No. S194861

IN THE SUPREME COURT OF STATE OF CALIFORNIA

CALIFORNIA REDEVELOPMENT ASSOCIATION, LEAGUE OF CALIFORNIA CITIES, CITY OF UNION CITY, CITY OF SAN JOSE, and JOHN F. SHIREY

Petitioners,

v.

ANA MATOSANTOS, in her official capacity as Director of Finance, JOHN CHIANG, in his official capacity as the Controller of the State of California, PATRICK O'CONNELL, in his official capacity as Auditor-Controller of the County of Alameda and as representative of the class of county auditor-controllers,

Respondents.

APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS' CHALLENGE TO ABX1 26 AND ABX1 27 AND [PROPOSED] AMICI CURIAE BRIEF OF AMICI THE ASSOCIATION OF BAY AREA GOVERNMENTS AND VARIOUS CALIFORNIA CITIES AND REDEVELOPMENT AGENCIES CONCERNED WITH THE CONFLICT BETWEEN ABX1 26 AND THE CALIFORNIA CONSTITUTION, ARTICLE XVI, SECTION 16

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ATTORNEYS FOR AMICI CURIAE

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ATTORNEYS FOR AMICI CURIAE

APPLICATION TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 8.520(f) of the California Rules of Court, the Association of Bay Area Governments and various California cities and redevelopment agencies concerned with the conflict between ABX1 26 and the California Constitution, Article XVI, Section 16, (collectively "Amici") respectfully request leave to file an amici curiae brief in support of Petitioners. The proposed amici curiae brief and Exhibit "A" thereto accompany this application. The proposed Amici are familiar with the questions presented by this case. They believe there is need for further argument, as discussed below.

I. Interests of Amici Curiae

A. The Association of Bay Area Governments

Amicus curiae Association of Bay Area Governments ("ABAG") is the regional planning agency for the nine counties and 101 cities and towns of the San Francisco Bay region. ABAG is committed to lead the region through advocacy, collaboration, and excellence in planning, research, housing, and member services to advance the quality of life in the San Francisco Bay Area. ABAG's planning and service programs work to address regional economic, social, and environmental challenges.

The Bay Area is comprised of nine counties: Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma. All nine counties and all 101 cities and towns within the Bay Area are voluntary

members of ABAG, representing all of the region's population – more than 7,000,000 people. [1]

ABAG strongly supports the continuation of redevelopment in California, and believes, as do the other Amici, that ABX1 26 fundamentally violates Article XVI, section 16 of the California Constitution, as well as Proposition 22. ABAG is partnering with redevelopment agencies on many of its key projects designed to implement SB 375 by promoting transit-oriented development to reduce greenhouse emissions. Many of these projects will depend on tax increment financing, which is threatened by ABX1 26.

For these reasons, ABAG has a substantial interest in the present Petition.

B. Various California Cities and Redevelopment Agencies

In addition to ABAG, proposed Amici are comprised of various California cities and redevelopment agencies concerned with the conflict between ABX1 26 and the California Constitution, Article XVI, Section 16, including, the City of Artesia and the Artesia Redevelopment Agency, the Brea Redevelopment Agency,

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[1] ABAG counts among its members Petitioner City of Union City and Petitioner City of San Jose, and has additional members in common with the League of California Cities ("League") and the California Redevelopment Association ("CRA"). However, ABAG is not a petitioner in this action, it has not participated in formulating the arguments advanced by the League and the CRA, and it has no control over the direction of the litigation.

The County of Santa Clara is also one of ABAG's members. ABAG recognizes that the County of Santa Clara is an intervenor herein on the side of Respondents. ABAG does not suggest that the County of Santa Clara supports any of the positions advanced herein or in the accompanying brief.

the City of Buena Park Community Redevelopment Agency, the City of Calimesa and the Calimesa Redevelopment Agency, the Fairfield Redevelopment Agency, the City of Hawthorne and the Hawthorne Community Redevelopment Agency, the La Mirada Redevelopment Agency, the Manteca Redevelopment Agency, the City of Monterey, the Palm Desert Redevelopment Agency, the Rancho Cucamonga Redevelopment Agency, the Rancho Palos Verdes Redevelopment Agency, the City of Seal Beach, and the Seal Beach Redevelopment Agency, the Temecula Redevelopment Agency, the Turlock Redevelopment Agency, and the Whittier Redevelopment Agency. [2]

The Amici cities and redevelopment agencies have been implementing and desire to continue to implement programs which achieve the public purposes of blight elimination and the provision of low and moderate income housing opportunities within established, blighted redevelopment project areas. These cities and agencies also wish to honor commitments made to the community residents, businesses and property owners concerning specific redevelopment projects in various stages of planning and execution.

