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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, QUENTIN KOPP, TOWN OF ATHERTON, a municipal corporation, COUNTY OF KINGS, a subdivision of the State of California, MORRIS BROWN, PATRICIA LOUISE HOGAN-GIORNI, ANTHONY WYNNE, COMMUNITY COALITION ON HIGH-SPEED RAIL, a California nonprofit corporation, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, and CALIFORNIA RAIL FOUNDATION, a California nonprofit corporation,

Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity, BOARD OF DIRECTORS OF THE CALIFORNIA HIGH-SPEED RAIL AUTHORITY, and DOES 1-20 inclusive,

Defendants.

Case No. 34-2016-00204740

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: April 19, 2017
Time: 11:00 a.m.
Dept: 54
Judge: Hon. Raymond M. Cadei
Trial Date: None set
Action Filed: December 13, 2017

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INTRODUCTION

Plaintiffs seek to stop the High-Speed Rail Authority from spending bond funds to build the first segment of the high-speed rail system in the Central Valley. Plaintiffs' claims lack merit and their preliminary injunction motion should be denied. First, plaintiffs have failed to demonstrate that they will suffer the requisite specific harm (beyond their interest as taxpayers) in the absence of preliminary relief. Second, plaintiffs cannot show a likelihood of success on the merits of their claims, because the actions and statute they challenge are consistent with law, and the Authority acted within its discretion. Finally, an injunction would harm the public interest, both by putting billions of public dollars at risk and endangering a major public works project already under construction that is providing important economic benefits to the Central Valley and the State. Should the Court grant preliminary relief, it should first require plaintiffs to post a bond sufficient to mitigate this harm.

BACKGROUND

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

In 2008, the voters approved Proposition 1A, the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century (the "Bond Act"). The Bond Act authorized construction of a high-speed rail system in California (expected to be one of the largest public works project in California's history), and the issuance of $9 billion in general obligation bonds to partially fund the initial segments of the system. (Stats. 2008, ch. 267 [Assem. Bill No. 3034], § 9, codified at Sts. & Hy. Code, § 2704 et seq.[1]) The Bond Act permits the High-Speed Rail Authority to use the proceeds of bond sales ("bond funds") for various purposes. (§ 2704.04, subd. (b)(1)(B).) Generally, before the Authority can spend bond funds, it must approve and submit a detailed pre-expenditure funding plan to the Director of Finance, the Chairperson of the Joint Legislative Budget Committee, and a statutorily-mandated peer review group. (§ 2704.08, subd. (d)(1); Pub. Util. Code, § 185035, subds. (a), (c), (d).) The Authority also must submit to those same persons

[1] All further code citations are to the Streets and Highways Code, unless otherwise noted.

an independent consultant report reviewing the plan. (§ 2704.08, subd. (d)(2).) If, after receiving any communication from the Joint Legislative Budget Committee, the Director of Finance finds that the project is likely to be successfully implemented as proposed in the funding plan, the Authority may commit bond proceeds for capital costs. (§ 2704.08, subd. (d).)

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

The Director of Finance has approved one such plan for the Authority to use bond funds to pay for construction of a segment of high-speed rail in the Central Valley (the "Central Valley Funding Plan"), where acquisition of land and construction for the high-speed rail project has been underway since 2013, using non-bond funds. (See Plaintiffs' Request for Judicial Notice, Exh. C at pp. 5-8.) The Director of Finance deferred a final decision on another plan to fund a project on the San Francisco Peninsula (the "Peninsula Funding Plan").

II. PLAINTIFFS' PREVIOUS EFFORTS TO STOP HIGH-SPEED RAIL

This is the latest in a series of lawsuits project opponents have brought in an effort to impede or kill the high-speed rail project in California. The rulings made and positions taken by plaintiffs in some of these related actions are relevant to this motion. Plaintiffs John Tos ("Tos") and County of Kings ("Kings County") sued the Authority, the Governor, the Treasurer, the Director of Finance, and the California State Transportation Agency in 2011, challenging the Authority's preliminary, pre-appropriation plan for the Central Valley, on the grounds that the earlier plan violated the Bond Act. They were unsuccessful in seeking (1) a writ invalidating the

