

## MEMORANDUM

### VIA EMAIL

**TO:** Margaret Brodtkin

**FROM:** James C. Harrison and Ben Gevercer

**DATE:** May 8, 2023

**RE:** Opportunities to Influence Efforts to Pass Local Ballot Measures

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## INTRODUCTION

You have asked us to evaluate opportunities to influence efforts to pass local ballot measures in the coming decade for purposes of strategic planning.

Voters and local governments can utilize local revenue resources to fund programs for children, youth, and families. The state Constitution, statutes, local city and county charters, and ordinances set forth the legal parameters for establishing new revenue streams for such programs. Determining the best revenue stream for a local community turns on various additional factors, such as economic and electoral conditions of a jurisdiction, the rate at which a revenue-raising tax measure can and should be imposed, and whether advocates should seek the support of a local governing body to place a measure on the ballot or collect signatures for a citizen-initiative.

This memorandum discusses several legal issues and opportunities that bear on local ballot measures seeking to fund programs for children, youth, and families. First, we summarize the most significant immediate risk to revenue-raising ballot measures: the Taxpayer Protection and Government Accountability Act, a statewide ballot measure that would severely curtail voters' ability to enact taxes. Second, we discuss the current state of litigation on local tax measures. Third, we address potential legislative options to create new opportunities to fund programs for children, youth, and families. Finally, we evaluate current ideas and opportunities to fund children, youth, and family programs by taxing large social media companies and through current data privacy laws.

### **I. The Taxpayer Protection And Government Accountability Act**

A proposed initiative constitutional amendment, "The Taxpayer Protection and Government Accountability Act," has qualified for the November 2024 general election ballot. If enacted, the measure would make sweeping changes to the California Constitution that are

designed to make it significantly more difficult for state and local governments to raise revenue by imposing or increasing taxes and non-tax charges.

Among other things, the measure would raise the vote threshold for a special tax initiative to require a two-thirds vote for approval. This provision would also apply retroactively, meaning that prior special tax initiatives passed without two-thirds approval would require a new vote. The measure would also expand the definition of a tax, which could increase the number of revenue proposals subject to the higher state and local vote requirements. In addition, the measure would prohibit a local tax from being imposed through a charter amendment and would prohibit a local general tax from being accompanied by an advisory measure asking voters to express a preference for how the revenue from the general tax should be spent.

The measure has qualified for the 2024 general election ballot. If passed in its current form, it would greatly limit the voters' ability to enact revenue-raising measures.

## **II. Current Litigation Regarding Local Ballot Measures**

### **A. Budget Set-Aside Litigation**

Previously, courts have ruled that the initiative power could not be used to set minimum future annual budgets for public safety agencies in a general law county. *Totten v. Board of Supervisors*, 139 Cal. App. 4th 826, 830 (2006).

In 2021, a Los Angeles County Superior Court applied the *Totten decision* to invalidate a charter county initiative that sought to limit public safety spending and reallocate funds to community support programs.<sup>1</sup> Even though the charter amendment was placed on the ballot by the county board of supervisors – not by the voters exercising their initiative power – the Court reasoned that the ballot process could not be used to take budget authority out of the hands of the current and future boards of supervisors. The decision has been appealed and the Court of Appeal will issue an opinion later this year that may determine the feasibility of set-aside initiatives in the future.

Consequently, whether voters in general law cities or counties can enact a set-aside, like in charter cities such as San Francisco, is unclear. The forthcoming decision from the Court of Appeal, discussed above, will bear on that question. If the Court of Appeal allows the county board of supervisors' budget set-aside to stand, other charter counties may pursue similar measures. Conversely, if the Court upholds the trial court's invalidation of the set-aside and the decision stands without any review by the California Supreme Court, it will be

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<sup>1</sup> *Coal. of Cty. Unions v. Los Angeles Cty. Board of Supervisors*, No. 20STCP04019 (L.A. Superior Court June 17, 2021).

incumbent on the Legislature to enact a statute allowing general law cities and counties to enact local set-asides, as discussed below.

