Comment for Initiatives 25-0004 and 25-0005

Unlike other commenters, who have expressed uncritical support or opposition, we will address the language of this proposed initiative by voter petition (voter-initiative) in accordance with the purpose of the comment period -- to provide the proponent with suggestions so as to enable the proponent to improve the language without having to re-file the voter-initiative. At the end of the comment period, the proponent has a 30-day window to address those suggestions, or not, by filing an amendment with germane changes to the language.

The arrogance of the proponent hits one immediately with the title "Save Proposition 13 Act of 2026" (SP13). The proponent's donor-funded job is to do just that. Arguably, the existence of this, latest in a series, attempt to 'fix' Prop 13 demonstrates his failure.

We're posting this comment on both Version 1 (25-0004) and Version 2 (25-0005) because, except for some sloppy drafting, the versions are virtually identical. The difference between the two versions is a single paragraph. Version 1 has the paragraph. Version 2 doesn't.

The added paragraph will cause the attorney general to write two different circulating titles and summaries.

The proponent has completely abandoned his mythical "loophole" search-and-destroy mission of the previous voter-initiative (21-0026) self-titled "The Taxpayer Protection and Government Accountability Act" (TPGAA) by a surrogate proponent.

SP13 addresses a single "loophole" alleged to have been created by the California Supreme Court in *Coalition v. City of Upland* (2017) 3 Cal.5th 924. The "loophole" involves the passage percentage required for a local (not statewide) voter-initiative for a local tax for a specific purpose, commonly referred to as a special tax. In *Upland*, the court suggested that the passage percentage should be a simple majority, rather than a two-thirds super majority.

What the court did in *Upland* was apply the statewide initiative provision of the constitution (Art. II, Sec. 10) to a local initiate by voter petition. How do

we know that it's a statewide provision? Because it requires an act by the Secretary of State.

SP13 simply adds a section to the article that was originally created by Proposition 13 (1978).

Background:

In 1911 voters passed Proposition 7, a constitutional amendment, which reserved to the themselves the powers of statewide initiative and statewide referendum. For those purposes, it was self-executing (Prop. 7, para. 15.), meaning the manner in which the powers were to be executed were written into the constitution. Statewide initiatives and referenda expressly required a majority vote for passage. The Legislature was expressly prohibited (Prop. 7, para. 15.) from making any other laws, except those that would "facilitate" the operation of those powers. In 1911, the entirety of Proposition 7 was in Article IV, Section 1. Today its fifteen paragraphs have been broken up and dispersed all over the constitution through amendments that were mostly designed for reorganization purposes.

The initiative and referendum powers were also reserved to the voters of cities and counties. (Prop. 7, para.13.) The local powers were specifically NOT self-executing. Determining the manner of how those powers were to be executed was delegated to the Legislature and charter cities, several of which already had initiative or referendum powers in their charters.

The Legislature enacted an implementing statute for counties and an implementing statutes for cities in 1912. Each statute was lengthy, comprising the entire process. Today, those statutes, broken up into smaller sections are found in Article 2 (counties) and Article 3 (cities) of Division 9 of the Elections Code. In each implementation, the Legislature granted the same initiative and referendum powers to BOTH the county or city and the voters. For a county or city, the power was granted to the governing body. For the electors, the power was granted by petition to the governing body.

Since the Legislature has complete authority over the manner in which those powers are implemented, it has over the years made many changes to the original language. The constitution has never imposed any overriding requirement on those powers.

Over the years the Legislature has also extended the powers to the class of special districts which are authorized to enact ordinances, none of which are school or college districts.

Prior to Proposition 13 (1978), the only things that there were submitted to voters were ordinances. Charter amendments, which are much like ordinances, were submitted in accordance with the rules set for charters, whether set by the Legislature generally or set by the charter itself.

When Proposition 13 (1978) passed, the Legislature was faced with an entire category of acts -- taxes -- that had to be submitted to the voters. Since no part of Proposition 13 was self-executing, the Legislature had to enact implementing statutes for each kind of tax for each kind of governing body that it deemed appropriate. For cities and counties, tax enactments are still implemented as ordinances, so, arguendo, the initiative and referendum powers still apply. However, it's been muddied.

