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' TRAVERSE TO RESPONDENT'S AND REAL PARTY IN INTEREST'S RETURNS

CRITICAL DATE: JUNE 27, 2024

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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 Senator 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 this case is June 27, 2024.[1]

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. Nevertheless, his arguments in favor of the Measure's validity all hinge on dramatically understating its effects.

First, Real Party resists preelection review by misstating the standard for removing from the ballot a measure that is beyond the voters' power to enact. This Court has repeatedly held that preelection review is appropriate when a measure cannot be adopted by initiative. It has accordingly removed at least six measures from the ballot which were beyond the voters' power to enact. The courts of appeal have removed at least half a dozen more. Here, the case for preelection review is especially strong. Not only is there adequate time available for review – which is already well underway – but there is a pressing need to resolve the fiscal uncertainty surrounding the Measure's

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[1] Respondent's Return to Order to Show Cause ("Resp. Ret.") at p. 5.

threat to retroactively void the many taxes and charges enacted throughout this state since January 1, 2022.

Real Party seeks to minimize that threat by arguing that there are "only" 26 local tax measures that "clearly" do not comply with the Measure[2] – rather than the 131 measures identified by Petitioners.[3] However, because these 26 measures alone raise more than $830 million annually, it is now undisputed that the Measure threatens at least $830 million in annual local tax revenues, with much additional revenue at stake from state tax enactments and charges adopted by state and local executive agencies.[4] The essential point here, however, is the degree of uncertainty at the root of the disagreement between the parties over the other 105 local tax measures. That uncertainty is forcing government officials across the state to guess at how courts would resolve the Measure's ambiguities because there would not be time for appellate court rulings in the twelve short months the Measure provides to readopt non-conforming taxes and charges. Because the Measure is invalid, it must be removed now rather than require policymakers to take preemptive steps to be ready if the Measure should pass.

Second, Real Party argues that Petitioners' revision argument is predicated entirely on speculation that the voters

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[2] Real Party in Interest's Return to Order to Show Cause ("RPI Ret.") at p. 35, fn. 8.

[3] Pets.' Reply in Supp. of Emergency Pet. for Writ of Mandate ("Reply") at p. 33.

[4] See p. 25, *infra*.

will never approve tax increases. In fact, Petitioners have made no such prediction and make none now. What matters is only whether the Measure would make "a far-reaching change in the fundamental governmental structure or the foundational power of its branches" – not how many governmental actions that foundational change is likely to affect. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 444 (*Strauss*).) On that front, the revocation of the Legislature's power to directly impose taxes – substituting for it the power merely to recommend taxes for voter approval – is at least as sweeping as the revocation of the judicial power to interpret the rights of criminal defendants which this Court held was an unlawful revision in *Raven v. Deukmejian* (1990) 52 Cal.3d 336 (*Raven*). 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 update executive branch regulations that impose administrative fees for non-revenue purposes.

Rather than meaningfully grapple with the standard for revisions, Real Party argues that the Measure is better understood as a constitutional amendment because it (a) amends existing constitutional provisions and (b) builds upon precedents from past and current versions of the Constitution. *Raven* forecloses the former argument because it held that another measure purporting to amend an existing constitutional provision was a revision. It also forecloses the latter argument because it

dismisses the significance of two prior measures that were precedent for the measure it struck down. (*Raven*, *supra*, 52 Cal.3d at pp. 354-355.) Furthermore, none of the prior voter approval requirements or restrictions on legislative power identified by Real Party come close to the Measure's profound changes to the governmental structure and the foundational powers of the legislative and executive branches of government. Simply put, this Measure is radical in unique and unprecedented ways that make it a constitutional revision.

Finally, Real Party claims these fundamental changes cannot be expected to interfere with essential government functions because local governments have not collapsed under the weight of past efforts to restrain their ability to generate revenue. But Real Party asks this Court to place too much faith in the resiliency of government. The ability to withstand several past restrictions is no guarantee that the Legislature and local legislative bodies will be able to withstand an additional round of restrictions that are more extreme than what has come before. The Measure must be read in light of the 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 more serious, and frankly dangerous, than Real Party wants this Court to understand.

That is why the validity of the Measure should be decided now, while there is time, and before scores of jurisdictions must take action to readopt taxes and fees and slash budgets in anticipation that voters may not approve them. Without preelection review, scores of 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.

TRAVERSE

Petitioners contend that Real Party's unverified Return by Answer does not contain any material allegations. To the extent that any statement in Real Party's Return by Answer could be construed as a material allegation, Petitioners hereby deny any and all such material allegations. Additionally, Petitioners dispute each of Real Party's affirmative defenses.

ARGUMENT

I.

THE UNIQUE CIRCUMSTANCES OF THIS CASE REQUIRE THAT THE MEASURE BE INVALIDATED NOW

Even though the Court called for preliminary briefing on the issue of preelection review and then issued an order to show cause, Real Party persists in arguing that the Court should not decide this matter. Real Party's arguments exaggerate the relevant case law and minimize the Measure's impact, all the

while failing to acknowledge the unique circumstances of this case. Both the timing and impact of the Measure set it apart from the cases upon which Real Party relies, and Real Party ignores many of the cases in which appellate courts have removed measures from the ballot.

The discussion that follows shows that when considered under the proper standard for preelection review, the facts regarding *this* case warrant such review.

A. Depending On Timing, Preelection Review Is Appropriate For Measures That Cannot Properly Be Submitted By Initiative

Real Party makes the extraordinary claim that in order to warrant preelection review, a challenge to an initiative "must identify and prove a *procedural defect* in the measure's qualification; or in the alternative, a *substantive defect* must be so egregious that [the] initiative's proponent either admits the violation or cannot seriously contest removal from the ballot." (RPI Ret. at p. 30, emphasis in original.)

That is not the standard in this state, and it never has been. Rather, this Court has repeatedly said that preelection review can be appropriate "when the challenge is based upon a claim, for example, that the proposed measure may not properly be submitted to the voters because the measure is not legislative in character or *because it amounts to a constitutional revision rather than an amendment."* (*Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1029, quoting *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1153

(*Senate v. Jones*), emphasis added.) That is, of course, Petitioners' claim here.

Real Party acknowledges only two cases in which this Court has substantively reviewed an initiative measure before an election. The first is *Senate v. Jones*, *supra*, 21 Cal.4th 1142, in which the Court removed an initiative constitutional amendment from the ballot because it violated the single subject rule. Real Party first tries to distinguish that case based on the fact that subdivision (d) of article II, section 8 of the Constitution provides that an initiative measure embracing more than one subject may not be submitted to the voters. (RPI Ret. at pp. 30-31.) But subdivision (a) of article II, section 8 is equally clear: It only allows use of the initiative process to pass statutes and constitutional amendments; *revision* by initiative is not authorized. There is therefore no need for an explicit prohibition against submission of revisionary initiatives to the voters.

Real Party's second argument – that the *Senate v. Jones* Court took the measure off the ballot because the proponent engaged in logrolling – is simply wrong. The Court mentioned the proponent's efforts, but it did not rely on them in deciding that the measure contained more than one subject. (*Senate v. Jones*, *supra,* 21 Cal.4th at pp. 1151-1153, fns. 5, 6.) That is because the Court has long held that if an initiative "satisfies the single-subject rule, there is no constitutional basis for a separate claim of 'logrolling.'" (*Kennedy Wholesale Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 255.) Logrolling may be disfavored, but it is not unconstitutional.

