

Supreme Court Case No. S175357
Third Appellate District Court Case No. C058479

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSH SHAW, etc. et al., Plaintiffs and Appellants,

vs.

JOHN CHIANG, etc., et al., Defendants and Appellants,

Appeal from the Superior Court for Sacramento County
The Honorable Jack Sapunor, Judge
Superior Court Case No. 07CS01179

**PLAINTIFFS' AND APPELLANTS' ANSWER
TO PETITION FOR REVIEW**

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INTRODUCTION

The issues addressed by the Court of Appeal involve legislative manipulation of the budget process of an extraordinary nature. While the State of California is experiencing an enormous fiscal problem, that problem should not be resolved by disregarding measures twice approved by the voters that were intended to protect from legislative diversion specified motor vehicle fuel revenues; i.e., "spillover revenues." In 1990, Proposition 116 (an initiative statute) designated those revenues as trust revenues to be used *only* for transportation planning or mass transportation purposes, and required that they be deposited in the Public Transportation Account, which Proposition 116 designated as a trust fund. In 1998, Proposition 2 (a legislative constitutional amendment) authorized loans from the Public Transportation Account to the General Fund, but only pursuant to specific repayment provisions.

In fiscal year 2007-08 the Legislature took, not borrowed, \$1,258,893,348 (Opn. App. A) revenues away from, and out of, the Public Transportation Account for purposes other than transportation planning or mass transportation. The legislation sought to circumvent the trust nature of the revenues by creating two non-trust funds, the Mass Transportation Fund and the Transportation Debt Service Fund. The legislation then diverted Public Transportation Account revenues into these funds and used

them for purposes other than transportation planning or mass transportation. Revenues already in the Public Transportation Account were similarly diverted on the erroneous theory that the purpose for which they were diverted was mass transportation.

The Court of Appeal's decision describes this artful legislative effort in precise detail and finds it totally without legal merit. Defendants' petition accurately identifies the issues addressed by the Court of Appeal and presented to this Court.

REASONS FOR DENYING REVIEW

Although the Court of Appeal's decision was correctly decided, until its decision becomes final for all purposes the defendants will continue to make the same illegal diversions away from, and out of, the Public Transportation Account. For example, during fiscal year 2008-09, \$1,765,509,000 was diverted away from or out of the Public Transportation Account for the very purpose found illegal by the Court of Appeal. For fiscal year 2009-10, similar diversions are authorized, specifically:

- I. Diversion of All Spillover Revenues Away From the Public Transportation Account to the Mass Transportation Fund, 2009-10.

The Court of Appeal correctly held that the diversion of spillover revenues to the Mass Transportation Fund was not consistent with the trust purposes of the Public Transportation Account. (See Opn. at pp. 29-30.)

Statutes 2009, chapter 14, section 6 (SBx3 7) adds subparagraph (I) to paragraph (1) of subdivision (a) of section 7102 of the Revenue and Taxation Code. Subparagraph (I) requires that *all* spillover revenues for fiscal years 2009-10 to 2012-13 be transferred to the Mass Transportation Fund.

With respect to fiscal year 2008-09, Statutes 2009, chapter 10, section 6 (ABx4 10) amends subparagraph (H) of paragraph (1) of subdivision (a) of section 7102 to increase the 2008-09 transfer of spillover revenues to the Mass Transportation Fund by \$101,826,000 (from \$939,408,000 to \$1,041,234,000).

II. Diversion of Revenues Out of the Public Transportation Account.

(A) Home-to-School Program, 2009-10: \$404,333,000.

The Court of Appeal correctly held that use of spillover revenues for the Home-to-School and Small School District Transportation programs was not a transportation planning or mass transportation purpose and therefore could not be funded from spillover revenues. (See Opn. at p. 40.) Nonetheless, Items 6110-111-0046 and 6110-111-3116, respectively, of Statutes 2009, chapter 1 (SBx3 1) appropriate to the Department of Education for fiscal year 2009-10 \$313,886,000 out of the Public Transportation Account, and an additional \$90,447,000 from the Mass Transportation Fund, for this purpose.

(B) Regional Center Transportation, 2009-10: \$138,275,000.

The Court of Appeal correctly held that use of spillover revenues for the transportation of the disabled to regional centers for their programs was not a transportation planning or mass transportation purpose. (See Opn. at p. 40.) Item 4300-101-0001(5) of Statutes 2009, chapter 1 (SBx3 1) appropriates to the Department of Developmental Services for fiscal year 2009-10 \$138,275,000 for the transportation of disabled individuals to regional rehabilitation centers.

