

how California government functions and a deep interest in ensuring that our state and local government entities continue to serve the public effectively.

THE AMICUS CURIAE BRIEF WILL ASSIST THIS COURT IN DECIDING THIS MATTER

Amicus curiae seeks to fulfill the "classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus.* (9th Cir. 1982) 694 F.2d 203, 204. As commentators have stressed, an *amicus curiae* is often in a superior position "to focus the court's attention on the broad implications of various possible rulings." Robert L. Stern et al., *Supreme Court Practice* (6th ed. 1986) 570–571 (citation omitted).

Amicus curiae is familiar with the briefs that have been previously filed in this proceeding. He has experience with the issues presented by this appeal and believes his experience will make his proposed brief of assistance to this Court.

In addition, the undersigned counsel argued before this Court on behalf of the petitioners in *Raven v. Deukmejian* (1990) 52 Cal.3d 336 – the most recent case in which this Court held that constitutional changes made by a ballot initiative were a constitutional revision – and thus has a perspective on the issues in the present proceeding that may assist the Court in deciding this matter.

CONCLUSION

Amicus curiae therefore respectfully asks the Court to grant this application and permit him to file the accompanying *amicus curiae* brief in support of Petitioners.

Dated: January 31, 2024

Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ David B. Goodwin*
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Edmund G. Brown, Jr.

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INTRODUCTION

"[A]lthough the initiative power may be used *to amend* the California Constitution, it may not be used *to revise* the Constitution." *Strauss v. Horton* (2009) 46 Cal.4th 364, 414 (emphasis in original). While this Court has not attempted to identify all of the circumstances in which a constitutional revision might occur – an impossible task given the multitude of potential ballot initiatives – the Court has found that a revision would certainly take place if an initiative makes "far reaching changes *in the nature of our basic governmental plan*" or to "*the foundational powers of its branches*." *Id.* at 427, 438 (emphasis in original) (citations omitted).

The initiative at issue in this proceeding, called by its proponents the "Taxpayer Protection and Government Accountability Act" and referred to in the Petition and here as the "Measure," proposes to make precisely that type of far reaching change: it would deprive the Legislature of its power to tax.

No serious dispute can exist that the taxing power is fundamental to our basic governmental plan. As the United States Supreme Court found in 1819 and reiterated 200 years later, "[t]he power to tax is…'essential to the very existence of government.'" *N.C. Dep't of Revenue v. Kimberly Rice Kaestner 1992 Fam. Tr.* (2019) 139 S.Ct. 2213, 2219-2220 (quoting *McCulloch v. Maryland* (1819) 4 Wheat. 316, 428).[1] As this Court

[1] The United States Supreme Court has emphasized that the power to tax is "basic to the power of the State to exist." (continued…)

similarly put it, the power to tax is "probably the most vital and essential attribute of the government." *Santa Clara Cnty. Loc. Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 254 (citation omitted). Indeed, "the power to govern – whether local or state – means little without the coordinate power to tax, so integral is finance to government." *Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles* (1991) 54 Cal.3d 1, 15.[2]

Nor can there be any serious dispute that the Measure would take that power away from the Legislature. Under the Measure, every single tax must be submitted to the voters for approval, meaning that the Legislature could only recommend that the voters approve new taxes, but could not itself exercise the power to tax. The actual taxing power would instead be lodged entirely in the electorate. The Measure would also strip

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Arkansas v. Farm Credit Servs of Cent. Ark. (1997) 520 U.S. 821, 826. It is "vital and fundamental, and, in the highest degree, governmental in character." *Charles C. Steward Mach. Co. v. Davis* (1937) 301 U.S. 548, 610. It "is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive." *Nicol v. Ames* (1899) 173 U.S. 509, 515.

[2] *See also City & County of San Francisco v. Regents of Univ. of Cal.* (2019) 7 Cal.5th 536, 545 ("The power to tax…is the lifeblood of the charter city; without it, 'the municipality cannot exist'") (citation omitted); *County of Sonoma v. Comm'n on State Mandates* (2000) 84 Cal.App.4th 1264, 1280 ("The principle that the Legislature may exercise all powers not denied to it by the Constitution 'is of particular importance in the field of taxation, in which the Legislature is generally supreme'") (citations omitted); *People v. Superior Court* (1985) 164 Cal.App.3d 526, 542 ("The power to tax is essential to the existence of a government").

the Legislature of much of its spending power by requiring all tax measures to contain binding commitments as to where the money raised could be spent.

That is not all. The Measure also proposes to gut state administrative agencies by depriving them of the ability to impose fees and charges; limiting fees and charges to actual cost; transferring the power, and the burden, to set fees and charges to the Legislature or the voters, while expressly overriding prior judicial decisions that upheld measures designed to combat climate change; imposing extreme burdens on state agencies that set fees and charges, *e.g.*, to determine the "actual cost" to the State of a motorist's drive across the Bay Bridge or use of the express lane on the 405; requiring the agencies to prove that "actual cost" by clear and convincing evidence; and limiting fees and charges to no more than "actual cost," which could eliminate tens of billions of dollars of revenue that fund our State Government.[3] On top of that, the Measure would terminate all remaining taxing power of local governments and, as Petitioners explain (*see* Kaminski Decl., ¶¶ 9, 23), would invalidate as many as 131 local tax measures enacted over the past two years as well as local measures adopted in 2024, wreaking havoc on the budgeting process for local governments.[4]

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[3] Measure, Sec. 4, proposed art. XIII A, § 3, subds. (e)(1), (g)(1), (h)(1); Sec. 5, proposed art. XIII C, § 1, subds. (a), (j)(1); Sec. 6, proposed art. XIII C, § 2, subd. (h)(1).

[4] To take just one example, in June 2022, the voters of the City of Oakland – where *amicus curiae* had served as Mayor – approved a measure to fund local public libraries. Under the (continued…)

The issue for this Court is not, of course, whether the Measure is a good idea, but whether Real Party can inflict a change of this magnitude on our system of government through a ballot initiative. That, he cannot do.

In an attempt to give the back of the hand to these concerns, Real Party echoes a 1950s film noir in which a police officer tells a crowd, "there's nothing to see, move along," when the police officer in fact is standing in front of a corpse – in this instance (to apply the metaphor to the facts), the corpse of our State Government.

As to Real Party's argument against the Petition, it is, at bottom, that this Court held 45 years ago that Proposition 13 was not a constitutional revision, so the Measure cannot be a constitutional revision as both initiatives concern taxation. But Proposition 13, the Court concluded back in 1978, perhaps with undue optimism, was "modest both in concept and effect and does not change our basic governmental plan." *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 225, 227. The same cannot be said of the Measure, which turns our basic governmental plan inside out.

Measure, the City of Oakland would be forced to stop collecting money on behalf of the libraries unless Oakland holds another election in which the voters re-approve the library tax. Kaminski Decl., Ex. A, p. 15; *see also* Measure, Sec. 4, proposed art. XIII A, § 3, subd. (b). In the meantime, library funding would be interrupted, libraries would close, and one of the most important civic services provided to the children of Oakland would be disrupted if not eliminated.

