Case No. S220289

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HOWARD JARVIS TAXPAYERS ASSOCIATION and JON COUPAL,
Petitioners,

v.

DEBRA BOWEN, in her official capacity as the Secretary of State of the State of California,
Respondent.

LEGISLATURE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

ORIGINAL WRIT PROCEEDING

REAL PARTY IN INTEREST LEGISLATURE OF THE STATE OF CALIFORNIA'S PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF

DIANE F. BOYER-VINE,
Legislative Counsel (SBN 124182)
JEFFREY A. DELAND,
Chief Deputy (SBN 105103)
ROBERT A. PRATT,
Principal Deputy (SBN 137704)
OFFICE OF LEGISLATIVE COUNSEL
925 L Street, Suite 900
Sacramento, California 95814
Telephone: (916) 341-8300
Facsimile: (916) 341-8020
E-mail:
jeff.deland@legislativecounsel.ca.gov

FREDRIC D. WOOCHER (SBN 96689)*
MICHAEL J. STRUMWASSER (SBN 58413)
STRUMWASSER & WOOCHER LLP
10940 Wilshire Boulevard, Suite 2000
Los Angeles, California 90024
Telephone: (310) 576-1233
Facsimile: (310) 319-0156
E-mail: fwoocher@strumwooch.com

* Counsel of Record

Counsel for Real Party in Interest
Legislature of the State of California

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INTRODUCTION

The Petition for Writ of Mandate ("Petition") seeks an extraordinary order from this Court commanding Respondent Secretary of State Debra Bowen to refrain from taking any further action to comply with Senate Bill 1272 (Stats. 2014, ch. 175 ["SB 1272"]), a statute that was duly enacted on July 3, 2014, by a majority vote in both houses of the Legislature and that became operative twelve days thereafter pursuant to article IV, section 10(b)(3), of the California Constitution when it was not vetoed or returned to the Legislature by the Governor. SB 1272 calls for a special election to be held on November 4, 2014 — to be consolidated with the statewide general election on that same date — for the purpose of submitting an advisory question to the voters on whether Congress should propose, and the California Legislature should ratify, an amendment or amendments to the United States Constitution in order to overturn the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310. (SB 1272, § 4, subd. (a), included as Exh. A to the Petition for Writ of Mandate.)[1] Respondent Secretary of State has designated the advisory

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[1]Specifically, SB 1272 directs the Secretary of State to submit the following advisory question to the voters at the November 4, 2014, consolidated election:

> "Shall the Congress of the United States propose, and the California Legislature ratify, an amendment or amendments to

question as "Proposition 49" and is in the final stages of preparing the Voter Information Pamphlet and other ballot materials to submit the measure to the voters at the November 2014 election.

Petitioners Howard Jarvis Taxpayers Association and Jon Coupal (collectively, "Petitioners") contend that because Proposition 49 "enacts no law," the Legislature exceeded its authority under the California Constitution in ordering the advisory measure to be placed on the ballot. Petitioners rest their argument on the decision in *American Federation of Labor-Congress of Industrial Organizations v. Eu* ("*AFL-CIO*") (1984) 36 Cal.3d 687, in which this Court held that a *citizen-sponsored initiative* seeking to compel the Legislature to adopt a resolution calling on Congress to propose and submit to the states an amendment to the U.S. Constitution requiring a balanced federal budget "exceeds the scope of the initiative power under the controlling provisions of the California Constitution" because "the crucial provisions of the balanced budget initiative do not adopt a *statute* or enact a law." (Petition, p. 17, *quoting AFL-CIO*, 36 Cal.3d at p. 694 [emphasis in original].)

> the United States Constitution to overturn *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310, and other applicable judicial precedents, to allow the full regulation or limitation of campaign contributions and spending, to ensure that all citizens, regardless of wealth, may express their views to one another, and to make clear that the rights protected by the United States Constitution are rights of natural persons only?" (SB 1272, § 4, subd. (a).)

Reasoning that "the people and the Legislature possess the same power," Petitioners state that it is "axiomatic that if the people do not have the power to place Proposition 49 on the ballot, than neither does the Legislature." (Petition, p. 19.)

The premise of Petitioner's argument, however, is fundamentally flawed: The power of the Legislature *is not* coextensive with the people's initiative power, and the Legislature *is not* limited to "adopting statutes" — even though SB 1272 is undeniably a statute. Rather, as more than a century of this Court's jurisprudence makes clear, the Legislature has the power to engage in any activities that are "incidental or ancillary to its lawmaking functions," so long as the power to engage in those activities is not expressly, or by necessary implication, denied to it by the Constitution. (See, e.g., *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.) Moreover, "[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." (*Ibid.*)

In enacting SB 1272 and formally soliciting the views of the electorate on the important question of whether the Legislature should continue to seek Congressional action in amending the U.S. Constitution to permit more robust and effective campaign finance regulation — and whether the Legislature

should ratify such an amendment if it were to be submitted to the states — the Legislature was not only acting well within its essential lawmaking function of determining and formulating legislative policy (see, e.g., *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 299), but it was engaging in a practice that has a longstanding and unchallenged historical precedent — both at the state and local levels of government in California, and throughout the country. (See, e.g., Propositions 9 and 10 on the June 1933 California statewide election ballot.) As then-Justice Rehnquist succinctly observed in refusing to enjoin the placement on the ballot by the Nevada Legislature of an advisory measure requesting the electorate's view on the proposed ratification of the Equal Rights Amendment: "If each member of the Nevada Legislature is free to obtain the views of constituents in the legislative district which he represents, I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort." (*Kimble v. Swackhamer* (1978) 439 U.S. 1385, 1387–1388 (per Rehnquist, J. as Cir. J.), *quoted in Bramberg v. Jones* (1999) 20 Cal.4th 1045, 1058.) Petitioners' challenge to the Legislature's action in this case is thus entirely without merit.

