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JOHN TOS, AARON FUKUDA; AND COUNTY OF KINGS, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA

COUNTY IS EXEMPT FROM FILING FEES PER GOV. CODE SECTION 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA; AND COUNTY OF KINGS, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, CHIEF EXECUTIVE OFFICER, ROELOF VAN ARK; GOVERNOR JERRY BROWN; SENATOR MARK LENO, CHAIRMAN, JOINT LEGISLATIVE BUDGET COMMITTEE; STATE TREASURER, BILL LOCKYER; DIRECTOR OF FINANCE, ANA MATOSANTOS; SECRETARY (ACTING) OF BUSINESS, TRANSPORTATION AND HOUSING, TRACI STEVENS; STATE CONTROLLER, JOHN CHIANG; AND DOES I-V, INCLUSIVE,

Defendants.

Case No. 34-2011-00113919

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER

Date:	June 15, 2012
Reservation No.:	1660513
Time:	9:00 a.m.
Dept:	54
Judge:	Hon. Shelleyanne W.L. Chang
Trial Date:	None Set
Action Filed:	November 14, 2011

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I.

INTRODUCTION

This lawsuit is a challenge to the legality of the proposed financing of the California high-speed rail project, with plaintiffs alleging that numerous restrictions and requirements set forth in Proposition 1A will be violated if funding is provided, as requested by the California High-Speed Rail Authority (the Authority) in its Final Business Plan and Final Funding Plan which is now in the final stages of being realized.

It is important for the Court to have some appreciation of the background in order to understand the massive ramifications of this project and the importance of protecting the State from financial risk, which has always been the intent of the drafters of Proposition 1A and the intent of the voters.

This State-wide project is comprised of Phases I and II. It is designed to create an 800-mile network of high-speed rail throughout the State. It was originally represented that the cost would be approximately $33 billion. The current costs, just for Phase I, are estimated to be approximately $75 billion, and many experts are of the opinion that when the entire project is completed, the cost to California could be in the $200 billion range, or higher.[1]

This is the largest public works project in the history of the United States, not to mention California. It is 10 times larger than the previous record holder, the "Boston Big Dig," which was estimated originally to cost $3.2 billion but which ultimately came in at $22 billion. It is also massively more expensive than the current Bay Bridge remodel (which is already seven times higher than the original estimate). The Court need scarcely be reminded that the history of public works projects in the United States is replete with huge cost overruns.

All of this was of grave concern to the Legislature when plans for the high-speed rail project were being developed, and as the Legislature planned for the election of November 2008, when the HSR bond measure (Proposition 1A) was to be placed before the voters. Frustrated over years of non-cooperation on the part of the Authority, the Senate Transportation Committee

[1] The Authority has already spent more than $485 million in "planning" for the project, including more than $400 million in Prop 1A funds.

and the drafters of Proposition 1A became seriously concerned over the financial risks to the State itself from such a massive and uncontrollable project. Therefore, the drafters carefully crafted extensive restrictions and requirements which were designed to protect the state from such financial risk and ensure that the project could be completed.

The voters approved the project in November, 2008. In 2011, the Sacramento Court of Appeal held that there were numerous problems with the Proposition and the representations that had been made to the voters (see, *Howard Jarvis Taxpayers Association v. Bowen* (2011) 192 Cal.App. 4th 110), but declined to set aside the vote.

After the election, the Authority, belatedly, promulgated several business plans for the project. These have been analyzed in great detail by official State agencies such as the Auditor's Office, the Legislative Analyst's Office, and the Peer Review Group (a body set up under Proposition 1A itself to analyze the Authority's plans), and these groups have found Authority's plan to be seriously lacking and in violation of Proposition 1A. Therefore, this case is not simply one of allegations; official State agencies have also found that Proposition 1A has been violated and, indeed, the Authority itself, as will be shown *infra*, has admitted to certain facts that establish Proposition 1A violations. Therefore, the case has advanced beyond the stage at which plaintiffs' allegations must be accepted as true (for purposes of the demurrer), and has reached the point where violations have been established as a matter of law.