III. Payment of Debt Service, 2009-10.

The Court of Appeal correctly held that spillover revenues, whether within the Public Transportation Account or diverted away from the Public Transportation Account, may not be used to reimburse the General Fund for payment of *prior* debt service on Proposition 108 bonds. (See Opn. at p. 42.) Defendants do not contest that holding. The basis for the court's conclusion is that reimbursement of the General Fund is not a transportation planning or mass transportation purpose. Thus, the prohibition would apply to the reimbursement of the General Fund for payment of past debt service on any transportation-related bonds, not just Proposition 108 bonds. Statutes 2009, chapter 10, section 7 (ABx4 10), adds subdivision (d) to Revenue and Taxation Code section 7103. Subdivision (d) authorizes the Director of Finance to transfer spillover

revenues in the Transportation Debt Service Fund to the General Fund in order to offset the cost of debt service payments made from the General Fund for "transportation related bonds," in *any* fiscal year. No distinction is made between prior debt service and current debt service, or transportation bonds that do not fund transportation planning or mass transportation and those that do.

The Court of Appeal correctly held that use of spillover revenues to pay *current* debt service on Proposition 116 bonds was precluded by the terms of Proposition 116. (See Opn. at p. 49.) The Court of Appeal also held that use of spillover revenues to pay *current* debt service on Proposition 192 bonds was not for transportation planning or mass transportation purposes. (See Opn. at p. 38.) Use of spillover revenues to pay *current* debt service on those bonds or any other bonds that are not for transportation planning or mass transportation purposes would be illegal.

IV. The Court of Appeal Opinion Should not be Depublished.

Defendants request that, should this Court should deny their petition, it should nonetheless depublish the Court of Appeal's opinion. It appears to be defendants' hope that if their petition is denied and the opinion of the Court of Appeal is depublished, any attempt to preclude the illegal expenditure of spillover funds under the 2009 legislation could not be based on a depublished opinion dealing with 2007 legislation. While we would

hope that defendants would act responsibly if the Court denies their petition and refrain from making further illegal diversions and use of spillover revenues pursuant to the 2009 legislation, they should not be encouraged to do so by the lack of a published opinion.

CONCLUSION

The Public Transportation Account has been bled enough. When the voters adopted Proposition 116 and created a trust fund for transportation planning and mass transportation purposes, they signaled their belief that public transit was a vital service to the public -- and particularly to those who have no other means of regular transportation other than public transit. When the voters adopted Proposition 2, they only authorized *borrowing* from the Public Transportation Account, and then only pursuant to strict repayment obligations. Rather than go back to the voters and seek changes to Propositions 116 and 2, the Legislature and the Governor, under the pretext of a fiscal emergency, arrogated to themselves the power to ignore the trust obligation created by the voters in Propositions 116 and 2.

The judicial branch is the only protection the public has against such excesses. As noted above, absent a final decision in this matter, defendants will continue to make use of spillover revenues during the current 2009-10 fiscal year in the exact same manner that the Court of Appeal found illegal for the 2007-08 fiscal year. This Court can affect that finality and protect


the trust revenues from further pillage by rejecting defendants' petition in its entirety.

In the event this Court should grant the petition, plaintiffs respectfully request that the Court issue an order prohibiting defendants from implementing the 2009 legislation identified above until this Court has disposed of the matter.

DATED: August 21, 2009

Respectfully submitted,

Nielsen, Merksamer, Parrinello,
Mueller & Naylor, LLP.

By: 
Richard D. Martland, Attorneys for
Plaintiffs/Appellants Josh Shaw,
Taxpayer and Executive Director of
California Transit Association;
and California Transit Association,
a nonprofit corporation

CERTIFICATE OF COMPLIANCE

I, Richard D. Martland, attorney for Plaintiffs/Appellants Josh Shaw, Taxpayer and Executive Director of California Transit Association; and California Transit Association, a nonprofit corporation, hereby certify that pursuant to Rule 14(c)(1) or 33(b)(1) of the California Rules of Court, the enclosed Brief is produced using 13 point New Times Roman type including footnotes and contains approximately 1,360 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this Brief.

DATED: August 21, 2009

Respectfully submitted,

Nielsen, Merksamer, Parrinello,
Mueller & Naylor, LLP.

By: 

Richard D. Martland, Attorneys for
Plaintiffs/Appellants Josh Shaw,
Taxpayer and Executive Director of
California Transit Association;
and California Transit Association,
a nonprofit corporation

AFFIDAVIT OF SERVICE

Case Name: *Shaw et al v. Chiang et al*
Supreme Court Case No. S175357
Appellate Court Case No. C058479
Sacramento Court Case No. 07CS01179

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 1415 L Street, Suite 1200, Sacramento, CA 95814.

On August 21, 2009, I caused the foregoing document(s) described as **PLAINTIFFS' AND APPELLANTS' ANSWER TO PETITION FOR REVIEW** to be served on the individual(s) listed below as follows:

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(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed August 21, 2009, at Sacramento, California.


MARIE COOK