A157598 / A157972

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

HOWARD JARVIS TAXPAYERS ASSOCIATION, ET AL.

Appellants,

v.

BAY AREA TOLL AUTHORITY, ET AL.

Respondents.

RANDALL WHITNEY

Appellant,

v.

METROPOLITAN TRANSPORTATION COMMISSION

Respondent.

After Judgments of the Superior Court for the County of San Francisco,
Case Nos. CGC-18-567860 / CPF 18-516276; Hon. Ethan P. Schulman

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APPLICATION OF TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, SILICON VALLEY TAXPAYERS ASSOCIATION, CONTRA COSTA TAXPAYERS ASSOCIATION, NAPA VALLEY TAXPAYERS ASSOCIATION, SOLANO COUNTY TAXPAYERS ASSOCIATION, MARCUS CRAWLEY AND THOMAS A. RUBIN FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANTS HOWARD JARVIS TAXPAYERS ASSOCIATION AND RANDALL WHITNEY AND [*PROPOSED*] BRIEF OF *AMICI CURIAE*

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TO THE HONORABLE PRESIDING JUSTICE OF THE COURT OF APPEAL:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 8.200(c) of the California Rules of Court, Transportation Solutions Defense and Education Fund, Silicon Valley Taxpayers Association, Contra Costa Taxpayers Association, Napa Valley Taxpayers Association, Solano County Taxpayers Association, Marcus Crawley and Thomas A. Rubin respectfully request leave to file the attached *amici curiae* brief in support of Appellants Howard Jarvis Taxpayers Association and Randall Whitney.

HOW THIS BRIEF WILL ASSIST THE COURT

This proposed amici brief will assist the Court by offering public policy perspectives and undisputed facts not covered by the parties. Amici have deep backgrounds in transportation and taxation, thus bringing a useful real-world perspective to the case.

Not only will Amici offer their own view of case, but also they will summarize what they understand to be the compelling arguments, stripped of irrelevancies.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Transportation Solutions Defense and Education Fund, Silicon Valley Taxpayers Association, Contra Costa Taxpayers Association, Napa Valley Taxpayers Association, Solano County Taxpayers Association, Marcus Crawley and Thomas A. Rubin (collectively, "Amici") worked together as a diverse coalition of environmentalists

and taxpayer advocates in an effort to defeat Regional Measure 3 ("RM3") on the June 2018 ballot.

Transportation Solutions Defense and Education Fund ("TRANSDEF") is a California environmental non-profit dedicated to reducing the impacts of transportation on climate change. TRANSDEF opposed RM3 because the projects it proposed to fund perpetuate the transportation status quo, which is deeply dysfunctional. In particular, RM3 could not possibly accomplish its priority function of reducing congestion. TRANSDEF wrote RM3 opposition ballot arguments for three counties. These arguments were published in the Voter Information Guides of Marin and San Mateo counties. TRANSDEF's President debated the President of the Bay Area Council on KQED-FM and wrote four opinion pieces for the region's newspapers. He also wrote the legal memo that led to the filing of the instant case. On the first anniversary of the disputed victory at the polls that is at the heart of the instant case, TRANSDEF and its ally Bay Area Transportation Working Group (BATWG) filed a complaint with the Fair Political Practices Commission, alleging illegal use of public resources by Respondent MTC/BATA in campaigning for RM3. That complaint is currently under investigation.

TRANSDEF's advocacy at MTC began in 1994 and has continued up to the present. TRANSDEF initiated several lawsuits seeking to resolve policy issues during that period. In 2009, TRANSDEF brought suit to halt MTC's reallocation of RM2 toll funds away from the voter-approved Dumbarton Rail project to the BART extension to Warm Springs, asserting it had no statutory mandate to do so. Finally, TRANSDEF is a party in *Tos v. State of California*, Case No. C089466, now pending in the Third District

Court of Appeal. Although, like the instant case, *Tos* involves allegations of legislative overreach, a decision in this case will not affect that case.

Silicon Valley Taxpayers Association (SVTA) is dedicated to protecting the rights and interests of the taxpayers of Silicon Valley against the over-reaching and over-spending of government. SVTA has nearly 500 members in Santa Clara and San Mateo Counties.

