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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, et al.,

Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, et al,

Defendants.

CASE NO. 34-2011-00113919

PLAINTIFFS' TRIAL BRIEF, PART II: CLAIMS FOR CCP 526a TAXPAYER STANDING RELIEF TO PREVENT ILLEGAL EXPENDITURES OF PUBLIC FUNDS; FOR DECLARATORY RELIEF; AND FOR INJUNCTIVE RELIEF

Trial Date: May 31, 2013

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I.

INTRODUCTION

This lawsuit does not represent a political attack on the high speed rail project as an unwise step for California. Instead, the suit has a much more narrow focus: that it would be illegal to proceed with construction of the high speed rail project (HSR Project) because the Authority has violated numerous of the safeguards, restrictions and prohibitions crafted by the Legislature in AB 3034, the provisions of which were inserted into Proposition 1A; the Legislature then placed Proposition 1A on the ballot, as an initiative (which the Legislative can do), and the voters approved it, making it a voter-passed initiative. As this brief will demonstrate, a vote-passed initiative must be liberally construed in favor of the intent of the voters, and any deviation from that intent by the Authority is subject to strict scrutiny. The safeguards, restrictions and prohibitions in Proposition 1A are elaborate and extensive. Why? Because the Legislature wanted to prevent, at all costs, financial exposure to the State typically resulting from mega-public works projects. The Authority has willfully violated that intent, the State faces great financial risks because of these violations and, therefore, the courts are the last resort to make the Authority comply with the law. Construction of the HSR project cannot commence because of these violations.

II.

PROCEDURAL BACKGROUND

This case is a challenge to the financing of the California High Speed Rail Project from the $9,000,000,000 bond fund established by Proposition 1A (passed by the voters in November, 2008). The focus is therefore whether the providing of bond funds is legal. The Second Amended Complaint alleges at least 10 separate violations of Proposition 1A; most of them, standing alone, would preclude the use of any of the $9,000,000,000 to fund the High Speed Rail Project in the Central Valley or elsewhere.

The case is a "mixed" or hybrid action: part of the case is for writ of mandamus/prohibition; the rest of the case seeks to prevent illegal expenditures of Proposition 1A/public funds, and such a cause of action is authorized by C.C.P. § 526a which gives California

taxpayers standing to "prevent the illegal expenditure of public funds." The plaintiffs allege that if the High Speed Rail Authority (Authority) is provided with bond funds, this would result in an illegal expenditure of those public funds in light of the 10 illegal violations of the requirements and restrictions placed by Proposition 1A on the use of bond funds. The cause of action for illegal expenditure of public funds (C.C.P. § 526a) is joined with causes of action for declaratory relief, and this is proper under California law. There is also a claim for a permanent injunction, and in the event that the Court rules that Proposition 1A has been violated, it would be appropriate to enjoin any effort by the Authority to commence construction, since to do so would involve the illegal expenditure of public funds. The Authority does plan to commence construction in the summer of this year (2013).

Several months ago, this Court held an informal, telephonic case management conference. At that time, the Court was generally informed of the nature of the action; the Court indicated that it would try "legal issues" first and then see what developed after that and the decisions on such legal issues. The plaintiffs are generally satisfied with that approach, although we did express a desire for at least an advisory jury on certain factual issues, and that continues to be our position. The right to an advisory jury will be briefed below; plaintiffs have already (several months ago) posted jury fees and lodged their demand for a jury trial. The plaintiffs are prepared to go to trial on the issues raised in this trial brief, Part II, immediately after the trial of Part I (the writ issues). This Court has to be concerned about the one final judgment rule, since even if plaintiffs win on the writ claims, probably the 526a claims have to be decided as well; and vice versa, if plaintiffs lose on the writ claims, that decision is not necessarily collateral estoppel on the claims in Part II of this case, and those issues (which could be determinative in favor of plaintiffs) must be resolved and tried.

An advisory jury on certain issues of fact (discussed below) will not result in an inordinately long trial, and oral witnesses and evidence will be presented. It would be anticipated that the advisory jury would simply answer certain questions (special interrogatories), and the Court would then take the answer to the questions and make a legal ruling as to whether the answers given by the jury establish a violation of Proposition 1A.

If the Court refuses to allow an advisory jury, then plaintiffs are prepared to go to trial, first, on certain mixed legal issues, and secondly, on issues that involve questions of fact, with the Court to resolve those issues as well (although plaintiffs preserve the right to object that a jury is not deciding such questions of fact). The "evidence" in this court trial of issues of fact and certain mixed issues of law will involve the evidence as attached to this brief, Part II, in the form of numerous declarations from expert and percipient witnesses. Plaintiffs also reserve the right to request that certain of the witnesses present oral testimony during this court trial on issues of fact.

The following is plaintiffs' view of what are "legal" issues and what issues involve questions of fact:

Legal Issues:

Most of the legal issues will be tried in Part I of the case (the writ claim). They concern, but are not limited to, issues as to whether a proper usable segment is to be constructed; whether the funding for such a usable segment is inadequate; whether the requirements of environmental compliance have been violated; whether various misrepresentations were made to the voters in the ballot papers.

Some, but not all, such legal determinations may affect plaintiffs' remaining claims in Part II (the 526a declaratory and injunctive relief part of the case). That remains to be determined.

Issues Involving Questions of Fact (Either Reserved for Advisory Jury or for the Court, in the Event a Jury is Denied):

The following issues are not legal issues, but involve disputes of fact:

- Will a state, local, or federal subsidy for operating costs be required? Related to this issue are issues of the Authority's projections for revenue, costs, profits, and ridership.
- Will a non-stop, express high speed train be able to make the trip from Los Angeles to San Francisco (or vice versa) in two hours and 40 minutes, as promised to the voters in Proposition 1A?
- Will the Los Angeles to San Francisco passenger (or vice versa) have to change trains before reaching the final destination?

Mixed Questions of Law and Fact:

- Plaintiffs will present evidence of the intent of the voters and the intent of the Authority and the Legislature with respect to the scope and framework of the Project, and whether the Authority's plans and conduct violate that intent and, therefore, violate Proposition 1A.
- Related issues as to whether the Authority and the Legislature can seek to alter a voter-enacted bond initiative together with the issue of whether this is unconstitutional.

Supplemental Issues Related to Writ in this Part II of the Case:

- The writ claims are by law limited in scope; most of them pertain to matters that were before the Authority at a certain period of time, were considered by the Authority, and whether their decisions were legal, based upon the material before them at that time. However, Part II of the case is not so limited, and the conduct of the Authority with respect to certain writ matters may still be illegal, based upon subsequently-occurring evidence.
- In this brief, Part II, we will update the Court on the environmental compliance issue, demonstrating that as of now, the non-compliance that existed when decisions were made by the Authority still continues to exist and is ongoing.
- We shall also update the Court on the funding situation, that as of now, the funding situation has remained the same and that the hopes for a new form of funding (cap and trade) has evaporated.

These matters were not before the Authority in November, 2011, and April, 2012, when the decisions pertinent to the writ were being made. But these facts are highly relevant as to whether compliance with the law (Proposition 1A) exists and whether construction should be allowed to start.

Conduct of the 526a/Declaratory Relief/Injunction Part of the Case:

As stated above, there will be a request for an advisory jury on issues involving fact questions. We have no assurance that the Court will grant our request; therefore, the bulk of our evidence will be presented through declarations from expert witnesses and percipient witnesses and those Declarations are attached to this brief. We have no intention of using all of these

people as oral witnesses, but in the event that the Court acts as the "fact" finder, there are some of these witnesses whom we would like to present before the Court in oral testimony. This should move the process along.

This brief will also contain a request for judicial notice of numerous documents, things, videos, etc., – most of which are of public meetings, Authority meetings, official state agency reports concerning the project, and similar material. Such material will be referred to in the brief and in the declarations. For the convenience of the Court, plaintiffs will reduce their request for judicial notice to a CD and in the written Request for Judicial Notice, we shall also endeavor to cite the links to the documents for the convenience of the Court. This will avoid an undue accumulation of paper.

Difference Between the Writ Claims and the 526a/Declaratory/Injunction Claims:

Even though both the writ claims and the 526a/declaratory/injunction claims may involve some of the same alleged violations of Proposition 1A, writ claims and the 526a claims are significantly different: writ claims are largely limited to a discrete period of time and focus on information that was before the Authority and considered by the Authority at the time that it made its critical decision. The scope of the 526a, etc., claims is not so limited, and all evidence, gathered at any time, so long as it is relevant, can be presented to demonstrate the illegality of the Authority's acts. The individual act is either legal or illegal, and all relevant evidence should be admissible on that point. Furthermore, declarations are ordinarily not allowed in writ proceedings; there is no such restriction with respect to a 526a/declaratory/injunctive relief claim, and the declarations constitute "evidence" to support the allegations of illegality. The "record" in a 526a/declaratory/injunction relief claim is much broader is scope. In addition, the proof standards as between a writ claim and a 526a claim are quite different; a decision against plaintiffs on an individual writ claim will not be collateral estoppel on the 526a claim by reason of these differences and proof standards (abuse of discretion, substantial evidence, preponderance of the evidence test, etc.). A colloquial example: The O.J. Simpson case, wherein Simpson was acquitted in the criminal case, but this had no effect upon the civil action for wrongful death (where he was found liable) due to the lesser burden of proof in a civil case. Here again, there

"may" be a higher standard of proof for plaintiffs to satisfy in the writ claim, while only a preponderance of the evidence claim is necessary in the 526a/declaratory/injunction claim. There may be certain issues in the 526a claim on which the Authority has the burden of proof, proving that no state, local or federal subsidy will be required for operating costs, for example.

For this reason, and for the convenience of the Court, the briefing has been separated into two parts: the first part deals with the writ claims; the second with the 526a/declaratory/injunction claims. We hope the Court will find this permissible, for there appears to be no definitive answer in the Rules of Court for Sacramento County, or the Rules of Court for this particular department. The rules do allow for transfer of this case to Department 31 because the case involves, in addition to writ claims, non-claim claims. Writ papers are limited to 50 pages; there appears to be no limit for a "trial brief" as to what will be allowed on the 526a, etc., claims which, as stated above, are quite distinct from the writ claims with a much broader spectrum of evidence to be presented.

III.

PLAINTIFFS ARE ENTITLED TO A JURY TRIAL ON CERTAIN FACTUAL ISSUES UNDERLYING WHETHER ILLEGAL EXPENDITURES HAVE OCCURRED OR ARE THREATENED AND WHETHER MANDATORY PROVISIONS OF PROPOSITION 1A HAVE BEEN VIOLATED

California Constitution, Article I, Section 16, guarantees the right to a jury trial in civil actions; this is codified in C.C.P. § 592. We are fully cognizant of the fact that this Court may consider the present action as an action essentially in equity, since the claim is based upon 526a, joined with declaratory relief and injunctive relief. However, courts have allowed juries to hear similar cases when an equitable claim has been substituted for a legal claim. (See, *Escamilla v. California Insurance Guarantee Association* (1983) 150 Cal.App.3d 53. Also see the recent case of *Enten v. Provident Life and Accident Insurance Company* (2012 DJDAR 11518 (August, 2012) for an extensive discussion, with the court authorizing jury trial on factual issues).

Plaintiffs are not requesting a full-fledged jury trial, but are instead simply requesting an advisory jury on the fact questions underlying the claims of illegality. Such an advisory jury has been held to be proper. (See, *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156.) Plaintiffs

acknowledge that such findings by an advisory jury are advisory only and not binding on the Court. (*ACCO v. Security Pacific National Bank* (1985) 173 Cal.App.3d 467, 474).

As stated above, in section I, the plaintiffs claim that factual questions exist with respect to numerous issues of illegal conduct and illegal expenditures under Proposition 1A.

IV.
THE C.C.P. § 526A CLAIM FOR ILLEGAL EXPENDITURE OF PUBLIC FUNDS HAS BEEN DEMONSTRATED; A C.C.P. § 526A CLAIM MAY ALSO APPROPRIATELY BE JOINED WITH CLAIMS FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF. STANDING HAS ALSO BEEN FOUND TO EXIST, AND ALL DEFENDANTS ARE PROPERLY SUED.

This is a taxpayers standing suit under C.C.P. § 526a, joined with claims for declaratory and injunctive relief.

Standing on the part of all plaintiffs, public and private, has been found to exist; also that the State and its agencies are subject to suit under section 526a [see, *Central Valley Chapter of Seventh Step Foundation, Inc. v. Younger* (1979) 95 Cal.App.3d 212.] Judge Robert Hight so ruled in this action on June 22, 2012. That ruling has not been challenged by the defendants.

It is also clear that, as far as the State, state agencies, and state officials are concerned, they may be sued in C.C.P. § 526a actions. See *Central Valley Chapter of Seventh Step Foundation, Inc. v. Younger* (1979) 95 Cal.App.3d 212. Furthermore,

> "Although plaintiff parents bring this action against state, as well as county officials, it has been held that state officials, too, may be sued under section 526a." [Citing *Serrano v. Priest*, 5 Cal.3d 584, 618, footnote 38]

The Supreme Court in *Stanson v. Mott* (1976) 17 Cal.3d 206, 227-233, also stated the following:

> "If a taxpayer can demonstrate that a state official did authorize the improper expenditure of public funds, the taxpayer will be entitled at least to a declaratory judgment to that effect. If he establishes that similar expenses are threatened in the future, he will also be entitled to injunctive relief." Stanson, supra, at page 223.

In the present case, to be noted is the fact that not only is the Authority sued, but also individual defendants, and according to the Supreme Court language, if they participated in authorizing the improper expenditure (which all of them did because of their unique role to play

in implementing Proposition 1A) they are subject to suit.

C.C.P. § 526a has been around since 1909. Commonly known as the Taxpayers Standing Statute, the statute is to be construed liberally in favor of its remedial purpose. *Blair v. Pitchess* (1971) 5 Cal.3d 258. As the Supreme Court stated in *Blair*,

> "The primary purpose of Section 526a . . . is to enable a large body of the citizenry to challenge governmental actions which would otherwise go unchallenged in the courts because of the standing requirement." Blair at p. 267.

Additionally, when taxpayers sue under C.C.P. § 526a and request declaratory relief, an "actual controversy" is presumed to exist, eliminating the requirement for proving "case or controversy." Stated another way, plaintiffs suing under § 526a automatically satisfy the actual controversy requirement. *Van Atta v. Scott* (1980) 27 Cal.3d 424, at page 450:

> "Since § 526a authorizes taxpayer suits for declaratory relief, the further contention that this suit lacks justiciability because plaintiffs have not satisfied the actual controversy requirement, C.C.P. § 1060 [the declaratory relief statute] must also fail. An action such as this one, which meets the criteria of § 526a satisfies case or controversy requirements." *Van Atta*, at page 450.

Therefore, it is clear pursuant to California Supreme Court decisions that it is proper for a C.C.P. § 526a action to be joined with a declaratory relief claim. *Van Atta*, *supra, Stanson v. Mott*, *supra*. Also see, *Cates v. California Gambling Control Commission* (2007) 154 Cal.App.4th 1302, 1308 [citing *Van Atta*, *supra*]. Also see, to the same effect, 4 Witkin, California Procedure, (5th ed., 2008 and 2012, supplement) Actions, section 162.

An action under C.C.P. § 526a is given special dignity by law since it takes precedence over all other civil actions on the court calendar except those given precedence by law.