As recently as 2001, the California supreme court recognized that ordinances of cities and counties submitted to the voters are initiatives. See first sentence of *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165.

> This case presents an issue important to local governments and those interested in historic preservation: whether an initiative ballot measure, generated by a city council rather than by voter petition, submitting to the voters an ordinance that removes a structure or structures from historic preservation status is a project subject to the California Environmental Quality Act.

In simple terms, this means that all ordinances placed on the ballot by a city or county are government-initiatives, just as the Legislature established in 1912. All cities and counties were given the same power as the voters.

Think about it. Why would a city or county need the initiative or referendum power? The governing body could enact or repeal any ordinance it wished by a vote of its members. The Legislature recognized that the powers were needed in order to counteract the passage of voter-initiatives or voter-referenda because the governing body could not alter voter-initiatives. The cities and counties can't override a voter-initiative because the Legislature wrote the law to prevent that. Of course, the Legislature can change what it wrote, but allowing a city or county to override a voter-initiative would be tantamount to saying that the voter-initiative power is meaningless.

In fact, for cities and counties, the voters do not have absolute powers of initiative or referendum. The Legislature has provided implementing statutes

that allow the governing bodies to hobble voter-initiatives or voter-referenda. In addition to the statutes, a city or county could actually defeat an unfriendly voter-initiative by writing a derogatory ballot question. (That should change. The proponents of a voter-initiative should have the ability to write the ballot question as well. Of course, that is only necessary because all local governments violate the law on ballot questions by writing arguments in favor of their government-initiative into the ballot question.)

As for enactments of taxes, we contend that Proposition 13 and its progeny has constitutionally overridden the Legislature's initiative and referendum implementation for that category. In other words, Proposition 13 preempted the field for taxes. Of course, the courts have never heard any of this, because the lawyers arguing all the losing cases have never made the arguments.

We've examined many, many of the implementing statutes enacted in the aftermath of Proposition 13. None of them address the voter passage percentage. Could it be more clear that the Legislature could not set a passage percentage because Proposition 13 controlled?

It's been eight years since the Upland decision. Has the Legislature enacted a statute that implements that decision? Why not? Might it be because it can't? It can't because a statute cannot supersede a provision in the constitution.

The first use of the Upland "loophole" came in November 2018 with the City and County of San Francisco's Measure C. Measure C was a voter-initiative tax to create a permanent homeless services industry. San Francisco could have changed its charter to a allow a majority vote. Immediately following the election, the city filed a validating action to get court approval of its special tax for homeless services that didn't achieve two-thirds approval. Eventually, appeals courts validated that election and a couple others. The taxpayer lawyers failed in every case.

Comment 1: Length of Text.

We suspect that SP13 has been written in order to enable the printing of the voter petition on a single page. The purpose of a single page is to save money. In our opinion, that is a poor rationale for adding garbage language to the constitution. This is discussed in detail in the comments on paragraphs (a) and (e) [(d) in Version 2].

If something is worth doing, we would hope that it wouldn't be done on the cheap. If the proponent doesn't consider that it has value, why should the voters who are going to be asked to sign the voter petition, fund and energize a campaign, and to vote for it?

We're certain that the proponent expects to recruit donors and volunteers to achieve the valid signatures needed and to pass the voter-initiative at the general election. It is a disservice to all to cut corners to save some money. It demonstrates that the product is not worthy of support.

Comment 2: Scope.

SP13 address only cities and counties because the voter-initiative power was reserved only for voters in cities and counties.

It addresses only the Upland "loophole."

Both versions purport to prohibit the passage of a voter-initiative special tax (the only kind that would ever exist) by a majority vote, as opposed to a two-thirds vote. Version 1 purports to vitiate special taxes created by voter-initiative that have already passed by majority vote. We'll address that further in the comment on that paragraph.

Comment 3: Paragraph (a).

The first paragraph (a) is language that is usually found in a separate section or sections that do not become part of the constitution. It's the longest at 117 words. Who knows how that superfluous language will be used by the opposition and the courts when made part of the constitution.

A typical voter-initiative will set out, in separate sections, "whereas" clauses and purposes. The "whereas" clauses are the reasons (arguments) supporting the operative language. The purposes are, usually, short declarations of the objectives of the operative language.

