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.

REAL PARTY IN INTEREST'S REPLY TO THE *AMICUS CURIAE* BRIEFS SUBMITTED IN SUPPORT OF PETITION

Thomas W. Hiltachk*
(SBN: 131215)
Paul Gough (75502)
BELL, McANDREWS &
HILTACHK, LLP
455 Capitol Mall, Suite 600
Sacramento, CA 95814
Telephone: (916) 442-7757
tomh@bmhlaw.com
Attorneys for Real Party in Interest

Jonathan Coupal (107815)
Timothy Bittle (112300)
Laura Dougherty (255855)
HOWARD JARVIS
TAXPAYERS ASSOCIATION
1201 K Street, Suite 1030
Sacramento, CA 95814
laura@hjta.org

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA, pursuant to the Order of this Court issued on November 29, 2023, Real Party in Interest submits his Reply to the *Amicus Curiae* briefs filed in support of Petitioners, as follows:

I.
INTRODUCTION

The *Amicus* briefs submitted in support of the Petition represent a cadre of special interests entirely dependent on higher tax and fee revenue, former government officials, including a former Governor who ran for election promising that he would not propose any increase in state taxes without voter approval,[1] and associations representing local governments and agencies that have successfully sought and received voter approval of local taxes for decades under the same constitutional requirements that TPA merely seeks to restore. They have joined with Petitioners in predicting certain fiscal calamity if the voters are allowed to even consider the merits of TPA. Instead of trying to persuade a majority of the voters that TPA should be rejected based on the political claims made here, Petitioners and *Amici* are hoping to persuade a majority of this Court, using the same political claims, to prohibit the voters from having the opportunity to decide for themselves whether to

[1] Not only did Governor Edmund G. Brown campaign on said promise, he began his third term in the face of a massive budget deficit and the largest recession since the Great Depression, yet restated his campaign pledge: "no taxes without a vote of the people."
Anthony York, *Jerry Brown plans to take his case for taxes to voters*, (April 1, 2011) Los Angeles Times, (https://www.latimes.com/archives/la-xpm-2011-apr-01-la-me-brown-pensions-20110401-story.html; See also, Maeve Reston, *Candidates for governor, Senate hopscotch the state*, (Oct. 30, 2010) Los Angeles Times, https://www.latimes.com/archives/la-xpm-2010-oct-30-la-me-campaign-20101030-story.html; Brown for Governor, *JB401*, (Sep. 2, 2010) Youtube.com, https://youtu.be/plWquvOBt5A?t=24).

support or oppose TPA. In fact, the campaign against TPA, funded by several of the special interest *Amici* here, is well-underway. On February 11, 2024, the opponents of TPA (including Petitioners) purchased full page ads in the San Francisco Chronicle and the Los Angeles Times urging the individual members of the sponsors of TPA to withdraw it from the ballot.[2] Their campaign message is eerily similar to the political claims made here.

As for their legal claims, *Amici* are unable to overcome the same issue that stymies Petitioners' claims, namely that this Court has clearly stated that it may not, *pre-election*, find that an initiative measure is unconstitutional based on speculation, uncertainty, unproven premises, or mere predictions of dire economic consequences, (*Amador, supra,* 22 Cal. 3d at 224-226; *Brosnahan, supra,* 32 Cal. 3d. at 259-60; *Legislature v. Eu, supra,* 54 Cal. 3d at 510; *Raven, supra,* 52 Cal. 3d at 224-26.) As this Court stated in *Legislature v. Eu*, "[w]e are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged measure, and that their 'fears and doubts' are not highly authoritative in construing the measure." (*Legislature v. Eu, supra,* 32 Cal. 3d at 505, citing *DeBartolo Corp. v. Fla. Gulf Coast Trades Council* (1988) 485 U.S. 568, 585.)

No calamity shall befall the state, or any city, county, or special district if TPA is approved by the voters. And certainly, no calamity shall befall the State from this Court deferring *pre-election* review and merely allowing the voters to exercise their franchise rights and cast votes on the measure. Real Party trusts the voters to act responsibly and so too should this Court.

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[2] Vote No The Taxpayer Deception Act, *An Open Letter to the CA Business Roundtable*, https://www.taxpayerdeceptionact.com/letter.

II.
ARGUMENT COMMON TO ALL OR MOST OF THE PROPOSED *AMICUS* BRIEFS

A. TPA and Voter Approval of Taxes is Responsive to the Recent Actions of Petitioners Acting at the Behest of *Amici*.

Real Party has not previously defended the economic or social wisdom of TPA as it should not be relevant to the outcome of this case. (*Amador, supra,* 22 Cal. 3d at 219.) Yet, several of the *Amicus* briefs ascribe a specific motive behind TPA, or offer commentary on the policy choices made. (See, e.g. *Amicus* brief of Governor Brown describing TPA as just another "anti-tax initiative;" *Amicus* brief of Local Governments stating that TPA is intended to "greatly restrict governments to raise and spend revenues," and *Amicus* brief of Former Directors stating that TPA reflects "bad budgetary policies.") The motive of the one million plus voters that signed the TPA petition is not "anti-tax." If it were, they would have proposed an initiative to repeal or reduce one or more existing state or local taxes, like Proposition 13 did. (See, *Amador, supra,* 22 Cal. 3d 208, *Rossi v. Brown, supra,* 9 Cal. 4th 688; *Carlson v. Cory, supra,* 139 Cal.App.3d 724.)

If this Court is interested in the voters' motive in proposing TPA, it need look no further than what is stated directly in the text of the initiative. Importantly, the voters' motive in proposing TPA is a direct response to the recent actions of Petitioners, acting at the behest of many of the special interest *Amici* here, who demand higher fees and taxes without regard to the cost to taxpayers or the state's economy in doing so. These statements of <u>fact</u> are identified in Section 2 of TPA, and summarized here as follows:

· California's combined state and local tax burden is the highest

in the nation;

· Despite this fact, members of the Legislature, continue to propose new and higher taxes and fees every legislative session that, if enacted, would raise more than $200 billion annually, in addition to the taxes and fees currently imposed. [3]

· Since 2010, the government revenue derived from state and local "fees" has more than doubled.

· All of this has occurred despite the voters' prior attempts to assert some control over the process of how taxes and fees are increased.

Not surprisingly, all of this revenue has fueled an unprecedented growth in state government spending. Even Petitioner Governor Newsom's own budget reflects that since he took office General Fund expenditures on a per capita basis have increased by more than 60%, and at more than twice the rate of growth than under his predecessor *Amicus* Governor Brown.[4] The same budget document indicates that there are now 11 state workers for every 1,000 residents of the state, an all-time high.

The initiative power was designed to address the exact situation present today – to break the stranglehold that these special interest's dependent on government revenue (represented by several of the *Amici* here) have over the Legislature. If the Legislature will not protect the

[3] TPA references the 2021-22 legislative session. The same is true of the 2023-24 legislative session. California Tax Foundation, *Tax and Fee Report*, (Nov. 14, 2023) https://www.caltax.org/foundation/reports/20231114-Tax-and-Fee-Report.pdf.

[4] Schedule 6 at 2024-25 Governor's Budget, Summary of State Population, Employees, and Expenditures, https://ebudget.ca.gov/2024-25/pdf/BudgetSummary/BS_SCH6.pdf.

interests of the taxpayers and voters, then the voters must act to protect themselves.

TPA also furthers other worthy goals relating to tax and fee policy, namely, certainty, transparency, and accountability. These purposes are clearly stated within the text of TPA. (See, TPA, § 3.) None of this is intended to persuade this Court, Petitioners, or *Amici* that TPA is the right policy for the future of California. Instead, it is offered to show that the provisions of TPA are not unprecedented, untested, or radical, and that the million plus voters that signed the petition seeking to vote on TPA believe it will ultimately prove beneficial to the State and local governments. Indeed, most of the provisions of TPA merely restore or improve upon tax and fee provisions that have existed in our Constitution for decades.

Rather, it is the very fact that there are two opposing views regarding the long-term fiscal effects of TPA that this Court has previously stated "inhibits" it from holding that a constitutional revision has taken place. (*Legislature v. Eu, supra,* 54 Cal. 3d at 510 ["We are in no position to resolve the controversy between the parties regarding the long-term consequences of Proposition 140, for the future effects of that measure on 'our basic governmental plan' are simply unfathomable at this time."].) Notably, the challenge to Proposition 140 was leveled after the voters approved the constitutional amendment, not before.