The only other preelection review case that Real Party mentions is *Planning & Conservation League v. Padilla* 2018 Cal.LEXIS 6817 (Sept. 12, 2018, S249859), in which the proponent stipulated that his measure should be removed from the ballot. Such stipulations are, however, not required. Despite vigorous opposition by the proponents, the Court ordered measures removed from the ballot in these other cases:

- *Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1115 (*Wilde*) (local referendum would improperly challenge municipal water fees)[5]
- *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 209 (local initiative would impermissibly impose voter approval requirement on future adjustments of water delivery charges)
- *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 715-716 (*AFL*) (state initiative would conflict with federal constitution and exceed scope of initiative power by forcing Legislature to adopt a resolution rather than enacting change in state law)
- *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 663 (state initiative would impermissibly force redistricting more often than constitutionally allowed)
- *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832, 840 (local referendum would impermissibly challenge county sales tax)
- *Simpson v. Hite* (1950) 36 Cal.2d 125, 127 (local initiative would impermissibly interfere with county administrative matters committed solely to the board

[5] In addition, the Court upheld the substantive validity of a local initiative measure in a preelection challenge in *Kugler v. Yocum* (1968) 69 Cal.2d 371.

of supervisors, and with state policy regarding sites designated for superior courts)

Real Party also ignores the following cases in which courts of appeal have held that an initiative or referendum may not appear on the ballot, again despite vigorous opposition from the proponents:

- *Howard Jarvis Taxpayers Association v. Amador Water Agency* (2019) 36 Cal.App.5th 279, 286-287 (local referendum would impermissibly challenge local water rates)
- *Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892, 900 (local initiative would impermissibly lower water rates)
- *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 402-403 (local initiative would impermissibly force administrative decisions and undermine a measure previously adopted by the voters)
- *San Francisco Forty-Niners v. Nishioka* (1999) 75 Cal.App.4th 637, 639 (local initiative petition impermissibly sought to mislead and misinform voters)
- *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1025-1027 (local initiative would violate equal protection clause and promote private discrimination)
- *California Trial Lawyers Association v. Eu* (1988) 200 Cal.App.3d 351, 361 (state initiative violated single subject rule)

This list is by no means exhaustive, but it demonstrates the error in Real Party's claim that a substantive defect in an initiative "must be so egregious that [the] initiative's proponent either admits the violation or cannot seriously contest

removal from the ballot" to justify removal before an election. (RPI Ret. at p. 30.) Petitioners agree that the courts should exercise "considerable caution" before removing a measure from the ballot,[6] but caution does not mean abdication and courts appropriately exercise their power where, as here, the measure is one that cannot be adopted by initiative and its very presence on the ballot will cause serious harm.

B. Preelection Review Is Uniquely Necessary In This Case

Real Party cites *Independent Energy Producers, Inc. v. McPherson*, *supra*, 38 Cal.4th 1020, for the principle that even a revision challenge can wait until after the election "when there will be more time for full briefing and deliberation . . . ." (RPI Ret. at p. 27.) That is not the case with this Measure because of the way Real Party chose to draft the Measure's retroactivity clause.

1. The Measure's Timing

Article II, section 8, subdivision (c) of the Constitution and Elections Code section 9016 generally require that an initiative measure appear on the next statewide November general election ballot held at least 131 days after the measure qualifies. Because the Measure at issue here qualified for the ballot in an odd-numbered year, it would not appear on the ballot until November 5 of this year. The Legislature, the Governor, and Senator Burton filed their petition with this Court

[6] *Costa v. Superior Ct.* (2006) 37 Cal.4th 986, 1007.

on September 26, 2023, more than a year before the November 2024 election. The Secretary of State agrees with Petitioners that the critical date for resolution of this case is June 27, 2024, when she must certify measures for the November ballot. (Resp. Ret. at p. 5.) That provides the Court with nine months to consider and decide a case in which briefing is already well underway.

Because most initiatives qualify much closer to the 131-day deadline, the Court understandably postpones review when time is short. For example, in *Strauss, supra*, 46 Cal.4th at pages 397-398, petitioners filed a preelection challenge to the same-sex marriage initiative on June 20, 2008, which was only six days before the Secretary of State was required to certify the measure for the November 4, 2008 ballot under Elections Code section 9033, subdivision (b). The *Strauss* Court summarily denied the petition and then reviewed the measure after the election. (*Id.* at p. 475.) This case is different; time for preelection review is not short, but as demonstrated below, time will inevitably be short for post-election litigation over the validity of the Measure.

2. <u>The Measure's Retroactivity Provision</u>

Sections 4 and 6 of the Measure provide that any noncompliant state or local taxes or exempt charges adopted after January 1, 2022 – nearly three years before the Measure's potential effective date – are void unless they are reenacted within 12 months from the Measure's effective date. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (f); Sec. 6, proposed

art. XIII C, § 2, subd. (g) [attached as Exhibit A to the Petition].) Real Party insists that there will be "ample time" to litigate the Measure's validity after the election, because Petitioners could file this same lawsuit more than 13 months before the reenactment window closes. (RPI Ret. at p. 35.) That claim ignores what would necessarily be occurring simultaneously: Hundreds of jurisdictions will need to decide immediately whether or not they must call special elections or reenact fees and charges on which they have been counting for up to three years. As the Secretary of State put it, the Measure would "create immediate responsibilities" for state and local government to (1) determine which taxes or charges are affected by the Measure, (2) decide which ones to place before the electorate, (3) take action necessary to place those matters on the ballot and (4) prepare for and conduct those elections. (Resp. Ret. at p. 8.)

In crafting his Measure, Real Party decided to require that all of this must be done within the space of one year, which is only half the time allotted to local governments under the retroactivity provisions of Propositions 218 and 62. Both of those measures gave local jurisdictions two years to conform taxes to their requirements, and they only applied to taxes passed in the prior year. (Cal. Const., art. XIII C, § 2, subd. (c); Gov. Code, § 53727, subd. (b).) The retroactivity provision in Proposition 26 was limited to article XIII A, which only applies to taxes passed by the Legislature. (Cal. Const., art. XIII A, § 3, subd. (c).) Thus, even though the Legislature had only one year

in which to reenact taxes or fees, the Legislature could do so through 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.

In *Legislature v. Deukmejian*, *supra*, 34 Cal.3d at page 666, this Court wrote that "[t]he general rule favoring postelection review contemplates that no serious consequences will result if consideration of the validity of a measure is delayed until after an election." In that case, the Governor had called a special election in December 1983 for a statewide redistricting measure that would have changed district boundaries for the June 1984 legislative and congressional elections. (*Id.* at pp. 663-664.) Noting that there would be "very substantial problems" for election officials, candidates, and campaigns if it were to delay ruling on the measure, the Court took it off the ballot. (*Id.* at p. 666.)

The same is true here. Although Real Party tries to downplay the effect of his Measure, it is already having detrimental impacts on governmental decision-making. An amicus letter signed by five local government associations, including the California League of Cities, stated that the proposed measure "is already destabilizing government finance" because its provisions "discourage new government efforts no matter how urgent the problem to be addressed, discourage expenditures in fiscal years 2023-2024 and 2024-2025, hang like

a shadow over budgets to be adopted in summer 2025 for fiscal year 2025-2026, may trigger continuing disclosure obligations of issuers of publicly traded debt, and impair California governments' ability to borrow."[7]

The mayors of eight of California's largest cities have said that "our cities will be forced to reassess and potentially slash lawfully prepared budgets in anticipation that the Measure *might* pass" and that preelection review is necessary "to protect state and local governments from the potentially dire and unnecessary consequences of having to implement this invalid measure – even before it passes."[8]

Real Party insists that this reaction is overblown and that, if enacted, the impact of the Measure will be far less than Petitioners and their amici describe. The facts do not bear this out. For example, in her return, the Secretary of State reiterates that if enacted, the Measure would have an immediate impact on election administration, and she points out that the 2021 gubernatorial recall election cost $200.24 million and that the cost for Los Angeles County alone was nearly $53 million. (Resp. Ret. at pp. 8-9.) In addition, Petitioners' reply to Real Party's preliminary opposition contained a declaration and chart showing that the Measure's retroactivity provision could invalidate local taxes expected to raise between $1.3 billion and $1.9 billion in annual revenue and may also apply to at least

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[7] Amicus Letter of Cal. State Assn. of Counties, et al., filed Sept. 28, 2023.

