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

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

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Supreme Court of the
State of California

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Supreme Court Case Caption:

HOWARD JARVIS TAXPAYERS ASSOCIATION and JON COUPAL,
v.
DEBRA BOWEN, in her official capacity as Secretary of State of the State of California

Please check here if applicable:

☒ There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

Name of Interested Entity or Person (Alphabetical order, please.)	Nature of Interest
1.	
2.	
3.	

Please attach additional sheets with Entity or Person Information, if necessary.

Fredric D. Woocher

Date: November 10, 2014

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DEMURRER TO PETITION FOR WRIT OF MANDATE

Real Party in Interest Legislature of the State of California (the "Legislature") hereby demurs generally to the Petition for Writ of Mandate or Other Extraordinary Relief ("Petition") filed by Petitioners Howard Jarvis Taxpayers Association and Jon Coupal ("Petitioners"), and to each and every cause of action therein, on the ground that the Petition fails to state facts sufficient to constitute a cause of action, because SB 1272 is a valid exercise of the Legislature's constitutional authority and Respondent Secretary of State Debra Bowen therefore has no clear, present, and mandatory duty to refrain from submitting to the voters the advisory question set forth therein. To the contrary, the facts as alleged in the Petition establish as a matter of law that granting the judicial relief requested in the Petition would violate the separation of powers guaranteed by the California Constitution and that the California Constitution, if interpreted to prohibit the Legislature from submitting to the voters the advisory question set forth in SB 1272, would violate article V of the U.S. Constitution.

PRAYER FOR RELIEF

WHEREFORE, the Legislature prays that this Court:

1. Issue an order denying the Petition for Writ of Mandate; and

2. Grant such other or further relief as the Court deems just and

proper.

Dated: November 10, 2014

STRUMWASSER & WOOCHER LLP
Fredric D. Woocher
Michael J. Strumwasser
Dale K. Larson

OFFICE OF THE LEGISLATIVE COUNSEL
Diane F. Boyer-Vine
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By _____
Fredric D. Woocher

Attorneys for Real Party in Interest
Legislature of the State of California

VERIFICATION

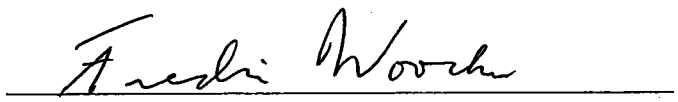
I, Fredric D. Woocher, declare:

I am one of the attorneys for Real Party in Interest Legislature of the State of California in this action. I make this verification for the reason that my office is in a different county than that of the Legislature and because I am more familiar with the legal arguments on which this return by demurrer is based.

I have read the foregoing DEMURRER TO PETITION FOR WRIT OF MANDATE. I am informed and believe that the contents thereof are true, and on that ground I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 10th day of November, 2014, at Los Angeles, California.



Fredric D. Woocher

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REAL PARTY IN INTEREST'S RETURN TO PETITION FOR WRIT OF MANDATE

INTRODUCTION

The Petition for Writ of Mandate seeks an extraordinary order from this Court commanding Respondent Secretary of State Debra Bowen to refrain from taking any further action to comply with Senate Bill 1272 (Stats. 2014, ch. 175 ["SB 1272"]), a statute that was duly enacted on July 3, 2014, by a majority vote in both houses of the Legislature and that became operative twelve days thereafter pursuant to article IV, section 10(b)(3), of the California Constitution when it was not vetoed or returned to the Legislature by the Governor. SB 1272 called for a special election to be held on November 4, 2014, for the purpose of submitting to the voters an advisory question (denominated "Proposition 49" by the Secretary of State) on whether Congress should propose, and the California Legislature should ratify, an amendment or amendments to the United States Constitution in order to overturn the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310. (SB 1272, § 4, subd. (a).)[1] SB 1272 was enacted in

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[1]Specifically, SB 1272 directs the Secretary of State to submit the following advisory question to the voters:

> "Shall the Congress of the United States propose, and the California Legislature ratify, an amendment or amendments to the United States Constitution to overturn *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310, and other applicable judicial precedents, to allow the full regulation or

response to the Legislature's receipt of petitions signed by thousands of California voters requesting a vote on the issue and following the Legislature's extensive consideration of its authority to place the advisory question on the ballot. (See, e.g., Report of the Senate Com. on Elections and Constitutional Amendments (Apr. 22, 2014).)

Petitioners contend that because the advisory measure "enacts no law," the Legislature exceeded its authority under the California Constitution in directing it to be placed on the ballot. Petitioners rest their argument on the decision in *American Federation of Labor v. Eu* ("*AFL-CIO*") (1984) 36 Cal.3d 687, in which this Court held that a *citizen-sponsored initiative* seeking to compel the Legislature to adopt a resolution applying to Congress to call for a constitutional convention for the purpose of proposing a Balanced Budget Amendment to the U.S. Constitution "exceeds the scope of the initiative power under the controlling provisions of the California Constitution" because "the crucial provisions of the balanced budget initiative do not adopt a *statute* or enact a law." (Petition, p. 17, *quoting AFL-CIO*, 36 Cal.3d at p. 694 [emphasis in original].) Reasoning that "the people and the Legislature possess the same power," Petitioners assert that it is "axiomatic that if the people do not have

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> limitation of campaign contributions and spending, to ensure that all citizens, regardless of wealth, may express their views to one another, and to make clear that the rights protected by the United States Constitution are rights of natural persons only?" (SB 1272, § 4, subd. (a).)

the power to place Proposition 49 on the ballot, than [sic] neither does the Legislature." (Petition, p. 19.)

The premise of Petitioner's argument, however, is fundamentally flawed: The power of the Legislature *is not* coextensive with the people's initiative power, and the Legislature *is not* limited to "adopting statutes" — even though SB 1272 is undeniably a statute. Indeed, in *AFL-CIO* itself, this Court emphasized that "the reserved powers of initiative and referendum do not encompass all possible actions of a legislative body." (36 Cal.3d at p. 708.) Rather, as more than a century of this Court's jurisprudence makes clear, the Legislature has the power to engage in *any activities* that are "incidental or ancillary to the ultimate performance of [its] lawmaking functions" (*Parker v. Riley* (1941) 18 Cal.2d 83, 89), so long as the power to engage in those activities is not expressly, or by necessary implication, denied to it by the Constitution. (See, e.g., *Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.) Moreover, "[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." (*Ibid.*)

In enacting SB 1272 and formally soliciting the views of the electorate on the important question of whether the Legislature should continue to seek Congressional action in amending the U.S. Constitution to permit more robust and effective campaign finance regulation — and, critically, whether the

Legislature should ratify such an amendment if it were submitted to the states — the Legislature was not only acting well within its "appropriate functions" under the state and federal constitutions, but it was engaging in a practice that has a longstanding and unchallenged historical precedent — both in California and throughout the country. Most importantly, no provision of the Constitution *prohibits* the Legislature from taking such action. As then-Justice Rehnquist succinctly observed in refusing to enjoin the Nevada Legislature's placement on the ballot of a similar advisory measure requesting the electorate's view on the proposed ratification of the Equal Rights Amendment: "If each member of the Nevada Legislature is free to obtain the views of constituents in the legislative district which he represents, I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort." (*Kimble v. Swackhamer* (1978) 439 U.S. 1385, 1387–1388 (per Rehnquist, J. as Cir. J.), *quoted in Bramberg v. Jones* (1999) 20 Cal.4th 1045, 1058.) Petitioners' challenge to the Legislature's action in this case is thus without merit, and the Petition should be denied.

ARGUMENT

I. THE LEGISLATURE MAY EXERCISE ANY AND ALL POWERS THAT ARE NOT EXPRESSLY OR BY NECESSARY IMPLICATION DENIED TO IT BY THE CONSTITUTION

Petitioners' claims must be analyzed against the backdrop of one of the most fundamental principles of California constitutional law: "Unlike the

federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180, *quoting Methodist Hospital,* 5 Cal.3d at p. 691 [citations omitted].) As a result, "unlike the United States Congress, which possesses only those specific powers delegated to it by the federal Constitution, it is well established that the California Legislature possesses *plenary* legislative authority except as specifically limited by the California Constitution." (*Marine Forests Society v. California Coastal Commission* (2005) 36 Cal.4th 1, 31 [emphasis in original]; accord, *People v. Tilton* (1869) 37 Cal. 614, 626 ["State Constitutions are not grants of power to the Legislature. Full power exists when there is no limitation."].)[2]

The Legislature's plenary power stems from the organic nature of the

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[2]In upholding the Legislature's authority to appoint officials who perform executive functions, the Court in *Marine Forests Society* stressed the importance of this distinction in adjudicating disputes under the California Constitution:

> "The most cursory examination of state constitutions confirms how distinctive state constitutions and governments are. The Federal Constitution restricts the federal government both by imposing prohibitions on the government and by granting the government only limited powers. Under state constitutions, by contrast, the second restriction is largely missing, and thus the states exercise plenary legislative power." (*Marine Forests Society*, 36 Cal.4th at p. 28, *quoting* Tarr, *Interpreting The Separation of Powers in State Constitutions* (2003) 59 N.Y.U. Ann. Surv. Am. L. 329, 329–330.)

legislative body, possessing all the sovereign powers of the people. As this Court explained shortly after the state's founding:

> "A legislative assembly, when established, becomes vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions. These powers and privileges are derived not from the Constitution; on the contrary, they arise from the very creation of a legislative body, and are founded upon the principle of self preservation. The Constitution is not a grant, but a restriction upon the power of the Legislature, and hence an express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms. *A legislative assembly has, therefore, all the powers and privileges which are necessary to enable it to exercise in all respects, in a free, intelligent and impartial manner, its appropriate functions, except so far as it may be restrained by the express provisions of the Constitution, or by some express law made unto itself, regulating and limiting the same.*" (*Ex Parte McCarthy* (1866) 29 Cal. 395, 403 [emphasis added].)[3]

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[3]The debates surrounding the adoption of California's Constitution reflect this same view of the Legislature's authority as flowing directly from the reserved power of the people themselves, to be limited only by an explicit prohibition in the Constitution. Typical are the following remarks of one of the 1849 Convention delegates:

> "As it is impossible for the people individually, to regulate taxes, organize towns and villages, and make and amend laws, they form a Legislature to conduct these operations for them. That Legislature is amenable to them, for the faithful discharge of its duties, either annually or biennially. No other state sovereignty can interfere with these rights. . . . All power which is not expressly forbidden by the Federal Constitution, is left to the people and their representatives in their State capacity. . . . It is impossible to direct your State Legislature what it shall do. You can only say what it shall not do — you can only embody certain fundamental principles of government in your Constitution for the protection of minorities and the well-being

Several important and well-established consequences follow from this fundamental principle. First, because the California Constitution is not a grant of power or an enabling act, the Legislature's power to act — such as by calling for the advisory election in the instant case — does not depend upon a specific grant of authority to be found in any provision of the Constitution: "[W]e do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited. In other words, unless restrained by constitutional provision, the legislature is vested with the whole of the legislative power of the state." (*Fitts v. Superior Court* (1936) 6 Cal.2d 230, 234; accord, *In re Madera Irrigation District* (1891) 92 Cal.2d 296, 308 ["The presumption which attends every act of the legislature is, that it is within its power; and he who would except it from the power must point out the particular provision of the constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body."].)

