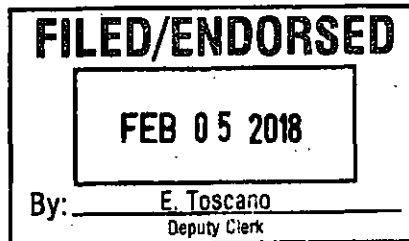


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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

10 **JOHN TOS; QUENTIN KOPP; TOWN OF**
 11 **ATHERTON, a municipal corporation;**
 12 **COUNTY OF KINGS, a subdivision of the**
 13 **State of California; PATRICIA LOUISE**
 14 **HOGAN-GIORNI; ANTHONY WYNNE,**
 15 **COMMUNITY COALITION OF HIGH-**
 16 **SPEED RAIL, a California nonprofit**
 17 **corporation; TRANSPORTATION**
 18 **SOLUTIONS DEFENSE AND**
 19 **EDUCATION FUND, a California**
 20 **nonprofit corporation; and CALIFORNIA**
 21 **RAIL FOUNDATION, a California**
 22 **nonprofit corporation,**

Petitioners and Plaintiffs,

v.

23 **THE STATE OF CALIFORNIA,**
 24 **CALIFORNIA HIGH SPEED RAIL**
 25 **AUTHORITY, a public entity, BOARD OF**
 26 **DIRECTORS OF THE CALIFORNIA**
 27 **HIGH-SPEED RAIL AUTHORITY in their**
 28 **individual and official capacities, JEFF**
MORALES, in his official capacity as Chief
Executive Officer of the California High-
Speed Rail Authority, MICHAEL COHEN,
in his official capacity as Director of the
Department of Finance of the State of
California, and DOES 2-20 inclusive,

Respondents and Defendants.

Case No. 34-2016-00204740

RESPONDENTS' OPPOSITION TO MOTION TO BIFURCATE

Date: February 16, 2018
 Time: 10:00 a.m.
 Dept: 28
 Judge: Hon. Richard K. Sueyoshi
 Trial Date: Not Yet Set
 Action Filed: December 13, 2016

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1 **INTRODUCTION**

2 The motion to bifurcate the First Cause of Action from the rest of the Second Amended
3 Complaint should be denied because independent resolution of that claim for declaratory relief
4 will not create any efficiencies. Although a judgment rejecting as a matter of law petitioner’s
5 challenge to AB 1889 would dispose of this action in its entirety—because petitioners concede
6 that in that event, their remaining challenge to the Authority’s funding plans necessarily fails—
7 the converse is not true. In the unlikely event that this Court were to rule AB 1889 invalid, the
8 law governing declaratory relief requires consideration of evidence of the harm to the public
9 interest that would result from that before a court could issue that equitable relief. A portion of
10 this evidence demonstrating hardship to the State and the taxpayers on the order of several billion
11 dollars was before the Court on petitioners’ motion for preliminary injunction and application for
12 stay, both of which were denied. Because the claim for declaratory relief, contrary to petitioners’
13 argument, cannot necessarily be resolved as a matter of law, and because a ruling against
14 petitioners would resolve the entire case without bifurcation, bifurcation of the First Cause of
15 Action serves no useful purpose.

16 **BACKGROUND**

17 **I. THE SAFE, RELIABLE HIGH-SPEED PASSENGER TRAIN BOND ACT FOR THE 21ST**
18 **CENTURY**

19 In 2008, the voters approved Proposition 1A, the Safe, Reliable High-Speed Passenger
20 Train Bond Act for the 21st Century (the “Bond Act”). The Bond Act authorized construction of
21 a high-speed rail system in California (expected to be one of the largest public works project in
22 California’s history), and the issuance of \$9 billion in general obligation bonds to partially fund
23 the initial segments of the system. (Stats. 2008, ch. 267 [Assem. Bill No. 3034], § 9, codified at
24 Sts. & Hy. Code, § 2704 et seq.)¹ The Bond Act permits the High-Speed Rail Authority to use
25 the proceeds of bond sales (“bond funds”) to build the high-speed rail system, subject to certain
26 restrictions. (§ 2704.04, subd. (b)(1)(B).) Generally, before the Authority can spend bond funds,

27 _____
28 ¹ Unless otherwise indicated, all further statutory references are to the Streets and
Highways Code.

