Case No. S281977

SUPREME COURT OF CALIFORNIA

LEGISLATURE OF THE STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

SHIRLEY N. WEBER, PhD., et al.,

Respondent.

THOMAS W. HILTACHK,

Real Party in Interest.

APPLICATION OF *AMICUS CURIAE* CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE TO FILE BRIEF IN SUPPORT OF PETITIONERS

Sloan R. Simmons, SBN 233752
Daniel M. Maruccia, SBN 199890
Constantine C. Baranoff, SBN 213507
LOZANO SMITH
One Capitol Mall, Suite 640
Sacramento, CA 95814
Telephone: (916) 329-7433
Facsimile: (916) 329-9050
E-mail: ssimmons@lozanosmith.com

Keith J. Bray, SBN 128002
General Counsel & Chief of Staff
Kristin D. Lindgren, SBN 235607
Dana Scott, SBN 329184
California Sch. Boards Assn.
3251 Beacon Boulevard
West Sacramento, CA 95691
Telephone (800) 266-3382
Facsimile (916) 371-3407
E-mail: legal@csba.org

Attorneys for *Amicus Curiae*
California School Boards Association's
Education Legal Alliance

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

TO THE HONORABLE CHIEF JUSTICE PATRICIA GUERRERO AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT,

Pursuant to Rule 8.487(e) of the California Rules of Court, and the Court's November 29, 2023, Order to Show Cause, leave is hereby requested to file the accompanying Brief of *Amicus Curiae* California School Boards Association's Education Legal Alliance ("*Amicus Curiae*") in this action in support of Petitioners Legislature of the State of California et al.

INTEREST OF AMICI CURIAE

This case concerns an emergency Petition for Writ of Mandate asking this Court to remove from the ballot the Taxpayer Protection and Government Accountability Act ("the Measure"). At the crux of the Petition is the dilemma that the Measure would result in changes to the way state and local government revenues are raised and programs and services are funded by the State Legislature which are so significant that it presents to the voters not an amendment, but an unlawful revision of the California Constitution.

CSBA is a California nonprofit corporation duly formed and validly existing under the laws of the State of California. CSBA is a member-driven association composed of the governing boards of over 950 school districts and county offices of education. CSBA's ELA is composed of over 700 CSBA members and is dedicated to addressing public education legal issues of statewide concern to school districts and county offices of education.

CSBA's ELA develops, communicates, and advocates the perspective of California school districts and county offices of education. This includes ensuring that local school boards retain the authority to exercise fully the responsibilities vested in them by law and to make appropriate policy decisions for their local agencies. The ELA's activities include joining in litigation where legal issues of statewide concern affecting public education are at stake. As an advocate for its constituent members, CSBA has determined that this case affects the ability of California school districts to invite their electorates to pass parcel tax measures with provisions customized to local needs and local voter preferences which, if resolved in favor of Respondent, would harm school districts by limiting their ability to seek consistent revenue to fund vital local programs which are important to their communities.

Amicus Curiae has a significant interest in the outcome of this case, where the Measure's drafting puts at issue matter of great public importance. If permitted to advance on the ballot and enacted, the Measure will directly impact a wide range of critical financial and operational aspects of CSBA's member school districts and county offices of education.

BRIEF OF *AMICUS CURIAE* WILL ASSIST THE COURT

Amicus Curiae's Brief will assist the Court in identifying and understanding the array of long-existing public financing, operational, and other aspects of public education that the Measure threatens to upend, whether explicitly, or implicitly due to ambiguity in the Measure's drafting. *Amicus Curiae* believe it imperative for the Court to understand what these long-existing, lawful practices, programs, and options utilized by CSBA's members are, and how they are put at risk by the Measure. Such lawful

practices, programs, and options include: the school funding minimum guarantee established by Proposition 98; school and school district-based fees; school parcel tax measures; school developer fees; and Community Facilities Districts. The risk of harm and resulting impact on school district budgets and operations that would flow from the Measure are all the more serious in light of the vague and overbroad nature of the Measure's drafting and its retroactive application. All told, the bedrock of California school district operations vis-à-vis local control is directly threatened.

A sound understanding of these points is essential for the Court's proper resolution of this case and overarching recognition of the importance of its decision for California schools.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that the Court accept the accompanying Brief for filing in this case.

January 31, 2024 Respectfully submitted,

LOZANO SMITH

/s/ Sloan Simmons
SLOAN R. SIMMONS*
DANIEL M. MARUCCIA
CONSTANTINE C. BARANOFF
Attorneys for *Amicus Curiae*
CALIFORNIA SCHOOL
BOARDS ASSOCIATION'S
EDUCATION LEGAL ALLIANCE

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LOZANO SMITH
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Sacramento, CA 95814
Telephone: (916) 329-7433
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Kristin D. Lindgren, SBN235607
Dana Scott, SBN 329184
California Sch. Boards Assn.
3251 Beacon Boulevard
West Sacramento, CA 95691
Telephone (800) 266-3382
Facsimile (916) 371-3407
E-mail: legal@csba.org

Attorneys for *Amicus Curiae*
California School Boards Association's
Education Legal Alliance

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INTRODUCTION

California school districts and county offices of education have long had at their disposal various sources of school funding and revenue generating opportunities. These structures are framed in existing law and their long-standing existence underpin budgeting, programing, growth, and planning for K-12 public education at the local level. The Measure's sweeping terms, explicit reach, and perhaps even larger implicit ambiguous reach, directly threaten to upend these lawful and critically important practices, programs, and options in public education. Herein, *Amicus Curiae* provide to the Court information regarding those practices, programs, and options for California's school agencies which the Measure puts at risk, so that the Court has a full understanding of K-12 education context when considering the Petition in this case.

