IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S220926

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, et al.,
Petitioners,

v.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent,

and

JOHN TOS, et al.,
Real Parties-in-Interest.

After a Decision of the Court of Appeal,
Third Appellate District
Case No. C075668

Superior Court of Sacramento County
(Case Nos. 34-2011-0113919-CU-MC-GDS and
34-2013-00140689-CU-MC-GDS, Honorable Michael P. Kenny, Judge)

REPLY IN SUPPORT OF PETITION FOR REVIEW

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Petitioner First Free Will Baptist Church (Church) hereby submits the following Reply to the "Answer to Petitions for Review" (Answer) by the California High-Speed Rail Authority, et. al. (Authority). As with Church's Petition for Review (Petition), this Reply deals only with the issues arising from the validation case, *High-Speed Rail Authority v. All Persons Interested* (Superior Court Case No. 34-2013-00140689-CU-MC-GDS) in which Church is a Defendant.

INTRODUCTION

May a California administrative body's authorization of taxpayer-supported bonds be exempt from traditional standards of judicial review for administrative actions? May taxpayers be encumbered with repayment obligations for decades, without the possibility of even the most deferential review to ensure that the bond authorization was not "arbitrary or capricious"?

No California court has ever announced that bond issuances enjoy such exemption—until the ruling below. According to that ruling, when an authorization takes the form of a declaration that it is "necessary or desirable," it is beyond judicial review. (Slip op. at 21.) Because this holding is a first—and because it immunizes from "arbitrary or capricious" review a multi-billion-dollar authorization in "the largest infrastructure project in the State's history" (*see* Authority's Petition for Extraordinary Writ of Mandate at 1), it clearly raises "an important question of law" (*see* Cal. R. Ct. 8.500).

The ruling below also raises an "important question of law" concerning the integrity and application of Cal. Const. art. XVI, § 1 (Section 1), the provision designed to protect taxpayers from being burdened with public debt for purposes that have not been approved by voters or that are otherwise invalid. By ordering validation without analysis of the project to be funded—because the plans are asserted to be in "flux" (Slip op. at 29)—the ruling undermines Section 1's taxpayer-protection purposes. The ruling allows debt to be created *prematurely—i.e.*, prior to any assurance that the project conforms with the will of the voters and the requirements of the law. It preemptively "moots out" any challenge to the creation of debt based on the principles of Section 1, by ensuring that the debt will already have been created before courts will review the project that is to be funded.

The Authority contends that the ruling below, ordering validation, "was unexceptional." (Answer at 7.) In fact, it raises legal questions of exceptional importance, in the context of a project of monumental scope; in sum, it is exceptionally appropriate for review by the state's highest court.

ARGUMENT

I

REVIEW SHOULD BE GRANTED BECAUSE THE RULING BELOW ANNOUNCED, FOR THE FIRST TIME, AN EXEMPTION OF CERTAIN BOND ISSUANCES FROM TRADITIONAL STANDARDS OF REVIEW—AND APPLIED IT TO THE LARGEST INFRASTRUCTURE PROJECT IN CALIFORNIA HISTORY

The Authority characterizes the appellate ruling as "unremarkable." (Answer at 7.) In fact, it was the Trial Court that issued the "unremarkable" decision, applying to a quasi-legislative administrative action the well-settled standard of scrutiny. What was "exceptional" was the appellate court's announcement of a new exemption from scrutiny when bond authorizations that take the form of a finding that a bond authorization is "necessary or desirable." This exemption lacks clear precedent, so review is warranted.

A. The Trial Court's Application of the Well-Settled Standard of Review for a Quasi-Legislative Action Was Unexceptional and Correct

It is a doctrinal principal of administrative law that, for the quasi-legislative actions of administrative bodies, judicial review requires an examination of agency proceedings to determine whether the decision was "arbitrary, capricious or entirely lacking in evidentiary support." *Morgan v. Community Redevelopment Agency*, 231 Cal. App. 3d 243, 260 (1991) (citation omitted). When the High-Speed Passenger Train Finance Committee

(Committee) authorized $8.6 billion in bonds, it was engaging in a quasi-legislative decision. (Slip op. at 23.) Therefore, the Trial Court scrutinized that act by the "arbitrary, capricious or entirely lacking in evidentiary support" standard. Even though it is a deferential standard, the court had to withhold validation because there was no "evidentiary support" for the court to rely on—nothing in the record to tell the court or the public what factors led the Committee to its decision. (HSR21-22.)

