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Proposition 54:

Legislature. Legislation and Proceedings. “California Legislature Transparency Act”

Initiative Constitutional Amendment and Statute

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I. EXECUTIVE SUMMARY

Proposition 54, designated as the “California Legislature Transparency Act” by its proponents, is an initiative constitutional amendment and statute that would make three substantive changes to the California Constitution and Government Code.¹

This proposition would: (1) require each legislative measure be published online and in print for 72 hours prior to being voted on, except in case of public emergency; (2) require the Legislature to record all public proceedings, publish such recordings online within 24 hours, and maintain the online publication for no less than 20 years; (3) allow any individual to record public legislative proceedings and to use their own recordings or the Legislature’s recordings for any legitimate purpose for no fee.²

A “yes” vote for Proposition 54 would mean that no bill could be voted on by the Legislature unless it had been available online and in print for 72 hours; the Legislature would record public proceedings and publish them online within 24 hours, making them available for download for at least 20 years; and any person could record a public proceeding and use it or the Legislature’s recordings for any legitimate reason without any payment to the state.³

A “no” vote for Proposition 54 would simply mean that the current rules and regulations that the Legislature follows would remain unchanged.⁴

II. THE ROAD TO THE BALLOT

A. Previous Attempts

Numerous attempts have been made by the Legislature itself to increase transparency, including authors from both sides of the aisle, to almost no avail. As George Skelton of the *Los Angeles Times* said, “Proposition 54 is one of those measures no Legislature would ever pass – regardless of which party was in control – because it would weaken the power of leaders.”⁵ Embedding requirements in the California Constitution, rather than leaving transparency rules to legislative discretion, will tie the hands of future legislatures and diminish the flexibility that current lawmakers have when negotiating legislation. Despite the challenges of convincing legislators to tie their own hands, some efforts have been made in the last three years to enact legislation similar to Proposition 54.

¹ Cal. Proposition 54 at § 1 (2016).

² CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 8, 2016, at 36, available at <http://voterguide.sos.ca.gov/pdf/complete-vig.pdf> (on file with the *California Initiative Review*) [NOVEMBER 2016 VOTER GUIDE].

³ *Id.*

⁴ *Id.*

⁵ George Skelton, *Sunlight Is The Best Disinfectant — And In California's Legislature, There's A Lot To Disinfect*, L.A. TIMES (Sept. 15, 2016, 12:05 AM), <http://www.latimes.com/politics/la-pol-sac-skelton-proposition-54-california-legislature-transparency-20160915-snap-story.html> (on file with the *California Initiative Review*) [Skelton, *Sunlight Is The Best Disinfectant*].

1. SCA 14 (2016)

SCA 14, introduced by Senator Lois Wolk on April 21, 2016, sought to amend similar sections of the California Constitution and Government Code, and would have made similar, although weaker, changes to the way the Legislature conducted its business.⁶

First, SCA 14 would have required the Legislature to record all of its proceedings and to “promptly” post them online, being downloadable for no less than 20 years.⁷ Second, SCA 14 would have allowed members of the public to record and broadcast such recordings of legislative proceedings.⁸

Third, SCA 14 would have required a 72-hour “public notice period” from the time the text of a bill would be made available to the public to when it would be first voted on.⁹ The bill provided an exception for when the Governor declares a state of emergency and upon two-thirds approval of both houses.¹⁰ The important difference between this and Proposition 54’s 72-hour requirement is that under SCA 14, a violation of this section would not forfeit that bill’s enactment or enforcement.¹¹ SCA 14 contained no penalty for a situation where a bill was voted on prior to the 72-hour requirement, which would have given it little teeth.¹² Under Proposition 54, a bill voted on prior to the 72-hour mark would not be enacted or enforced.¹³

Fourth, SCA 14 would have changed the constitutional requirement that no committee nor either house be allowed to hear a bill until its 31st day in print.¹⁴ It would have allowed a committee to hear a bill on its 16th day in print.¹⁵

Despite passing the Senate with its requisite two-thirds votes, and passing through the Assembly Rules and Assembly Appropriations committees,¹⁶ the proposed constitutional amendment stalled and was moved to the Assembly Inactive File on August 1, 2016.¹⁷ Because the 2015-2016 Legislative Session ended on August 31, this bill cannot be resuscitated prior to the November vote on Proposition 54.

⁶ Text of S.C.A 14 (2015–16), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SCA14# (last visited Sept. 20, 2016) (on file with the *California Initiative Review*).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Cal. Proposition 54 at § 4.2 (2016).

¹⁴ CAL. CONST. art. IV, § 8(a).

¹⁵ Text of S.C.A 14 (2015–16), *supra* note 6.

¹⁶ Votes of S.C.A. 14 (2015–16), available at http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201520160SCA14 (last visited Sept. 20, 2016) (on file with the *California Initiative Review*).

¹⁷ History of S.C.A. 14 (2015–16), available at http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160SCA14 (last visited Sept. 20, 2016) (on file with the *California Initiative Review*).

2. AB 884 (2016)

AB 884, authored by Assemblymember Rich Gordon this year as a companion measure to SCA 14, repeals Section 9026.5 of the Government Code, which creates a misdemeanor offense for the use of a television signal generated by the Assembly for any political or commercial purpose. This bill completely removes the Legislature's copyright interests in this information.¹⁸

Further, this bill includes an urgency clause, which allows it to take effect immediately upon its signature into law by the Governor.¹⁹ AB 884 was signed and chaptered on September 22, 2016.²⁰ If Proposition 54 passes, it is unclear how AB 884 and the similar Government Code amendments of Proposition 54 will be reconciled.

