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
IMMEDIATE RELIEF REQUESTED

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF

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I.

INTRODUCTION

Just yesterday, this Court restated its long-held commitment to the protection of the people's exercise of initiative power:

> In 1911, Californians amended our Constitution, reserving to themselves the powers of initiative and referendum. (Cal. Const. art. IV, § 1; *Associated Home Builders, etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 (*Associated Home Builders*).) Voter initiatives have been compared to a " '*legislative battering ram*' " because they " 'may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end.' " (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228.) In light of the initiative power's significance in our democracy, courts have a duty "to jealously guard this right of the people'" and must preserve the use of an initiative if doubts can be reasonably resolved in its favor. (*Associated Home Builders,* at 591; see *Amador Valley*, at p. 248.)

(Tuolumne Jobs & Small Business Alliance v. The Superior Court of Tuolumne County (2014) __ Cal.4th __, __; 2014 WL 3867558 (Cal.), at p. 2.)

The ballot box is for the people. The Legislature has no need for a "legislative battering ram." It has *legislative power*. However, Proposition 49 is not the exercise of legislative power. Nor will it lead to the exercise of legislative power. As the Legislature concedes, Proposition 49 is nothing more than "a poll" question. As a matter of constitutional law it cannot be on the ballot. This Court has long held that there is no "value in putting before the people a measure which they have no power to enact." (*American Federation of Labor-Congress of Industrial Organizations v. Eu*

(1984) 36 Cal.3d 687, 697 (*AFL-CIO*).) More importantly, Proposition 49's presence on the ballot causes harm now, harm that cannot be remedied after the election. Important issues, issues of current public policy of the state (not remote federal matters) like, water policy, state budgets, health care, and gaming policy, are all before the voters in just 88 days. Proposition 49 interferes with the voters due consideration of these important, legislative matters. It must be removed from the ballot just as this Court did in *AFL-CIO* some 40 years ago this month.

II.

ARGUMENT

A. THE CONSTITUTION DOES NOT AUTHORIZE THE LEGISLATURE TO PLACE AN ADVISORY QUESTION ON THE BALLOT.

The Legislature dedicates most of its preliminary opposition making a compelling case that it has broad legislative power. Petitioners have never contested that truth. It then argues that there are good and sound public policy reasons why its poll question is justified. However, in this case the Legislature is not exercising legislative power and every justification offered by it here was specifically and directly rejected by this Court in *AFL-CIO*:

> We acknowledge the arguments of the proponents that there may be value to permitting the people by direct vote not only to adopt statutes, but also to adopt resolutions, declare policy, and make known their views upon matters of statewide, national, or even

> international concern. Such initiatives, while not having the force of law, could nevertheless guide the lawmakers in future decisions. Indeed it may well be that the declaration of broad statements of policy is a more suitable use for the initiative than the enactment of detailed and technical statutes. Under the terms of the California Constitution, however, the initiative does not serve those hortatory objectives; it functions instead as a reserved legislative power, a method of enacting statutory law. The present initiative does not conform to that model.

(*AFL-CIO*, *supra*, 36 Cal.3d at p. 715.)

As indicated more fully below, the Constitution specifically and directly limits the Legislature's access to the ballot. Thus, when the Legislature states, "[p]etitioners can point to no provision of the California Constitution that expressly or by necessary implication prohibits the Legislature from taking such action," it simply refuses to acknowledge what Petitioners have already argued. In fact, Petitioners pointed out constitutional provisions that clearly prohibit the Legislature's action here both as a direct and express prohibition and by necessary implication.

1. The Power to Propose and Adopt Law is "Reserved" to the People, not the Legislature.

The Legislature claims that section 8 of Article II, ("The initiative power is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them") "does not define or limit the powers of the *Legislature*." It does.

The limitation is found in section 1 of Article IV ("...but the people reserve to themselves the powers of initiative and referendum."). Thus, the Constitution "expressly" prohibits the Legislature from proposing to the voters the adoption or rejection of statutory law.[1] Further, even if the Court were to accept the Legislature's argument that Proposition 49 is a legislative matter ("incidental" thereto), it is specifically prohibited by section 8 of Article II, and section 1 of Article IV. Of course, Proposition 49 is not a legislative matter, nor is it incidental to a legislative matter, "even under the most liberal interpretation." (*AFL-CIO*, *supra*, 36 Cal.3d at p. 708.)

