IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, GOVERNOR EDMUND G. BROWN JR., TREASURER BILL LOCKYER, DIRECTOR OF DEPARTMENT OF FINANCE MICHAEL COHEN, SECRETARY OF THE STATE TRANSPORTATION AGENCY BRIAN KELLY, and CHIEF EXECUTIVE OFFICER OF THE HIGH-SPEED RAIL AUTHORITY JEFF MORALES, **Petitioners,** **v.** **THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO,** **Respondent,** **JOHN TOS, AARON FUKUDA, COUNTY OF KINGS** **Real Parties In Interest.**	Case No.

Sacramento Superior Court, Case No. 34-2011-00113919 CUMCGDS
Dept. 31; The Honorable Michael P. Kenny, Judge; Tel: (916) 874-6353

PETITION FOR EXTRAORDINARY WRIT OF MANDATE OR OTHER APPROPRIATE WRIT AND MEMORANDUM OF POINTS AND AUTHORITIES

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to rules 8.208 and 8.488 of the California Rules of Court, Petitioners California High-Speed Rail Authority, et al. hereby certify, through their undersigned counsel, that there are no interested entities or persons that must be listed in this certificate.

Dated: March 21, 2014

Respectfully submitted,

KAMALA D. HARRIS
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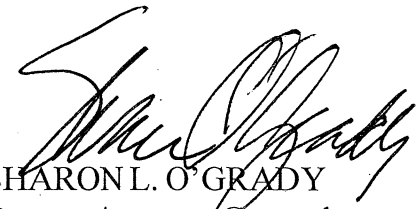

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INTRODUCTION

This Court has already issued a stay and alternative writ to review rulings of the Sacramento Superior Court that imperil billions of dollars in state and federal funding for California's high-speed rail project. (*High-Speed Rail Authority v. Superior Court*, Case No. C075668 ("*High-Speed Rail I*").) Since that alternative writ issued a month ago, the Sacramento Superior Court has issued a third order—in one of the cases already being reviewed by this Court—that imposes yet another obstacle to the project, and that also warrants this Court's immediate review.

In *High-Speed Rail I*, this Court stayed the superior court's writ of mandate in *Tos, et al. v. California High-Speed Rail Authority, et al.*, Case No. 34-2011-00113919 ("*Tos*"), which ordered the Authority to rescind its first funding plan.[1] Now, in that same case, the superior court has denied the defendants' motion for judgment on the pleadings and ordered a trial on "the design of the entire system and whether that design complies with Proposition 1A." Because the Authority has not yet committed to a plan or design of the entire high-speed train system (a process that will take years), the trial will determine the validity of the project based on assumptions made when the Authority adopted its first funding plan in 2011—the plan at issue in *High-Speed Rail I*.

The superior court's ruling is wrong as a matter of law because the challenged decisions of the High-Speed Rail Authority are discretionary. Such decisions—like the design of the entire system—may be challenged only by mandamus where it would be reviewed for abuse of discretion,

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[1] The second matter under review in *High-Speed Rail I* is an order declining to validate the issuance of bonds authorized to pay for construction of the project in *High-Speed Rail Authority, et al. v. All Persons Interested*, Sacramento Superior Court Case No. 34-2013-00140689.

based on an administrative record. The superior court has repeatedly failed to resolve this issue. What is more, the court has directed this matter to proceed to trial even though the *Tos* plaintiffs have conceded that their challenges to the proposed design for the entire system are not ripe for mandamus review.

These issues cannot await appeal. Like *High-Speed Rail I*, this petition concerns a matter of great public importance—the commencement of construction of the largest infrastructure project in the State's history and the potential loss of billions of dollars in federal grants to build it. The same complaint, the same parties, the same governing law, and the same record before this Court in *High-Speed Rail I*, are all involved here. Thus, judicial economy weighs strongly in favor of resolving these petitions together. Consideration of this petition in conjunction with *High-Speed Rail I* will likely resolve all of the legal issues pending in the *Tos* case.

For all of these reasons, this Court should grant this petition and consolidate these proceedings with *High-Speed Rail I*.

PETITION FOR WRIT OF MANDATE

JURISDICTION

This Court has jurisdiction. (Cal. Const., art. VI, § 10; Code Civ. Proc., § 1085.)

AUTHENTICITY OF EXHIBITS

All exhibits accompanying this Petition are true and correct copies of original documents on file with the respondent superior court except Tabs 8-9 and 457, which are true and correct copies of the original reporter's transcripts of the May 31, 2013 hearing on the petition for writ of mandate, the November 8, 2013 hearing on the remedies issue, and the February 14, 2014 hearing on the motion for judgment on the pleadings in *Tos, et al. v. California High-Speed Rail Authority, et al.*, Sacramento Superior Court Case No. 34-2011-00113919. The exhibits are incorporated herein by reference as though fully set forth in this petition and reproduced in their entirety in the concurrently-filed Appendix of Exhibits. The exhibits are referenced by their tab and, where applicable, by page number.[2]

PARTIES

1. Petitioners High-Speed Rail Authority, its Chief Executive Officer, the Governor, the Treasurer, the Director of the Department of Finance, and the Secretary of the State Transportation Agency, are the named respondents/defendants in *Tos*. The Authority is a state agency. (Pub. Util. Code, § 185012 et seq.; Sts. & Hy. Code, § 2704.12 et seq.)

2. Respondent is the Superior Court of California, County of Sacramento.

3. Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings are petitioners/plaintiffs in *Tos*.

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[2] Almost all of the documents in the Appendix are already on file in *High-Speed Rail Authority I*. To avoid confusion and for ease of reference, the tab and page numbering for identical documents is the same in both appendices.

FACTUAL AND PROCEDURAL HISTORY

4. The Legislature enacted the California High-Speed Rail Act in 1996. (Pub. Util. Code, § 185000 et seq.) The Act created the High-Speed Rail Authority. (*Id.*, § 185020.) "The authorization and responsibility for planning, construction, and operation of high-speed passenger train service at speeds exceeding 125 miles per hour in this state is *exclusively* granted to the authority." (*Id.*, § 185932, subd. (a)(2), italics added.)

5. In November 2008, the Legislature put on the ballot and the voters approved Proposition 1A, the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century, codified at Streets and Highways Code section 2704 et seq. (the "Bond Act"). The Bond Act authorizes the sale of $9 billion in state general obligation bonds in order to "*initiate* the construction of a high-speed train system" in California, based on the plans submitted by the Authority. (Sts. & Hy. Code, §§ 2704.04, subds. (a), (b), (c), 2704.06, italics added.)

6. The Bond Act requires the Authority, at least 90 days before requesting an appropriation of bond funds to begin construction, to submit a funding plan ("first funding plan") to the Director of Finance, a peer review group charged with evaluating the Authority's plans and submitting its report to the Legislature, and the transportation and fiscal committees of both houses of the Legislature. (Sts. & Hy. Code, § 2704.08, subd. (c)(1); Pub. Util. Code, § 185035, subd. (e).)

7. After two years of extensive planning, including several public hearings (see Tab 322, HSR05158), on November 3, 2011, the Authority approved a first funding plan in advance of seeking an appropriation to construct a usable segment on the first phase corridor (between Los Angeles and San Francisco) of the high-speed rail system in the Central Valley. (Tabs 323, 337.) On July 18, 2012, following legislative hearings and comment (Tabs 369, 392-396), and informed by an updated Authority

business plan (Tabs 372-373, 419-420), the Legislature enacted Senate Bill 1029 ("SB 1029"), appropriating $2.609 billion of bond funds and $3.24 billion in federal grant funds for that construction. (Stats. 2012, ch. 152, §§ 3, 9.) The federal funds are matching funds and must be used by September 2017, or they will expire. The Authority has not adopted any funding plan to construct the high-speed rail system beyond this initial funding plan for a usable segment on the initial corridor.

8. On November 14, 2011, Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings commenced the *Tos* case by filing an action challenging the first funding plan. (Tab 317.) They subsequently filed a First Amended Complaint ("FAC"), to which Petitioners successfully demurred, and a Second Amended Complaint ("SAC"), which (as amended) is the operative complaint. (Tabs 308, 304, 293, 292.) The SAC alleged nine mandamus claims pursuant to Code of Civil Procedure section 1085, and five purported claims for "waste" seeking declaratory and injunctive relief for which standing was alleged pursuant to Code of Civil Procedure section 526a. (Tab 292, HSR04821-HSR04836.) *The same facts are alleged in support of both the mandamus claims and the claims for declaratory and injunctive relief.* (*Id.*, HSR04809-HSR04819.) Real Parties alleged that the Authority's first funding plan violated the Bond Act and, as relief, asked the superior court to "vacate" and "set aside" the plan, halt construction (which had not begun and was not imminent), and prevent the Authority from spending bond funds as set forth in that funding plan. (*Id.*, HSR04824, HSR04821-HSR04822, HSR04836.)

