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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS et al. Petitioners, **v.** **CALIFORNIA HIGH SPEED RAIL AUTHORITY et al.,** Respondents.	Case No. 34-2011-00113919 **RESPONDENTS' NOTICE OF MOTION AND MOTION FOR ORDER THAT THE SCOPE OF EVIDENCE AT TRIAL IS LIMITED TO THE ADMINISTRATIVE RECORD; MEMORANDUM OF POINTS AND AUTHORITIES** Date: July 25, 2014 Time: 9:00 a.m. Dept: 31 Judge: The Honorable Michael P. Kenny Trial Date: None set Action Filed: November 14, 2011

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 25, 2014, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department 31 of the Sacramento Superior Court, 720 9th Street, Sacramento, California, 95814, Respondents California High-Speed Rail Authority, Chief Executive Officer Jeff Morales, Governor Edmund G. Brown Jr., State Treasurer Bill Lockyer, Director of Finance Michael Cohen, Secretary of the California Transportation Agency Brian Kelly, and State Controller John Chiang, will and hereby do move the court for an order limiting the scope of evidence at trial to the content of the administrative record compiled by the High-Speed Rail Authority. Respondents make this motion on the grounds that, under settled Supreme Court law, extra-record evidence may not be introduced to challenge an administrative agency's quasi-legislative, discretionary determinations, including the High-Speed Rail Authority's planning decisions for the high-speed rail system. Respondents seek relief under, *inter alia*, Code of Civil Procedure section 1085, Evidence Code sections 350, 351, and 352, and the Supreme Court's decision in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559. This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the pleadings, orders, and records on file in this case, and such argument as the court may entertain.

Pursuant to Local Rule 1.06(A), the court will make a tentative ruling on the merits of this matter by 2:00 p.m. the day before the hearing. The complete text of the tentative rulings for Department 31 may be downloaded off the court's website. If the party does not have access to the website, they may call the dedicated phone number for the department as referenced in the local telephone directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the court day before the hearing, no hearing will be held.

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Dated: July 2, 2014

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The California High-Speed Rail Authority determined, based on expert analysis, input from the public, and secondary review by outside experts, that the planned system complies with Proposition 1A's performance standards. In making these determinations, the Authority amassed an extensive administrative record. Petitioners seek to challenge the Authority's determinations, based not on that administrative record, but on new evidence. Indeed, Petitioners do not dispute they would lose this case if judicial review were limited to whether substantial evidence in the administrative record supports the Authority's determinations. To avoid this result, Petitioners seek to introduce new evidence, including but not limited to purported expert witnesses, to try to show that both the Authority and the outside experts charged with reviewing the Authority's methodology and analyses got it wrong. Although Petitioners had an opportunity to do so, they presented none of this evidence to the Authority in the course of its decision-making.

This attempt to collaterally attack the Authority's expert determinations with new evidence outside of the administrative record is foreclosed by Supreme Court law. Whether their challenge is cast as a mandamus action, or an action to enjoin illegal expenditures pursuant to Code of Civil Procedure section 526a, evidence outside the administrative record may not be admitted to challenge quasi-legislative administrative decisions. This is particularly true of administrative decisions, like the Authority's planning decisions, which require a high degree of technical expertise. Because admitting evidence from outside the administrative record would be highly improper, prejudicial, and wasteful, Respondents now move to limit the scope of evidence at trial to the administrative record.[1]

The parties have reached an impasse in their efforts to resolve the scope of evidence admissible at trial. Deciding this threshold issue now is critical to resolving fundamental case

[1] If the Court denies this motion in whole or in part, Petitioners reserve the right to make specific objections to Petitioners' evidence at the appropriate time. For example, Petitioners have indicated they intend to introduce various declarations they previously submitted in connection with their trial brief, but declarations are hearsay and are inadmissible at trial. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1354 -1355; see also Evid. Code, §§ 1200, 711.)

management issues: it will eliminate discovery disputes; it will also have a significant impact on the timing and length of the trial. If, as Respondents contend, the challenged actions of the Authority may be reviewed based only on the content of the administrative record, no discovery is necessary or permissible. The parties can proceed to negotiating the contents of the administrative record, which they successfully did in connection with earlier writ proceedings resolved by this Court. The claims can then proceed expeditiously to trial.

