IN THE CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT - DIVISION TWO

HOWARD JARVIS TAXPAYERS ASSOCIATION, et al.,
Plaintiffs/Appellants,

v.

THE BAY AREA TOLL AUTHORITY, et al.,
Defendants/Respondents,

and

RANDALL WHITNEY,
Plaintiff/Appellant,

v.

METROPOLITAN TRANSPORTATION COMMISSION,
Defendant/Respondent.

On Appeal From San Francisco County Superior Court
Trial Court Case No. CGC-18-567860
and Case No. CPF-18-516276
The Honorable Ethan P. Schulman

RESPONDENTS' CONSOLIDATED OPPOSITION BRIEF

Consolidated
Court of Appeal Case Nos. A157598 and A157972

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METROPOLITAN TRANSPORTATION COMMISSION

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION 5	COURT OF APPEAL CASE NUMBER: A157972
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 199675 NAME: Michael Weed FIRM NAME: Orrick, Herrington & Sutcliffe STREET ADDRESS: 400 Capitol Mall, Suite 3000 CITY: Sacramento STATE: CA ZIP CODE: 95814 TELEPHONE NO.: 916-447-9200 FAX NO.: E-MAIL ADDRESS: mweed@orrick.com ATTORNEY FOR (*name*): Metropolitan Transportation Commission	SUPERIOR COURT CASE NUMBER: CPF-18-516276
APPELLANT/ PETITIONER: Randall Whitney RESPONDENT/ REAL PARTY IN INTEREST: Metropolitan Transportation Commission	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Metropolitan Transportation Commission

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 16, 2019

Michael Weed
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FIRST **APPELLATE DISTRICT, DIVISION** 2	COURT OF APPEAL CASE NUMBER: A157598
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 199675 NAME: Michael Weed FIRM NAME: Orrick, Herrington & Sutcliffe STREET ADDRESS: 400 Capitol Mall, Suite 3000 CITY: Sacramento STATE: CA ZIP CODE: 95814 TELEPHONE NO.: 916-447-9200 FAX NO.: E-MAIL ADDRESS: mweed@orrick.com ATTORNEY FOR (*name*): Bay Area Toll Authority	SUPERIOR COURT CASE NUMBER: CGC-18-567860
APPELLANT/ PETITIONER: Howard Jarvis Taxpayers Association, et al. RESPONDENT/ REAL PARTY IN INTEREST: Bay Area Toll Authority, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Bay Area Toll Authority

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest** ***(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Other Authorities

INTRODUCTION

These consolidated appeals address the constitutionality of a bridge toll increase under the California Constitution as amended in 2010 by Proposition 26. Appellants contend the toll increase is a tax that required a two-thirds majority vote to be lawfully imposed. As the trial court correctly found, however, the toll increase is not a tax under the California Constitution and it was lawfully adopted. More specifically, the trial court correctly found that: (1) article XIII A, section 3, of the California Constitution applies to these challenges because the Legislature imposed the toll increase; (2) the toll increase is a "charge for entrance to or use of state property," which is an express exception (state property exception) to the definition of "tax" under article XIII A, section 3(b); and (3) the component of the burden shifting provisions in article XIII A, section 3(d) relating to reasonable costs and allocations (reasonableness burden shifting provisions), do not apply to the state property exception to the definition of "tax" and, therefore, do not apply to the challenged toll increase.

Accordingly, the trial court granted Respondents' respective motions for judgment on the pleadings, without leave to amend,

confirming the constitutionality of the toll increase and the related proceedings. The trial court rulings were correct in all respects, and they should be affirmed.

SUMMARY OF THE CASE AND ARGUMENT

The California Legislature enacted Senate Bill 595 (SB 595) during the 2017-2018 legislative session. Among other things, SB 595 imposes a toll increase (Toll Increase) on the seven state-owned bridges in the San Francisco Bay Area (Bridges) and applies a portion of the revenues to fund specified San Francisco Bay Area (Bay Area) transportation systems and projects (Expenditure Plan). The Legislature determined in SB 595 that those projects and programs would reduce traffic congestion and improve travel on the Bridges and throughout the Bridge corridors. Respondent Bay Area Toll Authority (BATA), among other responsibilities, administers toll revenues from the Bridges on behalf of the state.

The Legislature is authorized, on its own, to statutorily impose the Toll Increase without voter approval. However, the Legislature, in its discretion, chose to make the Toll Increase and the Expenditure Plan contingent upon a majority approval by voters in the applicable Bay Area counties (Counties).

Accordingly, the Legislature directed the Board of Supervisors of each County to submit the question to voters, and directed Respondent BATA to determine the date of the election and the ballot question, which the Legislature directed BATA to title Regional Measure 3 (RM3). The Legislature also directed a separate legal entity, Respondent Metropolitan Transportation Commission (MTC), to prepare a summary of the Expenditure Plan. SB 595 provided that the Toll Increase would be an amount not to exceed three dollars, which may not be changed without further legislative action, and then required BATA, as a public instrumentality of the state, to determine the specific amount of Toll Increase, up to three dollars, to be included in the ballot measure.

These duties imposed upon the Counties, BATA, and MTC were neither optional nor discretionary under the clear terms of SB 595. The Counties, BATA, and MTC had no choice in the matter of facilitating the election or taking the actions and making the other determinations required by the Legislature in SB 595. Nor did Respondents have any choice, following voter approval of RM3, about whether the Toll Increase would go into effect—the Legislature had already determined in SB 595 that it

would, and simply directed BATA to manage it.

BATA and MTC took the actions mandated by SB 595, including making the limited determinations the Legislature required them to make. Then, as the Legislature had directed in SB 595, having confirmed voter approval of the Toll Increase and Expenditure Plan (at the June 5, 2018 election) BATA and MTC prepared to take the steps necessary to manage the Toll Increase imposed by the Legislature beginning on January 1, 2019. Two lawsuits intervened.

Appellants Howard Jarvis Taxpayers Association, along with certain individuals (together, HJTA), sued BATA and the Legislature. HJTA asserted that the Toll Increase was an unconstitutional tax because either: (1) the Legislature imposed it in SB 595 without a two-thirds majority vote, in violation of California Constitution, article XIII A, section 3, as amended by Proposition 26; or (2) BATA imposed it through RM3 without a two-thirds majority vote from the electorate, in violation of California Constitution, article XIII C, section 1, as amended by Proposition 26. Appellant Randall Whitney sued MTC, contending that the Toll Increase was an unconstitutional tax because MTC imposed it without a two-thirds vote of the

electorate, violating article XIII C, section 1.

As the uniform focus of Appellants' trial court challenges demonstrates, identifying which entity imposed the Toll Increase is a central issue when determining the constitutionality of the Toll Increase. The California Constitution contains two relevant provisions that define what constitutes a "tax"—one relating to state taxes and one relating to taxes imposed by certain local governments—both of which were added in 2010 by Proposition 26. Article XIII A, section 3, applies to "any levy, charge, or exaction of any kind imposed by the State," except for five enumerated exceptions. Article XIII C, section 1, applies to "any levy, charge, or exaction of any kind imposed by a local government," except for seven enumerated exceptions. Thus, whether the state or a local government imposed the "levy, charge, or exaction" in question determines which constitutional provision controls its lawfulness.

The trial court correctly concluded that the Legislature imposed the Toll Increase in enacting SB 595, and therefore article XIII A, section 3, governs its constitutionality. Nothing in Appellants' consolidated opening brief calls the trial court's conclusions into question. Indeed, as discussed below in

Section I, there is no remaining issue as to which Respondent imposed the Toll Increase. At the hearing on BATA's motion for judgment on the pleadings, Appellant HJTA unequivocally agreed with the trial court that BATA did not impose the Toll Increase. Appellant stated, "It [the Toll Increase] was not imposed by the Bay Area Toll Authority . . . ." (1 RA[1] 7:1-2.) Having correctly recognized that fact, Appellant HJTA did not contest the trial court's grant of BATA's motion for judgment on the pleadings, stating at the outset of the hearing, "I imagine that excuses the Bay Area Toll Authority from the case, and we won't need to hear from [BATA's counsel]." (1 RA 7:2-4.) Correspondingly, Appellants agreed with the trial court that article XIII A, section 3, controlled the constitutional challenge to the Toll Increase, specifically because the Legislature imposed it. (*See* 1 RA 7:5-28 [Appellant HJTA conceding that "[t]he issue in this case centers around that fourth exception" to article XIII A, section 3].) Having agreed with the trial court and BATA below, Appellants cannot revive the issue on appeal to contend that

[1] "RA" refers to the Respondents' Appendix on Appeal. Respondents primarily cite to the Appellants' Appendix (AA) to avoid unnecessary duplication in the record.