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[2] The city Amici are members of the League. The redevelopment agency Amici are members of the Petitioner CRA. None of these cities or agencies has been asked to be a petitioner, and none of their respective city councils or boards of directors have authorized them to undertake such a role. None of the Amici has participated in formulating the arguments advanced by the League and the CRA, nor does any Amici have any control over the direction of the litigation. CRA members have been asked to make financial contributions to CRA to assist in its efforts to defeat ABX1 26 and 27. All the Amici redevelopment agencies have made such contributions with the exception of the Hawthorne Community Redevelopment Agency and the Temecula Redevelopment Agency.

Amici redevelopment agencies have adopted redevelopment plans and incurred indebtedness pursuant to those plans, which remains outstanding, and such indebtedness is repayable from tax increment revenue, all pursuant to Article XVI, section 16. The Legislature, acting alone, may not impair the repayment of that existing indebtedness because Article XVI, section 16 is operative as to that indebtedness, and mandates that all tax increment revenue be deposited with the redevelopment agencies and held in special funds of the agencies for repayment of their indebtedness.

For these reasons, the city and redevelopment agency Amici have a substantial interest in the present Petition.

II. Need for Further Briefing

Amici are familiar with the issues before the Court and the scope of their presentation. Amici believe that further briefing is necessary to provide greater detailed discussion of certain authorities and arguments that the parties did not have the opportunity to fully address. Specifically, Amici seek to assist the Court by addressing the direct conflict between ABX1 26 and Article XVI, section 16. Amici wish to discuss in depth the Court's prior decisions holding that Article XVI, section 16 became operative with the enactment of Health & Safety Code § 33950 (now Health & Safety Code § 33670), and that Article XVI, section 16 is implemented upon an agency incurring indebtedness pursuant to a lawfully adopted redevelopment plan providing for tax increment financing. The decisions

are clear that once Article XVI, section 16 has been implemented by an agency, the Legislature may not impair the pledge of tax increment revenue as to that agency's existing indebtedness, yet that is precisely what ABX1 26 purports to do.

Dated: September 29, 2011

Respectfully submitted,

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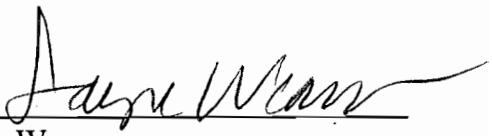

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

TABLE OF AUTHORITIES (cont.)

Page(s)

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

ABXI 26 IMPERMISSIBLY CONFLICTS WITH ART. XVI, SEC. 16 OF THE CALIFORNIA CONSTITUTION, WHICH PROVIDES FOR THE ALLOCATION OF TAX INCREMENT REVENUES TO A REDEVELOPMENT AGENCY UNTIL THE AGENCY'S TOTAL INDEBTEDNESS HAS BEEN PAID

Whatever authority the Legislature has over redevelopment agencies, it lacks the power, acting alone, to nullify Article XVI, section 16 ("Art. XVI, sec. 16") of the California Constitution, authorizing the allocation of tax increment revenue to a redevelopment agency until the agency's total indebtedness has been paid. Yet that is precisely what the Legislature impermissibly seeks to do through ABXI 26 ("AB26").

In *Redevelopment Agency of the City of San Bernardino v. County of San Bernardino* (1978) 21 Cal.3d 255, 259, this Court explained the tax allocation provisions of Art. XVI, sec. 16. If, after a redevelopment project has been approved, the assessed valuation of taxable property in the project increases, the taxes levied on such property are divided between the taxing agency and the redevelopment agency. *Id.* The taxing agency receives the same amount of money it would have realized under the assessed valuation existing at the time the project was approved. *Id.* The additional money resulting from the rise in assessed valuation (known as tax increment revenue) is placed in a special fund for repayment of indebtedness incurred in financing the redevelopment project. *Id.* Specifically, Art. XVI, sec. 16

provides that tax increment revenue "shall be allocated to and when collected shall be paid into a special fund of the redevelopment agency to pay the principal of and interest on loans, moneys advanced to, or indebtedness (whether funded, refunded, assumed or otherwise) incurred by the redevelopment agency to finance or refinance, in whole or in part, the redevelopment project." *See* Art. XVI, sec. 16(b).