B. Petitioners and *Amici* Continue to Assert without Legal Authority that TPA is Unconstitutional because it is the "Straw that Breaks the Camel's Back."

The *Amicus* briefs of former Governor Brown and the Former Directors of Finance, in particular, expand on an argument made by

Petitioners that TPA's "effect must be analyzed in light of existing limitations on government revenue-raising that began with Proposition 13 and have been steadily increasing in the 46 years since then." (Petitioners' Traverse at p. 57.) *Amicus* Governor Brown even names this legal theory, stating that the Court must invalidate the initiative measure because it is the final "straw that breaks the camel's back." (*Amicus* brief of Governor Brown at p. 43-44.) Governor Brown identifies TPA (which of course, has not been enacted) as one of "the five anti-tax measures [that] taken together, would revise the California Constitution." (*Id.* at 46.) The other four initiative measures are identified as Propositions 13 (1978); 62 (1986); 218 (1996), and 26 (2010). (*Id.*)

Amici Former Directors make the same argument "[a]dding the Measure's voter approval requirement for all new or increased taxes and fees[5] 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." (*Amicus* brief of Former Directors at p. 12-13.) The Former Directors have a different list of existing constitutional constraints that "breaks the camel's back" if TPA were enacted, citing: Proposition 98 (1988) – minimum school funding guarantee (described by *Amici* as "the most significant constraint"); Proposition 4 (1979) and Proposition 111 (1990) – state and local spending limit; Proposition 2 (2014) – budget stabilization requirement; Proposition 1A (2004) – prohibition on shifting use of property tax revenue; Proposition 22 (2010) – prohibition

[5] This is an incorrect statement of what TPA requires. Neither state nor local fees (e.g. exempt charges) require voter approval at all.

on borrowing local property tax revenue; Proposition 69 (2018) – limiting use of vehicle license tax revenue; and lastly the original constitutional provision requiring voter approval to obtain revenue through public bond debt. (*Id.* at pp. 13-20.) *Amici* Former Directors are forced to acknowledge that many of these "constraints" were proposed and placed on the ballot by the Legislature itself. (*Id.*)

Amicus Governor Brown describes the impact of all of these prior initiatives as having now reached the "tipping point." (*Amicus* brief of Governor Brown at p. 48.)

1) Neither Petitioners nor *Amici* cite any legal authority for their "Straw that Breaks the Camel's Back" legal theory.

No legal authority is cited by Petitioners or *Amici* in which any court has found an initiative measure to be an impermissible revision or an impairment of essential government functions because of the projected cumulative effect the measure may have in relation to prior constitutional amendments. This is not surprising since this Court has stated that such legal challenges must "necessarily or inevitably appear from the face of the challenged provision." (*Legislature v. Eu, supra,* 54 Cal.3d at 509-511.) The primary difficulty with Petitioners' and *Amici's* argument is that its acceptance means that as a practical matter, no further reform of the Legislature's tax or spending power can be initiated by the People, once a cumulative "tipping point" has been reached. But this Court has stated that the opposite is true – the Legislature is not insulated from reform initiated by the People, since our Constitution places "all political power" in the People. (*Id.* at 511.)

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2) The "Straw that Breaks the Camel's Back" is not a Fall-Back if TPA Standing-Alone does not Revise the Constitution or Impair Essential Government Functions.

Amici directly states what Petitioners merely imply – because TPA is the "last straw," it constitutes a revision, "even if standing alone, it would not." (*Amicus* brief of Governor Brown at p. 48.) This argument directly contradicts any argument that TPA is "clearly, positively, and unmistakably" unconstitutional on its face. (*Rossi, supra,* 9 Cal. 4th at 711.) More fundamentally, this legal theory necessarily opens up all prior constitutional amendments to new revision or impairment claims. For example, is this Court prepared to determine that Proposition 98, which, according to *Amici* Former Directors, is the "most significant constraint on the Legislature's use of General Fund revenue" now revises the Constitution or impairs essential government functions in light of other amendments enacted since its passage? (*Amicus* brief of Former Directors at p. 13.) Numerous education-funding ballot measures have been adopted post-Proposition 98: Prop. 111 (1990), Prop. 49 (2002), Prop. 30 (2012), and Prop. 55 (2016).

Beyond that, other important areas of constitutional law could be placed beyond the reach of the *current and future* voters based upon decisions made by *prior* voters. For example, voters have already enacted multiple measures protecting transportation revenues from legislative raids and diversions (Prop. 2 (1998), Prop. 42 (2002), Prop. 22 (2010), and Prop. 69 (2018)) and reforming redistricting (Prop. 11 (2008) and Prop. 20 (2010)). Will the transportation or redistricting camel's backs be broken by the next initiative on those subjects, so that those subjects are now beyond the reach of the initiative power?

Petitioners' and *Amici's* last straw argument must be rejected.

3) Our Constitution is Specifically Designed to Deal with a Broken Camel.

Real Party does not concede that TPA or any of the prior constitutional amendments referenced by *Amici* "breaks the camel's back." On the contrary, TPA merely restores and improves upon the constitutional limitations that voters have imposed on the legislative branch for decades. However, our Constitution includes a procedure for addressing a constitution with excessive, duplicative, contradictory, or unnecessary provisions. The Legislature is free, at any time, to propose a ***revision or amendment*** of the Constitution or to call for a constitutional convention to review the Constitution and to propose such revisions for approval by the voters. (Cal. Const. Art. XVIII.) This procedure, authorizing the Legislature to propose a revision of the Constitution, was enacted by the voters in 1962 (Proposition 7). In other words, the Legislature is free to review any of the prior "straws" and seek the voters' approval to amend or rescind the prior limitation if the voters deem it now unworkable or unnecessary, which it has done previously.

III.
ARGUMENT AGAINST EACH INDIVIDUAL PROPOSED *AMICUS* BRIEF

A. The ACLU *Amicus* Brief.

1) Two-Thirds Vote for all Local Government Special Taxes.

The *Amicus* brief of the ACLU re-raises the argument that a two-thirds vote for a voter-initiated special tax is "fundamentally undemocratic" and therefore should not be reinstated at the local level. (*Amicus* brief of ACLU at 13-14; citing *Los Angeles County*

Transportation Com. v. Richmond (1982) 31 Cal.3d 197, 205; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 52, 57.) The usual legal question is whether the two-thirds vote threshold for local special taxes set in Propositions 13 and 218 should be liberally or strictly construed. The *Richmond/Farrell* "strict construction" rule against Proposition 13's two-thirds vote had been overturned by the courts and by the People in express language of Proposition 218 itself. (*Rider v. County of San Diego* (1991) 1 Cal.4th 1; *Howard Jarvis Taxpayers Ass'n v. State Bd. of Equalization* (1993) 20 Cal.App.4th 1598, 1603 [recognizing reversal before Proposition 218 through *Rider*]; *Capistrano Taxpayers Ass'n v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 [recognizing reversal by the People through Proposition 218]; *id*. at 1512, n. 19 [citing *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 445].) *Amicus* ACLU cites an opinion of an appellate district three years ago, which firmly stated its disagreement: "We disagree, seeing no conflict between Proposition 218's liberal construction clause and the maxim of *Richmond* and *Farrell*." (*City and County of San Francisco v. All Persons Interested in the Matter of Proposition G* (2021) 66 Cal.App.5th 1058, 1072.)

With respect to this provision of TPA (clearly providing that all local government special taxes require a two-thirds vote, as was intended by Proposition 218 and enforced for decades), it is not clear that TPA makes any change in law at all. This Court has never addressed the issue directly and has declined to grant review of the appellate decisions that have. *Amicus* ACLU asks this Court to cement the decision of the appellate courts on the People by prohibiting them from considering an amendment to clarify their intent. But that intent

is what this Court attempted to discern in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924. If the electorate would like to make a choice now, this Court cannot now honorably recharacterize the voters as not having such a choice. (*Id.* at 931.)

It is the People's constitutional prerogative to address this disagreement. Restoring the two-thirds vote to all local special taxes is not a revision precisely because the voters may "impose a supermajority voting requirement upon themselves when that is what they want [] to do." (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 252.)