[8] Amicus Letter of Mayor Karen Bass, et al., filed Sept. 26, 2023.

15 state laws passed since January 1, 2022. (Decl. of Inez Kaminski in Supp. of Emergency Pet. for Writ of Mandate ["Kaminski Decl."], ¶¶ 9, 13.)

Despite this evidence, Real Party argues that there are only 26 local tax measures that "are clearly non-compliant" with the Measure. (RPI Ret. at p. 35, fn. 8; Decl. of Sarah E. Yonan in Supp. of RPI Ret. ["Yonan Decl."], ¶ 9.) The estimated revenue from even these 26 measures alone amounts to between $830 million and $1.3 billion annually, a huge sum to be raised in off-year special elections, particularly if the measures require a supermajority vote.[9]

Even more importantly, however, the key word in Real Party's argument is "clearly," because there are scores of measures that may or may not comply. Real Party relies on the Declaration of Sarah Yonan, a lawyer in his firm who states her opinion that the other measures cited by Petitioners in the Kaminski Declaration either clearly or substantially comply with the Measure. The fact that one lawyer in Real Party's firm has reached these conclusions is hardly dispositive for the scores of jurisdictions that must decide whether to try to reenact taxes and other charges upon which their current budgets rely. Unless and until appellate courts interpret the Measure, government officials must necessarily guess at its meaning, including whether the

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[9] These are conservative numbers, as they do not include any estimated annual revenues for seven of the measures noted by Real Party. Petitioners identify these estimates as "unknown." (See, e.g., Kaminski Decl., Exh. A at p. 17 [showing unknown annual revenues for Measure L in Humboldt County].)

doctrine of substantial compliance applies to particular requirements.[10] That lack of clarity means that government officials must decide now, not later, whether to call special elections or cut back on expenditures or both.

Consider the situation in Los Angeles County. Ms. Yonan agrees that there are seven clearly noncompliant local taxes enacted there since January 1, 2022. (Yonan Decl., ¶¶ 5, 8.) One of those is a county-wide tax (Measure C), one is a City of Los Angeles tax (Measure ULA), and another two are in Santa Monica. Exhibit A of the Kaminski declaration identifies *17* more, including another one in Santa Monica, two in Baldwin Park, and two in El Segundo. (Kaminski Decl., Exh. A at pp. 19-21.) The anticipated revenues from these 17 additional taxes amount to more than $66 million (*ibid.*), and it will cost millions to put them before the voters at special elections – money that will be wasted if the taxes are not approved.

Real Party's argument that the Court could stay implementation of the Measure's retroactivity provision (RPI Ret. at p. 35) would only postpone the uncertainty without curing the problem. First, government officials would have to wait to see whether the Measure passes, wait to see how quickly this Court (assuming the Court agreed to hear the case) would rule, then – depending on the outcome of the decision – decide whether

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[10] See *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 649 (holding that substantial compliance "means *actual* compliance in respect to the substance essential to every reasonable objective of the statute." [quoting *Stasher v. Harger-Haldeman* (1962) 58 Cal.2d 23, 29, emphasis in original]).

to call a special election, all without knowing whether they can count on having the revenue from previously enacted measures available to them.

Real Party's suggestion that state and local officials could bring validation actions is similarly unavailing. Whether the validation statutes even apply to a particular tax or charge is often unclear, as the Court's decisions in *Davis v. Fresno Unified School District* (2023) 14 Cal.5th 671 and *Bonander v. Town of Tiburon* (2009) 46 Cal.4th 646 attest. Even if such an action is available and therefore is entitled to priority, Code of Civil Procedure section 860 provides that the action must be commenced in a superior court. Government officials cannot realistically expect that their individual actions will be heard and resolved at the appellate level within the space of one year.

Finally, it is not true, as Real Party claims, that Petitioners do not challenge the Measure in its entirety and that review should wait until after the election in order for the Court to conduct a severability analysis. (RPI Ret. at pp. 33-34.) The Measure works as a whole to restrict the revenue-raising function of state and local government by, in the words of the Measure itself, "clos[ing] loopholes and revers[ing] hostile court decisions." (Measure, Sec. 2, subd. (e).) Because the Measure would accomplish those goals in ways that amount to a revision and impair essential government functions, severability analysis will be the same whether the Measure's validity is decided now or after the election. As this Court said in *American Federation of Labor v. Eu*:

> In a preelection opinion, . . . it would constitute a deception on the voters for a court to permit a measure to remain on the ballot knowing that most of its provisions, including those provisions which are most likely to excite the interest and attention of the voters, are invalid.
>
> (*AFL*, *supra*, 36 Cal.3d at p. 716, fn. 27.)

II.

THE MEASURE IS INVALID BECAUSE IT WOULD REVISE THE CONSTITUTION

A. The Measure's Revisionary Aspects Are Apparent On Its Face

A measure should be deemed an invalid revision when it "necessarily or inevitably appear[s] from the face of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 510.) Real Party claims that Petitioners do not meet this standard because Petitioners' claim "is predicated entirely on their own speculation of the fiscal effects TPA will have." (RPI Ret. at p. 11.) This is incorrect.

The Measure is revisionary because it would profoundly change California's governmental structure and powers *in ways that are written directly into the text of the Measure*:

- Proposed article XIII A, section 3, subdivision (b)(1) revokes the Legislature's power to tax by requiring that any state law resulting in a new or higher tax

for any taxpayer be "submitted to the electorate and approved by a majority vote."

- Proposed article XIII A, section 3, subdivision (h)(4) guts executive branch power by changing the definition of "state law" to include actions by the "executive branch[ ]," and then, in proposed section 3, subdivisions (b)(1) and (c), by requiring that any change in "state law" must be imposed either by "the electorate" and "the Legislature" if it is a tax or "the Legislature" if it is an exempt charge. Proposed article XIII C, section 1, subdivision (f) and section 2, subdivision (e) make these changes at the local level.

- Proposed article XIII A, section 3, subdivision (e) and article XIII C, section 1, subdivision (j) expand the definition of taxes to place many additional charges beyond the power of the Legislature and local legislative bodies to directly enact.

- Proposed article XIII A, section 3, subdivision (d) and article XIII C, section 1, subdivision (i) expand the voters' power to use the referendum to disapprove charges currently categorized as taxes.

- Proposed article XIII C, section 2, subdivisions (c) and (f) reduce the voters' power to use the initiative to raise taxes.

Real Party agrees that the Measure would reallocate power among branches and the electorate in these ways. (RPI Ret. at pp. 23-26.)

The only explanation Real Party offers for characterizing the revision claim as speculative is to argue that Petitioners rely on a "presumption that voters will never approve tax increases." (RPI Ret. at p. 11.) Yet Petitioners did not and would not rely on such a presumption because future voter approval statistics are not materially relevant to the revision

question before this Court. A revision is defined by the *type* of change it makes to governmental structures and powers, not the ability to predict *how often* that change will yield different substantive results. After all, even if the voters approved every new or increased tax the Legislature proposes, taxation would still have been profoundly transformed in California. Under the Measure, the Legislature would no longer have the power to change taxes itself for the first time in the State's history. Most troubling, the Legislature will have lost the ability to change taxes quickly in a manner that best serves the public interest and would instead be limited to proposing changes that it thinks could garner majority support from the voters. Likewise, the voters will have to assume responsibilities for governing the State that they do not have today. The list goes on.