9. By stipulation, resolution of the *Tos* complaint was bifurcated, so that the mandamus claims would be tried first, after which the court would determine whether there was anything left to be resolved. (See Tab 5, HSR00074-HSR00075.) The trial of the mandamus claims was held on May 31, 2013. (Tab 8.)

10. On August 16, 2013, the superior court ruled that the Authority's first funding plan did not comply with the requirements of Streets and Highways Code section 2704.08, subdivision (c)(2)(D) and (K). (Tab 5, HSR00080-HSR00084.)

11. On November 25, 2013, the superior court issued a second ruling. (Tab 6.) It rejected allegations that the Authority had committed or spent bond proceeds in violation of the Bond Act. (*Id.*, HSR00092-HSR00094.) Nevertheless, the court held that a writ of mandate should issue to rescind the first funding plan. (*Id.*, HSR00091-HSR00092.) The court denied other relief Real Parties had requested, including a request to prohibit the Authority from spending bond proceeds or federal grant money, and dismissed all of Real Parties' remaining writ claims as unripe. (*Id.*, HSR000094.) On January 3, 2014, the superior court's writ of mandate issued without a final judgment. (Tab 2.)

12. A December 13, 2013 case management conference was held to determine what, if anything, of the SAC remained unresolved by the superior court's earlier rulings. (Tab 194.) Petitioners argued that all of Real Parties' claims, no matter how labeled, were only cognizable in mandamus and that the superior court had fully resolved those claims by granting them, denying them, or ruling them unripe, leaving nothing outstanding to resolve. (Tab 196.) Real Parties argued they were now entitled to another trial, this one featuring extra-record evidence, including expert and other live witnesses, and requested an advisory jury to resolve disputed facts in what they argued were separate claims for declaratory and injunctive relief. (Tab 197.)

13. At the direction of the superior court, Real Parties specified four claims they contended remained for resolution. (Tab 192.) On January 10, 2014, Petitioners moved for judgment on those four claims. (Tabs 190-191.) Petitioners contended that these four claims were resolved in the mandamus

proceeding, were not ripe, or were never pled in the SAC. (Tabs 190-191.) In response, Real Parties argued that the claims resolved had been directed only to the first funding plan, and that they were entitled to present extra-record evidence to challenge the design of the high-speed rail system as a whole. (Tab 449, HSR09558, HSR09562.) They argued the four remaining claims fell within a narrow exception to the rule limiting court review of quasi-legislative actions to mandamus proceedings based on the administrative record. (*Id.*, HSR09567-HSR09568.)

14. On January 24, 2014, Petitioners filed an original petition for a writ of mandamus or other extraordinary writ in the California Supreme Court challenging the superior court's writ of mandate requiring the Authority to rescind the first funding plan. (See *High-Speed Rail I*, Case No. S216091, Order dated January 29, 2014.) The Supreme Court transferred the matter to this Court and, after expedited briefing, this Court issued an alternative writ and order to show cause and an order staying the superior court's writ of mandate. (*High-Speed Rail I,* Order dated February 14, 2014.) The parties are now briefing the merits; the deadline for Real Parties to file their opposition briefs was March 17, and Petitioners will file their reply on or before April 1, 2014.

15. On March 4, 2014, the superior court denied Petitioners' motion for judgment on the pleadings and ordered the parties to confer on a trial date. (Tab 455.) It held that the writ proceedings had only disposed of plaintiffs' claims directed to the first funding plan, and that "the issues that remain to be tried involve *the design of the entire system* and whether that design complies with Proposition 1A." (Tab 455, HSR09596-HSR09597, italics added.)

16. Real Parties and Petitioners have stipulated, and the superior court has ordered, that all proceedings in *Tos* are stayed until final resolution of this petition for an extraordinary writ of mandate. (Tab 456.)

17. Additional factual and procedural history is set forth in the memorandum of points and authorities immediately following the petition.

ISSUES PRESENTED

18. The issues presented by this writ petition are:

a. Whether Real Parties may contest the Authority's discretionary decisions for the design of the high-speed rail system in an ordinary civil trial, or whether such claims are cognizable only in mandamus, and reviewable only for abuse of discretion based on the administrative record.

b. Whether all of Real Parties' claims contesting the Authority's decisions were necessarily resolved by the superior court's order following trial of their mandamus claims, which granted, denied, or dismissed those claims as unripe.

c. Whether, to the extent Real Parties contest any decision about system design other than the Authority's first funding plan, such claims are unripe.

APPEAL IS AN INADEQUATE REMEDY AND INJURY TO THE PETITIONERS WOULD BE IRREPARABLE ABSENT IMMEDIATE RELIEF

19. The superior court denied Petitioners' motion for judgment on the pleadings and is now poised to hold a trial at which Real Parties intend to introduce extra-record evidence, including expert testimony, for consideration by an advisory jury (Tab 197, HSR02907-HSR02909), in a challenge to the "design of the entire system" and whether it complies with the Bond Act. (See Tab 455, HSR09596-HSR09597.) However, but for those matters reflected in the Authority's first funding plan, which is already before this Court in *High-Speed Rail I*, and the subsequent

legislative appropriation to build the Central Valley project, there is no decision about the "design of the entire system" ripe for review.

20. If the superior court's ruling is allowed to stand, there will be an unnecessary trial, applying an incorrect standard of review, followed by a likely appeal that could take years to resolve. Moreover, the court's determinations will be advisory, since final design determinations are years away.

21. Unless this Court acts, this pattern can be expected to recur each time the Authority issues or revises a plan, no matter how indefinite. If and when the Authority ultimately issues a second funding plan—which it must do before it spends a single dollar of bond funds on construction—Real Parties (or similar litigants) will likely file suit challenging that decision, forcing the Authority to defend the system's design, based not on the administrative record the Authority considered in making its decisions, but against a new round of outside experts. Like the rulings already being reviewed in *High-Speed Rail I*, the superior court's latest error, if not corrected, threatens to engulf the high-speed rail project in litigation that improperly second-guesses the wisdom of discretionary decisions by the Legislature and the government officials charged with designing and building the train.

22. And, like the rulings at issue in *High-Speed Rail I*, this ruling cannot await review on appeal. Because a trial has been ordered, it is uncertain when the case will come to a final judgment reviewable by appeal. In the meantime, the pendency of the action casts a cloud of uncertainty over the State's ability to bring the project to fruition. The high-speed rail system is a critical part of the State's strategy to reduce air pollution and combat climate change. Thus, the Legislature mandated that the system be built "*as quickly as possible*" (Stats. 2008, ch. 267, § 8(f), italics added), and declared the Bond Act to be an "urgency statute necessary for the

immediate preservation of the peace, health or safety within the meaning of Article IV of the Constitution" (*id.*, § 14). In addition, the Authority has secured $3.24 billion dollars in federal grant funds, of which $2.2 billion must be matched with state funds before they expire in 2017. (See Tab 442, HSR09372; see also 31 U.S.C. § 1552; 74 Fed. Reg. 2990.) Persistent challenges to the Authority's discretionary decisions, no matter how unfounded, create a climate that puts those crucial federal funds, and thus the entire project, at risk.

23. The superior court passed on several opportunities to settle the question of the nature of Real Parties' claims and the applicable standard of review, and in this vacuum, the parties have struggled about the matters at issue in the case and how to resolve them. (See, e.g., Tab 254; Tab 249, HSR03705-HSR03712; Tab 9, HSR00265-HSR00266.) The motion for judgment on the pleadings is just the most recent example. Resolution cannot await an appeal. Without this Court's guidance, this issue is bound to repeat itself in every challenge filed to the Authority's actions.

BENEFICIAL INTEREST

24. Petitioners have a beneficial interest in this matter. Petitioners have a direct interest in the issuance of the desired writ as parties in the proceedings below.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully pray that this Court:

1. Issue a peremptory or alternative writ of mandate or other appropriate writ directing Respondent superior court to vacate its March 4, 2014 Ruling on Submitted Matter and directing that court to enter an order granting Petitioners' motion for judgment on the pleadings.