In the face of a project that could cost over $100 billion, this Court should know that the financing for the project is extremely limited. The Federal government has directed that the project will start in the Central Valley. The Federal government is only providing $3.3 billion for the entire project, and Congress has specifically declared the California HSR project will receive no further Federal funding, and many believe that that cut-off in Federal funding will last for a long period of time, if not indefinitely. This is important because the Authority is counting on upwards of $40 billion from the Federal government to advance the project and without that money, there would be serious financial risk to the State if the project were allowed to proceed as planned.

The State financing plan is set forth in Proposition 1A itself. A $9 billion bond fund was set up, and it was contemplated that equal amounts would be forthcoming from the Federal government and from private sources (this will not happen for reasons set forth above with respect to the Federal government; in addition, *no* private funding has been advanced or offered). Proposition 1A has an unambiguous requirement that for every dollar that comes out of the State bond fund, that dollar must be matched by Federal or private contributions (the matching fund requirement).

As indicated above, the initial construction activity is set to begin in the Central Valley. All of the Federal money ($3.3 billion) will be exhausted. The Authority is requesting $2.8 billion from Proposition 1A, with additional money to be requested in the future.

If the project is allowed to proceed as planned, there are huge financial risks involved to the State, and the State could be saddled with an albatross of ongoing and increasing debt for generations, since no high-speed rail system in the world operates without substantial government subsidies (and subsidies are expressly prohibited under Proposition 1A). Such financial risks expressly violate the intent of the drafters of Proposition 1A and the intent of the voters in approving it.

The plaintiffs in this action are individual taxpayers and the County of Kings, and they bring suit under the Taxpayer's Standing statute, C.C.P. §526(a), which automatically confers standing and creates the presumption of a justiciable controversy. It is a statute liberally to be construed in favor of relief, and is designed to make it easy for taxpayers to challenge the illegality of an action of a State agency (the Authority) and State officials who are involved in approving or spending financial resources, when to do so would be illegal.

After many years, the project has reached the final stages moving towards approval by the Legislature. The final business plan and the final funding plan have been submitted to the Legislature by the Authority. The matter is now ripe for determination.[2]

[2]There was a previous lawsuit entitled *Brown v. CHSRA* raising somewhat similar issues; that lawsuit was dismissed by the Sacramento Superior Court on grounds that it was "premature," since at the time when the demurrer was heard, the Authority had not even requested that Proposition 1A funds be used to finance the project. The present case, however, has moved far beyond that since the Authority has formally requested Proposition 1A funds in (continued...)

Plaintiffs have alleged eight separate violations of Proposition 1A. The specific facts are alleged which support each legal violation, and for purposes of a demurrer, factual allegations must be accepted as true. *Any one* of the eight violations would justify the overruling of the demurrer, and allowing the suit to go forward.

We submit that all eight violations are either admitted or will be proven by competent evidence, and, therefore, the case should be allowed to go forward to judgment or trial.

ARGUMENT

II.

EIGHT MANDATORY REQUIREMENTS OF PROPOSITION 1A HAVE BEEN VIOLATED, MAKING THE CENTRAL VALLEY INELIGIBLE TO RECEIVE PROPOSITION 1A FINANCING

The Authority's 130-mile proposed project in the Central Valley (the Project), from near Fresno to near Bakersfield, fails to comply with multiple requirements of Proposition 1A:

A. No Electrification

Streets and Highways Code[3] section 2704.09 mandates that "The high-speed train system to be constructed pursuant to this chapter shall be designed to achieve the following characteristics: (a) Electric trains that are capable of sustained maximum revenue operating speeds of no less than 200 miles per hour." (emphasis added.)

Section 2704.08(c)(2)(H) requires the Authority to certify that:

> The corridor or usable segment[4] thereof *would be suitable and ready for high-speed train operation.* (emphasis added.)

The absence of electrification, HSR-compatible signalling, and any electric trains whatsoever means that the Authority cannot possibly make this mandatory certification.

Closely related to this non-electrification issue is the issue of whether the 130-mile segment constitutes a "usable segment" as required by Proposition 1A. Proposition 1A requires that the entire system, from the outset, be built in segments called "usable segments," which are

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(...continued)
its final business plan, and the Legislature is poised to grant the request.

[3] Unless otherwise noted, all statutory citations are to the Streets and Highways Code.

[4] "Usable segment" means a portion of a corridor that includes at least two stations." (Section 2704.01(g).)

electrified, high speed train segments, containing all the components of a true HSR system, with each one having at least two hsr stations. Sec. 2704.01 (g); section 2704.04 (c) (1) (G) (H) [has to be suitable and ready for high speed train operation].

