**A157598 / A157972**

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

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**HOWARD JARVIS TAXPAYERS ASSOCIATION, ET AL.**

***Appellants,***

**v.**

**BAY AREA TOLL AUTHORITY, ET AL.**

***Respondents.***

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**RANDALL WHITNEY**

***Appellant,***

**v.**

**METROPOLITAN TRANSPORTATION COMMISSION**

***Respondent.***

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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' OPENING BRIEF

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## RULE 8.204(a)(2) STATEMENT

These consolidated appeals challenge the declared election outcome for Regional Measure 3 (RM3), a $3 toll increase for seven Bay Area bridges that was on the June 5, 2018 ballot in nine Bay Area counties. The Bay Area Toll Authority, which is governed by the Metropolitan Transportation Commission (collectively BATA), declared that RM3 passed with 55% voter approval.

Appellants believe the RM3 toll increase is a "tax" as defined by Proposition 26 because most of its revenue will be used neither for the bridges nor to benefit the motorists who pay the toll, but rather to benefit persons using other transportation facilities including BART, ferries, in-city buses, the Port of Oakland, and bicycle and pedestrian trails. (Cal. Const., art. XIII C, § 2(e).) If appellants are correct that this toll increase is a tax, then RM3 needed the two-thirds voter approval required to pass a special tax because BATA is a special purpose agency (Cal. Const., art. XIII C, § 2(a)), and because revenue from the toll increase may be expended only for specific purposes. (Cal. Const., art. XIII C, §§ 1(d), 2(d)). The complaint filed by appellant Howard Jarvis Taxpayers Association also challenged Senate Bill 595 (SB 595), the bill that authorized BATA to propose and implement the toll increase, because it did not receive the two-thirds legislative approval required for statutes that result in increased taxes. (Cal. Const., art. XIII A, § 3(a).)

The Legislature, BATA, and MTC filed motions for judgment on the pleadings. They argued that the Legislature, not BATA or MTC, imposed the toll increase when it passed SB 595. And the Legislature, they argued, can impose a charge "for entrance to or use of state property" without any voter approval whatsoever, much less two-thirds approval. (Cal. Const., art. XIII A, § 3(b)(4).)

The trial court granted the three motions for judgment on the pleadings, and entered judgment against appellants, which judgment is now final and therefore appealable. (Code of Civ. Proc. § 904.1(a)(1).)

## STATEMENT OF FACTS

(Respondents' motions for judgment on the pleadings were filed before any meaningful discovery could be completed. The only facts known to appellants, therefore, are their own personal circumstances and matters of public record.)

The map of the Bay Area Rapid Transit (BART) system resembles a giant letter "X." BART's Transbay Tunnel is the hub of the X. From there, one leg goes through San Francisco, down the western shore of the San Francisco Bay to the San Francisco Airport in Millbrae. Another two legs of the X run along the opposite shore of the Bay – one goes north to Richmond, the other goes south to Fremont. The last leg heads roughly east along State Route 24 and Interstate 680 up to Concord.

Because the system is laid out in an X, there are lots of spaces – hundreds of square miles – that are not reached by BART. Many people, including appellants, live in those spaces and commute to work in the Bay Area. Generally speaking, the closer you get to the San Francisco hub of the X, the more expensive housing becomes. The average price of a two-bedroom apartment in San Francisco is $4500/month. Travel 40 miles from San Francisco and you can find a two-bedroom apartment for $1800/month. But the farther you travel from the hub of the X, the greater the space between the legs. Thousands of blue collar employees who work in the Bay Area cannot afford to live near their jobs. They live 40 or 50 miles away, in territory not served by BART. They commute across one or two bridges each way, five days a

week. Even before RM3, they paid $3,000/year just in tolls. In 2018 the price of their commute went up as Governor Brown's 12-cent/gallon increase in gasoline taxes took effect, raising the State tax on gas to 61 cents/gallon. Then, starting this year, the first of the three RM3 toll increases took effect that together will raise the price to $9.00 for each bridge crossing.

Most of the RM3 toll increase is budgeted by Streets & Highways Code section 30914.7 neither for the bridges nor to benefit the motorists who pay the toll, but rather to subsidize other transportation facilities such as BART, which – thanks to such subsidies – can charge ride fares and parking fees that recover only 30 percent of its annual budget. (See https://www.bart.gov/sites/default/files/docs/FY18_Budget_Summary.pdf.) It is undeniable, then, that the RM3 toll increase takes money from low wage workers who can't afford to live near their Bay Area jobs in order to subsidize the commutes of wealthier people who can afford to live near BART and other subsidized Bay Area public transit services.

The Legislature in 2017 passed SB 595, authorizing BATA to propose the RM3 toll increase. Among other things, SB 595 added section 30923 to the Streets & Highways Code. Section 30923 authorized BATA to propose a toll increase in an amount of its choosing, up to $3, for the seven bridges within BATA's jurisdiction. (Str. & Hwy. Code § 30923(a).)[1] It authorized BATA to call an election on a date of its choosing (§ 30923(c)(1)), and to present the increase to voters in ballot language of its choosing (§ 30923(c)(2)). If the voters approved it, BATA was authorized to adopt or not adopt the increase (§ 30923(f)) and, if adopted, to phase in the increase in amounts and over a duration of its choosing (§ 30923(e)). Finally, BATA is authorized to collect the toll increase and deposit the revenue into BATA's

[1] All unspecified code citations are to the Streets and Highways Code.

own account (§ 30911), for BATA to dole out and spend (§ 30914.7(a)), with oversight by a committee to be established by BATA (§ 30923(h)).

Nowhere in SB 595 does the Legislature state that a $3 toll increase is "hereby imposed" or "shall be imposed." Rather, the bill refers to it as "the toll increase adopted by [BATA] pursuant to ... statutory authorization by the Legislature." (§ 30923(j).)