2. Alternatively, if a peremptory writ does not issue in the first instance, and in addition to or in lieu of any alternative writ, issue an order directing Respondent superior court to show cause why its March 4, 2014 Ruling on Submitted Matter should not be vacated and why it should not be ordered to enter an order granting Petitioners' motion for judgment on the pleadings.

3. Award Petitioners costs in this action.

4. Award such other relief as may be just and proper.

Dated: March 21, 2014

Respectfully submitted,

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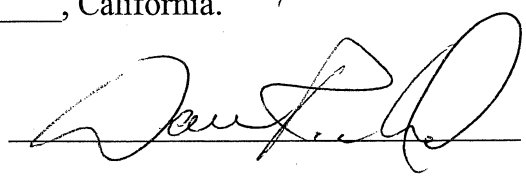
Attorneys for Petitioners

VERIFICATION

I, Dan Richard, am chairman of the Board of Directors of the California High-Speed Rail Authority, a petitioner herein. I have read the foregoing Petition for Extraordinary Writ of Mandate or Other Appropriate Writ and know its contents. I am informed and believe the matters therein are true and on that ground allege that the matters stated therein are true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 19, 2014, at SACRAMENTO, California.



MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This petition seeks relief from an order of the superior court denying Petitioners' motion for judgment on the pleadings. The court erred in failing to rule that Real Parties' claims challenge discretionary decisions of the Authority that are reviewable only in mandamus for abuse of discretion based on the administrative record. The court also erred in denying judgment because it had fully resolved the claims alleged in the SAC in its ruling on Real Parties' mandamus claims. In allowing these claims to go to trial, the superior court disregarded its own earlier rulings: that any mandamus claims not resolved are unripe; that the Authority has neither spent monies in violation of the Bond Act nor is threatening to do so; and that the Authority's use of federal grant monies is not governed by the Bond Act. Also ignored were Real Parties' admissions that they cannot prevail on their claims under the standard of review applicable in mandamus.

As a result, the stage is set for the superior court to hold a trial that violates cardinal principles of administrative law, the separation of powers, and will have the superior court reviewing the work of the Authority's engineers. Real Parties intend to submit extra-record evidence to challenge the Authority's decisions, and have asked the court to review de novo the Authority's past and future decisions, putting the entire high-speed rail system on trial. This trial will proceed on claims for declaratory and injunctive relief notwithstanding that those claims were resolved by the writ proceeding; the Authority has not committed to a system design; there is no plan in effect (other than the first funding plan review of which is pending before this Court in *High-Speed Rail I*) that reflects a decision of the

Authority to spend any bond funds on construction; and, at the present time, high-speed rail bonds cannot even be sold.

II. LEGAL AND FACTUAL BACKGROUND

A. Relevant Principles of Administrative Review

1. All Acts of Administrative Agencies Are Reviewable by Mandamus, But Discretionary Decisions May Only Be Reviewed for Abuse of Discretion Based on the Administrative Record.

This Court set forth the standard of review applicable to the acts of public agencies in *Carrancho v. California Air Resources Bd.* (2003) 11 Cal.App.4th 1255, 1264-1271. Code of Civil Procedure section 1085 (ordinary mandamus) "permits judicial review of ministerial duties as well as quasi-legislative acts of public agencies." (*Id.* at pp. 1264-1265.) Thus, mandamus can be used "to compel the performance of a clear, present, and ministerial duty" and also "to correct the exercise of discretionary legislative power, *but only* if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law." (*Id.* at p. 1265, italics in original.)

Where, as here, judicial review is not otherwise provided by statute, discretionary decisions of administrative agencies may only be reviewed by traditional mandamus. (See *Western States Petroleum Assn. v. Superior Court* (1998) 9 Cal.4th 559, 567; *Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 602.) And neither a writ of mandate, an injunction, nor declaratory relief may be used to control the exercise of discretion delegated to an agency by the Legislature. (*Western States, supra,* 9 Cal.4th at p. 567 [discussing mandamus review of quasi-legislative acts]; *State v. Superior Court* (1974) 12 Cal.3d 237, 249 [declaratory relief is not appropriate to challenge a specific quasi-legislative act of a public agency]; *Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149,

154-155 [to same effect]; *Excelsior College v. Cal. Bd. of Registered Nursing* (2006) 13 Cal.App.4th 1218, 1228, fn. 2 [noting that action for declaratory relief is not appropriate to review administrative action because it cannot be used to control discretion]; 2A Cal.Jur.3d (2014) Administrative Law, §§ 640 [same], 643 [noting that an injunction cannot be used to control the exercise of discretion and citing cases].)

2. Review of Discretionary Acts Requires Deference to the Constitutional Separation of Powers, Legislative Delegation of Authority, and Agency Expertise.

Review of quasi-legislative acts, as opposed to ministerial duties, is limited "out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within the scope of its authority." (*Carrancho v. California Air Resources Bd., supra,* 11 Cal.App.4th at p. 1265.)

Thus, the reviewing court may consider only the evidence in the administrative record that was before the agency when it made its decision, and does not exercise independent judgment or inquire into the wisdom of the decision; "[t]he authority of the court is limited to determining whether the decision of the agency was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair." (*Carrancho v. California Air Resources Bd., supra,* 11 Cal.App.4th at p. 1265.) Review is especially deferential when it comes to matters requiring technical expertise: "our high court has made it clear agencies should be given wide latitude to solve such problems without judicial interference." (*Id.* at pp. 1277-1278.) Although this is a deferential standard, the reviewing court "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (*Id.* at p. 1265.) But the court

does not weigh the evidence or substitute its judgment for that of the agency, "for to do so would frustrate legislative mandate." (*Ibid.*)

The standard of review varies, depending whether the agency's action was ministerial or discretionary, on a continuum from nonreviewability to independent judicial judgment. (*Carrancho v. California Air Resources Bd., supra,* 11 Cal.App.4th at p. 1265.) Quasi-legislative decisions receive deferential review, while ministerial acts receive more searching review. (See *id.* at pp. 1265-1266.) This calls on the court to make a critical determination of "whether the agency had a ministerial duty capable of direct enforcement or a quasi-legislative duty entitled to a considerable degree of deference." (*Id.* at p. 1266.) This question is one of law that is reviewed de novo on appeal. (*Ibid.*)

3. Discretionary Acts Must Be Distinguished from Ministerial Duties in Traditional Mandamus Review.

This Court has made clear that a ministerial duty must not be confused with discretionary authority. (*Carrancho v. California Air Resources Bd., supra,* 111 Cal.App.4th at pp. 1267-1269.) A ministerial duty requires no exercise of judgment whatsoever on the part of the agency because the statute prescribes the duty to be performed when a given state of facts exists; in contrast, discretion is the power to act officially according to the dictates of the agency's judgment. (2 Cal.Jur.3d (2014) Administrative Law, § 176, citing *County of Los Angeles v City of Los Angeles* (2013) 214 Cal.App.4th 643, 653-654.)

Thus, even when a statute constrains the exercise of discretion, it does not destroy the delegation of discretionary authority, or transform a quasi-legislative discretionary act into a ministerial duty. (*Carrancho v. Cal. Air Resources Bd., supra,* 111 Cal.App.4th at pp. 1267-1269; *Coachella Valley Unified School Dist. v. State* (2009) 176 Cal.App.4th 93,

116-117 [noting that conflating the two "eliminates the distinction between ministerial and discretionary acts" and that "[t]he impact of this approach is not inconsequential because our standard of review varies depending on the nature of the agency's action"].) Indeed, it is black-letter law that for a delegation of discretion to an agency to be constitutionally valid, the Legislature *must* provide standards for its exercise. (2 Cal.Jur.3d (2014) Administrative Law, § 183.) A statute that simply sets these kinds of parameters for the exercise of discretion does not destroy it. To impose a ministerial duty, the statute must "eliminate[] *any element* of discretion." (*Carrancho, supra,* 111 Cal.App.4th at p. 1267, internal quotations omitted, italics added.) Where a statute "directs the agency to prepare a plan designed to achieve a generalized goal . . . , [b]ut the specifics of the plan are left entirely to the agency," it has delegated discretionary quasi-legislative authority, not commanded a ministerial duty. (*Ibid.*)

B. The California High-Speed Rail Act Vests the Authority With Discretionary Power to Plan, Construct, and Operate a High-Speed Rail System.

