

Case 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 FORMER DIRECTORS OF THE STATE OF
CALIFORNIA DEPARTMENT OF FINANCE MICHAEL COHEN,
B. TIMOTHY GAGE, AND ANA J. MATOSANTOS FOR LEAVE
TO FILE AMICUS CURIAE BRIEF AND AMICI CURIAE BRIEF
IN SUPPORT OF PETITIONERS LEGISLATURE OF THE STATE
OF CALIFORNIA, GAVIN NEWSOM AND JOHN BURTON**

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons who must be listed in this certificate under Cal. Rules of Court, rule 8.208(e)(3.)

Dated: January 31, 2024

Respectfully submitted,

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BY:  _____
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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS	2
TABLE OF CONTENTS	3
TABLE OF AUTHORITIES.....	4
APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF	6
BRIEF OF AMICI CURIAE.....	10
INTRODUCTION.....	10
ARGUMENT	12
I. The Initiative Seriously Impairs the Essential Government Function of Developing and Adopting a Balanced State Budget	12
II. The Measure’s New, Broad Definition of a Tax and Requirement for Voter Approval Will Seriously Impair the State’s Ability to Navigate Financial Emergencies	20
A. 1989 Loma Prieta Earthquake.....	20
B. The Great Recession.....	22
C. The Global COVID-19 Pandemic	24
III. That the Measure Is an Unlawful Constitutional Revision Is Embodied in Its Evisceration of the Legislature’s Authority Over the State’s Budget.....	25
CONCLUSION	28
CERTIFICATE OF COMPLIANCE	29

TABLE OF AUTHORITIES

Federal Cases

<i>Brown v. Plata</i> (2011) 563 U.S. 493	16
---	----

State Cases

<i>Raven v. Deukmejian</i> (1990) 52 Cal.3d 336.....	25
<i>Rossi v. Brown</i> (1995) 9 Cal.4th 688.....	12
<i>Strauss v. Horton</i> (2009) 46 Cal.4th 364.....	25

California Constitution

Cal. Const., art. IV,	
§ 12	10, 13, 19
§ 12.5	10
Cal. Const., art. XIII,	
§ 24	15
§ 25.5	15
Cal. Const., art. XIII B,	
§ 1	14
§ 2	14
Cal. Const., art. XVI,	
§ 1	15, 19
§ 8	13
§ 8.5	14
§ 20	14, 15
§ 21	14
§ 22	15
Cal. Const., art. XIX D	15

Statutes

Elec. Code,	
§ 9040	19

Gov. Code,	
§§ 13070 – 13076	10
§§ 13070 et seq.....	10

Cal. Rules of Court

Rule 8.520.....	6, 9
-----------------	------

Miscellaneous

Colo. Const. art. X, § 20.....	26
Congressional Research Service, Medicaid: An Overview (Feb. 2023)	17
National Association of State Budget Officers, Budget Processes in the States (2021).....	26
Pew Charitable Trusts, Fiscal 50: State Trends and Analysis (Dec. 7, 2023).....	26

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.520(f), amici, Former Directors of the State of California Department of Finance Michael Cohen, B. Timothy Gage, and Ana Matosantos respectfully request leave to file the following amici curiae brief in support of Petitioners Legislature of the State of California and Gavin Newsom. This application is timely made pursuant to the Court's November 29, 2023, order of permitting such briefs on or before January 31, 2024.

Each amicus is a former Director of the State of California Department of Finance who was appointed by the Governor and confirmed by the State Senate. Michael Cohen was appointed Director of Finance on September 14, 2013, by Governor Edmund G. Brown Jr. and served until August 20, 2018. Director Cohen previously served as Chief Deputy Director of Finance from 2011 to 2013. He also served at the Legislative Analyst's Office from 1997 to 2010. He holds a master's degree in public affairs from the Lyndon B. School of Public Affairs at the University of Texas, as well as a bachelor's degree in urban studies from Stanford University.

B. Timothy "Tim" Gage was appointed Director of Finance by Governor Gray Davis on January 4, 1999, and served in the role for four years. He received a bachelor's degree from Harvard College and a master's in public policy from the University of California, Berkeley. Director Gage previously served as Chief Financial Advisor to Senators John Burton and Bill Lockyer when those senators served as President pro Tempore of the California State Senate. Before serving in this position, Director Gage was the Chief Consultant to the Assembly Ways and Means Committee (currently the domain of the Assembly Appropriations and Assembly Budget Committees) for seven years. He also served for six years as the Assistant Fiscal Advisor to Senate President pro Tempore David

Roberti, and for three years as a budget analyst with the Legislative Analyst's Office. Director Gage is an expert and consultant on state and local fiscal relations, state tax policy, and overall budget dynamics.

