S220289

IN THE SUPREME COURT OF CALIFORNIA

En Banc

HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Petitioners,

v.

DEBRA BOWEN, as Secretary of State, etc., Respondent;

LEGISLATURE OF THE STATE OF CALIFORNIA, Real Party in Interest.

Respondent Debra Bowen, as Secretary of State of the State of California, and real party in interest the Legislature of the State of California, are ordered to show cause before this court, when the above matter is placed on calendar, why the relief sought by petitioners should not be granted. The return is to be served and filed by respondent and real party in interest on or before September 10, 2014.

Time constraints require the court to decide immediately whether to permit Proposition 49 to be placed on the November 4, 2014, ballot pending final resolution of this matter. Three decades ago, this court removed an advisory measure from the ballot rather than permit it to be on the ballot subject to later review as to its validity. As we explained, "The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure." (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 697.) Because the proposition's validity is uncertain, because this court in *American Federation* made clear that substantial harm can occur if an invalid measure is permitted to remain on the ballot, and because the measure, which the parties agree would have no legal effect, can be placed on a future ballot at the Legislature's direction if the court ultimately determines it is valid, respondent Debra Bowen is directed to refrain from taking any further action related to the placement of Proposition 49 on the November 4, 2014, ballot.

Baxter
Associate Justice

Corrigan
Associate Justice

Werdegar
Associate Justice

Liu
Associate Justice

Chin
Associate Justice

CONCURRING STATEMENT
by Liu, J.

In opposing a stay in this matter, the Chief Justice cites decisions of this court holding that challenges to ballot propositions should be decided after an election " 'in the absence of some clear showing of invalidity' " (*Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1029) and that " '[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action' " (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691). I believe petitioner has made a sufficiently clear showing of invalidity at this point to warrant our grant of a stay.

The parties' briefing is in agreement on two points. First, Proposition 49 is not an initiative or a referendum because it does not propose to enact any law. Proposition 49 is a different species of ballot measure with no official nomenclature. The Legislature refers to it as an "advisory question"; petitioner calls it an "opinion poll." Second, no specific constitutional provision authorizes the Legislature to place this kind of question on the ballot.

The Legislature says no express authorization is required because it may exercise " 'any and all legislative powers which are not expressly, or by necessary implication denied to it by the Constitution' " (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180, italics omitted), including the power to engage in activities "incidental and ancillary to the ultimate performance of lawmaking functions by the legislature itself" (*Parker v. Riley* (1941) 18 Cal.2d 83, 89). But, as petitioner notes, Proposition 49 is not incidental or ancillary to any legislative proposal. It calls on Congress to propose a federal constitutional amendment, and it calls on the Legislature, in the event such an amendment is proposed, to ratify it. "[R]atification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word." (*Hawke v. Smith* (1920) 253 U.S. 221, 229.)

The main question is whether Senate Bill No. 1272 (2013–2014 Reg. Sess.), which put Proposition 49 on the ballot, is a valid legislative act. The Legislature is correct that the California Constitution contains no express prohibition against submitting an advisory question to the voters. But there is a strong case that such a prohibition is a necessary implication of our Constitution's text and structure.

The California Constitution authorizes the Legislature to put three kinds of measures on the ballot: (1) state constitutional amendments (Cal. Const., art. XVIII, §§ 1, 4); (2) a statute authorizing issuance of bond debt (Cal. Const., art. XVI, § 2); and (3) an amendment or repeal of previously enacted initiative or referendum measures (Cal. Const., art. II, § 10, subd. (c)). We have said that an enumeration of legislative powers does not necessarily give rise to an inference of exclusivity. (*Ex parte McCarthy* (1866) 39 Cal. 395, 403.) But there is a structural consideration favoring such an inference here.

Article IV, section 1 of the California Constitution says: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." Thus, the legislative power is ordinarily exercised by the Legislature. The people reserved to themselves *only* the powers of initiative and referendum — both of which are strictly *lawmaking* powers that do "not include [adoption of] a resolution which merely expresses the wishes of the enacting body" in a "hortatory" manner. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 708, 715.) In other words, the voice of the people, as expressed at the ballot box on legislative matters, must take a distinctive form: it must take the form of *law*.

We have often said the core purpose of this divided lawmaking structure is to enable the citizenry to bypass unresponsive elected officials in enacting desired legislation. (See, e.g., *Perry v. Brown* (2011) 52 Cal.4th 1116, 1140 ["The primary purpose of the initiative was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt."]; *Amador Valley Joint Unified Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228.) No one contends that this purpose is served by Proposition 49. Everyone agrees that Proposition 49 is not legislation.

