

Case No. C058479

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THIRD APPELLATE DISTRICT**

JOSH SHAW, ET AL.,
Plaintiffs and Appellants,

VS.

JOHN CHIANG, ET AL.,
Defendants and Respondents,

On Appeal from the Superior Court of the County of Sacramento
(Sacramento Super. Ct. No. 07CS01179) (Hon. Jack Sapunor)

**APPLICATION TO FILE *AMICUS CURIAE* BRIEF IN
SUPPORT OF APPELLANTS AND CROSS-RESPONDENTS;
PROPOSED BRIEF OF *AMICI CURIAE***

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**TO THE HONORABLE ARTHUR G. SCOTLAND, PRESIDING
JUSTICE OF THE THIRD DISTRICT COURT OF APPEAL:**

Pursuant to Rule 8.200(c) of the California Rules of Court, TransForm; the California Public Interest Research Group; Urban Habitat; the Planning and Conservation League; California Rural Legal Assistance, Inc.; Legal Services of Northern California; and the Los Angeles Bus Riders Union, respectfully apply for permission to file the accompanying *amicus curiae* brief in support of Appellants and Cross-Respondents Joshua Shaw, et al.

INTEREST OF *AMICI*

TransForm (formerly known as the Transportation and Land Use Coalition) works to create world-class public transportation and walkable communities in the Bay Area and beyond. TransForm's coalition of more than 100 organizations represents social justice, environmental, smart growth, affordable housing, transit, bicycle and pedestrian, and open space advocates, including the Sierra Club, PolicyLink, Save the Bay, League of Women Voters of the Bay Area, Greenbelt Alliance, and Non-Profit Housing Association of Northern California. TransForm has a mission of influencing policy and developing innovative programs to improve the lives of all people and protect the environment. Since its founding in 1997, TransForm has advocated for increased funding to support public transportation choices in the Bay Area, and has advocated in particular to protect the use of "spillover" funds for the public transit purposes for which they were placed in trust by Proposition 116. TransForm's efforts have also included work to pass local and county transportation sales tax measures, to

expand lifeline transit services for low-income communities, and to promote cost-effective alternatives to unduly expensive transit projects. TransForm's interests in this case relate to social justice, the environment, and good government. In particular, TransForm and its member groups are deeply concerned about the impacts on transit riders occasioned by the loss of state funding, and the significant relationship between access to transportation choices and reduction of global warming pollution.

The **California Public Interest Research Group (CALPIRG)** stands up to powerful special interests on behalf of the California public, working to win concrete results for the health and well-being of California residents. With researchers, advocates, organizers, members, and student activists, CALPIRG takes on the special interests on issues such as health care, transportation, product safety, political corruption, and voting rights, where these interests stand in the way of reform and progress. CALPIRG advocates that all Californians should have access to clean, safe, efficient, and affordable transportation options. Additionally, taxpayer funding should prioritize transportation projects that reduce oil dependence and harmful pollution, reduce traffic over the long-term, and keep current transportation options safe and efficient. Over the last several years CALPIRG has spoken out against state budget cuts to public transportation, both capital expenditures and operations, and has advocated for increased federal and local funding to expand and improve transit services, and maintain and modernize existing roads and bridges.

The **Bus Riders Union**, a project of the Labor/Community Strategy Center, is a progressive civil rights and environmental justice membership organization. Beginning with the mass transit and public health needs of the multi-racial, multi-ethnic communities who are transit dependent in Los

Angeles, the Bus Riders Union seeks to promote environmentally sustainable public transportation for the entire population of Los Angeles, on the premise that affordable, efficient, and environmentally sound mass transit is a human right. The organizing and public policy work of the Bus Riders Union reflects several guiding principles, among them: first, that the needs of low-income people and oppressed nationality peoples and communities – Black, Latino, Mexicano/Chicano, Asian/Pacific Islander and Indigenous peoples – must be given priority since they suffer systematic racial and national oppression in our society; and second, that human and ecological rights are the leading social, political and economic priority for people throughout the world. Through organizing, policy advocacy and litigation, the Bus Riders Union and the Labor/Community Strategy Center have been instrumental in winning significant improvements to bus service provided by the Los Angeles Metropolitan Transportation Authority for more than ten years.

The **Planning and Conservation League** (“PCL”) is a 501(c)(4) nonprofit lobbying organization with a mission to protect and restore California’s natural environment and to promote and defend the public health and safety of the people of California. PCL works at the state legislative and administrative levels to enact and implement policies to protect and restore the California environment, and partners with hundreds of California environmental organizations to provide an effective voice in Sacramento for sound planning and responsible environmental policy at the state level. As one of the leading advocates for Proposition 116 and Proposition 108, PCL strongly believes that funding for public transportation is critically important if the state is to meet the mandates laid out in AB 32 and the vision of SB 375.

Urban Habitat is a non-profit organization with a mission to build power in low-income communities and communities of color by combining education, advocacy, research and coalition-building to advance environmental, economic and social justice in the Bay Area. Urban Habitat works to advance equity and improve public transit affordability and reliability for the Bay Area's low-income neighborhoods of color through research and advocacy for equitable transportation policies at the regional, state and federal levels; work to equalize investments to ensure that bus systems that serve low income communities and communities of color are fairly funded; providing technical assistance to community-based organizations to win transportation improvements that are top priority for their members and residents; reframing the debate on transportation and land-use policy to include a race and class lens through grassroots communications, convenings with multi-sector stakeholders, a national publication *Race, Poverty and the Environment* and via press events and op-eds; and building coalitions of community-based organizations, social justice advocacy groups, youth organizations, public agencies and others to advance policy objectives at the local, regional and state level.

California Rural Legal Assistance, Inc. ("CRLA") was created in 1966 as a statewide not-for-profit law firm to provide legal representation to rural low-income tenants, farmworkers and other rural poor throughout California. CRLA has enabled thousands of low income people and farmworkers to have access to justice in the civil legal system in California in substantive areas including housing, fair housing, employment, education, health access and civil rights. CRLA's clients live at or below the federal poverty level and 65 percent are racial and ethnic minorities. Enforcement of their fundamental rights to decent, affordable housing and fair access to

housing, a good education, health treatment and benefits and fair employment is a priority for all of CRLA's twenty-one field offices throughout the state. CRLA's low-income clients are adversely affected by the government's failure to adequately fund public transportation. The lack of accessible, affordable public transportation can mean that they are forced to live in segregated communities, unable to travel to their jobs or schools or unable to reach a desperately needed health clinic or affordable food market.

Founded in 1956, **Legal Services of Northern California** ("LSNC") is a non-profit organization providing no-cost civil legal services and representation to low-income persons in 23 northern California counties. LSNC's mission is to provide quality legal services that empower the poor to identify and defeat the causes and effects of poverty. LSNC's low-income clients depend disproportionately on public transportation as compared to the general public, as the cost of reliable automobiles and other modes of private transportation and gasoline is often prohibitive for them. Significant numbers of LSNC's clients depend upon public transportation to go to work, school, medical appointments and to purchase groceries and other necessities of life. In order to remain true to its mission, LSNC must remain ever mindful of the importance of reliable, efficient public transportation systems for its clients. For instance, LSNC recently succeeded in preventing closure of neighborhood health clinics by providing testimony and showing maps documenting the increased public transportation travel time, and concomitant health burden, such closures would impose on our clients. In sum, the clients LSNC serves can ill afford the diversion of any funds intended to support and improve public transportation in California. Accordingly, LSNC has a strong interest in the outcome of this matter.

AMICI ARE FAMILIAR WITH THE ISSUES

Amici are familiar with the issues in this case, based on their missions to promote safe, reliable and affordable public transportation; their memberships' reliance on and/or support for public transit; their advocacy efforts relating to ensuring adequate funding for public transit, including the "spillover" revenues at issue in this case; and, in the case of the Planning and Conservation League, their direct involvement with the enactment of Proposition 116. Accordingly, *Amici* are well-positioned to provide the Court with information and analysis that could aid the Court in deciding this case.

POINTS TO BE ARGUED

Amici's brief addresses two legal questions:

1. Did the Legislature validly amended Revenue and Taxation Code section 7102(a)(1), in a manner that furthers the purposes of Proposition 116, where that amendment had the effect of diverting \$621.9 million in "spillover" revenue into the General Fund, before it reached the Public Transportation Account ("PTA")? *Amici* respectfully answer that the Legislature did not validly do so.
2. Was the Legislature's appropriation of \$636.9 million from the PTA for transportation of persons with developmental disabilities to Regional Centers and for home-to-school transportation programs run by local school districts appropriated for a valid "mass transportation" purpose, within the meaning of Proposition 116? *Amici* respectfully answer that it was not.

On the first question – the validity of the diversion of "spillover" funds earmarked for the PTA into the General Fund – the pivotal issue is

whether the Legislature's amendment of Section 7102 is "consistent with, and furthers the purposes of, the section," as the voters required in adopting Proposition 116. An unbroken line of cases, tracing back to the California Supreme Court's decision in *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, requires the conclusion that this diversion of funds does not "further the purposes" of Proposition 116. Where the voters have restricted the Legislature to amendments that "further the purposes" of their enactment, legislative action must further all of those purposes and, in particular, may not undercut any "primary mandate" of the voters. The voters' declared intent in Proposition 116 was "that funding for public transit should be increased from existing sources including fuel taxes and sales tax on fuels." (Prop. 116, § 1, codified at Pub. Util. Code § 99611.) The Legislature's diversion of those "existing sources" earmarked for the PTA into the General Fund violates that "primary mandate," and is invalid.

