No. A157598 (Consolidated With No. A157972)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

HOWARD JARVIS TAXPAYERS ASSOCIATION, et al.,

Plaintiffs and Appellants,

v.

THE BAY AREA TOLL AUTHORITY, et al.,

Defendants and Respondents.

RANDALL WHITNEY,

Plaintiff and Appellant,

v.

METROPOLITAN TRANSPORTATION COMMISSION,

Defendant and Respondent.

On Appeal of Judgments of the San Francisco County Superior Court,
Case Nos. CGC-18-567860 / CPF 18-516276;
The Honorable Ethan P. Schulman, phone: (415) 551-3723, Department 302

CONSOLIDATED RESPONDENT'S BRIEF OF CALIFORNIA STATE LEGISLATURE

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INTRODUCTION

Plaintiffs in these consolidated cases challenge a toll increase that the State, acting through the Legislature, imposed on seven state-owned bridges by passing Senate Bill 595 in 2017. That legislation required the Bay Area Toll Authority ("BATA") to submit the toll increase to the voters for their approval, and it set out in great detail how BATA was to spend the new money.

After losing at the ballot box, plaintiffs Howard Jarvis Taxpayers Association and four individuals turned to the courts to argue that the toll increase is a tax under either article XIII A or article XIII C of the California Constitution. Under the former theory, S.B. 595 required a two-thirds vote from the Legislature, while under the latter theory, the toll increase required a two-thirds vote from the voters. Because both voting thresholds fell just short of these requirements, plaintiffs insist the toll increase must be struck down as an invalid tax.

The trial court rejected plaintiffs' claims in their entirety, entering judgment for defendants without leave to amend. It properly found that the State, not a local government, imposed the toll increase and that the increase was not a tax because it falls within the exception in article XIII A, section 3 for charges imposed for entrance to or use of state property.

On appeal, plaintiffs' arguments rest on two mistaken assumptions that they now hope this Court will accept. The first relates to which constitutional provision governs: article XIII A, which applies to charges imposed by the State, or article XIII C, which applies to charges imposed by local governments. Plaintiffs insist that BATA, not the Legislature, imposed this toll increase because S.B. 595 gave BATA a role

in placing the measure before the voters and required voter approval before the increased toll could go into effect. As demonstrated below, the Howard Jarvis plaintiffs expressly waived this argument in the trial court, and plaintiff Whitney sued the Metropolitan Transportation commission, a different entity than BATA. Thus, the issue about which entity – the Legislature or BATA – imposed the toll increase is not properly before the Court on appeal.

Even if the issue were properly before the Court, the trial court's decision that it was the State that imposed the toll increase on these state-owned bridges was correct. When the Legislature passed S.B. 595, it *required* BATA to put a measure on the ballot to raise tolls for Bay Area bridges. It *required* the nine Bay Area counties to hold a special election on the proposed toll increase. And it *mandated* that BATA dedicate revenue from the toll increase to specific priorities and projects identified by the Legislature. Thus, article XIII A governs this case.

The second flaw in plaintiffs' argument flows from their mistaken reading of article XIII A, section 3. That provision contains five exceptions to the definition of tax, including one for "[a] charge imposed for entrance to or use of state property." Cal. Const. art. XIII A, § 3(b)(4). Although this exception obviously describes a toll imposed for entrance to and use of a state-owned bridge, plaintiffs argue that it is not enough for the toll increase to fit within this exception. According to plaintiffs, section 3(d) of article XIII A also requires that the bridge toll increase must be no more than necessary to cover the reasonable cost of the government activity and bear a reasonable relationship to the payor's burdens or benefits received from the governmental activity.

As the trial court once again properly found, plaintiffs' premise does not survive a reading of the plain text of article XIII A. Of the five exceptions to the definition of tax contained in section 3(b) of article XIII A, three expressly incorporate a requirement that the charge bear a relationship to the "reasonable costs" to the State of the benefit, privilege, or service conferred on the payor. The exception for use of state property, however, does not mention reasonable costs, and as demonstrated below, it clearly was not intended to incorporate such a requirement. As a consequence, the State-imposed toll increase is not a tax within the meaning of the California Constitution, and it received all of the support that is necessary from both the Legislature and the voters. The decision below should therefore be affirmed.

BACKGROUND

A. Regional Measure 3

In 2017, the California Legislature passed Senate Bill No. 595 ("S.B. 595") with 67.5% of the Senate and 54% of the Assembly voting in favor. Appellant's Appendix ("AA") 014, ¶ 13. S.B. 595 required defendant BATA to increase tolls on seven state-owned toll bridges in the Bay Area, subject to approval by the voters in nine Bay Area counties. *See generally* AA 166-88. BATA is a State-created public instrumentality that is responsible for administering all toll revenues from state-owned toll bridges within the geographic jurisdiction of the Metropolitan Transportation Commission. It is governed by the same board as that which governs the Metropolitan Transportation Commission. Sts. & High.

Code §§ 30950.2, 30950.[1] S.B. 595 required BATA to select the amount of the proposed increase, not to exceed $3, and to spend the money, in amounts specified by the Legislature, on 35 specifically enumerated projects. §§ 30923, 30914.7. The Legislature further stated that the projects "have been determined to reduce congestion or to make improvements to travel in the toll bridge corridors . . . ." § 30914.7. The money can only be spent on these purposes; it cannot be used to reduce congestion in areas outside the toll bridge corridors.

BATA selected a toll increase of $1 effective in 2019, $1 effective in 2022, and $1 effective in 2025, for a total increase of $3 in accordance with the directives of S.B. 595.[2] *Id.* § 30923(a). On June 5, 2018, the voters approved the toll increase and associated expenditure plan, known as Regional Measure 3 or RM3, by a 55% margin.[3] The first toll increase under RM3 went into effect on January 1, 2019. The revenues collected pursuant to this increase are being held in a separate account pending resolution of these consolidated cases. AA 218.

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[1] All subsequent statutory references are to the Streets and Highways Code unless otherwise indicated.

[2] AA 191. The ballot materials for Regional Measure 3 that appeared in the Alameda County ballot pamphlet can be found at pages 191-216 of Appellants' Appendix. The materials are similar to those prepared in the other Bay Area counties for Regional Measure 3.

[3] Although plaintiffs' complaint alleges that the margin was 53.66% (AA 010), the final certified election results show that RM3 was approved by 55% of the voters. Regional Measure 3, Metropolitan Transportation Commission website at <https://mtc.ca.gov/our-work/fund-invest/toll-funded-investments/regional-measure-3>.

B. Proceedings In The Trial Court

Plaintiff Howard Jarvis Taxpayers Association ("HJTA") and three individuals ("plaintiffs") filed their action on July 5, 2018, challenging the toll increase as an invalid tax under article XIII A, section 3 or article XIII C, section 1(e) of the California Constitution. In a separate action now consolidated with plaintiffs' action on appeal, plaintiff Randall Whitney filed a petition for writ of mandate against the Metropolitan Transportation Commission but not BATA or the Legislature, alleging that RM3 is an unconstitutional tax under article XIII C. AA 313-26.

The HJTA plaintiffs filed the complaint at issue here on October 18, 2018, with two causes of action. The first cause of action is against the Legislature for a declaration that S.B. 595 is an invalid tax under article XIII A, section 3, because it did not receive a two-thirds vote in the Legislature. AA 012-14. The second cause of action is against BATA for a declaration that RM3 is an invalid tax under article XIII C, section 1, because it did not receive two-thirds voter approval. AA 014-16.