Further, where the Constitution specifically prohibits the Legislature from presenting an actual law to the people for approval or rejection, it follows that it cannot present to the people a question that the people themselves could not propose through exercise of their reserved initiative power.

2. The Constitution Provides Three Methods for the Legislature to Present Legislative Matters to the Voters, Thereby Evidencing a Clear Limitation on its Authority to Present any Other Matter to the Voters.

In their Petition and Opening Brief, Petitioners noted that the Legislature is not completely without power to place legislative matters on

[1] As discussed, *infra*, the Legislature is specifically authorized to propose amendments to the Constitution and submit such to the voters on the ballot. (Cal. Const. Art. XVIII, §§ 1 and 4.)

the ballot for the voters' consideration. The Constitution specifically authorizes three different legislative measures: (1) constitutional amendments (Cal. Const. Art. XVIII, §§ 1 and 4); (2) bond statutes (Cal. Const. Art. XVI, § 2(a).); and (3) amendments or repeals of previously enacted initiative or referendum measures (Cal. Const. Art. II, § 10(c).).

As a matter of constitutional interpretation the maxim *expressio unius est exlusio alterius* applies here: having listed items in the Constitution where the Legislature is empowered to present legislative matters directly to the voters, items not so listed are impliedly assumed to be excluded. (*Gibson v. The Civil Service Commission of Los Angeles* (1915) 27 Cal.App. 396, 399 ["such a maxim is applicable as a rule of constitutional construction"], citing, *In re Ohm* (1889) 82 Cal. 160 and *Spier v. Baker* (1898) 120 Cal. 370.)

Thus, the Legislature's challenge to Petitioners to point to express and/or implied provisions of the Constitution limiting its power to propose questions to the voters has been met. If that is not enough to compel removal of Proposition 49 from the ballot, Petitioners also remind the Court that Proposition 49 is <u>not</u> the exercise of "legislative power" (the only power vested in the Legislature by section 1 of Article IV) or "incidental" to the exercise of legislative power.

3. Proposition 49 Will Not Lead to the Enactment of Law, Thus It is Not Incidental to Legislative Power.

The thrust of the Legislature's justification for asking the voters a question is its contention that "an essential prerequisite to determining and formulating legislative policy is the gathering of facts and opinions that will inform the legislative decisionmaking [sic] process." Thus, the Legislature argues its decision "to directly poll the California electorate" is incidental to the exercise of legislative power.

First, the Legislature mischaracterizes its own ballot question, framing it as if it (the Legislature) is seeking the voters' advice (i.e., "solicit[ing] the views of its constituents"). The actual ballot question is primarily directed at Congress: "Shall the Congress of the United States propose, and the California Legislature ratify...?" Without action by the Congress, there is nothing for the Legislature to do, and no need for it to seek advice from the electorate.

Second, the Legislature is not really seeking the "advice" of the electorate. The Legislature has already acted on this issue, not once, but at least twice. Just a couple of months ago the Legislature expressed its views directly to the Congress "speaking on behalf of the people of the State of California" regarding the *Citizens United* decision with the passage of Assembly Joint Resolution 1. (Res. 2014, Ch. 77.) But that was not the first time the Legislature addressed Congress about this matter. Just over

two years ago, the Legislature passed Assembly Joint Resolution 22, wherein it called upon Congress "to propose and send to the states for ratification a constitutional amendment to overturn *Citizens United...*" (Res. 2012, Ch. 69.). If the voters say "no" to Proposition 49 is the Legislature going to retract AJR 1 and AJR 22?[2]

Lastly, this Court has already concluded that a measure like Proposition 49 is not incidental to a legislative act, because the ultimate decision to either ratify a federal constitutional amendment or to request Congress to call a Constitutional Convention is not a legislative act. This Court in *AFL-CIO* cited both the California Supreme Court decision in *Barlotti v. Lyons*, (1920) 182 Cal. 575, and the United States Supreme Court decision in *Hawke v. Smith*, (1920) 253 U.S. 221, to support its conclusion that the Balanced Budget initiative was not "legislative" in character. (*AFL-CIO*, *supra*, 36 Cal.3d at p. 703.)