Second, all doubts must be resolved in favor of the Legislature's authority to act. "[A]ll intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in

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of the mass — majorities can protect themselves. All measures not expressly prohibited in the Constitution, are fair subjects of legislative action." (Report of the Debates in the Convention of California, on the Formation of the State Constitution (1849) ("1849 Debates"), pp. 51-52 [Remarks of Mr. Semple].)

any given case, the doubt should be resolved in favor of the Legislature's action.'" (*Methodist Hospital*, 5 Cal.3d at p. 691, *quoting Collins v. Riley* (1944) 24 Cal.2d 912, 916.) Correlatively, any constitutional restrictions on the Legislature's authority must be narrowly construed: "Such restrictions and limitations (imposed by the Constitution) are to be construed strictly, and are not to be extended to include matters not covered by the language used." (*Ibid.*) "Legislative power, except where the constitution has imposed limits upon it, is practically absolute; and where limitations upon it are imposed they are to be strictly construed, and are not to be given effect as against the general power of the legislature, unless such limitations clearly inhibit the act in question." (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1255, *quoting Martin v. Riley* (1942) 20 Cal.2d 28, 39.)

Third, where — as here — the Legislature has acted with awareness of the pertinent constitutional prescriptions, the presumption of constitutionality accorded to its action is particularly strong and its judgment on the question "enjoys significant weight and deference by the courts." (*Pacific Legal Foundation*, 29 Cal.3d at p. 180.) "It is no small matter for one branch of the government to annul the formal exercise by another and co-ordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the

Constitution." (*Methodist Hospital*, 5 Cal.3d at p. 692.)

Finally, in ruling upon a challenge to the Legislature's exercise of its constitutional powers, the courts must confine their inquiry to the action actually taken by the Legislature and must not speculate — as Petitioners invite this Court to do — about how the Legislature might use its authority in other, future circumstances. To support a determination of unconstitutionality, "petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute . . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Pacific Legal Foundation*, 29 Cal.3d at pp. 180-181.)

Thus, in order not to offend the separation of powers between the legislative and judicial branches of government, the courts may not invalidate an action of the Legislature "unless there is an explicit prohibition of legislative action in the Constitution itself." (*Marine Forests Society,* 36 Cal.4th at p. 39.) Only upon finding "a clear constitutional mandate" may a court overturn a legislative act as ultra vires. (*County of Riverside v. Superior Court* (2003) 30 Cal. 4th 278, 285.) For a court to invalidate the Legislature's action in the absence of a clear showing of its prohibition by the Constitution would usurp the Legislature's authority: "[L]egislative restraint imposed

through judicial interpretation of less than unequivocal language would inevitably lead to inappropriate judicial interference with the prerogatives of a coordinate branch of government. Accordingly, the only judicial standard commensurate with the separation of powers doctrine is one of strict construction to ensure that restrictions on the Legislature are in fact imposed by the people rather than by the courts in the guise of interpretation." (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1218.)

The core principles set forth above are not mere bromides, to be cited and then disregarded in the ensuing analysis. They represent the very foundation upon which the entire structure of our state Constitution and government rests. And they establish the high burden that Petitioners must satisfy to obtain relief in this case. Applying these principles, it is evident that Petitioners have not shown that the Legislature exceeded its plenary authority or violated any provision of the Constitution by enacting SB 1272 and directing the Secretary of State to place Proposition 49 on the ballot.

II. NO PROVISION OF THE CALIFORNIA CONSTITUTION PROHIBITS THE LEGISLATURE FROM SEEKING GUIDANCE FROM THE ELECTORATE THROUGH AN ADVISORY BALLOT MEASURE

One can scan the Constitution in vain for any provision that prohibits the Legislature from submitting an advisory question like Proposition 49 to the voters. Even Petitioners cannot point to any "clear constitutional mandate" that expressly bars such action. Instead, Petitioners cobble together several

different sections of the Constitution and contend that, in combination, these provisions should be *interpreted* to prohibit the Legislature from placing an advisory measure on the ballot. These constitutional provisions, however, do not mean what Petitioners say they mean, and — especially when given the strict construction that the case law requires — they fall far short of establishing the "explicit prohibition of legislative action in the Constitution itself" that is necessary to nullify the Legislature's exercise of its plenary power. (*Marine Forests Society,* 36 Cal.4th at p. 39.)

A. THE PEOPLE'S RESERVATION OF THE INITIATIVE AND REFERENDUM POWERS DOES NOT PROHIBIT THE LEGISLATURE FROM SUBMITTING AN ADVISORY QUESTION TO THE VOTERS

Petitioners first contend that article II, section 8, subdivision (a) — when read in conjunction with article IV, section 1 — prohibits the Legislature from placing an advisory measure like Proposition 49 on the ballot. The former section defines the initiative as "the power of the electors to propose statutes," and the latter section provides that "the people reserve to themselves the powers of initiative and referendum." According to Petitioners, these provisions, taken together, mean that "the Constitution 'expressly' prohibits the Legislature from proposing to the voters the adoption or rejection of statutory law." (Petitioners' Reply Brief in Support of Petition for Writ of Mandate ("Petitioners' Reply"), p. 4.) In a further leap to get to their desired result, Petitioners then posit that "where the Constitution specifically prohibits

the Legislature from presenting an actual law to the people for approval or rejection, it follows that it cannot present to the people a question that the people themselves could not propose through exercise of their reserved initiative power." (*Ibid.*) The text of the Constitution, its history, and the pertinent case law all refute Petitioners' arguments.

Certainly, neither article II, section 8, nor article IV, section 1, contains "unequivocal language" prohibiting the Legislature from submitting an advisory question to the voters. Indeed, neither provision *says anything whatsoever* about the powers of the Legislature, much less purports to restrict or prohibit any particular legislative action. By its express terms, article II, section 8, addresses only the scope of *the people's initiative* power: "The initiative is the power *of the electors* to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. II, § 8, subd. (a) [emphasis added].) Likewise, article IV, section 1, merely confirms that "the people reserve to themselves the powers of initiative and referendum."[4]

Petitioners appear to contend that in reserving to the people themselves the "initiative" power — i.e., the power "to propose statutes . . . and to adopt

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[4]The full text of article IV, section 1, provides: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

or reject them" — article IV, section 1, should be interpreted to withdraw or to withhold from the Legislature the power to place any legislative measures on the ballot — including, in this case, a non-binding advisory measure.[5] This is not a reasonable construction of the constitutional language nor of its intent, however. Rather, both the wording and history of the pertinent constitutional provisions make clear that in reserving to the people the *initiative* power, and specifying the manner in which they may exercise that power, the Constitution does not deny *to the Legislature*, either expressly or by implication, the authority to *itself* place measures on the ballot under its plenary powers.

As defined by the Constitution, an "initiative" is a term of art that specifically refers to a statute or constitutional amendment that is *proposed by the electors* and that qualifies for the ballot *through the prescribed petition process* set forth in article II, section 8, subdivisions (b) and (c).[6] Under their

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[5]Even on its own terms, Petitioners' argument proves too little. Petitioners cannot contend that the reason the Legislature is prohibited from "proposing statutes" is because the people have reserved the *initiative* power to themselves, yet then assert that the Legislature is also thereby prohibited from placing *advisory questions* on the ballot, even though the power to propose advisory questions is *excluded* from the scope of the initiative power under the decision in *AFL-CIO*.

[6]Indeed, the measure's very name — the "initiative" — derives from the defining characteristic that it is *initiated* by the people, not the Legislature. Thus, Justice Liu's comment in his Concurring Statement in the Court's August 11, 2014, Order to Show Cause ("Concurring Statement") that the parties are in agreement that "Proposition 49 is not an initiative or a referendum because it does not propose to enact any law" is only *partially correct*. Proposition 49 is indeed "not an initiative or a referendum," but the reason is because it did not qualify for the ballot through *the citizen-sponsored*

reserved powers, the electors directly exercise a lawmaking function as *an alternative to*, and *in addition to*, the exercise of lawmaking authority by the Legislature in its role as the elected representatives of the people. The term "initiative" has never referred to the placement of a measure on the ballot *by the Legislature*. An "initiative" is thus completely distinct from a measure, like Proposition 49, that is submitted to a vote of the people by action of the Legislature, and the constitutional provisions addressing the people's *initiative* power therefore have no bearing on the completely *separate question* of whether *the Legislature* has the authority to place a particular measure on the ballot — whether acting pursuant to express constitutional direction (see, e.g., Cal. Const., art. XVI, § 1 [state general obligation bonds]; *id.*, art. XVIII, § 1 [proposed constitutional amendments]), or pursuant to its plenary power. Neither when the Legislature places a measure on the ballot, nor when the electors vote on that measure in response to the Legislature's action, are the people exercising the "initiative" power. By their own express terms, then, the constitutional provisions relating to the *people's* exercise of the initiative and referendum powers do not purport to define or limit the powers of the *Legislature*, nor have they ever been construed to do so by this or any other court.