On March 11, 2019, BATA and the Legislature separately moved for judgment on the pleadings. AA 034-35, AA 138-39. The trial court granted both motions without leave to amend on April 3, 2019. AA 286-94. It dismissed plaintiffs' second cause of action against BATA on the ground that article XIII C does not apply to the toll increase because the increase was imposed by the Legislature, not BATA. RM3 therefore did not require approval by a two-thirds majority of the voters. AA 287-88. The trial court also dismissed plaintiffs' first cause of action against the Legislature on the ground that the toll increase is not a tax within the meaning of article XIII A. Accordingly, S.B. 595 did not require the approval of two-thirds of the Legislature either. AA 291-94.

The trial court granted BATA's motion for judgment on the pleadings in the *Whitney* case on June 11, 2019 on the ground that article XIII C does not apply to a toll increase imposed by the State. AA 560.

Plaintiffs in both cases filed timely appeals, and on October 9, 2019, this Court granted BATA's unopposed motion to consolidate the appeals for purposes of briefing, oral argument, and decision.

C. Response To Plaintiffs' Factual Assertions

Plaintiffs' opening brief begins with a Statement of Facts replete with unsupported assertions about the cost of housing in the Bay Area, the Bay Area Rapid Transit ("BART") District map, the length and cost of plaintiffs' commutes, and the demographics of those who live closer to a BART station. Plaintiffs end their recital with the claim that they "time their daily trips so as to cross bridges when they are least congested." Appellants' Opening Brief ("AOB") at 13.

Because the assertions did not appear in either complaint, plaintiffs cannot ask the Court to assume the truth of those assertions in reviewing the lower court's ruling on a motion for judgment on the pleadings. Even if they could rely on these claims, however, plaintiffs fail to acknowledge that S.B. 595 is meant to ease the very congestion of which they complain. The bill begins with detailed findings and declarations about how "[t]raffic congestion on the region's seven state-owned bridges degrades the bay area's quality of life, impairs its economy, and shows no signs of abating." AA 168. It describes how westbound congestion leading up to the Bay Bridge begins at 5:35 a.m., and eastbound congestion begins

at 1:00 p.m., continuing until 9:30 p.m. AA 168-69. The findings conclude that:

> To improve the quality of life and sustain the economy of the San Francisco Bay area, 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 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 with its jurisdiction.

AA 169.

S.B. 595's expenditure plan is contained in section 30914.7 of the Streets and Highways Code, which begins by saying that "[t]hese projects and programs have been determined to reduce congestion or to make improvements to travel in the toll bridge corridors . . . ." § 30914.7(a). The plan that follows provides that funds from the toll increase will be used to make improvements to BART, which runs under the Bay, and to the ferries, which cross the Bay, thereby easing congestion on the bridges that plaintiffs use. § 30914.7(a)(1) & (a)(5). Toll revenues will also be used to increase ridership on the cross-Bay bus service provided by the Alameda-Contra Costa Transit District, provide funding to reduce truck traffic congestion leading to the Port of Oakland near the Bay Bridge, and begin design of a second transbay rail crossing. § 30914.7(a)(3), (a)(11-13).

Thus, both the Legislature and a 55% majority of Bay Area voters concluded that a bridge toll increase would ease congestion on Bay Area bridges and roads. Plaintiffs' claim that it is "undeniable" that the toll increase will take money from low wage workers to subsidize wealthier

commuters who live closer to BART (AOB at 11) is both factually incorrect and entirely unsupported by citation, in violation of Rule 8.204 of the California Rules of Court. Because the unsupported factual allegations contained on pages 10-11 of the plaintiffs' opening brief were not pled in plaintiffs' complaints, they are improper argument in opposition to a motion for judgment on the pleadings and should be stricken.

STANDARD OF REVIEW

Plaintiffs are correct that on appeal of an order granting judgment on the pleadings, courts review legal issues de novo and treat the pleadings as admitting all material facts, assuming the allegations were properly pled. *Travelers Property Casualty Co. of America v. Engel Insulation, Inc.*, 29 Cal. App. 5th 830, 834 (2018); *Moore v. Hill*, 188 Cal. App. 4th 1267, 1278 (2010). However, courts will not assume the truth of contentions, deductions or conclusions of fact or law, and they will not consider conclusions of fact or law, opinions, speculation or allegations that are contrary either to law or to judicially noticed facts. *Long Beach Equities, Inc. v. County of Ventura*, 231 Cal. App. 3d 1016, 1024 (1991).

It is axiomatic that the issues on appeal are limited to those that the appellant has fully briefed and argued. *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal. App. 4th 944, 964 (2003); Cal. Rules of Court 8.204(a)(1)(B). The trial court granted defendants' motion for judgment on the pleadings without leave to amend, and plaintiffs have not argued on appeal that they should have been allowed leave to amend or that any amendment could cure the deficiencies of their complaint. Any argument regarding leave to amend, therefore, has been waived.

ARGUMENT

I.

ARTICLE XIII A APPLIES BECAUSE THE STATE IMPOSES TOLL INCREASES ON STATE-OWNED BRIDGES

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." Cal. Const. art. XIII A, § 3(b); art. XIII C, § 1(e). The trial court correctly determined that it is "[t]he State, through the Legislature, [that] imposes tolls on state-owned toll bridges, such as those affected by the toll increase at issue here." AA 287.

A. Plaintiffs Have Waived Their Argument That BATA Imposed The Toll Increase

Plaintiffs begin their first argument by saying that "RM3 was a BATA toll increase." AOB at 14. They spend the next 11 pages arguing that the toll increase was imposed by BATA, not by the Legislature.

That is *not* the position that counsel for the HJTA plaintiffs took before the trial court, however. At the hearing on the motions for judgment on the pleadings, counsel responded to the trial court's tentative ruling by saying:

> We're challenge – we're not challenging the Court's decision that the toll increase was imposed by the State. It was not imposed by the Bay Area Toll Authority, so I imagine that excuses the Bay Area Toll Authority from the

> case, and we won't need to hear from [BATA's counsel].
>
> Respondents' Unopposed Motion to Augment Record to Include Reporter's Transcript at 12-13.

Counsel could not have been clearer: the HJTA plaintiffs conceded that the toll increase was not imposed by BATA and that BATA was excused from the case. As a result, the HJTA plaintiffs are judicially estopped from changing their position now. *Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171, 183 (1997) (judicial estoppel applies "when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."

Nor can plaintiffs revive their argument by relying on plaintiff Whitney's claims. 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.

Thus, the Court need go no further on the first issue, because both parties have waived it altogether.

B. The Plain Text Of S.B. 595 Demonstrates That The Legislature Imposed The Toll Increase

If the Court does decide to reach and resolve the first issue, it will find that HJTA wisely chose not to contest that the Legislature

imposed the toll increase at the hearing below. That is because it is well established in California that "in the field of taxation . . . the Legislature is generally supreme." *Armstrong v. County of San Mateo*, 146 Cal. App. 3d 597, 624 (1983). Local governments have no authority to impose taxes unless the Legislature bestows that authority upon them. *Santa Clara Cty. Local Transp. Auth. v. Guardino*, 11 Cal. 4th 220, 247-48 (1995). Accordingly, the trial court properly began its analysis with the applicable state law: S.B. 595.

