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 IN SUPPORT OF EMERGENCY PETITION FOR WRIT OF MANDATE

STAY REQUESTED
CRITICAL DATE: JUNE 27, 2024

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MISCELLANEOUS:

INTRODUCTION

As requested by the Court, both the Secretary of State and Real Party in Interest have responded to the petition filed by the Legislature, Governor, and John Burton challenging Real Party's initiative. The Secretary of State does not oppose Petitioners' request for review and confirms that the critical date for a decision in the case is June 27, 2024.

Real Party opposes review and defends the constitutional validity of his measure. Importantly, Real Party agrees with Petitioners about the basic changes that the Measure would make, but his arguments all hinge on dramatically understating the Measure's effects on the structural powers of both the legislative and executive branches at all levels of California government. For example, Real Party claims that the Measure's retroactivity clause would affect fewer than 24 taxes.[1] Petitioners, however, have identified no fewer than 131 local taxes that may have to be reenacted to conform with the Measure within 12 months, and depending on how the courts interpret the Measure's requirements, there may be many more. Considered together, the Measure threatens to void tax measures that are expected to raise between $1.3 billion and $1.9 billion in annual revenue for local governments in California. (See Declaration of Inez Kaminski (hereinafter "Kaminski Decl."), ¶ 12 and Exhibit A thereto.)

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[1] Real Party in Interest's Prelim. Opp'n to Emergency Pet. for Writ of Mandate and Req. for Immediate Stay (hereinafter "RPI Opp.") at p. 12, fn. 1.

As demonstrated below, this Measure is unique in both its timing and in the effect it would have on state and local governments. The timing of the Measure is unique because it qualified for the ballot more than one year before the 2024 election at which it would appear. Thus, unlike other pre-election challenges, the Court will have ample time to fully consider and decide the matter before the June 27, 2024 deadline confirmed by the Secretary of State. The timing is also unique because if the Court were to defer ruling on the Measure's validity, state and local governments would have only one year in which to hold special elections to reenact the many existing nonconforming taxes and obtain judicial clarification about the scope and meaning of the Measure.

The content of the Measure is unique because, despite Real Party's protestations to the contrary, the Measure would make sweeping changes to California's fundamental governmental structure and the core powers of both the legislative and executive branches of state and local governments. The changes are wholly different in kind from those made by Propositions 13 and 218, both of which left intact the Legislature's ability to pass taxes. The revocation of the Legislature's power to directly impose taxes – substituting for it the power merely to recommend taxes for voter approval – is itself at least as sweeping as the revocation of the judicial power to interpret the rights of criminal defendants which this Court found to be an unlawful revision in *Raven v. Deukmejian* (1990) 52 Cal.3d 336. Yet this Measure goes much further. It would

also restructure the powers between the legislative and executive branches in ways that would significantly undermine the ability of government at all levels to generate revenue of any kind, no matter how urgently needed, or even to impose administrative fees for non-revenue purposes.

The effect of these fundamental changes on essential government functions must be read in light of earlier measures that made local government more reliant on state funding while simultaneously limiting the ability of state and local government to raise and spend money. In combination with those preexisting restrictions, the impact of *this* Measure on essential government functions would be far greater than Real Party is willing to concede.

That is why the validity of the Measure should be decided now, while there is time before scores of jurisdictions must decide whether taxes or fees must be readopted and budgets slashed in anticipation that voters may not approve them. Those special elections would occur in parallel with this Court deciding whether they are needed at all – a recipe for confusion and waste. Petitioners respectfully request that the Court act now to avoid the severe uncertainty and distraction of voters that would arise from an invalid measure appearing on the 2024 general election ballot.

ARGUMENT

I.

THE UNIQUE CIRCUMSTANCES OF THIS CASE CALL FOR PREELECTION REVIEW

In addition to stating no opposition to preelection review, the Secretary of State makes the important point that "if enacted the initiative would have an immediate impact on election administration" and that the Measure's retroactivity provision "would therefore create immediate responsibilities" for every state and local jurisdiction to determine which legislative enactments are affected by the Measure, whether to place them before the voters, and then prepare for and conduct elections. (Prelim. Resp. to Pet. for Writ of Mandate and Req. for Stay; Decl. of Jana M. Lean at pp. 6-7.) Petitioners agree.

Real Party's opposition to preelection review relies on cases holding that it is "usually" more appropriate to review initiative challenges post-election. (RPI Opp. at p. 23.) Real Party then argues that this case presents "no greater urgency" than any other case that has undergone post-election review. (*Id.* at p. 24.) That is simply not true, and the cases on which he relies are readily distinguishable.

First, according to Real Party, it is "pure speculation" to assume that the Measure would require numerous special elections within a year. (RPI Opp. at pp. 24-25.) Yet, since January 1, 2022, there was a minimum of 117 state and local statutes that could require special elections for voter approval. (Kaminski Decl., ¶¶ 9, 23 & Exhs. A & C.) Depending upon how

the Measure is interpreted, that number could increase to 131 taxes in 117 local jurisdictions. (*Id.*, ¶ 9 & Exh. A.) This puts at risk between $1.3 billion and $1.9 billion in *annual* revenue for local governments based on local tax measures alone. (*Id.*, ¶ 12.) Yet these statistics do *not* include local bond measures that contained a tax to support the bonds, of which 87 may not comply with the Measure. (*Ibid.*) Nor do these statistics include new or increased fees that do not meet the Measure's definitions of an exempt charge, which could include anything from library fines and parking tickets to utility rates.

