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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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APPELLANTS' CONSOLIDATED REPLY BRIEF

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ELECTION TO FILE ONE CONSOLIDATED BRIEF

Respondent State Legislature and respondents Bay Area Toll Authority ("BATA") and Metropolitan Transportation Commission ("MTC") make basically the same arguments. To conserve judicial resources, appellants Howard Jarvis Taxpayers Association ("HJTA") and Randall Whitney ("Whitney") elect to file one consolidated reply brief in response to both respondents' briefs.

ARGUMENT
I
THE QUESTION OF WHETHER BATA/MTC IMPOSED THE TOLL INCREASE HAS NOT BEEN WAIVED, EITHER BY HJTA OR WHITNEY

Both the Legislature and BATA/MTC agree that the primary question in this case is, "Who 'imposed' the Regional Measure 3 toll increase?" The Legislature says:

> "The first issue before the Court is which constitutional provision – article XIII A or article XIII C – governs the issues raised in plaintiffs' complaints. The answer to that question turns solely on whether the Legislature or BATA 'imposed' the toll increase at issue here because article XIII A applies to 'any levy, charge, or exaction of any kind imposed by the State' while article XIII C applies to 'any levy, charge, or exaction of any kind imposed by a local government.'" (Legislature's Brief at 15.)

BATA/MTC agrees that this case turns on the question, "Did the Legislature or BATA 'impose' the Toll Increase, the answer to which governs whether article XIII A, section 3, or article XIII C, section 1, of the California Constitu-

tion applies to determine the constitutionality of the Toll Increase?" (BATA/MTC's Brief at 29.)

Indeed, in our Opening Brief, appellants' first Issue Presented is: "Who imposed the RM3 toll increase? The Legislature, by granting authorization to BATA in SB 595? Or BATA and the voters, by BATA proposing the increase on the ballot and adopting it after receiving voter approval?" (Opening Brief at 13.) That is a lynchpin issue in this case.

Yet respondents contend that appellant HJTA conceded this lynchpin issue at oral argument, and appellant Whitney never properly raised it because he sued the wrong "agency." Neither contention has merit.

First, respondents' contention that HJTA conceded its case at oral argument is based on a Reporter's Transcript that HJTA had no opportunity to review before it was finalized. Proof of that is evident from the fact that the transcript does not even correctly spell the name of HJTA's counsel (Bittle misspelled "Biddle" throughout.) According to the transcript, Mr. Bittle said, "that excuses the Bay Area Toll Authority *from the case*, and we won't need to hear from Mr. Weed."[1] That is not what Mr. Bittle said. According to Mr. Bittle's notes and his own recollection, he said, "that excuses the Bay Area Toll Authority *for today*, and we won't need to hear from Mr. Weed."[2]

The afternoon before the April 4, 2019, hearing, the trial court issued a Tentative Ruling. In San Francisco Superior Court, if counsel wishes to be heard on any point in the Tentative Ruling, he must email the Court and specify what point(s) he wishes to argue. Mr. Bittle emailed the Court and

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[1] Unless noted otherwise, all emphasis is added.

[2] Mr. Bittle, by signing this brief, certifies that these statements are true. (Code of Civ. Proc. § 128.7.)

asked to be heard on whether the Article XIII A "tax" exception for "entry to or use of state property" was completely free of conditions, or whether the State still had the burden to prove that the RM3 toll increase was not a tax. Mr. Bittle's legal secretary had put together a clever visual aid to illustrate HJTA's construction of the critical language in Article XIII A (see Respondents' Appendix at 16:18), and Mr. Bittle wanted to see if he could change the Judge's mind with the help of that prop. Mr. Bittle had no hope that he could change the Judge's mind on the question of who imposed the toll so, as to that question, he "submitted" on the Tentative Ruling without requesting oral argument. At the hearing, then, the following exchange took place between Mr. Bittle and the Judge:

> THE COURT: Mr. Biddle, you have my tentative rulings as to both causes of action. I think ... if I read the emails correctly, that you're challenging only the tentative ruling as to the claim against the legislature but not the rulings as to the claim against the Bay Area Toll Authority, but I may have that wrong.
>
> MR. BIDDLE: That is correct, Your Honor. ... We're not challenging the Court's decision that the toll increase was imposed by the State, [that] it was not imposed by the Bay Area Toll Authority, so I imagine that excuses the Bay Area Toll Authority [for today], and we won't need to hear from Mr. Weed.

Nothing in California law requires counsel to attend oral argument. If counsel is content that the trial court record is ready for appeal, he may submit on the Tentative Ruling. As this Court knows, the appellate courts *encourage* counsel to waive oral argument, but waiving appellate oral argument does not preclude counsel from petitioning the California Supreme Court for review.

That same rule applies when counsel waives oral argument in the trial court. It does not operate as a concession or preclude an appeal.

