

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

<b>DATE:</b>	August 24, 2016	<b>DEPT. NO.:</b>	24
<b>JUDGE:</b>	HON. SHELLEYANNE W. L. CHANG	<b>CLERK:</b>	E. HIGGINBOTHAM
<p><b>TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, Petitioner and Plaintiff,</b></p> <p style="text-align: center;">v.</p> <p><b>CALIFORNIA AIR RESOURCES BOARD, an agency of the State of California, and DOES 1 - 10, inclusive, Respondents and Defendants,</b></p> <hr/> <p><b>JOHN CHIANG, in his official capacity as the Controller of the State of California; the CALIFORNIA HIGH-SPEED RAIL AUTHORITY, an agency of the State of California, and DOES 11-20 inclusive, Real Parties in Interest.</b></p>		<p>Case No.: 34-2014-80001974</p>	
<b>Nature of Proceedings:</b>		<b>RULING ON SUBMITTED MATTER: DEMURRERS TO PETITION FOR WRIT OF MANDATE; MOTION TO STRIKE</b>	

On August 18, 2016, the Court issued a tentative ruling denying the petition for writ of mandate (Petition). On August 19, 2016, the parties appeared for oral argument, and were represented by counsel as stated on the record. After oral argument, the Court took the matter under submission. The Court now rules as follows:

Respondent Air Resources Board (ARB) demurs to the Fourth and Fifth Causes of Action in the Petition for Writ of Mandate and Complaint for Declaratory Relief (Petition). RPI's demur to the Fifth Cause of Action and have also filed a Motion to Strike.

**I. Background**

Assembly Bill 32 (AB 32) requires California to reduce its greenhouse gas (GHG) emissions. Among other things, AB 32 charges ARB with monitoring and regulating GHG emissions, and requires ARB to prepare, approve, and update the Climate Change Scoping Plan (Scoping Plan) to achieve the maximum technologically feasible and cost-effective reduction of greenhouse gas emissions. The Scoping Plan is a "blueprint" for

ARB's regulatory measures and must be updated no less than every five years. (*Association of Irrigated Residents v. State Air Res. Bd.* (2012) 206 Cal.App. 4<sup>th</sup> 1487, 1505.)

The Petition challenges ARB's 2014 adoption of the update to the Scoping Plan and ARB's certification of the program-level Environmental Analysis (EA) for the Scoping Plan.

During the adoption period, Petitioner criticized the Scoping Plan's recommendation that the Legislature allocate funds from the Greenhouse Gas Reduction Fund (GGR Fund) for the High Speed Rail (HSR) Project. (Petition, ¶¶21-22.) Petitioner also criticized the EA for the Scoping Plan, because it did not discuss GHG emissions associated with the HSR Project. (Petition, ¶23.)

Petitioner seeks a writ of mandate ordering ARB to "rescind" its inclusion of the HSR Project in the Scoping Plan and Environmental Analysis and to comply with the California Environmental Quality Act (CEQA). Petitioner also seeks a declaration that specific actions taken by the Legislature to fund the HSR Project are invalid.

The First, Second, and Third Causes of Action assert that ARB failed to comply with CEQA in certifying the EA for the Scoping Plan. The Fourth Cause of Action alleges that ARB violated AB 32 by approving the Scoping Plan. The Fifth Cause of Action seeks a declaration as to the legality of the Legislature's appropriations for the HSR Project.

## II. Discussion

### a. Requests for Judicial Notice

ARB's Request for Judicial Notice (RJN) is **denied**. Although the documents sought to be judicially noticed are properly subject to judicial notice, they are not attached to the request. (Cal. Rule of Court 3.1306(c).) The RJN of RPI's is **granted**.

### b. Demurrer

The rules governing civil actions are generally applicable to writs. (Code Civ. Proc., § 1109; *Rodriguez v. Municipal Court* (1972) 25 Cal.App.3d 521, 526.) In reviewing a demurrer, the Court must accept all material facts properly pled in the pleading as true. (*Burt v. County of Orange* (2004) 120 Cal.App.4<sup>th</sup> 273, 279.) The pleading's allegations are liberally construed with a view toward substantial justice. (*Stevens v. Superior Court* (1999) 75 Cal.App.4<sup>th</sup> 594, 601.) "Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment." (*Goodman v. Kennedy* (1976) 10 Cal.3d 335, 349.)

