

1 KAMALA D. HARRIS  
Attorney General of California  
2 CHRISTINA BULL ARNDT  
Supervising Deputy Attorney General  
3 ANDREW M. VOGEL  
Deputy Attorney General  
4 BAINE P. KERR  
Deputy Attorney General  
5 State Bar No. 265894  
300 South Spring Street, Suite 1702  
6 Los Angeles, CA 90013  
Telephone: (213) 620-2210  
7 Fax: (213) 897-2801  
E-mail: Baine.Kerr@doj.ca.gov  
8 *Attorneys for Real Party in Interest California High  
Speed Rail Authority*

*No filing fee pursuant to Government  
Code section 6103*

9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SACRAMENTO  
12

13 **TRANSPORTATION SOLUTIONS  
DEFENSE AND EDUCATION FUND, a  
14 California nonprofit corporation,**

15 **Petitioner and Plaintiff,**

16 v.

17 **CALIFORNIA AIR RESOURCES BOARD,  
18 an agency of the State of California, and  
DOES 1-10, inclusive,**

19 **Respondents and  
20 Defendants;**

21 **BETTY YEE, in her official capacity as the  
Controller of the State of California; the  
22 CALIFORNIA HIGH-SPEED RAIL  
AUTHORITY, an agency of the State of  
23 California, and DOES 11-20 inclusive,**

24 **Real Parties in Interest.**

Case No. 34-2014-80001974-CU-WM-GDS

**REAL PARTY IN INTEREST  
CALIFORNIA HIGH SPEED RAIL  
AUTHORITY'S NOTICE OF  
DEMURRER; DEMURRER;  
MEMORANDUM OF POINTS AND  
AUTHORITIES; DECLARATION OF  
BAINE P. KERR PURSUANT TO CODE  
OF CIVIL PROCEDURE SECTION  
430.41, SUBDIVISION (a)(3)(A)**

**[FILED CONCURRENTLY WITH  
MOTION TO STRIKE AND REQUEST  
FOR JUDICIAL NOTICE]**

Assigned for all purposes to the Hon.  
Shelleyanne W.L. Chang, Dept. 24

Date: August 19, 2016  
Time: 11:00 a.m.  
Trial Date: none set  
Action Filed: June 23, 2014

1 **NOTICE OF DEMURRER**

2 TO PETITIONER AND ITS COUNSEL OF RECORD:

3 Please take notice that a hearing is set on August 19, 2016, in Department 24 of the above-  
4 captioned court, located at the Gordon Schraber Sacramento County Courthouse, 720 9<sup>th</sup> Street,  
5 Sacramento, California 95814 at 11:00 a.m. or as soon thereafter as the Court may hear the  
6 matter, to consider Real Party in Interest California High Speed Rail Authority's demurrer to the  
7 petition for writ of mandate and complaint for declaratory relief. Real Party in Interest demurs  
8 pursuant to Code of Civil Procedure sections 430.10, subdivisions (a) and (e), 430.30, and 430.70  
9 on the following grounds:

10 1) The fifth cause of action fails to allege facts sufficient to constitute any cause of  
11 action for declaratory relief because the relief requested would violate the separation of powers  
12 doctrine.

13 2) The Court lacks jurisdiction over the fifth cause of action because it raises a  
14 political question.

15 Real Party in Interest bases this demurrer upon this notice and accompanying  
16 memorandum of points and authorities, the concurrently-filed Declaration of Baine P. Kerr and  
17 Request for Judicial Notice, and the records and documents in the Court's file.

18 Pursuant to Local Rule 1.06(A), the court will make a tentative ruling on the merits of the  
19 matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings  
20 for the department may be downloaded off the court's website. If parties do not have online  
21 access, they may call the dedicated phone number for the department as referenced in the local  
22 telephone directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the  
23 hearing and receive the tentative ruling. If you do not call the court and the opposing party by  
24 4:00 p.m. the court day before the hearing, no hearing will be held.

25 ///

26 ///

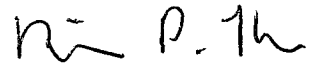
27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: March 9, 2016

Respectfully submitted,  
KAMALA D. HARRIS  
Attorney General of California  
CHRISTINA BULL ARNDT  
Supervising Deputy Attorney General



BAIN P. KERR  
Deputy Attorney General  
ANDREW M. VOGEL  
Deputy Attorney General  
*Attorneys for Real Party in Interest  
California High Speed Rail Authority*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**DEMURRER**

Real Party in Interest California High Speed Rail Authority hereby demurs to the Verified Petition for Writ of Mandate and Complaint for Declaratory Relief pursuant to Code of Civil Procedure sections 430.10, subdivisions (a) and (e) and 430.30 on the following grounds:

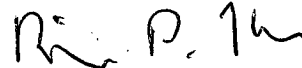
1) The fifth cause of action fails to allege facts sufficient to constitute any cause of action for declaratory relief because the relief requested would violate the separation of powers doctrine.