In both cases, the courts reached the same conclusion, namely that the process of ratifying a federal constitutional amendment is not legislation: "ratification by a State of a constitutional amendment in not an act of legislation with the proper sense of the word." (*Hawke v. Smith, supra*, 253 U.S. at p. 229.) Thus, even the Legislature's argument that its

[2] It is worth noting that the people could not challenge the Legislature's adoption of either Resolution by way of referendum. Thus, further confirming that such Resolutions are not "legislative" acts. (*Barlotti v. Lyons* (1920) 182 Cal. 575 [Legislature's Resolution ratifying Eighteenth Amendment not subject to referendum].)

poll question might serve as "invaluable guidance" whether it should vote to ratify a non-existent constitutional amendment, should one ever be proposed, cannot be incidental to any legislative act because the ultimate act at issue is not itself legislative.[3]

If this Court countenances such an extension of legislative power, there is virtually no limit to the possibilities for future ballot box opinion polling. The ballot box is not *American Idol.* ("The phone lines are now open, vote for your favorite public policy.") Only this Court can provide a constitutional check on the Legislature's power grab.[4] Only this Court can protect the vitality and sanctity of the initiative and referendum process reserved to the people.

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[3] The current session of this Legislature ends on November 30, 2014. (Cal. Const. Art. IV, § 3(a).)

[4] The Governor's letter to the Senate (Ex. B to the Petition) implies that he would veto future advisory measures ("it is my intent to signal that I am not inclined to repeat this practice"). However, the Governor's letter is an empty promise. As indicated more fully by *amicus curiae* Governor Wilson, SB 1272 was "presented" to the Governor only because the Legislature had to wiggle its way out from the statutory deadline for legislative measures found in Elections Code section 9040. Had the Legislature acted a mere two or three weeks earlier, there would have been no need for it to enact a "statute" and thus there would have been no need to enact a "bill" and then there would have been no requirement that such "bill" be "presented" to the Governor under Article IV. Indeed, when the Legislature proposes a Constitutional Amendment in a timely way, it does so by Resolution which means it is not a "bill" and not presented to the Governor for approval or veto. As an example, Proposition 44 was placed on the 2014 General Election ballot by ACA 1 without the Governor's consent. (Res. Ch.1, 2013-14, 2nd Ex. Sess.)

B. NO COURT HAS UPHELD THE USE OF ADVISORY MEASURES.

The Legislature's citation to *Kimble v. Swackhammer* is misleading. It is true that in *Kimble* the United States Supreme Court chose not to enjoin an advisory measure concerning the ratification of the proposed Equal Rights Amendment (a proposed federal constitutional amendment that was ripe for ratification) in the State of Nevada. In doing so, the court upheld a decision of the Nevada Supreme Court which concluded that the non-binding nature of the measure did not run afoul of the procedure established by United States Constitution for ratification of constitutional amendments. (*Kimble v. Swackhammer* (1978) 439 U.S. 1385, 1387-88.) What was not at issue in the United States Supreme Court or the Nevada State Supreme Court was whether the Legislature had the power under Nevada law to put an advisory measure on the ballot in the first place. Indeed, in dissent in the state case, Justice Gunderson stated:

> [M]y colleagues have not explained how it is proper under the Nevada Constitution for our Legislature through an "Act" obviously intended neither to make nor modify law, and therefore manifestly outside the Legislature's normal law-making function to utilize the state's election ballots in ways not contemplated by Nevada's Constitution.

(*Kimble v. Swackhammer* (1978) 94 Nev. 600, 603, J. Gunderson, dissenting.)

Nor has any court ruled on the legality of any prior "advisory measure" in California, other than the measure rejected in *AFL-CIO*. Thus,

the existence of two ambiguous measures on the ballot over 80 years ago, proves nothing and surely does not evidence any legal authority for the Legislature use the ballot to ask the voters a question.[5]

Lastly, the existence of Elections Code section 9603 (authorizing local advisory elections) offers no refuge for the Legislature. The legislative power over counties and general law cities is plenary, since counties are merely "subdivisions of the State" (Cal. Const. Art. XI, § 1) and general law cities are creatures of the state law (Gov. Code § 34000 et seq.). If the Legislature desires to provide local government with the ability to ask the voters advice on the ballot, it is free to do so. It is not incongruous, contrary to the Legislature's view, for the Legislature to grant power to local governments respecting elections, the ballot, and even the initiative process that it itself does not possess. It has done so many times.