BATA imposed the Toll Increase.[2]

Similarly, as addressed below in Section II, Appellants make no argument in their consolidated opening brief addressed to Respondent MTC. In particular, Appellants do not argue that MTC itself was actually the entity that imposed the Toll Increase or that MTC took any action this Court needs to address. MTC, however, was the sole named defendant in the Whitney lawsuit, and MTC's successful motion for judgment on the pleadings was separately appealed. (2 AA 313, 565.) By ignoring MTC and the claims Appellant Whitney asserted in the trial court, Appellants have in effect abandoned any challenge to MTC's actions. (*See In re Sade C.* (1996) 13 Cal.4th 952, 994; *see also Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 710.)

Finally, putting aside Appellants' concessions and waivers, the trial court's rulings on the merits of the issues asserted below were entirely correct, as discussed below in Section III. The express terms of SB 595, and indeed the entire statutory scheme set forth in the remainder of Chapter 4 of Division 17 of the

[2] The Court can and should disregard Appellants' entire argument that BATA imposed the Toll Increase and the purported resulting outcome, Section I, A-E, at pages 14-28 of Appellants' Opening Brief.

California Streets and Highways Code, demonstrate that the Legislature imposed the Toll Increase by enacting SB 595, and that BATA's and MTC's actions simply implemented the Toll Increase as mandated by the Legislature. To argue that Respondents could choose whether or not the Toll Increase was imposed, Appellants must disregard the specific mandates in and explicit language of SB 595.

Correctly recognizing that the Legislature imposed the Toll Increase, the trial court correspondingly correctly determined that article XIII A, section 3, as amended by Proposition 26, provides the relevant criteria against which to judge Appellants' challenge to the Toll Increase. Article XIII A, section 3, after amendment by Proposition 26, makes every type of charge imposed by the state, by definition, a "tax" unless such charge falls within one of five enumerated exceptions. The fourth exception in article XIII A, section 3(b), exempts from the definition of "tax" charges imposed "for entrance to or use of state property" or the "purchase, rental or lease of state property" (previously defined, the state property exception). The trial court correctly found that the Toll Increase falls squarely within that exception, and that Appellants' attempt to read into the state

property exception a substantive reasonableness requirement (that three prior exceptions actually contain) was improper and contrary to the plain language of article XIII A, section 3.

The result is the same on appeal—Appellants' arguments as to how the state property exception in article XIII A, section 3(b), should be interpreted and applied to the Toll Increase, whether based on the language of article XIII A, section 3 as amended by Proposition 26, voter intent, or outdated pre-Proposition 26 case law, are unavailing. The plain language of article XIII A, section 3, and, in particular, the state property exception set forth in section 3(b)(4), controls the outcome in these appeals. And as the trial court properly determined, under the plain, unambiguous language in article XIII A, section 3, the Toll Increase is by definition not a "tax" that was subject to the two-thirds vote requirement. The trial court's grant of the respective motions for judgment on the pleadings should be affirmed.

STATEMENT OF FACTS AND BACKGROUND

I. Respondents MTC and BATA

MTC is the regional transportation planning agency for the Bay Area. (Cal. Gov. Code, § 66502.) MTC's jurisdiction includes

the City and County of San Francisco, and Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano, and Sonoma counties (previously defined, Counties). (*Id.*) BATA, a separate and distinct legal entity, is a public instrumentality of the state, created by the Legislature and governed by the same board as MTC. (Cal. Sts. & Hwy. Code, § 30950.) BATA was established by the state to manage toll revenues from the state-owned bridges in MTC's jurisdiction pursuant to statutory requirements and certain authority delegated to BATA by the Legislature. Section 30950.2(a)[3] provides: "[BATA] is responsible for the administration of all toll revenues from state-owned toll bridges within the geographic jurisdiction of [MTC]." There are seven state-owned toll bridges under BATA's administration—the Antioch Bridge, Benicia-Martinez Bridge, Carquinez Bridge, Dumbarton Bridge, Richmond-San Rafael Bridge, San Mateo-Hayward Bridge, and San Francisco-Oakland Bay Bridge (previously defined, Bridges). (*Id.* § 30910.)

[3] Textual statutory references are to the California Streets and Highways Code unless otherwise noted.

II. SB 595 and RM3

The Legislature enacted SB 595 in 2017.[4] (1 AA 060.) SB 595 imposed the Toll Increase and approved the Expenditure Plan, which consists of programs and projects within the Bay Area transportation system to be funded from proceeds of Toll Increase revenues. (Cal. Sts. & Hwy. Code, §§ 30914.7, 30923(a).) The Legislature made numerous findings and declarations in SB 595 regarding the substantial existing congestion and burden on the Bridges and the entire Bay Area transportation system, and the resulting adverse impact to the region's economy and quality of life. (1 AA 62-63.) The Legislature enacted SB 595 and imposed the Toll Increase to fund the Expenditure Plan in order to address such impacts. (*Id.*)

Though not required to do so, the Legislature chose to make the Expenditure Plan and the Toll Increase imposed by SB 595 contingent on majority approval by voters in the Counties. The Legislature stated:

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[4] Senate Bill No. 595 (2017-2018 Reg. Session) (enacted as Chapter 650), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB595. For clarity, Respondents primarily cite to the codified provisions of SB 595 in the California Streets and Highways Code.

> 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 [MTC] to place on the ballot a measure authorizing the voters to approve an expenditure plan to improve the mobility and enhance travel options on the bridges and bridge corridors to be paid for by an increase in the toll rate on the seven state-owned bridges within its jurisdiction.

(1 AA 63.) If approved by the voters, the Legislature mandated that BATA, as part of its duties in maintaining the toll schedule for the Bridges, increase the toll schedule following that approval. Section 30916(c)(1) states:

> If the voters approve a toll increase, pursuant to Section 30923, [BATA] shall increase the base toll rate for vehicles crossing the [B]ridges described in subdivision (a) from the toll rates then in effect by the amount approved by the voters pursuant to Section 30923.

(Cal. Sts. & Hwy. Code, § 30916(c)(1) [emphasis added][5].)

In SB 595, the Legislature also determined the projects and programs for which Toll Increase revenues were to be spent. Section 30914.7(a) states:

> If the voters approve a toll increase pursuant to Section 30923, [BATA] shall, consistent with the provisions of this section fund the projects and programs described in this subdivision that shall collectively be known as the Regional Measure 3 expenditure plan by bonding or transfers to [MTC]. These projects and programs have been determined to

[5] All further emphases are added unless otherwise noted.

> reduce congestion or to make improvements to travel in the toll bridge corridors, from toll revenues from all bridges : . ..

(*Id.* § 30914.7(a).) Section 30914.7 then proceeds to specify the 35 projects and programs that the Legislature directed to be funded from Toll Increase revenues as part of the Expenditure Plan, including respective funding amounts for the individual programs and projects. (*Id.* §§ 30914.7(a)(1)-(35), (b), (c).)

Prior to the Toll Increase becoming operative, the Legislature mandated in SB 595 that the respective Boards of Supervisors of the Counties call a special election to "determine whether the residents of [the Counties] approve the toll increase" (*Id.* §§ 30923(c), (e)), and further required that, following approval, BATA update the toll schedule it maintains to implement the increase (*Id.* § 30916(c)(1)). The Legislature further directed BATA to determine the ballot question and MTC to prepare a summary of the Expenditure Plan for use in the election. Section 30923 provides:

> (c)(1) [T]he 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 [BATA].

> (2) [BATA] shall determine the ballot question, which shall include the amount of the 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.
>
> (d) The ballot pamphlet for the special election shall include a summary of the Regional Measure 3 expenditure plan regarding the eligible projects and programs to be funded pursuant to Section 30914.7. [MTC] shall prepare a summary of the Regional Measure 3 expenditure plan.
>
> (e) The county clerks shall report the results of the special election to [BATA]. If a majority of all voters voting on the question at the special election vote affirmatively, [BATA] may phase in the increased toll schedule consistent with subdivision (c) of Section 30916.

(*Id.* § 30923.) In Section 30923, the Legislature further determined that the Toll Increase would be no more than three dollars. (*Id.* § 30923(a).) The Legislature directed BATA to determine a specific amount for the Toll Increase, up to three dollars, and to determine whether the Toll Increase would be phased in—all of which the Legislature directed BATA to also include in the ballot measure. (*Id.* §§ 30923(a), (j).)

