IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, et al., Petitioners, **v.** **THE SUPERIOR COURT OF SACRAMENTO COUNTY,** Respondent, **JOHN TOS, et al.,** Real Parties in Interest.	Case No. C075668

Sacramento County Superior Court
Case Nos. 34-2011-00113919CUMCGDS, 34-2013-00140689CUMCGDS
The Honorable Michael P. Kenny, Judge

PETITIONERS' ANSWER TO JOINT PETITION FOR REHEARING BY REAL PARTIES HOWARD JARVIS TAXPAYERS ASSOCIATION AND FIRST FREE WILL BAPTIST CHURCH

KAMALA D. HARRIS
Attorney General of California
KATHLEEN A. KENEALY
Chief Assistant Attorney General
DOUGLAS J. WOODS
Senior Assistant Attorney General
CONSTANCE L. LELOUIS
Supervising Deputy Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General
STEPHANIE F. ZOOK
Deputy Attorney General
State Bar No. 238383

PAUL STEIN
Deputy Attorney General
State Bar No. 184956
SHARON L. O'GRADY
Deputy Attorney General
State Bar No. 102356
455 Golden Gate Ave, Ste. 11000
San Francisco, CA 94102
Telephone: (415) 703-5899
Fax: (415) 703-1234
E-mail: Sharon.OGrady@doj.ca.gov
Attorneys for Petitioners

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INTRODUCTION

Petitioners respectfully submit this answer to the joint petition for rehearing filed by Real Parties in Interest Howard Jarvis Taxpayers Association and First Free Will Baptist Church, pursuant to the Court's order dated August 21, 2014.

Real Parties ask for rehearing of the validation portion of the Court's Opinion on the grounds that the Court made a mistake of fact and left one of their arguments unaddressed. There is no merit to either argument.

Real Parties first argue that because Senate Bill No. 1029 (Stats. 2012, ch. 152, [SB 1029]) "lays down some clear markers for how to spend" appropriated bond proceeds, the Court should not have rejected as premature their challenge to validation based on uses of bond proceeds. There was, however, no mistake of fact, because SB 1029 did not require the Authority to spend the funds appropriated. The Authority may choose not to use the bond proceeds appropriated in SB 1029, and the Legislature may later re-appropriate them for other uses. Until the Authority encumbers funds, its plans to spend bond proceeds remain in flux. Moreover, rehearing is unnecessary because the validation judgment ordered by the Court will not prevent anyone from challenging uses of bond proceeds once the Authority commits those funds to particular projects. All of this, however, is for the future.

Second, Real Parties contend that the Court failed to address an argument that the Finance Committee did not justify the specific dollar amount of bonds to be issued and sold with a finding supported by substantial evidence. A court's decision not to address an argument, however, is not grounds for rehearing, and even if it were, the argument is waived. Moreover, on the merits, this argument is resolved by the Court's ruling that no law required the Finance Committee to rely on evidence or make findings other than the evidence and findings that are reflected in the

record. Because there was no error and no basis for rehearing, the Court should deny the petition.

ARGUMENT

I. THE COURT DID NOT MAKE A MISTAKE OF FACT IN DECIDING THAT A CHALLENGE TO THE USE OF BOND PROCEEDS IS PREMATURE AND NOT GROUNDS FOR WITHHOLDING VALIDATION OF THE BONDS.

Rehearing may be based on a misstatement of a material fact in the Court's decision. (See *Frisk v. Superior* Court (2011) 200 Cal.App.4th 402, 417; Cal. Rules of Court, rule 8.500(c)(2).) Real Parties' grievance, however, is not with a factual finding. They want to revisit the Court's legal conclusion that a challenge to validation based on use of bond proceeds is premature. (Slip op., pp. 29-31.) The Court specifically rejected Real Parties' contention that "Senate Bill No. 1029 and the revised business plan set forth the uses of bond proceeds," and reasoned that "Senate Bill No. 1029 expressly requires the Authority to prepare many more reports, approvals and certifications, and the revised business plan is subject to biennial revisions and updates," and "the final funding plan has not been submitted," and therefore it is "too soon to determine how the Authority will specifically use the bond proceeds." (Slip op., pp. 29-30, fn. 7.)