Pursuant to this constitutional authority, amici redevelopment agencies have all adopted redevelopment plans providing for tax increment financing. Further, they have all incurred indebtedness pursuant to their redevelopment plans, and their total indebtedness is repayable from tax increment revenue allocated and paid into their special funds pursuant to Art. XVI, sec. 16(b). "To insure its ability to perform its obligations, a redevelopment agency is entitled to all tax increment funds as they become available, until its 'loans, advances and indebtedness, if any, and interest thereon have been paid....'" *Marek v. Napa Community Redevelopment Agency* (1988) 46 Cal.3d 1070, 1082 (*quoting* Art. XVI, sec. 16).

Simply put, the California Constitution expressly authorizes the allocation and payment of tax increment revenue to the special funds of redevelopment agencies for repayment of the agencies' obligees, and the total amount of each agency's outstanding debt is secured by that constitutional promise. The Legislature "contemplated the 'special fund' would provide a reliable fund of money to be used to pay any and all

obligations incurred by a redevelopment agency and **that up to the amount of the agency's total indebtedness, tax increment revenues not expended currently would be accumulated for payment of such indebtedness when due**." *Marek*, 46 Cal.3d at 1083 (emphasis added). In *Marek*, this Court further recognized that "[t]he very notion of a 'special fund of the redevelopment agency' plainly implies that the agency itself will control the utilization of tax increment funds and militates against the notion of a process budgetarily controlled by county auditors." *Id.* at 1083. The voters, by adopting the constitutional provisions that establish the special fund and the allocation procedures set forth in Art. XVI, sec. 16 (originally Art. XIII, sec. 19), plainly shared this understanding of an agency's special fund.

Yet, through AB26, the Legislature attempts to divert tax increment revenue into a system "budgetarily controlled by county auditors" in lieu of its payment into the agencies' special funds for their existing indebtedness. This conflicting system involves, among other things, a legislative usurpation of the judicial function by AB26's declaration as to which of an agency's existing obligations are enforceable and which are not, and its treatment of existing indebtedness at any given time as only that portion of the indebtedness which is due and payable within the next six-month period. AB26 further attempts to transfer tax increment revenue to the taxing entities before all outstanding indebtedness of an agency is paid, and

for purposes other than redevelopment (exactly what this Court held in *Marek* violates Art. XVI, sec. 16(b)). *See* new Health & Safety Code § 34183.

Down the legislatively contrived rabbit hole of AB26, fundamental elements of the constitutionally prescribed financing scheme, such as tax increment revenue and the agency's "special fund," are "deemed" to be something other than what Art. XVI, sec. 16 in express and unambiguous language says they are. Many such fundamental elements are deemed to be something other than what they really are "solely for the purposes of Section 16 of Article XVI of the California Constitution." Not the least of these is agency indebtedness, which under new Health & Safety Code Section 34174 is "[s]olely for the purposes of Section 16...deemed extinguished and paid" notwithstanding that other provisions of AB26 require that the "enforceable obligations" of redevelopment agencies be paid. *See* new Health & Safety Code §§ 34174 and 34177.

None of these semantic devices save AB26 from its material conflicts with the express language of Art. XVI, sec. 16, and with the promise embodied in those provisions that once tax increment financing is provided for in a lawfully adopted redevelopment plan, and an agency incurs indebtedness pursuant to that plan, tax increment revenue will be allocated to, and deposited with, the agency to secure repayment of all that debt. This Court has previously held that the allocation of tax increment

revenues called for in Art. XVI, sec. 16 becomes "'operative just as soon as it is supplemented by so much legislation as is absolutely necessary to supply its deficiencies.' (*Denninger v. Recorder's Court* (1904) 145 Cal. 629, 635 [79 P. 360].)." *See In the Matter of the Redevelopment Plan for the Bunker Hill Urban Renewal Project 1B of the Community Redevelopment Agency of the City of Los Angeles, California, and of Bonds Therefor. Community Redevelopment Agency of the City of Los Angeles, California v. Goldman* (1964) 61 Cal.2d 21, 75 ("*Bunker Hill*"). The Legislature used the language of Art. XVI, sec. 16 almost verbatim in Health & Safety Code § 33950 (now Health & Safety Code § 33670). Accordingly, Art. XVI, sec. 16 is operative.

As this Court also acknowledged in *Bunker Hill*, the ordinance adopting a redevelopment plan providing for tax increment financing is a "valid exercise of the power delegated to the council to act in a limited area as a state agency providing for the allocation of taxes pursuant to [Art. XVI, sec. 16]...." *Bunker Hill*, 61 Cal.2d at 75. Accordingly, it is immaterial whether Art. XVI, sec. 16 is "permissive" because it became operative with enactment of Section 33950 (now Section 33670), and it is implemented once an agency has incurred indebtedness pursuant to a lawfully adopted redevelopment plan providing for tax increment financing.