2) The Court lacks jurisdiction over the fifth cause of action because it raises a political question.

Dated: March 9, 2016

Respectfully Submitted,

KAMALA D. HARRIS  
Attorney General of California  
CHRISTINA BULL ARNDT  
Supervising Deputy Attorney General



BAINE P. KERR  
Deputy Attorney General  
ANDREW M. VOGEL  
Deputy Attorney General  
*Attorneys for Real Party in Interest  
California High Speed Rail Authority*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## TABLE OF CONTENTS

	<u>Page</u>
Introduction.....	1
Statement of Facts.....	2
A.    The California High Speed Rail Project.....	2
B.    AB 32 and the Scoping Plan .....	2
C.    The Greenhouse Gas Reduction Fund .....	3
D.    The Legislature’s Appropriations of Funds to the High-Speed Rail Project .....	3
E.    Petitioner’s Allegations.....	4
Standard of Review.....	4
Argument .....	5
I.    California Law Precludes the Type of Judicial Interference with Legislative Decision-making that the Fifth Cause of Action Seeks .....	5
II.   The Petition Improperly Seeks an Advisory Opinion.....	10
III.  ARB’s Demurrer .....	11
Conclusion .....	11

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CASES**

*Baker v. Carr*  
(1962) 369 U.S. 186 .....6

*Berkeley Hillside Preservation v. City of Berkeley*  
(2015) 60 Cal.4th 1086 .....9

*Blank v. Kirwan*  
(1985) 39 Cal.3d 311 .....4, 5

*Butt v. State*  
(1992) 4 Cal.4th 668 .....8

*California High Speed Rail Authority v. Superior Court (Tos)*  
(2014) 228 Cal.App.4th 676 .....5, 7, 8, 9

*Carsten v. Psychology Examining Com.*  
(1980) 27 Cal.3d 793 .....10

*Frantz v. Blackwell*  
(1987) 189 Cal.App.3d 91.....4

*Hernandez v. City of Pomona*  
(2009) 46 Cal.4th 501 .....5

*Howard Jarvis Taxpayers Assn. v. Padilla*  
(2016) 62 Cal.4th 486 .....8

*In re Claudia E.*  
(2008) 163 Cal.App.4th 627 .....10

*Nadler v. Schwarzenegger*  
(2006) 137 Cal.App.4th 1327 .....5

*Schabarum v. California Legislature*  
(1998) 60 Cal.App.4th 1205 .....5, 6, 7, 8

*Shaw v. People ex rel. Chiang*  
(2009) 175 Cal.App.4th 577 .....5

*Stonehouse Homes v. City of Sierra Madre*  
(2008) 167 Cal.App.4th 531 .....10

*Taxpayers for Improving Public Safety v. Schwarzenegger*  
(2009) 172 Cal.App.4th 749 .....10

*Wilson & Wilson v. City Council of Redwood City*  
(2011) 191 Cal.App.4th 1559 .....10

1	<i>Zelig v. County of Los Angeles</i>	
2	(2002) 27 Cal.4th 1112 .....	5
3	<b>STATUTES</b>	
4	Government Code	
5	§ 16428.8 et seq. ....	3
6	§ 16428.8.....	6, 7
7	§ 16428.8, subd. (b) .....	3
8	§ 16428.8, subd. (c).....	3, 7
9	§ 16428.85, subd. (a).....	7
10	§ 16428.9.....	7
11	§ 16428.95.....	7
12	Health and Safety Code	
13	§ 38561, subd. (b) .....	2
14	§ 39712.....	<i>passim</i>
15	§ 39712, subd. (a)(1).....	6
16	§ 39712 subd. (b) .....	6, 7, 8
17	§ 39718.....	6
18	§ 39719.....	9
19	§ 39719, subd. (b)(2).....	2, 3, 6
20	§ 39719.1, subds. (a) & (b) .....	6
21	Public Utilities Code	
22	§ 18500, et. seq. ....	2
23	§ 185010, subds. (a)-(d) .....	2
24	§ 185010, subd. (g) .....	2
25	§ 185012, subd. (c).....	2
26	§ 185020.....	2
27	§ 185030.....	2
28	<b>OTHER AUTHORITIES</b>	
	California Code of Regulations, Title 17	
	§ 95801 et. seq. ....	3

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Petitioner Transportation Solutions Defense and Education Fund attempts to circumvent  
4 the California Constitution's strict separation of powers by inviting this Court to undo a  
5 Legislative decision to appropriate funds, and substitute petitioner's choice for how to appropriate  
6 those funds in its place. The Court should decline this invitation.