Fundamentally, the validation judgment that this Court crafted will not validate any *use* of bond proceeds. The Finance Committee authorized *issuance* of the bonds to carry out the purposes of the Bond Act, without reference to any particular use of bond proceeds. (Appendix of Exhibits, Tabs 108, HSR01956, HSR01958, HSR01961, HSR01967; 109, HSR02048.) Validation of the issuance of bonds cannot be denied based on speculation that the Authority will at some future date attempt to use bond proceeds for an unauthorized purpose.

That the Legislature in appropriating bond proceeds placed limitations on the Authority's uses of those funds does not make the uses of bond proceeds any more definite. Real Parties confuse the Legislature's appropriation of funds for particular purposes with a commitment of funds to particular purposes, but the two are not the same. For example, it is not the case that the "appropriation commits the project to the so-called blended design." (Petition for Rehearing, p. 2.) With respect to construction on the San Francisco to San Jose corridor, SB 1029 does not specify the uses to which bond proceeds *must* be put, so much as it specifies purposes for which they may *not* be used. The restrictions on which Real Parties rely prevent the Authority from using bond proceeds on "a dedicated four-track system." (SB 1029, § 3.) A case cannot be made for improper use of proceeds based on what the Legislature has forbidden. This is particularly true because no law, including SB 1029, requires the Authority to use bond proceeds to build any part of the high-speed rail system on the San Francisco to San Jose corridor. Those funds may come from a variety of sources. (Sts. & Hy. Code, § 2704.07.)

The appropriation in SB 1029 *authorizes*, but does not require, the Authority to use bond proceeds for particular purposes, including on the San Francisco to San Jose corridor. The Authority may choose to fund projects on that corridor from other sources to which the restrictions in SB 1029 would not apply. The same is true for the "local assistance projects" and bookend acquisitions referenced in the bill. If the Authority does not use the appropriation in SB 1029 for those purposes, the Legislature may later re-appropriate the same funds for different purposes. For these reasons, SB 1029 does not commit bond proceeds to any particular use and therefore cannot provide grounds for a validation challenge.

Contrary to Real Parties' assertion, this Court did not make a mistake of fact. Before it can be said that bond proceeds are *committed* to any

particular uses there must be both an appropriation of bond proceeds, and an act of the Authority encumbering appropriated bond proceeds for a particular use. The Authority has exclusive power to plan and build high-speed rail. (Pub. Util. Code, § 185032, subd. (a)(2).) The plan for spending bond proceeds remains fluid and in flux, as this Court noted, because the Authority has hurdles to meet before it will have legal authority to encumber bond proceeds. (Slip Op., pp. 29-30 & fn 7.) It remains "too soon to determine how the Authority will specifically use the bond proceeds." (*Id.*, p. 30, fn. 7.) When the Authority encumbers bond proceeds, project opponents will have opportunities to challenge the Authority's use of those funds. But that is not *this* case, it is a future case. As this Court concluded, "[t]he validity of the authorization . . . is the only issue framed by the pleadings and decided by the trial court." (*Id.*, p. 30.)

II. THE ARGUMENT THAT THE FINANCE COMMITTEE WAS REQUIRED TO JUSTIFY THE DOLLAR AMOUNT OF THE BONDS AUTHORIZED TO BE ISSUED IS BOTH WAIVED AND WITHOUT MERIT.

Real Parties argue that rehearing should be granted because the Court did not address an argument that the Finance Committee had to justify the dollar amount of the bonds authorized with findings supported by substantial evidence. (Petition for Rehearing, pp. 3-6.) As a threshold matter, an appellate court's failure to address every argument briefed is not grounds for rehearing. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1263.) Beyond that, Real Parties' argument fails because: (1) they did not raise it in their briefs, and therefore waived it; and (2) even if they had made the argument, it would have been resolved by the Court's determination that the Finance Committee did not abuse its discretion in authorizing issuance of the remaining $8.6 billion in high-speed rail bonds.

A. The Belated Argument That the Finance Committee Was Required to Justify the Dollar Amount of Bonds Authorized Fails on the Merits.