3. ACA 4 (2013)

ACA 4, authored by Assemblymember Kristin Olsen in 2013, included two similar provisions to SCA 14. First, ACA 4 would have allowed a bill to be heard by a committee on the 16th day in print, as opposed to the current constitutional requirement of 30 days.²¹ Second, ACA 4 would have required a bill to be in print and available online for 72 hours prior to being voted on, excepting a Governor's declaration of emergency.²²

ACA 4 was never set for a hearing after being referred to the Assembly committees on Rules, Budget, and Appropriations.²³ A motion to request that the bill be withdrawn from committee, so as to get a hearing date in another committee, failed, after garnering only 25 of the required 41 votes.²⁴

B. Initiative Funding

The campaign funding for Proposition 54 supporters and opponents is straightforward. One person provided millions of dollars for the entire support operation.²⁵ The opposition campaign has received no funding.²⁶

¹⁸ Text of A.B. 884 (2015–16), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB884 (last visited Sept. 20, 2016) (on file with the *California Initiative Review*).

¹⁹ *Id.*

²⁰ 2016 Cal Stats. ch. 441.

²¹ Text of A.C.A. 4 (2013–14), available at http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201320140ACA4 (last visited Sept. 20, 2016) (on file with the *California Initiative Review*).

²² *Id.*

²³ History of A.C.A. 4 (2013–14), available at http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201320140ACA4 (last visited Sept. 20, 2016) (on file with the *California Initiative Review*).

²⁴ *Id.*

²⁵ Skelton, *Sunlight Is The Best Disinfectant*, *supra* note 5.

²⁶ CAMPAIGN FINANCE: CALIFORNIANS FOR AN EFFECTIVE LEGISLATURE, CONTRIBUTIONS RECEIVED, CALIFORNIA SEC'Y OF STATE (Sept. 30, 2016), <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1385928&session=2015&view=received> (on file with the *California Initiative Review*).

1. Proponent Funding

The single ballot measure committee formed to support Proposition 54 is named “Yes on 54 - Voters First, Not Special Interests - Sponsored by Hold Politicians Accountable.”²⁷ As of September 28, 2016, the “Yes on 54” committee reported contributions of over \$9 million.²⁸ Through the end of June 2016, the committee reported expenditures of over \$6.7 million.²⁹ A single person provided all of the committee’s contributions, California resident Charles T. Munger, Jr.³⁰ *The Mercury News* characterizes Munger’s involvement not as “a case of moneyed interests trying to disproportionately influence elections for their own benefit [because] Munger happens to be appalled by legislative secrecy and happens to have the money to try to fix it.”³¹

2. Opposition Funding

The single ballot measure committee formed to oppose Proposition 54 is named “Californians for an Effective Legislature.”³² As of September 30, 2016, the opposition committee reported no financial contributions for the 2015-16 election cycle.³³ The committee also reported no financial expenditures for the cycle.³⁴ Californians for an Effective Legislature bills itself as “a coalition of Democrats, Independents, and Republicans opposed to the big money power grab to rewrite California’s constitution.”³⁵ The group was founded in 2009 to oppose an effort to make the California Legislature part-time.³⁶

²⁷ CALIFORNIA SEC’Y OF STATE, PROPOSITION 54 - LEGISLATURE. LEGISLATION AND PROCEEDINGS. INITIATIVE CONSTITUTIONAL AMENDMENT AND STATUTE (Sept. 15, 2016), <http://www.sos.ca.gov/campaign-lobbying/cal-access-resources/measure-contributions/legislature-legislation-and-proceedings-initiative-constitutional-amendment-and-statute/> (on file with the *California Initiative Review*) [SEC’Y OF STATE, PROPOSITION 54].

²⁸ FAIR POLITICAL PRACTICES COMM’N, NOVEMBER 2016 GENERAL ELECTION (Sept. 28, 2016), <http://www.fppc.ca.gov/transparency/top-contributors/nov-16-gen-v2.html> (on file with the *California Initiative Review*).

²⁹ CAMPAIGN FINANCE: YES ON 54 - VOTERS FIRST, NOT SPECIAL INTERESTS - SPONSORED BY HOLD POLITICIANS ACCOUNTABLE, EXPENDITURES MADE, CAL. SEC’Y OF STATE (Sept. 15, 2016), <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1381029&session=2015&view=expenditures> (on file with the *California Initiative Review*).

³⁰ CAMPAIGN FINANCE: YES ON 54 - VOTERS FIRST, NOT SPECIAL INTERESTS - SPONSORED BY HOLD POLITICIANS ACCOUNTABLE, CONTRIBUTIONS RECEIVED, CAL. SEC’Y OF STATE (Sept. 15, 2016), <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1381029&session=2015&view=received> (on file with the *California Initiative Review*).

³¹ Mercury News Editorial, *Editorial: Proposition 54 Is Excellent Reform for California Legislature/Mercury News*, THE MERCURY NEWS (AUG. 11, 2016), <http://www.mercurynews.com/2016/07/25/editorial-proposition-54-is-excellent-reform-for-california-legislaturemercury-news/> (on file with the *California Initiative Review*).

³² SEC’Y OF STATE, PROPOSITION 54, *supra* note 27.

³³ CAMPAIGN FINANCE: CALIFORNIANS FOR AN EFFECTIVE LEGISLATURE, *supra* note 26.

³⁴ CAMPAIGN FINANCE: CALIFORNIANS FOR AN EFFECTIVE LEGISLATURE, EXPENDITURES MADE, CAL. SEC’Y OF STATE (Sept. 15, 2016), <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1385928&session=2015&view=expenditures> (on file with the *California Initiative Review*).

³⁵ VOTE NO ON PROP 54, ABOUT US (Sept. 19, 2016), <http://www.noonproposition54.com/about-us> (on file with the *California Initiative Review*).