There is no provision for building a "partial" usable segment or for building a conventional rail segment first with a true hsr segment to come later (therefore, phasing is not allowed; see, *infra*, section II (F) of this MPA).

The lack of electrification totally disqualifies the 130-mile segment from being classified as a usable segment, which is required under Proposition 1A. Indeed the LAO specifically agreed that this fatal defect was violative of Proposition 1A and that the 130-mile segment was ". . . not a usable segment and therefore does not meet the requirements of Proposition 1A." [See Plaintiffs' RJN, Exhibit 14, LAO Report dated November 29, 2011, p. 6]. The lack of electrification and the lack of a usable segment, alone, require overruling of the demurrer. Indeed, these have now become admitted facts.

B. Incomplete Funding

While the Authority has stated its intention to build a qualifying usable segment connecting the Central Valley to the Los Angeles Basin, its plans would require $20.3 billion from the federal government to implement. In the absence of identified funding, the Legislative Analyst's Office found that "Our review finds that the funding plan only identifies committed funding for the ICS[5] [the 130-mile segment], which is not a usable segment, and therefore does not meet the requirements of Proposition 1A." (RJN Exhibit 14, page 6. emphasis added.) The State Auditor noted that there are no funding commitments from private investors (RJN, Exhibit 12, page 22.) The legislatively mandated Peer Review Group is entrusted under Public Utilities Code section 185035(c) with analyzing the issue of "feasibility." They concluded: "The fact that the Funding Plan fails to identify any long term funding commitments is a fundamental flaw in the program . . . lacking [this funding commitment] the project as it is currently planned is not financially feasible." (RJN, Exhibit 13, page 4.)

[5] "ICS" or Initial Construction Segment, is the term used in the November 2011 Draft Business Plan for the Project. The Authority stopped using it, after this LAO report.

The April 2012 Business Plan proposed that the State's new cap-and-trade revenues could fill in any shortfalls in federal funding. The LAO commented that there were serious legal obstacles to using cap-and-trade revenues as a funding mechanism for the High-Speed Rail project. (RJN, Exhibit 15, p. 8.) The LAO concluded only two months ago that:

> "In view of the above concerns regarding the certainty of future funding and the recent significant changes proposed for the project, we find that the HSRA has not made a strong enough case for going forward with the project at this time. Accordingly, we recommend that the Legislature *not approve* the Governor's various budget proposals to provide additional funding for the high-speed rail project." (RJN, Exhibit 15, p. 9. Emphasis added.)

C. Incomplete Environmental Clearance

See First Amended Complaint, ¶9. Streets and Highways Code sections 2704.08(c)(2) and 2704.08(c)(2)(K) require that before the Authority formally requests funding from Proposition 1A, it must demonstrate that it has completed all environmental clearances for any usable segment. The Authority has not published a Draft EIR for the Merced to Bakersfield segment, much less certified a Final EIR. In addition, challenges are expected to be filed shortly (filed June 1, 2012) to the Fresno to Merced Final EIR, and an appeal has been filed on the Bay Area to Central Valley Program Final EIR. The Authority is a long ways from clearance.

D. Travel Time Requirement Not Met

Section 2704.09 is a mandatory requirement, promising the voters that a trip from Los Angeles to San Francisco would take no longer than two hours and 40 minutes. Achieving this would make HSR competitive with airlines, which is vital if High-Speed Rail is to be economically viable.

We now have a document *from the Authority itself* indicating that the trip would take a minimum of three hours. (RJN, Exhibit 17 – The Ridership and Revenue Forecasting report for the Authority's 2012 Business Plan. The page is unnumbered, but is #244 in the online PDF file.)

A further fact that occurred as recently as May 31, 2012, and which casts great doubt on the credibility of the Authority's trip time estimates is that on that day, the CHSRA records staff (Mr. Kyle Wunderli) responded to a public records request seeking all documentation concerning the 2 hour, 40 minute, trip time estimate. The response was: "I have an answer on your request

for some documented proof of the assertions the engineers made to Dan Richard. *The answer is that no document exists*. These were verbal assertions based on skill, experience, and optimism." (See RJN, Exhibit 35)

E. Project Completion Plan Not Met

The Legislature intended ". . . that [the High-Speed Rail system] be completed no later than 2020." (AB 3034 Section 8(f).) The LAO noted that Phase I of the project would not be completed until 2028. (RJN, Exhibit 15, p. 8.)