ARGUMENT

I. THE MEASURE THREATENS POTENTIAL, SIGNIFICANT, NEGATIVE IMPACTS ON PUBLIC SCHOOLS.

The Measure provides that:

- every levy, charge, or exaction imposed by a district, is either a tax or an exempt charge;
- an exempt charge may only be imposed by a resolution or other formal action of the governing board;
- the district bears the burden of proving by clear and convincing evidence that a levy, charge, or exaction is an exempt charge rather than a tax;
- the district also bears the burden of proving by clear and convincing evidence that the amount of the exempt charge is reasonable and does not exceed the actual cost of providing the service or product.

(Measure, § 6, subd. (a), (e) and (h) (1).) As explained below, accounting for these stated parameters and the intent of the Measure, there are numerous anticipated negative impacts of California's public school system overall and local school districts that will flow from the Measure.

A. School Funding Minimum Guarantee Established By Proposition 98.

Proposition 98 (1988) sets a minimum guarantee for public school funding in California, and its formula ensures that approximately 40 percent of state revenues, or the previous year's Proposition 98 funding, go to education funding. (Cal. Const., art. XVI, §§ 8, 8.5; see *County of Sonoma v. Comm. on State Mandates* (2000) 84 Cal.App.4th 1264, 1275, fn. 8.) The Proposition 98 guarantee consists of state General Fund revenues driven primarily by state income, sales, corporate, and capital gains taxes and local property tax revenue. There are three tests for determining the amount of Proposition 98 funding. Changes to tax revenues would impact how each of these tests are calculated.

Critically, tax revenue fluctuations affect the minimum guarantee. For example, the minimum guarantee was revised down for the 2022-23 school year because of a reduction in General Fund revenue due to a reduction in tax collections. According to the Legislative Analyst's Office, "General Fund revenue tends to be the most significant input in the calculation of the Proposition 98 guarantee."[1]

Because state education funding is dependent upon General Fund revenues, the Measure's limitations on the ability to approve new taxes will have devastating effects on California's K-12 education finance. In addition, Proposition 98 is a minimum guarantee (floor) and, while the Legislature has typically treated it as a maximum (ceiling), the Legislature has the discretion to increase Proposition 98 funding. (See Cal. Const., art. XVI, § 8.) This discretion would be hampered by the Measure's limits on the Legislature's ability to raise funds when necessary. Because of these

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[1] Legislative Analyst's Office, *The 2023-24 Budget Proposition 98 Overview and K-12 Spending Plan* (Feb. 7, 2023), at p. 6 , accessible at <https://lao.ca.gov/Publications/Report/4670>.

issues, this Measure will seriously impair the ability of the Legislature and school districts and county offices of education to address current and future needs of public education in the state, which is an important governmental function of constitutional stature. (Cal. Const. art. IX, § 5.)

Where the Measure requires any new tax approved by the Legislature to be approved by the voters (Measure, § 4 [proposed Cal. Const., art. XIII A, § 3, subd. (a)]), it presents significant concerns for school districts and county offices of education that are vastly dependent on state funding for the majority of their operations.[2] As a result of these impacts, unless rejected, the Measure, with its stated purpose of requiring "all fees and other charges are passed or rejected by voters themselves or a governing body elected by voters and not unelected and unaccountable bureaucrats" (Measure, § 3, subd. (a)), will throw California's carefully crafted system of school finance into a tailspin, and the basic mission to educate California's children will be less attainable.

B. School and School District-Based Fees.

In 1984, this Court held that the free school guarantee under the California Constitution prohibits charging students any fee, charge or deposit for curricular, extracurricular, credit, or non-credit activities that are part of the District's or a school sites' educational program. (Cal. Const., art. IX, § 5; *Hartzell v. Connell* (1984) 35 Cal.3d 899, 905, 911.) In *Hartzell*, this Court considered for the first time the issue of the free school

[2] Federal funding makes up less than 10 percent of funding for California schools. (See Lafortune, Public Policy Institute of California, *Financing California's Public Schools* (Nov. 2023) ["The federal government allocated $34.2 billion in relief aid during the pandemic; federal funds accounted for 23% of K–12 funding in 2020–21 and 11% in 2021–22. In most non-recession years before the pandemic, the federal share ranged from 6% to 9%."], accessible at <https://www.ppic.org/publication/financing-californias-public-schools/>.

guarantee in the context of whether a school district could charge students fees for participating in educational activities that the district considered extracurricular. In that case, the district adopted a plan to maintain its athletic and band programs by charging a fee for each student who wanted to participate in those extracurricular activities. The district also had a policy for waivers for those students who could not afford the fees. This Court invalidated the fees, concluding that, "the free school guarantee extends to all activities which constitute an 'integral fundamental part of the elementary and secondary education' or which amount to 'necessary elements of any school's activity.'" (*Hartzell*, 35 Cal.3d at 905.) The Court reasoned that extracurricular offerings, such as sports and band, fall within the Constitutional free school guarantee as part of a school district's educational program and offerings. (See *id.* at 911.)