Contra Costa Taxpayers Association (CoCoTax) is a non-partisan, non-profit California corporation whose mission is to promote "good government at affordable cost" throughout Contra Costa County and beyond. Eighty years old, CoCoTax is a bona fide taxpayer advocacy organization, with over two hundred members.

In addition to analyzing potential legislation, researching and filing ballot arguments, CoCoTax provides taxpayer representatives on a dozen citizen bond oversight committees in county school districts, monitoring over $2 billion in Proposition 39 bond programs.

Napa Valley Taxpayers Association (NVTA) was organized in 2010, and is not registered as a California nonprofit organization. NVTA's directors realize California has some of the highest state and local tax rates in the nation. They critically review any new tax proposals by the City or County of Napa, Yountville, St. Helena, and Calistoga. This has resulted in the association's opposition to most of the recent proposals for new or increased taxes in Napa County. Although it is a small group, its efforts have been successful in defeating or avoiding over $1 billion in local tax proposals.

Solano County Taxpayers Association (SCTA): Established in October 1960, it is a 501(c)(3) non-profit corporation operated by volunteers in Solano County. Its specific and primary purposes are to secure by lawful means greater economy and efficiency in government; to stimulate the public interest in civic affairs; to effect reduction in taxes and to assist governments of a county region by studying and recommending regional policies directed at the solution of mutual problems that transcend local jurisdictions, but affect all of them. Membership is available in each city in Solano County, with the formation of local city chapters.

SCTA sponsors candidate debate forums and successfully lobbied the California Legislature. Members have testified before the Little Hoover Commission and the California State Water Resources Control Board and have placed initiatives on the ballot.

Marcus Crawley is President of the Alameda County Taxpayers Association (ACTA) and a retired California General Contractor, licensed since 1972.

He is a resident and voter in Oakland, Alameda County and regularly travels to all parts of the Bay Area and uses all of the toll bridges. He represents ACTA on the Peralta Community College District Bond Measures Oversight Committee, the Alameda County Budget Oversight Committee and the California Association of Bond Oversight Committees.

Thomas A. Rubin, CPA, CMA, CMC, CIA, CGFM, CFM, is Vice-President of the Alameda County Taxpayers Association. He is a resident and voter in Oakland, Alameda County, and regularly utilizes most of the State-owned Bay Area toll bridges.

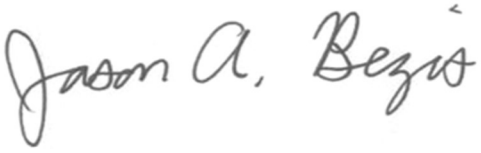
He has over four decades of experience in the government surface transportation industry as a senior executive of major transit operators (chief financial officer of the Southern California Rapid Transit District (now Los Angeles County Metropolitan Transportation Authority) and the Alameda-Contra Costa Transit District and as a consultant and auditor to well over 100 transit operators, metropolitan planning organizations, state departments of transportation, and the U.S. Department of Transportation. He has served as an expert/expert witness is over a dozen transportation and public finance legal actions in Federal and state courts.

Amici join together in this application and proposed brief to support Appellants Howard Jarvis Taxpayers Association and Randall Whitney.

Respectfully submitted,

DATED: February 7, 2020

By:



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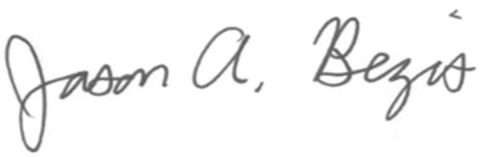
CERTIFICATE REGARDING AUTHORSHIP AND FUNDING

No party or counsel in the pending case authored the proposed amici curiae brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No person other than the proposed Amici Curiae made any monetary contribution intended to fund the preparation or submission of this brief.

