Case Number:

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

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HOWARD JARVIS TAXPAYERS ASSOCIATION,
DAVID JOHN SHAWVER, BROOKE PAZ,
RYAN HOSKINS and AMANDA McGUIRE
Petitioners,

v.

ALEX PADILLA,
in his official capacity as the Secretary of State of the State of California,
Respondent,

THE CALIFORNIA LEGISLATURE,
Real Party in Interest.

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**ORIGINAL WRIT PROCEEDING**
**IMMEDIATE RELIEF REQUESTED**

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# EMERGENCY PETITION FOR WRIT OF MANDATE AND REQUEST FOR IMMEDIATE STAY

## MEMORANDUM OF POINTS AND AUTHORITIES

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**ELECTION LAW MATTER ENTITLED TO CALENDAR PREFERENCE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE §35; ELECTION CODE § 13314(a)(3).**

**Critical Date: August 24, 2017**

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Third Appellate District

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Petitioners hereby certify that they are not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

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## PETITION FOR WRIT OF MANDATE

## AND REQUEST FOR IMMEDIATE STAY

TO THE HONORABLE PRESIDING JUSTICE OF THE THIRD DISTRICT COURT OF APPEAL AND HONORABLE ASSOCIATE JUSTICES:

Petitioners are the Howard Jarvis Taxpayers Association and proponents of a petition to recall State Senator Josh Newman. After collecting well over the number of signatures on the petition needed to compel an ***immediate*** recall election, the Legislature passed, and the Governor signed SB 96, a "budget-trailer" bill, that brazenly expressed their intent to interfere with and indefinitely delay the immediate election that the recall petition and constitution commands. Section 1 of SB 96 states:

> It is the Legislature's intent that the changes made by this act in the Elections Code apply retroactively to recalls that are pending at any stage at the time of the act's enactment…

As described more fully below, they seek to accomplish this delay by ***prohibiting*** Respondent, the Secretary of State, from performing his ministerial duty to certify the sufficiency of the recall petition until such time as the Governor and Legislature determine. SB 96 is unconstitutional in at least three respects:

First, and most importantly, the attempted retroactive interference in a recall process that has already commenced for the express purpose of nullifying, through unreasonable delay, Petitioners' constitutionally-vested right, violates both due process and equal protection of the law.

Second, SB 96 clearly violates the single-subject rule for legislation (Cal. Const. Art. IV, § 9 ["A statute shall embrace but one subject"]), which has been deemed to apply to budget trailer bills by our Supreme Court in

*Harbor v. Deukmejian*. SB 96 amends or adds provisions to the Elections Code, the Government Code, the Labor Code, the Military and Veterans Code, the Public Contracts Code, and the Revenue and Taxation Code on subjects *literally ranging from A-to-V* (asbestos-related work illnesses to veteran cemeteries).

Lastly, SB96 clearly violates the single-appropriation rule for legislation. (Cal. Const. Art. IV, § 12(d) ["No bill except the budget bill may contain more than one item of appropriation"]) by making at least two distinct appropriations (SEC. 89 - Continuous appropriation from Veterans Cemetery Maintenance Fund and SEC. 93 - $5 million from General Fund to Department of Finance).

Under the California Constitution and Elections Code provisions that existed prior to the Legislature's unlawful repeal and amendment of several applicable statutes, Petitioners' recall petition would have triggered an election occurring not less than 60 nor more than 80 days from the date of the Secretary of State's certification that the petition contained a sufficient number of signatures from registered voters (certification most likely on or about August 14, 2017 resulting in an election in November, 2017). Absent this court's intervention, the Legislature and Governor will be able to delay the required election ***indefinitely*** – or at least until June, 2018, more than a year after Petitioners commenced the recall process. Assuming that the election is postponed until June, 2018, Senator Newman will be able to vote on thousands of bills heard in the second year of the biennium session instead of his replacement – in other words, the Legislature will have won and the people will have lost.

Therefore, Petitioners seek an ***emergency stay*** of this court to prevent Respondent from enforcing any provision of SB 96 as it relates to the proposed recall of Senator Newman, and thereafter order him to certify

the sufficiency of the recall petition, as required by applicable law in effect at the commencement of this recall process and prior to the unlawful enactment of SB 96. Petitioners have no other plain, speedy, or adequate remedy at law. Any delay by this, or any other court, will effectively give the Legislature exactly what it sought by enacting SB 96 – the indefinite delay of the recall election of one of its own Members in complete disregard of the requirements of our Constitution. **Petitioners request this court's immediate action on or before August 24, 2017**, or as soon thereafter as possible.

By this verified petition, Petitioners allege as follows:

## JURISDICTION

1. This Court has original jurisdiction over this matter pursuant to article VI, section 10 of the California Constitution, Elections Code section 13314, Code of Civil Procedure sections 1085 and 1086 and Rule 8.485 of the California Rules of Court, to decide a dispute where, as here, the case presents issues of great public importance that must be resolved promptly. This petition presents such a case where the constitutionally-guaranteed power to recall and replace an elected representative in a timely manner is directly threatened by the purported enactment of legislation intended to apply retroactively to Petitioners' recall petition. This is especially so where the purported enactment of the legislation is so clearly, positively and un-mistakeably unconstitutional on its face and as applied specifically to Petitioners.

2. Petitioners are entitled to the relief sought because they do not have a "plain, speedy, and adequate remedy, in the ordinary course of law." (Code of Civ. Proc., § 1086.) While a superior court would also have jurisdiction over this matter, our Supreme Court has recognized that it and the appellate courts have frequently exercised invocation of original

jurisdiction in "cases involving significant legal issues affecting the electoral process." (*Vandermost v. Bowen* (2012) 53 Cal. 4th 421, 453.) Commencing this action in the superior court would invariably result in a request for review or writ relief in this court by the losing party regardless of the outcome in the trial court. However, since delay is the Legislature's ultimate goal, prolonging the process of review of this important question of law would effectively deny Petitioners any chance for the remedy they are entitled to receive.

## PARTIES

3. Petitioner **HOWARD JARVIS TAXPAYERS ASSOCIATION** is a non-profit organization dedicated to protecting the interests of taxpayers in the Legislature and at the ballot box. Several of its members are official proponents of the recall effort and it has helped fund the recall petition effort.

4. Petitioners **DAVID JOHN SHAWVER, BROOKE PAZ, RYAN HOSKINS,** and **AMANDA McGUIRE** are registered voters and taxpayers in the 29th Senatorial District and are among the 58 "proponents" of the recall petition at issue herein. It is Petitioners' constitutional rights that are directly affected by SB 96 as well as the interests and constitutional rights of the tens of thousands of persons who have already signed the recall petition at the time this action was commenced.

5. Respondent **SECRETARY OF STATE ALEX PADILLA**, is the elections official charged with the duty to certify the qualification of the recall petition after having received signature verification certificates from the three county Registrars of Voters that are elections officials within the 29th Senatorial district and who have received recall petitions submitted by Petitioners.

6. Real Party in interest, the **CALIFORNIA LEGISLATURE**, passed SB 96 as a "budget-related" trailer bill on June 15, 2017. It was signed by the Governor on June 27, 2017. (See petitioners' Request for Judicial Notice ("RJN"), "Exhibit 1".)

## FACTS

7. On April 6, 2017, Senator Josh Newman voted to approve SB 1, a bill that imposed over $5 billion in new annual taxes on cars and gasoline. Because the bill imposed new taxes, it required a two-thirds vote of both houses of the Legislature. The bill passed the Senate with the bare-minimum number of votes necessary, meaning Senator Newman was a deciding vote that resulted in the enactment of the new taxes. RJN "Exhibit 2".