Further, Petitioners have failed to establish the appropriateness — much less the necessity — of pre-election review in the present case, requiring the Court "to resolve the issue in the often charged and rushed atmosphere of an

expedited preelection review," rather than "to leave the challenge for resolution with the benefit of the full, unhurried briefing, oral argument, and deliberation that generally will be available after the election." *(Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal. 4th 1020, 1025.) The "irreparable harm" that Petitioners and the electorate will supposedly suffer if Proposition 49 appears on the ballot as directed by SB 1272 is far from "manifest." (See Petition, p. 10.) Indeed, in light of Petitioners' repeated insistence that "Proposition 49 has no legal or practical effect" (*id.,* p. 11), it is difficult to discern *any conceivable harm* that can result from allowing the state's voters to directly and collectively communicate to the Legislature their position on one of the most hotly debated and controversial public policy issues of the day. At present, there are only six other ballot measures slated to be voted on in the November election — substantially fewer than in any recent general election (see, e.g., Nov. 6, 2012, general election [11 propositions]; Nov. 2, 2010 [10 propositions]; Nov. 4, 2008 [12 propositions]) — and there is thus little danger that the inclusion of Proposition 49 will "steal[] attention, time, and money from the numerous valid propositions on the same ballot." (*AFL-CIO*, 36 Cal.3d at p. 697.) Nor is there any legitimate cause for concern that "leaving [Proposition 49] on the ballot could result in a flood of 'advisory measures' in the future" (Petition, pp. 23-24), given that there has been exactly

one advisory measure placed on the ballot by the Legislature in the past 81 years.

By contrast, an order commanding Secretary of State Bowen to remove Proposition 49 from the November ballot would not only interfere with the Legislature's exercise of its constitutional prerogatives in contravention of the separation of powers doctrine, but it would deprive the Members of the Legislature from receiving the information regarding their constituents' views that they have determined they require in order to properly fulfill their responsibilities under the state and federal constitutions. The harm to the electorate is perhaps even greater, because an advisory vote via Proposition 49 represents the *only mechanism* that the voters have for participating in the federal constitutional amendment process by directly communicating their opinions to their state representatives on an issue that is critical to the future of the political process in this country.

For these reasons, the Petition for Writ of Mandate or Other Extraordinary Relief should be summarily denied.

I. PETITIONERS' CHALLENGE TO SB 1272 HAS NO MERIT BECAUSE THE LEGISLATURE HAS THE AUTHORITY UNDER THE CALIFORNIA CONSTITUTION TO CALL AN ELECTION SEEKING THE ELECTORATE'S VOTE ON AN ADVISORY QUESTION

As set forth above, SB 1272 calls a special election, to be consolidated

with the November 4, 2014, statewide general election, for the purpose of submitting an advisory question to the voters on whether "the Congress of the United States [shall] propose, and the California Legislature [shall] ratify, an amendment or amendments to the United States Constitution to overturn *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310, and other applicable judicial precedents . . . ." (SB 1272, § 4, subd. (a).)[2] Petitioners contend that this Court in *AFL-CIO* "held that a nearly identical 'advisory measure' was not lawful when proposed by the people exercising their reserved legislative power under the initiative," and "[t]hat same analysis applies to the Legislature." (Petition, p. 13; accord, *id.*, p. 19 ["It seems axiomatic that if the people do not have the power to place Proposition 49 on the ballot, than neither does the Legislature."].)

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[2]In dissenting from the Third District Court of Appeal's denial of the Petition for Writ of Mandate below, Presiding Justice Raye stated that he believed Proposition 49 to be invalid because "[t]he adoption of a resolution by initiative is unconstitutional under article II, section 8, subdivision (a) of the California Constitution. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 707-715.) The Legislature has no authority to authorize the voters to adopt a resolution in violation of the California Constitution." (See Petition, Exh. E.)

However, neither SB 1272 nor Proposition 49 implicates the constitutional provision addressed by the Court in *AFL-CIO*: They do not involve "the adoption of a resolution by initiative," nor do they "authorize the voters to adopt a resolution." Instead, they represent the exercise of the *Legislature's* constitutional powers, asking for the voters' opinion on a specific question relevant to the Legislature's lawmaking functions under the state and federal constitutions.