But even assuming that Real Party could persuade this Court that the Measure is not a constitutional revision standing by itself, the Measure does not stand by itself. Just as initiative proponents cannot revise the California Constitution by breaking a single illegal initiative into separate initiatives, the Measure must be considered along with the prior tax initiatives expressly referenced in the Measure – initiatives that, together, effectively deprive state and local government, and government agencies, of all power to tax and much of their power to spend.

For the reasons set forth below and in Petitioner's Emergency Petition for Writ of Mandate, this Court should find the Measure to be a constitutional revision of the California Constitution and remove the initiative from the November 2024 ballot.

ARGUMENT

I. The Measure Would Eliminate Inherent, Longstanding Core Powers Of Our State Government

A. An Initiative Is A Constitutional Revision If Its Constitutional Changes Would Impair A Core Governmental Power Or Function

"The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Cal. Const., art. II, § 8(a). But the Constitution only allows the initiative process to amend – rather than revise – the Constitution because activities leading to "'comprehensive changes' to the Constitution require more formality, discussion and deliberation than is available through the initiative process." *Strauss*, 46 Cal.4th at 444 (citing Douglas C. Michael, *Preelection Judicial Review: Taking the Initiative in Voter Protection* (1983)

71 Cal.L.Rev. 1216, 1224) (emphasis omitted); *see Raven v. Deukmejian* (1990) 52 Cal.3d 336, 341.

An amendment to the California Constitution is relatively easy to identify: it is an "'addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.'" *Amador Valley*, 22 Cal.3d at 222 (quoting *Livermore v. Waite* (1894) 102 Cal. 113, 119). In contrast, a revision involves a significant or meaningful change to the Constitution, either in the *quantitative* or the *qualitative* sense. *Id.* at 223.

A *quantitative* revision is likewise relatively easy to identify under this Court's prior rulings: it occurs when an initiative is "so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions…." *Strauss*, 46 Cal.4th at 427.[5]

In contrast, the Court has not set forth a single standard for determining whether an initiative proposes to work a

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[5] The only initiative that failed the "quantitative" test was the one at issue in *McFadden v. Jordan* (1948) 32 Cal.2d 330. No one has proposed a quantitative revision in the subsequent 76 years and, as a practical matter, no future initiative is likely to do so. Initiatives are expensive, typically involving an expenditure of at least $20 million between the cost of signature gathering and an election campaign, and the groups or wealthy individuals who are willing to bear such an expense are likely to be concerned with specific issues (such as eliminating the right to same-sex marriage or reclassifying Uber and Lyft drivers as independent contractors) rather than with rewriting the bulk of the Constitution.

qualitative revision. In *McFadden*, the Court found that an initiative was a revision "both because of its varied aspects and because of the 'substantial curtail[ment]' of governmental functions which it would cause." *Amador Valley*, 22 Cal.3d at 222 (citing *McFadden*, 32 Cal.2d at 345-346). In *Legislature v. Eu*, the Court held that a revision would also occur if it appears "from the face of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution." *Legislature v. Eu* (1991) 54 Cal.3d 492, 510 (emphasis omitted). In *Raven*, this Court struck down, as an improper revision, the portion of an initiative that deprived the California courts of the power to determine constitutional rights in criminal cases. *Raven*, 52 Cal.3d at 355.[6] And in *Strauss*, the Court explained that a revision would occur if an initiative proposes to make "far reaching changes *in the nature of our basic governmental plan*" or to "*the foundational powers of its branches*." *Strauss*, 46 Cal.4th at 427, 438 (emphasis in original).

None of these articulations of the qualitative test require the proposed change to be complex or multifaceted. As this Court explained, "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic

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[6] Real Party tries to take comfort from the fact that this Court did not invalidate the entire initiative in *Raven*. *See* RPI Return, p. 33. But that was because the initiative also made numerous statutory changes, and the only challenge to the statutory changes was on "single subject" grounds, which the Court declined to accept. *Raven*, 52 Cal.3d at 347, 349. (As noted in the application for leave to file this brief, the undersigned counsel represented the petitioners before this Court in *Raven*.)

governmental plan as to amount to a revision." *Amador Valley*, 22 Cal.3d at 223.

As is discussed in Sections I.B to I.E *infra*, the Measure fits each of these articulations of the qualitative test. The Measure would eliminate the Legislature's powers to tax and to spend; expand the definition of "taxes" to place what are currently non-tax fees and charges beyond the power of the Legislature and local governments to enact and the Executive Branch to administer; disrupt the power and functions of the Executive and Legislative Branches; and call into question the integrity of more than 100 local government programs.[7] No initiative since *McFadden* has come close to proposing such far-reaching changes to our State Government.

B. The Measure Would Strip The Legislature Of Its Core Power To Enact Taxes

Real Party relies largely on the fact that this Court has held that ballot initiatives can address tax issues and can impose supermajority requirements for specific types of taxes without revising the California Constitution. *See* RPI Return, at pp. 25, 42-43; *see also Rossi v. Brown* (1995) 9 Cal.4th 688, 703-704; *Santa Clara*, 11 Cal.4th at 235; *Amador Valley*, 22 Cal.3d at 228. But the Court's prior rulings on ballot initiatives only go so far. To date, the Court has not addressed an initiative like the Measure, which deprives the Legislature of its taxing power

[7] *See* Measure, Sec. 4, proposed art. XIII A, § 3, subds. (b)(1), (h)(4); Sec. 6, proposed art. XIII C, § 2, subds. (b), (c); Sec. 5, proposed art. XIII C, § 1, subd. (f).

altogether by requiring that all new or reenacted taxes be approved by the electorate.

That distinction is critical. As the citations in the Introduction to this brief reflect, the taxing power is fundamental to all other government functions. As one commentator put it: "[w]ithout the power to tax, a government will have few resources to do anything. It cannot effectively police its citizens, protect its people from foreign invaders, or regulate commerce because it cannot pay the associated costs."[8] Courts therefore have long understood that "'[t]he power of the Legislature in the area of taxation is paramount.'" *Hoogasian Flowers, Inc. v. State Bd. of Equalization* (1994) 23 Cal.App.4th 1264, 1270 (citation omitted).

The California Legislature has possessed the power to tax since the first state constitution in 1849, and it has exercised that power ever since, starting with its very first session in 1850.[9] Subsequent changes to the California Constitution have authorized or eliminated, or imposed supermajority requirements for, particular taxes, or have imposed restrictions on the power of

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[8] Prof. Steven J. Willis, *The Power to Tax*, Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/articles/article-i/clauses/751#:~:text=Without%20the%20power%20to%20tax,cannot%20pay%20the%20associated%20costs.