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petition process, but was instead directed to be placed on the ballot by the Legislature.

The legislative history of these constitutional provisions only confirms this interpretation. It must be remembered that the initiative and referendum were *added* to the Constitution by an amendment in 1911. For more than half a century prior to that amendment, the legislative authority of the state rested *exclusively* with the Legislature, and as is discussed further below, the Legislature had used that authority on more than one occasion to solicit the electorate's views by placing an advisory question on the ballot. (See Part III.B.3, *infra*.) When the amendment reserving the initiative and referendum powers to the people was added to the Constitution, it was explicitly presented as a "supplement" to the Legislature's plenary authority; the initiative and referendum were not intended to *diminish* or to *take away* any of the Legislature's existing powers, but only to serve as an *addition* to, and a *check* on, the Legislature's exercise of its authority. As the ballot argument in favor of the 1911 constitutional amendment explained: "Objection has been made that these powers would deprive the legislature of its functions. . . . *It is not intended and will not be a substitute for legislation*, but will constitute that safeguard which the people should retain for themselves, *to supplement the work of the legislature* by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and to hold the legislature in check, and veto or negative such measures as it may viciously or negligently enact." (Reasons Why Senate

Constitutional Amendment No. 22 Should Be Adopted (Sept. 1, 1911), p. 20 [emphasis added].)

In fact, the original 1911 amendment contemplated and expressly provided that the Legislature had the authority to submit its own measures to the voters. As originally adopted, the amendment provided for both a "direct" and "indirect" initiative process: With the "direct" initiative, citizens could submit petitions containing the signatures of voters equal to at least 8% of the number of votes cast in the last gubernatorial election and, upon qualification, the Secretary of State would place their proposed constitutional amendment or initiative statute on the next ballot. With the "indirect" initiative, citizens could submit fewer signatures (equal to at least 5% of the number of votes cast at the last election for Governor), and the Secretary of State upon qualification would submit the proposed statute *to the Legislature* for its consideration; if the Legislature enacted the law without change, that would end the process, but if the Legislature refused or declined to timely do so, the proposed initiative statute would be placed on the next general election ballot for a vote of the people. Notably, however, in this last circumstance, the 1911 amendment explicitly provided that the Legislature could "propose a different [measure] on the same subject by a yes and nay vote upon separate roll call, and in such event both measures shall be submitted by the secretary of state to the electors for approval or rejection at the next ensuing general election . . . ."

(Cal. Const., art. IV, § 1 (1911); see also Reasons Why Senate Constitutional Amendment No. 22 Should Be Adopted, p. 19 ["In this case [if the Legislature does not enact the proposed initiative statute], the legislature has the privilege of submitting to the people, at the same time, a different or amended measure on the same subject."].) Plainly, those who proposed adding the initiative and referendum powers to the Constitution, and those who voted in favor of the 1911 amendment, did not believe that the initiative power was inconsistent with the Legislature's authority to place measures on the ballot and did not intend to prohibit the Legislature from doing so, even in the context of the electors' exercise of the initiative power.[7]

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[7]The provisions relating to the indirect initiative remained in the Constitution until 1966, when they were deleted at the recommendation of the California Constitution Revision Commission as part of a modernization and streamlining of the entire Constitution, including the initiative and referendum provisions. (See Proposition 1-a on the Nov. 8, 1966, General Election Ballot.) The Commission concluded that the indirect initiative had rarely been used (only four times since 1911, and only once successfully), and that its purpose could equally be served by lowering the petition signature threshold for qualifying proposed initiative statutes from 8% to 5% (while leaving the threshold for qualifying proposed initiative constitutional amendments at 8%). (See California Constitution Revision Commission, *Proposed Revision of the California Constitution* (Feb. 1966), p. 52 [explaining that the provisions setting forth the procedure for the "indirect initiative" were deleted because the proposed revision reduces the percentage of signatures required for an initiative statute from 8 to 5 percent, the same previously required for an indirect initiative, and therefore "[t]he indirect initiative merely adds an additional step to accomplish the same result that can be accomplished under the initiative generally. Further, the indirect initiative has been used only four times, and only once successfully. Accordingly, it was determined that the indirect initiative could be deleted without impairing the right of the people to propose laws through the initiative procedure."].)

Consequently, neither article IV, section 1's reservation to the people of the initiative and referendum powers, nor the provisions of article II, section 8, defining and specifying the manner in which the people may exercise the initiative power, may reasonably be construed to restrict the authority of *the Legislature*, acting as the elected representatives of the people, to place legislative measures on the ballot, including — as is specifically at issue in this case — a *non-binding advisory question.* The Legislature's power to submit such a measure to a vote of the electorate is neither defined by nor co-extensive with the scope of the people's initiative power. To the contrary, it is well established that the Legislature has the authority to take any action that is "incidental and ancillary" to the ultimate performance of its lawmaking functions. (See, e.g., *Parker v. Riley* (1941) 18 Cal.2d 83, 89 ["It is difficult to see how the general doctrine of political theory designed to apply to the basic and fundamental powers of government can be said to prohibit the exercise of such subsidiary and incidental duties."].)

Petitioners protest that the submission of Proposition 49 to the voters cannot be considered to be "incidental and ancillary" to the Legislature's lawmaking functions because it supposedly will not lead to the enactment of any legislation. This argument rests on too restrictive of an interpretation of the scope of the Legislature's "incidental and ancillary" powers, as well as too limited of a view of the Legislature's appropriate lawmaking functions.

To begin with, the functions of the Legislature are not strictly limited to "the enactment of legislation." For example, among other powers, the Legislature may make executive appointments (see, e.g., *Marine Forests Society, supra*); may promulgate rules to regulate the internal proceedings of its houses (see *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316); and may act to protect the safety and security of its members (see *Zumbrun Law Firm v. California Legislature* (2008) 165 Cal.App.4th 1603). Moreover, the state Constitution specifically tasks the Legislature with ratifying Indian gaming compacts (Cal. Const., art. IV, § 19(f)); judging the qualifications of its Members and exercising the power of expulsion (*id.*, art. IV, § 5); confirming the Governor's appointments to vacancies in state offices (*id.*, art. V, § 5); and initiating and trying impeachments (*id.*, art. IV, § 18). The federal Constitution likewise assigns the state Legislature responsibility for consenting to the formation of states (U.S. Const., art. IV, § 3(1)) and — of particular relevance to Proposition 49 — for applying to Congress for a convention to propose amendments to the Constitution and for ratifying any constitutional amendments that are proposed by Congress or a convention (*id.*, art. V).

Accordingly, although ratification of a proposed federal constitutional amendment by the Legislature may not technically be "an act of legislation within the proper sense of the word" (*Hawke v. Smith* (1920) 253 U.S. 221,

229), *it is indisputably one of the Legislature's legitimate and constitutionally assigned functions as the legislative branch of state government.*[8] The powers of the Legislature include all those that are incidental and ancillary to the performance of its "appropriate functions," not just to the enactment of legislation: "A legislative assembly, when established, becomes vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions." (*Ex Parte McCarthy*, 29 Cal. at p. 403.) And "[w]hen a legislative body has a right to do an act, it must be allowed to select the means within reasonable bounds." (*Parker v. Riley*, 18 Cal.2d at p. 91.) Accordingly, if — as it did with SB 1272 — a majority of the Legislature decides to submit an advisory question to the voters in order to formally obtain the views of their constituents on whether the Constitution should be amended in response to the *Citizens United* decision — and, if so, *whether the Legislature should ratify such an amendment* — the Legislature possesses ample authority to take this action, incidental to its express constitutional powers under article V of the U.S. Constitution, and the courts

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[8]Justice Liu's Concurring Statement cites this quotation from *Hawke v. Smith* in suggesting that the submission of Proposition 49 to the voters is not within the Legislature's power because it is not "incidental or ancillary" to any "legislative proposal." Justice Rehnquist, however, specifically rejected this interpretation of *Hawke v. Smith* in refusing to enjoin a vote on the Nevada advisory measure in *Kimble v. Swackhamer*: "I would be most disinclined to read either *Hawke*, *supra*, . . . or Art. V as ruling out communication between the members of the legislature and their constituents." (439 U.S. at pp. 1387-1388.)

are not to second-guess its decision.[9]

More generally, the core function of the Legislature is "the determination and formulation of legislative policy" (see, e.g., *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 299; *State Bd. of Educ. v. Honig* (1993) 13 Cal.App.4th 720, 750), and it has repeatedly been held that an "indispensable incident" to determining and formulating legislative policy is the gathering of facts and opinions that will inform the legislative decisionmaking process. As this Court explained in *In re Battelle* (1929) 207

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[9]As Petitioners note, a couple of weeks before enacting SB 1272, the Legislature adopted a joint resolution applying to Congress to call a constitutional convention for the sole purpose of proposing an amendment to the U.S. Constitution that would limit corporate personhood with respect to campaign financing and would permit legislative limitations on political spending. (Res. 2014, ch. 77 ["AJR 1"].) The outcome of the advisory vote on Proposition 49 will therefore serve as invaluable guidance for the Legislature as it determines whether to continue to call for a constitutional convention, whether (and how forcefully) to push the California Congressional delegation to propose a constitutional amendment, and (should either of those efforts prove successful) whether to vote to ratify the resulting amendment — all "appropriate functions" of the Legislature.

Indeed, an interpretation of the California Constitution that prohibits the Legislature from ascertaining the views of the electorate in order to faithfully exercise its responsibilities under article V of the U.S. Constitution would raise constitutional questions under the Supremacy Clause. The article V jurisprudence emphasizes that Members of the Legislature must be permitted to exercise their own discretion, free from any constraints under state law, in fulfilling their responsibilities under the federal constitution. (See, e.g., *Leser v. Garnett* (1922) 258 U.S. 130, 137 ["[T]he function of a state Legislature in ratifying a proposed amendment to the federal Constitution . . . is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state."]; see generally *Bramberg v. Jones*, 20 Cal.4th at pp. 1055-1063 [collecting cases].)