1 it must approve and submit for review a detailed pre-expenditure funding plan to the Director of
2 Finance, the Chairperson of the Joint Legislative Budget Committee, and a peer review group.
3 (§ 2704.08, subd. (d)(1); Pub. Util. Code, § 185035, subds. (a), (c), (d).) The Authority also must
4 submit for their review an independent consultant's review of the plan. (§ 2704.08, subd. (d)(2).)
5 If, after receiving any communication from the Joint Legislative Budget Committee, the Director
6 of Finance finds that the project is likely to be successfully implemented as proposed in the
7 funding plan, the Authority may then commit bond funds for capital costs. (§ 2704.08, subd. (d).)
8 Thus, the statute provides for significant legislative and executive branch oversight of the high-
9 speed rail program.

10 Effective January 1, 2017, the Legislature enacted Assembly Bill 1889, adding section
11 2704.78 to the Bond Act. Among other things, AB 1889 clarified the meaning of otherwise
12 undefined language in the Bond Act providing that, on completion, certain projects approved
13 under section 2704.08, subdivision (d) will be "suitable and ready for high-speed train operation."
14 (Assem. Bill No. 1889 (2015-2016 Reg. Sess.) § 2, codified at Sts. & Hy. Code, § 2704.78, subd.
15 (a).) Specifically, AB 1889 provides that "suitable and ready for high-speed train operation"
16 means that the "project . . . would enable high-speed trains to operate immediately or after
17 additional planned investments are made on the corridor or useable segment thereof and
18 passenger train service providers will benefit from the project in the near-term." (§ 2704.78,
19 subd. (a), emphasis added.)

20 **II. THE CENTRAL VALLEY FUNDING PLAN AND THE PENINSULA FUNDING PLAN**

21 The Director of Finance approved a funding plan in March 2017 for a project in the Central
22 Valley (the "Central Valley Funding Plan"), where acquisition of land and construction has been
23 underway since 2013, using appropriations of non-bond funds. (See Second Amended Complaint
24 ("SAC"), ¶ 73.) Billions of dollars in federal grant funds have already been spent on that segment
25 of the high-speed rail system, and as a condition of those grants, the Authority is contractually
26 obligated to complete the work. (Declaration of Sharon O'Grady in Opposition to Motion for
27
28

1 Preliminary Injunction filed April 6, 2017 (“O’Grady Decl.”), ¶¶ 9-10 & Ex. 8 at pp. 2-3, 34-35,
2 51-52, 62-63.)²

3 The Director of Finance approved a plan to fund another project on the San Francisco
4 Peninsula (the “Peninsula Funding Plan”) in May 2017. (See Petitioners’ Request for Judicial
5 Notice in Support of Application for Stay of Administrative Decision, ROA # 136 (“Petitioners’
6 RJN”), ¶ 7 & Ex. G.)³ This project will electrify the San Francisco to San Jose Caltrain corridor,
7 allowing the Peninsula Corridor Joint Powers Board (“PCJPB”), which operates Caltrain, to
8 replace the “costly, polluting and noisy” diesel trains currently providing commuter service with
9 “electric trains [that] would permit improved system performance and increased ridership,” a goal
10 of PCJPB since at least 1992. (See *Town of Atherton v. Peninsula Corridor Joint Powers Board*,
11 Superior Court of Contra Costa, Case No. MSN15-0573 (*Atherton v. PCJPB*), Final Judgment
12 Denying Petition for Writ of Mandate (Sept. 30, 2017) Ex. 3 to RJN at p. 2.) In addition, and
13 importantly, electrification of this Caltrain corridor is necessary for providing high-speed rail
14 service, for in the future high-speed trains will share track, infrastructure, and other facilities with
15 Caltrain (in what is referred to as a blended system) on that corridor. (See *ibid.*; Central Valley
16 Funding Plan, Ex. 2 to RJN at Ex. C.)

17 III. *Tos I*

18 An earlier lawsuit filed by some of the same petitioners challenged the Authority’s
19 compliance with the Bond Act. (*Tos v. High-Speed Rail Authority*, Sacramento Super. Ct., No.
20 34-2011-1003919 (*Tos I*.) In *Tos I*, Judge Kenny dismissed the petition and complaint. (*Tos I*,
21 Judgment Denying Petition and Complaint (Mar. 22, 2016), Ex. 4 to RJN.) The Court held that
22 the Bond Act only governs the use of bond funds and does not govern the use of other, non-bond
23 funds that the Legislature may appropriate for development of the high-speed rail system. (*Id.* at
24 Ex. A, p. 10; see *id.* at Ex. A, pp. 7-10.) The Court further held claims that the challenged project
25 did not comply with the Bond Act were not ripe. (*Id.* at Ex. A, p. 16-17.)