BACKGROUND

I. THE HIGH-SPEED RAIL AUTHORITY

In 1996, the Legislature enacted the California High-Speed Rail Act, which created the High-Speed Rail Authority (Authority) and directed the Authority to develop a high-speed rail system linking the State's major population centers. (Pub. Util. Code, §§ 185020, 185030, 185032, subd. (a), 185034.) In November 2008, the Legislature drafted a bond measure to partially fund the system, which the voters approved. (Sts. & Hy. Code, § 2704 et seq.[2]) (hereafter Proposition 1A or the "Bond Act"). The Bond Act sets goals and guidelines for use of the bond funds, while vesting broad discretion in the Authority to determine how those goals should be achieved. (§§ 2704.04, subd. (b)(3), 2704.08, subd. (c)(1), 2704.09.) Of particular relevance here, the Bond Act provides that the system "shall be designed to achieve" certain design characteristics, including:

- trains "capable of achieving" a minimum of 200 miles per hour;
- maximum nonstop travel times for each corridor;
- maximum "achievable" time between successive trains;
- the maximum total number of stations;
- the "capability" of trains to bypass or transition intermediate stations at mainline operating speed;
- the "capability" of passengers to travel between any two stations on a corridor without changing trains;

[2] All subsequent statutory references are to the Streets and Highways Code, unless otherwise noted.

- the alignment of the system that should, "to the extent feasible," follow existing transportation or utility corridors and be financially viable, "as determined by the authority"; and
- stations to be located near access to local mass transit "or other modes of transportation"; and planning and construction that should "minimize" urban sprawl and impacts on the environment, as well as preserve wildlife corridors, "where feasible."

(§ 2704.09, subds. (a)-(j).) Complying with and reconciling the demands of these characteristics, however, was left to the Authority's discretion. (*Id.*)

By statute, the Authority has discretion to "direct the development and implementation of inter-city high-speed rail service." (Pub. Util. Code, § 185030.) Every two years, the Authority must "prepare, publish, adopt, and submit to the Legislature . . . a business plan." (*Id.*, § 185033, subd. (a).) In addition to producing an updated business plan every two years, the Authority is required, prior to requesting an appropriation of funds from the Legislature, to approve and submit to the Legislature an initial funding plan. (§ 2704.08, subd. (c)). And, before committing any bond funds to construction, the Authority must approve and submit a second funding plan to the Director of Finance and the Chairperson of the Joint Legislative Budget Committee. (§ 2704.08, subd. (d).) Each of these business and funding plans have been approved by a majority vote of the Authority's members in open session, after opportunity for public comment, as required by the Bagley-Keene Open Meeting Act (Gov. Code, §§ 11120-11121). (Administrative Record, lodged May 1, 2013 ("Admin. Rec.") at AG000953; *id.* at AG002782-AG002783; Declaration of Sharon L. O'Grady (O'Grady Decl.), ¶¶ 2-3 & Exhs. 1-4 thereto.)

The Authority is also subject to oversight by an independent peer review group made up of experts on intercity and commuter passenger train service, environmental planning, financial services, project finance, and the engineering, construction, and operation of high-speed trains (hereafter "Peer Review Group"). (Pub. Util. Code, § 185035, subds. (a) & (b).) The Peer Review Group is charged with "reviewing the planning, engineering, financing, and other elements of the [A]uthority's plans and issuing an analysis of the appropriateness and accuracy of

the [A]uthority's assumptions and an analysis of the viability of the [A]uthority's financing plan." (*Id.*, subd. (a).) It also is charged with evaluating the Authority's funding plans and preparing its "independent judgment as to the feasibility and reasonableness of the plans . . . ." (*Id.*, subd. (c).) The Peer Review Group's findings, which it reports to the Legislature, are also well-documented in the administrative record. (Admin. Rec., AG001326-AG001333, AG001919-AG001924, AG003674-AG003685, AG004177-AG004182; O'Grady Decl., ¶¶ 4 & Exhs. 5-8.)

