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.

PETITIONERS' REPLY TO BRIEFS AMICUS CURIAE

CRITICAL DATE: JUNE 27, 2024

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Pursuant to the Court's order dated November 29, 2023, Petitioners respectfully submit their reply to the briefs amicus curiae filed in support of Real Party in Interest Thomas Hiltachk.

INTRODUCTION

Real Party's amicus briefs all share a common theme: that the Measure[1] at issue here would only add to a series of tax reduction amendments already made to the California Constitution. Therefore, they argue, the Measure cannot be a revision nor can it impair essential government functions.

Amici are wrong on both counts. First, the Measure goes far beyond what Propositions 13, 218, and 26 previously did. If enacted, this Measure would strip the Legislature of its authority to enact statewide taxes, something that none of the three previous constitutional amendments even came close to doing. Real Party and his amici cannot deny that the Measure would eliminate the Legislature's core foundational power to tax. This in itself would revise the Constitution, but as Petitioners and their amici have demonstrated, the Measure would also severely limit executive branch functions in ways that no previous measure ever has, and limit the voters' power to increase their own taxes. This fundamental rebalancing of the powers of the three branches of government would revise the Constitution, which an initiative may not do.

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[1] As in our previous pleadings, Petitioners refer to Real Party's initiative as "the Measure."

Second, the Measure would impair essential government functions because it would remove the linchpin that has kept local government afloat since passage of Propositions 13 and 218. That linchpin has been the State's ability to support local government, most notably by funding our public schools but also with support for everything from streets to public safety. As the amicus briefs supporting Petitioners amply demonstrate, these essential services are already severely strained by lack of funding. In the words of former Governor Brown, enactment of the Measure will be the straw "that *breaks* the camel's back."[2]

Most of the points made by Real Party's amici need no reply. We address the few that do merit reply by grouping them together with respect to the revision and essential government function issues at the heart of this case. Lastly, we address one brief's argument that the Court should sever portions of the Measure but leave it on the ballot.

ARGUMENT

I.

THE ARGUMENTS MADE BY REAL PARTY'S AMICI CONFIRM THAT THE MEASURE IS AN IMPERMISSIBLE REVISION

Real Party's amici make arguments about Propositions 13, 218, and 26 that only further demonstrate why *this* Measure stands apart and would revise the Constitution by

[2] Amicus Brief of Edmund G. Brown Jr. at p. 44, filed Jan. 31, 2024, emphasis in original.

removing foundational powers from the legislative and executive branches of our government.

Reform California argues that the Measure "is hardly different in nature or function than the voting rights on other categories of taxes established by Prop 13 and Prop 218."[3] The California Farm Bureau Federation brief argues that the Measure merely "represents an extension of prior tax limitation efforts" and clarifies voter intent.[4] A group of local taxpayer associations argues that the Measure is not only consistent with Propositions 13, 218, and 26, but with a 1914 constitutional amendment that ended California's poll tax.[5] For his part, Jack Cohen, attorney and co-drafter of Proposition 218, blames the courts for "not properly interpreting and applying the provisions of Proposition 13" and the voters for electing too many Democrats to the Legislature.[6]

But these amici fail to note that Proposition 13 expressly *recognized and affirmed* the Legislature's taxing authority. Although Proposition 13 added a two-thirds vote requirement when it was passed in 1978, section 3 of Proposition 13's newly enacted article XIII A read:

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[3] Amicus Letter of Reform California ("Reform Cal. Ltr.") at p. 6, filed Jan. 30, 2024.

[4] Amicus Brief of Cal. Farm Bureau Federation, et al. ("Cal. Farm Bureau Fed. Br.") at p. 8, filed Jan. 31, 2024.

[5] Amicus Brief of Alameda County Taxpayers' Association, et al. ("Local Taxpayer Assn. Br.") at pp. 17-24, filed Jan. 31, 2024.

[6] Amicus Brief of Jack Cohen ("Cohen Br.") at pp. 21, 31, filed Jan. 31, 2024.