Respectfully submitted,

DATED: February 7, 2020

By:



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BRIEF OF AMICI CURIAE

SUMMARY OF ARGUMENT

[Proposed] Amici are outraged at the trial court's ruling turning decades of fee-tax jurisprudence on its head. This truly is a case of the exception swallowing the rule. Amici will seek to demonstrate that the Legislature's arguments (echoed by MTC/BATA) are a mere *post hoc* rationalization to excuse the Legislature's unconstitutional violation of Article XIII A of the California Constitution. We will also dispute some of the allegations in the Opposition briefs, based on our long experience with MTC [including its behavior administering Regional Measure 2 ("RM2"), the 2004 regional toll measure] and our position in the trenches, fighting the tsunami of money used to promote passage of Regional Measure 3 ("RM3") in the June 2018 election.

ARGUMENT

I. THE NEXUS REQUIREMENT THAT WAS LOOSELY APPLIED IN REGIONAL MEASURE 2 WAS EFFECTIVELY DISPENSED WITH IN REGIONAL MEASURE 3.

The 2004 predecessor to RM3 was named RM2. While the nexus between bridge tolls and the projects supported by that measure was not perfect, many of the projects bore at least some geographic relationship to toll crossings and/or their approaches. RM3 eliminated even the pretense that the toll increase would provide a direct benefit to bridge users. The Legislature's Opposition Brief ("OB") was incorrect in trying to generalize from Appellant's position on RM2:

> Instead, in the trial court, HJTA appeared to concede that RM2 was valid under that case law, implying that the "base toll rates" set forth in Streets and Highways Code section 30916, which includes the RM2 toll increase, were valid fees imposed by the State. AA 250. (OB at 45.)

First, voter ratification of Proposition 26 in 2010 significantly amended Articles XIII A and XIII C of the California Constitution after passage of RM2 in 2004. Due to these constitutional amendments, "tax" had a much broader definition when RM3 was before voters in 2018 than when RM2 was before voters fourteen years earlier.

Second, because RM2 provided a plausible--if imperfect--relationship between paying a toll and receiving a benefit, the characterization of RM2 as a fee is not in any way generalizable to the instant case. Amici believe that the Legislature conflates "projects targeted at reducing traffic congestion" in the geographic vicinity of toll crossings with those that affect traffic congestion regionwide:

> Like RM2, which was approved by the voters in 2004, the revenue generated by the RM3 tolls will pay for projects targeted at reducing traffic congestion on the interconnected system of Bay Area bridges and highways, thereby creating a strong nexus between the increased toll and the benefit to the payor. See Sts. & High. Code §§ 30914(c), 30914.7(a). (OB at 46.)

The listing of projects in § 30914.7(a)[1] tells the tale. Of the thirty-five projects listed, twenty-five (see next page) had no relationship <u>whatsoever</u> to bridge corridors, as they were inland of the Bay. Most projects are located many miles from the nearest toll bridge. Two others, (1) BART Expansion Cars, and (2) Bay Area Corridor Express Lanes, would provide some benefit to bridge corridors, but these projects were primarily

[1] All code references in this brief are to sections of the Streets and Highways Code.

directed at serving the larger region. TRANSDEF determined that 18 percent of the dollars would go to bridge-related projects. Many of them were highway projects that would eventually result in even more congestion, due to the counterintuitive principle of induced demand.[2]

(3) Goods Movement and Mitigation
(6) BART to San Jose Phase 2
(7) Sonoma-Marin Area Rail Transit District
(8) Capitol Corridor
(9) Caltrain Downtown Extension
(10) MUNI Fleet Expansion and Facilities
(12) AC Transit Rapid Bus Corridor
(14) Tri-Valley Transit Access Improvements
(15) Eastridge to BART Regional Connector
(16) San Jose Diridon Station
(19) Contra Costa Interstate 680/State Route 4 Interchange Improvements
(20) Highway 101-Marin/Sonoma Narrows
(21) Solano County Interstate 80/Interstate 680/State Route 12 Interchange
(22) Interstate 80 Westbound Truck Scales
(24) San Rafael Transit Center
(26) North Bay Transit Access Improvements
(27) State Route 29
(28) Next-Generation Clipper Transit Fare Payment System
(29) Interstate 680/Interstate 880/Route 262 Freeway Connector
(30) Interstate 680/State Route 84 Interchange Reconstruction Project
(31) Interstate 80 Transit Improvements
(32) Byron Highway-Vasco Road Airport Connector