On January 24, 2018, the BATA governing board adopted Resolution No. 123 identifying the June 5, 2018 election as the election in which the Counties would be called to place RM3 on

the ballot. (1 AA 84-88; Appellants' Request for Judicial Notice (App. RJN), Ex. 1.)[6] Also as directed by SB 595, MTC and BATA caused ballot materials detailing RM3 and the Expenditure Plan to be prepared and made available to the Counties for use in the election. (1 AA 90-118; Cal. Sts. & Hwy. Code, § 30923(d).) The ballot question entitled Regional Measure 3 stated:

> BAY AREA TRAFFIC RELIEF PLAN. Shall voters authorize a plan to reduce auto and truck traffic, relieve crowding on BART, unclog freeway bottlenecks, and improve bus, ferry, BART and commuter rail service as specified in the plan in this voter pamphlet, with a $1 toll increase effective in 2019, a $1 increase in 2022, and a $1 increase in 2025, on all Bay Area toll bridges except the Golden Gate Bridge, with independent oversight of all funds?

(1 AA 114.) At the election required by SB 595, 55% of voters approved RM3. (App. RJN, Ex. 2.)

[6] Respondents do not object to Appellants' RJN on the basis that the submitted documents are not the type that can be properly noticed. However, the documents, except Appellants' Exhibits 1 and 2, are irrelevant to the legal issues here, and on that basis, judicial notice should be denied. (*See* Cal. Evid. Code, § 350; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, overruled in part on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276 [judicially noticeable matters "are subject to the qualification that the matter to be judicially noticed must be relevant"].)

III. The Trial Court Proceedings

These consolidated appeals arise from the trial court's grant, without leave to amend, of three motions for judgment on the pleadings in two lawsuits. (1 AA 286-88, 290-94; 2 AA 559-60.) Appellant HJTA sued the Legislature and BATA (HJTA lawsuit). (1 AA 10-17.) HJTA contended that, either, the Toll Increase was an unlawful "tax" under article XIII A, section 3, of the California Constitution because the Legislature imposed the Toll Increase by enacting SB 595 without a two-thirds vote; or, the Toll Increase was an unlawful "tax" under article XIII C, section 1, because BATA imposed the Toll Increase without obtaining a two-thirds majority vote in the election approving RM3. (1 AA 12-16.) In a separate lawsuit, Appellant Randall Whitney sued MTC (Whitney lawsuit). (2 AA 313-22.) Whitney asserted that MTC imposed the Toll Increase, which he alleged was an unlawful "tax" under article XIII C, section 1, for failure to obtain a two-thirds vote in the election approving RM3. (2 AA 314.)

BATA and the Legislature concurrently moved for judgment on the pleadings in the HJTA lawsuit. (1 AA 34, 138.) The trial court correctly granted both motions, without leave to

amend, finding that the Legislature, not BATA, imposed the Toll Increase through its enactment of SB 595; that article XIII A, section 3, therefore controlled the constitutionality of the Toll Increase; and that the Toll Increase was a "charge imposed for entrance to or use of state property," which by definition was not a "tax" under article XIII A, section 3, as amended by Proposition 26. (1 AA 287, 291.) The trial court also correctly concluded that the reasonableness burden shifting provisions in article XIII A, section 3(d), did not apply to the state property exception to the definition of "tax" in article XIII A, section 3 and, thus, did not apply to the Toll Increase. (1 AA 291.)

MTC moved for judgment on the pleadings in the Whitney lawsuit. (2 AA 434.) The trial court granted the motion without leave to amend, again concluding correctly that the Legislature, not MTC, imposed the Toll Increase in SB 595, and that by definition it was not a "tax" under article XIII A, section 3, the applicable constitutional provision. (2 AA 560.) The trial court also appropriately concluded that Whitney's conflation of MTC with BATA did not impact the result and denied Whitney's oral request to amend the complaint to name the individual MTC commissioners as defendants. (2 AA 560; 1 RA 39:6-16.)

HJTA and Whitney separately appealed. (1 AA 301; 2 AA 565.) Previously *pro se*, Whitney substituted HJTA's counsel for the appeal. (2 AA 561.) Thereafter, the Court granted Appellants' motion, joined by Respondents, to consolidate the appeals.

STATEMENT OF ISSUES

These consolidated appeals involve a single over-arching legal issue, the determination of which turns on the answers to two foundational questions. The ultimate legal issue is this:

> Is the Toll Increase resulting from the Legislature's enactment of SB 595 a "tax" under the California Constitution, as amended by Proposition 26, which would therefore have required a two-thirds majority vote to enact, either by the Legislature or the citizens voting on RM3?

Subsumed in that determination are the following foundational issues:

> (1) Did the Legislature or BATA "impose" the Toll Increase, the answer to which governs whether article XIII A, section 3, or article XIII C, section 1, of the California Constitution applies to determine the constitutionality of the Toll Increase?
>
> (2) Do the reasonableness burden shifting provisions in the applicable constitutional provision apply to the Toll Increase?

As demonstrated in detail below, the trial court reached the correct answers to these questions and its ruling should be

affirmed. First, the Legislature, not BATA, imposed the Toll Increase through SB 595, thus article XIII A, section 3 applies. Second, the Toll Increase is a "charge imposed for entrance to or use of state property" and therefore, by definition, is not a "tax" under article XIII A, section 3. Finally, the reasonableness burden shifting provisions set forth in article XIII A, section 3(d), do not apply to the Toll Increase.

STANDARD OF REVIEW

Respondents agree that the *de novo* standard of review applies to the trial court's grant of judgment on the pleadings. A motion for judgment on the pleadings admits the truth of properly pleaded material facts, and must be decided on the face of the complaint and matters subject to judicial notice. (Cal. Civ. Proc. Code, § 438(d); *Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 966-67.) The court need not accept as true allegations that are in substance legal contentions or conclusions. (*People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 777 ["All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law."] [internal quotations omitted].)

ARGUMENT

I. Appellants Agreed with the Trial Court that BATA Did Not Impose the Toll Increase and Therefore Have Waived that Issue for Appeal.

By expressly agreeing with the trial court that BATA did not impose the Toll Increase, Appellants waived the ability on appeal to challenge the trial court's ruling on this issue. At the hearing on Respondent BATA's motion for judgment on the pleadings, Appellant HJTA unequivocally agreed with the trial court that the Legislature, and not BATA, imposed the Toll Increase. Appellant explained to the trial court at the outset of the hearing:

> 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].

(1 RA 6:27-7:4.) Despite agreeing with the trial court that the Legislature imposed the Toll Increase, Appellants devote over fourteen pages of their opening brief to the argument that the Toll Increase was a local government special tax imposed by BATA. (*See* Appellant's Opening Brief (AOB) at pp. 14–28.) Appellants conceded this issue in the trial court and cannot now dispute it on appeal.

Reviewing courts should not consider "a challenge to a ruling if an objection could have been but was not made in the trial court." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on other grounds as stated in *In re S.J.* (2008) 167 Cal.App.4th 953, 961–62.) This well-established rule is intended to encourage parties to bring errors to the trial court's attention in order to correct them. (*Id.*) Agreeing to the complained-of conduct results in a waiver of a party's right to pursue that issue on appeal. (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166 ["[A]n appellant may waive his right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal."]; *see Elec. Equip. Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 857 [appellant waived its ability to challenge on appeal the trial court's definition of a term used on a special verdict form where the appellant expressly stated on the record that it had no objection to the trial court's definition].)

In *Sperber v. Robinson*, the appellant's counsel had agreed with the trial court that the court—not the jury—must decide whether an equitable lien existed. (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 742.) On appeal, the appellant argued that the

equitable lien question was an issue for the jury—not the court. (*Id.*) Thus, just as Appellants have done here, the appellant in *Sperber* reversed course on appeal to contradict its earlier agreement with the trial court. The appellate court did not countenance the reversal, holding that, by agreeing with the trial court's decision on the issue, the appellant did not preserve the issue for appeal. (*Id.* at pp. 742–43.) The same holds true here.

Appellants' counsel's statement that they agreed with "the Court's decision that the toll increase was imposed by the State[]" and "was not imposed by [BATA]" was both unambiguous and related to a central issue in these cases—namely, whether the Legislature or BATA imposed the Toll Increase. That determination, in turn, dictates which constitutional provision controls the constitutionality of the Toll Increase—article XIII A, section 3 if the Legislature imposed it, or article XIII C, section 1 if BATA imposed it. Necessarily, by agreeing with the trial court that the Legislature, not BATA, imposed the Toll Increase in SB 595, Appellants also agreed with the trial court that article XIII A, section 3, was the relevant constitutional provision on which the court should decide their challenges to the Toll Increase. (1 RA 7:14-28.) Oral statements by counsel in the

same action are binding judicial admissions if the statements were "an unambiguous concession of a matter then at issue and [were] not made improvidently or unguardedly." (*Fassberg Constr. Co. v. Hous. Auth. of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752; *see Physicians Comm. for Responsible Medicine v. KFC Corp.* (2014) 224 Cal.App.4th 166, 181 [concluding that the appellate court could not ignore a judicial admission in the trial court that a party lacked information to support an essential element of one of its claims].)

