No. S281977

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LEGISLATURE OF THE STATE OF CALIFORNIA et al.,
Petitioners,

vs.

SHIRLEY N. WEBER, Ph.D., in her official capacity as Secretary of State of the State of California,
Respondent,

THOMAS W. HILTACHK,
Real Party in Interest.

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF LOCAL GOVERNMENT AMICI

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The undersigned certifies there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

DATED: January 31, 2024

COLANTUONO, HIGHSMITH & WHATLEY, PC

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Guerrero and Associate Justices of the California Supreme Court:

Under California Rules of Court, rule 8.520(f), these local government associations (together, "Local Government Amici") respectfully seek leave to file the amicus curiae brief accompanying this application in support of Petitioners Legislature of the State of California, Governor Gavin Newsom, and John Burton:

- Association of California Water Agencies
- California Special Districts Association
- California State Association of Counties
- California Air Pollution Control Officers Association
- California Association of Sanitation Agencies
- California Fire Chiefs Association
- California Municipal Utilities Association
- City and County of San Francisco
- City of Los Angeles
- Fire Districts Association of California
- League of California Cities.

This brief will assist the Court by offering perspective and analysis on these issues:

- The policy context for the legal issues presented, including the great diversity of local government agencies it affects;
- The constitutional basis for the relationship of our State and local governments and how the Measure will revise that aspect of our Constitution rather than amend it; and
- The Measure's impact on local government — it will impair essential functions of these public entities.

For the reasons stated in this application and in the attached amicus brief, Local Government Amici respectfully request leave to file that brief.

The application and amicus brief were authored by Michael G. Colantuono and Matthew C. Slentz pro bono on behalf of Local Government Amici. No other person or entity made a monetary contribution to its preparation and submission.

IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

The **Association of California Water Agencies** (ACWA) is a California nonprofit public benefit corporation comprised of over 430 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts, and special purpose public agencies. ACWA's Legal Affairs Committee is composed of attorneys from each of its regional divisions throughout the State. The Committee monitors litigation of significance to ACWA's members and has determined this is such a case.

The **California Special Districts Association** (CSDA) is a non-profit corporation with a membership of more than 1,000 special districts throughout California that was formed to promote good governance and to improve core local services through professional development, advocacy, and other services for all types of independent special districts. Independent special districts provide a wide variety of public services to urban, suburban, and rural communities, including irrigation, water, recreation and parks, cemetery, fire protection, police protection, library, utilities, harbor, healthcare, community-service districts, and more. CSDA monitors issues of concern to special districts and identifies those matters that

are of statewide significance, and has identified this case as having such significance given the harmful impact on special districts throughout the State of the Measure it challenges.

The **California State Association of Counties** (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The **California Air Pollution Control Officers Association** (CAPCOA) is a non-profit association of the Air Pollution Control Officers from all 35 local air quality agencies throughout California. CAPCOA was formed in 1975 to promote clean air and to provide a forum for sharing of knowledge, experience, and information among the air quality regulatory agencies across the State and the Nation. The Association promotes unity and efficiency, and strives to encourage consistency in methods and practices of air pollution control. It is an organization of air quality professionals — leaders in their field. Its Board of Directors has authorized this brief,

concluding that the Measure which is the subject of the Petition will have profound implications for local air quality agencies' ability to fund their essential services.

The **California Association of Sanitation Agencies** (CASA) is a nonprofit mutual benefit corporation organized and existing under the laws of the State of California. CASA is comprised of over 130 local public agencies throughout the state, including cities, sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, California water districts, and municipal utility districts. CASA's member agencies provide wastewater collection, treatment, water recycling, renewable energy, and biosolids management services to millions of California residents, businesses, industries, and institutions.

The **California Fire Chiefs Association** (CFCA) is a large and diverse professional association with over 800 members who serve in California's fire service. CFCA members are fire chiefs, executive staff officers, administrative support staff, EMS personnel, associated colleagues from fire service support organizations, and vendor partners. CFCA members cover, but are not limited to, services such as fire and emergency medical services (EMS). CFCA reviews all legislation which involves EMS, fire or life safety components, employment, labor, or that would impact our

members' ability to fund these vital public services. CFCA has identified this case as having a major impact on its members' ability to save lives and protect property.

The **California Municipal Utilities Association** (CMUA) represents 77 publicly owned electric utilities, water agencies, and gas and oil services statewide. Together, CMUA members provide water service to 70 percent of Californians and electric service to 25 percent of the state. CMUA represents its members' interests on energy and water issues before the California Legislature, the Governor's Office, and regulatory bodies, such as the California Energy Commission, the California Air Resources Board, the Department of Water Resources, the California Independent System Operator, and the State Water Resources Control Board.

The **City of Los Angeles** is a municipal corporation and a charter city that serves a population of more than 3.8 million residents and is among the largest and most complex local governments in California and the United States. Its fiscal operations include those of the Los Angeles World Airports, the Los Angeles Harbor, and the Los Angeles Department of Water and Power. Its City Council and Mayor are assisted in their policymaking tasks by countless boards, committees, commissions and departments and by a staff of more than 32,000 City employees. The Measure threatens

the City's ability to finance essential public services, including emergency, fire and police services, trash and sanitation management, treatment and disposal, road and sidewalk maintenance and repairs, shelter and bridge housing, infrastructure and public works construction and maintenance, and park, library, zoo, animal shelter, and other facilities. In particular, the Measure threatens to deprive the City of Los Angeles of a vital source of taxpayer-approved funds to provide housing for its most vulnerable unhoused residents and to impact the debt obligations of the City. In sum, the Measure would negatively and profoundly impact the City of Los Angeles's ability to effectively manage a large and complex public organization for the reasons stated in the accompanying amicus brief.