BATA passed its own Resolution No. 123 (Motion for Judicial Notice, Ex. 1), by which it chose the maximum increase, $3.00, to be phased in over three years in $1.00 annual increments (*id.* at 2), and by which it chose the June 2018 Primary Election to present RM3 to the voters (*id.*) using a ballot question it authored (*id.*). BATA requested the elections official in each county to place RM3 on the ballot. (*Id.* at 3.) The counties' expenses for doing so were reimbursed by BATA. (*Id.*)

RM3 did not pass in every county, but the region-wide total favored RM3 by approximately 55%. BATA declared the measure passed. (Motion for Judicial Notice, Ex. 2.) On January 1, 2019, BATA implemented the first $1.00 increase. Due to this litigation, BATA is holding the revenue from the increase in escrow so that it can be refunded if necessary.

While BATA has discretion to prioritize spending, the RM3 bridge toll funds can be used only for the specific purposes listed in section 30914.7. These specific purposes include new BART railway cars and other BART enhancements, the repair or replacement of San Francisco Bay ferry vessels, the replacement and expansion of San Francisco's in-city MUNI vehicle fleet, improved ship access to the Port of Oakland, and a grant program to fund bicycle and pedestrian trails.

Plaintiffs do not use these rail, in-city bus, ferry, shipping, bicycle or pedestrian services when they drive across toll bridges. They time their daily trips so as to cross bridges when they are least congested. They are being charged not for operation or maintenance of the bridges they cross, but rather to subsidize other people's commute.

## ISSUES PRESENTED

1. 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?

2. If the Legislature imposed the RM3 toll increase, then is it a tax that triggered a two-thirds legislative approval requirement for SB 595?

## RELIEF SOUGHT ON APPEAL

The judgment of the Superior Court, holding that the Legislature imposed the RM3 toll increase, and that it is not a tax, should be reversed.

## STANDARD OF REVIEW

On appeal from a motion granting judgment on the pleadings, the Court of Appeal accepts as true the facts alleged in the complaint and reviews the legal issues de novo. (*Moore v. Hill* (2010) 188 Cal.App.4th 1267, 1278; *Noble v. Draper* (2008) 160 Cal.App.4th 1, 10.)

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## ARGUMENT
## I
## UNDER PROPOSITION 26, THE RM3 TOLL INCREASE IS A LOCAL GOVERNMENT TAX THAT NEEDED TWO-THIRDS VOTER APPROVAL

The State of California owns the seven bridges impacted by the RM3 toll increase. Historically, a toll has always been collected by the State for bond repayment, construction, repair, operation and maintenance of the bridges. BATA is a regional governmental entity, separate from the State, that has been granted authority by the Legislature to collect additional tolls to fund local and regional transportation projects in the nine Bay Area counties. RM3 was a BATA toll increase. Under the new definition of "tax" in Proposition 26, BATA's toll increase is a local government tax that needed two-thirds voter approval to pass.

### *A. Prop. 26 Broadly Defines "Tax" and "Local Government," and Requires Voter Approval of Taxes Imposed by Local Government*

The California Constitution requires "local governments" to obtain voter approval as a condition of enacting or increasing any "tax." (Cal. Const., art. XIII C, § 2(a).) A simple majority of voters can approve a "general tax" (*id.*, § 2(b)), but two-thirds are required to approve a "special tax." (*Id.*, § 2(d).) A "special tax" is any tax imposed for specific purposes (*id.*, § 1(d)) or imposed by a special purpose agency. (*Id.*, § 2(a).)

While the two-thirds vote requirement for special taxes has been a part of the state constitution since 1978 (see Cal. Const., art. XIII A, § 4), the critical term "tax" had no definition prior to 2010. Many legal battles were fought over what constituted a tax.

In November 2010, California voters adopted Proposition 26 which, among other things, amended Article XIII C of the state constitution to provide

a broad definition of "tax" that encompasses every payment of money to the government unless it fits one of seven narrow exceptions. As defined today:

> "'tax' means any levy, charge or exaction of any kind imposed by a local government, except the following:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that 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." (Cal Const., art. XIII C § 1(e).)

As it said in the first line, this broad definition labels as a "tax" every non-exempted levy, charge or exaction of any kind "imposed" by a "local government." "Local government" is also broadly defined. It means "any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity." (Cal. Const, art. XIII C § 1(b).) BATA and MTC, which are declared by statute to be regional local agencies "and not ... part of the executive branch of the state government" (Gov. Code § 66502), fit the definition of "local government." That means, if the RM3 toll increase was "imposed" by the regional agency BATA, then the article XIII C definition of a local "tax" applies to the toll increase.

/ / /

### *B. History Shows That Some Tolls Are Imposed by the Legislature, and Some Tolls Are Imposed by the Regional Agency and Voters*

The first Bay Area bridge, the Antioch Bridge, opened to automobiles and horses in 1926. The huge San Francisco–Oakland Bay Bridge was completed only ten years later. The last of the seven Bay Area bridges, the Benicia-Martinez Bridge, opened in 1962. (Motion for Judicial Notice, Ex. 3.)

For many years the State Department of Transportation (Caltrans) operated the bridges and collected the tolls. (Str. & Hwy. Code § 30150.) During those years, the Legislature set the toll amounts unilaterally. No election was needed or held. The tolls were different for each bridge, ranging from 25¢ to 75¢. (Motion for Judicial Notice, Ex. 3.) Toll revenue collected by Caltrans was deposited into the State's Toll Revenue Fund. (Str. & Hwy. Code §§ 30150, 30304.) Money in the Fund could be used only for bond repayment, construction, repair, operation and maintenance of the bridges. (§ 30306.)

Of course, automobile ownership grew, and the population grew. Consequently bridge traffic increased, toll revenue increased, and the State found itself with more money than it needed to service the bridge construction bonds and operate and maintain the bridges.

