No. S281977

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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

THOMAS W. HILTACHK,
Real Party in Interest.

APPLICATION OF JACK COHEN (IN HIS CAPACITY AS A PROPOSITION 218 DRAFTER) FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT AND REAL PARTY IN INTEREST

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APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.487(e) of the California Rules of Court applicable to an original proceeding in this Court, JACK COHEN (hereafter "Applicant") respectfully requests permission to file an amicus curiae brief in this case (Case No. S281977) in support of Respondent and Real Party in Interest. The proposed amicus curiae brief is combined with this application.

Applicant is an attorney and one of the drafters of Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added articles XIII C and XIII D to the California Constitution and was approved by California voters in November 1996. Applicant has a major interest in seeing that Proposition 218 is effectuated consistent with its stated purposes and intent. The initiative measure involved in this case, the "Taxpayer Protection and Government Accountability Act" (hereafter "TPA Initiative"), would beneficially amend multiple provisions of Proposition 218.

Applicant states there is nothing to identify or disclose pursuant to Rule 8.487(e)(5) (which incorporates the required disclosures under Rule 8.200(c)(3)) of the California Rules of Court.

Applicant is familiar with the legal issues involved in this case and has reviewed the returns and the traverse to the returns that were filed. Applicant believes there is a need for additional briefing because this case involves the interpretation of important issues relating to the exercise of the constitutional initiative power by California voters.

Matters to be addressed in the proposed amicus curiae brief include additional analysis relating to the following:

(1) The legal distinction between a permissible constitutional amendment and an impermissible constitutional revision in the specific context of a taxpayer protection initiative measure, including historical information relating to meaning of a constitutional revision;

(2) Providing historical background information relating to the genesis of the "window period" provisions contained in the TPA Initiative (Proposition 218 contains a similar "window period" provision); and

(3) Providing historical background information relating to the genesis of the "impairing essential government functions" judicially created exception to the initiative power, including its specific application to state initiative measures such as the TPA Initiative.

Applicant believes the arguments contained in the proposed amicus curiae brief will assist the Court in resolving the issues in this case in a manner that effectuates the purposes and intent of the constitutional initiative power.

For the foregoing reasons, Applicant respectfully requests leave to file the proposed amicus curiae brief that is combined with this application.

Respectfully submitted,

/s/ Jack Cohen_____
Jack Cohen
Attorney at Law

AMICUS CURIAE BRIEF

I. INTRODUCTION.

This case concerns whether the "Taxpayer Protection and Government Accountability Act" (hereafter "TPA Initiative"), an initiative measure eligible to appear on the November 2024 ballot, is a legally permissible initiative constitutional amendment to be decided by California voters or an impermissible constitutional revision outside the scope of the initiative power. Also at issue in this case is whether the TPA Initiative is invalid under the "impairing essential government functions" judicially created exception to the constitutional initiative power.

Both the Governor and the California Legislature are petitioners in this case. At taxpayer expense, an unprecedented effort is being made by the other branches of California government to thwart the exercise of the constitutional initiative power by California voters which the courts are required to jealously guard and protect. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 248 ("*Amador Valley*") [relating to upholding the validity of Proposition 13].) No prior instance could be found where the Governor and the Legislature teamed up to attempt to remove a duly qualified initiative measure from the ballot and thereby seek to deny California voters an opportunity to even vote on the initiative.

In providing historical context, unsuccessful efforts were previously made in 1978 to remove the landmark Proposition 13

constitutional tax initiative measure from the ballot. However, neither the Legislature nor the Governor attempted to invalidate Proposition 13 in the courts before the June 1978 election in which Proposition 13 was overwhelmingly approved by California voters. The same is true with regard to subsequent taxpayer protection initiative constitutional amendments adopted by California voters such as Proposition 218 in 1996 and Proposition 26 in 2010.

In rejecting a preelection legal challenge to remove Proposition 13 from the ballot brought by a sitting California judge, the trial court judge in that case called Proposition 13's potential removal from the ballot "a drastic kind of action that would inhibit the will of more than 1 million people." The trial court judge further stated: "we're talking about the inherent right of the people to vote, and no court should take that right away unless it's absolutely necessary." (Seiler M., *Move to Take Jarvis Initiative Off Ballot Fails*, L.A. Times (Feb. 16, 1978) p. B3 <https://www.proquest.com/historical-newspapers/move-take-jarvis-initiative-off-ballot-fails/docview/158425827/se-2>.)

When the Proposition 13 preelection removal matter reached the California Supreme Court, then led by Chief Justice Rose Bird, this court summarily denied the petitions without comment (there was one other preelection challenge). It was thus up to the voters to decide the fate of Proposition 13. Following the summary denial by this court, Howard Jarvis (an official Proposition 13 proponent) was quoted: "I think that the politicians are hysterical in Sacramento and they are grabbing at every straw to try and defeat Proposition 13." (Endicott W., *Jarvis Stays on the Ballot: Court*

Bars Challenges to Prop. 13, L.A. Times (Mar. 2, 1978) p. A1 <https://www.proquest.com/historical-newspapers/jarvis-stays-on-ballot/docview/158546782/se-2>.)

Just like the preelection legal challenges to Proposition 13 were unsuccessful in 1978, this preelection legal challenge to the TPA Initiative must be rejected by this court. As is proper for a duly qualified initiative measure, it is up to the voters to decide the fate of the TPA Initiative.

Concerning the exercise of the initiative power in general, this court has made it crystal clear that it is "the duty of the courts to jealously guard this right of the people," that the initiative power is "one of the most precious rights of our democratic process," that "it has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled," and "if doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 591 ("*Associated Home Builders*".)

While the courts have acknowledged that other branches of government (e.g., the Legislature) may not be enamored with a taxpayer protection initiative (See, e.g., *Hoogasian Flowers, Inc. v. State Bd. of Equalization* (1994) 23 Cal.App.4th 1264, 1277 [the Legislature and Proposition 13]), this must have no bearing on the required application by the judiciary of the aforementioned guiding principles relating to the initiative power articulated by

this court in *Associated Home Builders*. These fundamental principles relating to upholding the exercise of the initiative power by the voters are just as applicable, and must be equally applied by this court with the same vigor and force, even in those cases where public officials or other branches of government do not like the subject matter and contents of an initiative measure, as is apparently the case with the TPA Initiative.

As this court stated in *Amador Valley* relating to Proposition 13: "We do not consider or weigh the economic or social wisdom or general propriety of the initiative. Rather, our sole function is to evaluate article XIII A legally in the light of established constitutional standards." (*Amador Valley*, *supra*, 22 Cal.3d at p. 219.) The same also applies to the TPA Initiative in this case.

II. HISTORICAL CONTEXT STRONGLY SUGGESTS THAT A CONSTITUTIONAL "REVISION" WAS INTENDED TO APPLY TO CONSTITUTIONAL CHANGES OF SUCH MAGNITUDE AND SCOPE AS THAT ASSOCIATED WITH A NEW CONSTITUTION.

The history of what is a constitutional "revision," particularly at the time the constitutional initiative power was adopted by California voters in 1911, strongly suggests that a "revision" was intended to apply to constitutional changes of such magnitude and scope as that associated with a new constitution.