Real Parties belatedly argue that the Finance Committee's decision to authorize issuance of the remaining $8.6 billion in bonds was an abuse of discretion because the dollar amount chosen was not supported by substantial evidence, the required findings were not made with respect to sale of the bonds, and the Bond Act restricts the authority of the Committee to sell all the bonds. (Petition for Rehearing, pp. 6-8.) Real Parties' arguments fail, however, because as this Court explained in its Opinion, the Finance Committee has broad statutory discretion to authorize issuance of bonds:

> Real parties in interest would have us impose more of an evidentiary burden on the Finance Committee than is required by the governing statute, and thus would have us cramp the broad discretion the Finance Committee is afforded by the applicable statutes and intrude into the quasi-legislative role it was assigned by the voters. We reject the invitation to embark upon such an unwarranted and unwise intrusion into the administrative process.

(Slip op., p. 24.) This principle applies equally to Real Parties' new arguments.

Real Parties argue for the first time that rehearing is necessary because Streets and Highway Code section 2704.13 "require[s] more than just a finding of necessity or desirability," and that the statute separately and independently requires that the Finance Committee "determine the amount of the bonds to be issued and sold" based on substantial evidence. (Petition for Rehearing, p. 6.) But these contentions cannot be squared with the statutory text. Section 2704.13 provides, in relevant part:

> The committee shall determine whether or not it is necessary or desirable to issue bonds authorized pursuant to this chapter in order to carry out the actions specified in Sections 2704.06 and

> 2704.095 and, if so, the amount of bonds to be issued and sold. Successive issues of bonds may be issued and sold to carry out those actions progressively, and it is not necessary that all of the bonds authorized be issued and sold at any one time. . . . In addition to all other powers specifically granted in this chapter and the State General Obligation Bond Law, the committee may . . . [delegate] necessary duties to the chairperson and to the Treasurer as agent for the sale of the bonds.

Real Parties suggest, without legal authority, that the words "if so" indicate the need for a second determination as to amount, for which there must be findings supported by substantial evidence. (Petition for Rehearing, p. 6.) In fact, the "necessary or desirable" determination remains the only determination the Bond Act requires the Finance Committee to make, that finding encompasses the amount of the bonds to be issued and sold, and the Finance Committee in fact found that issuance of approximately $8.6 billion—all of the remaining bonds—was necessary and desirable:

> WHEREAS . . . the Committee has determined that it is necessary and desirable to authorize the issuance hereunder of $8,599,715,000 in principal amount (the "Authorized Amount") of general obligation bonds. . . . "

(Appendix of Exhibits, Tab 108, HSR01956.) Thus, all the requirements of the Bond Act were met.

In addition, the General Obligation Bond Law (Bond Law), which is incorporated in the Bond Act (Sts. & Hy. Code, § 2704.11, subd. (a)), undermines Real Parties' attempt to sever the "necessary or desirable" standard from the Finance Committee's decisions about the dollar amount of bonds to be issued and sold and replace it with a substantial evidence standard. The Bond Law makes clear that the Finance Committee's single determination that it is "necessary or desirable" to authorize issuance of bonds governs: (1) the authority to *issue* bonds, as well as the *amount* of the bonds authorized to be issued, and (2) the authority of the Committee or its designee to *sell some or all* of the bonds. (Gov. Code, §§ 16730, 16731.)

With respect to *issuance* of bonds, the Bond Law provides that "supported as required in the bond act, the committee shall determine the necessity or desirability . . . *of issuing any bonds authorized to be issued and the amount* . . . of bonds then to be . . . issued and sold." (*Id.*, § 16730.) Thus, the "if so" language of the Bond Act adds nothing of substance to the requirement that the Finance Committee determine the amount of bonds authorized to be issued, which is governed by the "necessary or desirable" standard. With respect to *sale* of bonds, the Bond Law provides that "[w]henever the committee determines that the sale of *all or any part of the bonds is necessary or desirable*, it shall adopt a resolution to that effect." (*Id.*, § 16731.) These provisions show that Real Parties' new arguments lack merit, and should end the Court's inquiry.