The controlling case on this issue is *Mundy v. Lenc* (2012) 203 Cal.App.4th 1401. In *Mundy*, the plaintiff moved to strike defendant's cross--complaint under the anti-SLAPP statute. (203 Cal.App.4th at 1405.) The trial court issued a tentative ruling denying the anti-SLAPP motion. Plaintiff did not contest it. (*Id.*) The tentative ruling then became the trial court's order. The plaintiff appealed. On appeal, the defendant argued that plaintiff was barred from challenging the trial court's order because he submitted on the tentative ruling. (*Id.* at 1406.) The Court of Appeal rejected the argument. By filing his anti-SLAPP motion, plaintiff made clear his position, and he gave the trial court a fully-briefed opportunity to rule on that position. (*Id.*) The Court of Appeal explained, "He did not mislead the trial court. Submission on a tentative ruling is *neutral*; it conveys neither agreement nor disagreement with the analysis." (*Id.*) That is all HJTA did here. It submitted on the tentative ruling. It did not agree with the tentative ruling, concede the issue, or waive its right to appeal.

The question of who imposed the RM3 toll increase is a pure question of law. HJTA could have raised it for the first time on appeal. This Court determines pure legal questions *de novo*. Because of that, "the rule that on appeal a litigant may not argue theories for the first time does not apply to pure questions of law." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324 (citing *Ward v. Taggart* (1959) 51 Cal.2d 736, 742); see also *Kaura v. Stabilis Fund II, LLC* (2018) 24 Cal.App.5th 420, 430; *Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1130; *Tyre v. Aetna Life Ins. Co.* (1960) 54 Cal.2d 399, 405; *Burdette v. Rollefson Constr. Co.* (1959) 52 Cal.2d 720, 726; *Panopulos v. Maderis* (1956) 47 Cal.2d 337, 340-341.)

If pure legal questions don't even need to be presented to the trial court because the Court of Appeal decides them *de novo*, then how could a pure legal question that was fully briefed in the trial court be conceded by waiving oral argument? It couldn't. HJTA did not concede its case. Nor did Whitney.

According to the Legislature, "Mr. Whitney has never argued that BATA imposed the toll increase. Instead, he sued the Metropolitan Transportation Commission, which is a different entity from BATA and which was not tasked with performing the same functions that plaintiffs argue demonstrate that BATA, not the Legislature, imposed the toll increase." (Legislature's Brief at 16.) BATA/MTC likewise argue, "Appellant Whitney named MTC as the sole defendant in his lawsuit, and argued that MTC imposed the Toll Increase in violation of the applicable constitutional provisions," but "MTC is a separate and distinct legal entity from BATA." (BATA/MTC's Brief at 35.)

The "Metropolitan Transportation Commission" is actually what its name implies. It is a commission. Webster's New World College Dictionary (4th Ed.) defines commission as "a group of people officially appointed to perform specified duties ... a type of municipal governing body." In the trial court, Whitney explained why he sued MTC:

> "Defendant Metropolitan Transportation Commission is a commission comprised of 21 commissioners, locally appointed from the nine Bay Area counties. (Gov. Code § 66503.) They direct MTC and the Bay Area Toll Authority (BATA). (Str. & Hwy. Code § 30950 ["the Bay Area Toll Authority, which is hereby created ... is a public instrumentality governed by the same board as that governing the Metropolitan Transportation Commission."].)" (Appellants' Appendix, Vol. 2, at 536:3.)

In other words, Whitney sued MTC as the Board that "direct[s] MTC and the Bay Area Toll Authority." (*Id.*) When challenging a decision of an agency's board, as here, it is common and perfectly acceptable to name the board rather than the agency. (E.g., *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 166-67 [challenging county ordinance]; *Newport Beach Fire & Police Protective League v. City Council of Newport Beach* (1961) 189 Cal.App.2d 17, 18 [challenging city ordinance]; *Schabarum v. Cal. Legislature* (1998) 60 Cal.App.4th 1205, 1212 [challenging state budget act].) In fact, in the case at bar, HJTA named the legislative body rather than the agency itself when it sued the State Legislature rather than the "State of California." The State has not objected.

When MTC raised this "wrong agency" argument in the trial court, Whitney moved for leave to amend his complaint to clarify that he was suing MTC as the board of both agencies. The trial court denied his motion not because it was improper, but only because the trial court was prepared to rule that the RM3 toll increase was imposed by the Legislature, not by MTC or BATA, making Whitney's proposed amendment irrelevant. In response to Whitney's motion, the Judge said, "Well, what purpose would that serve? If you were to add BATA, I have already granted BATA judgment on the pleadings as to these claims. So where would that get you anyway?" (Appellants' Appendix at 41:9.) Whitney is not complaining that the Judge should have granted his motion; rather Whitney maintains that he permissibly sued the 21 commissioners who made all the decisions and undertook all the actions to place RM3 on the ballot, declare the election outcome, and impose the toll increase that is now in effect.