A suit under § 526a is authorized where the governmental agency in question "has a duty to act and has refused to do so." *California Association for Safety Education v. Brown* (1994) 30 Cal.App. 4th 1264, 1281. In the present case, numerous specific violations of Proposition 1A are alleged to have already occurred or are threatened to occur. The taxpayer is entitled to challenge whether a mandatory duty was carried out or not. See, *Cates v. California Gambling Control Commission* (2007) 154 Cal.App.4th 1302, 1310.

When a plaintiff proves that a mandatory duty has been breached, relief is in order. See, *Brown*, 30 Cal.App.4th at 1281; *Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, at 310.

Summary: Plaintiffs will prove that various provisions of Proposition 1A, AB 3034, the Streets and Highways Code, and the Public Utilities Code (all statutes implementing Proposition 1A and AB 3034) have been violated; declaratory and injunctive relief should be provided.

V.

THE DEFENDANTS HAVE VIOLATED THE ENVIRONMENTAL REQUIREMENTS OF PROPOSITION 1A; THEY NEVER OBTAINED PROJECT LEVEL ENVIRONMENTAL CLEARANCES ON THAT PORTION OF THE CORRIDOR WHICH THE DEFENDANTS IDENTIFIED AND CHOSE AS THEIR USABLE SEGMENT

Preliminary Note:

The non-compliance with environmental requirements of Proposition 1A has been extensively briefed in Part I having do with the writ claims. The purpose of this Section IV is to update the Court on current evidence pertaining to non-compliance with environmental requirements.

New Evidence:

Writ claims may be limited in scope to matters that were before the Authority, in point of time, when critical decisions were made and whether those decisions were adequately supported in law.

But the 526a et al. claims are not so limited. If evidence at the time of this trial demonstrates that environmental non-compliance with Proposition 1A has occurred or is still occurring, then judgment should be entered in favor of plaintiffs. This is therefore an example of where a favorable decision for the defendants on the writ claim does not collaterally estop plaintiffs from prevailing on the 526a et al. claims.

The critical evidence is found in the Declaration of Jason W. Holder, (Exhibit M), a competent and experienced California environmental attorney, who frequently litigates CEQA claims, and is currently involved in a major CEQA claim against the Authority. He is well-acquainted with the geographical area that is the subject of the present suit (Merced to Los

Angeles). He is well-acquainted, has researched, analyzed and downloaded all of the information pertaining to the environmental compliance requirements of Proposition 1A, which does require that (even before submission of the Funding Plan in November, 2011) all project level environmental clearances for the usable segment (Merced to Los Angeles) have been completed.

The Holder Declaration contains some remarkable evidence, namely, a virtual complete lack of compliance with the many environmental clearances that must be completed as of the present time. The relevance of this, of course, is that the Authority plans to start construction six weeks after the trial of this case! Legally, construction cannot start until all the proper environmental clearances have been completed, and that is impossible to achieve.

Here are the highlights of the Holder Declaration:

- A study of the instances of non-compliance is made easier by examining the table set forth in Exhibit 13 attached to the Holder Declaration.
- The portion of the corridor that the Authority proposes to build on (the ICS) runs from roughly Merced to Fresno. Uniquely, this 130 mile segment (the ICS) is a part of two separate sections, namely, Merced to Fresno (sometimes called M-F) and Fresno to Bakersfield (F-B).
- Because Merced to Fresno and Fresno to Bakersfield are two separate geographical sections, it doubles the number of environmental permits/approvals that must be obtained for the 130 mile ICS (different local agencies, regional agencies, etc.).
- Therefore, the ICS is required to have completed approximately 50 project level environmental clearances.
- The Holder Declaration indicates that they have completed only approximately 10 (about 20%).
- But the non-compliance saga is far from finished. There is the remainder of the "usable segment" (which goes all the way from Merced to Los Angeles). The remainder includes the Bakersfield to Palmdale section (B-P) and the Palmdale to Los Angeles section (P-LA).
- The Holder Declaration indicates that nothing has been done on these two sections, which likewise require approximately 50 permits/approvals. This is two-thirds of the usable

segment, not an insignificant portion.

This, therefore, is an update to the Court of information concerning current compliance with environmental requirements, which is a strict requirement of Proposition 1A. No construction can commence without such compliance. If the Authority is unable to demonstrate on May 31, 2013, that it has completed all project level environmental clearances for the Merced to Los Angeles usable segment, then judgment must be entered for the plaintiffs and commencement of construction must be enjoined.

As part of this section of the brief, we are requesting that the Court take judicial notice of various environmental documents that Mr. Holder has attached to his declaration; those will be burned into a DVD for the convenience of the Court. They demonstrate the areas of compliance and the areas of non-compliance.

Introduction:

This issue, compliance with the environmental requirements of Proposition 1A, is largely covered by attorney Stuart Flashman in the writ brief, Part II. He argues that (1) Streets and Highways Code § 2704.08(c)(2)(K) requires that, with respect to the usable segment, the Authority must certify that it has completed all project level environmental clearances, and that this requirement must be fulfilled before the Authority submits its Funding Plan to the Director of Finance and to the Legislature (the Funding Plan was so submitted in November 2011). Mr. Flashman further argues that this was not done. (2) Instead, the Authority did not even comply with the certification requirements, since it stated that it would, in the future, and before construction commenced, obtain the necessary environmental clearances. (Scarcely the fulfilling of a mandatory requirement in the statute that this be done before the submission of the Funding Plan, which is now one and a half years ago.) (3) Mr. Flashman further argues the statute and the certifications do not contemplate doing something the future, but require the completion and obtaining the required clearances before setting the wheels in motion for approval of plans to commence construction. All of this is consistent with the paramount policy of Proposition 1A – to spare the State from financial risk – and to require that the Authority have all of its "ducks in line," all of its approvals in place, before the ultimate step of asking for the Legislature to

appropriate funds for the construction. None of this was done, subjecting the Authority to a writ of mandate/prohibition.

The purpose of this section of the brief is to demonstrate that at the present time, the Authority is woefully non-compliant with the environmental clearance requirements, and there is virtually no chance that this will be accomplished before construction commences.

The Court should review the Declaration of attorney Jason W. Holder, who is an environmental lawyer and expert. In connection with that Declaration, the Court should also take note of the Request for Judicial Notice filed by attorney Brady (for the plaintiffs) with the request that the Court take judicial notice of numerous public documents filed by the Authority in connection with environmental compliance and other public documents related thereto. In a nutshell, this Declaration and these documents indicate the following:

- For the usable segment, running from Merced to Los Angeles, County, there are some 17 local, federal, state and regional agencies that have to "sign off" with environmental clearances; the Authority has currently satisfied about three of them.
- Even with respect to the 130 mile ICS [which the Authority may claim is a usable segment] the same degree of non-compliance exists.

This is an overwhelming demonstration of failure to comply with the mandatory provision of Proposition 1A. The Legislature full and well knew how difficult it was to satisfy these requirements; this is why they required compliance before setting the legislative wheels in motion for appropriation of funds for construction.

The material contained in attorney Holder's declaration and the matters subject to judicial notice are being placed before the Court so that the Court will see, in the real world the incompetent planning and management on the part of the Authority, five years after the enactment of Proposition 1A and only weeks before it wishes to commence construction. Construction cannot be allowed to start because of these violations. Furthermore, given the complicated nature of the compliance requirements, there is virtually no chance that the Authority, given its long track record of delay, will be able to secure the "completed project level environmental clearances" for years to come.

An injunction should therefore issue to prevent the imminent start of construction (which the Authority says will be in July of this year).

VI.

PROPOSITION 1A PRECLUDES A STATE, LOCAL, OR FEDERAL SUBSIDY FOR OPERATING COSTS ON THE USABLE SEGMENT. THE CENTRAL VALLEY PROJECT WILL REQUIRE SUCH A SUBSIDY, AND THEREFORE, IT IS INELIGIBLE TO RECEIVE PROPOSITION 1A BOND FUNDS.

Section 2704.08(c)(2)(J) requires the Authority to certify that, "The planned passenger service by the Authority in the corridor or usable segment thereof will not require a local, state, or federal operating subsidy."

Plaintiffs contend that with respect to this issue, since the statute is phrased in the negative (the Authority must certify that the usable segment will not require an operating subsidy), the Authority has the burden of proof.

The overwhelming weight of the evidence supports the proposition that an operating subsidy will be required for the first usable segment and all usable segments thereafter.

The analysis is not complex: In order to decide whether an operating subsidy will be required, revenues are measured against costs; if costs exceed revenues, then a subsidy will be required. Ridership on the system is an integral part of the revenue analysis, and ridership will be discussed in a separate section, *infra*. If the ridership numbers provided by the Authority are suspect and without foundation, then its revenue projections fail, and a subsidy will be inevitable.

However, in this section, we shall assume that the Authority's revenue projections are in the proper range, and the focus will be on the costs.

Preliminarily, common sense and empirical experience demonstrate that throughout the world, virtually all high speed rail systems receive heavy government subsidies.[1] Even the Governor of California conceded that it is virtually a joke for people to think that railroads are not subsidized. Governor Brown said in a radio interview, "You don't think the freeways are run

[1] See Exhibit G, Declaration of Adrian Moore, ¶ 28 [citing to congressional study, Congress Research Service, CRS, p. 11, ¶ 28, fn xiv, Proposed RJN 033]; also see Exhibit F, Declaration of Randal O'Toole, ¶ 7; Exhibit C, Declaration of William Grindley, ¶ 16, fn 23, 33, 71, 75, 86, 91-92; also see Exhibit B, Declaration of Wendell Cox, ¶¶ 29, 30.

with subsidies? The airports are run with subsidies. Come on. It costs money."[2] [Responding to Larry Elder in a program on whether the high speed rail train would operate without a subsidy.]

In the United States, all passenger rail service operates with large government subsidies and has for many decades. Amtrak is a prime example.[3] There are only two lines in the world (Paris to Lyon, and Tokyo to Osaka) which purportedly operate at a profit (and European and Asian railroad accounting systems are interesting as far as what a true profit[4] is).

The Issue of Revenues:

In this case, the Authority initially told the voters that it was going to charge $50 for a one-way ticket from San Francisco to Los Angeles. This has now been raised to $81 (which raises another issue about misrepresentation to the voters, discussed, *infra*). But the Authority had already decided to charge a number in excess of $100 (bait and switch, given the 2008 $50 representation to the voters), when it was brought to their attention that this would make HSR noncompetitive with the airlines, they therefore reduced the fare to $81.

An $81 fare works out to about 23¢ per passenger mile in revenue.[5] This concept of "per passenger mile" is the measure of financial performance for passenger rail and airline operation set by the Department of Transportation.[6]

In reality, the Authority is "stuck" at that rate, since to charge higher prices makes them uncompetitive, resulting in loss of ridership, thus resulting in loss of revenue and pushing them

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[2] See Proposed RJN 141. The interview begins at the six minute mark at http://www.larryelder.com/pg/jsp/charts/audioMaster.jsp?dispid=301&pid=59845. See Exhibit E, Declaration of William Warren, ¶ 19, fn 48. This is also an admission by the Governor, who is a party to this lawsuit, therefore resolving the hearsay issue.

[3] See Exhibit C, Declaration of William Grindley, ¶ 39, fn 129, regarding existing California subsidies and the CHSRA planned pricing; also see Exhibit F, Declaration of O'Toole, p. 3, ¶ 6, summarizing testimony before infrastructure committee indicating Amtrak subsidies are almost as great as the fares themselves, with Amtrak receiving subsidies of 29¢ per passenger mile.

[4] See Exhibit G, Declaration of Adrian Moore, ¶ 28, fn 14, 45; also see Exhibit C, Declaration of William Grindley, ¶ 16, fn 23 and ¶75, fn 163, 164, 165; also see Exhibit B, Declaration of Wendell Cox, ¶ 29, citing references to Congressional Research Service (CRS) report and a World Bank report making the same point. Also see Exhibit F, Declaration of Randall O'Toole, ¶ 7, fn 2 and ¶8, fn 5, 6; also see Exhibit J, Declaration of Robert Poole, ¶ 7, fn 2-11; a discussion of differences between U.S. and European accounting methods of profitability is found in Exhibit C, Declaration of William Grindley, ¶¶ 76-90.

[5] See Exhibit E, Declaration of William Warren, ¶ 10; also see Exhibit C, Declaration of William Grindley, ¶ 66, fn 147.

[6] See Exhibit E, Declaration of William Warren, ¶ 5, fn 4; also see Exhibit C, Declaration of William Grindley, ¶ 66, fn 146; also see Exhibit B, Declaration of Wendell Cox, ¶ 5.

into the subsidy column. Therefore, the issue of revenue, unless ridership numbers are fatally flawed [which they are], can be accepted, *arguendo*, at the 23¢ per passenger mile range. The experience of Acela with respect to revenue is most interesting: Acela's fare charge per passenger is approximately 70¢ per passenger mile, 300% more than the Authority's 23¢ charge per passenger mile.[7] But Acela can get this large price because of their demographics and, therefore, does not incur a subsidy. Acela, operating on a northeast corridor, deals with a different geographic region, densely populated, with many large cities close together and with elaborate inter-city infrastructure. It is an expensive rail service designed for the well-to-do business passenger.[8] The fact is that the Authority can never afford to charge these kinds of fares since that would make non-competitive with airlines, driving down its ridership and pushing it into a subsidy situation.[9]

Finally, on this subject, the Authority was presented with a letter from the International Union of Railroads (UIC) in the year 2011.[10] This indicated that generally, revenues and costs internationally were in the 40-55¢ per passenger mile range – roughly equal. But this is scarcely good news for the Authority since the Authority finds itself in a position of being locked in at 23¢ per passenger mile, and if the costs (according to the UIC) should be in the 40-50 range, the subsidy is guaranteed.[11]

Costs:

The real controversy has to do with the costs projected by the Authority. Their figure is 10¢ per passenger mile![12] On its face, this looks ridiculous, given that the average for international high speed rail operation is 40¢ to 50¢ passenger mile, which is four to five times

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[7] See Exhibit E, Declaration of William Warren, ¶ 12, fn 23; also see Exhibit C, Declaration of William Grindley, ¶ 68.

[8] European riders are also known to be wealthy or charging the fares on business expense accounts. See Exhibit C, Declaration of William Grindley, ¶ 91, fn 96.

[9] See Exhibit E, Declaration of William Warren, ¶ 10, fn 25, commenting on the "To Repeat" report; this report also discusses the California marketplace, section 1 of the report, figure 1-3; also see Exhibit C, Declaration of William Grindley, ¶ 68, fn 150 and ¶ 69, fn 151.

[10] See Exhibit E, Declaration of William Warren, ¶ 15, fn 45.

[11] See Exhibit E, Declaration of William Warren, ¶¶ 8, 10 and 11.