### i. Fourth Cause of Action

ARB demurs to the Fourth Cause of Action on the grounds that it fails to state facts constituting a cause of action. (Code Civ. Proc., § 430.10(e).)

The Fourth Cause of Action alleges that ARB violated AB 32 by approving the update to the Scoping Plan, by failing to ensure that the GHG emissions reductions were “real, permanent, quantifiable, verifiable and enforceable.” (Petition, ¶58.)

AB 32 (Health and Safety Code sections 38500, *et seq.*) requires ARB to prepare the Scoping Plan, which serves as the basis for future regulations to reduce GHG emissions. (*Association of Irrigated Residents, supra*, 206 Cal.App. 4<sup>th</sup> at p. 1505.)

When preparing the Scoping Plan, ARB must (1) consult with all state agencies with jurisdiction over sources of greenhouse gases; (2) consider all relevant information pertaining to GHG emissions reduction programs in other jurisdictions; (3) evaluate the total potential costs and benefits of the plan to California's economy, environment, and public health; and, (4) ultimately, identify and make recommendations on direct emission reduction measures, alternative compliance mechanism, market-based compliance mechanisms, and potential monetary and nonmonetary incentives for sources and categories of sources that ARB finds are necessary and desirable to facilitate the achievement of the maximum feasible and cost-effective reductions of greenhouse gas emissions by 2020. (*Association of Irrigated Residents, supra*, 206 Cal.App. 4<sup>th</sup> at p. 1495.) The Scoping Plan's requirements are codified at Health and Safety Code<sup>1</sup> section 38561.

Section 38562 then directs ARB to promulgate regulations “to achieve the maximum technologically feasible and cost-effective reductions in [GHG emissions]” and requires that regulations ensure that GHG emissions reductions are “real, permanent, quantifiable, verifiable and enforceable.” (Health & Saf. Code, § 38562, subs. (a), (d)(1).)

ARB contends that the Scoping Plan is not a “regulation” and thus may not be challenged under the criteria governing regulations listed in Section 38562 as Section 38561, contains no such requirement. The Court agrees with ARB that because the Fourth Cause of Action cites language that governs the regulatory criteria, not the Scoping Plan, it fails to state a cause of action.

Petitioner responds that the Court should instead construe the Fourth Cause of Action as a challenge to the Scoping Plan under Section 38561. Petitioner further argues that because the Scoping Plan serves as the basis for ARB's regulations, its challenge to the Scoping Plan is proper, even if Petitioner cited a standard applicable to regulations. Petitioner should amend the Fourth Cause of Action to clarify that it is challenging the Scoping Plan under either or both theories. As Petitioner has demonstrated a reasonable possibility that the Petition may be amended, **the Court sustains ARB's demurrer to the Fourth Cause of Action with leave to amend.** In doing so, the Court expresses no

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<sup>1</sup> Unless further specified, all statutory references shall be to the Health and Safety Code.

opinion as to the ultimate validity of either theory. Rather the Court's review upon demurrer only extends to the sufficiency of the pleadings.

ARB also argues that the Petition is really an attack on the HSR Project, not the Scoping Plan. It is true that Petitioner's challenge to the Scoping Plan centers on critiques regarding GHG emissions from the HSR Project. However, this is not a basis for demurrer, and the Court declines to sustain the demurrer to the Fourth Cause of Action on this ground.

**The demurrer to the Fourth Cause of Action is SUSTAINED with leave to amend.**

## ii. Fifth Cause of Action

The Fifth Cause of Action seeks a declaration that the Legislature's appropriation of funds from the GGR Fund for "any measure, program, or project not included in a properly approved Scoping Plan," including the HSR project, is improper. (Petition, ¶67.)

ARB demurs to the Fifth Cause of Action, for failing to allege facts that constitute a cause of action, in that it seeks declaratory relief, and declaratory relief is not proper to challenge an administrative action. (Code Civ. Proc., § 430.10(e).)<sup>2</sup> Although the Petition challenges ARB's adoption of the Scoping Plan, the Fifth Cause of Action seeks a declaration regarding actions of the Legislature. Thus, demurrer does not lie on this ground, as the Fifth Cause of Action does not challenge the actions of ARB or any other administrative agency. However, the Court and the parties agree that the Fifth Cause of Action does not state a cause of action against ARB. **Accordingly, the demurrer to the Fifth Cause of Action is sustained without leave to amend as to Respondent ARB.**

RPI's demur to the Fifth Cause of Action on the grounds that it fails to allege facts that constitute a cause of action (Code Civ. Proc., § 430.10(e), because the relief would violate the separation of powers doctrine, and because the Fifth Cause of Action raises a political question.

