Case No. S220289

In the Supreme Court of the State of California

HOWARD JARVIS TAXPAYERS ASSOCIATION AND JON COUPAL, PETITIONERS

v.

DEBRA BOWEN, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF THE STATE OF CALIFORNIA, RESPONDENT

LEGISLATURE OF THE STATE OF CALIFORNIA, REAL PARTY IN INTEREST

Original Writ Proceeding

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF REAL PARTY IN INTEREST

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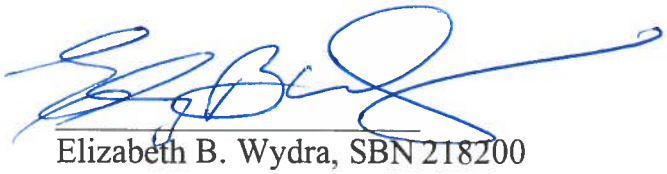
CERTIFICATE OF INTERESTED ENTITIES

The undersigned counsel certifies, pursuant to Rule 8.208 of the California Rules of Court, that she represents the following entity, Constitutional Accountability Center, which is the sole organization represented in the attached application and *amicus* brief. I know of no entity or person that must be listed as defined in the California Rules of Court.

Executed on January 29, 2015.



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Amicus Constitutional Accountability Center (CAC) respectfully requests leave pursuant to Rule 8.520(f) of the California Rules of Court to file the attached brief *amicus curiae* in support of Real Party in Interest Legislature of the State of California.[1]

Amicus CAC is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the U.S. Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in the issues of campaign finance and constitutional reform, and accordingly has an interest in this case.

CAC has filed *amicus* briefs in its own name and on behalf of various clients in the U.S. Supreme Court in cases raising significant issues regarding campaign finance, including *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), *Citizens United v. FEC*, 558 U.S. 310 (2010), and *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). CAC also has expertise in the U.S. Constitution's text and history, including the history surrounding the drafting and ratification of the Article V amendment process. *Amicus* seeks to assist this Court's consideration of this matter by situating advisory ballot measures such as Proposition 49 within the context of the text, history, and purpose of Article V of the U.S. Constitution, as well as by discussing how such measures have been used to push constitutional reform efforts at various times in American history, including by the State of California. *Amicus* submits this brief to demonstrate that the U.S. Constitution's text and his-

[1] Pursuant to Rule 8.520(f)(4), *amicus* states that no party in this case, and no person or entity other than *amicus*, its members, or its counsel, authored the proposed *amicus* brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief.

tory strongly support the authority of states to use advisory measures as part of the Article V amendment process.

For the foregoing reasons, *amicus* respectfully requests that the Court accept the accompanying brief for filing in this case.

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT

Proposition 49 is an attempt by the California Legislature to use the state ballot to solicit the views of California voters on an important topic of public concern—whether to amend the U.S. Constitution to overturn *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).[2] Howard Jarvis's challenge to the legal validity of Proposition 49 arises wholly under the State Constitution, and does not raise any federal constitutional challenge. Nevertheless, earlier in this case, Justice Goodwin Liu filed a concurring opinion that relied on federal constitutional principles to support removing Proposition 49 from the 2014 ballot. Justice Liu's opinion argued that "our nation's Founders rejected pure, plebiscitary democracy" choosing "instead . . . a system of representative democracy that vests lawmaking power in elected officials who must deliberate . . . and compromise in order to decide what will best serve the public good." *Howard Jarvis Taxpayers Ass'n v. Bowen*, No. S220289, slip op. at 3-4 (Cal. Aug. 11, 2014) (en banc) (Liu, J., concurring). The opinion expressed the view that Proposition 49—a measure that uses the state ballot to solicit the public's views on a key issue of constitutional reform—is inconsistent with such a system.

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[2] The advisory ballot measure reads as follows:

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

S. 1272 § 4(a) (Cal. 2014) (enacted).

In this brief, *amicus* demonstrates that there is no federal aversion to a state legislature's seeking the input of the people in choosing whether to invoke Article V's amendment processes. The principle of popular sovereignty at the core of our nation's charter, the text and history of Article V of the U.S. Constitution, and the tradition of popular control over state legislatures that existed at the Founding and upon which the U.S. Constitution itself—including Article V—was both drafted and ratified, all strongly support the California Legislature's ability to use the ballot to solicit the views of the people on the question of whether the state legislature should use its Article V authority to seek a constitutional amendment. Furthermore, various states—including the State of California—have used similar advisory ballot measures to push successful Article V amendments, including the Seventeenth Amendment (providing for the direct election of Senators) and the Twenty-First Amendment (ending our nation's experiment with Prohibition). Finally, other states and scores of localities—including localities in California—have already used similar advisory measures to gauge public support for a constitutional amendment designed to overturn *Citizens United*.

