Case No. S220289

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

HOWARD JARVIS TAXPAYERS ASSOCIATION and JON COUPAL,
Petitioners,

v.

DEBRA BOWEN, in her official capacity as the Secretary of State of the State of California,
Respondent.

LEGISLATURE OF THE STATE OF CALIFORNIA,
Real Party In Interest.

ORIGINAL WRIT PROCEEDING
IMMEDIATE RELIEF REQUESTED

PETITIONERS' REPLY TO REAL PARTY IN INTEREST LEGISLATURE OF THE STATE OF CALIFORNIA'S RETURN BY DEMURRER TO PETITON FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF

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I.

INTRODUCTION

It is not surprising that the Legislature would assert that it "may exercise ***any and all*** powers that are not expressly or by necessary implication denied to it by the Constitution." (Emphasis added.) From that faulty premise, the Legislature takes the Court down a rabbit-hole in search of any express or implied provision in the State Constitution that denies it the power to place an advisory question on the ballot. Finding none, the Legislature concludes that its action in adopting SB 1272 was, therefore, lawful. It was not.

First, the Legislature is vested with legislative power, not any and all power. Because the advisory ballot question posed by SB 1272 is not the exercise of legislative power, nor will it even lead to the exercise of legislative power, it is not permitted.

Second, the ballot is a means of exercising "political power," which is the province of the people, not the Legislature. (Cal. Const., art. II, § 1 ["All political power is inherent in the people."].) The people, through their Constitution, have granted the Legislature limited direct access to the ballot. Those enumerated provisions are the exclusive means by which the Legislature can gain access to the ballot. SB 1272 is unconstitutional because it is not one of those exclusive means.

Third, the Constitution reserves the initiative and referendum power to the people, (Cal. Const., art. IV, § 1) and it is this Court's duty to "jealously guard" the exercise of such power. Allowing the Legislature unfettered access to the ballot, beyond that expressly granted to it by the Constitution, infringes on the people's exercise of their reserved power, and upsets the careful balance struck in the Constitution, whereby the Legislature and the people share legislative power. The initiative and referendum power have been described as a "legislative battering ram" used to circumvent the Legislature or challenge legislative action taken. Thus, there is a natural tension between the people and the Legislature in most instances. Any opportunity to interfere with the voters' careful consideration of a valid initiative or referendum (i.e., by cluttering the ballot with non-binding measures on the same subject as a proposed initiative/referendum) infringes upon the people's reserved power. If the Court follows the Legislature down the rabbit-hole and upholds its broad political power grab, then there is no limit to the mischief that will be created.

The Court's order removing the non-binding question from the November 2014 General Election ballot was correct when issued and should be made permanent now.

II.

ARGUMENT

A. THE LEGISLATURE POSSESSES "LEGISLATIVE POWER," SUCH POWER "INCIDENTAL TO THE EXERCISE OF LEGISLATIVE POWER," AND OTHER CONSTITUTIONALLY ENUMERATED NON-LEGISLATIVE POWERS.

The Legislature's assertion that it possesses "***any and all powers*** that are not expressly, or by necessary implication, denied to it by the Constitution" (Return at p. 7 (Emphasis added.)) is simply not supported by the law or the cases it cites for that proposition.[1] The Legislature's power is derived from the people in creating the legislative body in the first instance. (*Ex Parte McCarthy* (1866) 29 Cal. 395, 403.) The people, through their enactment of the Constitution, have granted "legislative" power (Cal. Const., art. IV, § 1, ["[t]he legislative power of this State is vested in the California Legislature..."]) and other specifically enumerated non-legislative powers to the Legislature. Petitioners have always acknowledged the broad scope of legislative power granted to the Legislature, but that power is the power to make law. There is no

[1] If the Legislature truly possesses "any and all power" not denied to it by the Constitution, it begs the question as to why the Constitution has dozens of provisions that expressly grant both legislative and non-legislative power to the Legislature (See, e.g., the powers to propose constitutional amendments and revisions, the power to amend previously enacted initiative measures, the power to impeach, the power to create committees to conduct its business, the power to regulate horse races, bingo games and raffles, among many others.).

constitutional basis for the notion that legislative power includes the power to place non-binding advisory measures on the ballot.

1. Legislative Power is the Power to Make Law and All Power Incidental to the Power to Make Law.

From the very beginning of our State to today, this Court has always held that the legislative power under Article IV is the power to make law. (*Nougues v. Douglass* (1857) 7 Cal. 65, 70 ["[t]he legislative power makes the laws"].); *California Redevelopment Association v. Matosantos* (2011) 53 Cal.4th 231, 254 ["[a]t the core of legislative power is the authority to make laws."].) A "law" is different than a mere declaration of policy. A law carries with it the power to compel compliance. (*Washington v. City Council of City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1142.)