The sheer normalcy of a two-thirds vote margin likewise affirms the voters' right to make the requirement clear. There is "nothing novel" about voter approval thresholds above simple majority. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228.) Even *Richmond* said in 1982 that "[t]he constitutionality of this requirement for an extraordinary majority [in Proposition 13 alone] is not in question." (31 Cal.3d at 203.) There is no basis to call the People's potential response to *Upland* litigation a revision. Nor could it functionally impair local government when it was the widely-accepted practice for decades.

2) Charter Cities

The *Amicus* brief of the ACLU argues that charter cities should be able to evade the two-thirds vote requirement for special taxes by imposing such taxes through their charters, which are amended by a mere majority vote. Again, it is not a revision or functional impairment to prohibit charter cities from evading the two-thirds vote requirement. TPA treats charter cities and counties and general law cities and

counties the same.

Not only is the ability to enact taxes through charter amendment unnecessary and bad policy (decreased budget flexibility), but charter cities and counties may not circumvent the California Constitution. (*Howard Jarvis Taxpayers Association v. City of San Diego* (2004) 120 Cal.App.4th 374 [one holding: local taxpayers may not amend charter (through "Proposition E") to raise voter approval threshold for taxes higher than set by Proposition 218].) Therefore, if the People amend the Constitution through TPA, charter cities and counties are bound by that amendment.

Amicus ACLU misread *HJTA v. City of San Diego* to make this argument when they quote the following: "[T]he electorate of a city has the right, but not the obligation, to adopt or amend a charter, but if the electorate exercises that right, only a majority vote, not a supermajority vote, is required for approval of such charter adoption or amendment." (*Amicus* brief of ACLU at 19; citing 120 Cal.App.4th at 386.) This case did not stand for an absolute right to do *anything* in a charter, and the majority vote margin is limited to valid charter amendments. TPA does not change the vote threshold to enact or amend a city charter. TPA merely eliminates a loophole in the requirement of two-thirds vote for local special taxes by amending the Constitution to prevent charter cities from doing so with a majority-vote charter amendment.

This statement quoted by *Amicus* ACLU actually concerned Proposition F, a city council measure, not the initiative measure at issue, Proposition E. Proposition F was the San Diego city council's reaction to the initiative Proposition E, in an effort to try to defeat it by

increasing the vote threshold for its enactment.[6] In San Diego, Proposition F, while invalid, turned out to be unnecessary. As the court summarized:

> At the General Municipal Election held on March 5, 2002, two ballot measures proposing to amend the charter—Propositions E and F—were presented to the city's electorate. *Proposition E, which had been placed on the ballot pursuant to certified petitions presented to the city council*, purported to require a two-thirds vote for the imposition of any new general tax, or for any increase in any existing general tax, to be levied by the city council. *Proposition F, which the city council placed on the ballot*, purported to retroactively require from the date of the election that any measure requiring a supermajority vote (such as Proposition E) must itself be adopted by an identical supermajority vote to be effective.

(120 Cal.App.4th at 379-380, emphasis added.)

Thus, when the court spoke to the "electorate" in the quote cited by *Amicus* ACLU, it was speaking of the electorate voting on the city council's proposed measure, Measure F. The opinion simply enforced article XI, section 3(a)'s majority voter approval requirement to amend a city charter. The court's holdings that both Propositions E and F were substantively invalid were based on the same principle: The California Constitution is supreme to charters. Proposition F was invalid under the Constitution's charter provision. Proposition E was invalid under Proposition 218.

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[6] Ironically, Petitioners are attempting the same gambit with respect to TPA. The Legislature has placed ACA 13 on the same ballot as TPA, purporting to require a supermajority vote to enact TPA.

3) Vote Threshold to Reduce Taxes

Amicus ACLU argues, with bare reference to "unsettled" law and citation to opinions that have been overruled, that TPA, if enacted, would impose a higher vote threshold to impose a new or higher special tax than the vote threshold that would be required to repeal or reduce a tax. Of course, there is nothing new about this, as Propositions 13 and 218 both provide for a two-thirds vote to enact a local special tax. Indeed, TPA itself says nothing about the vote needed to repeal or reduce a tax. The answer to *Amicus* is to propose an amendment to the Constitution to increase the vote threshold to repeal or reduce a tax and to convince the voters to enact such an amendment. Again, its arguments are political, not legal.

4) Los Angeles Measure ULA

Amicus ACLU raises Los Angeles Measure ULA as an example of something that it wishes not to be undone. Again, this is a political argument and also presupposes that the voters of Los Angeles would not approve it again with a two-thirds vote, if required by TPA. The reapproval can be facilitated by the city council itself, without the necessity of collecting signatures on a petition. The validity of TPA does not rise or fall on the legality or popularity of Los Angeles Measure ULA.

B. The Edmund G. Brown, Jr. *Amicus* Brief

As stated in the Introduction *supra, Amicus* Former Governor Brown championed the very provision in TPA that he now states will cripple the state – voter approval of state taxes. Not only that, but in 2012 while Governor, and facing a massive budget deficit during the

worst recession since the Great Depression, he supported and campaigned for a statewide initiative measure (Proposition 30) increasing both the sales tax and the income tax and obtained the voters approval. The tax proposed by Proposition 30 was "temporary" and prior to its termination, the state's voters voted to extend the income tax increase again with Proposition 55, in 2016. Despite the Governor's role in seeking and obtaining voter approval of tax increases, he now states that, in many cases, voter approval is "highly unlikely." Governor Brown has the "right to be wrong" about his prognostications as part of a political debate (whether consistent with his past actions or not) but they have no moment in establishing that TPA is unconstitutional.

1) TPA Does Not "Eliminate" Core Powers of State Government

Amicus Governor Brown re-states the primary argument of Petitioners, that the Legislature's power of taxation is revoked by TPA. As discussed throughout the briefing, the Legislature's power is not revoked by TPA. TPA does not repeal or reduce a single existing tax by type or rate. TPA does not prohibit any type of tax from being proposed or imposed. This is important, because this Court has upheld prior initiatives that did, in fact, reduce or repeal an existing tax and did, in fact, prohibit the Legislature from imposing a type of tax. These are all described at length in Real Party's Return at pp. 49-51.

But even the Legislature's general legislative power to enact laws is not absolute: yet in that context, those existing limitations do not render the Legislature's taxing authority "merely advisory." For example, when a bill passes both houses of the Assembly or Senate, it still requires the Governor's approval to become law. The

constitutional provision of a gubernatorial veto imposes a limitation on the Legislature's power, over ***every*** subject matter of legislation. TPA applies only to legislation proposing new or higher taxes, and as Real Party has argued extensively the Legislature is currently required to seek voter approval to complete the enactment process for many subjects, including bond debt, amendments or repeals of prior initiative measures, amendments to the Constitution, and specific types of taxes or tax exemptions. TPA is in-keeping with these existing limitations, which are all permissible and foundational to the exercise of the People's reserved initiative power.

Amicus Governor Brown also misstates a provision of TPA by concluding that TPA "eliminates" the Legislature's spending power. (*Amicus* brief of Governor Brown at p. 24.) TPA has no such provision or effect. TPA merely requires the Legislature to inform the voters how it intends to use the revenue generated from the new or higher tax. That can include a statement that the tax revenue will be used for "unrestricted" general government purposes. (TPA, § 4, amending Cal. Const. Art. XIIIA, § 3(b)(1)(B).) Thus, the decision to limit or restrict the use of tax revenue would be a decision of the Legislature itself, not the voters. TPA does not restrict the Legislature's spending authority in any way.

2) The "Emergencies" Argument

Amicus Governor Brown largely restates the "emergencies" argument made by *Amici* Former Directors. Real Party discusses this argument *infra* in connection with its Reply to *Amici* Former Directors.

3) The "Last Straw" Argument

Amicus Governor Brown, adopts and names the "last straw"

argument proffered by Petitioners, which is addressed in part II of this Reply.

4) The Degradation of Executive Branch Power Argument

Amicus Governor Brown overstates the burden on executive branch agencies to establish the proper amount to charge a fee payor for a government product or service and the burden on the Legislature to simply approve the same. First, the Constitution now limits the amount of fees or charges to be the "reasonable cost" and imposes the burden to establish that the fee does not exceed that amount on the government. (Cal. Const. Art. XIIIA, § 3(b)-(d).) TPA instead limits fees and charges to the "actual costs" because the term "reasonable cost" has proven to be too amorphous and subject to abuse. TPA increases the burden of proof required of the government because history has shown that the existing preponderance standard has also been too amorphous and inconsistently enforced. TPA merely holds the government to a higher standard of transparency and accountability in the establishment and increasing of fees. As noted above however, even under TPA's heightened standard of proof, the government has complete control over the process of establishing the accuracy and determination of actual costs.

