C089466

CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

JOHN TOS *et al.*

Appellants

v.

STATE OF CALIFORNIA *et al.*

Respondents

Sacramento County Superior Court Case Number 34-2016-00204740
on appeal from the final judgment of Hon. Richard Sueyoshi
Additional judges: Hon. Michael P. Kenny, Hon Raymond M. Cadei

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Third **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number: C089466
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APPELLANT/PETITIONER: John Tos et al. RESPONDENT/REAL PARTY IN INTEREST: State of California et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Appellants John Tos et al.

2. a. ☑ 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: September 3, 2019

Stuart M. Flashman

(TYPE OR PRINT NAME)

▶ Stuart M. Flashman

(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION AND OUTLINE OF ARGUMENT

This appeal is about an issue that California courts firmly decided almost a hundred years ago. When the government puts a bond measure on the ballot for voter approval, it is making a promise to the voters: If the bond is approved, the money will be spent in accordance with the bond measure's provisions. Once the measure has been placed on the ballot and approved by the voters, the government can no longer unilaterally change the terms of its promise. (*O'Farrell v. County of Sonoma* (1922) 189 Cal. 343.)

Here, California voters approved a bond measure in 2008, but in 2016, the Legislature changed an important term. The Legislature thereby violated article XVI section 1 of the California Constitution.

In 2014, this Court decided *California High-Speed Rail Authority v. Superior Court ("CHSRA v. Sup. Ct.")* (2014) 228 Cal.App.4th 676. That case, which involved some of the same parties as this, concerned Respondent and Defendant California High-Speed Rail Authority's ("Authority") compliance with provisions of Proposition 1A ("Prop.1A" or "the Act"). Prop. 1A was a November 2008 ballot measure, drafted by the Legislature, to approve a general obligation bond act authorizing $9 billion towards the planning and construction of a high-speed rail system for the state. The Act placed many conditions on the Authority's use of those bond

proceeds; so much so that this Court, agreeing with the Respondents and Plaintiffs, stated that:

> …the voters clearly intended to place the Authority in a financial straitjacket by establishing a mandatory multistep process to ensure the financial viability of the project, … (*Id*. at p. 706).

In the end, this Court determined that, while the "preliminary" funding plan at issue in that case appeared to have glaring deficiencies (*Id.* at p. 709), that plan, once approved by the Legislature, was not subject to judicial review. Rather, it was intended for the benefit of the Legislature, which was the sole arbiter of its adequacy. (*Id*. at p. 715.)

However, the Court then went on to note that:

> The Authority now has a clear, present, and mandatory duty to include or certify to all the information required in subdivision (d) of section 2704.08 in its final funding plan and, together with the report of the independent financial consultant, *to provide the Director of the Department of Finance with the assurances the voters intended that the high-speed rail system can and will be completed as provided in the Bond Act*. (*Id*. at p. 713 [emphasis added].)

At this point, some five years later, the Authority has indeed issued, not just one, but three final funding plans[1] for three separate usable segments. Each of those funding plans has also been reviewed and

[1] Only two of those three funding plans are challenged in this action. The third final funding plan was not given final approval until well after this action was filed. However, because it also relied on AB 1889, its approval would, also be subject to challenge if AB 1889 were found unconstitutional. (See, 1 AA at p. 250 [SAP ¶ 21], 3 AA at p. 618 [FAA ¶ 21]; see also, 2 AA pp. 503-539 [draft Funding Plan for Rosecrans/Marquardt Grade Separation Incremental Capital Investment].)

approved by the Director of Finance, as called for in Streets & Highways Code Section 2704.08(d).[2]

There is a fly in the ointment, however. During the intervening period – in 2016 to be precise – the Legislature enacted Assembly Bill 1889. That bill purported to "clarify" the meaning of a crucial phrase in Section 2704.08(d) of the Act; a phrase establishing one of a number of conditions precedent for use of the bond funds for high-speed rail construction.

That condition related to the review of the final funding plan by an independent and impartial expert. The expert needed to report that the segment being proposed for construction could be completed in accordance with the final funding plan, and with the funding identified in that plan. The expert also had to report that the constructed segment would be "suitable and ready for high-speed train operation." (§ 2704.08(d)(2)(B).)

Appellants contend that, in enacting AB 1889, the Legislature did not merely "clarify" the meaning of that phrase; it fundamentally altered the phrase's meaning from what the voters had understood and relied upon in approving Prop. 1A. (Verified Second Amended Petition for Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief ["SAP"] ¶¶ 1, 3, 84, 85 – found at 1 Appellants' Appendix ["AA"] pp. 244,

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

245, 263[3].) Consequently, AB 1889 violated article XVI section 1 of the California Constitution by effecting a partial repeal of the Act. Specifically, AB 1889 essentially "erased" part of "the scheme or design that induced voter approval." (*Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 693.) Appellants therefore seek this Court's reversal of the trial court's judgment, which found, to the contrary, that AB 1889 was a valid legislative enactment.

Appellants ask that the Court find that AB 1889 is facially unconstitutional and remand the case to the trial court for further proceedings consistent with that determination.

STATEMENT OF FACTS AND OF THE CASE

I. AB 1889 AND THE AUTHORITY'S USE OF BOND ACT FUNDS FOR CONSTRUCTION.

Many of the basic facts underlying this case were reviewed in *CHSRA v. Sup. Ct., supra*, 228 Cal.App.4th at pp. 684-690. After the underlying trial court case for that appeal had been decided, construction of a high-speed rail segment began in 2015, but using only federal grant funds. (SAP, ¶ 39, 1 AA at p. 255; Respondents California High-Speed Rail Authority and State of California's Amended Answer to Second Amended

[3] Appellants have prepared an Appellants' Appendix in Lieu of Clerk's transcript in five volumes. References to the appendix will be in the form: n AA p. xxx when n is the volume number and xxx is the page number.

Petition for Peremptory Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("RAA"), ¶ 39, 3 AA at p. 620.)

During the 2016 session of the California Legislature, AB 1889 (Mullin[4]), an initially innocuous bill, was amended to add a new section to the Streets & Highways Code, Section 2704.78. An uncodified section of the bill explained that it:

> …clarifies that early investments in the Bookends and elsewhere along the system …, which will ultimately be used by high-speed rail trains, are consistent with the intent of the Legislature in appropriating funding *and is consistent with Proposition 1A.* (3 AA at p. 882 [emphasis added].)

The amended bill was enacted. (SAP ¶62, 1 AA at p. 259; RAA ¶ 62, 3 AA at p. 623.)

Subsection (a) of Section 2704.78 reads as follows:

> (a) For purposes of the funding plan required pursuant to subdivision (d) of Section 2704.08, a corridor or usable segment thereof is "suitable and ready for high-speed train operation" if the bond proceeds, as appropriated pursuant to Senate Bill 1029 of the 2011–12 Regular Session (Chapter 152 of the Statutes of 2012), are to be used for a capital cost for a project that would enable high-speed trains to operate immediately *or after additional planned investments are made on the corridor or useable segment thereof and passenger train service providers will benefit from the project in the near-term*. (3 AA at pp. 882-883 [emphasis added].)

[4] Assembly Member Mullin represented part of the area served by the Caltrain's San Francisco – San Jose segment. (Petitioners' Motion for Judicial Notice, ¶ 1.)

Following the passage of AB 1889, the Authority began work on two final funding plans pursuant to Section 2704.08(d). (SAP ¶ 63, 1 AA at p. 259; RAA ¶ 63, 3 AA at p. 623.) One of these was for a segment, denominated the "Central Valley Segment," extending from Madera at its northern end to Shafter at its southern end. (SAP ¶ 64, 65, 1 AA at p. 259; RAA ¶ 65, 3 AA at p. 623.) The other, denominated as the "San Francisco to San Jose Peninsula Corridor," extended from the Caltrain Station at 4th & King Streets in San Francisco to Diridon Station in San Jose.[5] (SAP ¶¶ 64, 70; RAA ¶¶ 64, 70.)

Not just by coincidence, both funding plans were given final approval by the Authority in early January of 2017, almost immediately after AB 1889 became effective. (SAP ¶ 72, 1 AA at p. 261; RAA ¶ 72, 3 AA at p. 623.)

II. THE TRIAL COURT PROCEEDINGS

Petitioners filed their initial Complaint for Declaratory and Injunctive Relief on December 13, 2016, the same date on which the Authority's Board of Directors gave final approval to both funding plans. (1 AA p. 1.) Petitioners filed their Verified First Amended Complaint for Declaratory and Injunctive Relief ("FAC") on January 31, 2017. (1 AA p. 33.) The Amended Complaint updated the Authority's actions to include

[5] That funding plan provided $600 million of high-speed rail bond funds towards the electrification of Caltrain's commuter rail line.

its final approval of both funding plans and their submission to the Director of Finance. (FAC ¶ 53, 1 AA at p. 44.)

The Defendants demurred to the entire FAC, arguing that the claims were unripe and the Authority's actions could only be challenged via a petition for writ of mandate. (1 AA 52-74.) In April 2017, Hon. Raymond Cadei heard the demurrer. He sustained it with leave to amend in regard to both ripeness and the need for decisions to be challenged through mandamus. (1 AA 232.)

Petitioners filed their SAP on May 25, 2017. (1 AA 243.) The SAP now included two claims in mandamus. One was directed at the Authority. The other was directed at the California Director of Finance. Both alleged improper approvals for noncompliant funding plans. The SAP also continued to include claims for declaratory and injunctive relief, amended to address the ripeness issue. Nevertheless, Respondent Authority again demurred to the injunctive relief claim (2 AA 386), while Respondent State of California demurred to the declaratory relief claim, asserting that it was not a proper defendant. (2 AA 372)

In February 2018, Hon. Richard Sueyoshi, who had been assigned for all purposes[6], heard the demurrers. (2 AA 572.) He overruled

[6] Initially, with the filing of the SAP, the case was reassigned for all purposes, first to Department 24, and then, based on the case's relationship to *Tos et al. v. California High Speed Rail Authority et al.* (Sacramento County Superior Court Case #34-2011-0113919), to Dept. 31, Hon.

Respondent State of California's demurrer to the First Cause of Action (Declaratory Relief). He sustained without leave to amend, however, the Authority's demurrer to the Second Cause of Action (Injunctive Relief under C.C.P. § 526a). (2 AA pp. 577-581.) Petitioners' concurrent motion to bifurcate was denied. (*Id.*)

Petitioners then sought judgment on the pleadings on the First Cause of Action. (3 AA pp. 631.) In October 2018, Judge Sueyoshi denied Petitioners' motion. (4 AA 1161 *et seq.*)

Judge Sueyoshi noted this Court's holding that, in approving Prop. 1A, the voters intended to place the Authority in a financial straitjacket by establishing a mandatory multistep process to ensure the financial viability of the project. (*Id*. at p. 1164.) However, he went on to find that because the Act did not explicitly define the phrase "suitable and ready for high-speed train operation," its meaning was subject to clarification by the Legislature. (*Id*. at p. 1169.) He ruled that the clarification made by AB 1889 was consistent with the Act's general understanding "that construction will occur piecemeal," and that AB 1889 was therefore a valid legislative enactment. (*Id*. at p. 1170.)

After contemplating Judge Sueyoshi's ruling, Petitioners eventually decided that it made no sense to continue litigating the case in the trial

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Michael P. Kenny presiding. (**2** AA 542-543.) Upon Judge Kenny's reassignment to other duties, the case was reassigned to Judge Sueyoshi.

court, as the ruling had essentially decided the case in favor of Respondents. Petitioners therefore approached Respondents about stipulating for entry of an appealable judgment in favor of Respondents, pursuant to *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 402. After some negotiation, a suitable stipulation was agreed upon (5 AA 1186), and judgment was entered in accordance with the stipulation on May 2, 2019. (5 AA 1209.) The following day, May 3, 2019, Petitioners filed their Notice of Appeal. (5 AA 1226.)

The appeal was initially stayed while this Court considered whether mediation was appropriate. On June 10, 2019, the Court determined that the case was not suitable for mediation and the stay of the appeal was lifted. (5 AA 1252.) Shortly thereafter, Appellants filed their Notice Designating Record on Appeal (5 AA 1254), opting to prepare an Appellant's Appendix in Lieu of Clerk's Transcript. Appellants followed up with an Amended Notice, designating a Reporter's Transcript for which three hearing transcripts would need to be compiled. (5 AA 1259.)

STANDARD OF REVIEW

The final judgment entered in this case was contingent on the propriety of the trial court's decision denying judgment on the pleadings on the First Cause of Action. That decision also found that AB 1889 was a valid legislative enactment. (Stipulation for Entry of Appealable Judgment in Favor of Respondents and Defendants, ¶ 7 of stipulation; 5 AA at p.