Our Constitution further says: "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. II, § 8, subd. (a).) As petitioner notes, this provision — together with article IV, section 1's reservation of the initiative power to the people — means that the Legislature may not propose statutes for the voters to adopt or reject (apart from the specific exceptions noted above). Structurally, this arrangement maintains clear lines of accountability: If the Legislature enacts a statute that the voters don't like, the voters can hold their representatives accountable through the ordinary electoral process. If the citizenry adopts an initiative, it is entirely the handiwork of the citizenry for better or worse; the Legislature is not involved. But if the Legislature were to propose a statute for the voters to approve, the lines of accountability would be blurred.

The same concern would arise if the Legislature could put advisory questions on the ballot. For what if the Legislature put to the voters, not a statute, but a question that says, "The Legislature is considering the following statute: [print the statutory language]. Should the Legislature enact this statute?" If a majority of voters say yes and the Legislature adopts the statute, who would be accountable?

The California Constitution draws a clear line between lawmaking by the Legislature and lawmaking by the citizenry through the ballot. It does not contemplate a mix-and-match approach. Our Constitution makes no provision for advisory questions because such polling of the electorate by the Legislature is in tension with the basic purpose of *representative* as opposed to direct democracy. In crafting a blueprint for workable and effective government, our nation's Founders rejected pure, plebiscitary

democracy out of concern that the electorate would often act on momentary passions, narrow self-interest, or factional ties. They opted instead for a system of representative democracy that vests lawmaking power in elected officials who must deliberate, build coalitions, logroll, and compromise in order to decide what will best serve the public good. (Madison, The Federalist No. 10 (Cooke ed. 1961) pp. 56–65.) The people of California followed this basic approach by vesting "[t]he legislative power of this State . . . in the California Legislature," while "reserv[ing] to themselves the powers of initiative and referendum" as a safeguard against breakdowns in representative democracy. (Cal. Const., art. IV, § 1.) When voters exercise the initiative power, the locus of accountability is clear. But the people did not reserve to themselves the power to answer advisory questions posed by the Legislature at the ballot box, a mechanism that blurs accountability for legislative choices. This structural concern is what underlies petitioner's contention that legislative resort to the ballot box to ask advisory questions would be "an anathema to the idea that elected legislators serve as representatives of the electorate, empowered to act on their behalf and in their stead."

None of this suggests that the Legislature may not consider opinion polls or generally should not consider public opinion in formulating policy. Of course it may and it should. If the Legislature wants to commission Gallup to do a poll on *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310 (*Citizens United*), I see no problem with that. But there is a difference between doing that and doing what the Legislature has done here. Here, the Legislature has resorted to *the electoral apparatus* to conduct its opinion poll, with the obvious import that the result will carry an official sanction or legitimacy that a regular opinion poll does not. Indeed, in their amicus brief, the proponents of Proposition 49 emphasize that "the difference between an election and a poll" is that "an election provides a structured format for citizens to speak collectively." But it is precisely this formality, this electoral legitimacy, that disturbs the careful way that our Constitution has structured the legislative power. Under our Constitution, the only "structured format for citizens to speak collectively" on legislative matters is through an initiative or a referendum, i.e., through an exercise of *lawmaking*. Posing advisory questions to the electorate is at odds with the people's constitutional choice of how to structure an accountable lawmaking process.

In sum, our constitutional structure contemplates that lawmaking will ordinarily occur at one step of remove from a direct plebiscite, with "the powers of initiative and referendum" — both *lawmaking* powers — "reserve[d]" as a political check and safeguard. (Cal. Const., art. IV, § 1.) To allow the Legislature to leverage the formality of the electoral process (as opposed to the informality of a Gallup poll) to pose advisory questions to the voters would alter this delicate balance between legislative and citizen lawmaking.

The Chief Justice further contends that irreparable harm will occur in light of today's order granting a stay, whereas no such harm would occur had we denied a stay. In fact, the converse is true. Without a stay, Proposition 49 would remain on the ballot,

and this court would not resolve its validity until after the election. If we were to later declare Proposition 49 invalid, there is no meaningful relief we could provide. The electorate would have already provided the information that the Legislature seeks, and the constitutional harm could not be undone. On the other hand, our decision to grant a stay and thereby remove Proposition 49 from the ballot will cause no irreparable harm to the Legislature or the electorate. If we were to later declare Proposition 49 a valid ballot measure, the Legislature could put the same measure on the ballot in the future. In the meantime, the Legislature has ample means to solicit the public's views on *Citizens United* or to urge voters to call on Congress to propose a constitutional amendment overruling *Citizens United*. The Legislature could hold hearings, it could convene town halls, or it could commission a poll. There appears to be nothing urgent on the state or federal political landscape that makes the electorate's input on *Citizens United* any more salient or timely now than it will be in, say, 2016.

In light of the balance of harms and petitioner's likelihood of success on the merits, I join today's decision to grant a stay and to issue an order to show cause.

Liu
Associate Justice

CONCURRING AND DISSENTING STATEMENT
by Cantil-Sakauye, C.J.