In 1996, the Legislature enacted the California High-Speed Rail Act, which gave the Authority broad discretion to develop and implement a high-speed rail system. (Pub. Util. Code, §§ 185020, 185030.) The law gives the Authority the exclusive authority and responsibility for the planning, construction, and operation of high-speed passenger train service in California. (*Id.*, § 185032, subd. (a).) The Authority has discretion, among other things, to conduct engineering and other studies related to the selection of rights-of-way, including environmental, socioeconomic, and financial studies; to evaluate alternative high-speed rail technologies and select an appropriate system; to accept grants; to select a proposed route and terminal sites; and to prepare a financing plan and a financial plan for submission to the Legislature. (*Id.*, § 185034.)

The Authority was tasked to "prepare a plan for the construction and operation of a high-speed train network for the state," which plan "shall be submitted to the Legislature and the Governor for approval by the enactment of a statute." (*Id.*, § 185032, subds. (a)(1) & (b).) The Authority undertook planning, including early environmental certifications. In May 2007, the Authority adopted a plan to build the first phase of the system between Los Angeles and San Francisco. (Sts. & Hy. Code, § 2704.04, subd. (b)(2).) It certified environmental impact reports in November 2005 and July 2008, which were subsequently modified. (*Id.*, § 2704.06.)[3]

C. The Bond Act Gave the Authority Discretion to Plan the System in Segments, and Propose to the Legislature an Appropriation of Bond Proceeds to Construct the System in Segments.

In November 2008, the voters enacted the Bond Act. (Sts. & Hy. Code, § 2704 et seq.) The Bond Act authorized the issuance and sale of $9 billion in general obligation bonds to begin construction of the system. (*Id.*, §§ 2704.04, subds. (b), (c), 2704.06.)

This amount was an initial investment, not enough to pay for construction of the entire system, or even the entire first phase of the system from Los Angeles to San Francisco. The Bond Act contemplated that revenues from operation of the system, as well as private and other public funds would also be used to fund construction. (*Id.*, §§ 2704.07, 2704.08, subd. (a).) The Bond Act also envisioned that the system would not be built all at once, but in smaller parts called "corridors," "usable

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[3] The Authority's programmatic environmental impact report from 2008 was the subject to two challenges, the first in 2008, and the second in 2010. The Authority undertook additional environmental review and certified a Partially Revised Program EIR in 2012. Appeals from the 2010 litigation are pending before this court in *Town of Atherton v. California High-Speed Rail Authority*, Case No. C070877.

segments," "or any portion thereof." (*Id.*, §§ 2704.01, subds. (f) & (g), 2704.04, subd. (c) [referring to capital costs payable from bond proceeds "with respect to the high-speed train system or any portion thereof"], 2704.08, subd. (c)(1) [referring to appropriation of bond proceeds for eligible capital costs "on each corridor, or usable segment thereof"].)

The Bond Act sets goals and guidelines for use of the bond funds, while vesting broad discretion in the Authority to determine how those goals should be achieved. (Sts. & Hy. Code §§ 2704.04, subd. (b)(3), 2704.08, subd. (c)(1), 2704.09.) For example, it describes the end points of various corridors the Authority might choose to build, but not the route the train must take between them. (*Id.*, § 2704.04, subds. (a), (b).) It describes the general uses to which the Authority may and may not put bond proceeds, but does not state precisely how much the Authority shall spend, or what it shall spend it on. (*Id.*, §§ 2704.04, subds. (c) [defining capital costs payable or reimbursable from bond proceeds], (d) [excluding use of bond proceeds for operating or maintenance costs], 2704.08, subds. (a) [limiting use of bond proceeds to 50 percent of the total cost of construction], (b) [limiting to ten percent of bond proceeds payment for environmental studies, planning, and preliminary engineering activities].)

In addition, the Bond Act provides that the system "shall be designed to achieve" a set of broad design characteristics, but reconciling the demands of these characteristics is left to the Authority's discretion. (Sts. & Hy. Code, § 2704.09.) These include: trains "capable of achieving" a minimum of 200 miles per hour; maximum nonstop travel times for each corridor; maximum "achievable" time between successive trains; the maximum total number of stations; the "capability" of trains to bypass or transition intermediate stations at mainline operating speed; the "capability" of passengers to travel between any two stations on a corridor without changing trains; the alignment of the system that should, "to the extent

feasible," follow existing transportation or utility corridors and be financially viable "as determined by the authority"; stations to be located near access to local mass transit "or other modes of transportation"; and planning and construction that should "minimize" urban sprawl and impacts on the environment, as well as preserve wildlife corridors, "where feasible." (*Id.*, § 2704.09, subds. (a)-(j).)

Moreover, the Bond Act governs only uses of proceeds from the sale of the state general obligation bonds it authorizes; it does not govern the use of other public and private funds the Legislature may appropriate to the Authority, including federal funds. The uses of non-bond funds are in the Authority's discretion, as that may be limited by the Legislature when it appropriates such funds.

D. The First Funding Plan and the Appropriation.

After two years of study, comment, and public meetings, on November 3, 2011, the Authority approved a first funding plan and a draft business plan in advance of seeking an appropriation of bond funds to construct a portion of the high-speed rail system. (Sts. & Hy. Code, § 2704.08, subd. (c); Tabs 323, 337.) That is the only funding plan the Authority has approved, and the only appropriation of bond funds for construction that it has requested. On April 12, 2012, after outreach to and comment from many interested parties, legislative hearings, and input from the Legislative Analyst, State Auditor, and peer review group, the Authority adopted a revised 2012 business plan. (Tabs 372, 373; see Tab 377.) The business plan—a planning document forecasting the Authority's long-term horizon—is an evolving document that must be adopted at a public hearing and revised and submitted to the Legislature every two years. (Pub. Util. Code, § 185033.)

The 2012 revised business plan cut the initial costs of the proposed system by selecting a single segment for initial construction and providing

for increased blending of the system with existing commuter rail infrastructure in the San Francisco region. (See Tab 373, HSR07052-HSR07054.) This plan modification reduced the expected cost of the first phase of the rail system by almost $30 billion. (*Id.*, HSR07054.)

The first funding plan, which incorporated the Authority's business plan (Tab 323, HSR05179), was the result of significant preliminary planning the Authority undertook in 2009 to develop the statewide high-speed train system in a manner consistent with the purposes and objectives outlined in the Bond Act. The Authority and the Federal Railroad Administration ("FRA"), its funding partner, engaged in public scoping under the California Environmental Quality Act and National Environmental Policy Act for nine discrete sections of the statewide system. (Tab 373, HSR07113, HSR07060.) In the summer of 2011, the Authority and FRA circulated draft environmental impact report/environmental impact statements for the Merced to Fresno and Fresno to Bakersfield sections of the system. (Tab 398, HSR08109.) The Authority certified the Merced to Fresno Final EIR in May 2012.[4] (See Tab 418.)

On July 18, 2012, the Legislature enacted Senate Bill 1029, appropriating $2.609 billion of bond funds in addition to $3.24 billion of federal grant funds to begin construction. (Stats. 2012, ch. 152, §§ 8-9.) In the appropriation, the Legislature stipulated that the Authority could not spend appropriated funds for construction until after the Department of

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[4] Three lawsuits were filed challenging the Authority's EIR certification and decision to approve the Merced to Fresno section in June 2012. All three lawsuits were dismissed in 2013. (*County of Madera v. California High-Speed Rail Authority*, Sacramento Superior Court No. 34-2012-80001165; *City of Chowchilla v. California High-Speed Rail Authority*, Sacramento Superior Court No. 34-2012-80001166; *Timeless Investment Inc., v. California High-Speed Rail Authority*, Sacramento Superior Court No. 34-2012-80001168.)

Finance and State Public Works Board issued certain approvals, and also required detailed biennial project update reports for any year in which bond proceeds were encumbered. (Sen. Bill. No. 1029, Stats. 2012, ch. 152, § 9 [Provision 4].) In addition, the Legislature conditioned the appropriation, providing that the funds "shall not be used to expand the blended system to a dedicated four-track system." (*Id.*, § 1.)

Under the Bond Act, the Authority cannot actually spend bond money appropriated to it on construction of the system until the bonds are issued and sold, the Authority approves a second funding plan, that funding plan has been reviewed by a peer review committee and the Joint Legislative Budget Committee, and the Director of Finance has made a determination that the final funding plan "is likely to be successfully implemented as proposed." (Sts. & Hy. Code, § 2704.08, subd. (d).)