The **City and County of San Francisco** is the State's only city and county and a charter city that serves a resident population of some 874,000 and receives millions of visitors annually. It is among the largest and most complex local governments in California and the United States. Its fiscal operations include those of San Francisco Airport, the Port of San Francisco, the San Francisco Public Utilities Commission, including the Hetch Hetchy Project, and the Priscilla Chan and Mark Zuckerberg San Francisco General Hospital, the regional trauma center for the City and northern San Mateo County.

Its Board of Supervisors and Mayor are assisted in their policymaking tasks by numerous boards, committees, commissions and departments and by a staff of more than 44,500 City employees. The Measure threatens San Francisco's ability to finance essential public services, including emergency, fire and police services, trash and sanitation management, treatment and disposal, road and sidewalk maintenance and repairs, shelter and bridge housing, infrastructure and public works construction and maintenance, and park, library, animal shelter, and other facilities. In particular, the Measure threatens to deprive San Francisco of funds under an initiative special tax its voters approved since the 2022 retroactive date of the Measure.

Fire Districts Association of California (FDAC) is a statewide association whose sole mission is to represent special districts that provide fire and emergency services to California communities. FDAC members are local government entities primarily located in rural or suburban areas and employ crucial first responders. FDAC member agencies play a vital role in supporting California's mutual aid system responding to all hazard emergencies including wildland fires, flooding, earthquakes, and civil unrest. FDAC provides legislative advocacy, educational information, member services, and informational resources in support of special districts that provide

fire protection services. FDAC has evaluated this case as harmful to fire protection districts and their ability to continue to provide responsive and essential emergency services to their constituents and to fight destructive fires.

The **League of California Cities** (Cal Cities) is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 25 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The issues in this case are significant to Local Government Amici because the local governments they represent provide all manner of critical public functions throughout California. The governing structure and powers of these agencies can vary significantly depending on the source of their authority and the purposes for which they are formed. However, all must raise revenue to serve their constituents, and all need to engage in fiscal planning to achieve their public purposes. The Measure which is the subject of the Petition threatens to strip them of the ability to make

sound fiscal policy, to rely on the knowledge and expertise of staff to implement and collect revenues, and to fund essential government services.

DATED: January 31, 2024

COLANTUONO, HIGHSMITH & WHATLEY, PC

Matthew Slentz

MICHAEL G. COLANTUONO
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Attorneys for Local Government Amici

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The so-called Taxpayer Protection and Government Accountability Act ("Measure") seeks to rewrite the entire constitutional structure of government finance in California, at both state and local levels. Section 3 of the Measure states its purpose to require voter approval of "**any** new or higher tax" and to require legislative, not administrative, action on "**all** fees or other charges." (Emphases added.) Such sweeping changes are not merely an amendment to our Constitution , but a revision that cannot be achieved by initiative.

Because the Measure is intended to greatly restrict government's ability to raise and spend revenues, it trades clarity for breadth, creating a host of interpretive issues that will take years for courts to resolve. Over the next decade, local public entities will face the Hobson's choice of significantly restricting their spending to avoid challenge, or instead risk expensive litigation in which they may pay both their own and the plaintiffs' legal fees. In the near term, the mere threat of the Measure impairs local governments' ability to borrow. These factors will together impair essential government services as previous tax initiatives have not, constraining the ability of local governments to make prudent long-term planning and budgetary decisions for their communities.

Indeed, the Measure greatly expands those earlier initiatives to achieve its unconstitutional result.

In addition, the Measure transforms the constitutional relationship of state and local governments, making the latter dependent on the State for fiscal survival but stripping the State of the ability to provide necessary funding. It alters the separation of powers between the legislative and executive branches provided by article III.[1] It also deprives local government and the State alike of essential powers to tax, spend, plan, and delegate financial authority to the executive branch. These fundamental changes in our form of government require more deliberation than the initiative process allows. To avoid the immediate harm that would result from the Measure, the Petition should be granted and the Measure removed from the November 2024 ballot.

II. JOINDER IN PETITIONER'S STATEMENT OF THE CASE

Local Government Amici join in the Factual Background provided by Petitioners Legislature of the State of California,

[1] Unspecified references to "articles" are to the California Constitution.

Governor Gavin Newsom, and John Burton in their Emergency Petition for Writ of Mandate. (Cal. Rules of Court, rules 8.204, 8.520.)

III. ARGUMENT

A. The Measure Revises the Constitution as to Local Governments

1. The Constitution distributes power between state and local governments

California has a wide variety of public entities managing the municipal affairs of the State, but local political subdivisions are usually counties, cities, and special districts. (See, e.g., Cal. Const., art. XIII A, § 4 ["Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes … ."].)

Counties are legal subdivisions of the state created and empowered by general laws. (Cal. Const., art. XI, § 1.) A county may also adopt a charter for limited purposes. (Cal. Const., art. XI, § 3, subd. (a); see generally *San Bernardino County Board of Supervisors v. Monell* (2023) 91 Cal.App.5th 1248, 1275 [comparing powers of general law and charter counties].) Even so, legislative authority over counties is not unlimited. (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2021) 60 Cal.App.5th 327, 338

[constitutional language establishing counties provide compensation for employees implicitly limits authority of Legislature].)