Like Petitioners, *Amicus* Governor Brown suggests that the Legislature will be overly burdened approving the myriad of fees imposed by the state, citing DMV fees, healthcare fees, and the like. TPA does not eliminate the role of executive branch agencies in determining the proper amount to be charged. All TPA requires is the Legislature to approve the establishment of such fees. In other words, TPA is premised on the belief that the People's elected representatives

are the appropriate body for the ultimate approval of fees so that the accountability for imposing and increasing fees is more direct and transparent. That is, elected officials should not be able to escape accountability for the amount and impacts of new or increased fees by delegating the unilateral power to enact fees to an agency consisting of unelected bureaucrats. The Legislature already does this with respect to many types of fees, as Real Party has already identified.

Nor is TPA's fee approval requirement onerous for the government to impose as it could likely be satisfied in a budget bill approving an agency's budget, since that budget might be directly tied to the fee revenue projected by the agency. This provision of TPA is not a revision.

Amicus Governor Brown does focus on TPA's requirement for the establishment and enactment of fees more concretely when he discusses the state's "cap-and-trade" program. (*Amicus* brief of Governor Brown at p. 39.) As *Amicus* Governor Brown concedes, the "cap-and-trade" program was authorized by the Legislature, but the program was created by and administered by the California Air Resources Board under the "broad discretion" provided to that agency. No member of CARB is elected. The program generates billions of dollars annually and, as *Amicus* notes, those funds are used by the Legislature on a host of different government programs. The program was challenged as being unconstitutional as a "tax" that was not approved by the Legislature in *California Chamber of Commerce v. State Air Resources Board* (2017) 10 Cal.App.5th 604. A divided appellate court upheld the program finding that it was neither a "tax" subject to the two-thirds vote requirement for taxes, nor a "fee or

charge" subject to the limitations on the enactment of either in the Constitution. Rather, the Court held that the program was "something else." (*Id.* at 653, Hull, J., dissenting.) All TPA does is make clear that the government raises revenue by the imposition of either taxes or the imposition of exempt charges. There is no other source. The cap and trade program was implemented long before the effective date of TPA (if enacted) and is unaffected by TPA; hence TPA makes no determination whether the existing cap-and-trade program is a "tax" or "exempt charge" or if it would comply with TPA. But it does provide a clear example of how the Legislature has washed its hands from voting on a program that provides it with billions of dollars of revenue to spend at a direct cost to constituents who ultimately bear the cost of the regulatory policy. TPA corrects this transfer of taxing power simply by requiring a majority vote by elected officials to approve the exempt charges, even those estimated and proposed by agency personnel.

C. The California School Boards *Amicus* Brief.

1) Proposition 98

Amicus CSBA argues that despite Proposition 98 (the constitutional minimum education funding guarantee) education funding may be "hampered" by TPA. (*Amicus* brief of CSBA at p, 13.) Interestingly, Proposition 98 is cited by other *Amici* as the single greatest limitation on the Legislature's power to control taxing and spending. It is doubtful that *Amicus* CSBA would concede that Proposition 98 is a revision of the Constitution, nonetheless. *Amicus* CSBA is again making a political argument here.

Amicus CSBA remarkably claims that it will be harmed by the elimination of the so-called *Upland* loophole, despite the fact that prior

to that decision all local special taxes, including school parcel taxes, were subject to a two-thirds vote, and that many such special taxes were approved by voters. Of course, what CSBA (and *Amici* for Local Governments) do not say is that local governments and their special interest allies are exploiting the *Upland* loophole and are, in many cases, directly connected to the "citizen led" special tax initiatives. (See, e.g. *Howard Jarvis Taxpayers Association v. City & County of San Francisco* (2020) 60 Cal.App.5th 227; *City and County of San Francisco v. All Persons Interested in the Matter of Proposition G* (*Nowak*) (2021) 66 Cal.App.5th 1058; and *Alliance San Diego v. City of San Diego* (2023) 94 Cal.App.5th 419.)

Oddly, *Amicus* CSBA cites a "lack of clarity" with respect to TPA's interaction with taxes imposed by Community Facility Districts ("CFDs"), thereby creating "havoc." In truth, TPA clarifies current law with respect to the validity of elections in such CFDs, which do not typically conduct "elector" elections, but instead conduct "landowner" elections. There is ambiguity as to whether such landowner elections are constitutional. TPA makes it clear that such elections are lawful. Similarly, TPA specifically excludes school developer fees from its provisions, in much the same way such fees are currently excluded from the provisions of Proposition 13, Proposition 218, and Proposition 26. On these two points alone, *Amicus* CSBA should support TPA.

Finally, TPA does nothing to affect local control of school districts. TPA does nothing directly affecting the funding of public schools, the administration of public schools, or the education decisions of school districts. Unfortunately, *Amicus* CSBA is dependent on the largesse of the Legislature and must toe the line and declare its

agreement that chaos will ensue if voters are permitted to have a say in the taxes sought to be imposed upon them. Their arguments, however, are political, not legal, and should be addressed to voters in a campaign and not to this Court.

D. The California Professional Firefighters *Amicus* Brief

Like many of the *Amici, Amicus* CPF predicts great harm to its ability to provide fire protection services. These same predictions were made with respect to Proposition 13 during that campaign and later determined to be unfounded or overstated. Like public education funding, the voters are typically very supportive of supplemental funding for public safety services and frequently approved special taxes by a two-thirds vote under Proposition 218. Similarly, fees imposed for firefighting are also met with general approval, though recently, fees charged by fire districts for ambulance services have caused concerns because of their magnitude and lack of transparency in how they were set. As *Amicus* CPF argues that its funding, particularly from the state's General Fund, is so volatile, it would seem that it ought to focus on reforming Proposition 98 and other legislative actions that limit the Legislature's ability to provide more stable funding. At best, TPA may affect "new" revenue. It has no effect on existing revenues of the state.

Amicus CPF cites little law, making political arguments as to why it believes TPA to be bad public policy, but those arguments are of no consequence to this Court's evaluation of the merits of the Petition and should be reserved for the voters to decide in the November General Election.

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E. The California Labor Federation *Amicus* Brief

Amici California Labor Federation, *et. al*. makes similar outlandish political arguments regarding threatened services as a result of TPA. *Amici* boldly state that TPA "puts at risk every state responsibility, service, and program that relies on government funding." (*Amicus* brief of CLF at p. 27.) Such political arguments add nothing to the legal issues presented herein.

F. The Former Directors of the Department of Finance *Amicus* Brief.

1) The Budget "Deadline" That No Longer Exists

Amici Former Directors argue that TPA would "seriously impair" the Legislature's ability to prepare and approve a budget within the constitutional deadline. (*Amicus* brief of Former Directors at p. 12.) This purported fear is exacerbated by other identified "constraints" on the Legislature in enacting a budget, including "the most significant" of all restraints, Proposition 98 (an educational funding measure, not a tax measure). (*Id.* at p. 13.) This argument is the foundation for the *Amici's* "straw that breaks the camel's back" argument addressed *infra* in Part II. Despite the fact that the Former Directors' service spans many years, they fail to cite a single example where the State Budget required a tax increase to be "balanced" as required by the Constitution. Instead, *Amici* Former Directors concede that many of the budget constraints they cite (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 of the state's finances." (*Id.* at p. 18.)