Real Party argues that it is impossible to know whether state and local officials will seek voter approval of these taxes and fees (RPI Opp. at p. 25), but he offers no response to the fact that if they do *not* seek voter approval, they risk losing funds they have been counting on in preparing current and upcoming budgets, or that they may have already contractually committed to spend. Thus, without calling an election, a jurisdiction has *no* chance of retaining a particular revenue stream unless it can demonstrate that the fee or charge complies with the Measure. There is every reason to expect that jurisdictions will find it necessary to call special elections to protect the laws they have already enacted.

Real Party's argument that "at least nine months" would be "ample time" to obtain judicial clarification regarding the Measure (RPI Opp. at p. 26) ignores the difficulty of securing appellate rulings on the numerous issues that require clarification, and the fact that many jurisdictions may simply call

special elections rather than wait for final resolution in the appellate courts.

Real Party's comparison of the Measure's retroactivity provision to those in previous initiatives only underscores how unprecedented and potentially harmful this Measure's retroactivity provision is. (RPI Opp. at pp. 25-26.) Both Propositions 218 and 62 gave local jurisdictions two years to conform taxes to their requirements, and they only applied to taxes passed in the prior year. (*Ibid.*) The retroactivity provision in Proposition 26 was limited to article XIII A, which only applies to taxes passed by the Legislature. Thus, even though the Legislature had only one year in which to reenact taxes or fees, that could be accomplished by legislative action alone, without the need for any special election. This Measure is significantly more burdensome on our State's governments and elections administrators because it reaches back nearly three years and requires that both taxes and certain fees be reenacted within a single year.

Real Party's argument that state law establishes an election date in November of each year is no help. (RPI Opp. at p. 26.) The Measure would require that special elections be held in an odd-numbered off-year.[2] Moreover, because general election costs are usually shared among all jurisdictions in the

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[2] Turnout is usually lower in off-year elections. (See, e.g., Secretary of State, Historical Voter Registration and Participation in Statewide General Elections 1910-1922, available at https://elections.cdn.sos.ca.gov/sov/2022-general/sov/04-historical-voter-reg-general.pdf.)

county, the cost of holding individual special elections will be much higher for the jurisdictions forced to hold them. Finally, for jurisdictions wishing to reenact a general tax, if members of the governing body are not on the ballot, article XIII C, section 2(b) will require a unanimous vote of that body declaring an emergency in order to hold the election. Ironically, if the tax at issue there originated as a popular initiative that did not receive a two-thirds majority, the unanimity requirement could be used to thwart the initiative process rather than protect it.

In short, it was Real Party's choice both to build a retroactivity provision into his measure and to afford jurisdictions only one year to reenact affected taxes and fees. The chaos that would result as a consequence of that choice suffices to overcome the "usual" rule discouraging preelection review. And Real Party does not dispute that there is ample time for pre-election review before the critical date of June 27, 2024.

II.

THE MEASURE IS INVALID BECAUSE IT WOULD REVISE THE CONSTITUTION

Real Party and Petitioners agree on two crucial threshold matters. First, although they dispute the significance of the Measure's effects, and describe those effects using very different terms, Real Party and Petitioners agree on the basic changes that the Measure would make. That is, they agree that the Measure would prohibit the Legislature from directly imposing taxes and would curb its spending power; that it would require the legislative branches of state and local governments to

assume much of the current work of the executive branches; that it would expand the definition of taxes; and that it would make it more difficult for voters to increase their own taxes. (RPI Opp. at pp. 18-20.)

Second, they agree that a revision is "a far-reaching change in the fundamental governmental structure or the foundational power of its branches as set forth in the Constitution." (RPI Opp. at p. 27, quoting *Strauss v. Horton* (2009) 46 Cal.4th 364, 444.)[3]

Accordingly, this Court need only decide whether the changes the Measure would make to California's governmental structure and the core powers of its branches are sufficiently far-reaching to meet that standard.

A. The Measure Is A Revision Because It Revokes Core Legislative Powers

Real Party defends the Measure's repeal of the Legislature's taxing authority by reciting provisions in current and past Constitutions that restrict the Legislature's taxing power or require voter approval of certain legislative acts. He

[3] Real Party nevertheless argues that the Measure is not a revision because it "merely amends existing sections of the Constitution." (RPI Opp. at p. 31.) This is incorrect. The standard for a revision – which, again, is undisputed between the parties – has to do with the scope of the change, not whether the change is accomplished through the amendment, repeal, or addition of provisions of or to the Constitution. Indeed, Proposition 115 was also an amendment to an existing section of the Constitution (article I, section 24) but this Court nevertheless declared it to be a revision. (*Raven*, *supra*, 52 Cal.3d at p. 341.)

concludes that such provisions have frequently "been added to our Constitution . . . without 'revising' the Constitution." (RPI Opp. at p. 33, fn. 9.)