Coupled with *Hartzell*, the contours of the free school guarantee are delineated with greater clarity via Education Code section 49010 et seq. and the California Code of Regulations. Under these provisions, the following non-exhaustive general rules apply:

- The free school guarantee under the California Constitution prohibits charging students any fee, charge or deposit for curricular, extracurricular, credit, or non-credit educational activities that are part of the District's or a school sites' educational program. (Cal. Const., art. IX, § 5; *Hartzell*, *supra*; Ed. Code, §§ 49010-11);
- For purposes of "educational activities" for which student fees, charges and deposits cannot be imposed, such activities include "an activity offered by a school, school district, charter school, or county office of education that constitutes an integral fundamental part of elementary and secondary education, including, but not limited to,

curricular and extracurricular activities." (Ed. Code, § 49010, subd. (a));

- Prohibited fees, charges and deposits include, but are not limited to: (1) a fee charged to a pupil as a condition for registering for school or classes, or as a condition for participation in a class or an extracurricular activity, regardless of whether the class or activity is elective or compulsory, or is for credit; (2) a security deposit, or other payment, that a pupil is required to make to obtain a lock, locker, book, class apparatus, musical instrument, uniform, or other materials or equipment; and (3) a purchase that a pupil is required to make to obtain materials, supplies, equipment, or uniforms associated with an educational activity. (*Id.*, § 49010, subd. (b)(1)-(3)); and
- Fees and charges ***are permissible*** where specifically provided for by the Education Code or other statute. (Cal. Code Regs., tit. 5, § 350; Ed. Code, § 49011, subd. (e)).

As to the final proposition and California Code of Regulations, title 5, section 350, this provision is read to allow for the imposition of a fee or charge to a student only when the fee is statutorily authorized, for which there are a number of such statutes in the Education Code.

With this context in mind, within the core mission of California public education is the responsibility to provide enrolled children with services such as nutritious meals and home to school transportation, as well as opportunities and activities to ensure their physical, emotional, and mental health and wellbeing. These services enable and enhance children's ability to learn, succeed, and become productive citizens of the state.

To meet these obligations, as described above, school districts receive an annual state appropriation. However, school districts are also statutorily authorized to charge students and the public fees for certain services to supplement or replace the state appropriation. This Court recognized this statutory authority when it held that a district-imposed home-to-school transportation fee did not violate the state constitution's free school guarantee. (*Arcadia Unified School Dist. v State Dept. of Ed.* (1992) 2 Ca1.4th 251, 259-65.) Fees for preschool and childcare and development services, insurance for school athletic team members, school camp programs, food sold at school, Civic Center Act use of school facilities and student field trips are mere examples of some of the common services and activities for which districts charge fees. (Ed. Code, §§ 8211, 8213, 32221, 35335, 38084, 38134 and 35330).

These statutorily authorized fees may not be directly affected by the Measure, however, and uniquely concerning, the terms of the Measure will interfere with school boards' ability to fulfill other critical roles they are required to perform. Though under existing laws and regulations fees are charged with board approval, the requirements of the Measure, especially those requiring proof by clear and convincing evidence that each fee is reasonable and does not exceed actual cost, will involve more in-depth studies and analyses for any fee to be charged, regardless of the amount charged.

With the sheer number of fees for which such studies and analyses will have to be done each year, it is foreseeable that school boards will have less time for other critical matters for which they are responsible. Matters that bear upon the primary mission of school districts, such as adopting instructional materials, plans to protect students against unlawful conduct (including discrimination), a sound budget, and a comprehensive Local Control Accountability Plan (LCAP), could be impacted. One possible

solution to this situation will be for school boards to increase the number or duration of their regular meetings, but this will significantly burden an already stressed system. Correspondingly, increases in board meetings merely to have adequate time for efforts to comply with the Measure's new requirements, might very well deter members of the public from seeking school board office, including students desiring to serve as a student board member.

In fact, the Measure's accountability provisions are unnecessary. Many statutes that authorize district fees come with a complaint process for anyone who is aggrieved to challenge the fees and, where applicable, receive reimbursement or other available remedy. For example, Education Code section 49013 provides for the filing of a complaint under the Uniform Complaint Procedures, as specified in the California Code of Regulations, title 5, section 4600 et seq., if a district imposes any fee, deposit, or other charge on a student in violation of the free school guarantee of the state constitution. These long recognized and permitted school fees[3] which are integral to the operation of comprehensive educational programs that support the whole child are thus put at risk by the sweeping, unnecessary, and improper Measure.

C. School Parcel Tax Measures.

Before Proposition 13 (1978), school districts were able to choose their own level of spending, and were able to finance such spending prerogatives through local property taxes. (See Brunner, *The Parcel Tax,* in *School Finance and California's Master Plan for Education* (Richardson &

[3] See Cal. Dept. of Ed., *Fiscal Management Advisory 23-02, Pupil Fees, Deposits, and Other Charges* (Nov. 28. 2023) [specifying permissible student fees delineated and authorized by statute], accessible at < https://www.cde.ca.gov/re/lr/fm/fma2302.asp>.

Sonstelie eds., 2001), at p. 189.)[4] In 1978, California voters passed Proposition 13. (See *County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1451; see also Brunner, *supra*, at p. 189.) Proposition 13 essentially turned the property tax into a state tax by restricting property tax rates to one percent of the assessed value. (See *Sasaki*, 23 Cal.App.4th at 1451; see also *City of Rancho Cucamonga v. Mackzum* (1991) 228 Cal.App.3d 929, 945 ["the purpose of Proposition 13 itself was to achieve statewide control over escalating local property tax rates."].) This had a dismal effect on school district funding, as school districts lost control over their largest source of discretionary revenue. (See Brunner, *supra*, at p. 189.) Under California's current fiscal scheme, the state controls 90% of school district revenue and school districts have very few options for alternative sources of funding. (See *id.*)

While Proposition 13 severely diminished the ability of school districts to raise additional revenue, it did not eliminate it. (See *id.*) Prior to Proposition 13, parcel taxes were forbidden because property had to be taxed in proportion to its full value. (See Perry, EdSource, *Local Revenues for Schools: Limits and Options in California* (Sept. 2009), at p. 2.) However, the parcel tax was born out of Proposition 13, allowing local governments, including school districts, to pass a new "non ad-valorem" tax if they received approval from two-thirds of local voters. (See *id.*) Thus, parcel taxes are a means for school districts to raise additional funds, and a tax on real estate parcels as opposed to the actual value of real property, permissible under Proposition 13. (See Brunner, *supra*, at pp. 189-90.)