As the trial court found, it is the State, acting through the Legislature, that established the base toll rates on the seven state-owned toll bridges within MTC's jurisdiction. AA 287 (citing Sts. & High. Code § 30916(a)). Likewise, it is the State, acting through the Legislature, that ***mandated*** an increase in the base toll rates several times in subsequent years, including in 2018 through RM3. AA 287; § 30916(b) & (c).

Plaintiffs argue that the Legislature did not require BATA to increase the toll through S.B. 595, but instead gave BATA a choice in the matter. AOB at 20. That is incorrect. Section 1 of S.B. 595 declares that "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 on the seven state-owned bridges . . . ." S.B. 595, 2017-2018 Reg. Sess., § 1(m) (Cal. 2017) (emphasis added). Consistent with that intent "to require" MTC to submit a proposed toll increase to the voters, the Legislature mandated that the nine counties in the affected region hold a special election on the proposed toll increase. § 30923(b) & (c)(1) (stating that a special election would be held "to determine whether the residents of those counties . . . approve the toll increase" and providing that the county

boards of supervisors "shall call a special election"). And it declared that "[i]f the voters approve a toll increase, pursuant to Section 30923, ***[BATA] shall increase the base toll rate*** for vehicles crossing the bridges . . . ." § 30916(c)(1) (emphasis added).

This language contrasts sharply with statutes like those on which plaintiffs relied in the trial court, where the Legislature merely granted taxing or fee authority to a local government agency, but left it to the local agency to decide whether to exercise that authority. AA 256. Revenue and Taxation Code section 7285, for example, states that "[t]he board of supervisors of any county ***may*** levy, increase, or extend a transactions and use tax" if approved by two-thirds of board members and a majority of the electorate. (Emphasis added). Likewise, Vehicle Code section 9250.19 grants the board of supervisors of any county the right (but not the duty) to adopt a resolution approving a vehicle registration fee of one dollar. In neither of these examples is the local agency required to take action as BATA was under S.B. 595.

Although plaintiffs concede BATA had a duty to implement the toll increase once the voters approved it (AOB at 21), they insist BATA had a choice about whether to submit the toll increase to the voters as an initial matter. This is demonstrably false.

To begin, plaintiffs ignore the statement of intent from S.B. 595 quoted above, in which the Legislature states that the bill would "***require***" MTC to place the toll increase on the ballot. S.B. 595, § 1(m) (emphasis added). They also ignore the description of S.B. 595 in the Legislative Counsel's Digest, which says nothing about BATA having a choice in whether to submit the toll increase to the voters, but instead confirms that "[t]his bill would ***require*** [the nine Bay Area counties] to

conduct a special election, to be known as Regional Measure 3, on a proposed increase in the amount of the toll rate charged on the state-owned toll bridges . . . ." *Id.* (emphasis added).[4]

Plaintiffs instead purport to find ultimate authority for BATA to "impose" this toll increase in several different provisions of S.B. 595. First, plaintiffs claim that, under subsection (c) of section 30923, "[i]t was up to BATA to place the proposed toll increase on the ballot, at an election of its choosing." AOB at 21. Yet the text of that provision demonstrates that the Legislature gave BATA discretion to choose the particular election at which RM3 would be considered, but it mandated that the election be held:

> (c)(1) Notwithstanding any provision of the Elections Code, the Board of Supervisors of the City and County of San Francisco and of each of the counties described in subdivision (b) ***shall call a special election*** to be conducted in the City and County of San Francisco and in each of the counties that shall be consolidated with a statewide primary or general election, which shall be selected by the authority.
>
> § 30923(a)(1) (emphasis added).

Indeed, the very next provision of the same statute expressly requires that RM3 be submitted to the voters:

> (2) The authority shall determine the ballot question, which shall include the amount of the

[4] The Legislative Counsel's "digest constitutes the official summary of the legal effect of the bill and is relied upon by the Legislature throughout the legislative process. Thus, it is recognized as a primary indication of legislative intent." *Souvannarath v. Hadden*, 95 Cal. App. 4th 1115, 1126 n.9 (2002) (citing *Eu v. Chacon*, 16 Cal. 3d 465, 470 (1976); *People v. Superior Court*, 70 Cal. 2d 123, 129 (1969)).

> proposed toll increase selected pursuant to subdivision (a) and a summary of the Regional Measure 3 expenditure plan. ***The ballot question shall be submitted to the voters as Regional Measure 3*** and stated separately in the ballot from state and local measures.

Id. at § 30923(c)(2) (emphasis added).

Second, plaintiffs suggest the Legislature gave BATA the freedom to choose a toll increase of zero. AOB at 21; *see also* AA 256. The Legislature did no such thing. Subsection (a) of section 30923 declares that BATA "shall select an amount for the proposed increase in the toll rate, not to exceed three dollars ($3). . . ." It should go without saying that BATA could not have fulfilled its mandate to propose an "increase in the toll rate" by selecting no increase at all.

Third, plaintiffs declare that "[i]f BATA determined that voter approval was obtained, then BATA could, but was not required to, adopt the proposed increase," citing the last sentence of subdivision (f) of section 30923. AOB at 21. The problem for plaintiffs is that the first sentence of subdivision (f), which plaintiffs omit, demonstrates that this provision does not address the election at issue here at all, but instead addresses what BATA could do if the voters initially rejected RM3:

> (f) If a majority of all the voters voting on the question at the special election do not approve the toll increase, the authority 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, the authority may adopt the toll increase and establish its effective date and establish the completion dates for all reports and studies required by Sections 30914.7 and 30950.3.

In other words, even if this provision gave BATA the discretion to refuse to implement the toll increase after the voters adopted it at a second election – a dubious proposition in itself[5] – such alleged discretion would not arise unless the voters had originally rejected RM3. In that event, S.B. 595 allows BATA to review the *amount* of its proposed toll increase and resubmit either the same amount or a different one at a subsequent election.

Fourth, plaintiffs assert that "the Legislature clarified that RM3 would be a BATA-imposed toll increase . . . ." AOB at 22. S.B. 595 never says that. It does not even use the word impose. The provision plaintiffs cite instead refers to "the toll increase *adopted* by [BATA] . . . ." § 30923(j) (emphasis added). The word "adopt" has a different meaning than "impose," and the difference harms rather than helps plaintiffs' case. Adopt means "to accept consent to, and put into effective operation,"[6] while

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[5] Courts "have construed 'may' as both discretionary and mandatory," depending on legislative intent. *People v. Ledesma*, 16 Cal. 4th 90, 95 (1997). Here, the statute provides that if the voters approve the toll increase in a second election, after initially rejecting it at the first election, "the authority may adopt the toll increase and establish its effective date . . . . " § 30923(f). If "may" is discretionary in this sentence, it would mean that the Legislature gave BATA the authority to resubmit RM3 to the voters, but then ignore the results of that election, an interpretation that must be rejected because it leads to an absurd result. *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524, 533 (2011). Instead, the phrase "may adopt" in section 30923(f) refers to the timing of the toll increase, which BATA may (and must) adopt once the voters have approved it.

[6] *Adopt*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/adopt; *see also adopt*, Dictionary.com, https://www.dictionary.com/browse/adopt (defining adopt to mean "to accept or act in accordance with").