In 1970 the Legislature formed the Metropolitan Transportation Commission (MTC) "as a local planning agency and not as a part of the executive branch of the state government ... to provide comprehensive regional transportation planning for the region comprised of the [nine Bay Area counties]." (Gov. Code § 66502.)

In 1975, the Legislature created a new fund, the Toll Bridge Revenues Account, into which Caltrans was thereafter required to deposit all "net

revenues" from the bridge tolls, defined as toll revenue in excess of the amount needed for bond repayment, construction, repair, operation and maintenance of the bridges. (Stats. 1975, ch. 1229, sec. 4, new Str. & Hwy. Code §§ 30884, 30890 (Motion for Judicial Notice, Ex. 4).) MTC was given authority to make grants from the new fund to other public entities for the operation or improvement of existing public transportation services or the establishment of new services, according to its regional transportation plan. (*Id.*, §§ 30890, 30892.)

In 1988, the Legislature passed SB 45 which, among other things, authorized MTC to propose toll increases for each of the state-owned Bay Area bridges so as to standardize the tolls at a uniform $1 for all bridges, the revenue to be allocated by MTC "[c]onsistent with its adopted regional transportation plan ... to eligible public entities." (Stats. 1988, ch. 406, sec. 2, new Str. & Hwy. Code §§ 30916, 30919 (Motion for Judicial Notice, Ex. 5).) The proposal was to be placed on the ballot in the nine Bay Area counties as Regional Measure 1. (*Id.*, § 30917.) The measure passed.

Following the Loma Prieta earthquake in 1989, when sections of the elevated Nimitz Freeway and the San Francisco–Oakland Bay Bridge collapsed, killing 43 people, the Legislature passed SB 36X requiring Caltrans to conduct a comprehensive seismic inspection of all publicly owned bridges, applying state of the art seismic standards. (Stats. 1989, 1st Ex. Sess., ch. 18, sec. 3.) That study ultimately recommended seismic retrofitting or replacement of several Bay Area bridges.

To fund this work, the Legislature in 1997 passed SB 60, raising the Bay Area bridge tolls to $2 to pay for seismic retrofitting or replacement of specified bridges. This increase was a direct and unilateral act of the Legislature. The operative language of the bill 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.) No election was needed or held.

Shortly thereafter, the Legislature created BATA, to be governed by MTC. (§ 30950.) BATA took over operation of the toll plazas, and was given authority to collect, manage, and distribute all toll revenue from the state-owned Bay Area bridges. (Str. & Hwy. Code § 30950.4.)

In 2003, the Legislature passed SB 916, which authorized BATA to place Regional Measure 2 on the ballot in the nine Bay Area counties, proposing another $1 toll increase to pay for a long list of MTC-recommended local and regional public transportation projects (see Str. & Hwy. Code §30921(b)(1)). The bill stated, "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 also stated, "If a majority of all the voters ... do not approve the toll increase, [BATA] may by resolution resubmit the measure to the voters at a subsequent general election." (Str. & Hwy. Code § 30921(e).) The measure passed, and BATA adopted the increase.

Thus, the history of Bay Area toll increases shows that some increases are imposed unilaterally by the Legislature with no election, and some increases are imposed by MTC/BATA, conditioned upon voter approval.

### *C. Under SB 595, RM3 Is Clearly a BATA-Imposed Toll Increase*

When article XIII C uses the term "impose" it means "adopt" or "enact." (*Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 944 ["'impose' in this context means enacted"]); see also *Santa Clara County Local Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 240; *Howard Jarvis*

*Taxpayers Assn. v. Fresno Metro. Projects Auth.* (1995) 40 Cal.App.4th 1359, 1373 ["'impose' is synonymous with 'levy'"].)

The Superior Court erroneously held that the RM3 toll increase was imposed not by BATA, but by the Legislature when it passed SB 595. The court held, "Article XIII C, section 1 of the California Constitution applies only to taxes imposed by local governments. Because Defendant California State Legislature imposed the challenged toll increase by passing SB 595 and because BATA is a regional entity charged [only] with implementing that state mandate, Article XIII A, section 3 of the Constitution applies to this state imposed charge, not Article XIII C, section 1." (Order Granting BATA's Motion for Judgment on the Pleadings (Appendix, Ex. __ ) at 1:5. See also Order Granting MTC's Motion for Judgment on the Pleadings (Appendix, Ex. __) at 1:27 ["The California State Legislature imposed the bridge toll increase in the San Francisco Bay Area by passing SB 595."])

The Superior Court misread SB 595. SB 595 did not adopt or enact 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, if BATA had taken no action or if a majority of the voters had voted no, the tolls would not have been increased. 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. The operative language of that bill 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.) Accordingly, no election was needed or held.

The operative language of SB 595 is quite different. It granted authority to BATA to propose a toll increase to the 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).)[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

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

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).)

The Legislature in SB 595 thus clearly did not, on its own, adopt or impose a toll increase, but stated that BATA "may" adopt one, if the voters approve it. If BATA had taken no action, or if (as appellants contend) the voters rejected RM3, the tolls would not have increased.

As further proof that this was not a State toll increase, revenue from the increase is not remitted to the State, nor will the State Auditor monitor its expenditure. This is important because, under *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, a tax is "imposed" by a governmental entity if it is paid to that entity or remitted to that entity. (*Schmeer*, 213 Cal.App.4th at 1326-27, 1328-29.) The RM3 toll increase is collected by BATA and deposited into BATA's own account (§ 30911), for BATA to dole out and spend (§ 30914.7(a)), with oversight not by the State, but by a committee to be established by BATA (§ 30923(h)).

It is clear from the language of SB 595 then, that the RM3 toll increase was imposed not by the Legislature itself, but by BATA acting pursuant to legislative authorization, after receiving voter approval.