This is why the *Raven* Court found Proposition 115 to be a revision without needing to predict whether or how many times future criminal defendants would ask state courts to extend state constitutional protections that are unavailable under the federal Constitution. Because Proposition 115's fundamental rebalancing of powers was apparent on the face of the measure, the measure was a revision. The same is true here.

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

1. The Measure Is A Revision And Not An Amendment

Petitioners and Real Party agree on the standards governing this case. Real Party does not dispute that a qualitative revision is one that would "make a far-reaching

change in the ***fundamental governmental structure*** or the ***foundational power of its branches*** as set forth in the Constitution." (*Strauss*, *supra*, 46 Cal.4th at p. 444, emphasis added.) And Petitioners do not dispute that an amendment has been described as "an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (*Id.* at p. 419, quoting *Livermore v. Waite* (1894) 102 Cal. 113, 118-119 (*Livermore*).)

Real Party does little to grapple directly with the definition of a revision. Rather, Real Party argues primarily that the Measure fits within the definition of an amendment and therefore its changes are not sufficiently far-reaching to constitute a revision.

First, Real Party argues that the Measure "merely amends existing sections of the Constitution." (RPI Ret. at p. 42.) That is immaterial. The standard for a revision focuses on the scope and type of change, not whether the change is accomplished by amending existing provisions of the Constitution or adding new ones. Indeed, Proposition 115 also amended 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.)

Second, Real Party argues that the Measure is "within the lines" of current and past versions of the Constitution because other voter approval requirements have not been struck down as revisions. (RPI Ret. at pp. 45, 51.) This Court has already rejected that argument. In *Raven*, the Attorney General

defended Proposition 115 in part based on prior Court rulings upholding initiatives that sought to curb aspects of the same judicial power. Specifically, in *In re Lance W.* (1985) 37 Cal.3d 873, 891, 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, 184-187, the Court upheld a measure requiring California courts "to apply the state cruel or unusual punishment clause consistently with the federal Constitution." (*Raven*, *supra*, 52 Cal.3d at p. 355.) This Court declined to extend the holdings in those cases 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. Just as the Constitution at the time of *Raven* curbed judicial power in discrete ways, today's Constitution contains voter approval requirements for certain legislative acts. For example, today's Constitution requires voter approval for changes to a hospital provider tax, tax sharing agreements between counties, and changes to retirement boards. (See RPI Ret. at p. 48, fn. 13.) Yet none of these restrictions fully *revoke* the Legislature's power to tax as the Measure would, and none are any more instructive about the validity of the Measure than were the pre-Proposition 115 provisions considered by the *Raven* Court.

Moreover, it is not accurate to compare the Measure with other mere voter approval requirements because the Measure would do far more. It would impose a voter approval requirement on top of the existing requirement that any tax increase receive the approval of a legislative supermajority. In this way, the Measure would impose on the Legislature the same high procedural requirements for increasing state taxes as is required *to amend or revise the Constitution itself*. (See Cal. Const., art XVIII, § 1.)

Similarly, Real Party cannot save the Measure by relying on provisions that otherwise restricted the Legislature's power to tax in the 1849 and 1879 Constitutions. (RPI Ret. at p. 46.) None of those provisions is as sweeping as the Measure's wholesale revocation of the Legislature's taxing power. Far from it, the highlighted provisions from the 1849 Constitution merely set forth three generalized requirements, including requirements that taxation be "equal and uniform," that property "be taxed in proportion to its value," and that the Legislature "restrict" the power of local governments to tax in unspecified ways. (RPI Ret. at p. 46, quoting Cal. Const. of 1849, art. XI, § 13 & art. IV, § 37.) The 1879 Constitution went further by requiring the imposition of a poll tax, exempting crops and certain government property from taxation, and prohibiting the Legislature from imposing local taxes for local purposes. (RPI Ret. at pp. 46-48, quoting Cal. Const. of 1879, former art. XI, § 12 & former art. XIII, §§ 1, 12.) But the 1879 Constitution otherwise left the Legislature free to impose state taxes in any way that it deemed appropriate.

Indeed, this Court declared the Legislature's remaining taxing authority to be "plenary" in that same era. (See, e.g., *In re Estate of Wilmerding* (1897) 117 Cal. 281, 286.)

Besides, even these relatively modest restrictions on the Legislature's power were enacted via constitutional conventions called to *revise* the Constitution.[11] This includes both highlighted provisions from the original 1849 Constitution, and the provisions Real Party highlights from the 1879 version of the current Constitution. (RPI Ret. at pp. 46-48 & fns. 12, 13; *Strauss*, *supra*, 46 Cal.4th at pp. 415-417 [discussing the constitutional conventions leading to the 1849 and 1879 Constitutions].) It also includes the voter approval requirement for bond debt which Real Party contends is structurally similar to the Measure's voter approval requirement for taxes. (RPI Ret. at pp. 47-49.)[12] History therefore demonstrates that the framers of the 1849 and 1879 Constitutions chose to restrict the

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[11] The Constitution of 1849 allowed the Legislature to amend the Constitution by submitting proposed amendments to the people, but it required the calling of a constitutional convention to "revise and change this entire Constitution . . . ." (Cal. Const. of 1849, art. X, §§ 1, 2, available in Thorpe, The Federal and State Constitutions (1909) pp. 402-403, https://www.google.com/books/edition/_/5m2HAAAAMAAJ?hl=en.)

[12] Although current article XVI, section 2 was added to the Constitution in 1962, both the 1849 and 1879 Constitutions required voter approval for bonds. (Cal. Const. of 1849, art. VIII, § 1 [available in Thorpe, *supra*, at p. 401]; Cal. Const. of 1879, former art. XVI, § 1 [Thorpe, *supra*, at pp. 444-445].) The issuance of bond debt is not comparable to the imposition of a new tax because bonds necessarily bind future generations in ways that taxes may not.

Legislature's taxing powers as part of two separate constitutional *revisions*, not amendments.

This gravely undermines Real Party's defense of the Measure because, as Real Party emphasizes, this Court has described constitutional revisions as proposed changes that are so far-reaching and extensive "that *the framers of the 1849 and 1879 Constitutions plausibly intended to be proposed only by a new constitutional convention*, and *not* through the ordinary amendment process." (RPI Ret. at p. 38, quoting *Strauss*, *supra*, 46 Cal.4th at p. 445, emphasis changed.) While it cannot be known whether the framers believed that restrictions on the Legislature's taxing power could *only* be proposed by constitutional convention, it is an indisputable fact that the framers themselves restricted the Legislature's taxing powers through revisions, not amendments.

Turning to today's Constitution, Real Party overstates current restrictions on the Legislature's power to tax. (RPI Ret. at p. 50.) Most strikingly, Real Party misconstrues section 19 of article XIII, which, on its face, does not restrict the method of assessing multi-county pipelines and the like; it only requires that they be assessed annually by the State, a function that could be severely limited by the Measure if a change in assessment resulted in higher taxes for any taxpayer. Nor does the Constitution prohibit the Legislature from imposing or increasing taxes other than property taxes on utilities; it only requires that such taxes not "differ[ ] from" the taxes on "other business corporations." (Cal. Const., art. XIII, § 19.) Similarly, it

does not prohibit the Legislature from changing the property taxes on railroads and public utilities, as the Legislature has done multiple times since section 19 was added to the Constitution. (See *County of Santa Clara v. Superior Ct.* (2023) 87 Cal.App.5th 347, 362.)