E. The Underlying Litigation.

The SAC was a challenge to the terms of the first funding plan. (Tab 292, HSR04836.) It sought three types of relief: a writ of mandate, as well as declaratory and injunctive relief. Some of the claims for declaratory and injunctive relief were styled as causes of action to prevent "waste" under Code of Civil Procedure section 526a ("Section 526a"). (*Id.*, HSR04829-HSR04836.) Since *Tos* was filed, Petitioners have asserted that Real Parties' challenges were only cognizable in mandamus, and asked the superior court to so decide.[5] The superior court consistently sidestepped the question.

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[5] Tab 305, HSR05071-HSR05073 [Mem. in Supp. of Demurrer to FAC]; Tab 289 [Answer to SAC]; Tab 281 [December 13, 2013 letter to the court responding to Real Parties' attempt to dismiss the writ claims]; Tab 249, HSR03705-HSR03707 [Opp. to Real Parties' Pt. I Trial Brief]; Tab 254 [Objections to Real Parties' Part II Trial Brief], Tab 9, HSR00265-HSR00266 [transcript of November 8, 2013 hearing on remedies].

The superior court issued its ruling on the petition for writ of mandate on November 25, 2013. (Tab 6.) It granted Real Parties' request for a writ requiring the Authority to rescind the first funding plan, but denied all other requests for relief. (*Ibid.*) The court ruled that Real Parties had not shown that the Authority had illegally spent bond proceeds or that it was threatening to do so, and denied their request for an injunction. (*Id.*, HSR00093-HSR00094.) It found that the Authority's use of federal money was not regulated by Proposition 1A or its funding plan requirements. (*Ibid.*) The court also dismissed Real Parties' remaining writ claims as unripe, on the strength of Real Parties' agreement "on the record" that "all other writ of mandate claims were not ripe and could be dismissed." (*Id.*, HSR00094.) These unripe claims included claims for mandamus alleging that the design of the initial segment for which the first funding plan sought construction funds would prevent the high-speed rail system as a whole from achieving the performance characteristics set forth in Streets and Highways Code section 2704.09. (*Id.*, HSR00093.)

In connection with the case management conference following the superior court's November 25, 2013 ruling, Real Parties argued they were entitled to a further trial on the same allegations underlying their concededly unripe design claims (restyled as claims for "waste"), to adduce extra-record evidence, and to an advisory jury. (Tab 197, HSR02907-HSR02909.) Petitioners objected again, pointing out that regardless of how they were pleaded, the substance of Real Parties' claims could only be resolved in mandamus, had been decided or dismissed, and that Real Parties had either been granted or denied all of the relief they could legally obtain; therefore, the superior court should enter a final judgment. (Tab 196, HSR02894-HSR02898.) At that conference, the superior court directed Real Parties to specify the claims they contended remained

unresolved, and to set a briefing schedule for Petitioners to move for judgment on the pleadings as to those claims. (Tab 194.)

As specified by Real Parties, the four remaining claims are:

Claim One – Two Hour and 40 Minute Travel Time Requirement

> The currently proposed high-speed rail system does not comply with the requirements of Streets and Highways Code §2704.09 in that it cannot meet the statutory requirement that the high-speed train system to be constructed so that maximum nonstop service travel time for San Francisco – Los Angeles Union Station shall not exceed 2 hours and 40 minutes.

Claim Two – The No-Government-Subsidy Requirement

> The currently proposed high-speed rail system does not comply with the requirements of streets [sic] and Highways Code §2704.09 in that it will not be financially viable as determined by the Authority and the requirement under §2704.08(c)(2)(J) that the planned passenger service by the Authority in the corridors or usable segments thereof will not require a local, state, or federal operating subsidy.

Claim Three – Blended Rail System's Constitutionality

> The currently proposed "blended rail" system is substantially different from the system whose required characteristics were described in Proposition 1A, and the legislative appropriation towards constructing this system is therefore an attempt to modify the terms of that ballot measure in violation of article XVI, section 1 of the California Constitution and therefore must be declared invalid.

Claim Four – Inability To Construct A Useful Project

> If Plaintiffs are successful in any of the above three claims, Proposition 1A bond funds will be unavailable to construct any portion of the Authority's currently-proposed high-speed rail system. Under those circumstances, the $3.3 billion of federal grant funds will not allow construction of a useful project. Therefore, under those circumstances the Authority's expenditure of any portion of the $3.3 billion of federal grant funds towards the construction of the currently-proposed system

> would be a wasteful use of public funds and would therefore be subject to being enjoined under Code of Civil Procedure §526a.

(Tab 192, headings added.) According to Real Parties, these are the *only* claims remaining in this case. (*Ibid.*)

Petitioners moved for judgment on the pleadings on January 10, 2014. (Tab 190.) The grounds for the motion were that there remained no issues for trial because Real Parties' claims (1) only sound in mandamus, (2) could only be reviewed based on the administrative record and under an abuse of discretion standard, (3) were resolved in or mooted by the superior court's prior orders, or (4) were not pled in the SAC. (Tabs 190, 193.) In response, Real Parties argued that their writ claims were directed only to the first funding plan and they were entitled to a civil trial based on extra-record evidence in their challenge to the design of the high-speed rail system as a whole, because, they argued, these claims fell within a narrow exception to the rule limiting judicial review of quasi-legislative determinations to mandamus proceedings. (Tab 449.)

The superior court denied Petitioners' motion on March 4, 2014, without deciding the key issue presented: whether the challenged acts of the Authority were discretionary acts that can be reviewed only in mandamus under an abuse of discretion standard upon the administrative record. (Tab 455.) Nor did the court decide the issue Real Parties raised in opposition to the motion—whether their claims fell within a narrow exception to the rule that permits the admission of extra-record evidence. (Tab 229.) The court also overlooked that it had dismissed all of Real Parties' remaining writ claims as unripe, including those alleging that the design of the entire system could not meet the design specifications listed in the Bond Act. (Tab 6, HSR00094.) Instead, the court decided Real Parties were entitled to a trial on four claims directed to the design of the entire high-speed rail system, whether or not these claims were cognizable only in

mandamus—and without deciding what evidence it would allow at trial or what standard of review would apply. (Tab 455, HSR09596-HSR009597.)

III. IMMEDIATE APPELLATE REVIEW IS APPROPRIATE IN THIS CASE.

"Although appellate courts are loath to exercise their discretion to review rulings at the pleading stage, they will do so where the circumstances are compelling and the issue is of widespread interest." (*County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 126.) "[W]hen the question is purely legal and the issue significant, relief by extraordinary writ is appropriate." (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 558; see also *American Internat. Group. Inc. v. Superior Court* (1991) 234 Cal.App.3d 749, 755.)

The issues raised by this petition are purely legal and their public importance is apparent. In submitting Proposition 1A to the voters, the Legislature declared high-speed rail to be vitally important to the State's economic and environmental welfare. (Stats. 2008, ch. 267, §§ 8, 8(a), 14.) Indeed, high-speed rail is a critical component of the State's strategy to combat air pollution and, by extension, global warming. For that reason, and because building transportation capacity through high-speed rail is more efficient than building more freeway and airport capacity to meet the State's rapidly growing transportation needs, the Legislature further declared it is "imperative that the state proceed quickly to construct a state-of-the-art high-speed passenger train system to serve major metropolitan areas," and that the system be built "as quickly as possible." (*Id.*, §§ 8(a), (c), (d) & (f), 14.) Despite these declarations of urgency, the superior court's ruling will bog down the high-speed rail project in an unnecessary trial and inevitable appeal, regarding "waste" claims that are not cognizable and not ripe—and which the superior court therefore has no jurisdiction to adjudicate.

Tos challenges discretionary, quasi-legislative decisions of the Authority that under settled law may only be reviewed in mandamus for abuse of discretion, based on the administrative record. (See *Carrancho v. California Air Resources Bd., supra*, 111 Cal.App.4th at pp. 1264-1271; *Coachella Valley Unified School Dist. v. State, supra,* 176 Cal.App.4th at pp. 116-118.) The superior court, however, has declined to rule on this issue, and has said the matter should proceed to a second trial. (Tab 455, HSR09595-HSR09597.) This Court's immediate intervention will prevent a needless and expensive trial on non-justiciable claims. (See *Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 634 [Third District Court of Appeal, treating order denying summary judgment as an order denying motion for judgment on the pleadings, granted peremptory writ of mandate because, if left undisturbed, trial court's order would force defendants to "undergo trial on nonactionable claims"]; *Boy Scouts of America Nat. Foundation v. Superior Court* (2012) 206 Cal.App.4th 428, 438 [extraordinary writ granted where trial court erroneously sustained demurrer as to less than all causes of action, exposing defendant to a risk of a needless trial, and a ruling in defendant's favor would have resulted in a final disposition as to defendant].) Unless this Court intervenes to correct the superior court's error, there will be a multiplicity of suits every time the Authority issues or revises a plan.