Ana J. Matosantos served as Director of Finance in both the Edmund G. Brown Jr. and Arnold Schwarzenegger administrations, serving in the role from December 31, 2009, to December 7, 2010, and from January 3, 2011, to September 13, 2013. Director Matosantos was Director while the state addressed and recovered from the impact of the Great Recession, and served as Chief Deputy Director at the Department of Finance from April 1, 2008, until December 31, 2009, during the 2008 drop in the stock market and California's 2008-09 cash crisis. Director Matosantos was Governor Brown's Chief Fiscal Advisor as the state closed a \$27 billion shortfall and transitioned from years of recurring budget deficits to multibillion-dollar surpluses. She previously worked in the state senate as a consultant to the Senate Committee on Health and Human Services and as the human services consultant of the Senate Committee on Budget and Fiscal Review. In 2016, she was appointed by President Obama to serve on the seven-member Puerto Rico Oversight, Management and Economic Stability Board, charged with working with the government of Puerto Rico on the largest public bankruptcy in United States history, where she worked to achieve structural budget balance, restructure more than \$120 billion in debts and obligations, and rebuild opportunity for the people of Puerto Rico after a decade of economic contraction and population decline. In 2019, Director Matosantos was appointed the cabinet secretary in the Office of Governor Gavin Newsom. She received her bachelor's degree in Political Science from Stanford University in 1997.

Amici have a strong interest in the outcome of this case because they worked at the center of the state budgeting process and are therefore deeply aware of the devastating impact that the "Taxpayer Protection and

Government Accountability Act” (the “Measure”) would have on state finances and on the state’s ability to respond to changing fiscal circumstances. Amici, as Finance Directors, possess unique experience and knowledge allowing them to understand that the unconstitutional Measure would significantly impair the executive and legislative branches’ abilities to fulfill their duties to propose and pass a balanced budget, and that the Measure represents a radical departure from the structure of government that the California Constitution provides.

This brief is intended to assist the Court by providing more specifics about the current constraints and limitations on the executive and legislative branches in crafting an annual balanced budget as required under the California Constitution. These constraints include nondiscretionary spending requirements and limitations on how revenue may be used. The brief further explains why prohibiting the Legislature from exercising its core function of raising revenue would drastically impair the Legislature’s ability to perform an essential government service in light of these existing constraints and limitations.

The brief reviews three recent unanticipated fiscal crises that the state faced—the 1989 Loma Prieta Earthquake, the Great Recession in 2009, and the COVID-19 Pandemic in 2020. The brief describes the tools that the executive and legislative branches used—primarily as urgency measures passed in Extraordinary Sessions of the Legislature—to balance budgets in those challenging and rapidly changing fiscal environments and notes that several of the most important tools used would be prohibited under the Measure. Without the tools that the Measure seeks to destroy, the state would likely not have been able to balance its budget as constitutionally required.

Finally, the brief explains how the Legislature relies on the tools that the Measure seeks to eradicate as part of its core functions, and that

stripping those tools away fundamentally changes the Legislature's powers.

Pursuant to California Rules of Court, rule 8.520(f)(4), amici filing this brief affirm that no party or counsel for a party to this appeal authored any part of this proposed amicus brief. No person other than proposed amici and their counsel made any monetary contribution to the preparation or submission of this brief.

Dated: January 31, 2024

Respectfully submitted,

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BRIEF OF AMICI CURIAE

INTRODUCTION

Amici Michael Cohen, B. Timothy Gage, and Ana Matosantos are each Former Directors of the State of California Department of Finance who have spent years at the center of the California budgeting process.¹ After analyzing the “Taxpayer Protection and Government Accountability Act” (the “Measure”), amici conclude that it seriously impairs the state’s ability to fulfill its duties to propose and pass a balanced budget and that Real Party in Interest fails to grasp the existential threat of his own creation. The sweeping breadth of the measure cannot be overstated. No longer would the Legislature be able to exercise its constitutional authority to impose any new state taxes, a core function it has had since the state’s founding. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (b)(1).) But that is only the tip of the iceberg.

In its sweeping definition of tax, encompassing “[e]very levy,

¹ The Department of Finance is an executive branch department charged with promoting long-term economic sustainability and responsible resource allocation through the state’s annual financial plan (see generally, Gov. Code, §§ 13070 et seq.), and amici served under both Democratic and Republican administrations. The Director of Finance is appointed by the Governor and serves as the chief fiscal policy advisor in the Governor’s cabinet and senior staff. The Department’s and Director’s principal functions include the following that are pertinent to this case: establishing appropriate fiscal policies to carry out the state’s programs; preparing, explaining, and administering the state’s annual financial budget, which the Governor is required under the State Constitution to present by January 10 of each year (Cal. Const., art. IV, §§ 12, 12.5); analyzing legislation that has a fiscal impact; devising, supervising, and maintaining a modern and complete system of accounting; monitoring and auditing expenditures by state departments to ensure compliance with law, approved standards, and policies; developing economic forecasts and revenue estimates; and developing population and enrollment estimates and projections. (Gov. Code, §§ 13070 – 13076.)