The premise underlying Petitioners' argument is not correct, however. The constitutional authority of the Legislature is substantially *broader* than the people's initiative power under article II, section 8, subdivision (a).[3] While "the reserved powers of initiative and referendum . . . are limited, under article II, to the adoption or rejection of 'statutes'" (*AFL-CIO,* 36 Cal.3d at p. 708), the Legislature's power is not so limited. Indeed, in *AFL-CIO* itself, the Court emphasized that "[e]ven under the most liberal interpretation, . . . the reserved powers of initiative and referendum do not encompass all possible actions of a legislative body." (*Ibid.*)

Thus, it is most decidedly *not* the case, as Petitioners contend, that "the people's exercise of 'legislative power' and the Legislature's exercise of 'legislative power' is [sic] deemed to be coextensive." (Petition, p. 19.)[4] In

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[3]Article II, section 8, subdivision (a) provides: "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them."

[4]As supposed support for this proposition, Petitioners cite to this Court's statement in *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, that "the power of the people through the statutory initiative is coextensive with the power of the Legislature." (Petition, p. 19, *quoting* 34 Cal.3d at p. 675.) But the Court's statement in *Legislature v. Deukmejian* was made in response to the initiative proponents' argument in that case that "the people may enact a statute which the Legislature has no power to enact" (34 Cal.3d at p. 675) — specifically, that their proposed redistricting initiative was not subject to the "once per decade" limitation that article XXI of the state Constitution imposed on reapportionment by the Legislature. The Court emphatically rejected this argument, ruling that "[a] statutory initiative is subject to the same state and federal constitutional limitations as are the Legislature and the statutes which

particular, unlike the people's initiative power, the Legislature's power is not limited to the enactment of statutes and the proposal of amendments to the California Constitution. Rather, as Petitioners are forced to concede (Petition, pp. 19-20), the Legislature's power includes the power to engage in any activities that are "incidental and ancillary to the ultimate performance of lawmaking functions by the legislature itself." (*Parker v. Riley* (1941) 18 Cal.2d 83, 89; accord, *Zumbrun Law Firm v. California Legislature* (2008) 165 Cal.App.4th 1603, 1614 ["the Legislature has the power to engage in activity that is incidental or ancillary to its lawmaking functions"].)

Almost 150 years ago, this Court set forth the guiding principle that establishes the scope of the Legislature's authority under the California Constitution, explaining that in exercising its powers, the Legislature is not dependent upon any specific grant of authority but that it may instead take any action that is not expressly prohibited by the terms of the Constitution:

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it enacts." (*Id.* at p. 674.)

In context, then, the Court's statement in *Legislature v. Deukmejian* meant only that the power of the people to enact statutes through the initiative is *no greater than* the power of the Legislature. Indeed, in subsequent cases, the Court has articulated a more precise and more accurate formulation of this principle: "The electorate's legislative power is 'generally coextensive with the power of the Legislature *to enact statutes*.'" (*Professional Engineers in California Govt. v. Kempton* (2007) 40 Cal.4th 1016, 1042, *quoting Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 253 [emphasis added].)

> "A legislative assembly, when established, becomes vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions. These powers and privileges are derived not from the Constitution; on the contrary, they arise from the very creation of a legislative body, and are founded upon the principle of self preservation. The Constitution is not a grant, but a restriction upon the power of the Legislature, and hence an express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms. *A legislative assembly has, therefore, all the powers and privileges which are necessary to enable it to exercise in all respects, in a free, intelligent and impartial manner, its appropriate functions, except so far as it may be restrained by the express provisions of the Constitution, or by some express law made unto itself, regulating and limiting the same.*" (*Ex Parte McCarthy* (1866) 29 Cal. 395, 403 [emphasis added].)

The principle that the Legislature's powers are not restricted to those expressly enumerated in the Constitution has been re-affirmed time and again in the ensuing century and a half. As this Court summarized the "well-settled rules of constitutional construction" in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168:

> "Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. In other words, 'we do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited.'"

> "Secondly, all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. *Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.*'" (*Id.* at p. 180, *quoting Methodist Hospital,* 5 Cal.3d at p. 691 [citations omitted] [emphasis in original].)

Under these established prescripts, there can be no doubt that the Legislature possesses the power to solicit the views of its constituents by placing an advisory measure on the ballot. Such an action is plainly "incidental and ancillary" to the Legislature's lawmaking function. The courts have long held that "the determination and formulation of legislative policy" is an essential aspect of the legislative function. (See, e.g., *Carmel Valley Fire Protection Dist.*, 25 Cal.4th at p. 299; *State Bd. of Educ. v. Honig* (1993) 13 Cal.App.4th 720, 750.) And an essential prerequisite to determining and formulating legislative policy is the gathering of facts and opinions that will inform the legislative decisionmaking process. As this Court recognized in *Parker*: "Intelligent legislation upon the complicated problems of modern society is impossible in the absence of accurate information on the part of the legislators, and any reasonable procedure for securing such information is proper." (18 Cal.2d at p. 90; accord, *id.* at p. 91 ["The ascertainment of pertinent facts for legislation is within the power of the lawmaking department

of government. When a legislative body has a right to do an act it must be allowed to select the means within reasonable bounds."]; *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1219 ["The performance of the policymaking role of the Legislature necessitates that the Legislature engage in certain factfinding processes."].)