1189.) It effectively denied Petitioners' cause of action for declaratory relief based on AB 1889 being unconstitutional on its face.

More specifically, the SAP alleged that AB 1889, as enacted by the Legislature, violated article XVI section 1 of the California Constitution. It did so by effecting a partial repeal of the Act, and even more specifically, by "making substantial changes in the scheme or design which induced voter approval." (*Veterans of Foreign Wars, supra*, 36 Cal.App.3d at p. 693.)

The trial court's determination that AB 1889 was a valid legislative enactment and did not violate article XVI section 1 of the California Constitution was purely a question of law. (*See, e.g., Pryor v. Municipal Court* (1979) 25 Cal.3d 238 [determination of whether criminal statute was unconstitutionally vague was a question of law – to be determined based on the statute's language, its legislative history, and cases interpreting that language].) As such, the Court's review of the trial court decision is *de novo*, and no deference is given to the trial court's determination. (*See, Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 [facial validity of initiative affecting water rates, decided by motion for judgment on the pleadings, was purely a matter of law, and lower court determinations were not entitled to deference]).

Of course, the Legislature's power is plenary. Except where it would contravene a constitutional provision, the presumption is that the

Legislature's actions are proper. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548 [faced with alternative constructions of a statute, a construction finding it valid, if reasonable, should be chosen].) However, the Court may not, under the guise of construing a statute, change its meaning from that indicated by its plain language. "We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*People v. Leal* (2004) 33 Cal.4th 999, 1008.)

As to the threshold question of whether this appeal is properly before the Court, that also is also purely a question of law. In *Norgart, supra,* 21 Cal.4th at p. 402, the California Supreme Court defined an exception to the rule that a stipulated judgment is not appealable. This Court must independently determine whether, under the undisputed facts of this case, it meets that standard. (See, e.g., *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438 [nature of stipulated judgment demonstrated compliance with *Norgart*].)

ARGUMENT

I. AS A THRESHOLD PROCEDURAL ISSUE, THIS APPEAL SATISFIES THE EXCEPTION SET FORTH IN *NORGART V. UPJOHN CO.*

Ordinarily, a judgment entered by the stipulation or mutual consent of the parties is not appealable. (*See, Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 817.) The reasoning behind this "rule" is

that in consenting to entry of an adverse judgment, the aggrieved party has waived its right to appeal.

In *Norgart, supra*, however, the situation was somewhat different. There, whether plaintiff's case was timely filed or not depended on the interpretation of the "Discovery Rule," under which a cause of action does not accrue until the plaintiffs knew, or should have known, of its existence. Under one interpretation, the discovery had to do with the specific defendant's potential liability. Under the other, just a general knowledge that someone was liable triggered the statute of limitations for all defendants on all causes of action. In *Norgart*, the case was only timely if the defendant-specific liability interpretation applied.

On Defendant Upjohn's motion for summary judgment based on the statute of limitations, the trial court, using the defendant-specific interpretation of the discovery rule, denied the motion. As denial of summary judgment is not appealable, the case would ordinarily move forward towards trial. However, an appellate ruling adopting the contrary interpretation of the Discovery Rule had just been issued. (*Norgart, supra*, 21 Cal.4th at pp. 393-394,)

Plaintiffs realized that if the trial court's decision were reversed on appeal, any efforts to try the case would have been wasted. Consequently, they proposed, and Upjohn agreed, that the parties stipulate to granting Upjohn's summary judgment motion and entering a final judgment in

Upjohn's favor. That allowed the issue to be taken up on appeal and definitively decided prior to plaintiffs seeking a trial on the merits. If the appeal went in Upjohn's favor, the case would be over. If it went in favor of the plaintiffs, the case would return to the trial court for trial.

The case reached the California Supreme Court, and that court held that the situation was an exception to the rule that a "consent judgment" was not appealable. Specifically, the court held that, "Although a consent ... judgment is not normally appealable, an exception is recognized when 'consent was merely given to facilitate an appeal following adverse determination of a critical issue.'" (*Norgart, supra*, 21 Cal.4th at p. 400 [quoting from *Connolly v. County of Orange* (1992) 1 Cal.4th 1105, 1111].) That exception has subsequently become generally accepted, and it applies under the circumstances of this case.

As explained earlier, this case challenges approvals for final funding plans for two "usable segments" of the Authority's proposed high-speed rail system. Appellants alleged that the approvals relied on AB 1889 to find that, if constructed as proposed under the funding plans, the segments would be "suitable and ready for high-speed train operation." (SAP ¶¶ 97, 99, 110, 113, 120, 1 AA at pp. 264, 266, 267.) Given the flexibility provided to the Authority by AB 1889 and the facts of the case, there can be no question that, if AB 1889 is valid, both segments would indeed be

found "suitable and ready for high-speed rail operation."[7] That would be true even if, as a practical matter, neither segment would truly be either "suitable" or "ready" for high-speed train operation when construction was complete. Nor would they become so until such time [if ever] as additional major capital improvements were made.

Once the trial court held that AB 1889 was a valid legislative enactment, the die had been cast. Continuing to prosecute challenges to the approved funding plans would be "wasteful of trial court time to require the plaintiff to undergo a probably unsuccessful ... trial merely to obtain an appealable judgment." (*Building Industry Assn., supra,* 41 Cal.3d at p. 817.) For this reason, the Court should find that here, as in *Norgart* and *Building Industry Assn.*, the stipulated judgment is properly appealable.

II. AB 1889 IS UNCONSTITUTIONAL ON ITS FACE IN VIOLATING ARTICLE XVI SECTION 1 OF THE CALIFORNIA CONSTITUTION.

A. THE STANDARD FOR CONSTITUTIONALITY UNDER ARTICLE XVI SECTION 1 OF THE CALIFORNIA CONSTITUTION.

As relevant, article XVI, section 1 of the California Constitution reads as follows:

> The Legislature shall not, in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or

[7] i.e., both funding plans provided for short-term improvements to an existing [conventional] passenger rail service in a segment that might eventually be used in the high-speed rail system.

> liabilities, exceed the sum of three hundred thousand dollars ($300,000), … …, unless the same shall be authorized by law for some single object or work to be distinctly specified therein which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within 50 years of the time of the contracting thereof, *and shall be irrepealable until the principal and interest thereon shall be paid and discharged*, …; but no such law shall take effect unless it has been passed by a two-thirds vote of all the members elected to each house of the Legislature and until, at a general election or at a direct primary, it shall have been submitted to the people and shall have received a majority of all the votes cast for and against it at such election; and all moneys raised by authority of such law shall be applied only to the specific object therein stated or to the payment of the debt thereby created. … [emphasis added]

The cases interpreting and applying this provision make clear that once the voters have been presented with and approved such a bond measure; the Legislature may not make "substantial changes in the scheme or design which induced voter approval." (*Veterans of Foreign Wars, supra*, 36 Cal.App.3rd at p. 693; *accord, CHSRA v. Sup. Ct., supra*, 228 Cal.App.4th 701.) The reason for this is that any such change would constitute a partial repeal of the bond measure. (*Id.*) This principle was perhaps most clearly stated in *O'Farrell v. County of Sonoma* (1922) 189 Cal. 343:

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

> Sebastopol to Freestone, four miles, designating the point of beginning and the point of the ending, any question of discretion as to division or subdivision into sections was, as to these elements, exercised once and for all *and as a finality*. (*Id.* at p. 347 [Emphasis added].)

In other words, once the Legislature has approved the final bond measure language, has placed it on the ballot, and has had it approved by the voters, the Legislature's ability to make any further change to "the scheme or design which induced voter approval" is terminated. The voters must ratify any subsequent substantial change to that scheme or design. That is what the Constitution requires.

B. AB 1889 SUBSTANTIALLY CHANGED THE SCHEME OR DESIGN THAT THE LEGISLATURE PLACED BEFORE THE VOTERS IN PROP. 1A.

How does the Legislature's action in approving AB 1889 stack up against the requirements of article XVI section 1? Was the Legislature, as it asserted, merely clarifying an ambiguity in the Act, or was it engaged in an unconstitutional post-election modification of the Act? To answer that question, we need to first understand what Prop. 1A did.

1. **Prop. 1A created a mandatory, multistep scheme intended to protect the voters' expectations and their pocketbooks.**

The Act, as approved by the voters in 2008, was far from a standard bond measure. A more usual measure would be the bond that was at issue in *East Bay Municipal Utility Dist. v. Sindelar* (1971) 16 Cal.App.3d 910. There, in 1958 the voters had approved bonds authorizing a "water

Development Project for the East Bay Area." However, the measure itself only described the project's components in the most general terms, including "an additional source of water" and construction of "appropriate aqueducts and water transmission facilities" along with "appurtenant facilities" that would "provide an adequate and comprehensive water system." (*Id.* at p. 919.)

Nowhere did the actual ballot language call for a "10-year program." Nor did the measure specify any deadline for sale of bonds or use of the proceeds. (*Id*.) While it is true that other materials distributed during the election campaign did assert further restrictions, those materials were not part of what the voters approved. (*Id*.) The court concluded that under these circumstances, the District's request to issue further bonds beyond the ten-year period was proper. (See also, *Clark v. Los Angeles* (1911) 160 Cal. 317, 320 ["the details of the proposed work or improvement need not be given at length in the ballot"].)

a. The "scheme" proposed in Prop. 1A contained mandatory preconditions on the appropriation and expenditure of bond funds intended to restrict the Authority's use of the funds.

Prop 1A, in contrast to a typical bond measure, explicitly placed numerous conditions on the Authority's use of bond funds. These conditions would need to be met before bond proceeds could be appropriated or expended for high-speed rail construction. (§ 2704.08

subsections (c) and (d).) The measure also included substantive requirements specifying characteristics that the project would need to meet. (§ 2704.09.)

What was purpose behind Prop. 1A's many conditions? While the Act authorized issuance of $9 billion of bond funds for high-speed rail construction, both the Legislature that drafted Prop. 1A and the voters who approved it understood that the high-speed rail system would cost far more than that. (See, Legislative Analyst's analysis of Prop. 1A, **3** AA at p. 766 [Authority estimated system's construction cost, as of 2006, as $45 billion].)

In his May 2008 budget revision, then-Governor Schwarzenegger expressed his concern to the Legislature about having the ballot measure placed before the voters during a time when the state was under great financial stress and the state's deficits were increasing (3 AA at p. 709). He pointed out that while the measure needed to be flexible enough to attract outside investment, it also needed to provide assurance to the voters that, "expenditure of the bond funds will result in operational high-speed rail services …" (3 AA p. 712.) Otherwise, there was a risk that chary voters would reject the measure (which the Governor supported).

To that end, he announced that his administration would be proposing amendments to the bond act to do two things: 1) limit how much bond money could be devoted to planning and preliminary engineering.

This would preserve the bulk of the funds for actual construction; and 2) ensure that before bond funds were spent on construction or equipment, there would be a funding plan "that provides assurances [to the voters] that all funding needed *to provide service* on that portion of the system is secured." (3 AA at p. 712 [emphasis added].)

The Legislature, and specifically the Senate Transportation Committee, took the Governor's proposals to heart, and amended the bond measure to create a scheme for incremental construction of the system out of operational building blocks, which it defined as "usable segments" and "corridors." (§ 2704.01 (f) and (g) [definitions of terms used].) The Legislature further provided that these segments would be delineated through not just one, but two successive funding plans. The funding plans implemented the Governor's desire to assure voters that there would be sufficient funds available to construct the full segments, and that the segments would be capable of "providing service on that portion of the system… ." In this way, the Legislature put forward to the voters "a mandatory multistep process to ensure the financial viability of the project." (*CHSRA v. Sup. Ct.*, *supra*, 228 Cal.App.4th at p. 706.)

The "guts" of the scheme drafted by the Legislature were contained in Section 2704.08, and specifically subsections (c) and (d), which laid out the many conditions that would need to be met before bond funds could be spent on construction.

i. § 2704.08(c) established conditions to be met prior to a legislative appropriation.

As this Court discussed at length in *CHSRA v. Sup.Ct., supra,* subsection (c) defined conditions to be met prior to the Legislature appropriating funds for construction. Those conditions required the Authority to explain what the segment would be, how much it would cost, as well as its projected ridership and revenue. The Authority was also required to certify (i.e., express its honest belief) that it had met, or would meet, six requirements: 1) that it would have sufficient funds to build the segment; 2) that the environmental review of the segment had been successfully completed; 3) that construction of the segment could be completed; 4) that, when completed, the segment would be suitable and ready for high-speed rail operation; 5) that the segment would be used by one or more passenger service providers; 6) and that service on the segment by the Authority, or under its authority, would not require an operating subsidy. Certification of these requirements would reassure the Legislature, and the voters, that no impediments stood in the way of successfully constructing the segment. However, this Court also noted that the Legislature alone was the arbiter of the adequacy of the Authority's compliance with that subsection. (*Id.* at pp. 714-715.)

ii. § 2704.08(d) established conditions that needed to be met before the appropriated funds could actually be expended.