F. Proposition 1A Makes No Provision for Phasing

Section 2704.09(f) provides that "passengers shall have the capability of traveling from any station on that corridor to any other station on that corridor *without being required to change trains*." (Emphasis added.) This mandate essentially requires the Los Angeles to San Francisco corridor to be constructed as a single HSR project. The Authority has proposed, instead, to build the HSR system in phases: Fresno to Bakersfield, extend to Los Angeles, extend to San Jose, and then extend to San Francisco. All phases would require changing trains, or changing to buses, in violation of Proposition 1A. While the Authority may argue that a phased approach may possibly be a logical approach to dealing with a shortage in funding, there is no authorization in Proposition 1A to proceed that way.

G. The HSR System Will Require An Impermissible Operating Subsidy

Proposition 1A forbids subsidies from the State, local *or* Federal government for operating costs. Virtually all high-speed train systems throughout the world receive heavy government subsidies. California, again seeking to avoid financial risk to the State, squarely prohibited this. Section 2704.08(c)(1)(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."

While the Authoritiy may argue that a phased approach is the only logical approach in dealing with a shortage of funding, the California State Auditor asked "However, the plan does not address how the authority will pay for operating and maintenance costs should the program's revenues not cover such costs." (RJN, Exhibit 12, p. 22 – California State Auditor Report.)

The Authority may take the position now that this is a contested issue, but the plaintiffs will introduce competent expert evidence that, based on worldwide experience, the proposed system will require a substantial government subsidy, in direct violation of Proposition 1A.

III.

ALL PLAINTIFFS HAVE STANDING TO SUE

Suit is brought under C.C.P. section 526a, the so-called Taxpayer Standing statute.[6] This 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 action which would otherwise go unchallenged in the courts because of the standing requirement. (Blair, p. 267.)

The individual plaintiffs, Fukuda and Tos, allege that they are taxpayers, living in Kings County, and that they have paid sales, property and income taxes for the last several years. The statute automatically grants them standing under such circumstances, and no separate injury or damage is required to be alleged. (*Van Atta v. Scott*, *infra*, 29 Cal.3d 450, fn. 28.)

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

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

With respect to the County of Kings, California case law holds that even though the County may itself not be a taxpayer, it has standing to sue in a case such as this so long as it has "an

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[6] Defendants' arguments to the contrary are based entirely on a handful of inapplicable appellate cases that preceded the Supreme Court's landmark decision in *Van Atta v. Scott, supra.* Defs. Mem. Pts. Auth. (MPA) p. 11. They are not good law.

interest" in the proceeding being brought by the other plaintiffs. (*City of Industry v. City of Fillmore*, 198 Cal.App.4th 191 (2011).) In the present case, the County of Kings has perhaps an even greater interest in the proceedings instituted by Tos and Fukuda then Tos and Fukuda themselves. The County alleges that its policies, rules and regulations will be interfered with when the project traverses the County; that it stands to lose property taxes through property devaluations when the project enters the County; and that its emergency fire, police and rescue operations will be seriously affected when the project enters the County and prevents access to the residents of the County. Under *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 203, 208, this is certainly "an interest" in the proceeding brought by the individual taxpayers, Tos and Fukuda, and requires that standing be found to exist on the part of County of Kings.[7]

It is also clear as far as defendants are concerned that State agencies (the Authority) and State officials may be sued in 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. (*Serrano v. Priest*, 5 Cal.3d 584, 618, fn 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 v. Mott,* at p. 223.) This language is particularly determinative, since not only is the present action brought under C.C.P. section 526a, but the

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[7] Cases relied upon by defendants are distinguishable. They cite *Ceres v. Modesto* (1969) 274 Cal.App.4th 545 (defendants' MPA p. 12); but *Ceres* speaks to a political controversy, rather than legal controversies which are asserted in this case. Defendants' reliance on *Sklar v. FTB* (1986) 185 Cal. App. 3d 616,624 (defendants' MPA, p. 14) is also inapposite: the present suit is not seeking to compel legislative or executive acts, but instead predominantly seeks , through declaratory relief, an interpretation of Proposition 1A and whether it is being complied with. Defendants argue that under *Connerly v. Schwartznegger* (2007) 146 Cal.App.4th 739, plaintiffs have to allege that defendants had a specific intent to ignore the law (defendants' MPA pp. 8-10). But plaintiffs have repeatedly alleged that defendants are refusing to follow the law, and these claims are backed up by the State Auditor, the LAO, and the Peer Review Group. This is enough to support a "challenge" to the legality of the defendants' plans.

