November 9, 2023

Via TrueFiling

The Honorable Chief Justice Patricia Guerrero
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Letter of Amicus Curiae in Support of Emergency Petition for Writ of Mandate: *Legislature of the State of California et al. v. Weber (Hiltachk), Case No. S281977*

Honorable Chief Justice Guerrero and Honorable Associate Justices,

Petitioners in this matter have submitted an emergency petition for writ of mandate asking this Court to remove from the ballot the Taxpayer Protection and Government Accountability Act ("the Measure"), because the changes to the way state and local government revenues are raised and programs and services are funded by the State Legislature are so significant that the Measure presents to the voters not an amendment, but an unlawful revision of the California Constitution. We agree. For the reasons set forth below, the California School Boards Association's Education Legal Alliance (ELA)[1] has a significant interest in this court accepting and granting the emergency petition for writ of mandate and concurs that the initiative as drafted presents an issue of great public importance necessitating a preelection review by this court to remove the initiative from the November 2024 ballot. (*Patterson v. Padilla* (2019) 8 Cal. 5th 220, 247; *Lockyer v. City & County of San Francisco* (2004) 33 Cal. 4th 1055, 1066-1067.) As the petitioners have pointed out, the Measure will imperil the provision of essential government functions, including public education, before future courts will have an opportunity to find that the Measure is legally invalid. Therefore, action by this Court is needed now.

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[1] CSBA is a non-profit corporation duly formed and existing under the laws of the State of California. CSBA is a member-driven association composed of the governing boards of over 950 K-12 school districts and county offices of education throughout California. CSBA's ELA is composed of nearly 725 CSBA members dedicated to addressing public education issues of statewide concern to school districts and county offices of education. The purpose of the ELA, among other things, is to ensure that local governing boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy decisions for their local educational agencies. The ELA's activities include, as demonstrated by this amicus letter, supporting its members by joining in litigation where the interests of public education are at stake.

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The Legislature's Authority

The Legislature has plenary lawmaking authority in the state. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.) This has historically been particularly true with respect to "the field of taxation, in which the Legislature is generally supreme." (*Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 624.) Specifically, the taxation provisions in the Constitution "are a limitation on the power of the Legislature rather than a grant to it." (*Id.*) The Measure represents a significant sea change in the way the State has operated and, on the Legislature's constitutional authority to raise revenues. Thus, it will have the far-reaching effect of destabilizing and disrupting California's entire taxation and funding scheme.

Impact on Proposition 98

Because the Measure requires *any* new tax approved by the Legislature to be approved by the voters (Measure, Sec.4 [proposed amended Cal. Const., Article XIII A, § 3, subd (a)]), it presents significant concerns for school districts and county offices of education that are vastly dependent on state funding for the majority of their operations. (Federal funding makes up less than 10 percent of funding for California schools.) Proposition 98 sets a minimum guarantee for public school funding in California, and its formula ensures that approximately 40 percent of state revenues, or the previous year's Proposition 98 funding, go to education funding. (Cal. Const., Article XVI, §§ 8 and 8.5; see *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1275, fn. 8.) The Proposition 98 guarantee consists of state General Fund revenues driven primarily by state income, sales, corporate, and capital gains taxes and local property tax revenue. There are three tests for determining the amount of Proposition 98 funding. Changes to tax revenues would impact how each of these tests are calculated.

Critically, tax revenue fluctuations affect the minimum guarantee. For example, the minimum guarantee was revised down for the 2022-23 school year because of a reduction in General Fund revenue due to a reduction in tax collections. According to the Legislative Analyst's Office, "General Fund revenue tends to be the most significant input in the calculation of the Proposition 98 guarantee."[2] Because state education funding is dependent upon General Fund revenues, the Measure's limitations on the ability to approve new taxes will have devastating effects on K-12 education finance. In addition, Proposition 98 is a minimum guarantee (floor) and, while the Legislature has typically treated it as a maximum (ceiling), the Legislature has the discretion to increase Proposition 98 funding. This discretion would be hampered by the Measure's limits on the Legislature's ability to raise funds when necessary. Because of these issues, this Measure will seriously impair the ability of the Legislature and school districts and county offices of education to address current and future needs of public education in the state, which is an important governmental function. (Cal. Const. Article IX, § 5.)

[2] Legislative Analyst's Office, the 2023-24 Budget: Proposition 98 Overview and K-12 Spending Plan (February 2023) https://lao.ca.gov/Publications/Report/4670

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As a result of these impacts, unless rejected, the Measure, with its stated purpose of requiring "all fees and other charges are passed or rejected by voters themselves or a governing body elected by voters and not unelected and unaccountable bureaucrats", (Measure, Sec. 3, subd. (a)) will throw California's carefully crafted system of school finance into a tailspin, and the basic mission to educate California's children will be less attainable.