8. Petitioners commenced the recall of Senator Newman immediately after his vote. Within eleven days thereafter, Petitioners physically served Senator Newman with a Notice of Intent to Recall, citing their statement of reasons for the recall, all pursuant to Elections Code sections 11020 and 11021. Two days later, on April 19, 2017, Petitioners filed their Notice of Intention and proof of service with Respondent. (RJN "Exhibit 3") (Elec. Code §§ 11006, 11021.) On April 20, 2017, Petitioners published their Notice of Intention as required by law. (RJN "Exhibit 4") (Elec. Code § 11022.)

9. The Elections Code provides the subject of a proposed recall the right to "answer" the proponents statement of reasons within seven days from the filing of the Notice of Intent (Elec. Code § 11023). Senator Newman filed an "answer" with Respondent on April 24, 2017, and upon request, Respondent provided the answer to the proponents' legal counsel on April 27, 2017. (RJN "Exhibit 5")

10. The Elections Code required the proponents to submit, for Respondent's approval, copies of recall petitions it proposed to circulate among the voters within 10 days of the receipt of the official's answer (Elec. Code § 11042.) Petitioners submitted copies of their proposed petition on April 28, 2017, the day after receiving Senator Newman's answer from Respondent. (RJN "Exhibit 6") Notably, the Governor also signed SB 1 on April 28, 2017. (RJN "Exhibit 2")

11. Respondent had ten days to approve the recall petition format (Elec. Code § 11042.) On the tenth day, May 8, 2017, Respondent approved two different petition formats and informed Petitioners that they could commence circulating their petition among the voters of the 29th Senatorial District. (RJN "Exhibit 7")

12. Thus, within 33 days from Senator Newman's vote on SB 1, seventeen days of which Senator Newman and Respondent were responsible for, Petitioners had commenced and received official approval from Respondent to commence the petition gathering process to institute a recall election of Senator Newman.

13. The Constitution requires a recall petition of a state legislative officer to contain signatures representing 20% of the total number of votes cast for candidates for that office in the last election. (Cal. Const. Art. II, § 14(b).) Respondent determined that total number of votes cast in 2016 in the 29th Senatorial District was 317,962. Thus the recall petition would require signatures of registered voters within that district totaling 63,593. (RJN "Exhibit 8")

14. The Constitution also provides proponents *up to* 160 days to circulate and submit their recall petition to the appropriate elections officials within the 29th Senatorial district. (Cal. Const. Art. II, § 14(a).)

15. Despite having 160 days to circulate the recall petition, Petitioners desired the immediate recall of Senator Newman, so stating in the recall petition itself: "Josh Newman should be recalled immediately and replaced by a Senator that shares our values." (RJN "Exhibit 6") An *immediate* recall is provided for in the Constitution. Section 15(a) of Article II provides that a recall election shall be held "not less than 60 days nor more than 80 days from the date of certification of sufficient signatures."

16. The gas tax increase enacted by SB 1 goes into effect on November 1, 2017. (Rev. & Tax Code § 7360(c).) That date, is also a traditional time for elections in the state of California. (Elec. Code § 1001(d) ["The established election dates are the first Tuesday after the first Monday in November of each year."].)

17. Based on the 60-80 day election date window provided in the Constitution, Petitioners knew that they could not use the entire 160 day period to collect recall petition sections. In particular, the Constitution provides one exception to the 60-80 day election timetable. If a recall petition is certified on a date within 180 days of a regularly scheduled election occurring partially within in the 29th Senate District, the Governor can set the election on that date instead. June 5, 2018 is the next regularly scheduled election (the state primary election) in the 29th Senate District. Thus, if the recall petition was certified on or after December 7, 2017, the Governor could set the election for June 5, 2018, *more than a full year* after the recall process commenced. If the recall election was certified on or after May 10, 2018, the Governor could even set the election for November 6, 2018.

18. Both the Constitution and the signature verification process provided for in the Elections Code set forth specific time allotments for the

various procedures and actions required to compel a recall election. That allows the recall proponents the opportunity to force an immediate election based on the time a recall is commenced and the pace with which petition signatures are obtained. In short, so long as the recall petitions were certified by Respondent before December 7, 2017, the election would have had to be called within 60-80 days from the date of that certification.

19. Petitioners were fully aware of this requirement and acted based on the Constitutional right to an immediate and speedy election and the existing Elections Code procedures for submitting and verifying petition signatures. Petitioners calculated that as long as the recall petition was certified by Respondent on or before September 7, 2017, the Governor could easily choose to call the recall election for November 7, 2017 (a traditional established election day).

20. Petitioners set about achieving that goal. Unlike an initiative or referendum petition which must be turned in to elections officials at one time, a recall petition can be turned in to election officials as frequently as desired. Petitioners began submitting signed recall petitions almost immediately. The 29th Senate District includes a large part of Orange County and small parts of Los Angeles and San Bernardino Counties.

21. On May 31, 2017, Petitioners filed 31,061 signatures with the three relevant county elections officials. (RJN "Exhibit 9") This submission triggered Respondent notifying each of the three elections officials that Petitioners had submitted more than 10% of the total number of signatures needed and thus, the elections officials shall commence verification of the petition signatures. (Elec. Code § 11104(d).) That notice was issued by Respondent on June 8, 2017. (RJN "Exhibit 10").

22. Petitioners continued to collect recall petition signatures at a very fast pace. Petitions were filed on June 6, June 13, June 19, June 27, and June 30, 2017. As reported by each of the three county elections officials on their official reports to Respondent on July 7, 2017, Petitioners had submitted a total of 87,884 petition signatures through their June 30 submission. (RJN "Exhibit 11") Because of the uncertainty created by SB 96, Petitioners have continued to submit thousands of additional signatures to the three county elections officials, at great expense, though it is unlikely that any of those signatures are needed to qualify the recall. As of July 7, 2017, another 8,631 petition signatures were submitted to the three county elections officials. (RJN "Exhibit 12")

23. The recall petition was circulated among the voters in a variety of ways, including by a professional petition circulation company, by mail, and by volunteers. Most of the signatures were obtained by professional petition circulators. All of the petition signatures were validated by the professional petition circulator using the voter file obtained from each of the three counties. Petitioners are informed and believe that over 80% of all petition signatures submitted are from validly registered voters in the 29th Senate District. Indeed, the first validity check reported to Respondent by two of the three county elections officials reports a validity rate of between 83 - 86%. (RJN "Exhibit 11")

24. Based on the gross number of signatures recorded on the July 7, 2017 report, the recall petition will easily qualify based on the current projected and actual reported validity rate (i.e. 80% of 87,884 = 70,307 valid signatures – over 6,700 more than necessary) This amount excludes the 8,631 signatures submitted after the cut-off for the July 7, 2017 report.

25. Prior to the purported enactment of SB 96, Respondent would have received notification from the three county election officials that the

recall petitions contained the requisite number of valid signatures (based on a 3% random sample) on or about August 14, 2017. That date is 30 working days from the June 30, 2017 submission which, combined with prior submissions, will result in qualification of the recall (Elec. Code § 11105 – repealed by SB 96.) Even if the elections officials verified every signature (as now required by SB 96), the 30-working day deadline would have been the same, August 14, 2017.

26. Under the Elections Code prior to the purported enactment of SB 96, upon notification from the three elections officials that the recall petition contains enough valid signatures of voters in the 29th Senate District, Respondent would then be required to certify that fact within 10 days and notify the Governor to set the recall election date. (Elec. Code §§ 11108, 11109.)