Amicus does not take a position on the wisdom of any specific advisory ballot measure, including Proposition 49. Instead, we simply seek to demonstrate that the U.S. Constitution's text and history strongly support the authority of states to use advisory measures like Proposition 49 as part of their Article V amendment processes. While the U.S. Constitution may reject "pure, plebiscitary democracy" at the federal level, it does not reject it at the state level, even when states are involved in administering federal mechanisms like the Article V amendment process. Article V does not, of course, require

states to allow space on their ballots for advisory measures, but it does, nevertheless, permit states to use them as part of the Article V amendment process if they so choose, as the California Legislature did in placing Proposition 49 on the ballot.

ARGUMENT

I. The U.S. Constitution's Text And History Permit A State Legislature To Use Its Article V Authority To Solicit The Views Of The People Of A State On A Constitutional Amendment.

Article V, in relevant part, provides that "[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid for all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress." This language gives state legislatures a central role in the amendment process, see *Hawke v. Smith*, 253 U.S. 221, 227-30 (1920); *see also Leser v. Garnett*, 258 U.S. 130, 137 (1922) (explaining that "the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution").

This Court has already recognized that states may exercise their authority under Article V by enacting purely advisory ballot measures that solicit the input of the electorate. *See Bramberg v. Jones*, 978 P.2d 1240, 1248 (Cal. 1999); *see also Kimble v. Swackhamer*, 439 U.S. 1385, 1387-88 (1978) (Rehnquist, J., in-chambers) ("If each

member of the Nevada Legislature is free to obtain the views of constituents in the legislative district which he represents, I can see no constitutional obstacle to a nonbinding, advisory referendum . . . ."). While ballot measures that coerce state legislators in the exercise of their constitutional responsibilities in the amendment process may exceed the bounds of Article V, state legislatures have the authority under Article V to enact advisory measures, such as Proposition 49, in order to inform a state legislature's exercise of its Article V powers. As this Court has recognized, Article V permits "a state's electorate [to] contribut[e] some input to the amendment process." *Bramberg*, 978 P.2d at 1248. A state legislature that uses its authority to call for an advisory vote by the people on a potential constitutional amendment acts in accord with the fundamental constitutional principle of popular sovereignty.

A. Advisory Ballot Measures Vindicate The Principle Of Popular Sovereignty At The Core Of The Constitution's Text And History.

The principle of popular sovereignty has been the engine of American constitutional development since the Founding and remains the ultimate source of our Constitution's legitimacy. At its core, popular sovereignty is the idea that the people themselves are the source of the government's authority and, in turn, can alter the government whenever they deem it appropriate—whether in response to tyrannical misrule or smaller-scale deficiencies in the Constitution's design. *See* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 230 (Jonathan Elliot ed., 1836) [hereinafter *Elliot's Debates*] (James Iredell) ("In America, our governments have been clearly created by the people themselves. The same authority that created can destroy; and the

people may undoubtedly change the government, not because it is ill exercised, but because they conceive another form will be more conducive to their welfare."). Far from transgressing this fundamental principle, a state legislature that uses its authority to call for an advisory vote on an important constitutional question vindicates it.

The opening words of the U.S. Constitution—"We the People"—alone make clear our nation's commitment to popular sovereignty. U.S. Const. pmbl. However, the Founders demonstrated through the U.S. Constitution's ratification process that these powerful words were more than a mere rhetorical flourish.

When the Constitution was drafted and ratified, the world was dominated by monarchies and emperors; representative democracies were rare. *See* Akhil Reed Amar, *America's Constitution: A Biography* 8 (2006). Of course, both Athens and Rome had experimented with forms of democracy in ancient times, but these experiments had failed; and, even so, no nation had ever allowed its people to vote on its governing charter. *See* James Wilson, *Oration delivered on the 4th July, 1788, at the procession formed in Philadelphia to celebrate the adoption of the constitution of the United States*, *in* 3 *The Works of the Honourable James Wilson, L. L. D.* 297, 300 (Brad Wilson ed., 1804) ("You have heard of Sparta, of Athens, and of Rome; you have heard of their admired constitutions . . . . But did they . . . ever furnish . . . an exhibition similar to that which we now contemplate? Were their constitutions framed by those, who were appointed for that purpose, by the people? After they were framed, were they submitted to the consideration of the people?"). That changed with the American republic and the ratification of the U.S. Constitution.

