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

RESPONDENTS' REPLY TO AMICUS BRIEF OF COMMON CAUSE, *et al.*

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INTRODUCTION

The state's amici advance an argument already expressly rejected by the California Supreme Court. The purposes of an initiative are determined by the substantive provisions of the initiative and the context of its enactment. The court is not limited to the so-called purposes section of the initiative. The Supreme Court has also already recognized that the ban on public financing of political campaigns was one of the three main goals of Proposition 73. When the people amended the Political Reform Act with the adoption of Proposition 73, those goals became a part of that Act as well. Any contrary interpretation simply renders the entire Act incoherent and leads to interpretations, such as that put forward by the state's amici, that the provisions of the Political Reform Act are contrary to the purposes of the Political Reform Act.

Further, contrary to the argument of the state's amici, there is no special exception in the California Constitution for the Political Reform Act. Initiatives that amend the Political Reform Act are subject to the same constitutional provisions and protections limiting legislative power to amend those initiatives as any other statutory initiative. Indeed, amici's own initiative-drafting practice recognizes this truth.

As the state and its amici demonstrate, the only way to uphold Senate Bill No. 1107 is to ignore the Constitution, the California Supreme Court, and the law as enacted and amended by the people.

ARGUMENT

I. The prohibition on public financing of election campaigns is one of the three main goals of Proposition 73 and is thus one of the purposes of the Political Reform Act as amended by Proposition 73.

First, the state's amici try to make the argument that a ban on public financing of political campaigns was not a purpose of Proposition 73. The argument cannot withstand scrutiny. The Legislative Analyst's summary, the Attorney General's description of the purpose, the arguments in the ballot, the decisions of this Court and the California Supreme Court all recognize that one of the purposes of Proposition 73 was to prohibit public financing of election campaigns. *E.g.*, Clerk's Transcript on Appeal (CT), vol. I at 00131, 00133-34; *Gerken v. Fair Pol. Pract. Comm'n*, 6 Cal. 4th 707, 718 (1997); *Taxpayers to Limit Campaign Spending v. Fair Pol. Pract. Comm'n*, 51 Cal. 3d 744, 750-51 (1992); *California Common Cause v. Fair Pol. Pract. Comm'n*, 221 Cal. App. 3d 647, 649 (1990) ("Government Code section 85300, enacted in 1988 as part of Proposition 73, amends the Political Reform Act of 1975 (Gov. Code § 81000 et seq.) to prohibit the use of public money for political campaigns.") That purpose is carried out in Government Code section 85300, as it was enacted by Proposition 73.

Recognizing the popularity of this provision with the voters, amici did not seek to eliminate that ban when they proposed Proposition 208. CT, vol. I at 00138. Even the Legislature, when it proposed Proposition 34 to replace Proposition 208, did not seek to obtain voter approval to overturn the ban on public financing of election campaigns. Indeed, the Legislature made clear in its title to Proposition 34

that it was preserving the ban on taxpayer funds for election campaigns. *Id*. at 00150, 00154, 00157.

Although the state's amici concede that Proposition 73 amended the Political Reform Act, they argue that it did not alter the purposes of the Act. Indeed, they argue that the ban on public financing of campaigns itself violates the purposes of the Political Reform Act.[1]

The state's amici start by arguing that Government Code section 81002, the "purposes" section of the Political Reform Act, governs the purposes of Title 9 for all time. Only an amendment to that section can change the recognized purposes of the law. The Supreme Court has already rejected that argument, however.

In *Amwest Surety Insurance v. Wilson*, 11 Cal. 4th 1243, 1256 (1995), the surety companies argued that in determining the purposes of an initiative statute the court "is limited to the express statement of purpose in the initiative." The Supreme Court flatly rejected the argument: "We are aware of no case that holds we are so constrained." *Id*. Instead, the purpose of a measure is determined by looking at the historical context, ballot arguments, and the law as a whole. *Id.* That means that once a law is amended, the court must look to the amended whole to determine the current purpose.

[1] If one were to take the state and its amici at their word, and limit consideration of purposes to Government Code section 81002, then a ban on public financing of political campaigns is a very precise fit with the purposes of the Act. Section 81002(e) lists as a purpose: "Laws and practices unfairly favoring incumbents should be abolished in order that elections may be conducted more fairly." Public financing of political campaigns, however, tends to help incumbents maintain the advantage that exists by the mere fact of incumbency. Bradley A. Smith, Cato Institute Policy Analysis No. 238: Campaign Finance Regulation: Faulty Assumptions and Undemocratic Consequences, September 13, 1995 at 3.

This is not a new rule of law. The courts have long recognized that when a law is amended the lawmaker intended to change the existing law. *Clements v. T. R. Bechtel Co.*, 43 Cal. 2d 227, 232 (1954); *Louisiana-Pac. Corp. v. Humboldt Bay Mun. Water Dist*., 137 Cal. App. 3d 152, 159 (1982) ("Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose.").