In this spirit, the court in *Hayward Area Planning Assn. v. Alameda County Transportation Authority* (1999) 72 Cal. App.4th 95, summarized California law on ripeness:

> The legal issues posed must be framed with sufficient concreteness and immediacy so that the court can render a conclusive and definitive judgment rather than a purely advisory opinion on hypothetical facts or speculative future events. (See *Pacific Legal Foundation v. California Coastal Com.*, *supra*, 33 Cal.3d at p. 171.) A controversy is 'ripe' for judicial resolution when 'it has *reached, but has not passed*, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.' [Citation]" *Ibid.*, quoting *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22). *Id.* at p. 102 (emphasis added).

In determining ripeness, the court must consider whether the fast-moving high-speed rail program may outstrip the orderly pace of this litigation. The Authority's plans to commence construction this year in the Central Valley are moving forward at a very rapid rate. (See RJN 19-35 for description of various government decisions that have already occurred; the entire matter is mature, congealed, and therefore ripe). The Federal Transportation Secretary only a few days ago appeared before the legislature and in effect told them that they had to fund the project by July 1, or the federal government could withdraw its funds; all indications are that the state will act within weeks. The matter is therefore imminent.

This situation is much like that before the court in *Hayward Area Planning Assn.*, *supra*, the determinative case for projects like this. There, plaintiffs sued the county transportation authority for using sales tax revenues to fund a highway extension project on a route significantly different from the one presented to the voters. Defendants claimed the suit was premature and not ripe for adjudication because the essential environmental and planning documents had not been approved and certified. The court rejected this argument in light of the strong public interest in prompt resolution of the legal issues and the relative hardship to the parties if a decision were

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(...continued)
action." Defs. MPA p. 8. Plaintiffs *also* allege an independent right to relief as a declaratory relief action (FAC, Fifth Cause of Action, see , e.g., *California Water & Tel. Co.* v. *Los Angeles* (1967) 253 Cal.App.2d 16; *Alameda County Land Use Assn.* v. *City of Hayward* (1995) 38 Cal.App.4th 1715.) as well as mandamus. (FAC, First Cause of Action, see, e.g., *Waste Management of Alameda Cty.* v. *County of Alameda* (2000) 70 Cal.App.4th 1223, 1233 1236 (public duty dispute justiciable under citizen-action exeeption to beneficial interest requirement); *Hayward Area Planning Assn.* v. *Alameda County Transportation Authority* (1999) 72 Cal.App.4th 95.

relief requested is for declaratory relief and the Supreme Court indicates that such claims for illegal expenditure of public funds are properly brought. Therefore, standing exists, and defendants' arguments to the contrary must be rejected[8].

It is also interesting to note in defendants' points and authorities that they characterize plaintiffs' action as one for "waste" under C.C.P. section 526a. Indeed, the word "waste" is used almost a dozen times. Plaintiffs have not sued under that theory. C.C.P. section 526a allows suit under an alternative theory; namely, illegal expenditure of public funds, which is precisely the basis for plaintiffs' claim (and which was the basis for plaintiffs' claim in the *Stanson* case, *supra*.)

IV.

THE CLAIM OF LACK OF RIPENESS MUST BE REJECTED; RIPENESS EXISTS UNDER THE LAW[9]

Well-settled California law establishes that an action properly brought under section 526a satisfies the justiciability requirements of standing and actual controversy regardless of injury. (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 450 n. 28; *Blair v. Pitchess* (1971) 5 Cal.3d 258, 269-270.) Taxpayer standing under section 526a "allows prompt action to prevent public injury, and the statute must be construed liberally to achieve this purpose [citing, inter alia, *Blair v. Pitchess*, *supra*]." (*Santa Barbara County Coalition etc. v. Santa Barbara County Assn. Of Governments*) (2008) 167 Cal.App.4th 1229, 1236.[10]

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[8] It is also difficult to understand how defendants can argue that individual State officials are somehow immune from suit. The Supreme Court in *Serrano* and *Stanson*, immediately above, has disagreed, saying that State officials can be sued individually under C.C.P. section 526a and that they are subject to declaratory judgment for illegal expenditures. Indeed, in the present suit, all of the individual defendants are entrusted with the power to make decisions on the sale of the bonds, and the distribution of the bond proceeds to the Authority – how can meaningful relief be obtained unless such defendants are sued?

