IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

No. C086334

HOWARD JARVIS TAXPAYERS ASSOCIATION, a California nonprofit public benefit corporation, and QUENTIN L. KOPP, a California Taxpayer,
Plaintiffs and Respondents,

v.

EDMUND G. BROWN, JR., Governor of the State of California, and FAIR POLITICAL PRACTICES COMMISSION, an agency of the State of California,
Defendants and Appellants.

On Appeal from a Judgment of the Sacramento Superior Court
Case No. 34-2016-80002512-CU-WM-GDS

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COURT OF APPEAL THIRD **APPELLATE DISTRICT, DIVISION**	COURT OF APPEAL CASE NUMBER: C086334
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 88561 NAME: Anthony T. Caso FIRM NAME: Center for Constitutional Jurisprudence STREET ADDRESS: c/o Chapman Univ., Fowler Sch. of Law, 1 University Dr. CITY: Orange STATE: CA ZIP CODE: 92866 TELEPHONE NO.: 714-628-2666 FAX NO.: E-MAIL ADDRESS: caso@chapman.eud ATTORNEY FOR (*name*): Respondents, Howard Jarvis Taxpayer's Ass'n and Quentin Kopp	SUPERIOR COURT CASE NUMBER: 34-2016-80002512-CU-WM-GDS
APPELLANT/ PETITIONER: Edmund G. Brown, Jr., Fair Political Practices Comm'n RESPONDENT/ REAL PARTY IN INTEREST: Howard Jarvis Taxpayer's Ass'n and Quentin Kopp	

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INTRODUCTION

At issue in this case is the power of the Legislature to repeal, without voter approval, what the Supreme Court recognized as one of the "three main goals" of Proposition 73, an initiative statute enacted by the voters in 1988. *Gerken v. Fair Political Practices Commission*, 6 Cal. 4th 707, 718 (1993). Proposition 73 outlawed public financing of election campaigns. The Governor and the Fair Political Practices Commission now argue that the Legislature is free to repeal this prohibition and authorize what the people forbade. But the California Constitution does not allow such a result.

The Legislative Power in California is a shared power between the people (the true sovereign) and their representatives in the Legislature. The Constitution specifically provides that the Legislature has no power to amend statutory initiatives unless the people grant such authority. Here, the Legislature claims that its amendment repealing a key provision of Proposition 73 actually advances the "purposes" of the law that Proposition 73 amended. That argument, however, ignores both Supreme Court precedent and the explicit action of the California Attorney General defining the chief purposes of Proposition 73.

The Legislature has no authority under the Constitution to strike down a voter-approved ban on publicly financed election campaigns. This Court should affirm the ruling of the trial court that Senate Bill No. 1107 violates the Constitution and that its provisions cannot take effect.

BACKGROUND

Proposition 73 was enacted by voters in 1988. According to the Supreme Court, the measure had "three main goals," one of which was a ban on public financing of election campaigns. *Gerken*, 6 Cal. 4th at 718 (Lead opinion of Lucas, C,J.), 722 (Baxter, J., concurring). The Supreme Court noted that the Attorney General agreed that this ban on public funding of election campaigns was one of the goals of the initiative. *Id*. at 717 (Lead opinion of Lucas, C,J.), 722 (Baxter, J., concurring). The Attorney General characterized the purposes of Proposition 73 in the Title and Summary of the measure.[1] The title was "Campaign Funding. Contribution Limits, Prohibition of Public Funding Initiative Statute." CT 131. The Attorney General's summary noted that the measure "Prohibits public officials using and candidates accepting public funds for purpose of seeking elective office." *Id*. The issue in this case is whether the Legislature has authority to repeal this explicit ban on public funding for election campaigns and replace it with an explicit authorization of public funding for election campaigns. As originally enacted, Proposition 73 included a provision (Government Code §85103) authorizing the Legislature to amend the provisions of the measure so long as the amendment was consistent with the purposes of Political Reform Act, as amended. CT 132. That provision, however, was later repealed by voters.

[1] By law, the Attorney General prepares the title of each initiative measure and "a summary of its chief purposes." *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 243 (1978).

At the same election where voters approved Proposition 73, voters also considered Proposition 68, a measure sponsored by Common Cause (among others). That measure received a majority of votes, but fewer yes votes than Proposition 73. Proposition 68's purposes, according to the Attorney General, included "Partial Public Funding" of election campaigns. CT 120. Proposition 68 would have provided an express mechanism for partial public funding of state legislative candidate election campaigns. *Id*. The California Supreme Court was asked to harmonize the two measures to allow both to take effect. The court declined to do so, noting the irreconcilable conflict between Proposition 73's express prohibition on public financing of campaigns and Proposition 68's express authorization of partial public financing of legislative election campaigns. This demonstrated a fundamental conflict between the two measures. Since Proposition 73 received the most favorable votes of the two measures, it took effect and Proposition 68 did not. *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 51 Cal. 3d 744, 770-71 (1990).[2]