The Constitution was ratified in an unparalleled democratic moment, making it perhaps the first foundational charter of national government that could legitimately claim to rest on the consent of the governed. While the delegates to the Constitutional Convention had put pen to paper in Philadelphia, only the people themselves—acting through specially elected ratifying conventions in each of the thirteen states—were empowered to replace the dysfunctional Articles of Confederation with a new national charter. *See The Federalist* No. 40, at 220 (James Madison) (Robert A. Ferguson ed., 2006) (explaining that the delegates to the Constitutional Convention had "proposed a constitution, which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed"); 2 *Elliot's Debates* at 470 (James Wilson) ("[T]his Constitution . . . claims no more than a production of the same nature would claim, flowing from a private pen. It is laid before the citizens of the United States, unfettered by restraint. . . . By their *fiat*, it will become of value and authority; without it, it will never receive the character of authenticity and power."). Ultimately, the Constitution would go into effect only when at least nine states had given their approval through this specially prescribed process. U.S. Const. art. VII.

When electing delegates to their respective ratifying conventions, many states waived their typical voting restrictions—including property requirements—allowing nearly all taxpaying adult male citizens to vote. *See* Amar, *America's Constitution*, *supra*, at 7. They also permitted a broad group of Americans to serve as convention delegates—broader than might have served in the upper houses of the states' respective legislatures. *Id.* Finally, as part of the ratification process, the states allowed the American

people to freely debate the merits (and deficiencies) of the proposed Constitution—often through competing pamphlets, newspapers, and other publications, including, most famously, *The Federalist*. Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* 51-54 (2012). Following this period of vigorous debate both within the state conventions and in the public square, the Constitution was finally ratified in June 1788.

Importantly, this ratification process conflicted with the express terms of the Articles of Confederation, which required the consent of all thirteen states before any amendments could take hold. Articles of Confederation of 1781, art. XIII. To supersede this unanimity requirement and justify the ratification process outlined in the new Constitution, the Founders, in part, appealed to the principle of popular sovereignty. *See* 2 *The Records of the Federal Convention of 1787*, at 476 (Max Farrand ed., 1911) [hereinafter *Farrand's Records*] (James Madison) ("The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased."). Ultimately, even opponents of the new Constitution acquiesced, permitting it to go into effect.

To ensure that popular sovereignty remained the American constitutional system's driving force even after ratification, the Founders prescribed a means for amending the new Constitution in Article V—a process designed to be more permissive than the Articles' unanimity requirement. While the Founders may have rejected "pure, plebiscitary democracy" as a means of ordinary lawmaking at the federal level—instead preferring

"representative democracy" driven by "deliber[ation]" and "compromise"—they reserved an important role for popular input as part of the Article V amendment process.

B. The Text And History Of Article V Give State Legislatures Broad Authority To Employ Advisory Measures In Exercising Their Constitutional Responsibilities.

The Founders recognized that they did not have a monopoly on constitutional wisdom. 3 *Farrand's Records* at 121 (letter of Charles Pinkney) ("It is difficult to form a Government so perfect as to render alterations unnecessary . . . ."). Therefore, they wrote Article V to ensure that the American people had "an easy, regular[,] and Constitutional way" of altering our nation's charter. 1 *Farrand's Records* at 203 (George Mason); s*ee also* 4 *Elliot's Debates* at 177 (James Iredell) (hoping that the Constitution could be "altered with as much regularity, and as little confusion, as any act of Assembly"). While King George III's tyrannical actions justified the revolutionaries' decision to cast aside British rule, the Founders sought to ensure that, under their new Constitution, the American people would be able to pass any amendment that was "conducive to their welfare," whether such an amendment was needed to correct governmental abuse or simply to improve the system of government. *Id.* at 229-30 (James Iredell).

Under the Articles of Confederation, all thirteen states had to give their consent to any proposed amendment before it took effect. Articles of Confederation of 1781, art. XIII. The Framers' experience under the Articles convinced the delegates of the need for an easier method of amendment. Consequently, the new Constitution would provide the American people with multiple methods for altering its provisions—methods that would require mere supermajority support rather than unanimity. In the process, the Founders

sought to promote what Alexander Hamilton described as a "fundamental principle of republican government"—"the right of the people to alter . . . the established constitution whenever they find it inconsistent with their happiness." *The Federalist* No. 78, at 432 (Alexander Hamilton) (Robert A. Ferguson ed., 2006); *see generally* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 462-94 (1994) (explaining the importance of this principle during the Founding era).