The original California Constitution of 1849 used the language "revise and change this entire Constitution" in referring to a constitutional revision:

> "And if, at any time two-thirds of the Senate and Assembly shall think it necessary to *revise and change this entire Constitution*, they shall recommend to the electors, at the next election for members of the Legislature, to vote for or against the convention ; and if it shall appear that a majority of the electors voting at such election have voted in favor of calling a convention, the Legislature shall, at its next session, provide by law for calling a convention, to be holden within six months after the passage of such law; and such convention shall consist of a number of members not less than that of both branches of the Legislature." (Cal. Const. of 1849, art. X, § 2, available at Stats. 1850 at pp. 32-33, italics added.)

The original language from the California Constitution of 1849 under section 2 of article X was amended in 1856 to provide additional language that a new constitution is associated with a constitutional revision. The amended section 2 read as follows:

> "And if, at any time, two-thirds of the Senate and Assembly shall think it necessary to *revise and change this entire Constitution*, they shall recommend to the electors, at the next election for members of the Legislature, to vote for or against a convention; and if it shall appear that a majority of the electors voting at such election have voted in favor of calling a convention, the Legislature shall, at its next session, provide by law for calling a convention, to be holden

> within six months after the passage of such law; and such convention shall consist of a number of members not less than that of both branches of the Legislature. *The Constitution that may have been agreed upon and adopted by such convention* shall be submitted to the people at a special election, to be provided for by law, for their ratification or rejection; *each voter shall express his opinion by depositing in the ballot-box a ticket, whereon shall be written or printed the words "For the New Constitution," or "Against the New Constitution."* The returns of such election shall, in such manner as the convention shall direct, be certified to the Executive of the State, who shall call to his assistance the Controller, Treasurer, and Secretary of State, and compare the votes so certified to him. *If, by such examination, it be ascertained that a majority of the whole number of votes cast at such election be in favor of such new Constitution, the Executive of this State shall, by his proclamation, declare such new Constitution to be the Constitution of the State of California.* (Cal. Const. of 1849, art. X, § 2, as amended Nov. 4, 1856, available at Stats. 1856, ch. 117, § 2, pp. 138-139, italics added.)

With the 1856 amended language, it was pretty clear that a constitutional "revision" was associated with a new Constitution. The 1856 amended language under section 2 of article X remained part of the California Constitution of 1849 until the new California

Constitution was ratified by California voters in 1879 (see Stats. 1878, p. lxii).

The original language from the California Constitution of 1879 also contained supporting language that a constitutional revision intended to apply to constitutional changes of such magnitude and scope as that associated with a new constitution. The California Constitution of 1879 contained the following language relating to "revising" the Constitution under section 2 of article XVIII thereof:

> "Whenever two thirds of the members elected to each branch of the Legislature shall deem it necessary to revise this Constitution, they shall recommend to the electors to vote at the next general election for or against a Convention for that purpose, and if a majority of the electors voting at such election on the proposition for a Convention shall vote in favor thereof, the Legislature shall, at its next session, provide by law for calling the same. The Convention shall consist of a number of delegates, not to exceed that of both branches of the Legislature, who shall be chosen in the same manner, and have the same qualifications, as members of the Legislature. The delegate so elected shall meet within three months after their election at such place as the Legislature may direct. At a special election to be provided for by law, *the Constitution that may be agreed upon by such Convention* shall be submitted to the people for their

> ratification or rejection, in such manner as the Convention may determine. The returns of such election shall, in such manner as the Convention shall direct, be certified. to the Executive of the State, who shall call to his assistance the Controller, Treasurer, and Secretary of State, and compare the returns so certified to him; *and it shall be the duty of the Executive to declare, by his proclamation, such Constitution, as may have been ratified by a majority of all the votes cast at such special election, to be the Constitution of the State of California*." (Cal. Const., art. XVIII, § 2, available at Stats. 1880 at p. xli, italics added.)

In *Livermore v. Waite* (1894) 102 Cal. 113, this court discussed a constitutional revision under section 2 of article XVIII as generally being in the context of revising the entire constitutional instrument: "Article XVIII of the constitution provides two methods by which changes may be effected in that instrument, one by a convention of delegates chosen by the people for the express purpose of *revising the entire instrument*, and the other through the adoption by the people of propositions for specific amendments that have been previously submitted to it by two-thirds of the members of each branch of the legislature." (*Id.* at p. 117, italics added.) This court further stated in *Livermore*: "The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a

revision of the entire constitution under the form of an amendment . . .” (*Id.* at p. 118, italics added.)

The section 2 of article XVIII language adopted in 1879 applicable to “revising” the Constitution represented the language that was in effect in 1911 (see Stats. 1911, p. xlviii) when California voters added the initiative power to the California Constitution, by amending section 1 of article IV (Sen. Const. Amend. No. 22, Stats. 1911, res. ch. 22, pp. 1655-1659), which allowed voters to amend (but not revise) the Constitution by initiative.

For purposes of the voters exercising the initiative power to amend the California Constitution, this historical context regarding the meaning of a constitutional “revision” provides important and helpful guidance for purposes of distinguishing an impermissible constitutional “revision” from a permissible constitutional amendment. This historical context at the time the initiative power was adopted in 1911 strongly suggests that a constitutional “revision” generally applies only to constitutional changes of such magnitude and scope as that associated with a new constitution.

The initiative measure invalidated and removed from the ballot by this court in *McFadden v. Jordan* (1948) 32 Cal.2d 330 (“*McFadden*”), provides a clear example of an impermissible constitutional “revision” under this historical context. In support of the foregoing, this court stated in *McFadden* that the subject initiative measure “proposes to add to our present Constitution ‘a

new Article to be numbered Article XXXII thereof' and to consist of 12 separate sections (actually in the nature of separate articles) divided into some 208 subsections (actually in the nature of sections) set forth in more than 21,000 words." (*Id*. at p. 334.) This court further stated in *McFadden* that "[i]t is apparent that in mechanical composition the sections of the proposed measure correspond to articles of the Constitution and subsections of the measure to sections of the Constitution." (*Id*. at p. 340.)

By comparison, the TPA Initiative is far more consistent with the Proposition 13 tax initiative upheld by this court in *Amador Valley* as a permissible initiative constitutional amendment (*Amador Valley*, *supra*, 22 Cal.3d at pp. 221-229 [constitutional revision/amendment analysis]) than the "far reaching and multifarious substance" (*McFadden*, *supra*, 32 Cal.2d at p. 332) of the initiative measure invalidated by this court in *McFadden* as an impermissible constitutional revision.

III. THE SCOPE AND CONTENT OF THE PROPOSITION 13 (1978) INITIATIVE CONSTITUTIONAL AMENDMENT PROVIDES A LEGAL MARKER IN SUPPORT OF THE TPA INITIATIVE BEING A PERMISSIBLE INITIATIVE CONSTITUTIONAL AMENDMENT.

The Proposition 13 initiative constitutional amendment approved by California voters in 1978, and the initiative power itself approved as a constitutional amendment by California voters in 1911, provide important legal markers (a frame of reference) for

purposes of this court determining whether the TPA Initiative is a permissible constitutional amendment.

In *Amador Valley*, this court held that the Proposition 13 tax initiative in its entirety was a permissible constitutional amendment. (*Amador Valley*, *supra*, 22 Cal.3d at pp. 221-229.) In her separate concurring and dissenting opinion in *Amador Valley*, Chief Justice Rose Bird also endorsed the majority opinion that Proposition 13 was not an impermissible constitutional revision. (*Id*. at pp. 248-249.)

