Case No. S272563

IN THE SUPREME COURT OF CALIFORNIA

JOHN TOS *et al.*,

Petitioners

v.

THE STATE OF CALIFORNIA *et al.*

Respondents

After a Decision of the Court of Appeal
Third Appellate District
Case Number C089466
Sacramento County Superior Court Case Number 34-2016-00204740
On appeal from the final judgment of Hon. Richard Sueyoshi
Additional judges: Hon. Michael P. Kenny, Hon Raymond M. Cadei

REPLY TO RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Respondents' Answer to the Petition for Review reiterates the position that the Attorney General has taken in this case, both in the trial court and in the court of appeal.[1] According to Respondents, Proposition 1A was about building a California high-speed rail system and, in the process, improving the state's connecting conventional rail system. Full stop. Nothing else in the measure, none of the many promises the measure itself made to California's voters, none of the stringent requirements placed in the measure to assure accountability, matters. After all, they assert, this is a very large project, and large projects cannot be held to details – even detailed promises made to the voters in the very text of the measure.

Respondents are wrong. As this Court said one hundred years ago in *O'Farrell v Board of Supervisors* (1922) 189 Cal. 343, 347:

> When the defendant board was contemplating a bond issue on the sixteenth day of April 1919, it had the statutory right to make its order just as broad and just as narrow and just as specific as it was willing to be bound by, so long as the provisions of the statute were complied with. …
> When in the order it specified Sebastopol to Freestone four miles, designating the point of beginning and the point of the

[1] Presumably because it was prepared in haste, Respondents' Answer contains both factual and legal misstatements. The most glaring is the claim that SB 1029 appropriated $8 billion of the $9 billion Proposition 1A bond funds designated for high-speed rail. (Answer at p. 13.) In fact, that number referred to the total appropriation, which included almost $3.3 billion of federal grant funds, and only appropriated $4.7 billion of bond funds. (*See California High-Speed Rail Authority v. Sup. Ct. ("CHSRA")* (2014) 228 Cal.App. 4th 676, 692.) There remain $4.2 billion of bond funds yet to be expended; not a trifling amount in itself.

> ending, any question of discretion as to division or subdivision into sections was, as to these elements, exercised once and for all and as a finality.

Since that time, and up until the present day, this Court's, and lower courts', decisions have been uniform in insisting that once a bond measure is placed on the ballot and approved by the voters, the issuing agency is bound by the terms it set before the voters, just as much as if it was presenting a contract to the voters for their ratification. (*See, e.g., Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1084; *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 339.)

ARGUMENT

I. THE COURT OF APPEAL'S OPINION DEVIATES RADICALLY FROM PRIOR CALIFORNIA JURISPRUDENCE ON MODIFICATION OF A VOTER-APPROVED BOND MEASURE.

Respondents argue that the subject of Proposition 1A was simply to provide $9 billion of bond funding to initiate the construction of a California high-speed rail system, plus an additional $950 million to improve existing passenger rail services that would connect to the high-speed rail system. While they acknowledge that the funding was to be provided through a *mandatory* multi-step process, they insist that the details of that process, and specifically the standards that needed to be met during that process, could be modified post-approval without returning to the voters.

Respondents attempt to distinguish Proposition 1A from earlier cases, such as *O'Farrell, supra*, and *Jenkins v. Williams* (1910) 14 Cal.App. 89, 95 [where a bond measure had named the specific bridges to be repaired, remaining bond funds could not be used to repair another bridge, even though it was over the same river]. They argue that the restriction involved here was not central to the measure, but only part of a "laundry list" included in both the preliminary and final funding plan processes. (Answer at p. 27.)

Respondents argue that an important requirement would have been more prominently featured, or, as they put it, "the drafters of legislation do not, one might say, hide elephants in mouseholes." (*Id*. at p. 28.) Yet Streets & Highways Code Section 2704.08[2], the section containing the requirements for both preliminary and final funding plans was far from hidden. It is by far the longest single section of the bond measure. By contrast, Section 2704.04(a), which Respondents posit is the heart of the measure, is no more than a one-paragraph statement of the general intent of the bond measure.