> From and after the effective date of this article, *any changes in State taxes* enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation *must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature*, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.[7]

Thus, the only restrictions that Proposition 13 put on the Legislature's taxing authority were to add a two-thirds majority vote requirement and prohibitions on real property taxes. Proposition 218 did not change that part of section 3, and its only limitation on the Legislature was to prohibit it from imposing a higher signature requirement for local revenue-reducing initiatives than that applicable to statewide statutory initiatives. (Cal. Const., art. XIII C, § 3.) The effect of *that* provision has been to cut in half the signature requirement for local initiatives that would reduce or repeal local taxes, assessments, fees or charges, while leaving the signature requirements for initiatives that would raise or impose new taxes

[7] UC Hastings Scholarship Repository, Text of Proposition 13, at p. 57, available at https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1849&context=ca_ballot_props, emphasis added.

or charges at twice that number.[8] And although Proposition 26 redefined the difference between a fee and a tax, it did not change Proposition 13's affirmation of the Legislature's taxing authority.[9]

None of these prior measures did what this Measure would do: take away the Legislature's taxing authority entirely, and substitute the power to merely recommend taxes to the electorate. That in itself removes one of the core foundational powers of the legislative branch, which has the resources and experience necessary to understand not only the State's budget but the impact of a new or increased fee or tax on the State's economy. (See *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 595, quoting *Myers v. English* (1858) 9 Cal. 341, 349 ["'[T]he power to collect and appropriate the revenue of the State is one peculiarly within the discretion of the Legislature.'"];

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[8] Article II, section 8, subdivision (b) sets the signature requirement for a statewide statutory initiative at five percent of the votes for all candidates for Governor at the last gubernatorial election. Elections Code section 9215 sets the signature requirement for a city initiative ordinance at ten percent of the voters of the city.

[9] Reform California argues that Propositions 13, 218, and 26 were "deemed appropriate," but Petitioners are not aware of any preelection legal challenge to the validity of Propositions 218 or 26. (Reform California Ltr. at p. 4.) Petitioners note one post-election decision that ruled on two constitutional arguments brought against Proposition 218, neither of which addressed the issues now before this Court. (*Consolidated Fire Prot. Dist. v. Howard Jarvis Taxpayers Assn.* (1998) 63 Cal.App.4th 211, 219-226 [initiative did not unconstitutionally impair obligations of contract and was not an unconstitutional referendum].)

Ingels v. Riley (1936) 5 Cal.2d 154, 163 ["It is elementary that the Legislature is vested with all governmental powers in matters of regulation and revenue not reserved to the federal government or denied to the state Legislature by our own or the Federal Constitution."].)

Thus, it is simply not enough to cite this Court's opinions in *Rossi v. Brown* (1995) 9 Cal.4th 688 and *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220.[10] Those cases dealt only with use of the initiative process to impose tax limitations at the local level, a situation that has done much to centralize fiscal policy at the state level but thus far has not amounted to a revision. Nor is it enough to say that in 1914 the voters repealed a poll or head tax and prohibited the Legislature from enacting one in the future.[11] Nothing in the 1914 measure prohibited the Legislature from replacing the tax with another tax, as the Measure at issue here would do.

Similarly, it does not help to argue that the initiative and referendum powers themselves were added to the Constitution by amendment in 1911, not as a constitutional

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[10] See Cohen Br. at pp. 26-28, 34; Cal. Farm Bureau Fed. Br. at p. 2.