II. THE PARTIES HAVE BEEN UNABLE TO INFORMALLY RESOLVE THE SCOPE OF ADMISSIBLE EVIDENCE.

After this Court issued its ruling on the first funding plan,[3] Petitioners stated their intent to bring "four claims to trial under Code of Civil Procedure § 526a," and, in summary, described those claims as follows:

1. The currently proposed high-speed rail system cannot achieve nonstop service travel time from San Francisco to Los Angeles Union Station of 2 hours and 40 minutes, in violation of § 2704.09, subdivision (b)(1);

2. The currently proposed high-speed rail system will not be financially viable, as required by § 2704.09, and will require an operating subsidy, in violation of § 2704.08, subdivision (c)(2)(J);

3. The currently proposed "blended rail" system materially deviates from the system promised to the voters in Proposition 1A, and therefore violates the Bond Act and article XVI, section 1 of the California Constitution; and

4. If Plaintiffs are successful in any of the above three claims, neither Proposition 1A bond funds nor any of the $3.3 billion in federal grant funds obtained by the Authority may be spent on construction of the currently proposed system.[4]

(O'Grady Decl., ¶ 5 & Exh. 9.)

Respondents subsequently moved for judgment on the pleadings, which the Court denied, finding that Petitioners had, at a minimum, alleged facts that "state a cause of action for issuance of a writ of mandate under Code of Civil Procedure section 1085." (Ruling on Submitted Matter:

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[3] This Court found the Authority's first funding plan did not comply with the Bond Act (§ 2704.08, subd. (c)), and granted a writ of mandate requiring the Authority to rescind and re-adopt the plan. The Court of Appeal is reviewing that decision. (*High-Speed Rail Authority et al. v. Superior Court*, Case No. C075668 [submitted for decision on May 23, 2014].)

[4] As Petitioners conceive it, this last claim is simply a legal conclusion that supposedly flows from the other alleged violations, and is not in itself a challenge to any particular decision.

Mot. for J. on the Pleadings (Code Civ. Proc., § 438) (March 4, 2014) (hereafter "March 4 Ruling"), p. 2.) The Court noted that, while much of Respondents' argument "focused on whether the evidence at trial should be limited to the content of the administrative record," the motion for judgment on the pleadings "was not brought as an evidentiary motion, and was not directed to any specifically-identified evidence that [P]etitioners intend to offer at trial." (*Id.* at p. 4.) The Court ordered the parties to "meet and confer and report to the Court regarding their positions as to the scope of admissible evidence at trial, and regarding any further proceedings that will be needed to resolve disputes over the admissibility of evidence." (*Ibid.*)

The parties have tried without success to informally resolve the scope of evidence at trial and are now at an impasse. (O'Grady Decl., ¶ 6 & Exhs. 10-13.) Respondents began the meet and confer process by asking Petitioners to identify "precisely what decisions by the Authority plaintiffs will be challenging at trial . . . ." (*Id.*, Exh. 10.) Petitioners responded by referencing the Authority's Revised 2012 Business Plan and 2014 Business Plan, but they refused to specify any administrative decisions they seek to challenge. (O'Grady Decl., Exh. 11.) Instead, Petitioners argued that the Authority "has not made a formal decision on the nature of the high-speed rail system it intends to build," and therefore "this is not a situation where a writ of mandate proceedings [sic] based on an administrative record is appropriate." (*Ibid.*, underlining in original.) As to the evidence they wish to adduce at trial, Petitioners argued that "each party should retain the right to submit appropriate documentary evidence to support its position," and to "present appropriate percipient and expert witness testimony in support of their contentions." (*Ibid.*) Petitioners further indicated they intend to call as witnesses some or all of the declarants who provided written testimony in support of Petitioners' opening trial brief, filed in March 2013. (*Ibid.*)

Respondents again asked Petitioners to identify the "final decisions of the Authority, informal or otherwise, plaintiffs intend to challenge at trial . . . . Once we have that information, we can have a more productive discussion about the evidence that might be admissible at trial to prove or defend against those claims." (O'Grady Decl., Exh. 12.) Petitioners responded, again, without specifying the administrative decisions they seek to challenge. They contended that:

(1) their January 8, 2014 letter summarizing their four remaining claims lays out "the legal and factual issues to be litigated at trial"; and (2) their claims of illegal expenditure of public funds "are not based on any one or more specific 'final' decisions of the Authority," but rather "point to an *overall course of conduct* indicating a commitment to the Authority's 'blended system' proposal." (O'Grady Decl., Exh. 13, italics added.)