California law also recognizes two types of cities. "A city organized under the general law of the Legislature is referred to as a general law city. (Gov. Code, § 34102.) A municipality organized under a charter … is a charter city. (Gov. Code, § 34101.)" (*City of Redondo Beach v. Padilla* (2020) 46 Cal.App.5th 902, 909.) Neither charter nor general law cities are creatures of statute, but are instead created by their voters and property owners. (Cal. Const., art. XI, § 5.) For general law cities, statute must provide a "uniform procedure" by which they do so and for the powers of such cities. (Cal. Const., art. XI, § 2; Gov. Code, § 34000 et seq.)

Conversely, "[c]harter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs." (*State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555.) Charters have the force of state statute. (Cal. Const., art. XI, § 3, subd. (a); *Coalition of County Unions v. Los Angeles County Bd. of Supervisors* (2023) 93 Cal.App.5th 1367, 1385 [upholding initiative amending county charter to establish funding criteria for County law enforcement programs].) While county charters have relatively narrow purposes (Cal. Const., art. XI, § 4),

city charters have broad reach under article XI, section 5 and, in particular, municipal finance is a "municipal affair" to be preempted by statute only when a pressing matter of statewide concern requires it. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 12–13.) Otherwise, "the conflicting charter city measure is a 'municipal affair' and 'beyond the reach of legislative enactment.'" (*Id.* at p. 17.) "[T]he power to govern—whether local or state—means little without the coordinate power to tax, so integral is finance to government."' (*Id.* at p. 15.)

Finally, "special district" refers broadly to any other California public entity formed "for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies." (Cal. Const., art. XIII C, § 1.) While cities and counties have broad police powers under article XI, section 5 to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws," special districts have only the power conferred by statute. (E.g. *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 177 [special act granted limited powers of groundwater regulation to specifically identified special districts].) However, local governments, including special districts, can provide utility services. (Cal. Const., art. XI, § 9.) That power is

understood to include the power to establish rates for such services. (*Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 137 ["The power of the city to fix rates to be charged those customers residing within its boundaries is incidental to the power to 'establish and operate' public utility systems"].)

The Legislature cannot delegate local government powers to private parties, as was common when the Southern Pacific Railroad dominated California politics. (Cal. Const., art. XI, § 11; art. XVI, § 6.) "[I]t was 'manifestly the intent' of the drafters 'to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature'" (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 395), and "'to prevent the state legislature from interfering with local governments by the appointment of its own special commissions for the control of purely local matters'" (*Howard Jarvis Taxpayers' Assn. v. Fresno Metropolitan Projects Authority* (1995) 40 Cal.App.4th 1359, 1372). All together, these provisions are described as "affecting the distribution of powers between the Legislature and cities and counties." (Cal. Const., art. XI, § 13.)

This structure was first established by article XI of the 1879 Constitution. The current version of article XI was approved in 1970, after two-thirds of each legislative chamber approved submitting significant amendments to voters. (See *Californians for an Open*

Primary v. McPherson (2006) 38 Cal.4th 735, 752 [describing background of Proposition 2]; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1332 [same].) Those ballot materials recognized major changes in the structure of local government amounted to a constitutional revision.[2] So, too, here.

2. The Measure revises this constitutional structure

The Measure revises the structure of local and State government, fundamentally changing the responsibilities of local legislators and administrators, and stripping charter counties of their power to establish administrative structures and charter cities of their "plenary power" (Cal. Const., art. XI, § 5) to determine the roles and responsibilities of their officials.

First, all revenue measures would require action by the local legislative body (subject to referendum), changing the division of power between legislators and administrators, and robbing local legislators of their constitutional power to delegate administrative tasks. (See, e.g., *Times Mirror Co. v. City of Los Angeles* (1987) 192

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[2] See Ballot Pamp., Special Elec. (consolidated with Primary) (June 2, 1970) analysis of Prop. 2, pp. 5–9, available at < https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1713&context=ca_ballot_props > as of Jan. 27, 2024.

Cal.App.3d 170, 188 ["It has long been established that a legislative body need not prescribe the exact means by which a tax is to be fixed but may delegate to its taxing officers the power to adopt a suitable method" (citing cases from 1950 and 1944)]; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 173 [initiative charter amendment inappropriately prevented rent control board from appointing hearing officers].) This will be impractical, especially for the largest and most complex local governments, and will revise charter provisions of the cities of Los Angeles, Oakland and San Francisco which provide for utility, port and other commissions to isolate these functions (and their funds) from the cities' general policymaking.

In addition, many local and regional governments exist by special statute, such as the myriad water districts established by special acts collected in the Appendix to the Water Code, or by agreement among other governments (see, e.g., Gov. Code, § 6500 et seq. [Joint Exercise of Powers Act]). Many of these entities have appointed, rather than elected, governing boards, raising interpretive issues under the proposed language of the Measure's section 3, subdivision (a) ["Statement of Purpose"] and amended article XIII C, section 2, subdivision (e) requiring all taxes and "exempt charges" to be imposed by an ordinance of an elected

governing body. California voters may face the unhappy choice of abandoning these public entities, or participating in thousands of additional elections for board positions every election cycle. Rural communities already have many Boards comprised of appointees as too few candidates seek office there. (Elec. Code, § 10515, subd. (b).)

