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Proposition 53:
Revenue Bonds. Statewide Voter Approval.

Initiative Constitutional Amendment.

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I. EXECUTIVE SUMMARY

A. Introduction

Proposition 53, the No Blank Checks Initiative, would amend the California Constitution to require statewide voter approval for projects managed by the state or a state agency which would be financed through revenue bonds in excess of \$2 billion.¹ Currently, state revenue bonds do not require voter approval.²

A **YES** vote means statewide voter approval would be required for state revenue bonds that exceed \$2 billion for a project that is funded, managed, or owned by the State.³

A **NO** vote means state projects could continue to be financed by revenue bonds without voter approval.⁴

B. Background

A Stockton-area farmer and food processor, Dean Cortopassi, and his wife devoted about \$4.5 million into Proposition 53. The Proposition could disrupt Governor Jerry Brown's plan to build a two-tunnel water conveyance through the Sacramento-San Joaquin Delta. However the Cortopassi's have sponsored Proposition 53 in the name of reigning in government spending to curb the proliferation of long-term public debt.⁵

Revenue bonds are currently used as a means of financing state projects.⁶ Revenue bonds are issued by the state to finance a project, but the bonds are repaid by the users of that project.⁷ For example, if revenue bonds are issued to build a water reservoir, then the consumers of that water will see increases on their water bills to repay the bonds.⁸ An alternative form of revenue bonds is a lease revenue bond where the project will have no direct consumer, such as a prison, so the bond repayment will come from the state general fund that pays for the use.⁹

Fiscal conservatives have jumped on board in support of Proposition 53 because they would also like to limit government spending, prevent future taxes, and foster legislative accountability through Proposition 53's voter approval requirement. Proponents of Proposition 53 regard the current lack of voter approval requirement for revenue bonds as a loophole that

¹ CAL SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 8, 2016, at 124, available at <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> ["NOVEMBER 2016 VOTER Guide"] (on file with the *California Initiative Review*).

² *Id.* at 30.

³ *Id.* at 9.

⁴ *Id.*

⁵ David Siders, *This Wealthy Farmer is Taking on Sacramento: 'God Help You if You Disagree with Him'*, THE SACRAMENTO BEE, Aug. 28, 2016, available at <http://www.sacbee.com/news/politics-government/capitol-alert/article98163397.html> (on file with the *California Initiative Review*).

⁶ George Skelton, *Proposition 53 is a Ballot Measure Gov. Brown Hates, but It's One Voters Should Love*, LOS ANGELES TIMES, Sept. 19, 2016, available at <http://www.latimes.com/politics/la-pol-sac-skelton-voter-approval-revenue-bonds-20160919-snap-story.html> (on file with the *California Initiative Review*).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

legislators all too willingly exploit to raise money out of the public's sight. The other type of bond sold by the state, the general obligation bond, does require voter approval.¹⁰

Two recent projects, California High Speed Rail and the proposed Cal WaterFix, (the Delta tunnels proposal likely to be funded by revenue bonds), could be affected by Proposition 53, if it passes.¹¹ Both of those projects are expected to cost significantly more than the \$2 billion threshold that Proposition 53 would establish. Cal WaterFix is currently estimated to cost \$16 billion.¹² High Speed Rail is expected to cost upwards of \$80 billion dollars.¹³ If those projects had to go to the ballot, there is no guarantee the voters would approve them. As such, many of the proponents of those projects, such as Governor Brown, oppose the proposition. It would not be the first time a Delta water conveyance project was put to the voters in a statewide election. Back in 1982, Proposition 9, the Peripheral Canal Act was on the ballot but was rejected by voters.¹⁴