7 Petitioner's fifth cause of action seeks an extraordinary judicial declaration that all actions  
8 the California Legislature has taken to fund the California high-speed rail project with money  
9 from the Greenhouse Gas Reduction Fund (GGRF) were invalid. Petitioner alleges that the high-  
10 speed rail project does not further AB 32's regulatory purposes of reducing greenhouse gas  
11 emissions, and that the California Air Resources Board therefore should not have included the  
12 project in the Climate Change Scoping plan that it adopted to identify greenhouse gas reduction  
13 measures. Based on these allegations, petitioner claims that the Legislature lacked discretion to  
14 appropriate money to the project.

15 This argument fails as a matter of law for three simple reasons. First, there is a strict  
16 presumption against judicial invalidations of legislative appropriations. Second, no statute limits  
17 the Legislature's appropriation power from the GGRF for high-speed rail. And, third, the  
18 Legislature expressly determined that high-speed rail furthers the regulatory purposes of AB 32,  
19 and will reduce California's emissions of greenhouse gases.

20 Petitioner is not asking the Court to adjudicate the facial validity of a statute. Instead it is  
21 requesting that the Court revisit the wisdom of, and nullify, a legislative decision on a policy  
22 matter. The Court should refuse to do so. If petitioner wants to undo the Legislature's decision  
23 to appropriate money, it should address its case to the Legislature itself, not to the courts. The  
24 fifth cause of action raises a non-justiciable political question, and the declaration Petitioner seeks  
25 would violate the separation of powers doctrine. The petition also seeks an improper advisory  
26 opinion by requesting that the Court find that *any* appropriation for a project not included in a  
27 properly-approved Scoping Plan is invalid, not only the Legislature's appropriations for high-  
28 speed rail. The allegations in the fifth cause of action are insufficient to sustain a claim for



1 declaratory relief. The Authority respectfully requests that the Court sustain its demurrer to the  
2 petition's fifth cause of action without leave to amend.

### 3 STATEMENT OF FACTS

#### 4 A. The California High Speed Rail Project

5 Because California's freeways and airports cannot adequately meet the state's  
6 transportation needs, the Legislature created the California High-Speed Rail Authority to develop  
7 a high-speed rail system.<sup>1</sup> (Pub. Util. Code, §§ 185010, subds. (a)-(d); 185020; 185030.) The  
8 Authority was established in 1996 to direct the development and implementation of intercity  
9 high-speed rail service in California. (*Id.* § 185000 et seq.) "High-speed rail" is "intercity  
10 passenger rail service [with] an alignment and technology that makes it capable of sustained  
11 speeds of 200 miles per hour or greater." (*Id.* §185012, subd. (c).)

#### 12 B. AB 32 and the Scoping Plan

13 In 2006, the Legislature approved and the Governor signed AB 32. That bill committed  
14 California to a strategy to reduce greenhouse gas emissions over a period of years. (Pet. at ¶ 15.)  
15 The aim of the reductions was to place California on a path that, if adopted by the rest of the  
16 world, would stabilize emissions worldwide and reduce the likelihood of catastrophic climate  
17 change impacts. (*Ibid.*)

18 AB 32 required that the Air Resources Board ("ARB") adopt a plan to "identify and make  
19 recommendations" on measures to "facilitate the achievement of the maximum feasible and cost-  
20 effective reductions of greenhouse gas emissions by 2020." (Health & Saf. Code, § 38561, subd.  
21 (b).) It also required that ARB "update its plan for achieving the maximum technologically  
22 feasible and cost-effective reductions of greenhouse gas emissions at least once every five years."  
23 (*Id.* at subd. (h).) As AB 32 required, ARB adopted a "Scoping Plan" in 2008. (Pet. at ¶ 16.)

24 In 2014, ARB prepared a first draft update to the Scoping Plan, and on March 14, 2014  
25 released a Draft Environmental Analysis under CEQA, along with the Updated Scoping Plan for

26 <sup>1</sup> The petition refers to the "high speed rail project," while various statutes discuss to  
27 California's "high speed rail system," and appropriate funds for projects within that system. (See  
28 Pet. at ¶ 2; Pub. Util. Code, § 185010, subd. (g); Health & Saf. Code, § 39719, subd. (b)(2).) For  
ease of reference, this pleading adopts the petition's terminology.