Also in *Amador Valley*, this court described the four major elements contained in Proposition 13 and how they are related to one another:

> "[A]rticle XIII A consists of four major elements, a real property *tax rate* limitation (§ 1), a real property *assessment* limitation (§ 2), a restriction on *state* taxes (§ 3), and a restriction on *local* taxes (§ 4). . . . Since the total real property tax is a function of both rate and assessment, sections 1 and 2 unite to assure that *both* variables in the property tax equation are subject to control. Moreover, since any tax savings resulting from the operation of sections 1 and 2 could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes." (*Amador Valley*, *supra*, 22 Cal.3d at. p. 231, original italics.)

By this court holding in *Amador Valley* that all of Proposition 13 was a permissible constitutional amendment, it therefore follows that an initiative measure less sweeping in scope than the entirety of Proposition 13 (such as an initiative addressing one or more components or elements thereof) would also be a permissible constitutional amendment.

Under the foregoing analysis, if Proposition 13 in its entirety is a permissible constitutional amendment, then section 3 of article XIII A (relating to state taxes) and section 4 of article XIII A (relating to local special taxes) would also be permissible constitutional amendments both individually and combined. (Cf. *In re Lance W.* (1985) 37 Cal.3d 873, 891 [rejecting argument that a portion of a constitutional initiative measure was an impermissible revision after this court previously determined the initiative measure in its entirety was a permissible constitutional amendment].)

With regard to the several successful taxpayer protection initiative measures that followed the passage of Proposition 13 (e.g., Proposition 62 in 1986, Proposition 218 in 1996, and Proposition 26 in 2010), if one were to look at the big picture and examine their overall underlying purpose, these taxpayer protection initiative measures are generally about restoring the intended purpose and effect of section 3 of article XIII A (relating to state taxes) and/or section 4 of article XIII A (relating to local taxes) under Proposition 13, as described by this court in *Amador Valley*.

The impetus for the proponents of these successful taxpayer protection initiative measures that followed Proposition 13 was that California courts were not properly interpreting and applying the provisions of Proposition 13 in a manner consistent with the purposes and intent of that constitutional amendment.

In an early and prominent example of such adverse court decisions, this court formulated a special strict construction rule in significantly limiting the two-thirds voter approval requirement applicable to local special taxes (section 4 of article XIII A) under Proposition 13. (*Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 202-205 ("*Richmond*") [strict construction standard applicable to Proposition 13].) Justice Richardson in his dissenting opinion in *Richmond* strongly criticized the majority's analysis by stating: "I believe that the patent inconsistencies of the majority's analysis suggest that the new rule has been adopted more as a means to an end than to vindicate any principle, democratic or otherwise." (*Id*. at p. 210.)

Shortly thereafter, this court in *City & County of San Francisco v. Farrell* (1982) 32 Cal.3d 47 ("*Farrell*") applied the new strict construction rule in *Richmond* in narrowly construing the term "special tax" under section 4 of article XIII A. In his dissenting opinion in *Farrell*, Justice Richardson stated: "Using a very restricted interpretation of the term 'special tax,' the majority decides that petitioner's tax is exempt from the limitations of the constitutional provision. The majority thereby widens still further the hole which they have cut in that protective fence which the people of California thought they had constructed around their

collective purse by the adoption of article XIII A, a fence which the majority first breached in *Richmond*." (*Farrell*, *supra*, 32 Cal.3d at p. 57.)

Justice Richardson wasn't the only one who felt that way about a restrictive interpretation of a "special tax" under Proposition 13 by this court in *Farrell*. When the *Farrell* case was decided at the Court of Appeal level in 1981, the term "special tax" under Proposition 13 was significantly more broadly construed by that court to include what is now commonly known as a "general tax" (an unrestricted tax imposed by a city or a county) which is not subject to the local two-thirds voter approval requirement under Proposition 13.

In reaching that appellate court decision, Justice Newsom who authored the unanimous opinion (and the father of one of the petitioners in this case) stated the following: "We accordingly are convinced that sustaining the tax at issue would mark the first crack in the wall of tax reform contemplated by Proposition 13, would lead to the creation of a loophole nearly as large as the wall itself, and would flout the public will as we understand it to have been expressed in the subject initiative." Justice Newsom also stated: "In our view, the intent of article XIII A, section 4, as envisioned by the electorate which enacted it, was to impose a two-thirds popular vote requirement as a prerequisite to the establishment of any new tax, including a rate adjustment, so as to prevent local governments from circumventing the tax-cutting purpose of article XIII A in the absence of such a popular mandate. Under any other interpretation we need hardly emphasized the

ease and frequency which new taxes would be permitted to 'soften' the blow imposed by the 'legislative battering ram' of article XIII A." (See 172 Cal.Rptr. 116, 121 (Feb. 27, 1981) [citations omitted, this reference is provided for historical purposes only and not as legal authority]; *SF to appeal court rejection of tax hike*, UPI (Feb. 28, 1981) <https://www.upi.com/amp/Archives/1981/02/28/SF-to-appeal-court-rejection-of-tax-hike/7968352184400/>.)

If the interpretation by Justice Newsom of a "special tax" under Proposition 13 had ultimately prevailed, it would have completely altered the subsequent evolution of taxpayer protection jurisprudence in California as Proposition 13 would have been interpreted by the courts as intended by the voters. Instead, in the 1982 *Richmond* and *Farrell* cases, this court went in the complete opposite direction which regrettably started the seemingly endless cycle of adverse court decisions followed by restorative taxpayer protection initiative measures intended to restore the original intent of Proposition 13 taxpayer protections.

It didn't take long following the passage of Proposition 218 (the "Right to Vote on Taxes Act") for this court to start eroding the constitutional provisions in that initiative. As Justice Brown noted in her dissenting opinion in *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 [restrictive interpretation of a property-related fee]: "When the voters passed Proposition 13 in 1978, they sought to restrict the ability of government to impose taxes and other charges on property owners without their approval. For almost two decades, however, they witnessed politicians evade this constitutional

limitation. The message of Proposition 218 is that they meant what they said. With the majority turning a deaf ear to that message, we may well expect a future effort to 'stop politicians' end-runs around Proposition 13.'" (*Id*. at p. 848.)

There were other adverse court decisions that significantly eroded Proposition 13 constitutional taxpayer protections (which decisions have already been articulated by the real party in interest), and the corresponding taxpayer protection initiative measures that responded to those adverse court decisions were intended to help restore the vitality of the constitutional taxpayer protections as intended under Proposition 13. This now includes the TPA Initiative as one such taxpayer protection initiative.

In examining the big picture, the TPA Initiative can essentially be distilled as containing restoration provisions designed to help ensure that section 3 (state taxes) and section 4 (local taxes) of article XIII A achieve their intended effect under Proposition 13, in which the aforementioned constitutional components of law represent a subset of the entirety of Proposition 13 which was found by this court in *Amador Valley* to be a permissible constitutional amendment. As such, this further supports the conclusion that the TPA Initiative is a permissible initiative constitutional amendment allowable under the initiative power.