Moreover, judicial economy strongly weighs in favor of writ review. This Court is already reviewing the writ issued by the superior court in *Tos* in *High-Speed Rail I.* The same complaint and the same record is already before the Court, and if the Court does not take this writ, it will inevitably face an appeal following a final judgment in *Tos*. Resolution of this petition with *High-Speed Rail I* could resolve the entire case.

IV. STANDARD OF APPELLATE REVIEW

Where, as here, the superior court has abused its discretion by basing its rulings on "improper criteria or incorrect legal assumptions," review is de novo. (*Los Angeles Gay and Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 300.)

V. ARGUMENT

The writ should issue because Real Parties' claims are only cognizable in mandamus, and in fact were heard and decided with the claims formally pled as mandamus claims. As a matter of law, there is no distinction between Real Parties' claims for "waste" or declaratory and injunctive relief, and the claims for mandamus previously decided, because no matter the label, their challenge is to the Authority's discretionary decisions. And, as Real Parties admitted and the superior court held in the context of the mandamus proceedings, any challenges to the design of the "entire system" are unripe.

A. Real Parties' Four Claims Challenge Quasi-Legislative Acts of the Authority That Can Only Be Reviewed in Mandamus Proceedings.

1. Real Parties Challenge Only Discretionary, Quasi-Legislative Acts of the Authority.

Although it is not entirely clear, there is some indication that Real Parties and the superior court may hold the mistaken belief that the Authority has a non-discretionary *ministerial* duty to build the high-speed rail system in a particular way. By the standard this Court set in *Carrancho v. California Air Resources Bd., supra,* 111 Cal.App.4th at pp. 1267-1269, however, it is clear that the acts Real Parties challenge in *Tos* are discretionary, not ministerial.

The nature of the Authority's actions being challenged by Real Parties and the consequent determination of the standard of review depend

on an interpretation of the High-Speed Rail Act and the Bond Act. Here, as in *Carrancho,* quasi-legislative acts are at issue, and any review under mandamus is therefore deferential to the agency. As explained in Sections II.B. and II.C. above, ante at pp. 17-20, both the High-Speed Rail Act and the Bond Act empower the Authority to make the discretionary decisions challenged in this case, including but not limited to planning the system to achieve the operating standards and purposes of the Bond Act, selecting an initial corridor or usable segment, reaching agreements governing construction and operation of the system, estimating the cost of completing the corridor or usable segment, evaluating anticipated revenues, operating costs, and financial feasibility, and approving preliminary and final funding plans as a predicate to obtaining an appropriation of bond funds. (Sts. & Hy. Code, §§ 2704.08, subds. (c), (d), 2704.09.) The Authority's decisions to date are reflected in its first funding plan, together with the supporting draft and revised business plans.[6]

In *Carrancho v. California Air Resources Bd., supra,* 111 Cal.App.4th at pp. 1267, this Court held that statutes authorizing an agency to prepare plans, and give progress reports, "must be considered legislative acts." (*Id.* at p. 1267.) "In authorizing administrative agencies to investigate, hold hearings, and report findings, the Legislature is, in effect, using those agencies as an 'arm' of the Legislature itself, performing functions that are legislative in nature." (*Id.* at p. 1266.)

Similarly, in *Tos*, Real Parties challenge the Authority's determinations that the segment to be constructed as described in the first funding plan (and now in the appropriation to build) is consistent with the

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[6] A new business plan is due to be issued by May 1, 2014, and a draft has been published for public review and comment. (Pub. Util. Code, § 185033, subd. (a).)

performance standards in the Bond Act, specifically, (1) the maximum non-stop travel time between Los Angeles and San Francisco, (2) the financial feasibility as determined by the Authority, including the absence of a need for an operating subsidy, and (3) the blended system.[7] Real Parties do not contend that the Authority's decisions, as expressed in the first funding plan and the business plan, are not supported by the administrative record, nor could they. Instead, they assert that the Authority was just wrong. But the Authority is invested by statute with the discretion to make these determinations, which it duly reported to the Legislature to inform the decision of whether and how to appropriate funds. These are legislative acts—discretionary acts the Legislature itself could have undertaken, but were instead delegated to the Authority.

It is true that the Bond Act restricts the exercise of the Authority's discretion in any number of ways, among them: by setting parameters for the corridors of the system; by restricting the use of bond proceeds for capital and other costs; by prohibiting the use of bond proceeds for more than 50 percent of construction costs; by requiring the Authority to submit a

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[7] The allegation that the blended system is "substantially different from the system whose required characteristics were described in Proposition 1A" is particularly puzzling. First, it is not alleged in the SAC. (Tab 292, HSR04836.) Second, by its terms, there is nothing in the Bond Act's performance standards that prohibits or is at clearly odds with a blended system. (Sts. & Hy. Code, § 2704.09.) To the contrary, the Bond Act contains provisions that encourage sharing of resources. (Sts. & Hy. Code, §§ 2704.08, subds. (f)(4) [calling for consideration in choosing corridors of whether they include facilities that will enhance connectivity of the system to other modes of transit], (g) [providing the bond funds may be used to make improvements compatible with high-speed rail], 2704.09, subds. (g) [calling for alignment of system to follow existing corridors to reduce impacts on communities and the environment], (i) [calling for the system to be built to minimize urban sprawl and impacts on the environment].)

plan before seeking an appropriation and a second plan before obtaining authority to spend appropriated funds; and by requiring the Authority to design the system to achieve certain characteristics. (Sts. & Hy. Code, §§ 2704.08, 2704.06, 2704.04, 2704.09.) These standards guide the Authority's decisionmaking.

As in *Carrancho*, Real Parties have argued that because the Authority's discretion was circumscribed by substantive requirements for its exercise, those substantive requirements create a ministerial duty that can be specifically enforced by independent judicial review. But these restrictions on the exercise of discretion are just necessary standards for its exercise, they do not convert the authority delegated into a ministerial duty because they do not "eliminate[] *any element* of discretion." (*Carrancho, supra,* 111 Cal.App.4th at p. 1267, internal quotations omitted, italics added.) The Legislature provided "a goal to aim for, not a result that could automatically be achieved by blind obedience to a legislative command." (*Id.* at p. 1268.) These standards and goals "do not eliminate agency discretion, but require it." (*Ibid.*)

For these reasons, *Hayward Area Planning Assn., Inc. v. Alameda County Transportation Authority* (1999) 72 Cal.App.4th 95, which the trial court cited in support of its ruling, is inapposite. That case challenged agency staff's interpretation of Caltrans' statutory authority to choose where and what to build. Caltrans argued that it had exclusive jurisdiction to determine state highway routes, and thus could use sales tax revenue approved by the voters for one project on a different project. The court of appeal held that Caltrans' jurisdiction over state highways did not trump a voter initiative that specified the route for a proposed highway. (*Id.* at pp. 107-108.) There, the voter-approved measure authorized bond funds to be spent on specific projects set forth in an Expenditure Plan that was submitted to the voters with the ballot measure. (*Id.* at pp. 104-107.) The

court found that the bond act in that case did *not* vest Caltrans with discretion to select a different route for a highway that was one of the projects approved:

> If local officials had desired the discretionary power to select [the highway route] after the election, it would indeed have been a simple matter to so word the Expenditure Plan before its submission to the electorate. Instead, the Expenditure Plan included a project that was fully described and depicted in an accompanying map. . . .

(*Id.* at p. 109.)

In contrast, the Bond Act gives the Authority broad discretion in designing and developing a high-speed rail system in California. It does not tell the Authority how to achieve maximum non-stop travel time, or financial viability, or how to determine whether or not an operating subsidy will be required. These are all matters the Bond Act and the High-Speed Rail Act entrust to the Authority's discretion. Further, unlike Caltrans, the Authority has not stated its intention to defy the Bond Act by building some other railroad in some other location. Consequently, *Hayward Area Planning Assn., Inc. v. Alameda County Transportation Authority, supra*, does not govern here.