Amici redevelopment agencies have adopted such plans, incurred indebtedness pursuant to those plans, which remains outstanding, and pledged tax increment revenue for the repayment of such indebtedness, all pursuant to Art. XVI, sec. 16. The Legislature, acting alone, may not impair that pledge as to existing indebtedness because Art. XVI, sec. 16 is operative as to that indebtedness, and mandates that all tax increment revenue be deposited with the redevelopment agencies and held in special funds of the agencies for repayment of that indebtedness.

ARGUMENT

A. AB26 CONFLICTS WITH THE EXPRESS LANGUAGE AND THE EXPRESS INTENT OF ART. XVI, SEC. 16

In pertinent part, Art. XVI, sec. 16 provides as follows:

> "The legislature may provide that any redevelopment plan may contain a provision that the taxes, if any, so levied upon taxable property in a redevelopment project each year by or for the benefit of the State of California, any city, county, city and county, district, or other public corporation (hereinafter sometimes called 'taxing agencies') after the effective date of the ordinance approving the redevelopment plan, shall be divided as follows:
>
> ...
>
> (b)... that portion of the levied taxes each year... shall be allocated to and when collected shall be paid into a special fund of the

redevelopment agency to pay the principal of and interest on loans, moneys advanced to, or indebtedness (whether funded, refund, assumed or otherwise) incurred by the redevelopment agency to finance or refinance, in whole or in part, the redevelopment project.... When the loans, advances, and indebtedness, if any, and interest thereon, have been paid, then all monies thereafter received from taxes upon the taxable property in the redevelopment project shall be paid into the funds of the respective taxing agencies as taxes on all other property are paid....

The legislature may also provide that in any redevelopment plan or in any proceedings for the advance of moneys, or making of loans, or the incurring of any indebtedness (whether funded, refunded, assumed, or otherwise) by the redevelopment agency to finance or refinance, in whole or in part, the redevelopment project, the portion of taxes identified in subdivision (b)... may be irrevocably pledged for the payment of the principal of and interest on those loans, advances, or indebtedness. ...

The Legislature shall enact those laws as may be necessary to enforce the provisions of this section."

Art. XVI, sec. 16 (emphasis added).

These provisions were added to the State Constitution in 1952 as Art. XIII, sec. 19, by adoption by the people of an assembly constitutional

amendment. That amendment also ratified and validated all provisions of the Community Redevelopment Law, as amended in 1951, relating to the use or pledge of taxes. *Redevelopment Agency of the City and County of San Francisco v. Hayes* (1954) 122 Cal.App.2d 777, 809. In 1974, the provisions were re-adopted in pertinent part by the voters and renumbered Art. XVI, sec. 16 as part of a general constitutional revision. *See* Ann. Cal. Const. XVI, § 16 (West 2010). The people of the State of California have thus twice embraced the tax increment funding mechanism for financing redevelopment projects that is set forth in these constitutional provisions.

In adopting Art. XIII, sec. 19, the Legislature and the voters provided a novel solution to the problem of the lack of popular support for bond measures needed to obtain federal grants. By dividing up the property tax revenues generated by real property in a project area, and allocating to the redevelopment agency the portion of taxes levied on the assessed value in excess of the base-year value (*i.e.*, the assessed value at the time of adoption of the redevelopment plan), Art. XIII, sec. 19 provided a creative and simple mechanism through which redevelopment projects would effectively pay for themselves. The tax revenues derived from the increase in property values due to the elimination of blighting conditions in the project area (*i.e.*, the tax increment revenue) would be available to secure debt incurred by the agency to fund the redevelopment projects. *See Redevelopment Agency of City of Sacramento v. Malaki* (1963) 216

Cal.App.2d 480, 482-85. Given that redevelopment agencies are not empowered to levy taxes (*see Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100,106), the tax increment financing mechanism not only serves as a source of funding for the continuing activities of the redevelopment agencies, but also provides protection to those who lend money to the redevelopment agencies by mitigating the swings in the amount of tax increment revenues generated each year as a result of the boom and bust cycles long associated with the real estate market.