A. A Taxpayer Protection Initiative Measure Can Be Even More Comprehensive and Impactful than Proposition 13, or Otherwise Contain Substantive Provisions Not Included in Proposition 13, and Still Be a Permissible Constitutional Amendment.

In concluding that Proposition 13 was a permissible constitutional amendment, this court in *Amador Valley* did not hold that Proposition 13 was the legal demarcation point that separates a permissible constitutional amendment from an impermissible constitutional revision. Thus, it is legally possible that a taxpayer protection initiative measure could be even more comprehensive and impactful than Proposition 13, or otherwise contain significant substantive constitutional provisions not included in Proposition 13, and nonetheless still be a permissible constitutional amendment for which the initiative power may be exercised by the voters.

One such significant substantive constitutional provision contained in the TPA Initiative is that it includes an additional voter approval requirement for state taxes similar to that which already exists at the local and regional levels in California. Currently, a two-thirds legislative vote is already required for state tax increases (Cal. Const., art. XIII A, § 3), and simple majority vote approval by the California electorate would be added to that requirement under the TPA Initiative. (TPA Initiative, § 4.)

As this court has previously noted, there is nothing unusual about a voter approval requirement for taxes as they have a long

history in this state. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 250-251 ("*Guardino*").) In generally discussing the history of voter approval requirements at the state level that originated with constitutional amendments and then expanded to various statutory matters, including taxes, a leading publication previously cited by this court in *Rossi v. Brown* (1995) 9 Cal.4th 688 (and several other cases decided by this court), stated the following:

> "The plebiscital method of constitutional amendment originated in Connecticut in 1818, when the old charter of the state was abandoned and a new constitution adopted. . . . In the course of time it became the general rule for constitutional amendments to be adopted by the legislature and accepted by popular vote, in order to become effective, and gradually a wide variety of statutory questions came to be more or less customarily submitted for popular decision. The electorate decided such state issues as the location of capitals, sites for state universities and other public institutions, bond issues, and *tax rates*." (Key & Crouch, The Initiative and Referendum in Cal. (1938) p. 491, italics added.)

The Legislature itself has imposed numerous statutory voter approval requirements as a legal condition for exercising the local taxation power. As this court noted in *Guardino*:

> "The requirement of voter approval before a local government enacts a proposed tax is another such condition on the exercise of local taxing power. If the local government chooses to exercise that power, the Legislature may require it to take several steps in order to impose the tax. One of those steps is to obtain the approval of a specified proportion of the votes of the members of the local legislative body. Another such step is to obtain the approval of a specified proportion of the votes of the local electors." (*Guardino*, *supra*, 11 Cal.4th at p. 250 [citations omitted].)

This court in *Guardino* then concluded that the voters themselves exercising the initiative power could also lawfully enact similar conditions on the local taxation power, including the condition of a voter approval requirement, pursuant to a statutory initiative measure (Proposition 62 (1986)). (*Id.* at pp. 253-254.)

If the voters can lawfully impose a voter approval requirement as a condition on the local taxation power pursuant to an initiative statute, as held by this court in *Guardino*, then there is little reason why the voters cannot constitutionally impose a similar voter approval requirement as a condition on the state taxation power applicable to the imposition of state taxes by the Legislature.

For the Legislature to impose a state tax, the TPA Initiative adds the additional requirement of majority vote approval by the

California electorate (TPA Initiative, § 4) in addition to the already existing requirement of two-thirds approval by the Legislature (Cal. Const., art. XIII A, § 3). In upholding the validity of the Proposition 62 (1986) statutory initiative in *Guardino*, this court also upheld a component provision in that initiative similar to the conditions that would apply to the imposition of state taxes under the TPA Initiative. In particular, general taxes under the Proposition 62 (1986) statutory initiative require two-thirds approval by the local legislative body (Gov. Code, § 53724, subd. (b)) and majority vote approval by the local electorate (Gov. Code, § 53723).

B. Another Initiative Measure was Filed by Howard Jarvis During the Proposition 13 Campaign that Contained a Voter Approval Requirement for Certain State Tax Increases.

Shortly after Proposition 13 qualified for the June 1978 ballot, Howard Jarvis filed another constitutional initiative measure in January 1978 (proposing to add Article XIII B to the California Constitution) that would have required two-thirds voter approval by the California electorate for any increases in state income tax rates or state sales tax rates that exceeded those tax rates that may be in effect on April 1, 1979. (Income And Sales Tax Rates California Initiative 172 (1978) <http://repository.uchastings.edu/ca_ballot_inits/339> [PDF copy of initiative documents may be downloaded from site].) The two-thirds voter approval requirement by the California electorate

would have been in addition to the two-thirds legislative vote requirement under the already qualified Proposition 13.

This new initiative measure was filed by Howard Jarvis in response to a massive "doomsday" state tax increase bill introduced in the Legislature (Sen. Bill No. 1569 (Rodda) (1977-1978 Reg. Sess.) intended to "compensate local governments for the property tax revenues they would lose if Proposition 13 passes." (*If Jarvis Initiative Passes: 'Doomsday' Bill a Tax Survival Plan*, L.A. Times (Mar. 13, 1978) p. C1 <https://www.proquest.com/historical-newspapers/if-jarvis-initiative-passes/docview/158551862/se-2>.)

In pursuing this new initiative measure containing an additional statewide two-thirds voter approval requirement for certain state tax increases, Howard Jarvis said: "Certain legislators are threatening the people they will enact higher sales and income taxes if the Jarvis initiative passes . . . They say these new taxes will leave home and property owners worse off taxwise than they are now." The new initiative was drafted as a form of "insurance against these threats." Whether or not the initiative is circulated would "depend on how or whether the Legislature carries out these threats to boost state taxes." (*Tax Freeze Plan Readied by Jarvis*, L.A. Times (Jan. 18, 1978) p. B33 < https://www.proquest.com/historical-newspapers/tax-freeze-plan-readied-jarvis/docview/158511220/se-2>.)

Thus, the additional statewide voter approval requirement contained in the new initiative filed by Howard Jarvis served the

purpose of making it more difficult for the Legislature to "withdraw or "deplete" the property tax relief provisions of Proposition 13 which was an intended purpose of the state and local tax restrictions contained in Proposition 13. (*Amador Valley*, *supra*, 22 Cal.3d at p. 231.)

Howard Jarvis ultimately did not circulate the new initiative because the "doomsday" state tax increase bill was not enacted by the Legislature. At that time, the two-thirds legislative vote requirement applicable to state tax increases contained in Proposition 13 (section 3 of article XIII A) adequately served its intended and protective purpose in making it difficult for the Legislature to impose state tax increases. As a result, in a letter to the Secretary of State dated August 14, 1978, Howard Jarvis wrote: "For now the matter is a dead issue. . . . If we decide to carry it out in the future we will make a new filing." (Income And Sales Tax Rates California Initiative 172 (1978) <http://repository.uchastings.edu/ca_ballot_inits/339> [letter is contained in PDF copy of initiative documents which may be downloaded from site].) With the TPA Initiative and its similar added voter approval requirement for state taxes, that "in the future" is now.

The added voter approval requirement for state taxes contained in the TPA Initiative reflects a policy that the existing two-thirds legislative vote requirement under Proposition 13 by itself is no longer adequate in sufficiently protecting taxpayers against significant state tax increases by the Legislature. Whether that policy should be enshrined in the California

Constitution is a matter for the voters to decide without impediment by the judiciary.