/ / /

II
EVEN UNDER THE LANGUAGE QUOTED BY RESPONDENTS, SB 595 DID NO MORE THAN AUTHORIZE BATA/MTC TO IMPOSE A TOLL INCREASE

SB 595 did not impose a toll increase. It was not a self-executing bill like SB 60 in 1997 by which the Legislature itself increased the tolls $1 to pay for seismic retrofitting. Here, BATA was authorized to propose a toll increase to the voters in the nine-county Bay Area and, if the voters approved it, to adopt and implement the increase.

Nowhere in SB 595 does the Legislature state that a $3 toll increase is "hereby imposed" or "shall be imposed." The wording of SB 595 contrasts sharply with the 1997 bill, SB 60, which stated, "There is *hereby imposed* a seismic retrofit surcharge equal to one dollar ($1) per vehicle for passage on the Bay Area state-owned toll bridges." (Str. & Hwy. Code § 31010.) The Legislature itself imposed the SB 60 increase. Accordingly, no election was needed or held.

The operative language of SB 595 is quite different. It granted authority to BATA, a local agency, to propose a toll increase to local voters "not to exceed three dollars." (Str. & Hwy. Code § 30923(a).) It conditioned the increase on voter approval: "The toll rate ... shall not be increased by the rate selected by [BATA] prior to the availability of the results of a special election to be held in the [nine Bay Area counties] to determine whether the residents of those counties ... approve the toll increase." (§ 30923(b).) It was up to BATA to place the proposed toll increase on the ballot, at an election of its choosing. (§ 30923(c).) BATA and MTC were to draft and provide the ballot language. (§ 30923(c) and (d).) BATA's proposed toll increase was to be "submitted to the voters as *Regional* Measure 3 and stated separately in the ballot from *state* and local measures." (§ 30923 (c)(2).) The counties were to

report their election results to BATA, and were to be reimbursed by BATA for their election expenses. (§ 30923(e) and (g)(2).) If BATA determined that voter approval was obtained, then BATA could, but was not required to, adopt the proposed increase: "If a majority of all of the voters vote affirmatively on the measure, [BATA] *may* adopt the toll increase and establish its effective date." (§ 30923(f).) However, if BATA imposed an increase, it had to be for the amount approved by the voters: "If the voters approve a toll increase pursuant to Section 30923, [BATA] shall increase the base toll rate ... by the amount approved by the voters pursuant to Section 30923." (§ 30916(c)(1).) If the voters rejected the proposed increase, then BATA could, but was not required to, try again at a future election. "If a majority of all the voters voting on the question at the special election do not approve the toll increase, [BATA] may by resolution resubmit the measure to the voters at a subsequent statewide primary or general election." (§ 30923(f).) Finally, the Legislature clarified that RM3 would be a BATA-imposed toll increase, but BATA needed additional legislative authorization before it could impose any other increases, except for CPI adjustments: "Except [for CPI adjustments], the toll increase *adopted by [BATA]* pursuant to this section shall not be changed without statutory authorization by the Legislature." (§ 30923(j).)

Respondents try to overcome the plain text of SB 595 by emphasizing certain words and inventing illogical alternative constructions of the text, to no avail. They repeatedly quote a sentence from the uncodified preamble to SB 595, emphasizing the word "require" as follows:

> "[I]t is the intent of the Legislature to *require* the Metropolitan Transportation Commission to place on the ballot a measure authorizing the voters to approve an expenditure plan to improve mobility and enhance travel options on the bridges and bridge

> corridors to be paid for by an increase in the toll rate on the seven state-owned bridges within its jurisdiction." (SB 595, Sec. 1(m).)

But that sentence does not say a toll increase is hereby imposed by the Legislature. Shifting the emphasis clarifies its meaning: "it is the intent of the Legislature to require *the Metropolitan Transportation Commission* to place on the ballot a measure *authorizing the voters to approve* an expenditure plan ... to be paid for by an increase in the toll rate ...." (*Id.*)

Thus, the language from SB 595 most cited in respondents' briefs merely reinforces appellants' position that RM3 was proposed by BATA/MTC and approved by the voters – which necessarily makes it a locally imposed tax. (And by the way, this language, requiring "the Metropolitan Transportation Commission" to place RM3 on the ballot, further demonstrates that appellant Whitney sued the proper defendant.)

Respondents next quote Streets and Highways Code section 30923(c) which requires the nine Bay Area counties to cooperate with BATA when it calls the election: "the Board of Supervisors of ... each of the counties described in subdivision (b) shall call a special election ... that shall be consolidated with a statewide primary or general election, which shall be selected by [BATA]." Nothing about this statute suggests that the RM3 toll increase is a state-imposed levy. To the contrary, it shows that the State is neither choosing the election, nor calling the election, nor conducting the election. Rather, the Legislature is authorizing local agencies – BATA and the counties – to propose the matter to local voters.