Proposition 73's ban on public funding of election campaigns was repeatedly challenged by Common Cause. In addition to its executive director signing the argument against Proposition 73 in the Ballot Pamphlet (CT 134), Common Cause

[2] The contribution limit provisions of Proposition 73 were struck down by the Ninth Circuit in *Service Employees International Union v. Fair Pol. Pract. Comm'n*, 955 F. 2d 1312 (9th Cir. 1992). That decision was later recognized as impliedly overruled by subsequent Supreme Court decisions. *DJB Holding Corp. v. C.I.R.*, 803 F.3d 1014, 1022 (9th Cir. 2015).

also brought litigation to strike down the ban on public financing of election campaigns. *Gerken*, 6 Cal. 4th at 710 n.2; *Common Cause v. Fair Political Pract. Comm'n*, 221 Cal. App. 3d 647 (1990). These efforts were unsuccessful.

After these litigation attempts at overturning the ban on public funding of political campaigns failed, Common Cause (and others) put forward a new initiative to limit campaign contributions. CT 140. The proponents claimed that the measure was "carefully written." *Id.* Thus, it is significant that Proposition 208, unlike Proposition 68, did not seek to authorize public funding of political campaigns. Further, despite years of challenging the ban on public financing of election campaigns, Proposition 208 did not propose to repeal that prohibition enacted Proposition 73. The measure did, however, repeal the authorization for legislative amendments to Proposition 73. CT 142. The campaign funding limits enacted by Proposition 208 were struck down by a federal court. *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998).

The last initiative in the series to consider is Proposition 34. That measure did not attempt to revive the Legislature's power to amend the provisions of Proposition 73 that were repealed by Proposition 208. Instead, section 16 repeated the repeal of all of Article 1 of Proposition 73, which includes Government Code Section 85103. CT 159. Section 18 substituted a new Article 1 containing only Government Code Section 85100 titling the measure as "Campaign Contribution and Voluntary Expenditure Limits *Without Taxpayer Financing*." CT 159 (emphasis added). Like Proposition 208, the Legislature's proposal did not disturb

the ban on public funding of election campaigns. Instead, the Legislature emphasized in both its title and in the arguments in support of the measure that it did not disturb the ban on public financing of election campaigns. CT 154 ("PROPOSITION 34 DOES NOT ALLOW TAXPAYER FUNDED CAMPAIGNS"), 159.

The current dispute concerns Senate Bill No. 1107 (Chapter 837 of the Statutes of 2016). As added by Proposition 73, Government Code Section 85300 provides: "No public officer shall expend and no candidate shall accept any public moneys for the purpose of seeking elective office." The challenged Senate Bill No. 1107 purports to repeal this prohibition on public financing of election campaigns and replace it with express authorization for public financing of election campaigns. The Legislature's rewrite of section 85300 reads: "A public officer or candidate *may* expend or accept public moneys for the purpose of seeking elective office if the state or a local governmental entity establishes a dedicated fund for this purpose by statute, ordinance, resolution, or charter." (Emphasis added.)

STANDARD OF REVIEW

This appeal concerns pure issues of law which this Court reviews de novo. *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, 3 Cal. 5th 744, 751 (2017). In reviewing the Legislature's attempt to reverse a statute enacted by the people, the Court has a duty to "jealously guard" the people's right of initiative. *People v. Kelly*, 47 Cal. 4th 1008, 1025 (2010). In particular, it is the duty of this Court to ensure that initiatives are not "improperly annulled" by legislative action.

Id. The Court cannot defer to the Legislature's finding that its amendment of an initiative statute furthered the purpose of the initiative. *Amwest Sur. Ins. Co. v. Wilson*, 11 Cal. 4th 1243, 1255–56 (1995). The Legislature has no power to define the purposes of an initiative measure. That duty initially falls to the Attorney General (*Howard Jarvis Taxpayers Association v. Bowen*, 192 Cal. App. 4th 110, 115 (2011)) and then becomes the province of the courts using the tools of statutory construction (*People v. Briceno*, 34 Cal. 4th 451, 459 (2004)).

ARGUMENT

I. The Legislature's Power to Amend or Repeal Initiative Statutes Is Limited

As the California Constitution makes clear, all political power in this state resides in the people. Cal. Const. art. II, § 1; *Legislature v. Deukmejian*, 34 Cal. 3d 658, 682 (1983). To this end, the people have reserved a portion of the legislative power to themselves. Cal. Const. art. IV § 1.

> Thus, the Constitution forcefully teaches us that the source of ultimate legislative and political power in this state, and all of it, is found not in Sacramento or Washington D.C. but in the people, who may exercise this power both indirectly (through their chosen representatives) or directly (through a referendum or, as here, an initiative).