What *Amici* Former Directors fail to explain is that since

Proposition 25's passage in 2010, which provided for a majority vote to pass a budget and "budget-related" bills, June 15th is no longer a real or meaningful deadline. "The reality is that since Prop. 25 passed, California has no budget process. The 'budget bill,' which is supposed to be a comprehensive spending plan for the fiscal year reflecting the policy priorities of the state, has now morphed into an ongoing legislative process that has no beginning and no end. 'Budget bills' are now being enacted nearly a year after the June 15th deadline, despite legislators being able to collect their paychecks in the meantime."[7]

Post-Proposition 25, courts have approved the Legislature's practice of leaving blanks in the budget and filling them in throughout the year. The Legislature, and no one else, determines what *is* a balanced budget. When State Controller John Chiang, for example,

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[7](Jon Coupal, *California's budget is a scam*, (June 19, 2022) Daily Breeze, https://www.dailybreeze.com/2022/06/19/the-states-approved-budget-is-a-scam/; See, also (Dan Walters, *California's sham budget and unintended consequences*, (June 14, 2022) Cal Matters, https://calmatters.org/commentary/2022/06/californias-sham-budget-and-unintended-consequences/ ["The 1,000-page budget being passed this week is another sham, drafted largely in secret with minimal public exposure and many blanks to be filled in later. Democratic leaders and Gov. Gavin Newsom are still at odds on multi-billion-dollar issues, including the size and form of payments to Californians to offset inflation."]; and John Myers, *California budget deadline doesn't work like voters might think*, (June 15, 2021) Los Angeles Times, https://www.latimes.com/california/story/2021-06-15/california-budget-deadline-does-not-work-like-voters-might-think-analysis) ["In six of the 10 years since Proposition 25 took effect, including this year, legislators failed to finalize the budget by the June 15 deadline. Subsequent details were later passed through the use of budget "trailer bills," a nickname meant to convey that each proposal is legally linked to the main spending plan."].)

disapproved of the Legislature not passing what he felt would be a balanced budget by midnight on June 15, 2011, he pointed out that the Legislature was relying on revenues not yet authorized in existing law or trailer bills. (*Steinberg v. Chiang* (2014) 223 Cal.App.4th 338.) But the court found that "where the *Legislature* is the entity acting indisputably within its fundamental constitutional jurisdiction to enact what it designates as a balanced budget, the Controller does not have audit authority to determine whether the budget bill is in fact balanced." (*Id.* at 347, emphasis in original.) As just one example of our modern practice, "[o]n August 24, 2017, the Legislature enacted and the Governor signed a budget bill that amended the June 2017 budget act and designated certain bills as bills related to the budget bill that would be effective immediately." (*Howard Jarvis Taxpayers Assn. v. Weber* (2021) 67 Cal.App.5th 488, 494-495.) TPA is no impediment to the Legislature's ability to enact a "budget."

2) Navigating Emergencies

The *Amicus* brief of the Former Directors cite three historical events to argue that TPA impairs essential government functions and must, therefore, be removed from the ballot. As Real Party pointed out in his Return, both the Legislature and the voters have enacted laws and constitutional provisions to prepare for emergencies before they happen. The *Amicus* brief simply recasts their dire prediction if a future emergency occurs. In fact, the Governor has reported in the Proposed 2023-2024 Budget that "the state's ability to withstand an economic downturn is stronger than ever: the result of building reserves, eliminating budgetary debt, reducing retirement liabilities, and focusing on one-time spending over ongoing investments to

maintain structurally balanced budgets over the long term. As a result, the proposed budget does not call for deep reductions to critical programs, but uses a variety of tools to balance the budget moving forward."[8]

a. The 1989 Loma Prieta Earthquake

The federal government paid 75% of the government's costs of mitigating this event (Larson Decl., at 95; 98, Exh. C at 69; 72.) The remainder was funded by a temporary 0.25% sales tax increase, passed by the Legislature and signed by the Governor, and that was projected to raise about $785 million. (*Amicus* brief of Former Directors at p. 21.) Notably, some of this new revenue actually back-filled tax cuts enacted at the same time, and while the Legislature also suspended Proposition 98 education funding requirements, further reducing pressure on the state's General Fund. (*Id.*) Thus, it is not historically clear and undisputed that a tax increase was necessary at all to mitigate the impact of the Loma Prieta event. More importantly, since the legislation was approved in the year following the earthquake, there would have been ample time to obtain voter approval if TPA were in effect at the time.

More fundamentally, this reactive sales tax increase pre-dates the proactive 2004 and 2014 enactments of "Rainy Day Funds," and thus represents a bygone era of inadequate emergency planning. In 2004, proactive planning began when voters passed Proposition 58,

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[8]Senate Committee on Budget and Fiscal Review, *Summary of the Governor's Proposed 2023-24 Budget*, (Jan. 10, 2023) https://sbud.senate.ca.gov/sites/sbud.senate.ca.gov/files/Summary_of_the_Governors_Proposed_2023_24_Budget.pdf, at 3.

establishing the "Budget Stabilization Account" or BSA. (See Cal. Const., art. XVI, § 20.) In 2014, voters passed Proposition 2, updating the BSA and adding the "Public School System Stabilization Account" or PSSSA. (See Cal. Const., art. XVI, § 21.) When the Governor declares a budget emergency, the Legislature can access these funds. Thus, general and public school system emergencies have been planned for.

Proposition 58's BSA was designed to be available in all types of emergencies. The Legislative Analyst informed voters that Proposition 58 would create an $8 billion reserve target, which far surpasses the $785 million estimated to be raised in the 1989 temporary tax cited by the Former Directors:

> The $8 billion reserve target established by this proposition is much larger than the amounts included in past budget plans. This larger reserve could be used to smooth state spending over the course of an economic cycle. That is, spending could be less during economic expansions (as a portion of the annual revenues are transferred into the reserve), and more during downturns (as the funds available in the reserve are used to "cushion" spending reductions that would otherwise be necessary).[9]

In 2014, the Legislative Analyst informed voters that through Proposition 2 the reserves would be strengthened. On page 15 of the voter guide, it specifically mentioned natural disaster relief as well as budgetary relief:

> The state still could take money out of the BSA with a majority vote of the Legislature, but this could happen only when the Governor calls a budget emergency as described

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[9] California Secretary of State, *Propositions – Proposition 58*, 2004 Official Voter Information Guide, https://web.archive.org/web/20041009192632/http://primary2004.ss.ca.gov/propositions/prop58-title.html.

> above. Proposition 2 also limits how much the state could take out of the BSA. Specifically, the state could take out only the amount needed for the natural disaster or to keep spending at the highest level of the past three years—adjusted for population and cost of living. In addition, if there was no budget emergency the year before, the state could take out no more than half of the money in the BSA. All of the money could be taken out of the BSA in the second straight year of a budget emergency.[10]

The BSA and PSSSA are not the only emergency funding mechanisms in state law, but are simply the only two so far passed by voters into our Constitution. More could be created. Moreover, the Legislature has enacted statutory emergency funding programs which do not require the Governor to declare an emergency for the Legislature to access those funds.

In 2018-2019, the Legislature created the Safety Net Reserve, which holds funds to secure benefits and services for CalWORKS and Medi-Cal in case of an economic downturn. (Welf. & Inst. Code, § 11011 [Finding (d): "Establishing the Budget Deficit Savings Account will allow the state yet another mechanism to prepare in advance of a recession, thus further mitigating the impacts of state revenue losses."].) Every year, the state also deposits money into the Special Economic Fund for Uncertainties or SFEU. (Cal. Gov. Code, § 16418.) The Legislature has total discretion as to how to use the Safety Net Reserve and SFEU funds. There is an expected SFEU balance of $3.8

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[10] University of California, Hastings College of Law, *Voter Information Guide for 2014, General Election*, https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2328&context=ca_ballot_props.

billion at the end of this fiscal year.[11] Meanwhile, the constitutional PSSSA has an expected balance of $8.5 billion and the Safety Net Reserve has an expected balance of $900 million. (*Ibid.*)

b. The 2008-2009 Recession

This economic event caused an extreme "budget shortfall." The Legislature chose to address the problem with a combination of tax increases and spending reductions. However, *Amici* Former Directors concede that in the absence of a tax increase the state "would have relied on even more drastic cuts that would have fallen heavily on schools and local governments and would have resulted in more borrowing." (*Amicus* brief of Former Directors at p. 23.) In other words, tax increases helped avoid other hard choices, but tax increases were not necessary to avoid impairment of essential government functions. At the time, the BSA account had only been created a few years prior to the economic event and was insufficient to completely cover the budget shortfall. But today there is expected to be $22.4 billion in the BSA by the end of the fiscal year.[12]

c. The Covid-19 Pandemic

The *Amicus* brief of Former Directors again states that temporary tax increases were enacted to avoid having to make "significant reductions to [government] programs." (*Amicus* brief of Former Directors at p. 24.) That was a political decision, not a legal