The purposes of the changes made by Proposition 73 are no mystery. The California Supreme Court noted that the Legislative Analyst identified the three main goals of the measure: "'In summary, this measure: [¶] • Establishes limits on campaign contributions for all candidates for state and local elective offices; [¶] • *Prohibits the use of public funds for these campaign expenditures*; and [¶] • Prohibits state and local elected officials from spending public funds on newsletters and mass mailings.'" *Gerken*, 6 Cal. 4th at 718. The third goal, prohibiting the expenditure of public funds for newsletters and mass mailings, is an important component of the ban on public financing of elections. Both goals work together to keep taxpayer moneys from being spent on election campaigns and limit the power of incumbency.

"Prohibition of Public Financing" is part of the title of Proposition 73. The ban on public financing of election campaigns is also touted in the ballot arguments. The argument in favor of the measure noted (in all capital letters for emphasis) "MOST IMPORTANT OF ALL, PROPOSITION 73 ACCOMPLISHES THIS NEEDED REFORM OF CAMPAIGN FINANCING WITHOUT GIVING YOUR

HARD-EARNED TAX MONEY TO POLITICIANS. *In fact, it flatly PROHIBITS candidates' use of any tax money to campaign for office*." CT vol. I at 00133 (emphasis in original).

This ban on public financing of campaigns was also emphasized in several court decisions upholding that Proposition 73 against challenges by the backers of Proposition 68. *E.g.*, *Gerken*, 6 Cal. 4th at 718; *Taxpayers to Limit Campaign Spending*, 51 Cal. 3d at 750-51; *California Common Cause*, 221 Cal. App. 3d at 649; *Center for Public Interest Law v. Fair Pol. Pract. Comm'n*, 210 Cal. App. 3d 1476, 1480-81 (1989). Proposition 68 permitted some public financing of election campaigns. This created a direct conflict with the provisions of Proposition 73, which outlawed public financing of election campaigns. *Center for Public Interest Law*, 210 Cal. App. 3d at 1480-81.

Proposition 73 amended the Political Reform Act. *Taxpayers to Limit Campaign Spending*, 51 Cal. 3d at 748. The people obviously intended to change the Political Reform Act with those amendments. *See Clements*, 43 Cal. 2d at 232. As operative provisions of the law, these amendments also added to the purposes of the Political Reform Act – to the extent that the purpose of limiting the advantages enjoyed by incumbents did not already support a ban on public financing of campaigns and the use of public funds to send out newsletters and other mass mailings. *See* Gov't Code § 81002(e); *Gerken*, 6 Cal. 4th at 715; Smith, Campaign Finance Regulation, *supra*.

Amici's only response to this is to argue that the provisions of Proposition 73, which were part of the Political Reform Act as amended, are contrary to the purposes of the Political Reform Act as amended. But that makes no sense. The operative provisions of a law cannot, as a matter of law, be contrary to the purposes of that law. This is because the purpose of the law is determined by its operative provisions. *Amwest*, 11 Cal. 4th at 1256. Amici's contrary argument simply renders the entire Political Reform Act incoherent.

II. There is no "Political Reform Act Exception" to the California Constitution.

The state's amici argue that there is a special need for the Legislature to be able to amend the Political Reform Act that does not exist with other statutory initiatives. In this, amici have a theory of government at odds with the California Constitution. Under our system of government, all political power in this state resides in the people and the people have reserved a portion of the legislative power to themselves. Cal. Const. art. II, § 1; art. IV § 1; *Legislature v. Deukmejian*, 34 Cal. 3d 658, 682 (1983). Political power in California is exercised through this structure and there is no exception for when amici might think that the ends justify the means. Instead of the Legislature possessing a "special" power to amend voter-enacted initiatives, the people retain the power to bind future legislatures and to limit their power to amend or alter statutory initiatives. *Rossi v. Brown*, 9 Cal. 4th 688, 715-16 (1995); *California Common Cause*, 221 Cal. App. 3d at 652. Unless the statutory initiative provides otherwise, the Legislature has no power to amend

an initiative statute without a vote of the people. Cal. Const. art II, § 10(c); *People v. Kelly*, 47 Cal. 4th 1008, 1025-26 (2010).

This rule applies whether the Legislature seeks to amend the original provisions of the Political Reform Act or a statutory initiative that itself amended that Act. The language of the statutory initiative defines the Legislature's power to enact amendments. Absent a provision granting the Legislature power to amend, no legislative amendment can be effective without voter approval. *Id*. As explained below, the Legislature had no power to amend the provisions of Proposition 73 because the people repealed the Legislature's authority to amend that initiative statute. In any event, the "amendments" made by Senate Bill No. 1107 are contrary to the purposes of both Proposition 73 and the Political Reform Act as amended.