The outcome of the second question – the appropriation of \$636.9 million from the PTA – turns on whether these PTA funds were used for invalid purposes other than the "transportation planning and mass transportation" purposes permitted by Public Utilities Code section 99310.5 (b), as amended by Proposition 116. The lower court correctly concluded that the voters used "mass transportation" synonymously with "public transit." That conclusion is required by the voters' express statement of their intent to "increase" "funding for *public transit*." (Prop. 116, §1, codified at Pub. Util. Code § 99611, emphasis added.) That plain intent makes it unmistakably clear that when the initiative speaks of "mass transportation" or "public transportation" in connection with the use of "spillover" funds, it is referring to "public transit." The core meaning of public transit is that it is provided to the general public. Statutory definitions of "public

transportation” and “mass transportation,” both in federal law and in state law, consistently provide that these terms – like “public transit” – include only services that are available to the “general public.” (Pub. Util. Code § 99211 [“transportation services to the general public”]; see 49 U.S.C. § 5302(a)(7) & (10); 49 C.F.R. § 665.5.) Transportation services provided by school districts to their students, or by Regional Centers to some of their developmentally disabled clients, are not mass transportation programs under any definition of “mass transportation” or “public transit.” The appropriation of PTA funds for those limited purposes that are not available to the “general public” violates Proposition 116, and is unlawful.

For these reasons, *amici* will urge the Court to reverse the decision of the Sacramento County Superior Court insofar as it permits the diversion of funds that the voters placed in trust for public transit.

Wherefore, *amici* respectfully request this Court to grant this application to file the accompanying amicus curiae brief.

Dated: December 9, 2008

Respectfully Submitted,

Richard A. Marcantonio
Guillermo Mayer
PUBLIC ADVOCATES, INC.

By: 

RICHARD A. MARCANTONIO

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INTRODUCTION AND SUMMARY OF ARGUMENT

Public transportation is not simply one among many important public services. It is, instead, a unique engine of economic prosperity and growth; an essential tool of environmental health and sustainability; and, for low-income communities at risk of social and economic exclusion, the gateway to every form of opportunity and every necessity of daily living.

Throughout California, low-income families, students, seniors and people with disabilities depend on public transportation to overcome their isolation from quality jobs, schools and health care, and to carry them to grocery markets, public parks and places of worship. The social equity impacts of under-funded public transportation fall particularly on low-income youth, for the majority of whom the public bus has replaced the traditional “yellow bus” as their ride to school; and on people with disabilities (among them, the 4% of Californians with disabilities who are developmentally disabled) and seniors, for whom both general public transportation and “demand responsive” paratransit service represent a lifeline to mainstream society.

Far beyond these especially vulnerable transit-dependent riders, public transportation protects and enriches all Californians. Preserving and enhancing public transportation lies at the core of California’s high-priority policy to reduce the greenhouse gas emissions responsible for global climate change to 1990 levels by 2020, and has numerous beneficial impacts on public health generally.

And California’s economic growth and prosperity suffer

disproportionately with cuts in public transportation funding and service. Studies show that \$1 in cuts to bus service yield \$10 in economic harm, while a dollar invested in transit operations yields a threefold return in increased business sales. Operating funding for public transportation, in short, grows both the economy and the state's critical sales tax base.

The Public Transportation Account ("PTA") is an important source of funding for public transportation operations. Appellants challenged two broad transactions affecting the PTA: first, the Legislature's amendment of Revenue and Taxation Code section 7102(a)(1), which had the effect of diverting \$621.9 million in "spillover" revenue into the General Fund, before it reached the PTA¹; and second, the Legislature's appropriation of \$636.9 million from PTA for purposes Appellants alleged were invalid.

On the first issue – the validity of the diversion of "spillover" funds earmarked for the PTA into the General Fund – the pivotal question is whether the Legislature's amendment of Section 7102 is "consistent with, and furthers the purposes of, the section," as the voters required in adopting Proposition 116. The court below ruled that the Legislature's amendment was lawful. It reasoned that "the purpose of section 7102 . . . is to provide for the distribution of all state sales and use tax revenues that have been deposited in the Retail Sales Tax Fund," and that the challenged amendments "are consistent with and further the purposes of section 7102 because the

¹ Of this \$621.9 million, Appellants challenged all but the \$70.9 million that went toward current debt service on Proposition 108 bonds. See Appellants' opening brief at 36, n.11.

amendments distribute sales and use tax revenues for the general operation of the government.” (CT 383 [Statement of Decision at 15].)

An unbroken line of cases, however, tracing back to the California Supreme Court’s decision in *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, requires a contrary outcome. The *Amwest* Court insisted on “effective judicial review” to prevent the Legislature from “undoing” voter initiatives. Where the voters have restricted the Legislature to amendments that “further the purposes” of their enactment, legislative action must further all of those purposes and, in particular, may not undercut the “primary mandate” of the voters. The voters’ declared intent in Proposition 116 was “that funding for public transit should be increased from existing sources including fuel taxes and sales tax on fuels.” (Prop. 116, § 1, codified at Pub. Util. Code § 99611.) Directing specific funding streams into the PTA was the voters’ “primary mandate,” whereas their further direction that any “balance” be transferred to the General Fund was secondary and derivative. The court below erred in giving effect to this secondary instruction at the expense of the voters’ “primary mandate.”

On the second issue – the appropriation of \$636.9 million from the PTA – the question turns on whether these PTA funds were used for invalid purposes other than the “transportation planning and mass transportation” purposes permitted by Public Utilities Code section 99310.5 (b), as amended by Proposition 116. The lower court ruled the use of \$409 million in PTA funds for past debt service on bond

debt unlawful, but upheld two other appropriations: \$128.8 million for transportation of persons with developmental disabilities to Regional Centers; and \$99.1 million for home-to-school transportation programs run by local school districts. (CT 385, 388 [Statement of Decision at 17, 20].) It is undisputed that these appropriations were not for “transportation planning” purposes (CT 386 [Statement of Decision at 18, n.11]); and the court below agreed that “the voters, in approving Proposition 116, intended the phrase ‘mass transportation’ to be synonymous with ‘public transportation.’” (CT 386 [Statement of Decision at 18].) In so ruling, the court implicitly respected the voters’ express statement of their intent to “increase” “funding for *public transit*.” (Prop. 116, §1, codified at Pub. Util. Code § 99611, emphasis added.) That plain intent makes it unmistakably clear that when the initiative speaks of “mass transportation” or “public transportation” in connection with the use of “spillover” funds, it is referring to “public transit.” The core meaning of public transit is that it is provided to the general public.

The lower court nonetheless concluded that “mass transportation” includes transportation provided by school districts to their students, and by Regional Centers for people with developmental disabilities to their clients. The court reasoned that both school district and Regional Center services are “special transportation” services within the meaning of the federal statutory definition of “mass transportation.” (CT 386 [Statement of Decision at 18]; *see* 49 U.S.C. § 5302(a)(7) & (10).) The Federal Transit Administration, however – the agency charged with interpreting the federal statutory definition –

has ruled in a quasi-judicial opinion that “[t]he term ‘special transportation’ is meant to refer to a type of ‘public transportation’; namely, paratransit or other demand response service.” *Thompson Motor Coach*, FTA Docket No. 2005-12 at 6 (FTA, 2007).² Statutory definitions of “public transportation” and “mass transportation,” both in federal law and in state law, consistently provide that these terms – like the term “public transit” – include only services that are available to the “general public.” (Pub. Util. Code § 99211 [“transportation services to the general public”]; see 49 U.S.C. § 5302(a)(7) & (10); 49 C.F.R. § 665.5.) Transportation services provided by school districts to their students, or by Regional Centers to some of their developmentally disabled clients, are not mass transportation programs under any definition of “mass transportation” or “public transit.” Most California youth rely on public buses to get to school, not on the increasingly rare yellow school bus. And people with developmental disabilities – who make up less than 4% of all Californians with disabilities – rely on public transit and paratransit services, not Regional Center transportation, for the majority of their transportation needs. The appropriation of PTA funds for those limited purposes that are not available to the “general public” violates Proposition 116, and is unlawful.

² For the Court’s convenience, a copy of this decision is attached as Appendix A to this brief. Accessed November 2008 at http://www.fta.dot.gov/documents/Thompson_MotorCoach_Decision_Feb-7-2007.pdf.

ADDITIONAL STATUTORY BACKGROUND³

In Proposition 116, the voters established the Public Transportation Account (“PTA”) as “a trust fund in the State Transportation Fund.” (Rev. & Tax. Code § 7102(a)(1) (“Section 7102”); Pub. Util. Code § 99310.5 (a).)⁴ The declaration of the voters’ intent expressly states “that funding for public transit should be increased from existing sources including fuel taxes and sales tax on fuels.” (Prop. 116, § 1, codified at Pub. Util. Code § 99611.)⁵

One revenue stream dedicated to the PTA, known as “spillover” revenue, is of particular relevance to this case. Under Section 7102 (a)(1), the “spillover” is the “amount by which gasoline sales tax revenues at the 4.75% rate exceed the amount generated from sales tax on all other goods at the 0.25% rate.”⁶ (CT 371 [Statement of

³ *Amici* adopt the Statement of Facts in Appellants’ Opening Brief, and the “Summary of Background Legislation” in the trial court’s Statement of Decision, at pp. 2-5 (CT 370-373), with the exception of an apparent typographical error in the description of percentages in the discussion of Section 7104 that do not add up to 100%. (CT 372.)

⁴ The PTA was previously known as the Transportation Planning and Development Account. Pub. Util. Code § 99310 (a).

⁵ While the voters’ declaration of intent in Section 1 of Proposition 116 is found in Part 11.5 (commencing with Section 99600) of the Public Utilities Code, the specific reference to “existing sources [of funding for public transit] including fuel taxes and sales taxes on fuels” can refer only to the amendments of Rev. & Tax. Code § 7102 and Pub. Util. Code § 99310.5 in Sections 3 and 2 of the Proposition, respectively. The provisions of Part 11.5 themselves relate solely to bond proceeds, not to “increas[ing] [funding for public transit] from existing sources including fuel taxes.”

⁶ The 1/4 cent (0.25%) tax rate corresponds to the sales tax that funds transit assistance under the Mills-Alquist-Deddeh Transportation Development Act. (Pub. Util. Code §§ 99200 et seq.)

Decision at 3 n.1].) “Spillover” revenue is generated when the price of gasoline rises faster than the price of other taxable goods or when the volume of gasoline sales outstrip the sale of other goods. When this happens – in particular, as occurred recently, when there is a spike in gasoline prices – net “spillover” revenue becomes available for the PTA.