Respondents, citing *CHSRA, supra*, also support the court of appeal's decision here in claiming that this Court's precedents allow a particularly fluid interpretation of bond act provisions for large public

[2] Unless otherwise indicated, all statutory references herein are to the California Streets & Highways Code.

works projects, even if the project appeared to be at odds or beyond the scope of the purpose or description placed on the ballot. (Answer at pp. 22, 30, 31.)[3] *CHSRA* had made that assertion as dicta, citing *Cullen v. Glendora Water Co.* (1896) 113 Cal. 503, 510.[4]

Cullen involved a single agricultural irrigation district's issuance of a mere $170,000 in bonds. It was based on an earlier decision – cited therein (*Modesto Irr. Dist. v. Tregea* (1891) 88 Cal. 357).[5] That decision had involved reducing the size of an initially approved bond by half (from $800,000 to $400,000) when it was found to only need to serve 400 parcels versus the 800 estimated when the bond had initially been approved.

To say the least, neither case involved a monumentally large public works project. Rather, both cases addressed the obvious point, not at issue here, that a vaguely written, but legal, bond measure could be properly approved by the district's members, and could later be modified without a

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[3] The citation is misstated on p. 31.

[4] In *CHSRA*, *supra*, what was at issue was the propriety of issuing bonds based on Proposition 1A, not the propriety of using the bond funds for any particular project. Respondents point out that Section 2704.08(i) declares that noncompliance with the provisions of Section 2704.08 would not affect the validity of bonds issued under the measure. (Answer at p. 28 fn. 8.) True enough, but noncompliant use of bond funds can be enjoined and funds ordered restored. (See, e.g., *Veterans of Foreign Wars v. State of California("VFW")* (1974) 36 Cal.App.3d 688, 697 [in a writ petition, an appropriately named respondent can be ordered to correct improper expenditures]; see also *Shaw v. People Ex Rel. Chiang* (2009) 175 Cal.App.4th 577, 594, 616 [court ordered writ of mandate to restore misappropriated bond funds].)

[5] See also 164 U.S. 170 (1896) [denying existence of a federal question].

further vote of the district's members, so long as the change remained within the bounds of the earlier vague description and would not increase the liability of the district's members.

It is certainly true that if the Legislature had written the one first paragraph of Section 2704.4 and left that as the extent of requirements or restrictions on the use of bond funds, Appellants would have had no case. However, to paraphrase what this Court stated in *O'Farrell, supra*, the Legislature could have written Proposition 1A to be just as broad and just as narrow and just as specific as it was willing to be bound by. It chose to add further and much more restrictive conditions on bond fund use.

In 2008, the country– including California – was entering into the "Great Recession." The Legislature, and the Governor, were clearly concerned about whether the voters would be willing to approve an almost ten billion dollars general obligation bond to fund a "visionary" project. While their heads might have been in the clouds, they wanted to show voters that their feet were firmly planted on the ground. The specific requirements of Sections 2704.08 subsections (c) and (d) were added to reassure voters that the money they would eventually be providing to repay the nine billion dollars of bond financing would result in a real and useful benefit in the form of usable high-speed rail-ready segment. (See, *CHSRA, supra,* 228 Cal.App.4th at pp. 709, 713.) These restrictions formed the framework of the "financial straitjacket" and provided that grounding.

While, as the court stated in C*HSRA, supra,* 228 Cal.App.4th at p. 713, the preliminary funding plan that was the subject of Section 2704.08(c) may have only been aimed at informing the Legislature, which could, if it chose, ignore noncompliance with subsection (c)'s requirements, the requirements in Section 2704.08(d) were intended "to provide the Director of the Department of Finance *with the assurances the voters intended that the high-speed rail system can and will be completed as provided in the Bond Act*." (Emphasis added.) In enacting AB 1889, the 2016 Legislature attempted to fundamentally alter one of those assurances. But the promises and assurances that the 2008 Legislature made to voters could not be unilaterally unmade by the 2016 Legislature. That is the central statement of *O'Farrell* and its progeny. The opinion of the court of appeal below would undo that statement.