Real Parties' argument that the Finance Committee's determination of the amount of bonds to be *sold* "is not imbued with the same broad discretion or entitled to the same judicial deference that would apply if the Committee was required merely to decide whether the issuance was necessary or desirable" (Petition for Rehearing, p. 7), fails, as explained above, because the Bond Act and the Bond Law require nothing more than a finding that such sale is necessary or desirable. (Sts. & Hy. Code, § 2703.13; Gov. Code, § 16731.) Moreover, Real Parties appear to confuse *authorizing* issuance and sale of bonds with *issuing and selling* them. Nothing in the Committee's actions requires that any or all of the bonds authorized be sold. As Petitioners have argued, bonds authorized need not be issued or sold. (Petition for Extraordinary Writ of Mandate, etc., pp. 23, 34, fn. 4.) The reason to authorize all the outstanding bonds is so that they can be validated, after which they can be issued and sold by the Treasurer on an as-needed basis. (*Id.*, pp. 33-34 & fn. 4.) The Committee delegated to the Treasurer authority "to determine the structure of the bonds to be issued," and to determine how much and when to sell them. (Appendix of

Exhibits, Tab 108, HSR01968.) This delegation is expressly contemplated by section 2704.13, and anticipates that there may be successive issuances and sales of bonds. Like private borrowers, the State avoids incurring debt and paying interest on debt before cash is actually needed to fund particular projects, and it prefers to issue debt when interest rates are favorable. That is why the Finance Committee delegated to the Treasurer the authority to issue and sell the bonds. Real Parties' suggestion that the State will sell all the bonds, regardless of appropriation (Petition for Rehearing, pp. 8-9), is misinformed. The Finance Committee limited the sale of bonds, providing that "the principal amount of Obligations . . . issued and sold *shall not exceed the appropriation authorized by the Legislature* as required by the Act." (Appendix of Exhibits, Tab 108, HSR01961.) And, until a validation judgment is entered, the Treasurer cannot know the conditions necessary to determine the appropriate amount or timing of bond sales.

Finally, Real Parties now contend that the language in section 2704.13 providing that "it is not necessary that all of the bonds authorized be issued and sold at one time," implies a "presumption" against issuing and selling all of the bonds at once that must be overcome by substantial evidence. (Petition for Rehearing, pp. 7-8.) This Court should decline to imply a presumption where none exists. The fact that section 2704.13 does not *require* that all bonds be issued and sold at once does not create a presumption that they should not all be issued and sold at once. When the Legislature wants to create a presumption, it does so explicitly, and typically uses the word "presumed." (See, e.g., Veh. Code, § 10855 [person who fails to return rental car within five days after expiration of rental agreement "shall be presumed to have embezzled the vehicle"]; Fam. Code, § 7611 [a person "is presumed to be the natural parent of a child if . . ."]; Evid. Code, § 664 ["It is presumed that an official duty has been regularly performed"].) Real Parties cite no authority for implying any

presumption, and there is none. Moreover, as this Court found, the Bond Act requires nothing more that the Finance Committee's determination that issuance and sale of bonds is "necessary or desirable." (Slip op., pp. 23-24.)

B. The Argument That the Finance Committee Was Required to Make Separate Findings Supporting the Amount of the Bonds Authorized Is Waived Because It Was Not Raised in Real Parties' Briefs.

Real Parties mischaracterize the record when they claim that Howard Jarvis Taxpayer Association (HJTA) previously argued that the Finance Committee's discretion was limited by two separate requirements: "[1] whether or not it is necessary or desirable to" to issue bonds, and "[2] if so, the amount of bonds to be issued and sold." (Petition for Rehearing, p. 4.) Because no Real Party previously briefed this argument, it is waived. (*In re Edward's Estate* (1932) 126 Cal.App. 152, 157 ["[R]ehearings will not be granted for the purpose of considering points not included in the original briefs"].)

The quotation from the HJTA brief to which Real Parties refer (Petition for Rehearing, p. 4) is not an argument at all. It is simply quoted language from Streets and Highway Code section 2704.13, to which Real Parties have added in their Petition for Rehearing the numbers "[1]" and "[2]" in an attempt to divide what was originally a single argument into two. None of the briefs Real Parties filed on the merits argued a "second contention—that the statute in this case requires something more than just a finding of necessity or desirability." (Petition for Rehearing, p. 6-7.) HJTA's answer does not make, or even hint at, this argument. (See HJTA Answer, pp. 2-7.) Similarly, Real Parties' briefs did not suggest that section 2704.13 contains a "presumption" against a single issuance and sale of all bonds. (See Petition for Rehearing, pp. 7-8.)