Concomitant with its law making power, the Legislature also has the "power to engage in activity that is incidental or ancillary to its lawmaking functions." (*Zumbrun Law Firm, Inc.* (2008) 165 Cal.App.4th 1603, 1614, citing *Parker v. Riley* (1941) 18 Cal.2d 83, 89.) In other words, any incidental power possessed by the Legislature is directly connected to its power to make law. Indeed, this Court has held that "when the main power of legislating dies, the incidental or implied power dies with it." (*Special Assembly Interim Committee* (1939) 13 Cal.2d 497, 504.) Even then, the exercise of incidental legislative power is not without limit.

2. The Legislature's Incidental Legislative Power Must Be Derived From the Constitution or Parliamentary Common Law.

The Legislature quotes a long passage from this Court shortly after the State's founding in *Ex Parte McCarthy* to support its "any and all" power claim. (Return at p. 9.) The issue in that case was whether the Senate had the power to investigate charges against one of its members. However, the quoted reference does not validate the Legislature's broad power grab. In fact, that early decision of this Court is based on an examination of legislative power derived from parliamentary common law. (*Ex Parte McCarthy, supra,* 29 Cal. at pp. 403-04 ["What powers and privileges, therefore a legislative assembly takes by force and effect of its creation are to be ascertained by a reference to the common parliamentary law."].) That same principle has been applied more recently by courts examining the scope of incidental legislative power. (*Zumbrun Law Firm, Inc. v. Superior Court, supra,* 165 Cal.App.4th at p. 1614 ["we look to the history of the parliamentary common law against which the fundamental charter of our state government was enacted" to determine whether an activity is incidental to the lawmaking function];[2] and *see People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 322.)

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[2] Petitioners incorrectly cited this same quote in their original Petition for Writ of Mandate filed on August 1, 2014 at p. 20 as being a quote from *People's Advocate, Inc. v. Superior Court.*

Thus, it is not true that the Legislature has any and all power except those expressly or implicitly denied to it by the Constitution. Its power must derive from the Constitution or from parliamentary common law.

The Legislature can point to no parliamentary common law to support its desire to ask the voters non-binding questions. This Court in *Ex Parte McCarthy* referenced a treatise (Cushing)[3] classifying the thirteen powers and privileges possessed by a legislative assembly under parliamentary common law. (*Ex Parte McCarthy, supra,* 29 Cal. at pp. 403-04.) Over time, most of these incidental powers have been incorporated specifically into the Constitution (many with the 1879 revision of the Constitution after this Court's decision in *Ex Parte McCarthy*), and others have been recognized by this Court in specific contexts. None of them validate the power to use the ballot to poll the electorate on any subject matter desired by the Legislature. These parliamentary common law powers recognized by this Court in *Ex Parte McCarthy* are:

1) The power to judge the election and qualification of its own members. (Cal. Const., art. IV, § 5(a), added to Constitution of 1879; see also Grodin et al., *The California State Constitution: A Reference Guide* (1993), Cal. Const., art. IV, § 5.)

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[3] Luther Stearns Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America* (1856).

2) The power to choose its officers and to remove them. (Cal. Const., art. IV, § 7(a), added to Constitution of 1879.)

3) The power to establish its own rules of proceeding. (Cal. Const., art. IV, § 7(a), added to Constitution of 1879.)

4) The power to compel the attendance and service of its members. (Cal. Const., art. IV, § 7, added to Constitution of 1879.)

5) The power to be secret in its debates and proceedings. (Cal. Const., art. IV, § 7(c)(1) [this provision has been revised throughout Constitutional history, most recently in 1990]; see also, Grodin et al., *The California State Constitution: A Reference Guide* (1993), Cal. Const., art. IV, § 7.)

6) The power to expel a member and require ethical service. (Cal. Const., art. IV, § 5 [added to Constitution of 1879 and further amended in 1966 and 1990]; see also, Grodin et al., *The California State Constitution: A Reference Guide* (1993), Cal. Const., art. IV, § 5.)

7) The power to protect the security of its members. (*Zumbrun Law Firm, Inc. v. Superior Court, supra,* 165 Cal.App.4th at p. 1614, citing *Ex Parte McCarthy, supra,* 29 Cal. at pp. 403-04; see also Cal. Const., art. IV, § 7(c)(1)(B).)

8) The power to protect itself and members from libelous and slanderous attacks. (Cal. Const., art. VII, § 10, added in 1984.)

9) The power to protect itself and its members from corruption. (Cal. Const., art. IV, §§ 5(b) – (f) and 15, [added throughout constitutional history commencing in 1879]; see also, Grodin et al., *The California State Constitution: A Reference Guide* (1993), Cal. Const., art. IV, §§ 5 and 15.)

10) The power to require information from public officers.

11) The power to require the opinion of the judges and other law officers.

12) The power to investigate by committee and compel testimony of witnesses. (Cal. Const., art. IV, § 11, added to Constitution in 1940; see also *Special Assembly Interim Committee v. Southard, supra,* 13 Cal.2d 503, citing *Ex Parte McCarthy, supra,* 29 Cal. at pp. 403-04; [Legislature may create "committees necessary to ascertain facts and make recommendations to the Legislature on a subject within the scope of legislative control."]; see also, Grodin et al., *The California State Constitution: A Reference Guide* (1993); Cal. Const., art. IV, § 11.)