Deukmejian, 34 Cal. 3d at 682. What is more, the people's reserved legislative power of initiative is greater than the legislative power of the Legislature. *Rossi v.*

Brown, 9 Cal. 4th 688, 715-16 (1995). This is because the people have the power to bind future legislative bodies (other than the people themselves) – a power that the Legislature does not have. *Id.*

That power to bind future Legislatures is vital to the reserved power of initiative. The people's reserved power would be useless if the Legislature were free to amend initiative statutes at will. Thus, the Constitution expressly limits the power of legislative amendment of initiative statutes. Unless the initiative statute itself provides differently, legislative amendments are not effective unless approved by the people. Cal. Const. art II, § 10; *Kelly*, 47 Cal. 4th at 1025-26. The Constitution forbids the Legislature from "undoing what the people have done without the electorate's consent." *Id*. Without a grant of limited power to the Legislature to amend in the initiative itself, no legislative amendment can take affect without consent of the voters. *Amwest*, 11 Cal. 4th at 1251.

This constitutional limitation on the Legislature's power to amend initiative statutes protects the people's initiative powers by precluding the Legislature from undoing what the people have done without the electorate's consent. *County of San Diego v. Commission on State Mandates*, 2018 WL 6037872 (November 19, 2018); *Kelly*, 47 Cal. 4th at 1025-26; *Amwest*, 11 Cal.4th at 1251; *County of San Diego v. San Diego NORML*, 165 Cal.App.4th 798, 829-30 (2008); *Proposition 103 Enforcement Project v. Quackenbush*, 64 Cal.App.4th 1473, 1484 (1998). Thus, the Legislature had no authority to "amend" or "repeal" a provision of Proposition 73 unless there is a provision of law in that initiative granting it that authority.

Recognizing this limitation on legislative power, the courts have struck down numerous attempts by the Legislature to alter an initiative statute, including attempts to alter the provisions of the Political Reform Act as amended. *See*, *e.g.*, *Kelly*, 47 Cal. 4th at 1049 (Proposition 215); *Amwest*, 11 Cal. 4th at 1247 (Proposition 103); *Howard Jarvis Taxpayers Ass'n v. Bowen*, 192 Cal. App. 4th at 127 (Political Reform Act); *Gardner v. Schwarzenegger*, 17 Cal. App. 4th 1366, 1377 (2009) (Proposition 36); *Proposition 103 Enforcement Project*, 64 Cal. App. 4th at 1444 (1998); *Franchise Tax Board v. Cory*, 80 Cal. App. 3d 772, 777 (1978) (Political Reform Act).

As originally enacted, Proposition 73 included a limited authorization for legislative amendment. The initiative added Government Code Section 85103 which authorized legislative amendments in accordance with the provisions of Government Code Section 81012. That section allows amendments to the other provisions of the Political Reform Act *only* if the amendment furthers the purposes of the Act, as amended. Section 85103 was later repealed by the "carefully crafted" provisions of Proposition 208. The effect of that repeal is discussed in Argument III, below. At a minimum, however, the Legislature must demonstrate that any amendments to *any* provisions of Title 9 advance the purposes of the Act, as amended.

II. Senate Bill No. 1107 Is Contrary to the Purposes of Both Proposition 73 and Title 9

A. The prohibition on public funding for election campaigns is a central purpose of Proposition 73.

Appellants stake their case on the argument that the prohibition on public financing of election campaigns is a "method" rather than a "purpose" or a "goal" of Proposition 73. Appellants cite no authority for this novel argument and it is far too late to make such an assertion. The Attorney General initially identified the chief purposes of Proposition 73 more than 30 years ago and the time to challenge that determination has long since expired. Further, the California Supreme Court has explicitly recognized the prohibition on public financing of election campaigns as a major "goal" of Proposition 73. Finally, using the tools of statutory construction for initiatives, there is no doubt that the ban on public financing of election campaigns was indeed a central goal of Proposition 73.

The Political Reform Act assigns the task of drafting a title and summary for initiative measures to the Attorney General. *Howard Jarvis Taxpayers Ass'n*, 192 Cal. App. 4th at 122-23. In performing this task, the Attorney General must discern the chief purposes of the initiative and include those purposes in the summary. *Id.* at 123. As this Court noted, statutes dating back to 1913 have consistently assigned this duty to the Attorney General. *Id*. In another case, this Court noted that the summary prepared by the Attorney General "'must reasonably inform the voter of the character and real purpose of the proposed measure.'" *Lungren v. Superior Court*, 48 Cal. App. 4th 435, 440–41 (1996). Indeed, the courts have looked to the

Title and Summary prepared by the Attorney General as a guide to determining the purposes of Proposition 73. *Ctr. for Pub. Interest Law v. Fair Political Practices Com.*, 210 Cal. App. 3d 1476, 1485–86 (1989) (relying on Attorney General's title and summary for Propositions 68 and 73 to determine purposes of the measures relating to the permissibility of public funding of political campaigns).

The Title and Summary of Proposition 73 represent Attorney General's exercise of judgment and discretion in identifying the "*chief purposes*" of the measure. *Amador*, 22 Cal. 3d at 243; *Becerra v. Superior Court*, 19 Cal. App. 5th 967, 975 (2017). Courts generally defer to the Attorney General's characterization of the chief purposes of an initiative. *Becerra*, 19 Cal. App. 5th at 975. In the case of Proposition 73, the Title and Summary were prepared more than 30 years ago. It is simply too late for the Attorney General (on behalf of the Governor and the Fair Political Practices Commission) to now challenge the title and summary issued by the Attorney General for Proposition 73 as an accurate statement of the "chief purposes" of the measure. Elect. Code § 9092.