Subsection (d), however, was a different matter. While some of its requirements echo those of subsection (c), the requirements in this subsection needed to be met preparatory to and as conditions precedent for a final administrative decision allowing expenditure of bond funds, rather than for their appropriation. As the Legislature was certainly well aware, that made them subject to judicial review.

What were the requirements under subsection (d)? [8] First and foremost, there must be a detailed final funding plan, which must describe the corridor or usable segment being proposed for construction, its full cost for construction, and any changes to what was being proposed since the approval of the preliminary funding plan under subsection (c). The funding plan must also identify the sources of all funds to be used for construction, with their expected time of receipt, including commitments, authorizations, or other assurances of those funds' availability. There must also be a ridership and operating revenue report, construction cost projections, and the terms and conditions for any agreements involved in the construction or operation of the segment.

In addition, and as this Court noted, of particular significance (*CHSRA v. Sup. Ct., supra*, 228 Cal.App.4th at p. 710), there must also be

[8] The full text of § 2704.08(d) is appended to this brief as attachment A.

prepared and submitted to the Director of Finance one or more independent expert report(s) evaluating the final funding plan; not mere certifications by the Authority. The expert report(s) must verify that the funding plan met four requirements: 1) the corridor/segment could be completed as proposed in the final funding plan; 2) if so completed, "the corridor or usable segment thereof would be suitable and ready for high-speed train operation;" 3) "upon completion, one or more passenger service providers can begin using the tracks or stations for passenger train service," and 4) "the planned passenger train service to be provided by the authority, or pursuant to its authority, will not require operating subsidy." The report(s) must also include an assessment of the risks involved in proceeding with the construction, along with strategies for mitigating those risks.

The report(s) would be an expert, technical analysis of the adequacy of the funding plan, as all the information evaluated in the reports(s) would need to come from the final funding plan, including its associated reports. As with the need for a Final EIR to meet CEQA's requirements, only if the two sets of reports – the funding plan and the independent consultant's report(s) – met the requirements of Section 2704.08(d) was the Director of Finance authorized to consider giving a final approval.

iii. The factual findings required in the consultant's report were the "straps" on the Act's financial straitjacket.

The consultant report's evaluations, along with the supporting information in the final funding plan, were crucial restraining straps in the Act's financial straitjacket – the scheme designed by the Legislature and approved by the voters that "ensured the financial viability of the project." (*CHSRA v. Sup. Ct.*, *supra*, 228 Cal.App.4th at p. 706.)

They did this by requiring that the consultant confirm that: 1) there be sufficient funds available to complete the corridor or segment's construction – i.e., there would be minimal risk of the Authority running out of funds, leaving an inoperable, partially-completed segment; 2) the completed corridor would be "suitable and ready for high-speed train operation;" – i.e., the segment could function as a high-speed rail route; 3) at least a portion of the corridor/segment would be used for passenger train service – i.e., this would be a useful segment, not a boondoggle; and 4) any passenger train service provided by the Authority, or under its authority, would not require an operating subsidy – i.e., high-speed rail service, when provided, would not be a money-loser, a continuous drain on the voters' pocketbooks.

In essence, these requirements implemented the scheme first proposed by the Governor. The scheme assured voters that if they approved the bond measure the resulting construction would not be, as the

real parties in *CHSRA v. Sup. Ct., supra,* had termed it, "a boondoggle or … stranded [i.e., inoperable] segment of the rail system." (*Id.* at 228 Cal.App.4th p. 709.) Nor would it result in high-speed rail service that placed a continuing burden on California taxpayers. Obviously, the Legislature's hope in adding these provisions was that they would tip the scales so voters would approve the measure.

iv. Like a Final EIR under CEQA, the provisions of § 2704.08(d) ensured that decisions on expending bond funds for construction would be fully informed.

In *CHSRA v. Sup. Ct., supra,* this Court made the analogy between the process involved in Section 2704.08(c) and (d) and the environmental review of a project under the California Environmental Quality Act ("CEQA"). It is a good analogy. The preliminary funding plan required under Subsection (c), like the water supply assessment discussed in *CHSRA v. Sup. Ct.*, was not a final determination, but only an interlocutory and preliminary step in the process leading to a final decision on the expenditure of funds. (*Id*. at 228 Cal.App.4th pp. 712-713.)

The requirements in subsection (d), by contrast, involve the final funding plan, which, along with an independent consultant's analysis of the plan, are to be reviewed by the Director of Finance and used to justify a final determination on approving the bond funds' expenditure. Thus the final funding plan and accompanying consultant's report, like a Final EIR

under CEQA, provide the information needed for an informed final agency decision. (*CHSRA v. Sup. Ct., supra*, 228 Cal.App.4th at p. 713.) As with an agency's decision based on a certified Final EIR under CEQA, that decision *would* be subject to judicial review. (*Id.* [Director of Finance's decision is a final determination subject to mandamus review].)

v. Together, the provisions of § 2704.08(c) and (d) provided voters with assurances that bond funds would not be squandered.

The combination of assurances in subsections (c) and (d) were a major part of the scheme, drafted by the Legislature, that it hoped would convince skeptical voters to approve the measure.[9] The provisions showed voters that no project would be funded or constructed under this high-stakes bond measure unless it would result in a complete corridor or usable segment that would be suitable and ready for high-speed train operation. Further, the requirements were intended to assure voters that the constructed segment would actually be put to productive use, and without becoming an ongoing drain on the public's pocketbook.

[9] That scheme also included, in addition to the substantive requirements of § 2704.09, the following: 1) promising a system linking Southern California, Central Valley cities, and the Bay Area (§ 2704.04(a)), 2) requiring matching state, federal, local, and/or private funding for all construction (§§ 2704.07, 2704.08(a)), 3) prohibiting the use of bond funds to operate or maintain the system (§ 2704.04(d)) and 4) providing limited funds to improve connecting conventional rail service (§ 2704.095). None of these other elements are at issue here.

Thus, the provisions of Section 2704.08(d), along with the substantive requirements of Section 2704.09, are central elements of the "scheme or design that induced voter approval," no less so than was the detailed description of the four-mile road between Sebastopol and Freestone in *O'Farrell* or of the revolving loan fund established to finance veterans' home mortgages in *Veterans of Foreign Wars*; and like those provisions, the provisions of the Act were enforceable through court action.

b. The promise in § 2704.08(d) that any segment to be constructed would be "suitable and ready for high-speed train operation" is a key requirement whose meaning needs no clarification.

In AB 1889, the 2016 Legislature took aim at a key restrictive term in the Act – one of the "straps" in the financial straitjacket fashioned by the 2008 Legislature and approved by the voters. Those requirements had prevented the Authority from using the bond funds for construction. There simply weren't enough funds available to complete a working high-speed rail segment. The requirement that was the focus of AB 1889 – that any segment intended for construction must, when completed under its funding plan, be suitable and ready for high-speed train operation – implemented the Governor's and Legislature's promise to voters that their tax dollars would be building <u>working</u> pieces of a high-speed rail system. Nothing less. The voters were, after all, approving bonds for "safe, reliable high-

speed rail," not for incremental improvements to existing conventional passenger rail service.

Appellants contend that the meaning of this phrase was abundantly clear. "Clarification" of its meaning by the 2016 Legislature was neither necessary nor allowable. (See, e.g., *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735-737.)

i. The meaning of "suitable and ready for high-speed train operation" is evident from the plain language in the statute.

In determining the meaning of the phrase "clarified" by AB 1889, the Court must start with the plain language of the measure. (*National Asian American Coalition v. Newsom* (2019) 33 Cal.App.5th 993, 1011.)

> To determine legislative intent, a court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent. If it is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it. If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036,1047 [citations omitted].)

The clause at issue can be parsed into two portions: the completed segment must be *suitable* for high-speed train operation, and it must also be *ready* for high-speed train operation.

"Suitable", according to the dictionary definition[10], means "appropriate to a given purpose."[11] That purpose, here, is high-speed train operation. To be appropriate, the segment must have a track structure, slope limits, curvature limits, power supply, signaling equipment, etc. appropriate to allow a high-speed train to operate safely and reliably.[12] If any of these necessary elements are missing, the segment is not suitable.

"Ready," again by the primary dictionary definition, means "prepared or available for service or action." Here, that would mean prepared or available to run high-speed trains. Thus, even if the *design* of the system were suitable for high-speed train operation, if some part of the design had not yet been implemented – e.g., the signaling system had not been installed or properly tested and certified, the segment would still not be prepared or available, and hence not ready for high-speed train operation.

ii. The phrase's meaning is unchanged when viewed in context.

The phrase must also be understood in the context of the totality of the subsection, the entirety of section 2704.08, and the overall structure of the Act. (*People v. Valencia* (2017) 3 Cal.5th 347, 356.) In particular,

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[10] *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122 ["When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word."].

[11] Webster's II New College Dictionary, 1995 ed.

[12] After all, the very title of the bond measure is the "*Safe, Reliable* High-Speed Passenger Train Bond Act For The 21st Century" [emphasis added].

Subsections (c) and (d) of § 2704.08 set a series of preconditions to be met not just once, but twice. Subsection (c) laid out requirements to be met before the Legislature could appropriate bond funds towards construction of a corridor or segment. Subsection (d) mandated what preconditions must be met in order for appropriated funds to actually be spent on construction of a corridor or usable segment.

The phrase used fits neatly into the two-part structure of subsections (c) and (d). As explained earlier (see pp. 25-32, *supra*) the two subsections created a scheme designed to ensure *productive* use of the bond's construction funding. In that context, the specific phrase, which was prominently featured in both subsections, ensured the finished segment's utility *for high-speed rail*, and its confirmation by the independent expert implemented the "oversight and accountability" touted in the Legislative Analyst's analysis of the measure. (Appellants' Motion for Judicial Notice, ¶ 2.a, 3 AA at p. 766.)

iii. The plain meaning of the phrase makes sense in the overall statutory scheme.

As was explained in *CHSRA v. Sup. Ct.*, *supra*, the requirements of subsection (c) were aimed at informing the Legislature in its deliberations over whether to approve an appropriation. It was up to the Legislature to decide whether an appropriation was merited, and so long as the appropriation was consistent with the Act's purposes and other

constitutional requirements, the Legislature had free rein to accept or reject a funding plan.

The requirements in subsection (d), while similar on their face, had a different purpose. They were intended to assure that the *expenditure* of the funds complied with the Act's requirements. Unlike an appropriation, which is a legislative act, approval of the final funding plan, both by the Authority and by the Director of Finance, would be final administrative acts, and thus could be challenged via mandamus if the Act's mandatory provisions were not being properly followed.

In the context of both § 2704.08(c) and (d), and of the Act's overall structure, the phrase "suitable and ready for high-speed rail operation" set a measurable and mandatory metric or standard for determining whether a corridor or segment being proposed for funding met the Act's requirement of producing a usable high-speed rail segment that could serve as a foundational building block for the entire high-speed rail system. In short, it was a key component of the scheme that induced voter approval.

iv. Even if, arguendo, the phrase's meaning was ambiguous, the structure of the Act and its legislative history demonstrate that the intent of the Legislature, and of the voters is consistent with the phrase's plain meaning.

Respondents argued, and the trial court agreed, that in spite of the apparent clarity of the plain language, the fact that "suitable and ready for

high-speed train operation" was not specifically defined in the Act, and the incremental nature of the project being constructed made the provision ambiguous and subject to statutory construction. (5 AA at p. 1221.)

Appellants disagree. Statutory definitions may be necessary if a precise legal meaning is intended that is different from what a voter's common understanding would be. For example, a "corridor" as defined in Section 2704.01 (f) of the Act is different from a corridor as a voter might think of it in the context of an office-building corridor. But there is nothing in the Act to indicate that "suitable" and "ready" mean anything other than their standard dictionary definitions. (See, e.g., *Citizens for Improved Sorrento Access, Inc. v. City of San Diego* (2004) 118 Cal.App.4th 808, 815-816 [in the absence of a statutory definition or evidence supporting another meaning, the common dictionary definition is presumed to apply].)

Even, arguendo, if one were to grant an ambiguity, however, the ambiguity may be resolved by resort to the overall statutory scheme, as well as the legislative history of the statute. (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 250.) Both support the meaning provided by the plain language of the statute.

a) The structure of the Act supports Appellants' interpretation of the phrase.