27. August 24, 2017 is the likely day Respondent would have certified the sufficiency of Petitioners' recall petition and notified the Governor to call an election, prior to SB 96.

28. Thus, based on Petitioners' reliance on the Elections Code provisions that existed at the time their recall commenced, (and at the time petitioners had filed a sufficient number of signatures to qualify) they believed that the recall election would legally be required to be called between 60 and 80 days from August 24, 2017 – in other words between October 23, 2017 and November 12, 2017 – which was their "target date".

29. On January 11, 2017, SB 96 was introduced by the Committee on Budget and Fiscal Review. It had no substantive provisions, just one section that stated "It is the intent of the Legislature to enact statutory changed relating to the Budget Act of 2017." (RJN "Exhibit 13")

Bills that contain no substantive provisions of law are referred to as "spot bills."

30. It passed the Senate as introduced and was amended in the Assembly on June 9, 2017. (RJN "Exhibit 14") The Assembly amendments were the first introduction of the many provisions now found in SB 96. The Assembly passed the bill, as amended, on June 15, 2017, and the Senate quickly concurred in those amendments that same day. The bill was presented to the Governor on June 22, 2017 and he signed it on June 27, 2017 along with the state Budget and several other "budget-related" trailer bills. (RJN "Exhibit 14") By that date, Petitioners had already submitted petition signatures well over the amount required to compel a recall election.

31. On June 28, 2017, Respondent issued a memorandum to the three county elections officials, counsel for Senator Newman, and counsel for Petitioners with the subject line "REVISED RECALL OF STATE SENATOR JOSH NEWMAN, STATE SENATE DISTRICT 29; CALENDAR OF EVENTS." (RJN "Exhibit 15") Petitioners are informed and believe, and on that basis allege that Respondent fully intends to implement SB 96. He will therefore withhold his certification of the recall petition within 10 days of receipt of certifications from the three county elections officials showing that the petition contains the requisite number of valid signatures, thereby resulting in an indefinite delay of the election.

32. SB 96 is divided into 95 separate sections. (RJN "Exhibit 1") Sections 1 – 6 of the bill relate to the present recall proceeding. The bill attempts to impose delay in the recall process in three ways:

First, the bill eliminates the statutory authority for the county elections official to verify petition signatures using a random sample methodology (Secs. 2 and 3 of SB 96.)

Second, the bill creates a ***new supplemental*** period for a person to "withdraw" his or her signature from the recall petition. This period adds nearly two months (a total of 40 working days) to the signature verification and certification process (Sec. 5 of SB 96.) This new withdrawal procedure is added to the ***existing withdrawal procedure*** already provided for in Elections Code sections 103 and 11303.

Lastly, the bill ***prohibits*** Respondent from certifying the recall petition, after having been informed by the county elections officials, by their individual certificates, that the recall petition has been signed by the requisite number of registered voters to compel a recall election. This prohibition continues until the Governor's Department of Finance and the Legislature have had an opportunity to "estimate the costs of the recall election." (Sec. 5 of SB 96.) SB 96 provides ***no time period or limit to complete this cost estimate.*** This requirement is imposed despite the fact that the cost of an election is irrelevant to the determination as to the sufficiency of the petition and the ministerial duty to order an election date. In other words, the Legislature, through the Department of Finance, can now delay the recall election demanded by Petitioners' petition and the Constitution ***indefinitely***.

33. Interestingly, the projected costs of a recall election have been widely cited by Real Party and opponents of the recall over the course of the last two months. Indeed, SB 96 provides an appropriation of $5 million for recall election costs (Sec. 93.) It is not clear why Real Party needs another "estimate" of such costs other than as a pretext for delaying

Respondent from performing his ministerial function to certify the recall petition.

34. On Friday, July 7, 2017, the three county registrars of voters provided Respondent with the statutorily-required "report" of the status of the petitioning process in their respective counties. That report included the cumulative total number of petition signatures received by that official since the time the recall was initiated through July 2, 2017. The three reports submitted to Respondent show that 87,884 total signatures were submitted to the three counties comprising the 29th Senate District. Only 63,593 valid petition signatures are needed to compel an immediate election.

35. Based on the actual rate of validity shown on the same report and based on Petitioners' information and belief, it is clear that the recall petition already contains a sufficient number of valid signatures to trigger an immediate recall election. Absent SB 96, it is also clear that Respondent would likely certify that fact on or before August 24, 2017. Thereafter, the Governor would be required to set an election not less than 60 days and not more than 80 days from that date.

36. If allowed to stand un-impeded by this court, Respondent and Real Party will be able to delay the recall election indefinitely. Even assuming their motivation was to hold the election in June, 2018, or even later, that would be *over a year* after the recall process was commenced and would not be in conformance with the immediate and speedy recall provided for in the Constitution and the statutes in place at the time the recall was commenced and at the time a sufficient number of valid signatures were presented to the elections officials in Senate district 29.

37. Therefore, Petitioners urgently seek relief in this court to rule on the validity and constitutionality of SB 96 both on its face and as applied to Petitioners. In doing so, they ask this court to preserve their constitutional right to an immediate and speedy recall election that was obtained in due and appropriate reliance on the law that existed at the time the process was commenced, and for which they have expended considerable energy and money.

38. In addition, Petitioners have been compelled by the action of Real Party to commence this legal proceeding at additional expense to preserve and protect the constitutional rights of tens of thousands of voters and residents of the 29th Senate District who desire the immediate removal of Senator Newman and the opportunity to replace him.

**RELIEF REQUESTED**

Wherefore, Petitioners respectfully request that this Court:

1. Issue an immediate temporary stay to prevent Respondent from enforcing any provision of SB 96 as it relates to the proposed recall of Senator Josh Newman of the 29th Senate District;
2. Issue a peremptory writ of mandate, or such other extraordinary relief as warranted, directing Respondent to certify the sufficiency of Petitioners' recall petition pursuant to the Elections Code provisions as they existed prior to the enactment of SB 96;
3. Award Petitioners their reasonable attorneys' fees and costs; and
4. Order such other relief as may be just and proper.

Dated: July 20, 2017

Respectfully submitted,
BELL, McANDREWS & HILTACHK, LLP

By: _____
Thomas W. Hiltachk
Attorney for Petitioners

VERIFICATION

I, JON COUPAL, am the President of Petitioner HOWARD JARVIS TAXPAYERS ASSOCIATION herein. I have read this Verified Petition for Writ of Mandate and have personal knowledge of the contents stated therein and believe them to be true.

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

Executed on this 11th day of July 2017 in Sacramento, California.

JON COUPAL, President
HOWARD JARVIS TAXPAYER ASSOCIATION

VERIFICATION

I, DAVID JOHN SHAWVER, am a petitioner in this action.

I have read this Verified Petition for Writ of Mandate and have personal knowledge of the contents stated therein and believe them to be true.

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

Executed on this 14 day of July 2017 in STANTON, California.

David John Shawver

DAVID JOHN SHAWVER

## VERIFICATION

I, BROOKE PAZ, am a petitioner in this action.

I have read this Verified Petition for Writ of Mandate and have personal knowledge of the contents stated therein and believe them to be true.

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

Executed on this 15th day of July 2017 in Chino Hills, California.

BROOKE PAZ

## VERIFICATION

I, AMANDA MCGUIRE, am a petitioner in this action.

I have read this Verified Petition for Writ of Mandate and have personal knowledge of the contents stated therein and believe them to be true.