In the present case, one of the means selected by the Legislature to ascertain the facts necessary to assist it in formulating the appropriate legislative policy with respect to the ongoing debate over the *Citizens United* decision and the rights of corporations in the electoral process was to directly poll the California electorate on this issue through the submission to the voters of the advisory question set forth in Proposition 49. The role of the Members of the Legislature as the elected representatives of the 38 million residents of California — and the legislators' attendant responsibility to ascertain and promote the interests of their constituents — makes it entirely appropriate that the Legislature formally seek the guidance of the voters in order to properly represent their interests. Petitioners' unsupported assertion that using the ballot to seek the views of the electorate on an important question of public policy is "an anathema to the idea that elected legislators serve as representatives of the electorate" (Petition, p. 20) has it exactly backwards: In a representative democracy, legislators can *best serve* their constituents by

soliciting their views on critical issues that lie within the decisionmaking authority of the Legislature, and then taking actions that implement and further the electorate's collective will.[5]

To accomplish this objective, the Legislature duly enacted a statute, SB 1272, directing the Secretary of State to place an advisory question on the November 4, 2014, statewide general election ballot to seek the formal position of the voters on whether it should continue to pursue amending the U.S. Constitution in order to overturn the ruling in *Citizens United.* Petitioners can point to no provision of the California Constitution that expressly or by necessary implication prohibits the Legislature from taking such action. To the contrary, the only provision of the Constitution that Petitioners rely upon in challenging the Legislature's enactment of SB 1272 is article II, section 8,

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[5]Petitioners accuse the Legislature of "election tampering" by placing Proposition 49 on the November 2014 ballot "for the transparent purpose of attempting to influence the voter turnout in a year in which low voter turnout is expected." (Petition, p. 4.) Aside from the wholly unwarranted and inherently implausible nature of the accusation — if the gubernatorial and Congressional races and the controversies over a massive water bond measure, a "rainy day fund" constitutional amendment, and initiatives dealing with health insurance rates, medical malpractice lawsuits, and the reduction of certain criminal penalties are not sufficient to attract voters to the polls, it is difficult to believe that adding a nonbinding advisory measure on campaign financing will do the trick — it is well-established that courts will not speculate about or inquire into the subjective motives of the Legislature in passing any law. (See, e.g., *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 726-728.) Accordingly, the alleged "political" motivations of the Legislature in enacting SB 1272 are as irrelevant as those of Petitioners in filing this action challenging the statute.

subdivision (a), which speaks only to "the power of the *electors* to propose statutes" through the *initiative* process. By its express terms, article II, section 8 does not define or limit the powers of the *Legislature* to direct the Secretary of State to place an advisory measure on the ballot as an "incidental and ancillary" aspect of its lawmaking function, nor has that section or any other provision of the Constitution ever been construed by this or any court to prohibit such an action by the Legislature.[6]

Indeed, the authority of a legislative body to place an advisory question

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[6]Petitioners contend that the Legislature is somehow barred from seeking the electorate's input on whether to continue pursuing a federal constitutional amendment because it "has already passed a resolution requesting Congress to call a Constitutional Convention to consider amending the First Amendment, in the form of AJR 1." (Petition, p. 21 [referring to Assembly Joint Resolution 1, 2013-14 Regular Session, included as Exh. C to the Petition].) To begin with, Proposition 49 and AJR 1 address different means of amending the U.S. Constitution: AJR 1 constitutes the Legislature's application to Congress to call a *constitutional convention* for the purpose of amending the Constitution, whereas Proposition 49 seeks the electorate's input on whether *Congress itself* should directly propose an amendment to the Constitution to overturn the *Citizens United* decision and, if so, *whether the California Legislature should ratify it*. Second, regardless of the specific content of AJR 1, the outcome of the advisory vote will serve as invaluable guidance for the Legislature as it determines whether to continue to call for a constitutional convention, whether (and how forcefully) to push the California Congressional delegation to propose a constitutional amendment, and — should either of those efforts prove successful — whether it should vote to ratify the resulting amendment. Finally, and in any event, Petitioners provide absolutely no legal support for their novel contention that the Legislature, having once spoken on a subject, is thereafter precluded from addressing the subject further, including by seeking to ascertain the will of their constituents through an advisory ballot question.

on the ballot has a long and well-established history in California, at both the state and local levels of government. As far back as 1891, the Legislature placed an advisory question on the ballot to ascertain the will of the voters as to whether United States Senators should be elected by a direct vote of the people, directing the Governor to send the results of the vote on that question to the President, Vice President, every cabinet member and member of Congress, and the governors of each state and territory. (Stats. 1891, ch. 48.) Twenty years later, when the Legislature was still responsible for choosing the United States Senators to represent California, it sought nonbinding voter guidance for its decision on whom to select by placing the names of the various candidates on the ballot to be voted on by the electorate. (Stats. 1911, ch. 387.) And as Petitioners note (see Petition, p. 21, fn. 5), two advisory questions — Propositions 9 and 10 — were submitted to the voters in a special statewide election held in June 1933, along with eight proposed constitutional amendments on the same ballot. (See Stats. 1933, ch. 435.)[7]

