



Yes on 49 Money Out Voters In campaign FPPC #1368359
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August 8, 2014

Chief Justice Tani Cantil-Sakauye
Associate Justice Carol A. Corrigan
Associate Justice Joyce L. Kennard
Associate Justice Kathryn M. Werdegar
Associate Justice Ming W. Chin
Associate Justice Marvin R. Baxter; and
Associate Justice Goodwin Liu
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Via Hand Delivery

Re: Amicus Letter: *Howard Jarvis Taxpayers Assn., v. Bowen, et al.*
Case No. S220289

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Statement of Interest

The Yes on 49, Money Out Voters In Committee is a ballot committee formed under California law to advocate passage of Prop 49 by an unincorporated group of real people calling themselves Money Out Voters In (MOVI). MOVI coordinated a significant outreach effort to mobilize public support for SB 1272, which placed Proposition 49 on the ballot. This effort produced more than 55,000 petition

signatures, 40,000 e-mails, 176,000 faxes, and hundreds of personal visits to the state Capital all urging the Legislature to approve SB 1272.

California Clean Money Campaign and the California Public Interest Research Group (CALPIRG) are non-profit, non-partisan organizations of real people who have joined together to advocate governmental responsiveness to the public. Both organizations, and their members, actively supported SB 1272 and are supporting Proposition 49. The real people who have advocated for SB 1272 through these incorporated and unincorporated entities have done so in order to give their fellow California citizens the opportunity to speak collectively as We the People to our state and federal elected officials and to direct them to take actions on our behalf, using an historically appropriate and completely legal means of voter instructions.¹

99 Rise is a group of Californians who, among other activities, organized a march from Los Angeles to Sacramento in order to draw attention to corruption in American politics and demand that elected officials address it. More than 500 participants in the March walked a combined total of more than 10,000 miles. Among the actions urged by the marchers was the passage of SB 1272 to place Prop 49 on the ballot.

Introduction

The organizations signing this letter want to provide an opportunity for their members, and all California voters, to formally instruct their elected officials to take action to reverse the *Citizens United v. FEC* ruling by the U.S. Supreme Court, and related opinions. More profoundly, they seek to preserve and use the right of all citizens to speak and petition our government in the tradition envisioned and used by the Framers of our federal and state constitutions through specific voter instructions.

¹ In the interests of efficiency and in deference to the Court, the authors of this letter are not including petitions from citizens expressing frustration that the judicial process is being used by these Petitioners in an attempt to deprive the Citizens of California the right to vote on Proposition 49, which the authors view as a means of correcting a previous error by the federal judicial branch in its ruling in *Citizens United v. FEC* and related cases.

Americans have lost faith that the US Congress is responsive to their needs. Public confidence in Congress now stands at a record low of 7%.² Their loss of confidence results from several recent US Supreme Court decisions, including *Citizens United*.

The public's suspicion that Congress does not truly represent them is based on more than emotion and speculation. A study by Martin Gilens (Princeton University) and Benjamin Page (Northwestern University) ("The Princeton Study") empirically examined 1,997 separate issues recently pending before Congress, and came to this conclusion:

Multivariate analysis indicates that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence. The results provide substantial support for theories of Economic Elite Domination and for theories of Biased Pluralism, but not for theories of Majoritarian Electoral Democracy or Majoritarian Pluralism.³

In sum, Americans have correctly concluded that Congress has come under domination of economic elites, and no longer serves the broader public interest.

Through *Citizens United*, and related cases, the Federal Courts have substantially tied the Legislature's hands to remedy this problem. We therefore stand at an unfortunate moment where in order for the Legislature to pass its own laws to reduce corruption and bolster public confidence in Congress, the legislatures need to invoke the Article V process. That's precisely what the California Legislature has done by enacting SB 1272. It would be ironic if in this one instance where the

² See: Public Faith in Congress Falls Again, Hits Historic Low: <http://www.gallup.com/poll/171710/public-faith-congress-falls-again-hits-historic-low.aspx>

³<https://www.princeton.edu/~mgilens/Gilens%20homepage%20materials/Gilens%20and%20Page/Gilens%20and%20Page%202014-Testing%20Theories%203-7-14.pdf>

Legislature was highly responsive to the needs of their constituents in passing SB 1272, the courts blocked it.

Opportunities to correct the imbalance between what is obtained in Congress by a very few economic elites and what is obtained by the rest of Americans was commonplace in the American system of government as originally conceived. In the past, voters had available to them a system whereby they could convey voter instructions at appropriate times. If any such time exists, this is it.

Discussion of Voter Instructions

Voter instructions have been an integral part of US history and have played a central role in the development of our federal Constitution and were used shortly after the adoption of the California Constitution.

Instructions were a principal part of the American political system before independence. The wording of instructions from Boston to its representatives in 1764 illustrates the practice in Colonial America. "We, the freeholders of the town, have delegated you the power of acting in our public concerns, in general as your prudence shall direct you, reserving to ourselves the constitutional right of expressing our minds and giving you such instructions upon important subjects as at any time we may judge proper."⁴

Some of the Framers themselves were acting under Voter Instructions when they drafted Article V of the Constitution.⁵ Indeed, the use of instructions, also known as "enjoining" a representative, was specifically mentioned as a means of amending the Constitution by its Framers. John Dickinson of Delaware defended Article V during ratification debates by noting that the Constitution could be amended as a result of instructions:

⁴ Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* (University Press, Cambridge, MA 1930), p. 449.

⁵ Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 13 U.C. Davis Law Review 33, 56

Thus, by a gradual progress, we may from time to time introduce every improvement in our constitution, that shall be suitable to our situation. For this purpose, it may perhaps be advisable, for every state, as it sees occasion, to form with the utmost deliberation, drafts of alterations respectively required by them, and to enjoin their representatives, to employ every proper method to obtain a ratification.