[2] "Capacity expansion leads to a net increase in VMT [Vehicle Miles Traveled, or the total amount of driving], not simply a shifting of VMT from one road to another." Handy, Susan, *Increasing Highway Capacity Unlikely to Relieve Traffic Congestion,* https://escholarship.org/uc/item/58x8436d

(33) Vasco Road Safety Improvements
(34) East Contra Costa County Transit Intermodal Center
(35) Interstate 680 Transit Improvements
(§ 30914.7(a).)

The level of nexus in the RM3 project list is substantially different from the level of nexus in the RM2 project list (§ 30914(c)). TRANSDEF concluded that of the thirty-six projects listed in RM2, eighteen have an ostensible relationship to a bridge corridor. A far lower percentage of the total funding was committed to highway expansion.

Setting aside the textual interpretation of Article XIII A and looking just at the bigger picture painted by the list *supra*, Amici think it is obvious that RM3 would be a tax imposed on toll bridge users to benefit the larger region. The vast bulk of the money raised would be sprinkled widely across the region. Bridge tolls would be merely a convenient revenue source. Furthermore, the California Supreme Court historically has scrutinized overly expansive use of bridge tolls to fund projects not directly related to toll bridges. *Cal. Toll Bridge Authority v. Kuchel* (1952) 40 Cal.2d 43.

II THE TRIAL COURT'S CONSTITUTIONAL INTERPRETATION WAS FLAWED.

In the case at bar, the constitutional limitations of Articles XIII A and XIII C, ratified by voters as Proposition 26 in 2010, clearly inhibit SB 595 and RM3.

> We must also enforce our [State] Constitution and 'may not lightly disregard or blink at … a clear constitutional mandate.' … Because legislative power is 'practically absolute,' constitutional limitations on legislative power are strictly construed and may not be given effect as against the general power of the legislature, '*unless such limitations clearly inhibit the act in question*.' *Foundation for Taxpayer*

> *& Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1365. (Emphasis in original.)

While Amici find Appellants' contention that MTC/BATA imposed the tax more compelling than Respondents' view, they disagree that the heart of the case rests on the determination of who imposed the tax. Although Appellants and Amici contest SB 595's vote threshold, it was ultimately the voters that imposed RM3. No matter whether it was the State or MTC/BATA that imposed it, the burden is on a governmental entity to "prov[e] by a preponderance of the evidence that a levy, charge, or other exaction is not a tax." (Cal. Const., Article XIII A, § 3(d) and Article XIII C §1(e).) A governmental entity has not provided sufficient evidence that RM3 is not a tax, so no governmental entity has met that burden.

Amici assert that the trial court approached its constitutional analysis with tunnel vision, and lost sight of the big picture, as demonstrated by the trial court hearing transcript: "[The Court:] I've got to tell you I've read hundreds and hundreds of statutory interpretation cases..." (Respondents' Appendix at 29, containing RT 25:16-17.)

The required burden-shifting inquiry is much broader than the mere determination of whether an exception fits. A significant part of the evidence gathering should involve the issues raised in Section I on nexus, *supra.* Other text in Article XIII A, § 3(d) also should be considered:

> the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

The preponderance of non-toll bridge-related projects in the RM3 project package is strong evidence that the measure is a tax. The costs of RM3 allocated to bridge toll payors bear an unfair and unreasonable relationship to bridge toll payors' burdens, or benefits received from RM3 projects located many miles distant from toll bridges.

A. The Trial Court's Ruling Produced an Absurd Result.

As discussed in Appellants' Opening Brief at 29-32, the overall purpose of the Proposition 26 constitutional amendment, ratified by voters in 2010, was to close the loophole where government was imposing taxes by calling the new charges "fees." The trial court decision turned that purpose on its head, resulting in a new multi-billion dollar loophole being opened. Because that outcome is absurd on its face, the Court should inquire more deeply, to determine whether a misinterpretation of the Constitution led to that absurdity. *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 533.

