

A look forward to arguments in Howard Jarvis Taxpayers Association v. Bowen

Later this year the Supreme Court of California will hear arguments in *Howard Jarvis Taxpayers Association v. Bowen*, a dispute over the scope of the legislature's power to place so-called "advisory measures" on the ballot for voter consideration. This case poses a number of important questions bearing on separation of powers under the California Constitution, specifically, between the legislative power allocated to the legislature and that reserved for the citizens.

Under the California Elections Code, advisory measures allow voters to "voice their opinions on substantive issues," or to indicate approval or disapproval of the ballot proposal to the "sponsoring legislative body." Last summer, the legislature passed a bill to place on the November 4, 2014 general election ballot an advisory measure (Proposition 49) asking whether voters would approve of a federal amendment overturning the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*.

On July 23, 2014, Howard Jarvis Taxpayers Association ("HJTA") filed a writ petition in the court of appeal seeking injunctive relief prohibiting "the unlawful inclusion of Proposition 49" on statewide ballots. HJTA argued, among other things, that statewide advisory measures are inherently invalid because they are not "legislative acts" within the legislature's power. HJTA also claimed that Proposition 49 was passed "unlawfully" in order to "alter the makeup of the ballot for the transparent purpose of attempting to influence the voter turnout." The court of appeal denied the writ, holding that post-election review was the more appropriate remedy.

HJTA then filed another writ petition with the Supreme Court of California, seeking relief on nearly identical grounds. On August 11, 2014, the court issued an order directing the Secretary of State to refrain from placing Proposition 49 on the ballot. The court reasoned that a potentially invalid ballot could cause substantial harm, while removing the measure pending a decision on its validity did not preclude the

legislature from placing it on a future ballot, particularly because such an advisory measure would have no legal effect.

The court's opinion is noteworthy for the separate statements issued by Justice Liu and Chief Justice Cantil-Sakauye. In his concurring statement, Justice Liu asserted that advisory measures are "by necessary implication denied to [the legislature] by the Constitution." Looking to the "text and structure" of the California Constitution, Justice Liu argued that California's divided lawmaking structure maintains clear lines of accountability, and that advisory measures blur those lines. Specifically, he argued that "[t]he California Constitution draws a clear line between lawmaking by the Legislature and lawmaking by the citizenry through the ballot," and it "does not contemplate a mix-and-match approach." While Justice Liu conceded that the California Constitution "contains no express prohibition against submitting an advisory question to the voters," he maintained that the act was implicitly prohibited: "To allow the Legislature to leverage the formality of the electoral process (as opposed to the informality of a Gallup poll) to pose advisory questions to the voters would alter [the] delicate balance between legislative and citizen lawmaking."

Chief Justice Cantil-Sakauye wrote a concurring and dissenting statement, arguing that pre-election removal of Proposition 49 was inappropriate in light of the court's "established approach" of declining to remove challenged measures from the ballot absent a "clear showing of invalidity." In concluding that there was not a clear showing of invalidity, the Chief Justice reviewed a series of factors, including the plenary power of the legislature, which includes activities that are incidental or ancillary; the precedent of resolving doubts as to the legislature's power in favor of the legislature's action; and the historical precedent of legislatively referred advisory measures in California.

The Chief Justice argued that removing Proposition 49 would result in appreciable harm to both the legislature and the electorate, since it would deny the legislature valuable access to voter opinion and impact the "underlying endeavor." To that end, removal of Proposition 49 would cause "real and present harm" to the electorate by depriving citizens of the ability to vote on a current issue. The Chief Justice argued that no significant harm would occur by permitting the measure to proceed to

election and rejected arguments that the measure would cause voter confusion or create unnecessary expense. Moreover, she concluded that post-election relief was sufficient to address the validity of the legislature's use of the advisory measure practice.

HJTA v. Bowen thus poses a number of important constitutional questions, which we will explore in depth as the case heads toward argument.

This posting is the first in a series of SCOCABlog's coverage of Howard Jarvis Taxpayer Ass'n v. Bowen.

* by Stephen Duvernay & Margaret Tides

Partial Docket & Case Documents

8/1/14 - Petition for writ of mandate/prohibition with request for stay

8/4/14 - Preliminary opposition to writ petition requested

8/6/14 - Preliminary opposition to writ petition filed

8/8/14 - Reply to preliminary opposition filed

8/8/14 - Amicus Letter by Yes on 49, Money Out Voters In Committee

8/8/14 - Amicus Letter by Bradley Benbrook, counsel for Citizens in Charge

8/11/14 - Order to show cause issued

- Order to Show Cause