13) The power to be free from interference from another coordinate branch of government. (Cal. Const., art. III, § 3.)

Thus, parliamentary common law provides no support for the Legislature's broad assertion that it possesses "any and all" power not denied to it by the Constitution. Nor does it support the Legislature's claim to free access to the people's ballot.

3. The Advisory Question Posed by SB 1272 Will Not Lead to the Enactment of Law.

At this point, the Legislature does not even argue that the advisory question posed by SB 1272 would lead to the enactment of legislation because it clearly does not. The proposed advisory measure merely calls on Congress to propose an amendment to the United States Constitution, and if such an amendment is ever proposed to the states, it calls on the Legislature to ratify the yet-to-be proposed amendment. Calling on Congress to propose an amendment to the United States Constitution is clearly not "legislation" and even the Legislature's hypothetical act of ratification itself is not "legislation." (*Hawke v. Smith* (1920) 253, U.S. 221, 229.) With that, this inquiry should end. SB 1272 is not authorized by the California Constitution because it is not "legislation" or incidental to the enactment of "legislation" in the exact same way and for the exact same reason that the people were denied access to the ballot in *American Federation of Labor – Congress of Industrial Organizations v. Eu* (1984) 36 Cal.3d 687 ("*AFL-CIO*").

Absent any authority to ask the voters non-binding questions based on the exercise of its legislative power, and absent any authority based on parliamentary common law, the Legislature must look to some other power granted to it by the State Constitution. No such power exists.

B. NO PROVISION OF THE CONSTITUTION AUTHORIZES THE LEGISLATURE TO ASK THE ELECTORATE NON-BINDING QUESTIONS. ON THE CONTRARY, THE TEXT OF THE CONSTITUTION NECESSARILY IMPLIES THAT SB 1272 IS IMPERMISSIBLE.

Since the desire to ask the voters a non-binding question in SB 1272 (again, primarily directed at Congress) is not grounded in the Legislature's law-making function or incidental thereto, the non-legislative power must be granted by the Constitution. It is not. The Legislature argues that the Constitution, by implication from its silence on the subject, allows it to use any means at its disposal to "gather information" and "ascertain the views" of the electorate through use of the ballot on presumably any topic. (Return at p. 25.)[4] But the Constitution is not silent on either the Legislature's authority to ascertain facts or regarding its access to the ballot.

1. The Constitution Provides a Specific Vehicle for the Legislature to Investigate and Ascertain Facts Necessary For the Performance of its Functions.

Article IV, section 11 provides:

> The Legislature or either house may by resolution provide for the selection of committees necessary for the conduct of its business, ***including committees to ascertain facts*** and make

[4] At best, this argument must be limited to the exercise of its law-making function, which SB 1272 decidedly is not. However, the Legislature contends that it would apply to any legislative or non-legislative power it possesses. Such power includes the power of impeachment and the power to confirm certain appointees of the Governor to fill vacancies. Thus, presumably the Legislature would be empowered to call a special election to ask the voters whether it should confirm a gubernatorial appointment or proceed with impeachment proceedings.

> recommendations to the Legislature on a subject within the scope of legislative control. (Emphasis added.)

Thus, our Constitution provides the Legislature with a specific vehicle to "ascertain facts" with regard to its desire to call on Congress to amend the Constitution, and if such amendment is ever proposed, to make a recommendation as to whether the Legislature should ratify it.[5] Notably absent is any authority to conduct a public opinion poll using the ballot.

2. The Constitution Grants the Legislature Specific Access to the Ballot in Just Three Limited Circumstances.

The Legislature argues that the constitutional enumeration of three specific instances where the Legislature is granted access to the ballot implies nothing with regard to its authority to access the ballot in any other context, including non-binding advisory questions.[6] It also argues that the maxim *Expressio unius est exlusio alterius* does not generally apply to the Legislature's exercise of legislative power.[7] However, that is not the issue here since SB 1272 does not further the exercise of legislative power.

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[5] Through the committee and hearing process, the Legislature would be free to use any number of means to gauge the pulse of the electorate, including presumably a public opinion survey, as suggested by Justice Liu.

[6] The Legislature notes in its Return at pp. 19-20 and fn. 7 that for a time the Constitution specifically granted the Legislature the power to place on the ballot a measure on the same subject as a proposed initiative measure (i.e., a competing measure). That provision was removed in 1966. This fact further evidences that the Legislature's ability to access the ballot has always been by the grant of power.