In enacting former Health & Safety Code § 33950 (now Section 33670) of the Community Redevelopment Law ("CRL"), the Legislature set forth almost verbatim this constitutionally prescribed scheme of tax increment financing. In 1964, this Court rejected a challenge to that scheme in consolidated actions, brought by various parties, including taxing entities with territory in a redevelopment project area, who asserted their consent was necessary to implement the allocation of tax increment revenue under the law. *Bunker Hill*, 61 Cal.2d at 73.

Among other things, the tax allocation provisions of the subject redevelopment plan were challenged on the ground that Art. XIII, sec. 19 (now Art. XVI, sec. 16) was permissive only, and that as to a chartered city, such as Los Angeles, Art. XIII, sec. 19 required a charter amendment to become effective. This Court rejected that challenge:

> "It is immaterial whether [Art. XIII, Sec. 19] is self-executing because it becomes 'operative just as soon as it is supplemented by so much legislation as is absolutely necessary to supply its deficiencies.' (*Denninger v. Recorder's Court* (1904) 145 Cal. 629, 635 [79 P. 360].)
>
> "We conclude that the ordinance adopted by the council involving an allocation of tax revenue to become due a chartered city was not an unlawful amendment to the city charter but was a valid exercise of power delegated to the council to act in a limited area as a state agency providing for the allocation of taxes pursuant to the above mentioned constitutional amendment and statutory provisions."

Bunker Hill, 61 Cal.2d at 75.

The constitutionally prescribed funding mechanism established by Art. XIII, sec. 19 (now Art. XVI, sec. 16) is therefore operative as to existing redevelopment plans providing for tax increment financing, because the Legislature did supplement it by Health & Safety Code § 33950 (now Health & Safety Code § 33670), using the same language almost verbatim as in the constitutional provision. *See also* Health & Safety Code § 33670.5 ("Section 33670 fulfills the intent of Section 16 of Article XVI of the Constitution...."); Health & Safety Code § 33671 (authorizing the irrevocable pledge of the portion of the taxes mentioned in Section

33670(b) (*i.e.*, tax increment) for the payment of an agency's indebtedness); and Health & Safety Code § 33671.5 (the agency's pledge of taxes allocated to its special fund pursuant to section 33670(b) "shall have priority over any other claim to those taxes not secured by a prior express pledge of those taxes.").

Redevelopment agencies have implemented that constitutional authority by incurring indebtedness to finance the redevelopment projects authorized by their existing plans, and their existing indebtedness is secured by that constitutionally prescribed funding mechanism. In addition, as this Court has made clear, it is only when an agency's total indebtedness and any interest thereon has been paid that all monies thereafter received from taxes upon the taxable property in the redevelopment project shall be paid to the respective taxing agencies:

> "In essence this section [referring to Cal. Const. Art XVI, sec. 16] provides that if, after a redevelopment project has been approved, the a*ssessed valuation of taxable property* in the project increases, the taxes levied on such property in the project area are divided between the taxing agency and the redevelopment agency. The taxing agency receives the same amount of money it would have realized under the assessed valuation existing at the time the project was approved, while the additional money resulting from the rise in

assessed valuation is placed in a special fund for repayment of indebtedness incurred in financing the project."

San Bernardino, 21 Cal.3d at 259; *see also Marek*, 46 Cal.3d at 1086 ("In other words, it is only when the Agency's total indebtedness has been paid that tax increment revenues are to be paid to other taxing entities. (§ 33670; *Redevelopment Agency* v. *County of San Bernardino*, *supra*, 21 Cal.3d 255, 259.)").

In *Marek*, this Court rejected a claim that agency "indebtedness" as referenced in Art. XVI, sec. 16 is only debt due and payable in the coming year:

> "Since redevelopment agencies are statutorily empowered to enter into binding contracts to complete redevelopment projects, the term 'indebtedness' must be interpreted in a way that will enable those agencies to perform their contractual obligations. In this light, we think it clear that 'indebtedness' was meant to include all redevelopment agency obligations, whether pursuant to an executory contract, a performed contract or to repay principal and interest on bonds or loans. To insure its ability to perform its obligations, a redevelopment agency is entitled to all tax increment funds as they become available until its 'loans, advances and indebtedness, if any, and interest thereon have been paid....' (Art. XVI, § 16; § 33670 (see fn. 3, ante].)"

Marek, 46 Cal.3d at 1082.

In *Marek*, this Court also concluded that the "notion of a 'special fund'" of the redevelopment agency existing under the authority of both Art. XVI, sec. 16 and the CRL "plainly implies that the agency itself will control the utilization of tax increment funds and militates against the notion of a process budgetarily controlled by county auditors." *Marek*, 46 Cal.3d at 1083.