PTA funds may be used “only for transportation planning and mass transportation” purposes. (Pub. Util. Code § 99310.5 (b), as amended by Proposition 116.) Half of the PTA funds derived from Section 7102⁷ are earmarked for the State Transit Assistance program (Pub. Util. Code § 99312 (b) & (c)), with the other half going to transportation planning activities. (Pub. Util. Code § 99312 (a).)⁸ The logic of directing “spillover” revenues to transit assistance is compelling: when gasoline prices rise sharply, many public transit operators face *both* higher operating costs (of which the cost of fuel

⁷ In addition to “spillover” revenues, Section 7102 directs three other fuel-tax revenue streams to the PTA: sales and use tax revenues derived from any increase to the Motor Vehicle Fuel License Tax after December 31, 1989 (Rev. & Tax. Code § 7102(a)(2)); Use Fuel Tax Law revenues under Rev. & Tax. Code § 8601 et seq. (Rev. & Tax. Code § 7102(a)(3)); and Diesel Fuel Tax Law revenues under Rev. & Tax. Code § 60001. (Rev. & Tax. Code § 7102(a)(3).)

⁸ In addition to revenue streams directed by Section 7102, another revenue stream that feeds the PTA is article XIXB of the California Constitution, added in 2002 by Proposition 42. Section 7104.2 of the Revenue and Taxation Code governs the expenditure of revenues transferred to the Transportation Investment Fund pursuant to Proposition 42. Twenty percent of those revenues are transferred to the PTA, and three-quarters of that 20 percent share is directed to the State Transit Assistance program, described below. (Rev. & Tax. Code § 7104.2 (c) (1) (B) & (C).)

comprises a significant portion) *and* higher demand, as the higher cost of driving induces more people to ride transit.

Spillover funds play a critical role in operating and maintaining California's transit system. Federal transportation law requires metropolitan transportation planning organizations⁹ to "emphasize the preservation of the existing transportation system" in their fund allocation. 23 U.S.C. §134(h)(1)(H). Preservation of existing transit service requires funds for two kinds of expenses, *operating* and *capital rehabilitation*. Without adequate *operating* funding (to cover, among other things, driver salaries and fuel costs), existing service must be cut, and fares increased beyond affordable levels. Without adequate *capital rehabilitation* funding, aging buses, rail cars and tracks, and ferries must eventually be removed from service. In 1998, Congress placed restrictions on the use of federal transit "formula" funds which had previously been broadly available to address transit operating expenses; in larger urban areas, those funds may now be used only to meet capital expenses, with the exception that they may also be used for "preventive maintenance," an operating expense. (49 U.S.C. § 5307(a)(1).) The effect of this restriction in some parts of California has been significantly to reduce the pool of public funding available for transit operations.

⁹ The eighteen metropolitan planning organizations ("MPOs") in California include various "councils of governments" (such as the Southern California Association of Governments, the San Diego Association of Governments, Sacramento Area Council of Governments), as well as the Bay Area's Metropolitan Transportation Commission. See <http://www.dot.ca.gov/hq/tpp/offices/orip/index.html>.

When incremental gasoline tax revenues “spill over” into the the PTA, half of those revenues go toward the State Transit Assistance (“STA”) program and are available to sustain existing public transit operations. By statute, STA funding is allocated to regional transportation planning agencies (“RTPAs”),¹⁰ half on a revenue-based formula and half on a population-based formula. (Pub. Util. Code §§ 99312 (b) & (c), 99313 [population], 99314 [revenue].) Both population- and revenue-based STA funds must be used “for public transportation purposes, including community transit services.”¹¹ (Pub. Util. Code § 99313.3.) In particular, in allocating STA funds, the RTPAs must “give priority consideration to claims to offset reductions in federal operating assistance [under 49 U.S.C. § 5307, *see above*] and the unanticipated increase in the cost of fuel, to enhance existing public transportation services, and to meet high-priority regional, countywide, or areawide public transportation needs.” (Pub. Util. Code § 99314.5(c).)

Entirely distinct from the system *preservation* needs (operating and capital rehabilitation funds) are the financial costs of system *expansion* – the construction of new transportation infrastructure, such as freeway expansion or the extension of a rail line. Capital

¹⁰ In addition to the agencies designated as MPOs under federal law (see previous footnote), there are twenty-six regional transportation planning agencies in smaller regions of the state. See <http://www.dot.ca.gov/hq/tpp/offices/orip/index.html>.

¹¹ “Community transit services” include “such services for those, such as the disabled, who cannot use conventional transit services” (Pub. Util. Code § 99275(a)), i.e., paratransit services provided pursuant to the Americans with Disabilities Act.

expansion projects compete for certain funding sources with existing system preservation, and also make use of capital-only funding sources such as the bonds authorized by Proposition 1B (the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006), and Proposition 1a (the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century of 2008). Bond funds, however, generally may not be used to operate transit service. In fact, the construction of new transportation infrastructure can place an additional strain on the availability of transit operating funds, for two reasons. First, new transit infrastructure requires operating subsidies once it is built; and second, since the repayment of transportation construction bonds is secured by the state's General Fund, state funding for transit operations becomes especially precarious in difficult budget times. Indeed, in times of fiscal emergency public transit operating fund commitments are at risk of suspension in order to meet other obligations, such as bond repayment. This danger has now become real with the Governor's announcement in his November 2008 budget revise that the STA funding programs will be entirely eliminated from the current and all future state budgets.¹² The future of the "spillover" becomes even more critical as a result of this new budget proposal.

¹² Office of the Legislative Analyst, *Overview of the Governor's Special Session Proposals*, Figure 5 at page 10. Accessed November 2008 at http://www.lao.ca.gov/2008/bud/nov_revise/nov_revise_overview_111108.pdf.

FACTUAL BACKGROUND

A. Public Transit Plays a Critical Role in Providing Access to Opportunity, Promoting Important Climate Change Policy and Growing the Regional and Statewide Economy.

Behind the voters' expressed intent "that funding for public transit should be increased from existing sources including fuel taxes and sales tax on fuels" (Prop. 116, § 1, codified at Pub. Util. Code § 99611) are weighty reasons of public policy demanding increased funding for public transit. Public transportation enriches all Californians. Low-income families and others who depend on transit services to meet all of their transportation needs benefit from the social equity impacts of transit investment, and suffer grave harms when funding falls short. California's environmental sustainability – including its high-priority goal of reducing the greenhouse gas emissions behind global climate change – depends heavily on sufficient funding for public transportation. And economic growth for all Californians is promoted by more robust transit systems, supported by adequate funding, and is jeopardized by shortfalls in such funding.

1. Social Equity

While public transportation benefits all Californians, it is particularly critical to our State's most vulnerable populations – in particular, families and individuals who have no choice but to depend on transit because they lack reliable access to private automobiles. These "transit-dependent" populations and communities are largely composed of the working poor, seniors, youth, people of color,

women, immigrants, and persons with disabilities.¹³ Public transportation links these communities to essential opportunities – jobs, schools, senior centers, hospitals, grocery stores, and other necessities of daily life – from which they would otherwise be excluded.¹⁴ Transit-dependent persons already face significant mobility barriers resulting from the underfunding of the existing transportation system, and have shouldered the burden of repeated transit service cuts and fare increases over a period of years. The Legislature’s continuing diversion of scarce public transportation dollars – especially operating dollars – harms these low-income populations acutely, compounding the hardships they already face in accessing basic opportunities.

Public transportation is especially critical to low-income residents because “households that use public transportation save an average of \$6,251 every year.”¹⁵ This is a very significant sum for

¹³ Income and transit dependency are closely correlated. In the San Francisco Bay Area, for example, low-income households are overall nearly five times more likely to have no car than other households (27.4% vs. 6.0%). Metropolitan Transportation Commission for the San Francisco Bay Area, *Transportation 2030 Equity Analysis Report* (November 2004), Appendix B at B-11. Accessed November 2008 at http://www.mtc.ca.gov/planning/2030_plan/equity.htm.

¹⁴ See Alameda County Public Health Department, *Life and Death from Unnatural Causes – Health and Social Inequity in Alameda County* (August 2008) at 80 (hereafter “Life and Death”). Accessed November 2008 at http://www.acphd.org/user/data/DataRep_ListbyCat.asp?DataRepdivId=2&DataRepdivcatid=62.

¹⁵ H.R. 6052, introduced on May 14, 2008, co-sponsored by Rep. Ellen Tauscher (10th Calif. Cong. Dist.). See also American Public Transit Association, *Public Transportation Reduces Greenhouse Gases and*

lower-income families. In Alameda County, for instance, households making less than \$20,000 spend over half their income on transportation, as compared to households with incomes over \$100,000, who spend only 7 percent on transportation.¹⁶ Low-income adults in Oakland and Richmond already spend \$840 annually on monthly AC Transit passes, while families in Santa Clara County spend \$440 a year per child to send their children to school on the public bus.¹⁷ For these transit-dependent residents – particularly low-wage workers, women in poverty, youth, seniors and persons with disabilities – more money spent on transportation means less money for housing, food, prescription medicine, and other necessities.

Low-income workers rely heavily on transit to get them to entry-level jobs, increasingly located in suburbs distant from their homes.¹⁸ In the San Francisco Bay Area, where at least 23 percent of

Conserves Energy at 3 (citing “Public Transportation and Petroleum Savings in the U.S.: Reducing Dependence on Oil,” ICF International, January 2007). Accessed November 2008 at http://www.apta.com/research/info/online/greenhouse_brochure.cfm.

¹⁶ Life and Death, *supra*, at pages 81-82. Moreover, transportation-related costs are increasing at a faster rate for low-income households. Sanchez, T. W., Stolz, R., & Ma, J. S., *Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities* Cambridge, MA: The Civil Rights Project at Harvard University (2003) (hereafter, “Sanchez”), at 12. Accessed August 2005 at <http://www.civilrightsproject.harvard.edu/research/transportation/MovingtoEquity.pdf>.