[9] Among other things, the first Legislature enacted the Foreign Miners' Tax Act of 1850 (imposing a monthly tax on foreign miners); a property tax (levied at the rate of 50 cents on each $100 of taxable property); and a poll tax (levied at the rate of $5 per person on every male inhabitant over 21 and under 50 years of age). *See, e.g.*, *Statutes of 1850*, Chs. 17, 52; *see also Statutes of 1851*, Chs. 6, 27 (enacting additional taxes); *Statutes of 1852*, Chs. 2, 3, 6, 7 (same).

local governments to impose certain types of taxes, but those changes still left the statewide taxing power in the Legislature's hands and the Legislature continues to exercise that power.[10] Thus, the power to tax has been for 175 years, and remains today, a core function of the California Legislature. That fact should not be surprising. *Every state legislature in the country has the power to enact taxes.*[11] If the Court allows the Measure to stay on the ballot, and it is approved, California would be the sole exception.

Under the Measure, the only thing the Legislature could do is *recommend* (by a two-thirds vote) that the voters approve specific taxes, effectively turning *all* (and not merely some local) tax measures into referenda. *See* Measure, Sec. 4, proposed art. XIII A, § 3, subd. (b); Sec. 6, proposed art. XIII C, § 2, subd. (d).

In addition, the retroactivity provision of the Measure dictates that local governments would have only twelve months to ensure that *every tax, fee, or charge of any sort* adopted since January 1, 2022 conforms to the Measure's requirements. Measure, Sec. 4, proposed art. XIII A, § 3, subd. (f); Sec. 6, proposed art. XIII C, § 2, subd. (h). To satisfy those requirements, local governments would need to call elections to

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[10] *See, e.g., Statutes of 2023*, Ch. 231 (increasing taxes on firearms); *Statutes of 2022*, Ch. 878 (increasing payroll taxes).

[11] *See* U.S. Const., art I, § VIII, cl. I (Taxing Power); U.S. Const. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states"); *see generally* 71 *Am.Jur.2d*, § 57 (State and Local Taxation); Prosper Bernard, Jr. et al., *American Government* (3d ed. 2021), p. 482.

re-address each tax passed over the course of three years. Since no election is scheduled before the twelve-month deadline would expire, the jurisdictions affected – numbering more than 100 – would be required to hold special elections to revive previously adopted taxes and fees. Kaminski Decl., ¶¶ 9, 23. On top of that, the Legislature would need to call special elections at the state level to revive at least 15 taxes enacted by the Legislature that the Measure would otherwise void. *See id.* ¶ 23; Section I.E *infra*.

This plethora of special elections would not be free. For example, Marin County, which has a population of around 260,000, estimated that a county election would cost $800,000-$1,000,000 – numbers that would increase dramatically for elections in California's more populous counties or in a major city – and that a statewide election would cost $1.75-$3.00 for each of California's 22,114,156 registered voters.[12] There is more than a small degree of irony in the fact that Real Party's proposal to revise the California Constitution by eliminating the power to tax

[12] Marin County based those estimates on a study from 2003. *See* Lynda Roberts, *Election Costs and Billing*, Cnty. of Marin, https://www.marincounty.org/depts/rv/election-info/election-costs-and-billing; *Report of Registration: March 5, 2024, Presidential Primary Election*, Sec'y of St., Shirley N. Weber, Ph.D. (Oct. 3, 2023), https://elections.cdn.sos.ca.gov/ror/154day-presprim-2024/complete-ror.pdf. To reflect today's prices, each of the dollar figures in the text should be increased by 67%. *See $1 In 2003 Is Worth $1.67 In 2024*, CPI Inflation Calculator, https://www.officialdata.org/us/inflation/2003?endYear=2024&amount=1.

would impose a very hefty new expense on the taxpayers of this State.

C. The Measure Would Also Strip The Legislature Of Its Core Spending Power

The Measure not only proposes to deprive the Legislature of its *taxing* power, it would also largely eliminate the Legislature's *spending* power going forward. From 1850 to the present, the Legislature has had broad authority to decide how to appropriate funds that have been collected through state taxes and from fees and charges imposed by government agencies. That power is currently set forth in Article IV of the California Constitution, among other places.[13] As this Court explained in 1858 and reiterated 140 years later, "'the power to collect and appropriate the revenue of the State is one peculiarly within the discretion of the Legislature.'" *In re Att'y Discipline Sys.* (1998) 19 Cal.4th 582, 595 (quoting *Myers v. English* (1858) 9 Cal. 341, 349); *see also Perez v. Roe 1* (2006) 146 Cal.App.4th 171, 177 ("A core function of the Legislature is to make statutory law, which includes weighing competing interests and determining social policy.").

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[13] *See* Cal. Const., art. IV, § 12(e)(1) ("the budget bill and other bills providing for appropriations related to the budget bill may be passed in each house by rollcall vote entered in the journal, a majority of the membership concurring, to take effect immediately upon being signed by the Governor or upon a date specified in the legislation"); *id.* § 12(f) ("The Legislature may control the submission, approval, and enforcement of budgets and the filing of claims for all state agencies").

The Measure would terminate that power. Going forward, each new state tax measure must contain binding limitations on how the revenue could be spent. Measure, Sec. 4, proposed art. XIII A, § 3, subd. (b)(2). The Measure thus would relegate the Legislature to an advisory role by depriving the Legislature of all discretion in deciding how to spend the revenue raised through new taxes.

Real Party may respond that the Measure allows future ballot measures to direct tax revenue to "unrestricted general revenue purposes." It therefore is *possible* that two-thirds of the members of the Legislature may vote to put a general spending measure on the ballot and it is also *possible* that two-thirds of the voters may agree, Real Party may suggest. But the political reality is that a measure to enact new taxes for general purposes is highly unlikely to make it to the ballot, and that remote possibility is not enough. For example, a constitutional amendment that grants the electorate the power, by a future initiative, to transfer all judicial power to the Legislature surely would, by itself, be a revision even if the electorate could decide not to exercise that power. Likewise, a measure that eliminates the Legislature's core power to direct spending to appropriate programs and activities would be a revision even if a slim chance exists that the voters might hand part of that power back to the Legislature.

D. The Measure Would Undermine Core Powers Of The Executive And Legislature To Respond To Emergencies

The Measure's elimination of the Legislature's spending

power is of special concern in the context of emergencies.

A core function of the Governor is to address and respond promptly to emergencies that require supplemental appropriations or additional resources. Government emergencies are not mere possibilities. Emergencies have occurred in the recent past, including the COVID-19 pandemic, the floods during the winter of 2022-2023, and the wildfires of 2017, 2018, and 2019. California is currently faced with a fiscal emergency in the form of the largest budget deficit in its history, with a revenue shortfall of $58 billion according to the Legislative Analyst's most recent report.[14] And future emergencies are certain to arise, whether a major earthquake, another pandemic, a financial depression, or forest fires or floods driven by climate change. But under the Measure, the California Government's ability to respond would be hamstrung.