In enacting AB26, the Legislature has ignored all of what the foregoing cases establish regarding the constitutionally prescribed tax increment scheme embodied in Art. XVI, sec. 16. As these cases make clear, that scheme ensures a stream of revenue that will accumulate in the agency's special fund for repayment of an agency's total existing indebtedness incurred to finance the redevelopment project. AB26 attempts an impermissible end run around Art. XVI, sec. 16 by providing that:

(1) tax increment revenue (relabeled "property tax" by AB26) is retained by the county auditor and deposited in a fund held in the county treasury and administered by the county auditor for a redevelopment agency, rather than being allocated to and paid into a special fund of the agency, to be administered by the agency (*see* new Health & Safety Code §§ 34170.5 and 34183);

(2) less than all of the tax increment revenue (relabeled "property tax" by AB26) is to be deposited by the county auditor in the fund for the agency (*see* new Health & Safety Code § 34183);

(3) tax increment revenue (relabeled "property tax" by AB26) is to be allocated to taxing entities on a semi-annual basis before payment in full of all of the agency's outstanding indebtedness (*see* new Health & Safety Code § 34183; and

(4) tax increment revenue (relabeled "property tax" by AB26) is to be used by the taxing entities for purposes other than payment of principal and interest on outstanding indebtedness of the redevelopment agency incurred to finance the redevelopment project (*see new* Health & Safety Code § 34183). In fact, the revenues are not intended to be used for redevelopment at all, and instead are intended to fund governmental services provided by local government.

While new Health & Safety Code § 34175 gives lip service to honoring an agency's pledges of revenues associated with the agency's "enforceable obligations" at least one bond rating agency views AB26 with grave concern. On August 31, 2011, Moody's Investor's Service issued a Rating Update entitled "Moody's Places On Review For Possible Downgrade All California Tax Allocation Bonds Due To Recent Legislation and Pending State Supreme Court Action" (hereafter "Update"). In describing AB26, the Update states, in pertinent part:

"Assembly Bill ABXI 26 does not require the segregation and tracking of revenues pledged to individual tax allocation bonds. It also changes the flow of funds that are allocated to bond debt service. These developments would severely diminish the bonds' credit quality. If implemented as currently written, this legislation could result in multi-notch downgrades on bonds of the dissolved redevelopment agencies."

A true and correct copy of the Update is attached as Exhibit "A" to this Amici Curiae Brief.

The change in the flow of tax increment funds securing debt service on outstanding bonds referred to in the Update is a function of new Health & Safety Code §§ 34182 and 34183. New Section 34182 requires the county auditor to determine what amount of property taxes would have been allocated to an agency had it not been dissolved pursuant to AB26. *See* new Section 34182(c)(1). This section then declares that such revenues are "deemed property tax revenues within the meaning of subdivision (a) of Section 1 of Article XIIIA of the California Constitution and are available for allocation and distribution in accordance with the provisions of the act adding this part."

In this manner, the Legislature purports to take the tax increment revenue that Art. XVI, sec. 16 ensures shall be allocated and paid to an agency for payment of all an agency's outstanding indebtedness, re-labels it "property tax," and makes it available to taxing entities prior to the

repayment of such indebtedness, and for purposes other than financing a redevelopment project. *See* new Health & Safety Code §§ 34182 and 34183.

Under new Health & Safety Code §§ 34170.5, 34182 and 34183, the newly labeled "property tax" is to be placed by the county auditor in a "Redevelopment Property Tax Fund", to be administered by the county auditor allegedly for the benefit of the "holders of former redevelopment agency enforceable obligations" and the taxing entities. *See* new Health & Safety Code § 34182(c)(2).

However, the definition of an agency's "enforceable obligations" set forth in new Health & Safety Code § 34171(d) does not include all outstanding agency obligations. For example, if a city loaned money to its agency to finance a redevelopment project, with that loan to be repaid from tax increment revenue allocated to the agency's special fund, with certain limited exceptions, that loan is not an "enforceable obligation" under AB26. *See* new Health & Safety Code §§ 34171 and 34178. Under the scheme set forth in Art. XVI, sec. 16, whereby an agency must incur indebtedness before it can receive tax increment, such city/agency loans are commonplace.