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[7]Petitioners' suggestion that Propositions 9 and 10 might have been "legislative" in character rather than merely "advisory" is refuted not only by the language of the measures but by the label given to them on the ballot, which explicitly described them as "Question submitted to the electors by Legislature as follows." (See Exhibit 1 attached hereto.) More to the point, neither of the measures purported to enact a statute, authorize a bond, or propose a constitutional amendment, but instead only asked a question. Proposition 9, for example, asked: "Shall the Legislature divert $8,779,750 from the gasoline tax funds to the general fund for payment of bond interest and redemption on outstanding highway bonds for the biennium ending

At the local level, the practice of submitting advisory questions to the voters is even more established. The Elections Code explicitly authorizes "[e]ach city, county, school district, community college district, county board of education, and special district [to] hold, at its discretion, an advisory election . . . for the purpose of allowing voters within the jurisdiction, or a portion thereof, to voice their opinions on substantive issues, or to indicate to the local legislative body approval or disapproval of the ballot proposal." (Elec. Code, § 9603, subd. (a).)[8] Pursuant to this section, several local jurisdictions in California have recently placed advisory questions on the ballot to gauge their constituents' views on whether the United States Constitution should be amended to limit political campaign spending by corporations, the same issue that is addressed on the statewide level by Proposition 49. (See, e.g., <http://clkrep.lacity.org/onlinedocs/2013/13-1300-s6_ord_182453.pdf> (last visited Aug. 6, 2014) [City of Los Angeles Ordinance calling special

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June 30, 1933?" Proposition 10 asked a similar question with respect to whether gasoline tax proceeds should be diverted to pay for outstanding bonds for the biennium ending June 30, 1935.

[8]It would certainly be incongruous for the Legislature to have the constitutional power to authorize *local governments* in California to submit advisory questions to the voters within their respective jurisdictions, as Elections Code section 9603 provides, yet *not* possess that same authority itself in order to permit voters throughout the state to voice their opinions on important public policy questions. That is the result that Petitioners argue for, however.

election in order to place an advisory question entitled "Resolution to Support Constitutional Amendment Regarding Limits on Political Campaign Spending and Rights of Corporations" on the May 21, 2013, municipal election ballot]; <http://www.co.mendocino.ca.us/bos/meetings/MG24081/AS24112/AI24191/DO24297/1.PDF> (last visited Aug. 6, 2014) [Mendocino County Board of Supervisors agenda summary memorializing placement of advisory measure calling for a "Constitutional Amendment to End Corporate Rule and Defend Democracy" on the November 6, 2012, ballot].) In fact, the website of the organization "United for the People" lists *dozens* of state and local governments that have submitted advisory ballot measures in the past few years asking in one manner or another whether action should be taken to overturn the *Citizens United* decision, including statewide ballot measures submitted to the voters by the Colorado and Montana legislatures in November 2012. (See <http://www.united4thepeople.org/local.html> (last visited Aug. 6, 2014); see also N. Sawhney, "Advisory Initiatives as a Cure for the Ills of Direct Democracy? A Case Study of Montana Initiative," 24 *Stan. Law & Policy Rev.* 589, 590, fn. 6 (2013) [noting that as of January 2013, over 120 cities and counties across the country had approved advisory ballot measures against corporate campaign contributions].)

These examples underscore not only the long and well-established

history of advisory ballot measures within California (and throughout the country), but also the value that both the public and legislative bodies attach to such measures as an element of the lawmaking function. In the exercise of the state Legislature's wide range of constitutional powers, it is highly desirable that its Members be able to solicit and determine the views of the constituents they represent, in the same manner that local governments in California are able to submit advisory questions to their constituents on a regular basis. The placement of an advisory question on the ballot constitutes a formal, broad-based means of determining the electorate's views. In the absence of any provision in the California Constitution that may reasonably be construed to expressly or by necessary implication deny the Legislature the authority to submit advisory questions to the voters, there is no lawful basis for prohibiting such an action. The Petition for Writ of Mandate consequently must be denied.[9]

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[9]Petitioners contend in passing and without any supporting authority that they "believe" SB 1272's calling of an election on Proposition 49 for the same date as the statewide general election on less than 131-days notice is unlawful and that only an "urgency statute" passed by a two-thirds vote can properly "override existing law." (Petition, p. 25, fn. 6.) This argument is also without merit. Pursuant to article IV, section 8, subdivision (c)(3), of the Constitution, "statutes calling elections . . . shall go into effect immediately upon their enactment," and hence there is no need for them to be passed as "urgency statutes" by a two-thirds vote. Nothing in the Constitution restricts "statutes calling elections" to statutes that call for a stand-alone election on a date on which no other elections are being held, rather than adding a special election to a general election that has already been scheduled for the same

II. PRE-ELECTION REVIEW IS INAPPROPRIATE BECAUSE THE VOTERS AND THE LEGISLATURE WOULD SUFFER IRREPARABLE HARM FROM THE REMOVAL OF PROPOSITION 49 FROM THE NOVEMBER BALLOT, WHEREAS PETITIONERS WOULD SUFFER NO HARM FROM HOLDING THE ELECTION

Petitioners argue that this Court's decision in *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, does not *prohibit* pre-election review of Proposition 49 or prevent this Court from removing it from the ballot. (Petition, pp. 24-27.) This may well be true, but just because pre-election review is not *prohibited*, it does not mean that it is *appropriate* in this case. Indeed, *McPherson* re-affirmed this Court's "general statement in *Brosnahan* [*v. Eu* (1984)] 31 Cal.3d 1, 4, that 'it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity.'" (38 Cal.4th at p. 1029.)