[12] See Exhibit E, Declaration of William Warren, ¶¶ 10, 11, 12, 14, 15, 16, 18, 19, all discussing the findings of the "To Repeat" report, *supra*. Also see section 2 of that report, including Figure 4, for an excellent summary of the cost issue; also see Exhibit C, Declaration of William Grindley, ¶ ¶ 71, 72.

higher than the Authority's.[13] For example, see the Declaration of William Grindley, Exhibit C, citing a well-regarded paper that he wrote on the subject, citing the International Union of Railways, which paper was sent to the Authority; also see the Declaration of Wendell Cox, Exhibit B, attached hereto, for an extensive discussion of the international and American cost figures as being vastly higher than the Authority's cost figures. [Cox Declaration, Exhibit B.] The Peer Review Group in this case has criticized the Authority for not considering Acela, the Boston to Washington train service, which is the closest thing to high speed rail that the United States currently has.[14] No wonder: Their costs are 62¢ per passenger mile – six times higher than the Authority's projected costs![15]

These figures of 10¢ per passenger mile, in the face of international and American experience, make the Authority's figures appear ridiculous and beyond reason. They should be rejected on their face. What the Authority has done is take revenues, over which they have no control (because of competition with the airlines) and then pick a cost figure out of thin air, so as to show a 50% profit.[16] The LAO was so distressed with the situation that he simply picked a figure of 30¢ per passenger mile representing Authority costs, and of course, that would create a subsidy (since revenues are at 23¢).[17]

Also to be noted is that the Authority plans to build a conventional rail system on the 130 mile ICS and then turn it over to Amtrak to operate. But the San Joaquin Amtrak, currently operating, has revenues of $20,000,000 and costs of $48,000,000, resulting in a huge subsidy. How does the Authority prove that that is likely to change (to a profit for the Authority), given the entire history of Amtrak's operations? An operating subsidy is inevitable, and the Authority is unable to disprove this. As stated, *supra*, this probably explains why the Authority never chose

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[13] See Exhibit E, Declaration of William Warren, ¶¶ 10, 11; also see Exhibit G, Declaration of Adrian Moore, ¶ 30; also see Exhibit C, Declaration of William Grindley, ¶¶ 70-72. Also see Exhibit H, Declaration of Professor James Moore (USC), ¶¶ 11-15. Also see an extensive discussion of the international and American cost figures as being vastly higher than the Authority's cost figures. Also see Exhibit B, Declaration of Wendell Cox, ¶ 50; also see Exhibit C, Declaration of William Grindley, ¶ 83, fn 182 and 183.

[14] See Exhibit E, Declaration of William Warren, ¶ 18.

[15] See Exhibit E, Declaration of William Warren, ¶ 4; Exhibit C, Declaration of William Grindley,¶ ¶ 4, 68.

[16] See Exhibit E, Declaration of William Warren, ¶ 4; Exhibit C, Declaration of William Grindley,¶ 4.

[17] See Exhibit E, Declaration of William Warren,¶ 11, including fn 28-30, citing a March, 2012, report he co-authored regarding the need for a subsidy and the response to this report by the LAO and the CHSRA.

the 130 mile ICS as the "usable segment" since it would be extremely difficult to demonstrate that this would not require a local, state, or federal subsidy. See the Declaration of William Grindley, Exhibit C, discussing statements by Dan Richard and Hans Van Winkle, officials of the Authority, in public meeting, admitting that the 130 mile ICS was a money loser and that they never bothered to do a ridership study there because of that fact. If any "portion" were ever destined to require subsidy, it would be that ICS!

A very revealing exchange took place between Authority officials (Hans Van Winkle and then-Chairman Kurt Pringle) at the Authority Board meeting of July 14, 2011, concerning agenda item number 7, "Initial Operating Segment." Hans Van Winkle stated to the Board:

> "[With respect to Merced to Bakersfield] we're not calling it an IOS, we're calling it an extended ICS because in all likelihood, we don't think that the revenue projections with associated costs would make a viable system."[18]

Later, Chairman Kurt Pringle stated the following:

> "An IOS is the initial segment in which we can operate the high speed train. We've got to the initial construction segment. That's where we are spending money but we understand we cannot operate independent high speed service with the ICS to make enough money to pay for the operation. So our next determine is to try to figure out where that initial operating segment will, where we can use that construction segment and beyond to be able to pay for cost of operation."[19]

Comment: Another very revealing quote from Authority officials: they knew that they could make no money on the ICS (no surprise there: Amtrak has about a $28,000,000 subsidy in that area). If the Authority had tried to adopt the ICS as the usable segment, it would have fallen into the no subsidy trap. Instead, the Authority attempts an end-run around Proposition 1A, saying that they can "partially" build a usable segment and use all the money, without any ability to complete the usable segment as an electrified high speed rail segment a required by Proposition 1A.

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[18] See Proposed RJN 045.

[19] See Exhibit C, Declaration of William Grindley, ¶ 25, fn 47. The Pringle quote is from the same source. This is an admission by Authority officials that the 130 mile ICS was a money loser and that they never bothered to do a ridership study there because of that fact.

Subsidies in this case will be in the range of $124,000,000 to $373,000,000 per year. Reason Foundation, Due Diligence Report, 2013, Draft, page 5.[20]

It has also been estimated that the subsidies would be even high ($500,000 to $3,000,000,000).[21]

Accounting Methods:

Finally, there is a serious issue in this case as to whether the Authority, which has the burden of proof on the no subsidy issue, is utilizing the correct method of railroad accounting for determining operating costs. The term "operating costs" is not defined in the statute. Therefore, what is the approach that should be taken by an American court sitting in California concerning the proper accounting method to be applied to a California high speed rail system? It is interesting that the High Speed Rail Authority frequently uses "European" examples to support its position. As the Declaration of William Grindley points out, the European method of railroad accounting/high speed rail accounting is known for hiding costs, such that operating costs are understated.[22] The Europeans put more emphasis on "social benefit" than American railroad systems do. This makes for very inaccurate hard data when it comes to ascertaining whether a high speed rail system in Europe is really earning a profit or is receiving heavy government subsidies.

The reason the Authority likes to use the European example is because, were American examples used, the results for the Authority would be much worse, and the costs would be higher. This is by reason of the fact that American railroad accounting principles are governed by the FRA and, frankly, the American system is more honest and transparent, resulting in higher costs. Witness Acela whose costs are six times higher than what the Authority projects for its own costs,

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[20] See Exhibit B, Declaration of Wendell Cox, ¶ 9.

[21] See Exhibit E, Declaration of William Warren, ¶ 16, fn 43-46, citing projected subsidies based on different operating costs results.

[22] A discussion of differences between U.S. and European accounting methods for profitability is found at Exhibit C, Declaration of William Grindley, ¶¶ 76-90, fn 180, cites rulings that require single accounts. See Exhibit C, Declaration of William Grindley, ¶¶ 73-75, citing the International Union of Railways which discussed how profitability in Europe also includes a measure of *probability for the society to which the state-owned rail infrastructure belongs*. This is also confirmed by the U.S. Congressional Research Service and at a 2005 Beijing conference, Exhibit C, ¶ 75, fn 163-164.

and Amtrak is close behind. The American costs are higher than the European costs.[23]

It is difficult to understand why an American court would not apply American railroad accounting rules, especially when the Authority will be under the jurisdiction of the Federal Railway Administration, which has defined accounting practices and is known for its discipline of American railroads.

This being true, this is but another reason for this Court to conclude that the usable segment will require a local, state, or federal operating subsidy.[24]

Summary: The only certain factor is that the Authority intends to build a conventional rail system on the 130 mile ICS and allow Amtrak to operate it. Amtrak already incurs a sizeable subsidy, and the Authority will be unable to satisfy its burden of proving that its system will not require the same prohibited subsidy.

A Common Sense Point:

The Authority is going to have to incur the same costs that other American railroads incur: labor costs, salaries, bonuses, medical benefits, health benefits, pensions, payment for electricity, maintenance, taxes to state, local and federal government.[25] Why should one assume that the position of the Authority, an American railroad would be so materially different than the position of its sister passenger rail services? And yet the Authority, despite empirical evidence that costs for American rail passenger service are sky high, "projects" its own costs at one-fifth or one-sixth as much. This defies reason and must be rejected. Virtually all other categories of high speed and passenger rail service are requiring a subsidy for operating costs.

[23] See Exhibit C, Declaration of William Grindley, ¶ 83.

[24] See Exhibit C, Declaration of William Grindley, ¶¶ 82, fn 180, discussing section 209 of the Passenger Rail Investment and Improvement Act of 2008, which is in the process of imposing Uniform Accounting Practices on Amtrak, and this will include high speed rail lines. See 49 U.S.C. § 2410215(B) indicating that high speed rail corridors are subject to PRIIA, section 209(a). These laws should eliminate any question as to whether the California High Speed Rail Authority must follow the much stricter American accounting practices. Also see Exhibit B, Declaration of Wendell Cox, ¶¶ 30-32, 35.

[25] See Exhibit G, Declaration of Adrian Moore, ¶ 29; see Exhibit B, Declaration of Wendell Cox, p. 13; see Exhibit F, Declaration of Randall O'Toole, p. 6, ¶ 11.

VII.

THE PASSENGER RIDERSHIP NUMBERS PROJECTED BY THE AUTHORITY ARE FATALLY FLAWED AND SHOULD BE REJECTED BY THE COURT; FURTHERMORE, THE AUTHORITY'S REFUSAL TO SHARE THE VITAL UNDERLYING RIDERSHIP DATA WITH THE PUBLIC SHOULD CAUSE THIS COURT TO REFUSE TO CONSIDER THE RIDERSHIP NUMBERS. WITHOUT CREDIBLE RIDERSHIP NUMBERS, THE COURT CAN ONLY REACH THE CONCLUSION THAT THE USABLE SEGMENT WILL REQUIRE AN OPERATING SUBSIDY.

Introduction:

The subject of passenger ridership relates to the issue of whether an operating subsidy will be required for the usable segment. This is because ridership analysis is essential to understanding what the revenues will be. Lower passenger ridership results in lower revenues, triggering subsidies.[26] There are two paramount considerations: worldwide, and for decades, the subject of ridership projections has been notoriously exaggerated;[27] secondly, the facts of the present case indicate that the Authority has refused to share vital data on ridership with the public generally, and with organizations retained by the Legislature to analyze such data.[28] Since the Authority has refused to share this data, produced by its agents, out of a sense of fairness and due process, the Court should refuse to consider the Authority's ridership projections, and the Court should rule that the Authority failed to sustain its burden of proving that a subsidy for operating costs will not be required.

Ridership and the Experts:

The subject of ridership projections has long been a controversial subject; the leading experts in the world on transportation mega projects have concluded that such projections are

[26] See Exhibit C, Grindley Declaration, ¶ 46 on the "On the Validity of Ridership Forecasts". See also Exhibit A, Kopp Declaration, ¶ 18; see also Exhibit B, Cox Declaration, ¶¶ 6 to12 and ¶¶ 22 to 35; see also Exhibit K, Declaration of James Mills ¶ 7; see also Exhibit L, Declaration of Kathy A. Hamilton, ¶ 28; see also Exhibit B, Cox Declaration, ¶ 9, specifically referencing a Reason Foundation report "California High Speed Rail: A Updated Due Diligence Report Draft" [*hereafter referred to as* the Reason Report, with a final report to be published March 2013], see in particular section B. Ridership, Revenue and Operating Subsidies [*hereafter referred to as* Reason Report, section B].

[27] See Exhibit C, Grindley Declaration, ¶¶ 46 to 65 on "On the Validity of Ridership Forecasts", and how ridership has been wildly exaggerated on a worldwide basis. See also the Reason Report, section B.

[28] See Exhibit C, Grindley Declaration, ¶ 53. Also see RJN 116 letter from Californians Advocating Responsible Rail Design (CARRD) to the HSRA Board, July 26, 2011. Also see RJN 120 emails between CARRD and HSRA staff requesting Ridership Peer Review Panel reports, April 8 2011 thru June 30 2011.

almost always exaggerated materially.[29] According to the world's leading expert, Bent Flyvbjerg,

> "The problem with cost overruns is exacerbated by the fact that often this problem comes hand-in-hand with lower than estimated revenues. The consequence is projects that are risky to the second degree."[30] In 2012 the lead author went on to say "*Here, the assumption of innocence regarding estimates typically cannot be upheld*".[31]

Professor Flyvbjerg also noted, *"There is a massive and highly significant problem with inflated forecasts for rail projects for two-thirds of the project's forecasts are overestimated by more than two-thirds."*[32] A classic example is the Eurostar Train from London to Paris (the Chunnel). In 1996, it was forecast that ridership would reach 25,000,000 by 2006. By 2011, ridership was under 10,000,000 (9.7 million), which is 60% below the forecast. The private companies operating Eurostar went bankrupt, and the enterprise was taken over by the British and French governments.[33] Professor Flyvbjerg also reports that ridership forecasts have shown no improvement whatsoever and characterizes them as showing "optimism bias" and "strategic misrepresentation."[34] Reason, Due Diligence Report, Draft, pages 19-20, footnotes 18-21, citing "Megaprojects" by Flyvbjerg, *supra*.[35]

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[29] See Exhibit C, Grindley Declaration, ¶ 52, citing "Quality Control and Due Diligence in Project Management Getting Decisions Right by Taking the Outside View", by Professor Bent Flyvbjerg, Nov. 2012 [*hereafter referred to as* Quality Control]; see also ¶ 22 citing Flyvbjerg's publication Megaprojects; see also Exhibit B, Cox Declaration, ¶¶ 24-25 citing the GAO's reference to Flyvbjerg Megaprojects, and Quality Control; see also Exhibit E, Warren Declaration; see also Exhibit G, Adrian Moore Declaration, ¶¶ 18 to 22 also cite Megaprojects; Quality Control; and Mette K. Skamris and Bent Flyvbjerg, "Accuracy of Traffic Forecasts and Cost Estimates on Large Transportation Projects," 1996. See also Reason Report citing Megaprojects; Quality Control; and Chapter 13 by Bent Flyvbjerg: "Over Budget, Over Time, Over and Over Again," The Oxford Handbook of Project Management (Oxford University Press), pp. 321-344.

[30] See Exhibit C, Grindley Declaration, ¶ 22, footnote 33, referring to page 14 of the book of Bent Flyvbjerg, Nils Bruzelius and Werner Rothengatter, Megaprojects and Risk: An Anatomy of Ambition [*hereafter referred to as* Megaprojects]. See also Reason Report draft, section B.

[31] See Exhibit C, Grindley Declaration, ¶ 52, and footnote 115 citing a 2012 article by Bent Flyvbjerg, "Quality Control and Due Diligence in Project Management: Getting Decisions Right by Taking the Outside View".

[32] See Exhibit C, Grindley Declaration, ¶ 50 and footnote 105.

[33] See Exhibit C, Grindley Declaration, ¶ ¶ 22, 49 and footnote 34, citing Flyvbjerg, *Megaprojects* pg. 12. See also the Reason Report, section B, the Subsection, Background on Ridership Projections, citing Parliament of the United Kingdom, Public Accounts - Thirty-Eighth Report.

[34] See Reason, Due Diligence Report, Draft, pages 19-20, endnotes 18-21, citing "Megaprojects" by Flyvbjerg. See also Exhibit C, Grindley Declaration, pp. 30-32.

[35] Bent Flyvbjerg, Nils Bruzelius and Werner Rothengatter, "Megaprojects and Risk: An Anatomy of Ambition". This eminent publication was cited, and relied upon, by the High-Speed Rail Authority. See the Revised 2012 Business Plan, pg. AG001950.

The World Bank agrees. It said, *"High speed projects have rarely met the full ridership forecasts asserted by their promoters, and in some cases, have fallen far short."*[36] Therefore, we start with the premise that these forecasts have always been suspect and should be approached with that in mind.[37] Finally, a simple comparison of traffic on the Northeast corridor and the Los Angeles to San Francisco corridor would lead one to believe that the CHSRA projections are two to three times higher than a realistic projection.[38] And the GAO has also raised serious concerns about the ridership forecasts.[39]

The Process: What The Authority Did With Respect to Ridership Study:

The intriguing story of what happened with the ridership study is detailed in the Declarations of William Grindley and Wendell Cox (Exhibits C and B). In the present case, the Authority originally retained a company called Cambridge Systematics (Cambridge) to do a ridership analysis. Cambridge did so and published a report,[40] but refused to release the modeling data that formed the basis for the conclusions reached by Cambridge Systematics (CS). CS claimed proprietary privilege with respect to the modeling data.[41]

The Senate Transportation Committee and the Peer Review Group requested the Institute for Transportation Studies, a prestigious organization located at U.C. Berkeley, to analyze the Cambridge report.[42] Reason, Due Diligence Report, page 21, footnote 20. The ITS study is located at http://www.its.berkeley.edu/publications/UCB/2010/RR/UCB-ITS-RR-2010-1.pdf.