Cal. 227:

> " The power and duties reposed in the Legislature and in each and every member of both houses thereof is obviously that of enacting, and hence, necessarily, of preparing and proceeding to enact wise and well-formed and needful laws. . . . [I]n many instances, in order to the preparation of wise and timely laws *the necessity of investigation of some sort must exist as an indispensable incident and auxiliary to the proper exercise of legislative power*. This has been recognized from the earliest times in the history of American legislation, both federal and state, and from even earlier epochs in the development of British jurisprudence." (*Id.*, at pp. 240-241 [citations omitted] [emphasis added].)

In the present case, one of the means selected by the Legislature to gather information to assist it in formulating the appropriate legislative policy with respect to the debate over the *Citizens United* decision and the rights of corporations in the electoral process was to ascertain the views of the California electorate — whose interests the Members of the Legislature are elected to represent — by submitting to the voters the advisory question set forth in SB 1272. Although Petitioners question whether Proposition 49 will lead to the enactment of any legislation, the information provided by the vote could well prove very useful to the Legislature in formulating future legislative policy.[10] As noted above, information-gathering has long been viewed as

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[10]For example, current California law — unlike the Federal Election Campaign Act and the laws of many other states — does not prohibit corporations from contributing directly to candidates for public office. If the vote on Proposition 49 were to indicate overwhelming popular support for restricting the political spending of corporations, some Members of the Legislature might wish to consider revising this aspect of existing state law.

"incidental and ancillary to the ultimate performance of law-making functions by the legislature," and "any reasonable procedure for securing such information is proper." (*Parker v. Riley*, 18 Cal.2d at pp. 89, 90.) Those "reasonable procedures" include submitting an advisory question to the voters seeking a formal expression of their views regarding critical public policy matters that lie within the Legislature's responsibility to address.[11]

B. THE CONSTITUTION'S INCLUSION OF PROVISIONS GOVERNING THE SUBMISSION OF LEGISLATIVE CONSTITUTIONAL AMENDMENTS, BOND ACTS, AND AMENDMENTS OR REPEALS OF PREVIOUSLY ENACTED INITIATIVE STATUTES DOES NOT IMPLY THAT THE LEGISLATURE LACKS THE AUTHORITY TO SUBMIT AN ADVISORY MEASURE

In Petitioners' Reply, they assert that the Constitution's inclusion of provisions specifically authorizing the Legislature's submission of three different types of ballot measures — constitutional amendments (Cal. Const., art. XVIII, §§ 1 & 4); bond acts (*id.*, art. XVI, § 1); and statutes amending or repealing previously enacted initiative statutes (*id.*, art. II, § 10, subd. (c)) — should be construed under the maxim *expressio unius est exclusio alterius* to indicate an intent to prohibit the Legislature from submitting any *other type* of

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[11]Notably, Justice Liu's Concurring Statement acknowledges that the Legislature has the authority to spend public funds to conduct a private poll of the voters in order to ascertain the electorate's views. There is no discernible reason, then, why the Legislature's choice to use a more legitimate and more reliable procedure for ascertaining the voters' collective views — by placing an advisory question on the ballot — would not likewise be well within the Legislature's authority as "incidental and ancillary" to its lawmaking functions.

ballot measure to the voters, such as the advisory measure at issue in this case. Petitioners' argument is unavailing, however, because California courts — consistent with the fundamental principles of constitutional interpretation set forth in Part I, *supra* — have repeatedly rejected reliance on the *expressio unius* maxim as a basis for defining the scope of the Legislature's authority under the Constitution.[12]

In *Collins v. Riley* (1944) 24 Cal.2d 912, for example, the Court held that the Constitution's specification (in section 23) of two items that were allowable as compensation for Members of the Legislature — the "sum of one hundred dollars each for each month" and "mileage not to exceed five cents per mile" — did not prohibit the Legislature from enacting a statute that also reimbursed legislators for the "travel expenses" they incurred in attending the legislative session. The Court emphatically rejected application of the

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[12]As an initial matter, Petitioners misapply the *expressio unius* maxim. "The maxim *expressio unius est exclusio alterius* is generally applied to a specific statute, which contains a listing of items to which the statute applies." (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1411.) Here, there is no "listing of items" within a specific statute. Instead, Petitioners seek to apply the maxim to three separate sections of the Constitution, spread across three different articles, enacted at three different times, and addressing three disparate subjects. Moreover, "*expressio unius est exclusio alterius* is no magical incantation" (*Estate of Banerjee* (1978) 21 Cal.3d 527, 539), but is "a mere guide" to be utilized when a statute is ambiguous (*Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391). There is no ambiguity here, nor can it reasonably be argued that the voters' approval of these three disparate constitutional provisions, at different times, reflects an intent on the voters' part to address comprehensively the subject of "all measures the Legislature is authorized to place on the ballot."

expressio unius doctrine to support the imposition of any restrictions on the Legislature's authority that were not expressly set forth in the Constitution. The *expressio unius* argument, the Court declared, "overlooks the fact that our Constitution is not a grant of power but rather a limitation or restriction upon the powers of the Legislature and 'that we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.'. . . In section 23 the only restrictions are on the amount to be allowed for services ($100 per month) and on the amount for mileage (not to exceed five cents per mile), and the doctrine of *expressio unius* cannot be relied upon to support or incorporate other or additional restrictions." (*Id.* at p. 916 [citations omitted]; accord, *Dean v. Kuchel* (1951) 37 Cal.2d 97, 100-104 [collecting cases rejecting application of *expressio unius* doctrine to limit legislative power in the absence of a "positive and express" restriction]; *Ex Parte McCarthy*, 29 Cal. at p. 403 ["[A]n express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms."].)

In sum, as this Court recapitulated in *Marine Forests Society*, "California decisions long have made it clear that under our Constitution the Legislature enjoys plenary legislative powers unless there is an explicit prohibition of legislative action in the Constitution itself." (36 Cal.4th at p. 39.) Petitioners have identified no provision of the Constitution that

explicitly prohibits the Legislature from submitting an advisory question to a vote of the electorate, for no such provision exists. Under established constitutional doctrine, then, that should end this Court's inquiry, and the Petition should be denied on this basis.

III. THE CALIFORNIA CONSTITUTION DOES NOT, BY NECESSARY IMPLICATION, PROHIBIT THE LEGISLATURE FROM SEEKING GUIDANCE FROM THE ELECTORATE THROUGH AN ADVISORY BALLOT MEASURE

Petitioners themselves have made no further arguments in support of their Petition. In his Concurring Statement, however, Justice Liu puts forward an alternative ground for questioning the validity of SB 1272. Conceding that "the California Constitution contains no express prohibition against submitting an advisory question to the voters," Justice Liu nevertheless suggests that "there is a strong case that such a prohibition is a necessary implication of our Constitution's text and structure." In Justice Liu's view, "[t]he California Constitution draws a clear line between lawmaking by the Legislature and lawmaking by the citizenry through the ballot." Permitting the Legislature to leverage the formality of the electoral process to pose advisory questions to the voters, he suggests, "would alter this delicate balance between legislative and citizen lawmaking."

The Legislature respectfully submits that Justice Liu's conclusion that a prohibition against the submission of an advisory measure is a "necessary implication" of the California Constitution's text and structure is incorrect. To

the contrary, as we show below, the text, history, and structure of the Constitution all confirm that submission of advisory questions to the voters is perfectly consistent with California's constitutional framework and governmental organization. And the experience of other states that make use of advisory measures — many of which have identical or markedly similar constitutional structures — further confirms the legitimacy and legality of the Legislature's submission of advisory questions to the state's voters.

A. THIS COURT HAS NEVER INVALIDATED AN ACT OF THE LEGISLATURE BASED ONLY UPON ITS ASSERTED INCONSISTENCY WITH THE "STRUCTURE" OF THE CONSTITUTION

At the outset, the Legislature wishes to point out just how unprecedented and inappropriate it would be for the Court to invalidate an action of the Legislature — not on the ground that it violates some specific provision of the Constitution, but on the ground that it is perceived to be inconsistent with "structural considerations" that allegedly inhere in that document. Indeed, our research has uncovered no previous case in which this Court has ever rendered such a ruling.

As set forth above, the "fundamental principle of constitutional adjudication" (see *Pacific Legal Foundation v. Brown*, 29 Cal.3d at p. 180) is that the courts may not invalidate an action of the Legislature "unless there is an explicit prohibition of legislative action in the Constitution itself." (*Marine Forests Society,* 36 Cal.4th at p. 39.) One of this Court's earliest formulations

of this principle was in *People ex rel. Smith v. Judge of Twelfth Dist.* (1861) 17 Cal. 547, 551-552, in which the Court stated:

> "There is no question at this day of the power of the Courts to pronounce unconstitutional acts invalid . . . . But it is equally well settled that this power is not to be exercised in doubtful cases, but that a just deference for the legislative department enjoins upon the Courts the duty to respect its will, unless the act declaring it *be clearly inconsistent with the fundamental law* . . . . [¶] It is also unquestionable that the mass of powers of government is vested in the representatives of the people, and that these representatives are no further restrained under our system than *by the express language* of the instrument imposing the restraint, or by *particular provisions* which, by clear intendment, have that effect." (Emphasis added.)

A few years later, in *Ex Parte McCarthy*, the Court reiterated: "A legislative assembly has, therefore, all the powers and privileges which are necessary to enable it to exercise in all respects . . . its appropriate functions, except so far as it may be restrained *by the express provisions of the Constitution* . . . ." (29 Cal. at p. 403 [emphasis added].) And again, in *In re Madera Irrigation Dist.*, 92 Cal. at p. 308, the Court admonished: "The presumption which attends every act of the legislature is, that it is within its power; and he who would except it from the power must point out *the particular provision of the constitution by which the exception is made* . . . ." (Emphasis added.)