Real Parties' argument, which this Court properly rejected, has been that the Finance Committee was required to support its "necessary or desirable" determination with substantial evidence. The new argument that the Finance Committee must make separate findings to support the dollar amount of bonds authorized is waived, and the Court should not consider it. (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 446 fn. 12 [rejecting contention made for the first time in a petition for rehearing]; *Dieckmeyer v. Redevelopment Agency of the City of Huntington Beach* (2005) 127 Cal.App.4th 248, 259 [holding that argument raised for the first time in appellant's reply brief is waived]; *In re Edward's Estate*, *supra*, 126 Cal.App. at p. 157 [holding that rehearing will not be granted for purpose of considering points not included in original briefs].)

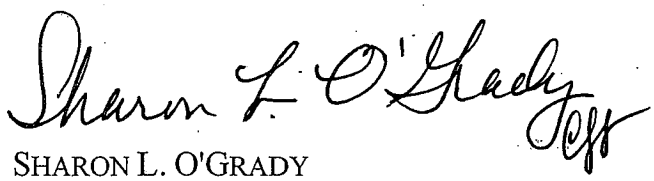
CONCLUSION

Real Party's petition for rehearing is without merit, and should be denied.

Dated: August 26, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California



SHARON L. O'GRADY
Deputy Attorney General
Attorneys for Petitioners

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITIONERS' ANSWER TO JOINT PETITION FOR REHEARING BY REAL PARTIES HOWARD JARVIS TAXPAYERS ASSOCIATION AND FIRST FREE WILL BAPTIST CHURCH** uses a 13 point Times New Roman font and contains 3,088 words.

Dated: August 26, 2014

KAMALA D. HARRIS
Attorney General of California

Sharon L. O'Grady

SHARON L. O'GRADY
Deputy Attorney General
Attorneys for Petitioners

DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **California High-Speed Rail Authority, et al. v. The Superior Court of Sacramento County, et al.**
No.: **C075668**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **Golden State Overnight courier service**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On August 26, 2014, I served the attached **PETITIONERS' ANSWER TO JOINT PETITION FOR REHEARING BY REAL PARTIES HOWARD JARVIS TAXPAYERS ASSN. AND FIRST FREE WILL BAPTIST CHURCH** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 26, 2014, at Sacramento, California.

Brenda Apodaca
Declarant

Brenda Apodaca
Signature

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SERVICE LIST

Case Name: **CALIFORNIA HIGH-SPEED RAIL AUTHORITY, ET AL. V. THE SUPERIOR COURT OF SACRAMENTO COUNTY, et al.**

No.: **C075668**

Stuart M. Flashman
Law Offices of Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533
(510) 652-5373
E-Mail Address:
stu@stuflash.com
Counsel for Real Parties in Interest
John Tos, Aaron Fukuda, and County of Kings

Michael J. Brady
Attorney at Law
1001 Marshall Street, Suite 500
Redwood City, CA 94063
(650) 364-8200
E-Mail Address:
mbrady@rmkb.com
Counsel for Real Parties in Interest
John Tos, Aaron Fukuda, and County of Kings

Mark L. Nations, Chief Deputy County Counsel
Theresa A. Goldner, County Counsel
Nicole M. Misner, Deputy County Counsel
Kern County Counsel
Kern County Administrative Center
1115 Truxtun Avenue, Fourth Floor
Bakersfield, CA 93301
(661) 868-3800
E-Mail Address:
nmisner@co.kern.ca.us
Counsel for Real Party in Interest
County of Kern

Jonathan M. Coupal
Timothy A. Bittle
Howard Jarvis Taxpayers Association
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
(916) 444-9950
E-Mail Address:
tim@hjta.org
Counsel for Real Party in Interest
Howard Jarvis Taxpayers Association

Michael R. Barr
Blaine I. Green
Pillsbury Winthrop Shaw Pittman, LLP
Four Embarcadero Center, 22nd Floor
San Francisco, CA 94126-2824
(415) 983-1000
E-Mail Address:
Blaine.green@pillsburylaw.com
Counsel for Real Party in Interest
Union Pacific Railroad Company