B. In Reversing the Trial Court, the Third District Announced a New and Exceptional Proposition That Would Immunize Certain Bond Issuances from Well-Settled Standards of Review

The appellate ruling below announces a new exception to the traditional standard of review for quasi-legislative actions: It exempts such actions—specifically, the major bond issuance under review—from *any* judicial review to the extent they consist of a declaration that the action is "necessary or desirable." (Slip op. at 21.) This would be a "remarkable" holding in any event, but it is particularly so here, with an authorization to encumber taxpayers with billions of dollars in repayment obligations, over decades, as part of "the largest infrastructure project in the State's history." (Authority's Pet. at 1.) The Trial Court reasoned that the doctrinal requirement for supporting evidence was particularly "critical," in view of the "significant fiscal impact" involved. (HSR31: 7-8.) The appellate decision is all the more

startling and "exceptional"—and merits review—because it exempts from review a decision with such tremendous "fiscal impact."

C. Precedent Does Not Support the Proposed New "Necessary or Desirable" Exception to Review for Administrative Actions

As noted, the standard of review for quasi-legislative actions that the Trial Court applied is a *doctrinal* principle of administrative law, cited as a precise formula again and again in the case law. *See, e.g.*, *Carrancho v. California Air Resources Board*, 111 Cal. App. 4th 1255, 1265 (2003) (citations omitted) (citing numerous cases referring to this standard). In contrast, for the supposed "necessary or desirable" exception to this rule, the Third District (Slip op. at 21) and the Authority (Answer at 8) invoke a mere three rulings, none of which propounds a clear principle of any kind. As pointed out in Church's Pet. at 22-23, in two of those cases, the court did not in fact exempt the actions at issue from review for unreasonableness. *See City of Monrovia v. Black*, 88 Cal. App. 687, 688 (1928) (a city's declaration of "necessity" was accepted when supporting evidence was available in public records); and *Perez v. Bd. of Police Comm'rs* 78 Cal. App. 2d 638, 645 (1947) (the challenged resolution could not be reviewed for "wisdom," but it still could not be "arbitrari[y]" or "unreasonable[]"). The third citation—to *Boelts v. City of Lake Forest*—is to dicta in a footnote. But even that language is distinguishable in a fundamental sense, because the court labels a requirement

for a necessary or desirable finding to be, in that particular context, a mere "procedural" matter. 127 Cal. App. 4th 116, 122 (2005). In contrast, the "necessary or desirable" finding in this case was a clearly *substantive* decision, directly authorizing $8.6 billion in general obligation bonds.

Again, the gaping hole in the argument by the Third District and the Authority is the lack of any definitional statement in case law. There is no clearly spelled-out doctrine, transcending individual cases and applicable in all times and all contexts, that defines and explains an exception to judicial review for a "necessary or desirable" finding.

In line with the ill-defined and amorphous quality to the concept, the Authority states that a finding that an action is "necessary or desirable" is "not a factual determination" and therefore is not appropriate for substantial evidence review. (Answer at 8, 11.) This contention does a disservice to any public body that might make such a finding in a responsible way, and distorts the nature of the substantial evidence test. Even if declaring an action to be "necessary" or "desirable" amounts to a policy opinion—as opposed to a measurable calculation—facts still play a role. Opinions and judgments, if rationally arrived at, do not develop spontaneously or by whim (or by throwing darts, flipping coins, or drawing straws). Rather, they are considered responses and conclusions resulting from observing and processing facts. And this is all that the traditional standard of review is concerned with—not re-

measuring a factual calculus, but simply confirming that there *were* factual observations that went into the decision, to ensure it was not "arbitrary or capricious." (*See, e.g.*, *California Hotel & Motel Ass'n v. Indus. Welfare Comm'n*, 25 Cal. 3d 200, 212 (1979): "A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors [and] the choice made.")

D. Precedent Does Not Support Immunizing Quasi-Legislative Administrative Actions from Judicial Review Merely Because the Challenge Comes in the Context of a Validation Proceeding

The Authority contends that the well-settled standard for judicial review of quasi-legislative actions "does not apply in this context"—*i.e.*, in a "validation proceeding." (Answer at 11.) The precedents do not support this attempt to turn validation laws into shields against judicial review. What the validation laws establish is a time frame for review, not immunity from review. While they are designed to promote "speedy and dispositive judgment[s]" (slip op. at 20), the litigation itself does not speed past the clear legal and constitutional standards for assessing legislative and administrative actions.

Indeed, where a government action is subject to validation laws, a "validation action under . . . [Cal. Gov't. Code] sections 860 et seq.," is not "mutually exclusive" with a challenge under other legal theories or statutory frameworks. *Regus v. City of Baldwin Park*, 70 Cal. App. 3d 968, 972 (1977). *Regus* made this observation with reference to a reverse validation action that

was combined with an action under California Code of Civil Procedure Section 526a (*i.e.*, a taxpayer action to enjoin illegal government expenditures). Both actions could be brought to challenge a governmental action if they were filed within the 60-day period for validation lawsuits. *Id.* Moreover, the administrative findings in *Regus* (relating to redevelopment) were evaluated under the very standard the Authority suggests is not available in validation—the substantial evidence rule. *Id.* at 975.