In 2008, Cortopassi opposed a Delta water conveyance project.¹⁵ If Proposition 53 passes, the Cal Waterfix might not come to fruition. Bipartisan concern is starting to mount over the potential cost of the Cal WaterFix. Earlier this year, Assemblymember Susan Eggman (D-Stockton) and State Senator Lois Wolk (D-Davis) requested an audit of Cal WaterFix.¹⁶ A bipartisan majority of state legislators approved the financial audit.¹⁷ However, proponents of Cal WaterFix have hinted that they might be able to secure financing that is not subject to Proposition 53's provisions.¹⁸

In many cases, projects involve advanced scientific or technical decisions which are considered and made by specialists. Requiring projects like Cal WaterFix to be approved by voters would take highly complex decisions away from the experts who manage them. Resources are managed, in part, by experts on a statewide level with policy and environmental considerations that are understood by few.

II. THE LAW

¹⁰ NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 30.

¹¹ Siders, *supra* note 5.

¹² Jeffrey Michael & John Kirlin, *Delta Tunnels Proposal a Muddled Gamble*, THE SACRAMENTO BEE, Sept. 9, 2016, available at <http://www.sacbee.com/opinion/california-forum/article100874797.html> (on file with the *California Initiative Review*).

¹³ John Fund, *High-Speed Rail Is a Fast Train to Fiscal Ruin, in California and Elsewhere*, NATIONAL REVIEW, May 22, 2016, available at <http://www.nationalreview.com/article/435703/high-speed-rail-california-boondoggle> (on file with the *California Initiative Review*).

¹⁴ David Siders & Ryan Sabalow, *Ballot Measure Threatens California Water Tunnels Plan*, THE SACRAMENTO BEE, July 11, 2015, available at <http://www.sacbee.com/news/state/california/water-and-drought/article27052015.html> (on file with the *California Initiative Review*).

¹⁵ *Id.*

¹⁶ *Delta Legislator's Request for Audit of Twin Tunnels Approved*, CALIFORNIA STATE ASSEMBLY DEMOCRATIC CAUCUS, Aug. 11, 2016, available at <http://asmdc.org/members/al3/news-room/press-releases/delta-legislators-request-for-audit-of-twin-tunnels-approved> (on file with the *California Initiative Review*).

¹⁷ *Id.*

¹⁸ Siders, *supra* note 5.

A. Existing Law

Currently revenue bonds do not require voter approval. Revenue bonds are a debt instrument that is typically paid back through fees or other charges paid by users of the project.¹⁹ In contrast, the California Constitution requires state general obligation bonds to be approved by the voters.²⁰ State general obligation bonds are typically repaid from the general fund, which is fed by income tax and sales tax.²¹ Proposition 53 would change the California Constitution and require state revenue bonds totaling more than \$2 billion to receive voter approval, as well.

Proposition 218 was passed by California voters in 1996. This initiative was a constitutional amendment which limited local government's ability to create or increase taxes or assessments without voter approval.²² Previously, local government's used these types of taxes to fund public service projects or other city and county services.²³ Proposition 218 required that revenue bond financing for local projects be approved by voters as local ballot measures.²⁴ Proposition 53 would be an extension of this type of requirement.

B. Path to the Ballot

1. Failed Ballot Attempt

In 2014, Dean Cortopassi attempted to qualify a "No Blank Checks" initiative constitutional amendment for the ballot.²⁵ Mr. Cortopassi obtained a title and summary for the initiative from the Attorney General's Office, but the initiative ultimately failed to obtain enough signatures to qualify for the ballot in the 2014 election.²⁶

2. Current Initiative

Mr. Cortopassi sponsored the proposition again in 2015.²⁷ This time, on November 2, 2015, he qualified his "No Blank Checks" initiative, Proposition 53, for the November 8, 2016 ballot.²⁸ The language of the qualified proposition is largely the same as that which was proposed

¹⁹ NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 30.

²⁰ *Id.*

²¹ *Id.*

²² *What is Proposition 218?*, CALIFORNIA TAX DATA, <http://www.californiataxdata.com/pdf/proposition218.pdf> (last visited Oct. 18, 2016) (on file with the *California Initiative Review*).