As written, this paragraph is just a bunch of whining written in the form on an argument in favor of passage. It is the kind of language that one would write for the arguments in the state voter guide.

We suspect that the attorney general might reject the language because it will almost certainly conflict with the "impartial" summary he prepares.

We also suspect that opponents could challenge the language as an illegal argument under the Political Reform Act, which controls the content of the state voter guide.

We contend that adding language to a constitution that does not change law or policy makes a constitution unnecessarily lengthy and confusing. If the Legislature took this approach when enacting statutes, the California codes would likely double in size, increase confusion, and logarithmically decrease comprehension by adding millions of words that are not law.

Ultimately, the language demonstrates a lack of legislative acumen. It's crass.

Comment 4: Paragraph (b).

The second paragraph (b) (81 words) is a restatement of the power of local governments to impose certain kinds of taxes by a two-thirds vote. As is *de rigueur* for lawyers, it's a single sentence with a bunch of commas. (The first paragraph uses four sentences.) Commas are often the worst enemy of any law. Why couldn't the proponent just use short declarative statements?

As is true for most restatements of this kind, it is cumbersome to read and understand because it has to refer to law found in other places.

The only purpose of the restatement is to expressly make voter-initiatives subject to a two-thirds super-majority vote. The use of the term "initiative power" is extremely troublesome as is the definition for that term in the final paragraph.

The trouble is that the Legislature had already reserved the "initiative power" to both city and county governments and their electors in 1912. That has never changed. To distinguish the voter-initiative power from the government-initiative power for local governments, arguably, makes them two different things. By making it part of the constitution, it unthinkingly overrides the Legislature's decision in 1912. It also elevates the local initiative power (voter or government, and perhaps both) beyond the control of the Legislature. In effect, it overrides at least part (para. 13) of Proposition 7 (1911).

The unintended consequence is that SP13 elevates the local initiative power (or at least the voter-initiative power) to the level of the constitution and makes it no longer subject to statutory control by the Legislature.

In other words, it makes things worse. What's even more distressing is that the proponent is doing this because of a fundamental misunderstanding of the scope of the local initiative power. That same misunderstanding goes back at least to *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832, where the lawyers arguing that case were at least as clueless as those arguing the Upland "loophole" cases. It's unfortunate that courts make such bad decisions because the lawyers don't know the law.

It is beyond the scope of this comment to address how paragraph (b) might effect the already existing statutory provisions in Division 9 of the Elections Code.

One way to save this might be to set the record straight that the local initiative and referendum powers apply to both governments and voters and that, unlike the statewide initiative and referendum powers, the local powers are determined by the Legislature. In other words, restate the voter intent in 1911 and the legislative intent of 1912. Leaving it as is just creates a rat's nest of uncertainty.

Comment 5: Paragraph (c).

The third paragraph (c) (107 words) is also a single sentence. It also has a bunch of commas and two "except" clauses. Basically, it restricts local governments (and their voters) to following the rules set out by Proposition 218 for *ad valorem* property taxes and by a Revenue and Taxation Code statute for non-*ad valorem* taxes and a whole list of "other taxes." There was no direct corollary to this in TPGAA. So purportedly, this doesn't change anything as it exists today, except for the inclusion of an "electors" clause, modifying "local government." With all the commas in this single sentence, it would take a lot of parsing and digging to understand why this is needed, unless it is simply to prevent local special tax voter-initiatives from avoiding a two-thirds majority passage requirement. That was also in TPGAA, but not in similar language.

Just as an aside, and to point out how sloppily SP13 was written, both the second and the third paragraph have an "including" clause modifying "local government." In the third paragraph, it reads "including the electors of a

local government exercising the initiative power." In the second paragraph "the" is omitted from the clause. Does it make a difference? No. It's just sloppy, and it's not the only instance of sloppiness.

Comment 6: Paragraph (d).

The fourth paragraph (d) (111 words, 2 sentences.) is the difference between Version 1 and Version 2. The gist of the paragraph is that it vitiates any voter-initiative tax that didn't comply with the second or third paragraph. These would all be taxes for a specific purpose that were voter-initiatives that passed with a majority in cases where they would have required a two-thirds vote if they were government-initiatives. The expiration is set to sometime after November 7, 2028.