26
27 ² The O’Grady Declaration and Exhibit 8 thereto are attached as Ex. 1 to the Request for
Judicial Notice filed herewith (“RJN”).)

28 ³ Petitioners RJN and relevant exhibits thereto are attached as Ex. 2 to the RJN.

1 IV. THIS ACTION

2 This action challenges the constitutionality of AB 1889, as well as the Authority's Central
3 Valley and Peninsula Funding Plans. On March 15, 2017, petitioners filed an application for
4 temporary restraining order and preliminary injunction seeking to enjoin the Authority's use of
5 bond funds for these two projects on the grounds that petitioners were likely to succeed on their
6 claim that AB 1889 was unconstitutional on its face. (Exs. 5 & 6 to RJN.) Judge Cadei denied
7 the application for temporary restraining order (Ex. 7 to RJN) and later denied petitioners' noticed
8 motion for a preliminary injunction (Ex. 8 to RJN). Judge Cadei held that petitioners had not
9 demonstrated a likelihood of success on their constitutional challenge to AB 1889.

10 [T]he "single object or work" specified in Prop. 1A was primarily the general
11 construction of a high-speed train system. Neither the language nor stated intent of
12 § 2704.78 facially clashes with, abandons, or repeals the "single object or work"
13 specified in Prop. 1A. The stated goal remains the construction of a high-speed train
14 system. The court concludes that Plaintiffs have not shown a probability of success
15 in establishing § 2704.78 necessarily conflicts with the "single object or work"
16 "distinctly specified" on Prop. 1A, or that the new law makes "substantial changes in
17 the scheme or design which induced voter approval" that effectively repeal Prop. 1A
18 in violation of article XVI Section 1 of the California Constitution.

15 (*Id.* at p. 10.) Judge Cadei further held that, even if petitioners could show a likelihood of
16 success, "an injunction could significantly harm the State and the public interest." (*Ibid.*)
17 Petitioners did not appeal that decision.

18 Judge Cadei also sustained the Authority's demurrer to the First Amended Complaint, with
19 leave to amend, finding that petitioners' challenge to the funding plans should have been asserted
20 as writ claims, and that petitioners' cause of action for declaratory relief "based on the alleged
21 facial unconstitutionality of [AB 1889], lacks a justiciable controversy unless it is also tethered to
22 the challenged Funding Plans and the threatened illegal expenditure of public funds under those
23 plans." (Ex. 9 to RJN at p. 3.) Judge Cadei reasoned:

24 [W]hether the construction project described in a funding plan will result in a usable
25 segment that is "suitable and ready for high-speed train operation" is at base only an
26 educated estimation to be made in and through the administrative process. If at the
27 completion of a Prop. 1A funded construction project, the result is not a segment that
28 is "suitable and Ready for high-speed train operation," neither §2704.08 nor any other
provision of Prop. 1A provides any remedy or penalty. In short, the phrase "suitable
and ready for high-speed train operation" is only a metric in the administrative
process.

1 (Ibid.)

2 Petitioners filed a second amended complaint ("SAC"), adding writ claims and additional
3 parties, including the Director of Finance. (ROA # 70.) Petitioners re-alleged their declaratory
4 relief claims as both facial and as-applied challenges to the constitutionality of AB 1889 as
5 applied to the Authority's Central Valley Funding Plan and Peninsula Funding Plan. (SAC ¶¶ 89-
6 90.) Petitioners subsequently filed a request for dismissal which improperly sought to delete
7 paragraphs and phrases from the SAC, in violation of Code of Civil Procedure section 581,
8 subdivision (c), in an attempt to limit the cause of action for declaratory relief to a facial
9 challenge, apparently to separate that challenge from the challenge to the funding plans. (Ex. 10
10 to RJN.) With the addition of the writ claims, the action was transferred from law and motion to
11 writs, and assigned to Judge Kenny, who had presided over *Tos I*.