Appellants' agreement with the trial court's ruling that the Legislature, not BATA, imposed the Toll Increase was unequivocal and unambiguous, and unquestionably involved a critical issue in Respondent BATA's motion. Appellants cannot now contradict their concession and take issue with an essential trial court ruling with which they previously agreed. Appellants have waived their ability to argue that the trial court erred in concluding that the Legislature, not BATA, imposed the Toll Increase. As a result, the only issue properly before the Court is whether the Toll Increase imposed by the Legislature in SB 595

constitutes a "tax" under article XIII A, section 3.[7]

II. Appellants Have Abandoned the Issues in the Whitney Lawsuit.

MTC is a separate and distinct legal entity from BATA. (Cal. Gov. Code, § 66502; Cal. Sts. & Hwy. Code, § 30950.) These consolidated appeals include the appeal from the trial court's grant of MTC's judgment on the pleadings in the Whitney lawsuit (App. Ct. Case No. A157972), which is a separate judgment and appeal from the HJTA lawsuit (App. Ct. Case No. A157598).[8] Appellant Whitney named MTC as the sole defendant in his lawsuit, and argued that MTC imposed the Toll Increase in violation of the applicable constitutional provisions. (2 AA 313-14.) The trial court entered judgment only for MTC. (2 AA 559.)

Appellants did not provide any argument or discussion in their opening brief regarding how the trial court erred with respect to its ruling in favor of MTC in the Whitney lawsuit. Appellants define "BATA" to include both BATA and MTC (AOB,

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[7] Appellants also have not challenged the trial court's denial of leave to amend when granting Respondents' motions, and have therefore waived that issue as well.

[8] In the trial court, *Randall Whitney v. Metro. Transp. Comm'n*, No. CPF-18-516276; *Howard Jarvis Taxpayers Ass'n, et al. v. Bay Area Toll Auth., et al.*, No. CGC-18-567860.

p. 9), but BATA and MTC are different entities and had different mandates from the Legislature in SB 595. (*See*, *supra*, Section II.) Appellant Whitney asserted in the trial court that MTC, alone, imposed the Toll Increase and MTC's actions were allegedly unlawful. (2 AA 321.) On appeal, Appellants have failed to demonstrate, or even directly discuss, how MTC's actions related to the Toll Increase were unlawful, or any purported error in the trial court's judgment in favor of MTC. Nor have Appellants addressed the trial court's denial of Whitney's oral motion to amend his complaint to name the individual MTC commissioners. (*See* 1 RA 40:2-42:20 [trial court correctly concluding that granting Whitney's oral request to name MTC commissioners as defendants would be pointless].)

An appellate court need not consider an issue on appeal that the appellant does not sufficiently support with authority and argument. (*See* *Huntington Landmark Adult Cmty. Ass'n v. Ross* (1989) 213 Cal.App.3d 1012, 1021 ["An appellate court is not required to consider alleged error where the appellant merely complains of it without pertinent argument."]; *see also* Cal. R. Ct. 8.204(a).) An appellant's "[c]ontentions supported neither by argument nor by citation of authority are deemed to be without

foundation and to have been abandoned." (*Huntington, supra*, 213 Cal.App.3d at p. 1021.)

Here, Appellants do not discuss or address the purported error in the trial court's ruling with respect to MTC in the Whitney lawsuit, thus Appellants have in effect abandoned the issues asserted against MTC. The Court should deny that aspect of the consolidated appeals on that ground alone. (*See Rossiter, supra*, 88 Cal.App.3d at p. 710 [treating appellant's claim as abandoned where opening brief stated an issue, but did not include any "argument, statement, comment, citation, authority or reference to this stated issue"]; *see also Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 984, fn. 1 [holding that any claim of error is deemed abandoned with respect to claims that were not addressed in appellate brief where appeal was directed solely to a single, separate claim].)

III. The Trial Court's Rulings on The Merits of the Challenge to the Toll Increase Were Correct in All Respects and Should Be Affirmed.

Putting aside Appellants' waivers and abandoned issues, the trial court properly analyzed and ruled on the issues asserted below that Appellants pursue here. As a matter of law, the Legislature imposed the Toll Increase in SB 595, and the Toll

Increase is by definition not a "tax" under the applicable constitutional provision—article XIII A, section 3. On the merits, the trial court's ruling upholding the Toll Increase and granting Respondents' motions for judgment on the pleadings should be affirmed in its entirety.

A. The Legislature Imposed the Toll Increase in SB 595, thus Article XIII A, Section 3, Controls and Article XIII C, Section 1, is Inapplicable.

As demonstrated above (*infra,* Section I), Appellants agreed with the trial court that the Legislature, not BATA, imposed the Toll Increase, and have thereby waived that issue on appeal. Regardless, the trial court's ruling was unquestionably correct, as Respondents show below.

1. The Definition of "Tax" Under Proposition 26

Voters passed Proposition 26 in November 2010, which, among other things provided a broad definition of "tax" as such term is used in California Constitution, article XIII A, section 3, and article XIII C, section 1. (Cal. Const., art. XIII A, § 3; *id.* art. XIII C, § 1.) After Proposition 26, "any levy, charge, or exaction of any kind imposed by" the state or local government constitutes a "tax" unless it comes within a few express exceptions specified in Proposition 26. (*Id.* art. XIII A, § 3(b); *id.* art. XIII C, § 1(e).)

As amended by Proposition 26, article XIII A, section 3, and its enumerated exceptions apply to a charge imposed by the state, while article XIII C, section 1, applies to a charge imposed by "local governments." Thus, whether the state or a local government imposed the Toll Increase determines which constitutional provision applies to it.

2. The State Imposed the Toll Increase in SB 595.

The state imposed the Toll Increase through the Legislature's enactment of SB 595. Therefore, as the trial court correctly concluded, article XIII A, section 3, controls whether the Toll Increase is a "tax" requiring a two-thirds majority vote. (1 AA 287.)

The state, not BATA (or MTC)[9], authorizes and imposes tolls on state-owned bridges. (*See, e.g.*, Cal. Sts. & Hwy. Code, § 30916.) BATA is a public instrumentality formed by the Legislature to manage and oversee, on behalf of the state, the collection and administration of toll revenues on the bridges

[9] As noted in Section II above, Appellants focus on BATA and BATA's actions in their opening brief, and do not address any argument separately toward MTC. Therefore, Respondents will largely omit separate discussion of MTC.

within its jurisdiction. (*Id.* § 30950.) Section 30950.2 provides:

> [BATA] is responsible for the administration of all toll revenues from state-owned toll bridges within the geographic jurisdiction of [MTC].

(*Id.* § 30950.2.) Correspondingly, Section 30886 directs BATA to "manage" "all of the toll revenues that are imposed by Sections 30916, 31010, and 31011" – *i.e.,* tolls that are imposed on Bay Area state-owned bridges by statutes enacted by the Legislature. (*Id.* § 30886; *see id.* §§ 30916(a) & (b) [imposing base toll rates and increases]; *id.* § 31010 [imposing seismic retrofit surcharge]; *id.* § 31011 [permitting, for specified purposes, BATA to increase seismic retrofit surcharge imposed by the State].)

Nowhere in BATA's authorizing statutes is BATA empowered to itself impose, or propose to voters the imposition of, additional tolls on its own authority for its own purposes. (*Compare*, *e.g.*, Cal. Gov. Code, §§ 50077-50077.5 [the "Special Tax Law," authorizing certain local governments to propose and impose special taxes].) Rather, the state imposes tolls on state-owned toll bridges and directs BATA regarding toll collection and management of toll revenues, including the delegated authority to increase the toll schedule for state-imposed tolls to meet certain specific requirements identified by the Legislature. (*See*

Cal. Sts. & Hwy. Code, §§ 30886, 30916, 31010; *id.* § 30918 [delegating to BATA the authority to increase the toll schedule for certain specified purposes, including funding maintenance and seismic retrofitting].)

The Toll Increase imposed by SB 595 is no different. SB 595 amended Section 30916 to add subdivision (c), which states:

> (1) If the voters approve a toll increase, pursuant to Section 30923, [BATA] shall increase the base toll rate for vehicles crossing the bridges described in subdivision (a) from the toll rates then in effect by the amount approved by the voters pursuant to Section 30923.