C. TPA Initiative Provisions Restore the Approximate Difficulty Level For Raising Taxes that Existed at the Time of Proposition 13 in a Manner Consistent with the Constitutional Amendment Determination in *Amador Valley*.

When Proposition 13 was adopted in 1978, as a result of the two-thirds legislative vote requirement under section 3 of article XIII A it was difficult (but not impossible) for the Legislature to raise state taxes. When this court held in *Amador Valley* that the entirety of Proposition 13 was a permissible constitutional amendment, the high difficulty level existing at that time for the imposition of state taxes pursuant to section 3 of article XIII A (a component element of Proposition 13) was thereby embedded in that constitutional amendment determination. In other words, this court in *Amador Valley* found Proposition 13 to be a permissible constitutional amendment even though at the time it was very difficult for the Legislature to raise state taxes under the two-thirds legislative vote required by section 3 of article XIII A.

Over time, the composition of the Legislature and the California electorate significantly changed to the point where the majority party in the Legislature currently controls nearly 80% of the legislative seats (California State Assembly Members (2023-24) <https://www.assembly.ca.gov/assemblymembers>; California State Senate Senators (2023-24) <https://www.senate.ca.gov/senators>) but that party does not

even represent a majority of the California electorate (currently about 47% of the electorate) (Sect. of State, Rep. of Registration (Oct. 3, 2023), p. 11 <https://elections.cdn.sos.ca.gov/ror/154day-presprim-2024/complete-ror.pdf>.)

Thus, given that the majority party in the Legislature currently controls nearly 80% of the legislative seats, reaching a two-thirds legislative vote threshold for state tax increases is significantly easier now compared to when Proposition 13 was approved in 1978.

Furthermore, given the large disparity between the nearly 80% control by the majority party in the Legislature, and the fact that this party does not represent a majority of the California electorate, a voter approval requirement for state taxes will also help to ensure that any decision by the Legislature to raise state taxes is aligned with the will of California voters. While a state tax increase might seem like a good idea in the halls of Sacramento, it is the people on the streets of California who will have to pay those higher state taxes and the TPA Initiative will give the people the final say on the matter.

The voter approval requirement for state taxes under the TPA Initiative, which serves as an additional condition on the imposition of state taxes, will have the practical effect of making it more difficult to raise state taxes by the Legislature than can currently be done under existing law. This increased difficulty level will have the resulting effect of approximately restoring the high difficulty level that existed at the time Proposition 13 was

adopted (i.e., achieving approximate difficulty equalization), whereby this high difficulty level under Proposition 13 was previously embedded into the constitutional amendment determination by this court in *Amador Valley*. This will help to ensure that Proposition 13 not only continues to achieve its intended effect but also in a manner consistent with this court's constitutional amendment determination in *Amador Valley*.

IV. THE 1911 CONSTITUTIONAL AMENDMENT PROVIDING FOR THE STATE AND LOCAL INITIATIVE AND REFERENDUM POWERS PROVIDES ANOTHER LEGAL MARKER IN SUPPORT OF THE TPA INITIATIVE BEING A PERMISSIBLE CONSTITUTIONAL AMENDMENT.

Under the authority of section 1 of article XVIII, the initiative and referendum powers were added to the California Constitution in 1911 by a constitutional amendment placed on the ballot by the Legislature (Sen. Const. Amend. No. 22, Stats. 1911, res. ch. 22, pp. 1655-1659 ("SCA 22")). At that time, the Legislature did not have the legal authority to place a constitutional revision on the ballot as a revision could only be done by convention pursuant to section 2 of article XVIII.

The SCA 22 constitutional amendment not only provided for the state initiative power applicable to statutes and constitutional amendments, including permissible subject matter extending well beyond the field of taxation, it also provided for the state referendum power (*Id*. at pp. 1656-1657) and the local initiative and referendum powers reserved to the voters "of each county, city

and county, city and town of the state." (*Id*. at pp. 1659.) All of the foregoing under SCA 22 was accomplished by a single constitutional amendment.

Under the initiative power in particular (the amended section 1 of article IV as adopted in 1911 and currently contained in article II), the people reserved to themselves "the power to propose laws and amendments to the constitution, and to adopt or reject the same, at the polls *independent* of the legislature." (*Id*. at p. 1655, italics added.) Prior to the approval and ratification of SCA 22 by the voters in 1911, the legislative power of the state was vested solely in the Legislature (under section 1 of article IV) and only the Legislature could propose constitutional amendments (under section 1 of article XVIII).

As specifically related to the exercise of the initiative power, the Constitution does not limit the subject matter of legislation proposed by initiative. (*Guardino*, *supra*, 11 Cal.4th at p. 253.) This includes laws and constitutional amendments relating to the field of taxation which represents a small subset of the permissible subject matter under the initiative power. The initiative power is generally coextensive with the power of the Legislature to enact statutes whereby the electorate may adopt a statute that the Legislature itself could have enacted. (*Ibid*.) The initiative power has also been used to repeal state taxes previously enacted by the Legislature, as upheld in *Carlson v. Cory* (1983) 139 Cal.App.3d 724 ("*Carlson*").

The Constitution clearly indicates that the initiative power is a separate and distinct power of the people to legislate. (*Id*. at p. 728.) As a component of the initiative power, voter approval is also required to either adopt or reject an initiative measure. (Cal. Const., art. II, § 8, subd. (a).) The Legislature is generally permitted to amend or repeal an initiative statute by another statute that becomes effective only when approved by the voters unless the initiative measure permits amendment or repeal without voter approval. (Cal. Const., art. II, § 10, subd. (c).)

With the exercise of the current initiative power in particular, the voters are able to completely bypass the Legislature and Governor with regard to the imposition of state taxes (or for any other permissible subject matter under the initiative power). Thus, the initiative power can be exercised by the voters without the benefit of the "experience" and "expertise" of the Legislature. Even if the Legislature in its infinite wisdom declined to enact a particular statute or propose a particular constitutional amendment, the voters can nonetheless do it themselves through the exercise of the initiative power. This court has stated that "the initiative is in essence *a legislative battering ram* which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end." (*Amador Valley*, *supra*, 22 Cal.3d at p. 228, original italics.)

Of legal significance is that the constitutional authority of the voters to exercise the initiative power, both at the state and local levels, came about as a result of the SCA 22 constitutional amendment which also provided for the state and local referendum

power. The scope and impact of the SCA 22 constitutional amendment on state and local government in California, especially the Legislature, is greater than that associated with the TPA Initiative which, unlike with SCA 22, is limited to the field of taxation. This is consistent with the TPA Initiative being a permissible constitutional amendment when considered in relation to the scope and impact of the SCA 22 constitutional amendment in its entirety.

Unlike with the exercise of the initiative power where the Legislature and Governor are shut out of the process, with the TPA Initiative the Legislature and the Governor would remain actively involved in the process of enacting state taxes where the policy merits of any state tax proposal would be deliberated. If deemed sufficiently meritorious, the Legislature can enact a state tax (Cal. Const., art. IV, § 8) subject to two-thirds legislative approval under current law (Cal. Const., art. XIII A, § 3). In addition, any state tax enacted by the Legislature would also remain subject to approval by the Governor (Cal. Const., art. IV, § 10) as is the case with other enacted legislation. The Legislature could also override any veto by the Governor (*Ibid*.).