charge, or exaction of any kind imposed by state law,” the Measure subjects not only taxes, but also *fees*, to a mandatory vote of the people. (*Id.*, subd. (a).) Indeed, “[a]ny change in state law which results in *any taxpayer* paying a new or higher tax” must be put to a vote of the people. (*Id.*, subd. (b)(1), emphasis added.) If a single taxpayer faces an increase in payment of a tax or another charge (other than a narrow list of exempt charges) as a result of a new state law, that law would trigger a statewide vote. The Legislature might not even be able to conform state tax law to changes in federal law, a common legislative function, if doing so would raise taxes on a single taxpayer. For example, the Measure would limit the ability of the Legislature to conform to the 2017 Tax Cuts and Jobs Act during President Donald Trump’s administration, resulting in complexity and confusion for taxpayers. These concerns do not even address the likely severe impacts of the Measure at the local level, which will surely result in a substantial decrease in local funding that will place even more burdens on the state budget.

All of these problems are exacerbated by the current state of California’s complex budgeting process, which is already constrained by state constitutional and statutory law, such as nondiscretionary spending requirements and limitations on how revenue may be used. By prohibiting the Legislature from raising revenue in almost any form without voter approval, a core legislative function granted under the Constitution, the Measure would drastically impair the Legislature’s ability to perform the essential government function—and a Constitutionally required duty—to approve a balanced budget. Where funds are short, this restriction will be felt most gravely, and its impacts may be widespread when necessary cuts to government services are confronted.

Amici and their colleagues have experience navigating the state through sudden unanticipated fiscal crises, and the Measure would be most

devastating in similar future crises. During the 1989 Loma Prieta Earthquake, the Great Recession in 2009, and the COVID-19 Pandemic in 2020, the executive and legislative branches came together to pass urgent legislation that included new sources of revenue. In each case, time was of the essence to allow the state to balance the budget while maintaining mandatory and crucial services, and in each case the Legislature was required to pass revenue increases that would be prohibited under the Measure. Put simply, the state government would not be able to perform these essential functions under the terms of the Measure, particularly during a statewide fiscal crisis.

ARGUMENT

I. The Initiative Seriously Impairs the Essential Government Function of Developing and Adopting a Balanced State Budget

The parties to this litigation have briefed at length the legal standard for when a measure seriously impairs essential government functions, and amici therefore do not repeat the discussion on the operative caselaw. Amici agree that the Measure is illegal if its enactment would seriously impair essential government functions. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 703.) Here, there is no question that the Measure would gravely impair essential government functions.

California's annual budgeting process is constrained by several constitutional provisions that direct General Fund revenues to different sources or otherwise restrict how revenue may be utilized. These provisions dictate how significant portions of the General Fund may be utilized, and thus render the task of funding all of the state's necessary services challenging even under optimal scenarios. Adding the Measure's voter approval requirements for all new or increased taxes and fees into the already challenging task of developing a state budget within the existing constraints in the Constitution would seriously impair the Governor's and

Legislature’s ability to carry out their constitutionally assigned duty to prepare and approve a budget that operates within revenue estimates and incorporates additional sources of revenue. (See Cal. Const., art. IV, § 12.)

While Real Party in Interest may believe that the answer to any budgetary challenge only is to decrease expenditures and borrow, this ignores the reality of constraints in the budget. The most significant constraint on the Legislature’s use of General Fund revenue is imposed by Proposition 98, approved by the voters in 1988 (and amended in 1990 by Proposition 111). Proposition 98 establishes a guaranteed annual minimum funding level for K-12 education, community colleges, and other related programs for child development and mental health. (Cal. Const., art. XVI, § 8.) Proposition 98 requires that “[f]rom all state revenues there shall first be set apart the moneys to be applied by the State for support of the public school system and public institutions of higher education.” (*Id.*, subd. (a).) Subject to certain limitations, these educational institutions receive the greater amount of funding that results from the application of three different “tests.” (*Id.*, subd. (b).) Generally, this amount is approximately 40 percent of General Fund revenue, and any increase in funding over the minimum adjusts that base under two of the three tests. (See *id.*, subds. (b)(2) & (3) [requiring consideration of funding from prior fiscal year].) The Legislature is permitted to suspend the Proposition 98 guarantee for a single year, on a two-thirds vote. (*Id.*, subd. (h).) However, in the event of a suspension, education spending must be restored over time. (*Id.*, subds. (d) & (e).) Proposition 98 has ensured consistent funding for education, but it dictates significantly constrain the state’s budgeting, consuming more than one-third of General Fund resources with little flexibility.

Two additional major constitutional restrictions constrain the annual budgetary process. The Gann Limit, codified in Article XIII B of the Constitution, which was adopted by the voters in 1979 and amended by the

voters in 1990, applies to both state and local spending. At the state level, the Gann Limit sets a maximum amount of spending, based on California's 1978-1979 budget (adjusted for changes in population and income). (Cal. Const., art. XIII B, § 1.) When state revenue exceeds the Gann Limit, the Constitution directs that 50 percent of such excess revenue must be transferred to a fund for educational purposes. (*Id.*, § 2, subd. (a)(1) [transfer to fund established pursuant to *id.*, art. XVI, § 8.5].) The other fifty percent of excess revenue over the limit must be "returned by a revision of tax rates or fee schedules within the next two subsequent fiscal years." (*Id.*, art. XIII B, § 2, subd. (a)(2).) The Gann Limit thus makes state budgeting more challenging by significantly restricting use of excess revenues generated during surpluses.