III. THE CHALLENGED PLANNING DECISIONS.

The Authority's planning decisions to date are reflected in its first funding plan, together with the 2012 business plans (draft and revised) and the 2014 business plan. Notwithstanding Petitioners' refusal to identify any specific decisions they wish to challenge, to the extent that the Authority has adopted a "design of the entire system" (March 4 Ruling, p. 3), these documents reflect the current version of that design plan. All of the alleged design flaws at issue in this case—covering the "blended system," the non-stop travel time requirement, and the alleged need for an operating subsidy—were addressed in detail in these documents, as well as in the public proceedings that led to the Authority's formal approval and adoption of these documents. The administrative record compiled by the Authority in connection with the first funding plan and the 2012 Business Plan alone consists of approximately 4,000 pages of materials; when the administrative record for the 2014 Business Plan is added, the record will include thousands of additional pages. (See O'Grady Decl., ¶¶ 3-4.) The Authority received more than 800 pages of public comments on its 2014 Business Plan. (*Id.*, ¶ 3.)

A. The Blended System.

The blended system—in which high-speed trains and Caltrain commuter trains will share the same tracks on the San Francisco Peninsula—is called for by the Authority's Revised 2012 Business Plan and its 2014 Business Plan. (See, e.g., O'Grady Decl., Exh. 14, pp. ES-2 - ES-6, ES-13 – ES-15, 2-1 - 2-3, 2-8, 2-19 – 2-24; *id.*, , Exh. 15, pp. 9, 14, 24, 28, 33.) After careful analysis, the Authority concluded the blended system will speed project completion, reduce environmental impacts, minimize community impacts, and sharply cut costs by almost $30 billion. (*Id.*, Ex, 14, pp. ES-3 – ES-4, 2-22.) Nothing in the Bond Act prohibits a blended system. (§ 2704, et seq.)

In addition, the Legislature has passed laws providing for the blended system. In 2012, when the Legislature appropriated Proposition 1A bond proceeds to begin construction, it expressly prohibited the Authority from using bond funds to build a dedicated four-track system on the San Francisco Peninsula. (Sen. Bill No. 1029, Stats. 2012, ch. 152, §§ 1-3 ["Any funds appropriated in this item for projects in the San Francisco to San Jose corridor, consistent with the blended system strategy identified in the April 2012 California High-Speed Rail Program Revised 2012 Business Plan, shall not be used to expand the blended system to a dedicated four-track system"].) More recently, the Legislature passed Senate Bill 577 (Stats. 2013, ch. 216, § 1), which provides that, to the extent bond funds appropriated under Senate Bill 1029 are allocated to projects in the San Francisco to San Jose segment, such funds "*shall be used solely to implement . . . a two-track blended system* to be used jointly by high-speed rail trains and . . . (Caltrain)." (§ 2704.76, subd. (b), italics added.) Senate Bill 577 further provides that "any track expansion . . . beyond the blended system approach identified in the [Authority's business plans] and approved by the High-Speed Rail Authority . . . shall require approval" by all nine parties to the Bay Area High-Speed Rail Early Investment Strategy Memorandum of Understanding, an inter-agency agreement which commits the Authority and regional transit agencies to the blended system approach. (§ 2704.77.) In other words, the Authority is required by law to implement a blended system, unless all of the various interests that advocated for the adoption of that design agree otherwise.

B. Operating Subsidies.

In its 2012 and 2014 business plans, the Authority determined that the high-speed rail system, as it is presently designed, will not require an operating subsidy. (O'Grady Decl., Exh. 14, pp. ES-16 – WS-17, 2-11, 2-15, 4-10, 7-1 – 7-25; O'Grady Decl., Exh. 15, pp. 9-13, 51-56.) The Revised 2012 and 2014 business plans contain detailed financial analyses projecting that each phase of the system that is implemented will not require an operating subsidy. (*Id.*, Ex. 15, p. 9; see *id.* pp. 51-56; Ex. 14, pp. ES-16 – ES-17, 7-1 – 7-25.)

The Peer Review Group reviewed the Authority's analyses and found that its most recent ridership and revenue forecasting marked an improvement over that in the 2012 Business Plan,

and that it "incorporated as many of the changes recommended by the Peer Review Panel as can be included within the time available." (O'Grady Decl., Exh. 8, Comments on the presentations.) The Peer Review Group found the Authority's analysis in the 2014 Business Plan to be adequate. (*Ibid.*)