If a state tax is enacted by the Legislature and approved by the Governor (or if there is a veto override by the Legislature) as is done under existing law, then the TPA Initiative adds the additional condition that the applicable tax act be submitted to the California electorate where majority voter approval would be required. (TPA Initiative, § 4.)

The initiative power that bypasses the Legislature and Governor, including the voter approval requirement contained thereunder, came into existence as a result of the SCA 22 constitutional amendment. However, with the TPA Initiative the Legislature and Governor would remain actively involved in enacting a state tax as is the case under current law, but a state tax would be subject to an added voter approval requirement thereunder. This is less impactful when considered in comparison to the impact of the initiative power, and is also consistent with the TPA Initiative being a permissible constitutional amendment when considered in relation to the SCA 22 constitutional amendment in its entirety.

V. TO THE EXTENT THE "IMPAIRING ESSENTIAL GOVERNMENT FUNCTIONS EXCEPTION" TO THE INITIATIVE POWER REMAINS RECOGNIZED, THAT EXCEPTION MUST BE APPLIED ONLY IN THE MOST EXTRAORDINARY OF CIRCUMSTANCES.

The "impairing essential government functions" limitation is a judicially created exception to the initiative power. Under the exception, the initiative power would not apply where "the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential." (*Simpson* v. *Hite* (1950) 36 Cal.2d 125, 134.)

However, application of this exception at the state level, especially in the context of an initiative constitutional amendment,

has not been definitively established. It would also be constitutionally suspect if an otherwise permissible initiative constitutional amendment were invalidated on the grounds of the judicially created "impairing essential government functions" exception which is not expressly provided for in the Constitution as a legal basis for invalidating a constitutional amendment under the reserved initiative power.

The "impairing essential government functions" exception first appeared in the 1915 Court of Appeal decision in *Chase v. Kalber* (1915) 28 Cal.App. 561, 569-570 ("*Chase*") relating to the exercise of the local referendum power.

The court in *Chase* originally ruled in favor of allowing the referendum power to be exercised (*Id*. at p. 564) which would have obviated the need for any language creating the "impairing essential government functions" exception as a basis for denying such relief. However, after many cities complained about the original decision, the court in *Chase* granted rehearing for further consideration of the issues in the case. (*Ibid*.)

In discussing its decision to grant rehearing, the court in *Chase* stated that "the arguments upon rehearing have convinced us that the decision upon the ultimate question involved here formerly rendered by this court, even if not faulty in its reasoning from the premises announced or wholly erroneous in conclusions as to some of the questions incidentally arising and necessarily legitimate subjects of discussion in the decision of the main proposition, is, at any rate, one which may, under the peculiar

circumstances of this case, the more justly and, at the same time, upon reasons of equal cogency, be superseded by a conclusion whose effect cannot be to disturb the integrity of the long and well-established system for the improvement of streets in the incorporated cities and towns of California not governed by freeholders' charters." (*Id*. at pp. 563-564.)

Hence, it was the "peculiar circumstances" of the *Chase* case that gave rise to the language creating the impairing essential government functions exception. Of particular significance in establishing the impairing essential government functions exception in *Chase*, there was no citation to any case law, no citation to any constitutional or statutory provision, and no citation to the ballot pamphlet or any other specific legislative history for purposes of establishing a sound legal foundation for such an exception.

In establishing the impairing essential government functions exception for purposes of deciding the case, the court in *Chase* stated:

> "[I]n examining and ascertaining the intention of the people with respect to the scope and nature of those powers, it is proper and important to consider what the consequences of applying it to a particular act of legislation would be, and if upon such consideration it be found that by so applying it the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the

> practical application of which is essential and, perhaps, as in the case of the power to compel the improvement of streets, indispensable, to the convenience, comfort, and well-being of the inhabitants of certain legally established districts or subdivisions of the state or of the whole state, then in such case *the courts may and should assume* that the people intended no such result to flow from the application of those powers and that they do not so apply [no citations provided -- nothing]." (*Id.* at. pp. 569-570, italics added.)

The court in *Chase* thus assumed that such an exception exists, and then set forth the supposed elements of this exception, even though there was no supporting language in the Constitution to that effect or otherwise contained in the legislative history or the ballot pamphlet.

While the impairing essential government functions exception to a direct democracy power may well appear to be a reasonable constitutional policy, there is no such exception actually set forth in the Constitution. If such an exception should exist, then it should expressly say so in the Constitution similar to the express "tax levies" exception to the referendum power (Cal. Const., art. II, § 9, subd. (a)) which serves a similar policy purpose.

With regard to the exercise of the initiative power in taxation matters, particularly in the context of a tax decrease, this was recognized by Justice Mosk in his concurring opinion in

Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal.3d 245 [upholding the validity of an initiative tax increase], in which he stated:

> "I am concerned about a worst case scenario that is conceivable if the subject of taxes can be considered by initiative. For if a tax increase is permissible through the initiative process, a tax decrease would also be upheld. [Par.] It is not within the realm of fantasy that an initiative proposal to repeal state income, sales and related taxes could, with a seductive public relations campaign, obtain sufficient signatures to qualify for the ballot and possibly prevail in an election. The adoption of such a measure would render state government virtually impotent. [Par.] . . . My purpose is not to sound a strident alarm, but merely to express a suggestion that the Legislature consider the issue and perhaps propose a constitutional amendment that would appropriately deal with the manner in which taxes may be created or eliminated, increased or decreased." (*Id*. at p. 256.)

The thrust of Justice Mosk's concurring opinion is that if there is to be an additional exception or limitation on the initiative power in matters relating to taxation, the proper legal vehicle for effectuating such a policy is by constitutional amendment. Consistent with the foregoing, judicial fiat such as in *Chase* is not a proper legal vehicle.

To the extent utilized, the impairing essential government functions exception also creates equity concerns because the exception is much more conducive to application and initiative invalidation in the context of reducing or repealing taxes (or making it more difficult to raise taxes) than increasing taxes (or making it easier to raise taxes). When the initiative power was adopted in 1911 (SCA 22), there was no indication that any such potential differential treatment applicable to the exercise of the initiative power was intended in matters relating to taxation.

Since exercise of the constitutional direct democracy initiative power is involved, in which it is "the duty of the courts to jealously guard this right of the people" (*Associated Home Builders*, *supra*, 18 Cal.3d at p. 591), and since there is no express impairing essential government functions exception in the California Constitution (or legislative/voter history that this exception was intended), to the extent the impairing essential government functions exception remains recognized by the courts, that exception must be applied only in the most extraordinary of circumstances. This court must make that clear in its decision in this case.

This approach would involve a strict examination of each and every required element contained in the exception, and if there is doubt as to any element, then no violation under the exception would be found.

A. Application of the "Impairing Essential Government Functions" Exception to Taxation Matters.

In *Carlson*, the impairing essential government functions exception was considered and rejected in the context of two initiative statutes that had the effect of repealing the state inheritance and gift tax laws. The court in *Carlson* questioned whether this exception even applied to statewide measures. The court stated:

> "Petitioners, however, cite no case, and we are aware of none, where this rule has been applied to statewide measures. Assuming, for the purpose of discussion, that the rule is so applicable [citation], petitioners' argument must nevertheless fall. Propositions 5 and 6 do not either destroy or severely limit the power of the state Legislature to tax or to balance the budget. Unlike local bodies whose power to tax is more limited, the state Legislature has broad powers to tax as well as considerable discretion to limit spending in order to achieve a balanced budget." (*Carlson*, *supra*, 139 Cal.App.3d. at p. 730).