RPI's argue that declaratory relief is proper to challenge a legislative action's constitutionality, but not the factual basis underlying that legislative decision. RPI's argue that the Fifth Cause of Action asserts a fact- and policy-based disagreement with the Legislature's decision to appropriate funds for the HSR, and the Court may not supplant the Legislature's judgment.

The Court's review of Legislative actions is limited, out of respect for the separation of powers doctrine. (*California High Speed Rail Authority v. Superior Court (Tos)* (CHSRA) (2014) 228 Cal.App.4<sup>th</sup> 676.)

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<sup>2</sup> ARB had also demurred to the Fifth Cause of Action on the grounds that it was uncertain (*See* Code of Civ. Proc., § 430.10 (f)), but abandoned this ground, by not arguing it.

For example, the Court may not review the factual basis underlying legislative actions, such as enacting statutes, or making appropriations thereto.

“While the courts have undoubted power to declare a statute invalid, when it appears to them in the course of judicial action to be in conflict with the constitution, yet they can only do so when the question arises as pure question of law, unmixed with matters of fact the existence of which must be determined upon a trial, and as the result of it, may be, conflicting evidence.” (*Scharbarum v. California Legislature* (1998) 60 Cal.App. 4<sup>th</sup> 1205, 1219-1220 [citations omitted].)

Conversely, “[i]t is not the judiciary's function...to reweigh the 'legislative facts' underlying a legislative enactment.” [Citation] Thus, it has been said that “[i]f the validity of a statute depends on the existence of a certain state of facts, it will be presumed that the Legislature has investigated and ascertained the existence of that state of facts before passing the law.” (*Scharbarum, supra*, 60 Cal.App.4<sup>th</sup> at p. 1219 [citations omitted].)

Similarly, “[t]he power to determine the facts upon which appropriations are based rests exclusively in the legislative and executive branches of the government, and the function of the courts is to determine the issues of law presented by the face of the legislation and relevant facts of which they can take judicial notice.” (*Scharbarum, supra*, 60 Cal.App.4<sup>th</sup> at p. 1219 [citation omitted].)

Additionally, a party challenging a Legislative appropriation must identify legal authority limiting the Legislature’s ability to appropriate funds.

For example, the Court of Appeal has held that a party may not challenge the Legislature’s appropriation of funds for the HSR based on an allegedly deficient preliminary funding plan. (*CHSRA, supra*, 228 Cal.App.4<sup>th</sup> 676.)

The Court of Appeal first observed that “[i]n the absence of a clear directive from the people to constrain the discretion of the Legislature, [courts] will not circumscribe legislative action or intrude on the Legislature’s inherent right to appropriate the funding for [HSR].” (*CHSRA, supra*, 228 Cal.App.4<sup>th</sup> at p. 715.)

In *CHSRA*, there was nothing in the governing Bond Act providing any basis “for allowing the judiciary to interfere with the collective judgment of the Legislature in approving the issuance of bonds even if the funding plan it considered did not meet the letter of the law. Rather, the legislative judgment to move forward with the [HSR] project before all funding sources were identified and all environmental clearances were obtained involves the type of decisionmaking peculiar to the discretionary power of a legislative body. ‘Mandate will not issue to compel action unless it is shown the duty to do the thing asked for is plain and *unmixed with discretionary power or the exercise of judgment.* [Citation.]’” (*CHSRA, supra*, 228 Cal.App.4<sup>th</sup> at 715. [Citation omitted; emphasis in original.])

Here, the Legislature's appropriation of funds is necessarily based on its finding that the Scoping Plan is factually sufficient. The Court will not "reweigh the 'legislative facts' underlying the decision to appropriate monies. (*Scharbarum, supra*, 60 Cal.App.4<sup>th</sup> at p. 1219.)

Further, Petitioner has identified no statutory limitations that would "compel[] the Legislature to ensure that the [Scoping Plan] [is] compliant," no statutory limitations "defining any ministerial duties the Legislature [is] obliged to perform," and Petitioner has identified no statutory language "describing any consequences to [ARB] for failing to produce" a sufficient Scoping Plan. (*CHRSA, supra*, 228 Cal.App.4<sup>th</sup> at 714.) Thus, pursuant to *CHSRA*, it is not appropriate for this Court to review the validity of the Legislature's appropriation for "any measure, program, or project: not included in a properly approved Scoping Plan. (Petition, ¶67.)