³⁶ Eric Bailey, *Opposition Campaign Launched Against Part-time Legislature Effort*, LA TIMES (Sept. 17, 2009), <http://latimesblogs.latimes.com/lanow/2009/09/opposition-campaign-launched-against-parttime-legislature-effort.html> (on file with the *California Initiative Review*).

III. THE LAW

A. Current Law - Legislative Rules

All legislative power is vested in the California Legislature, which consists of the Senate and Assembly.³⁷ Each house has the constitutional right to choose its own officers and to adopt its own rules for its proceedings.³⁸ However, unless otherwise stipulated, each house can waive any rule by a majority vote on its respective floor.³⁹

Specifically, despite both houses having Standing Rules that stipulate the exact steps to be taken and the duration of time needed prior to an amended bill being heard on the floor, in both houses these rules are subject to a majority vote rule suspension. For example, Assembly Rule 77.2 stipulates that any amendments adopted on the floor that make a substantial substantive change to a bill as passed by the last committee may be referred by the Speaker to the appropriate committee.⁴⁰ This rule is often suspended during the end of the legislative session, when there is little time for debate or dialogue on controversial bills. Senate Rule 29.3(a) stipulates that consideration on a bill that has been amended on the floor is disallowed until the amended measure has been in print for one legislative day.⁴¹ Similarly, this rule is waived during the last days and hours of a legislative session, so as to hasten the passing of bills.

While it is a constitutional right and important for the Legislature's self-sufficiency to allow it to self-regulate, each house's capacity to waive or suspend almost any of its rules by a simple majority vote may have contributed to the bringing about of this proposition.

B. Proposed Law – Proposition 54

The proposed law is titled the California Legislature Transparency Act.⁴² The intent of Proposition 54 is to “foster disclosure, deliberation, debate, and decorum in our legislative proceedings, to keep our citizens fully informed, and to ensure that legislative proceedings are conducted fairly and openly.”⁴³ Proposition 54 has a tripartite purpose: first, “To enable we, the people, to observe through the Internet what is happening and has happened in any and all of the Legislature's public proceedings . . .”⁴⁴; second, “To enable we, the people, to record and to post or otherwise transmit our own recordings of those legislative proceedings . . .”⁴⁵; and, finally,

³⁷ CAL. CONST. art. IV, § 1.

³⁸ CAL. CONST. art. IV, § 7(a).

³⁹ Assembly Rule 7 (Suspension of Rules), http://www.leginfo.ca.gov/rules/assembly_rules.pdf (last visited Sept. 30, 2016) (on file with the *California Initiative Review*); Senate Rule 21 (Suspension of Rules or Amending of Rules), http://www.leginfo.ca.gov/rules/senate_rules.pdf (last visited Sept. 30, 2016) (on file with the *California Initiative Review*).

⁴⁰ Assembly Rule 77.2 (Substantially Amended Bills), http://www.leginfo.ca.gov/rules/assembly_rules.pdf (last visited Sept. 30, 2016) (on file with the *California Initiative Review*).

⁴¹ Senate Rule 29.3(a) (Measures Amended From the Floor) http://www.leginfo.ca.gov/rules/senate_rules.pdf (last visited Sept. 30, 2016) (on file with the *California Initiative Review*).

⁴² Cal. Proposition 54, § 1 (2016).

⁴³ Cal. Proposition 54 at § 2(f).

⁴⁴ *Id.* at § 3(a).

⁴⁵ *Id.* at § 3(b).

“To give us, the people, and our representatives the necessary time to carefully evaluate the strengths and weaknesses of the final version of a bill before a vote by imposing a 72-hour public notice period between the time that the final version is made available to the Legislature and the public, and the time that a vote is taken”⁴⁶ This section is divided into two subsections: subsection III(b)(i) describes the initiative’s amendments to the California Constitution, and subsection III(b)(ii) describes the initiative’s amendments to the California Government Code.

1. Constitutional Amendments

Proposition 54 amends the California Constitution’s Article IV, Sections 7 and 8.⁴⁷ Section 7 of Article IV is amended to enable the recording and dissemination of the Legislature’s public sessions.⁴⁸ Section 7(c)(1) would be amended to allow the public to make and distribute audio or video recordings of the sessions, subject to the Legislature’s rules regarding placement and use of recording devices.⁴⁹ Section 7(c)(2) would be added to require, beginning on January 1, 2018, the Legislature to make recordings of all its public sessions and to make the recordings publicly available on the internet within 24 hours after the end of the session.⁵⁰ Amended § 7(c)(3) exempts closed sessions from the recording and publication requirement.⁵¹

Section 8 of Article IV is amended to require a minimum waiting period between the time a bill is published in final form and the time it is voted on.⁵² Section 8(b)(2) prohibits a bill’s passage or adoption unless the bill is “published on the Internet, in its final form, for at least 72 hours before the vote.”⁵³ The 72-hour waiting period is excused in instances where the Governor declares a state of emergency and the bill is necessary to address the emergency.⁵⁴

2. Government Code Amendments

Proposition 54 amends and adds to the Government Code to guide the dissemination of recordings of the Legislature and to prescribe how the California Legislature Transparency Act should be defended in the event of litigation.⁵⁵ Section 10248 would be amended to require Legislative Counsel to publish the recordings on the internet and maintain the availability of the recordings online for a minimum of 20 years.⁵⁶

Section 9026.5 would be amended to allow anyone to use the Legislature’s recordings for any purpose, free of charge.⁵⁷ At the time Proposition 54 was introduced, section 9026.5 made the commercial or political use of such recordings a misdemeanor offense, and the amendment in

⁴⁶ *Id.* at § 3(c).

⁴⁷ *Id.* at § 4, *amending* CAL. CONST. art. IV, § 7-8.