Real Party is mistaken. Most of the constitutional provisions he highlights were enacted via constitutional conventions, not initiative constitutional amendments. Critically, this includes the four provisions he cites from the original 1849 Constitution, and the five provisions he cites from the 1879 Constitution. (RPI Opp. at pp. 32-35; *Strauss*, *supra*, 46 Cal.4th at pp. 415-417 [discussing the constitutional conventions leading to the 1849 and 1879 Constitutions and describing the "revised Constitution" of 1879].) More specifically, it includes the voter approval requirement for bond debt which Real Party contends is so similar to the Measure's voter approval requirement for taxes. (RPI Opp. at pp. 33-34.)

Real Party is correct that some other constitutional provisions requiring voter approval have been enacted via amendments. (RPI Opp. at pp. 33-34, fn. 9.) But that does not mean that *all* attempts to limit legislative power through voter approval requirements are valid initiative constitutional amendments rather than revisions.

Indeed, this Court rejected a similar argument in *Raven*. There, the Attorney General defended Proposition 115 in part by pointing out that the Court had previously ruled that initiatives seeking to curb aspects of the same judicial power were not unlawful revisions. Specifically, in *In re Lance W.* (1985) 37 Cal.3d 873, the Court upheld a measure limiting the

state exclusionary remedy "to the boundaries fixed by the Fourth Amendment to the federal Constitution," while in *People v. Frierson* (1979) 25 Cal.3d 142, the Court upheld a measure requiring California courts "to apply the state cruel or unusual punishment clause consistently with the federal Constitution." (*Ibid.*) This Court acknowledged those rulings but declined to extend their holdings to Proposition 115 because "neither case involved a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution." (*Ibid.*)

The same analysis applies here. Real Party has identified voter approval requirements with no significant impact on core legislative powers, such as voter approval requirements for changes to retirement boards or tax sharing agreements between counties. (RPI Opp. at p. 33, fn. 9.) The fact that voters can pursue a relatively narrow change in the Legislature's power through an initiative does not mean the voters can pursue a much broader change revoking core powers that have existed since the State's founding without revising the Constitution.

Turning to the case law, Real Party disputes the applicability of *Raven* to this case. Real Party first argues that *Raven* addressed the *elimination* of a judicial power while the Measure imposes a mere *limitation* on the Legislature's taxing authority. (RPI Opp. at p. 30.) Yet that is not how the *Raven* Court understood matters because it described Proposition 115 as "restrict[ing]" judicial power, not eliminating it. (*Raven*, *supra*, 52 Cal.3d at pp. 353, 355.) Alternatively, Proposition 115 could

be said to have sought to take power away from California courts (*i.e.*, eliminate power) in the same way that the Measure seeks to take power away from the Legislature. Regardless, neither *Raven* nor this case turns on semantics. They turn on substance, and both cases address efforts to use the initiative process to deprive a branch of government of a substantial portion of core powers established through a constitutional convention.

Real Party then tries to distinguish *Raven* on the ground that the Constitution can be used to eliminate the Legislature's taxing power while the *Raven* Court declared that the Constitution cannot be used to eliminate "this Court's inherent power to interpret the state Constitution." (RPI Opp. at p. 31.) That is not what the *Raven* Court said. It essentially said the opposite when it observed that the Court had previously upheld other ballot measures limiting the Court's inherent power to interpret the Constitution. (*Raven*, *supra*, 52 Cal.3d at p. 355.) Thus, the question both here and in *Raven* is not whether the Constitution can be changed to accomplish the goals of Proposition 115 and the Measure – it most certainly can.[4] The question is whether such changes can be made by an initiative amendment when their character is to eliminate a core power of a branch of government. Under *Raven*, the answer is no.

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[4] Real Party accuses Petitioners of misrepresenting the law because they did not cite *Delaney v. Lowery* (1944) 25 Cal.2d 651 for the proposition that the Constitution can limit the Legislature's taxing power. (RPI Opp. at pp. 30-31.) But Petitioners twice cited a more-recent case, *The Gillette Co. v. Franchise Tax Bd.* (2015) 62 Cal.4th 468, for precisely the same point. (RPI Opp. at p. 30; Pet. at pp. 43, fn. 21, 48.)

Real Party next contends that *Amador Valley Joint Union High School Dist. v. State Board of Equalization* (1978) 22 Cal.3d 208 "is not distinguishable" from this case and so governs its outcome. (RPI Opp. at p. 36, fn. 11.) That is a peculiar position to take given that *Amador Valley* addressed a different constitutional change – a revocation of some local government taxing power versus the revocation of all State legislative taxing power – based on different legal theories – loss of home rule and a republican form of government versus the revocation of core legislative powers. (*Amador Valley*, *supra*, 22 Cal.3d at pp. 218, 225.)