"impose" means "to levy or exact as by authority."[7] Thus, the Legislature was stating that BATA would take the necessary steps to accept and implement RM3 as mandated by S.B. 595, not that BATA would levy the toll increase.

Without these statutory misinterpretations, plaintiffs are left with only the provisions of S.B. 595 that give BATA some discretion when administering the statute. Plaintiffs emphasize that BATA could choose the initial amount of the toll increase up to the legislatively imposed cap of $3, and it could choose whether to increase the toll for inflation, although the Legislature prescribed how any inflationary adjustment would have to be spent. §§ 30923(a); 30916(c). Yet, as the trial court pointed out, this does not alter the fact that BATA had no choice but to "implement an *increase* as directed by the Legislature." AA 287 (quoting § 30916(c)(1) [BATA "shall increase the base toll rate for vehicles crossing the bridges . . . by the amount approved by the voters . . ."]) (both emphases added by the trial court). Thus, the decision to impose the toll increase was made by the Legislature, which left BATA discretion only to choose the amount of the toll increase within a specific range prescribed by the Legislature, because BATA was the entity with knowledge about how to balance project needs with a toll amount that would find support from regional stakeholders.

Similarly, the Legislature gave BATA the duty to draft the ballot question voters would see before voting on RM3. § 30923(c)(2). But the Legislature always requires a particular government entity to draft

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[7] *Impose*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/impose; *see also impose*, Dictionary.com, https://www.dictionary.com/browse/impose (defining impose to mean "to lay on or set as something to be borne, endured, obeyed, fulfilled, paid, etc." or "to put or set by or as if by authority").

ballot materials for ballot measures, such as requiring the Attorney General to draft titles and summaries for statewide ballot measures and city attorneys to draft impartial analyses for municipal ballot measures. *See, e.g.*, Cal. Elec. Code §§ 9050, 9280. That does not mean the Attorney General imposes the mandates contained in state ballot measures or that city attorneys impose the mandates contained in municipal ballot measures. The same is true here. BATA's duty to draft the ballot question for RM3 was just one of its many duties to administer RM3.

Finally, plaintiffs ignore the fact that although BATA has some discretion regarding how to implement and administer RM3, the Legislature reserved the vast majority of decisions regarding RM3 to itself. The Legislature told BATA how to allocate revenues from the toll increase. § 30911. It told BATA exactly which projects it could fund. § 30914.7(a) ("If the voters approve a toll increase pursuant to Section 30923, the authority shall . . . fund the projects and programs described in this subdivision . . ."). It told BATA how much to spend on each project, and which projects to prioritize. *See, e.g.*, §§ 30914.7(a)(1) ($500 million in funding for new BART railcars), 30914.7(b) (prescribing how BATA must adjust funding if the toll increase is less than $3), 30914.7(e) (prescribing how BATA must adjust projects if they are underbudget or confront unexpected obstacles); 30950.3(b) (mandating that BATA give "first priority" to projects that will "preserve and protect the bridge structures"). It told BATA how to utilize state, federal, and local funding streams alongside the new toll revenues (§ 30915), and how to engage in long-range strategic planning to fund the projects chosen by the Legislature. §§ 30914.7(f); 30950.3(a). It told BATA which discounts on toll rates it *could* implement and which discounts it *must* implement. § 30918(c). And

it told BATA how to insure independent oversight of the expenditures made with the increased toll revenues, and how to report progress to the Legislature. § 30923(h) & (i). All of these provisions are consistent with a statutory scheme in which the Legislature imposes a toll increase while telling another entity how to implement and administer that toll increase.

C. Plaintiffs' Case Law Does Not Change The Plain Meaning Of The Statute

Plaintiffs rely on *California Cannabis Coalition v. City of Upland*, 3 Cal. 5th 924 (2017) for the proposition that "[w]hen article XIII C uses the term 'impose' it means 'adopt' or 'enact.'" AOB at 20. They go on to quote language from section 30923(j) that "[e]xcept [for CPI adjustments], the toll increase *adopted by [BATA]* pursuant to this section shall not be changed without statutory authorization by the Legislature." AOB at 22 (emphasis added by plaintiffs).

Yet the *Upland* Court did not say that "impose" means "adopt." It said only that the term "impose" means "to establish or enact." 3 Cal. 5th at 944 & n.17. As already noted, "adopt" and "impose" are defined differently. *See* pp. 22-23. In this instance, section 30923(j)'s use of the phrase "adopted by [BATA]" refers to the amount of the toll increase chosen by BATA, emphasizing that the voter-approved increase cannot be changed without legislative approval.

Furthermore, *Upland* directly contradicts plaintiffs' argument that BATA's role in administering the toll increase means that BATA imposed the increase rather than the Legislature. In *Upland*, the defendant city argued (unsuccessfully) that article XIII C, section 2 applied to ballot measures proposed and approved by the voters, but implemented by a local government. Specifically, the city argued that the word "impose" in

article XIII C, section 2(b) included the collection of a tax, so that if the local government collected a tax proposed by the voters, that meant the local government "imposed" the tax. *Upland*, 3 Cal. 5th at 944. The California Supreme Court disagreed, deciding instead that the word "impose" in article XIII C means "to establish or enact," "not to collect." *Id.* at 944 & n.17.

Thus, two principles flow from *Upland* that are relevant here. First, "impose" means to "enact" or "establish," which is what the Legislature did when it *enacted* S.B. 595 "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 on the seven state-owned bridges. . . ." S.B. 595, § 1(m).

Second, "impose" does *not* mean to implement or administer, which is what BATA is charged with doing under S.B. 595. As mentioned above, local governments always play a role in submitting ballot measures to voters and in administering the laws that the voters may subsequently enact. For example, the *Upland* decision confirms that the city attorney prepared a ballot title and summary for the voter-proposed measure at issue, and when presented with sufficient signatures to place a tax measure on the ballot, the Upland city council voted to submit the initiative to the voters at the next general election rather than adopting it outright. 3 Cal. 5th at 931-32. Nevertheless, the Supreme Court concluded that the city had not imposed the tax contained within the measure because it had not established or enacted the tax. *Id*. at 944. In other words, the city had only played an administrative role with respect to the tax; it had not proposed the tax or taken the legal steps necessary to enact the tax, which there involved qualifying the measure for the ballot.

Plaintiffs' reliance on *Schmeer v. County of Los Angeles*, 213 Cal. App. 4th 1310 (2013) is equally unavailing. According to plaintiffs, under *Schmeer*, "a tax is 'imposed' by a governmental entity if it is paid to that entity or remitted to that entity." AOB at 22. This matters, plaintiffs argue, because the RM3 toll increase will be remitted to BATA rather than the State "for BATA to dole out" with local rather than State oversight. *Id*. at 22.

Plaintiffs are wrong on the law. First, as demonstrated above, the California Supreme Court rejected this same argument in *Upland.* Second, *Schmeer* considered whether a Los Angeles County ordinance that required retail stores to charge 10 cents for paper carryout bags imposed a "tax" within the meaning of article XIII C. 213 Cal. App. 4th at 1313. There was no dispute in the case over who "imposed" the 10 cent charge. The County of Los Angeles did. The question was whether the charge was governed by article XIII C because its revenues were retained by retail stores rather than the County. *Id*. at 1313-14. The *Schmeer* court decided that the charge was not governed by article XIII C, because charges under that provision have to be either "payable to, or *for the benefit of*, a local government." *Id.* at 1328-29 (emphasis added).