The Court has re-affirmed this principle time and again over the course of the past 150 years. The precise language used by the Court has varied somewhat from case to case, but the core precept and common commandment

in each of its formulations is the same: *Any judicially imposed limitation on the plenary power of the Legislature must be grounded in some* ***specific provision*** *or provisions of the Constitution that expressly or by necessary implication prohibit the Legislature's action.* The Court has never suggested — and we have found no case that has ever held — that an act of the Legislature may be invalidated because it is assertedly inconsistent with the "structure" of the Constitution, without it violating some *explicit prohibition* contained therein. (See, e.g., *Amwest Surety Ins. Co. v. Wilson*, 11 Cal.4th at p. 1252 ["Unless conflict with *a provision of the state or federal Constitution* is clear and unquestionable, we must uphold the Act."] [emphasis added; citations omitted], *quoting California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594.)

There is good reason why no such case exists, for a judicial decision nullifying legislative action that is not grounded in the express language of a specific provision of the Constitution threatens to breach the separation of powers between the judicial and legislative branches. When the invalidation of a legislative act is tied to the language of a particular section of the Constitution, the courts are performing their legitimate and proper function, giving effect to the people's will as reflected in the explicit terms of the Constitution. Untethering the court's decision from any specific and clear textual constitutional prohibition, however — and resting the decision instead

merely on a perceived inconsistency with the Constitution's overall "structure" — risks permitting the judiciary to substitute its judgment and conceptions of the appropriate "structural considerations" for those of an equal and coordinate branch of government. As the court observed in *Schabarum, supra*: "Judicial application of clear and unequivocal constitutional restrictions on the Legislature's authority merely enforces the people's exercise of the right to place restrictions upon the Legislature. On the other hand, legislative restraint imposed through judicial interpretation of less than unequivocal language would inevitably lead to inappropriate judicial interference with the prerogatives of a coordinate branch of government." (60 Cal.App.4th at p. 1218.)

In the present case, as Justice Liu's Concurring Statement acknowledges, "[t]he Legislature is correct that the California Constitution contains no express prohibition against submitting an advisory question to the voters." Nor have Petitioners identified any *specific provision* of the Constitution that, even by necessary implication, imposes such a restriction on the Legislature. Under this Court's established precedents, then, SB 1272 must be upheld as a valid exercise of the Legislature's plenary authority.

B. THE LEGISLATURE'S SUBMISSION OF A NON-BINDING ADVISORY QUESTION TO THE VOTERS IS FULLY CONSISTENT WITH THE CONSTITUTION'S TEXT, STRUCTURE, AND HISTORY

1. The California Constitution Incorporates Elements of Both Representative Government and Direct Democracy

The premise underlying Justice Liu's "structural concern" in allowing the Legislature to place advisory questions on the ballot is that "[t]he California Constitution draws a clear line between lawmaking by the Legislature and lawmaking by the citizenry through the ballot." In his view, the "Constitution makes no provision for advisory questions because such polling of the electorate by the Legislature is in tension with the basic purpose of *representative* as opposed to direct democracy. [¶] Under our Constitution, the only 'structured format for citizens to speak collectively' on legislative matters is through an initiative or a referendum, i.e., through an exercise of *lawmaking*. Posing advisory questions to the electorate is at odds with the people's constitutional choice of how to structure an accountable lawmaking process."

This view of the Constitution's structure is not accurate, however. As Justice Liu notes, the *federal Constitution* does indeed reflect the Founder's rejection of pure, plebiscitary democracy in favor of a republican form of government that vests all lawmaking power in the people's elected representatives. But the people of California have not adopted this same

approach. Instead, the California Constitution includes elements of both a direct democracy and a republican form of government, incorporating a model of *shared* legislative decisionmaking that does not necessarily draw a clear line between lawmaking by the Legislature and lawmaking by the citizenry.

The initiative and referendum, of course, represent the most conspicuous embodiment of this shared governmental power structure in the California Constitution, allowing the electorate to completely bypass the Legislature and to directly enact or reject laws themselves. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 227 ["[N]otwithstanding our continuing representative and republican form of government, the initiative process itself adds an important element of direct, active, democratic contribution by the people."].) Justice Liu's Concurring Statement suggests that the initiative maintains the "clear lines of accountability" that he believes to exist in the Constitution because "[i]f the citizenry adopts an initiative, it is entirely the handiwork of the citizenry for better or worse; the Legislature is not involved." But what about the referendum? If the voters approve an act of the Legislature that was referred to the ballot, is that "entirely the handiwork of the citizenry" with no "involvement" by the Legislature? We dare say not.

Moreover, Justice Liu's position overlooks the fact that, as originally added to the Constitution in 1911 and for the next 55 years thereafter, the

initiative provisions "blurred the lines of accountability" in precisely the manner that he derides as being inconsistent with the structure of the Constitution. As noted above, under the "indirect" initiative procedure, the citizens draft and formally propose legislation for the Legislature's consideration. If the Legislature adopts the citizens' proposal under the threat of it otherwise going to a vote of the electorate, who would be deemed "accountable" for that legislation — the citizens who drafted it or the Legislature that enacted it? And if, alternatively, the Legislature fails to enact the citizen-sponsored initiative as presented, and instead places both it and the Legislature's competing proposal on the ballot, who would be "accountable" for the adoption of the Legislature's proposed statute — the Legislature that drafted it, or the voters who ultimately enacted it?

Similar questions arise under the provisions of the California Constitution that explicitly authorize the Legislature to submit proposed constitutional amendments (Cal. Const., art. XVIII, §§ 1 & 4), statutes authorizing the issuance of bond debt (*id.*, art. XVI, § 1), and amendments or repeals of previously enacted initiative measures (*id.*, art. II, § 10, subd. (c)). Each of these constitutional provisions *mandates* use of the "mix and match" approach that Justice Liu suggests is contrary to the Constitution's "structure": The Legislature drafts the measure, deliberates on it, and decides whether to place it on the ballot; but it is the citizens who directly vote on it and ultimately

determine whether it will be enacted. Each of these provisions blurs the "clear lines" that the Constitution supposedly creates between lawmaking by the Legislature and lawmaking by the people.

Finally, Justice Liu's assertion that under the California Constitution, "the only 'structured format for citizens to speak collectively' on legislative matters is through an initiative or a referendum" disregards the people's "right to instruct their representatives" guaranteed by article I, section 3.[13] The "right to instruct," which has been included in every version of the California Constitution since 1849,[14] has deep historical roots, tracing back to England's House of Commons and the early New England colonies. (See generally Terranova, *The Constitutional Life of Legislative Instructions in America*

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[13]Article I, section 3, subdivision (a), declares: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." (Emphasis added.)

[14]See Cal. Const., art. I, § 10 (1849): "The people shall have the right freely to assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances." The "right to instruct" was included in the 1849 Constitution over the initial objection of some delegates who feared the clause would "transform[] a republic into a pure democracy." (1849 Debates, p. 295 [Remarks of Mr. Lippitt].) This objection was overcome based upon the delegates' agreement that the instructions were not binding upon the elected representatives: "We simply say here that the people have a right to assemble and instruct their representatives. We do not say whether the representatives shall obey or not." (*Id.*, p. 297 [Remarks of Mr. McCarver]; accord, *id.*, p. 296 ["[T]he people have a right to instruct their representatives, and the representative has a right to refuse to obey those instructions. Both have rights."] [Remarks of Mr. McDougal].)

(2009) 84 N.Y.U. L.Rev. 1331.) Although the First Congress rejected a proposal to incorporate an explicit "right to instruct" into the First Amendment of the U.S. Constitution (see *Cooke v. Gralike* (2001) 531 U.S. 510, 521), many state constitutions included such a provision, and by the time of California's entry into the Union, it was a common feature of the new states' foundational documents.

There is no case law in California interpreting (or even specifically referencing) the "right to instruct" clause in article I, section 3. In other states containing similar provisions in their constitutions, however, the clause has been interpreted to permit the people to provide non-binding instructions to their elected representatives through the submission of advisory ballot measures. Notably, the "instructions" are not strictly limited to the enactment of legislation, but "may concern subjects excluded from the popular initiative as long as they remain appropriate subjects for some type of action by the Legislature." (Opinion of the Attorney General, No. 2 (1984) 1984-85 Mass. Op. Atty. Gen. 75, *3 [1984 WL 249035] [explaining that the people's "right to instruct" on public policy questions under the Massachusetts Constitution is broader than the people's reserved power of initiative]; see also *Thompson v. Secretary of Commonwealth* (1928) 265 Mass. 16.)[15]

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[15]Part 1, article XIX, of the Massachusetts Constitution, in language similar to that of article I, section 3, of the California Constitution, declares: "The people have a right, in an orderly and peaceable manner, to assemble to

One of the most common uses by voters in other states of instruction measures has been to "instruct" their state legislative and Congressional representatives with respect to pending or proposed amendments to the U.S. Constitution, much as Proposition 49 does with respect to a proposed amendment to overturn the *Citizens United* decision.[16] When such measures have attempted to make the instructions binding, either directly or through coercive ballot labels or other means, they have been struck down as violating article V of the federal Constitution, but when placed on the ballot merely as non-binding, advisory measures (like Proposition 49), they have regularly been held to be valid by the courts. (See, e.g., *Simpson v. Cenarrusa* (1997) 130

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consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer." Massachusetts has also enacted a statute implementing the "right to instruct" clause of its Constitution by authorizing citizens in each state senatorial or representative district to submit applications, signed by the requisite number of voters, "asking for the submission to the voters of that senatorial or representative district of any question of instructions to the senator or representatives from that district, and stating the substance thereof." (Mass. Gen. Law, ch. 53, § 19 (2014). Upon fulfillment of the statutory requirements, the instructional question is placed on the ballot at the next election held in the district. (*Ibid.*)

[16]In fact, many of the petitions received by the California Legislature requesting that SB 1272 be enacted and Proposition 49 be placed on the ballot invoked the "right to instruct" clause, specifically characterizing the advisory question as a "Voter Instruction measure." (See, e.g., petitions submitted by SB 1272 sponsor Democracy for America, calling upon the Legislature and the Governor to pass "SB 1272, The Overturn Citizens United Act, a Voter Instruction measure" [on file with Senate Com. on Elections and Constitutional Amendments].)