B. The Legislature's Argument Collapses Upon Scrutiny

The Legislature's Opposition Brief contains the following argument:

> Here, the toll increase may be held by BATA for purposes of administering those funds, but it is for the State's "benefit," not BATA's. Those funds must be used for improvements to state-owned property for state purposes: improving the transportation, quality of life and economy in one of the state's most densely populated regions. See, e.g., S.B. 595 § 1(m) & § 30914.7(a). (OB at 26. emphasis added.)

When one carefully peruses the list of RM3 projects in § 30914.7(a) (see Section I, *supra*), it becomes apparent that while some of the projects are on State-owned highways, most are owned by other governmental entities, e.g. BART. Clipper is owned by MTC

and many transit agencies.[3] Respondent's flawed argument gives credibility to Appellants' assertion that MTC/BATA imposed the tax.

C. The Legislature's Claim That RM3 is an Exception to Article XIII A is a *Post-Hoc* Rationalization

Amici believe Respondents' dissection of Article XIII A is nothing more than their lawyers' clever *post hoc* rationalization, generated in response to being challenged to justify the Legislature's decision that:

> The county clerks shall report the results of the special election to the authority. If a majority of all voters voting on the question at the special election vote affirmatively, the authority may phase in the increased toll schedule...
> (§ 30923(e), emphasis added.)

Amici were highly aware of SB 595--and this provision in particular--as the campaign for RM3 progressed. As a no-budget campaign, Amici determined they did not have the resources needed to file a pre-election challenge to the constitutionality of this provision. During Amici's intense involvement in the RM3 campaign, no rationale was ever offered by RM3 supporters to justify why only a majority vote was needed to pass the measure, when it was so blatantly a tax under Articles XIII A and XIII C.

Notably absent from the Legislature's Opposition Brief were any citations to the legislative history of SB 595. Had Legislative Counsel opined during SB 595's legislative process that the toll fell under the "entrance to or use of state property" exception, that likely would have been included in the bill as a legislative finding. But such a finding was not included in the text of SB 595. A conscientious Legislature would have recog-

[3] See Clipper Memorandum of Understanding, http://clipper.mtc.ca.gov/pdf/Clipper_Amended_and_Restated_MOU.pdf

nized the need to justify any authorization for a mere majority vote to pass RM3, since it was so obviously inconsistent with any reasonable interpretation of Article XIII A.

Because there is no evidence that anyone had seriously considered the state property exception prior to the filing of the instant case, Amici conclude that the Legislature had not relied on the "entrance to or use of state property" exemption in drafting SB 595. The trial court's painstaking textual interpretation of the Constitution thus misses the forest for the trees. A motion for judgment on the pleadings was inappropriate, because it could not and did not consider "the preponderance of the evidence." (See Section II E, *infra*.)

Furthermore, two years before enactment of SB 595 in 2017, the Legislature enacted the Statutes of 2015, Chapter 687 (AB 194), a bill about highway toll lanes (Express Lanes). Like SB 595, AB 194 was silent on whether tolls were to be considered taxes or fees. Relevant here, the Legislature found and declared in Section 1 of AB 194 that, "Highway tolling ... should not be employed strictly as a revenue generating facility." The Legislature thereby admitted that highway tolling is or can be "a revenue generating facility" and therefore goes beyond what one would expect of a "charge imposed for entrance to or use of state property." **(**Article XIII A, § 3(b)(4).) Revenue generation clearly goes beyond "no more than necessary to cover the reasonable costs of the governmental activity" **(**Article XIII A, § 3(d)), which makes the tolls a tax.

In a useful analogy to legitimate bridge tolls, the Legislature directed in Section 2 of this 2015 statute that: "All remaining revenue generated by the toll facility shall be used in the corridor from which the revenue was generated pursuant to an expenditure

plan developed by the sponsoring agency …" (§ 149.7(e)(5).) Strikingly different from SB 595, this nearly contemporaneous 2015 statute demonstrates a legislative intent that tolls shall pay for improvements in their respective corridors, and not be spread broadly around a region. Consistent with the definition of "tax" in the Constitution, "the manner in which those costs are allocated to a payor bear[s] a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." **(**Article XIII A, § 3(d).)