Not only have Petitioners failed to make a "clear showing of

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date. And to the extent that Petitioners object to the fact that SB 1272 directed Proposition 49 to be placed on the November 4, 2014, ballot in contravention of Elections Code section 9040's 131-day "deadline" for the submission of constitutional amendments, bond measures, or other legislative measures, it is well-established that the enactment of a statute by one Legislature does not bind a future Legislature, or preclude the enactment of a subsequent statute like SB 1272 that repeals, amends, or otherwise modifies the operation of the earlier statute. (See, e.g., *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 929; *In re Collie* (1952) 38 Cal.2d 396, 398.)

Proposition 49's invalidity," but as noted above, they have failed to demonstrate *any* injury — much less *irreparable* injury — that would result from allowing the election on Proposition 49 to proceed. What harm can Petitioners realistically claim will befall them and the public if the voters are permitted to express their views on the advisory question posed by Proposition 49? As Petitioners themselves argue with such force, "Proposition 49 has no legal or practical effect." (Petition, p. 11.) It "simply asks the voters a question." (*Id.* at p. 18.) It is clearly labeled as a "legislative advisory question" on the ballot and in the Voter Information Pamphlet, with the Legislative Analyst's Analysis stating in no uncertain terms that "Proposition 49 is an advisory measure only. As such, it does not require any particular action by Congress or the California Legislature." (Official Voter Information Guide for Nov. 4, 2014, General Election [Proposition 49: SB 272, Lieu. Campaign Finance: Advisory Election].) No one is likely to be misled with regard to the impact or effect of the measure.

The unwarranted removal of Proposition 49 from the ballot, by contrast, would adversely affect both the Legislature and the millions of California voters that the Members of the Legislature have been elected to represent. As is discussed above, the authority to formally seek the collective view of the voting public on important matters of public policy is inherent in the

responsibilities of a legislative body, and it is a means of communication expressly granted by the Elections Code to a wide range of local government entities and frequently employed by those entities. While the Legislature has less often availed itself of the authority to place advisory questions on the ballot, in this instance the Legislature has determined that it would greatly benefit from seeking a formal statement of the collective will of the voters on the important issue of whether it should continue to pursue the amendment of the United States Constitution to reverse the effects of the *Citizens United* decision. The Legislature would thus be harmed by any action of this Court that, even temporarily, denied it the prerogative to seek the voter input that it desires, particularly in the absence of any provision of the California Constitution that may be said to prohibit that action.

But it is the voting public who would undoubtedly suffer the greatest harm from the removal of Proposition 49 from the November ballot. As noted above, under article V of the U.S. Constitution, there is no means for the electorate to initiate or to directly participate in amending the federal Constitution. Instead, the voters are completely dependent upon their elected representatives in Congress and in the state Legislature to accurately discern the electorate's views and to act upon those views accordingly. An advisory measure like Proposition 49 thus provides voters with perhaps their *only*

mechanism for communicating their views to their elected representatives on the momentous question of whether the Constitution should be amended.

In the present circumstances, the harm to the public from the removal of Proposition 49 from the ballot would be especially acute. Public support for a constitutional amendment to overturn the *Citizens United* decision has been fueled in large part by the belief — whether rightly or wrongly held — that *Citizens United* and other recent judicial decisions have effectively disenfranchised voters, elevating the voices of corporations and monied interests so as to drown out all other messages and viewpoints. It would be ironic if the voters' voices were silenced and they were denied even this opportunity to express their opinion on the very question of whether the federal constitutional framework should be amended in order to preserve their say and influence in the political process.

CONCLUSION

For all of the reasons discussed above, Real Party in Interest Legislature of the State of California respectfully requests that this Court deny the Petition for Writ of Mandate and allow the election on Proposition 49 to proceed as called for by SB 1272.

Dated: August 6, 2014

STRUMWASSER & WOOCHER LLP
Fredric D. Woocher
Michael J. Strumwasser

OFFICE OF THE LEGISLATIVE COUNSEL
Diane F. Boyer-Vine
Jeffrey A. DeLand
Robert A. Pratt

By 
Fredric D. Woocher

Attorneys for Real Party in Interest
Legislature of the State of California

CERTIFICATE OF COMPLIANCE

WITH RULE 8.204(c)(1)

I certify that, pursuant to California Rules of Court, rule 8.204(c)(1), the attached Real Party in Interest Legislature of the State of California's Preliminary Opposition to Petition for Writ of Mandate or Other Extraordinary Relief is proportionately spaced, has a typeface of 13 points or more, and contains 5,677 words, as determined by a computer word count.