[11] Local Taxpayer Assn. Br. at pp. 17-18. Unlike the poll taxes previously used to prevent minorities from voting in some parts of the country, this tax was assessed on every male between the ages of 21 and 60. See UC Hastings Scholarship Repository, 1914 Constitutional Amendment, available at https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1064&context=ca_ballot_props.

revision. (Cohen Br. at pp. 35-37.) To Petitioners' knowledge, no legal challenge was ever made to the amendments that added the initiative and referendum powers, and in any event the 1911 measure cannot be evaluated under today's revision jurisprudence. First, the 1911 amendments were placed on the ballot by the Legislature after receiving the approval of two-thirds of both houses of the Legislature, as all constitutional amendments were at the time because, of course, there was not yet any mechanism for proponent-sponsored initiative constitutional amendments. (Sen. Const. Amend. No. 22, Stats. 1911 (1910-1911 Reg. Sess.) res. ch. 22, p. 1655; see *Livermore v. Waite* (1894) 102 Cal. 113, 118-119.) Like any legislatively referred initiative, it therefore had the benefit of legislative deliberation – a key distinguishing feature for such an immense change today. Accordingly, even if the 1911 direct democracy amendments would be considered a revision today, they were adopted according to the procedures by which constitutional revisions are currently enacted regardless. The Measure here has had none of the legislative deliberation that the 1911 amendments did.

Moreover, Mr. Cohen wrongly asserts that the initiative power "shut out" the Legislature and the Governor from legislating, while the Measure keeps the Legislature and Governor involved, to a certain extent, in taxation matters. (Cohen Br. at p. 36.) The initiative power did no such thing; rather, it left the Legislature free to legislate in any area of the law where it could legislate before, while allowing the People to

also enact legislation and constitutional amendments. A more appropriate comparison would be a hypothetical proposal that sought to subject certain state and local citizen initiatives to legislative approval.

Finally, amici's attempt to downplay the effect of the Measure on the modern functioning of our legislative and executive branches ignores the crucial role that the Legislature's ability to delegate power to executive branch agencies plays in governance. Indeed, this Court has refused to take a narrow view of the administrative rule-making power because to do so "would be to overlook one of the fundamental purposes of the policy of delegation of powers and *to deprive the Legislature and the people of the state of one of the major benefits thereof*." (*First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 549, emphasis added.)

Yet that is exactly what the Measure would do: deprive the Legislature and the people of the expertise and efforts that executive branch agencies currently dedicate to advancing state policy, an approach that ignores the realities of California government. By requiring the Legislature and local legislative bodies to review and adopt every change in a fee or fine – even one that is revenue neutral and affects only one taxpayer – the Measure would profoundly hamper those bodies' ability to attend to the very real problems the State now faces. If changes to every administrative fee or fine must be passed by both houses and signed by the Governor, rather than updated by

administrative agency regulation, the already-crushing workload for these two branches would become exponentially worse.

The same would be true for local legislative bodies, particularly those in large cities or counties. The Los Angeles City Council already meets Tuesdays, Wednesdays, and Fridays of every week; the Los Angeles County Board of Supervisors meets every Tuesday and reserves its meeting on the last Tuesday of the month for legally required hearings on a variety of topics, including fee increases.[12] These meetings are, of course, in addition to committee or commission meetings or other meetings that local legislators must also attend. Even if local legislators can draw on agency expertise in their decision making, to require these meetings to include increases in every fee or fine that may affect a single person will inevitably add to their length and complexity.

II.

REAL PARTY'S AMICI MISREPRESENT THE MEASURE'S IMPACT ON ESSENTIAL GOVERNMENT FUNCTIONS

To the degree they address Petitioners' essential government functions argument at all, Real Party's amici insist that the Measure's impact on essential government functions will be minimal or that the doctrine does not apply in this case.

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[12] Los Angeles Office of the City Clerk, Council and Committee Meetings, https://clerk.lacity.gov/clerk-divisions/cps/council-committee-meetings; Board of Supervisors of the County of Los Angeles, Board Meeting/Agendas, https://bos.lacounty.gov/board-meeting-agendas/.

Reform California merely argues that "state and local governments in California have more than enough money to fulfill their duties for providing essential government functions,"[13] a subjective opinion easily refuted by facts included in the amicus briefs of professional firefighters and other safety associations filed in support of Petitioners.[14]

Real Party's amicus Jack Cohen argues that the essential government functions doctrine only applies in "the most extraordinary circumstances,"[15] tracing the doctrine back to a 1915 case, *Chase v. Kalber* (1915) 28 Cal.App. 561. (Cohen Br. at pp. 37-40.) Mr. Cohen neglects to point out that *Chase* involved use of the referendum power to prevent local street grading, an essential function to be sure, but hardly an extraordinary circumstance. (*Chase*, at p. 563.)