Here, the toll increase may be held by BATA for purposes of administering those funds, but it is for the State's "benefit," not BATA's. Those funds must be used for improvements to state-owned property for state purposes: improving the transportation, quality of life and economy in one of the state's most densely populated regions. *See, e.g.*, S.B. 595 § 1(m) & § 30914.7(a). As a consequence, the mere fact that BATA collects and will administer funds from the toll increase does not bring the increase within article XIII C's ambit.

Plaintiffs are also wrong on the facts to the extent they imply S.B. 595 allows BATA to "dole out" revenues from the toll increase without State oversight. Not only does S.B. 595 mandate exactly which projects the revenues must fund, it also requires BATA to annually report to the Legislature on the status of all projects and programs funded with those revenues. §§ 30914.7(d)(1), 30923(i).

Next plaintiffs claim that the court in *Howard Jarvis Taxpayers' Association v. Fresno Metropolitan Projects Authority*, 40 Cal. App. 4th 1359 (1995) found that a statute with language similar to S.B. 595 authorized a local authority to impose a local sales tax. AOB at 23-24. In fact, *Fresno* is different from this case in almost every particular. In *Fresno*, the issue was whether the Legislature violated article XI, section 11 of the Constitution by delegating power to a private authority, the Fresno Metropolitan Projects Authority (Fresno MPA), to collect and administer the sales tax. The Fresno MPA argued that the Legislature had delegated that power to the voters who would ultimately approve or disapprove that tax, but the Court of Appeal disagreed. The *Fresno* case was decided 15 years before passage of Proposition 26 and did not consider the question presented here, which is whether the Legislature imposes a toll increase within the meaning of article XIII A of the Constitution when it requires an administrative agency to submit that toll increase to the voters.

Furthermore, although plaintiffs portray the statute at issue in *Fresno* as virtually identical to S.B. 595, they are materially different, as the *Fresno* court makes clear. As noted above, S.B. 595 expressly declares that the Legislature intends "to require" MTC to submit the toll increase to the voters for their approval. S.B. 595, § 1(m). By contrast, the *Fresno*

statute only authorized the Fresno MPA to impose a sales tax, stating that "[t]he [Fresno MPA], subject to the approval of a majority vote by the voters, may impose a retail transactions and use tax . . . ." Former Cal. Gov't Code § 68059.7(a) (repealed 2008). That statute then required the Fresno MPA to submit to the voters "the question of whether the [Fresno MPA] shall be authorized to levy and collect transactions and use taxes . . . ." *Id*., § 68059.7(b). Thus, the statute concerned only the issue of whether the Fresno MPA would have the power to impose a particular type of tax generally – it did not require the Fresno MPA to impose any particular tax. If the voters gave the Fresno MPA the power to impose taxes, another statute, which plaintiffs do not cite, provided that the Fresno MPA "may" impose such a tax once certain conditions are met, including additional voter approval. Request for Judicial Notice, Ex. A at 8 (adding section 7262.6 to the Revenue and Taxation Code). The differences are thus clear: S.B. 595 required BATA to submit a specific toll increase to the voters, while the *Fresno* statute only required the Fresno MPA to submit to the voters the question of whether it would have certain taxing powers, while leaving the decision about whether to actually impose a tax up to the Fresno MPA itself. *See Fresno*, 40 Cal. App. 4th at 1382-83 (rejecting the Fresno MPA's argument that the Legislature had "directed" the Fresno MPA "to levy a tax" because the statute merely "states that the [Fresno MPA] 'may' impose a transaction and use tax").

Finally, *Fresno* required the court to interpret the meaning of the word "levy" in article XI, section 11 and the statutes at issue in that case. That court decided that the word "levy" is synonymous with "impose," but then based its decision in part on a definition of "levy" that "includes the concept of 'collecting' the tax." 40 Cal. App. 4th at 1373. As

noted above, the Supreme Court in *Upland*, however, specifically rejected that interpretation of the word "impose" as it is used in article XIII C. *See* p. 25 (citing *Upland*, 3 Cal. 5th at 944).

In short, the *Fresno* court considered a different constitutional provision, a different issue, a different statute, and a different defined term. The case has no relevance here.

D. The Voters' Role In Approving RM3 Does Not Transform The Measure Into One Subject To Article XIII C

The voters' role in providing their additional approval of RM3 does not change the fact that the Legislature imposed the toll increase. Several provisions of the Constitution declare that a local government "imposes" a tax even when voter approval is required. For example, section 2(b) of article XIII C of the Constitution provides that "[n]o local government may *impose*, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote." (Emphasis added); *see also id*., § 2(c) & (d). In other words, regardless of the fact that a local government's decision to impose a tax cannot take effect without voter approval, the Constitution still defines that tax as one imposed by the local government. Proposition 26 left these provisions in place while defining certain levies, charges, and exactions as taxes "imposed by a local government," notwithstanding the fact that no

such tax could go into effect without securing the voter approval required by section 2 of article XIII C. Cal. Const. art. XIII C, § 1(e).[8]

The same logic applies to section 3(b) of article XIII A. Proposition 26 added that provision to the Constitution to define which charges "imposed by the State" are taxes and which are exceptions to the definition of taxes. Given that the rules of statutory construction require "statutory sections relating to the same subject" to "be harmonized, both internally and with each other, to the extent possible,"[9] the same understanding of the word "impose" that Proposition 26 used in article XIII C should apply to the way it used the word in section 3 of article XIII A. Thus, the fact that S.B. 595 provides that the State's decision to impose a toll increase could not take effect without voter approval cannot mean that the toll increase was not a charge "imposed" by the State.

Plaintiffs also argue that article XIII A does not apply because it does not require the Legislature to submit a measure like RM3 to the voters. AOB at 25. Apparently, plaintiffs mean that the Legislature could not have submitted RM3 to the voters unless required or authorized by article XIII A. That argument makes little sense. To be sure, the Legislature was not required to submit RM3 to the voters, but neither was it

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[8] In *California Cannabis Coalition v. City of Upland*, 3 Cal. 5th 924, the California Supreme Court highlighted this distinction between a voter-approved tax and one that originated through the initiative process. The Court held that because the cannabis tax at issue there was a product of a popular initiative, it was not "imposed by a local government" under article XIII C and therefore did not have to be placed on a general election ballot as would a tax initially proposed by a city council.

[9] *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1387 (1987).

prohibited from doing so. As the California Supreme Court recently affirmed, "the California Legislature possesses plenary legislative authority except as specifically limited by the California Constitution." *Howard Jarvis Taxpayers Assn. v. Padilla*, 62 Cal. 4th 486, 498 (2016) (quoting *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 254 (2011)). Thus, if the California Legislature wanted to make the toll increase contingent on voter approval *or any other* condition, it could do so in the absence of a constitutional limitation.

Plaintiffs also insist that it is significant that RM3 was only submitted to voters in the nine Bay Area counties rather than voters throughout the State. AOB at 25. Yet it makes sense that the Legislature sought the approval of only those voters who are most likely to pay the toll increase and most likely to understand the value of the improvements it would make possible. That decision does not change the fact that the tolls paid on state-owned bridges and their effect on one of the state's most economically significant regions are matters of statewide concern.