Dated: August 6, 2014

STRUMWASSER & WOOCHER LLP
Fredric D. Woocher
Michael J. Strumwasser

OFFICE OF THE LEGISLATIVE COUNSEL
Diane F. Boyer-Vine
Jeffrey A. DeLand
Robert A. Pratt

By _____
Fredric D. Woocher

Attorneys for Real Party in Interest Legislature of the State of California

EXHIBIT 1

9	**DIVERTING GASOLINE TAX FUNDS FOR BIENNIUM ENDING JUNE 30, 1933. Question submitted to electors by Legislature as follows:** 1. Shall the Legislature divert $8,779,750 from the gasoline tax funds to the general fund for payment of bond interest and redemption on outstanding highway bonds for the biennium ending June 30, 1933?	YES NO	

10	**DIVERTING GASOLINE TAX FUNDS FOR BIENNIUM ENDING JUNE 30, 1935. Question submitted to electors by Legislature as follows:** 2. Shall the Legislature divert $8,449,326 from the gasoline tax funds to the general fund for payment of bond interest and redemption on outstanding highway bonds for the biennium ending June 30, 1935?	YES NO	

CERTIFICATE OF SECRETARY OF STATE

STATE OF CALIFORNIA, DEPARTMENT OF STA
SACRAMENTO, CALIFORNIA.

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that the foregoing ten measures will be submitted to the electors of the State of California at a special election to be held throughout the State on the twenty-seventh day of June, 1933.

Witness my hand and the great seal of State, at office in Sacramento, California, the thirteenth day of May, A.D. 1933.

Frank C. Jordan
Secretary of State

connel in accordance with local desires, and without the delay now necessary to present the subject to the Legislature. The effect is to bring flexibility, efficiency and economy in county government.

Increases in the compensation of officers are prohibited after election and during the term of office, but decreases may be made at any time, as at present. Deputies' and assistants' salaries may be decreased or increased at will by the supervisors. This assures responsible home rule.

The act which is validated by this constitutional amendment carries out its purposes, and provides that present State laws fixing salaries shall be effective solely as local ordinances, and may be superseded by ordinance hereafter adopted, subject to the regular initiative and referendum powers of the people.

A vote yes will be a vote for home rule and economy and efficiency.

J. I. WAGY,
ANDREW R. SCHOTTKY,
HARRY A. PERRY,
BEN HULSE.
Members of the California State Senate.

DIVERTING GASOLINE TAX FUNDS FOR BIENNIUM ENDING JUNE 30, 1933. Question submitted to electors by Legislature as follows: 1. Shall the Legislature divert $8,779,760 from the gasoline tax funds to the general fund for payment of bond interest and redemption on outstanding highway bonds for the biennium ending June 30, 1933?	YES NO	

9

DIVERTING GASOLINE TAX FUNDS FOR BIENNIUM ENDING JUNE 30, 1935. Question submitted to electors by Legislature as follows: 2. Shall the Legislature divert $8,449,326 from the gasoline tax funds to the general fund for payment of bond interest and redemption on outstanding highway bonds for the biennium ending June 30, 1935?	YES NO	

10

Argument in Favor of Propositions 9 and 10

The People of California in 1909, 1915, and 1919 voted three highway bond issues totaling $73,000,000. In spite of the oft-repeated assertions that our present highway system was built by the proceeds of the gas tax the fact is that all of these seventy-three millions went into the construction of our present highway system and that this bond money was still being spent for highway construction in the year 1927—four years after the adoption of the gas tax system. The motorists at the present time, therefore, are getting the benefit of the proceeds of these State highway bonds expended both before and after the adoption of the present gasoline tax in 1923.

Although the avowed purpose of the gas tax was to provide for all highway expenditures, both principal and interest of these highway bonds have been and are being paid out of the general fund of the State, and not from gas tax revenues. To and including June 30, 1933, the general fund of the State has contributed $59,885,881.17 towards the payment of these highways bonds. The amount of these highway bonds still outstanding totals $55,850,000 and unless these bonds are paid from highway fund sources, a total of $95,804,713 must be raised from general fund sources in the course of the next thirty-one years to retire these bonds.

It is only logical that these highway bonds which provide part, at least, of the money to build our present highway system should be paid for by the motorists and truckmen who are making use of the highway system rather than by the taxpayers of the State generally.

The State faces an admitted deficit for the next biennium of approximately $50,000,000 and no one knows for certain just how this deficit will be met. It must however, be met by some means or the result will be State bankruptcy and a collapse of necessary governmental functions. Surely under these circumstances it is only fair, both as a matter of principle and expediency, that the interest and redemption of State highway bonds for the four years—1931

to 1935—amounting to approximately $17,000,000 should be paid from gas tax revenues and the general fund deficit reduced by that amount.

DAVID. F. BUSH,
State Senator, Twenty-second District.
BRADFORD S. CRITTENDEN,
State Senator, Twentieth District.
WILLIAM E. HARPER,
State Senator, Fortieth District.
EDWARD H. TICKLE,
State Senator, Twenty-fifth District.
ANDREW R. SCHOTTKY,
State Senator, Twenty-fourth District.
HARRY A. PERRY,
State Senator, Third District.
WALTER H. DUVAL,
State Senator, Thirty-third District.

Argument Against Propositions 9 and 10

This proposal to divert gas tax money to other than the purposes for which it was intended by the people is the opening attack to divert this fund for general fund needs now and for all future time. It is a raid pure and simple upon easily collected funds—easily collected because those paying have done so willingly with the realization of the benefits that accrue from such form of special tax.