The Second District Court of Appeal recently determined that an initiative cannot direct how a general law city spends general tax revenue. *City of Oxnard v. Starr*, 88 Cal. App. 5th 313, 328 (2023). In that case, the subject initiative shortened the sunset date of a previously enacted tax if the city did not spend adequate funds on streets and alleys. *Id.* at 319. The Court reasoned that the voters' direction was administrative in nature, as opposed to legislative, and therefore could not be proposed via initiative. *Id.* at 328.<sup>2</sup> Both parties in that case filed petitions for review in the California Supreme Court, but the Court denied review.

We interpret *City of Oxnard* to narrowly hold that voter initiatives cannot place restrictions and incentives on a previously enacted general tax to compel a city to spend that tax revenue in a specific manner, effectively turning the general tax into a special tax post hoc. Interpreted in this manner, *City of Oxnard* would not prevent the voters from enacting a new special tax or repealing a general tax and replacing it with a special tax directing revenues to specific purposes.

**B. Soda Tax Litigation: Possible Opportunity For Soda Taxes In Charter Cities**

In 2018, the Legislature enacted a law to preempt all local soda taxes until 2031, except in cities that had enacted a soda tax before 2018 (San Francisco, Berkeley, Oakland, and Albany). The law prohibited charter cities, counties, and other local governments from imposing taxes, fees, or assessments on sodas and other sugar-sweetened beverages. It also imposed a penalty – the loss of all revenue from sales and use taxes – for violations. In 2021, a nonprofit health advocacy organization and a city council member filed suit to challenge the penalty provision on the grounds that it wrongly serves to penalize charter cities that lawfully exercise their constitutional rights under the home rule doctrine. The trial court agreed, ruling that the penalty provision was unlawful and unenforceable.

In March 2023, the Third District Court of Appeal affirmed the decision that the penalty was unlawful. *Cultiva La Salud v. State of California*, 89 Cal. App. 5th 868, 881 (2023). The Court found that the penalty provision improperly uses the threat of crippling financial penalties to chill charter cities from exercising their constitutional rights to impose local taxes. *Id.* In its decision, the Court seemed to recognize that a charter city may adopt a soda tax that conflicts with this ban and could perhaps successfully argue that the tax is permissible under its

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<sup>2</sup> An initiative is legislative in nature if it prescribes a new policy or plan; it is administrative in nature if it merely pursues a plan already adopted by a legislative body or some power superior to it. See *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 399 (2001) (while the voters have the power to initiate legislative acts, they cannot take administrative action).

charter city constitutional home rule authority. Thus, the decision seemingly opens the door for a charter city to enact a soda tax without a penalty, making this a potentially viable avenue for local taxation in the future, though any charter city to enact a soda tax will likely have to defend its right to do so in litigation.

### **III. Potential Legislative Action**

State law also defines the ability of local governments and citizens to enact new local taxes. There are many ways in which legislative enactments can expand or open new revenue opportunities that could support programs for children, youth, and families. We list some ideas below.

#### **A. Authorize General Law City And County Set-Side Measures**

As explained above, courts have relied on the language of the County Budget Act as exclusively delegating the board of supervisors the power to set the county budgets and have thereby excluded the voters from enacting set-asides in a county budget through the initiative process.

The Legislature could amend the County Budget Act or enact a separate law to clarify that county voters may enact a budget set-aside. For example, the Legislature could amend the general law city provision on city budgets to expressly permit voters to enact set-asides. Alternatively, the Elections Code could be amended to specify that such measures are permissible.

#### **B. Permit Local Governments To Enact Different “Sin Taxes” And/Or Repeal The Ban On Soda Taxes**

The Legislature could repeal its 2018 soda tax ban, set an earlier sunset date for that ban, or permit new types of local taxes on other goods and services due to their ability, or perception, to be harmful or costly to society. For example, the Legislature could make fast food chains, cardrooms, liquor stores, or other types of legal gambling or unhealthy foods eligible for local tax measures.

#### **C. Permit Voters In School Districts To Enact A Tax By Initiative**

Under current law, voters have limited options to enact a tax in a school district with the revenue directed toward the school district itself. Neither the California Constitution nor any state statute expressly grants the initiative power to voters in school districts. Elections Code section 9300 grants the initiative power to certain special districts but not to districts formed under a law that does not provide for action by ordinance. School districts are formed under the Education Code, which nowhere provides that districts shall, or may, act by

ordinance. The Legislature could expressly amend the Elections Code or Education Code grant voters in school district the initiative power.