D. Legislative Overreach is a Far More Plausible Explanation for the Majority Vote Provision.

1. The legislative finding of congestion relief deserves no deference.

"[L]egislative findings, while not binding on the courts, are given great weight and will be upheld unless they are found to be unreasonable and arbitrary." *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1252. "While legislative findings in support of a statute are 'entitled to great weight,' they 'are not controlling.'" *Mendoza v. State of California* (2007) 149 Cal.App.4th 1034, 1051. Amici contend that SB 595 contains unreasonable and arbitrary legislative findings that should not be given credence.

TRANSDEF has observed MTC/BATA and development of state transportation policy for more than two decades. SB 595 and RM3 fall precisely into MTC/BATA's pattern of supporting the wish lists of cities and counties, and providing bounty for the transportation ecosystem of consultants and contractors. MTC's typical response to the region's problems is to want more money.

Senator James Beall, a former MTC/BATA Commissioner, wrote SB 595 in 2017 to provide that money. The process by which projects were added to the bill was political deal-making. There apparently was quite a feeding frenzy behind closed doors. There is no evidence of any facts (e.g., citations to studies or other analyses) that would substantiate the legislative finding that:

> These projects and programs have been determined to reduce congestion or to make improvements to travel in the toll bridge corridors ... (§ 30914.7(a), cited at OB 13.)

The Court should give no credence to this arbitrary finding as a reasonable claim, given the lack of evidence of efficacy in the record. Fiat does not make it so. MTC's own Final Environmental Impact Reports for its Regional Transportation Plans show increasing congestion in the future, even with massive expenditures.[4] On the other hand, the Court should consider this unreasonable and arbitrary finding as one of the indicia of legislative overreach.

2. The geographic distribution of those voting on RM3 was not representative of the distribution of toll payors.

The Legislature and BATA/MTC have not satisfied their constitutional burdens under Articles XIII A, § 3(d) and XIII C, § 1(e) because the manner in which RM3 bridge toll costs are allocated to bridge toll payors does not bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the RM3 toll increase.

[4] See TRANSDEF's comments on MTC's Regional Transportation Plan, starting at page 2-309 of the FEIR, available at http://2040.planbayarea.org/cdn/ff/ZVETZL-slG0Jga9HVZCgrm-m0fh_HVo66yWRu5xxgWA/1499723588/public/2017-07/PBA2040-FEIR-07.10.17_0.pdf

Regional Measures 1 (1988) and 2 (2004) were different from Regional Measure 3 in who was able to vote on them. Napa and Sonoma counties, which do not have bridge crossings, did not vote on a toll increase in RM 1 and RM2. (§ 30921(a).)

SB 595 adopted a different formula, so that all nine Bay Area counties were to vote on RM3. (§ 28845.) This was widely recognized as unfair. Contra Costa County has four toll bridge crossings. It voted 55 percent against RM3, with majority "no" votes in the working-class, ethnically diverse cities of Richmond, Concord, Pittsburg and Antioch, because voters did not want to pay higher tolls. RM3 was imposed anyway, largely because of the inclusion of Santa Clara County in the vote. As the most populous county in the Bay Area, yet with very few bridge commuters,[5] Santa Clara County was critical to the 55 percent passage of RM3.

This was highly political. The Chair of the Senate Transportation and Housing Committee represented San Jose. The second-highest allocation of funding in the measure was for the BART extension to San Jose. A mere two percent of bridge users who paid tolls by FasTrak in 2016-17 had Santa Clara County mailing addresses.[6] Yet Santa Clara County voters provided 21 percent of total ballots in the RM3 election.[7] For Santa Clara County voters, RM3 was essentially providing them with free money. Others paid the costs while they disproportionately benefited. There was no reason to vote against it.