Real Party nevertheless tries to bridge that gap by pointing out that Proposition 13 also limited the Legislature's authority to enact state taxes. Yet the *Amador Valley* Court's revision discussion focused on Proposition 13's effect on local government. It did not address the new supermajority voting requirement for State taxes. (*Amador Valley*, *supra*, 22 Cal.3d at pp. 221-229.)[5]

Rather, *Amador Valley*'s holding is limited to local taxes, and as Petitioners have explained, local governments "have no inherent power to tax" whatsoever. (Pet. at p. 48, quoting *Santa Clara Cty. Local Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 248.) Thus, when the *Amador Valley* Court held

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[5] Furthermore, there is a critical difference between limiting one of the Legislature's core powers by increasing the vote threshold and eliminating it altogether, as Petitioners have argued. (See, e.g., Emergency Pet. for Writ of Mandate and Req. for Stay (hereinafter "Pet.") at pp. 44-45.)

that Proposition 13 did not revise the Constitution, it did so knowing that Proposition 13's voter approval requirement did not change a fundamental part of the governmental structure or a core power protected by the Constitution. Indeed, the *Amador Valley* petitioners did not argue otherwise. The same is not true here, where the Measure would eliminate the Legislature's taxing power that has existed since the founding of the State and which is now preserved in article IV, section 1 of the Constitution. (See, e.g., *Tetreault v. Franchise Tax Bd.* (1967) 255 Cal.App.2d 277, 280-281 [describing Legislature's inherent power to tax].)

Real Party disagrees, noting that charter cities derive some power to tax from the home rule provision of the Constitution. (RPI Opp. at p. 36, fn. 11.) But charter cities have only had constitutional power to tax since 1914[6] and their taxing power remains subject to regulation by the Legislature in matters of statewide concern. (*Cal. Fed. Savings & Loan Ass'n v. City of L.A.* (1991) 54 Cal.3d 1, 7.) A change in a charter city's authority to enact municipal taxes is therefore not a "far-reaching change in the fundamental governmental structure" of the State.

Real Party also highlights a passage from *Amador Valley* in which the Court declared that, under Proposition 13, local government's authority "to enact appropriate laws and regulations remains wholly unimpaired" "[o]ther than in the limited area of taxation." (RPI Opp. at p. 37, quoting *Amador*

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[6] Ballot Pamp., Gen. Elec. (Nov. 3, 1914) text of Prop. 25, p. 14 (adding home rule provisions to Constitution).

Valley, *supra*, 22 Cal.3d at p. 227.) According to Real Party, this observation is "[p]articularly relevant" to the analysis of the Measure's provision requiring voter approval for all new State taxes. (*Id.* at p 36.) Yet this observation was made in the context of considering whether Proposition 13 deprived local voters of a republican form of government. That is a very different question than the one presented here, which is whether depriving the Legislature of one of its core powers fundamentally changes the foundational powers of a branch of government.

The *Amador Valley* Court's statement does not apply here for the additional reason that the Measure does far more to impair the government's ability "to enact appropriate laws and regulations" than Proposition 13 did. (*Amador Valley*, *supra*, 22 Cal.3d at p. 227.) In addition to fully depriving the Legislature of the power to make any change in state law which results in any taxpayer paying a new or higher tax, the Measure reduces the Legislature's spending power, deprives both the Legislature and local legislative bodies of the ability to delegate a broad range of duties to the executive branch, forces the Legislature and local legislative bodies to assume tasks that are currently administrative in nature, deprives state and local executive branches of the ability to do much of the work that they do today, subjects many additional legislative acts to the referendum, reduces the power of local voters to increase their own taxes, and increases the power of State and local voters to reject taxes and charges. (Pet. at pp. 19-27, 48-50.) *Amador*

Valley's description of the scope of Proposition 13 cannot be equated with the scope of this Measure.[7]

B. The Measure Shifts Substantial Power Between The Executive And Legislative Branches Of State And Local Government

By depriving the State and local executive branches of the ability to take any action that would increase a tax or fee for even a single taxpayer, the Measure would put an end to much of the role administrative agencies play in California government today. Given that this Court described that role as an "imperative" part of our governmental structure more than

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[7] The constitutions from other states that Real Party cites only demonstrate how radical the Measure is in comparison because *none* of those state constitutions require voter approval in every instance, as the Measure would. (RPI Opp. at p. 35, fn. 10.) Oklahoma allows the Legislature to increase taxes without voter approval with a three-quarters supermajority vote. (Okla. Const., art. V, § 33, subd. (D).) Florida allows the Legislature to approve statutes that impose new taxes or fees without voter approval; only constitutional amendments require voter approval. (Fla. Const., art. XI, § 7.) Arkansas allows the Legislature to increase certain taxes without voter approval and both Arkansas and Colorado allow their legislatures to increase taxes without voter approval in emergencies. (Ark. Const., art. 5, § 38; *ACW, Inc. v. Weiss* (1997) 329 Ark. 302, 308 [947 S.W.2d 770, 773]; Colo. Const., art. 10, § 20, subd. (6).) Michigan and Missouri do not require voter approval for new taxes unless the legislatures wish to exceed state revenue limits. (Mich. Const., art. IX, §§ 25, 26; 86 Ops.Mich.Atty.Gen. 203 (1986); Mo. Const., art. X, § 16.)