⁴⁸ *Id.* at § 4.1, *amending* CAL. CONST. art. IV, § 7.

⁴⁹ *Id.*, *amending* CAL. CONST. art. IV, § 7(c)(1).

⁵⁰ *Id.*, *amending* CAL. CONST. art. IV, § 7(c)(2).

⁵¹ *Id.*, *amending* CAL. CONST. art. IV, § 7(c)(3).

⁵² *Id.* at § 4.2, *amending* CAL. CONST. art. IV, § 8.

⁵³ *Id.*, *amending* CAL. CONST. art. IV, § 8(b)(2).

⁵⁴ *Id.*, *amending* CAL. CONST. art. IV, § 8(b)(2).

⁵⁵ *Id.* at § 5, 6.

⁵⁶ *Id.* at § 5.2, *amending* Cal. Gov’t Code 10248.

⁵⁷ *Id.* at § 5.1, *amending* Cal. Gov’t Code 9026.5.

Proposition 54 would have repealed the offense.⁵⁸ However, the adoption of AB 884 on September 22, 2016, completely repealed section 9026.5.⁵⁹ It is unclear how this amendment will be applied, should Proposition 54 pass.

Section 12511.7 would be added to the Government Code to provide guidance in the event an action is brought challenging the validity of the California Legislature Transparency Act.⁶⁰ In the event the Act is challenged in court, the Legislature would have to continue to comply with the Act until a final judgment is issued by an appellate court.⁶¹ Additionally, in the event the Governor or the Attorney General decline to defend the authority of the Act, the Act authorizes the official proponents of Proposition 54 “to act on the state’s behalf in asserting the state’s interest in the validity of the act in any such action and to appeal from any judgment invalidating the act.”⁶² The provisions authorizing the proponents to act on the state’s behalf seem to be an attempt to guarantee the proponents’ standing, (i.e., the right to initiate or participate in a lawsuit) in the event Proposition 54 is disputed.⁶³ Proposition 54’s statutory authorization for the proponents “to participate, either as interveners or real parties in interest, in any action affecting the validity or interpretation of the act” seems to be a response to the United States Supreme Court’s decision on Proposition 8.⁶⁴ The Court held that standing requirements may be met by a third party authorized by state law to be an agent of the state in the dispute.⁶⁵

IV. DRAFTING ISSUES

A. Proposition 54 Fails to Create a “72-hour Public Notice Period” for the Public’s Review of the Final Bill

Proposition 54 boldly proclaims that part of its purpose is to give the public a “72-hour public notice period between the time that the [bill’s] final version is made available to the Legislature and the public, and the time that a vote is taken.”⁶⁶ However, the proposed constitutional amendment does not specifically require the bill be available to the public for 72 hours.⁶⁷ The proposed amendment to Section 8(b)(2) of Article IV of the California Constitution requires only that the bill be “published on the Internet, in its final form, for at least 72 hours before the vote”⁶⁸ Publishing the bill on the internet does not necessarily mean it will be made public.⁶⁹

⁵⁸ *Id.*

⁵⁹ 2016 Cal Stats. ch. 441.

⁶⁰ Cal. Proposition 54, § 6, *adding* Cal. Gov’t Code 12511.7 (2016).

⁶¹ *Id.* at § 6.1 (2016), *adding* Cal. Gov’t Code 12511.7(a) (2016).

⁶² *Id.*, *adding* Cal. Gov’t Code 12511.7(d) (2016).

⁶³ *See* Hollingsworth v. Perry, 570 U.S. ___, 133 S. Ct. 2652, 2666-67 (2013) (emphasizing that the Proposition 8 proponents’ lack of an agency relationship with the State of California undercut the proponents’ claim of Article III standing).

⁶⁴ Cal. Proposition 54, § 6.1, *adding* Cal. Gov’t Code 12511.7(d) (2016).

⁶⁵ 133 S. Ct. at 2666.

⁶⁶ Cal. Proposition 54, § 3(c) (2016).

⁶⁷ *Id.* at § 4.2, *amending* CAL. CONST. art. IV, § 8(b)(2).

⁶⁸ *Id.*, *amending* CAL. CONST. art. IV, § 8(b)(2).

⁶⁹ Consider information that is privately shared on social media sites (e.g., Facebook), or privately published on subscription-based sites (e.g., Netflix).

The failure to require public access through the Internet to the published bill language is highlighted by the proposed amendments guaranteeing public access to the Legislature’s video recordings.⁷⁰ Consider the proposed amendments to Section 7(c)(2) of Article IV of the California Constitution concerning the Legislature’s video recordings: “. . . the Legislature *shall make such recordings public* through the Internet within 24 hours after the proceedings have been recessed or adjourned for the day, and shall maintain an archive of said recordings, *which shall be accessible to the public* through the Internet . . .” (emphasis added).⁷¹ Proposition 54’s requirements for bills and recordings are distinct: bills must be “published on the Internet;”⁷² however, recordings must be “accessible to the public through the Internet.”⁷³

When interpreting statutory language, the California Supreme Court relies on the statute’s plain meaning.⁷⁴ The language’s plain meaning is informed by its context in a comprehensive legislative scheme.⁷⁵ Plain phrases that are similar yet distinct from one another are presumed to not have the same meaning because doing so would obscure the purpose of the legislation.⁷⁶ The court’s disfavor of surplusage means it is unlikely that Proposition 54’s requirement for bills to be “published on the Internet” would be construed to mean the same thing as the requirement for recordings to be “accessible to the public through the Internet.”⁷⁷

B. What is a “Legitimate Purpose”?

Proposition 54 amends § 9026.5 of the Government Code to allow televised or audiovisual recordings of the Legislature’s public proceedings to be used for “any legitimate purpose.”⁷⁸ The proposition does not define “legitimate purpose,”⁷⁹ nor does the existing Government Code.⁸⁰ There is no prescribed penalty for using the recordings for an illegitimate purpose (whatever that may be).⁸¹ The proposition declares that its enactment would show that the voters’ intent is to post recordings “to encourage fairness in the proceedings, deliberation in our representatives’ decision-making, and accountability.”⁸² Conversely, the California Democratic Party claims that the proposition simply allows more political “attack ads.”⁸³

By limiting the allowed uses of a recording to “legitimate purposes,” proposed § 9026.5 effectively proscribes other uses of the recording. But the “legitimate purposes” limit is

⁷⁰ Cal. Proposition 54 at § 4.1, 5.2 (2016).