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[5] See page 19: https://mtc.ca.gov/sites/default/files/Handout_RM_3_Poll_Presentation.pdf
[6] See https://mtc.ca.gov/sites/default/files/RM3_Overview_MemoPresentation.pdf, p. 3.
[7] See https://mtc.ca.gov/our-work/fund-invest/toll-funded-investments/regional-measure-3

3. The formula for voting had no constitutional underpinning.

While the constitutionality of the SB 595 voting formula, which combined the votes of all nine counties, was not raised in the Petition, it is a further demonstration of legislative overreach. The geographic scope of the RM3 vote was defined here:

> This article shall become operative upon an affirmative vote of the residents of the City and County of San Francisco and the Counties of Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano, and Sonoma to increase tolls pursuant to Section 30923 of the Streets and Highways Code... (§ 28845.)

The question then becomes, what if some counties have an affirmative vote and others do not, as described *supra*. The Legislature provided this solution:

> The county clerks shall report the results of the special election to the authority. If a majority of all voters voting on the question at the special election vote affirmatively, the authority may phase in the increased toll schedule consistent with subdivision (c) of Section 30916.
> (§ 30923(e), emphasis added.)

Amici are unaware of any constitutional justification for nullifying or diluting a county's vote by combining the votes of all the counties of a region of the State. Some counties pay disproportionately more tolls while other counties disproportionately receive more benefits. The Legislature's inclusion of counties that disproportionately receive more benefits from bridge toll increases dilutes votes in other counties and makes a regional measure more likely to win voter approval. This raises the issue of self-determination.

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4. A hidden feature of SB 595 effectively removes any cap on tolls.

> It is the intent of the Legislature to maintain tolls on all of the bridges specified in Section 30910 at rates sufficient to meet any obligation to the holders of bonds secured by the bridge toll revenues. The authority shall retain authority to set the toll schedule as may be necessary to meet those bond obligations. (§ 30918(a), emphasis added.)

In the event of massive cost overruns, as was experienced on the construction of the East Span of the Bay Bridge, BATA could seemingly keep increasing its bonded debt, and then increase the tolls to pay for that beyond the statutory limits set in SB 595. The Legislature has effectively turned over control of bridge toll booths to Wall Street, in perpetuity. Also, the Legislature in SB 595 failed to provide any means for voters to propose and pass an initiative to amend or repeal RM3 at any future date.

5. In an effort to ensure passage of RM3, the Legislature moved the goalposts for approval.

Finally, the Legislature took the ultimate step to rig the election: It impermissibly set the threshold for approval at a mere majority, when California Constitution Articles XIII A and XIII C require a two-thirds supermajority to pass the Legislature or to win voter approval. MTC/BATA polling on the proposed RM3 reported in December 2017 showed 54 percent potentially voting yes for a $3.00 bridge toll increase. This number was similar to the election results from RM2 back in 2004.[8] Six years after RM2, however, Proposition 26 was passed in 2010, which changed the constitutional provisions on fees and taxes. The majority vote that passed RM2 was no longer sufficient to pass a

[8] See page 15: https://mtc.ca.gov/sites/default/files/Handout_RM_3_Poll_Presentation.pdf

post-Proposition 26 tax measure. Nonetheless, the Legislature adopted a majority threshold for RM3 via SB 595 in 2017:

> The county clerks shall report the results of the special election to the authority. If a majority of all voters voting on the question at the special election vote affirmatively, the authority may phase in the increased toll schedule consistent with subdivision (c) of Section 30916.
> (§ 30923(e), emphasis added.)

Perhaps this was based on the expectation that no one would challenge the measure. Too bad for Respondents that the instant case raises just such a challenge.

Critically, this case turns on the lack of justification for the vote threshold in SB 595, which leaves the Legislature exposed to the charge of overreach. Amici condemn this measure as a lawless, unconstitutional act that must not be countenanced by the Court.

6. The courts have found many instances of legislative overreach.

The list includes several very recent cases: *Howard Jarvis Taxpayers Association v. Newsom* (2019) 39 Cal.App.5th 158 [Legislature may not tinker with an initiative measure contrary to the intent of the voters who approved it] and *National Asian American Coalition v. Newsom*, (2019) 33 Cal.App.5th 993 [Legislature may not appropriate settlement funds in a manner inconsistent with the judgment providing those funds].