Directly relevant here, the Framers explicitly gave the "Legislatures . . . of the . . . States" a key role in the Article V amendment process, both at the proposal stage and at the ratification stage. U.S. Const. art. V. Early in the proceedings in Philadelphia, the delegates rejected a proposal that would have given Congress a veto over any proposed Amendment. "It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendmt." 1 *Farrand's Records* at 203 (George Mason); *see also The Federalist* No. 43, at 246 (James Madison) (Robert A. Ferguson ed., 2006) (explaining that Article V "equally enables the general and the state governments, to originate the amendment of errors, as they may be pointed out by the experience on one side or on the other"). To ensure that Congress did not have the last word over any Amendment, the Framers made state legislatures a central player in the amendment process.

Beginning with the proposal stage, Article V allows for two separate pathways for proposing constitutional amendments. First, Congress may propose such amendments

directly, following the approval of "two thirds of both Houses [of Congress]." U.S. Const. art. V. Once a proposed amendment clears this supermajority threshold, Congress then sends the proposed amendment along to the states for ratification without additional input from any other elected official or representative body, including the "Legislatures . . . of the . . . States." *Id.* Second, state legislatures themselves may jumpstart the constitutional amendment process. Indeed, even in the face of congressional inaction, state legislatures can use their powers under Article V to compel Congress to "call a Convention for proposing Amendments" whenever "the Legislatures of two thirds of the several States" apply for one. *Id.* This pathway promotes constitutional deliberation at the state level and, if successful, permits direct popular input into the Article V amendment process through the election of convention delegates.

Turning to the ratification stage, Article V also details two pathways for ratifying constitutional amendments—with the prescribed pathway in any given instance chosen by Congress. In short, once a new constitutional amendment clears the proposal stage, Congress is tasked with choosing the "Mode of Ratification"—whether "by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof." *Id.* Therefore, while Congress may play a direct role in proposing a given amendment, it plays a circumscribed role at the ratification stage—leaving the ultimate ratification decision either to state-level conventions, which are filled with delegates elected by the people of each state, or state legislatures, which are subject to varying degrees of popular control by each state's electorate.

The Framers feared a self-dealing Congress, recognizing that, if left to their own devices, members of Congress might block reforms designed to curb congressional power and promote reforms that aggrandized their own power. *See The Federalist* No. 85, at 486 (Alexander Hamilton) (Robert A. Ferguson ed., 2006) (explaining that the "national authority" would have "no option" but to yield, whenever the states exercised their Article V powers at the proposal and ratification stages); Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037, 1041 (2000) ("[T]he structural concern over governmental self-dealing counsels against reading Article V as giving a veto over constitutional change to government actors."). Suspicious of such abuses, the Founders crafted a system that ensured that the American people—at times, acting through their state legislatures—had the means of either clearing the path for reform or blocking a congressional proposal that might lead to abuse.

Therefore, state voters, acting through their legislatures, were given the power to put constitutional amendments on the nation's agenda, above and beyond the contrary wishes of Congress. And even when a supermajority in both Houses of Congress approved of an amendment, it would only take the form of a proposal, requiring the approval of three-fourths of the states—either through their legislatures or through state conventions—for it to become part of our nation's charter. The Framers' ultimate goal was an amendment process that was capable of transcending a self-interested Congress and ad-

vancing proposals "generally wished for by the people." 4 *Elliot's Debates* at 177 (James Iredell).

Advisory ballot measures like Proposition 49 are consistent with Article V's text and history. At both the proposal and ratification stages, the Constitution's text gives state legislatures—as opposed to other organs of state government, such as state executives—a central role in the process of amending the Constitution. A "yes" vote on a measure like Proposition 49 provides important help to the legislature in ultimately deciding whether to act, either by proposing a constitutional amendment, applying for a federal constitutional convention, or, when relevant, ratifying any new amendment that clears the proposal stage. Advisory measures like Proposition 49 simply permit California voters to relay their own preferences to state legislators, leaving it to the legislators themselves to act however they deem fit.

C. The Framers Wrote Article V Against The Backdrop Of Popular Control Of State Legislatures.

The American people ratified the U.S. Constitution against a state legislative backdrop that allowed for popular control of state legislatures. Rather than eliminating these controls, the Framers accepted state legislatures as they existed at the time—popular control and all—and harnessed them for important constitutional purposes, including the Article V amendment process.

Early state constitutions often envisioned a system of representative democracy at the state level that included a certain amount of popular control, often speaking of the relationship between the people and their legislators as that of a master and a servant. *See*

Va. Const. of 1776, Bill of Rights § 2 ("[A]ll power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."); Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 371 (1969) ("[M]any Americans believed their representatives to be . . . mere agents or tools of the people who could give [them] binding directions."). At the Founding, the key device for ensuring popular control over the state legislature—apart from frequent elections—was the use of voter instructions.