Idaho 609, 613-614; *Miller v. Moore* (8th Cir. 1999) 169 F.3d 1119, 1123-1126; see also *Bramberg v. Jones*, 20 Cal.4th at p. 1059 ["Proposition 225 goes beyond a permissible advisory measure and conflicts with Article V"].)

The Court need not address the proper interpretation and scope of article I, section 3's "right to instruct" clause in the present case. The important point for present purposes is simply that its presence in the Constitution confirms that from the very founding of the state, the "text and structure" of the Constitution contemplated and incorporated a provision guaranteeing the people the right to formally engage and communicate with their elected representatives — not by directly making law themselves, as with the initiative and referendum process, but by "instructing" their representatives what they should do with respect to legislative and other matters. Not only does the "right to instruct" clause once again demonstrate that the Constitution contains no "clear line" between lawmaking by the Legislature and lawmaking by the people, but it clearly implies that the Legislature has the authority to facilitate the people's exercise of their "right to instruct their representatives" — either, as the Massachusetts Legislature did, by enacting a statute that would permit the people to directly exercise the right themselves, or, as the California Legislature did here with SB 1272, by placing an advisory "instruction" measure on the ballot and permitting the people to weigh in on an important public policy issue in the only manner that the federal

Constitution allows.

2. A Non-Binding Advisory Measure Does Not Blur the Lines of Accountability for Legislative Choices

Even if the premise of Justice Liu's Concurring Statement were correct that the California Constitution "draws a clear line between lawmaking by the Legislature and lawmaking by the citizenry through the ballot," his conclusion that a non-binding advisory question like Proposition 49 would "blur" that line does not follow.

An *advisory* measure, after all, is just that; it is not an exercise in "lawmaking," and no reasonable voter would think that it is. As Chief Justice Cantil-Sakauye notes in her Concurring and Dissenting Statement in the Court's August 11, 2014, Order to Show Cause, "[t]here is unlikely to be any real voter confusion . . . about the mere advisory nature of the measure." Proposition 49, for example, would have been clearly labeled on the ballot as a "legislative advisory question," and the Voter Information Pamphlet would have told the voters in no uncertain terms that "it does not require any particular action by Congress or the California Legislature." (Draft of Official Voter Information Guide for Nov. 4, 2014, General Election [Proposition 49: SB 1272, Lieu. Campaign Finance: Advisory Election] (August 2014).) Thus, in response to Justice Liu's query regarding "who would be accountable" if a majority of voters say "yes" to an advisory question and the Legislature were

to proceed to adopt the statute they were asked about, there can be only one plausible answer: *the Legislature would be accountable.*[17]

Likewise, Petitioners' contention that the Legislature's resort to an advisory question to solicit the views of the electorate is "an anathema to the idea that elected legislators serve as representatives of the electorate, empowered to act on their behalf and in their stead" (Petition, p. 20), is puzzling. To be sure, the theory underlying a representative democracy is that legislators should not blindly pursue the immediate and narrow desires of their constituents, but should instead carefully deliberate with their colleagues, taking into account the larger interests of the state as a whole, before rendering a legislative decision. But it has never been suggested that these elected representatives should *disregard* the collective views of their constituents, or make *no attempt to ascertain them.* An advisory measure helps to achieve the proper balance between representative government and pure democracy by

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[17]Because an advisory measure is not binding on Congress or the Legislature, leaving the elected representatives to vote or not to vote as they feel prudent, it is not "in tension with the basic purpose of *representative* as opposed to direct democracy," as Justice Liu suggests. Indeed, precisely because advisory measures like Proposition 49 do not interfere with legislators' complete freedom to vote on constitutional ratification issues however and in whatever manner they please, advisory measures relating to proposed federal constitutional amendments have been held *not* to violate article V. (See, e.g., *Kimble v. Swackhamer* (1978) 94 Nev. 600, 602-603 ["To recommend does not mean to bind. Consequently, we find it wholly impossible to construe chapter 174 as a limitation on legislative power violative of article V of the federal constitution."] [citation omitted].)

providing a formal avenue for communication between the people and their elected representatives, while still maintaining the ultimate lawmaking authority in the hands of those representatives. Indeed, giving citizens a formal mechanism to voice their opinions on important public policy matters by voting on advisory measures *strengthens* a representative democracy by actively engaging the populace in political affairs and helping to assure them that their views will at least be heard, if not acted upon, by those whom they have elected as their representatives. As we have shown above, the California Constitution seeks to accommodate just such a balance between representative government and direct democracy. Far from being at odds with the Constitution's "structure," an advisory measure fits firmly within it.[18]

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[18]Several commentators have suggested, in fact, that an advisory measure achieves a better balance between representative and direct democracy than the initiative and referendum, because it would permit the voters to provide general policy direction, while leaving the more difficult legislative details to be worked out and implemented by their elected representatives:

> "In a sensible system that includes direct democracy, there ought to be a way for the voters to say, in a focused and formal way: 'We'd like a law that does the following things, but we'd be better off leaving it to legislative experts to draft the details, because we might not do a good job on the fine points, and we thus might generate undesirable consequences that a legislature but not ordinary citizens would be able to foresee.' Having citizen groups feel obligated to draft and implement the particulars of complex policy measures is one of the problems with direct democracy we should want to reduce, not one of its salutary features we should want to enhance."

3. California's Historical Practice Confirms the Legitimacy and Legality of Legislatively Proposed Advisory Measures

Further confirmation that the Constitution fully authorizes the Legislature's submission of advisory questions to the voters as an "incidental and ancillary" aspect of its legislative function is found in the long and well-established history of such measures in California, at both the state and local levels of government.[19] (See *Zumbrun Law Firm v. California Legislature* (2008) 165 Cal.App.4th 1603, 1614 [looking to the history of an activity in

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(V. Amar, *Are "Advisory" Measures (Like Proposition 49) Permitted on the California Ballot?*, in Verdict (Aug. 29, 2014), available at <http://verdict.justia.com/2014/08/29/advisory-measures-like-proposition-49-permitted-california-ballot> (last visited Nov. 6, 2014); see also Goldman, *The Advisory Referendum in America*, Public Opinion Quarterly (Summer 1950), p. 304 ["The advisory referendum aims to secure action by the elected officials and representatives in conformity with the popular judgment but through milder methods than direct legislation. The voters may suggest or express their opinion on a course of action without themselves making the law. It is a method of obtaining the will of the electorate without binding the legislature to a specific course of action and without enacting or rejecting a statute."].)

[19]The first "advisory" election in California actually appears to have been held even before the territory became a state and entered the Union. In his Proclamation Recommending the Formation of a State Constitution and calling for the 1849 Constitutional Convention, Brevet Brigadier General and Governor Riley scheduled a special election for August 1, 1849, in order to elect delegates to the Convention and to fill vacancies in a variety of local offices in what was then still the territory of California. Governor Riley noted that "[t]he Judges of the Superior, and District Prefects are by law executive appointments, but being desirous that the wishes of the people should be fully consulted, the Governor will appoint such persons as may receive the plurality of votes in their respective districts, provided they are competent and eligible to the office." (Proclamation of the Governor (June 3, 1849), *included in* 1849 Debates, p. 4.)

determining whether it is incidental to the Legislature's appropriate function].) As far back as 1891, the Legislature placed an advisory question on the ballot to ascertain the will of the voters as to whether United States Senators should be elected by a direct vote of the people, directing the Governor to send the results of the vote on that question to the President, Vice President, every cabinet member and member of Congress, and the governors of each state and territory. (Stats. 1891, ch. 48 ["An Act to ascertain and express the will of the people of the State of California upon the subject of election of United States Senators"].) That same year, the Legislature submitted another advisory question asking the electorate whether voters should be required to be able to read and write English as a qualification for suffrage. (Stats. 1891, ch. 113 ["An act to ascertain and express the will of the people of the State of California upon the subject of requiring an educational qualification of voters"].)

Some twenty years later — still before the adoption of the 17th Amendment, so that the Legislature was responsible for choosing the United States Senators to represent California — the Legislature again sought non-binding voter guidance for its decision on whom to choose for the office by placing the names of selected candidates on the ballot to be voted on by the electorate. (Stats. 1911, ch. 387.) And as Petitioners themselves acknowledge (see Petition, p. 21, fn. 5), two advisory questions — Propositions 9 and 10 —

were submitted to the voters in a special statewide election held in June 1933, along with eight proposed constitutional amendments on the same ballot. (See Stats. 1933, ch. 435.)[20] That these advisory measures appeared on the ballot without challenge and without harm to the government structure further supports the validity of SB 1272 in the present case. (See *Pacific Legal Foundation v. Brown*, 29 Cal.3d at p. 195 ["[S]uch a pattern of legislative action, evidencing a consistent legislative interpretation, merits great weight."].)