As an initial matter, the Measure would make it difficult for the Governor to prepare for times of emergency, in part because, as a practical matter, voters are unlikely to approve spending measures for unspecified future emergencies and in part because emergency funding is inherently difficult to predict with accuracy. Accordingly, it is nearly certain that the State

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[14] Gabriel Petek, *The 2024-25 Budget: Overview of the Governor's Budget*, Legis. Analyst's Off. (Jan. 2024), https://lao.ca.gov/reports/2024/4825/2024-25-Overview-Governors-Budget-011324.pdf (disagreeing with Governor Newsom's estimate of a $38 billion deficit on the ground that he used an incomplete baseline).

Government will be faced with the need to re-allocate spending or raise new funds in times of emergency.

While Real Party gives this scenario the back of the hand, saying, in effect, that the State will cope somehow, and the voters can always raise taxes during the next state election, any such limitation on the power of the Governor and Legislature to act swiftly in an emergency would change the way that our State Government has operated since 1850. The Executive and Legislative Branches have, during the State's entire lifespan, been able to reallocate funds as appropriate in times of emergency, with the judicial branch acting as an important check on their decisions. Even in the post-Proposition 13 world, the Legislature can approve funds for emergency use (by two-thirds vote) if the funds are "repaid" within three years. Cal. Const., art. XIII B, § 3. The Measure would upset that balance by calling into question the power to reallocate funds, potentially requiring the Governor and Legislature to wait until the next election to raise the funds needed to address an emergency. These limitations would be especially problematic if an emergency were to arise where the Governor and Legislature would want to divert massive amounts of funds from one use to another, such as funding public health during a pandemic or rebuilding freeways and bridges after a major earthquake, when it is far from certain that the reallocated funds could be repaid.

Real Party responds that "there is no emergency that the State could not financially address without requiring urgent voter approval of new taxes" because the State could use

interfund loans to borrow from itself in the event of an emergency. RPI Prelim. Opp., p. 50; *see also* RPI Return, p. 63. That response gives short shrift to the practical realities that would arise under the Measure. Interfund loans must abide by the strict statutory conditions set forth in Government Code §16310, including "exhaustion of the General Fund, no interference with the object for which the Special Fund was created, [and] return of the money as soon as feasible." *Tomra Pacific, Inc. v. Chiang* (2012) 199 Cal.App.4th 463, 489. But the Legislature could not commit to return borrowed funds – rendering an interfund loan impossible – because future spending decisions would no longer be the Legislature's to make.

Real Party would then say that the State could hold yet another special election, but that too raises serious concerns, including the costs and logistics of administering a special election in the midst of an emergency.[15] As the COVID-19 pandemic illustrated, holding an election during a pandemic would be logistically difficult, if not impossible, without risking the health of election workers and voters, and would also be counterproductive to the other measures needed to stem the

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[15] Statewide special elections are not everyday occurrences. Over the past 50 years, *only three* statewide special elections have been called for purposes other than a recall, and only a handful of local special elections have been called for purposes other than to fill a vacancy. The turnout at nearly all was far lower than in regular elections. *See California Special Elections History, 1989 to PRESENT*, https://elections.cdn.sos.ca.gov/special-elections/pdf/special-elections-history.pdf.

outbreak. Additionally, thousands of Californians have been displaced from their homes due to wildfires or earthquakes. Could the City of Paradise have held a special election to raise emergency funds when almost all of its residents were forced to relocate after the devastating Camp Fire in November 2018? Could local authorities administer a special election in the wake of a 7.9 earthquake in San Francisco or Los Angeles? Or would that disenfranchise the very people who would most need the additional funding allocation?

E. The Measure Would Fundamentally Degrade The Power Of The Legislative and Executive Branches And Impose New Burdens On The Judicial Branch

The Measure as a whole would also alter the balance of power between the three branches of the State Government by imposing new burdens on each of the branches while impeding the ability of the Executive, Legislative, and Judicial Branches to delegate to executive agencies.

Under the Measure, the State would bear a new evidentiary burden (likely to be administered at the agency level) to demonstrate by clear and convincing evidence that the State's thousands of fees and charges are imposed at actual cost. This new burden would be paired with a reduction in discretion at all levels. If the agency does not meet its burden, and the fee or charge is deemed a tax, it must be approved by both the Legislature or local legislative body and the voters. Even if the agency does meet its burden, and the fee is classified as an "exempt charge," it must still be approved by the Legislature or local legislative body. Measure, Sec. 4, proposed art. XIII A, § 3,

subd. (c). Consequently, the Legislature and the local legislative bodies would need to evaluate all fees, costs, and taxes (a category that the Measure substantially broadens). The Legislature would also need to enact all exempt charges, many of which are presently set and administered by executive agencies acting on delegated authority.

In addition, the Measure would necessarily involve the judicial branch in determining whether an administrative agency "levy, charge or exaction" is an exempt charge or a tax, transforming a function previously held by the Legislature and the State's administrative agencies into a judicial responsibility.

The Measure therefore threatens to impose an unprecedented burden on both the State Legislature and on the local legislative bodies, while stripping them of final decision-making authority over all but exempt charges, many of which they have previously been permitted to delegate anyway. Additionally, the Measure would burden agencies and the judiciary with an onerous fiscal analysis. Taken together, these burdens would fundamentally alter each branch's decision-making power while also interfering with their ability to delegate authority. The Measure would thereby transform the balance of power among the branches of government.

1. The Measure Would Impose Debilitating Burdens Of Proof On Agencies To Justify Fees And Charges

The regime proposed by the Measure would significantly impede the State Government's ability to function by transferring the power to set charges and fees from agencies to the

Legislature or, for local government agencies, the local legislative body.

As an initial matter, the Measure proposes to switch the burden of proof in taxpayer actions, which until now has always been held by the plaintiff or petitioner. The Measure instead places the burden on the State "to prove by clear and convincing evidence that a levy, charge, or other exaction is an exempt charge and not a tax." Measure, Sec. 4, proposed art. XIII A, § 3, subd. (g)(1); Sec. 6, proposed art. XIII C, § 2, subd. (h)(1) (placing the same burden on "the local government"). To satisfy that burden, the State must show, by clear and convincing evidence, that the charge is "reasonable and that the amount charged does not exceed the actual cost of providing the service or product to the payor." Measure, Sec. 4, proposed art. XIII A, § 3, subd. (g)(1). If the State satisfies the burden, the Legislature must still approve the charge. If the burden is not satisfied, the charge is deemed a tax and must go to the voters.

This "clear and convincing evidence" standard is a meaningful burden. It requires proof that it is "highly probable that [a] fact is true," in contrast to the ordinary preponderance standard, which merely requires proof that a fact is "more likely to be true than not." *See* CACI, No. 201 [Highly Probable—Clear and Convincing Proof]; CACI No. 200 [Obligation to Prove - More Likely True Than Not True]; 1 B. Witkin, *Cal. Evid. 6th* (rev. ed. 2023), Burden § 42. "Under the clear and convincing standard, the evidence must be 'so clear as to leave no substantial doubt' and 'sufficiently strong to command the unhesitating assent of

every reasonable mind.'" *Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1158 (citations omitted). This is tantamount to a presumption against a finding that a fee is an exempt charge. *See Colorado v. New Mexico* (1984) 467 U.S. 310, 316.