Older cases with similar holdings include *Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688 [Legislature may not make substantial changes to the scheme or design which induced voter approval of bond measure]; and *Shaw v.*

People ex rel. Chiang (2009) 175 Cal.App.4th 577 [appropriation of gas tax "spillover" funds to transport school children and developmentally disabled persons, while providing public benefit, invalidated as contrary to stated purpose of bond initiative measure]. Amicus TRANSDEF is party to a similar challenge to legislative overreach, which is now before the Third District Court of Appeal.

E. Respondents Ignore the Complete Language of the Burden-Shifting Subdivision, Thereby Rendering It Surplusage.

Amici agree with Appellants that this case turns on the State or local government bearing the first of the three burdens listed in Article XIII A § 3(d) and/or Article XIII C § 1(e): "the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax." (Appellants' Opening Brief at 9 and 33.) Respondents agree as to the burden-shifting, but assert they met the burden by asserting the "entrance to or use of state property" exemption.

> Thus, the State has the burden of showing that the tolls are not a tax because they fit into one of the exceptions (the first part of subsection (d)). (OB at 42.)
>
> In operation, this aspect of section 3(d) applies to all five enumerated exceptions to shift the burden to the state to establish that a challenged "levy, charge or other exaction" satisfies the particular requirements stated in the applicable exception. (BATA/MTC Opposition Brief at 59.)

Amici counter that Respondents' motion for judgment on the pleadings (relying on the claim of fitting an exception) is possible only by making surplus the "proving by a preponderance of the evidence" language in Article XIII A § 3(d) and Article XIII C § 1(e). Thus, their contention, as well as the trial court's, is not supportable as a valid

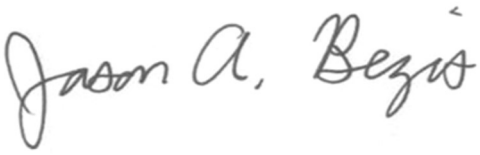
interpretation of the Constitution. *People v. Dayan* (1995) 34 Cal.App.4th 707, 716. [Courts are to give effect to each part and significance to each word where possible.])

CONCLUSION

The trial court's granting of a motion for judgment on the pleadings was based on an overly narrow constitutional interpretation that considered only the applicability of the state property exception. Amici have sought to draw the Court's attention to the lack of nexus, the absence of a justification in the legislative history, the multiple dimensions of legislative overreach at play here, and most important of all, the failure to consider "the preponderance of the evidence." Amici respectfully request the Court reverse the lower court and remand for further fact-finding proceedings consistent with the constitutional command to weigh "the preponderance of the evidence."

Dated: February 7, 2020

Respectfully submitted,



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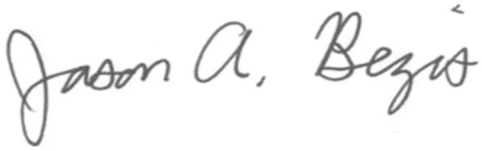
CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 4212 words, including footnotes, but excluding the caption page, Application, Table of Contents, Table of Authorities, Certificate of Service, this Certificate of Word Count, and signature blocks. I have relied on the word count of the Microsoft Word program used to prepare this Certificate.

Respectfully submitted,

DATED: February 7, 2020 By:



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PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 3661-B Mosswood Drive, Lafayette, CA 94549-3509. On February 7, 2020, I served a true copy of the following document:

APPLICATION OF TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, SILICON VALLEY TAXPAYERS ASSOCIATION, CONTRA COSTA TAXPAYERS ASSOCIATION, NAPA VALLEY TAXPAYERS ASSOCIATION, SOLANO COUNTY TAXPAYERS ASSOCIATION, MARCUS CRAWLEY AND THOMAS A. RUBIN FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT HOWARD JARVIS TAXPAYERS ASSOCIATION AND [*PROPOSED*] BRIEF OF *AMICI CURIAE*

on the following parties in said action:

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I declare, under penalty of perjury, that the foregoing is true and correct. Executed on February 7, 2020, in Lafayette, California.

Jason A. Bezis

JASON A. BEZIS