The ITS study found: ". . . some significant problems that render the key demand forecasting models unreliable for policy analysis." The ITS study concluded by saying, "Our

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[36] See Exhibit C, Grindley Declaration, ¶ 50, citing among several sources this study by the World Bank; see also Exhibit G, Adrian Moore Declaration, ¶ 18 and endnotes cite the World Bank study.

[37] See Exhibit C, Grindley Declaration, ¶47-52 citing Quality Control, *and* also citing Proposed RJN 013, GAO testimony to the Committee on Transportation and Infrastructure, House of Representatives, December 6, 2012. See also Exhibit B, Cox Declaration, ¶22-27 and citing Quality Control; see also Exhibit G, Adrian Moore Declaration, ¶18-22.

[38] See Exhibit F, O'Toole Declaration, ¶ 5.

[39] See Exhibit B, Cox Declaration, ¶ 23.

[40] See Exhibit C, Grindley Declaration, ¶ 53, footnote 116. See also AG000336-609, Ridership and Revenue Forecasting, Draft Technical Memorandum.

[41] See Exhibit C Grindley Declaration, ¶53. See also Proposed RJN 116 letter from Californians Advocating Responsible Rail Design (CARRD) to the HSRA Board, July 26, 2011; and see also Proposed RJN 120 emails between CARRD and HSRA requesting ridership information, April 2011 thru June 2011

[42] See Supp. Rcd. 059. *See also* Reason, Due Diligence Report, page 21, footnote 20.

main conclusion is that the true competence bands around the estimates from these models must be very wide. They are probably wide enough to include demand scenarios where HSR will lose substantial amounts of money, as well as those where it will make heavy profits." [43]

The Peer Review Group weighed in by stating the following:

> The issue identified by the University of California at Berkeley, the Legislative Analyst's Office and the State Auditor's Office, have raised sufficient concerns with the demand model so as to call into question the project's fundamental basis for going forward. The Group [Peer Review Group] recommends that the Authority work with U.C. Berkeley, the Legislative Analyst's Office and the State Auditor's Office to complete an analysis of any issues regarding the demand models so that a mutually agreed estimate can be reached among the ranges of uncertainty. Failure to arrive at such an agreement will put the project's forward progress in jeopardy. [44]

The Senate Transportation Committee joined this request for cooperation between the two disputing organizations. But this was rejected by the Authority chairman, Van Ark, indicating no willingness to cooperate on this ridership issue. [45] Van Ark went on to say that, "In the Authority's view, the professional opinions of the industry practitioner [Cambridge] carry more weight in this particular 'real world' context." [46] Reason, Due Diligence Report, Draft, page 22.

ITS did a subsequent report and stood by its position, indeed providing testimony before the Assembly Transportation Committee. [47] Professor Mark Hansen presented a report saying that ridership forecasts were ". . . not reliable enough to support the expenditure of billions of dollars." Reason, Due Diligence Report, page 23, footnote 23. Recently, the GAO (General Accountability Office) in Washington D.C., an important oversight agency of the U.S. Government, examined the ridership issue and expressed concerns over its numbers. [48]

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[43] See Proposed RJN #, ITS report to the Legislature, Review of "Bay Area/California High-Speed Rail Ridership and Revenue Forecasting Study" at www.its.berkeley.edu/publications/ucb/2010/rr/ucb-its-rr-2010-1.pdf. *"Cambridge Systematics appears to have relied on Koppelman and Garrow to justify their estimation and calibration procedure. Unfortunately, more recent work by Bierlaire, Bolduc and McFadden shows both theoretically and with real data examples that the Koppelman and Garrow procedure is wrong."*

[44] See Proposed RJN 063.

[45] See Proposed RJN 136, CEO van Ark letter to Senate Transportation and Housing Committee Chair, August 2, 2010

[46] *Ibid*.

[47] See Proposed RJN 062 for the ITS study; see also Proposed RJN 137 for Senate's background paper; Proposed RJN 138 for the Senate hearing.

[48] See Exhibit C, Grindley Declaration, ¶ 53 Footnote 116 citing email from Dr. Brownstone.

Therefore, this case presents an extraordinary procedural issue: A highly controversial subject, ridership, is studied by the Authority; its analyst (Cambridge) refuses to release critical data that is necessary for others to check the Cambridge report. ITS concludes that the Cambridge report is unreliable and not fit for policy analysis, but is still provided, despite request, with no data from Cambridge.[49] Further evidence of the refusal of Cambridge to furnish this data to the public is seen in the refusal to furnish the data to Mr. Brownstone when he requested it. [50]

This refusal took place against the backdrop of three public bodies (LAO, Peer Review Group, and Senate Transportation Committee) specifically requesting that the Authority cooperate in working this out – to no avail. Under these circumstances, plaintiffs request this Court to preclude the Authority from offering ridership projections○. Fairness dictates that result.

Also to be noted is that the Authority appointed its own special "Ridership Peer Review Committee" headed by Frank Koppelman. This group has not exactly been "independent" of the Authority, with Koppelman following Van Ark's orders that the ridership numbers looked good and to "move on." [51] A severe conflict of interest exists on the part of Mr. Koppelman; he was a consultant for Cambridge Systematic and received consulting fees of $231,000 for his work on the ridership program! [52]

This is but another reason why the entire ridership study of the Authority is tainted and should be rejected.

Was a ridership study ever even done on the usable segment?

Section 2704.08(c)(2)(A), *supra*, requires that the Authority must identify the corridor or usable segment in which the Authority is proposing to spend bond funds. Section 2704.08(c)(2)(E) orders the Authority to set forth projected ridership and operating numbers based upon projected high speed passenger train operation on the corridor or usable segment."

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[49] See Exhibit C, Grindley Declaration, ¶ 53 Footnote 116 citing email from Dr. Brownstone.
[50] *Ibid.*
[51] See Exhibit C, Grindley Declaration, ¶ 48, footnote 100 citing Supp. Rcd. 123 *which stated,*
"Mr. van Ark noted the controversy to date with the forecasts and underlying models, which in part motivated the formation of this Panel. However, the purpose of this Panel is not to further debate those controversies."
[52] See Proposed RJN 117, CARRD testimony to the Senate showing that payments to the Ridership Peer Review Panel exceeded $400,000.

The question arises as to whether this requirement has been carried out, and the Authority (since this relates to the subsidy question) has the burden of proof on that issue. Firstly, it does not appear that the Authority bothered to do a ridership study on the 130 mile ICS, because the Authority had no interest in doing so.[53] On March 13, 2012, the Authority chairman, Dan Richard, at a public meeting in Mountain View of the Senate Transportation Committee, stated the following:

> "We never intended -- our business plan does not contemplate -- that we would operate a high-speed rail system only in the Central Valley. That has never been part of our plan for exactly the reason you said: there would not be sufficient ridership to be able to do that. In our plan as it was presented on November 1 [2011], we said after the [ ] initial construction segment was built, what we said was the next thing that would happen would be an initial operating segment. And that would be the first true operation of high-speed rail."[54]

Comment: This would, therefore, seem to indicate that there certainly was no ridership study done on the 130 mile ICS, because the Authority had no interest in doing so. This was corroborated by another Authority official, Hans Van Winkle, who also stated that the Authority never did a ridership study on the 130 mile ICS because it was a loser, would not make money, and had very low ridership.[55] All of this perhaps explains why the 130 mile ICS was never picked as the "usable segment" by the Authority – as a money loser, it would inevitably have required a forbidden subsidy.

Since the ICS is, however, part of the usable segment (the IOS South from Merced to the San Fernando Valley),[56] the next question is this: Since no ridership analysis was done of the ICS,[57] part of the IOS usable segment, if there had been in fact a ridership study on the entire IOS usable segment, it would be tainted because of the low ridership numbers that Richard and Van Winkle said would exist on the ICS. After all, the 130 mile ICS is more than one-third of the usable segment itself. This issue has been totally ignored by the Authority, and they have the

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[53] See Supp. Rcd. 123 *which stated,*

> "It is the Panel's understanding that the model was not designed to support the analysis of the Minimal Operable Section (MOS) and associated detailed analyses."

[54] See Proposed RJN 131.
[55] See Exhibit C, Grindley Declaration, ¶ 25, footnote 47.
[56] See Proposed RJN 118, Scope of Work map; *see also* Proposed RJN 119, map of construction packages 2-4.
[57] See Supp. Rcd. 123, Independent Peer Review Group findings, July 2011.

burden of proof on the issue.[58]

The Authority may claim to have done some surveys concerning the IOS South, but any such surveys are tainted for this reason – the only survey work done in 2011, when the concept of an IOS first occurred, was a survey just of historic travel patterns that the participants had under taken in the past few months. No data was collected that would measure the likelihood of future travelers being willing to take a bus from SF or Sacramento to Merced, ride a HSR train to the San Fernando Valley and then ride Metrolink to Los Angeles. The Authority does have some extraordinary conclusions regarding ridership numbers on the IOS South, namely, 8,100,000 by the year 2025, when currently the area carries about 1,000,000 annually. These numbers are as absurd on their face as the famous "costs" figure of 10¢ per passenger mile, six times lower than the operating costs of the closest thing that America has to high speed rail, Acela on the northeast corridor.

The Reason Foundation Due Diligence Analysis:

The Reason Due Diligence Report, to be published in final form this month, has analyzed the Authority's ridership projections in great detail. See Draft Report, pages 20-35. One of its co-authors, Wendell Cox, filed a Declaration in this case, Exhibit B, and he is in a position to corroborate everything in the report. Mr. Cox will be available to testify that trial. The report points out that when Proposition 1A was sent to the voters in November 2008, the Authority was projecting 117,000,000 riders a year! [59] This is but another example of their vast exaggeration skills. If that were true, it would mean that every man, woman, and child in California would ride the train three and a half times a year! After Proposition 1A was passed, the ridership numbers greatly fluctuated and it has currently plummeted to a median of 25 million riders per year. Reason (and its author, Wendell Cox, whose declaration is attached) first concludes that when passengers realize that it will take three hours and 50 minutes to make the trip from San Francisco to Los Angeles, instead of the two hours and 40 minutes promised by the Authority, ridership will be reduced two-thirds. Reason, page 4. Reason even concludes that because of other analysis

[58] See Proposed RJN 045; Exhibit C, Grindley Declaration, ¶ 25, footnote 47.
[59] Exhibit C, Grindley Declaration ¶ 47, footnote 93.

errors in the Authority's approach, its ridership figures of 25 million (median) riders should be reduced by as much as 77%. Reason, page 4; Wendell Cox Declaration, ¶ 23. Among the errors noted by Reason is the population forecast: The Authority builds its ridership numbers on a projected 10% increase in California population, when the true facts are that the population only increased 5%.[60]

Senator Simitian sums it up:

Three of the four Democrats who ultimately voter against funding for the Central Valley Project (Lowenthal, Simitian, and DeSaulnier) were the three legislators most deeply involved with the passage of AB 3034 and the presenting of Proposition 1A to the voters;[61] they presided at many Committee hearings[62] and were responsible for many of the safeguards placed in AB 3034 because they exercised extensive oversight functions as legislators. Their negative vote[63] tells us much about the merits of this project, which Senator Simitian summed up as follows on April 18, 2012:

> You're talking about spending all of our federal money, $3.5 billion, plus more than one-quarter of our state money for a total of $6.2 billion to produce 130 miles of conventional rail in a low ridership area, that doesn't have positive train control, that doesn't have electrification, and that doesn't have high speed rail rolling stock and with no guarantees of further federal funding, private investment, and no plans to come back to ask the taxpayers for another bond measure. [64]

Summary: This Court should reject the Authority's ridership studies on the merits and for reasons of fairness in light of the concealment of essential data. Lack of proper ridership information means that the revenue figures will be materially lower, making it certain that a subsidy will be required.

The ridership issue is tied up with the subsidy issue; namely, that the Authority must prove that a state, local or federal subsidy or operating costs will not be required. It is impossible

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[60] See Proposed RJN 140, Exhibit C, Grindley Declaration, ¶ 61, footnote 135.
[61] See Proposed RJN 124, Proposed RJN 125, Proposed RJN 126, Proposed RJN 127, Proposed RJN 128, Proposed RJN 129, and Proposed RJN 130; see also AG002950-68. *These are Senate Staff Reports from 2007 to 2012.*
[62] *Ibid.*
[63] See Proposed RJN 010, Simitian's address to the Senate Floor on HSR funding; see also Proposed RJN 122, Lowenthal's address; and see also Proposed RJN 123, Sen. DeSaulnier's address.
[64] See Proposed RJN 010, Sen. Simitian's Floor address on Budget Bill SB 1029.

for the Authority to satisfy its burden of proof on this issue in light of the fatal flaws in its ridership study (or lack thereof). Accordingly, the Court should rule that section 2704.08(c)(2)(K) has been violated.

VIII.

PROPOSITION 1A REQUIRES THAT THE AUTHORITY PROVIDE NONSTOP SERVICE FROM LOS ANGELES TO SAN FRANCISCO IN NO LESS THAN TWO HOURS AND 40 MINUTES; THE AUTHORITY CERTIFIED THAT IT COULD DO THIS; BUT BECAUSE OF THE MAJOR DESIGN CHANGES MADE BY THE AUTHORITY, THIS PROMISED TRIP TIME IS NOT ACHIEVABLE.

Proposition 1A does require that a nonstop express train from Los Angeles to San Francisco, or vice versa, will make the trip in no less than two hours and 40 minutes[65] and that the passenger will not have to change trains (actually, the promise that there will be no change of trains applies to all HSR service from one destination to the other, no matter where that may be). But a major development occurred in April, 2012, when, in its Revised Business Plan, the Authority announced that it was adopting the "blended" system whereby the Authority would share track with local commuter rail services on the Peninsula and areas of Southern California. The complications of such a blended system now make it impossible for the Authority to achieve the statutorily required trip time.[66]

It was the Draft Business Plan (November 1, 2011) which promised the trip time of two hours, 40 minutes and said that there would be one train per hour making that trip time[67] [This belies any claim by the Authority that all it has to show is that on one occasion, a train was able to make the trip in the promised time; instead, the Authority is promising that this time will be achieved once a day on a regular basis.]

The Authority's own documents indicate that it is already in breach of that promise. The

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[65] See Exhibit B, Declaration of Wendell Cox, pp. 3, 4; Wendell Cox is the author of the 2012 Reason Foundation Due Diligence Report, frequently cited herein. Most significantly, he was the author of the 2008 Reason Foundation Due Diligence Report, published just before the November, 2008, Proposition 1A election. Mr. Cox, and his co-author, Joe Vranich, made predictions concerning virtually every issue and every claimed violation involved in this case, and all of their predictions have proved to be correct, including that the two hour and 40 minute travel time requirement could not and would not be met.