C. Travel Time Between San Francisco and Los Angeles.

And, finally, in the 2014 Business Plan, the Authority confirmed that the system, as it is presently designed, will comply with the Bond Act's travel-time standards. (O'Grady Decl., Exh. 15, p. 9 & attached Peer Review Group Report.) The Authority conducted an analysis of trip time with rail traffic controller software used by the Federal Railroad Administration. (*Id.*, Exh. 6, cover memo.) That analysis concluded the system is capable of achieving a non-stop travel time between San Francisco and Los Angeles Union Station of two hours and 32 minutes, less than the goal set out in section 2704.09, subd. (b)(1). (*Id.*, Exh. 6, p. 1) The Authority further determined that additional time savings may be achieved from "improved train performance, use of tilt technology, more aggressive alignments and higher maximum speeds." (See *id.*, Exh. 6, cover memo.) In July 2013, an update on that analysis was presented to the Peer Review Group. (*Id.*, Ex. 7.) That expert body later reported to legislative leaders that, as presently conceived, the system is designed to achieve maximum nonstop service travel time between Los Angeles and San Francisco of two hours and 32 minutes. (*Id.*, Ex. 8.)

ARGUMENT

I. PETITIONERS ARE CHALLENGING QUASI-LEGISLATIVE DETERMINATIONS BY THE AUTHORITY, AND THEREFORE EVIDENCE OUTSIDE THE ADMINISTRATIVE RECORD MAY NOT BE ADMITTED AT TRIAL.

Where, as here, judicial review is not otherwise provided by statute, quasi-legislative, discretionary decisions of administrative agencies may only be reviewed by traditional mandamus. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559; 574 (hereafter *Western States*).) The standard of review is deferential; courts will not exercise independent judgment or inquire into the wisdom of the agency's decision. (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1265 (hereafter *Carrancho*).) Review is especially deferential when it comes to matters requiring technical expertise: "our high court has made it clear agencies

should be given wide latitude to solve such problems without judicial interference." (*Id.* at pp. 1277-1278.)

Consistent with the limited scope of review, "it is well settled that extra-record evidence is generally not admissible in non-CEQA traditional mandamus actions challenging quasi-legislative decisions." (*Western States*, *supra*, 9 Cal.4th at p. 574.)[5] In particular, conflicting expert testimony and other extra-record evidence may not be introduced in order to "question the wisdom and scientific accuracy" of an agency's decision. (*Id.* at pp. 577-78.)

As explained in more detail below, Petitioners are challenging quasi-legislative, discretionary determinations by the Authority. Accordingly, this Court should enter an order barring the introduction or admission of extra-record evidence at trial.

A. The Authority Has Exercised Quasi-Legislative, Discretionary Authority in Planning the System.

The sorts of planning decisions at issue in this case are inherently legislative in character. (See, e.g., *Mills v. San Francisco Bay Area Rapid Transit Dist.* (1968) 261 Cal.App.2d 666, 668; *G.S. Sinclair v. State* (1961) 194 Cal.App.2d 397, 498.) As described above, both the High-Speed Rail Act and the Bond Act vest broad (and exclusive) discretion in the Authority to design and build the system. With respect to the Bond Act's performance requirements specifically, the Authority has discretion to determine both how to comply with those requirements and whether, in its expert judgment, those requirements have been met. Where, as here, a statute directs an agency to "prepare a plan designed to achieve a generalized goal," but "the specifics of the plan are left entirely to the agency," the agency acts in a quasi-legislative capacity. (*Carrancho*, *supra*, 111 Cal.App.4th at p. 1267) Thus, for example, in *Carrancho*, the Air Resources Board (ARB) was required to produce, in consultation with other state agencies and officials, a plan and schedule "to achieve diversion of not less than 50 percent of rice straw produced toward off-field

[5] Evidence that could not have been produced at the administrative level may be considered, but only "in those rare circumstances in which (1) the evidence in question existed *before* the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present this evidence to the agency *before* the decision was made so that it could be considered and included in the administrative record." (*Western States, supra,* 9 Cal.4th at p. 578, italics in original.)