100 years ago (*Gaylord v. Pasadena* (1917) 175 Cal. 433, 436), Real Party's effort to minimize the scope of that change falls flat.[8]

One of the far-reaching changes the Measure would make to the foundational powers of the legislative branches is to revoke their power to delegate many duties to the executive branches. Again, *any* agency regulation, interpretation, opinion, or Governor's executive order that has the effect of causing someone to pay more money to the government – even as a fee, not a tax – would have to be adopted by the Legislature. (Pet. at pp. 20-23.) Real Party challenges the significance of this change by citing statutes and ordinances in which the Legislature and local legislative bodies have retained rather than delegated some aspect of their fee setting authority. According to Real Party, this means that the Measure "merely" enacts "an extension of" this form of legislative authority. (RPI Opp. at p. 39.)

This Court already rejected a similar argument in *Raven*. There, the Attorney General asserted that Proposition 115's provision forcing state courts to comply with certain federal court precedents was "not new" and therefore not revisionary because state courts already adhered to a rule requiring them to defer to those precedents in most cases.

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[8] Real Party defends these provisions of the Measure by comparing them to a statute from *1855* through which the Legislature approved a variety of government fees. (RPI Opp. at p. 15.) Obviously, matters of governance have grown more complex in the intervening 168 years, and, as this Court has since recognized, those complexities necessitate the very duties of administrative agencies that the Measure would upend. (*Gaylord*, *supra*, 175 Cal. at p. 436.)

(*Raven*, *supra*, 52 Cal.3d at pp. 353-354.) This Court disagreed. "[I]t is one thing voluntarily to defer to high court decisions," wrote the *Raven* Court, "but quite another to *mandate* the state courts' blind obedience thereto . . ." (*Id.* at p. 353, emphasis in original.) The same principle applies here. It is one thing for the Legislature to make the policy decision to set a particular fee or decline to delegate the authority to do so, but quite another to deprive the Legislature of the power to decide that the public interest would be better served by delegating that task to an administrative agency.[9]

Real Party next argues that Petitioners wrongly stated that the Legislature can authorize agencies to impose taxes. (RPI Opp. at p. 40, citing Pet. at p. 50.) That is not what Petitioners said. Under the Measure, the legislative branches would lose the power to delegate a broad range of tax-related duties to executive officials, including but not limited to the duties to assess property, promulgate tax regulations, adjudicate administrative disputes concerning taxes, and interpret and enforce tax laws. That change could force the legislative branches to assume these duties whenever they would result in even a single taxpayer paying a higher tax or fee, regardless of whether the legislators have the capacity and expertise to perform that function, and even if the inability to delegate the duty would harm the public interest. This would upend the

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[9] Accord *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 326 (fact that Legislature adopted statutes regarding internal regulation of its houses does not permit voter initiative to do the same).

balance of power that has existed for decades between the Legislature and the state executive branch.

Real Party also argues that, because the act of revoking a legislative delegation of authority "is itself legislative," that revocation "cannot be a violation of separation of powers or a revision of the Constitution." (RPI Opp. at p. 42.) But again, Real Party errs by conflating how the Legislature may *choose to exercise* its powers with *depriving the Legislature* of its powers. There is no constitutional problem with the Legislature electing to revoke its prior delegation, but only a revision of the Constitution could take away from the Legislature the power to delegate authority to state agencies to make changes to any state fees or charges. (See Pet. at pp. 53-55.)

Furthermore, a revision is defined by the extent of its change to the governmental structure or the powers granted to the branches of government. (*Strauss*, *supra*, 46 Cal.4th at p. 444.) There is no legal authority supporting Real Party's theory that changes to the core powers of the legislative branch are exempt from this standard.[10]

Real Party reserves much of his argument, however, for rebutting the conclusion in *Schabarum v. Cal. Legislature* (1998) 60 Cal.App.4th 1205 that one could not prohibit the executive branches from performing delegated duties "without

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[10] Real Party cites only *Steiner v. Superior* Court (1996) 50 Cal.App.4th 1771, but that case addresses separation of powers issues without mentioning constitutional revisions.

effecting a constitutional revision." (RPI Opp. at pp. 42-44.) His arguments do not withstand scrutiny.

Real Party begins by emphasizing that the *Schabarum* Court's statement about revisions was made in the context of a hypothetical *full* dismantling of the executive branches' ability to perform delegated duties, while the Measure seeks only a *partial* dismantling. (RPI Opp. at pp. 42-43.) *Raven* demonstrates that this difference cannot save the Measure.

As background, before this Court identified its first qualitative revision in *Raven* in 1990, it articulated a hypothetical example in 1978. "[A]n enactment which purported to vest *all* judicial power in the Legislature," the *Amador Valley* Court suggested, "would amount to a revision." (*Amador Valley*, *supra*, 22 Cal.3d at p. 223, emphasis added.) Years later, the *Raven* Court cited this hypothetical when holding that an enactment which purported to vest *some* of California's judicial power in the federal courts also amounted to a revision. (*Raven*, *supra*, 52 Cal.3d at p. 352.) Accordingly, a substantial change in a foundational power of a branch of government can be as revisionary as a total change in that foundational power.