Complicating matters greatly, this heavy burden would apply to every fee and charge. *See* Measure, Sec. 3(a) (stating that the Measure would apply not just to "any new or higher tax" but also to "*all* fees and other charges") (emphasis added). And the burden would not end if a fee or charge were deemed to be exempt, because every subsequent change made – for example, in response to unavoidable economic changes that affect the cost of a service – would force the agency to bear the burden of proof again to justify the new charge. As the COVID-19 pandemic illustrated, a disruption to global supply chains and resulting inflation, which affects multiple fees and charges all at once, is certainly a plausible scenario.[16]

To take an example from an agency that we are all familiar with, the Department of Motor Vehicles currently has 72 different fees, for approximately 73 million transactions each year, collecting roughly $8 billion from them.[17] Ninety percent of

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[16] Susan Helper & Evan Soltas, *Why the Pandemic Has Disrupted Supply Chains*, Couns. of Econ. Advisors, The White House (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/why-the-pandemic-has-disrupted-supply-chains/.

[17] *Licensing Fees*, Dep't of Motor Vehicles, https://www.dmv.ca.gov/portal/driver-licenses-identification-cards/licensing-fees/; *About the California Department of Motor Vehicles*, Dep't of Motor Vehicles,
(continued…)

those revenues goes to government activities other than the cost of administering a driving test or producing a license plate, including the California Highway Patrol, state highways, environmental protection, local governments, and the general fund.[18] Under the Measure, each of these fees would be evaluated separately and none could exceed the actual cost of the service or charge provided directly to the payor without constituting a tax that the voters must approve. Measure, Sec. 4, proposed art. XIII A, § 3, subd. (e)(1). The State thus would face the choice of either submitting 72 fees to the Legislature and then the voters – and doing so again every time any change is made to any of them – or forcing the CHP, highway authorities, local government, and other government entities to lose more than $7 billion in funding.

To take another example, the California Department of Public Health ("CDPH") is responsible for regulating public and private health care facilities throughout the state, including licensing various health care professionals.[19] Through Health

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https://www.dmv.ca.gov/portal/about-the-california-department-of-motor-vehicles/#:~:text=Investigate%20consumer%20complaints,%248%20billion%20in%20revenue%20annually.

18 *Department of Motor Vehicles Strategic Plan: 2021-2026*, Dep't of Motor Vehicles, https://www.dmv.ca.gov/portal/about-the-california-department-of-motor-vehicles/department-of-motor-vehicles-strategic-plan/ ("Where Does The Money Go" tab).

19 *See Governor's Budget Highlights Fiscal Year 2024-25*, Cal. Dep't of Pub. Health, p.11 of PDF, https://www.cdph.ca.gov/Documents/CDPH-2024-25_Governor-Budget-Highlights.pdf.

and Safety Code section 1266(e), the Legislature has delegated authority to CDPH to "ensure efficient and effective use of fees collected, proper allocation of departmental resources to the [Center for Health Care Quality's] activities, survey schedules, complaint investigations, entity reported incidents, citations, administrative penalties and enforcement penalties, state civil monetary penalties, appeals, data collection and dissemination, surveyor training, and policy development."[20] These tasks are funded in large part through health care facility license fees.[21] But under the Measure, if it becomes necessary to increase these fees, CDPH would need to justify its fee allocations quite precisely to avoid running afoul of the Measure's requirements. This burden itself would direct resources away from CDPH's core mandate. Likewise, and of extra concern, the CDPH would be unable to track and respond to communicable disease outbreaks if the Department were required to await Legislative approval of any concomitant fee.[22] And if a fee does not qualify as an "exempt charge," it would need to be passed by a vote of two-thirds of the Legislature and then be approved by a majority of

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[20] *Center for Health Care Quality: Annual Fee Report for Fiscal Year 2021-22*, Cal. Dep't Pub. Health (Feb. 2021), https://www.cdph.ca.gov/Programs/CHCQ/LCP/CDPH%20Document%20Library/21-22_Annual_Fee_Report_02.05.2021.pdf; *see also* Health & Safety Code § 1266(e)(2)(A).

[21] *Licensed and Certified Healthcare Facility Services*, State of California Open Data, https://lab.data.ca.gov/dataset/licensed-and-certified-healthcare-facility-services.

the voters before it could be assessed. Measure, Sec. 4, proposed art. XIII A, § 3, subds. (b)(1), (g)(1).

The same holds true for local agencies. To take some simple examples, a city government would need to justify every building permit fee, every parking meter charge, and every dog license fee. But that is not all. The combination of the Measure's roadblock to generating revenue and the limitation on spending would prevent local governments from efficiently directing infrastructure and other investments. For example, the October 12, 2023 Letter of Amicus Association of California Water Agencies addresses the Measure's express intent to overturn *Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105 (*see* Measure, Sec. 3(e)) and explains that the Measure "would undermine the power of water agencies to pledge water rates to support debt, making it harder to efficiently fund the large capital expenditures reliable water service requires."

2. The Measure Would Place Immense Burdens On The Legislature

Real Party argues that the Measure does not revise the Constitution because the Legislature has the power to withdraw the quasi-legislative authority (*e.g.*, fee-setting) that it granted to those agencies. RPI Return, p. 55. But there is a material difference between possessing that theoretical ability, on the one hand, and, on the other hand, *requiring* the Legislature to perform the manifold fee-setting tasks now performed by state agencies in every instance. Real Party thus ignores the immensity of the new tasks that the Measure would *compel* the Legislature to undertake.

The Legislature and the Governor are currently empowered to delegate authority to executive agencies to manage and implement long-term projects and goals. Cal. Const., art. V, § 6; *see Duskin v. State Bd. of Dry Cleaners* (1962) 58 Cal.2d 155, 161-162; 7 B. Witkin, *Summary of Cal. Law* (10th ed. 2005), Constitutional Law, § 166. As a result, the executive branch includes various departments, boards, and commissions that currently exercise rulemaking authority and interpret and enforce existing statutes and regulations.[23]

The Measure requires that any state agency action or Governor's executive order that increases any payment to the State be adopted by the Legislature, rather than imposed by executive branch regulation, even if the payment is currently considered a non-tax "charge." Measure, Sec. 4, proposed art. XIII A, § 3, subds. (a), (b)(1), (c), (h)(4); *id.*, Sec. 3(a). This change would both eliminate much of the Executive Branch's administrative and regulatory power and also thrust upon the Legislature a massive new task that for decades it has delegated to state administrative agencies. This would force the Legislature and local governments to become involved in a myriad of minor details arising out of routine government operations: what is the actual cost of a fishing license or an overdue library book or an hour's parking at the garage of a city office building?

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[23] *Rulemaking Process*, Cal. Off. of Admin. Law, https://oal.ca.gov/rulemaking_process/.