Impacts on School-Based Fees

School districts are charged with providing free public education to California's children. (Cal. Const., Article IX, § 5). With this mission comes the responsibility to provide enrolled children with services such as nutritious meals and home to school transportation, as well as opportunities and activities to ensure their physical, emotional, and mental health and wellbeing. These services enable and enhance children's ability to learn, succeed, and become productive citizens of the state. As described above, school districts receive an annual state appropriation to fulfill this mission. Districts are also statutorily authorized to charge students and the public fees for certain services to supplement or replace the state appropriation. This Court recognized this statutory authority when it held that a district-imposed home-to-school transportation fee did not violate the state constitution's free school guarantee. (*Arcadia Unified School District v. State Department of Education* (1992) 2 Cal.4th 251.) Fees for preschool and childcare and development services, insurance for school athletic team members, school camp programs, food sold at school, Civic Center Act use of school facilities and student field trips are some of the common services and activities for which districts charge fees. (Education Code §§ 8211, 8213, 32221, 35335, 38084, 38134 and 35330).

The Measure provides that:

- every levy, charge, or exaction imposed by a district, is either a tax or an exempt charge;
- an exempt charge may only be imposed by a resolution or other formal action of the governing board;
- the district bears the burden of proving by clear and convincing evidence that a levy, charge, or exaction is an exempt charge rather than a tax;
- the district also bears the burden of proving by clear and convincing evidence that the amount of the exempt charge is reasonable and does not exceed the actual cost of providing the service or product. (Measure, Sec. 6, subd. (a), (e) and (h) (1).)

Together, these requirements will interfere with boards' ability to fulfill other critical roles they are required to perform. Though under existing laws and regulations fees are charged with board approval, the requirements of this Measure, especially those requiring proof by clear and convincing evidence that each fee is reasonable and does not exceed actual cost, will involve more in-depth studies and analyses for any fee to be charged, regardless of the amount charged. With the sheer number of fees for which such studies and analyses will have to be done each year, it is foreseeable that school boards will have less time for other critical matters for which they are responsible. Matters that bear upon the

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primary mission of school districts, such as adopting instructional materials, plans to protect students against unlawful conduct (including discrimination), a sound budget, and a comprehensive Local Control Accountability Plan (LCAP), could be impacted. One possible solution to this situation will be for school boards to increase the number or duration of their regular meetings, but this will significantly burden an already stressed system.

The Measure's accountability provisions are unnecessary. Many statutes that authorize district fees come with a complaint process for anyone who is aggrieved to challenge the fees and, where applicable, receive reimbursement or other available remedy. For example, Education Code § 49013 provides for the filing of a complaint under the Uniform Complaint Procedures, as specified in Title 5, Cal. Code of Regulations 4600 et seq., if a district imposes any fee, deposit, or other charge on a student in violation of the free school guarantee of the state constitution.

Impact on Voter Initiatives for Parcel Taxes

The Measure also reduces the ability of local voters to raise revenues for their local schools. Parcel taxes, which are considered special taxes that school districts in California can levy, have long been an essential part of school financing in California. Under the state Constitution, a school district may impose a special tax when a ballot measure proposing the tax is supported by two-thirds of qualified electors within that district. (Cal. Const. Article XIII A, § 4.) This two-thirds support from the public is a high hurdle for many districts and as a result, local voter initiatives which only require a simple majority to pass, can be instrumental in funding local school programs and activities. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924; *City and County of San Francisco v. All Persons Interested in The Matter of Proposition G* (2021) 282 Cal. Rptr. 3d 17.) From 1983 (when parcel taxes were first authorized) to November 2021, voters approved 487 parcel taxes. (School District Bond and Tax Elections, Ed-Data (2022), https://www.ed-data.org/articleR/School-District-Bond-and-Tax-Elections.)

In addition to a lower threshold of support for passage, in *City of Upland* this Court clarified even more flexibility provided by voter initiatives when it held that voter initiatives for taxes do not have to be submitted to the electorate at a regularly scheduled general election as the California Constitution requires for general taxes. (Cal. Const., Article XIII C, § 2.) Instead, these special tax initiatives can be considered by voters during a special election. However, the Measure eliminates the flexibility provided by citizen initiatives because it expressly eliminates this court's decision in *City of Upland* and changes the required threshold from a simple majority to a supermajority of two-thirds to pass a special tax. (Measure, Sec. 3, subd. (e); Measure, Sec. 6, [proposed art. XIII C, § 2, subd. (c)].) As a result, efforts for a parcel tax to support school districts' various program needs by a voter's initiative can only be placed on the general election ballot. This significantly diminishes the ability of voters throughout the state to approve tax measures necessary to fund the operations of their local schools.