The right to instruct dated back to the British House of Commons, and, at the Founding, most states recognized such a right. *See* Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* 448-49 (1930); Christopher Terranova, Note, *The Constitutional Life of Legislative Instructions in America*, 84 N.Y.U. L. Rev. 1331 (2009); Amar, *The People Made Me Do It, supra,* at 1047. In some states, this right was simply assumed; however, in a handful of others, this right was so fundamental that it was explicitly provided for in the state constitution. *See* N.C. Const. of 1776, Declaration of Rights, art. XVIII; Pa. Const. of 1776, Declaration of Rights, art. XVI; Mass. Const. of 1780, pt. 1, art. XIX; N.H. Const. of 1784, pt. 1, art. XXXII.

As part of their respective processes for ratifying the U.S. Constitution, Virginia, New York, and North Carolina all included declarations of rights—effectively, lists of preferred constitutional amendments—with each state including a right to instruct on its respective list. Amar, *The People Made Me Do It, supra,* at 1049. Congress rejected these attempts to add a right to instruct to the federal Bill of Rights, *The Complete Bill of*

Rights: The Drafts, Debates, Sources, & Origins 158 (Neil H. Cogan ed., 1997), concluding that a right of instruction was inappropriate on the federal level. "[W]hen the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community." 1 *Annals of Congress* 763 (1789) (Joseph Gales ed., 1834) (Roger Sherman). A right of instruction would have been inconsistent with the design of Congress as a national body. However, instruction on the *state* level did not raise these concerns, and even in rejecting proposals for instruction at the federal level, Members of Congress recognized the prevalence of the practice in the states. *See id.* at 774 (Burke) (mentioning that the Massachusetts, Pennsylvania, and North Carolina constitutions included the right to instruct); *id.* at 772 (Wadsworth) (recognizing that instructions "have frequently been given to the representatives of the United States"); *see also Cook v. Gralike*, 531 U.S. 510, 529-30 (2001) (Kennedy, J., concurring) ("The fact that the Members of the First Congress decided not to codify a right to instruct legislative representatives does not, in my view, prove that they intended to prohibit nonbinding petitions or memorials by the State as an entity.").

While voter instruction was viewed as incompatible with Congress's duty to act on behalf of the American people as a whole, state constitutions well into the Nineteenth Century continued to reflect Founding-era principles of popular sovereignty, including the right to instruct. *See* Luce, *supra*, at 448-55 (describing the inclusion of voter instruction provision in state constitutions from colonial times through the Nineteenth Century). Importantly, this was true of the California Constitution, which recognized "the peo-

ple['s]" right to "alter or reform" their government, as well as the right to "instruct their representatives." *See* Cal. Const. of 1849, art. I, § 2 ("All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people; and they have the right to alter or reform the same, whenever the public good may require it."); *id.* at § 10 ("The people shall have the right freely to assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances."). While advisory ballot measures like Proposition 49 are not as coercive as voter instructions, they are certainly permissible whether or not binding instructions would be. Indeed, to the extent that many modern courts have problems upholding binding instructions, allowing advisory measures is at least a way to give some life to the core of the state constitutional right to instruct, and is a key way to ensure that the voters' constitutional views are transmitted to and understood by their elected representatives.

In sum, Article V's textual grant of power to state legislatures, the fundamental constitutional principle of popular sovereignty, and the constitutional backdrop of popular control of state legislatures all provide strong support for allowing Proposition 49 on the ballot. As the next Part demonstrates, this conclusion is also supported by more than a century of historical practice, as various states, including California, have used advisory ballot measures as part of the Article V amendment process.

II. Throughout Our Nation's History, States—Including California—Have Used Advisory Ballot Measures To Promote Constitutional Change.

At various times in our nation's history, states have used advisory ballot measures as part of the Article V amendment process. Far from being inconsistent with the principles of representative democracy, these measures promote the principle of popular sovereignty at the U.S. Constitution's core, recognizing that it is the American people's right to change the Constitution when it is necessary for the public good.

While voters may signal their constitutional preferences in both federal and state elections, these contests are imperfect proxies for the constitutional views of the American people. With countless issues at stake in any given election, the final outcome may say little about the public's widely held view on a discrete constitutional issue. Advisory measures like Proposition 49 provide a useful way for the voters in a given state to register their own views in a direct, official way, allowing their representatives to take them into account when deciding whether to promote a given constitutional reform.

Of course, the result of a given advisory measure does not bind state legislators or members of Congress, nor is it required as part of the Article V amendment process. Nevertheless, it is a permissible—and useful—way to ensure that the American people's elected representatives are notified of their constituents' constitutional preferences. And our nation's history shows that states have sometimes used these devices to fulfill Article V's purpose of obtaining constitutional amendments "generally wished for by the people." 4 *Elliot's Debates* at 177 (James Iredell).