¹⁷ See <http://www.actransit.org/riderinfo/busfares.wu> (AC Transit) and <http://www.vta.org> (Santa Clara VTA).

¹⁸ Sanchez, *supra*, at 10, 17.

transit riders are transit-dependent,¹⁹ almost half of all transit routes connect low-income neighborhoods to employment hubs and other priority destinations.²⁰ In the Fresno-Clovis area, transit ridership is largely comprised of “the residents of our cities who suffer the highest unemployment rates,” for whom “the lack of necessary transportation is the primary barrier between finding and keeping jobs.”²¹ In contrast, investments in bus service result in significant employment opportunities for workers by improving accessibility to employment centers.²²

Women make up a large segment of the working poor, relying more heavily on public transportation than men.²³ Due to child care and household responsibilities, women tend to dominate lower-paying jobs located closer to home, and depend on transit not only to get to

¹⁹ Godbe Research, *2006 MTC Transit Passenger Demographic Survey* (April 2007), Chapter 2 at 3. Accessed November 2008 at http://www.mtc.ca.gov/maps_and_data/datamart/survey/2006_transit.htm. This survey understates transit-dependency rates as a result of its non-standard definition.

²⁰ Metropolitan Transportation Commission, *Lifeline Transportation Network Report: 2001 Regional Transportation Plan for the San Francisco Bay Area* (December 2001) (hereafter “LTN Report”), at 16, 21.

²¹ Council of Fresno County Governments, *2007 Regional Transportation Plan: The Long-Range Transportation Vision for the Fresno County Region for the Years 2007 to 2030* (2007), Chapter 4 at 45. Accessed November 2008 at <http://www.fresnocog.org/document.php?pid=250>.

²² Life and Death, *supra*, at 80.

²³ Women’s Foundation of California, *Women In Transit: Analyzing Gender for Transportation* (San Francisco, 2004) at 4. Accessed November 2008 at <http://www.womensfoundca.org/site/c.aqKGLROAIrH/b.982223>.

work, but for shorter trips to shop for food and clothing, to care for dependent parents, and to get their children to school.²⁴ This is particularly true in immigrant and low-income communities of color. Low-income Latinas with children take 95 percent more trips of under one mile than men.²⁵ Similarly, African American women with children take five times more trips by transit than other women.²⁶ Because of their heavy reliance on transit, low-income women of color are uniquely harmed by cuts in public transportation funding.

Young people in California increasingly depend on public transportation to get to educational opportunities. Because state law does not require school districts to provide transportation to school (see *Arcadia USD v. State Dept. of Educ.* (1992) 2 Cal.4th 251), districts in California and beyond have shifted the cost of student travel onto students and their families by eliminating or significantly curtailing their school transportation services. The Los Angeles Unified School District, for example, does not offer transportation service for most of its 693,000 students,²⁷ leaving local transit operators to fill the gap. The same is true in the Bay Area, where Alameda-Contra Costa Transit District (“AC Transit”) provides this service in the counties of Alameda and Contra Costa, carrying 60,000 students daily.²⁸ Overall, fewer than 8 percent of California students

²⁴ *Ibid.*

²⁵ *Id.* at 4.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ See

<http://www2.actransit.org/news/articledetail.wu?articleid=194db5a2&r=n>

rode a “yellow school bus” to school in 2000-01.²⁹ As a result, the Legislature’s appropriation of PTA dollars to backfill the General Fund dollars it previously dedicated to the State’s Home-to-School and Small School District Transportation programs results in a net *loss* of transportation services for youth.

For many of the 3.5 million **elderly** persons in California, public transportation functions as a lifeline service that connects them to relatives, health care services, senior centers, volunteer activities, and other community resources. Nationally, more than one in five Americans over the age of 65 do not drive.³⁰ Poor access to public transportation leaves many seniors isolated. Over 50 percent of non-driving seniors “stay home on any given day partially because they lack transportation options.”³¹ This affects African American, Latino, and Asian seniors disproportionately, as they are more than twice as likely to rely on public transportation than their white counterparts.³²

Finally, transit plays a crucial role in providing access for **persons with disabilities** to the mainstream of society. The “lack of accessible public transportation, cost of public transportation, or

(accessed November 2008).

²⁹ Surface Transportation Policy Project, *Can’t Get There From Here: The Declining Independent Mobility of California’s Children and Youth* (September 2003), at 3. Accessed November 2008 at <http://www.transformca.org/resource/cant-get-there-here>.

³⁰ Bailey, L., *Aging Americans: Stranded Without Options* (Surface Transportation Policy Project, April 2004) at 1 (hereafter “Stranded”). Accessed November 2008 at <http://www.transact.org/report.asp?id=232>.

³¹ Id. at 2.

³² Id. at 1.

distance to public transportation limit[s] the[] mobility” of disabled populations, causing “significant problems in the location and sustenance of competitive employment, engagement in leisure activities, and attempts to become self-sufficient.”³³ Nearly 13% of California’s residents have a physical, psychiatric, developmental or other type of disability.³⁴ Persons with developmental disabilities represent less than 4% of all Californians with disabilities.³⁵ Transit operators and paratransit providers function as the primary source of mobility for many of these individuals, transporting them to a diverse array of destinations. AC Transit, for example, the largest transit operator for the counties of Alameda and Contra Costa, provides over 4 million bus trips annually to persons with disabilities along the Interstate 80/880 corridor of the East Bay, not counting paratransit service.³⁶ By comparison, the Regional Center for the East Bay

³³ McGill, Tama, *Driver's education for students with physical disabilities*, EXCEPTIONAL CHILDREN, Volume 67; Issue 4 (September 30, 2001) at 455-466. Accessed November 2008 at <http://www.cec.sped.org/AM/Template.cfm?Section=Archives2&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=23&ContentID=4526>.

³⁴ U.S. Bureau of the Census, 2003 American Community Survey. Accessed November 2008 at http://www.pascenter.org/state_based_stats/state_statistics_2003.php?state=california.

³⁵ According to the California Department of Disability Services, one-half of one percent (0.5%) of Californians – just over 200,000 – are diagnosed with a developmental disability. DDS October 2008 Monthly Consumer Caseload Report. Accessed November 2008 at http://www.dds.ca.gov/FactsStats/docs/Oct08_caseload.pdf.

³⁶ People with disabilities represent 6 percent of AC Transit’s 200,000 daily riders. AC Transit District, *2002 On-Board Passenger Survey—System-wide Results AC Transit survey* (October 2003) at 2, 4. Accessed

provides only 1.2 million trips per year in the entirety of those same two counties.³⁷

Service cuts and fare increases will further impair the reliability and affordability of transit, keeping low-wage workers from jobs, further isolating seniors and people with disabilities from critical resources, depriving students of a ride to school and forcing low-income households to purchase, maintain and insure automobiles they cannot afford.

2. Environment

Apart from the benefits of public transit service to particularly vulnerable communities and populations throughout California, transit service promotes California's important goals in the areas of environmental sustainability and economic growth, as *amici* now discuss.

California recognizes that global warming is an urgent problem. In the words of the California Climate Change Center, "[t]oday's climate variability and weather extremes already pose significant risks to California's citizens, economy, and environment."³⁸ Assembly Bill

November 2008 at
http://www.actransit.org/planning_focus/details.wu?item_id=24&PHPSESID=09b13e2ae50a017db3740e7e3bbf062e.

³⁷ Nelson Nygaard Consulting Associates, *Coordinated Public Transit Human Services Transportation Plan Elderly and Disabled Component* (presented to the Metropolitan Transportation Commission, December 2007), at 4-3. Accessed November 2008 at <http://mtc.ca.gov/planning/pths/index.htm>. Calculated from the figure given for monthly one-way trips.

³⁸ California Climate Change Center, *Preparing for the Impacts of Climate Change in California: Opportunities and Constraints for Adaptation* (March

32, the California Global Warming Solutions Act of 2006, requires a reduction of the state's total greenhouse gas ("GHG") emissions to 1990 levels by the year 2020, based on Legislative findings that:

The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to the marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other health-related problems.

Governor Schwarzenegger's 2005 Executive Order S-3-05 requires further reductions to 80% below 1990 GHG levels by 2050.

Transportation accounts for the largest share of California's greenhouse gas emissions, 38%,³⁹ and much of this comes from the private automobile.⁴⁰ Moreover, if no action is taken, the California Air Resources Board projects that GHG emissions in the State's transportation sector will grow by 25 percent over the next twelve

2006) at v. Accessed November 2008 at <http://www.energy.ca.gov/2005publications/CEC-500-2005-198/CEC-500-2005-198-SF.PDF>.

³⁹ Governor's Exec. Order S-3-05 (June 1, 2005); California Climate Change Center, *Our Changing Climate: Assessing the Risks to California* (July 2006) at 2, 10. Accessed November 2008 at <http://www.energy.ca.gov/2006publications/CEC500-2006-077/CEC-500-2006-077.PDF>. The report was prepared by the Climate Change Center at the direction of CalEPA pursuant to its authority under Exec. Order S-3-05.

⁴⁰ Draft California Greenhouse Gas Emissions Inventory, as provided by CARB. Accessed November 2008 at http://www.arb.ca.gov/cc/inventory/data/tables/rpt_Inventory_IPCC_Sum_2007-11-19.pdf.

years.⁴¹ Accordingly, “improvements in public transportation” are proposed to be an important part of the solution to climate change.⁴² The California Attorney General is advising local and regional agencies to take a variety of steps to promote the use of public transit, including “[g]iv[ing] funding preference to investment in public transit over investment in infrastructure for private automobile traffic.”⁴³

“Public transportation use in the United States is estimated to reduce carbon dioxide emissions by 37 million metric tons annually.”⁴⁴ Individuals who commute to work using public transportation “reduce carbon dioxide emissions by 20 pounds per day (more than 4,800 pounds per year),” compared to those “who commute[] to work using a single occupancy vehicle.”⁴⁵

The Attorney General has specifically warned that shortfalls in the funding required to preserve existing levels of public transit service can significantly impede California’s GHG reduction goals. For instance, in recent comments to the Bay Area’s Metropolitan Transportation Commission, the Attorney General noted:

⁴¹ California Air Resources Board, *Draft Proposed Scoping Plan for AB 32 Regulations*, Oct. 2008, at 11-12. Accessed November 2008 at <http://www.arb.ca.gov/cc/scopingplan/document/scopingplandocument.htm>.