uses by 2000." (111 Cal.App.4th at p. 1262.) Rice growers brought a mandamus action alleging that the ARB's recommended "approaches for achieving 50 percent diversion were . . . infeasible." (*Id.* at pp. 1262-1263.) The Court of Appeal rejected the growers' argument that, because the ARB was required to "implement[] . . . the Legislature's directive under clear substantive requirements," the ARB had a "ministerial duty," rather than a grant of quasi-legislative, discretionary authority. (*Id.* at p. 1267.) Although the statutory scheme restricted and guided the ARB's exercise of discretion, it did not "eliminate[] any element" of discretion, and therefore did not impose a ministerial duty. (See *Carrancho*, *supra*, 111 Cal.App.4th at pp. 1267-1268.) The statutory scheme provided "a goal to aim for, not a result that could automatically be achieved by blind obedience to a legislative command." (*Id.* at p. 1268.) The same reasoning applies here. The standards and goals prescribed by the Bond Act "do not eliminate agency discretion but require it." (*Ibid.*) The Authority is charged with deciding whether the system, as currently proposed, is "designed to achieve" certain performance standards. (§ 2704.09.) Because the system has not been built, and because economic and financial forecasting are not exact sciences, these are necessarily predictive determinations that require expertise and judgment, not just a calculator. (See, e.g., *F.C.C. v. WNCN Listeners Guild* (1981) 450 U.S. 582, 594-595 [administrative decisions "must sometimes rest on judgment and prediction," and necessarily "involve[] deductions based on the expert knowledge of the agency"].) The Legislature and the voters tasked the Authority with developing the factual record needed to make these judgments, along with discretion to choose route alignments and other design features that would best achieve the Bond Act's purposes and operating standards. "The entire enterprise involves 'balancing various factors and selecting among approaches to the same problem, the hallmarks of discretionary acts.'" (*Carrancho*, *supra*, 111 Cal.App.4th at p. 1268, quoting *Venice Town Council, Inc. v. City of Los Angeles* (1966) 47 Cal.App.4th 1547; see also, e.g., *Coachella Valley Unified School Dist. v. State* (2009) 176 Cal.App.4th 93, 116.)

B. Extra-Record Evidence Cannot Be Used to Second-Guess the Authority's Decisions.

Petitioners do not appear to contend the Authority's decisions described above lack support in the administrative record, nor could they. Instead, they contend the Authority was just wrong. Their proposed expert witnesses previously submitted declarations in this case, arguing, for example, that the Authority's ridership forecasts are not reasonable; that the Authority has underestimated costs and overestimated revenues; that operating subsidies will be required; and that trip time between Los Angeles and San Francisco will exceed two hours and 40 minutes. It appears that, at trial, Petitioners plan to call the same witnesses, inviting this Court to "become the official second-guesser" (*Coachella Valley Unified School Dist. v. State*, *supra*, 176 Cal.App.4th at p. 117) of the Authority and its outside experts on a wide range of highly technical matters.

Western States, however, squarely holds that Petitioners may not introduce extra-record evidence to dispute the Authority's determinations. Simply put, "[e]xtra record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision . . . ." (*Western States*, *supra*, 9 Cal.4th at p. 579.) Indeed, Petitioners' challenges are strikingly similar to those at issue in *Western States*. There, the petitioners argued that an ARB decision rested on inaccurate and unsound data. (9 Cal.4th at p. 566.) The Supreme Court squarely rejected their attempt to introduce extra-record evidence to challenge the accuracy of the data on which the ARB relied. (*Id.* at pp. 577-579.) Yet that is exactly what Petitioners seek to do here: to raise doubts about the scientific accuracy and reliability of the Authority's financial forecasts and travel time analyses, both of which were vetted and validated by the Peer Review Group.

Petitioners' proposed challenge to the blended system is also inappropriate because the Authority's discretionary plans for a blended system on the San Francisco Peninsula have been superseded by the Legislature's adoption of Senate Bill 557, which added Streets and Highways Code sections 2704.76 and 2704.77. Section 2704.77 flatly requires the Authority to implement the blended system, unless all of the stakeholders agree to a different course. As a result, the

Authority currently has no discretion whether to develop the blended system, it must. Thus, the issue of whether the Authority acted arbitrarily or otherwise abused its discretion in initially adopting the blended system has been mooted by the Legislature. Whether the blended system is permitted by the Bond Act is a matter of statutory interpretation that does not depend on any disputed "facts" Petitioners may try to adduce at trial.

II. THE *WESTERN STATES* EXCEPTION DOES NOT APPLY HERE BECAUSE THE DECISIONS CHALLENGED BY PETITIONERS WERE ALL MADE IN PUBLIC AFTER OPPORTUNITY FOR PUBLIC COMMENT AND BASED ON AN EXTENSIVE ADMINISTRATIVE RECORD

Petitioners maintain that, because plans for the system have evolved "through a long series of actions," and not through "any one specific action that can be said to have definitively committed the Authority to its current course of action," this case falls into a narrow exception to the *Western States* rule for actions challenging "informal" agency decisions. (O'Grady Decl., Exh. 13.) Petitioners are mistaken.