In addition, under new Section 34183, the county auditor is to allocate to an agency's "successor agency" on a semi-annual basis only that amount of "property tax" needed to pay what is due during that period as

listed on the successor agency's "Recognized Obligation Payment Schedule", a schedule of those debts deemed "enforceable obligations" under new Health & Safety Code § 34171(d). New Section 34183 further mandates that the county auditor will make pass-through payments to taxing entities prior to making revenues available to the successor agency for the payment of obligations on the schedule, and dictates the order in which obligations on that schedule are to be paid. The amount of "property tax" remaining each period after making those payments is then to be allocated by the county auditor to taxing entities. *See* new Health & Safety Code § 34183(a)(1).

Thus, under new Section 34183, the amount of tax increment revenue that should be allocated to an agency and accumulate in the agency's special fund for payment of previously incurred indebtedness that is payable in the future, is now diverted on a semi-annual basis to taxing entities. As a result, under AB26 surplus tax increment that would provide a hedge against fluctuations in property values (for example, decreases due to the present recession), and which Art. XVI, sec. 16 allocates to agencies' special funds, becomes unavailable for the payment of an agency's total existing indebtedness.

This diversion of tax increment revenue to taxing entities before an agency's total existing indebtedness is satisfied is exactly what this Court found to be in conflict with Art. XVI, sec. 16 in *Marek*. *Marek*, 46 Cal.3d

at 1082. There the Napa County Auditor allocated to the redevelopment agency only the amount of tax increment revenue necessary for payment of debts due in the upcoming fiscal year. The County Auditor refused to treat as the agency's "indebtedness" the agency's contractual obligations to pay future expenses under a disposition and development agreement fully executed by the agency and the developer. *Id.* at 1077-1083. The County Auditor contended that available tax increment funds not needed for the Agency's expenditures in the upcoming fiscal year should be allocated to the taxing entities. *Id.* at 1083.

This Court rejected that contention as "wholly incorrect." *Id.* Relying on Art. XVI, sec. 16, this Court held that the agency's "indebtedness" includes "all redevelopment agency obligations, whether pursuant to an executory contract, a performed contract or to repay principal and interest on bonds or loans." *Id.* at 1082-1083.

In contrast, under AB26, if at the end of a given period, the amount of "property tax" made available to pay debt service on an agency's outstanding obligations is inadequate, the agency's successor is relegated to seeking a loan from the county. "[T]he county treasurer may loan any funds from the county treasury that are necessary to ensure prompt payments of redevelopment agency debts." *See* new Health & Safety Code § 34183(c) (emphasis added). In short, AB26 attempts to deprive an agency's obligees of the stream of revenue that, pursuant to Art. XVI, sec.

16, secures their loans to or contracts with the agency. These direct conflicts between Art. XVI, sec. 16 and AB26 cannot be reconciled.

B. CONCLUSION: THE CONFLICTS BETWEEN AB26 AND ART. XVI, SEC. 16 CANNOT BE RESOLVED WITHOUT A CONSTITUTIONAL AMENDMENT

As shown above, AB26 conflicts materially, directly, and irreconcilably with Art. XVI, Sec. 16. The process for securing agency indebtedness that is established by Art. XVI, sec. 16 underlies the existing indebtedness of redevelopment agencies, and the settled expectations of their current obligees. If upheld, AB26 would make unavailable the reliable source of funding that has already been promised for repayment of existing debt.

> "We conclude that 'indebtedness' as it is used in article XVI, section 16 and sections 33670 and 33675, includes redevelopment agencies' executory financial obligations under redevelopment contracts. Such indebtedness entitles those agencies to payment of available tax increment revenues by the local county auditor. This result is consistent with the purposes of redevelopment and with the mechanism by which those revenues are raised. The manifest legislative intent is that available tax increment revenues be furnished to redevelopment agencies so they have a reliable source of funds to pay all indebtedness incurred in the process of

redevelopment. To hold otherwise, we are persuaded, would disrupt the orderly scheme of redevelopment financing in California."

Marek, 46 Cal.3d at 1087.

It is well settled that a "California statute, of course, is invalid if it conflicts with the governing provisions of the California Constitution." *Strauss v. Horton* (2009) 46 Cal.4th 364, 395. Put alternatively, "... the Legislature ... may not nullify a constitutional provision" by statute. *Rost v. Municipal Court of the Southern Judicial District, San Mateo County* (1960) 184 Cal.App.2d 507, 513; *Rose v. State* (1942) 19 Cal.2d 713, 725 ("... it is likewise elementary that the Legislature by statutory enactment may not abrogate or deny a right granted by the Constitution."). The Legislature should not be permitted to nullify the express language of Art. XVI, sec. 16 through AB26 without a corresponding constitutional amendment. That nullification would reduce the status of the California Constitution to that of any statute enacted by the Legislature. Accordingly, Amici respectfully request that this Court grant the present Petition.