(*Id.* § 30916(c)(1).) Upon voter approval, SB 595 mandates that the base toll rate be increased, and BATA is given no choice in the matter. Similarly, in SB 595, the Legislature set the maximum toll increase at three dollars and identified the specific programs and projects in the Expenditure Plan to be funded from Toll Increase revenues, including the particular amount of funding to be allocated for each program and project. (*See id.* § 30914.7(a) [detailing 35 projects and programs in the Expenditure Plan to be funded by the Toll Increase]; *id.* § 30923(a) [providing for a toll increase of not to exceed three

dollars].) Consistent with BATA's administrative functions, the Legislature directed BATA, in coordination with MTC as appropriate, to apply Toll Increase revenues to fund the specific programs and projects identified by the State in SB 595 for purposes of reducing congestion and improving travel in the toll bridge corridors.[10] (*Id.* § 30914.7(a).)

In SB 595, the Legislature delegated certain authority to BATA with respect to the Toll Increase, but that delegation does not alter the conclusion that the Legislature imposed the Toll Increase in SB 595. In fact, the Legislature's delegations to BATA in SB 595 are contained within the Legislature's broader mandates. For instance, the Legislature mandated that BATA select the specific amount and any incremental phasing-in of the Toll Increase, up to a three dollar maximum established by the

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[10] Appellants rely on *Schmeer v. County of Los Angeles* in arguing that the Legislature did not "impose" the toll increase under article XIII A, section 3, because "revenue from the increase is not remitted to the State, nor will the State Auditor monitor its expenditure." (AOB, p. 22; (2013) 213 Cal.App.4th 1310.) Appellants' reliance on *Schmeer* is misguided because article XIII A was not at issue in that case, and further, the court explicitly noted that article XIII A had been amended to eliminate the prior requirement that a charge produce revenue for the government to be treated as a tax. (*Schmeer*, *supra*, 213 Cal.App.4th at p. 1329.) Thus, Appellants' attempt to import the discussion in *Schmeer* into its argument is not helpful.

Legislature. (*Id.* §§ 30916(c), 30923(a).) It also mandated that BATA include those determinations in the ballot question, which the Legislature required BATA and the Counties to present to the voters as Regional Measure 3. (*Id.* §§ 30916(c), 30923.) Authorizing BATA to make limited decisions regarding implementation of the Toll Increase, within the context of a legislative mandate that required BATA to make such decisions and take specific actions together with MTC and the Counties with respect to those decisions, is not the same as devolving to BATA the authority to choose whether to impose a toll increase on its own for its own purposes. As the trial court correctly recognized, the Legislature imposed the Toll Increase in SB 595 and, at the same time, directed BATA with regard to implementing the Toll Increase and managing the generated revenues. (1 AA 287.)

Despite the numerous mandatory provisions of SB 595, Appellants argue that BATA itself imposed the Toll Increase because SB 595 merely authorized BATA to raise the tolls if BATA chose to do so.[11] (AOB, p. 22.) Appellants repeatedly

[11] Appellants attempt to convolute the otherwise unambiguous term "impose" by asserting that "[w]hen article XIII C uses the

suggest, contrary to the mandatory provisions discussed above, that SB 595 gave BATA the option of doing nothing—of choosing not to increase the toll schedule at all. (*See, e.g.*, *id.* at p. 20 ["Here, if BATA had taken no action . . ."]; *id.* at p. 21 ["It was up to BATA to place the proposed toll increase on the ballot . . ."]; *id.* ["BATA could, but was not required to, adopt the proposed increase . . ."]; *id.* at p. 22 ["If BATA had taken no action . . ."]; *id.* at p. 25 ["Had BATA taken no action . . ."]; *id.* ["once BATA decided to propose a toll increase . . ."].) Appellants anchor this contention on a selected sentence from Section 30923(f) in SB 595. Appellants assert:

> 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

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term 'impose' it means 'adopt' or 'enact.'" (AOB, p. 20.) Nevertheless, Appellants ignore "the logical distinction between the act of imposing something and the act of complying with that which has been imposed." (*Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1770 [offering an interpretation of "impose" as used in Government Code § 66020, which the Supreme Court explicitly adopted when construing the term within the context of article XIII C]; *see also California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 944 [adopting meaning prescribed to "impose" by *Ponderosa* court].) Here, BATA merely complied with something that the Legislature had already imposed and conditioned on voter approval—the Toll Increase. Appellants' efforts to muddle this otherwise clear conclusion is unconvincing.

> vote affirmatively on the measure, [BATA] *may* adopt the toll increase and establish its effective date."

(*Id.* at p. 21, citing Cal. Sts. & Hwy. Code, § 30923(f) [italics in the original].)

From this single sentence taken from a subsection at the end of SB 595, Appellants erroneously contend that BATA had the free choice to decide whether or not to implement the Toll Increase after voter approval. However, this sentence does not have the supreme import Appellants ascribe to it, somehow overriding the remainder of the text of SB 595 and the entire statutory scheme set forth in Chapter 4 of Division 17 of the California Streets and Highways Code. Rather, this sentence, when read in the context of Section 30923(f), simply reaffirms the Legislature's decision that the Toll Increase in SB 595 will not be effective, and BATA is not to implement it, absent voter approval of RM3. The first sentence of Section 30923(f) addresses the possibility that voters reject RM3, providing that if the voters were to have initially rejected the measure, BATA could determine to resubmit it at a subsequent election. (*See* Cal. Sts. & Hwy. Code, § 30923(f).) The sentence that follows, which Appellants rely on, simply states that, if the SB 595 condition

precedent is met at a subsequent time—voter approval *after* initial voter rejection—BATA has authority to (i.e., BATA "may") move forward and implement the Toll Increase the Legislature imposed and take other actions that may be necessary at that time to re-establish the Toll Increase's effective date and the completion dates for the reports and studies required by SB 595. Regardless, as 55% of voters approved RM3 at the initial election, the provisions in Section 30923(f) relating to rejection and subsequent approval are irrelevant here. (App. RJN, Ex. 2.)

Contrary to Appellants' unsupported contention that BATA was free to disregard the directives in SB 595, BATA cannot simply ignore legislative mandates. BATA was created by the Legislature and is required to comply with statutes enacted by the Legislature for BATA to follow. (Cal. Sts. & Hwy. Code, § 30950.) As noted above, SB 595 amended Section 30916 to add subdivision (c), which states that "[BATA] shall increase the base toll rate for vehicles crossing" the Bridges if the voters approve RM3. (*Id.* § 30916(c)(1) [emphasis added].) Nor could BATA choose whether or not to submit the Toll Increase to the voters, as Appellants suggest. (AOB, p. 21 ["It was up to BATA to place the proposed toll increase on the ballot . . ."].) SB 595 provides

exactly the contrary:

> (c)(1) Notwithstanding any provision of the Elections Code, the Board of Supervisors of the [Counties] shall call a special election to be conducted in the [Counties] that shall be consolidated with a statewide primary or general election, which shall be selected by [BATA].
>
> (2) [BATA] shall determine the ballot question, which shall include the amount of the proposed toll increase selected pursuant to subdivision (a) and a summary of the Regional Measure 3 expenditure plan. The ballot questions shall be submitted to the voters as Regional Measure 3 and stated separately in the ballot from state and local measures.
>
> (d) The ballot pamphlet for the special election shall include a summary of the Regional Measure 3 expenditure plan regarding the eligible projects and programs to be funded pursuant to Section 30914.7. [MTC] shall prepare a summary of the Regional Measure 3 expenditure plan.

(Cal. Sts. & Hwy. Code, §§ 30923(c), (d).) Similarly,

Section 30914.7(a) mandates how BATA must manage and direct Toll Increase revenues:

> If the voters approve a toll increase pursuant to Section 30923, [BATA] shall, consistent with the provisions of this section fund the projects and programs described in this subdivision that shall collectively be known as the Regional Measure 3 expenditure plan by bonding or transfers to [MTC].

(*Id.* § 30914.7(a).)

The plain terms of SB 595 demonstrate, clearly and overwhelmingly, that the Legislature imposed the Toll Increase

in SB 595 and directed BATA to take specific actions to implement it. Contrary to Appellants' contentions, and as the trial court correctly concluded, BATA did not impose, enact, propose or otherwise establish, the Toll Increase.