Additionally, although the statutes cited by Petitioner may contemplate a judicial finding that an "expenditure" or "appropriation" of monies is "inconsistent with the law" (Gov. Code § 16428.9(d); Health & Saf. Code, § 39712(b)), these statutes do not expressly allow the Court to review the validity of the Legislature's appropriations based on consistency with the Scoping Plan.

The Court recognizes that courts may review Legislative appropriations or transfers pursuant to statutes that are allegedly unconstitutional or that conflict with voter-approved initiatives. (*See Professional Engineers in California Government v. California Dept. of Transp.* (1997) 15 Cal.4<sup>th</sup> 543 572-73; *Shaw v. Chiang* (2009) 175 Cal.App.4<sup>th</sup> 577.) However, Petitioner does not contend that these circumstances are present here, and that, in light of the *CHRSA* case, the Legislature's appropriation pursuant to the Scoping Plan may nevertheless be reviewed by this Court.

Petitioner requests leave to amend the Petition to revise the Fifth Cause of Action. Although the Court is doubtful that the Petition may be amended to remedy the defects in the Fifth Cause of Action, **the Court will sustain RPI's demurrer with leave to amend.**<sup>3</sup>

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<sup>3</sup> RPI's also argue that any declaration issued by the Court would constitute an improper advisory opinion as it challenges an appropriation not just for the HSR, but any other future hypothetical measure, program, or project not included in a properly-approved Scoping Plan. Petitioner does not dispute this. The question of whether future measures, programs, or projects are consistent with the Scoping Plan is not ripe for judicial review. **Accordingly, the demurrer to the Fifth Cause of Action is also sustained with leave to amend on this ground.**

RPI's also argue that the Court lacks jurisdiction over the fifth cause of action as it raises a political question. As RPI's do not elaborate on this argument further, the Court does not address it. However, the Court disagrees that all legislative appropriations constitute a "political question" which it may not review.

**c. Motion to Strike**

RPI's move to strike the following portions of the Petition that relate to the Fifth Cause of Action for declaratory relief: page 2, lines 10 through 14; page 13, lines 8 through 28; and page 14, lines 1 through 9 and 20 through 24. RPI's move to strike these statements the grounds that such statements are irrelevant, false and improper, as they relate to an improper request for declaratory relief. (Code Civ. Proc., § 436(a).)

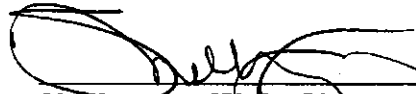
As the Court sustains the demurrer to the Fifth Cause of Action with leave to amend, **the motion to strike is denied.**

**III. DISPOSITION**

The demurrer to the Fourth Cause of Action is sustained with leave to amend. The demurrer to the Fifth Cause of Action is sustained without leave to amend as to Respondent ARB. The demurrer to the Fifth Cause of Action is sustained with leave to amend as to RPI's. RPI's motion to strike is denied. If Respondents or RPI's demur to the amended Petition, they must meet and confer pursuant to Code of Civil Procedure section 430.41.

Petitioner shall file and serve an amended Petition no later than September 7, 2016, to remedy the defects in the Petition. Respondent and RPI's shall file responsive pleadings within 30 days after service of the final ruling of the Court.

Date: August 24, 2016

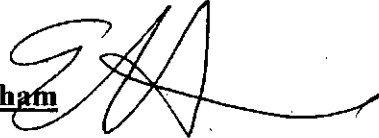
  
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**Shelleyanne W. L. Chang**  
**Judge of the Superior Court of California**  
**County of Sacramento**

**Declaration of Mailing**

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: August 25, 2016

E. Higginbotham, Deputy Clerk /s/ E. Higginbotham



Stuart Flashman  
Law Offices of Stuart Flashman  
5626 Ocean View Drive  
Oakland, CA 94618

Andrew Vogel  
Baine Kerr  
Office of the Attorney General  
300 South Spring Street, Ste. 1702  
Los Angeles, CA 90013

Mark Poole  
Office of the Attorney General  
1515 Clay Street, 20<sup>th</sup> Floor  
Oakland, CA 94612

Kavita Lesser  
Office of the Attorney General  
300 S. Spring Street  
Los Angeles, CA 90013