The same analysis applies here. Although the Measure's partial dismantling of the executive branches may not lead to the total "paralysis in the conduct of public business" envisioned by the *Schabarum* court (60 Cal.App.4th at p. 1224), it could lead to paralysis of substantial executive branch functions across the spectrum of agency activities. That is exactly the kind of "far-reaching and extensive" change to the Constitution that

"require[s] more formality, discussion and deliberation than is available through the initiative process." (*Strauss*, *supra*, 46 Cal.4th at p. 447, emphasis omitted; *Raven*, *supra*, 52 Cal.3d at pp. 349-350.)

Real Party next purports to identify a "[m]ore important[ ]" issue relating to the Legislature's inherent power to determine the scope of quasi-legislative power. (RPI Opp. at p. 43.) The argument is unclear, but if the point is that the Legislature cannot delegate the power of appropriation to administrative agencies, Petitioners agree. Yet the Measure does not even address the power to appropriate.[11] Instead, it prohibits any delegation of power that results in any taxpayer paying a higher tax or fee. If the point is that the Measure's burdens could be lessened if the Legislature approves fees or charges through the budget process, it does not get Real Party very far. The budget process for California – the world's fifth largest economy – is already exceedingly complex. Given the sweeping scope of the Measure – which again may apply to every change in state law that results in even a single taxpayer paying more in non-tax charges – the new workload would multiply much of that complexity. Moreover, it would not be possible to complete this work through a single budget act. There is simply no way to avoid the fact that the Measure would transform the work of

[11] An appropriation provides authority to spend money, not the authority to tax. (See *St. John's Well Child & Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 977-978.)

virtually every legislative body in the state in ways they are not equipped to handle.

And even if the legislative branches could easily absorb this new work (they most certainly could not), it would not save the Measure. The line between an amendment and a revision does not ultimately turn on the amount of chaos or dysfunction it would cause, though such disruptions certainly contribute to establishing the far-reaching nature of the change at issue. Rather, a revision is defined by the scope of the change an initiative would make to the fundamental governmental structure and the foundational power of its branches. Here, Petitioners have demonstrated that in this regard, the Measure's changes would be profound.[12]

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[12] Real Party seeks to normalize these provisions by arguing that other states also require legislative approval for fees. (RPI Opp. at p. 44, fn. 12.) Yet, again, these other states only demonstrate how radical the Measure is in comparison. The Arizona Constitution only requires a supermajority legislative vote for certain fee statutes. A simple majority of the legislature is still empowered to authorize "a state officer or agency" to set a fee as long as the legislature does not proscribe the fee by formula or amount. (Ariz. Const., art. IX, § 22, subds. (B)(5), (C)(2); *Biggs v. Betlach* (2017) 243 Ariz. 256, 261-262.) The Delaware Constitution only requires legislative supermajority approval for one specific type of fees – license fees – and this requirement may be suspended when the state lacks sufficient revenue to repay its debts. (Del. Const., art. VIII, § 11, subds. (a), (b).) The Florida Constitution only requires legislative supermajority approval for state fees. Local fees are expressly exempted. (Fla. Const., art. VII, § 19, subds. (a), (c).) The Nevada Constitution requires legislative supermajority approval for revenue raising measures including taxes, fees, assessments, and rates, but the Legislature

C. The Measure Restructures The Voters' Fiscal Powers

Real Party does not dispute that this Measure would restructure the voters' power for the purpose of benefitting those who disfavor revenue-raising measures. (Pet. at pp. 59-60.) Nor does he dispute that the Measure would greatly burden voters by forcing them to assume much of the legislative and executive branches' workload, or that doing so could overwhelm the ability of voters to adequately consider the many issues they are called upon to decide each election. (*Id.* at pp. 60-61.) Nor does he dispute that the Measure would ensure that *every* measure that increases payments for anyone could be subject to voter approval – including, for the first time in California history, state taxes duly enacted by the Legislature and approved by the Governor. (*Id.* at pp. 25-26, ¶ 26.) Indeed, Real Party has little to say about the Measure's provisions affecting voters other than to criticize this Court's interpretation of Proposition 218 in *Cal. Cannabis*

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may request that the voters approve revenue raising measures. (Nev. Const., art. IV, § 18, subds. (2), (3).) Significantly, the Nevada Supreme Court temporarily suspended this provision in 2003 after finding that it contributed to "an imminent fiscal emergency" in which the Legislature had been unable to pass a balanced budget or fund education after one regular and two special sessions. (*Guinn v. Legislature of the State* (2003) 119 Nev. 277 [71 P.3d 1269, 1274-1275], subsequently disapproved by *Nevadans for Nev. v. Beers* (2006) 122 Nev. 930, 944 [142 P.3d 339, 348].) Moreover, none of these provisions reach as far as the Measure to potentially encompass, not just certain fees, but virtually all categories of executive branch duties.

Coal. v. City of Upland (2017) 3 Cal.5th 924. (RPI Opp. at pp. 19, 35-36.)

What Real Party does instead is emphasize the importance of preserving the right of initiative for the people of California. (RPI Opp. at pp. 16, 37.) Yet there is no dispute among the parties about the "precious" nature of that right or its enduring importance to the State. (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) The dispute arises over how best to preserve the right of initiative in this case.