What remains from Real Party's list are relatively narrow and/or discrete restrictions on the Legislature's ability to tax food, property, the interest earned on government bonds, the income of certain nonprofit educational institutions, gifts and inheritances, and certain insurance business. Real Party thus vastly understates matters by arguing that a Measure that would revoke the Legislature's authority to impose or increase taxes on virtually everything else – including wages and salaries, retirement income, dividends, interest and rent, business income, capital gains, corporations, sales, gas, fuel, alcohol, tobacco, cannabis, and insurance – is no "more damaging to the[ ] legislative power than any of the prior constitutional amendments and initiative statutes" affecting the Legislature's taxing power. (See RPI Ret. at p. 51.)

Furthermore, Real Party ignores the Measure's other effects. By dramatically broadening the definition of taxes while simultaneously revoking the ability of the Legislature to directly enact taxes, the Measure revokes the Legislature's ability to enact many charges that are not currently considered to be taxes. This includes franchise fees, professional licensing fees, fees on polluters, court filing fees, and any other "charge" that does not meet the Measure's exceedingly narrow definition of an exempt

charge, which could include bridge tolls or park entrance fees that may "exceed the cost of providing the service . . . to the payor" or a penalty like a library fine imposed to punish a violation of the law in the absence of "adjudicatory due process." (Pet., ¶ 23; Measure, Sec. 4, proposed art. XIII A, § 3, subds. (g)(1), (e)(4), (5).)

Indeed, Real Party's comparison of the current constitutional restrictions and the restrictions the Measure would impose goes a long way towards undermining Real Party's defense. After all, Real Party has listed multiple ways in which voters have appropriately *amended* the Constitution in the past to restrict the Legislature's taxing power over specific categories or items. It is easy to understand how an initiative that, for example, limits the Legislature to raising revenue by taxing items other than food constitutes a "change within the lines of the original [Constitution.]" (*Livermore*, *supra*, 102 Cal. at pp. 118-119 [defining a constitutional amendment].) Yet a proposal to fully revoke the Legislature's power to impose *any* taxes itself is unlike any initiative that has come before. Accordingly, even placed within the context that Real Party has provided for the Court, the Measure cannot be described as a mere amendment.

2. Real Party's Effort To Distinguish *Raven* Fails

In *Raven*, *supra*, 52 Cal.3d 336, the Court held that Proposition 115 was revisionary because it revoked the judicial branch's power to independently interpret the California Constitution. Real Party seizes on the fact that this Measure

does not implicate the independence of the California Constitution to distinguish *Raven*. (RPI Ret. at p. 39.)

Real Party misconstrues the *Raven* Court's analysis. Again, the key issue in all revision cases is whether and to what extent an initiative seeks to change "the fundamental governmental structure or the foundational power of its branches . . . ." (*Strauss*, *supra*, 46 Cal.4th at p. 444.) Proposition 115 targeted a core state judicial power, namely the power to independently interpret the rights conferred on criminal defendants by the California Constitution. The initiative attacked the independence of the state Constitution *because* it attacked a foundational power of the judicial branch. (*Raven*, *supra*, 52 Cal.3d at p. 353.) This Measure attacks powers of state and local legislative and executive branches – the powers to tax, spend, and delegate duties to administrative agencies – that are just as foundational to those branches.

Real Party next argues that *Raven* addressed the *elimination* of a judicial power while the Measure imposes a mere *limitation* on the Legislature's taxing authority. (RPI Ret. at p. 40.) 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.)

Real Party's larger point, however, is that Proposition 115's encroachment on the judiciary's power is more consequential than the Measure's encroachment on the Legislature's power because the Legislature shares power with

the People, while the judiciary "share[s]" power with no one. (RPI Ret. at p. 40.) Real Party misunderstands the powers at play in both cases.

Proposition 115 did not simply eliminate state judicial power. It effectively transferred state judicial power to the federal judiciary by requiring state courts to construe certain constitutional rights "in a manner consistent with the Constitution of the United States." (*Raven*, *supra*, 52 Cal.3d at p. 350, quoting Proposition 115.) Although state courts had long opted to defer to federal courts on certain constitutional matters, as the *Raven* Court acknowledged, that pre-existing "shared" power did not prevent this Court from finding that a compelled transfer of power from state to federal courts would be revisionary.

Legislative power is no more interchangeable between the Legislature and the People than judicial power is between the state and federal judicial branches. Far from it, as Petitioners have already explained, the Constitution has never conferred identical legislative powers on the Legislature and the People,[13] and this Court has recently acknowledged the importance of preserving legislators' exclusive authority over certain tax matters. (*Wilde*, *supra*, 9 Cal.5th at p. 1122.) Accordingly, the forced transfer of the taxing power from the Legislature to the People is as revisionary as the forced transfer

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[13] Pet. at pp. 45-46 [describing how the Constitution grants the Legislature greater control over taxes and appropriations than the people].

of the power to interpret certain constitutional rights from the state to the federal courts.

Finally, Real Party tries to distinguish *Raven* on the ground that the Legislature's taxing power can be restricted by the Constitution while the Court's inherent power to interpret the state Constitution "may not be eliminated or limited." (RPI Ret. at p. 41, purporting to quote from *Raven*, *supra*, 52 Cal.3d at p. 354.) In doing so, Real Party misreads both *Raven* and the Constitution. The *Raven* Court did not say that the state Constitution may not eliminate or limit judicial power. In fact, it said the opposite when it confirmed that it had previously upheld other ballot measures limiting judicial power. (*Raven*, *supra*, 52 Cal.3d at p. 355; accord *In re Lance W.*, *supra*, 37 Cal.3d at p. 891 [upholding a constitutional amendment containing a "restriction on judicial authority"].) 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 be changed to do both.[14] 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 – only a revision will do.

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[14] It is unclear why Real Party accuses Petitioners of "obscure[ing]" the fact that the Constitution may limit the Legislature's power to tax. (RPI Ret. at p. 41.) Petitioners twice cited *The Gillette Co. v. Franchise Tax Bd.* (2015) 62 Cal.4th 468 to make this precise point. (Pet. at p. 43, fn. 21 & p. 48.)

3. ***Amador Valley* Is Distinguishable**

Real Party contends that *Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208 (*Amador Valley*) is "more directly on point" than *Raven*. (RPI Ret. at p. 41.) Not so. *Amador Valley* addressed a different constitutional change (a local voter approval requirement for special taxes) based on different legal theories – loss of home rule and a republican form of government. (*Amador Valley* at pp. 224-229.)

Real Party 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. The legislative supermajority voting requirement for State taxes was not part of the revision challenge. (*Amador Valley, supra*, 22 Cal.3d at pp. 227-229.)[15]

Accordingly, *Amador Valley*'s holding is limited to local taxes, and as this Court has declared, local governments "have no inherent power to tax." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 248 (*Guardino*).) Thus, when the *Amador Valley* Court held that Proposition 13 did not revise the Constitution, it did so knowing that Proposition 13's voter approval requirement did not change

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[15] 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., Pet. at pp. 44-45.)

a fundamental part of the governmental structure or a core power protected by the Constitution. It also knew that the Legislature itself retained the power to provide funds for support of local government, which it has done for 45 years. In contrast, this Measure threatens to upend that balance by eliminating the Legislature's taxing power that has existed since the founding of the State, leaving *no* legislative body *anywhere* in the state that could directly enact a tax. (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 that local governments have no inherent power to tax, noting that charter cities derive some power to tax from the home rule provision of the Constitution. (RPI Ret. at p. 42, fn. 10.) But a charter city's taxing power remains subject to regulation by the Legislature in matters of statewide concern,[16] while general law cities wholly derive their power to tax from the Legislature, as Real Party concedes. (RPI Ret. at p. 42, fn. 10.) Proposition 13's change in the local power to enact municipal taxes was therefore not a "far-reaching change in the fundamental governmental structure" of the State.