[66] See Proposed RJN 144, Report in Response to AB 115: "Specifically the Authority will need to accept: That the high speed trains will not operate at 125 mph as originally envisioned for the SF to SJ corridor and consequently not be able to make the 30 minute travel time goal between SF and SJ as stated in Proposition 1A." See also Exhibit G, Declaration of Adrian Moore, p. 9, ¶ 23; Exhibit B, Declaration of Wendell Cox, p. 3, ¶6.

[67] Draft Business Plan, November, 2011, p. 10 [AG000099]; Reason, Due Diligence, Draft, p. 43, fn 70.

April, 2012, Business Plan indicates a three hour minimum for a one-stop trip from Los Angeles to San Francisco.[68] An organization known as CARRD on a Freedom of Information request secured this information. See http://www.calhsr.com/wp-content/uploads/2012/04/CARRD-travel-time-inconsistencies.pdf.[69]

A Peninsula resident by the name of Kathy Hamilton, under a Freedom of Information request to the Authority, asked "what documentation exists" to support the two hour and 40 minute trip time promise. A response from the Authority's custodian of records was that there is no documentation and that the promise was based upon oral assurances, optimism, hope and the skill of Authority staff![70]

The "Blended" System and its Effects:[71]

As other sections of this brief indicate, after Proposition 1A was passed in November, 2008, and after slightly more than $3,000,000,000 in federal funds were furnished (2010), the outlook for success by the Authority deteriorated. The cost escalated to as high as $117,000,000,000; there was a total cutoff of additional federal funding (cutoff still in existence), and no private investor ever expressed any interest in the project. (See Exhibit I,[72] Declaration of Michael Brownrigg, indicating zero interest expressed in the project from the private investor community, and zero prospects for private investor interest in the future because of the precarious

[68] See Exhibit L, Declaration of Kathy Hamilton, ¶ 27. Even the Legislative Counsel casts doubt on whether the two hour and 40 minute required time can be achieved. *Id.*, Hamilton Declaration, ¶ 29.

[69] This organization had discovered that the Authority had made a presentation after the blended system was adopted, and that the Authority's own document demonstrated that the trip time would not be two hours and 40 minutes, but three hours. Proposed RJN 030; Exhibit D, Declaration of Richard Tolmach, p. 4; Exhibit G, Declaration of Adrian Moore, p. 10, ¶ 25; Exhibit C, Declaration of William Grindley, ¶¶ 93-97.

[70] The Peninsula resident, Kathy Hamilton, has also filed a Declaration in this case, Exhibit L, dealing with her efforts to obtain this information under the Freedom of Information Act and the resistance she encountered. Exhibit B of her Declaration includes the correspondence from the HSRA.

[71] Expert Adrian Moore states categorically that the two hour, 40 minute mandatory time requirement is not achievable by the Authority because of its adoption of the blended system. Exhibit G, Declaration of Adrian Moore, p. 9, ¶ 23. Moore goes into great detail on this subject, stating that the best time that can be achieved is three hours, 15 minutes. Exhibit G, p. 10, fn. xxxvi. The 200 miles per hour speed is unrealistic; FRA safety requirements would probably not tolerate speeds above 150 miles per hour; the train has to go through urban as well as rural areas, slowing down in the urban areas (p. 10). Accordingly, these high speeds are unrealistic, citing the Transportation Research Bureau (p. 11, ¶27). Also on this subject of travel time, see the Declaration of Richard Tolmach, Exhibit D. Mr. Tolmach is one of the most experienced railroad experts in California, having worked on many aspects of passenger rail, including scheduling, and he is the publisher of *California Rail News*. He indicates that the travel time of two hours and 40 minutes is not achievable (p. 3, ¶ 6, fn iii); that the Authority's own documents after the blended plan was adopted indicated a three hour trip time (p. 4, ¶ 8).

[72] Also see Exhibit O, Supplemental Declaration of Michael Brownrigg.

risk involved. The cost escalation was creating a public relations nightmare for the Authority, and the Authority therefore "reduced" the scope of the project and changed the design of the project so that it would come in at a lower cost figure. This was done at the April, 2012, meeting of the Authority under the Revised Business Plan which adopted the blended system. This called for the Authority to "share" trackage with local commuter trains on the San Francisco Peninsula and in Southern California. There would be no "dedicated" trackage reserved exclusively for high speed rail. As the Declaration of Quentin L. Kopp demonstrates, this was a change from the concept of a genuine high speed rail project (intended by the Authority in 2008) and completely undermined the intent of the voters in having such a genuine high speed rail system throughout California. Senator Kopp pointed out that this would have a huge effect upon revenues and that instead of having a high speed train every five to six minutes, we would now only get two to four trains per hour and this would have a major effect on reducing revenues. (See Exhibit A, Declaration of Quentin Kopp, pp. 6, 7, 11.) (Reason, Draft Report, page 49.) Senator Kopp also pointed out that the voters never voted to install conventional rail (Central Valley) or for aid to local commuter rail, but instead voted only for genuine high speed rail. (Reason, Draft Report, page 49, footnote 89.) See "Editorial: New Train Promises To Be Cheaper, Sooner, Longer, Slower." *Orange County Register*, April 3, 2012. Senator Kopp referred to this as the great train robbery, because funds were being taken out of Proposition 1A, not for genuine high speed rail, but for aid to these local commuter services which would be participating in the blended system. (See Exhibit A, Kopp Declaration, pp. 4, 6.)

Indeed, the Peer Review Group, established under Proposition 1A, stated that a blended system would result in only two to four trains per hour in the San Francisco and Los Angeles areas, sharing service with commuter rail. (Reason, Draft, footnote 88.) "California High Speed Rail Peer Review Group Letter to Senator Joe Simitian and Assemblyman Richard Gordon," August 12, 2011, page one, http://www.calhsr.com/wp-content/uploads/2010/10/Response-to-Sen-Simitian-Proposal.pdf.[73]

[73] Proposed RJN 134.

Physical Effects of the Blended System[74]*:*

In Europe, high speed trains and the high speed rail system runs on dedicated tracks, with no sharing with local commuter services; even sharing with freight is rare. A blended system applies to the San Francisco Peninsula (San Francisco to San Jose) and to areas of Southern California. On the San Francisco Peninsula, the tracks used by Caltrain will now be shared by high speed rail. Not only that, but HSR will share tracks with four levels of train operation: Caltrain Baby Bullets, Caltrain Express, locals (all stops), and freight service (Union Pacific Railway); with the Authority using the same tracks, five services will therefore be sharing the tracks. Track sharing creates problems because of the FRA's stringent safety standards dealing with crashworthiness. Reason, Draft Report, page 49.

All of the original assumptions behind the Authority's certification that it would be able to make the two hour and 40 minute trip time were based upon its having dedicated track, no obstructions, no "at grade" crossing and elevated viaducts with four track structures, for example). None of this is achievable with a blended system.[75] This will all obviously have a major effect on trip times. (See Exhibit A, Kopp Declaration, pp. 6-8.) There are special problems with having to share tracks with freight trains as well. Freight trains travel at slower speeds and have difficulty traveling on elevated structure. (Reason, Draft, page 46, footnote 77, pointing out that the United States runs the largest and the longest freight trains in the world (much more so than Europe). These present special difficulties for sharing track; the ideal design for HSR is not ideal for American freight. European tracks are more compatible with freight

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[74] As Senator and former Authority Chairman Kopp indicates, the adoption of the blended system had many adverse effects upon the ability of the Authority to achieve its goals, including the travel time goal. A distinguished railroad expert, Richard Tolmach, indicated that the two hour, 40 minute promise was not achievable and that the time would be "well over" three hours. Exhibit D, Declaration of Richard Tolmach, p. 3, ¶6; Tolmach has worked with railroads and public agencies for a decade, and is an expert in scheduling and actually received awards for his work in scheduling Amtrak's San Joaquin's line, ironically the location of the Authority's "conventional" rail in this case. Tolmach further indicates "optimism" and hope cannot be the basis for such an important promise. (Exhibit D, p. 4, line 1.) Other experts agree that this time promise is not achievable. (Exhibit, Declaration of Adrian Moore, p. 9, ¶ 2; Exhibit B, Declaration of Wendell Cox, p. 3, ¶ 6; Exhibit C, Declaration of William Grindley, ¶¶ 93-97.) Other experts predict that with the blended system, and the many impediments created by it, the best travel time would be three hours and 50 minutes. (Exhibit G, Declaration of Adrian Moore, fn xxxvi.) See, Exhibit N, Declaration of Paul Jones, pp. 2-3, on the effects of the blended system in reducing projected speeds.

[75] See Exhibit N, Declaration of Paul Jones, p. 3, discussing lack of grade crossings on Peninsula and how this adversely affects travel time.

although they do not share with freight very often.)

The blended system has other obvious effects upon trip time; for example, a high speed train sharing the same tracks might have to slow down for a commuter train ahead; reducing the number of trains per hour (See Exhibit A, Kopp Declaration, pp. 6-8), caused by the blended system, will also have a major effect upon revenues (they will be lower), creating the dangers of a subsidy. Reason, Draft, page 8.[76]

As to where the shared tracks will be, they will be from San Francisco to Gilroy and areas of Southern California. This is a large and densely populated area, with obvious effects upon speed and trip time. Reason, Draft, page 19.

For many months after the blended system was adopted, the Authority resisted Freedom of Information requests for new data concerning the trip time promise and how it was affected by the blended system. The Authority claimed that the information was in "grant" form and would not release it.[77] Nonetheless, Mr. Richard continued to travel around the State representing that there was no problem and that the trip time could be maintained at two hours, 40 minutes. Reason, Draft, page 43, footnote 71. [With numerous citations as to the meetings, radio shows, etc., on which Mr. Richard appeared.]

Finally, in late February, the Authority came up with the Vacca report[78] detailing that a blended system would not affect trip time at all and that the two hour, 40 minute promise could still be kept. This report is very interesting because in large sections of the State, the Authority has the train travelling at more than 200 miles an hour,[79] including in the Tehachapis! This is but another example (together with costs, ridership, profit projection, etc.) of the extraordinary and

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[76] Several experts have commented that the enormous speeds (more than 200 miles per hour) promised by the Authority to achieve the two hour and 40 minute promise are unrealistic (Exhibit G, Declaration of Adrian Moore, ¶ 26); the safety problems and the FRA requirement are implicated that such speeds are not achievable, and that the Transport Research Board only advises 150 miles per hour for average speed (Exhibit D, Declaration of Richard Tolmach, p. 11, ¶27).

[77] See Exhibit L, Declaration of Kathy Hamilton.

[78] See Proposed RJN 066.

[79] Many of the experts say these speeds are not attainable, that California has urban as well as rural areas, that the trains have to slow down, and that with the blended system, they have to share tracks with as many as four trains systems (the Peninsula, for example), and that in any event, the Authority has its train going faster than any train in the world! (See Exhibit G, Declaration of Adrian Moore; Exhibit D, Declaration of Richard Tolmach; Exhibit B, Declaration of Wendell Cox; Exhibit C, Declaration of William Grindley.)

unbelievable positions taken by the Authority (including barreling down the Tehachapi Mountains at 200 miles per hour!).[80]

The Reason Due Diligence Report co-authored by Wendell Cox, whose Declaration is attached, discusses this issue extensively from page 43, et seq., of the Draft Report. Consult figures 10 and 11 demonstrating that a two hour, 40 minute trip time is simply not achievable. Reason says the best time that can be attained is three hours, 50 minutes with no stops, and that with multiple stops (seven at most) the travel time can approach almost six hours. Reason, Draft Report, page 48.

The Speed Projections Are Unachievable:

This train is supposed to be designed to travel at 220 miles an hour. There is no train in the world that travels at such speeds. The fastest train in the world is the TGV from Paris to Lyon, which travels at 199 miles per hour, 21 miles an hour slower than the Authority's trains purport to travel. Reason, Draft, page 44.

There Are Some Severe Adverse Effects From Such Speeds:

Safety: Trains traveling at 200 miles an hour experience more slippage on the tracks, which requires bigger motors and more electricity to alleviate. Trains at this speed, with the blended system, will be traveling through stations, with two tracks and passengers standing on the platform, posing risk to the passengers from air flow, etc. Reason, Draft, page 46. Witness the recent serious crash of high speed trains in China, which occurred in Wenzhou where scores of people were killed. The train was traveling at 217 miles per hour. After the accident, the maximum speed was lowered by the Chinese government to 186.

Energy consumption: These higher speeds also result in greater energy consumption and greater greenhouse gas emissions (which the trains are supposed to alleviate). The slippage issue, mentioned above, requires bigger motors and a greater consumption of electricity, more wear and tear on the tracks results in causing increased maintenance and costs. Japan has recently reduced speeds to 186 miles per hour. Reason, page 44, footnote 73.

[80] See Exhibit N, Declaration of Paul Jones, who finds the Vacca report sketchy, lacking details and his predictions on travel time "not believable." Mr. Jones is an engineer with years of experience dealing with the European and Asian high speed rail systems.

Urban versus rural: Obviously, speeds must be lowered when the train is going through urban areas, compared to wide open rural areas. In California, 300 miles of the system are rural and 100 miles are urban, yet the Transportation Research Board has indicated that high speed trains would have maximum average speeds in urban areas of 60 to 100 miles an hour. Reason, page 46, footnote 6. Reason reports that the anticipated California speeds are not attained anywhere in the world. Reason, Daft, page 47.

Summary: The adoption of the blended system makes it impossible for the Authority to achieve their promised and required trip time.[81] It also, as Senator Kopp indicates in his Declaration (Exhibit A, pp. 4-6), turns Proposition 1A upside down, betrays the intent of the voters for a genuine high speed rail system throughout the State, and makes it impossible to achieve a feasible high speed train system in this State.

IX.

PROPOSITION 1A REQUIRES THAT THE PASSENGER TRAVELING FROM LOS ANGLES TO SAN FRANCISCO CANNOT BE REQUIRED TO CHANGE TRAINS. BY ADOPTING A BLENDED SYSTEM, THE AUTHORITY HAS ASSURED THAT THIS REQUIREMENT WILL BE VIOLATED

Section 2704.09(f) requires that the Los Angeles traveler, intending to travel to San Francisco (and vice versa) not be required to change trains. (See Second Amended Complaint, ¶14.) This may have been an achievable goal in 2008 under the original plan to provide genuine high speed rail through California. But, in April, 2012, when the Authority adopted the Revised Business Plan, they drastically altered the framework of the original intent behind Proposition 1A by imposing the "blended system" on the project. As the Declaration of former Chairman Quentin L. Kopp points out, the blended system not only betrayed the intent of the voters who enacted Proposition 1A, but it also made very specific requirements of Proposition 1A not achievable (the two hour, 40 minute travel time; headway, or the number of trains, per day; required speeds; safety issues associated with shared, non-dedicated tracks).

[81] The most eloquent and detailed recitation of the two hour and 40 minute "trip time" promise is found in Exhibit C, Declaration of William Grindley. He not only demonstrates that the trip time promise is not achievable, but also points out that the most recent Vacca memorandum from the Authority indicating that the promise can be kept, even with the blended system, is totally unsupportable. Exhibit C, pp. 46-51 and footnotes cited therein. See also Proposed RJN 066, Vacca memo.

(Exhibit A, Kopp Declaration, pp. 4-6.) Senator Kopp also indicates that this blended system makes change of trains inevitable for the passenger both in the Bay Area (Peninsula) and in Southern California.[82] This violates section 2704.09(f).

X.

PROPOSITION 1A REQUIRES THE STATEWIDE PROJECT TO BE FINISHED IN THE YEAR 2020. THE AUTHORITY, BY ITS OWN ADMISSIONS, , IS IN VIOLATION OF THAT PROMISE.