[11]Senate Committee on Budget and Fiscal Review, *Summary of the Governor's Proposed 2023-24 Budget*, (Jan. 10, 2023) https://sbud.senate.ca.gov/sites/sbud.senate.ca.gov/files/Summary_of_the_Governors_Proposed_2023_24_Budget.pdf

[12]Senate Committee on Budget and Fiscal Review, *Summary of the Governor's Proposed 2023-24 Budget*, (Jan. 10, 2023) https://sbud.senate.ca.gov/sites/sbud.senate.ca.gov/files/Summary_of_the_Governors_Proposed_2023_24_Budget.pdf

one. Indeed, as indicated in the materials submitted by *Amici* the tax increases may not have been necessary at all. In Exhibit I, the LAO refers to an "Anticipated Budget Problem," and later concludes as follows:

> The state's actual revenue situation improved significantly faster than the state anticipated when it adopted the temporary limits on NOL deductions and credits. The unusual economic effects of the pandemic resulted in unexpected growth in General Fund revenues. The *2020-21 Budget Act* forecast 2022-23 revenues of $132 billion—an amount that reflected a sharp decline in 2020-21, followed by slower than average growth. The Governor's budget now forecasts that 2022-23 General Fund revenues will be $196 billion, or 49 percent, higher than the projection when these business tax provisions were enacted. The provisions were enacted to address the anticipated budget problem, not to raise revenue for new state spending.

While the Legislature made reactionary moves to Covid-19 similar to its responses to the 2008-2009 Recession, this does not mean those moves were ultimately necessary or wise. It also does not mean that voters would not have approved of any proposed tax increases if simply asked to do so.

In light of California's decision to rely on proactive emergency planning, and the availability of options to expand that planning through the building of budget reserves TPA's drafters saw no need to match the Colorado constitution's emergency provisions or copy the Oklahoma provision for a three-fourths vote of legislators to override the otherwise identical requirement of simple majority voter approval of state tax increases. Colorado's 1992 amendment included the contemporaneous creation of reserves (whereas they are already established here in California at this time) and require that those

emergency reserves be used first before any emergency tax can be proposed. Colorado has not used its emergency tax provision once since 1992, even during Covid-19. Thus, TPA is not radical, but rather Colorado's provisions are proving unnecessarily overcautious.

If, however, the Legislature and Governor disagree, they remain free to propose change. Any genuine concern about emergency funding can also be addressed by proposing to increase the BSA (catch-all), the PSSSA (education), the Safety Net Reserve Fund (CalWORKS and Medi-Cal), and/or the SFEU (catch-all). For the Court's easy reference, the following is the summary of the current budget reserves options according to the California Budget & Policy Center:

	Budget Stabilization Account (BSA)	Public School System Stabilization Account (PSSSA)	Safety Net Reserve	Special Fund for Economic Uncertainties (SFEU)
Is the state required to make an *annual* deposit?	**Yes**	**No** However, a deposit is required under a restricted set of circumstances.[1]	**No**	**No**
Can a required deposit be reduced or suspended — and by who?	**Yes** A required deposit can be reduced or suspended if the governor declares a budget emergency and the Legislature approves the reduction or suspension by a majority vote.	**Yes** A required deposit can be reduced or suspended if the governor declares a budget emergency and the Legislature approves the reduction or suspension by a majority vote.	**Not applicable**	**Not applicable**
When can funds be withdrawn?	Funds may be withdrawn if the governor declares a budget emergency and the Legislature passes a bill, by majority vote, to withdraw funds.[2]	Funds may be withdrawn if the governor declares a budget emergency and the Legislature passes a bill, by majority vote, to withdraw funds.[3]	The Legislature may withdraw the funds at any time by majority vote.	The Legislature may withdraw the funds at any time by majority vote.[4]
Is there a limit on the amount of funds that can be withdrawn?	**Yes** The amount that can be withdrawn is limited to the lower of 1) the amount needed to address the budget emergency or 2) half of the funds in the BSA, unless funds had been withdrawn in the previous fiscal year, in which case all of the funds remaining in the BSA may be withdrawn.	**No**[5]	**No**	**No**
How can the funds be used by the state?	Funds may be used for any purpose.	Funds must be used to support K-12 schools and community colleges.	Funds are intended to maintain existing CalWORKs and Medi-Cal benefits and services during an economic downturn, but may be used for any purpose if the Legislature so chooses.	Funds may be used for any purpose.

California Budget & Policy Center, *California's State Budget Reserves Explained*, (Jan. 2024) https://calbudgetcenter.org/resources/californias-state-budget-reserves-explained/.

G. The Local Government Associations *Amicus* Brief

Amici Local Governments mostly argue that the constitutional limitations on the imposition of local taxes that have been in place

since Proposition 218 was enacted in 1996, are now a revision. They falsely state that TPA "seeks to rewrite the entire constitutional structure of government finance in California, at both the state and local levels." (*Amicus* brief of Local Government at p. 20.) Nothing could be further from the truth. After all, with respect to local government, TPA simply eliminates any dispute about the requirement that all special taxes must be approved by a two-thirds vote, a process that was well-understood and complied with for four decades until this Court's decision in *California Cannabis Coalition v. City of Upland, supra,* 3 Cal.5th 924.

Amicus the League of California Cities here, filed an *Amicus* brief in this Court, just seven years ago in the *Upland* case. At that time, the League summarized Proposition 218's requirement to impose both general and special taxes as follows:

> The plain language of California Constitution article XIII C, sections 1 and 2 establishes three simple rules for imposition of local taxes. First, all new or increased taxes require voter approval. Second, general taxes require majority approval, but the approval must occur at the same general election when the voters are selecting members of the agency's governing body, subject to an emergency exception. Third, special taxes require two-thirds voter approval, but at either a special or general election.

Brief of Amici Curia League of California Cities at 3-4, *California Cannabis Coalition v. City of Upland, supra,* 3 Cal.5th 924 (Prior Case # S234148)

The League went even further calling it "black letter law…that those rules apply regardless of whether a tax originates with the local agency's elected governing body or with the electors themselves by way of initiative." (*Id.*; See also, *Alliance San Diego v. City of San Diego*

(2023) 94 Cal.App.5th 419, 427 [two-thirds vote was "usual practice"].) Now, *Amicus* ask this Court to disregard its prior legal position (which was authored by the attorneys representing the Petitioner here, as well as the attorneys representing *Amici* Local Governments). Instead, the League asks this Court to accept its claims that compliance with the two-thirds vote for special taxes will cripple local governments, impair essential government functions, and revise the Constitution. This Court should reject *Amici's* reversal of opinion.

With respect to the enactment of fees, TPA merely requires of local government fees that which state law already requires for most state-level fees (that a legislative body simply approve such fees). Finally, with respect to TPAs restatement of the rarely-used ability to subject a fee to referendum, that option was well-understood and well-settled and complied with until this Court's decision in *Wilde v. City of Dunsmuir, supra,* 9 Cal.5th 1105. Here again, TPA merely restores what was commonly understood for decades to be existing law. Overall, TPA's impact on local government is to restore the tax and fee structure that existed prior to 2017, the date of the *Upland* decision.

1) Proposition 2 Comparison

The Local Governments *Amicus* brief analogizes TPA to Proposition 2 of 1970 because it was labeled a "partial revision." (*Amicus* brief of Local Governments at pp. 25-26.) Proposition 2 was labeled "Partial Constitutional Revision: Local Government Legislative Constitutional Amendment." The General Analysis began: "A 'Yes' vote on this measure is a vote to revise portions of the California Constitution dealing with counties and cities." It appears to have been concluded by the legislative counsel, not the courts, that Proposition 2

was a partial revision. Which parts of Proposition 2 constituted a revision were not identified.

Nonetheless, this lay-designation of Proposition 2 proves nothing. As indicated in *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 752, Proposition 2 was but one part of a prior massive quantitative revision of the Constitution that the voters rejected in 1968. The Legislature repackaged the prior revision into four smaller measures in a special election held in 1970. There is no adjudication that Proposition 2 was an amendment or revision and it is likely that its characterization by legislative counsel simply was in response to the fact that the 1968 measure was so clearly a quantitative revision that each of its parts, once separated should be characterized as a "partial" revision.