Respondents, and the trial court, relied upon the incremental nature of construction under the Act to create an ambiguity. It does not. As has

already been explained, the statutory scheme of the Act fits with the plain meaning of "suitable and ready for high-speed train operation."

The underlying purpose of the Act was to provide money to build a full high-speed rail system. True, it called for constructing the system incrementally, but in units of a "corridor" or "usable segment." Each corridor or usable segment had to be capable of serving as a self-sufficient unit of passenger transportation. Requiring that each corridor or usable segment be built such that it could be used for high-speed train operation helped implement the Act's purpose. Thus the overall structure of the Act is totally consistent with the plain meaning of the phrase.

If this were not sufficient justification for using the plain meaning of the words, the Legislative history of the Act, as drafted by the Legislature in 2008, further bolsters that meaning.

b). Legislative history further confirms Appellants' interpretation of the phrase in § 2704.08(d).

i) Legislative history can be consulted to construe the meaning of a bond measure.

Respondents insist that only materials actually placed before the voters can be used to determine the voters' intent, but the cases say otherwise. Respondents argue that the legislative history of a ballot measure is irrelevant to the voters' intent, because it was not before them when they viewed the ballot materials. (4 AA at p. 955:2-3.) However, it

has long been held that when a measure is placed on the ballot for voter approval, the intent of the drafters as well as the electorate can be considered. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 700 fn.7; *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495 [as applied to constitutional amendment]; *People v. Hazelton* (1996) 14 Cal.4th 101, 123 [as applied to initiative measure].) That principle should apply equally to a bond measure. For measures placed on the ballot, as for other legislation, the intent of the drafters may be gleaned from the measure's legislative history. (*People v. Cole* (2006) 38 Cal.4th 964, 975.) Unlike an initiative, where ordinarily ballot arguments are the only available "legislative history" (*White v. Davis* (1975) 13 Cal.3d 757, 775), for a bond measure, where the drafter was the Legislature, there is abundant legislative history.[13]

ii) The legislative history of AB 3034 confirms the meaning of the phrase.

When originally introduced, AB 3034, the bill containing Prop. 1A, differed little from a standard bond act, and gave the Authority wide discretion in how to use the bond funds, requiring only that, "…the Authority shall have a detailed funding plan for that segment that identifies

[13] In the trial court, Respondents argued that the legislative history is irrelevant as it was not available to the voters. (4 AA at p. 955.) But, as the trial court noted, legislative history of a ballot measure includes "contemporaneous construction of the Legislature." (4 AA at p. 1166.) Further, just as legislators are presumed to have knowledge of committee reports and other legislative materials, so also now, through the internet, voters have ready access to those same legislative materials.

the full cost of constructing the segment and the sources of all revenues needed to complete construction of the segment." (§ 2704.08(c); see, Appellants' Motion for Judicial Notice, ¶ 2.b and 3 AA pp. 697 – 702.)

When the bill reached the Senate Transportation Committee, however, it was extensively amended. (Appellants' Motion for Judicial Notice, ¶ 2.c and 3 AA pp. 713-736.) Perhaps the most significant amendments were the extensive changes made to § 2704.08. Subsection (c) was greatly expanded. Now, not only did the amended version require the Authority to prepare a funding plan that identified both the full cost of the section to be built and the sources of revenue to fund the construction, the amended version added numerous items that the authority needed to certify to the Legislature in the funding plan, including that when completed in accordance with the plan, it would be suitable and ready for high-speed train operation. (*Id.* at p. 723: 12-13.)

Even more important than those changes was the addition of subsection (d), which required a second, even more detailed funding plan before funds appropriated for construction of the segment could be spent. (*Id.*) Subsection (d) went beyond an Authority certification. It required that one or more impartial experts review the plan and prepare report(s). The report(s) must, if the project was to move forward, indicate that all requirements had been met, including specifically that, when completed according to the plan, the segment would be suitable and ready for high-

speed train operation. (*Id.* at p. 724:7-9; see also, AA 3 at pp. 740, 742 [Senate Transportation Committee Report on AB 3034, identifying Committee's addition of definition of "segment" and requirement for final funding plan with associated expert's report, showing that segment "would be ready for high-speed service"].)

Finally, the amendments added two new definitions to § 2704.01 – corridor and segment.[14] The definitions identified that what needed to be built under § 2704.08 was either the entirety of one of the corridors identified in § 2704.04(b)(2) and (3), or at the least, a segment of one of the corridors containing at least two stations – i.e., capable of picking up passengers at one station and discharging them at the other (hence the term usable segment). Taken together, these amendments were clearly intended, as the real parties asserted in *CHSRA v. Sup. Ct., supra*, to establish a "financial straitjacket" and prevent the Authority from wasting bond funds by building "a boondoggle or … stranded segment" – e.g., incomplete construction – that would not result in a usable high-speed train segment. As this Court noted in that opinion, "there is merit to many of the Tos real parties' arguments." (*CHSRA v. Sup. Ct., supra*, 228 Cal.App.4th at p. 709.)

[14] This definition was later refined to define a "*usable* segment."

2. AB 1889 materially altered the scheme or design that induced voter approval.

AB 1889 asserted that the 2016 Legislature was "clarifying" the meaning of a portion of Section 2704.08(d) – eight years after it was drafted by the 2008 Legislature and approved by the voters.[15] Was AB 1889 a clarification, or was it an attempt to modify the design of that subsection, and of the Act, as it was understood and approved by the voters, in violation of article XV1 section 1?

In the trial court, Respondents argued that the Act's purpose was *initiating* the construction of a high-speed rail system. They implied that because the system would be constructed "piecemeal," and the Act allowed constructed segments to also be used by conventional rail passenger lines, the voters did not expect construction of functional high-speed rail segments. (4 AA at pp. 946-949.)[16] They claimed that because AB 1889 still allowed the Director of Finance to approve construction of a segment that would truly be suitable and ready for high-speed train operations, it may have broadened, but did not change the voters' intent. By focusing on what they claimed was the overall aim of the Act, and ignoring its specific

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[15] But see, *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 470, 473 [while Legislature may modify an existing law, it is for the courts, not the Legislature, to interpret existing laws]; see also, *National Asian American Coalition, supra,* 33 Cal.App.5th at p. 1012 [citing *McClung*].)

[16] Respondents also asserted that Appellants had conceded that AB 1889 did not violate the "single object specified" provision of article XVI section 1. (4 AA at p. 942:17-19.) Appellants made no such concession.

requirements, Respondents conveniently downplayed the importance of the mandatory preconditions in Section 2704.08(d).

Despite Appellants' vigorous objections, the trial court accepted Respondents' argument. It reasoned that piecemeal construction of the system was consistent with AB 1889 loosening the strictures of Section 2704.08(d) to allow bond funds' use to provide short-term improvements benefiting a conventional rail passenger carrier, so long as the long-term goal remained construction of the high-speed rail system.

(4 AA at p. 1170.)

a. Appellants' challenge to AB 1889 was a facial challenge, not an "as applied" challenge.

At one point, the trial court contended that Appellants' facial challenge to AB 1889 failed, because it was really an "as applied" challenge. (RT at pp. 12-13.) The court's argument was that while AB 1889 may have allowed approval of projects that did not meet the voters' intent, any challenge needed to focus on the noncompliant project approvals, not the validity of the statute itself.

What this argument failed to address is that AB 1889 fundamentally changed the Act itself – the scheme that induced voter approval. The two cases cited herein as involving misuse of bond funds, *O'Farrell* or *Veterans of Foreign Wars*, do not directly addressed this issue. Both cases involved the legislative body's improper use bond funds, not legislation directly

modifying the bond measure's provisions. However, both cases clearly state that once a bond measure has been approved by the voters, the legislative body may no longer unilaterally change the bond measure's substantive provisions – the "scheme or design that induced voter approval."

More directly on point is the very recent case *Howard Jarvis Taxpayers Association v. Newsom* (August 26, 2019, C086334) ___Cal.App.5th ___ [2019 D.A.R. 8213].[17] In that case, as here, the Legislature, long after legislation had been placed on the ballot and approved by the voters, attempted to modify the effect of that legislation. The plaintiffs there raised a facial challenge to the modifying legislation as unconstitutional. Both the trial court and this Court agreed. Neither court felt that an as-applied challenge was necessary, as the Legislature's modification to the voter-approved statute's provisions was transparently obvious. Likewise here, while it is true that some funding plans might be properly approved regardless of the effect of AB 1889, that statute fundamentally altered the "scheme or design that induced voter approval." That, *in itself*, violated article XVI section 1 of the California Constitution.

Of course, *Howard Jarvis Taxpayers Assn.*, *supra*, involved an initiative, not a bond measure, but the basic principle is the same. Both constitutional provisions limit the ability of the Legislature to modify a

[17] A copy of the slip opinion is attached.

voter-approved measure. What would have been an analogous legislative modification attempt in the situation of *Veterans of Foreign Wars, supra?* Rather than appropriating bond funds for the maintenance of county veterans' offices, the Legislature could have, instead, passed a bill "clarifying" that bond act. The legislation would have provided that permissible uses for the bond funds would include both financing veterans' mortgages *and* bond expenditures for county veterans' offices. The result would have been the same – and equally facially unconstitutional. Violation of either constitutional provision, that protecting initiatives or that protecting bond measures, is properly addressed by a facial challenge to the offending statute. (See also, (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1261 [facial challenge to legislation purportedly "clarifying" initiative's provisions].)

b. The trial court erroneously conflated the use of the $9 billion of high-speed rail bond funds with that of the $950 million for conventional rail improvements.

The $9.95 billion of bond funds approved in Prop. 1A included two categories of funding. $9.0 billion was allocated toward the planning and construction of a high-speed rail system. (§ 2704.06.) The remaining $950 million was allocated to eligible recipients for capital improvements to intercity and commuter rail lines providing connectivity to the high-speed rail system. (§ 2704.095.)

In the trial court, Respondents argued that so long as the underlying purpose of the Act continued to be to initiate construction of a high-speed rail system, there could be no violation of article XVI section 1. (4 AA at p. 943.) Thus, according to Respondents, bond funds could be used to build a project that, when completed under the funding plan, would still not be suitable or ready for high-speed train operation, so long as the improvements would benefit existing (conventional rail) passenger service and the segment would *eventually* become part of the high-speed rail system. (4 AA at p. 943: 4-8.) In support of this notion, Respondents pointed to Section 2704.095, which provided that $950 million of the $9.95 billion bond proceeds are earmarked for capital improvements to intercity and commuter rail lines that provide direct connectivity to the high-speed rail line. (4 AA at p. 948:9-11.) While the trial court recognized that the Act placed *some* restrictions on the use of bond funds (See, 5 AA at p. 1220 bottom of page), it nevertheless accepted Respondents' argument.

The court justified its reasoning by reference to the Legislative Analyst's analysis of Prop. 1A, as included in the Supplemental Voter Information Guide. That analysis noted that the Act provided funding both for construction of the high-speed rail system and for improvements to connecting conventional rail services. (3 AA at p. 766.) The court pointed to that as meaning that the $9 billion of high-speed rail bond funds could

also be used to improve conventional passenger rail systems. (5 AA 1222 fourth from last line of top paragraph.)

Later in its analysis, however, the Legislative Analyst made clear, as does the bond measure itself (§ 2704.095), that the use of bond funds for conventional rail improvements referred *only* to the $950 million designated for improvements to intercity and commuter rail lines providing connectivity to the high-speed rail system; *not* to the $9 billion for design and construction of the high-speed rail system. (3 AA at p. 766 2nd column, beginning "Other Passenger Rail Systems.")

As noted earlier, Appellants vigorously disputed Respondents' contentions. (4 AA pp. 1139:18 -1140:5 [Petitioners' Reply Brief in Support of Judgment on the Pleadings – rebutting Respondents' argument that the high-speed rail bond funds could be used for conventional rail improvements].) When the trial court's tentative ruling accepted Respondents' arguments, Appellants, at hearing, continued to point out the error. (RT at p. 77: 2-4 [Appellants' counsel notes that only $950 million[18] of the bond funds was available for conventional rail projects].) Nevertheless, the trial court's final ruling remained unchanged. The trial court's error fatally infected its analysis.

[18] The RT erroneously transcribed the figure as $95 billion.

c. The trial court's error led it to misinterpret the Act, and AB 1889's effect on the Act.

Based on its mistaken understanding that the high-speed rail bond funds could be used to improve conventional passenger rail service, the trial court asserted that nothing in AB 1889 was inconsistent with the Act:

> …the language in AB 1889 does not ... divert the funds to a tenuously connected separate project (as in VFW)... . (5 AA 1222 eighth line of top paragraph.)