Indeed, by transferring the power to set fees and charges to the Legislature and local legislative bodies, the Measure threatens to bring their operations to a halt altogether by placing an immense burden on the State and local legislatures. Evaluating every new fee or charge is not a pro forma task. While executive agencies have developed specific expertise in the fees and charges within their scope, legislators must get up to speed on each proposed charge before making a reasoned decision, burdening legislative staff with tasks that have long been performed by agencies.[24] This is time taken away from legislation that requires long form discussion and debate and an upset to the balance of government.

Requiring legislative (and potentially voter) involvement in each fee increase would surely dominate the legislative agenda, at least in the initial sessions if the Measure passes, as the Legislature would need to approve not only existing charges and fees but also the thousands of pro forma changes to fee rates to reflect inflation, new activities, and altered responsibilities.

To return to the DMV example, if the cost to produce a California driver's license were to increase by one dollar (perhaps due to changes in federal requirements for a "REAL ID"), a presumption would exist that the increased cost is a tax, and the

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[24] Real Party's unseemly reference to our State's civil servants – a category that includes this Court's staff – as "unelected bureaucrats" (Measure, Sec. 3(a); RPI Prelim. Opp. pp. 15, 39) should not distract from the indisputable fact that many State employees have years of experience and immense amounts of expertise in their respective fields, expertise that the Legislature and voting public necessarily do not have.

increase would require a supermajority vote of 67% of the Legislature and then must be put to voters for approval. Only if the DMV could show by clear and convincing evidence that the driver's licenses would be provided at cost and the revenue would not be devoted to any other purpose, making it an "exempt charge," would the requirement for voter approval be waived. Even if the DMV met that burden, the fee increase would still have to be approved by the Legislature, where a member would need to move to increase the fee, send it to a committee for consideration, and then submit it for a majority vote. One can come up with thousands of similar examples, from this Court's filing fees to bridge tolls on state highways to charges for tours of San Simeon, each of which would need to be evaluated and submitted for approval either to the Legislature or to the voters or both.

The Measure would hinder both large and small-scale adjustments to the operations of those agencies because it would change both their means of obtaining revenue and their ability to determine how revenue raised in newly redefined "taxes" could be spent. By converting some unknown number of fees and charges into "taxes" that would require voter approval before they could be put into place and requiring State agencies to obtain legislative and/or voter approval for other charges, the Measure would impair the ability of those agencies to fund their own operations and significantly shift fiscal power within the State Government.

More than a century ago this Court refused to allow the legislative branch (albeit a local one) to be deprived of the ability to delegate power to the executive branch, noting that the removal of such power would "stop the wheels of government and bring about confusion, if not paralysis, in the conduct of the public business." *Gaylord v. City of Pasadena* (1917) 175 Cal. 433, 437 (quoting *Union Bridge Co. v. United States* (1907) 204 U.S. 364, 387); *E. Bay Mun. Util. Dist. v. Dep't of Pub. Works* (1934) 1 Cal.2d 476, 479 (same). Decades later, the Court of Appeal stressed the important role of administrative agencies when it stated that a world in which the Legislature and courts are forced to perform legislative and judicial functions without the aid of administrative agencies "may well be impossible, without risking paralysis in the conduct of the public business….But it is certainly too late in the day to return to such a form of government without effecting a constitutional revision." *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1224. By wrenching such functions away from State agencies and forcing the Legislature to exercise them, the Measure would wreak just such a revision.

As a result, the resources of the State's legislative bodies would be diverted away from governing and toward determining the actual cost of a driver's license or court filings or tour guides. The Legislature's agenda would be dominated not by improving the lives of our citizens but by approving driver's license charges and fees for parking meters.

3. The Measure Would Place Burdens And Responsibilities On The California Judiciary

The Measure would also surely create a new plaintiffs' bar, to challenge the reasonableness of every fee or charge, thereby imposing huge burdens on government agencies, the Attorney General's office, local governments, and, of course, our courts. Any taxpayer would have standing to sue under statutes such as Code of Civil Procedure section 526a and under common law principles such as the private attorney general doctrine, and such plaintiffs might be entitled to recover fees under provisions such as Code of Civil Procedure section 1021.5.

Such litigation would effectively transfer responsibility for oversight of agency charges from the agencies themselves to the judiciary, which then would suddenly be plunged into the midst of the administrative process, requiring our judges to devote resources to, and become experts in, administrative agency charges, fees, and exactions – tasks that until now have been primarily and ably handled by the agencies and the Legislature.

All this would fundamentally change the nature of the State's government and would threaten to bring its operation to a halt altogether. That surely is a revision.

4. By Expressly Targeting The State's Cap-And-Trade Program, The Measure Would Also Significantly Alter The State's Government And Impede Its Efforts To Combat The Effects Of Climate Change

While he was Governor, *amicus* worked to ensure that combatting climate change became a policy priority of the State.

Amicus is therefore particularly concerned with the impact of the Measure on the State's ability to address climate change. The Measure recites that it "intend[s] to reverse" *California Chamber of Commerce v. State Air Resources Board* (2017) 10 Cal.App.5th 604, which held that revenue generated by certain cap-and-trade auctions did not amount to a tax in violation of Proposition 13. Measure, Sec. 3(e).[25] This particular example of the Measure's drastic shift in the allocation of constitutional authority among the branches of the State Government amounts to a direct attack on the State's ability to combat climate change.

The cap-and-trade program, created by the California Air Resources Board ("CARB") pursuant to the California Global Warming Solutions Act of 2006 (the "Global Warming Solutions Act") (Health & Safety Code §§ 38500 et seq.), sets a declining, aggregate cap on the amount of greenhouse gas emissions allowed to be emitted in the state each year. Entities covered under the program represented nearly 75% of the state's greenhouse gas emissions and include transportation fuel suppliers, oil refineries, and electricity generators and importers.[26] To emit more than they are allotted, businesses can pay for allowances or participate in an auction held by CARB.

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[25] As another example of its apparent hostility to efforts to combat climate change, the Measure recites its express purpose to overrule *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, which allowed a city to require retailers to charge for paper bags. Measure, Sec. 3(e).

[26] *California's Cap-and-Trade Program: Frequently Asked Questions*, Legis. Analyst's Off. (Oct. 24, 2023), https://lao.ca.gov/Publications/Report/4811#.

The Legislature "subsequently passed four bills specifying how auction proceeds would be used to effectuate the [Global Warming Solutions] Act..." *Id.* at 618.[27]

California Chamber of Commerce upheld the sale of such emission allowances in California's cap-and-trade program, concluding that the Legislature gave broad discretion to CARB to sell emission allowances by auction and that the revenue generated by the auction sales did not amount to a tax subject to the constraints of Proposition 13. By proposing to overturn *California Chamber of Commerce* (Measure, Sec. 3(e)), the Measure would largely eliminate the ability of State agencies to regulate environmental pollution by imposing charges or cap-and-trade requirements on polluters and would remove the power of the Legislature to enforce State climate change policy through CARB's implementation of the Global Warming Solutions Act.