⁷¹ *Id.* at § 4.1, *amending* CAL. CONST. art. IV, § 7(c)(2).

⁷² *Id.* at § 4.2, *amending* CAL. CONST. art. IV, § 8(b)(2).

⁷³ *Id.* at § 4.1, *amending* CAL. CONST. art. IV, § 7(c)(2).

⁷⁴ *Poole v. Orange County Fire Authority*, 61 Cal. 4th 1378, 1385 (2015).

⁷⁵ *Id.*

⁷⁶ *Ste. Marie v. Riverside County Regional Park & Open-Space Dist.*, 46 Cal. 4th 282, 289 (2009).

⁷⁷ *Id.*

⁷⁸ Cal. Proposition 54 at § 5.1 (2016), *amending* Cal. Gov’t Code 9026.5 (2016).

⁷⁹ Cal. Proposition 54 (2016).

⁸⁰ *See generally* text search of the Government Code for the phrase “legitimate purpose”, CALIFORNIA LEGISLATIVE INFORMATION (Sept. 16, 2016), <http://leginfo.legislature.ca.gov/faces/codesTextSearch.xhtml> (on file with the *California Initiative Review*).

⁸¹ Cal. Proposition 54 (2016).

⁸² *Id.* at § 3(b).

⁸³ CALIFORNIA DEMOCRATIC PARTY, 2016 BALLOT INITIATIVES (Sept. 16, 2016) <http://www.cadem.org/vote/2016-ballot-initiatives> (on file with the *California Initiative Review*).

problematic because it could be perceived as an abridgement of free speech.⁸⁴ By failing to define “legitimate purposes,” proposed § 9026.5 is a vague and potentially unenforceable provision.

The United States Supreme Court instructs that free speech is “essential” to democracy as a tool of transparency and accountability.⁸⁵ The Court has stated that “it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”⁸⁶ The Court has held statutes that restrict speech based on undefined terms like “‘indecent’ and ‘patently offensive’” or “‘unjust or unreasonable [price]’” to be void for vagueness.⁸⁷ A statute or regulation is impermissibly vague when (1) “[the] regulate[d] persons or entities [are not given] fair notice of conduct that is forbidden or required,”⁸⁸ or (2) “[it lacks the precision and guidance] so that those enforcing the law do not act in an arbitrary or discriminatory way.”⁸⁹

The proposed limitation of using a recording only for a “legitimate purpose” does not give a person fair notice of conduct that is forbidden. There is no fair notice because a reasonable person would have no idea how to lawfully use the recording.⁹⁰ Further, the proposed limitation’s ambiguity would prompt arbitrary enforcement because it is unclear what establishes a “legitimate purpose.”⁹¹

V. CONSTITUTIONAL ANALYSIS

A. Single Subject Rule

The California Constitution asserts that “an initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”⁹² It has been established in the California courts that an initiative does not violate this single subject rule if, “despite its varied collateral effects, all of its parts are ‘reasonably germane’ to each other, and to the general purpose or object of the initiative.”⁹³

All three substantive sections of this proposition appear to be under the umbrella of providing more transparency in the legislative process for the benefit of California’s constituents. The 72-hour requirement allows the public to view pending legislation prior to its being voted on, so as to grant them time to do a proper analysis and to voice their opinions. The recording and online availability requirement allows the public to watch committee hearings and floor

⁸⁴ See U.S. CONST. amend. I (prohibiting the abridgment of the freedom of speech).

⁸⁵ *Citizens United v. Fed. Elec. Comm’n*, 558 U.S. 310, 340 (2010).

⁸⁶ *Id.* at 341.

⁸⁷ *Reno v. ACLU*, 521 U.S. 844 (1997) (holding a statute void because the terms “indecent” and “patently offensive” were too vague), and *U.S. v. L. Cohen*, 225 U.S. 81, 89 (1921) (holding a statute void because the prohibition on charging an “unjust or unreasonable rate” was void because it “forbids no specific or definite act.”).

⁸⁸ *FCC v. Fox TV Stations, Inc.*, 567 U.S. ___, 132 S. Ct. 2307, 2317 (2012).

⁸⁹ *Id.*

⁹⁰ See *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (explaining a statute should allow regulated parties to “should know what is required of them so they may act accordingly”).

⁹¹ See *id.* (explaining an enforcement is arbitrary when “it is unclear as to what fact must be proved”).

⁹² CAL CONST. art. II, § 8(d).

⁹³ *Senate v. Jones*, 21 Cal. 4th 1142, 1157 (1999) (quoting *Legislature v. Eu*, 54 Cal. 3d 492, 512 (1991)).

sessions to follow legislation through another step of the legislative process. It also enables the public to see the Legislature’s comments on these measures, specifically how their own elected officials vote, and whether their elected officials are faithfully representing them. Allowing the public to make their own recordings or to utilize the Legislature’s recordings for their own purposes gives more freedom to the public to hold their representatives accountable for their actions and to feel like they are truly a part of the process.