1 comment. (Pet. at ¶ 20.) After receiving public comment on the drafts, ARB released the  
2 proposed First Update to the Climate Change Scoping Plan and the supporting Final  
3 Environmental Analysis along with written responses to environmental comments on May 15,  
4 2014. (Pet. at ¶ 22.) On May 23, 2014, ARB filed a Notice of Determination for its approval of  
5 the Updated Scoping Plan.. (Pet. at ¶ 24.)

### 6 **C. The Greenhouse Gas Reduction Fund**

7 In 2012, the Legislature passed SB 1018, which created the GGRF. (See Gov. Code,  
8 § 16428.8 et seq.) The GGRF is funded with auction proceeds from ARB’s cap-and-trade  
9 program. (Gov. Code, § 16428.8, subd. (b).) ARB adopted cap-and-trade as a market-based  
10 regulation that is designed to reduce greenhouse gases from multiple sources. (Cal. Code Regs.,  
11 tit. 17, § 95801 et. seq.) All moneys deposited in the GGRF are appropriated by the legislature  
12 and separately identified in the annual Budget Act. (Gov. Code, § 16428.8, subd. (c).)

### 13 **D. The Legislature’s Appropriations of Funds to the High-Speed Rail Project**

14 In the 2013-2014 Budget, which the Governor signed into law on June 20, 2014, the  
15 Legislature appropriated \$250 million in GGRF monies to the Authority for the high-speed rail  
16 project. (Sen. Bill No. 852 (2013-2014 Reg. Sess.) § 2, pp. 164-166.)<sup>2</sup>

17 Also in 2014, the Legislature enacted SB 862, appropriating \$400 million for high-speed  
18 rail from the GGRF and establishing that, beginning in fiscal year 2015-16, there would be a  
19 continuing appropriation of 25% of the GGRF’s annual proceeds to the high-speed rail project.  
20 (Sen. Bill No. 862 (2013-2014 Reg. Sess. ) (“SB 862”) §§ 7, 8, pp. 13-14; see also Health & Saf.  
21 Code, §§ 39719, subd. (b)(2); 39719.1.)

22 In enacting SB 862, the Legislature found that high-speed rail was a “programmatic  
23 investment area” in the Cap and Trade Expenditure Plan that would further the regulatory  
24 purposes of AB 32 by facilitating the achievement of greenhouse gas reduction in the state.  
25 (SB 862 at p. 8.) The Legislature specifically determined that “once the high-speed train system  
26 is completed and operational, [it] will contribute significantly toward the goal of reducing

27 <sup>2</sup> SB 852 and SB 862 are attached as Exhibits A and B to the Authority’s Request for  
28 Judicial Notice, filed concurrently with this demurrer.

1 emissions of greenhouse gases and other air pollutants and will help reduce California's  
2 dependency on foreign energy sources.” (SB 862 at pp. 8-9.) The Legislature established that the  
3 “Cap-and-Trade Expenditure Plan investments to be funded,” including high-speed rail, “are  
4 consistent” with AB 32 and subdivision (b) of Health and Safety Code section 39712 “in  
5 facilitating the achievement of reduction of the emissions of greenhouse gases.” (*Id.* at p. 10.)

### 6 E. Petitioner's Allegations

7 Petitioner filed this action on June 22, 2014. Petitioner's first four causes of action – none  
8 of which petitioner directs against the Authority – attack the Updated Scoping Plan's compliance  
9 with CEQA and AB 32. Petitioner directs only its fifth cause of action against the Authority.  
10 Citing Health and Safety Code section 39712 (“section 39712”), the fifth cause of action alleges  
11 that “only projects properly included in the [Updated Scoping Plan] may be funded through a  
12 legislative appropriation from the GGRF.” (Pet. at ¶ 65.) Petitioner therefore seeks a judicial  
13 declaration as to the legality of the Legislature's appropriation from the GGRF for a measure,  
14 program, or project not included in a properly-approved Climate Change Scoping Plan –  
15 specifically the high-speed rail project – and a declaration that “any such appropriation would be  
16 improper, illegal and invalid ab initio.” (Pet. at ¶ 67.) As discussed below, this cause of action is  
17 facially invalid as a matter of law.

### 18 STANDARD OF REVIEW

19 A demurrer tests the legal sufficiency of a pleading and determines whether it states facts  
20 sufficient to constitute a legally-recognized cause of action. (*Blank v. Kirwan* (1985) 39 Cal.3d  
21 311, 318.) For purposes of demurrer, all material facts of the pleading and material shown in  
22 exhibits attached to a pleading are treated as though they were admitted. (*Ibid.*; *Frantz v.*  
23 *Blackwell* (1987) 189 Cal.App.3d 91, 94.) Pleadings are to be given a reasonable interpretation  
24 and read as a whole. (*Blank*, 39 Cal.3d at p. 318.) A court should not assume the truth of  
25 contentions, deductions or conclusions of fact or law, and may disregard allegations that are  
26 contrary to law, or are contrary to a fact subject to judicial notice. (*Zelig v. County of Los*  
27 *Angeles* (2002) 27 Cal.4th 1112, 1126.)