What the trial court failed to understand is that the situation here is actually quite similar to the VFW case. The veterans' bond measure did more than just generally require a benefit to veterans. Rather, it created a specific revolving mortgage loan fund for veterans' housing and farms. The appropriation of funds to maintain county veterans' offices did not fit into this scheme.

Likewise here, the Act's purpose was not simply to authorize bonds to initiate piecemeal construction of small pieces of a statewide rail system; pieces that would incrementally improve existing conventional passenger rail service and *might eventually* lead to a high-speed rail capability. Rather, it established a highly specific and mandatory scheme to assure that expenditure of high-speed rail construction funds (as opposed to funds provided under Section 2704.095) would result in fully built and usable *high-speed rail* segments.

While AB 1889 claimed to only be "clarifying" the meaning of a phrase is Section 2704.08(d), that phrase was clear on its face, both in itself and in the context of the Act as a whole. If the plain meaning of a measure's language is clear on its face and makes sense, no clarification is necessary or allowable (*Lungren*, *supra*, 45 Cal.3d at pp. 735-737.)

As with an initiative, the Legislature may not attempt to modify the plain meaning of a voter-approved bond measure under the guise of "clarifying" its provisions. (*Amwest Surety Ins. Co.*, *supra,* 11 Cal.4th at p. 1261 [Legislature's stated purpose of "clarifying" initiative's provisions did not withstand scrutiny; rather, Legislature had improperly modified initiative's provisions]; see also, *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 36 [ordinance purporting to "clarify" mobile home rent control ordinance facially invalid as improper attempt to legislatively amend measure adopted by initiative].)

In *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, like here, the court was confronted with the question of whether later legislation contradicted a voter-enacted measure (in that case, an initiative). The legislation's defenders argued that no prior case had rejected the type of amendment involved in the legislation, and thus it could be found consistent. However, the court held that the initiative contained a specific mandatory provision whose plain meaning manifested the voters' intent. Consequently, when the legislation contradicted that

provision's plain meaning, it violated the voters' intent. (*Id.* at pp. 1370, 1371.)

Likewise here, the plain meaning and the intent behind the key phrase "suitable and ready for high-speed train operation" is contradicted by AB 1889's provision specifically allowing approval of construction of segments that, when constructed under the funding plans with the funds available under that plan, would not be suitable and ready for high-speed train operation.

The trial court's error may be understandable, but it was an error nonetheless. It is clear and unavoidable that AB 1889 did substantially change the scheme or design that the Legislature had drafted and which successfully induced voters' approval of the Act.

d. § 2704.78(a) superseded the provision of § 2704.08(d) requiring that a segment to be constructed with bond funds actually be suitable and ready for high-speed train operation.

As noted in *Veterans of Foreign Wars, supra*, 36 Cal.App.3d at p. 694, if a later legislative enactment supersedes a provision of the voter-approved measure, it results in the implied partial repeal of that measure. Such an implied partial repeal is not only disfavored, it also violates article XVI section 1. However, such a partial repeal was in fact effected by AB 1889.

The requirement under § 2704.08(d) that a segment, when constructed, be "suitable and ready for high-speed train operation" does more than merely *allow* approval of such a segment. It *restricts* approval to segments satisfying the condition.

AB 1889 continued to allow use of bond funds to construct a segment that would truly be "suitable and ready for high-speed train operation," but it added a second, quite different, option. Under AB 1889, the corridor or segment could *also* be considered suitable and ready for high-speed train operation if, in the near term, it would benefit passenger train service providers, even though it would only become truly suitable and ready for high-speed train operation when and if additional planned investments were made on the corridor/segment.

To take one specific example, a proposal to convert one grade crossing within a usable segment to a grade separation would be necessary to make the segment both suitable and ready for high-speed train operation.[19] However, if there were more than one grade crossing in the segment (which is usually the case), converting that single crossing, while it might benefit conventional passenger train service providers already using the segment,

[19] Under Federal Railroad Administration regulations, a standard conventional rail grade crossing may only be used by trains travelling 79 mph or less. Such a crossing would not be suitable for high-speed train operation.

would not suffice to make the segment either suitable or ready for high-speed train operation.

Contrary to Respondents' argument, AB 1889, by allowing bond funds to be used for construction that, when completed, would not truly be suitable and ready for high-speed train operation, did indeed supersede a central provision and restriction in the voter-approved measure. It therefore inescapably violated article XVI section 1 and should be found facially unconstitutional.

III. ALLOWING THE TRIAL COURT DECISION TO STAND WOULD UNDERMINE VOTERS' WILLINGNESS TO TRUST THE LANGUAGE IN BOND MEASURES.

There is good reason for article XVI section 1's inclusion in the California Constitution, and particularly its provision prohibiting repeal of a bond measure until the bonded debt has been fully repaid. Early cases likened a bond measure to a contract between the voters and the government. (See, e.g., *Peery v. City of Los Angeles et al.* (1922) 187 Cal. 753, 766-768.) Whether it is an actual contract or not, the fact remains that, in approving bond measures, the voters implicitly rely upon the promises contained in the ballot measure's language, and on those promises not later being subject to unilateral change by the legislative body.

If this Court's decision were to hold that the legislative body can, post-election, change the meaning of a bond measure's language from what

voters had understood in approving it, it would destroy all trust between voters and legislators. Without that trust, voters will be far less willing to risk the prospect of their future taxes being used to pay off debt for projects they never actually approved, and might even find abhorrent. As a result, voters, fearing another "bait and switch," will be less likely to approve future bond measures, and government's ability to obtain long-term financing for major capital projects will be damaged.

The provisions of article XVI section 1, as interpreted by the courts, include a promise that when a bond measure is put on the ballot, voters can trust that whatever restrictions are placed on the use of the bond funds in order to garner voter approval will remain in force and be respected for the full life of the bond.

Here, the Governor had warned the Legislature (See, Appellants Motion for Judicial Notice, ¶ 2.e and 4 AA at pp. 1073,1074 [Governor's May 2008 revision to state budget, as transmitted to the Legislature].) that voters needed assurance[20] that even if Prop. 1A could not fully fund construction of a full high-speed rail system, it would still produce full, functional, high-speed rail segments.

In response the Legislature included of Section 2704.08 subsections (c) and (d) with their detailed requirements promising that, when

[20] The budget message mentioned repeatedly that the California economy was not doing well. (See, e.g., 4 AA 1055 [downturn in California economy], 1071 [elimination of 247 positions and 22 contract employees].)

constructed in accordance with the approved funding plan, each segment or corridor would be "suitable and ready for high-speed train operation."

The trial court's determination that AB 1889 is valid repudiated the voters' expectations. If this Court affirms that determination, the Authority (and Legislature) will feel free to fritter away the remaining bond funds on a host of minor conventional rail improvements projects, none of which have any realistic prospect of resulting in a working high-speed rail segment, never mind an entire high-speed rail system.[21]

Not only will this leave a bad taste in the voters' mouths that they had been misled by the Legislature, it will poison the waters for future bond measures, especially those for large and ambitious projects, such as those that are likely to be needed to avoid the looming threat of climate change and to alleviate the current crisis in housing affordability. The result could well be a disastrous decline in California's ability to meet future challenges.

IV. RESPONDENTS' REMAINING DEFENSES AGAINST THE MOTION FOR JUDGMENT ON THE PLEADING ARE UNAVAILING.

In their opposition to Petitioners' Motion for Judgment on the Pleadings, Respondents also claimed that its ninth and tenth defenses raised factual issues justifying denying the motion. The trial court never reached

[21] Indeed, as the current high-speed rail project continues to flounder, legislative leaders and local officials have already begun eying the remaining Prop. 1A bond funds with an eye to how they might be used to fund local conventional commuter rail improvements to Caltrain in the Bay Area and Metrolink in the L.A. area.

these defenses. (5 AA at p. 1222 fn. 3.) However, as a matter of law, based on the facts admitted in Respondents' answer, they cannot defeat the motion.

A. RESPONDENTS' NINTH AFFIRMATIVE DEFENSE – THAT DECLARATORY RELIEF IS NOT NECESSARY OR PROPER AT THIS TIME UNDER ALL OF THE CIRCUMSTANCES – FAILS AS A MATTER OF LAW.

As their ninth affirmative defense, Respondents assert that the court may exercise its discretion to refuse to grant declaratory relief "because the declaration or determination sought by petitioners is not necessary or proper at this time under all of the circumstances." (3 AA at p. 629.) Under the circumstances of this case, as admitted in Respondents' First Amended Answer, there is a present controversy between Petitioners and Respondents on whether AB 1889 facially violated article XVI section 1 of the California Constitution or, conversely, whether it is a valid legislative enactment. Respondents argue strongly that the court should grant declaratory relief on the latter determination. However, they argue that declaratory relief would be inappropriate for the former.

Respondents admit that the Authority has begun to encumber and expend Prop. 1A bond funds on construction of its Central Valley Segment. (RAA ¶ 75 – 3 AA at p. 624.) The actual expenditure of Prop. 1A bond funds on the Central Valley Segment, as well as on Caltrain electrification under the Peninsula Corridor Funding Plan, make the controversy over the

validity of AB 1889 far more than an academic exercise or advisory opinion.

When there exists an actual controversy and declaratory relief would provide a means of resolving that controversy, it would be an abuse of discretion for the court to refuse to address the declaratory relief claim. (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 647; *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 433.) Such is the case here.

If AB 1889 is unconstitutional, the expenditures on construction of non-qualifying segments are illegal and beyond the Authority's powers. Consequently, as in *National Asian American Coalition v. Newsom* (2019) 33 Cal.App.5th 993, the court has the authority and the duty to order the funds improperly diverted by the Director of Finance from the High-Speed Passenger Train Bond Fund restored to that fund by way of an offsetting transfer from the general fund. (*Id.* at p. 1023.)

B. RESPONDENTS' TENTH AFFIRMATIVE DEFENSE – THAT DECLARATORY RELIEF WOULD CAUSE SEVERE HARM TO THE PUBLIC WHILE PROVIDING NO SUBSTANTIAL BENEFIT TO PETITIONERS – ALSO FAILS.

As a last resort, in the trial court Respondents argued against granting judgment on the pleadings in favor of declaratory relief based on the argument that declaring AB 1889 facially unconstitutional would cause severe harm to the public while providing no substantial benefit to

petitioners. However, Respondents can point to no case that accepted that defense against a claim for declaratory relief.

Respondents point to two cases that, according to them, support their claimed defense. Neither case does.

County of San Diego v. State (2008) 105 Cal.App.4th 580, 593 did indeed include a claim for declaratory relief as to the fact that the state owed a certain amount to the two counties involved for state-mandated services, and the trial court did issue such a declaration. However, the court of appeal reversed, finding that there was no actual controversy, as the state acknowledged that the amount had been spent, that the counties were entitled to reimbursement, and that the state had enacted a stature providing for that reimbursement over a fifteen-year period. (*Id.* at p. 606.)

As to the mandamus claim in that case, Respondents misrepresent the court of appeal's statement by truncating it. The full statement continues on to say:

> … but where one has a substantial right to protect or enforce, *and this may be accomplished by such a writ*, and there is no other plain, speedy and adequate remedy in the ordinary course of law, [the petitioner] is entitled as a matter of right to the writ, or perhaps more correctly, in other words, it would be an abuse of discretion to refuse it. (*Id.* at p. 593 [emphasis added]

In the specific case, the court of appeal reversed the trial court's grant of a writ, but not based on harm to the public interest. Instead, the court found the trial court's writ violated separation of powers by ordering

the Legislature to take make appropriations in future years. (*County of San Diego, supra,* 105 Cal.App.4th at p. 594.)

Cota v. County of Los Angeles (1980) 105 Cal.App.3d 282, 292, also cited by Respondents as support for their defenses (4 AA at p. 959) is also inapposite. In that case, several citizen/taxpayers had challenged approval of funding for reconstruction of a juvenile detention facility after an earthquake. The causes of action were for injunctive relief under C.C.P. § 526a (illegal/wasteful expenditure of public funds) and for reverse validation under C.C.P. § 863 seeking a declaration that the approval of the expenditure was invalid.

The court of appeal held that the building's construction was neither illegal, nor, under the definition of wasteful applicable to C.C.P. § 526a, wasteful. The Court further denied the reverse validation action, finding that the expenditure approval was valid. As an aside, the court of appeal noted that even if the expenditure were found illegal or wasteful, the *injunction* could have been denied based on causing great harm to the public.

It is well understood that injunctive relief is discretionary, and an injunction may be denied based on the balance of harms. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205.) The same is not true for declaratory relief.