Further, according to the proposition’s statement of purpose, its three intentions are all directly related to furnishing greater public participation in the political process, which would pass muster under the reasonably germane requirement of the single-subject rule.⁹⁴

However, the proposed addition of Government Code section 12511.7 is less straightforward in this analysis.⁹⁵ Although the new code section would be labeled “Defense of the California Legislature Transparency Act,” its rigid stipulations might be seen as pushing the boundaries of seeking to uphold legislative transparency.⁹⁶ But, as noted above, this section was most likely added to secure standing in the case of a dispute,⁹⁷ which arguably is simply a stronger tactic for upholding the ideals contained in the substantive sections. Although its requirements are not specifically tailored to fit only a legislative transparency proposition, it is possible that the effects of this procedural section would be considered collateral and thus, still remain reasonably germane to upholding the general purpose of the initiative.⁹⁸

B. Legislative Autonomy

Although not a novel constitutional question, one that arises only in this particular subject matter is whether the electorate has the right to regulate the internal workings of the Legislature. According to the California courts, “only by means of an initiative constitutional amendment may the people modify or impinge upon the freedom of the Legislature to exercise its constitutionally granted powers.”⁹⁹

Because the sections of this proposition that affect the Legislature’s rulemaking capabilities are all part of an initiative constitutional amendment, it appears that proponents have utilized the proper vehicle to make these substantive changes. The initiative statute part of this proposition only affects the creation, use, and archival of legislative recordings, and therefore does not modify any of the Legislature’s constitutional freedoms.

C. Severability

Proposition 54 includes a severability clause, which addresses the possibility in which one or more sections of the proposition are deemed unconstitutional. The presence of such a

⁹⁴ Cal. Proposition 54 at § 3 (2016).

⁹⁵ *Id.* at § 6, *adding* Cal. Gov’t Code 12511.7.

⁹⁶ *Id.* at § 6.1, *adding* Cal. Gov’t Code 12511.7(a).

⁹⁷ *See* Hollingsworth v. Perry 133 S. Ct. 2652, 2666–67 (2013).

⁹⁸ *See* Manduley v. Superior Court, 27 Cal. 4th 537, 575 (2002).

⁹⁹ *People’s Advocate, Inc. v. Superior Court of Sacramento Cty.*, 181 Cal.App.3d 316, 327 (3d Dist. 1986).

clause establishes a presumption that severability would be constitutional, however, “the invalid provision must be grammatically, functionally, and volitionally separable.”¹⁰⁰

Because the proposition substantively amends separate pieces of legislation, grammatically, the invalid sections could “be removed as a whole without affecting the wording” or coherence of the remaining sections.¹⁰¹ For the same reason, functionally, each portion could stand on its own if one or more of the other sections were removed.

Volitionally, “the issue is whether a legislative body, knowing that only part of its enactment would be valid, would have preferred that part to nothing, or would instead have declined to enact the valid without the invalid.”¹⁰² As this is a legislative transparency measure, it seems obvious that the electorate would prefer that something pass rather than nothing at all, therefore, it would appear that the proposition could be volitionally separable as well.¹⁰³

However, the test for this prong is “whether it can be said with confidence that the electorate’s attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions.”¹⁰⁴ Each of the three substantive sections of the proposition are appropriately covered in all of the ballot arguments and voting materials, so as to make it clear that each of them has been focused on by the electorate.¹⁰⁵ Although the component that allows the public to make and use recordings themselves has received less attention, it is still sufficiently represented on both sides’ websites and voting materials.

The procedural addition to the Government Code is, interestingly, not found in any of the ballot arguments or voting materials, nor on either side’s websites. But, because this new statute would only exist to uphold the enactment of the proposition, it may be somewhat gratuitous to include it in a severability analysis.

Because Proposition 54 could be grammatically, functionally, and volitionally separable, it passes the severability test; therefore, should one or more of its sections be declared unconstitutional, the other remaining section(s) could still be enacted.

VI. PUBLIC POLICY CONSIDERATIONS

A. Supporting Arguments

A coalition made up of numerous bipartisan organizations and individuals has formed in support of Proposition 54, including League of California Cities, Howard Jarvis Taxpayers Association, California Chamber of Commerce and numerous regional and local chambers of commerce, California Conference of NAACP, California Common Cause, League of Women Voters California, California Business Properties Association, First Amendment Coalition, and

¹⁰⁰ Cal. Redevelopment Assn. v. Matosantos, 53 Cal. 4th 231, 270–71 (2011) (quoting Calfarm Ins. Co. v. Deukmejian 48 Cal. 3d 805, 821 (1989)).

¹⁰¹ 53 Cal. 4th at 273.

¹⁰² *Id.*

¹⁰³ NOVEMBER 2016 VOTER GUIDE, *supra* note 2, at 36.

¹⁰⁴ People’s Advocate, Inc. v. Superior Court of Sacramento Cty., 181 Cal.App.3d 316, 333 (3d Dist. 1986).

¹⁰⁵ NOVEMBER 2016 VOTER GUIDE, *supra* note 2, at 36–39.