Petitioners believe that preserving the right of initiative requires the Court to honor the limits the Constitution places on that power, and to avoid allowing the initiative power to collapse under its own weight. The initiative exists as a vehicle for *amending* the Constitution only, not enacting the kind of changes that are "*so far-reaching and extensive* that the framers of the 1849 and 1879 Constitutions would have intended that the type of change could be proposed only by a constitutional convention, and not by the normal amendment process . . . ." (*Strauss*, *supra*, 46 Cal.4th at p. 447.)

This Measure exceeds those limits by seeking to profoundly change the foundational governmental structure and the core powers of the branches of government. Respect for the initiative process requires that this initiative be withheld from the ballot so that voters are not asked to vote on a measure that is beyond their power and would ultimately not be permitted to take effect.

III.

THE MEASURE IMPAIRS ESSENTIAL GOVERNMENT FUNCTIONS

Real Party does not dispute that the initiative process cannot be used if it would seriously impair essential government functions. Nor can he dispute that this Court has held that when interpreting both the referendum and revision clauses of the California Constitution, it will find that "no such result was intended" by the voters who enacted them. (*Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1123.)

Real Party disputes only the nature and extent of the Measure's effect on essential government functions. As demonstrated in the preceding sections and those below, Real Party seriously downplays what his Measure would *actually* do.

A. The Measure Affects Funding For Every Major Governmental Function

Real Party argues that Petitioners have engaged in "hyperbole" and "speculati[on]" in describing the Measure's effect on essential government functions. (RPI Opp. at p. 45.) That is not the view of the mayors of California's eight largest cities, of the California Professional Firefighters, or of five local government associations representing well over 1,000 California cities, counties, public utilities, and special districts.[13] Instead, letters from these amici describe in detail the damage the

[13] Petitioners respectfully refer the Court to the six letters amicus curiae filed in support of Petitioners pursuant to Rule 8.500(g) of the California Rules of Court.

Measure would cause – and is already causing – to the government's ability to provide for public safety (California Professional Firefighters), to plan and fund current city budgets (Mayors), or to preserve credit ratings (Local Government Amici and California Budget and Policy Center). The Association of California Water Agencies states that its member agencies could not enact *any* water rate increases, because they are governed by appointed boards that have no authority to adopt ordinances.

Because our system of public education is heavily dependent on state funding, the Measure would also affect the State's 5.8 million schoolchildren. The 2023-24 State Budget includes $129.2 billion in K-12 funding and another $40 billion for higher education. (Cal. Dept. of Finance, 2023-24 State Budget: Enacted Budget Summary All Chapters, at pp. 9, 19, available at https://ebudget.ca.gov/2023-24/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf. (hereinafter "Cal. Dept. of Finance").)

The Measure could have a similar effect on the courts, which receive more than $5 billion in state support. (*Id.* at p. 78.)

Real Party argues that because much of this money comes from income and sales taxes, which are based on existing percentages, the Measure would not affect education or the courts. (RPI Opp. at pp. 48-49.) Yet the Measure's effects would be profound if the revenues from those percentages fall, as they have in the past, and the Legislature were unable to make up the difference.

Similarly, it is not enough to argue that the Budget and Public School System Stabilization Accounts established by article XVI, sections 20 and 21 would be sufficient to weather crises that may arise. (RPI Opp. at pp. 49-50.) The Budget Summary prepared by the Department of Finance reports that as of mid-2023, the State held approximately $37.8 billion in various reserve accounts. (Cal. Dept. of Finance, *supra*, at p. 1.) The Constitution limits the amounts and the circumstances under which the State may withdraw from the funds at any one time, and an ongoing recession would not only deplete the reserves but wreak havoc with other general fund accounts, rendering useless the ability of the Governor or the Legislature to transfer funds from one to the other. (See RPI Opp. at p. 50.)

The Measure would have different but equally harmful impacts on local school funding. Currently, a school parcel tax placed on the ballot by popular initiative needs only a majority vote to pass. (*City and County of San Francisco v. All Persons Interested in the Matter of Proposition G* (2021) 66 Cal.App.5th 1058.) The Measure would expressly overrule this Court's holding in *Cal. Cannabis Coal.*, *supra,* 3 Cal.5th 924, upon which the San Francisco case was based. If that were to happen, any school parcel tax, regardless of how it is put on the ballot, would require a two-thirds vote to pass. The impact will be especially severe on districts that may need such a tax to deal with the demands of increasing enrollment.

In addition, the Measure requires that the ballot materials for any proposed tax include the duration of the tax

and the use of the revenue derived from the tax. (Pet. at p. 36.) Today, the ballot materials for many taxes used to fund bond measures provide that the tax will be in effect "while bonds are outstanding." Whether that language would suffice as supplying the "duration of the tax" is an issue that must be decided by the courts, but it could leave many districts without a revenue stream to service existing bonds.