⁴² *Id.* at 23.

⁴³ California Department of Justice, “The California Environmental Quality Act: Addressing Global Warming Impacts at the Local Agency Level” (Sept. 26, 2008) at page 8. Accessed November 2008 at <http://ag.ca.gov/globalwarming/ceqa.php>.

⁴⁴ H.R. 6052, introduced on May 14, 2008, co-sponsored by Rep. Ellen Tauscher (10th Calif. Cong. Dist.).

⁴⁵ *Id.*

If low-performing “committed” projects were eliminated where feasible to do so, funding would be available to cover transit shortfalls, particularly for BART, Muni, and AC Transit, which together carry 80% of the transit riders in the Bay Area. If these shortfalls are not addressed, or if they are addressed through fare increases, as recently proposed, ridership may fall, with a concomitant increase in GHG emissions.⁴⁶

The Legislature reinforced its commitment to GHG reduction this year in Senate Bill 375 (“SB 375”) by means of new requirements to promote “smart growth.” Recognizing that quality public transit service is integral to meeting GHG reduction goals, SB 375 links land use policies that reduce GHG emissions to transportation investment. SB 375 effectively calls for compact development around public transportation. The loss of State Transit Assistance funding statewide, at a time when California policy requires increased transit ridership, undermines one of the state’s best ways to meet its ambitious climate change goals.

The environmental harm caused by restricting public transit extends well beyond global warming. Inadequate transit service undermines public health, as transportation availability and affordability are tied directly to key social and economic health determinants, including stress, education, employment, nutrition, health care and social inclusion.⁴⁷ For example, a recent study by the

⁴⁶ Letter of Attorney General to A. Nguyen, EIR Project Manager, Metropolitan Transportation Commission, dated Oct. 1, 2008, at page 6. Accessed November 2008 at <http://ag.ca.gov/globalwarming/ceqa/comments.php>.

⁴⁷ World Health Organization, *Social Determinants of Health: The Solid Facts* (2nd ed., 2003) at 12-21. Accessed November 2008 at

John Hopkins School of Public Health and the Pew Environmental Health Commission have found a clear link between smog created by car exhaust and increasing evidence of asthma, especially in children.⁴⁸ Roads are significant contributors to runoff pollution, the number one threat to water quality in the U.S.⁴⁹ Automobile-dependent cities devote three to five times more land to transportation than cities with robust transit networks.⁵⁰

3. Economy

The impacts of transit service cuts on the economy include not only indirect economic impacts on public health and climate change, but very direct harms to California's economy. Public transit service is an engine of economic growth. Conversely, reduced public transportation service has both near-term and long-term negative effects on the economy.

Public transportation keeps our economy moving. A 2007 study estimated that Californians in nine metropolitan regions spent

www.euro.who.int/document/e81384.pdf.

⁴⁸ Pew Environmental Health Commission, *Attack Asthma: Why America Needs a Public Health Defense System to Battle Environmental Threats*, May 2000. Accessed November 2008 at <http://healthyamericans.org/reports/files/asthma.pdf>.

⁴⁹ Natural Resources Defense Council, *Stormwater Strategies: Community Responses to Runoff Pollution* (May 1999). Accessed November 2008 at <http://www.nrdc.org/water/pollution/storm/stoinx.asp>.

⁵⁰ U.S.PIRG Education Fund, *A Better Way to Go: Meeting America's 21st Century Transportation Challenges with Modern Public Transit* (March 2008). Accessed November 2008 at <http://www.calpirg.org/home/reports/report-archives/world-class-public-transit/world-class-public-transit/a-better-way-to-go-meeting-americas-21st-century-transportation-challenges-with-modern-public-transit>.

871 million hours in traffic delays in 2006, a 38 percent increase from 1995. The report found that California's existing public transportation services prevented more than 70 million hours of additional traffic delay – equivalent to about 8,100 person-years – in those nine California regions, and saved the state's economy more than \$1.2 billion in lost time and productivity in a single year.⁵¹

Moreover, investment in operating public transportation has a multiplier effect on the economy: \$10 million invested in transit operations yields \$32 million in increased business sales.⁵² In particular, expanding public transportation creates 19 percent more jobs than expanding roadway and highway capacity.⁵³

⁵¹ David Schrank and Lomax, T., *The 2007 Urban Mobility Report*, (Texas Transportation Institute, September 2007). Accessed November 2008 at <http://mobility.tamu.edu>.

⁵² “It is estimated that every \$10 million in capital investment in public transportation yields \$30 million in increased business sales, and that every \$10 million in operating investment in public transportation yields \$32 million in increased business sales. Further, every \$1 taxpayers invest in public transportation generates \$6 in economic returns.” American Public Transportation Association, *Statement of National Purpose*. Accessed November 2008 at http://www.apta.com/research/info/online/post_safetea_lu.cfm.

⁵³ Surface Transportation Policy Project analysis of FHWA JOBMOD: Construction Employment Model, as reported in *Decoding Transportation Policy & Practice #11: Setting the Record Straight*. January 28, 2004. Accessed November 2008 at http://www.transact.org/library/decoder/jobs_decoder.pdf. See also P. Haas, B. Taylor, S. Van Beek, K. Samples, J. Li & D. Lewis, *Capital and Operating Grants for Transit in California: The Effects of Outlays and Expenditures* (Norman Y. Mineta International Institute for Surface Transportation Policy Studies, July, 1997) (finding that “operating expenditures generate more employment and economic growth than do capital expenditures.”).

At the household level, investments in public transportation can significantly reduce transportation costs for those living near transit stops. Residents in areas with robust transit networks spend approximately 10 percent of their income on transportation, whereas residents in auto-dependent communities spend as much as 25 percent of their income on transportation,⁵⁴ a disparity that will almost certainly grow with the increasing price of oil.⁵⁵

Conversely, service cuts can have a magnified ripple effect on the communities they affect. A case study of bus service cuts in 1998 in the Bay Area concluded that an AC Transit service cut prompted by a \$4.8 million budget shortfall cost AC Transit's minority and low-income riders about ten times that sum in estimated lost income and additional transportation costs – some \$48.1 million.⁵⁶

Nationally, “the direct petroleum savings attributable to public

⁵⁴ Center for Transit-Oriented Development and Center for Neighborhood Technology, *The Affordability Index: A New Tool for Measuring True Affordability of a Housing Choice* (Brookings Institution, January 2006) at 2. Accessed November 2008 at http://www.brookings.edu/reports/2006/01_affordability_index.aspx.

⁵⁵ The price of a gallon of gasoline more than doubled between 1990 and 2007. In real dollars the price rose from \$1.73 to \$2.69 per gallon – an increase of 55 percent. Stacey C. Davis and Susan W. Deigel, U.S. Department of Energy: Energy Efficiency and Renewable Energy, *Transportation Energy Data Book Edition 26*, 2007; Energy Information Administration, Retail Gasoline and Diesel Price, 1 October 2007.

⁵⁶ Orain & Associates, and Byrd R., *Using Public Transportation to Reduce the Economic, Human and Social Costs of Personal Immobility* (1998), Appendix (prepared for the Transit Cooperative Research Program of the Transportation Research Board, National Research Council). Accessed November 2008 at http://books.nap.edu/openbook.php?record_id=9438&page=129.

transportation is 1.4 billion gallons per year, and when the secondary effects of transit availability on travel are also taken into account, public transportation use saves the United States the equivalent of 4.2 billion gallons of gasoline per year. . . .”⁵⁷

B. The Diversion of Spillover Funds Has Harmed Riders of Transit Systems Across California.

Transit operators of every size, in every region of California, serving urban, suburban and rural communities with bus, rail and ferry transit, have suffered significant harms as a result of inadequate funding to operate and rehabilitate their existing transit systems. In total, legislative diversions of spillover revenues have deprived operators of \$4.6 billion since fiscal year 2000-01.⁵⁸ This massive loss of revenue has forced operators to raise fares, cut service, continue to operator older polluting vehicles required to be replaced with clean air technology, and defer a range of needed improvements.

The ten largest transit operators in California carry over one billion riders annually among them.⁵⁹ These large operators are

⁵⁷ H.R. 6052, introduced on May 14, 2008, co-sponsored by Rep. Ellen Tauscher (10th Calif. Cong. Dist.). See also American Public Transit Association, *Public Transportation Reduces Greenhouse Gases and Conserves Energy* at 3 (citing “The Broader Connection between Public Transportation, Energy Conservation and Greenhouse Gas Reductions,” ICF International, February 2008.). Accessed November 2008 at http://www.apta.com/research/info/online/greenhouse_brochure.cfm.

⁵⁸ See <http://transformca.org/campaign/state-budget/transit-funding-losses> (accessed November 2008).

⁵⁹ The ten largest California operators are the Los Angeles County Metropolitan Transportation Authority, San Francisco Municipal Railway (“Muni”), San Francisco Bay Area Rapid Transit District, Orange County

suffering grave economic difficulties, in part resulting from the diversion of spillover funds. In the Bay Area, the diverted STA funding would have helped to close **San Francisco Muni's**⁶⁰ \$14.8 million projected deficit for 2008-2009. Further cuts will exacerbate Muni's projected \$65M budget deficit for 2009-2010. To close Muni's current budget deficit, the agency has proposed increasing monthly pass. fares. **Alameda-Contra Costa Transit** ("AC Transit")⁶¹ proposed a fare increase in 2008, but has delayed adoption

Transportation Authority, Alameda-Contra Costa Transit District "AC Transit"), Santa Clara Valley Transportation Authority, San Diego Trolley, Inc., Sacramento Regional Transit District, City of Los Angeles Department of Transportation, and Long Beach Transit. Phineas Baxandall, *A Better Way to Go: Meeting America's 21st Century Transportation Challenges with Modern Public Transit* (March 2008, U.S. PIRG Education Fund) at Table B-2. Accessed November 2008 at <http://www.calpirg.org/uploads/pQ/18/pQ18Wu1k2jV-pDPxFnFKoQ/A-Better-Way-to-Go.pdf>.