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

Executed on this 15th day of July 2017 in Chino Hills, California.

AMANDA MCGUIRE

VERIFICATION

I, RYAN HOSKINS, am a petitioner in this action.

I have read this Verified Petition for Writ of Mandate and have personal knowledge of the contents stated therein and believe them to be true.

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

Executed on this 14 day of July 2017 in Yorba Linda, California.

Ryan Hoskins

RYAN HOSKINS

## MEMORANDUM OF POINTS AND AUTHORITIES

## I.

## INTRODUCTION

Petitioners, and nearly one hundred thousand voters in the 29th Senate District regret sending Josh Newman to represent them in the California State Senate. Senator Newman, a freshman Senator, was barely elected last November to a four-year term. Out of over 300,000 votes cast, Senator Newman beat out the incumbent by a mere 2,498 votes. <http://elections.cdn.sos.ca.gov/sov/2016-general/sov/40-state-senators-formatted.pdf> After Senator Newman cast a deciding vote to pass SB 1, a bill imposing a $5 billion annual increase in gas and car taxes, Petitioners immediately commenced the extremely-challenging and costly process of recalling Senator Newman.

The power of recall is provided for in our Constitution and is one of the three powers reserved by the people, the other two being the power of initiative and referendum. (Cal. Const. Art. II, § 13 ["Recall is the power of the electors to remove an elective officer"].) The Constitution also provides that the recall election shall be immediate – within 60-80 days of the certification that the recall petition contains a sufficient number of signatures from registered voters to trigger the election. (Art. II, § 15(a).)

While the use of the recall procedure of a state officer is relatively rare, it was most famously used to recall the incumbent Governor in 2003 – coincidentally largely because of his approval of a massive increase of the car tax. That statewide election was held within the constitutional time period following qualification of recall petition, without incident. (*Southwest Voter Registration Educ. Project v. Shelley,* 244 F.3d 914, 916

(2003) [recall petition qualified on July 23, 2003 and election was held October 7, 2003].)

Pursuant to section 16 of article II of the Constitution, the Legislature has enacted a series of statutory provisions governing the petitioning process, the verification of recall petitions by county election officials, the Secretary of State's certification of the recall, and Governor's duty to call the recall election (Elec. Code §§ 11000 – 11110.)

Based on the Constitution and the applicable Elections Code provisions, Petitioners could easily calculate the time they needed to commence the recall process and the time in which they would have to collect the necessary petition signatures to compel an immediate election to recall Senator Newman during the month of November, 2017 (the month during which the gas tax increase imposed by SB 1 becomes operative). In their quest for an immediate recall election, Petitioners:

1) Commenced the recall process immediately after Senator Newman's vote on SB 1 on April 6;
2) Served Senator Newman personally with the Notice of Intent to Recall, citing their reasons for doing so, on April 17, just eleven days after his vote;
3) Immediately filed their Notice of Intent and proof of service with Respondent on April 19;
4) Published their Notice of Intent on April 20;
5) After the Secretary of State provided Petitioners a copy of Senator Newman's "answer" to the recall on April 27, Petitioners submitted their proposed recall petitions to Respondent for approval the very next day – April 28;

6) Immediately set about collecting the 63,593 petition signatures needed to qualify the recall, after Respondent approved their petition format on May 8;
7) Submitted petitions on May 31, June 6, June 13, June 19, June 27, and June 30, 2017 to the three county registrars of voters that comprise the 29th Senate District (parts of Los Angeles, Orange and San Bernardino counties). As reported by each of the three county elections officials on their report to Respondent dated July 7, 2017, the total number of signatures submitted was 87,884;
8) Continued to collect recall petition signatures at great expense, though such signatures are unnecessary but for the uncertainty caused by SB 96. So far, an additional 8,631 petition signatures have been submitted to the three county election officials.

The Elections Code requires the county elections officials to validate the recall petition signatures submitted within 30 workings days of receipt. (Elec. Code §§ 11104(b), 11105.) Whether validated using a random sample technique (authorized in Elec. Code § 11105) or a full-check of each signature, the 30-working day period for the last submission on June 30, 2017 would end on August 14, 2017. Respondent would, pursuant to Elections Code sections 11108 and 11109, within 10 days of receiving the individual certificates from the three county election officials, issued his own certificate of qualification and alerted the Governor to call an election within 60 and 80 days. Assuming Respondent waited the full 10 days, his certification would have issued on or about August 24, 2017. The recall election would have been called not sooner than October 23, 2017 and not later than November 12, 2017.

The Legislature, in a last-ditch effort to protect one of its own, set about to change the rules of the game in the closing minutes of the fourth-quarter. While it was considering adoption of the annual State Budget, the Assembly amended SB 96, a "spot-bill" that had passed the Senate as a "budget-related" trailer bill. The Assembly amendments added dozens of new, unrelated provisions of law, including a series of amendments and repeals of the recall provisions for state officials (but not local officials). The bill was passed by both houses as a "budget-related" trailer bill on June 15, 2017. The Governor signed the bill on June 27, 2017, despite the fact that Petitioners had already submitted more signatures than necessary to qualify the Newman recall. *Critically, all acts remaining* in the recall process after June 27, 2017 were to be performed by government entities – counties verifying signatures, Secretary of State issuing notices, Governor ordering an election date.

The bill included a statement of intent regarding retroactivity as follows:

> It is the Legislature's intent that the changes made by this act in the Elections Code apply retroactively to recalls that are pending at any stage at the time of the act's enactment…

Sections 1 – 6 of the bill purport to apply to the present recall proceeding. The bill clearly and brazenly attempts to delay the recall election at least until June, 2018, if not indefinitely. If applicable, it achieves that objective by delaying Respondent's certification past December 7, 2017. After that date, the Constitution allows the Governor to call the recall election for the same day as the regularly scheduled statewide election in June, 2018 (Cal. Const. Art. II, § 15(b).) SB 96 achieves such delay in three ways:

First, the bill eliminates the statutory authority for the county elections official to verify petition signatures using a random sample

methodology, which was already underway when SB 96 was enacted (Sec. 2 and 3 of SB 96).

Second, the bill creates a ***new supplemental*** period for a person to "withdraw" his or her signature from the recall petition. This period adds nearly two months (a total of 40 working days) to the signature verification and certification process (Sec. 5 of SB 96). This new withdrawal procedure is added to the ***existing withdrawal procedure*** already provided for in Elections Code sections 103 and 11303.

Lastly, the bill ***prohibits*** Respondent from certifying the recall petition, after having been informed by the county elections officials, by their individual certificates, that the recall petition has been signed by the requisite number of registered voters to compel a recall election, until the Department of Finance has had an opportunity to "estimate the costs of the recall election." (Sec. 5 of SB 96). There is ***no time period or limit provided to complete this cost estimate.*** Thereafter, the Legislature is provided 30 days to review the Department of Finance estimate. The new offending provision of law provides as follows:

> (d) Upon receipt of the notification from the Secretary of State required in subdivision (c) that there is a sufficient number of verified signatures, not including withdrawn signatures, to initiate a recall election, the Department of Finance shall, in consultation with the affected elections officials and the Secretary of State, estimate the costs of the recall election, including expenses for verifying signatures, printing ballots and voter information guides, and operating polling places. The Department shall estimate the costs that would be incurred if (1) the recall election is held as a special election and (2) the recall election is consolidated with the next regularly scheduled election pursuant to subdivision (b) of Section 15 of Article II of the California Constitution. The Department of Finance shall submit the estimate to the Governor, the Secretary of State, and the Chairperson of the Joint Legislative Budget Committee.