[7] All of the citations offered by the Legislature are confined to a discussion of legislative power. (See, Return at p. 28: *Dean v. Kuchel* (1951) 37 Cal.2d

While not always applicable where legislative power is concerned, the "maxim is applicable as a rule of constitutional construction" with respect to other powers expressly granted to the Legislature. (See *Gibson v. Civil Service Commission of Los Angeles County* (1915) 27 Cal.App. 396, 399, citing *In re Ohm* (1889) 82 Cal. 160; and *Spier v. Baker* (1898) 120 Cal. 370; see also, *In re Werner* (1900) 129 Cal. 567, 574 ["Under the rule of construction, *Expressio unius est exclusio alterius,* the legislature has no authority to create other public corporate bodies - whether called districts - or by any other name - and clothe them with the power to make and enforce local, police, sanitary, and other regulations conferred by the constitution upon counties, cities, towns, or townships."].). The specific enumeration of three instances where the Legislature may place a proposed measure on the ballot in the text of the Constitution evidences a clear intent that those are the exclusive means by which the Legislature may place matters on the ballot.

3. The Constitution Specifically Reserves the Ballot as a Means of Enacting Law.

Lastly, the text of the Constitution also reserves the ballot for the enactment of law. As the Court held in *AFL-CIO,* the people's reserved

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97, 100-104 [rejecting application of *Expressio unius* doctrine to limit legislative power]; *Ex Parte McCarthy, supra,* 29 Cal. at p. 403 ["A]n express enumeration of legislative powers..."]; *Marine Forests Society v. California Coastal Commission,* (2005) 36 Cal.4th 1, 39 ["...the Legislature enjoys plenary legislative powers..."].)

power of initiative and referendum under Article II was solely for the purpose of enacting law, and not a means of merely expressing the wishes of the people in a "hortatory" manner. (*AFL-CIO, supra,* 36 Cal.3d at p. 708.) Similarly, all other "measures" permitted under the Constitution enact law as well (e.g., Constitutional amendments, bond statutes, and amendments to prior enacted initiative/referendum.) Thus, whether by textual implication or by the doctrine of *Expressio unius est exclusio alterius*, the text of the Constitution necessarily implies that neither the people nor the Legislature has the power to place non-binding advisory measures on the ballot.

C. THE BASIC STRUCTURE OF THE CONSTITUTION, BY NECESSARY IMPLICATION, ALSO DENIES THE LEGISLATURE ANY POWER TO ASK THE VOTERS NON-BINDING QUESTIONS ON THE BALLOT.

In addition to the textual implication that can be drawn from the Constitution, the basic structure of the Constitution also indicates that there is a clear line drawn between the lawmaking function of the Legislature on the one hand, and the powers reserved to the people on the other hand, most notably the reserved power of initiative and referendum.

1. The Exercise of "Political Power" Primarily Through the Ballot is the Province of the People, not the Legislature.

"All political power is inherent in the people" (Cal. Const., art. II, § 1) and the other powers of government are distributed among the three branches of government (Cal. Const., art. III, § 3.) The whole of Article II

relates to voting and this Court has long held that the exercise of political power means the right to vote. (*Walther v. Rabolt* (1866) 30 Cal. 185, 188; *The People v. Washington* (1869) 36 Cal. 658, 662 ["The elective franchise and the right to hold public offices constitute the principal political rights of citizens..."], overruled on other grounds in *People v. Brady* (1870) 40 Cal. 198.) Despite this reservation of political power (i.e., electoral power) in the people, this Court held that even the people have no power to place a non-binding advisory measure on the ballot. (*AFL-CIO*, *supra,* 36 Cal.3d at p. 687.)

Rather than acknowledging Article II's reservation of political power in the people, the Legislature boldly asserts it has unfettered access to the ballot to ask the voters any question, all in the name of the constitutional guarantee of the people to "instruct their representatives." (Cal. Const., art. I, § 3(a) ["The people have the right to instruct their representatives..."].)

But this "right to instruct" is a right of the people, not the Legislature. And this Court in *AFL-CIO* has already held that the people's right to instruct does not include the people's right to place an advisory measure on the ballot. It follows that the right to instruct does not imply power in the Legislature to place an advisory measure on the ballot. In short, the Legislature cannot derive more power from the right to instruct than granted to the people.

In order to exercise this self-declared right, the Legislature argues that it must be permitted to seek the advice of the people through the ballot. Of course, the question posed by SB 1272 doesn't really seek any advice, as it is directed primarily at sending a message to Congress: "Shall the Congress of the United States propose...?" Based on this self-declared right, can the Legislature send a message to the National Football League? "Shall the NFL locate a franchise in Los Angeles, California?"

But why stop there? The State Constitution provides that "the powers of state government are legislative, executive, and judicial." (Cal. Const., art. III, § 3.) The supreme executive power of the State is vested in the Governor who is the people's "representative" in the Executive Branch. (Cal. Const., art. V, § 1.) This executive power is also broad and the Constitution is similarly silent regarding the Governor's access to the ballot. Does the Governor have a right to seek the advice of the people through unfettered access to the ballot? Can he or she ask the voters' advice on any number of Executive functions, like pardoning a convicted felon, (See, Cal. Const., art. V, § (8)(a)) or who he or she should appoint to fill a vacancy on this Court? (See, Cal. Const., art. VI, § 16(d)(3).)