2) "Impracticality" in Approving Fees

The *Amicus* brief of Local Governments labels the requirement that fees be approved by legislative governing bodies "impractical." (*Amicus* brief of Local Governments at p. 27.) Notably, *Amici* do not argue that compliance is impossible. Real Party suspects that local governments believe compliance with other transparency and accountability requirements, like the Brown Act (public notice of public meetings) and the Public Records Act, are similarly "impractical," costly, or burdensome. But the People place a high value on government transparency. (*National Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488 ["The Legislature that enacted the PRA recognized that increased access to government information can have both intangible and tangible costs."].) Like *Amicus* Governor Brown, *Amici* Local Governments incorrectly assume that TPA eliminates the

involvement of state or local agencies in the formulation or calculation of a proper fee. It does not. TPA simply requires the legislative body to approve those calculations. As Real Party exhibited, city councils approve an omnibus fee resolution every year. If *Amici* thinks the cost is too high, or the burden to much, they can try to persuade the voters to reject TPA.

3) Geiger v. Board of Supervisors

The *Amicus* brief of Local Governments suggests that an analysis of this Court's decision in *Geiger v. Board of Supervisors of Butte County* (1957) 48 Cal.2d 832 has been gravely neglected. (*Amicus* brief of Local Governments at pp. 34-35.) *Geiger* was indeed cited in *Wilde*, but it concerned the Constitution's prohibition against using the power of referendum to challenge an ordinance imposing a local sales tax. TPA does not change the rule against referendum of taxes, though it certainly could have.

4) Wilde v. City of Dunsmuir

Amici Local Governments argue TPA's reversal of this Court's decision in *Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105 would wreak havoc on the fiscal management of government and impair essential government functions. Such is a broad overstatement of what this Court actually held in *Wilde* and the more than 100 years of referendum power over fees that preceded it – all without impairing essential government functions. What *Amici* do not say is that the exercise of referendum power in this context is rare and difficult. In order to qualify a referendum, voters must obtain a large number of signatures of registered voters in a mere 80 days (for state statutes) and just 30 days for local ordinances. (Elec. Code § 9141, 9235.) As

more fully discussed below, the government is not without options when faced with a duly qualified referendum.

First, this Court in *Wilde* simply tried to discern the voters' intent from the words chosen in the Constitution, concluding that the words "tax" under the referendum power did not have the same meaning as the word "tax" in other parts of the Constitution. Thus, the Court concluded that the revenue measure at issue in *Wilde* was a "tax" and thus not subject to referendum, which it clearly would have been if the Court concluded that the revenue measure was not a "tax," but rather a "fee." As this Court stated, "[b]ut while we have a duty to harmonize constitutional provisions where possible, this duty does not compel us to graft the tax terminology of articles XIII C and XIII D onto the referendum provision *when the voters have not chosen to do so*." (*Wilde, supra,* 9 Cal.5th at 1117, emphasis added.) TPA accepts this Court's invitation to make a different choice.

Because the power of referendum has been applicable to fees, both before and after the Court's decision in *Wilde,* TPA merely reverses the Court's determination that the specific revenue measure in that case was a "tax." *Wilde* did not hold that all revenue measures (including fees or charges) are "taxes" under the referendum provision of the Constitution.

When the voters added their referendum power to the state Constitution in 1911, even the courts at that time drew a sharp distinction between taxes and fees. (See, e.g., *Fatjo v. Pfister* (1897) 117 Cal. 83, 85 [holding that the fee to file an inventory of a decedent's estate set at $5 plus $1 for each thousand dollars of inventory was an invalid "*tax*" and "in no sense a *fee*" because the county's costs were "the

same ... in every estate, large or small," therefore "[t]o call it a fee is a transparent evasion"]; *City of South Pasadena v. Pasadena Land and Water Company* (1908) 152 Cal. 579, 592-93 [holding that water rates are not a form of taxation because a city sells water to customers in its proprietary capacity, not its governmental capacity]; *City of Madera v. Black* (1919) 181 Cal. 306, 310-12 [holding that sewer rates are fees for a service by the city in its proprietary capacity, but if rates exceed the cost of service, they are, to that extent, an invalid tax].) Thus, from its inception, fees have been subject to the referendum power.

Since then, the voters have enacted more than one initiative to preserve and reinforce in the Constitution itself this distinction between taxes and fees, defining taxes to exclude fees (Cal. Const., art. XIII C, § 1(e)) and defining fees to exclude taxes. (*Id.*, art. XIII D, § 2(e).) TPA is simply another attempt to make this distinction clear.

Accordingly, in the 109 years between 1911 and 2020, when this Court decided *Wilde*, the statewide electorate exercised its power to referend *fees* (not taxes) eight times.[13] Similarly, at the local level, a referendum of local fees are rarely considered by the voters at an election. That is because, if a referendum of a new fee is qualified, the local government is not powerless to act. First, the referendum does not suspend the operation of the pre-existing fee, it stays operation of the newly proposed fee. Second, the local government can choose to rescind its approval of the fee subject to referendum and enact a

[13] Proposition 67, November 2016 (plastic bag fee), Proposition 72, November 2004 (state health insurance fee), Proposition 5, November 1939 (oil conservation fee), Propositions 3 and 4, November 1939 (regulatory fee on property brokers), Proposition 8, November 1928 (vehicle registration fee), Proposition 3, November 1926 (oleomargarine fee), and Proposition 29, November 1914 (State regulation of water, including fees for water rights and appropriation of water).

different fee amount, rather than place the fee measure on the ballot for voter approval. (See, Elec. Code §§ 9145, 9241, 9340.) TPA cannot therefore be revising the Constitution by ensuring the voters' right to referend fees, because it is merely proposing the *complete* return to an existing practice that is over 100 years old.

5) Fees Through Ordinances Approved by Elected Representatives

Amici Local Governments object to the requirement in TPA that local government fees be enacted by ordinance (so as to make such fees subject to referendum) and by elected representatives and not non-elected agency officials. Even *Amici* acknowledges, however, that many of these agencies consist of elected officials, acting based on their status as a county supervisor, city council person, or some other elected official. Thus, TPA imposes no burdensome requirement on those agencies. With respect to an agency that imposes fees on Californians without elected representative oversight, such fees will have to be approved by the legislative body that has such oversight, most likely the legislative body that created the agency. In some cases, that will be the Legislature.

As far as TPA's requirement that a fee be enacted by ordinance, our courts have long eliminated the legal distinction between an "ordinance" and a "resolution" as it relates to the exercise of referendum power (*Hopping v. City of Richmond* (1915) 170 Cal. 605, 611; *Yesson v. San Francisco Municipal Transportation Agency* (2014) 224 Cal. App. 4th 108, 117), but even if the courts were to conclude that "ordinance" means "ordinance," the power to enact a fee by ordinance can be provided by the Legislature in subsequent legislation, like many districts already possess. Following the passage of Proposition 62 in

1986, there was doubt as to whether school districts could continue to impose parcel taxes. This, and other doubts, were resolved with the passage of statutes such as Government Code section 50079, granting clear and satisfactory authorization. (*Borikas v. Alameda Unified School Dist.* (2013) 214 Cal.App.4th 135, 139 ["The Legislature responded with a host of statutory provisions expressly delegating taxing authority to a panoply of local districts, including school districts."].) In short, aside from adding a baritone section to the swelling chorus of political arguments, the *Amicus* brief of Local Governments adds little to the debate at issue in this proceeding.

H. The Remaining *Amicus* Briefs

The remaining *Amicus* briefs continue with their predictions of grave consequences to the government if TPA is allowed to be presented to the voters. For those briefs that include any legal arguments at all, those arguments have been fully addressed *infra*.

IV.
CONCLUSION

The California Constitution vests all political power in the People. (Cal. Const. art. II, § 1.) For over a century, the instrument by which the People have manifested that power has been the initiative process as provided for in article II. It is the sole means by which the People of California can directly and collectively disagree with tax policy choices the Legislature and Executive have made. The courts have zealously guarded the People's right to use the initiative, adopting a longstanding tradition of letting the voters decide at the ballot box in all but the clearest of cases of a constitutional revision. It is that

tradition that Petitioners and *Amici* challenge.