⁶⁰ San Francisco Municipal Transportation Authority ("Muni") provides 207 million passenger trips every year in San Francisco through a network of buses, trolleys, light rail, cable car, and paratransit. Between 2007 and 2008, Muni saw a 4.7% increase in ridership, with light rail ridership increasing by over 12%. In San Francisco, 31% of residents commute to work by transit and 30% of residents do not own a car. See <http://www.sfmta.com/cms/mhome/home50.htm>.

⁶¹ Alameda-Contra Costa Transit ("AC Transit") is the third-largest public bus system in California. Serving 13 cities, AC Transit carries approximately 65 million riders a year within Alameda and Contra Costa counties, with service to three other counties. Overall, 78% of AC Transit's riders are minorities, 17 percentage points higher than the Bay Area baseline of 61%. More than a third of all AC Transit riders have extremely-low household incomes, earning below \$25,000. More than 60% of adult AC Transit riders rely on transit as their main source of transportation. Nearly a quarter of AC Transit riders are youth, many of whom depend on its school service. Nearly 10% are seniors and people with disabilities. See <http://www.actransit.org/main.wu?r=n>.

in favor of extending a parcel tax in the district. And **Santa Clara Valley Transit Authority (“VTA”)**⁶² recently identified \$40 million in unbudgeted capital rehabilitation needs over the next 5 years. The redirected state funds could have met this maintenance shortfall. Instead, VTA must delay other critical investments.

Small rural operators are also gravely impacted. **Yuba Sutter Transit**,⁶³ like other small operators, use STA funds as their primary source of local match for federal money. Loss of these funds means deferred capital investment in their transit systems. The diversion of spillover funds in fiscal year 2007-08 forced **Fresno County Rural Transit Agency**⁶⁴ to delay the planned purchase of alternatively-fueled replacement transit vehicles to meet mandated greenhouse gas emission requirements in California. And **Monterey Salinas**

⁶² Santa Clara Valley Transportation Authority (“VTA”) provides 43 million trips per year on its bus and light rail services. Nearly two-thirds 65% of VTA riders use transit as their primary mode of transportation. System ridership grew 9.1% between March 2007 and March 2008. See <http://www.vta.org>.

⁶³ Yuba Sutter Transit provides six lines of bus service in Yuba City, Marysville, Linda and Olivehurst. Yuba Sutter Transit provided 828,166 rides in 2007-08, an 11% increase over the previous year. To meet increasing demand, Yuba Sutter Transit increased systemwide service hours by 8% in 2007 and by another 5% in 2008. Youth ridership has increased by one-third since 2007. See <http://www.yubasuttertransit.com>.

⁶⁴ Fresno County Rural Transit Agency serves 45 unincorporated rural cities, 23 of them in Fresno County. The 18 transit subsystems that work together under Fresno Rural Transit Agency provide 500,000 trips annually. They they have experienced a 10% increase in ridership over the past year. Eighty percent of their riders do not have access to a personal vehicle. Over the past year, Fresno Rural Transit Agency has seen an increase in seniors (over 65) using their services. See <http://www.ruraltransit.org>.

Transit⁶⁵ had to defer many mid-life rebuilds of its 2000 vintage buses because of lack of funding.

The loss of state transit funds in the 2007-08 budget meant a shortfall that **North County Transit** (San Diego)⁶⁶ had to fill by raising fares across the board, and has also required it to propose the largest service cuts in the agency's history – a \$4 million annual reduction in service. Further diversion of funding will likely force North County to cut additional service and defer several maintenance projects. With the diverted state transit funding, **San Diego Metropolitan Transit System**⁶⁷ could have placed another 35 buses in service; instead, it imposed \$4 million in service cuts in the first half of 2008 alone, and implemented fare hikes. The diversion of state transit funds meant that **Riverside Transit Agency**⁶⁸ could not

⁶⁵ Monterey Salinas Transit (“MST”) serves a population of about 352,000 with 37 routes in a 280 square-mile area of Monterey County and Southern Santa Cruz County, providing 5 million bus and paratransit rides per year. Fifty-seven percent of MST riders use MST service as their main form of transportation. See <http://www.mst.org>.

⁶⁶ North County Transit District provides commuter rail, bus, and paratransit services in the 1,020 square miles of north San Diego County, a service area of 800,000 people. North County provides 11.9 million trips per year to a ridership, nearly two-thirds of which is transit-dependent. Commuter rail ridership in their service area continues to grow at a 5-7% annual rate. See <http://www.gonctd.com>.

⁶⁷ San Diego MTS provides light rail service and bus service, with three rail lines (53 stations on 53.5 miles of track) and 82 fixed-route bus lines. MTS served 86 million riders in 2007. Ridership grew five percent more in 2008, with growth as high as eleven percent on some lines. See <http://www.sdcommute.com>.

⁶⁸ Riverside Transit Agency (“RTA”) provides local and regional transit services in a 2,500 square mile region with 38 fixed-routes, five CommuterLink routes, and Dial-A-Ride services. RTA’s CommuterLink

to purchase additional expansion buses, expand CommuterLink routes, or implement Bus Rapid Transit service.

The diversion of state transit funds prevented **Santa Cruz Metro**⁶⁹ from long-deferred replacement of vehicles, raising serious safety risks. If spillover funds continue to be diverted in the state's 2009-2010 budget, Santa Cruz Metro will not be able to replace 30 diesel buses that must be retired to meet California Air Resources Board guidelines requiring the replacement of these buses with clean compressed natural gas ("CNG") buses, resulting in a severe service cut. Paratransit service levels will also be threatened. The diverted public transit funding would have enabled **Santa Monica Big Blue Bus**⁷⁰ to increase service on its successful community transit routes and to improve its bus rapid transit service on its busiest corridor, Pico

ridership rose 18.52% by mid-2008 over 2007 levels, growth that RTA accommodated by replacing 12-seat buses with 40-seat buses and by adding mid-day service. Much of RTA's increase in demand comes from high school and college students. Approximately 85% of RTA riders use public transit as their main form of transportation. See <http://www.riversidetransit.com/home/index.htm>.

⁶⁹ Santa Cruz Metro provides 5.6 million trips per year in the County of Santa Cruz on 39 local bus routes, an express bus route on Highway 17, and paratransit. Nearly 60% of Santa Cruz Metro riders use transit as their main form of transportation. Ridership on the Highway 17 commuter line rose by 7% between in 2008. See <http://www.scmtd.com>.

⁷⁰ Santa Monica's Big Blue Bus provides 21.8 million trips per year. In 2008, a series of community transit routes, on some which ridership has increased by over 100%. Three-quarters of Big Blue Bus riders use transit as their main form of transportation, and nearly two-fifths are Hispanic, a proportion that has grown over the past few years. See <http://www.bigbluebus.com/home/index.asp>.

Blvd. Instead, it faces a funding gap that has forced it to eliminate free transfers. And the diversion of spillover funding has prevented **Santa Rosa CityBus**⁷¹ from provide service at greater frequencies, meaning waits of 30 minutes or more for riders, and has required weekday service to run only until 8:30 p.m. Finally, lost STA funds would have helped **Torrance Transit System**⁷² meet the rising fuel costs that they have been facing over the past several years. Instead, they are moving forward with a fare increase proposal and have had to draw on reserves to pay for increased fuel expenses. Further loss of state funding will mean that Torrance defers replacement of diesel buses by gas-electric hybrid buses.

These are but a sampling of the transit systems on which riders depend up and down California. Diverted spillover revenues mean harms to their low-income riders, youth, seniors, and people with disabilities; to California's efforts to stem global warming by reducing greenhouse gas emissions; and to California's economic viability.

⁷¹ Santa Rosa CityBus operates 19 bus lines throughout the City of Santa Rosa. Seventy percent of riders use City Bus as their primary source of transportation. Santa Rosa CityBus had to raise their fares by 10% in 2008 and is scheduled to raise fares and additional 15% in 2009 to accommodate increased operating expenses and the reduction in state funding. State funding is CityBus' primary source of operating revenue. See <http://ci.santa-rosa.ca.us/departments/transitandparking/transit/CityBus/Pages/default.aspx>.

⁷² Torrance Transit System provides 4.5 million bus trips per year on eight routes between Los Angeles and Long Beach. It has experienced an 18.6% increase in ridership in 2008. They also operate a "Senior Taxi" program for adults over 65 and a "Dial-a-Taxi" service for people with physical disabilities. Nearly 85% of its bus riders use its service as their main form of transportation. See <http://www.ci.torrance.ca.us/128.htm>.

LEGAL DISCUSSION

I. THE AMENDMENTS TO SECTION 7102 DO NOT FURTHER THE VOTERS' PURPOSES AND ARE INVALID.

A. *Amwest's* Independent Review Standard Protects the People's Sovereign Initiative Powers from Legislative Encroachment.

While “[t]he legislative power of this State is vested in the California Legislature, ... the people reserve to themselves the power of initiative and referendum.” (Cal. Const., art. IV, §1.) It has long been “settled that the power of initiative ... is the exercise by the people of a power reserved to them, and not the exercise of a right *granted* to them.” (*Ley v. Dominguez* (1931) 212 Cal. 587, 593, emphasis in original.) Indeed, “the people’s reserved power” is not merely co-equal with the power it has delegated to the Legislature; it “is greater than the power of the legislative body.” (*Rossi v. Brown* (1995) 9 Cal.4th 688, 715; see *id.* at 695 [court’s duty to “jealously guard” the initiative power by applying a “liberal construction” to it].) The Legislature, for its part, “may not bind future Legislatures, ... [but] through [the] exercise of the initiative power the people may bind future legislative bodies other than the people themselves.” (*Ibid.*)

The people’s sovereign power to bind the Legislature is expressed constitutionally in article II, section 10(c), which imposes strict limits on the Legislature’s power to amend an initiative statute without a vote of the people:

The Legislature ... 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.