3. The Fact that the Toll Increase Was Submitted to the Voters Does Not "Prove" that BATA Imposed It.

Appellants erroneously assert that the RM3 election approving the Toll Increase "is proof that the Legislature did not impose [it]." (AOB, p. 25.) Again, Appellants mistakenly suggest that BATA itself chose to seek voter approval of the Toll Increase, contrary to the explicit terms of SB 595. Appellants state: "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." (*Id.*) As the provisions regarding the RM3 election demonstrate, Appellants argument is directly contradicted and refuted by SB 595. (*See* Cal. Sts. & Hwy. Code, §§ 30923 (c), (d) [quoted in prior discussion above].) BATA did not have the choice to "take[] no action" such that there "would have been no election." (AOB, p. 25.)

Put simply, the Toll Increase was submitted to voters in the Counties because the Legislature chose to obtain voter

confirmation of the Toll Increase and the Expenditure Plan prior to making them operative. To do so, the Legislature mandated that the Counties put RM3 on the ballot, that MTC prepare a summary of the Expenditure Plan, and that BATA prepare the ballot question and implement the Toll Increase (and fund the Expenditure Plan) if the voters approved. (Cal. Sts. & Hwy. Code, §§ 30923(c), (d).) Section 30923(b), enacted by SB 595, provides:

> The toll rate for vehicles crossing the bridges described in Section 30910 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 [Counties] to determine whether the residents of those [Counties] approve the toll increase.

(Cal. Sts. & Hwy. Code, § 30923(b).) In other words, the Legislature imposed the Toll Increase in SB 595, directed MTC, BATA and the Counties to take certain actions with regard to the Toll Increase, but chose to make it operative only upon voter approval—a decision entirely consistent with the Legislature's representative role. (*See* *Hobart v. Butte Cty. Supervisors* (1860) 17 Cal. 23, 31 [the Legislature is free to "provide that a law shall go into effect at one time or another; absolutely or on condition; upon certain terms or in a certain event, or without regard to

future events"].)

In *People ex rel. Graves v. McFadden*, the California Supreme Court grappled with the constitutionality of a voter approval requirement in the statute creating the county of Orange. ((1889) 81 Cal. 489, 491.) The Court emphasized that the statute at issue was "in its nature and effect an enabling act, and, as such, it was full and complete, as an act of legislation, when it received the approval of the governor." (*Id.* at p. 495.) It noted that even though the legislature undoubtedly had the power to create the new county without the need for voter approval, it was still free to refer to the decision of the voters—particularly since the burdens of the new law would be mainly borne by the people within the territory. (*Id.*) Here, like in *Graves*, the Legislature was empowered to enact and impose SB 595 without the consent of voters. It was also free, however, to defer to the will of those who would primarily bear the burdens of the new law; here, the voters of the Bay Area Counties.

The Legislature directed BATA, MTC, and the Counties to take specific actions to place RM3 on the ballot. (Cal. Sts. & Hwy. Code, §§ 30923(c), (d).) The Legislature could have instead chosen simply to increase the tolls and allocate funds to the

prescribed expenditures. In 2005, the Legislature did exactly that when it imposed a one-dollar seismic retrofit surcharge to the Bay Area bridge tolls. (*See id.* § 31010 [imposing $1 seismic surcharge without seeking voter approval].) Though not required to do so, the Legislature is certainly free to confirm public support for toll increases and related expenditures by causing a measure to be submitted to voters. The Legislature chose to do so in this case, but that decision does not "prove" that the Toll Increase was imposed by BATA or that it required two-thirds voter approval as if it were a local government special tax under article XIII C, section 1.

B. The Toll Increase is a Charge for Entrance to and Use of State Property, Which by Definition is Not a Tax Under Article XIII A, Section 3.

One of the express exemptions from the definition of "tax" in article XIII A, section 3, is a "charge imposed for entrance to or use of state property," previously referred to herein as the state property exception.[12] (Cal. Const., art. XIII A, § 3(b)(4).) The trial court correctly held that the Toll Increase is within the state

[12] As noted, the state property exception also exempts from the definition of "tax" a charge for "the purchase, rental or lease of state property."

property exception, and therefore, by definition, is not a "tax" under article XIII A, section 3. (1 AA 291.)

Appellants do not dispute that the state property exception applies to the Toll Increase, and rightly so. (*See generally* AOB, pp. 28-45 [arguing how the state property exception should be interpreted and applied, not whether it applies].) The Bridges BATA administers, and for which SB 595 imposed the Toll Increase, are owned by the state. (*See, e.g.*, Cal. Sts. & Hwy. Code, § 30910 [identifying the seven state-owned toll bridges]; *id.* § 30916(a) [establishing the "base toll rate" for "the state-owned toll bridges within the geographic boundaries of" MTC]; *id.* § 30923 [added by SB 595; Toll Increase for "the bridges described in Section 30910" – *i.e.*, the seven state-owned toll bridges].) BATA administers and manages the toll revenues derived from that state-owned property. (*Id.* § 30950.2.)

Tolls, including the Toll Increase, are charges imposed on vehicles crossing, *i.e.*, entering onto and traversing, the state-owned toll bridges. (*See, e.g.*, *id.* § 30916(a) ["The base toll rate for vehicles crossing the state-owned toll bridges. . .is…"]; *id.* § 30916(c)(1) ["If the voters approve a toll increase, . . . [BATA] shall increase the base toll rate for vehicles crossing the

bridges . . .”]; *id.* § 30923 [“For purposes of the special election to be conducted pursuant to this section, [BATA] shall select an amount of the proposed increase in the toll rate, not to exceed three dollars ($3), for vehicles crossing the bridges. . .”].) The Oxford Living Dictionary defines the verb ‘to cross’ as to “go or extend across or to the other side of (an area, stretch of water, etc.)[,]” and includes the example sentence, “[W]e crossed over the bridge.” (*See* “Cross,” Oxford Living Dictionary, https://en.oxforddictionaries.com/definition/cross (last visited Dec. 18, 2019).) And as common experience demonstrates, paying a toll permits the payor to cross, that is, to enter onto and use, a state-owned toll bridge. Thus, as the trial court concluded, the Toll Increase is a “charge imposed for entrance to or use of state property[,]” and therefore, by definition under article XIII A, section 3, the Toll Increase is not a “tax.”

C. The Burden Shifting Provisions Found in Article XIII A, Section 3(d), Do Not Establish Additional Substantive Requirements for the Toll Increase.

Having found that the Toll Increase falls squarely within the state property exception to the definition of “tax,” the trial court further concluded that the burden shifting provisions set

forth in section 3(d) of article XIII A cannot be interpreted to impose additional, substantive reasonableness requirements which the Toll Increase must satisfy. (1 AA 291.) As shown below, the trial court was correct, and to hold otherwise would not only contradict the plain language of article XIII A, section 3, but would also result in absurd and unworkable results and conflict with longstanding principles of statutory interpretation.

1. The Plain Language of Article XIII A, Sections 3(b) and 3(d), and Fundamental Principles of Statutory Interpretation, Demonstrate that the Reasonableness Burden Shifting Provisions Do Not Apply to the State Property Exception.

Proposition 26 amended article XIII A, section 3, adding a broad definition of "tax" that includes every charge the state could impose, subject only to five express exceptions, also established by Proposition 26. (Cal. Const., art. XIII A, § 3(b).) At the same time, Proposition 26 shifted the burden of proof to the state to demonstrate that a charge meets the applicable requirements of the relevant exception to the definition of "tax." (*Id.* art. XIII A, § 3(d).) Appellants argue, without sound basis, that this burden of proof shifting provision also imposes a substantive obligation on the state to prove that a charge does

not exceed the reasonable costs to the state in connection with the state property exception, *i.e.,* in connection with providing entrance to or use of state property, or the purchase, rental or lease of state property. (1 AA 252:1-4, 253:17-27.) As the trial court correctly found, however, the unambiguous language of article XIII A, as amended by Proposition 26, refutes this argument. (1 AA 291.) Nor could voters have intended such a result, given the absurd outcomes that necessarily follow from such an interpretation.

(a) The Plain Language of Article XIII A, as Amended by Proposition 26, Unambiguously Shows There is No Reasonableness Requirement in the State Property Exception.

The first tenet of statutory construction is that, where no ambiguity exists, the language of a statute must be given its plain meaning. (*See, e.g.*, Cal. Civ. Proc. Code, § 1858.) The same principle applies to construction of voter initiatives amending the constitution. (*See Schmeer, supra*, 213 Cal.App.4th at p. 1316 ["We construe provisions added to the state Constitution by a voter initiative by applying the same principles governing the construction of a statute."]; *Prof'l. Eng'rs in Cal. Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1037.) Here, the plain language of

article XIII A, section 3(b), as amended by Proposition 26, demonstrates unambiguously that the reasonableness requirements described in section 3(d) apply to the first three exceptions to the definition of "tax"—sections 3(b)(1), (2) and (3)—but do not apply to the state property exception, a "charge for entrance to or use of state property" (section 3(b)(4)), and thus, do not apply to the Toll Increase.