²³ *Id.*

²⁴ *Id.*

²⁵ Dean Cortopassi, *Request for Title and Summary for Proposed Initiative Constitutional Amendment*, June 27, 2014, available at <https://oag.ca.gov/system/files/initiatives/pdfs/14-0009%20%2814-0009%20%28Bond-funded%20Projects%29%29.pdf> (on file with the *California Initiative Review*).

²⁶ *California Proposition 53, Voter Approval Requirement for Revenue Bonds above \$2 Billion (2016)*, BALLOTEDIA, available at

[https://ballotpedia.org/California_Proposition_53_Voter_Approval_Requirement_for_Revenue_Bonds_above_\\$2_Billion_\(2016\)](https://ballotpedia.org/California_Proposition_53_Voter_Approval_Requirement_for_Revenue_Bonds_above_$2_Billion_(2016)) (on file with the *California Initiative Review*).

²⁷ Cortopassi, *supra* note 25.

²⁸ *California Proposition 53*, *supra* note 26.

in 2014 but there are at least two differences.²⁹ The first difference is a refined description of when projects that are proposed as separate projects for the purposes of revenue bond issuance are to be considered a single project for the purposes of the voter approval requirement.³⁰ The second is the removal of the section that previously outlined the information that would be required to be provided to voters when a proposition triggered voter approval.³¹ The qualified proposition does not say anything to this effect.³²

C. Proposed Law

Proposition 53, if enacted, would (1) require voter approval for revenue bonds that exceed two billion dollars; (2) apply to state projects or joint agency projects; and (3) prohibit projects that would otherwise surpass the two-billion-dollar threshold from being divided into smaller projects as a way to avoid the two-billion-dollar threshold.³³

The proposition would amend Article XVI of the California Constitution to require voter approval for any project managed by the state, or a state agency, which would be financed either singularly or in the aggregate by over two billion dollars in revenue bonds.³⁴ The voting requirement would not apply to projects proposed by local governments, school districts, or special districts.³⁵ Projects subject to this initiative would not be allowed to be considered separately so as to bring the cost of the project below the two billion dollar threshold.³⁶ The proposition specifies that allegedly separate projects are considered a single project if they will be located in close proximity to each other, are physically connected to one another, or cannot effectuate their purpose without the construction of all of the allegedly separate projects.³⁷ This list, however, is not exhaustive of the circumstances where allegedly separate projects may be considered a single project for the purposes of meeting the revenue bond financing threshold.³⁸

III. DRAFTING AND STATUTORY ISSUES

A. Emergency Exception

There is not an explicitly written section in the text of Proposition 53 that would allow for revenue bonds, in the case of an emergency, to be issued without statewide voter approval. There is a “notwithstanding any other provision of law” clause that prefaces the statewide voter

²⁹ Compare Cortopassi, *supra* note 25; and NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 123–25 (the 2016 initiative defines, in more detail, the manner of deciding if a separate projects are considered one project for determining if the project must be voted on and the 2016 initiative does not outline the information that must be provided to voters for projects being voted on for revenue bond financing).

³⁰ Cortopassi, *supra* note 25.

³¹ *Id.*

³² NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 123–25.

³³ *Id.* at 31.

³⁴ *Id.* at 124.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

requirement,³⁹ but without clear and express language it is unclear whether there is an emergency exception or not.

David Wolfe, Legislative Director for Howard Jarvis Taxpayer's Association, reasons that, in any case, he cannot foresee a major emergency that would require more than two billion dollars in revenue bonds.⁴⁰ He asserts that in the event of a major earthquake or flood, the federal government would pick up the tab and revenue bonds are never the primary source of funding.⁴¹ Mr. Wolfe points out that the Northridge and Loma Prieta earthquakes came nowhere near crossing the two billion dollar revenue bond threshold because a large portion of the funding in those situations came from FEMA in the form of grant relief.⁴²