As Petitioners and their amici have demonstrated, however, the Measure at issue here does in fact constitute an extraordinary circumstance. The brief of the California Statewide Law Enforcement Association, et al. documents in detail the dire shortages that exist in our public safety agencies and our courts.[16] Most of these, the brief explains, are due to the fact that these agencies lack the resources to hire sufficient staff.

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[13] Reform California Ltr. at p. 8.

[14] See, e.g., Amicus Brief of Cal. Professional Firefighters ("Cal. Prof. Firefighters Br.") at pp. 9-11, filed Jan. 30, 2024.

[15] Cohen Br. at p. 37.

[16] Amicus Brief of Operating Engineers Local 3, et al., at pp. 17-30, filed Jan. 31, 2024.

The brief of the California Professional Firefighters points to another extraordinary circumstance: the increasing proliferation of wildfires in our state, which has stretched our firefighters to the breaking point.[17] And the brief of former Department of Finance Directors Cohen, Gage, and Matosantos demonstrates just how much of California's current budget is made up of restricted revenue that is unavailable to meet those needs.[18]

The Finance Directors' brief also demonstrates how difficult it would be for the Legislature to conform state tax law to changes in federal law, citing the 2017 Tax Cuts and Jobs Act during the Trump administration. (DOF Directors Br. at p. 11.) And noting that lawmakers have historically been permitted to utilize tax increases to address budgetary shortfalls, the Directors conclude:

> The Measure eliminates the ability to impose targeted new taxes to meet the constitutional deadline to balance the state budget and provides no escape valve in times of fiscal crisis.

(*Id.* at p. 18.)

Nevertheless, the Local Taxpayer Association's amicus brief argues that voters have approved statewide taxes before, citing passage of temporary increases in sales and income taxes in 2012 and 2016. (Local Taxpayer Assn. Br. at p. 35.)

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[17] Cal. Prof. Firefighters Br. at pp. 9-11.

[18] Amicus Brief of Former Directors of the State of California Dept. of Finance ("DOF Directors Br.") at pp. 12-17, filed Jan. 31, 2024.

Amici omit the fact that in 2009, at the height of the Great Recession, the voters rejected extension of the emergency tax increases that the Legislature had passed in response to that fiscal crisis.[19] The Local Taxpayers Associations also argue that Propositions 13 and 218 imposed local voter approval requirements without impairing essential government functions. (Local Taxpayer Assn. Br. at p. 32.) As discussed above, Petitioners' amici have demonstrated that is not the case, and the only thing that has kept many local services from deteriorating further at the local level has been an infusion of state funds.[20]

The truth is that a voter approval requirement strips state and local legislative bodies of their authority to raise revenue. The Third District Court of Appeal made that clear in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, where the Court of Appeal held that imposition of a voter approval requirement in article XIII D meant that a local government had no authority to impose stormwater fees. (*Id.* at pp. 579-580.) The issue in that case was whether the local governments were entitled to state reimbursement for newly created conditions for the governments' stormwater discharge permits. The Court of Appeal held that the voter approval requirement in article XIII D, section 6 entitled local governments to State reimbursement for the cost of the new

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[19] UC Hastings Scholarship Repository, Proposition 1a Popular Vote Results, Special Elec. (May 19, 2009), available at https://repository.uclawsf.edu/ca_ballot_props/1294/.

[20] See, e.g., Cal. Prof. Firefighters Br. at pp. 9-11.

permit requirements because voter approval "limits permittees' police power to *proposing* the fee." (*Id.* at p. 580, emphasis added.) The court then quoted this Court's statement in *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 that state reimbursement was necessary under article XIII D, section 6 because local agencies "are 'ill-equipped' to assume increased financial responsibilities because of the taxing and spending limitations that article XIII A and XIII B impose." (*Dept. of Finance v. Com. on State Mandates*, *supra*, 85 Cal.App.5th at p. 580.)