E. The History of Bay Area Bridge Toll Increases Does Not Support Plaintiffs' Argument

Finally, plaintiffs devote three pages of their opening argument to a history of Bay Area bridge toll increases (AOB at 17-19), concluding "some increases are imposed unilaterally by the Legislature with no election, and some increases are imposed by MTC/BATA, conditioned upon voter approval." *Id.* at 19. Only one historical fact is relevant to plaintiffs' argument, however: Although some toll increases are imposed by the Legislature without voter approval, the Legislature has

chosen to require voter approval before implementing others.[10] As one example, in 1997 the Legislature imposed a $1 "seismic retrofit surcharge" on Bay Area bridges without requiring voter approval before implementation. S.B. 60, 1997-1998 Reg. Sess., § 10 (Cal. 1997) (adding § 31010 to the Streets and Highway Code). Most recently, in 2017, the Legislature passed S.B. 595 to require a toll increase to go into effect only if first approved by Bay Area voters.

Here, it is easy to understand why, as a matter of policy, the Legislature decided to submit RM3 to the voters for their final approval, unlike the toll increase imposed by S.B. 60. S.B. 60 explains that the 1997 toll increase was necessary to solve an urgent public safety problem: The state-owned Bay Area bridges badly needed seismic safety retrofitting. *Id.*, § 3(a)(1). By contrast, S.B. 595 sought to address important "quality of life" and economic issues in the Bay Area caused by "[t]raffic congestion on the region's seven state-owned toll bridges." S.B. 595, §§ 1(b) & (m). Thus, the Legislature unilaterally imposed a toll increase to address the life-

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[10] Several of plaintiffs' other allegations are too remote in time to have any clear relevance, while others lack evidentiary support. For example, plaintiffs offer no evidence to support their assertions that the Legislature set the toll amounts unilaterally during "those years" – presumably 1926 to 1962 – when "[n]o election was needed or held," and that eventually "the State found itself with more money than it needed" for its bridges. AOB at 17. They also allege that RM2, passed by the Legislature in 2003 as S.B. 916, merely authorized BATA to place the toll increase on the ballot. AOB at 19. In fact, like S.B. 595, S.B. 916 mandated that RM2 be placed before the voters and required BATA to implement the increase once approved by the voters. *See, e.g.*, § 30916(b) ("If the voters approve a toll increase, pursuant to section 30921, . . . the base toll rate . . . *is as follows* . . . ."); § 30921(b) (providing that the boards of supervisors in the nine Bay Area counties "*shall* call a special election" and "*shall*" submit RM2 to the voters) (all emphases added).

and-death problem of how earthquakes could damage the State's bridges, but it sought voter approval when it imposed a toll increase to address the quality of life issues posed by traffic congestion.

Plaintiffs nevertheless insist that the Legislature can only impose a toll increase through a bill like S.B. 60 that is "self-executing" in the sense that it does not require any action by BATA or by the voters. AOB at 20. Nothing in fact or the law supports this conclusion. Although it is true that the Legislature imposed the toll increase more directly in S.B. 60 than it did in S.B. 595, that does not change the fact that in both bills it was *the Legislature* that imposed the *mandate* that led to both toll increases.

There is no requirement in article XIII A that the State *directly* and *unilaterally* impose a tax or an exempt charge in order for the State to "impose" the tax within the meaning of that provision. The Constitution simply uses the phrases "levy, charge, or exaction of any kind imposed by the State" and "charge imposed," without suggesting that the imposition must be direct, or self-executing, or accomplished by a single governmental entity. Cal. Const. art. XIII A, § 3(b). Moreover, plaintiffs' attempted insertion of the word "directly" into these constitutional provisions violates the well-known canon of statutory construction that courts "cannot insert what has been omitted . . . or rewrite [a] statute to conform to a presumed intention that is not expressed." *Lewis v. Clarke*, 108 Cal. App. 4th 563, 567 (2003).

II.

THE BRIDGE TOLL INCREASE IS NOT A TAX UNDER ARTICLE XIII A

Plaintiffs argue in the alternative that if the toll increase was imposed by the State, it is a tax that required a two-thirds vote of the Legislature under section 3 of article XIII A, which was added by Proposition 26. *See* AOB at 28. In doing so, however, plaintiffs rely almost entirely on *pre-Proposition 26* case law to interpret Proposition 26, rather than the plain language of Proposition 26 itself. *See id.* 30-36. As demonstrated below, the text of Proposition 26 is clear: The bridge toll increase falls within the specifically enumerated exception for a fee charged for entrance to or use of state property, and that exception does not include a reasonable cost or proportionality requirement.

As discussed in Section I above, the bridge toll increases at issue here must be analyzed under article XIII A because the State, not a local government, imposed it. Article XIII A, section 3 states that any "change in state statute" that results in higher taxes must be approved by a two-thirds vote of each house of the Legislature. Section 3(b), however, contains five specific exceptions to the definition of tax. The fourth exception applies here:

> (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.[11]

As the trial court correctly found, the bridge toll increases enacted by S.B. 595 and approved by the voters in RM3 falls within this

[11] Section 15 of article XI deals with vehicle license fees and is not at issue here.

exception: It consists of a charge (the bridge toll increase) for the entrance to or use of state property (the seven State-owned bridges in the Bay Area). AA 290-96.

Plaintiffs do not really dispute the fact that the bridge tolls qualify under this exception. Instead, they devote their entire article XIII A argument trying to read the reasonable cost requirement from subsection (d) of section 3 into the exception. It cannot be done.

A. The Exception For Entrance To And Use Of State Property Does Not Contain A Reasonable Cost Requirement

Plaintiffs do not even address, much less rebut, the numerous reasons for the trial court's holding. Those reasons are grounded in the language and structure of article XIII A, section 3.

1. The trial court properly interpreted the plain meaning of Section 3

Section 3 begins with the statement that any statute that increases a fee or charge is a tax that must be enacted by a two-thirds vote of the Legislature, followed by five specific exceptions to the definition of "tax."

The plain text of the fourth exception, for charges to enter or use state property, does not contain a reasonable cost requirement. In sharp contrast, the first three exceptions do:

> (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.
>
> Cal. Const., art. XIII A, § 3(b) (emphasis added).

Thus, the drafters of section 3 expressly stated which exceptions contain a reasonable cost requirement (exceptions 1-3) and which do not (exceptions 4-5). These basic facts about the text and structure of section 3 led the trial court to conclude that "[t]he reasonable cost requirement in Article XIIIA, section 3(d) is inapplicable." The court explained:

> 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. [Citations omitted.] Consequently, there 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. (Cal. Const. art. XIII A, § 3(b)(4).)

AA 291-92.

As they did in the trial court, plaintiffs argue that the fourth exception must be read to include the reasonable cost requirement that is referenced in subsection (d). AOB at 41-43. Subsection (d) states:

> 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.

As is clear from its text, subsection (d) is simply a burden-shifting provision; it does not establish substantive, independent tests that apply to all five exceptions. Instead, it means that when an exception contains a reasonable cost or proportionality requirement, the State has the burden of proof with respect to that requirement.