The Title of the measure is "Campaign Funding. Contribution Limits. *Prohibition of Public Funding*. Initiative Statute." CT 131 (emphasis added). The Attorney General further emphasized the chief purposes of Proposition 73 in the Summary, which notes that the initiative "Prohibits public officials using and candidates accepting public funds for purpose of seeking elective office." *Id.* The Title and Summary are quite clear that the prohibition of public financing of election campaigns is one of the *chief purposes* of Proposition 73. It is not a "means" to

achieve a purpose, as appellants argue. The Attorney General identified the prohibition on public financing as a chief purpose. The appellants' arguments that the Attorney General somehow got this wrong are not only misplaced but are also simply too late.

The California Supreme Court agrees with the Attorney General that the ban on public financing of election campaigns was one of the primary goals of Proposition 73. In *Gerken*, Common Cause and other proponents of public financing of election campaigns sought to have Proposition 73's ban on public financing stricken on the basis that a federal court had ruled unconstitutional many of the other provisions of the measure dealing with contribution limits. *Gerken*, 6 Cal. 4th at 710-11. The petitioners argued that the remaining provisions of Proposition 73 should be stricken as well because they were not severable from the limitation on contributions.[3] *Id.* at 713. The Supreme Court rejected this argument.

The test for severability is whether the invalid part (limitations on contributions) is mechanically severable from the remainder *and* "*whether the remainder ... is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute*." *Id.* at 714 (emphasis in original). The court noted that this requires that "'*the electorate's attention was sufficiently focused upon the parts to be severed so that it would have*

[3] This is quite similar to the argument made by appellants in this case. They argue that the prohibition on public financing of election campaigns is not itself a purpose, but rather merely a method in service to other purposes of the measure. As will be seen, the Supreme Court rejected that argument.

separately considered and adopted them in the absence of the invalid portions.'" *Id.* at 714-15 (emphasis in original). The court ruled that if "any substantial part" of Proposition 73 was severable then the measure would continue in effect.

The lead opinion (authored by Chief Justice Lucas and joined by Justice George) chose to examine the ban on publicly funded newsletters from candidates and officials while the concurring opinion (authored by Justice Baxter and joined by Justice Panelli) focused on the ban on public financing of election campaigns. Because both bans were noted in the Summary prepared by the Attorney General and were separately mentioned in the analysis of the measure by the Legislative Analyst, the court ruled that it was "sufficiently highlighted 'to identify it as worthy of independent consideration'" by the electorate. *Id*. at 719 (lead opinion of Lucas, C.J.), 722 (Baxter, J., concurring) . Thus, the provision is severable and remains operative even without the limits on campaign contributions.

As the various opinions noted, the bans on mass mailings and publicly funded election campaigns were highlighted as two "of the three main goals" of Proposition 73. *Id*. All members of the court acknowledged that the ban on public funding of campaigns was one of the three main goals of Proposition 73. *Id*. Because the ban on publicly funded mass mailings (like the ban on public funding of election campaigns) was sufficiently highlighted for the voters as a "main" goal of Proposition 73, that provision was severable from the provisions on contribution limits and the court reject the petition to strike down the measure. *Id*. at 719 (Lead Opinion of Lucas, C.J.), 723-24 (Baxter, J., concurring).

Finally, both Common Cause and the Legislature have understood that the ban on public financing of election campaigns was a chief motivation for the voters' support of Proposition 73. Despite years of legal challenges to the ban on public financing of campaigns, Common Cause chose not to attack the ban in its "carefully crafted" Proposition 208. It neither sought to authorize public financing of election campaigns not did it propose to repeal the ban (and leave the issue to future legislative determination).

Similarly, the Legislature recognized the ban on public financing of election campaigns to be a chief goal of the voters. When the Legislature put forward Proposition 34 in 2000, it titled the measure to highlight the fact that the measure did not authorize the use of taxpayer money for election campaigns. CT 159. There is no escaping the conclusion that the ban on public financing of election campaigns was a central purpose of Proposition 73.

B. Proposition 73 amended the purposes of Title 9 to include a ban on public funding of election campaigns.

As a fallback position, Appellants argue that even if the ban on public funding of election campaigns were a purpose of Proposition 73, it is not a purpose of the Political Reform Act. Here, Appellants argue that the purposes of Title 9 (the Political Reform Act) can *only* be found in the original purposes section of the initiative that enacted the Act. Appellants claim that since Proposition 73 did not have its own purposes section, it could not alter the purposes of the Political Reform Act as a whole. This argument, however, is not supported by any authority. Indeed,

the argument that the courts are limited to the purposes section of an initiative has been expressly rejected by the California Supreme Court.