In addition to the limitations on allocations of revenues imposed by the Gann Limit, Proposition 2, approved by voters in 2014, contains additional dictates on the use of revenue. Pursuant to that proposition, the Legislature must set aside 1.5 percent of General Fund revenues to the Budget Stabilization Account. (Cal. Const., art. XVI, § 20, subd. (a)(2).) In years with additional revenue over certain thresholds, the state is obligated to further fund this account and to provide additional funds towards education. (*Id.*, § 20, subd. (c)(1) & § 21, subd. (b).) However, the total amount of money that may be set aside for future use in these funds is capped on an annual basis. (*Id.*, § 20, subd. (e) [rainy day funds transfer cannot exceed 10 percent of General Fund; excess amount may be expended only for infrastructure]; § 21, subd. (f) [transfer to school fund may not exceed 10 percent of Proposition 98 allocation].) If the Governor declares a budget emergency, the Legislature may suspend the state's Proposition 2 obligations for one fiscal year, or the state may return a portion of funds from the rainy day fund to the General Fund for current use. (*Id.*, § 22.) Moreover, Proposition 2 requires that until the 2029-2030

fiscal year, that half of 1.5 percent of General Fund revenue must be provided to service outstanding state debt (*id.*, § 20, subd. (c)(1)(B)(ii), and the Legislature is not authorized to suspend or reduce any such payments (*id.*, § 22, subd. (a)(1)-(4)).

An additional combination of measures, Proposition 1A of 2004 and Proposition 22 of 2010 further restrict the available means for the Legislature to balance its budget. Under Proposition 1A, the Legislature cannot shift local property taxes for General Fund use, but could borrow such funds on a short term basis. (See generally Cal. Const., art. XIII, § 25.5.) Proposition 22 in 2010 removed the Legislature's ability to borrow local property tax revenue. (*Id.*, art. XIII, § 24.)

The Legislature has acted on its own, after increasing fees and taxes, to request voter approval for limits on the use of those funds, but did so after enacting the tax under its constitutional authority. Proposition 69 of 2018 was placed on the ballot by the Legislature after increasing the fuel tax and imposing increased vehicle license fees in Senate Bill 1 of 2017. Proposition 69 places limits on use of the Senate Bill 1 vehicle license fees. (*Id.*, art. XIX D.)

The Constitution also specifically requires the repayment of all general obligation bonds within 50 years (or upon the terms set forth in the bond) as a priority. (*Id.*, art. XVI, § 1.) Furthermore, there would be other detrimental impacts to the state's credit rating if it were to default on debt service obligations, further increasing costs to the state of routine borrowing for possibly decades. The state's General Fund spending in 2023-2024 included \$5.6 billion in debt service obligation, comprising about 2.5 percent of General Fund spending, and includes \$14.1 billion for all pension and health care payments (CalPERS, CalSTRS, JRS and Health Care for Annuitants), which is 6.2% of General Fund expenditures.

Thus, much of the revenue collected by the state is restricted by

various constitutional provisions that also operate to prevent the collection of significant rainy-day revenues. Yet the state has many other budgetary demands, many of which, while not technically mandatory, are also not subject to easy reduction. For instance, the state must fund the In Home Supportive Services program (which is an optional benefit of the federal Medicaid entitlement); State Supplementary Payments to disabled and other qualifying households relying on federal Supplemental Security Income for support; and various children's programs including child welfare services, foster care, and child care for low-income working families. Eligibility for such programs is primarily determined by statute, and program benefits cannot be reformed quickly.

In addition, funding for public safety and natural resources and environmental protection are not provided revenue exemptions in the Measure. Roughly seven percent of the state budget goes to corrections, largely for the operation of the prison system.² Without a reduction in the number of inmates, this funding cannot practically be decreased due to minimum legal requirements and obligations for the operation of correctional facilities. (See *Brown v. Plata* (2011) 563 U.S. 493, 539 [reviewing California's overcrowded prisons and holding that the population of its prisons must be capped at percentage of the prisons' design capacity].) Similarly, natural resources and environmental protection comprise about 2.5 percent of the budget, largely for fire protection purposes, including staff and equipment. Other large budget items in the natural resources category are the operations of parks and wildlife refuges, which properties are not easily sold and which therefore will likely remain on state budgets in some form.

² Specific examples of the budgetary implications of past emergencies are provided in Part II, *infra*.