1 A trial court may properly sustain a demurrer without leave to amend if there is no  
2 reasonable possibility that the plaintiff can cure the defect in the pleading. (*Blank v. Kirwan*,  
3 *supra*, 39 Cal.3d at p. 318.) “The burden of proving such reasonable possibility is squarely on the  
4 plaintiff.” (*Id.* at p. 319; *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 520, fn. 16.)

## 5 ARGUMENT

### 6 I. CALIFORNIA LAW PRECLUDES THE TYPE OF JUDICIAL INTERFERENCE WITH 7 LEGISLATIVE DECISION-MAKING THAT THE FIFTH CAUSE OF ACTION SEEKS

8 On its face, petitioner’s claim fails as a matter of law. It asks this Court to adjudicate the  
9 wisdom of, and invalidate, a policy determination the Legislature has already made and codified  
10 by statute. California law bars such relief for several reasons.

11 First, legislative appropriations are generally isolated from judicial review, which “risks  
12 violating the separation of powers doctrine.” (*California High Speed Rail Authority v. Superior*  
13 *Court (Tos)* (2014) 228 Cal.App.4th 676, 714 [hereafter *CHSRA v. Superior Court*].) “[A]ll  
14 intendments favor the Legislature’s plenary authority: ‘If there is any doubt as to the Legislature’s  
15 power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.’”  
16 (*Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 598.) This rule is particularly  
17 applicable to the Legislature’s power to make appropriations because a court may not nullify a  
18 specific and valid exercise of such fundamental budgetary powers. (See *Butt v. State* (1992) 4  
19 Cal.4th 668, 702-703.) “[I]n the absence of a clear directive from the people to constrain the  
20 discretion of the Legislature, we will not circumscribe legislative action or intrude on the  
21 Legislature’s inherent right to appropriate the funding for high-speed rail.” (*CHSRA v. Superior*  
22 *Court, supra*, at p. 715.) Here, the petition pleads no such “clear directive” from the people. The  
23 facts alleged in the complaint give the Court no basis to allow the fifth cause of action to proceed  
24 in light of the strong presumption against it.

25 To the contrary, judicial review of the legislature’s decision would intrude on the  
26 Legislature’s power. “Courts are limited to the judicial function—the resolution of cases and  
27 controversies—and may not usurp the functions of the legislative and executive branches.”  
28 (*Nadler v. Schwarzenegger* (2006) 137 Cal.App.4th 1327, 1335 [citing *Schabarum v. California*

1 *Legislature* (1998) 60 Cal.App.4th 1205, 1213].) Usurpation would include unwarranted  
2 intrusion into the roles of the executive and/or legislative branches. (*Ibid.*) It is well-established  
3 that the judiciary interprets the law, and has the authority to declare when an act of the  
4 Legislature is beyond the constitutional authority vested in it, but courts should refrain from  
5 deciding non-justiciable political questions. (*Schabarum v. California Legislature, supra*, at p.  
6 1213; see also *Baker v. Carr* (1962) 369 U.S. 186, 217 [political question doctrine precludes  
7 adjudication of cases where there is “the impossibility of deciding without an initial policy  
8 determination of a kind clearly for nonjudicial discretion. . . .”].)

9         Second, no statute constrains the Legislature’s discretion to appropriate money from the  
10 GGRF for California’s high-speed rail project based on whether the rail project is included in  
11 ARB’s Scoping Plan. Section 39712, subdivision (a)(1) contains only two conditions on  
12 Legislative appropriations, and consistency of funded projects with the Scoping Plan is not one of  
13 them. In particular, section 39712, subdivision (a)(1) states that it “is the intent of Legislature  
14 that moneys shall be appropriated from the [GGRF] only in a manner consistent with the  
15 requirements of this chapter [i.e., Chapter 4.1 of the Health and Safety Code] and Article 9.7  
16 (commencing with Section 16428.8) of Chapter 2 of Part 2 of Division 4 of Title 2 of the  
17 Government Code.”