> (e) Notwithstanding any other law, ***the Secretary of State shall not certify*** the sufficiency of the signatures under Section 11109 until the Joint Legislative Budget Committee has had 30 days to review and comment on the estimate submitted by the Department of Finance pursuant to subdivision (d).

(Elec. Code § 11108(d) and (e), as amended by SB 96, emphasis added.)

In short, through the Department of Finance, the Legislature and Governor are empowered by SB 96 to delay the recall election demanded by Petitioners' petition and the Constitution ***indefinitely***.[1]

## II.

## WRIT RELIEF IS APPROPRIATE

This case presents an issue of great public importance not only because it affects the Petitioners' constitutional right to recall a state elected official, but because it involves the Legislature's attempt to retroactively change the rules of the game in the course of the voters' execution of a constitutionally reserved power. If permissible here, there is no limit to the ability of the Legislature to make it more difficult, if not impossible, to qualify future initiatives, referenda, and recalls by imposing new retroactive barriers.

Petitioners have no recourse that will preserve their right to an immediate recall election other than action and intervention by this court. In such an instance, writ relief is not only appropriate, but necessary. As indicated more fully below, SB 96 is unconstitutional in at least three respects.

This court has original jurisdiction pursuant to article VI, section 10 of the California Constitution, Elections Code section 13314, Code of Civil

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[1] This feature of the amended section 11108 renders it facially inconsistent with California Constitution, Article II section 15 [setting forth specific timelines for a speedy recall election].

Procedure sections 1085, 1086 and California Rule of Court 8.485. The matter is ripe for determination despite that fact that the recall petition had not been certified. Indeed, the remedy sought is to compel Respondent to issue his certification pursuant to the law that existed prior to the unconstitutional enactment of SB 96.

According to the July 7, 2017 report to Respondent by the three county elections officials, a total of 87,884 total signatures had been submitted by July 2, 2017. Of the signatures validated to that point, the total validity rate of the signatures examined was between 83% and 86%. Thus, if that validity rate holds, as expected, the recall petition will assuredly qualify with well in excess of the 63,593 valid petition signatures needed.

The Supreme Court has ruled that this court has jurisdiction to resolve a matter prior to certification of a petition in circumstances such as this, where it is likely that the petition will, in fact, qualify, and where waiting until after such event has occurred would render it impossible to grant meaningful relief. In *Vandermost v. Bowen, supra*, 53 Cal. 4th 421, 456-57, the court ruled that a matter relating to a referendum petition that had not yet qualified was, nonetheless, ripe for adjudication. The court stated:

> Accordingly, we conclude that, in order to preserve this court's ability to render a meaningful and realistically enforceable decision regarding which districts should be used in the event a proposed referendum qualifies, this court properly may determine that a proposed mandate proceeding is "ripe" for adjudication and may issue an order to show cause in such a proceeding in the absence of a showing that the referendum is "likely to qualify" for placement on the ballot. Given the realities of the timing of redistricting and the statutory electoral process, we hold that this court has authority to find that a mandate action satisfies the ripeness doctrine when we conclude that, in light of the relative probability that the proposed

> referendum will qualify for the ballot and the time limitations and potential detrimental consequences of refusing to consider a mandate petition at that point in time, it is prudent to issue an order to show cause and decide which districts should be used in the upcoming elections in the event the proposed referendum does qualify for placement on the ballot. (Accord, *People ex rel. S.F. Bay etc. Com. v. Town of Emeryville, supra,* 69 Cal.2d at pp. 537–539, [an appellate court has inherent power to order interim relief in aid of its own jurisdiction and to preserve the effectiveness of its ultimate decision].)

(*Id.*)

This is an appropriate case for this court to act and issue its interim order and final adjudication on or before August 24, 2017. At such time, it is likely that the court will then know that the recall petition has been certified by the county Registrars of Voters and that Respondent should be compelled to perform his ministerial duty under Elections Code sections 11108 and 11109, and in disregard to the unconstitutional amendments to the Elections Code brought about by SB 96.

## III.

## ARGUMENT

Petitioners challenge the application of SB 96 to its recall of Senator Josh Newman which was commenced more than two months prior to the enactment of SB 96 ("as-applied" challenge) and a facial challenge to the enactment of SB 96 for violating several provisions of the California Constitution. Normally a court would limit its review to the "as-applied" challenge if such would resolve the matter in Petitioners' favor. However, in this case, where the facial challenge is so crystal clear and irrefutable, the court may determine that resolution on that basis is also appropriate (*Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084 [facial challenge appropriate only where the law at issue "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions"]).

### A. PETITIONERS' RIGHT TO RECALL SENATOR NEWMAN NECESSARILY INCLUDES THE RIGHT TO A SPEEDY ELECTION TO REMOVE HIM AND ELECT HIS SUCCESSOR.

The Constitutional right to recall necessarily includes the right to a speedy election to remove the elected official and to replace him or her with a successor for the remainder of the term of office. Section 15(a) of article II provides:

> An election to determine whether to recall an officer and, if appropriate, to elect a successor shall be called by the Governor and held not less than 60 days nor more than 80 days from the date of certification of sufficient signatures.[2]

The speedy recall election provision is in stark contrast to the initiative and referendum provisions in the same article. In the case of an initiative, the election is the next general election after it qualifies and not less than 131 days after petition certification. (Cal. Const. Art. II, § 8(c).) In the case of a referendum, the election is held at the next general election held more than 31 days after certification of the petition. (Cal. Const. Art. II, § 9(c).) Thus, for both initiatives and referenda, the election date measure may be up to two years after the ballot measure has qualified. The recall election, by contrast, happens very quickly after qualification. The only exception to the speedy recall election provision is where the petition is certified within 180 days of a regularly scheduled election in the jurisdiction (Cal. Const. Art. II, § 15(b).)

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[2] The original text of the recall provision enacted in 1911 similarly provided: "When such a petition is certified as herein provided to the secretary of state, he shall forthwith submit the said petition, together with a certificate of its sufficiency, to the governor, who shall thereupon order and fix a date for holding the election, not less than sixty days nor more than eighty days from the date of such certificate of the secretary of state." (Former Cal. Const. Art. XXIII, § 1.)

Courts have recognized that an immediate election is part and parcel of the recall power. In *Wilcox v. Enstad* (1981) 122 Cal. App. 3d 641, 651 the appellate court stated:

> We recognize that recall statutes should be liberally construed to enable citizens to exercise this right. " 'The courts are ever mindful of the desirability of having recall petitions presented to the people through election without delay or excessive expenditure of time, money, and effort (*Gage v. Jordan* (1944) 23 Cal.2d 794, 799). And legislation affording the people a right to initiate legislation, repeal legislation or recall a public official is to be given the same liberal construction as that extended to election statutes generally.' " (*Moore v. City Council* (1966) 244 Cal.App.2d 892, 901, quoting from *Reites v. Wilkerson* (1950) 99 Cal.App.2d 500, 502-503.)

Indeed, as cited in *Wilcox*, the court in *Moore* further stated that the ordering of an immediate special recall election is "the ultimate purpose for which the recall statutes were enacted." (*Moore, supra,* 244 Cal.App.2d at 901.)