II. WITHOUT THIS COURT'S INTERVENTION TO ADDRESS THE COURT OF APPEAL'S DEVIATION FROM LONG-STANDING PRECEDENT, THE TRUST OF VOTERS IN FUTURE BOND MEASURES WILL BE PLACED IN JEOPARDY.

What would be the effect if the Court were to follow Respondents' suggestion and allow the court of appeal's decision to stand (review having been denied by this Court)? The Court has already gotten a preview in the Amicus Letter submitted by the Howard Jarvis Taxpayers Association (HJTA).

As that letter pointed out, the actions of Respondents in 2016 and after were analogous to those of a homebuilder who had made cost-saving but undesirable changes to the plans for a house. This would have been after the purchaser had already signed a contract based on the supposedly final plans and plunked down a $30,000 deposit check. Nevertheless, the homebuilder made the changes without first getting the buyer's approval for them.

HJTA's letter asserted that the court of appeal's decision was analogous to a court giving its approval to the homebuilder's actions. Perhaps needless to say, anyone who had ever signed a contract with an understanding and expectation of what had been agreed to would react viscerally to that analogy.

One can easily imagine HJTA's argument showing up in the ballot arguments against every major state general obligation bond measure placed on the ballot. One can easily imagine HJTA – or a similarly minded group – saying to voters, "Pay no attention to anything they've promised you that this bond measure will (or won't) do. Once it's been approved, California courts have said that the state can do whatever it wants, so long as the general subject of what the bond pays for stays the same."

With many Californians already leery of what government might do to them without their approval, the likely result would be the defeat of one bond measure after another; bond measures that, if approved, might have

provided affordable housing, supplemental water supplies, fire protection in high fire risk areas, or resilience in the face of other coming impacts from climate change. California can ill afford the risks that the court of appeal's decisions would create.

CONCLUSION

California has had a reputation of leading the nation forward; moving ahead confidently where other states might hesitate. If the court of appeal's decision is allowed to stand, California may get a new reputation – the state where the people have lost their trust and faith in their state government. For the above-stated reasons, and those stated in the Petition for Review. The Court should grant review.

Dated: February 26, 2022

Respectfully submitted,

Michael J Brady

Stuart M. Flashman

Attorneys for Petitioners John Tos *et al.*

By: ___/s/Stuart M. Flashman_____
Stuart M. Flashman

CERTIFICATE OF COMPLIANCE
[CRC 8.204(c)(1)]

Pursuant to California Rules of Court, rule 8.204(c)(1), I, Stuart M. Flashman, certify that this Reply to Respondents; Answer to Petition for Review contains 1910 words, including footnotes, as determined by the word count function of my word processor, Microsoft Word for Mac 2011, and is printed in a 13-point typeface.

Dated: February 26, 2022

/s/ Stuart M. Flashman
Stuart M. Flashman

PROOF OF SERVICE BY MAIL OR ELECTRONIC SERVICE

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On February 26, 2022, I served the within PETITION FOR REVIEW on the party listed below by placing a true copy thereof, enclosed in a sealed envelope with first class mail postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

Hon. Richard Sueyoshi
c/o Clerk, Sacramento County Superior Court
720 – 9th Street
Sacramento, CA 95814

In addition, on the above-same day, I also served electronic versions of the above-same document, upon counsel for the parties to this appeal, and on the California Third District Court of Appeal, as a pdf file, through the California Supreme Court's electronic filing vendor, Imagesoft TrueFiling.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on February 26, 2022.

/s/ Stuart M. Flashman