18         Nothing in these two identified chapters of the Health and Safety Code or Government  
19 Code ties the appropriation of money for high-speed rail to the Scoping Plan. Chapter 4.1, the  
20 “Greenhouse Gas Reduction Fund Investment Plan and Communities Revitalization Act,”  
21 specifically codifies permanent and ongoing GGRF funding for high-speed rail. (See Health &  
22 Saf. Code, §§ 39719, subd. (b)(2) [25 percent of annual GGRF proceeds appropriated to high-  
23 speed rail]; 39719.1, subs. (a) & (b) [\$400 million available for high-speed rail].) Beyond that,  
24 the Chapter merely provides that “moneys in the fund shall be appropriated through the annual  
25 Budget Act consistent with investment plan” submitted to Legislature by Department of Finance.  
26 (Health & Saf. Code, § 39718.) The Legislature’s appropriation was consistent with these  
27 provisions. Chapter 4.1 contains no provision limiting the Legislature to appropriating money  
28

1 from the GGRF to high-speed rail only if that project is part of the Scoping Plan. Petitioner  
2 unilaterally reads such a provision into the statute.

3 Similarly, the Legislature's action was consistent with Article 9.7 of Chapter 2 of Part 2 of  
4 Division 4 of Title 2 of the Government Code. This Article merely requires that "moneys in the  
5 [GGRF] shall be appropriated and shall be separately identified in the annual Budget Act." (See  
6 Gov. Code, § 16428.8, subd. (c).) It requires the Department of Finance to submit a spending  
7 plan for GGRF expenditures to the Legislature. (Gov. Code, § 16428.85, subd. (a).) It describes  
8 the administrative process for expenditure of appropriated funds. (Gov. Code, § 16428.9.) And it  
9 establishes the cost of the implementation account for GGRF. (Gov. Code, § 16428.95.) As  
10 above, none of the relevant provisions of this Article tie high-speed rail funding to ARB's  
11 Scoping Plan or limit the Legislature's discretion. Each in fact supports the Legislature's action.  
12 Petitioner cannot read into the Government Code contrary provisions that do not exist.

13 Accordingly, there is "no basis for allowing the judiciary to interfere with the collective  
14 judgment of the Legislature in approving" the appropriation of moneys from the GGRF to the  
15 Authority. (*CHRSA v. Superior Court, supra*, 228 Cal.App.4th at p. 715 [finding that the Bond  
16 Act did not curtail the Legislature's plenary authority to appropriate, and noting "we are obliged  
17 to respect the separate constitutional role of the Legislature"]; see also *Schabarum, supra*, 60  
18 Cal.App.4th at p. 1219 ["[r]espect for the Legislature's constitutional role demands that the courts  
19 refuse to judge the wisdom of legislation or the motives of the legislators".])

20 Third, the Legislature specifically found that high-speed rail furthers the regulatory  
21 purposes of AB 32, and *is consistent* with section 39712, subdivision (b). (See SB 862 at p. 8  
22 [high-speed rail is a "programmatically investment area" that would further the regulatory purposes  
23 of AB 32 by facilitating the achievement of greenhouse gas reductions in the state]; p. 9 ["once  
24 the high-speed train system is completed and becomes operational, [it] will contribute  
25 significantly toward the goal of reducing emissions of greenhouse gases and other air pollutants  
26 and will help reduce California's dependency on foreign energy sources."].) The Legislature  
27 further determined that the "Cap-and-Trade Expenditure Plan investments to be funded"  
28 including high-speed rail, "*are consistent*" with AB 32 and subdivision (b) of Health and Safety

1 Code section 39712 “in facilitating the achievement of reduction of the emissions of greenhouse  
2 gases.” (SB 862 at p. 10 [emphasis added].)

3 The Legislature’s factual determination that high-speed rail furthers the State’s climate  
4 change policies and is therefore an appropriate recipient for GGRF funds is conclusive: “[i]t is  
5 not the judiciary’s function . . . to reweigh the ‘legislative facts’ underlying a legislative  
6 enactment.’ [Citation.] The factual determinations necessary to the performance of the legislative  
7 function are of a peculiarly legislative character . . . ‘[T]he power to determine the facts upon  
8 which appropriations are based rests *exclusively* in the legislative and executive branches of the  
9 government . . .” (*Schabarum, supra*, 60 Cal.App.4th at p. 1219 (emphasis added) [agreeing with  
10 trial court that question of whether funds budgeted for Legislative Counsel Bureau must be  
11 included in the Legislature’s budget presented a non-justiciable political issue]; see also *Howard*  
12 *Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 521 [“It is no small matter for one  
13 branch of the government to annul the formal exercise by another and coordinate branch of power  
14 committed to the latter”].) The Court should not make a policy determination contrary to the  
15 Legislature’s findings. If petitioner disagrees with the Legislature’s appropriation, it should  
16 address its complaint to the legislative and executive branches, not the courts.