National Federation of Independent Business California Chapter.¹⁰⁶ The Editorial Boards from the *Los Angeles Times*, the *San Francisco Chronicle*, and the *San Diego Union-Tribune* have also voiced their support of the proposition.¹⁰⁷

I. 72-hour Requirement

Supporters contend that this requirement will increase transparency and accountability by allowing legislators and the public to become well-versed in the most up-to-date version of the bills that are being voted on.¹⁰⁸

The *San Francisco Chronicle*, in urging the proposition's passing on November 8, framed the issue in the following way: "California legislators had their chances to stop one of their sloppiest and most undemocratic practices: the passage of last-minute legislation that is jammed through before most rank-and-file lawmakers, let alone the rest of us, have a chance to read it."¹⁰⁹ This "practice" is colloquially known as the "gut and amend" process, by which a bill that has stalled for whatever reason is promptly completely gutted of its contents and replaced with entirely new language, while the bill still maintains its current status and location in the Legislature.¹¹⁰ Without the 72-hour requirement, these new bills can be voted on almost instantaneously in their respective houses, sometimes even before legislators, let alone the public, have a chance to digest the new language.¹¹¹

Supporters also argue that special interests use this process to manipulate legislators and pass controversial legislation quietly without any public comment or review.¹¹² During a joint informational hearing on Proposition 54 with the Assembly Rules Committee and the Senate Elections & Constitutional Amendments Committee, proponent and former Senator Sam Blakeslee testified that in the "gut and amend" process, both the legislators and the public loses; he further pointed out that the media loses too, as a function of not receiving accurate and timely information.¹¹³

¹⁰⁶ *About Us*, YES ON 54, <http://yesprop54.org/about-us/> (last visited Sept. 19, 2016) (on file with the *California Initiative Review*).

¹⁰⁷ *Newspaper Endorsements*, YES ON 54, <http://yesprop54.org/in-the-news/editorial-board-endorsements/> (last visited Sept. 19, 2016) (on file with the *California Initiative Review*).

¹⁰⁸ *Frequently Asked Questions*, YES ON 54, <http://yesprop54.org/facts/frequently-asked-questions/> (last visited Sept. 19, 2016) (on file with the *California Initiative Review*).

¹⁰⁹ *Chronicle Recommends: Yes on State Prop. 54*, SAN FRANCISCO CHRONICLE (Sept. 5, 2016), <http://www.sfchronicle.com/opinion/editorials/article/Chronicle-recommends-Yes-on-state-Prop-54-9204028.php> (on file with the *California Initiative Review*).

¹¹⁰ Dan Walters, *Sneakiness Abounded On Last, Hectic Night of California Legislature's Session*, SACRAMENTO BEE (Sept. 18, 2016), <http://www.sacbee.com/news/politics-government/politics-columns-blogs/dan-walters/article102291437.html> (on file with the *California Initiative Review*).

¹¹¹ Skelton, *Sunlight Is The Best Disinfectant*, *supra* note 5.

¹¹² *Facts*, YES ON 54, <http://yesprop54.org/facts/> (last visited Sept. 19, 2016) (on file with the *California Initiative Review*).

¹¹³ *Initiative Hearing: Proposed Initiative #1742*, Joint Informational Hearing Transcript, 17-18 (June 15, 2016), <http://yesprop54.org/wp-content/uploads/2016/08/June-15-2016-Informational-Hearing.pdf> (testimony of Sam Blakeslee) (on file with the *California Initiative Review*).

2. *Legislature's Recordings of Proceedings*

California Forward, in endorsing Proposition 54, framed the issues surrounding Proposition 54 thusly: “Lobbyists know [what’s going on], always. Legislators know, most of the time. Do the people know? Not so much!”¹¹⁴ Supporters argue that establishing an archive of video records of the Legislature’s meeting would be valuable to the public.¹¹⁵ Although many meetings of the Legislature are already recorded and published online,¹¹⁶ Proposition 54 would codify the practice as a constitutional requirement.¹¹⁷ The initiative requires the recordings be published within 24 hours of the meeting’s close, putatively allowing the public a minimum of 48 hours to watch the video before the Legislature votes on the bill.¹¹⁸

3. *Recording and Use of Recordings by the Public*

Proposition 54 would allow citizens to make their own video recordings of the Legislature’s meetings that are open to the public.¹¹⁹ The initiative’s proponents ask, “[i]ndividuals have been allowed to record] meetings of city councils and other local boards for years – So why can’t the State Legislature catch up?”¹²⁰ Basic modern technology allows people to make video records in a matter of seconds, and Proposition 54 would extend that privilege to be exercised at public meetings of the Legislature.¹²¹ Similarly, the initiative would allow people to use those recordings as they see fit, a move towards transparency that the *Monterey Herald* claims “is vital to a functioning democracy.”¹²²

B. Opposing Arguments

Much of the public opposition to Proposition 54 is attributed to one person, Steve Maviglio, whom the *L.A. Times*’s George Skelton described as “[t]he only person candid enough to really speak out against the measure.”¹²³ Maviglio is fiercely opposed to Proposition 54, going as far as to accuse bipartisan reform group California Forward of “pimping” the measure for

¹¹⁴ Ed Coghlan, *Prop 54 Supporters Make Their Case For Increased Transparency*, CALIFORNIA FORWARD (Sep. 13, 2016), <http://cafwd.org/reporting/entry/prop-54-supporters-make-their-case-for-increased-transparency> (on file with the *California Initiative Review*).

¹¹⁵ *Facts*, *supra* note 112.

¹¹⁶ *Chronicle Recommends: Yes On State Prop. 54*, *supra* note 109.

¹¹⁷ Cal. Proposition 54 at § 4.1 (2016), *amending* CAL. CONST. art. IV, § 7.

¹¹⁸ LEGISLATIVE ANALYST’S OFFICE, *Proposition 54 - Legislature. Legislation and Proceedings* (July 18, 2016), available at <http://www.lao.ca.gov/ballot/2016/Prop54-110816.pdf> (on file with the *California Initiative Review*) [LAO Analysis].

¹¹⁹ Cal. Proposition 54 at § 4.1 (2016), *amending* CAL. CONST. art. IV, § 7.

¹²⁰ *Facts*, *supra* note 112.

¹²¹ Cal. Proposition 54 at § 4.1 (2016), *amending* CAL. CONST. art. IV, § 7.