The cases where the legislative body made an unconstitutional change to a bond measure's provisions after the measure's approval by the voters have often involved a project that could benefit the public. That benefit would be negated if the expenditure were found unconstitutional. That has never, however, stood in the way of making such a declaration. (See, e.g., *Shaw v. People Ex Rel. Chiang* (2009) 175 Cal.App.4th 577, 608 [appropriation of gas tax "spillover" funds to transport school children and developmentally disabled persons, while providing public benefit, invalidated as contrary to stated purpose of bond initiative measure], *Veterans of Foreign Wars, supra*, 36 Cal.App.3d 688 [legislative appropriation providing funding for county veterans' offices was invalidated as contrary to voters' intent in passing bond despite the benefit such offices might provide to veterans]; *Jenkins v. Williams* (1910) 14 Cal.App. 89 [appropriation of bond funds for full repair of a bridge across the American River invalidated when amount appropriated exceeded that authorized by the bond act, even though sufficient funds remained in the bond account, and there was no question that complete repair would be beneficial]). Indeed, Appellants could find no case where declaratory relief was denied based on harm to the public or the balance of harms. In short, there is no legal basis for Respondents' Tenth Affirmative Defense.

CONCLUSION

Perhaps by 2016 the Legislature had become convinced that it had set the bar too high in 2008. Perhaps the Authority's entreaties moved the Legislature to loosen the straps of the financial straitjacket that the voters had tied the Authority into in 2008 – so that the Authority could begin to use Prop. 1A bond funds on the construction it had already begun using federal grant funds. Perhaps the threat of having to repay federal grant funds out of the general fund if they were not quickly matched by state bond funds was sufficiently ominous to move the Legislature to alter the conditions it had placed before the voters in the Act.

Whatever the motive, and however sincere the Legislature's intentions may have been, the result, in AB 1889, was a statute that very clearly violated article XVI section 1 of the California Constitution. AB 1889 effected a partial repeal of voter-approved provisions of Prop. 1A, provisions that had been designed to, and did, induce voter approval.

Unfortunately, sometimes the Legislature needs to be reminded repeatedly of its constitutional duties. Just as the Legislature has now hopefully learned, after its actions in its 2016 session, that it may not tinker with an initiative measure contrary to the intent of the voters who approved it (see, *Howard Jarvis Taxpayers Association, supra*), and that it may not appropriate settlement funds in a manner inconsistent with the judgment providing those funds (see, *National Asian American Coalition v. Newsom,*

supra, 33 Cal.App.5th at p. 1023), so it appears the Legislature also needs to learn (again) that may not substantively change the terms of a bond measure after its approval by the voters.

As this Court stated in *CHSRA v. Sup. Ct., supra,* 228 Cal.App.4th at p. 713:

> The Authority now has a *clear, present, and mandatory duty* to include or certify to all the information required in subdivision (d) of section 2704.08 in its final funding plan and, together with the report of the independent financial consultant, *to provide the Director of the Department of Finance with the assurances the voters intended that the high-speed rail system can and will be completed as provided in the Bond Act*. [emphasis added]

Consequently, this Court should find that AB 1889 is facially unconstitutional and remand this case to the trial court for further proceedings consistent with that conclusion.

Dated: September 16, 19

Respectfully submitted,

Michael J. Brady
Stuart M. Flashman

Attorneys for Appellants John Tos et al.

by: /s/ Stuart M Flashman

Exhibits

§ 2704.08(d)

Prior to committing any proceeds of bonds described in paragraph (1) of subdivision (b) of Section 2704.04 for expenditure for construction and real property and equipment acquisition on each corridor, or usable segment thereof, other than for costs described in subdivision (g), the authority shall have approved and concurrently submitted to the Director of Finance and the Chairperson of the Joint Legislative Budget Committee the following:

(1) a detailed funding plan for that corridor or usable segment thereof that

(A) identifies the corridor or usable segment thereof, and the estimated full cost of constructing the corridor or usable segment thereof,

(B) identifies the sources of all funds to be used and anticipates time of receipt thereof based on offered commitments by private parties, and authorizations, allocations, or other assurances received from governmental agencies,

(C) includes a projected ridership and operating revenue report,

(D) includes a construction cost projection including estimates of cost escalation during construction and appropriate reserves for contingencies,

(E) includes a report describing any material changes from the plan submitted pursuant to subdivision (c) for this corridor or usable segment thereof, and

(F) describes the terms and conditions associated with any agreement proposed to be entered into by the authority and any other party for the construction or operation of passenger train service along the corridor or usable segment thereof; and

(2) a report or reports, prepared by one or more financial services firms, financial consulting firms, or other consultants, independent of any parties, other than the authority, involved in funding or constructing the high-speed train system, indicating that

(A) construction of the corridor or usable segment thereof can be completed as proposed in the plan submitted pursuant to paragraph (1),

(B) if so completed, the corridor or usable segment thereof would be suitable and ready for high-speed train operation,

(C) upon completion, one or more passenger service providers can begin using the tracks or stations for passenger train service,

(D) the planned passenger train service to be provided by the authority, or pursuant to its authority, will not require operating subsidy, and

(E) an assessment of risk and the risk mitigation strategies proposed to be employed.

The Director of Finance shall review the plan within 60 days of its submission by the authority and, after receiving any communication from the Joint Legislative Budget Committee, if the director finds that the plan is likely to be successfully implemented as proposed, the authority may enter into commitments to expend bond funds that are subject to this subdivision and accept offered commitments from private parties.

Filed 8/26/19

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Plaintiffs and Respondents, v. GAVIN NEWSOM, as Governor, etc. et al., Defendants and Appellants.	C086334 (Super. Ct. No. 34-2016-80002512-CU-WM-GDS)

APPEAL from a judgment of the Superior Court of Sacramento County, Timothy M. Frawley, Judge. Affirmed.

Xavier Becerra, Attorney General, Thomas S. Patterson, Senior Assistant Attorney General, Paul Stein and Mark R. Beckington, Supervising Deputy Attorneys General, Emmanuelle S. Soichet and Amie L. Medley, Deputy Attorneys General, for Defendants and Appellants.

Megan P. McAllen and Urja Mittal for California Common Cause, League of Women Voters of California, and California Clean Money Campaign as Amici Curiae on behalf of Defendants and Appellants.

Bell, McAndrews & Hiltachk, Charles Bell; John C. Eastman, Anthony T. Caso; and Allen Dickerson for Plaintiffs and Respondents.

In 2016 the Legislature passed and the Governor signed Senate Bill No. 1107, amending Government Code section 85300,[1] a part of the Political Reform Act of 1974 (§§ 81000 et seq.) (Act). Section 85300 was added by Proposition 73, an initiative measure in 1988 prohibiting public funding of political campaigns. Senate Bill No. 1107 reversed this ban and permitted public funding of political campaigns under certain circumstances. Plaintiffs Howard Jarvis Taxpayer Association and Quentin Kopp challenged Senate Bill No. 1107 as an improper legislative amendment of a voter initiative. Defendants Governor Gavin Newsom and the Fair Political Practices Commission (the Commission) appeal from a judgment that invalidated Senate Bill No. 1107 and enjoined its implementation. They contend the trial court, in finding Senate Bill No. 1107 conflicted with the purposes of the Act, misconstrued the purposes of Act and erred in finding the ban on public financing of political campaigns was a primary purpose of the Act. They assert Senate Bill No. 1107, by permitting public funding of political campaigns, furthers the purposes of the Act, as codified in sections 81001 and 81002, to shrink the influence of large donors, reduce campaign spending and the advantages of incumbency, and give a voice to all citizens regardless of wealth.[2]

We affirm. We find that Senate Bill No. 1107 directly conflicts with a primary purpose and mandate of the Act, as amended by subsequent voter initiatives, to prohibit public funding of political campaigns. Accordingly, the legislation does not further the purposes of the Act, a requirement for legislative amendment of the Act.

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[1] Further undesignated statutory references are to the Government Code.

[2] We have also considered the amicus curiae brief in support of defendants filed by California Common Cause, the League of Women Voters of California, and the California Clean Money Campaign, and plaintiffs' response thereto.

BACKGROUND

The Political Reform Act of 1974

In 1974 the voters by an initiative measure (Proposition 9) enacted the Act, adding title 9 to the Government Code. "The initiative concerns elections and different methods for preventing corruption and undue influence in political campaigns and governmental activities. Chapters 1 and 2 contain general provisions and definitions, including a severability provision. Chapter 3 establishes the commission. Chapter 4 establishes disclosure requirements for candidates' significant financial supporters. Chapter 5 places limitations on campaign spending. Chapter 6 regulates lobbyist activities. Chapter 7 establishes rules relating to conflict of interest. Chapter 8 establishes rules relating to voter pamphlet summaries of arguments on proposed ballot measures. Chapter 9 regulates ballot position of candidates. Chapter 10 establishes auditing procedures to aid enforcement of the law, and chapter 11 imposes penalties for violations of the act." (*Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 37 (*Fair Political Practices Com.*).)

The Act includes findings as to the deleterious effect of large contributions to political campaigns and the resulting increased influence of wealthy donors and lobbyists. (§ 81001.) Section 81002 sets forth the Act's purposes. The first three relate to financial disclosures. (§ 81002, subds. (a), (b), & (c).) The other express purposes are to convert the ballot pamphlet into a useful document, abolish laws and practices that unfairly favor incumbents, and provide adequate enforcement mechanisms to enforce the Act. (*Id*, subds. (d), (e), & (f).)

The Act provides two methods for amendment or repeal. The first is by a statute "to further its purposes" passed in each house by two-thirds vote of the membership and signed by the Governor. (§ 81012, subd. (a).) The second method is "by a statute that becomes effective only when approved by the electors." (*Id.*, subd. (b).) The Legislature has amended the Act over 200 times. (*People v. Kelly* (2010) 47 Cal.4th 1008, 1042, fn.

59.) The electorate has passed four initiative measures amending the Act: Propositions 68, 73, 208, and 34.

Various provisions of the Act have been held invalid; particularly, under the compulsion of *Buckley v. Valeo* (1976) 424 U.S. 1, those provisions limiting expenditures for political purposes, and provisions relating to lobbyists. (See *Fair Political Practices Com.*, *supra*, 25 Cal.3d at pp. 38, 49; Stats. 1977, ch. 1095, § 4, p. 3509 [repealing chapter 5 of the Act].)

Propositions 68 and 73

In 1988 California voters faced two competing initiative measures that addressed campaign funding and amended the Act, Propositions 68 and 73. On the ballot pamphlet, the Attorney General titled Proposition 68, "Legislative Campaigns. Spending and Contribution Limits. Partial Public Funding. Initiative Statute." Proposition 68 proposed limits on campaign contributions to all candidates for the State Assembly and the State Senate, and state matching funds from voluntary designations on income tax returns for those candidates who agreed to comply with spending limits. (Ballot Pamp., Primary Elec. (June 7, 1988) analysis of Prop. 68 by Leg. Analyst.) The arguments against the proposition challenged the public funding of campaigns. (*Id.*, rebuttal to argument in favor of Prop. 68 and argument against Prop. 68, pp. 14-15.)

The second initiative was Proposition 73, entitled by the Attorney General, "Campaign Funding. Contribution Limits. Prohibition of Public Funding. Initiative Statute." It proposed establishing limits of campaign contributions for all candidates for state and local elective office, and prohibiting the use of public funds for campaign expenditures and newsletters and mass mailings. (Ballot Pamp., Primary Elec. (June 7, 1988) analysis of Prop. 73 by Leg. Analyst.) It proposed adding a new chapter 5 to the Act that established contribution limits. Section 85300 of this new chapter 5 provided: "No public officer shall expend and no candidate shall accept any public money for the purpose of seeking elective office." (Ballot Pamp., *supra*, text of Prop. 73, p. 33.) The

arguments in favor of Proposition 73 stressed it would not give tax dollars to politicians. (*Id*., argument in favor of Prop. 73 and rebuttal to argument against Prop. 73, p. 34.) Proposition 73 also added section 85103, which read: "The provisions of Section 81012 shall apply to the amendments of this chapter." (Ballot Pamp., *supra*, text of Prop. 73, p. 33.)

The debate between proponents of the two measures "focused on the relative merits of the competing campaign contribution reform schemes offered to the voters in Propositions 73 and 68, with specific emphasis on the wisdom of committing public money to fund election campaigns." (*Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 719 (*Gerken*).)

The electorate approved both measures, but Proposition 73 received more affirmative votes. (*Gerken, supra,* 6 Cal.4th at p. 710.) In *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com*. (1990) 51 Cal.3d 744, at page 747 (*Taxpayers*), our Supreme Court held that under California Constitution, article II, section 10, subdivision (b), "when two or more measures are competing initiatives, . . . only the provisions of the measure receiving the highest number of affirmative votes [can] be enforced." The court declined to "merge" the two measures, and instead held that Proposition 73 was effective and that Proposition 68 was inoperative. (*Taxpayers*, at pp. 770-771.)