Proposition 26 defined "tax" for purposes of article XIII A, section 3(b), to include "any levy, charge, or exaction of any kind imposed by the State," except:

> (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 that charges governed by Section 1.5 of Article XI.
>
> (5) A fine, penalty, or other nonmonetary 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)(1)-(5).)

The first three exceptions to the definition of "tax" under article XIII A, section 3(b), all expressly impose a substantive reasonableness requirement, mandating that the charge imposed not exceed the reasonable costs to the State of providing the service or conferred the benefit in question. (Cal. Const., art. XIII A, § 3(b)(1) [charge imposed for specific benefit or privilege that is not provided to those not charged must not exceed the reasonable cost of providing the benefit or privilege]; *id.* § 3(b)(2) [charge imposed for specific government service or product that is not provided to those not charged must not exceed the reasonable costs of providing the service or product]; *id.* § 3(b)(3) [charge imposed for the reasonable regulatory costs incident to issuing licenses and permits, *etc.*].) In clear contrast, the remaining two, separate exceptions to the definition of "tax" in article XIII A, section 3(b)—the state property exception and an exception for penal fines imposed as a result of violations of law (the penal

fines exception)—contain no such reasonableness criteria. Rather, the reasonableness language found in the prior three exceptions is starkly absent. (*See* Cal. Const., art. XIII A, §§ 3(b)(4) & (5).) As the plain language demonstrates, the state property exception (3(b)(4)) and the penal fines exception (3(b)(5)), as enacted by the voters in Proposition 26, do not reference, much less impose, a substantive reasonableness requirement to qualify for the express categorical exception from the definition of a "tax."

Article XIII A, section 3(d), as amended by Proposition 26 further provides:

> (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.

(*Id.* art. XIII A, § 3(d).) Because they cannot find a reasonableness requirement in the substantive provisions of the state property exception, Appellants attempt to import one from this burden shifting language. This attempt fails. Instead, as the plain language of article XIII A, section 3(d), reflects, these

provisions address the burden of proof to be borne by the state in connection with the substantive requirements actually established in article XIII A, section 3(b).

First, in language directly parallel to the initial sentence of section 3(b), which defines a "tax," section 3(d) provides that the state rather than a challenger bears the burden of proof that a "levy, charge or other exaction" is "not a tax[:]"

> (b) As used in this section, "tax" means any levy, charge, or exaction of any kind imposed by the State, except the following…. [¶]
>
> (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….

(Cal. Const., art. XIII A, §§ 3(b), (d).) In operation, this aspect of section 3(d) applies to all five enumerated exceptions to shift the burden to the state to establish that a challenged "levy, charge or other exaction" satisfies the particular requirements stated in the applicable exception.

Second, echoing the phrasing of the substantive reasonableness requirements explicitly included in exceptions 3(b)(1), (2) and (3), but conspicuously omitted from exceptions 3(b)(4) and (5), section 3(d) provides that for the first three exceptions the state, rather than the plaintiff, bears the burden

of proof that the amount of any charge to the payor is no more than is "reasonable." (*Id.* art. XIII A, § 3(d).)

Were section 3(d) read to establish an independent, substantive reasonableness requirement in connection with each of the five exceptions set forth in section 3(b), it would render the language in sections 3(b)(1), (2) and (3)—mandating that the charge to the payor not exceed the "reasonable costs" of the benefit, service, product or regulatory activity—mere surplusage; a disfavored outcome of statutory interpretation and one that is neither necessary nor intuitive in this instance. (*See People v. Hudson* (2006) 38 Cal.4th 1002, 1010 ["As we have stressed in the past, interpretations that render statutory terms meaningless as surplusage are to be avoided."]; *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 828 ["'[I]t is surplusage.' Such a construction is, of course, to be avoided if possible…."] [quoting *Hudson*].)

Instead, the best reading of article XIII A, sections 3(b) and 3(d), is that article XIII A, section 3(b) establishes a "reasonableness" requirement in connection with three of five exceptions to the definition of "tax," and section 3(d) shifts the burden of proof to the state, both generally in connection with proving that the charge fits within an exception to the definition

of a "tax," and specifically with respect to proving the "reasonableness" of the charge for the three exceptions that expressly require such a demonstration by the state. Thus, under the plain language of sections 3(b) and 3(d), the reasonableness burden shifting provisions do not establish an additional "reasonableness" requirement for the state property exception. As a result, such reasonableness requirements do not apply to the Toll Increase. (1 AA 291-92.)

(b) Voters Intended to Approve the Plain Meaning of Article XIII A, Section 3, as Presented in Proposition 26.

If the language of a voter initiative is clear and unambiguous and a literal construction would not result in absurd consequences, the court must presume that the "voters intended the meaning on the face of the initiative and the plain meaning governs." (*Prof'l Eng'rs, supra*, 40 Cal.4th at p. 1037.) As voters would have clearly understood from a literal construction of the text of Proposition 26, the reasonableness criteria applied to charges imposed by the state only in connection with the first three exceptions to the definition of "tax," where the reasonableness requirement was explicitly

stated. (Cal. Const., art. XIII A, §§ 3(b)(1), (2) & (3).) Voters would have also clearly understood that such a showing was not required in connection with the two other exceptions, enacted simultaneously, in the same constitutional amendment and with parallel constructions, but without any reasonableness language. (*Id.* art. XIII A, §§ 3(b)(4) & (5).) Neither Appellants nor a court can properly read, nor assume voters intended to extend, a reasonableness requirement into the two exceptions to the definition of "tax" where such limiting language is expressly omitted. (*See Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543 ["Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language."].)

(c) Reading a Reasonableness Requirement into the State Property Exception Would Result in Absurd Consequences Not Intended by the Voters.

Courts should avoid any statutory construction that would produce absurd consequences. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245.)

An interpretation that "would lead to absurd results should be rejected . . . since absurd results are not supposed to have been contemplated by the legislature." (*Aggeler v. Dominguez* (1933) 217 Cal. 429, 434 [internal quotations omitted].)

The principle of avoiding absurdity in statutory construction further confirms that a reasonableness requirement cannot be read into the state property exception. If one reads section 3(d) to establish reasonableness requirements in connection with the state property exception, it follows logically and as a matter of consistency that such reasonableness requirements would also be applicable to the other exceptions in article XIII A, section b(4) and (5); namely, the exceptions for the sale, lease and rental of state property and the state's exercise of its police power in establishing penal fines for violations of law. For example, reading section 3(d) to establish an independent reasonableness requirement for fees to enter or use state property based on the costs to the state of such entrance or use, would also prohibit the state from enacting statutes that permit the sale or lease of its own property, except when such a sale or lease did not exceed the reasonable costs of such selling or leasing activity, as opposed to a sale or lease of state property at or even

above its fair market value. (Cal. Const., art. XIII A, § 3(b)(4) [exempting from definition of a "tax" a charge imposed for entrance to or use of state property, or "the purchase, rental, or lease of state property"].) Common sense and the principle of avoiding absurdities in constitutional construction each demonstrate that this cannot be the outcome voters intended when approving Proposition 26 or that voters understood the plain text of sections 3(b)(4) and 3(d) to require. (*See* *Amador Valley, supra*, 22 Cal.3d at p. 245 [courts should avoid absurd results in statutory interpretation]; *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616 [same].).

In the trial court, Appellants recognized the absurdity that would result from applying a substantive reasonableness requirement to the second part of the state property exception (purchase, rental or lease of state property), so they argued that the court should apply it only to the first half of the exception. (1 AA 253.) The trial court appropriately rejected that argument, and Appellants have not reasserted it here. Similarly, Appellants conceded in the trial court that it would result in an absurdity to apply the reasonableness burden shifting provisions from section 3(d) to the penal fines exception stated in section 3(b)(5).

(1 RA 15:21-23.) Appellants do not attempt to address the issue here, and for good reason—it would be absurd to interpret section 3(b)(5) to prohibit the State from enacting any new penal statutes resulting in a criminal offender paying a higher "fine, penalty, or other monetary charge [. . .] as a result of a violation of law," unless that statute was approved by a two-thirds vote of the Legislature or the amount of the fine, penalty or other monetary charge did not exceed the "reasonable costs" to the State of the unspecified "governmental activity." Nor is it reasonable to conclude that the voters who adopted Proposition 26 intended it to provide felons and other criminals a due-process-like right to challenge any fines or penalties imposed upon them as being in excess of the "reasonable costs" or bearing an unreasonable relationship to their burdens upon the state. (Cal. Const., art. XIII A, §3(b)(5).) But those are, in fact, the absurdities that necessarily result if the plain language of the state property and penal fines exceptions is disregarded to read the reasonableness burden shifting provisions in to those two exceptions.