In addition, the state’s budget generally devotes over 35 percent of General Fund revenue to Health and Human Services, and a large portion of those funds go to cover Medi-Cal expenditures, California’s Medicaid program. Medicaid is a federal entitlement and states that fully opt in are required to provide funding to support health coverage for all persons meeting eligibility criteria.³ Medi-Cal is funded by a state and federal cost sharing agreement, which has periodically included a special Managed Care Organization tax which is considered an “exempt charge” under Section 3(d)(3) of the Initiative. The fact that this type of tax has been exempted reflects the reality that existing tax revenues are not always adequate to cover the full range of services that the state must provide to its citizens.

In addition to the challenges posed in meeting the constitutionally required balanced budget requirement every year by June 15, the state has also experienced cash shortfalls within the fiscal year that require immediate attention to make required payments, like debt payments and distributions to K-14 schools and local governments. This was especially the case during periods of budget challenges. In these cases, the state has borrowed from private banks to finance these payments. However, to make these transactions the private banks need sufficient assurances that the state will be in a position to pay back its debt obligation. This, in the most dire circumstances, requires the state to take actions mid-fiscal year to reduce operating deficits to get the cash needed to fund current obligations. These

³ While participation in Medicaid is voluntary for states, all states choose to participate. Certain mandatory populations and services must be covered, and there are additional optional populations and services that states may cover. There are also programs that allow states to waive certain Medicaid rules. (See Congressional Research Service, Medicaid: An Overview (Feb. 2023), available at <https://crsreports.congress.gov/product/pdf/R/R43357> [last accessed Jan. 31, 2024].)

transactions are made more expensive by the state's relatively restricted budget landscape and would be made even more expensive by this Measure.

In setting a budget for the state, lawmakers have historically been permitted to utilize tax increases to address budgetary shortfalls, and to calibrate such increases to meet those shortfalls. Both Proposition 98 and Proposition 2 allow for the legislative and executive branches to temporarily suspend each measure's budgeting requirements, in principle recognizing the ebbs and flows to the state's finances. The Measure eliminates the ability to impose targeted new taxes to meet the constitutional deadline to balance the state budget and provides no escape valve in times of fiscal crisis. It risks leaving the state unable to fulfill basic public safety obligations due to insufficient budgetary resources and inadequate assurance of raising necessary funds.

The Initiative's proponent refers to the ability to hold a special election at any time for voters' consideration of the Legislature's proposed taxes. Of course, such election itself would consume significant financial resources. For instance, the September 14, 2021, Gubernatorial Recall Election was determined to have cost \$200,241,680 in state and local funds. (Amici's Motion for Judicial Notice, Larson Decl., Exh. A.) In a fiscal emergency, such spending could be wasteful or even infeasible. Perhaps more importantly, relying on a special election adds uncertainty to fiscal planning, which may then jeopardize cash financing on which the state, vendors, and taxpayers rely. Further, even a special statewide election takes months to draft a ballot measure, have it passed by the Assembly and Senate, pass legal review, draft a ballot title and summary, draft arguments for and against the measure, educate voters, translate and print ballot materials, and perform the other ministerial tasks required to hold a statewide election. Indeed, the 131-day minimum requirement for holding a

statewide election in Elections Code section 9040 is instructive in determining the minimum amount of time it takes to call and hold such an election. Past fiscal crises show that this delay is impractical in dealing with quickly changing fiscal conditions. For both the cost and timing reasons, calling a special election each time new revenues are required is an impractical solution to the problems imposed by the Measure.

Article IV, section 12 of the California Constitution obligated the executive and legislative branches to prepare a budget, which shall be passed by the Legislature by June 15. (*Id.*, subd. (c)(3).) These budgeting duties assume that a proposed budget may require additional revenue. If the Governor’s recommended expenditures “exceed estimated revenues, the Governor shall recommend sources from which the additional revenues should be provided.” (*Id.*, subd. (a).)

The budget process operates under an important fiscal limit:

[T]he Legislature may not send to the Governor for consideration, nor may the Governor sign into a law, a budget bill that would appropriate from the General Fund, for that fiscal year, a total amount that, when combined with all appropriations from the General Fund for that fiscal year . . . and the amount of any General Fund moneys transferred to the Budget Stabilization Account for that fiscal year, . . . exceeds General Fund revenues for that fiscal year estimated as of the date of the budget bill’s passage. (*Id.*, subd. (g).)

Moreover, the Constitution prohibits the Legislature from borrowing funds without a vote of the people. (Cal. Const., art. XVI, § 1.) Without any certainty over its ability to impose new taxes or fees as “sources from which the additional revenues should be provided” (*id.*, subd. (a)), the Legislature lacks the constitutional authority to unilaterally adopt a budget

that relies on any new revenue stream.⁴ The Measure’s restrictions therefore seriously interfere with the essential government function of developing and funding a state budget that ensures adequate revenue sources to meet the needs of citizens for crucial government services.

II. The Measure’s New, Broad Definition of a Tax and Requirement for Voter Approval Will Seriously Impair the State’s Ability to Navigate Financial Emergencies

The impairments to core government functions described in Part I are most devastating in times of quickly changing and unanticipated fiscal conditions. There are multiple times in recent California history in which the state has been required to respond quickly to rapidly changing fiscal circumstances. Below, we detail situations in which the Department of Finance and the State Legislature have used crucial tools to comply with their duty to provide a balanced state budget. In each case, these steps described would not have been legal had the Measure been in place.