This court in *Guardino* considered and rejected a similar impairing essential government functions challenge relating to the voter approval requirements for local taxes under the Proposition 62 (1986) initiative statute. This court in *Guardino* also stated the following in regard to the scope of the impairing essential government functions exception: "But in order for the exception to

apply the power must not only be 'essential,' its serious impairment or wholesale destruction must also be 'inevitable.'" (*Guardino*, *supra*, 11 Cal.4th at p. 254.)

B. Application of the "Inevitability" Requirement Under the "Impairing Essential Government Functions" Exception.

As clearly stated in *Guardino*, for the exception to apply, the serious impairment or wholesale destruction must be "inevitable."

"Inevitable" means "incapable of being avoided or evaded." ("Inevitable." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/inevitable>.)
Satisfying this high standard requires much more than mere speculation or the potential to occur. Problems cannot be assumed or merely alleged. "Inevitability" must be demonstrated to the clear satisfaction of the courts, and if there is doubt, there is no violation. (*Carlson*, *supra*, 139 Cal.App.3d at p. 728 [resolving doubts in favor of the exercise of the initiative power].)

Furthermore, in considering this exception, the courts will also assume the branches of government will act "with a view toward *preserving*, rather than destroying, the essential functions of government." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 258, italics added.) Thus, government officials are supposed to make a good faith effort to preserve the essential functions of government before a violation can possibly be found.

In addition to the legal action taken by the Legislature and the Governor in this case to remove the TPA Initiative from the ballot, recent actions by the Legislature provide examples that the serious impairment or wholesale destruction of essential government functions is not "inevitable" with regard to the TPA Initiative.

Having nearly 80% control of the Legislature, the majority party recently place proposed constitutional amendments on the November 2024 ballot that are unprecedented in their attacks on constitutional taxpayer protection initiatives, including Proposition 13 and the TPA Initiative itself. (See Assem. Const. Amend. No. 1, Stats. 2023, res. ch. 173 [major attacks on the local two-thirds voter approval requirements under Propositions 13 and 218]; Assem. Const. Amend. No. 13, Stats. 2023, res. ch. 176 [attack on the TPA Initiative by increasing the vote threshold requirement for approval and thereby making it much more difficult for voters to approve the initiative or similar future initiatives]).

While such conduct by the Legislature in attacking constitutional taxpayer protections related to the exercise of the initiative power may well necessitate additional constitutional reforms by the voters to preclude this type of conduct in the future, these actions taken to weaken (and make it significantly more difficult for voters to adopt) the TPA Initiative even before it appears on the ballot demonstrate a lack of "inevitability" as it relates to the essential government functions exception. (Cf. *Jensen v. Franchise Tax Bd.* (2009) 178 Cal.App.4th 426, 441 [in

context of the exception, initiatives are not "cast in stone" and can be modified].)

VI. HISTORICAL BACKGROUND AND CONTEXT OF THE TPA INITIATIVE "WINDOW PERIOD" PROVISIONS..

The TPA Initiative contains "window period" provisions affecting some government levies adopted after January 1, 2022, but prior to the effective date of the TPA Initiative. (TPA Initiative, § 4 [state levies]; TPA Initiative, § 6 [local levies].) An affected levy not adopted in compliance with the requirements of the TPA Initiative is void 12 months after the effective date of the initiative unless the levy has been reenacted in compliance with the provisions of the TPA Initiative. (*Ibid*.)

Such "window period" provisions are not new and have previously been used for decades in taxpayer protection initiative measures. In particular, Proposition 62 in 1986 (statutory initiative), Proposition 218 in 1996 (constitutional initiative), and Proposition 26 in 2010 (constitutional initiative).

A "window period" provision in a taxpayer protection initiative first appeared in Proposition 62 (1986) which is a statutory initiative. (Gov. Code, § 53727, subd. (b).) In the drafting of Proposition 218, the genesis of the "window period" provision was researched in the context of taxpayer protection laws. Proposition 218 (1996) represented the first time a "window period" provision was included in the California Constitution (Cal. Const., art. XIII C, § 2, subd. (c)). "Window period" provisions

were included in the subsequent Proposition 26 (2010) initiative constitutional amendment (Cal. Const., art. XIII A, § 3, subd. (c) [state taxes]) and in the current TPA Initiative proposed constitutional amendment.

The "window period" provisions contained in the TPA Initiative are structured in a manner similar to the "window period" provision contained in Proposition 26 (2010) for which there was little controversy. The Proposition 26 (2010) "window period" provision was not mentioned in the ballot arguments, including by the opponents of the initiative, and there is no known case involving issues relating to the Proposition 26 (2010) "window period" provision.

In providing historical background based on the research done in the drafting of Proposition 218, the "window period" provisions were traced to events that occurred shortly following the passage of Proposition 13 in 1978. Section 5 of article XIII A provided that Proposition 13 went into effect on July 1, 1978, except for section 3 of article XIII A (relating to state taxes) which went into effect upon the passage of Proposition 13. (Cal. Const., art. XIII A, § 5.) This meant that the two-thirds voter approval requirement for local special taxes under section 4 of article XIII A did not go into effect until July 1, 1978.

Following the passage of Proposition 13 in early June of 1978 but before the section 4 effective date on July 1, 1978, there were instances where local governments rushed to increase taxes to replace the expected lost property tax revenues from Proposition

13, and this was done without local voter approval, two-thirds or otherwise. The courts generally upheld all these expedited tax increases based on the language of Proposition 13 that section 4 of article XIII A did not go into effect until July 1, 1978. Examples of such cases include *National Independent Business Alliance v. City of Beverly Hills* (1982) 128 Cal.App.3d 13; *Pugh v. City of Sacramento* (1981) 119 Cal.App.3d 485; and *Kehrlein v. City of Oakland* (1981) 116 Cal.App.3d 332.

There are two Proposition 218 cases that described the purpose behind "window period" provisions. The first case is *McBrearty v. City of Brawley* (1997) 59 Cal.App.4th 1441 ("*McBrearty*"). In discussing the Proposition 218 "window period" provision, the court in *McBrearty* stated that "the window period provision was intended to discourage local taxing authorities from rushing to impose taxes after the ballot measure became public knowledge but before its enactment." (*Id*. at p. 1450.)

In *Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107 ("*Owens*"), the appellate court agreed with the assessment in *McBrearty* regarding the underlying purpose of the Proposition 218 "window period" provision: "We agree with this assessment of the purpose of the window period." (*Id*. at p. 129.) The underlying purpose of the Proposition 218 "window period" provision was stated once again in *Owens*: "[T]he purpose of the window period was to prevent taxing authorities from rushing to impose taxes after the ballot measure became public knowledge." (*Id*. at p. 130.)

That same purpose is applicable to the TPA Initiative "window period" provisions, including the January 1, 2022, demarcation date which represents the approximate date in which the TPA Initiative became public knowledge.