The Legislature frequently requires local agencies to hold elections. That doesn't mean that the voter-approved proposal was passed by the Legisla-

ture. As one example, consider the Los Angeles County Flood Control Act. The Act provides as follows:

> "[The Los Angeles County] board of supervisors shall ... employ ... engineers to [report on a plan to control the flood waters] of said district." (Cal Uncod. Water Code, Act 470 § 4.) "[W]hen a report satisfactory to said board of supervisors has been filed ... said board *shall* by resolution adopt said report." (*Id.* § 5.) "After the adoption of the report ... said board *shall without delay call a special election* and submit to the qualified electors of said district the proposition of incurring a bonded debt in the amount and for the purposes stated in said report. ... Said board of supervisors *shall ... fix the date on which such special election shall be held*. ... [The ordinance to be voted on] *shall* recite therein the objects and purposes for which the indebtedness is proposed to be incurred ... the estimated cost of the proposed work and improvements, [and] the amount of the principal of the indebtedness to be incurred. ... If at such election a majority of the votes cast are in favor of incurring such bonded indebtedness, then bonds of said district *for the amount stated in such proceedings shall be issued* and sold as in this act provided." (*Id.* § 6.) "The board of supervisors *shall levy a tax* each year upon the taxable real property in such district sufficient to pay the interest on said bonds as it becomes due, and such portion of the principal thereof as is to become due." (*Id.* § 10.)

The parallels between this Act and SB 595 are uncanny. The Board of Supervisors is *required* to call an election, but on a date of its choosing, for a bond and associated tax in an amount of its choosing. The board is to author

the ballot language, but shall include in it an expenditure plan. If a majority of the voters approves the measure, then the board shall issue the bonds and levy the tax "for the amount stated" in the measure.

Although the "Los Angeles County Flood Control District was created by an act of the legislature of the state of California ... [t]hese special assessments were levied by the county officials of said County of Los Angeles, acting for and on behalf of the Los Angeles Flood Control District." (*City of Inglewood v. County of L.A.* (1929) 207 Cal. 697, 698-99.)

Thus, even though the Los Angeles Flood Control Act was passed by the Legislature and required the county to call an election, that requirement did not transform the bonds, or the taxes levied to repay them, into state bonds or state taxes. The excerpts of the Act quoted above contain all of the mandatory language urged by respondents as proof that the RM3 toll increase was imposed by the Legislature, yet the *Inglewood* court found that the voter-approved tax was levied by and on behalf of a local agency. Nothing in SB 595 justifies a different conclusion.

Another example of the Legislature requiring a local agency to hold an election and to present a proposed levy to voters can be found in the San Diego County Regional Justice Facility Financing Act. (Former Gov. Code §§ 26250 *et seq.*) The Legislature made findings that the Superior Court *of the State California* was overcrowded due to a lack of local courtroom facilities, similar to SB 595's findings that state bridges are overcrowded due to a lack of local transportation facilities. (Former Gov. Code § 26251.) As it did with MTC and BATA, the Legislature created a local agency, the San Diego County Regional Justice Facility Financing Agency, specified the members of its board, and put it in charge of funding local justice facilities. (*Id.* §§ 26260, 26261, 26267.) As it did with MTC and BATA, the Legislature authorized the

Agency to propose the amount of a tax increase and to set the date of an election, and required the county to conduct the election. (*Id.* §§ 26271-73.) If the voters approved the tax increase, the Legislature required the Agency to adopt it in the amount approved by the voters, as it did with BATA/MTC. (*Id.* § 26271.) And as with BATA/MTC, the Legislature specified how revenue from the new tax increase could be spent. (*Id.* § 26267.)

Thus, this state-created agency was required by the Legislature to do all of the same things that BATA and MTC were required or authorized to do under SB 595 which, according to respondents, make the RM3 toll increase a state-imposed levy:

> "[T]he Legislature passed an act (Gov. Code § 26250-26285) creating the San Diego County Regional Justice Facility Financing Agency (hereafter the Agency) and setting forth the Agency's *obligations*. Under the act, the Agency was *charged with* adopting a tax ordinance imposing a supplemental sales tax of one-half of 1 percent throughout the County for the purpose of financing the construction of justice facilities. (*Id.*, § 26267, 26271-26275.) The act provided for a countywide election held for the purpose of approving the tax ordinance by simple majority vote. (*Id.*, § 26271, 26273.) The act also provided that the Agency possesses no tax power other than the foregoing sales tax. (*Id.*, § 26283.)" (*Rider v. County of San Diego* (1991) 1 Cal.4th 1, 5.)