A. 1989 Loma Prieta Earthquake

In 1989, an earthquake with a magnitude of 6.9 struck in Santa Cruz County and had devastating impacts throughout the entire Bay Area. The earthquake took the lives of 63 people, injured 3,757, and displaced at least 12,053. (Larson Decl., Exh. B.) Damage and business interruption was estimated at approximately \$10 billion, with direct damage estimated at \$6.8 billion. (*Ibid.*) At least 18,306 houses were damaged and another 963 were destroyed, and 2,575 businesses were damaged and another 147 were destroyed. (*Ibid.*) Portions of highways collapsed, as did a section of the Bay Bridge, rendering the bridge unusable for a month. (*Ibid.*)

⁴ While the Legislature could theoretically consider a potential future revenue increase that will be sent to voters as “revenue” for purposes of balancing the budget, this obviously would introduce even more uncertainty. Should the voters not approve the revenue increase, it would put significant strains on that and subsequent years’ budgets.

This natural disaster created massive and immediate fiscal challenges. Governor Deukmejian and the Legislature came together to pass several major earthquake-recovery bills during the 1989 Regular Session and First Extraordinary Session of the Legislature in 1989.

These bills impacted both expenditures and revenue. To provide relief to struggling Californians and help them rebuild after the earthquake, the Legislature passed several revenue-reducing tax credits, including credits related to low-income housing, ridesharing, and health benefits. (Larson Decl., Exh. C.) Legislation that year also created new revenue for emergency shelter and the rebuilding of homes, buildings, parks, and other infrastructure. To help offset these reductions in revenue and new expenditures, the Legislature enacted crucial revenue-generating urgency measures that would be prohibited under the terms of this Measure. The Legislature passed two urgency acts that temporarily increased the state sales tax rate by 0.25 percent for thirteen months, generating approximately \$785 million in revenue. (*Ibid.*) It specified that all of the revenue from the increase could only be used for earthquake response and recovery efforts. These measures also suspended the education funding requirements of Proposition 98. (*Ibid.*) Under the terms of the Measure, the Legislature would not have had the option to pass this crucial and urgent revenue-generating temporary tax increase as it did in 1989.

Real Party in Interest's point that "the Legislature did not enact tax increases in connection with . . . the Northridge earthquake" in 1994 illustrates nothing. (Real Party in Interest's Return to Order to Show Cause, p. 62.) First, each disaster and its fiscal impacts are unique and require different responses. Second, the state received considerable financial assistance from the federal government. President Bill Clinton declared a state of emergency and the federal government ultimately provided over \$8.9 billion in funds for recovery efforts, drastically easing the burden on

the state government. (See Larson Decl., Exh. D, p. 61.) The state cannot gamble on receiving such rapid federal assistance in future crises, especially when those crises impact the entire country as the Great Recession did.

B. The Great Recession

The state faced a sudden and unexpected fiscal crisis as a result of the Great Recession of 2008-2009. Given the rapidly changing conditions, urgency actions were required in Extraordinary Sessions in February, July, and September-October of 2009. The Great Recession created the largest budget gap the state has ever faced, both in dollar amount and in the percentage of General Fund revenues it represented. Revenue collections did not meet projections, resulting in the worst fiscal crisis in California since the Great Depression.

Again, the Governor and Legislature came together to pass several urgent measures to solve the crisis, each of which would be prohibited under the Measure. The most significant was a one-cent increase in the state sales tax through 2011-12, which was to generate over \$5.7 billion in revenue. (Larson Decl., Exh. E.) Also passed in February 2009 was an increase in the state Vehicle License Fee (VLF) by half of a percent through 2012-13 (over \$1.4 billion), a reduction in the Dependent Credit for up to four years, a new Personal Income Tax Surcharge of up to 0.25 percent (depending on the amount the state was to receive in federal funds) for up to four years (depending on future spending caps) that was to generate up to \$3.6 billion in revenue, and the imposition of other miscellaneous fees. (*Ibid.*) Notably, these increases in revenue were passed at the same time as over \$14 billion in cuts to schools, safety-net services, state employee payroll, and several other core services. Even with these cuts and new revenue, the State Controller was not issuing taxpayer refunds and later that year, the state took the drastic step of issuing IOUs.