Statutory language similar to SB 595 was considered by the Court in *Howard Jarvis Taxpayers Association v. Fresno Metropolitan Projects Authority* (1995) 40 Cal.App.4th 1359. In that case, a statute authorized the Fresno Metropolitan Projects Authority to increase the sales tax if local voters approved it. The statute read as follows:

Government Code § 68059.7. Transactions and use taxes

(a) The authority, subject to the approval of a majority vote by the voters, may impose a retail transactions and use tax at a maximum rate of one-tenth of 1 percent under this title.

(b) Notwithstanding any other provision of law, the authority at the next municipal election, or upon a majority vote of the authority, at any municipal or countywide election prior to December 31, 1994, shall submit to the voters within its geographical boundaries the question of whether the authority shall be authorized to levy and collect transactions and use taxes for the purpose stated in this title. The Fresno County Clerk shall be charged with the duty to conduct that election pursuant to the procedures adopted by the board.

(c) The tax ordinance shall specify the period, not to exceed 20 years, but subject to termination within 10 years upon a majority vote of the board, during which the tax is to be imposed.

(d) The authority shall reimburse the county for the county's costs in conducting the election through the proceeds of the retail transactions and use tax. (Motion for Judicial Notice, Ex. 6.)

The language quoted above directs the Authority to hold an election ("the authority ... shall submit to the voters"), specifies the maximum amount of the increase ("a maximum rate of one-tenth of 1 percent") and directs the elections official to conduct the election ("County Clerk shall be charged with the duty to conduct that election"). Construing this language, the Court held: "Government Code section 68059.7 authorizes *the Authority* to impose the tax

('a retail transactions and use tax at a maximum rate of one-tenth of 1 percent') if a majority of the voters within the geographical boundaries of the Authority approve of authorizing the Authority to levy and collect the tax." (*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 within the meaning of California Constitution article XI, section 11. 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 at all." (*Id.* at 1382.)

Compared to the statute construed in *Fresno Metropolitan Projects Authority*, the wording of SB 595 in the case at bar is even clearer in delegating to BATA the authority to propose and collect a toll increase, conditioned upon voter approval of the increase. The Legislature did not impose the RM3 toll increase, but authorized BATA to do so if it obtained voter approval.

### *D. The Fact There Was an Election Further Proves That RM3 Was Not Imposed by the Legislature*

The fact that the Legislature required an election is proof that the Legislature did not impose the toll increase. If, as the trial judge ruled, the toll increase was imposed by the Legislature, then no election was required. The Legislature need only pass a bill. While an elevated vote in the two legislative houses may be required to pass the bill (see Cal. Const., art. XIII A, § 3), no election to seek *voter* approval is required. An election is required only when

the charge is proposed by a *local* government. (Compare Cal. Const., art. XIII C, § 2.)

In certain cases, the Legislature is constitutionally authorized to place a statewide advisory measure on the ballot. (*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 520.) But this is not one of those cases (*id.*), nor is that what happened here.

First, the Legislature did not place RM3 on the ballot. BATA did. SB 595 was not self-executing. Had BATA taken no action, there would have been no election. It was BATA who, by its own Resolution No. 123, proposed a $3 toll increase, authored the ballot question, and called an election. (Motion for Judicial Notice, Ex. 1.)

Second, RM3 was not submitted to the statewide electorate. It appeared on the ballot only in the nine Bay Area counties. It was to be "submitted to the voters as *Regional* Measure 3 and stated *separately* in the ballot from *state* and local measures." (Str. & Hwy. Code § 30923(c)(2).)

Third, RM3 was not merely advisory. Advisory measures are non-binding. Here, once BATA decided to propose a toll increase, the voters then controlled whether or not BATA would be able to adopt it. "The toll rate ... shall *not* be increased by the rate selected by [BATA] pursuant to subdivision (a) 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).) "*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).)

A ballot measure such as RM3 "is not a public opinion poll. It is a method of enacting legislation." (*Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 782.)

The fact that the Legislature authorized BATA, a local agency, to propose a toll increase, but conditioned its authority to adopt the increase upon the local voters' consent, further proves that this was a locally imposed increase, not one imposed by the Legislature.

### *E. This BATA-Imposed Toll Increase Has Not Been Shown to Fit Any of the Local "Tax" Exceptions*

As explained earlier, Proposition 26 amended Article XIII C of the state constitution to provide a broad definition of "tax" that encompasses every payment of money to a local government unless it fits one of seven narrow exceptions. (Cal Const., art. XIII C § 1(e).) Appellants contend that the RM3 toll increase fits none of the exceptions.

While Exception No. 4 exempts "[a] charge imposed for entrance to or use of local government property," the bridges are not "local government property." They are owned by the State.

BATA will likely argue that Exception No. 1 applies. Exception No. 1 exempts "[a] charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." BATA will likely argue that the toll increase funds public transit improvements that will increase public transit ridership, which will reduce traffic congestion on the bridges, thus benefitting the motorists who pay the tolls.

This Court *could* reject BATA's theory as a matter of law. As a matter of law, increasing the bridge toll on motorists for the purpose of subsidizing public transportation facilities that the toll-paying motorist is not using could never qualify as providing a special benefit or privilege "directly to the payor that is not provided to those not charged."

But even if BATA's theory is deemed a contested factual question, it cannot support a judgment on the pleadings. The Court of Appeal assumes that contested facts will be resolved in plaintiffs' favor when reviewing an order granting defendants judgment on the pleadings. (*Moore v. Hill* (2010) 188 Cal.App.4th 1267, 1278; *Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 322 ["judgment on the pleadings must be denied where there are material factual issues that require evidentiary resolution."])