Nevertheless, the California Supreme Court deemed the tax increase a *locally*-imposed levy. (*Rider*, 1 Cal.4th at 11 [increase was a local tax subject to Proposition 13's two-thirds voter approval requirement].) Nothing in SB 595 justifies a different conclusion.

The Los Angeles Flood Control Act and the San Diego County Regional Justice Facility Financing Act are just two of many state laws requiring local agencies to hold elections. Other examples include mandatory elections to form special districts, impose special taxes, levy benefit assessments, enter into certain contracts, incorporate as a city, amend a charter, or annex new territory. By mandating an election, the Legislature does not transform any of these into state actions or state levies.

Appellants' Opening Brief cited another example of a statute containing language similar to SB 595. In *Howard Jarvis Taxpayers Association v. Fresno Metropolitan Projects Authority* (1995) 40 Cal.App.4th 1359, a statute authorized the Fresno Metropolitan Projects Authority to impose a sales tax if local voters approved it. The statute required a local election on a date of the Authority's choosing, required the Authority to propose a sales tax increase in an amount of its choosing, required the county elections official to cooperate by conducting the election, and required the Authority to reimburse the county for its election costs.

Construing this language, the *Fresno* Court held: "Government Code section 68059.7 authorizes *the Authority* to impose the tax ... if a majority of the voters [approve it]." (*Fresno Metro. Projects Auth.*, 40 Cal.App.4th at 1364.) "The act is a delegation by the Legislature to the Authority of the power to tax. The express language of the act conditions the delegation of that power upon voter approval of that delegation." (*Id.* at 1375.) "The Authority ... cites two Pennsylvania cases which it says support its contention that the Authority did not 'levy' the tax .... These cases ... are easily distinguishable from the present case because in [them] the Pennsylvania Legislature itself enacted the tax, whereas in the present case Government Code section 68059.7

purports to give the Authority itself the power to determine whether any tax will be imposed." (*Id.* at 1382.)

BATA/MTC ignored the *Fresno* case, but respondent Legislature argued it "has no relevance here" because "the Fresno court considered a different constitutional provision, a different issue, a different statute, and a different defined term." (Legislature's Brief at 29.) While the Legislature has identified differences between the facts of that case and the one at bar, it has not succeeded in distinguishing the case. Appellants cited the case because the Fresno Act and SB 595 share several similar provisions – provisions which, according to respondents, make the RM3 toll increase a levy imposed by the Legislature. The *Fresno* court, however, held that the Legislature did *not* levy the sales tax at issue, but authorized the local Authority to do so upon voter approval. Nothing in SB 595 justifies a different conclusion.

Turning to respondents' third and final attempt to make the text of SB 595 support its theory that SB 595 itself imposed the RM3 toll increase, respondents argue that the Legislature gave BATA discretion to adopt, or not adopt, the toll increase only as to a *resubmitted* ballot measure.

Appellants argued in their Opening Brief, "If BATA determined that voter approval was obtained, then BATA could, but was not required to, adopt the proposed increase: 'If a majority of all of the voters vote affirmatively on the measure, [BATA] *may* adopt the toll increase and establish its effective date.' (§ 30923(f).)" (Opening Brief at 21.)

Respondents concede, as they must, that section 30923(f) permits, but does not require, BATA to adopt the toll increase if approved by the voters. (Str. & Hwy. Code § 16 ["'Shall' is mandatory and 'may' is permissive."]) But that discretion, they say, is not vested in BATA until BATA *resubmits* a

proposed toll increase to the voters *after* the voters initially reject it. (Legislature's Brief at 20-21; BATA/MTC Brief at 45-46.)

According to respondents' theory, the *Legislature* imposes the toll increase if voters approve it on the first try, but *BATA* imposes the toll increase if voters approve it on the second try. How are citizens supposed to know, within SB 595's short 60-day statute of limitations (§ 30922), which article of the constitution governs the statute if it's not clear from the start who imposes the toll increase?

Nothing in the text of section 30923 requires such an illogical construction. In context, the disputed provision reads as follows:

> (e) The county clerks shall report the results of the special election to [BATA]. ...
>
> (f) If a majority of all the voters voting on the question at the special election do not approve the toll increase, [BATA] may by resolution resubmit the measure to the voters at a subsequent statewide primary or general election. If a majority of all of the voters vote affirmatively on the measure, [BATA] may adopt the toll increase and establish its effective date ...."

It is clear in context that subsection (e) requires the nine county clerks to report their county's vote totals to BATA, then subsection (f) requires BATA to determine whether "a majority of *all* the voters" approved Regional Measure 3. Once BATA makes that determination, if the majority *rejected* the measure, then BATA could resubmit it to the voters at a subsequent election; if the majority *approved* the measure, then BATA could adopt it. This is the only logical construction of section 30923.