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[4] Accessible at <http://www.ppic.org/content/pubs/report/R_601JSR.pdf>.

The first parcel tax was passed by a California school district in 1983, five years after approval of Proposition 13. (See *id.* at p. 190.) Since that time, between 1983 to date, 472 school parcel tax measures have been passed by local voters, resulting in a success rate of 64% for the 734 school parcel tax measures that made their way to local ballots. (Ed-Data, *School District Bond & Tax Elections* (2022), accessible at <https://www.ed-data.oril.articleR/School-District-Bond-and-Tax-Elections>.) Parcel taxes thus provide California school districts with an alternative source and essential helping hand for school funding. Once passed, these school districts typically have essential and stable revenue streams for three to ten years. (See Perry, *supra*, p. 2.) And, while the contours of lawful parcel tax measures are subject to occasional judicial scrutiny, the rules of the road have become clear over time. (See, e.g., *Traiman v. Alameda Unified School Dist.* (2023) 94 Cal.App.5th 89, 103-07.)

If permitted to proceed and enacted, the Measure reduces the ability of local voters to raise revenues for their local schools through parcel taxes. Under the California Constitution, a school district may impose a special tax when a ballot measure proposing the tax is supported by two-thirds of qualified electors within that district. (Cal. Const., art. XIII A, § 4.) This two-thirds support from the public is a high hurdle for many districts and as a result, local voter initiatives which only require a simple majority to pass, can be instrumental in funding local school programs and activities. (See *Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 943-44; see generally *City & County of San Francisco v. All Persons Interested in The Matter of Proposition G* (2021) 66 Cal.App.5th 1058.)

In addition to a lower threshold of support for passage, in *City of Upland*, this Court clarified even more flexibility provided by voter initiatives when it held that voter initiatives for taxes do not have to be submitted to the electorate at a regularly scheduled general election as the

California Constitution requires for general taxes. (Cal. Const., art. XIII C, § 2.) Instead, these special tax initiatives can be considered by voters during a special election. (*City of Upland*, 3 Cal.5th at 948.)

Yet, the Measure would eliminate the flexibility provided by citizen initiatives because it expressly supersedes this Court's decision in *City of Upland* and changes the required threshold from a simple majority to a supermajority of two-thirds to pass a special tax. (Measure, §§ 3, subd. (e), 6 [proposed art. XIII C, § 2, subd. (c)].) As a result, efforts for a parcel taxes to support school districts' various program needs by a voter's initiative can only be placed on the general election ballot. This would significantly diminish the ability of voters throughout the state to approve tax measures necessary to fund the operations of their local schools.

D. Community Facilities Districts.

The Mello-Roos Community Facilities Act of 1982 (Gov. Code, § 53311 et seq.) (the "Mello-Roos Act"), authorizes school districts to form community facilities districts ("CFDs") and levy special taxes within those districts in order to finance certain school facilities, or bonds that were issued to finance the same. CFDs represent an integral tool in school finance. Bonds are secured by a pledge of the special taxes imposed on the CFD and are payable from those same special taxes. The special tax rates and amounts are determined by a rate and method of apportionment ("RMA") (Gov. Code, § 53321).

School district governing boards must approve the formation of the CFD through a multi-step process. Additionally, the levy of special taxes within the CFD must be approved by a two-thirds vote of the qualified electors pursuant to a ballot measure. Importantly, if there are less than 12 registered voters residing within the boundaries of the CFD, the qualified electors in a CFD formation may constitute the landowners within the CFD boundaries. (Gov. Code, § 53326, subd. (b).)

Common practice involves having the ballot measure identify the maximum amount of bonded indebtedness, a brief description of the facilities and/or services to be funded, and an initial appropriations limit. Specific information regarding the purpose of the special tax is found in a facilities/services list included as part of the CFD resolution of intention or the resolution of formation ("CFD Resolutions") (Gov. Code, §§ 53321, 53325.1). The amount and duration of the special tax is found in the RMA which is also included as part of the CFD Resolutions which are commonly incorporated in the ballot measure by reference.

As it applies to CFDs, the Measure would amend section 2 of article XIII C of the California Constitution to provide as follows:

> Sec. 2. Local Government Tax Limitation. Notwithstanding any other provision of this Constitution:
>
> (c) No local law, whether proposed by the governing body or by an elector, may impose any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote….
>
> (d) The title and summary and ballot label or question required for a measure pursuant to the Elections Code shall, for each measure providing for the imposition of a tax, include:
>
> (1) The type and amount or rate of the tax;
> (2) the duration of the tax; and
> (3) The use of the revenue derived from the tax.

The Measure thus requires the three items noted in subdivision (d)(3), of section 2 of article XIII C of the California Constitution to be included in the title and summary and ballot label or question as part of the CFD election process. However, the Measure provides no clarity as to whether or not these three items need to be specifically identified in the title and summary and ballot label or question or whether they may be included

by reference. The RMA and the facilities/services list noted above each encompass several pages and do not lend themselves to a single use or a single number. In addition, the Measure provides no clarity as to whether or not these three items are to be separately included in the title, summary, and ballot label or question, or whether including them in just one place would be sufficient.