Proponents argue repeatedly that the Measure does not revise our Constitution because many fees are adopted by ordinance now. (See, e.g. Real Party in Interest's Return to Order to Show Cause, filed December 27, 2023 ("RPI Return"), at pp. 57–58.) However, that some fees are adopted by legislative bodies does not make it practical that they all be. *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353, rejected a similar argument, as the Attorney General argued for a constitutional amendment mandating our courts interpret the California Constitution consistently with the federal Constitution, noting "the idea of deferring to the United States Supreme Court in interpreting identical or similar constitutional language found in the state and federal Constitutions is not new." This Court was unconvinced:

> The foregoing authorities acknowledge and support a **general** principle or policy of deference to United States Supreme Court decisions, a policy applicable in the absence of good cause for departure or deviation

> therefrom. Yet it is one thing voluntarily to defer to high court decisions, but quite another to **mandate** the state courts' blind obedience thereto, despite "cogent reasons," "independent state interests," or "strong countervailing circumstances" that might lead our courts to construe similar state constitutional language differently from the federal approach.

(*Ibid.* [original emphases].) Moreover, the Return errs to suggest that it is the norm to take such fees to the legislative body, especially for California's largest and most complex local governments. What works for Beverly Hills (population 31,658) and Chula Vista (population 274,784) will not work for Los Angeles City or County or the City and County of San Francisco. (Contra, RPI Return at p. 57.) And even these "master fee schedules" referenced in the Return vest significant discretion in staff. For example, in Beverly Hills, the fee for a general plan amendment is set "at the fully burdened rates for the project or contract planner/engineer and legal costs."[3] This fee and dozens of other charges for everything from

[3] City of Beverly Hills, Fiscal Year 2022-23 Schedule of Taxes, Fees, and Charges, available at < https://www.beverlyhills.org/cbhfiles/storage/files/15765257701395648458/FY22-23Taxes,Fees,andChargesBook.pdf > as of Jan. 21, 2023.

tree removal to inspections of construction and environmental reviews are left to staff to determine the actual amount charged.[4] So, too, for Chula Vista's master fee schedule, which notes that the fully burdened hourly rates for staff time are set annually by staff, not by the City Council.[5]

Nor does Government Code section 66016, subdivision (b) have the broad application the Return suggests (RPI Return at p. 58); rather, it applies only to a closed list of land-use fees listed in its subdivision (d). Proponents' claims on this point amount to arguing that because one child can run a mile, that all children can be compelled to run a marathon. The lesser does not prove the greater and, to some extent, disproves it.

Next, Proponents observe that the Legislature lacks authority to delegate its power to tax, but only as to the present, relatively narrow, definition of that term (Cal. Const., art. XIII A, § 3, subd. (b)) and the even narrower definition that preceded 1996's Proposition

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[4] City of Beverly Hills, Fiscal Year 2022-23 Schedule of Taxes, Fees, and Charges, available at < https://www.beverlyhills.org/cbhfiles/storage/files/15765257701395648458/FY22-23Taxes,Fees,andChargesBook.pdf > as of Jan. 21, 2023.

[5] City of Chula Vista, Master Fee Schedule, pp. 10–20, available at < https://www.chulavistaca.gov/home/showpublisheddocument/2488/638242362729370000 > as of Jan. 21, 2023.

218 (see *Knox v. City of Orland* (1992) 4 Cal.4th 132). (RPI Return at p. 54.) That, however, does not defend the Measure's prohibition of delegation of power as to all "taxes" as newly and broadly defined. "Taxes" may now include such things as library fines if unaccompanied by an adjudicatory process (see Measure, § 5 [proposed Cal. Const. art. XIII C, § 1, subd. (j)]), and the Measure bars delegation of many financial functions not previously understood to be taxation.

It is no answer to say, as the Proponents do, that *Amador Valley* upheld Proposition 13, which had profound implications for state and local government and involved billions of dollars. (RPI Return at pp. 41–45, citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228 (*Amador Valley*).) To regulate one revenue stream and to encourage dependence on others is one thing. To insist on elected officials' approval of "any new or increased form of state government revenue" is another. (Measure, § 3, subd. (c); see also Measure, § 6 [proposed Cal. Const. art. XIII C, § 2, subd. (e)].) And the Measure is just as broad for local government, as all revenues would be defined as taxes requiring voter approval except for seven very narrowly defined classes of "exempt charges," each class limited to "actual" or "reasonable" costs, and most required to be "imposed" (also broadly defined) by

ordinance of an elected governing body. (See Measure, §§ 5, 6 [proposed Cal. Const., art. XIII C, § 1 & § 2, subd. (e)].)

Proponents fixate on the use of "all" by the courts in *Amador Valley* and *Schabarum v. Cal. Legislature* (1998) 60 Cal.App.4th 1205, arguing only initiatives akin to stripping the judiciary of "all judicial power" or the executive of "all quasi-legislative and quasi-judicial power" would be a constitutional revision. (RPI Return at pp. 36–37, 55–56.) Constitutional analysis is rarely so absolutist. Proponents admit, as they must, that the qualitative revision this Court struck down in *Raven* was not so expansive. (RPI Return at pp. 38–41.) Rather, it abrogated one part of judicial authority, the ability to interpret our Constitution, in one distinct realm, the constitutional rights of criminal defendants. (*Raven*, *supra,* 52 Cal.3d at p. 352.) Even so, "[f]rom a qualitative standpoint, the effect of Proposition 115 [was] devastating." (*Ibid.*) So, too, here. The Measure would fundamentally change the constitutional distribution of power between the State, on the one hand, and cities, counties and special districts, on the other.