There is another reason respondents' theory is unsound. Subsection (f) supplies not only BATA's discretion to adopt the toll increase, but also its discretion to establish an effective date: "If a majority of all of the voters vote affirmatively on the measure, [BATA] may adopt the toll increase *and establish its effective date* ...." Without BATA having that authority, a measure submitted to county voters takes effect 30 days after its passage. (Elec. Code § 9141.) The fact that BATA *exercised* this authority to set an operative date of January 1st for the toll increase proves that the sentence does not apply only to a resubmitted second ballot measure.

None of respondents' textual arguments have merit. The plain text of SB 595 authorized BATA to place Regional Measure 3 on the ballot and, if approved by the voters, to adopt it – which it did. The toll increase was enacted by BATA and the voters, not by the Legislature.

III

IF THIS COURT CONSTRUES REGIONAL MEASURE 3 AS A LEGISLATIVELY IMPOSED TOLL INCREASE, THEN IT IS A TAX THAT REQUIRED 2/3 LEGISLATIVE APPROVAL

SB 595 was not a self-executing toll increase imposed by the Legislature, but rather authorization for BATA to propose and adopt a toll increase if passed by local voters. The history of toll increases shows that some were enacted unilaterally by the Legislature, while others, like this one, were proposed by BATA to the voters. Although the Legislature required the election, that is not unlike a host of similar statutes requiring local elections for local levies.

If, despite this background and the clear language of SB 595, this Court concludes that the Legislature itself raised the tolls by enacting SB 595, then

appellants contend that SB 595 is invalid because it needed – but did not receive – two-thirds approval in each house of the Legislature.

As amended by Proposition 26 in 2010, article XIII A now requires two-thirds approval in each legislative house for any bill "which results in any taxpayer paying a higher tax" (art. XIII A, § 3(a)), and defines "tax" as "any levy, charge, or exaction of any kind imposed by the State" unless it fits one of five specified exceptions. (*Id.*, § 3(b).)

Appellants and respondents disagree over whether the RM3 toll increase qualifies for the fourth exception, "[a] charge imposed *for* entrance to or use of state property" (*id.*, § 3(b)(4)) and whether, in answering that question, subsection (d) applies requiring the State to show, "by a preponderance of the evidence that a levy, charge, or other exaction is not a tax." (*Id.*, § 3(d).)

Appellants in their Opening Brief cited a multitude of cases spanning the last 100 years uniformly distinguishing "taxes," which raise revenue for government programs whether they benefit the payer or not, from "fees" and other non-tax charges which are collected to recover the cost of some governmental service or benefit provided directly to the payer. (Opening Brief at 33-36.)

Appellants also quoted from the Findings and Declarations section of Proposition 26, the ballot materials for Proposition 26, and subsequent cases construing Proposition 26, to show that Proposition 26 was intended by voters not to upend that century of caselaw, but rather to broadly define "taxes" so as to capture *more* government charges and make them subject to the special approvals applicable to taxes. (Opening Brief at 38-39.)

Despite this century of case law and overwhelming indicia of contrary voter intent, respondents argue that the effect of Proposition 26 was to create

a new categorical exemption from the approvals applicable to "taxes." Whenever charges are for "entrance to or use of [public] property," they argue, no conditions apply to their enactment, no limits apply to their amount, and no restraints apply to the expenditure of their revenue.

As noted in appellants' Opening Brief, bridge tolls are just the tip of the iceberg if this Court creates a categorical exemption for such charges. The State (and local governments under the parallel section in article XIII C, § 1(e)(4)) could impose exempt "fees" or "tolls" on shipments entering public ports, rideshare businesses operating on public roads, water stored in public reservoirs, utilities located on public rights of way, internet traffic using public wifi networks, etc., etc., and could deposit the money in the General Fund for tax-like expenditure, with no special approvals required.

The arguments respondents offer for their illogical interpretation of Proposition 26 are all easily answered.

A. A New Categorical Exemption Is Not Needed to "Avoid Surplusage"

Respondents' first argument in support of a categorical exemption is that "it would result in surplusage" if the Legislature were required to show anything more than a collection point at the entrance to state property. The argument is based on the fact that the first three "tax" exceptions are for charges that do not exceed the State's "reasonable cost" to bestow a benefit or privilege, provide a product or service, or regulate an activity. The fourth exception for entrance to or use of state property contains no "reasonable cost" language. Since subsection (d) also requires that charges not exceed the State's reasonable costs, respondents argue, applying subsection (d) to the fourth exception would render the "reasonable cost" language in the first three exceptions "surplusage." (Legislature's Brief at 38; BATA/MTC Brief at 60.)

Respondents' argument, however, attacks a theory that appellants have not presented. Appellants have not argued that the "reasonable cost" burden in subsection (d) applies to the fourth and fifth exceptions.