The lack of clarity in the Measure results in the potential for a negative impact on the formation of CFDs, the validity of the CFD special taxes, and use of CFDs as an integral financing tool by California school districts. This is thus the next example of the Measure's cascading negative impacts on the structure of school funding in California, creating havoc to the minimum guarantee, historically permissible school-related fees, parcel taxes, all the way to CFDs, restraining local school boards' abilities to meet their students' needs tighter and tighter.

E. School Developer Fees.

In 1986, the California Legislature authorized school districts to levy school impact or developer fees to fund school facilities. (See *Grupe Development Co. v. Super. Ct.* (1993) 34 Cal.4th 911, 917.) Under this statutory scheme, the amount that could be levied was $1.50 per square foot for residential development and $0.25 per square foot for commercial and industrial development with inflationary adjustments to be adopted every other year. These fees were initially known as "Sterling" fees. The 1986 law appeared to some, on its face, to prohibit municipalities from requiring fees in excess of the statutory amounts to fund schools or from denying requests for development approvals on the basis of inadequate school facilities. Specifically, Government Code section 65996 prohibited local agencies from denying approval of a "project" on the basis of the adequacy of school facilities.

A series of significant appellate court decisions held that the limitations of the 1986 law applied only to adjudicative or ministerial decisions (such as approvals of parcel maps, use permits, and building permits), and not to legislative or discretionary decisions (such as general plan amendments and zoning changes). (See generally *Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1201; *William S. Hart Union High School v. Regional Planning Comm.* (1991) 226 Cal.App.3d 1612; *Murrieta Valley Unified School Dist. v. County of Riverside* (1991) 228 Cal.App.3d 1212.) These cases allowed cities and counties to use their legislative "police power" over land use to assist school districts by requiring developer fees, land dedications, or other measures to mitigate fully the impacts of development on school facilities, even if the mitigation measures exceeded the then applicable statutory fee. In addition to exercising their police powers to control land development, municipalities have a duty to assess and mitigate the environmental effects of development under the California Environmental Quality Act (CEQA) (Pub. Resources Code § 21000 et seq.). These cases thus allowed cities and counties to impose additional mitigation measures under CEQA for school facilities.

Following the *Murrieta* opinion, the building industry stepped up efforts to achieve through the Legislature what the courts had denied. The first significant change came in Senate Bill ("SB") 1287 in 1992. SB 1287 was an effort at a compromise which would become a common theme: trading approval of statewide bond issues in exchange for an attempted hard cap on developer fees. SB 1287 attempted to cap the fee at $2.65, but that cap was conditional. It would be lifted in the event that ACA 6, a constitutional amendment that would return state school bonds to a simple majority vote, did not pass. When ACA 6 was defeated by the electorate, SB 1287 was repealed in 1993. For the ensuing 5 years, the building

industry continued to attempt legislative "reform" without success. One significant effect was that no state bond measure was put out to the voters until 1998, as the bond was held up in negotiations over the fee issue. Ironically, the lack of state funding only increased the need for local funding, thus driving up justifiable school impact fees.

SB 50, which became fully effective on November 4, 1998, represents the compromise ultimately reached. SB 50, which also revamped the state school facilities funding program for both new construction and modernization, contained developer fee reform that would become effective only if Proposition 1A, a $9.2 billion state bond measure, passed. With Proposition 1A's passage on November 3, 1998, the landscape of developer fees in California was significantly affected. SB 50 amended Government Code section 65995, subdivision (a), to provide that only those fees expressly authorized by Education Code section 17620 (discussed below) or Government Code sections 65970 et seq., may be levied or imposed in connection with or made conditions of any legislative or adjudicative act by a local agency involving planning, use, or development of real property. Subdivision (h) of section 65995 declares that the payment of the development fees authorized by Education Code section 17620 constitutes "full and complete mitigation of the impacts of any legislative or adjudicative act on the provision of adequate school facilities." Section 65995, subdivision (i), states that an agency is precluded from denying or refusing to approve a legislative or adjudicative act involving development "on the basis of a person's refusal to provide school facilities mitigation that exceeds the amounts authorized [by SB 50]." SB 50 thus attempts to limit the ability of a city or county to deny development approvals on the basis of inadequate school facilities, whether under CEQA or otherwise.

Under SB 50, school districts continue to levy the current statutory fee per square foot of residential development, so long as sufficient justification exists to support that fee. This fee is commonly referred to as the "Level 1" fee. Commercial fees are not directly affected by SB 50. For school districts that meet certain criteria, a "Level 2" fee may be imposed that can be higher than the Level 1 fee. The Level 2 fee is based on a specific formula that must be applied. In concept, Level 2 fees are the equivalent of what the state assumes will total 50% of the cost of housing students from new development.[5]

Pursuant to section 1, subdivision (j)(5) of the Measure, it would appear that school developer fees **are not intended** to be swept into the scope of the Measure's application, **which *Amicus Curiae* believes is the proper interpretation**. This said, to the extent there is any ambiguity on point, it is almost certain that there will be litigation and challenges to school developer fees under the Measure by those who oppose such fees. Like with parcel tax measures and CFDs, this risks another direct attack and harm to school district operations that flows from the Measure if permitted on the ballot and enacted. Disputes in this particular arena thus pose the specter of creating conflicts that delay development projects, restrain the ability of school districts to rightfully obtain developer fees necessary to account for the burdens on the school system that new development will result in, and increase the costs for school districts forced to litigate grievances on point—even if the Measure's purpose is not explicit in its application.