Yet all of these governments need to plan and manage their finances to provide reliable and efficient services. (E.g., *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842–843.) All need affordable access to credit, which requires stable, predictable

finances. (*Fontana Redevelopment Agency v. Torres* (2007) 153 Cal.App.4th 902, 910.) Otherwise, public agencies face difficulty borrowing (essential for capital-intensive projects), higher interest rates, and even the loss of credit. (*Ibid.*) As this Court recently wrote:

> We feel that the possibility of future litigation [over a county's loan guarantees] is very likely to have a chilling effect upon potential third party lenders, thus resulting in higher interest rates or even the total denial of credit … .

(*Davis v. Fresno Unified School Dist*. (2023) 14 Cal.5th 671, 694 [quoting and abridging *Walters v. County of Plumas* (1976) 61 Cal.App.3d 460, 468].) Local governments need reserves against uncertainty, to stabilize rates, and to fund capital improvements, too. (*Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 16.) The Measure destabilizes these existing constitutional relationships in fundamental ways. It seems a pyrrhic effort to repeal modern administrative governance and reestablish nineteenth century horse-and-buggy government for a State of nearly 40 million people.

B. The Measure Undermines Essential Functions of Local Governments

This Court reiterated in *Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1123, that the People's reserved powers do not extend to undermining essential government functions, especially as to municipal finance. Although Proponents grant, as they must, that our Constitution limits the initiative and referendum powers to prevent them from undermining these essential government powers, the Return interprets this restriction so narrowly as to repeal it. (RPI Return at pp. 59–63.) Proponents read *Wilde* implausibly to require only that courts engage in case-by-case examination of each tax or exempt charge that potentially violates the Measure's far-reaching restrictions. (RPI Return at p. 60.) But Proponents never cite *Geiger v. Board of Sup'rs of Butte County* (1957) 48 Cal.2d 832, 839–840, on which *Wilde* relied for that point. As *Geiger* discussed:

> One of the reasons, if not the chief reason, why the Constitution excepts from the referendum power acts of the Legislature providing for tax levies or appropriations for the usual current expenses of the state is to prevent disruption of its operations by interference with the administration of its fiscal powers and policies. The same reasoning applies to similar acts

> of a county board of supervisors …. An essential function of a board of supervisors is the management of the financial affairs of county government, which involves the fixing of a budget to be used as the basis for determining the amount and rate of taxes to be levied. Before the board can properly prepare a budget, it must be able to ascertain with reasonable accuracy the amount of income which may be expected from all sources, and, when it has adopted ordinances imposing taxes, it cannot make an accurate estimate unless it knows whether the ordinances will become effective. These are some of the reasons why the people have entrusted to their elected representatives the duty of managing their financial affairs and of prescribing the method of raising money.

(*Geiger, supra,* 48 Cal.2d at pp. 839–840.) By interfering with essential local government powers, the Measure impairs effective financial planning. Indeed, by subjecting every fiscal decision of local government to referendum, the Measure achieves the very impairment *Geiger* and *Wilde* foreclosed. Proposed article XIII C, section 1, subdivision (i) redefines the taxes that article II, section 9 protects from referenda to

exclude "exempt charges." In turn, proposed article XIII C, section 2, subdivision (e) — requires local governing bodies to pass any "exempt charge" by ordinance. Together, these make clear that local revenues must be voter-approved as taxes or be subject to referendum. Fiscal planning by plebiscite is hardly planning at all.

Local government has the same needs as state government to plan and manage finances, to rely on expertise, and to spare overstretched legislative bodies from minutiae. Instead, the Measure compels local governments to account for costs under demanding, but ill-defined, standards and provides for years of retroactivity, destabilizing local government finance further. Proponents' response, that voters can simply abrogate a judicial decision such as *Wilde* by constitutional amendment (RPI Return at pp. 60–61), sidesteps what voters **cannot** do by initiative — revise the Constitution or impair essential government powers.

And in the case of California's local air quality agencies, funding expectations and fee program requirements for essential services are separately imposed by federal law. (E.g., 42 U.S.C. § 7410, subd. (a)(2) [requiring plans have "adequate personnel, funding, and authority" and agencies impose reasonable permit

fees], § 7661a, subd. (b)(3) [annual permit fees must "cover all reasonable (direct and indirect) costs required" to administer permit program].) The Measure could make it impossible to adopt fees to meet these requirements. This would result not only in a disruption of essential services but could also subject the State to federal sanctions. (42 U.S.C. §§ 7410, subd. (m), 7509, 7661a, subd. (i) [sanctions, including loss of federal highway funding, for "State failure" including inadequate resources and program administration]; see also 42 U.S.C. § 7413, subd. (a)(2) [providing for "federally assumed enforcement" when permit program not effectively enforced].)