Appellants' actual theory, explained on pages 42-44 of their Opening Brief, is that subsection (d) actually contains three burdens of proof: "the burden of proving ... [1] that a levy, charge, or other exaction is not a tax, [2] that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and [3] 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." (Art. XIII A, § 3(d).)

Although the first three exceptions contain a "reasonable cost" requirement, they do *not* contain Burden 1 – "the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax." *None* of the exceptions contains Burden 1. Since subsection (d) alone contains Burden 1, there is no surplusage to avoid.

Appellants contend, therefore, that Burden 1 applies to *all five* exceptions. For all five exceptions, if a charge is contested on grounds that it is a tax, the State bears the burden of showing that it is "not a tax." *Not* applying Burden 1 to the fourth and fifth exceptions would render Burden 1 mere surplusage – an entire phrase that the courts simply disregard – as to those charges. That result would violate the rule of construction requiring courts to give effect to each part and significance to each word where possible. (*People v. Dayan* (1995) 34 Cal.App.4th 707, 716.)

Remarkably, both the Legislature and BATA agree with appellants that Burden 1 applies to all five exceptions. (Legislature's Brief at 42 ["the State

has the burden of showing that the tolls are *not a tax*"]; BATA/MTC Brief at 59 ["this aspect of section 3(d) applies to *all five* enumerated exceptions"].)

Respondents argue, however, that they satisfied Burden 1 by simply *identifying* which exception they believe is applicable to the RM3 toll increase. (*Id.*) Appellants disagree. Burden 1 requires the State to "prov[e] *by a preponderance of the evidence* that a levy, charge, or other exaction is not a tax." Simply pointing to an exception and saying, "that one applies," *proves* nothing.

Appellants contend the State must still show that the RM3 toll increase is "not a tax" under the century-old definition of a tax, by showing that it is "imposed *for* entrance to or use of state property," and not "imposed for unrelated revenue purposes." (*Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 437-38.)

Since appellants seek only the application of Burden 1, since none of the five exceptions contains Burden 1, and since respondents therefore concede that Burden 1 applies to all five exceptions, respondents' surplusage argument is a red herring that this Court is not being asked to decide.

B. A New Categorical Exemption Is Not Needed to "Avoid Absurdity"

Respondents' second argument is that it would be "absurd" to apply subsection (d) to anything but the first three exceptions. However, this argument, like the first, attacks a "reasonable cost" theory that appellants have not presented. Appellants have not argued that the "reasonable cost" burden in subsection (d) applies to the fourth and fifth exceptions. Appellants seek only the application of Burden 1, "the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax."

Respondents fret that the fourth exception "for entrance to or use of state property" also exempts the "purchase, rental, or lease of state property," and the fifth exception exempts judicial fines and penalties "as a result of a violation of law." It is in the public interest, they argue, for fines to punish crime and for the sale or lease of state property to fetch top dollar, therefore no "reasonableness" requirement should apply to either one. (Legislature's Brief at 38; BATA/MTC Brief at 63.)

Appellants have agreed, however, here and in the trial court, that fines are meant to punish crime and that state property should not be sold or leased for less than fair market value. Appellants are not arguing that a new, stricter "reasonableness" requirement should apply to fines or prices.

The law already contains a reasonableness requirement for criminal fines and penalties. They must be proportionate to the crime under the excessive fines clauses of the state and federal constitutions: "Cruel or unusual punishment may not be inflicted *or excessive fines imposed*." (Cal. Const., art. I § 17; U.S. Const., 8th Amend; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728; *Timbs v. Indiana* (2019) 139 S.Ct. 682, 689 [Fourteenth Amendment's Due Process Clause applies Eighth Amendment's excessive fines prohibition to the states].) Thus, fines and penalties must be reasonably related to the severity of the crime; in other words, the "cost" to society.

The law also contains a reasonableness requirement for sales and leases. Article XVI, section 6, of the California Constitution prohibits the Legislature from making "any gift, of any public money or thing of value to any individual, municipal or other corporation." California courts have construed this "gift of public property" clause to prohibit the sale or lease of state property without adequate consideration. Consideration is adequate if it approximates

fair market value. (*Post v. Prati* (1979) 90 Cal.App.3d 626, 635.) The acquisition of property is an investment, and its "cost" includes not just money but also risk, which accounts for any appreciation in value. A sale or lease for fair market value, then, does not exceed the state's "cost."

Given that the amounts of fines and prices are already controlled by other provisions of the state constitution, it is not impossible or absurd to apply Burden 1 to fines and prices. A fine is "not a tax" if it is not excessive under the excessive fines clause. A price is "not a tax" if it represents adequate consideration under the gift of public property clause.