Administrative actions that do not involve public hearings are generally considered "informal," and fall into a narrow exception to the rule barring admission of extra-record evidence. (*Western States*, *supra*, 9 Cal.4th at p. 576.) In approving this exception, the Supreme Court was "persuaded by commentators who pointed out that 'the administrative record developed during the quasi-legislative process is usually adequate to allow the courts to review the decision without recourse to such evidence,' and that 'extra-record evidence is usually necessary only when the courts are asked to review ministerial or informal administrative actions, because there is often little or no administrative record in such cases.'" (*Carrancho*, *supra*, 111 Cal.App.4th at p. 1269, quoting *Western States, supra*, 9 Cal.4th at p. 575).)

The Court of Appeal, however, has ruled that this exception for "informal actions" is a narrow one that does not apply to planning decisions, like those of the Authority, which were made at public meetings, after opportunity for public comment, and supported by an administrative record. (*Carrancho*, *supra*, 11 Cal.App.4th at p. 1270; see also *id.* [holding that the informal action exception did not apply because, although the agency did not hold a formal hearing, "there were public meetings, workshops, and ample opportunity for input from the public," the agency consulted with an "advisory committee," and the agency compiled an

administrative record that exceeds 5,000 pages].) The administrative record underlying the decisions at issue in this case is more than adequate to facilitate judicial review. Moreover, the Authority provided "numerous opportunities for public and agency input," and made its planning decisions in public session. (*Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1392.) It cannot fairly be said that the Authority's decisions were "made in a bureaucratic vacuum leaving an inadequate paper trail." (*Id.* at p. 1391.)

Petitioners did not submit any of the evidence they now propose to introduce at trial to the Authority at the time it made its decisions. As in *Carrancho*, *supra*, "allowing extra-record evidence under these circumstances would encourage interested parties to withhold important evidence at the administrative level so as to use it more effectively to undermine the agency's action in court," and therefore it should not be permitted. (111 Cal.App.4th at p. 1271.) More fundamentally, it would invite "excessive judicial interference with the [Authority's] quasi-legislative actions," and violate "the well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers." (*Western States*, *supra*, 9 Cal.4th at p. 572, citations omitted; see also *Friends of the Old Trees v. Department of Forestry & Fire Protection*, *supra*, 52 Cal.App.4th at p. 1391 ["In restricting review of a quasi-legislative decision to the administrative record, the [Supreme] court's overriding concern was that the consideration of extra-record evidence would empower the court to engage in independent fact-finding rather than engaging in a review of the agency's discretionary decision"].) Moreover, it would inappropriately substitute the judgment of this Court for that of the expert agencies charged by the Legislature and the voters with carrying out the Bond Act's complex directives. (*Western States*, *supra*, 9 Cal.4th at p. 572.)

III. PETITIONERS CANNOT AVOID THE *WESTERN STATES* BAR BY COUCHING THEIR CLAIMS AS ONES FOR WASTE OR ILLEGAL EXPENDITURES UNDER CODE OF CIVIL PROCEDURE SECTION 526A.

Petitioners mistakenly contend that because they have alleged claims for waste or illegal expenditures under Code of Civil Procedure section 526a, this case falls outside the traditional standard of review and procedural framework applicable in mandamus proceedings. (See

O'Grady Decl., Exh. 11.) In essence, they contend that section 526a entitles them to a civil trial with extra-record evidence, even though such a trial would be impermissible under *Western States*. (*Id.*) If Petitioners were correct—and they are not—then section 526a would be an open invitation to avoid the boundaries of mandamus review. Under Petitioners' logic, any agency action could be labeled a waste of public funds, since even a small expenditure or threatened expenditure of public funds suffices to provide section 526a standing. (See *Fiske v. Gillespie* (1988) 200 Cal.App.3d 1243, 1246.) All administrative agency decisions would then be subject to challenge in a trial complete with percipient and expert witnesses. But this is not the law. (See *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138-1139 [to allow action for waste for alleged mistake of public officials in matters involving exercise of discretion "would invite constant harassment . . . by disgruntled citizens"]; *Daily Journal Corp. v. City of Los Angeles* (2009) 172 Cal.App.4th 1550, 1558 [same].)