The plain language of Proposition 26, and the incongruous results if read otherwise, confirm that only one interpretation of

article XIII A, section 3, is correct—that the reasonableness burden shifting provisions in section 3(d) do not establish an independent, substantive reasonableness requirement where the constitutional text has specifically omitted any such requirement. (*See Prof'l. Eng'rs, supra*, 40 Cal.4th at p. 1037 ["If the language is unambiguous and a literal construction would not result in absurd consequences, we presume that the voters intended the meaning on the face of the initiative and the plain meaning governs."].) The trial court correctly concluded that the reasonableness burden shifting provisions stated in section 3(d) do not apply to the Toll Increase.

2. Appellants' Proffered Interpretation on Appeal Is Also Refuted by the Unambiguous Language of the State Property Exception.

On appeal, Appellants abandoned their attempt to arbitrarily parse the state property exception into halves, but their interpretation proffered here fares no better. Appellants now focus on the first aspect of the section 3(d) burden shifting provision, contending that the state still bears the burden of proving that a charge is "not a tax" by showing that a charge fits within one of the enumerated exceptions. (AOB, pp. 43-44.)

Respondents do not disagree with that proposition, as far as it goes. However, Appellants' explanation of how that showing applies in the context of the state property exception finds no support from the actual language of the provision.

Appellants assert:

> 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 the "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, [. . ..] Plaintiffs do not use these rail, ferry, shipping, bicycle or pedestrial services when they drive across state-owned bridges. The 'governmental activity' that plaintiffs use is the provision, operation and maintenance of bridges.

(*Id.* [citing First Amended Complaint].) From this, Appellants contend that a factual question exists as to what the Toll Increase charge is "for" within the meaning of the state property exception, and that judgment on the pleadings was therefore improper. (*Id.* at p. 44.)

Appellants' argument runs contrary to the clear, common sense meaning of the state property exception. That exception excludes from the definition of "tax" any "charge imposed for

entrance to or use of state property, or the purchase, rental, or lease of state property . . . ." (Cal. Const., art. XIII A, § 3(b)(4).) Plainly, applied to the Toll Increase, this language means that the "charge" is being imposed on the payor "for" the physical act of crossing a state-owned bridge, just as a charge imposed for the purchase of state property would be for the purchase of that property, not what the state decided to do with the proceeds it received from the sale. Appellants attempt to twist this plain language, arguing that "charge imposed for" means that the revenue from the payment of Toll Increase must be used "for," *i.e.*, spent on, purposes that have a nexus to the use of a state-owned toll bridge, and not "for unrelated revenue purposes." (AOB, p. 43.) In addition to being contrary to the common sense reading of the state property exception, Appellants' argument is simply a recast version of their erroneous contention that the reasonableness criteria in section 3(d) apply to the state property exception.[13] The only "nexus" required under the state property

[13] Appellants also cite to a century of case law addressing the difference between a "fee" and a "tax" to assert that the Toll Increase is akin to a tax, not a fee, based on how the Toll Increase revenues are to be spent under SB 595. (AOB, pp. 33-35.) The case law and Appellants' arguments are irrelevant to these appeals. Proposition 26 eliminated the distinction between a

exception, and thus the Toll Increase, is that the payor of the Toll Increase is being charged in exchange for the physical action of "entrance to or use of" the state-owned toll bridges. Indisputably, that is what the Toll Increase is "for"—notwithstanding Appellants' attempt to contort the obvious meaning of the state property exception.

D. Appellants' View of Voter Intent in Enacting Proposition 26 is Both Irrelevant and Incorrect.

Appellants argue at length that Proposition 26 was enacted to close loopholes and impose strict limitations on the state and local governments' ability to impose charges without voter approval. In light of this purpose, Appellants argue that the trial court erroneously interpreted the state property exception and erred in applying it to uphold the Toll Increase. (AOB, pp. 36-44.) Appellants' discussion of what they contend the voters intended when enacting Proposition 26 cannot displace or overcome the clear language of the enacted provisions.

"fee" and a "tax" by explicitly defining every charge imposed by the State as a "tax" subject to five specific exceptions. Three of those exceptions incorporated the "reasonableness" or "nexus" concepts from the body of the "fee/tax" case law Appellants cite, and two of those exceptions did not. The language in article XIII A, section 3 enacted by Proposition 26 is what matters.

Appellants' reliance on voter intent is improper under the rules of statutory construction because the language and meaning of the state property exception established by Proposition 26 are unambiguous. (*See* *Lesher*, *supra*, 52 Cal.3d at p. 543 ["Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language."].) Moreover, for a legitimate ambiguity to exist there must be more than one reasonable interpretation of the provision at issue. Here, there is not. Appellants' proposed interpretation of the state property exception—that "imposed for" relates to how the revenues derived from the charge are spent—is not a reasonable interpretation. As discussed above, the state property exception means what the words say—that the charge is imposed in exchange for the right to enter onto or use state property, in this case, for the permission to cross a state-owned bridge.

Regardless, Appellants' beliefs about how voters must have intended Proposition 26 to operate, and the enumerated exceptions to the definition of "tax" in particular, contradict what voters would have understood based on a plain reading of

Proposition 26 and the effect of its amendments. Proposition 26 greatly expanded the definition of what constitutes a "tax" to include a charge, levy, or exaction of, literally, "any kind." (Cal. Const., art. XIII A, § 3(b); *id.* art. XIII C, § 3(e).) In doing so, Proposition 26 captured every charge the State and certain local governments could possibly impose and labelled it a "tax," which from that point on would need two-thirds majority approval in the applicable forum to be enacted. At the same time, however, per the plain language of Proposition 26, voters intended to exempt five specific, enumerated categories of state-imposed charges that, by definition, would not be deemed "taxes" and would not require a two-thirds majority vote to be lawfully enacted. (*Id.* art. XIII A, §§ 3(b)(1)-(5).) The language of Proposition 26 attached an explicit reasonableness requirement to three of those five exemptions, establishing a nexus between the revenues generated by the charge and the costs of the associated governmental activity, but did not include that same requirement in two of the exemptions, the state property exception and the penal fines exception. (*Id.*)

The distinction in section 3(b) between the first three and the last two exemptions is unmistakable, and there are clear

reasons why voters would have intended to endorse such a distinction. Given Proposition 26's unlimited expansion of the definition of state charges that would constitute a "tax" going forward, it is certainly understandable that voters would have intended to exempt transactions involving state-owned property and the imposition of criminal fines and penalties from any requirement to demonstrate "reasonable cost" relationships. Interpreted based on their plain language, those exemptions preserve the state's ability to enact policy with respect to the most basic and primary of it functions; namely, managing its property to serve the public interest and protecting its citizens by using the administration and enforcement of its police powers. In contrast, applying a "reasonableness" requirement to charges relating to state-owned property and penal fines results in gross absurdities, as described above, to the extent it is even possible to determine what reasonableness requirements might entail in such contexts.

In short, by almost boundlessly expanding the universe of state charges that would be deemed taxes, Proposition 26 did make it more difficult for the state to impose charges. But it did so while balancing the state's need for latitude to manage its own

property and discharge its police power in connection with criminal fines and penalties, which, based on the explicit language of those exceptions, voters clearly understood. This reading of voter intent readily comports with Proposition 26's general objective of making government charges harder to enact, as Appellants emphasize, while also being consistent with the unambiguous language enacted by Proposition 26, which manifestly did not attach a reasonableness requirement to the state property or penal fines exceptions to the definition of "tax." Thus, contrary to their criticism of the trial court (AOB, p. 37), it is Appellants that are asking this Court to frustrate the intent and will of the voters—both the voters who approved Proposition 26 and the voters who by majority registered their approval of the state's imposition of increased bridge tolls and the proposed expenditures of such revenues.

CONCLUSION

The trial court correctly concluded that the Toll Increase is lawful under article XIII A, section 3, of the California Constitution. The trial court's judgments should be affirmed.

Dated: December 19, 2019

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent, pursuant to Rule 8.204(c)(1) of the California Rules of Court, certifies that the foregoing is proportionally spaced and contains **12,986** words, as counted by the word count of the computer program used to prepare the brief.

Dated: December 19, 2019

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