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Impact Due to Retroactivity

Clearly, the Measure's retroactivity provisions as currently drafted are onerous and will cause a stampede for school districts working to bring any revenue-raising measures passed or adopted between January 1, 2022, and the effective date of the Measure into compliance with its requirements. The Measure allows such districts only 12 months within which to have any tax or exempt charge reenacted in compliance with the Measure. Any non-compliant voter-initiated district tax will have to be submitted for voter approval at a special election in 2025, otherwise the tax will become void. (Measure, Sec. 6, subd. (g).) For example, since January 1, 2022, 11 parcel taxes have passed and therefore would be subject to reapproval if the Measure passes and they are found to be noncompliant. (Parcel Tax Elections in California, Ballotpedia (2022), https://ballotpedia.org/Parcel_tax_elections_in_California.) With a large number of potential measures on a special election ballot due to this required reapproval (from municipalities, school districts, etc.), the likelihood of voter rejection will be higher than usual. Also, any "exempt charge," as broadly defined by the initiative, if not previously approved by the school board consistent with the new requirements imposed by the Measure, would also be subject to approval on or before the November 5, 2025, cut-off date.

Vagueness and Overbreadth of the Measure

For the reasons explained below, the measure is so vague and broad it will be extremely difficult to implement. First, by redefining the meaning of both "tax" and "exempt charge" (Measure, Sec. 4, [proposed Article XIII A, § 3; Sec. 5], [proposed Article XIII C, § 1]) the Measure opens the door for voters to use their referendum power to try challenge any fee appropriately characterized as an "exempt charge" (an unclear task in itself) with a referendum action to undo actions taken by a school or county board. While the power of voters to challenge these local school board actions is not explicitly provided for in the same way that other municipal actions can be challenged by voter referendum (*Board of Education v. Superior Court*, (1979) 93 Cal. App. 3d 578), the changes made by the Measure seem to create an opportunity for a referendum to challenge school district fees/exempt charges. Thus, school board actions will be caught, even if not intended to be, in the undertow of the consequences of the Measure's ambiguity. Due to the uncertainty created by the Measure, school boards and county boards of education will be left with the possibility that properly approved and characterized fees/exempt charges will be challenged by voter referendum, a referendum that then would be challenged in court.

Moreover, the requirement that local government entities demonstrate that any fee is for the "actual cost" of providing a service or product is still remarkably vague despite the definition offered in the Measure and will also be impossible to implement. (Measure, Sec. 5 [proposed Cal. Const., Article XIII C, §1, subd(a)].) Specifically, the definition provides that in computing the "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 a service or product." However, including all sources of revenue ignores the fact that local

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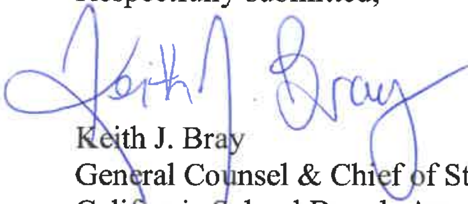
agencies, including school districts, have funding that is specifically directed to, or earmarked for, certain services or costs. This definition would require a local agency to include all revenue in determining any "actual cost" even when such revenue is already set aside for a different purpose. In other words, the definition does not limit the definition of actual cost to costs minus revenue *for the purpose of the fee at issue*, but rather all revenues received. Further, the Measure requires a demonstration that a charge is "reasonable" by clear and convincing evidence but provides no definition of "reasonable" except to reference the "actual cost" requirement. (Measure, Sec.6 [proposed Cal. Const., Article XIII C, §2, subd(g)].)

Lastly, the Measure limits exempt charges to be imposed by the governing body of a local government "by ordinance." (Measure, Sec. 6 [proposed Cal. Const., Article XIII C, §2, subd(e)].) Not all local bodies act by ordinance. This creates an additional lack of clarity beyond what is discussed herein regarding what types of charges are covered by the Measure. Constitutional language must be clear and specific in order to ensure that implementation is without uncertainty and risk of litigation. The language in the Measure as illustrated by the examples herein will likely lead to litigation contesting its applicability, breadth and vagueness.

Respectfully submitted,



Keith J. Bray
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ACC: kjb
Attachment: Proof of Service

Cc:
Susan Markarian, President, CSBA
Vernon M. Bily, CEO & Executive Director, CSBA

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PROOF OF SERVICE

I am employed in the County of Yolo, California. I am over the age of 18 years and not a party to this action. My business address is CSBA/Education Legal Alliance, 3251 Beacon Boulevard, West Sacramento, CA 95691.

On November 9, 2023, I served the following document(s):

Letter of Amicus Curiae in Support of Emergency Petition for Writ of Mandate:
Legislature of the State of California et al. v. Weber (Hiltachk),
Case No. S281977

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 9, 2023, in Elk Grove, California.

Anita Ceballos

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