The legislative history of Proposition 26 confirms this. "This shift in the burden of proof 'was largely a response to *Sinclair Paint* [*Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 878 (1997)],' in which the Supreme Court held that a plaintiff who challenges a fee bears the burden

of making a prima facie showing that the fee is invalid. The language in article XIII A, section 3 of the California Constitution, therefore merely directs that the government – and not the individual plaintiff – has the burden of proof." *Templo v. State of California*, 24 Cal. App. 5th 730, 738 (2018) (citations omitted).

In addition, as the trial court found, applying the reasonable cost requirement to all five exceptions would violate numerous canons of statutory interpretation. AA 292-93. First, it would result in surplusage in those three exceptions where the reasonable cost requirement is expressly stated (subsections (b)(1)-(3)). AA 292; *see also Hudec v. Superior Court*, 60 Cal. 4th 815, 828 (2015) (interpretations that render statutory terms meaningless as surplusage are to be avoided).

Second, as the trial court also found, "the principle of avoiding absurdity in constitutional construction cautions against reading the reasonable cost requirement into the final two exceptions for charges, purchases rentals or leases related to state property and for fines and monetary penalties." AA at 292. Judicial fines or penalties are meant to punish or deter, a purpose unrelated to how much the violation costs the State. Likewise, state-owned property is a public asset, and the State should not be limited to recovering only its costs in transactions related to the use, sale, or leasing of its property.

In the trial court, plaintiffs did not dispute that it would be absurd to limit the amount the State could recover when selling or leasing its property by imposing a reasonable cost requirement on such transactions. AA 252. As plaintiffs acknowledged, the State obviously should be able to sell, rent or lease its property at market prices, and not be limited to selling or leasing property at cost. *See id.* Plaintiffs refuse to

admit, however, that the same logic applies to the "entrance or use of state property," which left them struggling to explain why the reasonable cost requirement should apply to the first half of the sentence in section 3(b)(4) for entrance to and use of state property, but not to the second half for purchase, lease or rental of state property. AA 252. As the trial court correctly found, such an interpretation, aside from being absurd, would violate the basic rules of statutory construction that require, whenever possible, an interpretation that produces internal harmony, avoids redundancy, and accords significance to each word. AA 292.

Although plaintiffs' brief on appeal wisely omits any attempt to read a reasonable cost requirement into only the first half of section 3(b)(4), they have not explained whether they still believe the reasonable cost requirement applies to only half or all of the exception. As demonstrated below, the same problem is inherent in their new argument: that the reasonable cost requirement must be read into the word "for" as it is used in the exception for entrance to or use of state property.

2. The word "for" in section 3(b)(4) does not incorporate the reasonable cost requirement into the State property exception for taxes

Plaintiffs make one new argument on appeal: that the word "for" in section 3(b)(4) essentially incorporates the reasonable cost requirement into the exception for the entry to, use, sale, rent or lease of State property. AOB at 43. Plaintiffs argue that "[i]f 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,' and not 'for' some other purpose unrelated to the payer's entrance to or use of state property." *Id.*

First, the argument suffers from the same flaws as plaintiffs' original argument discussed above. That is because the word "for" modifies both the first part of the exception (for entry to and use of state property) and the second part (for the purchase, rental or lease of state property). Thus, unless plaintiffs are no longer of the view that the State can sell or lease state property at market rates, they are back to making the absurd argument that the reasonable cost requirement applies to the first part of the sentence but not the second part.

There is another problem arising out of the text of section 3: The first three tax exceptions listed in section 3(b) also refer to a fee charged "for" a particular purpose, but in addition, they contain the cost and proportionality requirements that plaintiffs ask the Court to read into the subsection at issue here. Thus, the requirements contained in the first three exceptions but not in the last two are either limited to the subsections in which they appear or they are surplusage.

Finally, common English usage contradicts plaintiffs' argument that a bridge toll is meant to pay "for" the reasonable cost of maintaining the bridge. The Merriam Webster Dictionary defines a toll as "a tax or fee paid for some liberty or privilege (as of passing over a highway or bridge)."[12] Thus, the toll is paid "for" the privilege of passing over the bridge, not for the maintenance of the bridge.

The dictionary definition is also the one used by the courts. In *Sands v. Manistee River Improvement Company*, 123 U.S. 288 (1887), the United States Supreme Court considered whether the State of Michigan

[12] *Toll*, Meriam-Webster Online, https://www.merriam-webster.com/dictionary/toll.

could impose a toll on vessels that used the Manistee River to fund improvements to the river, notwithstanding a provision in a federal ordinance declaring that navigable waters in that territory should be "forever free . . . without any tax, impost, or duty . . . ." *Id.* The Court concluded the toll was well within Michigan's authority in large part because a toll is compensation for use of government property, not a tax:

> There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of government, and their amount is regulated by its necessities. *Tolls are the compensation for the use of another's property, or of improvements made by him . . . .*
>
> *Id.* at 294 (emphasis added).

Other courts have concluded that tolls are "for" the privilege of using property, not taxes. For example, the District Court of Appeal of Florida concluded that a bridge toll is a user fee, and "as a legal matter . . . is not a tax." *Gargano v. Lee County Bd. of County Comm'rs*, 921 So. 2d 661, 668 (Fla. Dist. Ct. App. 2006). An appellate court in Illinois ruled that the state constitution's clause requiring uniformity in taxation did not apply to a bridge toll because tolls are not taxes. "Taxes are an enforced proportional contribution levied by the State by virtue of its sovereignty for support of the government" while tolls are "contractual in nature . . . *and are compensation for the use of another's property . . . .*" *Endsley v. City of Chicago*, 745 N.E. 2d 708, 715 (Ill. App. Ct. 2001) (emphasis added).

3. The trial court's ruling does not render subsection (d) surplusage

Plaintiffs also contend that the trial court's reasoning renders all of subsection (d) mere surplusage, and they appear to argue that the trial court did not apply any of subsection (d) to its analysis. AOB at 41-43. Neither point is true, but more fundamentally, plaintiffs misunderstand how subsection (d) works. As stated above, subsection (d) is simply a burden-shifting provision that requires the State, not plaintiffs, to prove by a preponderance of evidence each applicable requirement in section 3. Thus, the State has the burden of showing that the tolls are not a tax because they fit into one of the exceptions (the first part of subsection (d)). But because the applicable requirement (section (b)(4)) does not include the reasonable cost requirement, there is no burden to be shifted as to that requirement. That is precisely how the trial court applied subsection (d) in this case. AA 291 ("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 XIII A, section 3(b)(4) of the California Constitution."). Thus, far from being surplusage, subsection (d) applies to each of the exceptions, but what the State must prove varies for each exception.

B. Plaintiffs' Remaining Arguments About The Reasonable Cost Requirement Are Meritless

1. Pre-Proposition 26 case law is both irrelevant and unhelpful to plaintiffs

As they did in the trial court, plaintiffs devote the vast majority of their argument to claiming that the bridge toll increase would have been considered a tax under case law existing prior to the enactment of Proposition 26, and, because Proposition 26 was meant to close, not

open loopholes, Proposition 26 must be read to include the reasonable cost requirement for all of its exceptions. *See generally* AOB at 28-40.