(Cal. Const., art. II, §10(c).) Under section 10(c), the power of the voters “to decide whether or not the Legislature can amend or repeal initiative statutes ... is absolute and includes the power to enable legislative amendment *subject to conditions attached by the voters.*” (*Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal. App. 4th 1354, 1364 [hereafter, “*Foundation*”], quoting *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251, emphasis in original.) The purpose of section 10(c) is “to ‘protect the people’s initiative powers by precluding the Legislature from *undoing what the people have done*, without the electorate’s consent.” (*Foundation, supra*, 132 Cal. App. 4th at 1364, quoting *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484 [hereafter, “*Project*”], emphasis added, citation omitted.)

The voters, exercising their “absolute” power to limit the Legislature’s scope of action, imposed the condition that Proposition 116 may not be amended by an act of the Legislature unless it “is consistent with, and furthers the purposes of” Sections 7102 and 99310.5. (Proposition 116, § 2 (Pub. Util. Code § 99310.5 (c)); § 4 (Rev. & Tax. Code § 7102(d)).)

Insisting on “effective judicial review” (*id.* at 1256), the Court in *Amwest* rejected the deferential review urged by the insurer there, so that a similar “limitation upon the power of the Legislature ... [in Proposition 103 will] be given the effect the voters intended it to have.” (*Foundation, supra*, 132 Cal. App. 4th at 1365, quoting

Amwest, supra, 11 Cal.4th. at 1255-56.)⁷³ To defer to the Legislature, the Court elaborated,

might well have the ironic and unfortunate consequence of causing the drafters of future initiatives to hesitate to grant even a limited authority to the Legislature to amend those initiatives ... Such a result would diminish both the initiative process and the legislative process.

(*Amwest, supra*, 11 Cal.4th. at 1256; see *Foundation, supra*, 132 Cal. App. 4th at 1365.)⁷⁴

B. An Amendment Must Further All the Purposes of the Statute; It May Not Further Some Purposes at the Expense of The Voters' "Primary Mandate"

A trilogy of leading cases addresses the permissible scope of legislative amendment of initiatives protected – as are Propositions 103 and 116 – by a “furthers the purposes” limitation. (*Amwest, supra*, 11 Cal.4th 1243; *Project, supra*, 64 Cal.App.4th 1473; *Foundation, supra*, 132 Cal. App. 4th 1354.) These cases demonstrate that an amendment unlawfully infringes that limitation if it conflicts with a “primary mandate” of the voters, regardless of whether it furthers *other* purposes of the initiative. (*Amwest, supra*, 11 Cal.4th at 1260-65; *Project, supra*, 64 Cal.App.4th 1473, 1490

⁷³ Proposition 103, § 8(b), provides that “[t]he provisions of this act shall not be amended by the Legislature except to further its purposes by a statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring...” (*Foundation, supra*, 132 Cal. App. 4th at 1359.)

⁷⁴ Whether a legislative enactment furthers the purposes of an initiative statute is a question of law. (*Amwest, supra*, 11 Cal.4th. at 1254 (citing *Davis v. County of Los Angeles* (1938) 12 Cal.2d 412, 423).)

[“Legislature cannot enact any statute which has the effect of ‘undoing’ [Proposition 103’s] requirement of an at *least* 20 percent rollback of charges for insurance coverage”]; *Foundation*, *supra*, 132 Cal. App. 4th at 1370 [amendment that violates a “primary mandate” of an initiative cannot reasonably be found to further its purposes].)

The Supreme Court in *Amwest* analyzed whether a legislative amendment of Proposition 103 “further[s] its purposes” by undertaking a searching and independent inquiry. First, the Court identified the specific provisions of Proposition 103 that were impacted by the amendment under review. (*Amwest*, *supra*, 11 Cal.4th at 1259.) The Court next examined the *purposes* underlying those provisions. (*Ibid.*) Finally, after determining the *purposes* underlying each of the affected provisions, the Court determined the *effect* of the amendment on those purposes. The Legislature had justified its enactment as “clarifying whether surety insurance was meant to be included within the ambit of Proposition 103.” (*Amwest*, *supra*, 11 Cal.4th at 1259-1260.) The Court rejected this rationale: “the Legislature’s action constituted an alteration rather than a clarification of the initiative.” (*Id.* at 1260.) And this legislative “alteration” was inconsistent with, and in conflict with, the initiative. Proposition 103 regulated surety insurance rates; the amendment deregulated them. (*Ibid.*) This direct conflict rendered the amendment invalid, regardless of what other purposes it might be said to have furthered.

The court of appeal engaged in the same independent analysis in *Proposition 103 Enforcement Project*, where it examined a

legislative amendment that affected the operation of one specific provision, Insurance Code section 1861.01. Like the Court in *Amwest*, the court discerned the purpose underlying that specific provision: to maximize policyholder refunds. (*Project, supra*, 64 Cal.App.4th 1473, 1491.) “[T]he relevant question,” the court declared, was “whether [the amendment] furthers *this* purpose.” (*Ibid.*, emphasis in original.) The amendment, however, had the opposite effect: by shifting to consumers the cost of taxes and commissions paid on excess premiums (*id.* at 1494), it *reduced* consumer refunds, rather than maximizing them. Again, this direct conflict with the relevant purpose rendered the amendment invalid. (*Ibid.*)

Most recently, in *Foundation, supra*, 132 Cal.App.4th 1354, the court followed *Amwest* and *Project* in addressing an amendment to Proposition 103 that amended a particular section of the initiative. In determining the relevant purposes of the initiative, the court looked to “the plain meaning” of the affected section. (*Id.* at 1370 [citing *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968 at p. 977].) “In prohibiting use of the absence of prior insurance to discriminate against the uninsured, section 1861.02, subdivision (c) itself manifests the voters’ intent to eliminate such discrimination.” (*Ibid.*) The question before the court was what effect the amendment had on that section. (*Id.* at 1366.)

The relevant question here is whether Sen. Bill 841 furthers the purposes of Proposition 103 underlying subdivision (c) of section 1861.02: to protect a specific group of drivers (those without prior automobile insurance coverage) from insurers’

“arbitrary practices” and to prohibit the use of “absence of prior automobile insurance, in and of itself,” as a rating factor.

(*Foundation, supra*, 132 Cal.App.4th at 1369-70.) In short, the amendment was invalid because

Whereas the voters had *prohibited* insurers from using the absence of prior insurance coverage as a premium criterion . . . , Sen. Bill 841 *authorizes* insurers to use that criterion to determine whether a policyholder’s premium will be discounted or surcharged.

(*Id.* at 1366.) In particular, the court ruled that, even if an amendment can be shown to further *one* of the voters’ purposes, it may nonetheless be invalid if it violates a specific “primary mandate.” (*Id.* at 1370.)

In sum, this line of cases establishes that the Legislature may not cherry-pick among the voters’ purposes, amending an initiative to further one at the expense of another.

C. The Amendments to Section 7102 Conflict With, And Undermine, A “Primary Mandate” and Purpose of The Voters.

The Legislature’s amendment of Proposition 116 fails this test. As amended by the voters, subdivision (a) of Section 7102 provides that “[a]ll revenues, less refunds” derived from the relevant fuel taxes under the “spillover” formula “shall be transferred quarterly to” the Public Transportation Account. The express intent of the voters in enacting this provision was “that funding for public transit should be *increased* from existing sources including fuel taxes and sales tax on fuels.” (Prop. 116, § 1, codified at Pub. Util. Code § 99611, emphasis

added.) Only after that purpose was accomplished did the voters provide, in subdivision (b), that any “balance shall be transferred to the General Fund.”

Transferring that “balance” to the General Fund is not the “primary mandate” of the voters. To the contrary, in Subdivision (a), the voters explicitly specified that portion of the tax revenues that “shall be transferred” to the PTA. By contrast, the balance which Subdivision (b) transfers to the General Fund is defined only derivatively, as that portion remaining after the primary transfer to the PTA had been accomplished. Thus, regardless whether the trial court was correct in concluding that “[t]he purpose of section 7102 is broader than funding the PTA” (CT 384 [Statement of Decision at 16]), the plain language of the initiative makes it clear that the “*primary* mandate” of the voters was to transfer “all revenues” set forth in Section 7102 (a) to the PTA, among them the spillover revenues in the amount set forth in Rev. & Tax. Code § 7102 (a) (1).

The Legislature’s amendment of Section 7102 (a) (1) to add new subdivisions (G) and (H) (S.B. 79, § 4) does not further this primary purpose, but rather undoes it. (See *Project, supra*, 64 Cal. App. 4th at 1484 [purpose of section 10(c) is “to ‘protect the people’s initiative powers by precluding the Legislature from undoing what the people have done. . .’”].) In Subdivision (G), for the 2007-08 fiscal year, the Legislature diverted \$621,967,348 in funds the voters had earmarked for the PTA “to the Mass Transportation Fund.” (Rev. & Tax. Code § 7102 (a) (1) (G).) It did not do so consistent with, and in furtherance of the purposes, of Subdivision (a) (1), but instead

“notwithstanding any other provision of this paragraph.” Subdivision (H) similarly diverted \$939,408,000 in the 2008-09 fiscal year, again, “notwithstanding any other provision of this paragraph.” Notably, the Legislature made no finding that these amendments were consistent with Proposition 116, or that they furthered its purposes. (Compare *Foundation, supra*, 132 Cal.App.4th at 1362.)

The plain language of the voters manifests their intent to place “all [spillover] revenues” in a “trust” for public transportation. That intent is not only binding on the Legislature as a matter of the California Constitution, but promotes important public policy considerations with major statewide impacts on social equity, environmental sustainability and economic growth.