C. The Measure Is Poorly Drafted and Raises a Host of Interpretive Issues

Finally, Proponents' argument that review can await the results of the November 2024 election (RPI Return at pp. 26–27) willfully disregards the Measure's destructive impact. General taxes must be approved at general elections at which city council or board of supervisors seats are contested under article XIII C, section 2, subdivision (b). Taxes and exempt fees approved after January 1, 2022 must be reapproved in compliance with the Measure within 12 months of its possible November 2024 adoption under proposed article XIII C, section 2, subdivision (g). (Measure, § 6.) This would,

for example, retroactively invalidate measures such as "Measure ULA," a City of Los Angeles initiative special tax to fund solutions to homelessness, which passed with 57.77% of the vote in November 2022. The City of Los Angeles would then need to fund a renewed election on a proposition voters approved not two years before. Political subdivisions across the state will be in the same predicament.

But general elections for most cities and counties occur only in even-numbered years. (E.g., Elec. Code, §§ 1000, 1200, & 14052; Los Angeles City Charter, § 401, subd. (b); San Diego Municipal Code, § 27.0103; San Jose Municipal Code, § 12.05.020.) Thus, a raft of 2025 special elections will be needed, and general taxes may expire in 2025 and require reapproval in 2026 if the Measure is permitted to become law. Prudent local governments will be forced to significantly reduce their spending until they learn whether funds will be available, and credit can be expected to come at a risk premium — if it is available at all. For local measures such as Measure ULA, that equates to lost homelessness funding in the hundreds of millions of dollars. Local Government Amici noted these impacts of the Measure in letters supporting pre-election review, but the Return offers no reply.

In the interim, local governments must attempt to comply with the Measure or risk the impact of its retroactivity provision, but the Measure's poor drafting leaves them with little guidance on how to do so. While this Court has recognized the initiative is a "battering ram" designed to overcome legislative hurdles and pass popular legislation (*Amador Valley, supra,* 22 Cal.3d at p. 228), many propositions over the last century have been well-considered, well-written, and well-understood when placed on the ballot. The Measure is none of these. It is seemingly drafted to cause maximum financial pain to California government, and, as such, is confusing and raises a host of difficult interpretive issues. Far more than its predecessors Propositions 13, 26, and 218, each of which was many times shorter and more focused, the Measure will create years of work at all levels of government, particularly the courts, just to understand it.

The Measure is replete with broad pronouncements and undefined terms, some puzzling. For example, its newly tightened restrictions on fees for government services or products limit them to the "[a]ctual cost" to provide the service or product, stating:

> In computing "actual cost" the maximum amount that may be imposed is the actual cost less all other sources of revenue including, but not limited to taxes, other

exempt charges, grants, and state or federal funds received to provide such service or product.

(Measure, § 5 [proposed Cal. Const., art. XIII C, § 1, subd. (a), (j)(1)].)

This contradicts the more practical rules this Court found in Proposition 26 in *California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032 (*CBIA v. SWRCB*). There the Court allowed regulatory fees for related programs to be accounted for collectively, allowed fees to be based on reasonable projections of revenues and expenses, finding no excess if predictions prove wrong (as they always will) but excess funds remain in the program fund to subvene future rates. (*Id*. at pp. 1046–1047, 1051.) These rules also allow reasonable flexibility to ratemakers and spare courts from making complex ratemaking judgments that may challenge their resources. (*Ibid*.) Similarly, *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363 upheld a city's sewer service fees against a Proposition 218 challenge allowing labor costs to be divided between sewer and other city services based on supervisors' informal estimates of how their subordinates spent their time.

The Measure sweeps these rules away, requiring government to prove a fee is not a tax by "clear and convincing evidence." (Measure, § 6 [proposed Cal. Const., art. XIII C, § 2, subd. (h)].) But

whether a revenue measure imposes a tax or a fee is a legal question decided on independent judgment review of the agency's record, not a factual determination, making this requirement puzzling. (*CBIA v. SWRCB, supra,* 4 Cal.5th at p. 1046.) Perhaps the Measure means only that facts necessary to support legal analysis must be established by such evidence, but litigation on this point seems inevitable.

The Measure replaces a "reasonable cost" standard for service fees with "actual cost," defined so as to make it risky to fully fund a service from rate proceeds lest predictions underlying ratemaking prove wrong and a temporary surplus result. (Measure, § 5 [proposed Cal. Const., art. XIII C, § 1, subd. (j)(1)].)

These unrealistic rules make ratemakers of judges and require perfection in predictions and cost allocation. The resulting risk and uncertainty may lead local governments to subsidize rates with taxes to keep those rates provably below the "actual cost" of service to avoid litigation — already common under Propositions 13, 218 and 26. And, of course, proposed California Constitution, article XIII C, § 1, subdivision (a) requires fees to be net of some ill-defined class of taxes:

> (a) "Actual cost" of providing a service or product means: (i) the minimum amount necessary to reimburse

> the government for the cost of providing the service or product to the payor. and (ii) where the amount charged is not used by the government for any purpose other than reimbursing that cost. In computing "actual cost" the maximum amount that may be imposed is the actual cost **less all other sources of revenue including, but not limited to taxes**, other exempt charges, grants, and state or federal funds received to provide such service or product. (Emphasis added.)