The judicial power of the State is vested in the courts, including the Supreme Court. (Cal. Const., art. VI, § 1.) California judges are the people's elected representatives to the judicial branch of government. Likewise, the judicial power is also broad and not limited to the express

provisions of the Constitution. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 57 ["to say that a court has 'inherent power' with respect to a particular subject matter or function ... appears to mean simply that the court, by virtue of its status as one of the three constitutionally designated branches of government, has the power to act even in the absence of explicit constitutional or legislative authorization."].) Does this Court have access to the ballot to ask advice regarding matters of import to the Judiciary? (e.g., Should the Legislature provide adequate funding for the courts to provide speedy and equal access to all citizens?) After all, there is no express constitutional prohibition denying the Court access to the ballot.

Again, despite the constitutional guarantee of the right of the people to instruct their elected representatives, this Court held that the people had no power to do so via a non-binding advisory measure in *AFL-CIO*. This "right to instruct" guaranteed to the people grants no power to the Legislature.

2. The Constitution's Division of Legislative Power Between The Legislature and the People Implies that the Ballot is The Exclusive Province of the People.

The Legislature quarrels with Justice Liu's concurring opinion issued in connection with this Petition where he correctly points out that the Constitution creates "clear lines of accountability" with respect to the exercise of legislative power. As the representative legislative branch, the

Legislature must answer to the voters periodically by standing for election. As a further check on legislative abuse, the voters reserve the power to challenge a law enacted by the Legislature by referendum under section 9 of Article II. Moreover, Justice Liu is correct that the Legislature has no power to submit a "proposed" law to the people for adoption as that power is reserved in the people, (Cal. Const., art. IV, § 1) and would also violate the parliamentary common law principal that one legislature may not bind the hands of a future legislature. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 715; *Ex Parte Collie* (1952) 38 Cal.2d 396, 398.)

Similarly, the people are also empowered to make law (i.e., "direct democracy"). Thereafter, the people are also directly accountable for their legislative action because they are free to propose the repeal or amendment of a previously enacted initiative or referendum. Moreover, the Legislature has the ability to check abuse by the people by proposing the repeal or amendment of a previously enacted initiative or referendum. (Cal. Const., art. II, § 10(c).)

Advisory measures or questions posed to the voters "blur the lines of accountability" in a way not contemplated by the Constitution. Thousands of bills are considered each legislative session. The people get no say in which bills they may provide advice, and if the Legislature could ask for such advice, there would be no accountability tied to the outcome of an advisory vote, as its character is necessarily non-binding.

This reasoning was a fundamental basis for this Court's rejection of the advisory measure in *AFL-CIO*, namely that the voters' remedy regarding individual legislator's support, or opposition to the balanced budget amendment, was the upcoming election of legislative candidates. (*AFL-CIO, supra,* 36 Cal.3d at p. 695.) The people have no power to interfere directly with the Legislature's exercise of its legislative power any more than the Legislature has in interfering with the people's exercise of its legislative power.

In sum, the legislative power is shared by the people and the Legislature. This power to enact law is essentially two sides of the same coin and this Court has protected each from encroachment and interference by the other.

For example, the Court has limited the permissible scope of the people's initiative and referendum power in several instances to protect the representative legislative branch of government. (See, e.g., *People's Advocate, Inc., supra,* 181 Cal.App.3d at p. 327 [people have no initiative power to control inner-workings of the Legislature]; *DeVita v. County of Napa* (1995) 9 Cal. 4th 763, 776 [legislative body's administrative and executive acts not subject to initiative and referendum]; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 143 [judicial policy of resolving doubts as to the scope of initiatives and referenda to avoid interference with the legislative body's responsibility for fiscal management].)

Likewise, this Court has held that statutory procedures or actions of a legislative body designed to, or that have the effect of nullifying the initiative or referendum power, are unconstitutional. (See, e.g., *DeVita v. County of Napa, supra,* 9 Cal. 4th at p. 789 ["Because of the presumption in favor of the right of initiative, 'restrictions on the right are not read into the statutes'"], citing *Coalition for Fair Rent v. Abdelnour* (1980) 107 Cal.App.3d 97, 104 and *Assembly v. Deukmejian* (1982) 30 Cal. 3d 638, 678 ["Since its inception, the right of the people to express their collective will through the power of the referendum has been vigilantly protected by the courts. Thus, it has been held that legislative bodies cannot nullify this power by voting to enact a law identical to a recently rejected referendum measure"].)[8]

These principles expound on what Justice Liu described as "the delicate balance between legislative and citizen lawmaking."

[8] The original Amendment adding the initiative and referendum power to the Constitution included a specific prohibition on the enactment of procedures that would inhibit the exercise of the reserved powers. "This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved." (Cal. Const., art. IV, § 1, Amendment adopted October 10, 1911.)

D. IT IS THIS COURT'S DUTY TO GUARD THE EXERCISE OF THE INITIATVE AND REFERENDUM POWER. THE POTENTIAL FOR UNLAWFUL ENCROACHMENT BY LEGISLATIVE ADVISORY MEASURES ABOUNDS.