II. THE DIVERSION OF PTA FUNDS TO REGIONAL CENTERS AND SCHOOL DISTRICTS IS NOT A VALID MASS TRANSPORTATION USE.

The legality of the appropriation of \$636.9 million from the PTA hinges on the permissibility of the purposes for which those funds were appropriated. PTA funds may be used only for “transportation planning and mass transportation” purposes. (Pub. Util. Code § 99310.5 (b), as amended by Proposition 116.) The court below correctly concluded both that the diverted PTA funds were not earmarked for a “transportation planning” purpose (CT 386 [Statement of Decision at 18, n.11]). Consistent with the voters’ statement of intent in Proposition 116 that “spillover” revenues were intended to provide “increased” “funding for *public transit*.” (Prop. 116, § 1, codified at Pub. Util. Code § 99611), the court also correctly

concluded that “the voters intended the phrase ‘mass transportation’ to be synonymous with ‘mass transit’ or ‘public transit.’” (CT 385 [Statement of Decision at 17].) The court erred, however, in its conclusion that public transportation service need not “be available to every member of the general public to serve a mass transportation purpose” within the meaning of Section 99310.5. (CT 386 [Statement of Decision at 18].) The definitions of “mass transportation” and “public transportation” in state and federal law make it clear that “mass transportation” is transit service provided to the general public.

Public transportation is defined in state law as “any system of *an operator* which provides transportation services *to the general public* by any vehicle which operates on land or water, regardless of whether operated separated from or in conjunction with other vehicles.” (Pub. Util. Code § 99211, emphasis added.) “Operator,” in turn, “means *any transit district*, included transit district, municipal operator, included municipal operator, or transit development board.” (Pub. Util. Code § 99210, emphasis added.)⁷⁵

The trial court correctly ruled that mass transportation is the

⁷⁵ Consistent with this statutory definition, the California Department of Transportation defines “mass transportation” as “[t]ransportation . . . which provides *to the public* general or special services on a regular and continuing basis. Does not include school buses, charter, or sightseeing service). See also ‘Public Transportation.’” It defines “public transportation” as “[s]ervice that is *available to any person* upon payment of the proper fare, and *which cannot be reserved for the private or exclusive use of one individual or group*. (‘Public; in this term refers to the access to, not the ownership of, the system.’) California Department of Transportation, Division of Mass Transportation, Transit Terms (emphasis added). Accessed at <http://www.dot.ca.gov/hq/MassTrans/Transit-Info-Terms.htm#anchor1298061>.

same as public transit or public transportation. Indeed, federal statutory law explicitly equates the two. (49 U.S.C. § 5302 (a)(7) [“The term ‘mass transportation’ means public transportation.”]).

“Public transportation” is defined as

transportation by a conveyance that provides regular and continuing *general or special transportation to the public, but does not include schoolbus, charter, sightseeing, or intercity bus transportation or intercity passenger rail transportation provided by [Amtrak].*

(49 U.S.C. § 5302 (a)(10), emphasis added.) Similarly, federal regulation defines transit as “mass transportation by bus, rail, or other conveyance which provides general or special service to the public on a regular and continuing basis. *It does not include school buses or charter or sightseeing services.*” (40 C.F.R. § 93.101, emphasis added; *see also* 49 C.F.R. § 665.5.)

The lower court, relying on the phrase “special transportation” in the federal statute, concluded that “mass transportation services may include not only general transportation services provided to the public at large, but also specialized transportation services indiscriminately [sic] provided to *some portion of the public.*” (CT 386 [Statement of Decision at 18], emphasis added.) That conclusion is inconsistent with the authoritative interpretation of the statute by the federal agency that administers it, the Federal Transit Administration (“FTA”). Construing this language, FTA ruled that “[t]he term ‘special transportation’ is meant to refer to a type of ‘public transportation’; namely, paratransit or other demand response

service.” (*Thompson Motor Coach*, FTA Docket No. 2005-12 at 6 (FTA, 2007) (attached as Appendix A hereto).)

Paratransit service is the “comparable transportation service required by the ADA [Americans with Disabilities Act] for individuals with disabilities who are unable to use fixed route transportation systems.” (49 CFR § 37.3; see also 49 CFR § 37.131 [requiring comparable transportation for people with disabilities within the service area of existing transit routes].) It is provided in order to ensure that the general public has equal access to public transit services. In short, “specialized” public transportation services refers to paratransit or demand responsive services, and far from creating an exception to the requirement that the service be available to the general public, it is required precisely to ensure that no member of the public is excluded from public transit service.

The distinction between mass transportation services and “charter services” confirms this conclusion. Federal charter service regulations specify three distinctions between mass transportation and charter service:

First, mass transportation is under the control of the recipient [of federal funds]. Generally the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, *the service is designed to benefit the public at large* and not some special organization such as a private club. Third, *mass transportation is open to the public and is not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so.*

(52 Fed. Reg. 11916, 11920, emphasis added.)

While exclusive transportation services for developmentally

disabled individuals and school children doubtless provide a much needed service, neither is “mass transportation” because in neither case is “anyone who wishes to ride on the service . . . permitted to do so.” (52 Fed. Reg. 11916, 11920.) In sum, neither is open to the “general public.”

A. Regional Center Transportation Is Not “Mass Transportation.”

In the case of Regional Centers, the transportation services to which the Legislature directed PTA funding are not open to all persons in need of paratransit services, but only to a small segment (less than 4%) of the disabled population – those persons with developmental disabilities who have individual program plans that include transportation services. These “agencies are not primarily in the transportation business; rather, transportation is an auxiliary and not a core service.”⁷⁶

The transportation provided under the Regional Center Transportation program is not “special transportation” within the meaning of federal or California law because (1) it is not a service that is provided to ensure people with disabilities access to service comparable to existing mass transportation services and (2) it is not accessible by the public or any people with disabilities. As discussed above, “special transportation” services are “meant to refer to . . .

⁷⁶ Nelson Nygaard Consulting Associates, *Coordinated Public Transit Human Services Transportation Plan Elderly and Disabled Component* (Presented to the Metropolitan Transportation Commission, December 2007), at 4-1.

paratransit or other demand response service.” *Thompson Motor Coach, supra*, at 6. Paratransit services, unlike transportation to Regional Centers, are meant to ensure that those unable access to public transportation are provided with comparable services. (49 C.F.R. § 37.3, 49 C.F.R. § 37.131.) Regional Center transportation serves a very limited group of people with developmental disabilities who have been approved to receive transportation to services at Regional Centers. Rather than including all, Regional Center transportation excludes people with disabilities other than developmental disabilities, and even excludes many developmentally disabled persons whose individual plans do not include transportation.

B. Home-to-School Transportation Provided by School Districts Is Not “Mass Transportation.”

While public transit agencies across California provide the only means by which tens of thousands of students get to school each day, the converse is not true: transportation provided by school districts to their students is not public transit.

As noted above, the federal definition that equates “mass transportation” with “public transportation” (on which the court below relied) explicitly states that it “does not include schoolbus . . . transportation.” (49 U.S.C. § 5302 (a) (7), (10).)

In addition to this explicit exclusion of school bus transportation, further evidence that exclusive school bus services are not “mass transportation” can be found in regulations regarding funding for public transportation services. With some exceptions, federal law prohibits the use of federal funding for district-provided

school bus services. (See 49 U.S.C.A. § 5323(f).) The main exception proves the rule: funding is allowed for “tripper” services, which are “open to the public, and which [are] designed or modified to accommodate the needs of school students and personnel.” (49 C.F.R. § 605.13.) The definition of tripper service states that “[b]uses used in tripper service must be clearly marked as open to the public and may not carry designations such as ‘school bus’ or ‘school special’.” (49 C.F.R. § 605.3; see also *Blue Bird Coach Lines, Inc. v. Linton*, 48 F. Supp. 2d 47, 50 (D.D.C. 1999), citing 52 Fed. Reg. 11920; *Rochester-Genesee Regional Trans. Authority v. Hynes-Cherin*, 531 F. Supp. 2d 494, 499 (W.D.N.Y. 2008) [to receive federal public transit funding, school bus routes must be open to the public].)

The Home to School Transportation and Small School District Transportation programs provide funding for transportation of pupils to and from school, and for the purchase and maintenance of school buses. (Educ. Code, §§ 41850(b), 42291.) These buses are restricted to students of the district that provides the service. School buses so restricted are explicitly excluded from the definition of public transportation. These programs are not “mass transportation” for the purposes of Public Utilities Code § 99310.5. (See 49 U.S.C. § 5302 (a) (7), (10); Pub. Util. Code § 99211.)

CONCLUSION

For all the foregoing reasons, the judgment should be reversed insofar as it permits the diversion of funds that the voters placed in trust for public transit. This Court should declare this ongoing practice unlawful to prevent future violations of the voters’ intent, and

can craft an appropriate remedy that allows the State to repay the diversion of current PTA funds on a reasonable schedule.

Dated: December 9, 2008

Respectfully Submitted,

Richard A. Marcantonio
Guillermo Mayer
PUBLIC ADVOCATES, INC.


By: _____

RICHARD A. MARCANTONIO

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of *Amici Curiae* is in compliance with the requirements of rule 8.204, California Rules of Court. The brief contains 11,283 words.

DATED: December 9, 2008

A handwritten signature in black ink, appearing to read 'R. Marcantonio', written over a horizontal line.

Richard A. Marcantonio

CERTIFICATE OF SERVICE

Case Name: Shaw, Josh, et al. v. John Chiang, et al.
Appellate Court Case No. C058479
Sacramento Court Case No. 07CS01179

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 131 Steuart Street, Suite 300, San Francisco, California, 94105-1241.

On December 9, 2008, I caused the foregoing document(s) described as

APPLICATION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS AND CROSS-RESPONDENTS; PROPOSED BRIEF OF *AMICI CURIAE*

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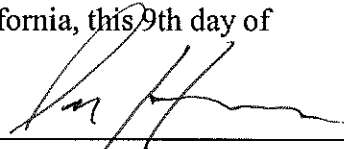
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I declare under penalty of perjury that the foregoing is true and correct, and that I executed this proof of service in San Francisco, California, this 9th day of December, 2008.



PEDRO HERNANDEZ,
Declarant