Real Party next highlights a passage from *Amador Valley* in which the Court declared that "[o]ther than in the limited area of taxation, the authority of local government to enact appropriate laws and regulations remains wholly unimpaired" under Proposition 13. (RPI Ret. at p. 43, quoting

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[16] *Cal. Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 7.

Amador Valley, *supra*, 22 Cal.3d at p. 227.) It is unclear why Real Party thinks this passage helps his defense because the same cannot be said of the Measure. In contrast to Proposition 13's more limited effect on the authority of local government, the Measure deprives local legislative bodies of the ability to delegate a broad range of duties to the executive branch, forces local legislative bodies to assume tasks that are currently administrative in nature, deprives local executive branches of the ability to do much of the work that they do today, subjects many additional legislative acts to referendum, reduces the power of local voters to increase their own taxes, and increases the power of local voters to reject taxes and charges. (Pet. at pp. 21-27, 48-49.) *Amador Valley*'s description of Proposition 13 therefore does not describe the Measure.[17]

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[17] 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 Ret. at p. 35, fn. 10.) Oklahoma allows the Legislature to increase taxes without voter approval with three-quarters supermajority votes. (Okla. Const., art. V, § 33, subd. (D).) Florida allows the Legislature to approve statutes that impose new taxes or fees with supermajorities, without voter approval; only constitutional amendments that do so 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

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Finally, Real Party argues that the Measure should be allowed to stand because it is less far-reaching and disruptive than Proposition 13. (RPI Ret. at pp. 44-45.) He bases this argument on his claim that the immediate fiscal impact of this Measure would be less than Proposition 13's immediate fiscal impact. This comparison is misleading because it quantifies the Measure's impact based solely on a portion of local ballot measures that might become void under the retroactivity provision, even though additional millions (perhaps even billions) of dollars are at risk based on other 2023 and 2024 tax enactments and any "exempt charges" that have been enacted since January 1, 2022.

But even if the comparison were valid, it would be irrelevant because the standard for a revision is not based on dollars lost or gained, but on changes to the government and government powers. (*Strauss*, *supra,* 46 Cal.4th at p. 447 [the difference between a revision and an amendment "does *not* turn on the relative *importance* of the measure but rather upon the measure's *scope*"].) In that regard, the Measure eclipses Proposition 13 and every ballot measure that came before or since.

Ops.Mich.Atty.Gen. 203 (1986); Mo. Const., art. X, § 16.) Regardless, Petitioners do not argue that other allocations of the taxing power are inherently invalid, but only that it requires a constitutional revision to adopt them in California.

C. 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 – a role this Court called an "imperative" part of our governmental structure more than 100 years ago. (*Gaylord v. Pasadena* (1917) 175 Cal. 433, 436.) As one appellate court has already recognized, it would take a "constitutional revision" to force the courts and Legislature to do the work that the Legislature has now delegated to administrative agencies. (*Schabarum v. Cal. Legislature* (1998) 60 Cal.App.4th 1205, 1223 (*Schabarum*), citing *East Bay Municipal Utility Dist. v. Department of Public Works* (1934) 1 Cal.2d 476, 478-479.) The far-reaching significance of the Measure's changes to the balance of powers between state and local legislative and executive branches is therefore clear.

Real Party does not dispute that the power to delegate is a core legislative power, or that the voters would now have to assume duties currently performed by state and local administrative agencies. Nor does Real Party respond to Petitioners' showing that the reasons this Court provided in *Legislature v. Eu*, *supra*, 54 Cal.3d 492, for concluding that Proposition 140 was *not* a revision demonstrate that the Measure *is* a revision. (Pet. at pp. 55-58.)

Real Party also seeks to obscure the breadth of the Measure. He treats the revocation of the Legislature's taxing power as the leading feature of Petitioners' claim[18] despite Petitioners clearly stating that the Measure's changes to the powers shared between the legislative and executive branches are also devastating, and also constitute a revision, even when considered in isolation. (Pet. at pp. 50-51.) Furthermore, Real Party acknowledges only that the Measure revokes the executive branch's authority "to set" fees, such as charges for hazardous waste storage. (RPI Ret. at pp. 54, 56.) Left unaddressed is the Measure's revocation of the executive branches' ability to unilaterally enact *any* agency regulation, interpretation, opinion, enforcement action, or Governor's executive order that has the effect of causing a single person to pay more money to the government. (Pet. at pp. 20-23.)

Instead of addressing these critical issues, Real Party minimizes the Measure's revocation of legislative authority to delegate fee-setting authority based on the fact that the Legislature and some local legislative bodies voluntarily choose to set some fees themselves. (RPI Ret. at pp. 53, 57.)[19] Yet this Court already rejected a similar argument in *Raven*. As noted

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[18] See, e.g., RPI Ret. at pp. 12-13, 43, 45-53.

[19] Furthermore, Real Party's statement that state law requires local legislative body approval for "many types of local government fees" is overstated. (RPI Ret. at p. 57.) Government Code section 66016, the only state law cited, applies to a limited subset of planning and permitting fees as specified in subdivision (d). (*Id.* at pp. 57-58.)

earlier, in *Raven* the Attorney General asserted that Proposition 115's provision forcing state courts to follow federal court precedents was not revisionary because state courts already adhered to a rule requiring them to defer to those precedents in many cases. (*Raven*, *supra*, 52 Cal.3d at p. 353.) 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 . . . ." (*Ibid.*, emphasis in original.)

The same principle applies here. It is one thing for the Legislature to voluntarily decide to set a particular fee, 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. (See also *People's Advocate, Inc. v. Superior Ct.* (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].)[20]

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[20] Real Party seeks to normalize these provisions by arguing that other states also require legislative approval for fees. (RPI Ret. at p. 57, fn. 15.) Yet, again, the real issue is whether shifts to these different balances of power can be accomplished without a constitutional revision in California. Regardless, these other states only demonstrate how radical the Measure is in comparison. None reach as far as the Measure to encompass, not just certain fees, but virtually all categories of executive branch duties. Furthermore, three of the states require legislative approval only for some fees. 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

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Real Party next faults Petitioners for suggesting the Legislature can authorize agencies to impose taxes. (RPI Ret. at p. 54, citing Pet. at p. 50.) Petitioners did not suggest that. Rather, under the Measure, the legislative branches would lose the power to delegate many tax-related duties to executive officials, including the duties to assess property, adjudicate administrative disputes concerning taxes, and interpret and enforce tax laws. That change would force the legislative branches, and sometimes also the voters, to assume these duties, thereby upending the balance of power that has existed for decades between the legislative and executive branches.

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legislature does not set 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 goes further to require legislative supermajority approval for revenue raising measures including taxes, fees, assessments, and rates, but majorities – not supermajorities – in the Legislature may request that the voters approve revenue raising measures. (Nev. Const., art. IV, § 18, subds. (2), (3).) Significantly, these requirements led the Nevada Supreme Court to temporarily suspend 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].)

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 Ret. at p. 56.) But again, Real Party errs by conflating how the Legislature may *choose to exercise* its powers with *depriving the Legislature* of the ability to make that choice. 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.) Nor is there any legal authority supporting Real Party's theory that changes to the core powers of the legislative branch are exempt from this standard.[21]

Real Party then seeks to rebut the conclusion in *Schabarum*, *supra*, 60 Cal.App.4th at page 1224, that a measure could not prohibit the executive branches from performing delegated duties "without effecting a constitutional revision." (RPI Ret. at pp. 56-58.) Real Party emphasizes 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. (*Id.* at p. 56.) *Raven* demonstrates that this difference cannot save the Measure.