¹²² *Sunshine Week: Bring Real Transparency To State Lawmaking*, MONTEREY HERALD (Mar. 16, 2016), <http://www.montereyherald.com/opinion/20160316/editorial-march-17-2016-sunshine-week-bring-real-transparency-to-state-lawmaking> (on file with the *California Initiative Review*); also The Federalist No. 49 (James Madison) (theorizing that frequent appeals to the public would be inefficient, but that the “road to the decision of the people ought to be marked out and kept open.”).

¹²³ Skelton, *Sunlight Is The Best Disinfectant*, *supra* note 5.

Munger Jr.¹²⁴ The formal opposition to Proposition 54 is two-fold, focusing on the initiative’s practical effect and its moneyed backing.

The initiative’s opponents claim that the legislative culture of compromise is essential to securing “landmark legislation.”¹²⁵ That culture would be undermined by the 72-hour delay period between a bill’s publication and its vote. The opponents fear that the 72-hour period would invite dissension because “powerful lobbyists and well-funded special interests [will have] time to launch campaigns to attack bipartisan compromises.”¹²⁶ The initiative would also cause an increase in political attacks ads, claim the opponents.¹²⁷ Attack ads would increase because the public would be allowed to use the Legislature’s recordings for political purposes,¹²⁸ although due to the passing of AB 884 with an urgency clause, this practice is now legal.¹²⁹

The opposition’s second front is principles-based, an argument that one person should not be allowed to singularly finance a campaign to amend California’s Constitution. That one person, Charles Munger, Jr., is accused of being “backed by big, out-of-state corporations” and pursuing Proposition 54 to give “special interests even MORE power in Sacramento.”¹³⁰ Munger Jr. has a history of significantly financing ballot initiatives, providing almost \$13 million in 2010 and \$37 million in 2012.¹³¹

The Legislature also tried to prevent Proposition 54 by introducing similar legislation in SCA 14.¹³² Senator Wolk, author of SCA 14, claimed that Proposition 54 suffered from “flaws” that required correcting.¹³³ Wolk claimed that SCA 14 could achieve the same goals as Proposition 54, but in a better fashion because the Legislature would try to “get the details right through a public process.”¹³⁴ The backers of Proposition 54 and SCA 14 attempted to negotiate a deal that would have seen the proposition removed from the ballot.¹³⁵ The deal never materialized; Proposition 54 remains on the ballot¹³⁶ and SCA 14 died in the Legislature.¹³⁷

¹²⁴ Steven Maviglio, TWITTER (June 1, 2016), <https://twitter.com/stevenmaviglio/status/738045253265940480> (on file with the *California Initiative Review*).

¹²⁵ NOVEMBER 2016 VOTER GUIDE, *supra* note 2, at 39.

¹²⁶ *Id.*

¹²⁷ Dan Walters, *California Measures For Three-day Waiting Period Near Showdown*, SACRAMENTO BEE (June 27, 2016), <http://www.sacbee.com/news/politics-government/politics-columns-blogs/dan-walters/article86297962.html> (on file with the *California Initiative Review*).

¹²⁸ NOVEMBER 2016 VOTER GUIDE, *supra* note 2, at 39.

¹²⁹ 2016 Cal Stats. ch. 441.

¹³⁰ NOVEMBER 2016 VOTER GUIDE, *supra* note 2, at 38.

¹³¹ Skelton, *Sunlight Is The Best Disinfectant*, *supra* note 5.

¹³² Dan Walters, *supra* note 127.

¹³³ Press Release, *Senate Moves Forward with the California Legislative Transparency Act* (June 16, 2016), <http://sd03.senate.ca.gov/news/2016-06-16-senate-moves-forward-california-legislative-transparency-act> (on file with the *California Initiative Review*).

¹³⁴ Alexei Koseff, *California Senate Approves Measure Requiring More Transparency*, SACRAMENTO BEE (June 16, 2016), <http://www.sacbee.com/news/politics-government/capitol-alert/article84247392.html> (on file with the *California Initiative Review*).

¹³⁵ *Only Voters Can Bring Transparency to Legislature*, SAN FRANCISCO CHRONICLE (July 1, 2016), <http://www.sfchronicle.com/opinion/editorials/article/Only-voters-can-bring-transparency-to-Legislature-8337551.php> (on file with the *California Initiative Review*).

¹³⁶ *Id.*

C. Fiscal Impact

According to the Legislative Analyst's Office, only one section of Proposition 54 would appear to have a price tag, although the total cost will depend on how the Legislature would address the new requirements if the proposition were to pass.¹³⁸

The recording and online maintenance section of the proposition would cost roughly \$1 million to \$2 million upfront, as a function of purchasing cameras and other equipment.¹³⁹ This section of the proposition would also cause an annual budget increase of approximately \$1 million for additional staff and online storage for the recordings, although this increase would be absorbed into the Legislature's annual budget for its operating costs, which comes out of the General Fund.¹⁴⁰ The increase in cost for this proposition would account for less than 1 percent of the Legislature's annual budget.¹⁴¹

VII. CONCLUSION

Proposition 54 would require the Legislature to be more transparent in its passage of bills and in its legislative hearings. It would give the public more access to information regarding committee hearings and floor sessions, allowing them to be a more crucial part of the legislative process and to hold the state's elected officials accountable to those constituents whom they represent. Because the costs of the proposition would be absorbed into the Legislature's budget from the General Fund, this transparency would come at a nominal cost to taxpayers.

¹³⁷ History of S.C.A. 14 (2015–16), available at http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160SCA14 (last visited Sept. 20, 2016) (on file with the *California Initiative Review*).

¹³⁸ LAO Analysis, *supra* note 118, at 3.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2–3.

¹⁴¹ NOVEMBER 2016 VOTER GUIDE, *supra* note 2, at 37.