As this Court has emphasized on several occasions, the initiative is "one of the most precious rights of our democratic process," and it is "the duty of the courts to jealously guard this right of the people." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1140 (Citation omitted.); accord *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1035.)

As ably described by *Amici,* Citizens in Charge, there are many strategic ways for the Legislature to interfere with the voters' due consideration of valid and legitimate initiatives proposed by the people. Two recognized direct threats to the initiative are voter confusion and voter fatigue:

> [V]oter confusion often results from the appearance on the ballot of competing ballot initiatives on the same subject, a tactic often used by opponents of the first initiative. Because savvy political actors know that voters frequently react to confusion by voting 'no' on both measures, opponents of a particular initiative may work to qualify a competing measure in the hope that it will result in both being defeated . . .

(Daniel A. Farber & Anne Joseph O'Connell, *Research Handbook on Public Choice and Public Law 155* (Edward Elgar Publishing 2010).)

Moreover, comprehensive initiative measures may be complex where a mere "advisory" measure may be simply stated. To be sure, SB

1272 is an example of such a situation. Obviously, the prospect of changing the First Amendment to the United States Constitution is heady and complex, particularly in the field of campaign finance regulation. If SB 1272's non-binding advisory question were on the same ballot with a comprehensive campaign finance reform initiative, which would garner the most votes? If both measures passed, what would be the result?

The State Constitution simply does not contemplate competing measures where one measure is non-binding and the other is binding. Section 10(b) of Article II provides: "If ***provisions*** of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail." (Emphasis added.) Thus, this Court has held that where the provisions of competing measures appear to be comprehensive and intended as such, the measure with the most votes prevails in its entirety, despite the recognized potential for abuse. (*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744.)

> Taxpayers and the FPPC argue that a construction of section 10(b) that does not permit implementation of individual, nonconflicting provisions of initiative measures will "eviscerate" the initiative process, and will make it possible for opponents of an initiative to defeat it even when it has been adopted by an overwhelming majority of the voters. The opponents will be able to do so, they argue, by placing another, less complex, but conflicting, measure on the same ballot in the hope that it will receive a greater vote.

> The possibility of abuse of the initiative, however, does not offset the equally serious threat to the process that may occur when courts and regulatory agencies attempt to enforce provisions of conflicting initiatives in the absence of any assurance that the electorate anticipated the resulting regulatory scheme.

(*Id.* at p. 769.)

How would this Court reconcile, or not reconcile competing measures where the one receiving the most votes was non-binding?

Lastly, as *Amici* asked: "[i]f the Legislature has the power to put advisory measures on the ballot, why stop at one?" How about ten, or twenty, or thirty? Cluttering the ballot with non-binding measures does not just invite confusion, it would increase the likelihood of voter fatigue and drop-off: weary voters will simply abstain from voting on measures as they move further down the ballot. (See, Ned Augenblick and Scott Nicholson, Working Paper, *Ballot Position, Choice Fatigue, and Voter Behavior* (University of California, Berkeley, Haas School of Business 2012).)[9]

Absent any direct constitutional authority granting the Legislature the power to use the ballot to ask the voters non-binding questions, it is this Court's duty to place the people's exercise of initiative and referendum power above the Legislature's desire to poll the electorate.

[9] Online at http://faculty.haas.berkeley.edu/ned/choice_fatigue.pdf.

E. EXAMPLES OF ADVISORY MEASURES IN OTHER STATES AND EARLY IN CALIFORNIA'S HISTORY DO NOT EVIDENCE ANY CONSTITUTIONAL AUTHORITY FOR THE LEGISLATURE'S DESIRE TO USE THE BALLOT TO ASK THE VOTERS QUESTIONS.

The Legislature continues to cite the fact that there has been no prior legal challenge to its long-ago use of an advisory question, and but one example post-1911 (the incorporation of initiative power in the Constitution) as a "pattern" evidencing legislative interpretation of its power under the Constitution, to which it argues the Court must give "great weight." However, this Court rejected that very claim in *Special Assembly Interim Committee v. Southard, supra,* 13 Cal.2d at pp. 508-09:

> Appellant's last argument is that the legislature for many years past has created interim committees by single house or concurrent resolution, and that such legislative usage, never before challenged, is entitled to the greatest weight in determining the validity of the appellant committee. The obvious answer to this contention is that usage and custom, no matter how long continued, cannot create a right in the legislature that otherwise it does not possess, and, which, as already held, is impliedly denied to it.

The Legislature also cites a list of other states where it asserts that the advisory measure has been used by the Legislature, yet concedes that no court has ever ruled on the validity of such measures under the constitution of the particular state. Notably, the Legislature cites the federal court decision in *Kimble v. Swackhammer* (1978) 439 U.S. 1385 as supporting the use of advisory measures in connection with ratification of an amendment to the United States Constitution. Of course that case had

nothing to do with state authority, and as Petitioners pointed out in prior briefing, the validity of the Nevada advisory measure under the Nevada Constitution was raised but not resolved in the Nevada state court:

> [M]y colleagues have not explained how it is proper under the Nevada Constitution for our Legislature through an "Act" obviously intended neither to make nor modify law, and therefore manifestly outside the Legislature's normal law-making function to utilize the state's election ballots in ways not contemplated by Nevada's Constitution.