In sum, if this Court agrees that SB 595 was not a self-executing toll increase imposed by the Legislature, but rather was authorization for BATA to impose a toll increase upon voter approval, then this Court must reverse the judgment on the pleadings. Under Proposition 26, where every payment of money to the government is a tax unless it fits one of the seven exceptions, the toll increase is presumed a tax because it has not yet been shown to qualify for an exception. Local taxes need voter approval. And if the toll increase needed voter approval, then as a matter of law it needed two-thirds voter approval because BATA is a special purpose agency (Cal. Const., art. XIII C, § 2(a)), and because revenue from the toll increase may be expended only for specific purposes. (Cal. Const., art. XIII C, §§ 1(d), 2(d)). RM3 received less than two-thirds approval. Therefore, BATA and the other respondents were not entitled to judgment on the pleadings.

## II
## IF THE RM3 TOLL INCREASE IS DEEMED AN ACT OF THE LEGISLATURE, THEN UNDER PROPOSITION 26 IT NEEDED TWO-THIRDS APPROVAL IN EACH HOUSE

SB 595 was not a self-executing toll increase imposed by the Legislature. To the contrary, the plain language of SB 595 authorized BATA to propose and adopt a toll increase. 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, unlike others that were proposed by BATA to the voters.

If, despite this background and the very clear language of SB 595, this Court concludes that the Legislature itself directly 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.

### *A. Proposition 26 Requires a Two-thirds Legislative Vote for "Tax" Bills*

In the preceding argument, appellants described the amendments that Proposition 26 made to article XIII C regarding *local* taxes. Proposition 26 also amended article XIII A, section 3, regarding *state* taxes. As amended, article XIII A now reads:

> "(a) Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.
>
> (b) As used in this section, "tax" means any levy, charge, or exaction of any kind imposed by the State, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of providing the service or product to the payor.

(3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or the State, as a result of a violation of law.

...

(d) The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that 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." (Cal. Const., art. XIII A, § 3.)

Thus, article XIII A, requiring two-thirds approval in each legislative house for any bill "which results in any taxpayer paying a higher tax" (art. XIII A, § 3(a)), was amended by Proposition 26 to broadly define "tax" much like the way "tax" was broadly defined in article XIII C – as "any levy, charge, or exaction of any kind imposed by the State" unless it fits an exception. (*Id.*, § 3(b).) The only difference is that article XIII A contains five exceptions instead of seven. In another similarity with article XIII C, article XIII A likewise places the burden of proof on the State to show, "by a preponderance of the evidence that a levy, charge, or other exaction is not a tax." (*Id.*, § 3(d).)

### *B. "Taxes" Raise Revenue; "Fees" and Other Charges Recover the Value of Benefits or the Cost of Burdens*

Taxes raise revenue to run the government, its projects and programs, whether their expenditure benefits the payer or not. (*Cal. Chamber of Commerce v. State Air Res. Bd.* (2017) 10 Cal.App.5th 604, 641 ["'no compensation is given to the taxpayer except by way of governmental protection and other general benefits.'" (quoting 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 1, p. 25)].)

"Fees" and other non-tax charges, on the other hand, are collected to recover the cost of some governmental service or benefit provided directly to the payer, or – in the case of regulatory fees – to mitigate some public burden attributable to the payer. (*Isaac v. City of L.A.* (1998) 66 Cal.App.4th 586, 595-97; *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1441.) Fees and other charges can become taxes if they

exceed reasonable costs or are imposed for general revenue purposes. (Gov. Code § 50076; *Isaac*, 66 Cal.App.4th at 597; *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 438.)

California courts have distinguished taxes from fees and other charges based on these principles since long before Proposition 26 was adopted. For example, *City of Madera v. Black* (1919) 181 Cal. 306, described the same distinction between taxes and fees a century ago. The City of Madera operated a public sewer system for which it charged residential customers $1 per month. The City sued one of its customers to collect a delinquent bill. The defendant customer answered alleging that the sewer fee was invalid because it was *excessive* and, *to that extent*, constituted an unauthorized tax.

The Court began with a broad definition of "tax," akin to Proposition 26: "A tax, in the general sense of the word, includes every charge upon persons or property, imposed by or under the authority of the legislature, for public purposes." (*Id.* at 310.) The Court then summarized the customer's argument that sewer charges are not supposed to operate as taxes: "The respondent's main argument is that the charge ... is an ordinary debt owed by the defendant to the plaintiff *for services performed* by plaintiff for the defendant in carrying away sewage from his premises. ... If the argument of the respondent, that it is a debt, is tenable, it must be upon the theory that the city, in its proprietary capacity, *is the owner of the sewer* and that it was operating the same in that capacity." (*Id.* at 311-12.)

> "It has been held that the power to construct and maintain sewers is possessed by cities ... 'as incident to the general and express power to construct and maintain streets.' [Citations.] But it is obvious that the power to construct and maintain sewers *does not include authority to raise revenue for general*

*purposes*. ... [T]he power to maintain a sewer may carry by implication the additional power to levy a monthly charge to raise money for the repairs and upkeep of such sewer. But the rates here imposed upon the sewer users were obviously for purposes additional to that of paying the expenses of repairs and maintenance. The sum of $40,734.92 has been raised in this manner. More than three-fourths of this sum has been transferred to other funds and used for purposes other than repairs to the sewers and expenses of their maintenance. More than half of it has been paid out for the general expenses of the city government. ... It must therefore be presumed that the high rates were imposed in order to bring about the known and inevitable result -- that is, the accumulation of a fund for the general benefit of the city and thereby enable it to fix a lower rate of *taxes* for general purposes. ... This would be an unjust discrimination and an unfair burden upon those who used the sewer, and it is clearly beyond any power possessed by the city. It follows that the charges were excessive and unreasonable. ... The entire charge must therefore be declared invalid." (*Madera v. Black*, 181 Cal. at 313-15.)