Until today, Proposition 49 had been slated for the November 4, 2014 General Election ballot to ask the voters an advisory question, akin to other similar advisory questions previously posed by our Legislature, and those of other states, concerning proposed amendments to the federal Constitution. Proposition 49 would ask the voters whether California should pursue a federal constitutional amendment to overturn a recent decision of the United States Supreme Court.[1] I agree that the petition for writ of

1 On July 22, 2014, the Legislature submitted Senate Bill 1272 to the Secretary of State, directing the following question be placed on the November 4, 2014 ballot: "Shall the Congress of the United States propose, and the California Legislature ratify, an amendment or amendments to the United States Constitution to overturn *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310, and other applicable judicial precedents, to allow the full regulation or limitation of campaign contributions and spending, to ensure that all citizens, regardless of wealth, may express their views to one

mandate challenging the authority of the Legislature to put this advisory question to the voters raises issues warranting the issuance of an order to show cause, but I cannot agree with the decision of a majority of this court to direct the Secretary of State to remove this matter from the ballot pending judicial resolution of these legal questions. For the reasons that follow, I respectfully dissent from that part of the order granting the stay.

Petitioners requested a stay, directing Debra Bowen, Secretary of State of California, to "desist and refrain from taking any further action relative to the placing of Proposition 49" on the November statewide ballot.

As this court unanimously explained eight years ago, " 'it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures *after* an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some *clear showing of invalidity*.' " (*Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1029, italics added, quoting *Brosnahan v. Eu* (1982) 31 Cal.1, 4.) Indeed, because the "type of challenge" at issue in this case "is one that can be raised and resolved after an election, *deferring judicial resolution until after the election — when there will be more time for full briefing and deliberation — often will be the wiser course*." (*McPherson, supra,* 38 Cal.4th 1020, 1030, italics added.)

I do not see such a clear showing that the Legislature lacks authority to place the measure before the voters, warranting this court taking the extraordinary step of removing the measure from the ballot, thereby disenfranchising the voters. Without prejudging the merits, I observe that it is well established that under the California Constitution the Legislature has, in addition to enumerated powers, plenary power to engage in any activities that are "incidental or ancillary to its lawmaking functions," so long as the power to engage in those activities is not expressly or by necessary implication, denied to it by the Constitution. (See, e.g., *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.) Moreover, "[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." (*Ibid.*) I note that there is historical precedent for the Legislature placing advisory questions on the California ballot (Stats. 1891, ch. 48; Stats 1911, ch. 387) and the briefing in this matter refers to a number of other analogous examples from other states, including one the validity of which was upheld in *Kimble v. Swackhammer* (Nev.1978) 584 P.2d 161, and *Kimble v. Swackhammer* (1978) 439 U.S. 1385, 1387-1388 (per Rehnquist, J., as Circuit Judge).

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another, and to make clear that the rights protected by the United States Constitution are the rights of natural persons only?"

Today, a majority resolves doubt *against* the Legislature's action instead of in favor of it, and at the same time disregards our established approach of declining to remove a challenged measure from the ballot in favor of post-election review.

I do not believe there is any legitimate basis for concluding that petitioners stand in jeopardy of experiencing *any* significant harm if the matter proceeds to election but ultimately the court concludes that the measure was improperly presented.

There is unlikely to be any real voter confusion in November about the mere advisory nature of the measure. Nor will the state have expended any substantial funds in adding this short measure to the existing ballot. Moreover, if we conclude that such measures are inappropriate for the future, the concerns raised by petitioners regarding manipulation or distortion of the ballot process that might result from allowing the Legislature to put advisory questions on the ballot will be put to rest; the practice would not continue. Similarly, the problems concerning promoting voter cynicism suggested in the petition would be nipped in the bud.

Neither can it plausibly be said that we would fail to afford any meaningful post-election relief to petitioners if we were to find Proposition 49 invalid on post-election review. Any such holding would have the real effect of preventing the Legislature from making any formal use of Proposition 49, for example, in any subsequent joint resolution to Congress calling for a constitutional convention.

Although I find no appreciable harm to petitioners by denying a stay, I find the opposite in the grant of the stay. By the majority's action today, the Legislature will be deprived of knowing in a timely manner where the voters stand on the issue, perhaps influencing what further steps the Legislature will take and how much effort it would invest in the underlying endeavor. The stay also deprives the voters of the ability to express their views on the subject at the time when the issue is being hotly debated, as opposed to two years from now, on the ballot of 2016. In the same way that a "prior restraint" is disfavored under the First Amendment, depriving voters of the ability to vote on an issue while it remains current constitutes a real and present harm.

Whatever the wisdom or practical impact of this particular advisory question, those considerations are beyond the nature and scope of our review. A majority's action today, however, without adhering to guiding precedent, has denied the Legislature the authority to place an advisory question to the vote of the people in the 2014 statewide election.

Cantil-Sakauye
Chief Justice