[5] "Level 3" fees are also available contingent upon certain actions by the State Allocations Board.

F. The Measure's Impact on School District Due to Vagueness and Overbreadth.

As noted, the Measure is so vague and broad it will be extremely difficult to implement. First, by redefining the meaning of both "tax" and "exempt charge" (Measure, § 4 [proposed art. XIII A, §§ 3, 5], [proposed art. XIII C, § 1]), the Measure opens the door for voters to use their referendum power to try to challenge any fee appropriately characterized as an "exempt charge" (an unclear task in itself) with a referendum action to undo actions taken by a school or county board. While the power of voters to challenge these local school board actions is not explicitly provided for in the same way that other municipal actions can be challenged by voter referendum (*Bd. of Ed. v. Super. Ct.* (1979) 93 Cal.App.3d 578, 580-85), the changes made by the Measure seemingly create an opportunity for a referendum to challenge school district fees/exempt charges and/or through other mechanisms, such as by way of petition for writ of traditional mandate under Code of Civil Procedure section 1085. Thus, school board actions will be caught, even if not intended to be, in the undertow of the consequences of the Measure's ambiguity. Due to the uncertainty created by the Measure, school boards and county boards of education will be left with the possibility that properly approved and characterized fees/exempt charges will be challenged by voter referendum, a referendum that then would be challenged in court.

Moreover, the requirement that local government entities demonstrate that any fee is for the "actual cost" of providing a service or product is still remarkably vague despite the definition offered in the Measure and will also be impossible to implement. (Measure, § 5 [proposed Cal. Const., art. XIII C, § 1, subd. (a)].) Specifically, the definition provides that in computing the "actual cost" the "maximum amount that may be imposed is the actual cost less all other sources of

revenue, including but not limited to taxes, other exempt charges, grants, and state or federal funds received to provide such a service or product." However, including all sources of revenue ignores the fact that local agencies, including school districts, have funding that is specifically directed to, or earmarked for, certain services or costs. This definition would require a local agency to include all revenue in determining any "actual cost" even when such revenue is already set aside for a different purpose. In other words, the definition does not limit the definition of actual cost to costs minus revenue for the purpose of the fee at issue, but rather all revenues received. Further, the Measure requires a demonstration that a charge is "reasonable" by clear and convincing evidence but provides no definition of "reasonable" except to reference the "actual cost" requirement. (Measure, § 6 [proposed Cal. Const., art. XIII C, § 2, subd. (g)].)

Lastly, the Measure limits exempt charges to be imposed by the governing body of a local government "by ordinance." (Measure, § 6 [proposed Cal. Const., art. XIII C, § 2, subd. (e)].) Not all local bodies act by ordinance. This creates an additional lack of clarity beyond what is discussed herein regarding what types of charges are covered by the Measure. Constitutional language must be clear and specific in order to ensure that implementation is without uncertainty and risk of litigation.

The language in the Measure as illustrated by the examples herein will likely lead to an endless stream of litigation contesting its applicability, breadth and vagueness. This consequence will result in ongoing uncertainty for impacted school district operations. Because of the vagueness of terms, whether drafted intentionally or unintentionally to fully account for existing scope of imperative school district policies, practices, and options in this area, the Measure will create log-jams in districts' operations in terms of the Proposition 98 school financing floor, imposition

of long viable school fees to support programs important to students and school communities, adoption of parcel taxes integral to school, establishment of community facilities districts, and potentially even institution of developer fees to account for school impacts—all of which inevitably bound to find their way to the courts. Regular and ongoing litigation on point is therefore easily anticipated, amounting to a further drain on school district resources—resources which the Measure itself is designed to constrain.

II. FURTHER DRAMATIC NEGATIVE IMPACTS ON SCHOOL DISTRICTS DUE TO RETROACTIVE APPLICATION.

The Measure's retroactivity provisions are onerous and will result in an incredible burden for school districts working to bring any revenue-raising measures passed or adopted between January 1, 2022 and the effective date of the Measure into compliance with its requirements. The Measure allows such districts only 12 months within which to have any tax or exempt charge reenacted in compliance with the Measure. Any non-compliant voter-initiated district tax will have to be submitted for voter approval at a special election in 2025, otherwise the tax will become void. (Measure, § 6, subd. (g).) For example, since January 1, 2022, 11 parcel taxes have passed and therefore would be subject to reapproval if the Measure passes and they are found to be noncompliant. (See Ballotpedia, *Parcel Tax Elections in California* (2022), accessible at <https://ballotpedia.org/Parcel_tax_elections_in_California>.) With a large number of potential measures on a special election ballot due to this required reapproval (from municipalities, school districts, etc.), the likelihood of voter rejection will be higher than usual. Also, any "exempt charge," as broadly defined by the initiative, if not previously approved by the school board consistent with the new requirements imposed by the

Measure, would also be subject to approval on or before the November 5, 2025, cut-off date.

Further complicating the matter for school officials, they are mandated by state law to produce financial reports twice per year for review and approval by their county superintendent of school. (Ed. Code, § 42130.) If a school district's multi-year budget projections show that it may not, or will not, be able to pay all its expenses, then the district must develop a plan to bring those budgets into balance and may ultimately lose many aspects of its financial autonomy, which could even include a state takeover of the district's budgeting and financial affairs in the most serious cases. (See *id.*, § 42130 et seq.) How is a school official to develop balanced multi-year budget projections if those projections depend on the receipt of revenues that could be taken away after voter or other lawful approval? And, how would that school officials be able to refund such taxes so many years later?