In *Service Emp. Intern. v. Fair Political Prac. Com'n* (9th Cir. 1992) 955 F.2d 1312, the Ninth Circuit affirmed the district court decision that found unconstitutional Proposition 73's contribution limits, the carry-over provision, and the ban on intra-candidate transfers.

In *Gerken, supra,* 6 Cal.4th at page 711, our Supreme Court held Proposition 73 nonetheless remained effective in part. The court found the initiative would not be invalidated entirely if "at least *one substantial part* of Proposition 73 is severable and operative." (*Id.* at p. 717.) Its ban on publicly funded mass mailings in section 89001 "most clearly and easily" met this requirement. (*Ibid.*) The Legislative Analyst

specifically listed the ban on publicly funded mass mailings as one of the three main goals of the initiative: "In summary, this measure: [¶] Establishes limits on campaign contributions for all candidates for state and local elective offices; [¶] Prohibits the use of public funds for these campaign expenditures; and [¶] Prohibits state and local elected officials from spending public funds on newsletters and mass mailings." (Ballot Pamp., Prop. 73, *supra*, Analysis by the Leg. Analyst, p. 32.) The analyst also emphasized the anticipated savings from this ban. (*Ibid.)* Our high court found the ban on publicly funded mass mailings was sufficiently highlighted to identify it as worthy of independent consideration such that the court could say with confidence that the electorate's attention was sufficiently focused on the ban so that it would have separately considered it absent the enjoined provisions. Because substantive provisions of Proposition 73 remained, the court concluded they should be enforced to effectuate the voters' intent. (*Gerken,* at p. 719.) The concurring opinion found that "Proposition 73's ban on the public financing of election campaigns is also severable from the enjoined contribution provisions." (*Id.* at p. 721 (conc. opn. of Baxter, J.).)

Proposition 208

In 1996 voters approved Proposition 208, which limited the amount of campaign contributions, established voluntary campaign spending limits, limited the period for campaign fund-raising, and established penalties for violations and increased penalties for existing campaign law violations. (Ballot Pamp., Gen. Election (Nov. 5. 1996) analysis of Prop. 208 by Leg. Analyst, p. 26.) Proposition 208 included provisions of findings and purposes. (*Id.*, text of Prop. 208, p. 89.) It also repealed article 1 of chapter 5 of title 9 of the Government Code, including section 85103, which incorporated section 81012's methods for amendment. (*Id.*, text of Prop. 208, p. 89.)

A federal district court enjoined enforcement of Proposition 208. (*California Prolife Council v. Scully* (E.D.Cal. 1998) 989 F.Supp. 1282). The injunction was

affirmed by the Ninth Circuit in *California Prolife Council v. Scully* (9th Cir. 1999) 164 F.3d 1189.)

Proposition 34

While challenges to Proposition 208 were pending, the electorate passed Proposition 34, the Campaign Contribution and Voluntary Expenditure Limits Without Taxpayer Financing Amendments to the Political Reform Act of 1974, which approved various amendments to the Act. (Stats. 2000, ch. 102, § 18, eff. July 7, 2000; Prop. 34, as approved by voters, Gen. Elec. (Nov. 7, 2000) (Sen. Bill No. 1223).) Proposition 34, like Proposition 208, included express findings and purposes. (Stats. 2000, ch. 102, § 1.) Also like Proposition 208, Proposition 34 left unchanged section 85300, the ban on public financing of campaigns. The argument in favor of Proposition 34 stressed it did not allow taxpayer dollars to be used in campaigns. "Proposition 34 does not impose taxpayer dollars to be used to finance political campaigns in California. Our tax money is better spent on schools, roads and public safety." "VOTE YES ON PROPOSITION 34 If you don't want taxpayers to pay for political campaigns." (Voter Information Guide, Gen. Election (Nov. 7, 2000) argument in favor of Prop. 34, p. 16.)

Senate Bill No. 1107

In 2016 the Legislature enacted Senate Bill No. 1107 which amended section 85300, the ban on publicly funded campaigns, to read:

"(a) Except as provided in subdivision (b), a public officer shall not expend, and a candidate shall not accept, any public moneys for the purpose of seeking elective office.

"(b) A public officer or candidate may expend or accept public moneys for the purpose of seeking elective office if the state or a local governmental entity establishes a dedicated fund for this purpose by statute, ordinance, resolution, or charter, and both of the following are true:

"(1) Public moneys held in the fund are available to all qualified, voluntarily participating candidates for the same office without regard to incumbency or political party preference.

"(2) The state or local governmental entity has established criteria for determining a candidate's qualification by statute, ordinance, resolution, or charter." (Stats. 2016, ch. 837, § 2, eff. Jan. 1, 2017 (Senate Bill No. 1107).)[3]

Senate Bill No. 1107 included numerous findings that public financing of campaigns furthers significant governmental interests of preventing corruption, reducing the undue influence of special interests, and facilitating and enlarging public discussion and participation in the electoral process. (Stats. 2016, ch. 837, § 1.) The bill also made an express finding that it "furthers the purposes of the Political Reform Act of 1974 within the meaning of subdivision (a) of Section 81012 of the Government Code." (*Id.*, § 6.)

The Challenge to Senate Bill No. 1107

Plaintiffs petitioned for a writ of mandate to compel the Commission to publish the provisions of section 85300 as enacted by Proposition 73, rather than as amended by Senate Bill No. 1107, and brought a complaint for injunctive and declaratory relief to enjoin the spending of any public funds to implement or enforce Senate Bill No. 1107 and to declare it void and of no legal effect.

Plaintiffs argued that since section 85103, incorporating the amendment provisions of section 81012 into Proposition 73, had been repealed, the Legislature had no authority to amend the provisions of Proposition 73. They further argued that Senate Bill No. 1107

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[3] In *Johnson v. Bradley* (1992) 4 Cal.4th 389, our Supreme Court upheld a charter city measure that provided for partial public funding of campaigns for elective city office under the "home rule" provision of the State Constitution.

did not further the purposes of the Act which include prohibiting public financing of political campaigns.

Defendants argued section 81012 applied to the entire Act and permitted legislative amendments. They contended Proposition 73 did not change the codified purposes of the Act and Senate Bill No. 1107 furthered those purposes. They claimed plaintiffs' argument conflated the purposes of Act with the methods used to achieve those purposes.

The trial court found the Act, including provisions added by Proposition 73, could be amended by the Legislature. Any such amendment must be consistent with the purposes of the Act. Petitioners established that a significant purpose of Proposition 73 was to prohibit public monies in political campaigns and Senate Bill No. 1107 conflicted with the purposes of the Act because it violated this specific mandate. Senate Bill No. 1107 directly contradicted a fundamental purpose of the Act, as amended by Proposition 73. The court declared the provisions of Senate Bill No. 1107 void and without legal effect and issued an injunction restraining enforcement of Senate Bill No. 1107.

Defendants appealed.

DISCUSSION

I

Legislative Amendment of Initiative Statute

Article II, section 10, subdivision (c) of the California Constitution states: "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." "Under article II, section 10, subdivision (c), the voters have the power to decide whether or not the Legislature can amend or repeal initiative statutes. This power is absolute and includes the power to enable legislative amendment *subject to conditions attached by the*

voters." (*California Common Cause v. Fair Political Practices Com.* (1990) 221 Cal.App.3d 647, 652 (*Cal. Common Cause*).)

The Act includes section 81012, which provides: "This title may be amended or repealed by the procedures set forth in this section. If any portion of subdivision (a) is declared invalid, then subdivision (b) shall be the exclusive means of amending or repealing this title. [¶] (a) This title may be amended to further its purposes by statute, passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring and signed by the Governor, if at least 12 days prior to passage in each house the bill in its final form has been delivered to the commission for distribution to the news media and to every person who has requested the commission to send copies of such bills to him or her. [¶] (b) This title may be amended or repealed by a statute that becomes effective only when approved by the electors." This section remains in effect despite the many amendments to the Act.

Proposition 73 included its own provision for amendment. Former section 85103 provided: "The provisions of Section 81012 shall apply to the amendment of this chapter." (Ballot Pamp., Primary Elec. (June 7, 1988) text of Prop. 73, p. 33.) This provision, however, was repealed by Proposition 208. (See Deering's Ann. Codes, Gov. Code, § 85103.)

Respondents contend that by repealing the specific authority to amend any provisions of Proposition 73, the people exercised their right to prohibit *any* legislative amendment of any provision of Proposition 73. We disagree.

The repeal of former section 85103 did not affect section 81012, which grants the Legislature conditional authority to amend any provision of the Act (title 9). Nothing in the new chapter 5 of the Act limits the Legislature's ability to amend the Act beyond the limitations of section 81012 or exempts any provision of chapter 5 from the reach of section 81012. "The [Act] provides that it may be amended or repealed if (1) the new law was passed by a two-thirds majority of the Legislature, (2) the new law furthers the

[Act's] purposes, and (3) the Legislature delivers a copy of the final bill, at least 12 days prior to its passage, to the Fair Political Practices Commission and anyone else who requests a copy." (*Santa Clarita Organization for Planning & the Environment v. Abercrombie* (2015) 240 Cal.App.4th 300, 320 (*SCOPE*).)

In *Cal. Common Cause, supra,* 221 Cal.App.3d 647, this court rejected a challenge to section 85300. Petitioners contended section 85300 was "unconstitutional because it binds future legislatures from enacting any laws regarding the public funding of political campaigns." (*Cal. Common Cause,* at p. 649.) We found the cases on which petitioners relied were not on point because in those cases the challenged provision "directly conflicted with authority vested in the legislative body by paramount organic law." (*Id.* at p. 650.) Section 85300 did not conflict with organic law; the issue of financing of political campaigns had not been reserved to the Legislature or excepted from the initiative power reserved to the people. (*Cal. Common Cause,* at p. 651.)

In dicta, we rejected the view that section 85300 could not be amended. "Petitioners' argument necessarily implies that section 85300 is an absolute, inflexible provision beyond the power of the Legislature to change. This ignores the fact section 85300--like other provisions of the Act--may be amended by a bill concurred in by two-thirds of the membership of the Legislature and signed by the Governor. (§ 81012, subd. (a).)" (*Cal. Common Cause, supra,* 221 Cal.App.3d at p. 651.) Appellants seize upon this language to argue this court has held section 85300 *may* be amended by the Legislature. "An amendment is a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision." (*People v. Cooper* (2002) 27 Cal.4th 38, 44.) To the extent they are arguing this court has held the Legislature may vote to remove the ban on public financing of campaigns contained in section 85300, we reject the argument. In *Cal. Common Cause* we did not consider whether a legislative amendment permitting public financing of political campaigns would further the purposes

of the Act. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

II

Furthering the Purposes of the Act

A. *Standard of Review*

Subdivision (a) of section 81012 places several conditions upon an amendment by the Legislature. Appellants challenge only the trial court's decision applying the condition that the amendment contained in Senate Bill No. 1107 must further the purposes of the Act and concluding that the amendment did not do so.

The Legislature made an express finding that Senate Bill No. 1107 *did* further the purposes of the Act. We are not bound by this finding and are not required to defer to it. (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1253 (*Amwest*).) "We do, however, apply the general rule that 'a strong presumption of constitutionality supports the Legislature's acts.' " (*Ibid.*) "Accordingly, starting with the presumption that the Legislature acted within its authority, we shall uphold the validity of [Sen. Bill No. 1107] if, by any reasonable construction, it can be said that the statute furthers the purposes of [the Act]." (*Id.* at p. 1256.) Because this determination is a question of law, we independently review the trial court's decision. (*Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374 (*Gardner*).

B. *Determining the Purposes of the Act*

The parties disagree on the purposes of the Act and what determines those purposes.

Appellants contend the purposes of the Act are limited to those set forth in sections 81001 and 81002. They contend these purposes are to reduce the advantages of incumbency, reduce the influence of large contributors to campaigns, reduce campaign spending, and ensure equal opportunity of participation in the electoral process. In *Amwest, supra,* 11 Cal.4th at page 1256, our Supreme Court rejected the argument that a

court was constrained to the express statement of purposes in determining the purpose of an initiative. Instead, evidence of its purpose can be drawn from many sources, including its historical context and ballot arguments in its favor. (*Ibid.*)

Respondents contend the chief purpose of Proposition 73 is that set forth in the title and summary prepared by the Attorney General for the ballot pamphlet at the time of the election. As described *ante*, both the title and summary for Proposition 73 included the prohibition on public funding of political campaigns. Respondents argue courts defer to the Attorney General's characterization of the chief purpose of an initiative. (*Becerra v. Superior Court* (2017) 19 Cal.App.5th 967, 975 (*Becerra*).) They argue the title and summary were prepared more than 30 years ago and it now too late to challenge them.