At the local level, the practice of submitting advisory questions to the voters is even more well-established. Since 1976, the Elections Code has explicitly authorized the legislative bodies of local governments to place advisory measures on the ballot, and dozens of such measures are voted on throughout California each year, without any apparent confusion in the mind of the voters or disruption to the local government structure. (See Elec. Code, § 9603, subd. (a). ["Each city, county, school district, community college district, county board of education, and special district may hold, at its discretion, an advisory election . . . for the purpose of allowing voters within

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[20]Proposition 9, for example, asked: "Shall the Legislature divert $8,779,750 from the gasoline tax funds to the general fund for payment of bond interest and redemption on outstanding highway bonds for the biennium ending June 30, 1933?" Proposition 10 asked a similar question with respect to whether gasoline tax proceeds should be diverted to pay for outstanding bonds for the biennium ending June 30, 1935.

the jurisdiction, or a portion thereof, to voice their opinions on substantive issues, or to indicate to the local legislative body approval or disapproval of the ballot proposal."].) In fact, pursuant to this section, several local jurisdictions in California have recently placed advisory questions on the ballot in order to permit the voters to voice their collective opinion on whether the United States Constitution should be amended to limit political campaign spending by corporations — the same issue that is addressed on the statewide level by Proposition 49. (See, e.g., <http://clkrep.lacity.org/onlinedocs/2013/13-1300-s6_ord_182453.pdf> (last visited Nov. 6, 2014) [City of Los Angeles Ordinance calling special election in order to place an advisory question entitled "Resolution to Support Constitutional Amendment Regarding Limits on Political Campaign Spending and Rights of Corporations" on the May 21, 2013, municipal election ballot]; <http://www.co.mendocino.ca.us/bos/meetings/MG24081/AS24112/AI24191/DO24297/1.PDF> (last visited Nov. 6, 2014) [Mendocino County Board of Supervisors agenda summary memorializing placement of advisory measure calling for a "Constitutional Amendment to End Corporate Rule and Defend Democracy" on the November 6, 2012, ballot].)[21]

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[21]The website of the organization "United for the People" lists *scores* of state and local governments that have submitted advisory ballot measures in the past few years asking in one manner or another whether action should be taken to overturn the *Citizens United* decision, including statewide ballot measures submitted to the voters by the Colorado and Montana legislatures in

Petitioners attempt to downplay the significance of the extensive use and acceptance of local advisory measures in California by arguing (without any evident irony) that "[t]he legislative power over counties and general law cities is plenary," and thus "[i]f the Legislature desires to provide local government with the ability to ask the voters advice on the ballot, it is free to do so." (Petition Reply, p. 10.) The Legislature's legislative power with respect to statewide affairs is also *plenary*, however, and the only reason that Petitioners have put forward for why the Legislature's plenary power does not similarly include the ability to ask the *state* voters advice on the ballot is that this authority was supposedly withdrawn from the Legislature by the people's reservation of the initiative and referendum powers. *Yet the Constitution guarantees the initiative and referendum powers to local voters, as well.* (See *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775 ["[T]he local electorate's right to initiative and referendum is guaranteed by the California Constitution, article II, section 11, and is generally co-extensive with the legislative power of the local governing body."].) Thus, if the Legislature does not have the constitutional authority to submit advisory questions to the voters, neither do

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November 2012. (See <http://www.united4thepeople.org/local.html> (last visited Nov. 6, 2014); see also N. Sawhney, "Advisory Initiatives as a Cure for the Ills of Direct Democracy? A Case Study of Montana Initiative," 24 *Stan. Law & Policy Rev.* 589, 590, fn. 6 (2013) [noting that as of January 2013, over 120 cities and counties across the country had approved advisory ballot measures against corporate campaign contributions].)

any of the local legislative bodies that have been exercising that authority for years in accordance with Elections Code section 9603. The far-reaching implications of Petitioners' argument, threatening the continued use of a favored mechanism for formally soliciting and ascertaining the will of the electorate throughout the state, only further underscores the unreasonableness of their proffered interpretation of the Constitution.

C. THE EXPERIENCE OF OTHER STATES WITH SIMILAR CONSTITUTIONAL STRUCTURES CONFIRMS THE AUTHORITY OF THE LEGISLATURE TO SUBMIT ADVISORY QUESTIONS TO THE VOTERS

California, of course, is not the only state in the country to have used advisory measures in order to obtain non-binding guidance from the voters on important public policy issues of the day. Although no single entity collects such data, our research has been able to confirm that *more than a third of the states' legislatures* have, at one time or another in recent years, submitted an advisory question to the statewide electorate, on topics as varied as political campaign financing (including proposed constitutional amendments to address the *Citizens United* decision), the state's minimum wage, property tax relief, same-sex public employment benefits, and sports betting. Attached to this return is an Appendix summarizing these research findings, identifying which state legislatures have been confirmed to have submitted advisory questions to the voters, with one documented example for each state, as well as indicating whether each state's constitution provides for the statutory initiative

and referendum and whether there appears to be any explicit constitutional authorization for the submission of advisory measures in each state.[22]

Of significance, *more than half* of the states that have made use of the advisory question also provide for the right of initiative and referendum in their constitutions; these states include Alaska, Colorado, Idaho, Massachusetts, Montana, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, and Washington. And none of the constitutions in the states that have made use of the advisory question contains any specific authorization for the legislature to submit advisory measures to a vote of the people. Finally, of even greater significance, none of the highest courts in these states has opined that permitting the Legislature to place an advisory measure on the ballot contravenes the people's reserved initiative and referendum power or "blurs the lines of accountability" in the lawmaking process.

Indeed, our research has not uncovered *a single case* in which *any court*

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[22]The Appendix addresses only *statewide* advisory measures placed on the ballot by state legislatures. The right to submit local advisory ballot measures exists in many more states, and votes on such measures are much more frequent than the statewide votes. (See, e.g., Gordon & Magleby, *Pre-Election Judicial Review of Initiatives and Referendums* (1999) 64 Notre Dame L.Rev. 298, 299 ["Today many states and localities also permit local governments to place advisory referendums and statutory changes on the ballot. Only three states do not have one of these processes for at least some unit of local government."]; *Advisory Question* (2014) BallotPedia.org <http://ballotpedia.org/Advisory_question> [last visited Nov. 10, 2014] ["Advisory questions are most commonly used at the local level, often to voice the opinions of the region to higher levels of government."].)

anywhere in the country has held that a state legislature does not have the authority to submit an advisory question to the voters. This Court should not be the first to do so. As the Supreme Judicial Court of Massachusetts cautioned in rejecting a constitutional challenge to the expenditure of public funds for payment of the salaries of legislative chaplains: "The long history of a certain practice . . . and its acceptance as an uncontroversial part of our national and State tradition do suggest that we should reflect carefully before striking it down." (*Colo v. Treasurer and Receiver General* (1979) 378 Mass. 550, 557.)

CONCLUSION

In the exercise of the state Legislature's wide range of constitutional powers, it is highly desirable that its Members be able to solicit and determine the views of the constituents they represent. The placement of an advisory question on the ballot constitutes a formal, broad-based means of determining those views. The authority to formally seek the collective guidance of the voting public on important matters of public policy is inherent in the responsibilities of a legislative body, and it is a means of communication that is expressly granted by the Elections Code to a wide range of local government entities throughout California and that is frequently employed by them with great benefit. In the absence of any provision in the California Constitution that may reasonably be construed to expressly or by necessary implication deny

the Legislature the same authority to submit advisory questions to the voters, there is no lawful basis for prohibiting such an action.

In this particular instance, the Legislature has determined that it would greatly benefit from seeking a formal statement of the collective will of the voters on the important issue of whether it should continue to pursue an amendment to the U.S. Constitution to reverse the effects of the *Citizens United* decision. For the people of this state, Proposition 49 represents their only means under article V of the federal Constitution to be heard on this momentous question. Elections on advisory ballot questions have been held in a wide variety of other states to ascertain and to formally convey the will of the voters as to whether the U.S. Constitution should be amended in various respects, and the courts have repeatedly upheld the submission of such measures to the electorate. The California Legislature is likewise entitled to seek this input from the voters as a matter "incidental and ancillary" to its constitutional power and responsibility to ratify proposed amendments to the U.S. Constitution.

Petitioners contend that allowing the Legislature to submit an advisory question to a vote of the people threatens to undermine the initiative and referendum powers and the structure of the California Constitution. If any threat to the foundation of the Constitution is raised by this litigation, however, it rests in Petitioners' request that this Court nullify an action of the

Legislature, a co-equal branch of state government, in the absence of any specific provision or element of the Constitution that expressly or impliedly denies to the Legislature the authority to take that action. Petitioners' request asks the Court itself to violate the blueprint for state government set forth in the California Constitution, infringing the separation of powers that is central to the state's governmental structure and organization.

For all of the reasons discussed above, Real Party in Interest Legislature of the State of California respectfully requests that this Court deny the Petition for Writ of Mandate and allow an election on Proposition 49 to proceed as called for by SB 1272.

Dated: November 10, 2014

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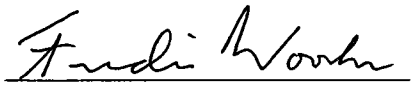
By 
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CERTIFICATE OF COMPLIANCE

WITH RULE 8.204(c)(1)

I certify that, pursuant to California Rules of Court, rule 8.204(c)(1), the attached Real Party in Interest Legislature of the State of California's Return to Petition for Writ of Mandate or Other Extraordinary Relief is proportionately spaced, has a typeface of 13 points or more, and contains 13,087 words, as determined by a computer word count.

Dated: November 10, 2014

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By _____
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Appendix: List of states that have held statewide advisory votes.

State	Example of Advisory Vote	Statewide initiative and referendum laws	Does state constitution contain an "instruct their representatives" clause?
Alaska	**Alaska Advisory Vote on Same-Sex Public Employment Benefits (2007)** (http://ballotpedia.org/Alaska_Advisory_Vote_on_Same-Sex_Public_Employment_Benefits_(2007); http://www.elections.alaska.gov/results/07SPEC/data/results.htm)	Allows for statewide statutory initiatives statewide referendums. (Alaska Const., art. XI; Alaska Stat., §§ 15.45.010 – 15.45.720.)	No.
Colorado	**Colorado Corporate Contributions Amendment (2012)** (http://ballotpedia.org/Colorado_Corporate_Contributions_Amendment,_Amendment_65_(2012); http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2011-2012/82Results.html)	Allows for statewide statutory and constitutional initiatives and statewide referendums. (Colo. Const., art. V, § 1; Colo. Stat., §§ 1-40-101 – 1-40-134, 31-11-104 – 31-11-118.)	No.