II

REVIEW SHOULD BE GRANTED BECAUSE THE RULING BELOW WEAKENS SECTION 1'S TAXPAYER PROTECTIONS

Section 1 protects taxpayers both by ensuring that the proceeds of debt are spent on a "distinctly specified" "object or work" approved by voters—*and* by barring the *creation* of debt in the first place if it is not for a distinct, voter-approved purpose. Specifically, major state debt shall not be "creat[ed]" "*unless* the same shall be authorized by law for some single object or work to be distinctly specified . . . ." (Section 1, emphasis added.)

The ruling below weakens these taxpayer protections, by undermining the ability of taxpayers to enforce them through timely litigation.

A. Section 1's Historic Purpose Is To Prevent Ill-Considered Debt Issuances, as Much as To Prevent Invalid Expenditure of Proceeds

From the outset, a core purpose of Section 1 has been to *prevent* debt from being created unless a valid, voter-authorized purpose was first distinctly identified. *Westbrook v. Mihaly*, 2 Cal. 3d 765, 774 n.5 (1970) (vacated on other grounds, 403 U.S. 915 (1971). The 1849 Constitutional Convention erected this protection out of alarm over the reckless creation of debt by a number of Eastern states, for ill-considered expenditures involving such projects as "*railroads*, turnpikes, and canals." *Id.* (emphasis added).

B. The Ruling Below Prevents Taxpayers from Enforcing Section 1's Protection Against the Ill-Considered Creation of Debt

Church's Petition for Review (at 20-24) outlines how the appropriations already enacted for bond proceeds, through SB 1029, can and should be measured against Proposition 1A for fidelity to the High-Speed Rail project outlined there. However, even if one were to stipulate, for argument's sake, that it is too early to assess the current project's compliance with Prop. 1A, because "the design . . . remains in flux . . . " (Slip op. at 29), the proper response is *not* to order that the bonds be validated and taxpayers saddled with repayment obligations spanning decades. The ruling below commands precisely what Section 1 forbids: the "creat[ion]" of debt before it has been determined that the proceeds will be used to fund an "object or work" that has

been "distinctly specified"—and has been approved by voters in the form as "specified." Moreover, the ruling has the effect of postponing any taxpayer attempt to enforce Section 1's protections against invalid debt until *after* the debt has been created! No litigation to invoke Section 1 is permissible, under the Third District's time line, until litigation over the sale of bonds would be moot—*i.e.*, until after they have been validated and sold, and taxpayers are required to take up the decades-long burden of repayment. The ruling asserts that a Section 1 challenge over the use of proceeds is "premature." (Slip op. at 1.) In fact, it is *validation* that is premature, if the purpose for which bond proceeds will be used cannot yet be "specified," because it is in "flux."

C. The Authority's Warning Against "Delay[ing]" the Project Contradicts the Case for Delaying a Section 1 Challenge to the Project

The Authority warns that "[r]eview by this Court would serve only to further delay this important infrastructure project." (Answer at 16.) Of course, this is not a valid legal argument against taking review. However, it does have relevance to the legal issues. It is in tension—instructively so—with the holding below that a use-of-proceeds challenge is premature. The Authority's claim of a need for speed in this litigation implies bond validation is needed *now,* that it *can't wait.* But why would this be so, if the project is still in "flux" and there is no way to know, now or in the near future, how precisely the

money will be spent? If the bond money is needed now, then the use of that money can and should be subject to analysis, now, for its constitutionality—and the constitutionality of the bonds for which such expeditious validation is sought.

The one area in which "delay" will be countenanced if review is not taken, is in the right of taxpayers to invoke Section 1's protections against debt incurred without a clear project in view. Under the Third District's ruling, taxpayers' right to challenge the invalid issuance of bonds, will be delayed until after the bonds have been validated and issued. In effect, that right will be destroyed. This Court should take review to consider whether such a "mooting out" of a constitutional right and taxpayer protection is permissible.

CONCLUSION

For the foregoing reasons, Church respectfully requests that this Court grant the Petition.

DATED: October 2, 2014.

Respectfully submitted,

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By _____
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing REPLY IN SUPPORT OF PETITION FOR REVIEW is proportionately spaced, has a typeface of 13 points or more, and contains 2,356 words.

DATED: October 2, 2014.

_____

HAROLD E. JOHNSON

DECLARATION OF SERVICE BY MAIL

I, SUZANNE M. MACDONALD, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

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which envelopes, with postage thereon fully prepaid,were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 2nd day of October, 2014, at Sacramento, California.

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SUZANNE M. MACDONALD