It is not sufficient that Petitioners will get an election eventually. First, the recall petition itself demanded an immediate election:

> "Josh Newman should be recalled immediately and replaced by a Senator that shares our values." (RJN "Exhibit 6")

Second, the Constitution grants Petitioners a right to a recall election "not less than 60 days nor more than 80 days" from the date they obtained a certification of sufficiency of their recall petition, an act that is completely within their control. Lastly, Petitioners believe that there is real harm in waiting to remove Senator Newman. His vote that precipitated the recall occurred in the first biennium session of the Legislature. The Legislature is scheduled to adjourn for joint recess on September 15, 2017 and return for the second biennium session on January 3, 2018 (Joint Rules of the Senate and Assembly §51(c)(4).) Thereafter, thousands of bills will be considered and voted on during the second biennium session. If recalled, a new

Senator representing the 29th District will be elected and would be casting those votes, perhaps proposing to undo much of what Senator Newman and his colleagues have done. Even if the objective of SB 96 was to delay the recall election to June, 2018 (rather than indefinitely as allowed under its provisions), such delay would allow Senator Newman to continue to vote against the wishes of his constituents for more than 6 months. Indeed, if Senator Newman was an Assembly member, SB 96 would allow him to remain in office for virtually all of his two-year term.

### B. THE LEGISLATURE HAS NO POWER TO RETROACTIVELY IMPAIR PETITIONERS' CONSTITUTIONAL RIGHT TO A SPEEDY RECALL ELECTION.

Despite the Legislature's stated intent that the provisions of SB 96 should apply retroactively to Petitioners' recall attempt, such an application in this case would violate due process.[3] Indeed, the Legislature may not impair such a vested right, which is possessed by Petitioners and derived from the Constitution (13 Cal. Jur. 3d Constitutional Law § 390; *Kerrigan v. Fair Employment Practice Com.* (1979) 91 Cal. App. 3d 43, 48-49.) The California Supreme Court addressed this issue in *Strauss v. Horton.*

> Past cases establish that retroactive application of a new measure may conflict with constitutional principles "if it deprives a person of a vested right without due process of law." (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 756, 218 [applying state due process clause].) In *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592, this court explained that "[i]n determining whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of

[3] The expression of legislative intent for retroactive application does not deprive the court of authority to determine whether retroactivity is nonetheless barred by constitutional constraints. (*Marriage of Buol* (1985) 39 Cal. 3d 751, 756.)

> that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." (See also *Buol, supra,* 39 Cal.3d at p. 761; *In re Marriage of Fellows* (2006) 39 Cal.4th 179, 189.)

(*Strauss v. Horton* (2009) 46 Cal. 4th 364, 473.)

When the constitutional right involved is access to the ballot, retroactive application of rules to a pending process are clearly invalid. In *Hudler v. Austin,* the United States Supreme Court affirmed a federal district court's holding that the retroactive application of petitioning requirement on the qualification of new parties for the Michigan ballot violated the due process clause of the 14th Amendment. It reached this holding even after concluding that prospective application of the new rules was not unconstitutional (*Hudler v. Austin*, 419 F. Supp. 1002, 1013, aff'd sub nom. *Allen v. Austin*., 430 U.S. 924 (1977) ["It is beyond question that legislation may achieve constitutionally valid goals but infringe the Fourteenth Amendment by doing so in an unconstitutional manner"].) The court noted:

> The passage of Act 94 late in April caught plaintiffs at a particularly prejudicial and inopportune time to begin attempting to comply with the new requirements. Their petition drives were either completed or nearly completed and the form of petition which had been used, pursuant to former M.C.L.A. s 168.685, indicated to signers that their signatures constituted the only action necessary to place the party on the ballot. Further, the opportunity for soliciting petition signatures and proselytizing for primary support at the same time was rendered impossible since petition gathering had all but drawn to a close when plaintiffs were first apprised of the primary performance requirement. In tandem then, these problems presented plaintiffs with an obligation substantially more difficult to satisfy

> than that which new parties will face in the future under Act 94 and deprived them of due process of law.

(*Id.* at 1014). Thus, the court upheld the new rules for future elections but invalidated the rule as applied to the plaintiff's petition effort, which had already commenced. (*Id.*)

In fact, the court in *Dodge v. Free* (1973) 32 Cal. App. 3d 436, 439.), similarly addressing a change in the rules in the midst of a petition effort, opined that:

> [I]t might be said that the action taken before [the effective date of the legislation] gave rise to rights that might be brought to fruition as though under the preexisting legislation.

(Further, the court in *Dodge*, without reaching the retroactive question, never-the-less chose to completely ignore the recall proponent's failure to comply with new provisions added to the recall process after commencement of the recall in invalidating his petition on other grounds under the pre-existing law (*Id.* at 446.) After the recall process had begun, several changes and additions to the recall process enacted by the Legislature became effective, including the current requirement of publishing a "notice of intent to recall," service of the statement of reasons for recall on the elected official, and an opportunity to "answer" such statement. (*Id.* at 439.) The new law, if applicable, would have been helpful to the recall proponent in at least one respect. (*Id.* at 445 ["Dodge…seems to have desired one of the benefits of the legislation…at the same time he wished to forestall such of the provisions of that legislation that might prove a hindrance"].) Ultimately, the court found that nothing could save the faulty petition under the pre-existing law (*Id.* at 446) With respect to the unanswered question about the application of the new law to a pending recall, ironically, the court stated that "such a problem is unlikely to recur." (*Id.*)

California cases have recognized that the constitutionally-vested power of recall, as well as that of the initiative and referendum, cannot be nullified by legislative action (*Dodge v. Free,* supra 32 Cal. App. 3d at 444 [acknowledging that legislation may not pose an "unreasonable, or an undue restraint upon the exercise of the constitutional right of recall"]; (*DeVita v. County of Napa* (1995) 9 Cal. 4th 763, 785 [legislatively enacted "procedural requirements...do not imply a restriction of the power of initiative or referendum"]; *Assembly v. Deukmejian* (1982) 30 Cal. 3d 638, 678 ["legislative bodies cannot nullify the [referendum] power by voting to enact law identical to a recently rejected referendum measure"]; *Padilla v. Lever, supra,* 463 F. 3d at 1052 [federal requirement of translation of certain election related materials "is far more likely to be used as a sword than a shield" and therefore not imposed for recall petitions].) SB 96 was intended to annul Petitioners' exercise of their constitutionally reserved recall power. It must not be allowed to stand. In particular, the Legislatures intent to retroactively effect the current recall effort does not conform with any of the factors identified in *Strauss v. Horton.*

### 1. The State's Interest in Ensuring Accuracy and the Validity of the Petitioning Process is not Served by the New Provisions of SB 96.

Section 1 of SB 96 includes findings and declarations of legislative intent and in particular states:

> Before a recall election is held, any and all steps should be employed to ensure the accuracy and validity of the petition process.

Petitioners agree. Indeed, the whole of the Elections Code is directed at the same objective. The changes wrought by SB 96 do not advance that goal. First, the amendment to Elections Code section 11108, regarding the cost of a recall election, has nothing to do with the "accuracy and validity" of the recall petitions. Section 11108(d) and (e) state, in pertinent part:

> (d) ... The Department shall estimate the costs that would be incurred if (1) the recall election is held as a special election and (2) the recall election is consolidated with the next regularly scheduled election pursuant to subdivision (b) of Section 15 of Article II of the California Constitution. The Department of Finance shall submit the estimate to the Governor, the Secretary of State, and the Chairperson of the Joint Legislative Budget Committee.
>
> (e) Notwithstanding any other law, the Secretary of State shall not certify the sufficiency of the signatures under Section 11109 until the Joint Legislative Budget Committee has had 30 days to review and comment on the estimate submitted by the Department of Finance pursuant to subdivision (d).