So, "actual cost" is total cost less an ill-defined class of other revenues, including some taxes. But, one asks, what other taxes must subsidize utility services to avoid the risk that estimated cost will — with the benefit of hindsight — be found to exceed "actual cost"? The phrase "all other sources of revenue" seems encompassing, but cities must still fund services to society generally, such as police and fire services and road maintenance. They cannot be obliged to divert tax revenues needed to do so to subsidize utility service. (*Citizens for Fair REU Rates v. City Redding* (2018) 6 Cal.5th 1, 18.) And how might a local government subsidize utility rates with the proceeds of "other exempt charges" without violating the requirement that the proceeds of those charges fund only the purpose for which they are

imposed? (Measure, § 6 [proposed Cal. Const., art. XIII C, § 2, subd. (h)(1)].)

As another example, the Measure provides a revenue measure is "imposed" each time it is collected. Proposed California Constitution, article XIII C, section 1, subdivision (d) defines "impose" as "adopt, enact, reenact, create, establish, **collect**, increase, or extend." (Emphasis added.) But only legislative bodies may "impose" an exempt charge. (Measure, § 6 [proposed Cal. Const., art. XIII C, § 2, subd. (e)].) Are city councilmembers to issue utility bills? Is a vote required each time a bill is collected? And the unamended text of California Constitution, article XIII D, section 6 requires notice and hearing to "impose" a property-related fee, within the newly defined "exempt charge." Are utility ratemaking hearings now required monthly before each mailing of bills?

Local fines and penalties for a violation of "law" (very broadly defined) would be allowed only "pursuant to an adjudicatory due process." (Measure, § 5 [proposed Cal. Const., art. XIII C, § 1, subd. (j)(4)]; proposed Cal. Const., art. XIII C, § 1, subd. (f) [broadly defining "local law"].) Must a neutral preside over librarians assessing late fines? Accompany parking meter readers? Or must voters approve every such regulatory device? Cities and counties would need to address all these problems the day after the Measure

passes, and will face costly litigation as courts provide answers. Surely, this justifies preelection review to ensure they do not do so needlessly.

The landscape becomes even murkier for special districts, which the Measure's authors seem not to have understood or considered. For example, the Measure's uncodified section 3, subdivision (a) states: "Voters also intend that all fees and other charges are passed or rejected by the voters themselves or **a governing body elected by voters** and not unelected and unaccountable bureaucrats." (Emphasis added.) Thus, as amici CAPCOA noted in its earlier letter to the Court, this seems to at least imply that "a governing body elected by voters" must adopt air quality permit and other regulatory fees considered "exempt charges" under proposed article XIII C, section 1, subdivision (j)(2) as:

> A charge for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(Measure, § 5.)

However, California's local air quality agencies have appointed boards, as do many other special districts. For example, Health and Safety Code section 40100 states that county boards of supervisors are the ex officio governing bodies of County Air Pollution Control Districts. Section 40152 of that code provides that Unified APCDs have governing boards appointed from among County Supervisors and City Councilmembers in the regions the districts serve. Section 40220.5 of that code provides for a similar board to govern the Bay Area Air Quality Management District. And many air district boards have members who are not elected officials in any capacity. (See e.g. Health & Saf. Code, §§ 40100.6 [San Diego County Air Pollution Control District], 40420 [South Coast Air Quality Management District].) In short, California's local air quality agencies would seem to have no "governing bodies elected by voters" unless interpretation takes great license with the Measure's text to avoid absurd results. The same is true of many boards for fire protection districts, mosquito abatement and vector control districts and cemetery districts, especially in rural counties, whose members are often appointed by county boards of supervisors. (Health & Saf. Code, §§ 2021, 9021, 13834.)

If the Measure becomes law, perhaps courts will interpret its statement of intent as merely aspirational and not intended to

require amendments to myriad statutes providing for appointed boards of local and regional agencies. But we cannot know that, and the uncertainty the Measure creates will impair functioning of air quality regulations until the point is resolved. Yet some California regions have the worst air quality in America; some have the highest child asthma rates in the country.[6] Their efficacy ought not be impaired needlessly while litigation clarifies these questionable drafting choices given the Petition's powerful arguments that the Measure cannot become law even if voters approve it.

Further, the measure requires voter approval of all "taxes," defined broadly to include nearly every local government revenue source except for a narrowly, specifically, and oddly defined set of "exempt charges." (Measure, §§ 5, 6 [proposed Cal. Const., art. XIII C, § 2, subd. (a)–(c); *id*., § 1, subd. (i)–(j)].) Proposed article XIII C, section 2, subdivision (e) provides:**

> Only the governing body of a local government, other than an elector pursuant to Article II or the initiative power provided by a charter or statute, shall have the authority to impose any exempt charge. **The governing**

[6] See American Lung Association, Most Polluted Cities, available at < https://www.lung.org/research/sota/city-rankings/most-polluted-cities > as of Jan. 27, 2023.

> **body shall impose an exempt charge by an ordinance** specifying the type of exempt charge as provided in Section l(j) and the amount or rate of the exempt charge to be imposed. and passed by the governing body. This subdivision shall not apply to charges specified in paragraph (7) of subdivision (j) of Section 1.

(Measure, § 6 [emphasis added].) Thus, utility rates deemed "exempt charges" under proposed article XIII C, section 1, subdivision (j)(1) as "[a] reasonable charge for a specific local government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the actual costs to the local government of providing the service or product" must be adopted "by an ordinance." (Measure, § 5.)