The increased financial responsibilities at issue in *Commission on State Mandates* involved new responsibilities added by the State, but there are, of course, many other increased responsibilities facing local governments that do not come out of Sacramento. Those responsibilities are the result of a host of factors, including climate change, lack of affordable housing, and crumbling infrastructure due to years of deferred maintenance. To argue that the voters "might" approve new taxes to meet those challenges ignores the fact that they very well might not, particularly if they must do so by a two-thirds majority vote.[21] That will inevitably mean leaving fire and

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[21] Local Taxpayer Assn. Br. at p. 35; see also *Totten v. Bd. of Supervisors* (2006) 139 Cal.App.4th 826, 839 ("'voters are not immersed in day-to-day government so as to be able to make reasoned judgments on the complex financial management of government. . . .'"), quoting *Convention Center Referendum Com. v. Dist. of Columbia Bd. of Elections & Ethics, etc.* (D.C. 1981) (en banc) 441 A.2d 889, 925.

police departments severely short-staffed, roads and bridges unrepaired, and cities and counties unable to help the thousands of unhoused people on their streets.[22]

Real Party's amici cannot escape the fact that previous revenue reduction measures, including voter approval requirements, have already stressed California government. If the Measure were enacted and it left the Legislature unable to respond to a crisis, the ability of state and local government to provide essential government services "would be seriously impaired." (*Wilde v. Dunsmuir* (2020) 9 Cal.5th 1105, 1123, quoting *Geiger v. Bd. of Supervisors* (1957) 48 Cal.2d 832, 839.) The Measure is therefore invalid on that ground alone.

III.

SEVERABILITY ANALYSIS WILL NOT SAVE THE INITIATIVE

The Local Taxpayer Associations make the unusual suggestion that the Court "take a granular approach by severing the offending provisions, and retaining those that do not suffer from the defects asserted by Petitioners." (Local Taxpayer Assn. Br. at p. 39.)

The Associations make no attempt to identify "the offending provisions," but presumably they refer to those provisions that: (1) impose a voter approval requirement for

[22] For a detailed description of the homelessness crisis in the City of Los Angeles, see the Amicus Brief of the United to House LA Coalition, at pp. 25-27, filed Jan. 31, 2024.

taxes on the Legislature; (2) force the Legislature to relinquish its spending power over revenues raised by special taxes; (3) strip the executive branches of government of the power to impose charges of any kind, thereby prohibiting much agency rule-making, enforcement, interpretations, adjudications and more; (4) redefine many fees as taxes so as to place them beyond the power of the Legislature to enact; (5) require all new or increased fees or charges to be passed by legislative bodies, be reasonable and limited to actual cost, and be defensible by clear and convincing evidence; and (6) restructure the initiative and referendum powers in favor of voters who disapprove of revenue increases and against those who do not, including overruling this Court's decisions in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, and *Wilde v. Dunsmuir*, *supra*, 9 Cal.5th 1105.[23]

Those are the Measure's chief points and purposes, as described in the California Attorney General's circulating title and summary of the Measure, which the voters saw before deciding whether to sign the petition in favor of its qualification:

> LIMITS ABILITY OF VOTERS AND STATE AND LOCAL GOVERNMENTS TO RAISE REVENUES FOR GOVERNMENT SERVICES. INITIATIVE CONSTITUTIONAL AMENDMENT. For new or increased

[23] For a discussion of the Measure's invalid provisions, see Petitioners' Memorandum of Points and Authorities filed in support of the Emergency Petition for Writ of Mandate at pp. 39-69.