B. <u>The Measure Affects Pre-Existing Revenue</u>

Real Party also insists that the Measure does not affect pre-existing tax revenue and "only applies to 'new' or 'higher' State taxes." (RPI Opp. at pp. 46, 48-49.) Not so – as written, its retroactivity provision applies to 15 bills passed by the Legislature and approved by the Governor, because the Legislative Counsel identified them as resulting "in a taxpayer paying a higher tax within the meaning of Section 3 of Article XIII A" of the state Constitution. (Kaminski Decl., ¶ 23, Exh. C.) Under the Measure, if those bills are to remain law, the voters would have to approve all 15 of them within a year. Moreover, as demonstrated earlier, the Measure reaches back nearly three years to possibly affect at least 131 local taxes, and taxes for 87 bond issues whose ballot language may not comply.

Real Party also neglects to mention that the Measure applies not only to statutes or ordinances but to any regulation, executive order, ruling, opinion letter "or other legal authority or interpretation" of any kind that results in "any taxpayer" paying a higher tax or fee, either state or local. (Measure, Section 4, proposed art. XIII A, § 3; Section 5, proposed art. XIII C, § 1.)

Thus, the Measure apparently would apply even to revenue neutral interpretations that result in a fairer application of a tax or fee if they cause a single taxpayer to pay more.

C. The Initiative Must Be Analyzed In The Context Of Existing Constitutional Provisions

Real Party repeatedly relies on the fact that the Constitution already contains voter approval requirements for some taxes, arguing that these neither constitute a revision nor impair essential government functions. (RPI Opp. at pp. 11, 19, 32-36, 47.) Petitioners agree that the initiative process can be used to affect or repeal taxes, and Petitioners do not question earlier constitutional amendments like Propositions 13 and 218. As Petitioners argued in their opening brief, however, *this* Measure must be analyzed in light of existing provisions for purposes of assessing its impact on essential governmental functions. (Pet. at pp. 66-69.) It is *because* there are voter approval requirements for new or increased taxes at the local level that so much depends on funding from the State. Similarly, existing definitions for fees versus taxes narrow the ability of both state and local governments to raise revenue without voter approval.

Our current Constitution permits only one deliberative body – the Legislature – to increase or impose a statewide tax and only by a two-thirds vote. (Cal. Const., art. XIII A, § 3.) Every local legislative body, whether in a charter city or not, must submit every tax proposal to the voters. If the proposal is for a general tax, it can only appear at a general

election unless the local governing body unanimously declares a fiscal emergency. (*Id.*, art. XIII C, §§ 1, 2.)

Thus, it was no accident that Propositions 13, 218, and 26 exempted the Legislature from voter approval requirements. Budgeting is incredibly complex in a state as large as California, and it is essential to have a deliberative body capable of raising taxes at the state level. The reasoning behind such a step cannot easily be explained to the voters in a ballot argument.

It was also no accident that previous measures never required that every new or increased charge be adopted by a legislative body or that the legislative body have clear and convincing evidence that the charge is limited to its actual costs. Nor did those measures sweep into those requirements everything from an ordinance to an opinion letter, as this one does.

That would all change if the Measure goes into effect. Real Party argues that the result would resemble this Court's description of a "power-sharing arrangement" between the initiative power and a public water agency's rate-setting authority in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220. (RPI Opp. at p. 48.) In fact, the Court's holding in that case was that under current law an initiative could decrease an agency's water rates, "but the agency's governing board could then raise other fees or impose new fees without prior voter approval." (*Bighorn-Desert View Water Agency*, *supra*, 39 Cal.4th at p. 220.) That is clearly not what the

Measure does, no matter how strenuously Real Party argues to the contrary.

CONCLUSION

The Constitution grants the voters of this State enormous legislative power to make new laws and to repeal laws with which they disagree. Yet from the first moment that the voters approved this power for themselves, they imposed an important limitation upon it. While they could amend the Constitution in ways both major and minor, they could not revise it. That is, they could not fundamentally remake the way our system of government works through an initiative constitutional amendment which individual voters may have no more than a few moments to consider.

Consistent with the courts' duty to safeguard the precious right of initiative, this Court has applied a definition of revision that has permitted the voters to approve even deeply significant changes to state and local laws via ballot measures. But it has drawn the line at measures that would make far-reaching changes in the fundamental governmental structure or the core power of its branches. This Measure, which is unlike any that has come before it, would do both in ways that would profoundly alter how government operates in this state and its ability to provide the essential government services its people need. Its provisions, particularly when considered in combination, are far more sweeping than the curb on the judicial power that this Court found to be revisionary in *Raven*, *supra*, 52 Cal.3d 336.

Given the need to determine whether this Measure is beyond the voters' power to enact, and given the havoc that the Measure threatens to wreak even before the election is held, the California Legislature, the Governor, and petitioner John Burton, all respectfully urge the Court to grant the writ and hold the Measure invalid.

Dated: November 9, 2023

Respectfully submitted,

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By: _____
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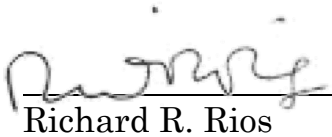
Dated: November 9, 2023



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Petitioners' Reply in Support of Emergency Petition for Writ of Mandate

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Nina Leathley

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