One could imagine an excessive fine, based not on the severity of the offense but on the defendant's ability to pay. One could also imagine an unreasonable rent increase on a private business that cannot relocate: for example, a desalination plant with pipes under state tidelands to draw water from the ocean. Requiring the government to prove that an allegedly excessive fine or price is "not a tax" does not produce an absurd result.

C. Crossing State Bridges Is Not a "Privilege" That Can Be Sold

When respondents finally get around to addressing appellants' actual theory, they – like appellants – focus on the word "for." Appellants have argued that, for the State to carry its burden of proving that the RM3 toll increase is "not a tax," it must show that the toll increase is "imposed *for* entrance to or use of state property" (art. XIII A, § 3(b)(4)), and not "imposed *for* unrelated revenue purposes." (*Cal. Farm Bureau Fed'n*, 51 Cal.4th at 437-38.)

Respondents selectively quote one definition of the word "for" from a nonlegal dictionary and declare that, because the RM3 toll increase is collected as a condition of admitting motorists onto state bridges, it is "for" entrance to

state property. The State can charge any amount it chooses as a condition of admitting motorists onto state bridges, respondents argue, because "the toll is paid for the *privilege* of passing over the bridge, not for the maintenance of the bridge." (Legislature's Brief at 40; see also BATA/MTC Brief at 68.)

Respondents misperceive the concept of "public property." State bridges are not owned by the Legislature. The Legislature is not selling Californians a "privilege" when they pay a toll to cross a public bridge. The people of California are not prohibited from crossing a water barrier to reach another body of land unless they are granted a government "privilege" to do so. Rather, the people of California have a "fundamental right to travel." It is part of our liberty as a free people, a "basic human right protected by the United States and California Constitutions." (*Halajian v. D & B Towing* (2012) 209 Cal.App.4th 1, 11.)

"Highways are for the use of the traveling public, and all have the right to use them in a reasonable and proper manner, and subject to proper regulations as to the manner of use. [They] belong to the people of the state, and *the use thereof is an inalienable right* of every citizen. ... The use of highways for purposes of travel and transportation is *not a mere privilege, but a common and fundamental right, of which the public and individuals cannot rightfully be deprived*." (*City of Lafayette v. County of Contra Costa* (1979) 91 Cal.App.3d 749, 753 (quoting *Escobedo v. State of California* (1950) 35 Cal.2d 870, 875-876.)

"In other words, the legislature has no power to lay out and establish private roads in the sense that they are [not open to the public] and hence, so far as they undertake to do so, their action is simply null and void; ... the road so laid out and established becomes a way over which all may lawfully pass

who have occasion, and therefore public." (*Hartley v. Vermillion* (1903) 141 Cal. 339, 348.)

Appellants are not suggesting that bridge tolls are illegal. Appellants readily acknowledge that the bridge tolls originally established for construction, bond repayment, repair, operation and maintenance of the bridges, and tolls subsequently established for seismic upgrades and replacements, were lawfully imposed without the need for an election or two-thirds legislative approval. Those tolls were not "taxes" because they were *for* use of the bridges.

Appellants contend, however, that if people have a constitutional right to travel from the part of California where they can afford housing to the part of California where their job is located, then the State cannot condition the exercise of that "basic human right" upon payment of a surcharge, *not* for use of the bridge but for general revenue, unless that surcharge has been approved as a tax on motorists by two-thirds of the people's representatives in each house of the Legislature. (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 281-85 [state cannot condition exercise of constitutional right upon payment of money]; *In re Allen* (1969) 71 Cal.2d 388, 391 [same].)

CONCLUSION

The Legislature did not impose the RM3 toll increase by passing SB 595, but rather authorized BATA to propose and adopt a toll increase if passed by local voters. This conclusion is reinforced by the fact that an election was held to obtain local voter approval, and by the history of toll increases, which shows that some were enacted unilaterally by the Legislature, while others were proposed by BATA to the voters. The trial court erred in ruling that the Legislature itself raised the tolls by enacting SB 595. Because this BATA-

imposed toll increase has not yet been shown to fit any of the local "tax" exceptions in article XIII C, section 1(e), it was error to grant judgment on the pleadings.

Even if this Court construes SB 595 as a self-executing toll increase imposed by the Legislature, SB 595 is invalid because it failed to garner two-thirds approval in each house of the Legislature as required by article XIII A, section 3. Just because the charge is collected at the entrance to state property does not, by itself, exempt the charge from the two-thirds legislative approval requirement. The Legislature must prove that the charge is "for" entrance to or use of state property, and "not a tax." The trial court erred by granting judgment on the pleadings without such proof. The judgment should be reversed.

DATED: January 24, 2020.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached petition and memorandum, including footnotes but excluding the caption page, tables, verification, and this certification, as measured by the word count of the computer program used to prepare this pleading, contains 7,248 words.

DATED: January 24, 2020.

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