The provision of Proposition 73 codified as Government Code § 85103, which authorized legislative amendments consistent with the Political Reform Act (as amended) was explicitly repealed by a later initiative measure drafted by the state's amici. CT, vol. I at 00142. Amici described their measure as "carefully written." *Id*. at 00140. This repeal was confirmed by Proposition 34, the legislatively proposed measure to add contribution limits. *Id*. at 00159. Thus, as the law stands, there is no authority for the Legislature to amend the provisions of Proposition 73. Cal. Const., art. II, § 10(c).

The state's amici argue that this lack of authority is irrelevant since the provisions of Proposition 73 were placed in Title 9 of the Government Code – the Political Reform Act. According to amici, this means that the pre-existing authority

to amend the provisions of the Political Reform Act govern the amendment of any subsequently enacted statutory initiatives. Yet amici's own initiative-drafting practice establishes that they do not believe this is an accurate statement of the law.

Amici were the proponents of Proposition 208 – a measure that amended the provisions of the Political Reform Act. CT, vol. I at 00142. In their argument in favor of Proposition 208, amici touted it as a "carefully written" measure "designed to fix the political process." *Id*. at 00140. Amici believed that restricting the Legislature's power to amend the measure was one of the fixes that the political process needed. Section 45 of the initiative specifically listed six sections of the measure that could not be amended by the Legislature – even if the Legislature complied with the procedures of the Political Reform Act. *Id*. at 00147.

There was no question that Proposition 208 was intended as an amendment to the Political Reform Act – it said so in the title of the measure. *Id.* 00132. All of the statutory provisions of Proposition 208 were designated to be included in Title 9 of the Government Code, and thus were meant to be part of the Political Reform Act. Nonetheless, in carefully crafting this proposition, amici understood that the amendment process of the original Political Reform Act would not control amendments of Proposition 208. Proposition 208 was a separate statutory initiative, and article II, section 10 of the California Constitution provided that it could only be amended by the Legislature if the initiative so provided. The proponents of Proposition 208 thus included a specific provision governing the Legislature's power to amend its provisions.

The state's amici were also the proponents of Proposition 68, another measure that sought to amend the Political Reform Act. Again, however, the proponents of that measure did not assume that the Legislature would have the power to amend its provision simply because those provisions were published in Title 9 of the Government Code. Instead, amici as proponents of Proposition 68 included a specific provision (Section 11 of the initiative) governing the Legislature's power to amend the law. CT I at 00128.

Now, however, amici argue that these parts of initiatives that they drafted were mere surplusage. Indeed, they now argue that their listing of six specific sections in Proposition 208 that the Legislature was forbidden to amend was all a wasted effort. The mere act of publishing the provisions enacted by the initiative in Title 9 of the Government Code meant that the existing provisions of the Political Reform Act would control the process of legislative amendment.

There is simply no authority for such an argument. Article II, section 10(c) refers to the Legislature's power to amend an initiative statute – that is, a statute that was enacted by initiative. If the initiative is silent on the subject of legislative amendments, no legislative amendment is effective until it is approved by the voters. Cal. Const. art. II, § 10(c); *Kelly*, 47 Cal. 4th at 1025-26; *Amwest*, 11 Cal. 4th at 1251. Proposition 73 originally included a provision allowing legislative amendment consistent with the provisions of the Political Reform Act, as amended. That provision was repealed by amici's Proposition 208 and the Legislature's Proposition 34. The Constitution does not limit the people's power to amend an

initiative statute. It only limits the Legislature's power to do so. Because the people repealed the Legislature's power to amend Proposition 73, Senate Bill 1107 can only take effect if it is approved by the voters.

CONCLUSION

The state and its amici apparently do not like, or perhaps simply do not trust California voters. They think that the voters made a mistake when they approved Proposition 73 with its promise of a ban on public financing political campaigns more than 30 years ago. The state and its amici are unwilling to submit that question to the voters again. Apparently, they are quite confident that voters will again choose to prohibit public financing of election campaigns. Until voters choose otherwise, however, the Legislature has no power to authorize public financing of political campaigns.

The judgment of the Superior Court should be affirmed.

DATED: April 29, 2019

Respectfully submitted,

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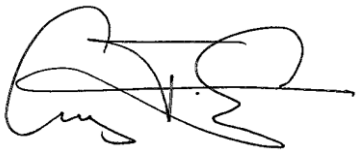
By 

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENTS' BRIEF uses 13 point Times New Roman font and contains 2,587 words.

DATED: April 29, 2019.

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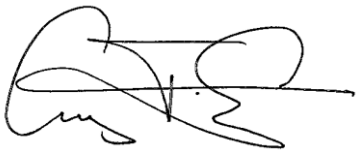
By 

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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, April 29, 2019 a true copy of **RESPONDENTS' REPLY TO AMICUS BRIEF OF COMMON CAUSE, *et al.***
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Additionally, I placed a copy of this brief in an envelope, postage prepaid, addressed to:

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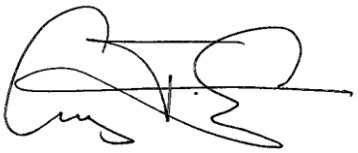
I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed this 29th day of April 2019, at Orange, California.



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