2. Review of the Authority's Discretionary Acts Is Limited to the Administrative Record.

Because Real Parties seek review of discretionary, quasi-legislative decisions, "review is limited to determin[ing] whether the findings, conclusions, and recommendations were arbitrary, capricious, or unsupported by substantial evidence." (*Id.* at p. 1269; see *County of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 654.)

"An unbroken line of cases holds that, in traditional mandamus actions challenging quasi-legislative administrative decisions, evidence outside the administrative record 'extra-record evidence' is not admissible."

(*Carrancho v. California Air Resources Bd., supra,* 111 Cal.App.4th at p. 1269.) There is a narrow exception to this rule in cases involving "informal actions," where there is no administrative record. (*Ibid.*) But the exception is inapplicable, where, as here, there is an administrative record, "public meetings, workshops, and ample opportunity for input from the public." (*Id.* at p. 1270; see *Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1469.) Here, as in *Carrancho*, the Authority held noticed public meetings, consulted with experts, put its plans before a peer review committee for comment, as well as committees of the Legislature, and produced a voluminous administrative record of more than 4,400 pages. (Tabs 319-445.) Extra-record evidence is not admissible in these circumstances because it "would encourage interested parties to withhold important evidence at the administrative level so as to use it more effectively to undermine the agency's action in court." (111 Cal.App.4th at pp. 1270-1271.)

The claims that Real Parties seek to raise at trial challenge classic quasi-legislative planning decisions of the Authority that may only be challenged in mandamus, under a deferential standard, based exclusively on the content of the administrative record. Because Real Parties have essentially admitted they could not prevail in such a proceeding (Tab 8, HSR00215-HSR00216; Tab 197, HSR02907-HSR02909), holding a trial on their remaining claims would indeed be a waste of government resources—and a barrier to bringing the high-speed rail system quickly to fruition, as intended by the voters and the Legislature.

B. Real Parties' Characterization of Their Claims as Taxpayer Claims for Declaratory and Injunctive Relief Does Not Render Them Justiciable.

Because any claims challenging the Authority's planning decisions—those made or yet to be made—can be reviewed only under the

deferential standard applicable to quasi-legislative decisions and based exclusively on the administrative record, Real Parties' reliance on Section 526a to allege claims for declaratory and injunctive relief is misplaced. The statute does not create a claim separate or distinct from Real Parties' mandamus claims, and it does not make a claim that is otherwise unripe justiciable.

The superior court's order expressly did not decide whether Real Parties' claims challenge discretionary acts subject to deferential mandamus review (Tab 455), and that is critical to understanding its error. Real Parties have conceded that they could not prevail on these claims if the claims were tried in mandamus; to prevail, they need to be able to introduce extra-record evidence. (See, e.g., Tab 241, HSR03480-HSR03482.) This concession is an implicit admission that the Authority's decisions were in fact supported by the administrative record. Real Parties styled some claims for "waste" or injunctive and declaratory relief to avoid the limitations of mandamus review, so that they may bring in "all evidence, gathered at any time," not just "information that was before the Authority and considered by the Authority at the time it made its critical decision." (Tab 273, HSR04214 [underlining in original]; see Tab 197, HSR02907 [conceding that Real Parties' remaining claims involve disputed issues of fact].) Yet, as previously demonstrated, Real Parties' claims are cognizable *only* in mandamus as a matter of law, and the superior court erred by not granting judgment against them.

Section 526a simply provides standing to challenge governmental action involving allegedly illegal expenditures where it would not otherwise exist. It cannot be used as a means of avoiding proper procedures for challenging public agency decisions. (*Daily Journal Corp. v. City of Los Angeles* (2009) 172 Cal.App.4th 1550, 1557-1558.) It authorizes taxpayer suits only if the agency has a ministerial duty to act.

(*Ibid.*) Attacks on quasi-legislative actions on the grounds that they are a waste of public money are simply not authorized by Section 526a. "Section 526a does not allow the judiciary to exercise a veto over the legislative branch of government merely because the judge may believe the expenditures are unwise, that the results are not worth the expenditure, or that the underlying theory of the Legislature involves bad judgment." (*Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138; *Humane Society of U.S. v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 356.) "Waste" as that term is used in Section 526a means something more than a mistake by public officials in matters involving the exercise of judgment or discretion. (*Sundance v. Municipal Court*, *supra*, 42 Cal.3d at pp. 1138-1139; *Humane Society of U.S. v. State Bd. of Equalization*, *supra*, 152 Cal.App.4th at p. 356.) Otherwise, the discretion would reside not in the agency to which it was delegated by the Legislature, but in the taxpayer. (*Daily Journal Corp., supra,* 172 Cal.App.4th at pp. 1558-1559.)

Even where an agency's discretionary decisions are allegedly inadvisable and result in monetary losses, a cause of action for waste will not lie. (*Lavine v. Jessup* (1958) 161 Cal.App.2d 59, 62, 66-67 [affirming judgment of dismissal on demurrer to taxpayer action alleging waste when county officials changed the site for construction of a county courthouse].) These are political issues or issues of discretion to be left to the agency, not the courts. (*Humane Society of U.S. v. State Bd. of Equalization*, *supra*, 152 Cal.App.4th at pp. 356-357; see *Reid v. State ex rel. Dept. of Public Works* (1961) 193 Cal.App.2d 799, 805 [taxpayer challenge to decision to build a new service road rather than use an existing road for the purpose was not justiciable].)

Section 526a also cannot be used to plead around the traditional standard of review and procedural framework applicable in mandamus proceedings. In *Nathan H. Schur, Inc. v. City of Santa Monica* (1956) 47

Cal.2d 11, a suit challenging an expenditure of city funds in connection with the issuance of licenses, the Supreme Court held that the trial court committed reversible error in considering independent evidence instead of confining its review to the city council record. (*Id.* at pp. 16-17.) That the complaint included a cause of action under Section 526a did not change the result:

> There appears to be no reason, however, why a municipal corporation with valid authority to do so, holding a public hearing and making a quasi-judicial determination with reference to the issuance of a license to engage in a certain business, should be required to justify its action in a trial de novo in the court whether the one attacking its determination is a taxpayer or one of the applicants for a license. The local officials are vested with the power of determination and such determination is reviewable by mandamus or certiorari in which the issues are limited as set forth in *Fascination, Inc., v. Hoover* [(1952)] 39 Cal.2d 260, 246 P.2d 656.

(*Nathan H. Schur, Inc. v. City of Santa Monica, supra,* 47 Cal.2d at pp. 17-18.)

Here, as in *Coachella Valley Unified School District v. State, supra,* the superior court "had before it one lawsuit seeking different remedies . . . . On this issue, the complaint did not state separate causes of action; rather, it asked for different forms of relief: mandate, declaratory, and injunctive. In framing the existence of a cause of action, California subscribes to the primary rights theory. Thus, the invasion of one primary right gives rise to but a single cause of action." (176 Cal.App.4th at pp. 125-126.) A writ issued in a mandamus action can address associated illegal expenditures and enjoin them. (*Long v. Hultberg* (1972) 27 Cal.App.3d 606, 609 [finding no difference between a writ and an injunction].) In fact, the purpose of the supplemental briefing on remedies ordered by the superior court in *Tos* was to determine what, if any, relief was appropriate. (Tab 5, HSR00087-HSR00088.) In its November 25, 2013 ruling, the court

ultimately determined there had been no illegal expenditures of public funds and therefore refused to enjoin further expenditures by the Authority. (Tab 6, HSR00094.)

C. Real Parties' Four Claims Are Not Justiciable, Either Because They Have Been Resolved, or Because They Are Not Ripe.

1. Real Parties' Claims Were Necessarily Resolved When the Superior Court Resolved the Mandamus Claims Addressing the Same Factual Allegations.

In any event, to the extent they are alleged in the SAC,[8] the four claims Real Parties contend remain unresolved were in fact resolved by the superior court's order in the writ proceedings. Where a writ has issued granting or denying the same relief a plaintiff seeks in associated civil causes of action, the writ rulings necessarily dispose of the civil causes of action. (*Griset v. Fair Political Practices Comm'n* (2001) 25 Cal.4th 688, 697-700.) That is true even when the trial court has not issued an order dismissing the civil causes of action or entered a formal order of judgment. (*Id.* at p. 698.) "It is not the form of the decree but the substance and effect of the adjudication which is determinative." (*Ibid.*, quoting *Lyon v. Goss* (1942) 19 Cal.2d 659, 670.)