AB 3034(f) provides as follows:

> "It is the intent of the Legislature that the entire High Speed Train System shall be constructed as quickly as possible in order to maximize ridership and the mobility of Californians, and that it be completed no later than 2020, and that all phases shall be built in a manner that yields maximum benefit consistent with available revenues."

Grammatically, we submit that this is a mandatory requirement, and that the word "shall" logically should be placed after the word "it" so that the statutory phrasing reads as follows:

> "It is the intent of the Legislature that the entire High Speed Train System shall be constructed as quickly as possible in order to maximize ridership and the mobility of Californians, and that it shall be completed no later than 2020 . . ."

But the Authority is now in violation of AB 3034(f) and has admitted that fact. The Authority indicates in its April, 2012, Business Plan that the statewide project will not be finished until 2029.[83] There is even some evidence that the project will not be finished until 2032.

Therefore, the project will not be completed for at least nine years after the Legislature required it to be completed. Such delay in completion will also lead to increased costs, carrying charges, and the usual collateral effects from a long delayed completion date for a public works project.

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[82] See Exhibit A, Declaration of Quentin L. Kopp, p. 8, l. 8-10, commenting that one of the effects of the blended system is to make this change of trains inevitable for a long period of time.

[83] Page ES-13 [AG001948] of the business plan says the completion date will be 2028; but a graph on page ES-14 [AG001949] suggests a later date, namely, 2029 or 2030. The situation is probably much worse, since the Authority is ignoring Phase II (San Diego, Sacramento, the Inland Empire) altogether, and if that area were included (which is required under Proposition 1A), this could push the completion date out by at least half a decade to 2035. This is a lot of "carry time" for the $9 billion bond, with interest running at approximately $700 million per year. Also see pp. AG001990; AG002064, AG002067, AG002069, and AG002071.

XI.

CALIFORNIA'S CAP AND TRADE LAW (AB 32) WILL NOT BE AVAILABLE TO FINANCE THE CONSTRUCTION OF A HIGH SPEED RAIL PROJECT

As the writ brief, Part I, argues, the Authority must demonstrate that it has adequate funding in place, committed, or secured to complete an electrified high speed rail project on the usable segment running from Merced to the San Fernando Valley. The financial situation has remained bleak since the year 2010, when the federal government did provide $3.3 billion for the project. But thereafter, all further federal funds were cut off, there has been no private investor interest (See Exhibit I, Declaration of Michael Brownrigg, indicating no investor interest whatsoever in this project which continues to the present time; he is a venture capitalist and says that no reasonable investor would ever invest in this project),[84] and no local contributions. Therefore, the Authority, as of today, has only the $3.3 billion in federal funds, plus $2.7 billion allegedly from Proposition 1A (since Proposition 1A cannot contribute more than the federal money available). But the usable segment will cost more than $31,000,000,000, and therefore, the Authority is approximately $25,000,000,000 short.

The Governor's administration, searching for a financing source, argues that revenues produced for California's Cap and Trade Law (AB 32) can be used to finance construction of the high speed rail project. Attorney Brady is addressing this issue, because this idea of funding high speed rail from cap and trade revenue may not have been actively considered at the time of the Funding Plan, but has only fully surfaced more recently. In the real world, it is important for this Court to realize that not only is there no hope for future federal funding, no hope for local contributions, and absolutely no private investor interest (despite the Authority's protestations to the contrary). There is also no possibility of filling the funding gap from cap and trade revenues.

[84] Also see Exhibit O, Supplemental Declaration of Michael Brownrigg, indicating more recent developments and empirical evidence that in Europe, Asia and South America, private investors who had been invited to participate in high speed rail have shown little interest because of no potential for profit. (See in particular discussion of recent Brazil experience, Exhibit O, pp. 1-2.) Also see Exhibit K, Declaration of James Mills [former Authority board member, and long-time distinguished State Senator from California] indicating no private investor interest and long-time lack of profit from private passenger service such as Amtrak. The private sector will not invest without some type of revenue guarantee [p. 5, ¶ 12] which of course is precluded since this would involve a State subsidy. Senator Mills also indicates that the Authority withheld from the voters information that there was no private investor interest, and continued to make contrary representations after the November, 2008, election [p. 5, ¶ 13, fn vii].

This further demonstrates the project is "not feasible" and certainly not "adequately funded" under Proposition 1A's stringent requirements. At the very most, the possibility of cap and trade funding must be rated as "uncertain," and that does not pass the test under the safeguards of Proposition 1A.

AB 32 does not contact precise requirements as to how the proceeds of the Cap and Trade Program may be used. The California Air Resources Board regulations implementing AB 32, however, require that auction proceeds be deposited in the Air Pollution Control Fund to be available for appropriation by the Legislature for the purposes designated in AB 32. See, 17 Cal Code of Regulation § 95870(b)(2), (f) (both stating that proceeds from sales of allowances will be "deposited into the Air Pollution Control Fund and will be available for appropriation by the Legislature for the purposes designated in California's Health and Safety Code, § 38500, et seq.") AB 32 cannot be considered a tax, since it did not receive the required two-thirds vote. Tax revenues may be used for general purposes, whereas the revenues generated by "fees" are limited. See, *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866. The California Supreme Court explained how fees must be used and the limits upon them. The high speed rail project probably falls under the category of regulatory fees imposed under the State's police power. *Sinclair,* at page 874. The police power involved with the regulation of greenhouse gases (GHG) is the primary purpose of AB 32. But the fees collected as auction proceeds under AB 32 must not be used for "unrelated revenue purposes," and, therefore, there must be a close relationship and an efficient use of such fees for the purposes of carrying out the Act.

The primary purpose of AB 32 is, of course, to reduce California's GHG to 1990 levels by the year 2020. (Coincidentally, the year that the HSR project is required to be completed, although the Authority has now indicated that that will not be accomplished until more than a decade later.)

Superficially, it is true that some environmental studies have indicated that high speed train operations will cause a decrease in GHGs, but there are several arguments that if the fees generated in the auction can be used to finance high speed rail construction this would result in

use of the fees for "unrelated revenue purposes," condemned unless AB 32 is a tax, which it is not.

Ridership issue: Estimates of GHG reduction depend on ridership, and as stated in this brief, the ridership numbers of the Authority are highly suspect and grossly exaggerated. They also dropped from 117,000,000 riders per year in 2008 (when Proposition 1A was passed) to approximately a median of 25,000,000 riders per year presently. Reason, Draft, Due Diligence Report, page 51, footnote 97. [The Reason, Draft Report, found that under two scenarios, ridership would be 6.9 million on the high side and 4.8 million on the low side; Reason, page 51.]

The LAO has commented that the train, during construction (and the completion date of the construction has been extended more than a decade) will be a net polluter/contributor (see footnote 90, *infra*) of greenhouse gas emissions, and this will last for a generation, at least (see footnote 90, *infra*). Also see Brownstone, M. Hansen, Samer, Madanat, "Review of Bay Area California High Speed Rail Ridership and Revenue Forecasting Study" (June 2010). Therefore, there is a strong argument that construction of this train system will not result in a net improvement to the GHG situation, given the enormous amounts of pollution that will be emitted by the train system for more than a generation.

Secondly, note that the 130 mile ICS is not planned to be electrified by the Authority. Instead, diesel conventional rail will be installed. This scarcely will promote the idea of GHG reduction.

Thirdly, there is the issue of "cost effectiveness." Many industries will be campaigning to receive auction proceeds. The government agency must evaluate which industries would be most "cost effective" in the use of the financial aid. As will be shown, *infra*, the cost per ton of removing GHGs from the high speed train system are enormously higher than most other industries, making HSR non-cost effective. In other words, there is no "bang for the buck." This being true, it is more likely that a court would find that use of the cap and trade proceeds to aid the Authority would be an "unrelated revenue purpose," condemned by the Supreme Court in *Sinclair Paint*, *supra*, 15 Cal.4th at page 78.

Finally, even if the Court were to decide that the proceeds sufficiently related to AB 32 in

connection with aid to the Authority, the question is whether the proceeds would be "in place, committed, or secured" as Proposition 1A requires. See § 2704.08(c)(2)(D) and (d). The first auction under AB 32 recently took place and there was enormous disappointment in the success of the auction. It was anticipated that it would raise $1,000,000,000; instead, only $55,000,000 was raised.[85] Also, see LAO, Energy Efficiency and Alternative Energy Programs 12 (December 19, 2012).[86]

Legislature Acts to Prohibit Funding From Cap and Trade:

To obtain an up-to-date status of this matter, it is important for the Court to note that Assembly Bill 1497 was recently introduced. It states that section 15.11 of the Budget Act of 2011 is amended so as to add section 15.11(a) which reads as follows:

> "The Director of Finance may allocate or otherwise use an amount of at least $500,000,000 for moneys derived from the sale of greenhouse gas emission allowances which are deposited to the credit of the Greenhouse Gas Reduction Fund . . ."

Then section 15.11(e) states as follows:

> "For a period of not less than two years, no funds allocated pursuant to subdivision (a) shall be used for the purpose of developing a high speed rail system."

Factual Information:

The matter of greenhouse gas emissions discussed extensively by Wendell Cox, one of the authors of this year's Reason Foundation Due Diligence Report. Mr. Cox will also be a witness in this case, and his Declaration is attached together with scholarly material on this subject.[87] He points out that the United Nations' intergovernmental panel on climate change estimated that a sufficient reduction in GHGs can be achieved for $20 to $50 a ton. And yet the cost to remove a ton from the high speed train system ranges from $1,800 a ton to $10,000 a ton.[88] Reason points out that a University of California study shows that it will take 71 years for high speed rail to save

[85] See Proposed RJN 133 p. 12.
[86] Proposed RJN No. 133, LAO Energy Efficiency report.
[87] Mr. Cox discusses the greenhouse gas emissions issue extensive in the Reason Foundation Report, pp. 32-36; the matter is also covered in his Declaration, Exhibit B, pp. 13-16; also attached to his Declaration is a report by noted expert Joel Schwartz on the subject of the environmental impacts of the phenomenon. (Also see Reason Due Diligence Report, Draft, p. 35, fn 48 and 49 citing to Schwartz), http://reason.org/files/cahsr_due_dilligence.pdf.
[88] Reason, Due Diligence Report, Draft, p. 5; Exhibit B, Cox Declaration.

enough greenhouse gas emissions to negate the emissions from its construction activity.[89]

This is but another reason why use of cap and trade revenues is not an "efficient use" of the money, since much more is achieved on GHG reductions by focusing on industries where the cost of removal is much cheaper.[90]

It is revealing that in its Business Plans, the Authority itself gives no estimate per ton for the cost of removing GHG emissions. Reason, Draft Report, page 34.

Mr. Cox further points out a ridiculous example used by the Authority (similar to their wildly exaggerated ridership claims and low costs). Authority website indicates that a trip from San Francisco to Los Angeles on high speed rail would ". . . reduce greenhouse gases by 714 kg, or 324 pounds."[91] However, the data developed by the University of California research group shows that GHG reductions on the trip would be 8 kg by airline and 38 kg in the car. Mr. Cox concluded that the Authority is vastly exaggerating reduction.[92]

Also, as stated above, sometime ago, the LAO issued a comprehensive report saying that the Authority would be a net contributor to pollution for an entire generation during construction and how the situation will be aggravated due to the delay and the extension of the completion date by more than a decade (see footnote 90, *supra*.)

Also, as noted above, there is the dramatic fact that the Legislature indicated that <u>no money</u> from cap and trade will go to high speed rail for at least the next two years.[93] This cannot be regarded as a guarantee that they will get money after that. And equally important is the fact that there is no certainty whatsoever that any money received will be adequate for the Authority's purpose, given the disappointing amount that was collected at the first auction. All of this flies in the face of the certainty put in place by the Legislature when they established the safeguards and

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[89] Reason, Due Diligence Report, Draft, p. 34, fn 46, citing Mikhail Chester and Irpad Horvath, Life-Cycle-Assessment of High Speed Rail: The Case of California." copscience.iop.org/1748-9326/5/1/0147003/pdf71/489326_5_1_014003.pdf

[90] The LAO has so found: in 2011, they reported that HSR was a net pollution contributor; in 2012, their report indicates that there are much cheaper ways to eliminate GHG than to spend it on high speed rail; that this is not proper allocation of priority [concentrating on other industries gives a better result]. See AG002938 -49, LAO 2012-13 budget report, referring to sections "Business Plan and Budget Proposals Raise Concerns – Most of the Future Funding Remains Speculative – Use of Cap-and-Trade Auction Revenues very Speculative."

[91] CHSRA, "Trip Planner," Access April 19, 2012, http://www.cahighspeedrail.ca.gov/trip_planner.aspx

[92] Reason, Due Diligence Report, Draft, page 35, http://reason.org/files/cahsr_due_dilligence.pdf.

[93] AB 1497, Budget Act of 2012 [AG002784]

protection in the funding sections of the Streets and Highways Code relating to Proposition 1A. This considerable uncertainty, whether funding can even take place from AB 32, and the uncertainty over the amount of such funding, even if funding occurred, dooms the prospects for funding, especially when we are talking about tens of billions of dollars ($25,000,000,000 to complete the usable segment).

XII.

THE PROPOSITION 1A BALLOT PAPERS MADE A MATERIAL MISREPRESENTATION TO THE VOTERS ABOUT THE COSTS OF THE PROJECT. BALLOT PAPERS ALSO MADE A MATERIAL MISREPRESENTATION CONCERNING THE FARES THAT WOULD BE CHARGED. THE AUTHORITY WAS RESPONSIBLE FOR THIS SINCE IT WAS IN POSSESSION OF ALL OF THE INFORMATION LEADING TO THE REPRESENTATIONS. IT SHOULD NOT PROFIT FROM THIS MISREPRESENTATION, AND PROPOSITION 1A FUNDS SHOULD BE DENIED.

There has been a serious escalation of costs concerning this project. This is endemic on mega rail projects. As the discussion on ridership points out (Section VI, *supra*), the leading author and expert in this area is Bent Flyvbjerg,[94] along with his colleagues Nils Bruzelius and Werner Rothengatter. Mr. Flyvbjerg is a professor at Oxford; Bruzelius is an associate professor at the University of Stockholm; and Rothengatter is head of the Institute of Economic Policy and Research at the University of Karlsruhe in Germany, and he has served as president of the World Conference on Transport Research Society. These three gentlemen studied 258 transportation infrastructure projects that went on over a 70 year period in North America, Europe, and Asia. They found that escalation of costs on rail projects averaged about 45%.[95] They found cost overruns in 90% of the projects. Comment: Flyvbjerg reports that over the years there has been no improvement with respect to this problem. Reason, Due Diligence Report, Draft, page 14. Flyvbjerg stated the following:

> "Cost underestimation and overruns cannot be explained by error and seem to be best explained by strategic misrepresentation, namely, lying, with a view to getting projects started."[96]

[94] This famous author in his analysis of mega public works projects has been cited by and relied upon by the Authority in its Business Plan. See AG001950.

[95] Exhibit B, Declaration of Wendell Cox, p. 4, et seq.; also see 2012 Reason Foundation, Due Diligence Report [authored by Cox] p. 4, fn. 2. http://reason.org/files/cahsr_due_dilligence.pdf.

[96] Reason Foundation, page 14, quoting Flyvbjerg, Megaprojects.