This Court has already ruled that the purposes of the Political Reform Act are not solely the ones in the original initiative. Instead, the court must look at the Act as amended. *Californians for Political Reform Foundation v. Fair Political Practices Comm'n*, 61 Cal. App. 4th at 483. In that case, this Court considered the legality of regulations enacted by the Fair Political Practices Commission. The Commission's power to enact regulations is limited to regulations that carry out "the purposes of the Act." *Id*. at 482-83. That determination hinged on the purposes of the Act "as amended." *Id*. at 483. Similarly, this Court interpreted the purposes of the Political Reform Act as amended by Proposition 34 in *Citizens to Save California v. California Fair Political Practices Commission*, 145 Cal. App. 4th 736 (2006). In interpreting an initiative measure, the Court noted that "the voters should get what they enacted." *Id*. at 748. That includes the prohibition on public funding of election campaigns enacted in Proposition 73.

In any event, the courts are not limited to an initiative's statement of purposes in determining the whether a legislative amendment advances the purposes of the initiative. The California Supreme Court expressly rejected the argument that appellants make here in *Amwest*: "We are aware of no case that holds we are so constrained." *Amwest*, 11 Cal. 4th at 1256. Instead, the courts look to "many sources" including "ballot arguments favoring the measure." *Id*. Following the guidance of the *Amwest* decision, the Court of Appeal in *Gardner v. Schwazenegger*,

noted that the purposes of an initiative must be drawn from the "initiative as a whole." 178 Cal. App. 4th at 1374. That court emphasized that the question is *not* whether the legislative amendment "furthers the public good," but whether it furthers the purpose of the law the people enacted. *Id*.

Statutes, including statutes enacted by initiative, must be construed to implement "the intent of the adopting body." *Lesher Communications, Inc. v. City of Walnut Grove*, 52 Cal. 3d 531, 543 (1990). If there is ambiguity in the meaning of the measure, the court can review the ballot arguments and Legislative Analyst's opinion in the official ballot pamphlet. *People v. Johnson*, 61 Cal. 4th 674, 687 (2015); *Robert L. v. Superior Court*, 30 Cal. 4th 894, 906 (2003); *San Francisco Taxpayers Assn. v. Bd. of Supervisors*, 2 Cal. 4th 571, 579 (1992); *Legislature v. Eu*, 54 Cal. 3d 492, 505 (1991).

It is no secret that a significant purpose of Proposition 73 was to prohibit the use of public moneys in political campaigns. The measure as presented to the voters included "Prohibition of Public Funding" in its Title and sought to accomplish this purpose with the addition of Government Code § 85300. This purpose was further highlighted by the Legislative Analyst in the ballot pamphlet. CT 131; *Gerken*, 6 Cal. 4th at 717-18 (Lead opinion of Lucas, C.J.), 722 (Baxter, J., concurring).

The very first sentence in the argument in favor of the measure by the proponents noted "*Proposition 73 will reform the way political campaigns are financed in California WITHOUT GIVING YOUR TAX MONEY TO POLITICIANS!*" CT 133 (italics in original). The closing argument in favor of the

measure noted in the last sentence "Support true campaign finance reform WITHOUT RAIDING THE STATE TREASURY." CT 134.

Proposition 34, the measure put on the ballot by the Legislature, confirms these purposes. Although the measure had no operative provisions to add to the general ban of section 85300, the arguments in favor of Proposition 34 emphasized that the ban on public funding of political campaigns would remain in place. The argument in favor of the measure noted "PROPOSITION 34 DOES NOT ALLOW TAXPAYER FUNDED CAMPAIGNS. Proposition 34 does not impose [sic] taxpayer dollars to be used to finance political campaigns in California. Our tax money is better spent on schools, roads and public safety." CT 154. The argument concluded "VOTE YES ON PROPOSITION 34 if you don't want taxpayers to pay for political campaigns." *Id.* The continued ban on public financing of political campaigns was even included in the Legislature's title of the measure. "This chapter shall be known as the 'Campaign Contribution and Voluntary Expenditure Limits *Without Taxpayer Financing* Amendments to the Political Reform Act of 1974.'" Gov't Code § 85100 (emphasis added). This echoes the title to the chapter originally enacted by Proposition 73: "This chapter shall be known and cited as the 'Campaign Contribution Limits Without Taxpayer Financing Amendments to the Political Reform Act.'" CT 132. It is a clear signal to voters that the Legislature understood that the ban on public financing of election campaigns was a chief purpose of Proposition 73, and now of the Political Reform Act, as amended.

The courts have also recognized this ban on public monies for political election campaigns as a key purpose of Proposition 73. Noting this language in the arguments and analysis of Proposition 73, the courts have held that there is no "ambiguity or uncertainty" in the purpose of Proposition 73 to ban the use of public moneys to fund election campaigns. *Ctr. for Pub. Interest Law*, 210 Cal. App. 3d at 1486. The California Supreme Court has also noted the prohibition on public financing of campaigns as a purpose of Proposition 73. *Johnson*, 4 Cal. 4th at 392 (holding that the prohibition did not apply to charter cities); *Taxpayers to Limit Campaign Spending*, 51 Cal. 3d at 762 (noting the conflict between the prohibition on public financing in Proposition 73 and the authorization for public financing in Proposition 68).