B. Timing of Vote and Cost Assessment

Another ambiguity that has been identified relates to the timing of a vote. The initiative does not outline when, during the process of planning, approving, and building a project, a vote triggered by the two-billion-dollar threshold would need to occur. The text of Proposition 53 does not explicitly state what will happen if a project exceeds the two-billion-dollar threshold after it has been undertaken. Proposition 53 specifies that revenue bonds issued by the state for a particular project have to obtain voter approval if they aggregate over two billion dollars.⁴³ However, the proposition does not prescribe any method for a project whose costs are projected to be under the two billion dollar threshold but then would cross that limit due to unforeseen circumstances or delay.⁴⁴ Would this open up state projects to having to halt construction before additional revenue bonds can be sold in order to complete construction? If these circumstances are allowed to forego the voter approval requirement due to significant steps already being taken towards completion of the project, would there then be an increase in the under-projection of state project costs in order to avoid the pain of first obtaining voter approval? The initiative is silent on any circumstance of cost overruns for financed projects.⁴⁵

Mr. Wolfe argues that, because Proposition 53 is a constitutional amendment, the courts will be required to uphold the California Constitution.⁴⁶ Exactly how the courts would go about doing this is unclear. Mr. Wolfe is of the opinion that there is reason to believe that the court will make a finding of whether there was a reasonable presumption that a project would surpass the two billion dollar threshold at its inception and judge it accordingly.⁴⁷ Presumably a court would have to consider the history of cost overruns, bids presented at the time, and the particular facts of each case if a project exceeded the two billion dollar threshold after the fact.⁴⁸ The proposition

³⁹ *Id.* at 211.

⁴⁰ Written Interview with David Wolfe, Legislative Director, Howard Jarvis Taxpayers Association, (Sept. 29, 2016) (notes on file with the *California Initiative Review*).

⁴¹ *Id.*

⁴² *Id.*

⁴³ NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 30.

⁴⁴ *Id.* at 123–25.

⁴⁵ *Id.*

⁴⁶ Written interview with David Wolfe, *supra* note 40.

⁴⁷ *Id.*

⁴⁸ Interview with David Wolfe, Legislative Director, Howard Jarvis Taxpayers Association, in Sacramento, Calif. (Sept. 12, 2016) (notes on file with the *California Initiative Review*).

does not address the timing for a determination of the cost of a project and this is an ambiguity that very likely could lead to post-passage litigation.

C. Project Definition

In its analysis of the proposition, the Legislative Analyst's Office (LAO) identified an issue with the lack of a definition for "project."⁴⁹ The LAO believes that the lack of definition makes it uncertain which projects will be affected by the voter approval requirement and indicates that courts will ultimately have to make the decision on how to construe what a single project is.⁵⁰ They use an example of financing a hospital building as a single project versus financing a group of projects as a medical center.⁵¹ However, the LAO report fails to consider how these alternatives would fare under the proposition's stated circumstances for the consideration of purportedly separate projects.

One such circumstance is the geographic proximity of the allegedly separate projects.⁵² Should the state attempt to finance the individual buildings of a multi-building medical center separately, a court would first look to the ordinary meaning of the geographic circumstance test. This would likely require the cost of all of the medical centers buildings to be considered in the aggregated for determining if the project would need to proceed to voter approval for revenue bond financing.⁵³ The court construes the language "in the context of the statute as a whole and the overall statutory scheme in light of the electorate's intent."⁵⁴ If the court concludes that the text is ambiguous, it will consider other indicia such as the analyses and arguments contained in the official ballot pamphlet to determine voter intent.⁵⁵ Additional arguments could be made that the project should be considered under either of the other specified circumstances as well.⁵⁶

D. Severability

Proposition 53 contains a severability clause⁵⁷ which establishes the presumption that if a portion of the initiative were found unconstitutional and invalidated, that portion could be removed and the remainder of the law would remain in effect.⁵⁸ The presence of a severability clause alone does not determine whether a provision is severable. The California Supreme Court has employed a three-part test to determine whether an invalidated provision is severable from

⁴⁹ *Proposition 53*, LEGISLATIVE ANALYST'S OFFICE, July 18, 2016, available at <http://www.lao.ca.gov/ballot/2016/Prop53-110816.pdf> (on file with the *California Initiative Review*).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 124.