> state taxes currently enacted by two-thirds vote of Legislature, also requires statewide election and majority voter approval. Limits voters' ability to pass voter-proposed local special taxes by raising vote requirement to two-thirds. Eliminates voters' ability to advise how to spend revenues from proposed general tax on same ballot as the proposed tax. Expands definition of "taxes" to include certain regulatory fees, broadening application of tax approval requirements. Requires Legislature or local governing body set certain other fees.[24]

The Measure does include other provisions, such as requiring a sunset provision on state taxes and specific statements in the ballot materials regarding the nature and duration of every proposed tax, including the tax rate. Notably, the rate and duration of a proposed tax must already be included in the ballot question under Elections Code section 13119, subdivision (b):

> If the proposed measure imposes a tax or raises the rate of a tax, the ballot shall include in the statement of the measure to be voted on the amount of money to be raised annually and the rate and duration of the tax to be levied.

The Measure also makes certain changes to article XIII D, which deals with assessments and property-related fees, and it amends

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[24] Cal. Dept. of Justice, Title and Summary Issued on Feb. 3, 2022, available at https://oag.ca.gov/initiatives/search?combine=21-0042.

article XIII to require that property tax revenues "shall be apportioned according to law to the districts within the counties." (Measure, Sec. 8, proposed art. XIII, § 1, subd. (c), § 14.)[25]

Petitioners doubt that Real Party and his sponsors would have spent $15.8 million to put this Measure on the ballot if it contained only the provisions described in the preceding paragraph and not the provisions at issue here.[26] Certainly the voters, including those who signed Real Party's petition, were told about the latter provisions in the Measure's title and summary. Likewise, the website for the Measure highlights the challenged provisions:

> **Empowers voters** with the right to approve or reject all new state and local taxes.
>
> **Increases accountability** and transparency so politicians spend our tax dollars more efficiently.
>
> **Stops politicians** from using "hidden taxes" disguised as fees to drive up the cost of government services.[27]

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[25] Attached as Exhibit A to the Emergency Petition for Writ of Mandate.

[26] Cal. Secretary of State, Cal-Access, Californians For Taxpayer Protection And Government Accountability, Sponsored By California Homeowners, Taxpayers, And Businesses (ID# 1442599), https://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1442599 [showing $15,842,356.22 in "petition circulating" expenditures in 2021-2022].

[27] Taxpayer Protection and Accountability Act, available at https://taxpayerprotection.com/.

In a situation like this one, where the Measure's many main provisions render it unconstitutional, this Court can and should do what it did in taking another measure off the ballot in *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687:

> In a preelection opinion, . . . it would constitute a deception on the voters for a court to permit a measure to remain on the ballot knowing that most of its provisions, including those provisions which are most likely to excite the interest and attention of the voters, are invalid.
>
> (*Id.* at p. 716, fn. 27.)

CONCLUSION

The California Farm Bureau Federation's amicus brief describes the Measure as "an evolution of 'tax reform,' not the revolution by revision alleged by Petitioners."[28] As every school child is taught, "evolution" can lead to extinction of some species if they lack the ability to adapt to change.[29] Far from bolstering Real Party's defense of the Measure, the amicus briefs filed in his support demonstrate the dangers of allowing this kind of evolution to proceed.

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[28] Cal. Farm Bureau Fed. Br. at p. 8.

[29] See Cal. Dept. of Education, Cal. Science Test – HS-LS4-1, Biological Evolution: Unity and Diversity, available at https://www.cde.ca.gov/ta/tg/ca/documents/itemspecs-hs-ls4-1.docx.

Dated: February 14, 2024

Respectfully submitted,

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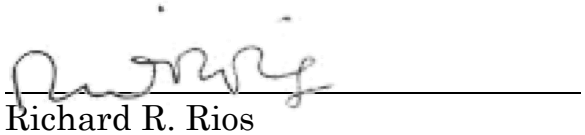
BRIEF FORMAT CERTIFICATION PURSUANT TO RULE 8.204 OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has a typeface of 13 points or more and contains 4,171 words as counted by the Microsoft Word 365 word processing program used to generate the brief.

Dated: February 14, 2024



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PROOF OF SERVICE

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

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 1901 Harrison Street, Suite 1550, Oakland, CA 94612.

On February 14, 2024, I served a true copy of the following document(s):

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Nina Leathley

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(00505731-5)

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Supreme Court of California

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