If "bridge" were substituted for "sewer" in that quote, the RM3 toll increase would be deemed a tax under *Madera v. Black*:

"[T]he power to maintain a [bridge] may carry by implication the additional power to levy a [toll] charge to raise money for the repairs and upkeep of such [bridge]. But the rates here imposed upon the [bridge] users were obviously for purposes additional to that of paying the expenses of repairs and

> maintenance. [Most of it] has been transferred to other funds and used for purposes other than repairs to the [bridges] and expenses of their maintenance. ... It must therefore be presumed that the high rates were imposed in order to bring about the known and inevitable result -- that is, the accumulation of a fund for the general benefit of the [public] and thereby enable it to fix a lower rate of *taxes* for general purposes. ... This would be an unjust discrimination and an unfair burden upon those who used the [bridges], and it is clearly beyond any power possessed by [a mere majority of the Legislature]. It follows that the charges were excessive and unreasonable."

Cases decided during the century following *Madera v. Black*, all the way up to today, have maintained this same distinction between taxes and other governmental charges. See, for example, *County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974, 983 ("Taxes are raised for the general revenue of the governmental entity to pay for a variety of public services" [citing 46 Cal.Jur.2d (1959) Taxation, § 7, p. 488]); *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659 ("[tax] does not embrace fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes"); *Fenton v. City of Delano* (1984) 162 Cal.App.3d 400, 405 ("'Taxes' are defined as burdens imposed by legislative power on persons or property to raise money for public purposes"); *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 234 ("exclude[d] from the definition of 'special tax' [is] any 'user fee,' i.e., 'any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes'"); *San Marcos Water Dist. v. San Marcos*

*Unified Sch. Dist.* (1986) 42 Cal.3d 154, 162 ("a usage fee typically is charged only to those who use the goods or services. The amount of the charge is related to the actual goods or services provided to the payer"); *Shapell Indus., Inc. v. Governing Bd.* (1991) 1 Cal.App.4th 218, 240 (taxes are "levied for the purpose of producing general revenue"); *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874 ("taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted"); *Townzen v. County of El Dorado* (1998) 64 Cal.App.4th 1350, 1359 ("[tax]does not include fees which do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes"); *Isaac v. City of L.A.* (1998) 66 Cal.App.4th 586, 597 ("fees can become special taxes subject to the two-thirds vote requirement of Proposition 13 [if] (1) the fee exceeds the reasonable cost of providing the service or the regulatory activity, or (2) the fee is levied for general revenue purposes"); *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 595 ("'fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes' are regulatory fees, not taxes"); *Cal. Assn. of Prof. Scientists v. Dept. of Fish & Game* (2000) 79 Cal.App.4th 935, 944 ("taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted"); *Collier v. City & County of S.F.* (2007) 151 Cal.App.4th 1326, 1339 ("regulatory fees [may] not be 'levied for unrelated revenue purposes' ... a municipality may, under its police powers, spend regulatory fee revenues for the purpose of legitimate regulation so long as those revenues do not exceed the reasonably necessary expense of the regulatory effort"); *Northwest Energetic Servs. v. Cal. Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 854 ("The essence of a tax is that it raises

revenue for general governmental purposes. ... A fee, on the other hand, funds a regulatory program or compensates for services or benefits provided by the government"); *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1037 ("If revenue is the primary purpose, and regulation is merely incidental, the imposition is a tax"); *Cal. Bldg. Indus. Assn. v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 131 ("a fee may be validly imposed under the police power for the purpose of legitimate regulation when the fee does not exceed the amount required to carry out the purposes and provisions of the regulation and is not levied for unrelated revenue purposes"); *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 437-38 ("A valid fee may not be imposed for unrelated revenue purposes. ... An excessive fee that is used to generate general revenue becomes a tax"); *Morning Star Co. v. Bd. of Equalization* (2011) 201 Cal.App.4th 737, 755 ("[the] charge to the Company is not regulatory because it does not seek to regulate the Company's use, generation or storage of hazardous material, but to raise money for the control of hazardous material generally. The charge is therefore a tax"); *Cal. Tow Truck Assn. v. City & County of S.F.* (2014) 225 Cal.App.4th 846, 859 ("In broad strokes, taxes are imposed for revenue purposes, while fees are collected to cover the cost of services or regulatory activities.")

In sum, "taxes" are collected to raise revenue, not recover the government's cost of serving the payer. When the amount of a charge exceeds the government's cost to provide service to the payer, it is to that extent a "tax." That has been the law in California for over a century.

/ / /

### *C. The Voters Intended to Close Loopholes by Expanding the "Tax" Definition, But the Trial Court Opened a New Loophole*

The trial court held that the RM3 toll increase cannot be ruled a tax that needed two-thirds legislative approval, even if plaintiffs were to prove that they and other payers are not benefitted by the expenditure of its revenue. It cannot be a tax, the court ruled, because it qualifies for the exception in article XIII A, section 3(b)(4), "[a] charge imposed for entrance to or use of state property." Although section 3(d) provides that "[t]he State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax," the trial court ruled that the burden-shifting language in section 3(d) does not apply to the fourth exception for charges to enter or use state property. (Order Granting State Legislature's Motion for Judgment on the Pleadings (Appendix, Ex. __ ) at 3:5.) Specifically, the court held:

> "In section 3(b), only the first three exceptions to the definition of 'tax' contain language mandating that charges not exceed the 'reasonable costs' to the State of conferring benefits or granting privileges, providing services, or performing regulatory acts. (Cal. Const. art. XIIIA, §§ 3(b)(1), 3(b)(2), 3(b)(3).) In contrast, the remaining two exceptions contain no comparable language. (Cal. Const. art. XIIIA, §§ 3(b)(4), (3)(b)(5).) Where no ambiguity exists, the language of statutes and voter initiatives amending the constitution are given their plain meaning." (Order Granting State Legislature's Motion for Judgment on the Pleadings (Appendix, Ex. __ ) at 2:15.)