[9] Defendants place unjustified reliance on the court's passing comment in *Waste Management of Alameda County, Inc. v. County of Alameda*, *supra*, that an illegal expenditure of public funds "is occurring or will occur." *Id.* at 1240. This is plain dictum inconsistent with the court's correct statement of the law that a "taxpayer action must involve an actual or threatened expenditure of public funds. *Ibid.*

Inherent in the term "threatened" is the element of risk and uncertainty. The greater the magnitude of the potential public injury the less certainty should be required. Cf. *United States v. Dennis* (1951) 3241 U.S. 494, 510 ("'whether the gravity of the "evil," discounted by its improbability, justifies such [action] as is necessary to avoid the danger.'"). At the pleading stage in a case like this where the potential public harm is unprecedented and events are moving swiftly, a reasonable likelihood of occurrence should suffice. Plaintiffs have more than met this standard.

[10] Defendants mistakenly assert that "Code of Civil Procedure section 526a is the only alleged basis for this (continued...)

deferred. *Id.* at pp. 102-104. As is the case here, the transportation authority had no intention of changing its plans, and the case turned on resolving the parties' "'fundamental disagreement over the construction of particular legislation . . .'", quoting with approval *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1715, 1723 and cases cited therein. *Id.* at p. 103.[11] The court concluded:

> Dismissing this appeal would require the parties to make the identical arguments at a later stage of these proceedings, after an expenditure of large sums of public money on a highly controversial project, the legality of which is still in question. Failure to resolve the tendered issue now will only create 'lingering uncertainty' with respect to a transportation project that is the subject of widespread public interest in the Bay Area, and particularly Alameda County. [citation] Based on all these factors, we conclude the issues raised in this controversy have 'sufficiently congealed' to the point of concreteness to justify review. [citation] *Hayward Area Planning Assn., supra* at p. 104.

Likewise, in the instant case the Authority's plans "have 'sufficiently congealed' (see RJN 19-35 as to how far the entire matter has advanced and how imminent approval is) to the point of concreteness" to "permit an intelligent and useful decision to be made" resolving "'the parties' fundamental disagreement over the construction of particular legislation.'" (*Hayward Area Planning Assn., supra*, at pp. 102, 103, 104.) Moreover, failure to do so will only add to "lingering uncertainty" with respect to this "highly controversial project, the legality of which is still in question." *Id.* at p. 104.

Thus, *Hayward Area Planning Assn.* establishes that where, as here, a large, ongoing transportation project is legally challenged as not compliant with the project approved by the voters, the facts have "sufficiently congealed to the point of concreteness," and the case turns on construction of the authorizing legislation, a compelling public interest requires that the case be held ripe for judicial review — notwithstanding that before construction can begin certain legally-

[11] A number of other cases also find that a case is ripe for review where it turns on construction of a statute or other purely legal issue(s). See, e.g. *San Diego Water Authority v. Metropolitan Water District* (2004) 117 Cal.App.4th 13, 20 n. 2; *Security National Guaranty v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 418 and cases there cited.

required approvals are needed which are not likely to change the nature of the legal issue(s) to be resolved.[12]

The importance of a definitive court decision *before* events move past the point where they cannot be unwound cannot be overstated. As one example, if $1 billion of state bonds are sold to finance the first phase of the Authority's Central Valley project[13] and the court should subsequently determine that the Authority cannot lawfully spend these funds on the project because it does not comply with Proposition 1A, presumably the State would still be liable to pay the bondholders for the next thirty years because the bonds are General Obligation bonds not dependent on the fate of the project they fund. Similarly, the ongoing expenditure of tens of millions of dollars per month of Proposition 1A bond funds for engineering design and environmental work will constitute an illegal expenditure of public funds if the court determines that construction of the projects for which that work is being done violates Proposition 1A and cannot be built.