(*Kimble v. Swackhammer* (1978) 94 Nev. 600, 603, J. Gunderson, dissenting.)

Nonetheless, the out-of-state examples are, in many cases, distinguishable or mischaracterized by the Legislature. For starters, the constitutional provisions regarding the ballot are unique in every state, as is the people's power to place initiative measures on the ballot. Further, not all advisory measures cited by the Legislature were placed on the ballot by the Legislature of that particular state. Four of the measures were placed on the ballot by the citizens, not the Legislature. Two measures were placed on the ballot as required by that state's law (because of the subject matter). One measure was determined to be binding, not advisory by that state's Supreme Court and another was advisory only because it conflicted with federal law. Lastly, in at least three states where the Legislature placed an advisory measure on the ballot, the people also have the power to place an advisory measure on the ballot. For example:

1. Alaska.

The advisory measure cited by the Legislature on Same-Sex Public Employment Benefits was referred by the Alaska Legislature. However, unlike California, Alaska case law allows citizens to also place advisory measures on the ballot. In fact, the Alaska Supreme Court considered and rejected this Court's decision in *AFL-CIO*, while upholding the citizen use of a non-binding advisory initiative. (*Yute Air Alaska, Inc. v. McAlpine* (Alaska 1985) 698 P.2d 1173, 1175.)

2. Colorado.

The advisory measure cited by the Legislature (Amendment 65) was a citizen-sponsored initiative, not placed on the ballot by the Colorado Legislature. (http://www.sos.state.co.us/pubs/elections/Initiatives/ballot/Statements/2012/82Sufficiency.pdf.) Petitioners are not aware of any legal challenge to the validity of the citizen-sponsored measure in Colorado.

3. Delaware.

The Charitable Gambling Referendum (1984) cited by the Legislature was required by the state's constitution. Article II, section 17B(1) of the Delaware Constitution states: "The General Assembly shall provide by law for the submission to the vote of the qualified electors of the several districts of the State, or any of them, mentioned in subparagraph 2 of Section 17B of this Article at the General Election held in 1984, the

question whether the playing of lotteries not under State control shall be licensed or prohibited within the limits thereof... ." (Emphasis added.)

4. Illinois.

The Birth Control in Prescription Drug Coverage Question cited by the Legislature was placed on the ballot by the Illinois Legislature. However, in Illinois, the people's legislative powers are limited to amending the legislative article of their constitution by petition; the people cannot enact statutory law. (Ill. Const., art. XIV, § 3.) In 1901, as an alternative to granting the people the initiative power to enact statutory law, the legislature passed the Illinois Public Opinion System, which established the ability of voters to submit "any question of public policy." (C.O. Gardner, *The Working of the State-wide Referendum in Illinois*, 5 Am. Pol. Sci. Rev., 394 (1911).) The "electors of the State or of any political subdivision" may submit "advisory questions of public policy" under Illinois statute. (10 Ill. Comp., stat., 5/28-1 -13.) Obviously, the people possess no such right in California.

5. Massachusetts.

Prior to the adoption of initiative and referendum, the Massachusetts Legislature adopted legislation granting the voters of any senatorial or representative district the ability to place questions of public policy on the ballot. (Mass. Gen. Law, Ch. 53, § 19.) Massachusetts has since adopted

initiative and referendum, but the mechanisms for non-binding, advisory questions of public policy remain intact.

(http://www.sec.state.ma.us/ele/elepdf/2014-Public-Policy-Question-Petitions-brochure.pdf.) Additionally, the Massachusetts Legislature may review initiative petitions and place an alternative on the ballot (Mass. Const., art. XLVIII.). None of these powers are possessed by the people of California.

6. Montana.

The advisory measure cited by the Legislature (the Taxpayer Funding for Political Campaigns Advisory Question) was placed on the ballot by the Massachusetts Legislature. However, like Illinois, the Massachusetts Legislature adopted legislation granting the voters of any senatorial or representative district the ability to place questions of public policy on the ballot. (Mass. Gen. Law, Ch. 53, § 19.) Massachusetts has since adopted initiative and referendum, but the mechanisms for non-binding, advisory questions of public policy remain intact.

(http://www.sec.state.ma.us/ele/elepdf/2014-Public-Policy-Question-Petitions-brochure.pdf.) Additionally, the Massachusetts Legislature may review initiative petitions and place an alternative on the ballot. (Mass. Const., art. XLVIII.) None of these powers are possessed by the people of California.

7. New Jersey.

The New Jersey sports betting measure cited by the Legislature actually proposed an amendment to the New Jersey Constitution, as authorized by its constitution. (New Jersey Const., art. IX.) It was "non-binding" in effect only because federal law prohibits sports betting in New Jersey. (*Professional and Amateur Sports Protection Act*), 28 U.S.C., §§ 3701, *et seq.*) Despite the ban, New Jersey lawmakers continue to push for legalized sports betting.