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[27] "The Legislature expressly authorized the Board to adopt regulations which establish market-based compliance mechanisms 'in furtherance of achieving the statewide [GHG] emissions limit.' (§ 38562, subd. (b); see § 38570, subd. (a) [ ].) The act defines a market-based compliance mechanism as 'either of the following: [¶] (1) A system of market-based declining annual aggregate emissions limitations for sources or categories of sources that emit greenhouse gases. [¶] (2) Greenhouse gas emissions exchanges, banking, credits, and other transactions, governed by rules and protocols established by the state board, that result in the same greenhouse gas emission reduction, over the same time period, as direct compliance with a greenhouse gas emission limit or emission reduction measure adopted by the state board pursuant to this division.' (§ 38505, subd. (k)." *Cal. Chamber of Com.,* 10 Cal.App.5th at 617 (quoting *Our Children's Earth Found. v. State Air Res. Bd.* (2015) 234 Cal.App.4th 870, 875).

Currently, the Legislature uses cap-and-trade revenue to mitigate environmental harm and support mitigation programs to protect the environment. For example, the proceeds from the cap-and-trade auctions are deposited in the Greenhouse Gas Reduction Fund, from which the Legislature appropriates money to agencies to administer mitigation programs focusing on projects including clean transportation and sustainable agriculture.[28] The collection of such revenues is based on the "polluter pays principle," which makes the party responsible for producing pollution responsible for paying for the damage done to the natural environment. *See also* Pub. Res. Code §§ 42041, 42050-42057 (shifting the plastic pollution burden from consumers to producers by raising $5 billion from industry members over 10 years and assigning the primary responsibility for managing products after their useful life to producers). The funds collected from the program must be spent on activities that reduce greenhouse gas emissions and/or address the impacts of climate change, especially on disadvantaged communities that are most affected by climate change. The Measure endangers this vital state program, which was extended during *amicus curiae's* time as Governor and will require another extension by 2030.

Cap-and-trade revenue has funded major climate-related projects, such as the state's bullet train, the restoration of wetlands and watersheds, the expansion of light rail, and the

[28] *See Cap-and-Trade Dollars At Work*, California Climate Investments, https://www.caclimateinvestments.ca.gov/.

advancement of zero-emissions vehicles. The funds have even been used to respond to wildfires, such as in 2018 when California was dealing with one of the worst fire seasons on record, and nearly $170 million in cap-and-trade funds were put towards fire prevention and mitigation.[29]

By eliminating these programs, the Measure would impair the Legislature's ability to delegate enforcement of the Global Warming Solutions Act to CARB and alter the balance of power in the State Government on a subject that may not have been critical 25 years ago, but which now is central to the State's efforts to help protect humans from climactic extinction.

II. The Court Should Also Consider The Measure In The Context Of Prior Initiatives, Which, Together With The Measure, Would Revise The California Constitution

A. Initiative Proponents Cannot Avoid The Prohibition On Constitutional Revisions By Submitting A Series Of Initiatives

Real Party's principal contention is that the Measure does not revise the California Constitution because other initiatives have limited the power to tax, and the Measure is just one more straw on the camel's back. But the qualitative analysis of the Measure, indeed, of any initiative involving constitutional changes, must consider whether (to continue the metaphor) the

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[29] Kimberly Veklerov, *California Giving Out $170 Million in Cap-and-Trade Revenue to Help Prevent Wildfires*, S.F. CHRONICLE (Aug. 10, 2018), https://www.sfchronicle.com/california-wildfires/article/California-doles-out-170-million-in-13139050.php.

latest straw is the one that *breaks* the camel's back. That is, the Court must take into account prior related initiatives, and the context in which an initiative is offered, when evaluating a constitutional revision challenge to an initiative that proposes to change the California Constitution.

To illustrate the point simply, it cannot be the case that the proponents of Proposition 115, which the Court found to be a constitutional revision in *Raven v. Deukmejian*, could have avoided a constitutional challenge by submitting five narrower initiatives, each of which, standing alone, would be acceptable but which, together, would work the same constitutional revision as Proposition 115. Otherwise, the constitutional revision requirement (and, for that matter, the single subject rule) would be read out of the California Constitution: every initiative, no matter how multifaceted, could be defended against a constitutional revision challenge on the ground that, since the electors could vote separately on the individual portions of the initiative, they should be able to vote on all the initiative's provisions as a single measure.

Likewise, initiative proponents surely cannot revise the Constitution by presenting constitutional changes that, together, revise the Constitution merely because the changes are presented to the voters over time. Assume, for example, that the voters approve an initiative in 2024 to cut the size of the California Legislature in half, to 40 members of the Assembly and 20 members of the Senate. That alone might not be a revision because the State Government could still function, and the

principal change would be that each legislator would have more work. Then assume that in 2026 the voters cut the size of the Legislature in half again, to 20 members of the Assembly and 10 members of the Senate. The same "not a revision" analysis might perhaps apply once again. But what if, in 2028, the voters cut the size of the Legislature to 10 members of the Assembly and five members of the Senate, and in 2030 to five members of the Assembly and 3 of the Senate? In that event a revision would have taken place because the Legislature could no longer function, even if the first one or two initiatives, standing alone, might have passed muster.

Or assume, by way of further example, that proponents put an initiative on the 2024 ballot to repeal Article XXXV of the California Constitution ("Medical Research"). That, standing alone, might not be a revision. Then assume that in 2026, the same proponents put an initiative to repeal Article XXXIV (public housing). That too, standing alone, might not be a revision. And in 2028, they sponsor an initiative to repeal Article XXII (architectural and engineering services). And so on. At some point, no Constitution would be left, and a revision would have occurred. In fact, it is safe to conclude that a revision would have occurred long before that, even if no single initiative, standing on its own, was a revision. That's a matter of common sense.

Also, as a matter of common sense, any initiative that threatens to revise the California Constitution must be considered in the context of the time when it is proposed. To illustrate this point, assume that the voters approved a change to

the California Constitution eliminating the ability of the State and local governments to borrow money and requiring all existing debt to be paid off in two years. That might not have been a constitutional revision in 1852 but it certainly would be in 2024 when the ability to incur debt is fundamental to the structure of the State and local governments, and tax constraints preclude State and local governments from massively increasing taxes to pay off debt immediately.

With that background, Section II.B below turns to the context in which the Measure is presented.

B. The Five Anti-Tax Measures, Taken Together, Would Revise The California Constitution

Section 2(d) of the Measure recites that four prior anti-tax initiatives were adopted, Propositions 13 (1978), 62 (1986), 218 (1996), and 26 (2010). The Measure is thus the fifth in a series of anti-tax initiatives that, under Section 2(d) of the Measure, must be considered together. The four prior measures made the following changes to the tax power: Proposition 13 reduced the government's ability to use property taxes to raise revenue and required a 67% supermajority vote of the Legislature for the adoption of state taxes "enacted for the purpose of increasing rates or changes in methods of computation." *Amador Valley*, 22 Cal.3d at 220. It also added a requirement of voter approval by a 67% supermajority for local special taxes. *Id.* Proposition 26 broadened what qualifies as a "tax" for purposes of that supermajority legislative vote requirement to include "any change in state statute which results in any taxpayer paying a higher tax," and broadened the definition of a tax to include any

"levy, charge or exaction of any kind" outside of enumerated exceptions.[30] Proposition 62 overturned this Court's decision in *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, so that general purpose taxes at the local level also required a taxpayer vote; and Proposition 218 added a voter approval requirement for all local taxes. Prop. 218, § 3.