#### **IV. Additional Revenue Sources From Social Media Companies And California Data Privacy Laws**

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Recently, San Mateo County school officials filed a lawsuit alleging three major social media companies – YouTube, TikTok, and Snapchat – are designed to be purposefully addictive and have sparked a mental health crisis among young people. In its lawsuit, the county contends that social media has had a severely negative impact on the mental health of children.

There are several ways the state could obtain additional revenue from large social media corporations. For example, it could tax the social media companies and direct the revenue to children or children’s health services. In 2020, Maryland enacted the nation’s first digital advertising gross receipts tax targeting online and digital advertisements stemming from the significant growth and popularity of social media.<sup>3</sup> The tax was imposed on companies with global annual gross revenues of at least \$100,000,000 and deriving gross revenues from digital advertising in Maryland of at least \$1,000,000. It is estimated to generate \$250 million in annual revenue, which will be dedicated to education programs.

The Maryland tax was challenged under the Internet Tax Freedom Act (ITFA) and the U.S. Constitution’s due process clause, commerce clause, and First Amendment. A Maryland trial court invalidated the tax, ruling that it violated ITFA as well as the commerce clause and the First Amendment. The Maryland Supreme Court is reviewing the case and is expected to release a decision this year. Thus, the legality of a social media tax remains unclear. Once the Maryland case is decided, there may be more clarity about whether California could enact a similar tax.

In addition, children’s advocates could pursue funding for families, youth, and children from social media companies and other internet companies that sell Californians’ personal data. In 2020, California voters enacted Proposition 24 to strengthen consumer data privacy laws, provide new consumer privacy rights, change existing penalties and limit the use of penalty revenues, and create a new state agency, California Privacy Protection Agency, to oversee and enforce consumer data privacy laws.

Under Proposition 24, businesses can face penalties for violations of these data privacy laws. Penalty revenues are deposited into the state’s Consumer Privacy Fund (CPF). CPF revenues must first be used to pay for state trial court and Department of Justice costs

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<sup>3</sup> Several other state legislatures have considered similar taxes. <https://www.stateandlocaltax.com/policy-and-legislation/more-digital-advertising-and-data-tax-legislation-introduced/>.

related to certain consumer privacy laws. Ninety-one percent of the remaining funds must be invested by the state, and the remaining nine percent will be made available to the California Privacy Protection Agency for the purposes of making grants in California, with three percent allocated to each of the following grant recipients:

- (i) Nonprofit organizations to promote and protect consumer privacy.
- (ii) Nonprofit organizations and public agencies, including school districts, to educate children in the area of online privacy.
- (iii) State and local law enforcement agencies to fund cooperative programs with international law enforcement organizations to combat fraudulent activities with respect to consumer data breaches.

Cal. Civil Code § 1798.160.

The California Privacy Protection Agency is still promulgating regulations to implement and enforce Proposition 24 and has yet to propose regulations for allocating funds from the CPF. This provides an opportunity for children's advocates to guide this agency in drafting regulations to ensure that CPF revenue is directed to children's programs that address the mental health crisis among young people and other needs.

California's regulatory process includes various procedures to allow stakeholders to provide input while an agency drafts and promulgates regulations, including making pre-ruling public comments, where stakeholders can propose ideas and topics for regulation, and an official comment period during which stakeholders can comment and the agencies must address the comment. Children's advocates can be involved in this process to ensure that the funds from the CPF truly address the needs of children.

Additionally, a bill recently proposed in the Legislature would seek to impose penalties on social media companies, creating a similar opportunity to advocate for penalty revenue to be used to support youth. Specifically, Senate Bill 287 would prohibit social media platforms from using features that they know or reasonably should know will cause child users to receive content that facilitates the purchase of a controlled substance, cause harm to themselves, develop eating disorders, and experience addiction, among other types of harm. Details regarding how penalty funds can be used are still being determined. This bill is well worth monitoring because its successful enactment could generate additional funds to support youth mental health and well-being.