Already the owner of a motor vehicle pays more in this State in taxes than any other class of taxpayer. Besides various Federal excise taxes upon gasoline, oils and lubricating greases, the motorist pays taxes ranging from local license fees for commercial vehicles to the annual State registration fees for all motor vehicles. He is also required to pay the personal property tax on his automobile, which revenue is used for the support of local government. In addition to these other taxes the motor vehicle owner of California pays a gasoline tax amounting to a special sales tax of 20 per cent, which revenue is at the present time devoted solely to street and highway maintenance and construction.

Diversion of $17,229,076 of special gas tax funds to the general fund means double taxation to the motorist.

The former highway bonds, redemption of which is sought by these diversions, are no different than any other State bonds, whether for buildings, for harbor improvements, or for any public work. They were all contracted for on the distinct understanding that they would be retired out of the general fund of the State. They are definite obligations against the revenues of the general fund.

When the gasoline tax was voted, the electorate of the State sanctioned the "pay-as-you-go-plan" of highway construction. This meant that thereafter those who used the highways would pay for them. The roads built under the original bond issue have long since disintegrated and have had to be rebuilt by the gas tax on the "pay-as-you-go-plan."

It has been argued that 32 states in the Uni already have diverted gas tax money for general purposes because of the prevailing economic stress.

This argument contains but a half truth inasmuch as taxes collected upon gasoline in most of those states is assessed upon all gasoline used, without farm, industrial, marine or other exemption as is allowed in California.

Diversion of $17,229,076 for relief of the general fund will throw out of employment 10,630 men for a year and add general distress to the State of California.

Ninety-one cents of every dollar paid for highway construction work goes directly into the pockets of labor.

Proponents of diversion of gas tax money would have the citizens of this State believe that failure on their part to authorize such diversion will result in an ad valorem tax. This is not the case. The people have before them at this coming special election a new tax system upon which they are requested to vote. In addition, the Legislature will reconvene in July, and, with the mandate of the people before them, set up a tax system which, keen financial minds are convinced, will not call for an ad valorem tax.

To lose $17,000,000 means bringing highway construction and maintenance of the State to halt, crippling of commerce and manufactu. and throwing thousands of citizens upon public charity, already burdened to a breaking point. And so we cite to you that the present is no time to cut down on construction of public works. Under these trying conditions of depression, with more than 800,000 unemployed in California and with more than a million and a half destitute and being supported by charitable organizations, the stimulation of public works ought to be encouraged. The National Government has declared itself for public construction on an enlarged scale to combat unemployment and destitution.

Why continue the depression?

We ask you to vote "No" on propositions "9" and "10," and in that way safeguard the gasoline tax fund for the purpose for which it was originally authorized.

ROY FELLOM,
State Senator, Fourteenth District.
ARTHUR H. BREED,
President pro tempore of the Senate.
BEN HULSE,
State Senator, Thirty-ninth District.
THOMAS McCORMACK,
State Senator, Fifteenth District.
JOHN B. McCOLL,
State Senator, Fifth District.
J. M. INMAN,
State Senator, Nineteenth District.
J. I. WAGY,
State Senator, Thirty-fourth District.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Re: *Howard Jarvis Taxpayers Association, et al. v. Debra Bowen, et al.*, Supreme Court Case No. S220289

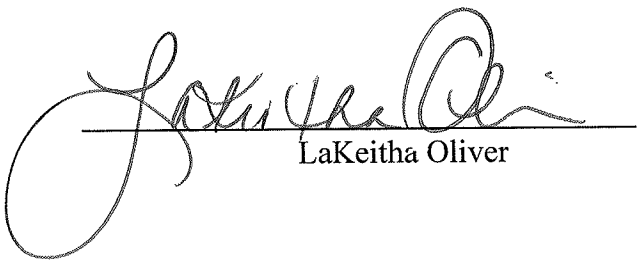
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10940 Wilshire Boulevard, Suite 2000, Los Angeles, California 90024.

On **August 6, 2014**, I served the document(s) described as **REAL PARTY IN INTEREST LEGISLATURE OF THE STATE OF CALIFORNIA'S PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF** on all appropriate parties in this action, as listed on the attached Service List, by the method stated.

☒ If electronic-mail service is indicated, by causing a true copy to be sent via electronic transmission from Strumwasser & Woocher LLP's computer network in Portable Document Format (PDF) this date to the e-mail address(es) stated, to the attention of the person(s) named.

☒ If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in the affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **August 6, 2014**, at Los Angeles, California.



LaKeitha Oliver

Service List

Howard Jarvis Taxpayers Association, et al. v. Debra Bowen, et al.,
Supreme Court Case No. S220289

Charles H. Bell, Jr.
Thomas W. Hiltachk
Bell, McAndrews & Hiltachk, LLP
455 Capitol Mall, Suite 600
Sacramento, California 95814
Tel: (916) 442-7757
Fax: (916) 442-7759
Email: cbell@bmhlaw.com
tomh@bmhlaw.com

Attorneys for Petitioners
Howard Jarvis Taxpayers Association;
and Jon Coupal

Robbie Anderson
1500 11th Street, 5th Floor
Sacramento, California 95814
Email: randerson@sos.ca.gov

Attorney for Respondent
Debra Bowen in her official capacity
as the California Secretary of State