A. The Ratification Of The Seventeenth Amendment Was Driven By State-Based Efforts, Including California's Use Of An Advisory Ballot Measure.

The Seventeenth Amendment's ratification history demonstrates the vital role that the states may play in driving constitutional change, including through the use of advisory ballot measures. Gerard N. Magliocca, *State Calls for an Article Five Convention: Mobilization and Interpretation*, 2009 Cardozo L. Rev. De Novo 74, 79 (2009) (describing the state-based push for the Seventeenth Amendments as "[w]ithout question" the "most successful invocation of Article Five by the states"). The Seventeenth Amendment provides for the direct election of Senators. U.S. Const. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . . ."). Prior to the Amendment's ratification, U.S. Senators were traditionally selected by members of each state legislature—not by the American people. Over time, various states began experimenting with different ways of providing the voters with a voice in selecting their own Senators.

The simplest approach was to allow voters to select their party's candidate in direct primary elections—a vote that was often decisive in single-party states, particularly in the South. Amar, *America's Constitution, supra*, at 411. Another popular approach—known as the "Oregon Plan"—allowed for a statewide advisory vote, during which state voters expressed their preference for U.S. Senator. *Id.* In many states, state legislators would then pledge support for the winner of this popular vote or voters would expressly "instruct" the state legislature to follow their preferences. *Id.* Some states went even further than that, indicating on the state ballot whether a candidate for state legislature pledged his support for the "people's choice for United States Senator." Ralph A. Rossum, *California and the Seventeenth Amendment, in The California Republic: Institu-*

tions, Statesmanship, and Policies 67, 84 (Brian P. Janiskee & Ken Masugi eds., 2004) (describing the law on the books in Nebraska). In the end, by the time the American people ratified the Seventeenth Amendment in 1913, more than half of the states already allowed some type of popular input in their selection of Senators, with thirty-three providing for direct primaries and another twelve implementing the Oregon system. Amar, *America's Constitution*, *supra*, at 412; Rossum, *California and the Seventeenth Amendment*, *supra*, at 83.

Even as the movement to provide for the popular election of Senators grew, the Senate itself used its role in the Article V amendment process to protect the status quo and block proposed amendments. In response, state legislatures used their Article V proposal power to spur the Senate into action.

Between 1894 and 1912, precursors to the Seventeenth Amendment passed the U.S. House of Representatives several times. Magliocca, *supra*, at 79. Furthermore, Congress received hundreds of proposals, memorials, and petitions from various states and organizations—with the California Legislature sending the first memorial to Congress on the issue in 1874. C.H. Hoebeke, *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment* 136 (1995); Rossum, *California and the Seventeenth Amendment*, *supra*, at 83. However, as the Senate continued to block these changes, reformers appealed to state voters and state legislatures; in turn, state legislatures used their Article V proposal power to apply to Congress for a constitutional convention. Magliocca, *supra*, at 79. Over time, thirty-one states invoked Article V and called for such a convention—only one shy of the total required at the time. *Id.* Faced with this threat, the

Senate finally acquiesced, passing the new amendment in 1912 and sending it along to the states for ratification.

As part of this state-driven process, the California legislature placed an advisory measure on the ballot in 1892, asking whether U.S. Senators should be directly elected by the people. Rossum, *California and the Seventeenth Amendment*, *supra*, at 83. California voters approved of the measure by an overwhelming margin—187,987 to 13,342. Ralph A. Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy* 199 (2001). And in 1893, California became the first state to apply to Congress for a constitutional convention focused on the direct election of Senators—the beginning of a multi-decade campaign that culminated in the ratification of the Seventeenth Amendment in 1913. Hoebeke, *supra*, at 149; Rossum, *California and the Seventeenth Amendment*, *supra*, at 84-85.

B. States Used Advisory Ballot Measures As Part Of The Successful Push To End Prohibition.

States also used advisory ballot measures during the drive to ratify the Twenty-First Amendment, which repealed the Eighteenth Amendment and ended our nationwide experiment in Prohibition. U.S. Const. amend. XXI ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed."). Interestingly, this was the first (and only) Amendment ratified by state conventions rather than state legislatures, with states using advisory measures at both the proposal and ratification stages. Amar, *America's Constitution*, *supra*, at 416-17.