⁵³ *Robert L. v. Superior Court*, 30 Cal.4th 894, 900 (2003).

⁵⁴ *Id.* at 901.

⁵⁵ *Id.*

⁵⁶ For the connection of allegedly separate projects test, it could be argued that the hospital building would connect or join with the other buildings through auxiliary elements of the plan that would bring the function of the buildings together to form the medical center. Similarly, considering the buildings separately would likely not withstand the ultimate purpose test, whereby, if the purpose of any of these buildings is to ultimately provide medical treatment and emergency medical services to a community then arguably the ultimate purpose of any of the buildings would not be fulfilled until the entire medical center is constructed.

⁵⁷ NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 124.

⁵⁸ *California Redevelopment Assn. v. Matosantos*, 53 Cal.4th 231, 270 (2011).

the rest of the initiative or not.⁵⁹ That three-part test considers whether the provision is grammatically (mechanically), functionally, and volitionally separable from the rest of measure. However, there are no apparent portions of the proposition which are likely to raise constitutional issues.

IV. CONSTITUTIONAL ISSUES

There are no federal constitutional issues. There do not appear to be state constitutional issues because this initiative proposes to amend the California Constitution.

V. PUBLIC POLICY CONSIDERATIONS

A. Proponents Main Arguments

Proposition 53 receives support from conservative parties throughout the state. Some of the major proponents of Proposition 53 include the initiatives sponsors, Dean and Joan Cortopassi, the California Republican Party, the Howard Jarvis Taxpayers Association, and Former U.S. Rep. Andrea Seastrand (R-22).

1. *Transparency of state project financing*

Proponents argue that requiring voter approval will bring transparency to state project costs.⁶⁰ The findings section of the proposition points to the initially publicized nine billion dollar cost of California High Speed Rail which was later revealed to be nearly eighty billion dollars.⁶¹ Proponents assert that these undisclosed costs are common, but that Proposition 53 will require the state and state officials to fully disclose the costs of projects exceeding \$2 billion before they can be funded by revenue bonds.⁶² They believe that this disclosure will be a means of limiting state debt and forcing the state to be more selective in the projects it chooses to complete.⁶³

2. *Closing a loophole*

Currently, the state is allowed to carry out projects financed with revenue bonds. Proponents argue that this power to force a debt obligation onto voters should be approved by voters first.⁶⁴ Proponents argue that revenue bond funding is used as a loophole for state officials to fund projects that have not obtained public support, while still forcing the public to be burdened with the costs of repaying the debt.⁶⁵

⁵⁹ *Id.* at 271.

⁶⁰ NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 34.

⁶¹ *Id.* at 124.

⁶² *Id.* at 34.

⁶³ Steven Greenhut, *Prop. 53 Could Have Far-Reaching Consequences for State Project Financing—or Not*, THE R STREET INSTITUTE, Sept. 13, 2016, available at <http://www.rstreet.org/op-ed/prop-53-could-have-far-reaching-consequences-for-state-project-financing-or-not/> (on file with the *California Initiative Review*).

⁶⁴ NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 34.

⁶⁵ Greenhut, *supra* note 63.

3. *Fiscal Savings*

Proponents argue that revenue bonds are an unnecessarily expensive way to fund government projects.⁶⁶ The voters could fund projects using general obligation bonds, which have a lower interest rate than revenue bonds.⁶⁷ Proponents maintain that Proposition 53 would discourage revenue bond financing and therefore encourage more affordable methods of financing.