Consistent with the assessments in *McBrearty* and *Owens*, the practical effect of the TPA Initiative "window period" provisions is to prevent, following public knowledge of the TPA Initiative, further exploitation of existing loopholes in the law before the opportunity to do so is closed by the voters under the restoration provisions of the TPA Initiative.

For example, with respect to local tax measures subject to the "window period" provision, there was public knowledge of the impending TPA Initiative. Although TPA Initiative compliance was not legally required, those local tax measures could be drafted and prepared to meet the requirements of the TPA Initiative in the event the initiative becomes law. Those who did so would not have to worry about the possibility of reenactment under the TPA Initiative.

On the other hand, those who declined to conform to the TPA Initiative provisions assumed an informed risk, with public knowledge of the impending TPA Initiative, that a local tax measure may be subject to reenactment in the event the TPA Initiative becomes law. In essence, these people knowingly decided to take their chances and thereby risk the possibility of reenactment under the TPA Initiative.

This is especially the case with local tax increase ballot initiatives following this court's controversial decision in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 ("*Upland*") where, to the significant detriment of many taxpayers, tax increase initiative proponents moved quickly to take advantage of the likely narrow window of opportunity to impose majority vote initiative special taxes (instead of the constitutional two-thirds vote required for special taxes) before the *Upland* loophole is closed by the voters under the TPA Initiative. These people knew exactly what they were doing in exploiting the loophole created by this court in *Upland*. The TPA Initiative "window period" provisions reflect and address that sentiment.

The TPA Initiative "window period" provisions serve a legitimate policy purpose that has been confirmed by two appellate courts in the context of the similar Proposition 218 "window period" provision. The TPA Initiative "window period" provisions also do not require the government to refund any levies adopted after January 1, 2022, but prior to the effective date of the TPA Initiative, as well as during the 12 month compliance period following the effective date of the TPA Initiative. This strikes a reasonable balance that mitigates the impact of the TPA Initiative "window period" provisions while at the same time accomplishing their intended purpose as set forth in *McBrearty* and *Owens*.

Furthermore, with respect to government levies adopted after January 1, 2022, but prior to the effective date of the TPA Initiative, there is public knowledge of the TPA Initiative

provisions and what would be needed to bring an affected levy into compliance with TPA Initiative provisions.

This is in contrast to what this court did in *Upland* in adopting the more stringent "clear statement" rule in 2017 (*Upland*, *supra*, 3 Cal.5th at pp. 945-946) and then expecting the proponents of Proposition 218 (and the voters that approved Proposition 218 in 1996 for purposes of ascertaining voter intent) to conform to that more stringent rule back in 1996 which was unknown at the time and more than 20 years before the rule was first announced. In doing so, this court literally expected the Proposition 218 initiative proponents to have the capability to travel forward in time to ascertain the more stringent "clear statement" rule announced in the 2017 *Upland* decision and then travel back in time to 1996 to apply that rule in the drafting of the Proposition 218 constitutional initiative. Of course, such time travel is not possible due to such factors, among other things, as the requirement of exotic matter which is not readily available to voters exercising the initiative power to pursue taxpayer protection laws. (See, e.g., Tippett & Tsang, *Traversable acausal retrograde domains in spacetime* (2017) Classical Quantum Gravity, vol. 34, no. 9, 095006.)

The TPA Initiative appropriately clarifies this court's decision in *Upland* in a manner consistent with contemporaneous voter intent in 1996 when Proposition 218 was adopted (e.g., *Altadena Library Dist. v. Bloodgood* (1987) 192 Cal.App.3d 585 [existing case law applying the Proposition 13 two-thirds voter approval requirement to an initiative special tax for purposes of

ascertaining voter intent]), and not voter intent based on tools and standards of interpretation that were unknown at the time and later adopted by this court in *Upland* more than 20 years after Proposition 218 was approved by the voters. This represents a more reasonable solution to addressing the problem at hand.

Moreover, this court in the pending *Castellanos* case (Case No. S279622) also has the opportunity to consider and address the foregoing "retroactive application" issue, as recognized in the dissenting opinion at the Court of Appeal level. (*Castellanos v. State of California* (2023) 89 Cal.App.5th 131, 198, fn. 21, review granted June 28, 2023, S279622 ["we must seek to discern contemporaneous voter intent . . . not voter intent based on tools and standards of interpretation that were unknown at the time"]).

VII. CONCLUSION.

In the Conclusion in *Amador Valley* in upholding the Proposition 13 initiative, this court stated that "it is our solemn duty 'to jealously guard' the initiative power, it being 'one of the most precious rights of our democratic process.' [citation] Consistent with our own precedent, in our approach to the constitutional analysis of article XIII A if doubts reasonably can be resolved in favor of the use of the initiative, we should so resolve them. [citation] This we have done." (*Amador Valley*, *supra*, 22 Cal.3d at p. 248.)

Consistent with the foregoing, this also applies and must also be done in regard to the TPA Initiative and the constitutional

right of the voters under the initiative power itself to decide whether "to adopt or reject" the TPA Initiative (Cal. Const., art. II, § 8, subd. (a)) which is currently eligible to appear on the November 2024 ballot.

In recent years, including this court's controversial decision in *Upland* and the progeny cases that followed allowing local tax increase initiatives to bypass constitutional taxpayer protection laws to the significant detriment of California taxpayers, the courts have heavily emphasized how precious and sacred the initiative power is as the key foundation in upholding the validity of all these tax increase initiatives to date.

If the initiative power is so precious and sacred when it comes to raising taxes (or making it easier to raise taxes), then the initiative power is just as precious and sacred when it comes to reducing or repealing taxes, or making it more difficult to raise taxes as is the case with the TPA Initiative.

Voters are mindful of Justice Richardson's dissenting opinion in the *Richmond* case relating to Proposition 13 in which he suggested that a decision of this court may have been made "more as a means to an end than to vindicate any principle, democratic or otherwise." (*Richmond*, *supra*, 31 Cal.3d at p. 210.)

The voters will make that determination themselves in this case, and if it be a "means to an end," voters will take comfort in knowing they have the constitutional capability to put an end to the means. (Cal. Const., art. XVIII, § 3.)

Dated: January 31, 2024

Respectfully submitted,

/s/ Jack Cohen_____
JACK COHEN
Attorney at Law

CERTIFICATE OF WORD COUNT

I certify that the foregoing amicus curiae brief, as measured by the word count of the computer program used to prepare the brief, contains 10,629 words.

Dated: January 31, 2024

/s/ Jack Cohen
JACK COHEN
Attorney at Law

PROOF OF SERVICE

State of California, County of Los Angeles

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is: Post Office Box 6273, Beverly Hills, CA 90212.

On January 31, 2024, I served the foregoing APPLICATION OF JACK COHEN (IN HIS CAPACITY AS A PROPOSITION 218 DRAFTER) FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT AND REAL PARTY IN INTEREST on the parties, through their attorneys of record, by filing and e-serving via the TrueFiling system.

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/s/ Jack Cohen_____
JACK COHEN

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **LEGISLATURE OF THE STATE OF CALIFORNIA v. WEBER (HILTACHK)**
Case Number: **S281977**
Lower Court Case Number:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

1/31/2024

Date

/s/Jack Cohen

Signature

Cohen, Jack (123022)

Last Name, First Name (PNum)