Ripeness therefore exists, and the Court should disregard claims to the contrary.

V.

IT IS APPROPRIATE FOR THE COURT TO GRANT PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE OF OFFICIAL STATE DOCUMENTS AND DOCUMENTS PREPARED ON BEHALF OF THE AUTHORITY

Plaintiffs' Request for Judicial Notice is appropriate and should be granted. The documents of which plaintiffs request the Court to take judicial notice are either official documents of

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[12] Proposition 1A defined a eomplex system of approvals required for the release of bond funds. The Authority's Demurrer seeks to separate out this complex system into its constituent parts, and then argue that each individual part cannot be challenged in a 526(a) lawsuit. The functional effect of the Authority's argument structure is the implicit assertion that the Proposition 1A funding process is immune from 526(a) challenge. Clearly, given the extraordinary sums of public funds proposed to be spent on this project, such a result would be absurd--it would violate the Legislature's intent in creating the taxpayer challenge mechanism when it adopted 526(a).

Plaintiffs argue that the statutory system of approvals must be considered as a unitary whole, and not as a collection of parts. That is why each decision-maker in that process is named as a defendant. That is why the suit is timely: the HSRA has made its application to the Legislature, setting the entire process into motion, and making the approval of funding imminent. If this is not the proper time to challenge the funding, there is no proper time. Thus, the test is not whether a given defendant can expend the bond funds during the pendency of this case, but whether the entire system can legally make funds available to an agency that (1) has applied for them, (2) insists on proceeding towards construction, despite an obviously flawed interpretation of the authorizing legislation, (3) continues to spend vast sums in preparation for construction, and (4) has made its intention clear that it will spend the funds when and if the rest of the system makes them available.

[13] See n.11 *supra.*

agencies/departments of the State of California, or official documents produced by the defendant, California High-Speed Rail Authority. It is appropriate to grant judicial notice under Evidence Code section 452(c) concerning "official acts of the legislative, executive and judicial departments of the United States, and of any state of the United States." (See, *Kaufman & Broad v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26.) All such documents are appropriate to be placed before the Court at the demurrer stage of the case. (*Ascherman v. General Reinsurance Corporation* (1986) 183 Cal.App.3d 307, 310-11.)

Therefore, plaintiffs respectfully request that the Court grant judicial notice of Exhibits 10-35 attached to the actual Request for Judicial Notice.

VI.

PLAINTIFFS ALSO PROCEED UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE AND FOR A WRIT OF MANDATE – RELIEF SANCTIONED BY THE CALIFORNIA SUPREME COURT

The defendants are silent on the last cause of action in the First Amended Complaint – claims under the Private Attorney General doctrine and for a writ of mandate. When the invalidity of State laws are challenged, the Supreme Court has indicated that private citizens may validly proceed under the Private Attorney General theory and for a writ of mandate. (*See, Perry v. Brown*, 52 Cal.4th 1116, at pp. 1160, 1161.)

In the present case, the public has a vital interest in not having billions of dollars in State bond funds spent illegally. The Private Attorney General theory, and the request for a writ of mandate are sanctioned by the Supreme Court under such circumstances and are eminently appropriate for this case. This issue is not addressed by the defendants.

VII.

CONCLUSION

Plaintiffs have adequately stated facts sufficient to constitute causes of action for violation of Proposition 1A; the relief requested is simple: letting a trial judge entertain orders of declaratory relief that various provisions of the Proposition have or will be violated by the planned action of the defendants. Such a "trial" could easily be a bench trial with most of the issues decided by briefing. If the court ruled for plaintiffs, this would allow the defendants to

modify their plans, so as to comply with the law, thereby protecting the State from needless financial risk – always the pre-eminent goal of the drafters of Proposition 1A.

On May 18, 2012, only one month ago, a hearing was being held by the Senate Transportation Committee; Senator Alan Lowenthal, Chairman of the Senate Select Committee on HSR, was asking CHSRA Chairman Dan Richard what the project would produce. Mr. Richard's response: We don't get a HSR system; but we get a lot." This is the problem: the residents and voters of California are about to get a rail system totally contrary to that for which they voted. To prevent that illegality from happening, this case should be allowed to go to trial.

Dated: June 4, 2012

Respectfully Submitted,

By: Michael J. Brady

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