Whether the Newman recall will cost $5,000 or $5 million dollars, that determination is irrelevant to the determination of whether the petitions were signed by the requisite number of registered voters, i.e. the "accuracy and validity" of the recall petitions. Furthermore, the difference in cost between a special election and a regular election is not relevant because the Constitution commands the selection of an election date based on the date of certification by Respondent.

Second, the addition of a "supplemental" period for a voter to "withdraw" his or her signature from a petition does not aid the legislative objective. Section 11108 was also amended by SB 96 to add subdivision (b) to provide a new "thirty business day" period following the Secretary of State's determination that the petition has been signed by the requisite number of registered voters. Further, the Elections Code already has two withdrawal provisions relating to recalls. Both Elections Code section 103 and Elections Code section 11303 give every person who signs a recall petition the right to withdraw that signature upon written request submitted to the appropriate elections official before the petition is submitted to the official for verification. Thus, elections officials are able to examine petitions and withdrawal signatures simultaneously. By authorizing a new withdrawal period after the accuracy and validity of the petitions have been

determined, the elections officials are required to reexamine petitions months later that have already been certified and are already subject to a withdrawal procedure. Courts have considered the existing withdrawal process as a valid and viable method of protecting a petition signer who may feel that he or she was deceived into signing the recall petition (*Padilla v. Lever,* 463 F. 3d 1046, 1052-53 (2006).) Nothing more is needed to serve that objective.

Lastly, the use of a "random sample" technique to verify all manner of petition signatures has long been a reliable and preferred method in the law. Indeed, the court in *Wilcox v. Enstad, supra,* 122 Cal. App. 3d at 649 acknowledged that the random sample method was properly employed by the Legislature "to economize" the costs of signature verification. Interestingly, SB 96 deleted the random sample method for petition verification ***only*** for state recall petitions, not state initiative or referendum, and not local recall, initiative, or referendum. This fact evidences that "accuracy and validity" are not the true motivation for the change in law. In short, the only legislative objectives achieved by the three changes to the recall procedure are delay, delay, delay.

### 2. Retroactive Application to the Newman Recall is not Necessary to Achieve the Legislature's Objective.

The fact that a Governor and other members of the Legislature have all faced a recall petition under the procedures that existed prior to SB 96 without incident and without any question about the "accuracy and validity" of the recall petitions shows that retroactive application of new procedures here is unnecessary. Petition signatures can and would have been verified under the process used to check all petitions containing a large number of signatures. Voters desiring to withdraw their signature

from a petition would have the same right all voters have had to do so on all petitions, including all recall petitions. And the cost of a recall election would be irrelevant to the determination that a petition is valid or invalid, as it has always been.

### 3. Petitioners Legitimately Relied on the Procedures That Existed at the Time They Commenced Their Recall of Senator Newman.

As stated previously, Petitioners commenced their recall of Senator Newman in early April, 2017, immediately following his vote on SB 1. Thus, for over two months, Petitioners operated under the Constitution and Elections Code procedures applicable to the recall of a state officeholder. Indeed, by the time SB 96 was signed by the Governor, Petitioners had already submitted petition signatures far in excess of the amount needed to trigger an immediate recall election. There was no indication that the Legislature was even considering a legislative change, as the text of the new law was not made public until just days before the vote on SB 96. Indeed, if not for the public controversy created by the enactment of SB 96, it is doubtful Petitioners would have had any reason to become aware of the changed law. Generally, new laws enacted by the Legislature become effective on January 1, following enactment (Cal. Const. Art. IV, §(8)(c)(2).) Only urgency bills (of which SB 96 was not) and bills adopted in connection with the Budget Bill go into effect immediately. (Cal. Const. Art. IV, § 8(c)(3); 12(e)(1).)

### 4. Retroactive Application of SB 96 Would Unconstitutionally Disrupt Petitioners' Reliance on the Law in Existence at the Time They Commenced Their Recall of Senator Newman.

As indicated in this petition for writ of mandate, the necessary consequence that follows the enactment of SB 96 is the indefinite delay of

the speedy recall election required by the Constitution. Petitioners desired the immediate removal of Senator Newman, as stated in their recall petition itself. They acted swiftly, in every respect, to qualify their recall petition for an election to occur in November, 2017. In doing so, they expended considerable time, effort, energy and money to make the recall a reality. They did all of this in complete reliance on the constitutional right to a recall in between 60 and 80 days of petition certification and upon the Election Code rules that existed at the time the recall proceeding was commenced. Petitioners have done all that they can and all that the law required to obtain the speedy election to which they are entitled. Nothing more may be properly asked. Indeed, and very disturbingly, they only actions which remained were the responsibilities of government officials, which the Legislature altered to harm Petitioners.

### C. THE ENACTMENT OF SB 96 VIOLATED THE SINGLE SUBJECT PROVISION OF THE CONSTITUTION AND THE SUPREME COURT'S HOLDING IN *HARBOR V. DEUKMEJIAN.*

California Constitution Article IV, Section 9 states the "single-subject" rule as applied to legislation. It states:

> A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void.

This provision was specifically found to be applicable to a budget-related trailer bill in *Harbor v. Deukmejian, 1987,* 43 Cal.3d, 1078, 1100. The Supreme Court held that the purpose of the rule is to regulate legislative procedure to avoid "log-rolling" by legislators in the enactment of laws. (*Id.* at 1094.) Stated another way, the rule "prevent[s] collusion in a legislative body, to prevent the passage of what are called omnibus bills – uniting various interests in order to get them passed." (*Id.*) The court also

held that the "title" requirement serves a related, but separate requirement namely to "prevent misleading and inaccurate titles so that legislators and the public are afforded reasonable notice of the contents of a statute." (*Id.* at 1096.) SB 96 violates the constitution and none of these purposes were served in its enactment.

### *1. Harbor v. Deukmejian*

In *Harbor*, the Legislature had passed SB 1379, which, according to its title, related to "fiscal affairs, making an appropriation therefor." The bill was passed in connection with, and contingent on, the passage of the Budget Bill that same year. (*Id.* at 1082.) It was referred to as a budget "trailer bill" necessary to implement the Budget Act of 1984. (*Id.* at 1097.) The court noted that SB 1370 contained "71 sections enacting, amending, and repealing numerous provisions in numerous codes." (*Id.* at 1083.)

After stating the general rule, namely that the provisions of a single legislative enactment must be either "functionally related to one another or reasonably germane to one another or a the object of the enactment," the court held that SB 1379 complied with "none of these standards." (*Id.* at 1100.)

> Bill 1379 complies with none of these standards. Petitioners do not claim that the provisions of the bill are either functionally related or germane to one another, and examination reveals that there is no apparent relationship among its various sections. A few examples will suffice: section 0.2 amends a provision of the Business and Professions Code to require that before transmitting a fiscal impact report to the Legislature, agencies within the Department of Consumer Affairs must submit it to the director of the department (Stats. 1984, ch. 268, p. 1306). Section 0.4 amends the same code to provide that the Contractors' State License Board may disclose to the public general information regarding complaints filed against licensees (ibid.); section 28.4 amends the Military and Veterans Code to provide that a veterans' home may be appointed guardian of the estate of a veteran (id. at p. 1352); section 66.7 permits

concession contracts for state parks to exceed 20 years (id. at p. 1405).