In other words, the prior initiatives imposed supermajority requirements and limited the power of local governments to impose taxes, closing what the proponents viewed as "loopholes" in Proposition 13. Taken together, they effectively eliminated the tax power of local government entities but left intact both the state and local governments' power to impose fees and charges where authorized by the Legislature or the local governing body, and also the Legislature's power to enact taxes.

The Measure eliminates the powers that the prior initiatives left intact. For the reasons discussed in Part I *supra*, the Measure proposes to make radical changes to our State Government. And taken together with the four prior initiatives, the Measure and its predecessors would eliminate the power to tax entirely, rendering the executive and legislative bodies at all levels in California mere advisors with no certainty that they could effectuate policy goals and priorities for the State.

This change is at least as extensive as the revision in *Raven v. Deukmejian*, which revoked state judicial power to

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[30] *Understanding Proposition 26*, Cal. Taxpayers Ass'n (2011) at 7, https://www.caltax.org/documents/UnderstandingProposition26.pdf.

interpret the rights of criminal defendants. That is because the tripartite system of government, which survived the first four anti-tax measures in a weakened state, would reach a tipping point if two core functions of the Legislature, the powers to tax and to spend, were removed from the Legislature and transferred to the voters.

As a result, the Measure, when viewed in conjunction with the four prior anti-tax initiatives, would constitute a revision even if the Measure standing alone would not.

III. The Measure's Transformation Of Our State Government From A Republican To A Democratic Form Of Government With Respect To The Core Taxing And Spending Functions Confirms That The Measure Is A Qualitative Revision

The discussion above addresses the effect that the Measure would have on the Legislature, the Executive, and local governments. This final section turns to the transformation the Measure proposes to make to the basic philosophy underlying our government, which is reflected in the Measure's attempt to eliminate much of the authority and functions of our Legislature and administrative agencies – perhaps as part of the same political movement that has been hostile to government and government agencies, making it very difficult for Congress to act effectively, especially over the past year.

By eliminating the Legislature's taxing and spending powers and the Governor's power to approve or veto tax

legislation and influence the allocation of revenues,[31] and placing those powers instead directly into the hands of the voters, the Measure would "result in a change from a 'republican' form of government (i.e., lawmaking by elected representatives) to a 'democratic' governmental plan (i.e., lawmaking directly by the people)." *Amador Valley*, 22 Cal.3d at 227. This too would cause "a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its branches…." *Strauss*, 46 Cal.4th at 438 (emphasis removed).

Twenty-four states and the District of Columbia have an initiative process, referendum process, or both at the statewide level, and eighteen allow constitutional amendments via initiatives.[32] But no other state has gone so far as the Measure as to place *all* future taxing and spending powers directly into the hands of the electorate. *See* 71 *Am.Jur.2d,* § 57 and *Bernard, supra,* note 11.

Real Party may respond that *Amador Valley* did not find Proposition 13 to be a revision merely because of the constraints it placed on the republican form of government, but that was because, "on the face" of the challenged provision, the initiative

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31 The Governor has had the power to approve or veto legislative enactments, including appropriations bills, since 1850. Cal. Const. (1850), art. IV, § 17; Cal. Const. (1966), art. IV, § 10(a).

32 *Initiative and Referendum Processes*, Nat'l Conf. of St. Legislatures (2022), https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes.

did not change the nature of government. *Amador Valley*, 22 Cal.3d at 224. As *Amador Valley* noted, under Proposition 13 "both local and state government ... continue[d] to function through the traditional system of elected representation" and their power "to enact appropriate laws and regulations remains *wholly* unimpaired." *Id.* at 227 (emphasis added). But there is a material difference between requiring a supermajority vote to enact a tax, and transferring the taxing and much of the spending power altogether from the Legislature to the electorate, ending 175 years of constitutional practice in this State.

Direct democracy may be good, or it may be bad; views will differ. But it should be beyond disagreement that converting the current republican representative system to such a direct democracy would be a "fundamental change in the nature of the governmental plan or framework established by the Constitution." *Strauss*, 46 Cal.4th at 444 (emphasis removed). The Measure therefore is a revision.

CONCLUSION

The Measure proposes to do expressly what prior jurisprudence warned that only a revision could do: "substantially alter the basic governmental framework set forth in our Constitution." *Legislature v. Eu*, 54 Cal.3d at 506. The Measure would significantly and meaningfully reduce the power and discretion of legislative bodies throughout California, thereby largely rendering our State Government ineffective. That is the type of change to the California Constitution that can be made only through the deliberateness and thoroughness of the legislative process, which is the hallmark of such fundamental changes, as Article XVIII of our Constitution requires.

For those reasons and the reasons set forth above, including the history and purpose of the constitutional revision rule in California and other states, *amicus curiae* joins Petitioners in urging the Court to find that the Measure is a constitutional revision and therefore cannot be presented to the voters for approval by means of a ballot initiative.

Dated: January 31, 2024

Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ David B. Goodwin*
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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies, pursuant to California Rule of Court 8.520(c)(1), that the foregoing *Amicus Curiae* Brief of Edmund G. Brown, Jr. in Support of Petitioners Legislature of the State of California, Gavin Newsom in his official capacity as Governor of the State of California, and John Burton was produced using 13-point Century Schoolbook type and contains 8,557 words, including footnotes, which is less than the total number of words permitted by the Rules of Court. Counsel relies upon the word count of the computer program (Microsoft Word) used to prepare this brief.

Dated: January 31, 2024

Respectfully submitted,

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PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 415 Mission Street, Suite 5400, San Francisco, CA 94105. On January 31, 2024, I served the following document(s) described as:

- **APPLICATION OF EDMUND G. BROWN, JR. FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS**

- **[PROPOSED] *AMICUS CURIAE* BRIEF OF EDMUND G. BROWN, JR. IN SUPPORT OF PETITIONERS**

on the interested parties in this action as follows:

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[x] (BY TRUEFILING) By filing and serving the foregoing through TrueFiling such that the document will be sent electronically to the e-service list on January 31, 2024.

Also on January 31, 2024, I served the above-described document(s) on the following:

Office of the Attorney General P.O. Box 944255 Sacramento, CA 94244-2550	*Pursuant to Rule 8.29 of the California Rules of Court*

[x] (BY UNITED STATES MAIL) By enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address above and placing the sealed envelope for collection and mailing, following our ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service is executed at San Francisco, California on January 31, 2024.

Ellen Chiulos