These open questions and corollary dire consequences for school district operations are all the more reason that the general rule against retroactivity should result in invalidation of the Measure. The general rule is that enactments "operate prospectively only[.]" (*McClung v. Employment Dev. Dept.* (2004) 34 Cal.4th 467, 475, citations omitted.) This "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." (*Id.*) "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted" and "[f]or that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." (*Id.*) This is particularly the case with regard to "laws creating new obligations,

imposing new duties, or exacting new penalties because of past transactions." (*In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428, 1439; see *Kizer v. Hanna* (1989) 48 Cal.3d 1, 7.)

In limited circumstances a statute may apply retroactively but "[a] statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent some constitutional objection to retroactivity." (*McClung*, 34 Cal.4th at 475.) When retroactivity is ambiguous, the law's application "is construed ... to be unambiguously prospective." (*Myers v. Philip Morris Companies, Inc*. (2002) 28 Cal.4th 828, 841.) Moreover, *even where it appears that a statute is intended to act retroactively, **there remains limitations***:

> In determining whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.

(*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592, citations omitted; *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.* (2005) 131 Cal.App.4th 517, 528 ["The theory against retroactive application of a statute is that the parties affected have no notice of the new law affecting past conduct."], citation omitted.)

These principles weigh extremely heavily against the validity of the Measure's retroactive application where the reliance interests for school districts and harm resulting from undercutting that reliance is great. The complications that will flow from ballot measures and board actions in the above-described areas of school operations are already baked into existing and future decisions of those districts. The Measure's retroactive

application can do nothing but upend those short- and long-terms decisions to the detriment of school district students and their communities.

III. IF ENACTED, THE INITIATIVE STRIKES DIRECTLY AT THE LONGSTANDING PRINCIPLE OF LOCAL CONTROL FOR SCHOOL DISTRICTS.

Considering all of the above concerns, the Measure's impacts strike directly at the bedrock principle of local control in California K-12 education. The California Constitution grants to local school districts and their governing boards the flexibility and local control appropriate to address their communities' unique needs. The broad discretion of school boards to take lawful action to address their diverse and localized community needs flows from the overarching mandate of the California Constitution:

> The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established.

(Cal. Const., art. IX, § 14; cf. Ed. Code, § 14000 ["It is the intent of the Legislature that the administration of the laws governing the financial support of the public school system in this state be conducted within the purview of the following principles and policies: The system of public school support should be designated to strengthen and encourage local responsibility for control of public education. . . ."]; *Cal. Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1523-24 ["It has been and continues to be the legislative policy of this state to strengthen and encourage local responsibility for control of public education through local school districts."].)

The Legislature further codified the legal principle of local control in Education Code section 35160, which provides in pertinent part:

[T]he governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established. Section 35160 provides school districts with local control and the ability to act without express legislative authorization. (*San Jose Unified School Dist. v. Santa Clara County Office of Ed.* (2017) 7 Cal.App.5th 967, 980, citing *Hartzell*, 35 Cal.3d at 915.)

Correspondingly, Education Code section 35160.1, subdivision (a), provides, in pertinent part:

> The Legislature finds and declares that school districts . . . have diverse needs unique to their individual communities and programs. Moreover, in addressing their needs, common as well as unique, school districts . . . should have the flexibility to create their own unique solutions.

In this regard, Education Code section 35160.1 "is a clarification of section 35160, which in turns provides flexibility [for school districts] to 'act in any manner which is not in conflict with or inconsistent with, or preempted by, any law . . . ." (*San Rafael Elementary School Dist. v. State Bd. of Ed.* (1999) 73 Cal.App.4th 1018, 1027; see also *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1017.)

With this authority in mind, California courts have repeatedly recognized the significance of article IX, section 14, of the California Constitution and Education Code section 35160's grant of local control, authority and discretion to school districts. (See *Butt v. State of California* (1992) 4 Cal.4th 668, 689 ["the Constitution and statutes encourage maximum local program and spending authority consistent with State law . . . ."]; *American Civil Rights Foundation v. Berkeley Unified School Dist.* (2009) 172 Cal.App.4th 207, 216 ["the Legislature has granted school boards wide authority to set policies for the communities they serve."]; *T.H.*

v. San Diego Unified School Dist. (2004) 122 Cal.App.4th 1267, 1281 [courts must construe educational statutes "keeping in mind the Legislature's expressed intent to provide each school district with broad discretion and flexibility to accomplish its educational mission."].)

All told, the Measure's strictures will have devastating impacts on the authority and local control of school boards, restraining long-understood, appreciated, and valid practices and options intended to assist with the costs of delivering facilities and services to their constituent students and community.

CONCLUSION

Based on the foregoing and for those reasons set forth in Petitioners' papers, *Amicus Curiae* respectfully requests that this Court grant Petitioners' Emergency Petition for Writ of Mandate in full.

Dated: January 31, 2024

Respectfully submitted,

LOZANO SMITH

/s/ Sloan R. Simmons
SLOAN R. SIMMONS*
DANIEL M. MARUCCIA
CONSTANTINE C. BARANOFF
Attorneys for *Amicus Curiae*
CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, counsel hereby certifies that the word count of the Microsoft® Word for Microsoft 365 MSO (Version 2210 Build 16.0.15726.20188) word-processing computer program used to prepare this Petition for Rehearing (excluding the cover, tables, and this certificate) is 6,717 words.