The deference to the Attorney General's title and summary noted in *Becerra* is appropriate when those writings are challenged as false, argumentative, and misleading, as was the case there. (*Becerra*, *supra*, 19 Cal.App.5th at p. 974.) Respondents cite no authority that the title and summary are binding on a court that is determining if a legislative amendment to an initiative furthers its purposes. The *Amwest* court did not specifically mention the Attorney General's title and summary as appropriate sources for determining an initiative's purposes and certainly did not so limit the inquiry. Determining whether the legislative amendment furthers the purposes of the Act is a legal question that we determine independently. (*Gardner, supra,* 178 Cal.App.4th at p. 1374.) The determination of the purpose of the Act is part of that legal question. Further, respondents' argument goes only to the purposes of *Proposition 73*; we are concerned with the purpose of *the Act as a whole*. In resolving that question, we are guided by the express statements of purpose in the Act, but also consider the initiative as a whole and the "particular language" used. (*Amwest, supra,* 11 Cal.4th at p. 1260; *Gardner*, at p. 1374.)

C. *Case Law*

In *Amwest, supra*, 11 Cal.4th 1243, our high court considered whether a legislative amendment to Proposition 103 that exempted surety companies from its rate regulation provisions furthered the purposes of that proposition. The express statement of purposes in the initiative identified protecting consumers, encouraging a competitive insurance market and fair and affordable insurance rates. (*Id.* at p. 1256 & fn. 9.) In determining two major purposes of Proposition 103, the court looked beyond the express statements of purposes to what the initiative actually did. "It is apparent from the foregoing that two major purposes of Proposition 103 were to reduce, by at least 20 percent, the rates for all insurance regulated under chapter 9 and to replace the former system for regulating insurance rates (which relied primarily upon competition between insurance companies) with a system in which the commissioner must approve such rates prior to their use." (*Id.* at p. 1259.)

The *Amwest* court found the exemption of surety companies from the scope of Proposition 103 did not further its purposes. (*Amwest, supra*, 11 Cal.4th at p. 1265.) It rejected the argument that the amendment merely clarified the initiative; it found the amendment altered the terms of the initiative "in a significant respect." (*Id.* at p. 1261.) While Proposition 103 altered the method of regulating insurance rates, it did not alter the types of insurance regulated, and surety insurance was so regulated. (*Id.* at p. 1260.) The surety company claimed exempting surety companies would further the purposes of Proposition 103 because neither the rate rollback nor the requirement of prior approval by the commissioner for rate increases were needed for surety insurance--surety rates were already fair and reasonable. The court noted, if this argument were true, there was a way to avoid the rollback if it would result in a confiscatory rate. (*Id.* at p. 1262.) The purpose of requiring the commissioner's prior approval for rate increases was to prevent future abuses. (*Id.* at p. 1263.)

In *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354 (*Foundation*), another legislative amendment to Proposition 103 was at issue. The amendment allowed automobile insurers to grant a persistency discount to drivers who previously had automobile insurance with any company. (*Id.* at p. 1362.) The court found one of the fundamental purposes of Proposition 103 was the elimination of discrimination against previously uninsured motorists. That purpose was set forth in a specific provision providing that the absence of prior insurance could not be used as a criterion for a discount. (*Id.* at p. 1366.) A proponent of the amendment argued no case had found the elimination of discrimination against the previously uninsured was a "purpose" of Proposition 103. The court responded the specific provision prohibiting such use of the absence of prior insurance "manifests the voters' intent to eliminate such discrimination." (*Id*. at p. 1370.) The amendment violated "this primary mandate" of Proposition 103 and thus did not further its purposes. (*Id.* at pp. 1370, 1371.)

In *Garner, supra,* 178 Cal.App.4th 1366, the appellate court found a legislative amendment of Proposition 36 that was inconsistent with terms of the initiative did not further its purposes. The express purposes of Proposition 36 were to divert nonviolent defendants charged with simple drug offenses from incarceration to substance abuse treatment, to end the wasteful expenditure on incarceration, and to enhance public safety by preserving jails and prison cells for serious and violent offenders. (*Id.* at p. 1370.) Under Proposition 36, probation could not be revoked for the first two drug-related violations of probation unless the court found defendant posed a danger or was not amenable to drug treatment. (*Id.* at p. 1375.) The amendment sought to allow short term or flash incarceration for a first or second drug-related violation of probation to enhance treatment compliance. (*Ibid*.) The court found the amendment did not further Proposition 36 because it took "a significantly different policy approach" to probation violations and undermined the specific rules of Proposition 36. (*Id.* at p. 1378.) Further, while the amendment might further the purpose of encouraging drug treatment, it was

inconsistent with the other primary purposes of saving jail cells for serious offenders and saving money by using treatment instead of incarceration. (*Id.* at pp. 1378-1379.)

D. *Analysis*

Appellants argue that while the prohibition on public funds for political campaigns may have been a purpose of Proposition 73, it is not a purpose of the Act as a whole. The ballot materials for Proposition 34, a later amendment of the Act, demonstrate the ban on public funds for political campaigns continues to be an important part of the Act. The argument in favor of the initiative stressed that taxpayer dollars would not be used to fund political campaigns. (Ballot Pamp., Gen. Election (Nov. 7, 2000) argument in favor of Prop. 34, p. 16.) Moreover, Proposition 34 added a new chapter 5 of the Act, entitled "the Campaign Contribution and Voluntary Expenditure Limits Without Taxpayer Financing Amendments to the Political Reform Act of 1974." (Stats. 2000, ch. 102, §1(b), pp. 1550-1551; § 85100.) Thus, Proposition 34 highlights the ban on public funds for political campaigns not just in section 85300 but in the entire chapter 5 on campaign expenditures and contributions. This emphasis shows the ban is a primary mandate of the Act.

Appellants contend that considering the ban on public funds for political campaigns to be a purpose of the Act conflates the *methods* used to achieve the Act's purposes with the purposes themselves. They offer no authority for the proposition that a method selected to achieve an initiative's purpose cannot also be a purpose of the initiative. In *Amwest*, the provisions for a rate rollback and prior approval of rate increases by the commissioner were the methods used to achieve the express purposes of protecting consumers, encouraging a competitive insurance market, and fair and affordable insurance rates. Our Supreme Court found these provisions to be "major purposes" of Proposition 103. (*Amwest, supra*, 11 Cal.4th at p. 1259.) In *Foundation, supra,* 132 Cal.App.4th at page 1371, the court found the specific provision prohibiting the use of the absence of prior insurance as a criterion for a rate discount made

eliminating discrimination against previously uninsured motorists a "fundamental purpose of Proposition 103."

Appellants urge that the trial court erred in relying on *Foundation* and *Gardner* because they are distinguishable. They argue that both cases invalidated a legislative amendment because although it furthered one express purpose of the initiative it was counter to another express purpose. The argument is unavailing. First, *Amwest, supra,* 11 Cal.4th at page 1256, held courts are not limited to the express statement of purpose in determining the purposes of an initiative. Second, in *Foundation, supra,* 132 Cal.App.4th at page 1370, the court found the legislative amendment conflicted with the "primary mandate" to eliminate discrimination against previously uninsured motorists. This mandate was set forth in a particular provision of Proposition 103, not in its general statement of purposes.

Appellants contend a similar legislative amendment to a prohibition in the Act was upheld in *SCOPE, supra,* 240 Cal.App.4th 300, and the trial court erred in ignoring this case. In *SCOPE,* a manager of a water company who was also a director of a water agency participated in negotiating the agency's acquisition of the water company. The enabling legislation for that water agency permitted a water company's employee to serve on the agency's board of directors and made an express exemption from a conflict of interest provision of the Act that prohibited officials from participating in contracts in which they had a financial interest, provided there was disclosure. In rejecting a challenge to the agency's acquisition of the water company, the court harmonized the conflicting provisions of the Act and the enabling legislation, finding the exception to the Act's conflict of interest provisions furthered the purposes of the Act of requiring disclosure of the conflict and permitting participation of the regulated industry in the public agency charged with that regulation. (*Id.* at p. 319.)

SCOPE is distinguishable from the instant case; it involved a limited exception to a provision of the Act, while still maintaining the somewhat conflicting purposes of the

Act. Here, by contrast, Senate Bill No. 1107 would permit the entire elimination--the complete repeal--of the ban on public financing of election campaigns. As we have discussed, that ban is an important part of the Act, as amended.

Amwest, Foundation, and *Gardner* teach that a legislative amendment that alters and conflicts with a fundamental purpose or primary mandate of an initiative does not further the purpose of the initiative and is invalid. As in *Amwest, supra,* 11 Cal.4th at page 1261, here Senate Bill No. 1107 alters the terms of the Act "in a significant respect" by removing the ban on publicly funded election campaigns. As in *Foundation, supra,* 132 Cal.App.4th at page 1371, here "in the guise of amending" the Act, the Legislature has instead "undercut and undermine[d] a fundamental purpose" of the Act to ban public funds in election campaigns. As in *Gardner, supra,* 178 Cal.App.4th at page 1378, Senate Bill No. 1107 "takes a significantly different policy approach" to campaign reform than the one in the Act. "The power of the Legislature may be 'practically absolute,' but that power must yield when the limitation of the Legislature's authority clearly inhibits its action." (*Foundation,* at p. 1371.) Because Senate Bill No. 1107 expressly conflicts with a primary mandate of the Act, the ban on public funding of election campaigns, it is invalid.

During oral argument, the parties discussed our recent opinion in *People v. Superior Court (K.L.)* (2019) 36 Cal.App.5th 529 (*K.L.*). Nothing in *K.L.* changes our analysis. There, the People challenged Senate Bill No. 1391 as conflicting with Proposition 57. Under Proposition 57, minors aged 14 or 15 could be tried in adult court only after a juvenile court conducted a transfer hearing, eliminating direct filing in adult court for these minors. (*Id*. at p. 534.) One of the stated purposes of Proposition 57 was to have a judge, not a prosecutor, decide whether these minors should be tried in adult court. (*Ibid*.) Senate Bill No. 1391 removed the authority of the prosecutor to seek transfer to adult court of minors aged 14 or 15, unless the minor was not apprehended until after the end of juvenile court jurisdiction. (*Id*. at p. 538.)

In finding Senate Bill No. 1391 furthered the purpose of Proposition 57 and did not conflict with it, we concluded the intent of Proposition 57 was not to permit the prosecution of 14- and 15-year-olds, but to reduce the number of youths who would be prosecuted as adults. (*K.L.*, *supra*, 36 Cal.App.5th at p. 541.) This intent "will further other broader purposes of Proposition 57 to reduce the number of offenders incarcerated in state prisons, and to increase the opportunities for rehabilitation, particularly for juvenile offenders." (*Ibid*.) Senate Bill No. 1391 furthered these purposes by eliminating adult prison for 14- and 15-year-old offenders. (*Id*. at p. 539.)

While Senate Bill No. 1391 furthered the purpose of Proposition 57 by replacing the restriction with a prohibition, Senate Bill No. 1107 does the opposite; it eliminates the existing ban. Senate Bill No. 1107 does not further the purposes of the Act, but removes a key component of the Act.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Murray, J.

CERTIFICATION

I, Stuart M. Flashman, as one of the attorneys for Plaintiffs/ Appellants, hereby certify that the above brief, exclusive of caption, tables, exhibits, and this certification, contains 12,979 words, as determined by the word-counting function of my word processor, Microsoft Word for Mac 2011 (version 14.7.7).

Dated: September 16, 2019

/s/ Stuart M. Flashman
Stuart M. Flashman

PROOF OF SERVICE BY MAIL OR ELECTRONIC SERVICE

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

On September 17, 2019, I served the within APPELLANTS' OPENING BRIEF on the party listed below by placing a true copy thereof, enclosed in a sealed envelope with first class mail postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

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

In addition, on the above-same day, I also served electronic versions of the above-same document, as well as APPELLANTS' MOTION FOR JUDICIAL NOTICE, and APPELLANTS' APPENDIX IN LIEU OF CLERK'S TRANSCRIPT (5 volumes) upon counsel for the parties to this appeal, and on the California Supreme Court as pdf files through the Court of Appeal's website electronic filing vendor, Imagesoft TrueFiling.

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

Executed at Oakland, California on September 17, 2019.

Stuart M. Flashman
Digitally signed by Stuart Flashman
Date: 2019.09.17 10:11:07 -07'00'