8. North Dakota.

The Legislature cites to a measure relating to a nuclear freeze, but it was also was placed on the ballot by citizen petition, not the North Dakota Legislature.

(https://vip.sos.nd.gov/pdfs/Abstracts%20by%20Year/1980s'%20Election%20Results/1982/General%20Election%2011-02-1982.pdf) In 1982, there was a nationwide trend of placing advisory measures on the ballot on this issue, including California.

(http://www.nytimes.com/1982/11/04/us/widespread-vote-urges-nuclear-freeze.html.) The North Dakota measure went unchallenged, but a similar measure was challenged in Nebraska. The Nebraska Supreme Court invalidated a nuclear freeze initiative because it was "nothing more than a nonbinding expression of public opinion." (*State ex rel. Brant v. Beerman* (1984) 217 Neb. 632, 350 N.W.2d 18, 23.)

9. Oregon.

Like the North Dakota Limits on Nuclear Weapons Initiative, the Oregon Nuclear Missile Freeze Act cited by the Legislature was part of a popular nationwide movement and was initiated by the people of Oregon, not the Oregon Legislature. (http://bluebook.state.or.us/state/elections/elections20.htm.) There was no legal challenge to the Oregon Nuclear Missile Freeze Act.

10. Rhode Island.

The Co-Equal Branches of Government Act was placed on the ballot by the governor, not the legislature, under Rhode Island General Law, § 17-5-2. It asked whether the state constitution should be amended. The measure was non-binding because constitutional changes can only be accomplished through either constitutional convention, or proposal by the general assembly and approval by the voters. Section 17-5-2 gave the governor the power "to order the secretary of state to submit any question or questions that he or she shall deem necessary to the electors at any election." This law was repealed in 2006.

11. South Dakota.

The Radioactive Waste Management Compact Question (RWMCQ) cited by the Legislature was placed on the ballot by the South Dakota Legislature, but it was not an advisory measure. The South Dakota

Supreme Court found that the RWMCQ was a binding measure because the Dakota Interstate Low-Level Radioactive Waste Management Compact (1984), preceding the RWMCQ, required voter approval. (*Wyatt v. Kundert* (1985) 375 N.W.2d 186.) South Dakota, like California, reserves the power to the right of initiative and referendum for the people. (S.D. Const., art. III, §1.) Unlike California, the same section reserving those rights to the people expressly states: "[The initiative and referendum] section shall not be construed so as to deprive the Legislature or any member thereof of the right to propose any measure." The South Dakota Supreme Court upheld the legislature's power to refer its own acts to the people under Article III, §1. (*Wyatt v. Kundert, supra*, 375 N.W.2d 186.)

12. Washington.

The Elimination of Agricultural Tax Preference cited by the Legislature was placed on the ballot as required by state law. In 2007, Washington voters approved Initiative 960, which enacted RCW section 43.135. As a result, "any action or combination of actions by the state legislature that increases state tax revenue deposited in any fund, budget, or account" may be referred to the voters directly by the legislature. (RCW 43.135.034.) The measure cited by the Legislature was placed on the ballot pursuant to the prior enacted law proposed and enacted by the people.

III.

CONCLUSION

Petitioners have never denied that the Legislature has broad legislative power. If the Legislature is truly troubled by the influence of large corporate campaign contributions, it can simply enact a law prohibiting such campaign contributions. If the Legislature would like Congress to take action on the same subject, it is free to pass a resolution so stating, as it has done on multiple occasions. What it cannot do, however, is to use the ballot to ask the voters non-binding questions on any topic of its choosing. The ballot is a tool to be used by the people, and the Legislature has no power to clutter and confuse the ballot with whatever non-binding advisory questions its clever political consultants may dream up.

For all of the foregoing reasons, Petitioners respectfully request that this Court deny the Legislature's Demurrer and that their Petition for Writ of Mandate be made permanent.

Dated: December 31, 2014. Respectfully submitted,

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By: _____
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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 of HOWARD JARVIS TAXPAYERS ASSOCIATION and JON COUPAL is produced using 13-point Times New Roman type including footnotes and contain approximately 7,069 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: December 31, 2014. BELL, McANDREWS & HILTACHK, LLP

By: _____
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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 455 Capitol Mall, Suite 600, Sacramento, CA 95814.

On December 31, 2014, I served the following: **PETITIONERS' REPLY TO REAL PARTY IN INTEREST LEGISLATURE OF THE STATE OF CALIFORNIA'S RETURN BY DEMURRER TO PETITON FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF**

on the following parties:

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X **BY U.S. MAIL:** By placing said document(s) in a sealed envelope and depositing said envelope, with postage thereon fully prepaid, in the United States Postal Service mailbox in Sacramento, California, addressed to said party(ies), in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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.

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 December 31, 2014. at Sacramento, California.

CORIANNE DURKEE