12 On November 21, 2017, petitioners again sought a temporary restraining order (styled an
13 "application for stay") to stop the Authority from spending bond funds to implement the Central
14 Valley Funding Plan and the Peninsula Funding Plan. (Exs. 11 & 12 to RJN.) The only evidence
15 of harm petitioners presented in support of their application was the Town of Atherton's desire
16 not to have trees in the town trimmed to allow for electrification of Caltrain, and the County of
17 King's desire to halt the construction of the high-speed rail system throughout the County. (See
18 Ex. 12 to RJN at pp. 8-10.)⁴ There was no evidence of harm resulting from the use of bond funds
19 to build high-speed rail, as opposed to other non-bond sources of funds. (Ex. 12 to RJN, *passim*.)
20 Judge Kenny denied the application, observing that petitioners were raising the same issues Judge
21 Cadei had addressed, namely the constitutionality of AB 1889. (Ex. 13 to RJN at pp. 5-6, 11-12.)
22 Petitioners could have proceeded with a noticed motion, but have not. (*Id.* at pp. 13-14.) Instead,
23 they filed this motion.

24
25 ⁴ Petitioners' counsel has admitted that the Atherton tree trimming is being done, not by
26 any party to this lawsuit, but by Caltrain, and Caltrain is not using bond funds for that purpose.
27 (November 21, 2017 transcript, Ex. 13 to RJN at p. 9-10.) Indeed, counsel conceded that he did
28 not know whether cutting off the Authority's use of bond funds "will have any difference or not."
(*Id.* at p. 8.) Kings County's arguments also are directed to impacts from construction of the
high-speed rail system itself, not the use of bond funds, which is all that is at issue in this lawsuit.
(Ex. 12 to RJN.)

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ARGUMENT

In the exercise of its discretion, the Court should deny the motion because bifurcating the First Cause of Action would serve no real purpose. Respondents agree with petitioners' assertion that "[i]f the Court were to find that SB [sic] 1889 was constitutional, there would be no basis for finding the expenditure of bond funds was either illegal or wasteful; nor would there be a basis for challenging the Authority's of the Director of Finances [sic] approvals for the two Final Funding Plans." (Motion at p. 9.) However, petitioners incorrectly argue that petitioners would be entitled to a declaratory judgment if the Court were to find AB 1889 is unconstitutional, and that such a ruling would reduce the complexity and speed the determination of the remaining causes of action. (See *id.* at pp. 8-9.) This is not the case.

The First Cause of Action for declaratory relief is an equitable claim, not a "purely legal issue," as petitioners claim. (Motion at p. 8; see *id.* at pp. 2, 4.) Declaratory or injunctive relief may be denied where the requested relief, even if otherwise proper, "would cause severe harm to the public." (*Cota v. County of Los Angeles* (1980) 105 Cal.App.3d 282, 292.) That is consistent with Code of Civil Procedure section 1061, which provides that "The court may refuse to exercise the power [to grant declaratory relief] in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

Cota v. County of Los Angeles, supra, is illustrative. In that case, the trial court refused to grant either declaratory or injunctive relief which would have halted construction and operation of a juvenile facility. Plaintiff had argued that construction of the facility violated statutory and constitutional law and was a waste of public funds. (105 Cal.App.3d at p. 289.) The Court of Appeal held that the trial court's decision refusing to grant declaratory and injunctive relief was supported by substantial evidence, but alternatively held the trial court properly could have declined relief even if plaintiff's claim of waste and illegality had been meritorious, because of the severe harm to the public from stopping the project.

[E]ven were we to assume that plaintiff might properly claim a right to injunctive relief on the ground of waste or illegality, such relief can be denied where it would cause severe harm to the public. Even as between private parties, a court should consider the relative hardship of the parties and balance the equities in deciding whether to issue an injunction halting construction of the magnitude herein. Where

1 injury would result to the public, an additional reason arises for refusal to grant
2 injunctive relief.

3 (*Id.* at p. 292, internal citations omitted.) The court noted that if construction were stopped the
4 damages could have been greater than the cost of completing the project, and concluded:

5 The trial court found that the injunction sought by plaintiffs would cause "severe
6 harm to defendants and severe harm and hardship to the public." The evidence
7 supports the findings. That damages might not have been compensable to plaintiffs
8 upon denial of injunctive relief did not preclude the trial court from exercising its
9 discretion in balancing the equities of relative hardship where there was evidence of
10 severe harm and hardship to the public.