To support their argument, plaintiffs devote more than five pages of their brief to pre-Proposition 26 case law. AOB at 30-36. That case law is irrelevant, because the validity of the bridge toll increase must be reviewed under the plain language and meaning of Proposition 26, not under the case law that existed prior to its passage in 2010. Even plaintiffs concede as much, stating that "the critical term 'tax' had no definition prior to 2010." AOB at 14.[13]

Moreover, none of plaintiffs' cases address whether tolls on state bridges were treated as taxes as opposed to fees. Most importantly, plaintiffs can point to nothing in the legislative history of Proposition 26 itself to suggest the voters intended to preserve any specific prior case law with respect to the treatment of bridge tolls that would suggest any ambiguity in section 3(b)(4).

Instead, plaintiffs argue that two post-Proposition 26 cases stand for the proposition that Proposition 26 was meant to preserve previous case law regarding the difference between a tax and a fee. AOB at 37 (*citing to City of San Buenaventura v. United Water Conservation Dist.*, 3 Cal. 5th 1191, 1210 (2017); *Cal. Bldg. Indus. Assn. v. State Water*

[13] Only three of the cases in plaintiffs' string cite on pages 33-37 were decided after Proposition 26. All of them involved regulatory fees, not bridge tolls. *See Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.*, 51 Cal. 4th 421 (2011); *Cal. Tow Truck Assn. v. City & County of S.F.*, 225 Cal. App. 4th 846 (2014); *Morning Star Co. v. Bd. of Equalization*, 201 Cal. App. 4th 737 (2011). Only one case – *Morning Star Co.* – held that the fee was a tax, but because the fee had passed with a two-thirds vote in the Legislature, the Court of Appeal had no occasion to interpret Proposition 26.

Resources Control Bd., 4 Cal. 5th 1032, 1050 (2018)). The cases do not advance plaintiffs' argument. Both cases involved local taxes or fees, and neither case addressed the parallel exception in article XIII C for entrance to or use of government property. Thus, neither case had anything to say about whether the reasonable cost requirement in the burden-shifting provision applied across the board to all exceptions. And while in *City of San Buenaventura*, the Supreme Court stated that Proposition 26 was drawn "in large part" from pre-proposition case law distinguishing between taxes and fees, it was careful to state that Proposition 26's language with respect to at least some of the exceptions to taxes does not "mirror" pre-Proposition 26 case law. 3 Cal. 5th at 1210 n.7. The Court went on to state it had "no occasion to address the extent of [that] difference." *Id*.

Proposition 26 was meant to clarify the confusing and often contradictory case law that arose after the passage of Proposition 13 as courts struggled to determine what was a tax and what was a fee. Proposition 26 accomplished this by expanding "the definition of taxes so as to include fees and charges, with specified exceptions. . . ." *Schmeer v. County of Los Angeles*, 213 Cal. App. 4th 1310, 1322 (2013). Thus, Proposition 26 changed the legal landscape by replacing the case law that "frequently 'blurred'" the distinction between fees and taxes with a broad definition of tax, but it did so with a set of five specific exceptions, one of which clearly applies here. *Id*. at 1321 (quoting *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 874 (1997)).

Moreover, it is not true that increases to bridge tolls, like those enacted by S.B. 595 and approved by the voters though RM3, would have been invalid under pre-Proposition 26 case law. For example, Regional Measure 2, which was passed in 2004 well before Proposition 26

was enacted, is just like RM3. The Legislature imposed a $1 increase on the entrance to the seven state-owned Bay Area bridges, subject to majority approval by Bay Area voters, to pay for thirty-six (36) specified projects to reduce congestion and improve travel in the toll bridge corridors. *See* Sts. & High. Code §§ 30916(b) (enacting $1 toll increase), 30921(b) (calling special election), 30914(c) (setting forth the specific projects to be funded by the toll). RM2 paid for a variety of projects including expanded BART, ferry, light rail, and bus services to ease congestion on the bridges and connected roadways.

Given plaintiff HJTA's history of litigating tax increases, one would have expected it to challenge RM2 if it believed that the measure violated pre-Proposition 26 case law. Instead, in the trial court, HJTA appeared to concede that RM2 was valid under that case law, implying that the "base toll rates" set forth in Streets and Highways Code section 30916, which includes the RM2 toll increase, were valid fees imposed by the State. AA 250.

In sum, although plaintiffs repeatedly proclaim that the trial court's ruling opens "a new loophole overturning 100 years of jurisprudence" and is a "perversion of Proposition 26" (AOB at 37), they fail to support those assertions with any pre-Proposition 26 case law or statements within Proposition 26 itself demonstrating that bridge tolls on state bridges should be treated as taxes.

2. <u>Plaintiffs' speculation about future State fees is specious</u>

Plaintiffs make a related policy argument: that if the State is unchecked by the reasonable cost requirement, the Legislature will begin imposing charges for use of state property to fund pet projects. "Under the

trial court's decision . . . [t]he 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." AOB at 42.

Plaintiffs' alarmist hypotheticals about excessive tolls or entrance fees to fund unrelated or unpopular programs have nothing to do with RM3, which is the only legislation before the Court. Like RM2, which was approved by the voters in 2004, the revenue generated by the RM3 tolls will pay for projects targeted at reducing traffic congestion on the interconnected system of Bay Area bridges and highways, thereby creating a strong nexus between the increased toll and the benefit to the payor. *See* Sts. & High. Code §§ 30914(c), 30914.7(a). The program is popular and garnered majority support from those who will be most responsible for paying the increased tolls: the Bay Area electorate. RM3 is nothing like the extreme hypotheticals plaintiffs suggest.

The argument also ignores the substantial checks and balances that exist that would make it extremely unlikely that any of plaintiffs' hypothetical examples could ever come to pass. If, however, a majority in the Legislature and the Governor wanted to impose a hefty increase in entrance fees for state parks to pay for a needle exchange program (using plaintiffs' example), the electorate could register its disapproval or overturn the legislation in a variety of ways. It could vote out the responsible legislators or initiate a recall against them (Cal. Const. art. II, § 14); refer the legislation, thereby staying it from going into effect until a vote of the people had occurred (Cal. Const. art. II, § 9); or pass an initiative to change the underlying statute (Cal. Const. art. II, § 10). The argument that the reasonable cost requirement is the only thing stopping the

Legislature from passing excessive tolls or entrance fees for unpopular programs is simply not credible.

CONCLUSION

Plaintiffs' chief complaint is that Proposition 26 *should* have been written to provide that the toll increase at issue here is a tax that requires a two-thirds vote of the Legislature. Plaintiffs must take the Constitution as they find it, however, and under article XIII A, the toll increase was properly enacted by the Legislature in S.B. 595. The trial court's ruling should be affirmed, and defendants should be awarded their costs on appeal.

Dated: December 18, 2019

Respectfully submitted,

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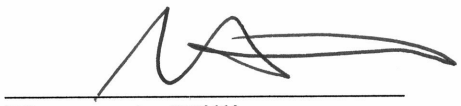
California State Legislature

BRIEF FORMAT CERTIFICATION PURSUANT TO RULE 8.204 OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has a typeface of 13 points or more and contains 11,889 words as counted by the Word processing program used to generate the brief.

Dated: December 19, 2019



Thomas A. Willis

PROOF OF SERVICE

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

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 1901 Harrison Street, Suite 1550, Oakland, CA 94612.

On December 19, 2019, I served a true copy of the following document(s):

Consolidated Respondent's Brief of California State Legislature

on the following party(ies) in said action:

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Michael A. Narciso

(00396676-15)