Alexander Hamilton also explained to the New York ratifying convention that any changes desired in the Constitution, such as a change in the size of the House of Representatives, could be accomplished by instructions. As he stated before the New York ratifying convention:

If the general voice of the people be for an increase [in the number of members of Congress], it undoubtedly must take place. They have it in their power to instruct their representatives; and the state legislatures, which appoint the senators, may enjoin it also upon them.”⁶

The addition of the Bill of Rights just subsequent to ratification of the Constitution came at the insistence of ratifying conventions in four states: Massachusetts, South Carolina, New York and Rhode Island. Each state inserted such instructions prominently in their ratification message to congress.⁷

In proposing the Bill of Rights as our first ten amendments to the Constitution, Congress considered including a federal right to make binding instructions. It chose not to because a majority of congressional members assumed non-binding instructions were protected under freedom of speech and petition and thought those would be adequate because the Framers widely expected elected officials would comply with them without the need to make them legally enforceable or subject non-complying legislators to immediate recall.⁸

⁶ Id. At 61

⁷ Id. At 64-66

⁸ Id at 69-70

California specifically used voter instructions in the Article V process in an 1892 proposition placed on the ballot by the Legislature in support of the 17th Amendment (Direct Election of Senators).⁹ The California Legislature clearly understood that it had authority to place such a measure on the ballot then, and many of these legislators undoubtedly took part in the framing and ratification of the California constitution just 12 years prior to their act to place the question on the ballot. The Legislature is equally authorized to do so today, and the additional powers of the citizens initiative process later given to voters do nothing to diminish this original legislative authority

Instruction ballot measures also influenced the debate over prohibition. In November 1928, voters in 36 of 40 Massachusetts state senatorial districts considered the question “shall the senator from this district be instructed to vote for a resolution requesting Congress to take action for the repeal of the 18th Amendment to the Constitution of the United States, known as the prohibition amendment?” All but two districts favored the question, with an overall vote of 63 percent in favor. Similarly, in November 1932, Connecticut voters adopted by 7-to-1 margin a proposal petitioning congress to end prohibition. Wyoming voters by 2-to-1 margin sent a “memorial” to congress calling for repeal of prohibition. In Louisiana, voters requested Congress call a constitutional convention to propose repeal of prohibition. After Congress proposed the 21st amendment, on July 21, 1933 Oregon voters voted 65 percent in favor of instructing the delegates to the state convention to ratify the amendment to support it. Seventeen days later, the Oregon convention did just that.¹⁰

Beyond the difference in legislative referral compared to citizen initiative, Proposition 49 can be distinguished from the measure in question in *AFL-CIO v. Eu*, 36 Cal.3d 687 (1984) by its different content. That case involved a proposition that used punitive measures (withholding pay) in an attempt to force legislators to comply with instructions. Prop 49 contains no such measures and is consistent

⁹ In November 1892, voters approved an advisory measure that was placed on the ballot by the Legislature asking whether United States Senators should be directly elected by a vote of the people. SB 1272 Bill Analysis

¹⁰ Kobach P. 82-84

with the tradition of non-punitive instructions used by the Framers of the U.S. Constitution

The legislature adopted SB 1272 in response to the broad and deep conviction of Californians that dramatic reform of the American system of campaign finance is urgently necessary. This belief is illustrated by overwhelming voter support for local voter instruction measures in Los Angeles, San Francisco, Richmond and resolutions by 55 California city councils all calling for a federal constitutional amendment to reverse the *Citizens United v. FEC* ruling. In addition, the Legislature received tens of thousands of e-mails, approximately 176,000 faxes, and heard hundreds of citizens personally attending hearings in specific support of SB 1272 to place Prop 49 on the ballot. The Legislature was, appropriately so, responsive to its constituents in adopting SB 1272. The contrary claim made by these Petitioners about the motivations of the legislature are completely without merit.

Conclusion:

The federal courts have given ample opportunities for wealthy people to speak to our elected officials through hiring lobbyists and paying unlimited amounts for campaign advertisements. Ordinary citizens have no such opportunities to make their viewpoints heard and in fact many people believe their voices are diminished and drowned out by the comparatively louder voices of billionaires and corporate CEOs. Proposition 49 is a legitimate attempt by the California Legislature to provide their constituents with an avenue for being heard.

Petitioners fail to understand the difference between an election and a poll. Unlike a public opinion poll, which can be skewed in its working and presents no opportunity for opposing viewpoints, an election provides a structured format for citizens to speak collectively. That is the reason we do not elect our representatives via public opinion poll.

In contrast to the founding period of the United States, Californians do not have the ability to gather together in a town meeting and deliberate instructions face to face. The ballot measure is the only means by which Californians can collectively speak

with one voice to our elected representatives in an official capacity. Given this Court's ruling in *AFL-CIO v. Eu*, the only current means that Californians have to engage in what they view as a crucial public debate and make their collective will expressly known to their elected representatives is a legislative referral. The California Legislature was appropriately responsive to the wishes of their constituents to be heard on this issue and the Court should not interfere in the legislative process between California elected representatives and their constituents.

Dated: August 8, 2014

Yes on 49: MOVI Committee

CALPIRG

Michele Sutter

Emily Rusch

California Clean Money Campaign

99 Rise

Trent Lange

Kai Newkirk

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: CALPIRG, 483 9th St Suite 100, Oakland CA 94702.

On August 8, 2014, I served true copies of the following: AMICUS LETTER IN OPPOSITION TO PETITION on the below listed counsel by electronic mail, PDF format or by fax, as indicated:

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

Emily Rusch