For instance, between 1926 and 1932, Connecticut, Louisiana, Massachusetts, Nevada, and Wyoming all used advisory measures to test their voters' views about repealing Prohibition. In 1926, Nevada held a referendum asking voters whether the Eighteenth Amendment should be repealed, David E. Kyvig, *Repealing National Prohibition* 68-69 (2000), with Nevadans voting 18,000 to 5,000 in favor of repeal, Joseph Percival Pollard, *The Road to Repeal: Submission to Conventions* 122 (1932). Similarly, in 1928, voters in the vast majority of Massachusetts's state senatorial districts (36 of 40) weighed in on an advisory ballot measure asking whether the "Senator from this district [should] be instructed to vote for a resolution requesting Congress to take action for the repeal of the Eighteenth Amendment to the Constitution of the United States, known as the Prohibition Amendment." *See* Luce, *supra*, at 476. Once again, voters offered widespread support for repeal, with a majority of voters in all but two of the relevant districts voting yes, and with sixty-three percent of voters overall favoring repeal of the Eighteenth Amendment. *Id.* at 476-77.

From there, in 1932, Connecticut, Wyoming, and Louisiana all passed ballot measures expressing support for repeal in various ways. Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1, 83 (1999). By a seven-to-one margin, Connecticut voters petitioned Congress to propose a repeal amendment. *Id.* By a two-to-one margin, Wyoming voters called upon their Secretary of State to send a "memorial" to Congress, explaining that the state's voters supported repeal. *Id.* And Louisiana voters directed

Congress to call a federal convention to consider the repeal of the Eighteenth Amendment. *Id.*

After this outpouring of popular support for repeal, Congress eventually sent the Twenty-First Amendment to the states for ratification through state conventions. As part of the ratification process, Oregon held a special referendum in 1933 designed "[t]o instruct the delegates to the constitutional convention as to whether the electors of the respective counties of the state of Oregon desire . . . the adoption of the proposed article of amendment." *Id.* at 86. Sixty-five percent of Oregonians voted yes, and, in August 1933, the Oregon state convention voted to ratify the Twenty-First Amendment. *Id.* at 86-87. And, of course, across the country, elections for convention delegates were essentially an advisory vote on repeal, with nearly every state offering separate slates pledged to favor or oppose the proposed amendment and the conventions themselves involving little deliberation. Kyvig, *Repealing National Prohibition, supra*, at 173-74. Indeed, the push to use state ratifying conventions was driven by the anti-Prohibition reformers' explicit desire to appeal to the American people directly on the issue of repeal rather than relying upon malapportioned state legislatures. *See id.* at 140, 173-74, 180-81; David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*, at 278-87 (1996).

C. *Advisory Ballot Measures Have Also Been Used In Other Constitutional Reform Efforts, Including As Part Of The Current Push To Address The Consequences Of* Citizens United.

While the use of advisory ballot measures were perhaps most successful in the constitutional reform contexts of the Seventeenth and Twenty-First Amendments, they

have also been employed in other efforts. For instance, after congressional approval of the ultimately-unsuccessful Child Labor Amendment in 1924, Massachusetts used an advisory measure as a tool for deciding whether to ratify it. *Id.* at 259-60. Similarly, Nevada placed an advisory measure on the ballot asking whether the Equal Rights Amendment should be ratified by the Nevada Legislature, a measure that was upheld by then-Justice Rehnquist in *Kimble v. Swackhamer*, 439 U.S. 1385 (1978) (Rehnquist, J., in chambers). And, as recently as 2010, Florida placed an advisory question on its ballot to assess public support for a federal balanced budget amendment, Legislature's Br. App. at 2; *see also Florida Federal Budget Advisory Question (2010)*, Ballotpedia.org, http://ballotpedia.org/Florida_Federal_Budget_Advisory_Question_%282010%29 (last visited Jan. 28, 2015). Although none of these overall reform pushes proved successful, these measures allowed for popular input as part of the federal amendment process.

Various states and localities are already using advisory ballot measures analogous to Proposition 49 to push constitutional reforms to address the consequences of the Supreme Court's decision in *Citizens United*. For instance, both Colorado and Montana placed statewide measures on their ballots in November 2012, with both measures passing by over seventy percent of the vote. *See Colorado Corporate Contributions Amendment, Amendment 65 (2012)*, Ballotpedia.org, http://ballotpedia.org/Colorado_Corporate_Contributions_Amendment,_Amendment_65_%282012%29 (last visited Jan. 28, 2015); *Montana Corporate Contributions Initiative, I-166 (2012)*, Ballotpedia.org, http://ballotpedia.org/Montana_Corporate_Contributions_Initiative,_I-166_%282012%29 (last visited Jan. 28, 2015). Colorado's measure directed its congressional delegation to