Section 526a was intended to, and does, provide standing to assert a claim where it would otherwise be lacking. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1032 ["[T]he primary purpose of [section 526a] ... is to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement"]; accord *Van Atta v. Scott* (1980) 27 Cal.4th 424, 447 [finding standing under section 526a to bring action for violation of the due process clauses of the federal and California constitutions].) The admissible evidence and standard of review in an action under section 526a depend on the underlying claim. In *Van Atta v. Scott*, *supra*, 27 Cal.4th 424, for example, the underlying claim was a violation of constitutional due process, and evidence necessarily may be taken in such cases. (See *People v. Ramirez* (1979) 25 Cal.3d 260, 268.) Here, in contrast, Petitioners are challenging the Authority's planning decisions—classic quasi-legislative decisions—as violating the Bond Act, and therefore the mandamus standard, including the bar against extra-record evidence, applies. (*Nathan H. Schur, Inc. v. City of Santa Monica* (1956) 47 Cal.2d 11, 17-18 [holding that challenges to an administrative agency action must be tried based on the administrative record, notwithstanding that the claims were alleged under section 526a]; accord *Daily Journal Corp. v. City of Los*

Angeles, supra, 172 Cal.App.4th at pp. 1557-1558 [holding that section 526a authorizes suit against public agency only if the agency had a ministerial duty to act].)

Challenges to quasi-legislative decisions alleged under section 526a must be construed congruently with mandamus challenges to prevent the kind of end-run around mandamus review that Petitioners are attempting. In *Nathan H. Schur, Inc. v. City of Santa Monica, supra*, 47 Cal.2d at pp. 11, 17-18, the Supreme Court held that a taxpayer challenging a licensing decision under section 526a was not entitled to a trial de novo or to introduce extra-record evidence. To hold otherwise would lead to an absurd result; taxpayer litigants concerned *solely* with preventing illegal government spending would have the right to present evidence in a trial de novo under section 526a, whereas other litigants with a direct, personal interest in the agency's decision-making—but who are not taxpayers—would be limited to a mandamus challenge based on the administrative record. (*Id.*)

Petitioners' further reliance on *Hayward Area Planning Assn. v. Alameda County Transportation Authority* (1999) 72 Cal.App.4th 95 (hereafter "*HAPA*"), is misplaced. (See O'Grady Decl., Exh. 11.) In that case, Caltrans stated its intention to defy a voter-approved bond act, arguing that its statutory authority overcame the requirements of the act. (72 Cal.App.4th at pp. 98-99, 106-107 & fn. 6.) The appellate court reversed summary judgment in Caltrans's favor, holding that the voter-approved measure afforded "no discretion, " (*id.* at p. 107) that would permit Caltrans to implement a route "significantly different from that which was described to the voters without opportunity for public comment and participation in the amendment process" (*id.* at p. 99). Here, in contrast, the design of the system is in the Authority's discretion, and there was ample opportunity for public participations in its decisions. Moreover, *HAPA* does not mention, much less discuss, Code of Civil Procedure section 526a, and did not decide what evidence was appropriate in the proceedings on remand. It is therefore inapposite here.

CONCLUSION

For the foregoing reasons, the Court should grant this motion and issue an order limiting the scope of evidence at trial to the administrative record.

Dated: July 2, 2014

Respectfully Submitted,

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SA2011103275

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Tos, et al. v. California High Speed Rail Authority, et al.**
No.: **34-2011-00113919**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practices at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service and for same-day personal delivery. In accordance with those practices, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business, or with the courier that same day in the ordinary course of business.

On July 2, 2014, I served the attached

RESPONDENTS' NOTICE OF MOTION AND MOTION FOR ORDER THAT THE SCOPE OF EVIDENCE AT TRIAL IS LIMITED TO THE ADMINISTRATIVE RECORD; MEMORANDUM OF POINTS AND AUTHORITIES

DECLARATION OF SHARON L. O'GRADY IN SUPPORT OF RESPONDENTS' NOTICE OF MOTION AND MOTION FOR ORDER THAT THE SCOPE OF EVIDENCE AT TRIAL IS LIMITED TO THE ADMINISTRATIVE RECORD

[PROPOSED] ORDER GRANTING RESPONDENTS' MOTION FOR ORDER THAT THE SCOPE OF EVIDENCE AT TRIAL IS LIMITED TO THE ADMINISTRATIVE RECORD

by emailing true copies thereof, placing true copies thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, and/or placing a true copy thereof with the courier for same-day personal delivery, as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 2, 2014, at San Francisco, California.

M. Argarin
Declarant

Signature

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proof revised FINAL.doc