Proposition 73's amendments to the Political Reform Act, adding Government Code Section 85300, added a new purpose to the Act. That purpose is to prohibit the use of public moneys for political campaigns. Even if section 81012 continues (after the repeal of section 85103) to authorize the Legislature to amend the provisions of Proposition 73, the Legislature would still be bound by the restriction that any such amendment must further the purposes of the Political Reform Act as amended by Proposition 73. That is, any legislative amendment must further the purpose of prohibiting the use of public moneys for political campaigns.

C. The repeal of the ban on public funding of election campaigns conflicts with Proposition 73 and Title 9, as amended.

As noted above, California courts have rejected the notion that they are limited to a "purposes" section of an initiative in determining whether a legislative amendment furthers the purposes of the voter-enacted measure. The purpose of Title 9, as amended, clearly includes the ban on taxpayer financing of political campaigns. But even when it is not clear from the stated purposes, courts have held that a measure does not advance the purposes if it conflicts with a voter-enacted section of the law. *Howard Jarvis Taxpayers Ass'n*, 192 Cal.App.4th at 116; *Gardner*, 178 Ca App. at 1374. It does not matter if the Legislature argues that it is "advancing the purposes" of a voter-enacted statute. If the legislative amendment conflicts with the voter-enacted statute, the amendment cannot be said to advance the purposes of the initiative. Indeed, the courts rejected several attempts of the Legislature to amend Proposition 103, notwithstanding legislative declarations that the amendments "furthered the purposes" of the initiative. *See Amwest*, 11 Cal. 4th at 1265; *Foundation for Taxpayer and Consumer Rights v. Garamendi*, 132 Cal. App. 4th 1354, 1366 (2005); *Proposition 103 Enforcement Project*, 64 Cal. App. 4th at 1494.

"Purposes" are often stated in general terms, inviting the Legislature to argue that its amendment somehow "furthers" those general "purposes." The duty of the courts, however, is to protect the people's right of initiative. *DeVita v. County of Napa*, 9 Cal. 4th 763, 776 (1995). This includes the people's "absolute" right to restrict the power of the Legislature to make changes to voter-enacted statutes. *California Common Cause v. Fair Pol. Pract. Comm'n*, 221 Cal. App. 3d at 651–52.

The decision in *Foundation for Taxpayer and Consumer Rights* is instructive in this regard. The court in that case considered a legislative amendment to Proposition 103, a voter-enacted insurance reform measure. In the amendment, the Legislature authorized insurers to give discounts based on "persistency" – the insured's maintenance of prior insurance. The petitioners in *Foundation* argued that using "persistency" as a rating factor did not advance the purposes of Proposition 103. As in this case, the Attorney General argued that nothing in Proposition 103's "statement of purposes" section spoke to the issue of "persistency" as a rating factor. The Legislature made a finding that the amendment would increase competition, and this, it was argued, furthere a purpose of Proposition 103. The "purposes" section of Proposition 103 provided only that the measure was intended "to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians." *Amwest*, 11 Cal. 4th at 1256 n.9. The petitioners argued that the legislative amendment conflicted with a purpose of prohibiting discrimination against drivers who did not have prior insurance. The state argued that because prohibition of discrimination is not mentioned in the purposes section, the amendment was within the Legislature's power.

The court in *Foundation* rejected the state's argument. The purpose of a voter-enacted measure is found in its operative provisions. *Foundation*, 132 Cal. App. 4th at 1369-70. A legislative amendment must not only further the "purposes in general" of an initiative measure – it also cannot violate "a specific primary mandate." *Id*. That is, the legislative amendment may not "do violence to a specific provision" of the initiative. *Id*. at 1370. For Proposition 103, that specific provision

was the prohibition on rate discrimination against previously uninsured drivers. *Id.* 1371.

As noted above, Proposition 73 amended the Political Reform Act to include a ban on taxpayer financing of political campaigns. In furtherance of this purpose, Proposition 73 added Government Code Section 85300. That section, as enacted by Proposition 73, prohibits candidates from accepting public monies for political campaigns. It further prohibits any public officer from expending public monies for political campaigns for elective office. Subsequent voter-enacted measures, Proposition 208 and Proposition 34, carefully left section 85300 in place even as they repealed other provisions of Proposition 73. Indeed, Proposition 34 proclaimed that it achieved campaign finance reform "without taxpayer financing." This is evidence that both Common Cause and the Legislature recognized that, for voters, the ban on public financing of election campaigns enacted by Proposition 73 was now a specific, primary mandate of the Political Reform Act.

Senate Bill No. 1107 reverses this "specific primary mandate" of Proposition 73. By converting the *ban* on public financing of political campaigns for elective office into and express *authorization* for public financing, Senate Bill No. 1107 "does violence to a specific provision" of a voter-enacted statute. By definition, Senate Bill No. 1107 cannot advance the purposes of Title 9 of the Government Code as amended by Proposition 73 when it authorizes the very thing that Proposition 73 forbids.