As construed by the trial court, Proposition 26 created a new loophole overturning 100 years of jurisprudence. Now, according to the trial court, charges designed solely to generate revenue for the government, that are not

imposed to recover the cost of any regulation, benefit, or service to the payer, are not necessarily taxes. The government can take money from Peter, who drives to work, and give it to Paul to subsidize his BART ride, and that is categorically not a tax so long as the money is taken from Peter at the entrance to state property.

The trial court's ruling is a perversion of Proposition 26, which was intended to reinforce and strengthen existing taxpayer protections by closing loopholes. It was never intended to open new ones.

"[T]he language of Proposition 26 is drawn in large part from pre-Proposition 26 case law distinguishing between taxes ... on the one hand, and regulatory and other fees, on the other. We described this distinction in *Sinclair Paint* ... that, '[i]n general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted.'" (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210 (citations omitted); *Cal. Bldg. Indus. Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1050 [the distinction between taxes and fees "described in *Sinclair Paint* [were] subsequently codified in article XIII A as amended by Prop. 26"].)

While Proposition 26 preserved the existing distinction between taxes and other charges, it also expanded the definition of taxes to close perceived loopholes where revenue-raising taxes were disguised as other charges to evade the special approvals applicable to taxes.

"Proposition 26 expanded the definition of taxes so as to include fees and charges, with specified exceptions ... and shifted to the state or local government the burden of demonstrating that any charge, levy or assessment is not a tax. Proposition 26 amended section 3 of article XIII A and section 1

of article XIII C of the California Constitution. The initiative was an effort to *close perceived loopholes* in Propositions 13 [art. XIII A] and 218 [art. XIII C]." (*Schmeer v. County of L.A.* (2013) 213 Cal.App.4th 1310, 1322.)

"Proposition 26 thus addressed the problem of state and local governments *disguising taxes as fees*, with the burden on the government to prove that the so-called fee is not in fact a tax." (*Johnson v. County of Mendocino* (2018) 25 Cal.App.5th 1017, 1033.)

"In November 2010, Proposition 26 amended section 3 of article XIII A to *'close perceived loopholes'* in Proposition 13." (*Cal. Bldg. Indus. Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1047.)

In its "Findings and Declarations of Purpose" section, Proposition 26 identified the specific loophole and how it would be closed. Despite the legislative approval and voter approval required for taxes by articles XIII A and XIII C, "the Legislature and local governments have *disguised new taxes as 'fees'* in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements. … In order to ensure the effectiveness of these constitutional limitations, this measure also defines a 'tax' for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as 'fees.'" (West's Ann. Cal. Const., art. XIII A, § 3 Hist. Notes, Prop. 26, § 1(e)-(f).)

Voters were informed by their ballot that Proposition 26's new definition of taxes would "expand[] the scope of what is considered a tax [to] make it *more difficult* for state and local governments to pass new laws that raise revenues." (Voter Information Guide for 2010 General Election,

https://repository.uchastings.edu/ ca_ballot_props/1305, Analysis by Leg. Analyst at 59.) The ballot argument in favor of Proposition 26 stated:

> "State and local politicians are using a loophole to impose Hidden Taxes on many products and services by calling them 'fees' instead of taxes. ... PROPOSITION 26 CLOSES THIS LOOPHOLE.
>
> Proposition 26 requires politicians to meet the same vote requirements to pass these Hidden Taxes as they must to raise other taxes, protecting California taxpayers and consumers by requiring these Hidden Taxes to be passed by a two-thirds vote of the Legislature and, at the local level, by public vote." (*Id.* at 61; *Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 940-41 [ballot arguments cited as indicia of voter intent].)

Thus the courts, the Legislative Analyst, the proponents, and Proposition 26's own findings and declarations indicate that the intent of Proposition 26 was to expand the definition of "tax" in order to capture tax-like fees and require two-thirds legislative or voter approval – thus closing a perceived loophole where "state and local governments disguis[e] taxes as fees." It would be incongruous for the courts to rule that Proposition 26 had the opposite effect. Yet that is what the trial court ruled when it held that article XIII A, section 3(b)(4) provides a free pass from judicial scrutiny for charges collected at the entrance to state property.

The *only* thing respondents needed to prove for their charge to be exempt from the "tax" definition, the trial court ruled, was that the charge was collected at the entrance to state property: "The Legislature has met its burden to show the applicability of the exception for 'entrance to or use of state

property' from the general definition of 'tax' in Article XIIIA, section 3(b)(4). ... [T]here is no need to rely upon Plaintiffs' interpretation of voter intent in evaluating the plain language of the provision. There is no reasonableness requirement in the 'charge imposed for entrance to or use of state property' exception, so it is improper to read one into the provision." (Order Granting State Legislature's Motion for Judgment on the Pleadings (Appendix, Ex. __) at 2:10.)

The trial court's ruling perverts Proposition 26 by making it easier for the government to hide taxes within fees. Contrary to the trial court's ruling, however, the plain language of Proposition 26 requires the Legislature to prove more than a collection point at the entrance to state property. The Legislature must also show "by a preponderance of the evidence that a levy, charge, or other exaction is not a tax." (Cal. Const., art. XIII A, § 3(d).)