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[21] Real Party cites *Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1785, but that case addresses legislative immunity and separation of powers issues, not constitutional revisions. (RPI Ret. at p. 56.)

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. Regardless of whether the Measure's partial dismantling of the executive branches' powers ultimately leads to the total "paralysis in the conduct of public business" envisioned by the *Schabarum* court (60 Cal.App.4th at p. 1224), it would 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 pp. 439, 447, emphasis omitted; *Raven*, *supra*, 52 Cal.3d at pp. 349-350.)

Real Party's next argument is far from clear. He appears to suggest that revoking the legislative branches' power to delegate fee-setting authority to the executive branch is not significant since, as the *Schabarum* court confirms, any such

delegated authority is a quasi-legislative power which the Legislature can control. (RPI Ret. at pp. 56-57.) The point seems to be that the legislative branches can perform these duties themselves since the duties are legislative in character.

The argument misses the *Schabarum* court's point. At issue was whether the budget cap Proposition 140 imposed on the Legislature included sums budgeted for the Office of Legislative Counsel, an independent executive agency that assists the Legislature. (*Schabarum*, *supra*, 60 Cal.App.4th at pp. 1226, 1227.) As part of its decision that it did not, the court reviewed the non-legislative "governmental departments or agencies that aid or assist the Legislature" with the legislative process. (*Id.* at pp. 1223-1224.) It is that portion of the opinion that Real Party cites, but he ignores the significance that the *Schabarum* court placed on the Legislature's ability to rely on executive agencies. Simply put, the Court found such reliance to be so "imperative" for modern governance (*id.* at p. 1223) that the voters could not have intended Proposition 140 – a mere constitutional amendment – to bar such reliance. Such a change would instead require a revision. (*Id.* at p. 1224.) The same is true here.

D. <u>The Measure Restructures The Voters' Fiscal Powers</u>

Real Party does not dispute that this 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. (Pet. at

pp. 60-61.) Nor does he dispute that the Measure would ensure that *every* measure that increases taxes 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 imposing burdens on the voters other than to criticize this Court's interpretation of Proposition 218 in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924. (RPI Ret. at p. 25.)

In short, Real Party offers no real defense to Petitioners' claim that the Measure's far-reaching changes in California's fundamental governmental structure include these changes to the voters' foundational powers. (Pet. at pp. 59-62.)

Considered in their totality, then, the Measure's provisions would profoundly change the role that virtually every major institution in California plays in the process of raising the revenues necessary to sustain our way of life in California. As a consequence, there would not be a single legislative body left in the State that could raise revenue directly and promptly; nor could there be a single revenue-raising measure enacted throughout the state that would not be subject to voter approval either as a tax that only the voters could enact or an exempt charge that would be subject to referendum; the executive branches at both the state and local levels would lose the ability to do much of the work they do today, while the legislative branches and the voters would be forced to assume that work; the

voters would find their power to advance their fiscal policy preferences either enhanced or diminished based solely on whether they oppose or support new revenues; and the courts would have to begin almost from scratch the arduous process of construing the constitutional definitions of taxes and charges. The result would be exactly the kind of profound governmental transformation that is beyond the power of the voters to enact by a mere constitutional amendment, as opposed to a constitutional revision placed on the ballot by the Legislature or enacted at a constitutional convention. The voters should not be made to vote on an initiative that is beyond their power to enact.

III.

THE MEASURE WOULD SERIOUSLY IMPAIR ESSENTIAL GOVERNMENT FUNCTIONS

In their earlier briefs, Petitioners demonstrated that the Measure is invalid because it would seriously impair essential government functions. (Pet. at pp. 62-69; Reply at pp. 30-36.) Real Party suggests, but does not argue, that the essential government functions doctrine does not apply to statewide measures, but he never offers a reason why that should be so, and Petitioners are not aware of any. (RPI Ret. at p. 58.) To the contrary, the notion that California courts would be powerless to invalidate a statewide measure that eliminated all public schools or criminal courts without anything to replace them is absurd.

Rather than pursue the point, Real Party moves on to two other arguments: (1) that Petitioners' description of the

impairment is "speculative" and (2) that local governments have operated under a voter approval requirement for all taxes since at least 1996. (RPI Ret. at p. 58.) The amicus letters filed by mayors and local agencies in support of the Petition confirm that the impairment the Measure would cause is real, and Petitioners respectfully refer the Court to those documents. (See p. 24, fns. 8, 9, *supra*.) Most importantly, the measure would cause impairment in large part *because* local government is required to operate under voter approval requirements. Those requirements leave local government dependent upon two sources of revenue: the State's ability to fund what would otherwise be local government functions and local government's ability to charge fees for services that it must otherwise provide. The Measure threatens those last remaining lifelines for local government. It is no exaggeration to say that at issue in this case is whether government can continue to function in California.

Moreover, although Real Party is correct that "*all* local governments have operated under a voter approval requirement" for taxes since 1996 (RPI Ret. at p. 58), he neglects to point out that local legislative bodies can propose taxes to voters with a simple majority vote, rather than the legislative supermajority vote that the Measure would require to propose state taxes that support local functions. Further, the definition of a "tax" has greatly expanded since 1996,[22] which this initiative would expand to new extremes. As stated before, Petitioners do

[22] See, e.g., *City of San Buenaventura v. United Water Conservation Dist*. (2017) 3 Cal.5th 1191, 1200.

not challenge the existing voter approval requirements contained in the Constitution; they do challenge the inevitable effect that *this* Measure would have in light of those existing requirements. Petitioners begin first, however, with the case law that governs resolution of a claim under the essential government functions standard.

A. This Court Has Recognized That Voter Approval Requirements For Tax Ordinances Can Seriously Impair Essential Government Functions

Real Party correctly quotes this Court's statement that an invalid voter approval requirement must inevitably cause "serious impairment or wholesale destruction" of essential government functions. (RPI Ret. at p. 59, quoting *Guardino*, *supra*, 11 Cal.4th at p. 254.)

Yet Real Party appears not to understand that "serious impairment" is not the same as "wholesale destruction." The doctrine is more protective of government services than that. Thus, although *Guardino* held that Proposition 62's voter approval requirement for local taxes was not an unconstitutional referendum, it did *not* hold that voter approval requirements could never be invalid under the essential government functions doctrine. (*Guardino*, *supra*, 11 Cal.4th at p. 254.)

The Court's holding in *Guardino* is informed by the Court's decision in *Rossi v. Brown* (1995) 9 Cal.4th 688 (*Rossi*), which came only six months before. *Rossi* held that a local initiative could be used for the prospective repeal of San Francisco's residential utility tax. (*Id.* at p. 693.) Among other things, the majority reasoned that the measure did not

impair essential government functions because the revenues from the tax consisted of only .625 percent of the city's general fund budget and the city did not argue that it could not replace that income. (*Id.* at pp. 712-714.) But the majority recognized that an initiative may impermissibly interfere with a legislative body's responsibility for fiscal management "if the repeal eliminates a major revenue source and *no other revenue source is available that may be tapped to offset a resulting budget deficit or to avoid future deficits*." (*Id.* at p. 710, emphasis added.)