Basically, the fourth paragraph repeals all local taxes that the proponent has argued for almost a decade resulted from a court-created "loophole." Supposedly, after SP13 passes, there would be no more of those kinds of taxes. (Dream on!)

This paragraph, however, is one of the failures of SP13. Does the proponent think that the cities and counties where a couple dozen of these taxes have already been approved by voters or ones that might be approved in 2025 or 2026 will just magically stop. The proponent has not provided any implementing statutes to make any official enforce this. Consequently, what happens when the expiration doesn't happen? Lawsuits. Won't that be just dandy? And these lawsuits would not even be ripe until after the deadline has passed. Will fighting a lawsuit for a couple years (using public moneys) benefit the city or county more than the cost of the lawsuit using public moneys? Indubitably. And that's if the cities and counties were to lose after an appeal.

We're not certain why there are two versions and the proponent does make that clear. If both versions are placed on the same ballot, the one with more votes will pass. Maybe the point is to have two qualified voter-initiatives, one for 2026, and one held back for 2028, ready to go, should there be problems with the first. Maybe the proponent thinks that vitiating a specific set of local elections with a generalized constitutional provision is dicey. We won't speculate further. It's a puzzle.

Comment 7: Paragraph (e)/(d).

The fifth paragraph (e) refers to definitions (92 words, 5 sentences). This is fuzzy and has one glaring mistake. It's fuzzy because some definitions refer to an already existing provision (Proposition 218 (1996)) along with one new definition. The definitions, however, aren't scoped. The mistake is the use of the self-referential "this section." Usually, when such a reference is made in a subsection of a provision, it is limited to just that subsection. There are many ways to clarify the scope of definitions.

In this case, however, "this section" is used three times in the subparagraph, but not for the scope of the definitions. It is used in connection with severability. A severability provision is usually not written into the constitution. Almost always, it appears in a "section" of the initiative. In other words, this initiative, should have at least three sections. One would be the purpose, which is paragraph (a), one would be the actual language being added to the constitution, and one would be the interpretation and severability section, the last three sentences of paragraph (e).

"This section" is also used twice in the fourth paragraph.

We take particular issue with second sentence which defines "initiative power."

> The term "initiative power" applies to the initiative power derived from the constitution, statute, or charter law.

First, it uses the term being defined in the definition. That may not be critical, but it's poor drafting.

Second, SP13 addresses only local voter-initiatives. The "loophole" in the Upland case exists most likely because the lawyers in that case agreed that the local voter-initiative power is derived from the constitution. In fact, Proposition 7 (1911) delegated the authority for local initiatives to the Legislature while at the same time preserving voter-initiative power that already existed in city charters.

> The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the state, to be exercised under such procedure as may be provided by law.

The TPGAA consisted of long, never-ending sentences with lots of internal punctuation. It also consisted of lots of oblique external references. The proponent did not publish anything that described to regular people what the TPGAA did or how it did it. The proponent appears to have used the same philosophy here. Just sound-bytes.

Comment 8: ACA-13.

The Legislature passed ACA-13 in 2023 to prevent the passage of TPGAA with a simple majority of votes. ACA-13 remains qualified for either the primary or general election in 2026.

The very last sentence of SP13 purports to address ACA-13 by referencing the majority vote required for any statewide measure to pass.

ACA-13 was designed to deal with a voter-initiative constitutional amendment that "increases" the voter passage requirement for a tax. It purports to require such an amendment to pass with the same voter passage requirement. In practical terms, it means that TPGAA or SP13 would need a two-thirds vote to pass.

When there is a conflict between two measures that are voted on in the same election, the general rule is that the one with more votes wins over the one with less votes. If ACA-13 were to be on the same ballot, we contend there would a conflict which might be settled by this rule. More likely, however, whichever way it goes, the other side will file a lawsuit to get a court to decide.

SP13 specifically states the two-thirds requirement in paragraph (b). Even whether that is an increase or not is likely to be the subject of lawsuits if SP13 passes. In the proponents view, it is not an increase. Since there is no written law that lowered the requirement to a majority, that is correct. The question will likely be, did an oblique court decision amend the constitution. The lawyers will all have fun with that one.