Finally, appellants argue that the decision in *Santa Clarita Organization for Planning and the Environment (SCOPE) v. Abercrombie,* stands for the proposition that the Legislature is free to repeal a specific primary mandate of the Political Reform Act so long as the Legislature is convinced that it is furthering the purposes

of the Act. Appellants argument, however, is not supported by the Court of Appeal decision.

SCOPE concerned the legality of special legislation applicable to only one water agency that created an exception to the financial conflict of interest provisions of Government Code § 1090. *Santa Clarita Organization for Planning and the Environment (SCOPE) v. Abercrombie*, 240 Cal. App. 4th 300, 311 (2015). There was no express attempt by the Legislature to change any of the provisions of the Political Reform Act. Instead, *the court* decided to imply an exception to the provisions of the Political Reform Act in order to accommodate what it saw as the Legislature's intent to allow constituents of a regulated industry to participate in the governance of the water district. *Id*. at 319. There was no attempt by the Legislature to repeal a provision of the Political Reform Act.

III. The Voters Repealed the Legislature's Authority to Amend the Provisions Added by Proposition 73

Without authorization from the voters, the Legislature has no power to amend an initiative statute. Cal. Const. art. II, § 10. As described below, the voters initially gave limited authority to the Legislature to enact amendments that furthered the purposes of Proposition 73. That authorization was later repealed by the voters in 1996, and again in 2000. Under the Constitution, the Legislature simply has no power on its own to amend section 85300. Senate Bill No. 1107 is thus an unconstitutional attempt to amend an initiative statute and it can have no legal effect.

Proposition 73 originally authorized legislative amendments that furthered the purposes of the Political Reform Act as amended. This authorization was found in former Government Code section 85103 which provided "[t]he provisions of section 81012 shall apply to the amendment of this chapter." Section 81012 permits legislative amendment of the provisions of the Act only if the amendment furthers

the purpose of "this title" (Title 9 in the Government Code containing the Political Reform Act and the provisions of Proposition 73) and is passed by a two-thirds vote in each house of the Legislature.

The limited authorization for legislative amendment of the provisions of Proposition 73 was itself repealed by two later initiatives. First, the measure co-sponsored by Common Cause, Proposition 208, repealed all of the provisions of article 1 of chapter 5 of title 9 of the Government Code. CT 142. That repeal included Government Code Section 85103, which was the only authorization for legislative amendment of Proposition 73. Cal Const. art II, § 10. It is important to note that the ballot pamphlet arguments in favor of Proposition 208 asserted that the provisions of the initiative were "carefully written." CT at 140. Both the voters and this Court are entitled to rely on that representation. Further, Common Cause had actively litigated against Proposition 73 and was thus very familiar with all of its provisions. There is no evidence that this repeal of section 85103 was an accident.

Proposition 34, approved by the voters in 2000, repealed the provisions of Proposition 208 but then repeated the repeal Article 1, chapter 5 of the Government Code as added by Proposition 73. CT 159. Thus, Proposition 34, a measure submitted to the voters by the Legislature, did not revive the power of the Legislature to amend section 85300. Instead, Proposition 34 expressly maintained the repeal of the Legislature's power to amend section 85300. Further, the Legislature restated the purpose of section 85300 in its title for Proposition 34: "Campaign Contribution and Voluntary Expenditure Limits *Without Taxpayer Financing* Amendments to the Political Reform Act of 1974. Gov't Code § 85100, CT 159 (emphasis added). The measure made clear the continued policy of the State of California, as enacted by voters in Proposition 73, to bar public financing of political campaigns. *Id*.

Section 85103's limited authorization for legislative amendments to Proposition 73 was challenged by Common Cause (the sponsor of Senate Bill No. 1107) [4] almost immediately after the voters' enactment of the measure. This Court rejected that challenge and the California Supreme Court declined review. *Cal. Common Cause*, 221 Cal.App.3d at 649. The court ruled that under the California Constitution, the voters' power to decide whether and under what conditions the Legislature may amend an initiative statute is "absolute." *Id*. at 652.

The power to legislate in California is one that is shared by voters and the Legislature. Section 10 of article II of the Constitution provides protections against legislative encroachment on the people's power of initiative. The courts are charged with the duty to zealously protect the initiative power, including the limitations on the Legislature that are part of our Constitution. *Rossi v. Brown*, 9 Cal 4th at 694-95. Because the power of initiative enables the people to bind future Legislatures, the people's power to legislate is greater than that of the Legislature. *Id*. at 715-16. When the people exercise their absolute power to limit or even eliminate the power of the Legislature to amend an initiative statute, the courts must enforce that restriction. *See Amwest* 11 Cal. 4th at 1251; *People v. Kelly*, 47 Cal 4th at 1025.