Dated: January 31, 2024

Respectfully submitted,

LOZANO SMITH

/s/ Sloan R. Simmons
SLOAN R. SIMMONS*
DANIEL M. MARUCCIA
CONSTANTINE C. BARANOFF
Attorneys for *Amicus Curiae*
CALIFORNIA SCHOOL
BOARDS ASSOCIATION'S
EDUCATION LEGAL ALLIANCE

PROOF OF SERVICE

I, Rachelle Esquivel, declare as follows: I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the law firm of Lozano Smith, One Capitol Mall, Suite 640, Sacramento, California 95814.

On January 31, 2024, I served the following document

APPLICATION OF *AMICUS CURIAE* CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE TO FILE BRIEF IN SUPPORT OF PETITIONERS

BRIEF OF *AMICUS CURIAE* CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF PETITIONERS

on the following persons at the locations specified:

Attorney	**Party**
Richard R. Rios Margaret R. Prinzing Robin B. Johansen Inez Kaminski Olson Remcho, LLP 1901 Harrison Street, Suite 1550 Oakland, CA 94612	Petitioners, Legislature of the State of California, Gavin Newsom, and John Burton
Steven J. Reyes Mary M. Mooney Alexa Purich Howard California Secretary of State 1500 11th Street Sacramento, CA 95814	Respondent, Shirley N. Weber
Thomas W. Hiltachk Bell McAndrews & Hiltachk 455 Capitol Mall, Ste. 600 Sacramento, CA 95814	Real Party in Interest, Thomas W. Hiltachk

in the manner indicated below:

[X] (***By Electronic Filing Service Provider***) By transmitting a true and correct copy thereof by electronic filing service provider (EFSP), True Filing, to the interested party(s) or their attorney of record to said action at the e-mail address(es) of record and contained within the relevant EFSP database listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication from the EFSP that the transmission was unsuccessful.

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

Executed January 31, 2024, at Sacramento, California.

/s/ Rachelle Esquivel
Rachelle Esquivel

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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Margaret Prinzing Olson Remcho, LLP 209482	mprinzing@olsonremcho.com	e-Serve	1/31/2024 9:50:19 PM
Anita Ceballos California School Boards Association	aceballos@csba.org	e-Serve	1/31/2024 9:50:19 PM
Eric Eisenhammer Dauntless Communications	eric@dauntlesscommunications.com	e-Serve	1/31/2024 9:50:19 PM
Ben Granholm	ben@swingstrat.com	e-Serve	1/31/2024 9:50:19 PM
Michael Colantuono Colantuono, Highsmith & Whatley, PC 143551	mcolantuono@chwlaw.us	e-Serve	1/31/2024 9:50:19 PM
Inez Kaminski Olson Remcho, LLP 345584	ikaminski@olsonremcho.com	e-Serve	1/31/2024 9:50:19 PM
Alexa Howard Office of the California Secretary of State 309197	lhoward@sos.ca.gov	e-Serve	1/31/2024 9:50:19 PM
Adrian Granda City of San Diego	ADGranda@sandiego.gov	e-Serve	1/31/2024 9:50:19 PM
Robin Johansen Olson Remcho LLP 79084	rjohansen@olsonremcho.com	e-Serve	1/31/2024 9:50:19 PM
Neil Sawhney ACLU of Northern California	nsawhney@aclunc.org	e-Serve	1/31/2024 9:50:19 PM

300130			
Natalie Boust California Business Roundtable	natalie@cbrt.org	e-Serve	1/31/2024 9:50:19 PM
Mike Young California Environmental Voters	mike@envirovoters.org	e-Serve	1/31/2024 9:50:19 PM
Richard Rios Olson Remcho, LLP 238897	rrios@olsonremcho.com	e-Serve	1/31/2024 9:50:19 PM
Matthew Slentz Colantuono, Highsmith & Whatley, PC 285143	mslentz@chwlaw.us	e-Serve	1/31/2024 9:50:19 PM
Adam Skaggs Giffords Law Center 4211173	askaggs@giffords.org	e-Serve	1/31/2024 9:50:19 PM
Thomas Hiltachk Bell, McAndrews & Hiltachk, LLP 131215	tomh@bmhlaw.com	e-Serve	1/31/2024 9:50:19 PM
Paul Dress ARC	Paul.Dress@asm.ca.gov	e-Serve	1/31/2024 9:50:19 PM
Hector Barajas	hbarajas@gmail.com	e-Serve	1/31/2024 9:50:19 PM
Christopher Hoene California Budget & Policy Center	choene@calbudgetcenter.org	e-Serve	1/31/2024 9:50:19 PM
Coyote Marin Court Added	c.c.marin@ic.institute	e-Serve	1/31/2024 9:50:19 PM
Steven Reyes Calfornia Secretary of State	steve.reyes@sos.ca.gov	e-Serve	1/31/2024 9:50:19 PM
Christina Williamson Mastagni Holstedt, A.P.C.	cwilliamson@mastagni.com	e-Serve	1/31/2024 9:50:19 PM
Thomas Hiltachk Bell, McAndrews & Hiltachk, LLP 131215	kmerina@bmhlaw.com	e-Serve	1/31/2024 9:50:19 PM
Sloan Simmons 233752	ssimmons@lozanosmith.com	e-Serve	1/31/2024 9:50:19 PM
Daniel Maruccia 199890	dmaruccia@lozanosmith.com	e-Serve	1/31/2024 9:50:19 PM
Constantine Baranoff	cbaranoff@lozanosmith.com	e-Serve	1/31/2024 9:50:19 PM

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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/Sloan Simmons

Signature

Simmons, Sloan (233752)

Last Name, First Name (PNum)

Lozano Smith, LLP

Law Firm