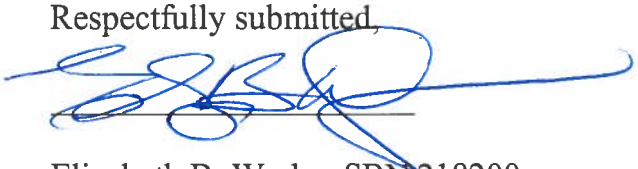
propose and support a constitutional amendment that "allows [C]ongress and the states to limit campaign contributions and spending" so as to "ensure that all citizens, regardless of wealth, can express their views to one another and their government on a level playing field." Colo. Rev. Stat. § 1-45-103.7(9)(a). Montana's measure was directed at corporate personhood, calling upon Montana's congressional delegation to "propos[e] a joint resolution offering an amendment to the United States Constitution establishing that corporations are not human beings entitled to constitutional rights." *Montana Corporate Contributions Initiative*, *supra*. All told, more than one hundred cities and counties have already approved of similar advisory measures. Neil K. Sawhney, Note, *Advisory Initiatives as a Cure for the Ills of Direct Democracy? A Case Study of Montana Initiative 166*, 24 Stan. L. & Pol'y Rev. 589, 590 n.6 (2013).

Finally, California state law explicitly authorizes "advisory election[s]" by cities, counties, and school districts, during which voters may "voice their opinions on substantive issues, or to indicate to the local legislative body approval or disapproval of the ballot proposal." Cal. Elec. Code § 9603(a). Local jurisdictions in California, including the City of Los Angeles and Mendocino County, have already used this power to place Proposition 49 analogues on their local ballots. Legislature's Br. 47. The California Legislature is simply trying to use its initiative power to do the same at the statewide level, and there is no federal constitutional impediment to this endeavor.

CONCLUSION

Amicus respectfully urges this Court to uphold the California Legislature's authority to place Proposition 49 on the California ballot and to solicit the views of California voters on an important topic of public concern—whether to amend the U.S. Constitution to overturn *Citizens United*. While we express no view about the wisdom of this specific constitutional proposal, the state legislature's act of placing such an advisory measure on the state ballot is consistent with the principle of popular sovereignty at the core of our nation's charter, the text and history of Article V, and the use of such measures as part of the Article V process throughout American history.

Respectfully submitted,



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January 29, 2015

Case No. S220289

In the Supreme Court of the State of California

HOWARD JARVIS TAXPAYERS ASSOCIATION AND JON COUPAL, PETITIONERS

v.

DEBRA BOWEN, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF THE STATE OF CALIFORNIA, RESPONDENT

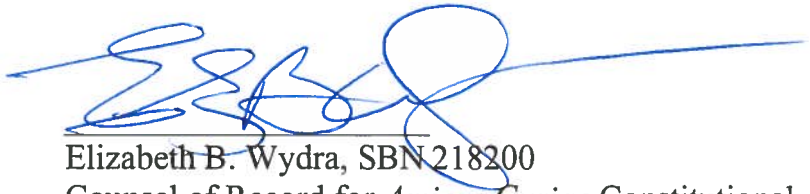
LEGISLATURE OF THE STATE OF CALIFORNIA, REAL PARTY IN INTEREST

RULES 8.204(c)(1) AND 8.520(c)(1) CERTIFICATE OF COMPLIANCE

As required by California Rules of Court 8.204(c)(1) and 8.520(c)(1), I certify that the Brief *Amicus Curiae* of Constitutional Accountability Center in Support of Real Party in Interest is printed in 13-point Times New Roman font and contains 6,367 words, excluding the parts of the document that are exempted by California Rules of Court 8.204(c)(3) and 8.520(c)(3). Counsel relies on the word count of the computer program, Microsoft Word, used to prepare this brief.

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

Executed on January 29, 2015.



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CERTIFICATE OF SERVICE

I, Elizabeth B. Wydra, do hereby declare that on January 29, 2015, I am an active member of the State Bar of California and am not a party to the cause. My business address is 1200 18th Street, NW, Suite 501, Washington, D.C. 20036.

As required by California Rule of Court 8.25(a), on January 29, 2015, I have caused to be served by overnight, postage pre-paid the Application for Leave to File *Amicus Curiae* Brief and *Amicus Curiae* Brief of Constitutional Accountability Center in Support of Real Party in Interest on counsel for each party by placing said document in a sealed envelope and depositing said envelope with Federal Express in Washington, D.C., addressed to said counsel, in the ordinary course of business. I have also caused true copies of PDF versions of said document to be sent to each email address listed below. In short, I have served said document on counsel for each party to the above proceedings as follows:

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

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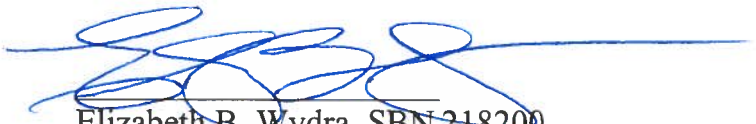

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