Comment: In this case, we remind the Court of the ridiculous positions of the Authority on the issue of "operating costs" with the projected 10¢ per passenger mile costs – one-sixth of the Authority's sister railroad (Acela) on the northeast corridor, and four to five times lower than the international average. We also remind the Court of the wild fluctuation in the Authority's ridership numbers, starting at 117,000,000 passengers a year and currently at a median of 25,000,000 passengers a year!

Before Proposition 1A, the Statewide project (made up of Phases I and II) was to supposed to cost around $23,000,000,000. By the time of Proposition 1A, the cost was approximately $33,000,000,000, and it was thought that the $9,000,000,000 in the Proposition 1A bond fund would be sufficient, since it would be matched, roughly, with federal contributions and private[97] and local contributions. But by the time of the 2011 Business Plan (November 1), the project had tripled in cost, between $98,000,000,000 and $117,000,000,000. Panic set in with the Authority, and the entire project was changed in scope and framework, with the blended system being adopted in April, 2012, when the Revised Business Plan was released. This dropped the cost about $13,000,000,000. Reason, Due Diligence Report, Draft, page 14. In the Due Diligence Report, Draft, page 16, the Reason Foundation has a figure 1 detailing the cost of escalation. The adoption of the blended system, of course, had drastic effects upon the performance qualities of the project, slowing down speed, creating all sorts of problems in the San Francisco and Los Angeles areas with track sharing, safety, increased maintenance costs, etc. It will also result in a three ride trip and changing trains twice (between the San Francisco and Southern California). Reason, Due Diligence Report, Draft, page 16.

Fares: The ballot papers presented to the voters on November 4, 2008 represented to the voters that the fare for a one-way ticket, from San Francisco to Los Angeles would be approximately $50. In the most recent business plan, the fare is now $81, 60% higher.

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[97] As the Declarations of venture capitalist Michael Brownrigg (Exhibits I and O) demonstrate, from the beginning, there has been zero interest from the private investor circles. As the Declaration of James Mills, distinguished former State Senator and former member of the High Speed Rail Authority board indicates, the Authority concealed from the public this lack of private investor interest, since they had information from Goldman Sachs and the Infrastructure Management Group (IMG) that private investors would not participate without a revenue guarantee. See Exhibit K, Mills, pp. 5, ¶ 13, fn. vii.

The Authority has been in possession of all of the information associated with these misrepresentations. Accordingly, Proposition 1A bond funds should not be dispersed to the Authority for construction of the Central Valley project.

XIII.

ILLEGAL EXPENDITURE OF PROPOSITION 1A FUNDS HAS ALREADY OCCURRED AND IS ONGOING

(See paragraph 17, 18 and 19, Second Amended Complaint.) Plaintiffs will prove not only that illegal expenditures are threatened (because the Authority says that construction with Proposition 1A funds will start six weeks after the trial of this case commences) but also that illegal expenditures of public funds (Proposition 1A) have already occurred and are ongoing. As this brief demonstrates, in November 2011, the Authority submitted its Funding Plan to the Legislature and to the Director of Finance. In connection with the submission of this Funding Plan, this submission was an illegal act under section 2704.08(c)(2)(K) because that section says that no funding plan can be submitted to the Legislature and the Director of Finance unless the Authority has completed project level environmental clearances for the usable segment. Not only did the Authority refuse to so certify, but in fact no such project level environmental clearances had been obtained or completed at the time of the submission.[98] The Authority used its own employees to prepare, promulgate, and submit the Funding Plan and related documents. The compensation paid to these employees constitutes an illegal expenditure. [See *Blair v. Pitchess* (1971) 5 Cal.3d 258, 269-70 (Los Angeles County Sheriff's payment of compensation in connection with illegal act provided standing for plaintiffs to sue); See Second Amended Complaint, ¶ 17A]

Secondly, the defendants' connection with the bidding process (now far advanced) handed out to the prospective bidders requests for proposals [called RFPs]. These were given to contractors and subcontractors to obtain construction bids. More than $900,000 in public funds has already been expended by the Authority in this bidding process. These expenditures are all related to construction and are capital expenditures for construction-related work within the

[98] See Section IV, *supra*.

meaning of section 2704.04(c) and these are illegal expenditures that have already occurred. These expenditures likewise could not have been made until all the project level environmental clearances had been completed, as set forth above. (See Second Amended Complaint, ¶ 17B, also see Section IV, *supra*.)

Thirdly, the Authority has engaged in an unusual and highly questionable expenditure process. It has agreed to pay, and has paid, $2,000,000 each to contractors and subcontractors who have been unsuccessful bidders on the Central Valley Project. The Authority rationalizes this by saying that this was to encourage more bidders. These capital expenses are likewise illegal for the same reasons set forth in this section of the brief in violation of section 2704.08(d). This process of compensating unsuccessful bidders was approved by the Authority in Resolution CHSRA No. 12-04 (Stipend and Term Sheet for Bidders). (See AG001751-2) For the Resolution, see http://cahighspeedrail.ca.gov/WorkArea/DownloadAsset.aspx?id=12275.

Evidence of these past and ongoing illegal expenditures will be presented at trial.

XIV.

THE AUTHORITY HAS VIOLATED THE INTENT OF THE VOTERS IN ENACTING PROPOSITION 1A; ACCORDINGLY, THE AUTHORITY IS INELIGIBLE TO RECEIVE PROPOSITION 1A BOND FUNDS FOR THE CONSTRUCTION OF THE CENTRAL VALLEY PROJECT.

The central theme of Parts I and II of this brief is that the Authority (and later the Legislature itself) has violated the intent of the voters in enacting Proposition 1A. As the remaining sections of this brief, Part II, point out, the intent of the voters must be strictly observed; Proposition 1A is to be liberally interpreted in favor of carrying out the intent of the voters; if discretion was not given by Proposition 1A to the Authority with respect to complying with its restrictions and prohibitions, then no discretion exists; and that if the Legislature seeks to amend or alter the provisions of Proposition 1A, those efforts are void and ineffectual.

The person most knowledgeable and experienced about the proceedings leading up to the approval of Proposition 1A (namely, the crafting of AB 3034), and the intent of the Authority itself as to its goal of carrying out the intent of the Legislature and the voters, is Judge Quentin L. Kopp, whose Declaration is attached as Exhibit A. Judge Kopp has a distinguished background.

He was a private attorney for several years; he then served in the Legislature for many years, including on the Senate Transportation Committee, and as Chairman, and that was the committee which played the prominent role of oversight with respect to the High Speed Rail Authority and the events leading up to AB 3034 and placing Proposition 1A on the ballot. Judge Kopp also served for many years as a San Mateo County Superior Court Judge. His background for many years in the Legislature was focused on transportation issues. He is really known as the father of high speed rail in California, having proposed the original bill and having shepherded it along through various administrations, culminating in the passage of Proposition 1A in November, 2008. Judge Kopp was an early and long-time member of the Board of the High Speed Rail Authority, and then served as Chairman during the time when AB 3034 was being crafted, during the time when the Assembly and Senate hearings were being held on the Proposition 1A election, during the last few weeks as the new restrictions, safeguards and prohibits were being inserted into AB 3034 [ultimately to go into Proposition 1A itself], and for approximately one and a half years after Proposition 1A was approved by the voters.

Senator Kopp full-well knows what the voters intended, because the Authority was attempting to carry out the intent of the voters, namely, to provide a genuine high speed rail system throughout California. Chairman Kopp felt that, in his capacity as chairman of that committee, in attempting to bring genuine high speed rail to California, he was not only carrying out the intent of the Authority, but also the intent of the Legislature; he was very familiar with what the Legislature intended, since he participated in so many hearings and answered countless questions from people like Senator Alan Lowenthal, Chairman of the Senate Transportation Committee, and Senator Joe Simitian, Vice-Chairman of the Senate Transportation Committee, probably the two leading California legislators with respect to knowledge of, and oversight of, the high speed rail program. (Both joined with the other high speed rail activist, Senator DeSaulnier, in ultimately voting "no" on funding the project, which tells us a lot about its feasibility.)

Judge Kopp states that by the time the Authority prepared its November, 2011, Business Plan, it was apparent the Authority was going to betray, not support, the voter intent behind Proposition 1A. For example, the Authority was not going to build a proper usable segment,

suitable and ready for high speed rail, since it would not be electrified but instead would be a standard, conventional, diesel, 130 mile section (the ICS). He indicates that he voters never intended that conventional rail would be the object of the Proposition 1A program, nor did they intend that the $9,000,000,000 part of Proposition 1A could be used for the assistance of local commuter rail services (Exhibit A, Kopp Declaration, pp. 4, 7) [which is exactly what is going on at the present time and what the Legislature in passing SB 1029 authorized]. (See Exhibit A, Kopp Declaration, pp. 4-6.)[99] Senator Kopp fully understood the safeguards, restrictions, and prohibitions in Proposition 1A, and supported them, and the legislative intent behind those provisions. He states these protections and safeguards have been frustrated and are not being carried out by the Authority, and that this violates Proposition 1A. He specifically focuses on the adoption of the Revised Business Plan in April, 2012, which adopted the so-called "blended system," and his Declaration outlines the many ways in which that blended system fundamentally altered the intent, goals, and purposes of Proposition 1A in providing a genuine high speed rail system throughout the State.[100] As he indicates, the entire framework of Proposition 1A was changed by the April, 2012, decisions. No longer was California going to furnish a genuine high speed rail system; instead, it became a program for the aid of local commuter rail systems and agencies, completely contrary to voter intent.

How and why did this happen? In 2010, the Authority received a sizeable federal contribution from the ARRA stimulus bill, and also received further funds from the FRA, the grand total of which was $3.3 billion. The original goal was that the entire statewide project would be funded with roughly equal contributions from the federal government, Proposition 1A, local sources, and the private investor sector. But after 2010, matters deteriorated: there has never been a local investment; there has never been any private investor interest, because,

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[99] Senator Kopp makes another very interesting and valid point: Proposition 1A actually totals $9,950,000,000. It was divided into two parts – the $9,000,000,000 part, and the $950,000,000 part. The $9,000,000,000 part was meant for genuine high speed rail funding; the $950,000,000 part could be used to benefit local commuter and other rail services, so long as they had some connection with high speed rail. This necessarily implies that the $9,000,000,000 part was strictly reserved for genuine high speed rail – a fact being totally ignored by the Authority and by the Legislature in passing SB 1029.

[100] Another distinguished former State Senator and a former member of the High Speed Rail Authority board himself, is James Mills. His Declaration is Exhibit K. Senator Mills agrees with Senator Kopp that the actions of the board are a betrayal of voter intent. Exhibit K, p. 3, ¶ 6.

financially, this is a terrible project with inevitable subsidies and no financial promise. (See Exhibit I and Exhibit O, Declaration and Supplemental Declaration of Michael Brownrigg.) Mr. Brownrigg is a distinguished Peninsula venture capitalist and states that no reasonable investor would ever risk money on this venture because it is so poorly managed and its prospects are so bleak. Most dramatically, the House[101] and Senate cut California off from any further high speed rail funding, since the national taste for such had severely declined, and other more pressing financial priorities faced the nation (true today as well). The Authority also began to experience serious cost overruns, with a project originally thought to cost around $33,000,000,000 soaring to as much as $117,000,000,000. The only money available was the $3.3 billion in federal money; only $3.3 billion could be taken out of Proposition 1A, since the terms of the proposition state that it will never finance more than 50% of the cost (the matching funds requirement). What could the Authority do when they had only $6,000,000,000 ($3,000,000,000 from the federal government, $3,000,000,000 from Proposition 1A) and with the "usable segment" where they were going to start construction in the Central Valley costing $31,000,000,00, and with the Proposition 1A requirement that $31,000,000,000 had to be in place, secured, or committed before construction commenced? In short, the Authority was $26,000,000,000 short!

The answer was the elaborate blended system which, at its core, is nothing more than a plan to aid local commuter rail services under the guise of these agencies "some day" achieving some connection with high speed rail. The blended system involves such things as sharing track with local rail service and providing cash to improve or modify local commuter rail facilities, with that money coming from Proposition 1A. As Chairman Kopp indicates, all of this was completely contrary to the intent of the voters who wanted nothing less than genuine high speed rail throughout the State.[102] (See Exhibit A, Kopp Declaration, pp. 4-8.)

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[101] The House was actually so upset with California's high speed rail program that it awarded the project the Boondoggle of the Year Award. See Proposed RJN 139

[102] Wendell Cox agrees; see Exhibit B, Declaration of Wendell Cox, p. 5, ¶ 11, et seq. Cox also points out another misrepresentation: The Authority has virtually ignored Phase II of the project involving Sacramento and San Diego and the Inland Empire, leaving those areas of California out in the cold. Exhibit B, p. 8, ¶ 21. On cost overruns and misrepresentations on costs, also see Exhibit G, Declaration of Adrian Moore, pp. 4, 5, ¶ 15. Adrian Moore is vice-president of the Reason Foundation and oversaw the production of the 2008 Due Diligence Report and the current

The blended system also had the political advantage of attracting Bay Area and Southern California politicians to support such a diversion of Proposition 1A funds for local commuter rail purposes, since it was "free money." No doubt, this helped attract votes in the Legislature itself when in July, 2012, the Legislature in essence approved the blended system by providing funds for it, in addition to providing $1.1 billion in Proposition 1A funds to the Peninsula and Southern California commuter rail agencies.

All this served the ends of the Authority in 2011-2012 because it allowed them to continue spending money (their consultants have now spent close to three-quarters of a billion dollars of Proposition 1A money). If this program continues, the Authority will simply continue to withdraw money from Proposition 1A, use it for local commuter rail services all over the State (pretending that it is HSR related), and before we know it, there will be nothing left in the $9,000,000,000 Proposition 1A fund! Very recently, dramatic evidence of the truth of these fears surfaced. There was a Board meeting of the High Speed Rail Authority on March 5, 2013. A vote was scheduled to be taken on the use of Proposition 1A funds to financially assist Caltrain on the San Francisco Peninsula, pursuant to SB 1029. Board member Lynn Schenk (often called the "mother" of the California High Speed Rail Project with Quentin L. Kopp being the "father") refused to support the use of Proposition 1A money for such purposes, contending that this was not genuine high speed rail, thereby putting her into the camp of Judge Kopp, as set forth in his Declaration, Exhibit A.[103]

Chairman Kopp goes into great detail explaining how the provisions of the blended system seriously undermine or destroy the specific goals of Proposition 1A's intent to provide a genuine high speed rail system in California. For example:

- The blended system calls for "track sharing" with local commuter rail; on the San Francisco Peninsula, for example, high speed rail will be sharing the same track with three Caltrain operations (Caltrain Express, Caltrain Bullet, and Caltrain local), together with the Union Pacific freight services; this means that five train services will be using the same set of tracks

2012 Due Diligence Report.

[103] See Proposed RJN 142 for the March 18, 2013 CHSRA board meeting video; also see Proposed RJN 143 for the video clip of Ms. Schenk.

every day; this will inevitably lead to slower trains, safety concerns (faster trains overtaking slower trains) and related problems.