When the state's economy continued to worsen, the Legislature and Governor were forced to take additional action to balance the budget. Even with drastic cuts of approximately \$15.6 billion in July 2009—highlighted by \$6.1 billion in Proposition 98, K-14 education-fund cuts; \$2 billion in higher education cuts; \$1.3 billion associated with state worker furlough days; \$1.2 billion in corrections cuts; \$1.3 billion in Medi-Cal reductions; \$1.7 billion from local redevelopment agencies; \$528 million from CalWORKS; \$334 million from Developmental Services; \$226 million from In-Home Supportive Services; and \$124 million from the Healthy Families program—the state had to find an additional \$8.6 billion to balance the budget. (Larson Decl., Exh. E.) It did this by increasing payroll withholding schedules by ten percent (\$1.7 billion), and accelerating Personal Income Tax and Corporation Tax revenues into 2009-10 (\$610 million). (*Ibid.*) The Legislature also borrowed \$2 billion from the suspension of Proposition 1A (2004), which diverted eight percent of property tax revenues of cities, counties, and special districts, and which the state was required to repay with interest within three years; and shifted approximately \$1 billion from transferring transportation revenues (the Highway Users Tax Account) from local governments to pay for debt service on transportation bonds. (*Ibid.*) Many of these actions were necessary to comply with the balanced budget provisions of the State Constitution. In this Measure, the state would not be able to raise the \$5.7 billion in revenues and would have relied on even more drastic cuts that would have fallen heavily on schools and local government and would have resulted in more borrowing.⁵

⁵ Real Party in Interest notes that “at the height of the Great Depression, the Legislature chose to ask the voters to approve a constitutional amendment (Proposition 1) limiting state appropriations,

C. The Global COVID-19 Pandemic

The rapid decline of the national and state economies in the early months of the COVID-19 Pandemic required significant actions, relying heavily on temporary tax increases to balance the budget that was passed in June 2020. As part of that budget, the Legislature disallowed the use of net operating loss deductions by medium and large businesses for any taxable year beginning on or after January 1, 2020, and before January 1, 2023, with the potential to extend the carryover period. (See Larson Decl., Exh. G.) It limited business incentive tax credits from offsetting more than \$5 million of tax liability for 2020, 2021, and 2022. These revenue measures net \$4.3 billion in 2020-21, \$3.1 billion in 2021-22 and \$1.3 billion in 2022-23. Given the broad definition of a tax in the Measure, these emergency measures would require being approved by voters before they could become law. Without these tools, the Legislature could not have balanced the budget without significant reductions to programs that support individuals and institutions like schools at a time when they were suffering and requiring increased expenditures because of the COVID-19 Pandemic.

Each of these crises was unexpected, resulted in rapidly changing fiscal conditions, and required the use of every tool available to meet the Legislature's constitutional duty to pass a balanced budget. Amici and their colleagues played a direct and central role in navigating a path to a balanced budget through these crises. Placing these urgent revenue-

imposing taxes on banks and insurance companies, and authorizing the Legislature to impose any form of taxation not prohibited by the Constitution.” (Real Party in Interest’s Return to Order to Show Cause, p. 62.) First, this was nearly a century ago under different and less complex fiscal circumstances. Second, the bill cited was not a stopgap revenue increase of the type detailed in this Section II, but was a complex bill that touched many aspects of state finance and lowered the tax burden for many. (See Larson Decl., Exh. F.)

generating measures on the ballot by waiting for the next statewide election would not allow for enough time to obtain a balanced budget. Calling for an expensive special election in the midst of a fiscal crisis is equally impractical as described above and would have its own timing limitations. Requiring a vote of the people would fatally impair the Governor's and Legislature's duties of providing a balanced budget in times of fiscal emergencies.

III. That the Measure Is an Unlawful Constitutional Revision Is Embodied in Its Evisceration of the Legislature's Authority Over the State's Budget

Comprehensive changes to the Constitution “require more formality, discussion and deliberation than is available through the initiative process.” (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349-350.) A qualitative revision of the Constitution is one that would “make a far-reaching change in the fundamental governmental structure or the foundational power of its branches as set forth in the Constitution.” (*Strauss v. Horton* (2009) 46 Cal.4th 364, 444, 447 [further describing a revision as a “change that is so far-reaching and extensive that the framers of the 1849 and 1879 Constitutions would have intended that the type of change could be proposed only by a constitutional convention, and not by the normal amendment process”].)

Applying that standard, the Measure constitutes an unlawful constitutional revision that would—for the first time in California's history—strip the Legislature of its constitutional power to impose taxes without voter approval, a core aspect of its lawmaking function. If enacted, California would join Colorado as the only states in the nation requiring

voter approval of all state taxes.⁶ Without the ability to independently impose new or increased taxes, the Measure strips the Legislature of the power to tax and vests that authority entirely in the electorate. But not only that, California would stand apart from Colorado and every other state in requiring voter approval of all state taxes *without an exception for emergencies*. In short, the elimination of the Legislature’s independent authority to tax—a core, foundational legislative power—would be unprecedented.

The fundamental, far-reaching nature of the constitutional revisions sought by the Measure are illustrated by the Legislature’s role in the budget process. Given that California’s tax revenue is among the most volatile in the nation,⁷ some actor must have the authority to flexibly and timely respond to inevitable annual budget deficits in order to steer the state away from fiscal peril all while meeting the Constitution’s balanced-budget requirement. The electorate is structurally incapable of fulfilling this role. Only the Legislature can act in a timely manner. Only it has the institutional competence to make budgetary adjustments in a timely manner on an annual basis—urgently in the event of a wildfire, an earthquake, a pandemic, or other emergency. Indeed, this year’s projected budget deficit of approximately \$38 billion demonstrates the point. (Larson Decl., Exh. H, p. 1.) Calling a statewide election for the approval of additional revenues to

⁶ Colo. Const. art. X, § 20; see National Association of State Budget Officers, *Budget Processes in the States* (2021), pp. 72-76, available at <http://tinyurl.com/bdtuu92p> [last accessed Jan. 31, 2024].