17 The type of relief petitioner seeks has already been addressed and foreclosed in *CHSRA v.*  
18 *Superior Court*. In that case, plaintiffs attempted to void the Legislature’s appropriation of bond  
19 funds for high-speed rail. (*CHSRA v. Superior Court, supra*, 228 Cal.App.4th at p. 714.)<sup>3</sup>  
20 Plaintiffs reasoned that, because the Legislature relied on a preliminary funding plan for high-  
21 speed rail that was legally defective, the court should issue a writ of mandate to invalidate the  
22 legislative appropriation. (*Id.* at p. 714-716.) The trial court disagreed, finding that the decision  
23 “whether to make an appropriation based on the funding plan” was entrusted “to the Legislature’s  
24 collective judgment.” (*Id.* at p. 714.) The court of appeal concurred: “the Bond Act provides no  
25 basis for allowing the judiciary to interfere with the collective judgment of the Legislature in  
26

27 <sup>3</sup> Plaintiff John Tos was represented by the same counsel as represents petitioner in this  
28 case. (*CHSRA, supra*, at p. 690.)

1 approving the issuance of bonds even if the funding plan it considered did not meet the letter of  
2 the law.” (*Id.* at p. 715.)

3 Here, as in *CHSRA*, petitioner seeks a judicial ruling undoing a Legislative appropriation  
4 of money for high-speed rail. And, as in *CHSRA*, the basis for relief is the alleged legal  
5 inadequacy of an informational document an administrative agency prepared. Section 39712 does  
6 not constrain the Legislature’s discretion to appropriate GGRF funds for high-speed rail, just as  
7 the Bond Act did not constraint the Legislature’s discretion to appropriate bond funds for high-  
8 speed rail. Therefore, the Court “must defer to the legislative prerogative to control  
9 appropriations.” (*CHSRA v. Superior Court, supra*, 228 Cal.App.4th at p. 715.)

10 Moreover, even if the Court had the power to revisit the policy wisdom of the  
11 Legislature’s appropriations – and it does not – the Legislature’s appropriation from the GGRF to  
12 high-speed rail is consistent not just with section 39712 but also with the GGRF’s statutory  
13 scheme. In the Greenhouse Gas Reduction Fund Investment Plan and Communities  
14 Revitalization Act, the Legislature continuously appropriated annual proceeds from the GGRF to  
15 various measures, including intercity rail, affordable housing, and high-speed rail. (See Health &  
16 Saf. Code, § 39719.) The decision to appropriate funds for high-speed rail on an ongoing,  
17 permanent basis demonstrates the Legislature intended that high-speed rail be a central  
18 component of California’s climate policy. (See *Berkeley Hillside Preservation v. City of Berkeley*  
19 (2015) 60 Cal.4th 1086, 1099-1100 [courts “do not construe statutes in isolation, but rather read  
20 every statute ‘with reference to the entire scheme of law of which it is part so that the whole may  
21 be harmonized and retain effectiveness’”].) The validity of ARB’s Scoping Plan under CEQA or  
22 AB 32 cannot override that policy determination as a matter of law, and a contrary judicial  
23 declaration would violate the separation of powers doctrine. (See *Schabarum v. California*  
24 *Legislature, supra*, 60 Cal.App.4th at p. 1218 [“legislative restraint imposed through judicial  
25 interpretation of less than unequivocal language would inevitably lead to inappropriate judicial  
26 interference with the prerogatives of a coordinate branch of government”].) This Court should  
27 decline to nullify the Legislature’s findings and decide a political question that the Legislature has  
28 already answered.



1 **II. THE PETITION IMPROPERLY SEEKS AN ADVISORY OPINION**

2 The petition seeks a declaration that “it would be improper, illegal, and a violation of law  
3 for the Legislature to appropriate funds from the GGRF for a measure, program or project that  
4 was not included within a properly approved [Climate Change Scoping Plan].” (Pet at p. 14, ln.  
5 20-22.) Such a declaration would constitute an advisory opinion.

6 Declaratory relief is not available unless there is a real dispute between parties involving  
7 justiciable questions relating to their rights and obligations. (*Taxpayers for Improving Public*  
8 *Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 768; *In re Claudia E.* (2008) 163  
9 Cal.App.4th 627, 638.) If a judgment would affect no person favorably or detrimentally and  
10 would simply offer gratuitous advice on future potentialities, the judgment would constitute an  
11 advisory opinion. (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 798.) To avoid  
12 issuing declaratory relief that constitutes an advisory opinion, courts assess whether the issue is  
13 ripe. The test for ripeness has two prongs: 1) whether the dispute is sufficiently concrete that  
14 declaratory relief is appropriate; and 2) whether withholding judicial consideration will result in  
15 the parties suffering hardship. (*Stonehouse Homes v. City of Sierra Madre* (2008) 167  
16 Cal.App.4th 531, 540.)