- No dedicated tracks: Chairman Kopp indicates that the original plan envisioned dedicated track reserved exclusively for high speed rail. With a shared track system, you encounter all of the scheduling problems associated with having to deal with other train networks, and this will make it impossible to keep the two hour and 40 minute trip time promised in Proposition 1A.
- With shared trackage, the high speeds anticipated by Proposition 1A will not be achievable.
- "Headway" (distance between trains) will be adversely affected.
- Number of trains per hour will be adversely affected. According to Chairman Kopp, to provide adequate revenue, you need at least 10 high speed rail trains per hour; but with the blended system, you will be lucky to have two to four trains per hour. This will adversely affect revenue and, hence, ridership. Instead of being profitable, the train will require subsidy. (See Exhibit A, Kopp Declaration, p. 9, ¶ 18.)
- Without the dedicated tracks, a viaduct system will be impossible, meaning that the goal of high speeds (200 miles an hour) are not attainable.
- The system will not be financially feasible, nor will it reach the goal of being able to pay for itself.
- And finally, the blended system leads to a system which will last for many years whereby passengers have to change trains during the trip from San Francisco to Southern California – squarely prohibited under Proposition 1A. (Exhibit A, Kopp Declaration, p. 8, l. 11-18)

It is indeed dramatic that Chairman Kopp, more deeply involved with high speed rail than anyone in history, has turned against the project because the project has turned against the voters, whose intent he respects. This case, therefore, presents the unusual scenario whereby Senator Kopp seeks to uphold the safeguards and restriction of Proposition 1A, whereas the Authority seeks numerous paths to "get around" those safeguards and restrictions. The primacy

of the initiative under the California Constitution dictates that Chairman Kopp's approach is the proper one, and that the Authority's arguments, seeking to avoid voter intent and these safeguards and restrictions, must be rejected.

Senator Joe Simitian, D-Palo Alto, captured the drama of the moment on April 18, 2012, in a hearing before the Senate Budget Committee:

> "If we don't have additional funds forthcoming, if we have no more money from the Feds, private investment or another bond measure, at the end of $6.2 billion, we have 130 miles of conventional rail. That investment that gives us 45 minutes off the commute time [of the existing Amtrak line] and the value is $15,000,000 a year which is not a great return on investment for $6.2 billion. Absent additional investment, we're left with a stranded investment with modest value."[104]

A telling quotation from the Authority Chairman, Dan Richard, occurred May 15, 2012, in a meeting of the Senate Joint Committee Hearing on High Speed Rail.[105] Mr. Richard was being questioned by Senator Lowenthal who had great concerns about the progress of the project, and its recent adoption (April, 2012) of the blended system.

> [Senator Lowenthal]: "You mentioned before that you don't have any problem sleeping at night because of the funding. I have a great deal of problem sleeping at night because of the funding because it's my responsibility to have to be fiscally responsible and vote on something that's for the best interest for the people of California. I am not saying it's not appropriate. I am just saying I have a lot of concerns. . . . I am deeply concerned that there is no other [financial] commitment. . . . Right now, no commitments to pick up what we need to fill this gap, which, if we don't get it, we're stuck."
>
> [Dan Richard]: ". . . . First of all, it's your last point, Senator, that I'd respectfully disagree with when you say, "We're stuck." Because this goes back to the question of what are we exactly stuck with. . . . So the administration's request is that you allow us to access $2.7 billion worth of the body of the bond money . . . we have indicated to you that in the future we'd be coming forth seeking additional bond fund access to effectuate these MOUs we've signed in northern and southern CA. . . . So when you say that's what we're stuck with, Senator, I have to differ. That is what we get.
>
> [Senator Lowenthal]: "But – "

[104] See Proposed RJN 042 at hour mark 53:37 to 1:04.
[105] See Proposed RJN 081.

> [Dan Richard]: "WE DON'T GET A HIGH-SPEED RAIL SYSTEM, BUT WE GET A LOT." [Emphasis supplied]
>
> Senate Joint Committee Hearing on High Speed Rail, May 15, 2012

Comment: This captures it all: the Authority had given up on genuine high speed rail; but California was going to get "a lot," namely, the raiding of a bond fund specifically intended for genuine high speed rail, for the purpose of aiding local commuter rail agencies all over the State. The adoption of the blended system, coming only one month before these remarks by Dan Richard, illustrates that that was indeed the express purpose of the blended system, namely, to turn Proposition 1A upside down and use Proposition 1A funds for non-high speed rail services. Unfortunately, Senator Kopp has been proven correct, namely, the voters have been betrayed.

Senator Kopp concluded as follows:

> "To me, the Authority Chairman during all the planning and pre-November 4, 2008 efforts regarding the bond measure, this constitutes the greatest betrayal of all in the context of the original intent and promises to voters. The project, as now planned rather than what was promised, constitutes a distortion and mangling of California's HSR project and promises to California voters." (Exhibit A, Kopp Declaration, p. 9, ¶16)

XV.

THE STANDARD OF REVIEW FOR BOND ACTS: STRICT SCRUTINY REQUIRED

As the discussion of the Supreme Court case of *O'Farrell*, *infra*, points out (see section XII, *infra*), when a bond act is being interpreted, strict compliance with its provisions, safeguards, restrictions, and prohibition is required:

> Furthermore, the California Constitution plainly states 'all moneys raised by the authority of a bond proposition shall be applied only to the specific project therein stated' (California Constitution, Article XVI, § 1). It is clearly established and has long been a principle of the State, that the expenditure of bond funds must be in strict compliance with the authorizing law therefor." *O'Farrell v. County of Sonoma* (1922) 189 Cal. 343, 348. (emphasis applied)

The *O'Farrell* case itself involved a bond act which authorized the construction of a four mile road. After the bond act passed, the public entity decided to build only 1.9 miles of the road, but spent almost all of the bond money in doing so. In discussing *O'Farrell*, the case of *San Diego v. Millan* (1932) 127 Cal.App. 326, stated as follows:

> The case of *O'Farrell v. County of Sonoma* involved the expenditure of money derived from the sale of bonds issued under the provisions of § 4088 of the Political Code for the purpose of constructing four miles of paved highway. A contract was let for the paving 1.93 miles of this road, which would consume practically all of the bond money available for the entire project. This was held illegal, as departing from the purpose for which the bonds were authorized, which was to pave all of the four miles of road, and not a minor fraction thereof. The case of *Hunter v. County of Santa Barbara* involved a similar question and a like conclusion. These cases establish the rule that the omission of a substantial portion of the improvement contemplated at the time the bonds were voted is an unauthorized departure from the purpose for which the bonds were issued. *City of San Diego v. Millan*, *supra*, at 127 Cal.App. at 530.

These authorities capture the essence of the present case: The Bond Act, being an initiative, must be strictly interpreted and liberally construed in favor of carrying out the will of the People. As the language of the Bond Act and the Declarations show (Exhibit A, Kopp Declaration), the purpose was to establish a genuine and statewide high speed rail system in California. This was completely changed in April, 2012, when the blended system was adopted. This was a departure from the Bond Act and therefore illegal and unauthorized.

XVI.

THE ENACTMENT OF AN INITIATIVE (THE BOND ACT) (PROPOSITION 1A) CREATES A CONTRACT BETWEEN THE VOTERS AND THE STATE; THE PROVISIONS OF THE INITIATIVE CANNOT THEREAFTER BE CHANGED BY THE LEGISLATURE; BY ENACTING SB 1029, THE LEGISLATURE IN EFFECT SOUGHT TO AMEND PROPOSITION 1A, THE BOND ACT, WHICH IS FORBIDDEN; ACCORDINGLY, SB 1029, WHICH PROVIDES FUNDING FOR THE CENTRAL VALLEY PROJECT IS UNCONSTITUTIONAL UNDER THE CALIFORNIA CONSTITUTION, WHICH GIVES PRIMACY TO INITIATIVES OVER ORDINARY LEGISLATIVE ENACTMENTS.

Summary: Proposition 1A is a voter-enacted initiative crafted by the Legislature and placed before the voters for approval. California law, and the California Constitution, gives priority and primacy to initiatives. They are binding upon all future legislatures. Their provisions cannot be changed by a legislature, unless the initiative itself allows such changes by a legislature (Proposition 1A does not). SB 1029 is a statute which provides funding for what is now known as the blended system, consisting of the Central Valley Project and the so-called "bookends" located on the San Francisco Peninsula and in the Los Angeles Basin. By enacting SB 1029, the Legislature in effect sought to materially change and alter the specific intent of the voters in

enacting Proposition 1A, since the express purpose of Proposition 1A – to provide a genuine high speed rail system in California – can no longer be achieved. (See Exhibit A, Kopp Declaration.) This action by the Legislature is contrary to law and violates the State Constitution. Neither the Legislature nor the Authority has any discretion to violate Proposition 1A and the intent of the voters in enacting it must be strictly enforced.

The leading recent case is *Shaw v. People ex rel Chiang* (2009) 175 Cal.App.4th 577. The Court held that the Legislature, acting after the enactment of an initiative (Proposition 116) had not acted in accordance with the mandates of the initiative and that the Legislature was bound to follow the initiative and the intent of the voters. It is the California Constitution that so restricts the power of the Legislature; it vests the entire initiative and referendum power with the People. Accordingly, when an act of the Legislature is challenged as violative of an initiative, the courts look at the Constitution:

> The People's power of initiative and referendum, however, are greater than the power of the Legislature (*Shaw*, at 597, citing *Rossi v. Brown* (1995) 9 Cal.4th 688, 715-16).

As to the standard of Court review, *Shaw* stated the following:

> When determining whether a legislative action is consistent with the statutes or constitutional provision enacted through the People's power of initiative, the courts liberally construe the resulting statutes or constitutional provisions (the initiative) to reflect the intent of the People as set forth in the initiative in order to avoid nullifying the People's exercise of this right. *Shaw*, at p. 597, citing *Rossi*, *supra*, at pp. 694-95. (Emphasis applied)

The Court went on to point out that courts recognize that an initiative can allow the legislature to amend it (however, in this case, there is no such provision in Proposition 1A). Therefore, the courts must interpret Proposition 1A to reflect the voters' intent as set forth therein. This, of course, is an historic function of the declaratory relief cause of action, namely, the interpretation of statutes, initiatives, and the constitutionality of the same.

As the preceding section of the brief demonstrates, the adoption of the blended system, and the statutory implementation thereof (SB 1029) by the Legislature of that system completely changed the voter intent in Proposition 1A. For this reason, SB 1029 is invalid.

These above principles are particularly applicable to Bond Acts. Several important cases

have established that bonds enacted through the initiative process create a contractual relationship between the government and the voters, and this contract cannot be changed after it is formed unless all parties consent:

> After the contract had been made, it could not be altered by one of the parties only [the legislature in our case], but by all the parties thereto. *O'Farrell v. County of Sonoma* (1922) 189 Cal. 343, 348.

Also note that the California Constitution specifically bears on this issue with respect to Bond Acts: "All moneys raised by authority of [a bond proposition] shall be applied only to the specific object therein stated . . ." California Constitution, Article XVI, § 1. [Emphasis applied]

O'Farrell went on to state as follows:

> It is clearly established, and has long been a principle of the State, that the expenditure of bond funds must be in strict compliance with the authorizing law, therefore. That is, as a contract with the taxpayers, the public entity must abide by the terms of its single 'contract' closely, only exercising discretion where discretion is provided or in the contract.

Comment: This is an important principle in the present case: Proposition 1A, as explained exhaustively in this brief, is replete with strict protections, prohibitions, and safeguards, carefully defined. There is virtually no discretion given to the Authority because the Legislature was concerned that providing such discretion would jeopardize the ability to complete the project and place the State at financial risk.

In the *O'Farrell* case itself, the bond measure provided for the construction of a four mile road; but the public body after the measure passed decided to build only a portion of the road (1.9 miles). In invalidating this, the Court stated:

> "Neither could it directly extend the moneys on only a portion of the road. What it could not do directly, it could not do indirectly. Such fact is of the utmost importance to the interested parties. It is the only hold the taxpayers have for specifically enforcing the contract as made by them." *O'Farrell*, *supra*.

Ironically, the then-California State Attorney General (now Governor Brown) agreed with the above principle in preparing an Attorney General Opinion. See, California State Attorney General Opinion No. 56-203, Edmund G. Brown, Attorney General. In finding that bond funds passed by an initiative were restricted, and that no changes could be made, he stated as follows:

"As such, moneys received from the issuance and sale of bonds can only be used for the purposes set forth in the proposition approved by the electors."

Therefore, SB 1029 is a material change in Proposition 1A, is unconstitutional and is a nullity. Since SB 1029 is the vehicle by which funding is provided for the Authority's project, no bond money may be released.

Conclusion:

Rarely have we seen an initiate more detailed and carefully crafted than Proposition 1A. During the months moving towards the vote (November 4, 2008), the Legislature, particularly the Senate Transportation Committee under the leadership of Senator Lowenthal and Senator Simitian, put together AB 3034 with detailed provisions which were carried over into and became part of Proposition 1A. After many months of hearings (more than a year) had convinced the Legislature that this type of public works project posed great financial risks for the State, the Legislature was determined to protect the State from such risk.

It is equally difficult to imagine how a public entity (the Authority) could more flagrantly violate so many of the detailed provisions the Legislature had crafted and the People had approved:

- Proposition 1A required that the project be built in building blocks called usable segments, which must be electrified. Instead, the Authority, although selecting IOS South as a usable segment, plans to build only on the ICS and has no plans to spend its existing money on electrification, choosing instead to install a conventional rail system, which is not allowed. The Authority's desperate funding situation means that it has no ability to "complete" the IOS South, much less the ICS as an electrified portion. Completion of the usable segment as an electrified system is required under Proposition 1A.

- The Legislature felt that it was vital, and the voters agreed, that all environmental clearances be completed even before the Authority submitted its Funding Plan (November, 2011) to the Legislature. The Authority flagrantly violated this provision, stating in its certification that it "would" in the future obtain such certifications before construction started. Not only that, but TODAY, the Authority has done virtually nothing for most of the usable segment (as far as

environmental compliance is required), and even for the ICS, it only about 25% there. Yet the Authority announces to the world that it plans to start the project one and a half months after the trial of this case!

- Most significantly, the Legislature and the voters strictly required that all the funding for the usable segment selected by the Authority had to be in place, committed, or secured before construction could commence. Instead, the Authority ignores the usable segment that it itself selected and it simply takes the position that it can proceed because it has "enough" to do the ICS (even though it plans to build only a conventional rail system, not the required electrified high speed rail system with all the components of a genuine high speed rail system); the Authority concedes that after the ICS is finished, it will have to wait for more funds, so therefore will be unable to finish the entire usable segment (electrifying it) until some future undecided date. This scarcely complies with the "certainty" mandated by the Legislature and the voters before construction starts.

- Promises were made to the voters that the fares would be low, the project would be completed by 2020, and the cost would be half of what they are now. These have been broken and the completion date is now more than a decade from the promised date, resulting in greatly increased costs for the bond and financial exposure for the State.

- Despite the fundamental promise of Proposition 1A to provide a genuine high speed rail system for this State, the Authority completely changed that goal by adopting a blended system, and the Legislature (unfortunately) ratified that choice in SB 1029, thereby violating the Constitution and the primacy of the initiative over legislation.

- The Legislature and the voters clearly and absolutely prohibited a subsidy for operating costs provided by the local, state or federal governments. In the face of contrary evidence from ordinary railroads and high speed railroads all over the world and in the United States, the Authority takes the position that it will earn a 50% profit and that its costs will be one-sixth of what Acela currently pays. Its wildly exaggerated figures on costs, ridership, train speed (this train will be the fastest in the world at 221 per hour) demonstrate a credibility problem that taints the entire project.

These are but a few of the violations of Proposition 1A; for these and the other reasons outlined in this brief and in the writ brief, this Court should grant writs of mandate/prohibition; should enter a declaratory relief judgment interpreting Proposition 1A and ruling that the Authority has violated the Proposition and is in violation of C.C.P. § 526a; and that the construction of the project should be enjoined.

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