But what if ACA-13 is put on the 2026 primary ballot all by itself, since SP13 can not be on the primary ballot. What if it passes? Where does that leaves SP13? In court with lawsuits that will likely take years to resolve.

Comment 9: City-initiatives to Enact Taxes for Special Districts

Of course, once a government gets away with something, it implements the old proverb, "give them an inch and they'll take a mile."

The latest trend is for desperate special districts to launder a voter-initiative for themselves through a city or county.

Here' how it works. A school district, let's say Manhattan Beach Unified, wants to implement a parcel tax of, let's say, $1,095, on property owners so that it can boost the pay of district employees by, let's say, $13 million for 12 years with an inflation kicker. The friendly city puts the voter-initiative on the ballot with all the arguments in favor written into the ballot question. The friendly city attorney writes the impartial analysis that raises no issues with the lack of statutory authority. The friendly county registrar ignores the charade as well as the unconstitutional ballot question and puts it on the ballot with a majority voter approval requirement. the friendly registrar cites no statute for that because courts can't write statutes. Of course, registrars will tell you that they can only do things authorized by a statute. Except, when they don't.

That's the scenario for Los Angeles County, Measure A, June 6, 2022. Fortunately, the city voters rejected the outrageous $1,095 per parcel tax.

Or maybe your Kings County firemen's union and you want an extra $12 million a year forever so you can buy your retirement property in Idaho or Nevada or Utah and avoid paying California income tax. Just organize the union members to collect signatures for a 1/2 cent county-wide sales tax. Have the friendly board of supervisors, county counsel, and county registrar grease the path to victory with a simple majority vote, and voila! You get more money for your outrageous pension and salary without having to go begging the board of supervisors to gore someone else's ox.

Except the voters rejected that one too. Kings County, Measure F, June 6, 2022.

The Manhattan Beach voter-initiative is one of a quickly growing number of trans-government taxes. At some point, primarily because the registrars print ballots with arguments in favor on the ballot, all of these kinds of taxes

are likely to pass, as long as the perpetrators don't get too greedy, as in these examples.

Comment 10: Benefits of Passage of SP13

Overall, like the TPGAA, we contend that this voter-initiative has been poorly thought out.

There are no actual benefits to any tax payer in California from its passage. By its own terms, it only applies to special tax voter-initiatives that impose taxes in cities and counties, and a couple of special districts that no one has ever heard of. There is even a chance that charter cities could amend their charters to make voter-initiatives pass with a simple majority.

After fighting it out in court, some tax payers in a couple dozen jurisdictions may eventually benefit to some extent. For example, Los Angeles County residents may have their sales tax reduced by 1/4 of a penny.

Is it worth a couple million dollars in direct costs and untold volunteer effort to get this passed? We think not.

Sometimes all it takes to see a boogeyman is to look in the mirror.

Comment 11: Conclusion

SP13 does not do anything. It is not self-executing, like its ancestors. It leaves everything up to the Legislature which is guaranteed not to implement it. That leaves the courts with the ensuing mess, if it passes.

The premise of SP13 is based on a fundamental misunderstanding that the local initiative and referendum powers are at an equal, constitutional level with the statewide initiative and referendum powers. They are not.

Besides not being self-executing, SP13, like its ancestors, provides no sanctions for non-compliance. A law without a consequence is just a suggestion.

The only people who will benefit from the passage of SP13 are the lawyers who will rake in the money from tax payers on all sides of the cases that it will instigate.

We have to ask, what's the point? Can't the proponent come up with something that actually does something?

The elephant in the room that the proponent has never addressed is the use of public moneys by all local governments to take sides in local elections by printing the arguments in favor on the ballots. In fact, the proponent helped to enable that situation by its sponsorship of AB-809 (2015) and AB-195 (2017).

Addressing the elephant in the room would not require a constitutional amendment. A few tweaks to already existing statutes, some of which have existed since 1850, would prohibit AND sanction that practice. That would likely save every tax payer in California hundreds to thousands of dollars annually into the future. How? By actually making it more difficult to pass any local measure, including tax measures, by preventing local governments from using public moneys to fleece the tax payers of this state to the tune of tens of billions of dollars in every two-year election cycle.

We can always hope.