⁷ In fact, a recent study by the Pew Charitable Trusts places California only behind Alaska, North Dakota, and Wyoming (the three states most heavily dependent on a single revenue source, taxation of fossil fuels) in terms of tax revenue volatility. (Pew Charitable Trusts, *Fiscal 50: State Trends and Analysis* (Dec. 7, 2023), available at <https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/fiscal-50#ind6> [last accessed Jan. 31, 2024].)

balance the budget whenever the state is faced with a budget deficit is infeasible. Barred from independently increasing revenues, however temporarily, the Legislature may be forced to make deep and painful cuts to essential public services.

As noted in describing the state's response to the COVID-19 Pandemic, the Legislature routinely relies on short-term tax increases that have no long-term impact on the taxpayer. One example is the suspension or capping of net-operating loss ("NOL") deductions. In 2020, faced with a projected budget deficit of approximately \$54 billion resulting from the COVID-19 pandemic, state leaders enacted Assembly Bill 85, which provided for a three-year suspension of NOL deductions for certain corporations and individuals. It is estimated that this NOL deduction suspension increased tax revenues by about \$2 billion for the 2020-21 budget cycle alone. (Larson Decl., Exh. I.)

Second, the Legislature also relies on revenue gains associated with conforming state tax law to federal tax law. One example of this is the Governor's proposal to conform the treatment of net operating loss carryforwards to a recently enacted federal change, which creates a cap on carryforwards in any one year at 80 percent of that year's net income. This single conformity is projected to lead to revenue gains of \$300 million in 2024-25, followed by ongoing annual gains of \$200 million thereafter. (Larson Decl., Exh. H, p. 145.) Other examples include the Governor's proposals to conform to federal treatment of charitable conservation easements, elimination of bad debt deductions by certain nonretailer lenders, and elimination of some tax incentives for oil and gas drilling. These enactments conforming to federal law, combined, are projected to result in revenue gains of \$100.5 million in 2024-25. (*Id.* at pp. 146-147.)

By stripping the Legislature of its independent authority to raise revenues, the Measure would eliminate these and other critical tools

routinely utilized by our elected leaders to nimbly and timely address regular budgetary shortfalls associated with the state’s revenue volatility. Ultimately, what the Measure reflects is not merely bad budgetary policies, but a total reformulation of a core legislative power and will inevitably expose the state to catastrophic cuts to public services. These are the reasons why no other state in the country does what the Measure proposes to do.

CONCLUSION

Amici have years of collective experience at the center of the California budgeting process and have steered the state through good and bad fiscal times. With this experience, amici have concluded that this Measure, if allowed on the ballot and passed by voters, would seriously, if not fatally, impair the state’s ability to manage its finances and pass a balanced budget as required by the Constitution. Even if the state could do this in times of fiscal crisis, it could only do so with deep, harmful cuts to essential government services. Further, amici are well-versed in the history of the state’s financial landscape and have concluded that this Measure would revise the balance of power laid out in the Constitution when it comes to managing the state’s finances. For these reasons, amici respectfully request that this Court deem the Measure unconstitutional and keep it off the November 2024 ballot.

Dated: January 31, 2024

Respectfully submitted,

STRUMWASSER & WOOCHER LLP

BY: _____


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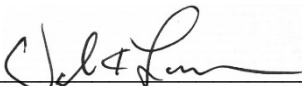
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I certify that, pursuant to rule 8.204(c)(1) of the California Rules of Court, the attached Amicus Curiae Brief is proportionally spaced, uses a typeface of 13 points, and contains 5,803 words, as determined by a computer word count.

Dated: January 31, 2024

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Re: *Legislature of the State of California, et al. v. Shirley N. Weber, Ph.D., et al.* . Case No. S281977

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1250 Sixth Street, Suite 205, Santa Monica, California 90401. My electronic mail address is loliver@strumwooch.com.

On **January 31, 2024**, I served the foregoing document(s) described as **APPLICATION OF FORMER DIRECTORS OF THE STATE OF CALIFORNIA DEPARTMENT OF FINANCE MICHAEL COHEN, B. TIMOTHY GAGE, AND ANA J. MATOSANTOS FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS LEGISLATURE OF THE STATE OF CALIFORNIA AND GAVIN NEWSOM** on all appropriate parties in this action, as listed below, by the method stated:

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LaKeitha Oliver

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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(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/LaKeitha Oliver

Signature

Larson, Dale (266165)

Last Name, First Name (PNum)

Strumwasser & Woocher LLP

Law Firm