As an initiative statute, Proposition 73 can only be amended by the voters, or by Legislature acting under specific authorization from the voters. Cal. Const. art. II, § 10. The voters can grant or limit authority for legislative amendments in any way they choose. Their power in this arena is "absolute." *Cal. Common Cause*, 221 Cal.App.3d at 652; *Amwest*, 11 Cal. 4th at 1251. When they enacted Proposition 73, the people initially gave limited authority for legislative amendment – so long as that amendment furthered the purposes of the proposition, including the

[4] *See* Report of the Senate Committee on Elections and Constitutional Amendments, March 28, 2016 at p. 7.

prohibition of public financing of political campaigns. The people later exercised their absolute power to repeal this authorization for legislative amendment by adopting Proposition 208 in 1996 and Proposition 34 in 2000. As the law currently stands, there is no voter-granted authority for legislative amendment of the provisions of Proposition 73. Since the provisions of Senate Bill No. 1107 have not been approved by the voters, the purported amendments to Government Code § 85300 are void and can have no legal effect.

Appellants argued below, however, that placing the provisions of Proposition 73 within the Political Reform Act divested voters of authority to restrict legislative amendments. CT 81. They reason that anything within the Political Reform Act is subject to Government Code section 81012, regardless of whether the statute was added to the Act by a subsequent initiative. There is no authority for such an argument, however. Indeed, Appellants rebutted their own argument by noting that both Propositions 208 and 34 had specific sections authorizing legislative amendment of the provisions of those initiatives. *Id*. If Appellants' main argument were correct, however, those sections authorizing legislative amendment were mere surplusage, and had no operative effect.

The essence of Appellants' argument is that once a measure authorizes legislative amendment, the people have no power to revoke that authorization. This misreads the scope of the people's power of initiative. While the people can bind future Legislatures with an initiative, they cannot bind the people themselves voting on a subsequent measure. *Rossi*, 9 Cal. 4th 715-16; *see Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 30 (1964). The people are always free, using another initiative, to amend an initiative statute. As noted above, the people repealed the authority of the Legislature to amend any of the provisions of Proposition 73 when

they enacted Proposition 208 and again when they enacted Proposition 34. The sponsor of Proposition 208 noted that it was carefully crafted, so the repeal of section 85103 cannot be assumed to be a mistake. *Amwest*, 11 Cal. 4th at 1260-61 (voters must be assumed to have voted intelligently and to have read the full text of a proposition "regardless of any insufficient recitals in the … arguments pro and con of its advocates or opponents"). Similarly, Proposition 34 was put forward by the Legislature – the one body that would be most intent on preserving legislative authority to amend a measure. Yet here again, the Legislature proposed a law that eliminated its authority to amend the provisions of Proposition 73.

CONCLUSION

More than 30 years ago, the Attorney General told voters that a prohibition of public financing of election campaigns was a chief purpose of Proposition 73. Today, the Attorney General (now representing the Governor and the Fair Political Practices Commission) has changed his mind. It is far too late for such a change of position.

The Attorney General, the courts, and the voters have all agreed that the ban on public financing of election campaigns is a chief purpose of Proposition 73. That ban on public financing of election campaigns is now a purpose of the Political Reform Act which Proposition 73 amended. Even if Government Code Section 85103 (which gave the Legislature limited power to amend the provisions of Proposition 73) had not been repealed, the "amendments" enacted by Senate Bill No. 1107 could not stand. Those "amendments" purport to repeal the ban on public

financing of election campaigns. An amendment that "does violence" to the operative provisions of the initiative cannot be said to be in furtherance of the purposes of the Political Reform Act.

The judgment of the Superior Court should be affirmed.

DATED: December 10, 2018

Respectfully submitted,

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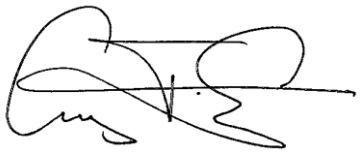
By 

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENTS' BRIEF uses 13 point Times New Roman font and contains 6,856 words.

DATED: December 10, 2018.

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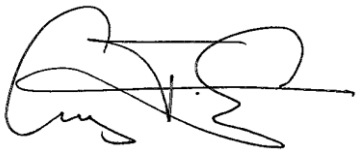
By 

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DECLARATION OF SERVICE

I, Anthony T. Caso, declare as follows:

I am a resident of the State of California, over the age of 18 years and not a party to this action. My business address is Center for Constitutional Jurisprudence, c/o Chapman University, Fowler School of Law, 1 University Drive, Orange, California, 92866.

The parties have agreed to electronic service of documents in this matter.

On, December 10, 2018 a true copy of **RESPONDENTS' BRIEF** was served via email through the TrueFiling e-service to:

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Additionally, I placed a copy of this brief in an envelope, postage prepaid, addressed to:

Superior Court of California
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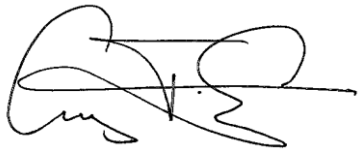
720 9th Street
San Francisco, CA 95814

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 10th day of December 2018, at Orange, California.



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