State	Example of Advisory Vote	Statewide initiative and referendum laws	Does state constitution contain an "instruct their representatives" clause?
Delaware	**Delaware Charitable Gambling Referendum (1984)** (http://ballotpedia.org/Delaware_Charitable_Gambling_Referendum_(1984); https://web.archive.org/web/20140511183624/http://elections.delaware.gov/information/electionresults/pdfs/1984.pdf, at p. 17)	Does not allow for statewide initiatives or referendums.	No.
Florida	**Florida Federal Budget Advisory Question (2010)** (http://ballotpedia.org/Florida_Federal_Budget_Advisory_Question_(2010); http://archive.flsenate.gov/Session/index.cfm?Mode=Bills&SubMenu=1&Tab=session&BI_Mode=ViewBillInfo&BillNum=2742&Chamber=Senate&Year=2010)	Allows for statewide constitutional initiatives, but not statutory initiatives or statewide referendums. (Fla. Const., art. XI, § 3; Fla. Stat., §§ 15.21, 16.061, 100.371, 101.161, 104.185.)	"The people shall have the right peaceably to assemble, **to instruct their representatives**, and to petition for redress of grievances." (Fla. Const., art. I, § 5.)
Idaho	**Idaho Property Tax Relief Advisory Vote (2006)** (http://ballotpedia.org/Idaho_Property_Tax_Relief,_HB_1_(2006); http://www.sos.idaho.gov/elect/inits/06advisoryvote.htm)	Allows for statewide statutory initiatives and statewide referendums. (Idaho Const., art. III, § 1; Idaho Code Ann. § 34-1801 – 34-1823.)	"The people shall have the right to assemble in a peaceable manner, to consult for their common good; **to instruct their representatives**, and to petition the legislature for the redress of grievances." (Idaho Const., art. I, § 10.)

State	Example of Advisory Vote	Statewide initiative and referendum laws	Does state constitution contain an "instruct their representatives" clause?
Illinois	**Illinois Birth Control in Prescription Drug Coverage Question (2014)** (http://ballotpedia.org/Illinois_Birth_Control_in_Prescription_Drug_Coverage_Question_(2014); http://ilga.gov/legislation/fulltext.asp?DocName=09800HB5755sam001&GA=98&LegID=81054&SessionId=85&SpecSess=0&DocTypeId=HB&DocNum=5755&GAID=12&Session=)	Allows for statewide constitutional initiatives, but not statewide statutory initiatives or statewide referendums. (Ill. Const., art. VII, § 11; art. XI, § 11; 10 Ill. Comp. Stat. Ann. 5/28.)	No.
Massachusetts	**Massachusetts Taxpayer Funding for Political Campaigns Advisory Question (2002)** (http://ballotpedia.org/Massachusetts_Taxpayer_Funding_for_Political_Campaigns_Advisory,_Question_3_(2002); http://www.sec.state.ma.us/ele/eleres/res02/questions.htm)	Allows for statewide statutory and constitutional initiatives and statewide referendums. (Mass. Const. Amend., arts. XLVIII, LXVII, LXXIV, LXXXI; Mass. Gen. Laws, ch. 53, §§ 19-22A.)	"The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; **give instructions to their representatives**, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer." (Mass. Const., pt. 1, art. XIX.)
Montana	**Montana Citizens United Advisory Vote, I-166 (2012)** (http://ballotpedia.org/Montana_Corporate_Contributions_Initiative,_I-166_(2012); http://sos.mt.gov/Elections/2012/BallotIssues/I-166.pdf)	Allows for statewide statutory and constitutional initiatives and statewide referendums. (Mont. Const., art. III, §§ 4-5; art. IV, §7; art. XIV, §§ 2, 9-10; Mont. Code Ann. § 13-27.)	No.

State	Example of Advisory Vote	Statewide initiative and referendum laws	Does state constitution contain an "instruct their representatives" clause?
Nevada	**Nevada Day Advisory Question (1998)** (http://ballotpedia.org/Nevada_Day_Advisory,_Question_4_(1998); http://www.nvsos.gov/Modules/ShowDocument.aspx?documentid=192, at p. 20)	Allows for statewide statutory and constitutional initiatives and statewide referendums. (Nev. Const., art. 19, §§ 1-5; Nev. Rev. Stat. Ann. §§ 293.12756 - 293.12758, 293.1276 - 293.1279, 293.12793, 293.12795, 295.035, 295.045, 295.055 – 295.056, 295.061, 295.075, 295.085, 295.095, 295.105, 295.115, 295.121, 295.125, 295.140, 295.150, 295.160, 295.170, 295.180, 295.195, 295.200, 295.205, 295.210, 295.215, 295.217, 295.220.)	"The people shall have the right freely to assemble together to consult for the common good, to **instruct their representatives** and to petition the Legislature for redress of Grievances." (Nev. Const., art. I, § 10.)
New Jersey	**New Jersey Sports Betting Amendment, Public Question 1 (2011)** (http://ballotpedia.org/New_Jersey_Sports_Betting_Amendment,_Public_Question_1_(2011); http://www.njleg.state.nj.us/2010/Bills/SCR/49_I1.PDF, at p. 6; http://www.nj.com/news/index.ssf/2011/11/nj_residents_vote_on_legalizin.html [referring to the measure as "nonbinding.")	Does not allow for statewide initiatives or referendums.	No.

State	Example of Advisory Vote	Statewide initiative and referendum laws	Does state constitution contain an "instruct their representatives" clause?
North Dakota	**Limits on Nuclear Weapons Advisory Vote (1982)** (http://ballotpedia.org/North_Dakota_Limits_on_Nuclear_Weapons_Initiative,_Measure_7_(1982); http://www.nytimes.com/1982/11/04/us/widespread-vote-urges-nuclear-freeze.html)	Allows for statewide statutory and constitutional initiatives and statewide referendums. (N.D. Const., art. III, §§ 1-10; N.D. Cent. Code Ann., §§ 16.1-01-09 - 16.1-01-12.)	No.
Oklahoma	**Oklahoma Charter Amendments to the United Nations Question (1951)** (http://ballotpedia.org/Oklahoma_Charter_Amendments_to_United_Nations,_State_Question_344_(1951); https://www.sos.ok.gov/documents/questions/344.pdf)	Allows for statewide statutory and constitutional initiatives and statewide referendums. (Okla. Const., art. V, §§ 1-7; Okla. Stat., tit. 34, §§ 1-27.)	No.
Oregon	**Oregon Nuclear Missile Freeze Act (1982)** (http://ballotpedia.org/Oregon_Nuclear_Missile_Freeze,_Measure_5_(1982); http://bluebook.state.or.us/state/elections/elections20.htm.)	Allows for statewide statutory and constitutional initiatives and statewide referendums. (Or. Const., art. IV, § 1; Or. Rev. Stat., §§ 250.005 – 250.990.)	"No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from **instructing their Representatives**; nor from applying to the Legislature for redress of greviances [sic]." (Or. Const., art. I, § 26.)

State	Example of Advisory Vote	Statewide initiative and referendum laws	Does state constitution contain an "instruct their representatives" clause?
Rhode Island	**Co-Equal Branches of Government Act (2002)** (http://ballotpedia.org/Rhode_Island_Question_5,_the_Co-Equal_Branches_of_Government_Act_(2002); http://www.elections.state.ri.us/publications/Election_Publications/Countbooks/RI_Election_Countbook_2002.pdf, at p. 65.)	Does not allow for statewide initiatives or referendums.	No.
South Dakota	**South Dakota Radioactive Waste Management Compact Question (1985)** (http://ballotpedia.org/South_Dakota_Radioactive_Waste_Management_Compact,_Question_1_(1985); http://ballotpedia.org/wiki/images/4/45/Referendums_Elections_for_South_Dakota_1968-1990.pdf, at p. 36.)	Allows for statewide statutory and constitutional initiatives and statewide referendums. (S.D. Const., art. III, § 1; S.D. Codified Laws §§ 2-1-1 – 2-1-14.)	No.
Vermont	**Vermont State Lottery Question (1976)** (http://ballotpedia.org/Vermont_State_Lottery_Question_(1976); http://web.archive.org/web/20110603204438/http://vermont-archives.org/govhistory/governance/Referendum/pdf/1976.pdf)	Does not allow for statewide initiatives or referendums.	"That the people have a right to assemble together to consult for their common good--to **instruct their Representatives**--and to apply to the Legislature for redress of grievances, by address, petition or remonstrance." (Vt. Const., art. I, § 20.)

State	Example of Advisory Vote	Statewide initiative and referendum laws	Does state constitution contain an "instruct their representatives" clause?
Washington	**Washington Elimination of Agricultural Tax Preference for Marijuana, Advisory Vote No. 8 (2014)** (http://ballotpedia.org/Washington_Elimination_of_Agricultural_Tax_Preferences_for_Marijuana,_Advisory_Vote_No._8_(2014); http://blogs.sos.wa.gov/FromOurCorner/index.php/2014/06/word-from-ag-two-advisory-votes-on-2014-ballot/)	Allows for statewide statutory initiatives and statewide referendums. (Wash. Const. art. II, § 1; Wash. Rev. Code Ann. §§ 29A.72.010 – 29A.72.290.)	No.
Wisconsin	**Wisconsin Death Penalty Question (2006)** (http://ballotpedia.org/Wisconsin_Death_Penalty,_Question_2_(2006); http://legis.wisconsin.gov/lrb/bb/07bb/pdf/887-923.pdf, at p. 888.)	Allows for statewide referendums only. (Wis. Stat. Ann. §§ 5.01 – 5.02, 5.35, 5.51, 5.64 – 5.65, 5.655, 5.81.)	No.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Re: *Howard Jarvis Taxpayers Association, et al. v. Debra Bowen, et al.*, Supreme Court Case No. S220289

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10940 Wilshire Boulevard, Suite 2000, Los Angeles, California 90024.

On **November 10, 2014**, I served the document(s) described as **REAL PARTY IN INTEREST LEGISLATURE OF THE STATE OF CALIFORNIA'S RETURN BY DEMURRER TO PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF** on all appropriate parties in this action, as listed on the attached Service List, by the method stated.

☐ If electronic-mail service is indicated, by causing a true copy to be sent via electronic transmission from Strumwasser & Woocher LLP's computer network in Portable Document Format (PDF) this date to the e-mail address(es) stated, to the attention of the person(s) named.

☒ If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, 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 contained in the affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **November 10, 2014**, at Los Angeles, California.

Carolyn Corazo

Service List

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