However, many California agencies do not have express statutory authority to act by ordinance and no statute establishes procedures by which they might do so. (Cf. Gov. Code, § 36931 et seq. [requiring publication, two readings, and 30 days before effectiveness of ordinances of general law city].) For example, the California Water Storage District law makes no reference to "ordinances" but includes many references to "resolutions." (Water Code, § 39000 et seq.) Water Code sections 43006 and 47180

authorize such agencies' water rates, but do not specify the form of legislation required. The practice, however, is action by resolution.

The Measure will invalidate water rates established after January 1, 2022 as of late 2025 unless they are adopted consistently with the Measure's requirements. (Measure, § 6 [proposed Cal. Const., art. XIII C, § 2, subd. (g)].) This means water providers wishing to act now — before the Measure becomes law — must do so by ordinance whether or not they have statutory authority to do so, or statutory guidance on how to do so. Whether ersatz methods they might adopt — such as using the procedures required for ordinances of general law cities — will be sufficient cannot be known until the point is litigated. Thus, the lawfulness of ordinary utility rates is now made uncertain.

The Measure also raises unresolved questions as to the relationship between state and local government. For instance, the Gann Limit (Cal. Const. art. XIII B) ties the State's ability to impose mandates on local government to the fee-setting power of local government — if local government can fund a mandate with fees, the State need not provide a subvention to cover its cost. (*Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 187.) However, "exempt charges" under the Measure are defined far more narrowly than levies currently allowed under

Propositions 26 and 218. And all are now subject to voter approval in the first instance as taxes or by referendum if they fall within the seven narrow classes of "exempt charges." To the extent the Measure narrows local government's fee authority, it narrows the State's authority, too. In many cases, the Legislature may no longer be able to make the finding that local government has the ability to raise fees to cover the costs of existing, new and expanded programs, and the State will be required to pay for those mandates — if it can — or forgo imposing them. The result may be a loss of essential services.

These are only a few of the myriad interpretive issues created by the Measure, and among those local governments find most pressing. But the impact on other parts of California government may be just as pronounced. For example, section 4 of the Measure rewrites article XIII A, section 3 to state: "3(a) Every levy, charge, or exaction of any kind imposed by **state law** is either a tax or an exempt charge." (Emphasis added.) Article XIII A currently only applies to a "state statute" but the expansion would seem to bring judicial branch fees under the definition of "exempt charge," meaning all judicial fees may need to be approved by the Legislature if the Measure passes. (Measure, § 4 [proposed Cal. Const. art. XIII A, § 3, subd. (c)].)

Similarly, "exempt charges" no longer include "other monetary charges" imposed for a violation of law; only fines or penalties may be so levied. (*Ibid.*) The Measure also replaces the longstanding limit that fines and penalties imposed by State and local governments not be "excessive" under the 8th Amendment and article I, section 17 of the California Constitution (*Sweeney v. San Francisco Bay Conservation and Development Commission* (2021) 62 Cal.App.5th 1, 19), with a requirement that government prove by clear and convincing evidence the penalties are "reasonable." (Measure, § 4, 6 [proposed Cal. Const. art. XIII A, § 3, subd. (c), & art. XIII C, § 2, subd. (h)(1)].) As just one consequence, Courts can expect constant challenges by criminal defendants to the reasonableness of the penalties imposed upon a conviction. Just as in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, these changes raise significant questions about the interaction of the Measure with article III, providing for the separation of powers and article VI, providing for an independent judiciary.

IV. CONCLUSION AND DISPOSITION

Amici respectfully urge the Court to conclude that the Measure is a revision that impermissibly alters our Constitution and impairs essential government functions. The Petition should be granted, and the Measure excluded from the November 2024 Ballot.

DATED: January 31, 2024 **COLANTUONO, HIGHSMITH & WHATLEY, PC**

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(b) and 8.204(c), the foregoing Brief of Amicus Curiae contains 6,503 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000-word limit of rules 8.520(b) and 8.204(c). In preparing this certificate, I relied on the word count generated by Microsoft Word for Office 365 MSO.

DATED: Janaury 31, 2024

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PROOF OF SERVICE

Legislature of the State of California et al. v. Weber (Hiltachk)

Supreme Court of California Case No. S281977

I, Tracey S. West, declare:

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 790 E. Colorado Boulevard, Suite 850, Pasadena, CA 91101-2109. On January 31, 2024, I served the document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF LOCAL GOVERNMENT AMICI** on the interested parties in this action as follows:

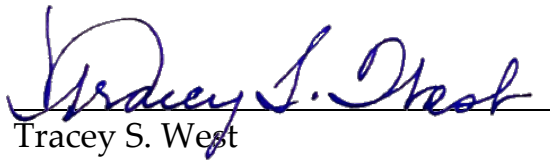
SEE ATTACHED LIST FOR METHOD OF SERVICE

BY MAIL: By enclosing the document(s) in a sealed envelope addressed to the person(s) at the address listed in the Service List. The envelope was mailed with postage thereon fully prepaid. 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 United States Postal Service on that same day with postage fully prepaid at Pasadena, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

BY ELECTRONIC SERVICE: I electronically transmitted the above document(s) to the person(s) at the e-mail address(es) set forth below via the TrueFiling electronic service portal.

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

Executed on January 31, 2024, at St. Louis, Missouri.



Tracey S. West

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Legislature of the State of California et al. v. Weber (Hiltachk)

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