Our second inquiry is whether the provisions of Bill 1379 can be fairly characterized as "reasonably germane" to the objects of the measure. Petitioners suggest that the subject of Bill 1379 is "fiscal affairs," as stated in its title, and that its object is "to make statutory adjustments which relate to the ongoing allocation of state funds appropriated annually in the budget bill, within the state programs so funded." Section 45.5 comes within this object because it "affects the cost of the state's AFDC program."

We understand this somewhat cryptic analysis to mean that the goal of Bill 1379 is to reflect matters encompassed in the budget bill, and that since the cost of the program mandated by section 45.5 affects the amounts appropriated in the budget, its provisions are conducive to that goal and therefore in compliance with the single subject rule.

Our unanimous determination in *Brosnahan,* supra, 32 Cal.3d 236, that a bill which encompasses matters of "excessive generality" violates the purpose and intent of the single subject rule is applicable to this assertion. "Fiscal affairs" as the subject of Bill 1379 and "statutory adjustments" to the budget as its object suffer from the same defect. They are too broad in scope if, as Petitioners appear to claim, they encompass any substantive measure which has an effect on the budget. The number and scope of topics germane to "fiscal affairs" in this sense is virtually unlimited. If Petitioners' position were accepted, a substantial portion of the many thousand statutes adopted during each legislative session could be included in a single measure even though their provisions had no relationship to one another or to any single object except that they would have some effect on the state's expenditures as reflected in the budget bill. This would effectively read the single subject rule out of the Constitution. We hold, therefore, that Bill 1379 is invalid as a violation of article IV, section 9 of the California Constitution.

(*Id.* at 1100-01)

**2. SB 96**

Like the Bill determined to be unconstitutional in *Harbor,* SB 96 contains the same constitutional infirmities. Both bills were enacted as

budget-related trailer bills. The *Harbor* bill contained 71 separate sections, SB 96 contains 96 separate sections. Both bills added, amended, or repealed numerous provisions in numerous different codes. In fact, SB 96 made changes to the Elections Code, the Government Code, the Labor Code, the Public Contract code, the Military and Veterans Code, and the Revenue and Taxation Code.

The wide-range of subjects found in SB 96 is most easily referenced in the "digest" prepared by Legislative Counsel. That digest identifies at least 19 different descriptions of existing law and what "this bill would" do, including the following distinct subjects:

1) State recall elections
2) Compensation of judges
3) Certain labor code violation proceedings
4) Farm labor contractors
5) Employee discrimination in connection with reporting work-related injury
6) Public works contract/registration
7) Labor Commissioner power to waive liquidated damage payment.
8) Loans from Labor Enforcement and Compliance Fund
9) Public works contract/exemptions
10) Public works/prevailing wage requirement enforcement
11) Occupational Safety and Health penalties
12) Asbestos-related work penalties deleted
13) Crane safety penalties deleted
14) Carcinogen work-place standards penalty deleted
15) Veteran's homes/administration and operation
16) Veteran's Cemetery at El Toro, moved to Bake Parkway

17) Veteran's Cemetery Master Plan Fund

18) Donations to Veteran's Cemetery

19) Sales and Use Tax in Los Angeles County for Homelessness.

The "title" of SB 96 is "State Government." It is actually much broader than the title rejected in *Harbor* – "fiscal affairs." Thus, the title fails to satisfy the purposes of the constitutional provision and provides no justification for the enforcement of the specific recall provisions in SB 96.

The purposes of the legislative single-subject rule were clearly frustrated by the inclusion of 19 different unrelated subjects. Though "related" to the Budget Bill enacted the same day, the vote counts for the two bills was different. The Budget bill passed the Assembly with 59 affirmative votes. (RJN "Exhibit 16") SB 96 only passed with 52 affirmative votes. In the Senate, the Budget Bill passed with 28 affirmative votes, but SB 96 passed with only 26 affirmative votes. (RJN "Exhibit 17") Would a bill retroactively changing the recall provisions in a stand-alone bill have passed either house?[4] The Constitution requires an answer to that question.

### D. THE ENACTMENT OF SB 96 VIOLATED THE SINGLE-APPROPRIATION PROVISION IN THE CONSTITUTION.

Like the single-subject rule, the Constitution also limits the number of appropriations in any bill other than the Budget Bill. Section 12(d) of Article IV states:

> No bill except the budget bill may contain more than one item of appropriation, and that for one certain, expressed purpose.

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[4] Additionally, a stand-alone bill relating to the recall procedure may not have been properly a "budget-related" bill able to go into effect immediately. As an "urgency" bill it would have required a two-thirds vote of the Legislature, which SB 96 did not get.

SB 96 contains at least two items of appropriation. The first is found in section 89 of the bill which amends section 1416(b) of the Military and Veterans Code:

> (1) Except as provided in paragraph (2) and notwithstanding Section 13340 moneys in the fund are continuously appropriated to the department for the maintenance, beautification, and repair of the cemetery or, subject to the approval of the secretary, for a specified cemetery maintenance or beautification project designated by the donor.
> (2) Moneys deposited into the fund for the purpose of preliminary or conceptual design or for construction of the cemetery, or to reimburse the state for expenditures made by the state for the purposes described in subdivision (a), shall be made available only upon appropriation by the Legislature.

SB 96 also contains an appropriation in section 93, whereby:

> The sum of five million dollars ($5,000,000) is hereby appropriated from the General Fund to the Department of Finance for allocation to counties to pay for the costs of state recall elections, including the expenses for verifying signatures, printing ballots and voter information guides, and operating polling places, in accordance with Section 11108 of the Elections Code.

The court in *Harbor* also had occasion to consider the definition of the term "appropriation" as it related to the Governor's attempted veto of one part of the budget trailer bill at issue in that case. The court noted that the term had been defined in varying ways, but that in sum an "appropriation" is the setting aside of a sum of money for a particular specific or particular purpose. (*Id.* at 1089.)

Again, would both houses of the Legislature have appropriated funds for the recall in a stand-alone bill? The Constitution requires an answer to that question.

## IV.

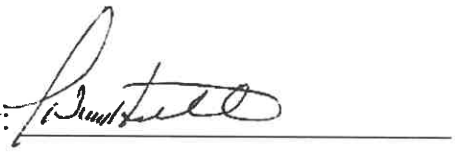
## CONCLUSION

Only this Court can reject the Legislature's brazen attempt to unconstitutionally interfere with Petitioners' constitutionally-guaranteed right to the speedy recall of Senator Newman. Petitioners have done all that the law demands. The court must order Respondent to certify their petition as required by law prior to the enactment of SB 96. SB 96 is unconstitutional as applied to the Newman recall and is also facially unconstitutional.

Petitioners are entitled to an award of attorney's fees pursuant to Code of Civil Procedure section 1021.5 upon proof provided to this Court.

Dated: July 20, 2017

Respectfully submitted,
BELL, McANDREWS & HILTACHK, LLP

By: 

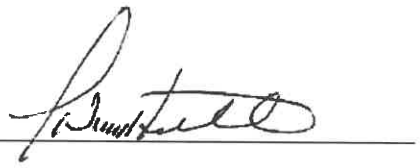
Thomas W. Hiltachk
Attorney for Petitioners

## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) and 8.360(b)(1) of the California Rules of the Court, the enclosed brief of HOWARD JARVIS TAXPAYERS ASSOCIATION and JON COUPAL is produced using 13-point Times New Roman type including footnotes and contain approximately 11,031 words, which is less than the total words permitted by the rules of the court. Counsel relies on the word count of the computer program, Microsoft Word, 2010, used to prepare this brief.

Dated: July 20, 2017

Respectfully submitted,
BELL, McANDREWS & HILTACHK, LLP

By: 

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