Dated: September 29, 2011

Respectfully submitted,

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MOODY'S
INVESTORS SERVICE

Rating Update: MOODY'S PLACES ON REVIEW FOR POSSIBLE DOWNGRADE ALL CALIFORNIA TAX ALLOCATION BONDS DUE TO RECENT LEGISLATION AND PENDING STATE SUPREME COURT ACTION

Global Credit Research - 31 Aug 2011

Approximately $11.6 Billion in Debt Affected

Atwater Redevelopment Agency, CA
Municipality
CA

Opinion

NEW YORK, Aug 31, 2011 -- Moody's Investors Service has placed on review for possible downgrade all of its rated California tax allocation bonds. Recent state legislation and a resulting state supreme court case create substantial uncertainty over the future of redevelopment agencies in California and the tax allocation bonds that they issue. One of the two new laws eliminates tracking of revenues that secure these bonds and changes the flow of funds used to pay debt service. If left unchanged, this law would be significantly negative for bondholder credit. The other law would increase the financial burden on redevelopment agencies, a generally more modest, negative credit impact. Depending on whether the supreme court invalidates or affirms either or both laws, or parts of each, the court's decision could have widely differing impacts on individual redevelopment agencies. The uncertainty surrounding the potential outcome of the court case is a key contributor to the current action.

More specifically, the bill that would dissolve all redevelopment agencies, Assembly Bill 1X 26, does not require segregation and tracking of revenues pledged to individual tax allocation bonds. It also changes the flow of funds that are allocated to bond debt service. These developments would severely diminish the bonds' credit quality. If implemented as currently written, this legislation could result in multi-notch downgrades on bonds of the dissolved redevelopment agencies. This law was stayed by the state supreme court pending review.

Assembly Bill 1X 27, the second bill, would allow redevelopment agencies to remain in existence if their sponsoring city/county commits to making specific annual payments. This development would have more modest, but still negative credit implications for bondholders. The payments would most likely be made from the redevelopment agencies' funds, weakening their balance sheets and operating flexibility. This law too was stayed by the court.

The fact that a state supreme court ruling could invalidate one, both, or neither of these bills, in whole or in part, creates uncertainty that is negative for the credit quality of all California tax allocation bonds.

The California legislature is considering a clean-up law in its current session, which ends September 9. It is unclear, however, whether this legislation would address the risks to bondholders outlined above. The supreme court is targeting January 15, 2012 for a ruling on this case. Given these dates, it is possible that the review for downgrade will extend beyond Moody's typical 90-day time horizon.

For an in-depth discussion of these risk factors please see our forthcoming Special Comment "California Tax Allocation Bonds May Face Substantially Increased Credit Risk Due to Recent Legislation and Pending State Supreme Court Action."

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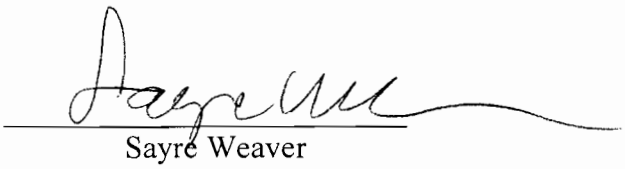
CERTIFICATE OF CONFORMITY

In accordance with Rule 8.204(c)(1) of the California Rules of Court, this certifies that the proposed amici curiae brief filed by Richards, Watson and Gershon in the case *California Redevelopment Association, et al. v. Matosantos, et al.* (Case No. S194861) does not exceed 14,000 words, including footnotes and excluding the title page, table of contents, table of authorities, and certificate of conformity. According to the word count function on the word processing program used, this brief contains 4,492 words.

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

Executed on September 29, 2011.



Sayre Weaver

PROOF OF SERVICE

I, Clotilde Bigornia, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 355 South Grand Avenue, 40th Floor, Los Angeles, CA 90071-3101.

On September 29, 2011, I served the within document:

APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS' CHALLENGE TO ABX1 26 AND ABX1 27 AND [PROPOSED] AMICI CURIAE BRIEF OF AMICI THE ASSOCIATION OF BAY AREA GOVERNMENTS AND VARIOUS CALIFORNIA CITIES AND REDEVELOPMENT AGENCIES CONCERNED WITH THE CONFLICT BETWEEN ABX1 26 AND THE CALIFORNIA CONSTITUTION, ARTICLE XVI, SECTION 16

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

Executed on September 29, 2011, at Los Angeles, California.

Clotilde Bigornia