### *D. The Legislature Must Show That the Toll Increase is Not a Tax, But is "For" Entrance to or Use of State Property*

The trial court took article XIII A, section 3, subsection (d), and compared some of its language to the five exceptions in subsection (b), then concluded that subsection (d) applies only to those exceptions that mirror its language. The court observed that subsection (d) requires the State to prove, in part, "that the amount [of a charge] 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 first three exceptions contain similar language, limiting the exception to charges that "*do[] not exceed the reasonable costs* to the State" of granting a privilege, providing a service, or administering the regulatory oversight of the payer. The fourth exception, for "entrance to or use of state property," does

not contain the "reasonable costs" language. The trial court construed this to mean that subsection (d) does not apply to the fourth exception:

> "In section 3(b), only the first three exceptions to the definition of 'tax' contain language mandating that charges not exceed the 'reasonable costs' to the State of conferring benefits or granting privileges, providing services, or performing regulatory acts. (Cal. Const. art. XIIIA, §§ 3(b)(1), 3(b)(2), 3(b)(3).) In contrast, the remaining two exceptions contain no comparable language. (Cal. Const. art. XIIIA, §§ 3(b)(4), (3)(b)(5).) Where no ambiguity exists, the language of statutes and voter initiatives amending the constitution are given their plain meaning." (Order Granting State Legislature's Motion for Judgment on the Pleadings (Appendix, Ex. __ ) at 2:15.)

The trial court justified its conclusion on the need to avoid surplusage: "Reading the burden shifting language regarding reasonableness in section 3(d) as applying to all five exceptions to the definition of tax, as requested by Plaintiffs, would render references to reasonableness in the first three exceptions mere surplusage—a result to be avoided in interpreting statutes and constitutional provisions." (*Id.* at 3:5.)

Appellants submit, however, that the trial court's construction has rendered subsection (d) mere surplusage. Worse yet, it has "thrown out the baby with the bath water" by rejecting the *entirety* of subsection (d), not just the "reasonable cost" language. The trial court's construction produces an absurd result where the fourth exception has no conditions whatsoever. So long as money is collected at the entrance to state property or in connection with the use of state property, it can never be considered a tax.

In the case at bar, SB 595 purported to establish a nexus between increasing bridge tolls and spending the revenue on public transit to reduce bridge traffic. (West's Ann. Pub. Util. Code § 28840, Hist. Notes, 2017 Leg., SB 595, Sec. 1; Str. & Hwy. Code § 30914.7(a).) Under the trial court's decision, however, no nexus is required. The State could impose fees on shipments using state highways, water stored in state reservoirs, utilities passing through state land, internet traffic using state servers, etc., etc., to generate revenue for literally anything the Legislature wants to fund – subsidized public housing, needle exchange programs, prison renovation, you name it. No nexus would be required.

There is a better construction of article XIII A, section 3 that does not conflict with the voters' goal of "expand[ing] the definition of taxes so as to ... close perceived loopholes in Propositions 13 and 218." (*Schmeer v. County of L.A.* (2013) 213 Cal.App.4th 1310, 1322.)

Subsection (d) shifts the burden of proof to the State to defend its fees and charges when challenged in court. (*Cal. Bldg. Indus. Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1048; *Cal. Chamber of Commerce v. State Air Res. Bd.* (2017) 10 Cal.App.5th 604, 635 fn. 22.) Subsection (d) can be neatly compartmentalized into three burdens: "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." (Cal. Const., art. XIII A, § 3(d).) The first three exceptions in subsection (b) contain Burdens 2 and 3. But they do not contain Burden 1. None of the exceptions contain Burden 1. Since there is nothing in subsection (b) to limit the

application of Burden 1, it logically should apply to all five exceptions. For all five exceptions, then, the State should at least bear the burden of proving that its "exaction is not a tax."

The fourth exception applies when a charge is "imposed *for* entrance to or use of state property." If the State bears the burden of proving that the RM3 toll increase is not a tax, then it must show that the increase is "*for* entrance to or use of state property," not "for" some other purpose unrelated to the payer's entrance to or use of state property. It is not enough to just label the exaction a charge for entrance to state property, or to collect the charge at the entrance to state property. It must be "for" that purpose and "not a tax."

While Proposition 26 does not supply the factors for differentiating a tax from an exempt charge "for" entering or using state property, that void is easily filled with the century of jurisprudence cited and quoted earlier, starting with *City of Madera v. Black* (1919) 181 Cal. 306. Under that body of law, "[a] valid fee may not be imposed for unrelated revenue purposes." (*Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 437.) "If revenue is the primary purpose ... the imposition is a tax." (*Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1037.)

The trial court granted the Legislature's motion for judgment on the pleadings without requiring any proof from the Legislature that the RM3 toll increase is "for" use of the bridges and "not a tax" for unrelated revenue purposes. Appellants' complaint, however, alleged that "RM3 bridge toll funds are to be used for the specific purposes listed in Streets & Highways Code section 30914.7. These specific purposes include new Bay Area Rapid Transit ('BART') railway cars and other BART enhancements, the repair or replacement of San Francisco Bay ferry vessels, the replacement and expansion of San Francisco's MUNI vehicle fleet, improved ship access for the

Port of Oakland, and a grant program to fund bicycle and pedestrian trails. [¶] Plaintiffs do not use these rail, ferry, shipping, bicycle or pedestrian services when they drive across state-owned bridges. The 'governmental activity' that plaintiffs use is the provision, operation and maintenance of bridges." (1st Amended Complaint (Appendix Ex. __) at 4:11.)

These allegations present a factual question that requires evidentiary resolution. Judgment on the pleadings therefore was improper. (*Moore v. Hill* (2010) 188 Cal.App.4th 1267, 1278; *Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 322 ["judgment on the pleadings must be denied where there are material factual issues that require evidentiary resolution."])

## CONCLUSION

SB 595 was not a self-executing toll increase imposed by the Legislature. To the contrary, the plain language of SB 595 authorized BATA to propose and adopt a toll increase. 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, unlike others that were proposed by BATA to the voters. The trial court erred by ruling that the Legislature itself directly raised the tolls by enacting SB 595. RM3 was a BATA-imposed toll increase which has not yet been shown to fit any of the local "tax" exceptions in article XIII C, section 1(e). Until that is shown in an evidentiary hearing, it must be presumed that the measure failed for lacking two-thirds voter approval. The trial court erred by granting judgment on the pleadings without such proof.

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: October 29, 2019.

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 10,608 words.

DATED: October 29, 2019.

/S/
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