[5] Petitioners have not located any definitive legislative history regarding Propositions 9 and 10 in 1933. As indicated, the subject matter related to the use of gas tax proceeds to pay down previously voter approved bond debt. However, since the voters, in approving the three bond measures, approved not only the debt but also the "ways and means" for repaying the debt, the Legislature was arguably required to return to the voters for permission to use some different source of revenue as repayment. That, of course, would make Propositions 9 & 10 legislative–not advisory–as constituting amendments of the three prior bond measures, which is one of the three types of ballot measures California Constitution allows the Legislature to submit to voters.

(See, e.g., Elec. Code §§ 9116, 9118, 9214, and 9215, authorizing local legislative bodies the power to adopt an initiative petition directly without placing it on the ballot for approval by voters. [6])

C. THE INJURY TO PETITIONERS AND ALL VOTERS IS MANIFEST AND CANNOT BE CURED AFTER THE ELECTION.

Petitioners' interest in preserving and protecting the exercise of initiative power requires no evidence as the organization itself was borne of Proposition 13 in 1982. The irreparable harm, to Petitioners and all Californians, is to the initiative process itself. This Court has already recognized the harm to the legitimate exercise of initiative power from the inclusion of unlawful measures on the ballot:

> The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.

(*AFL-CIO*, *supra*, 36 Cal.3d at p. 697; see also *Senate v. Jones* (1999) 21 Cal.4th 1142, 1154.)

Petitioners, and all Californians, face several important policy issues on the upcoming ballot, all of which propose the enactment of law. Proposition 49 is not one of them. The harm to Petitioners is manifest and

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[6] This statutory power of local legislative bodies to adopt a proposed initiative without resort to an election was the subject matter of this Court's recent decision in *Tuolumne Jobs & Small Business Alliance v. The Superior Court of Tuolumne County* (2014) __Cal.4th__; 2014 WL 3867558 (Cal.).

occurs if Proposition 49 remains on the ballot. No post-election remedy will cure the damage done. Indeed, it is not clear that any post-election remedy would offer standing to any party after the fact.

The Legislature, on the other hand, will suffer no harm by the removal of Proposition 49 from the ballot. First, as noted in its opening brief, the bill that proposed Proposition 49 was originally drafted to place the advisory measure on the 2016 ballot – there is no urgency regarding the subject of Proposition 49. Second, as also noted, the Legislature has already acted in regards to *Citizens United*, not once, but at least twice. Third, there is no proposal to amend the First Amendment that has advanced to the floor of either house of Congress, and certainly no proposed amendment awaiting ratification by the Legislature. Fourth, this session of the Legislature is nearly concluded. The next Legislature may not have the same appetite for using the ballot box as a public opinion poll. And lastly, both our Federal and State Constitution guarantee a remedy for those persons desiring to express their views to members of Congress or the Legislature – direct petition to the Government (e.g., "write your Congressmember.") The right to petition the government does not include the voters' right to use the ballot to express themselves -- except in the form of legislation.

IV.

CONCLUSION

Petitioners respectfully request the Court's immediate action to preserve the integrity of the ballot.

Dated: August 8, 2014. Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) and 8.360(b)(1) of the California Rules of the Court, the enclosed brief of HOWARD JARVIS TAXPAYERS ASSOCIATION and JON COUPAL is produced using 13-point Times New Roman type including footnotes and contain approximately 3,076 words, which is less than the total words permitted by the rules of the court. Counsel relies on the word count of the computer program, Microsoft Word 2010, used to prepare this brief.

Dated: August 8, 2014 BELL, McANDREWS & HILTACHK, LLP

By: _____
THOMAS W. HILTACHK

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PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 455 Capitol Mall, Suite 600, Sacramento, CA 95814.

On August 8, 2014, I served the following: **REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF**

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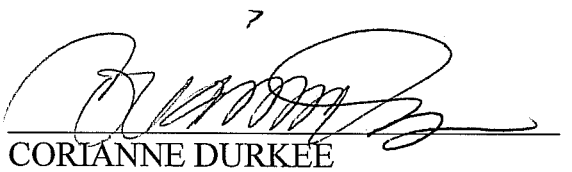
___ **BY U.S. MAIL:** By placing said document(s) in a sealed envelope and depositing said envelope, with postage thereon fully prepaid, in the United States Postal Service mailbox in Sacramento, California, addressed to said party(ies), in the ordinary course of business. I am aware that on motion of 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 in affidavit.

X **BY ELECTRONIC MAIL:** By causing true copy(ies) of PDF versions of said document(s) to be sent to the e-mail address of each party listed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 8, 2014, at Sacramento, California.



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