Andrew Daniel Bluth
Pillsbury Winthrop Shaw Pittman, LLP
2600 Capitol Avenue, Suite 300
Sacramento, CA 95816-5930
(916) 329-4700
E-Mail Address:
abluth@pillsburylaw.com
Counsel for Real Party in Interest
Union Pacific Railroad Company

Raymond L. Carlson
Griswold LaSalle Cobb Dowd & Gin, LLP
111 E. Seventh Street
Hanford, CA 93230
(559) 584-6656
E-Mail Address:
Carlson@griswoldlasalle.com
Counsel for Real Parties in Interest
Kings County Water District and Citizens for California High-Speed Rail Accountability

Bernard G. LeBeau, Jr.
Thomas Feher
Law Offices of LeBeau Thelen, LLP
5001 East Commercenter Drive, Suite 300
The Atrium
Bakersfield, CA 93309
(661) 325-8962
E-Mail Address:
blebeau@lebeauthelen.com
tfeher@lebeauthelen.com
Counsel for Real Party in Interest
Eugene Voiland

Meriem L. Hubbard
Harold E. Johnson
Ralph W. Kasarda
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
(916) 419-7111
E-Mail Address:
mlh@pacificlegal.org
hej@pacificlegal.org
rwk@pacificlegal.org
Counsel for Real Party in Interest
First Free Will Baptist Church

David J. Miller
Hanson Bridgett LLP
425 Market Street, 26th Floor
San Francisco, CA 94105
(415) 777-3200
E-Mail Address:
dmiller@hansonbridgett.com
Counsel for Amicus Curiae
Peninsula Corridor Joint Powers Board and San Mateo County Transit District

Adrienne D. Weil
Metropolitan Transportation Commission
101 8th Street
Oakland, CA 94607
(510) 817-5830
E-Mail Address:
aweil@mtc.ca.gov
Counsel for Amicus Curiae
Metropolitan Transportation Commission

Robert R. Fabela
Santa Clara Valley Transportation Authority
3331 N. First Street, Building C-2
San Jose, CA 95134
(408) 321-7552
E-Mail Address:
robert.fabela@vta.org
Counsel for Amicus Curiae
Santa Clara Valley Transportation Authority

Therese M. Stewart
City & County of San Francisco
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
(415) 554-4700
E-Mail Address:
therese.stewart@sfgov.org
Counsel for Amicus Curiae
City and County of San Francisco

Joanna G. Africa
Southern California Association of Governments
818 West 7th Street, 12th Floor
Los Angeles, CA 90017-3435
(213) 236-1928
E-Mail Address:
africa@scag.ca.gov
Counsel for Amicus Curiae
Southern California Association of Governments

Ellen M. Berkowitz
Gresham Savage Nolan & Tilden
3750 University Avenue, Suite 250
Riverside, CA 92501-3335
(213) 213-7249
E-Mail Address:
ellen.berkowitz@greshamsavage.com
Counsel for Amicus Curiae
Hon. Cathleen Galgiani, California State Senator

Peter D. Kelly, III
Kelly Crane Law, LLP
611 Wilshire Boulevard, Suite 913
Los Angeles, CA 90017
(310) 277-5333
E-Mail Address:
pkelly@kellycranelaw.com
Counsel for Amicus Curiae
Hon. Cathleen Galgiani, California State Senator

Scott A. Kronland
Altshuler Berzon, LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
E-Mail Address:
skronland@altshulerberzon.com
Counsel for Amicus Curiae
State Building and Construction Trades Council of California, AFL-CIO

Richard P. Chastang
County of Los Angeles
Office of the County Counsel
Transportation Division
One Gateway Plaza
Los Angeles, CA 90012
E-Mail Address:
chastangr@metro.net
(213) 922-2503
Counsel for Amicus Curiae
Los Angeles County Metropolitan Transportation Authority

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797
(4 copies)

Presiding Judge
Sacramento County Superior Court
c/o Clerk of the Court
720 Ninth Street
Sacramento, CA 95814
(916) 874-5487

The Honorable Michael P. Kenny
Sacramento County Superior Court
720 Ninth Street, Department 31
Sacramento, CA 95814
(916) 874-6353