17 Here, petitioner seeks a declaration that it would be improper, illegal, and a violation of  
18 law for the Legislature to appropriate GGRF funds for *any* measure, program or project not  
19 included within a properly-approved Scoping Plan. (Pet. at p. 14.) That claim fails to state an  
20 actual controversy because it is not sufficiently definite and concrete and does not relate to a  
21 specific set of facts before the Court. Rather, petitioner seeks an open-ended declaration binding  
22 the Legislature’s appropriation power as to any future hypothetical program, not merely the high-  
23 speed rail project. (See *Wilson & Wilson v. City Council of Redwood City* (2011) 191  
24 Cal.App.4th 1559, 1582-1583 [issue not ripe for adjudication where “court is asked to speculate  
25 on the resolution of hypothetical situations”].)

26 In addition, withholding judicial consideration of whether any program can be funded  
27 from the GGRF absent its inclusion in a Scoping Plan will not result in petitioner suffering  
28 hardship. Petitioner alleges it is a nonprofit corporation that has a beneficial interest in ARB’s

1 compliance with the requirements of AB 32 and CEQA. (Pet. at ¶ 5.) This allegation is not  
2 sufficient to show that petitioner will suffer hardship if the Court withholds consideration of  
3 whether the Legislature can fund any hypothetical program from the GGRF. Accordingly, the  
4 fifth cause of action seeks an advisory opinion, and the Authority's demurrer should be sustained.

5  
6 **III. ARB'S DEMURRER**

7 The Authority agrees with ARB's characterization of the governing law, as set forth in its  
8 demurrer. Accordingly, the Authority agrees that the fourth and fifth causes of action should be  
9 dismissed.

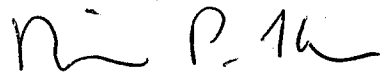
10  
11  
12 **CONCLUSION**

13 Because the petition's fifth cause of action fails to state a claim for declaratory relief as a  
14 matter of law, the Authority respectfully requests that the demurrer be sustained without leave to  
15 amend.

16 Dated: March 9, 2016

17 Respectfully Submitted,

18 KAMALA D. HARRIS  
19 Attorney General of California  
20 CHRISTINA BULL ARNDT  
21 Supervising Deputy Attorney General

22 

23 BAINÉ P. KERR  
24 Deputy Attorney General  
25 ANDREW M. VOGEL  
26 Deputy Attorney General  
27 *Attorneys for Real Party in Interest*  
28 *California High Speed Rail Authority*

1 **DECLARATION OF BAINE P. KERR**

2 I, Baine P. Kerr, hereby declare:

3 1) I am a Deputy Attorney General of the State of California, and am licensed to  
4 practice law in this state.

5 2) I represent Real Party in Interest the California High Speed Rail Authority in this  
6 matter.

7 3) On March 1, 2016, at 2:00 p.m., I telephonically met and conferred with counsel  
8 for petitioner TransDef regarding Real Party in Interest's planned demurrer to the Petition for  
9 Writ of Mandate and Verified Complaint. Also on the call were Deputy Attorney General  
10 Andrew Vogel, also representing Real Party in Interest, and Deputy Attorney General Mark  
11 Poole, representing Respondent the California Air Resources Board.

12 4) I stated the basis for Real Party in Interest's planned demurrer to the Fifth Cause of  
13 Action, namely that the cause of action improperly seeks judicial invalidation of a legislative  
14 appropriation, and therefore violates the separation of powers doctrine.

15 5) Counsel for petitioner stated that he had legal authority supporting his position.

16 6) The parties did not reach an agreement resolving Real Party in Interest's  
17 objections to the Fifth Cause of Action.

18 7) On March 4, 2016, at 1:00 p.m., I left a voicemail for counsel for petitioner stating  
19 that Real Party in Interest was also planning to demurrer to the fifth cause of action on the basis  
20 that it seeks an advisory opinion, in addition to the grounds that it violates the separation of  
21 powers. I also sent an email to petitioner stating this additional ground for the demurrer, and  
22 stating my availability to meet and confer further. No response from petitioner's counsel was  
23 received.

24 I declare under penalty of perjury under the laws of the State of California that the  
25 foregoing is true and correct and that this declaration was executed on March 9, 2016 at  
26 Los Angeles, California.

27 Signed:   
28 Baine P. Kerr