11 (*Ibid.*)

12 Even if the Court deems it necessary to reach the issue,⁵ it should uphold the
13 constitutionality of AB 1889. In that event, this entire case should be dismissed, given
14 petitioners' stipulation that all of their causes of action fail on a finding that AB 1889 is valid.
15 However, a contrary holding would not resolve the declaratory relief cause of action, for the
16 Court also must consider the potential for severe harm to the public from such a judgment. This
17 would require the Court to determine whether, even without AB 1889, the Authority's funding
18 plans comply with the Bond Act, and if not, whether declaratory relief should nonetheless be
19 denied to avoid severe harm to the State.⁶

20 Evidence of this harm, and its severity, has already been shown to the Court. In opposition
21 to petitioners' motion for preliminary injunction, the Authority provided unrebutted evidence of
22 the severe harm to the public interest that would result if the Authority were prevented by a court
23 ruling from using bond funds. The State is contractually obligated to complete the project
24 described in the Central Valley Funding Plan, and if it cannot use bond funds, funds must be

25 _____
26 ⁵ Deciding the constitutional question first would be inconsistent with the well-established
27 principle that courts "will not decide constitutional questions where other grounds are available
28 and dispositive of the issues of the case." (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d
53, 66. Accord, *Stone Street Capital, LLC v. California State Lottery Com'n* (2008) 165
Cal.App.4th 109, 118.)

⁶ Just as the Court may exercise discretion to deny declaratory relief, so too may the Court
exercise discretion to deny relief by mandamus. (*County of San Diego v. State* (2008) 164
Cal.App.4th 580, 593 [holding that in order to obtain writ relief under Code of Civil Procedure
section 1085, petitioner must show it has a "clear, present and *beneficial* right to performance,"
and "[t]hat issuance of a writ of mandate is not necessarily a matter of right, but rather lies within
the discretion of the court."].)

1 found elsewhere, and if not, the federal government could demand repayment of federal grant
2 money. (Ex. 8 to RJN at p. 10.) As Judge Cadei found, that could result in a loss of \$2.55 billion
3 to the State of California, which ultimately would be paid by California taxpayers. (*Ibid.*) Other
4 impacts could add approximately \$1 billion of direct losses, and a default under the grant
5 agreements could stand in the way of future federal funding grants. (*Ibid.*) There would be
6 indirect effects as well. If a declaratory judgment shut down the work in the Central Valley,
7 thousands of workers could lose employment, including small and disadvantaged businesses.
8 (Declaration of Scott Jarvis in Opposition to Motion for Preliminary Injunction, Ex. 14 to RJN, ¶¶
9 10-11.) As Judge Cadei found: “None of this would be in the public interest.”⁷

10 In short, because a declaration upholding AB 1889 will dispose of all of the causes of
11 action in the SAC, and because before the Court could issue a contrary declaration it would have
12 to analyze the merits of petitioners’ writ claims challenging the Central Valley Funding Plan and
13 the Peninsula Funding Plan and potentially weigh the likely harm to the public interest from
14 requiring the Authority to set aside those plans, there is no reason to bifurcate the First Cause of
15 Action. In that respect, as Judge Cadei found, petitioners’ declaratory relief claim is indeed
16 “tethered” to the Authority’s funding plans; it should not be bifurcated.

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23 ⁷ The Peninsula Funding Plan had not been approved by the Director of Finance at the
24 time petitioners’ motion for preliminary injunction was heard, so that motion addressed only the
25 Central Valley Funding Plan. By the time of the petitioners’ second application for temporary
26 restraining order, the Director of Finance had approved the Peninsula Funding Plan. At the
27 hearing on that application, counsel for petitioners stated that separate federal funding that has
28 been awarded for Caltrain electrification “was based on the assumption” that Caltrain would
receive \$600 million in bond funds from the Authority, and that “[i]f that assumption turns out
not to be well founded then the Federal grant will disappear.” (Ex. 13 to RJN at p. 10.) That
statement was unsupported by any of the evidence petitioners submitted in support of their TRO
application. But were it true, it would provide additional evidence of harm to the public interest.

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CONCLUSION

The Court should deny plaintiffs' motion to bifurcate the First Cause of Action.

Dated: February 5, 2018

Respectfully Submitted,

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Attorney General of California
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Supervising Deputy Attorney General



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Deputy Attorney General
Attorneys for Respondents and Defendants

SA2016104863

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Tos, John, et al. v. California High-Speed Rail Authority (Tos II)**

No.: **34-2016-00204740**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On February 5, 2018, I served the attached **RESPONDENTS' OPPOSITION TO MOTION TO BUFORCATE** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight**, addressed as follows:

Stuart M. Flashman
Attorney at Law
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5626 Ocean View Drive
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Ropers, Majeski, Kohn & Bentley -
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Redwood City, CA 94063

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 February 5, 2018, at San Francisco, California.

Susan Chiang
Declarant



Signature