In *Griset*, for example, the Supreme Court held that the trial court's resolution of plaintiff's writ claims on the constitutionality of a law prohibiting anonymous campaign mailings by a candidate or candidate-

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[8] It is not apparent that the four claims the superior court set for trial are alleged in the SAC. The superior court understands these claims to be different from the claims related to the first funding plan, which were adjudicated in the writ proceedings. (Tab 455, HSR09596-HSR09597.) The SAC, however, challenges alleged inadequacies in the first funding plan. There are also no allegations in the SAC about federal funding or the blended system.

controlled committees necessarily disposed of plaintiff's causes of action to enjoin future enforcement of the statute and to enjoin the Fair Political Practices Commission from enforcing fines for violation of the statute. (*Id.* at pp. 699-700.)

As explained above, in Real Parties' complaint the same factual allegations support the mandamus and waste causes of action. (Tab 292, HSR04809-HSR04819.) Therefore, the superior court's disposition of Real Parties' writ claims necessarily disposed of *all* claims, leaving nothing for another trial. (See *R & A Vending Services, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188, 1193-1194 [entry of writ of mandate barred remainder of lawsuit asserting claims for declaratory relief and injunction, since all three remedies sought were for the alleged invasion of a single primary right].)

2. Real Parties' Claims Are Not Ripe.

The superior court writ proceedings resolved the issues Real Parties raised based on the first funding plan. That plan is before this Court in *High-Speed Rail I*, and it is the *only* funding plan the Authority has approved. There is no other extant funding plan, and the Authority's business plan is subject to change (Pub. Util. Code, § 185033, subd. (a)), so Real Parties' claims based on decisions other than the first funding plan cannot be ripe.

A basic prerequisite to judicial review of administrative acts is the existence of a ripe controversy. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 169.) "The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion." (*Id.* at p. 170, internal citations omitted.) The basic rationale of the doctrine "is to prevent the courts, through avoidance of

premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." (*Id.* at p. 171.) A trial court's adjudication of claims that are non-justiciable, either because they are not ripe or because they have been rendered moot, is an abuse of discretion subject to reversal on appeal. (*Housing Group v. United Nat. Ins. Co.* (2001) 90 Cal.App.4th 1106, 1111-1112.)

At the trial of the writ in *Tos*, Real Parties' counsel conceded that some of their claims would not be ripe until such time as the Authority issues a second funding plan:

> And as you are aware, the complaint is both for writ mandamus, it's also for declaratory relief, it's also for injunctive relief under Code of Civil Procedure 526(a) [sic].
>
> And really when you read through the complaint, of course each of the causes of action incorporates everything prior to it by reference. So essentially all of those are rolled together into each of the issues in the complaint, each of the causes of action includes all three.
>
> Now, we are only prosecuting today two of those mandamus claims because, frankly, those are the only ones we think right now are ripe.
>
> *The complaint also issued – raised issues around the second Funding Plan that hasn't been issued yet. Basically they were made essentially toward the future, and so we're saying if these are ripe at the time we bring them to trial, we'll bring them to trial. They aren't, and so we're not.*

(Tab 8, HSR00215-HSR00216, italics added.) This concession by Real Parties' counsel was consistent with the superior court's 2012 ruling sustaining (with leave to amend) Petitioners' demurrer to the FAC on the ground that the "allegations are deficient to show the Authority has, or

imminently will, obtain permission to spend bond funds for the construction of the Central Valley HSR project." (Tab 293, HSR04847.)

Real Parties correctly acknowledged that any claims not challenging the first funding plan were not ripe, and the superior court was correct to dismiss them. (Tab 6, HSR00094.) Nothing has changed since the writ proceeding to cause these inchoate claims to mature.

The superior court's conclusion that it may adjudicate claims directed to the design of the entire high-speed rail system, divorced from a final funding plan committing the Authority to spend bond monies, was error. The high-speed rail system is a massive undertaking that will necessarily be built in phases and over a period of years. Over that time, the project design can be expected to evolve in response to community input, legislative directives, technological changes, and other factors. Until funds are committed, there is no decision that cannot be changed or reconsidered, and to challenge preliminary decisions in court before they are final would encourage a never-ending stream of advisory litigation that would be antithetical to the separation of powers concerns that inform mandamus review. Indeed, the peer review group (charged by the High-Speed Rail Act and Bond Act with reviewing the Authority's funding and business plans (Pub. Util. Code, § 185035; Sts. & Hy. Code, § 2704.08, subd. (c)(1))) recognized that point. In its May 2012 report on the revised business plan, it stated:

> [T]he Group does not possess the legal capacities to assess whether the proposed project meets the requirements of Proposition 1A. We can say, however, that mega-projects by their nature are typically constructed incrementally, over an extended period of time. The important challenge for program managers is to continue to focus on the ultimate vision of a completed system and to build toward that vision as financing becomes available.

(Tab 419, HSR08795.)

The discretionary power vested in the Authority to design and build this massive and complex project over the course of many years necessarily includes the power to make design changes as the project progresses in phases. (See, e.g., *Tooker v. San Francisco Bay Area Rapid Transit Dist.* (1972) 22 Cal.App.3d 643, 649, 653-654 [board had discretion to change station location and surface/subway configuration from that shown in earlier plan]; *East Bay Mun. Util. Dist. v. Sindelar* (1971) 16 Cal.App.3d 910, 916, 919 [1958 bond act gave agency discretion to issue authorized but unissued bonds in 1970 to construct additional water facilities]; *Lavine v. Jessup*, *supra*, 161 Cal.App.2d at pp. 66-67 [Board of Supervisors has discretion to change site of proposed courthouse].) The design of the Bay Area Rapid Transit System ("BART")—a project much smaller in scope than high-speed rail—changed as development of the system progressed. (See, e.g., *Tooker v. San Francisco Bay Area Rapid Transit Dist.*, *supra*, 22 Cal.App.3d 643.) The same can be expected with high-speed rail.

Both the Bond Act and the High-Speed Rail Act contemplate that the project's design will evolve over time, and vest broad discretion on the Authority to make decisions about that design. The business plans the Authority is required to prepare every two years are also expected to specify and discuss changes adopted by the Authority as the project moves forward. (Pub. Util. Code, § 185034.) Even the limited construction to be funded by the Bond Act is expected to undergo changes. That is why the Bond Act expressly anticipates that the second funding plan, which must be prepared before bond monies are actually spent on construction, may deviate materially from the first funding plan. (Sts. & Hy. Code, § 2704.08, subds. (d)(1)(E), (e).)

For the foregoing reasons, Real Parties' attack on the design of the entire high-speed rail system is not ripe, and the superior court's decision to hold a trial on these unripe claims was error.

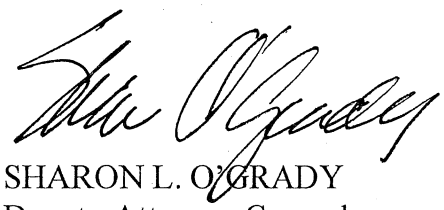
VI. CONCLUSION

For all the reasons set forth above, this Court should grant the relief prayed for in the Petition.

Dated: March 21, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California



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

SA2014114189

CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR EXTRAORDINARY WRIT OF MANDATE, APPLICATION FOR TEMPORARY STAY AND MEMORANDUM OF POINTS AND AUTHORITIES** uses a 13 point Times New Roman font and contains 11,994 words.

Dated: March 21, 2014

KAMALA D. HARRIS
Attorney General of California

Stephanie Zook

STEPHANIE F. ZOOK
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. Sacramento Superior Court**
No.: **TBD**

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 (GSO)**. 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 March 21, 2014, I served the attached **PETITION FOR EXTRAORDINARY WRIT OF MANDATE OR OTHER APPROPRIATE WRIT AND MEMORANDUM OF POINTS AND AUTHORITIES** by transmitting a true copy via electronic mail, and by placing a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, as shown below. In addition, I served the attached **APPENDIX OF EXHIBITS (VOLUMES 1-28)** by placing a true copy thereof enclosed in sealed boxes, in the internal mail system of the Office of the Attorney General, for overnight delivery, as shown below.

SEE ATTACHED SERVICE LIST

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 March 21, 2014, at Sacramento, California.

Eileen A. Ennis
Declarant


Signature

SERVICE LIST

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