B. Opponents Main Arguments

Proposition 53 is opposed by a broad collection of public service associations and democratic entities, including California Professional Firefighters, California Chamber of Commerce, CA Hospital Association, League of CA Cities, ACWACA State Sherriff's Association, Governor Jerry Brown, State Building and Construction Trades Council, Harvey Milk LGBT Democratic Club, and California Foundation for Commerce and Education. Opposition to Proposition 53 is grounded in the support of two of the largest public works projects to ever be undertaken in California - the High Speed Rail and Cal WaterFix.

1. Erosion of local control for local projects.

Opponents argue the proposition would impact local control and community infrastructure improvements negatively.⁶⁸ The Proposition would require a statewide vote for certain local projects which are managed under joint powers authorities.⁶⁹ For expensive local projects, which under revenue bond financing structure would be repaid by the local consumers of the project, voters from areas far from the projects location would have the right to vote on local projects for other areas of the state.⁷⁰ Potential effects could be lack of revenue bond funding for local needs such as water storage or vital infrastructure updates and repairs.⁷¹

2. Lack of emergency exception for natural disasters

The Proposition does not contain an exemption for emergencies or natural disasters.⁷² California Professional Firefighters Association has spoken out over the need for an exception to the voter approval process in the case of a natural disaster, saying, "Proposition 53 irresponsibly fails to contain an exemption for natural disasters or major emergencies. That flaw could delay our state's ability to rebuild critical infrastructure following earthquakes, wildfires, floods, or other natural or man-made disasters."⁷³

⁶⁶ Interview with David Wolfe, *supra* note 48.

⁶⁷ *Proposition 53*, *supra* note 49.

⁶⁸ Editorial, *Our View: Vote No: Prop. 53 is Not Taxpayer 'Protection'*, THE BAKERSFIELD CALIFORNIAN, Aug. 25, 2016 (on file with the *California Initiative Review*).

⁶⁹ NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 30.

⁷⁰ Editorial, *Mercury News Editorial: Reject Prop 53, Requiring Statewide Revenue Bond Approval*, SAN JOSE MERCURY NEWS, Aug. 12, 2016 (on file with the *California Initiative Review*).

⁷¹ NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 35.

⁷² *Id.*

⁷³ *Id.*

3. Fiscal Savings

If Proposition 53 causes potential projects to be separated into smaller projects to avoid the two billion dollar threshold, the smaller individual projects could end up costing more, in the long run, than a single, larger project would have cost if the larger project would have been a more efficient way to complete the project.⁷⁴ The state might resort to alternative sources of funding that are more expensive than revenue bonds, such as private loans that likely would have higher interest rates.⁷⁵ Additionally, the voter requirement would slow down the progression of projects because of the delay that would be required in order to put the project to a statewide vote.

VI. CONCLUSION

Proposition 53 is an effort to require that voter approval is obtained for state projects which would result in over two billion dollars in revenue bond funding. If the proposition is passed, it would amend the California Constitution to require statewide voter approval for projects managed by the state or a state agency before they can receive funding through revenue bonds.⁷⁶

Proponents assert that Proposition 53 protects voters from the state burdening Californians with additional debt and an obligation to repay it. Their main claims are focused on bringing transparency to state projects by requiring that the true cost of the project be disclosed before it can proceed, which will result in a limitation on projects that haven't received public support being pushed through by government officials.

Opponents of the proposition center around their support for the California High Speed Rail and Cal WaterFix, two state projects which would be required to go to the voters for approval before they can be financed, should Proposition 53 pass. The opponents argue that Proposition 53 will, in certain circumstances, take the decision-making power on local projects away from the regions in which they will be built and give distant voters who will be unaffected by the project a vote on whether it should proceed. Additionally, opponents have criticized Proposition 53 for not including an exception to the voter approval requirement for emergency and natural disaster situations.

⁷⁴ *Proposition 53, supra* note 49.

⁷⁵ *Id.*

⁷⁶ NOVEMBER 2016 VOTER GUIDE, *supra* note 1, at 124.