Chief Justice Lucas, then-Justice George, and Justice Mosk would have gone further, saying in dissent that "the majority's theory clashes with fiscal reality:"

> Cities – especially large cities like San Francisco – need to plan their finances farther in advance than merely the current fiscal year. They must be able, for example, to project their revenue sources and levels sufficiently into the future to ensure that they can not only meet the annual demands of municipal government but can also safely undertake numerous longer-term obligations, such as the servicing of bonds and the funding of multiyear employee contracts, ongoing social programs, and major civic repair and construction projects.

(*Rossi*, *supra*, 9 Cal.4th at p. 731.)

Six months later, Chief Justice Lucas and Justice Werdegar made essentially the same point dissenting in *Guardino*. As Justice Werdegar said: "The vote required by

Proposition 62 interferes with the administration of local governments' fiscal powers just as a referendum would interfere: it postpones fiscal planning until the next election." (*Guardino*, *supra*, 11 Cal.4th at p 271.)

Thus, four justices of this Court recognized in 1995 how gravely the initiative and referendum process could affect local government's ability to plan for and provide essential government services. Since then, initiatives have added more challenges for local government. Voters approved Proposition 218 in 1996, which greatly tightened voter approval requirements, and Proposition 26 in 2010, which made it harder for government to enact fees to replace taxes.

For these reasons, the fact that the *Rossi* and *Guardino* majorities were not persuaded that the particular measures at issue in those cases impaired essential government functions does not mean that the Measure at issue here will not. As described in Petitioners' earlier briefs, this Measure's effect must be analyzed in light of existing limitations on government revenue-raising that began with Proposition 13 and have been steadily increasing in the 46 years since then. The Legislature's ability to shore up the provision of essential local services was not at issue in *Guardino* and *Rossi*, but now it is. If the Legislature cannot enact taxes without voter approval and no legislative body can authorize fee increases without clear and convincing evidence that the fees are both reasonable and limited to actual costs, the predictions of the four dissenting justices in *Rossi* and *Guardino* will inevitably become true.

B. The Measure Will Seriously Impair Essential Government Functions At Both The State And Local Levels

Real Party insists that Petitioners' description of the Measure's effect on essential government functions is speculative and based primarily on state and local government's ability to respond to emergencies. (RPI Ret. at pp. 58, 61-63.) Important as that is in a state prone to earthquakes and wildfires, the problem is not limited to emergencies. Especially since passage of Propositions 13 and 218, local governments depend heavily on state funds to meet the needs of their residents. For the first time in California history, the Measure would severely limit the Legislature's ability to provide the funding to do that.

The California Budget and Policy Center's December 2023 report on the State budget explains that 78.7% of total state spending "flows as 'local assistance' to K-12 public schools, community colleges, families enrolled in the CalWORKS welfare-to-work program and other essential state services and systems that are operated locally."[23] Another one-fifth goes to higher education, state prisons, and other recipients of "state operations" dollars, all of which provide essential government services to educate our children, protect public safety, and maintain

[23] Cal. Budget & Policy Center, Guide to the California State Budget Process, Dec. 2023, https://calbudgetcenter.org/resources/a-guide-to-the-california-state-budget-process/#:~:text=State%20Funds%20Primarily%20Support%20Health,and%20higher%20education%20(7.4%25).

highways and other state infrastructure that Californians use every day.[24]

The State faces a deficit in the tens of billions of dollars in the 2024-2025 fiscal year.[25] The only way to cover a deficit that large is to decrease spending, increase revenues, or both. The Legislature and the Governor need the ability to make those hard choices, including whether to make changes that would increase taxes on particular activities or taxpayers. Yet if enacted, the Measure would severely constrain that ability, even if the changes were otherwise revenue neutral, because the Measure applies to any change in state or local law that increases a tax for a single taxpayer. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (b)(1); Sec. 6, proposed art. XIII C, § 2, subd. (a).)

The problem is magnified by the Measure's provisions limiting fees and regulatory charges at both the state and local levels. Increases in bridge tolls, admission to public parks and museums, parking fees, permit fees and a host of others would all have to justified by clear and convincing evidence that they are "reasonable" and do not "exceed the actual cost of providing the

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[24] See p. 58, fn. 23, *supra*.

[25] Office of the Governor, 2024-25 State Budget Proposal Protects Core Priorities and Ensures Fiscal Stability, Jan. 10, 2024, https://www.gov.ca.gov/2024/01/10/2024-25-state-budget-proposal-protects-core-priorities-and-ensures-fiscal-stability/; Legislative Analyst's Office, The 2024-2025 Budget; California's Fiscal Outlook, http://lao.ca.gov/Publications/Report/4819#The_Budget_Problem.

service or product to the payor." (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (g)(1); Sec. 6, proposed art. XIII C, § 2, subd. (h)(1).) The Measure would make these requirements applicable to water rate increases and pollution emission allowances by expressly overruling this Court's holding in *Wilde*, *supra*, 9 Cal.5th and the Court of Appeal's holding in *California Chamber of Commerce v. State Air Resources Board* (2017) 10 Cal.App.5th 604. (Measure, Sec. 3, subd. (e).)

It would also effectively overrule the First District Court of Appeal's holding that bridge tolls or fees for entry, sale, or use of state property are not subject to a reasonableness test based on the actual cost of providing or maintaining the state property. (*Howard Jarvis Taxpayers Assn. v. Bay Area Toll Authority* (2020) 51 Cal.App.5th 435, review dismissed, 2023 Cal. LEXIS 268.) As the court of appeal said in that case, there is no "self-defining reference point for determining the reasonable cost of allowing entry onto or use of state-owned property, which might include anything from obvious repairs and upkeep to myriad enhancements of the user's experience." (*Id.* at p. 461.)[26]

Moreover, even when courts have concluded that a fee is subject to Proposition 26's reasonableness test, they have held that an agency can implement fees related to the overall purposes of governmental action. (See, e.g., *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 997 [flat fees for

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[26] See also *Cal. Bldg. Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1052 (fees connected to regulatory activities "often are not easily correlated to a specific, ascertainable cost"), citation omitted.

residential unit inspections]; *Southern Cal. Edison Co. v. Public Utilities Com.* (2014) 227 Cal.App.4th 172, 199, 203 [flat surcharge to fund renewable energy research and development]; *San Diego County Water Authority v. Metropolitan Water Dist. of Southern Cal.* (2017) 12 Cal.App.5th 1124, 1153 [reasonable rates cover "costs incurred in maintaining a water conveyance system"].)

However, the Measure would require an even more stringent standard – *actual* cost – to be met. The result will be that many much-needed fee increases will not be made, for the simple reason that the governing body will be unwilling to risk extended litigation and an award of attorney's fees to defend them.

Thus, faced with increasing budget deficits, crumbling infrastructure, teacher shortages, and demands for more services, state and local legislative bodies will have no choice but to cut essential government functions. Even if they could get voter approval, they simply will not have the ability to raise revenues in time to avoid cuts in those services.

CONCLUSION

At the heart of Real Party's brief is its emphasis on the importance of preserving the right of initiative for the people of California. (RPI Ret. at pp. 37, 44.) 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. . . ." (*Strauss*, *supra*, 46 Cal.4th at p. 447.) Granting the People *unlimited* authority to modify the Constitution would pose too high a risk to the durability and sovereignty of the State, as initiatives like Proposition 115 and this Measure demonstrate.

The Measure exceeds the limits of the initiative power by seeking to profoundly change the foundational governmental structure and the core powers of the branches of government. Moreover, because of the depth and breadth of those changes, the Measure would also inevitably impair essential government functions.

For all of these reasons, 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.

Dated: January 17, 2024

Respectfully submitted,

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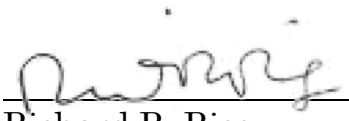

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Nina Leathley

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