At no time is protection of the initiative process more important than when the political power of the Legislative and Executive branches is concentrated in the hands of the few; indeed, it was that situation that gave rise to the initiative process in the first place and it is the perception that such conditions exist again today that led over one million voters to sign petitions to place TPA on the ballot. Petitioners and their *Amici* seek to stifle the People's voice and enlist this Court in their effort to close the last avenue available to the People to challenge their government to work as hard as the People do to be fiscally responsible with their limited revenue. Petitioners and their *Amici* have every right to oppose TPA at the ballot box, but their efforts to take away the People's opportunity to make up their own minds on the measure should be rejected.

For all the reasons previously argued in briefs filed in this Court and the reasons expressed herein, Real Party has shown good cause why the requested emergency petition for writ of mandate should be denied.

Dated: February 14, 2024

BELL, McANDREWS & HILTACHK, LLP

By: _____

THOMAS W. HILTACHK
Attorney for Real Party in Interest

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) and 8.360(b)(1) of the California Rules of the Court, the enclosed brief is produced using 13-point Times New Roman type including footnotes and contains approximately 10,544 words, which is less than the total words permitted by the rules of the court. Counsel relies on the word count of the computer program, Microsoft Word 2010, used to prepare this brief.

Dated: February 14, 2024

BELL, McANDREWS & HILTACHK

By: _____

THOMAS W. HILTACHK
Attorney for Real Party in Interest

PROOF OF SERVICE

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

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My electronic business address is kmerina@bmhlaw.com.

On February 14, 2024, I served the following:

REPLY TO THE AMICUS CURIAE BRIEFS SUBMITTED IN SUPPORT OF PETITION

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

Richard Rios
Email: RRios@olsonremcho.com
Margaret R. Prinzing
Email: mprinzing@olsonremcho.com
Attorney for Legislature of the State of California, Governor Gavin Newsom, and John Burton

Mary Mooney
mmooney@sos.ca.gov
Attorney for Respondent, Secretary of State

Via US Mail: *pursuant to Rule 8.29 of CRC.*
Office of the Attorney General
PO Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on February 14, 2024 at Sacramento, California.

K Merina

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:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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LaKeitha Oliver Strumwasser & Woocher LLP	loliver@strumwooch.com	e-Serve	2/14/2024 1:39:20 PM
Margaret Prinzing Olson Remcho, LLP 209482	mprinzing@olsonremcho.com	e-Serve	2/14/2024 1:39:20 PM
Anita Ceballos California School Boards Association	aceballos@csba.org	e-Serve	2/14/2024 1:39:20 PM
Paula Herndon Greines Martin Stein & Richland LLP	pherndon@gmsr.com	e-Serve	2/14/2024 1:39:20 PM
Salvador Perez Strumwasser & Woocher LLP 309514	sperez@strumwooch.com	e-Serve	2/14/2024 1:39:20 PM
Eric Eisenhammer Dauntless Communications	eric@dauntlesscommunications.com	e-Serve	2/14/2024 1:39:20 PM
Sloan Simmons Lozano Smith 233752	ssimmons@lozanosmith.com	e-Serve	2/14/2024 1:39:20 PM

Michael Strumwasser Strumwasser & Woocher LLP 58413	mstrumwasser@strumwooch.com	e-Serve	2/14/2024 1:39:20 PM
Ben Granholm	ben@swingstrat.com	e-Serve	2/14/2024 1:39:20 PM
William Turner Turner Law 161475	greg@turnersalt.com	e-Serve	2/14/2024 1:39:20 PM
Michael Colantuono Colantuono, Highsmith & Whatley, PC 143551	mcolantuono@chwlaw.us	e-Serve	2/14/2024 1:39:20 PM
Sharon Terman Legal Aid At Work 237236	sterman@legalaidatwork.org	e-Serve	2/14/2024 1:39:20 PM
Inez Kaminski Olson Remcho, LLP 345584	ikaminski@olsonremcho.com	e-Serve	2/14/2024 1:39:20 PM
Stanley Young Covington & Burling LLP	syoung@cov.com	e-Serve	2/14/2024 1:39:20 PM
Kathleen Storm Mastagni Holstedt 244298	kathleen@mastagni.com	e-Serve	2/14/2024 1:39:20 PM
Robin Meadow Greines Martin Stein & Richland LLP 51126	rmeadow@gmsr.com	e-Serve	2/14/2024 1:39:20 PM
Beverly Palmer Strumwasser & Woocher, LLP 234004	bpalmer@strumwooch.com	e-Serve	2/14/2024 1:39:20 PM
Alexa Howard Office of the California Secretary of State 309197	lhoward@sos.ca.gov	e-Serve	2/14/2024 1:39:20 PM
Adrian Granda City of San Diego	ADGranda@sandiego.gov	e-Serve	2/14/2024 1:39:20 PM
Matthew Taylor Messing Adam & Jasmine LLP 264551	matthew@majlabor.com	e-Serve	2/14/2024 1:39:20 PM
Robin Johansen Olson Remcho LLP 79084	rjohansen@olsonremcho.com	e-Serve	2/14/2024 1:39:20 PM
Neil Sawhney ACLU of Northern California 300130	nsawhney@aclunc.org	e-Serve	2/14/2024 1:39:20 PM
Natalie Boust California Business Roundtable	natalie@cbrt.org	e-Serve	2/14/2024 1:39:20 PM
Mike Young California Environmental Voters	mike@envirovoters.org	e-Serve	2/14/2024 1:39:20 PM

Richard Rios Olson Remcho, LLP 238897	rrios@olsonremcho.com	e-Serve	2/14/2024 1:39:20 PM
Matthew Slentz Colantuono, Highsmith & Whatley, PC 285143	mslentz@chwlaw.us	e-Serve	2/14/2024 1:39:20 PM
Jack Cohen 123022	jacohen3@ix.netcom.com	e-Serve	2/14/2024 1:39:20 PM
Adam Skaggs Giffords Law Center 4211173	askaggs@giffords.org	e-Serve	2/14/2024 1:39:20 PM
Katarina Rusinas Greines, Martin, Stein & Richland LLP 352688	krusinas@gmsr.com	e-Serve	2/14/2024 1:39:20 PM
Tracey West Colantuono, Highsmith & Whatley, PC	twest@chwlaw.us	e-Serve	2/14/2024 1:39:20 PM
Thomas Hiltachk Bell, McAndrews & Hiltachk, LLP 131215	tomh@bmhlaw.com	e-Serve	2/14/2024 1:39:20 PM
Paul Dress ARC	Paul.Dress@asm.ca.gov	e-Serve	2/14/2024 1:39:20 PM
Jason Bezis Law Offices of Jason A. Bezis 225641	bezis4law@gmail.com	e-Serve	2/14/2024 1:39:20 PM
Hector Barajas	hbarajas@gmail.com	e-Serve	2/14/2024 1:39:20 PM
David Goodwin Covington & Burling LLP 104469	dgoodwin@cov.com	e-Serve	2/14/2024 1:39:20 PM
Christopher Hoene California Budget & Policy Center	choene@calbudgetcenter.org	e-Serve	2/14/2024 1:39:20 PM
Coyote Marin Court Added	c.c.marin@ic.institute	e-Serve	2/14/2024 1:39:20 PM
Gary Winuk Kaufman Legal Group, APC 190313	gwinuk@kaufmanlegalgroup.com	e-Serve	2/14/2024 1:39:20 PM
Steven Reyes Calfornia Secretary of State	steve.reyes@sos.ca.gov	e-Serve	2/14/2024 1:39:20 PM
Keith Bray California School Baords Association	legal@csba.org	e-Serve	2/14/2024 1:39:20 PM
Christina Williamson Mastagni Holstedt, A.P.C.	cwilliamson@mastagni.com	e-Serve	2/14/2024 1:39:20 PM

Sara Cooksey American Civil Liberties Union Foundation of Northern California	scooksey@aclunc.org	e-Serve	2/14/2024 1:39:20 PM
Dale Larson Strumwasser & Woocher LLP 266165	dlarson@strumwooch.com	e-Serve	2/14/2024 1:39:20 PM
Thomas Hiltachk Bell, McAndrews & Hiltachk, LLP 131215	kmerina@bmhlaw.com	e-Serve	2/14/2024 1:39:20 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.

2/14/2024

Date

/s/Thomas Hiltachk

Signature

Hiltachk, Thomas (131215)

Last Name, First Name (PNum)

Bell, McAndrews & Hiltachk, LLP

Law Firm