Authority's approval of two construction contracts and prohibiting the Authority's use of federal grant funds;[2] (2) a writ invalidating the Legislature's appropriation of bond proceeds based on that funding plan;[3] (3) a writ requiring the Authority to rescind a pre-appropriation funding plan and issue an new one;[4] (4) a judgment that the Bond Act restricted any construction of the high-speed rail system, whether or not bond proceeds were used;[5] and (5) a judgment that the high-speed rail system the Authority is developing cannot comply with the Bond Act.[6] Tos and Kings County also unsuccessfully opposed the Authority's action to validate issuance of the bonds.[7] Plaintiff Town of Atherton, which has a policy position "to use all legal means to *delay*, *hinder* or *halt* the implementation of Prop 1a [the Bond Act]" (O'Grady Decl., ¶ 13 & Exh. 12, emphasis in original), unsuccessfully challenged the Authority's revised final program environmental impact report. (*Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314.)[8] In addition, plaintiff Transportation Solutions Defense and Education Fund ("TRANSDEF") has sued the California Air Resources Board seeking to cut off cap and trade funding for high-speed rail. (O'Grady Decl., ¶ 7 & Exh. 6 [*Transportation Solutions Defense & Education Fund v. California Air Resources Board*, Super. Ct. Sac. County, No. 34-2014-80001974, Verified Second Amended Petition for Preemptory Writ of Mandate (Oct. 18 2016)].) And plaintiffs Kings County, TRANSDEF, Community Coalition on High-Speed Rail, and California Rail Foundation have challenged a decision of the federal Surface Transportation Board ruling that

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[2] See Declaration of Sharon L. O'Grady in Opposition to Motion for Preliminary Injunction ("O'Grady Decl."), ¶ 5 & Exh. 4 [*Tos v. High-Speed Rail Authority* (Super. Ct. Sac. County, No. 34-2011-00113919), ("*Tos I*") Ruling on Submitted Matter: Remedies on Petition for Writ of Mandate (Nov. 25, 2013)], pp. 3-4.

[3] See *California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 713-715 ("*CHSRA*").)

[4] See *id.*, pp. 708-713.

[5] See O'Grady Decl., ¶ 4 & Exh. 3 [*Tos I*, Judgment Denying Petition and Complaint (Mar. 22, 2016), pp. 7-10.

[6] *Id.* at p. 16.

[7] *CHSRA*, *supra*, 228 Cal.App.4th at pp. 696-704.

[8] Kings County was an amicus in that case. (*Town of Atherton*, *supra*, 228 Cal.App.4th at p. 321.)

federal law preempts the California Environmental Quality Act for the Central Valley segment of the high-speed rail system.[9]

III. ALLEGATIONS OF THE COMPLAINT.

The First Amended Complaint ("FAC") alleges two causes of action challenging the validity of two pre-expenditure funding plans adopted by the Authority, and submitted to the Director of Finance for approval. The First Cause of Action seeks a declaratory judgment that AB 1889 is facially unconstitutional as an impermissible amendment of the Bond Act. (FAC, ¶¶ 56-61.) The Second Cause of Action (styled as a taxpayer suit to prevent waste of public funds under Code of Civil Procedure section 526a) alleges that because AB 1889 is invalid, the Central Valley Funding Plan and the Peninsula Funding Plan are invalid under the Bond Act. (*Id.*, ¶¶ 51, 52, 62.) Plaintiffs further allege that once the funding plans have been approved by the Director of Finance, the Authority will spend bond funds on the projects to be constructed pursuant to those plans, and that spending in connection with those plans and *future* funding plans "that must rely on the provisions of AB 1889" will be an illegal expenditure of public funds. (*Id.*, ¶¶ 64, 66). Plaintiffs ask the Court to enjoin future expenditures, specifically:

> 2. For this Court's temporary restraining order, preliminary injunction, and permanent injunction preventing CHSRA from expending any public funds toward the approval of a Funding Plan that relies on AB 1889 to find compliance with the requirements of Prop. 1A.
>
> 3. For this Court's temporary restraining order, preliminary injunction, and permanent injunction preventing CHSRA from expending any Prop. 1A high-speed rail construction bond funds towards the construction of any and all projects based on a second Funding Plan that relies on AB 1889 to find compliance with the requirements of Streets & Highways Code §2704.08(d).

(FAC, Prayer.)

ARGUMENT

I. APPLICABLE LEGAL STANDARD

A plaintiff seeking a preliminary injunction "ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an

[9] See O'Grady Decl., ¶ 6 & Exh. 5 [*Kings County, et al. v. Surface Transportation Board*, Ninth Cir. No. 15-71780, Petition for Review (June 11, 2015)].)

adjudication of the merits." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) "[T]rial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*Ibid.*, quoting *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) When the defendant is a public official or agency, the court also considers the public interest. (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1472-1473.)

II. PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE HARM.

A. Generalized Harm to Taxpayers Is Insufficient to Support a Preliminary Injunction.

Plaintiff's application fails at the threshold for failure to submit evidence of irreparable harm. Harm to a taxpayer's pocketbook is alone insufficient to establish "the high degree of existing or threatened injury required for the prejudgment injunctive relief sought here." (*White v. Davis*, *supra*, 30 Cal.4th at p. 555, quoting *Cohen v. Bd. of Supervisors* (1986) 178 Cal.App.3d 447, 454, emphasis omitted.) Nor is it alone sufficient that the taxpayer alleges a constitutional violation. (*Ibid.*) To show that it will suffer irreparable harm in the absence of a preliminary injunction, the party seeking such relief must provide evidence that it will suffer harm apart from the generalized harm suffered by all taxpayers. (*Ibid.*)

Thus, a motion for a preliminary injunction must be supported by evidence of irreparable harm specific to the moving parties. (See *White v. Davis*, *supra*, 30 Cal.4th at p. 554.) Such evidence is lacking here. Plaintiffs' declarant, William H. Warren, testified that the Authority has received a Federal Railroad Administration ("FRA") grant pursuant to the American Recovery and Reinvestment Act ("ARRA"), that there is an agreement that the ARRA funds will be spent first, and that the ARRA fund balance "goes to zero between July 2016 and June 2017." (Declaration of William H. Warren in Supp. of Ex Parte App. for TRO. ("Warren Decl."), ¶¶ 9-11.) Warren speculates that "starting in April 2017," the Authority will start spending bond proceeds. (*Id.*, ¶ 15.) He identifies no harm other than generalized harm to the taxpayers'

pocketbook, and his declaration is therefore inadequate as a basis for preliminary injunctive relief.[10]

B. The Tos Declaration Is Insufficient to Support a Preliminary Injunction.

On March 28, 2017, plaintiffs filed an addendum in support of their motion, along with the declaration of Tos, who claims he will be injured if the Authority uses bond funds to acquire his property through eminent domain. Preliminarily, the Court should decline to consider the documents, which were filed less than 16 court days before the hearing on this motion. (Code Civ. Proc., § 1005, subd. (b).) But even if the Court were to consider the declaration, it would be insufficient. First, it is beyond the scope of the FAC, which alleges only Tos's standing as a taxpayer under Code of Civil Procedure section 526a and pleads no other interest or harm to Tos, (FAC, ¶ 4), and therefore cannot support a preliminary injunction. (*Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 398-399.) Second, Tos' testimony that "it appears certain that the funds that [the Authority] will use to purchase my property . . . will come from the Proposition 1A bond proceeds that are at issue in this case," is inaccurate.[11] The bonds have not yet been sold, and the Authority has already deposited with the State Treasurer an amount equal to the fair market value of Tos's land, plus associated costs. (Declaration of Alan Glen in Opp. to Motion for Prelim. Injunction ("Glen Decl."), ¶¶ 4, 7.) Thus, an order enjoining the use of bond funds would not stop the Authority from acquiring Tos's land, which is necessary for the construction of the Central Valley Segment. (See *id.*, ¶¶ 6-8, 11-12.) Third, the argument lacks coherence. Plaintiffs cannot simultaneously argue that a preliminary injunction will avoid irreparable harm to Tos because it *will halt* the project and preserve his land, and that the Authority will not suffer irreparable harm if an injunction issues because the

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[10] Allegations in the complaint and argument in plaintiffs' motion suggesting injury to voters adds nothing, for there is no California authority recognizing voter standing. (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 751 [rejecting plaintiff's argument that he had standing to seek an injunction against implementation of an unconstitutional statute because it infringes on his right to vote, and noting that "Connerly has failed to cite a single state or federal case that either establishes or recognizes 'voter standing'"].)

[11] There are other substantive inaccuracies in Tos's testimony. (See Glen Decl., ¶¶ 6, 7.)

injunction *will not halt* the project. (See Plaintiffs' Memo, p. 13 [asserting existence of other construction funds].)[12] Finally, the injury Tos asserts arises from the construction of high-speed rail itself, regardless of whether that construction is funded by state bonds, or another source. (See Tos Decl. ¶ 5.)[13] There simply is no nexus between the harm Tos claims and the use of bond funds the plaintiffs seek to prevent.

III. PLAINTIFFS CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs also cannot show that they are likely to prevail on their challenge to the Authority's Central Valley Funding Plan, because in enacting AB 1889, which merely clarified a provision of the Bond Act, the Legislature acted within its statutory and constitutional authority. And, even if AB 1889 effected a change, that change would be constitutional.

A. The Legislature Has Statutory Authority to Impose Conditions and Criteria on Appropriations of Bond Funds, and Any Change in the Project was Consistent with the Constitution.

By its terms, the Bond Act broadly authorizes the Legislature to impose "conditions and criteria" by statute on any appropriation of bond funds. (§ 2704.06.) AB 1889 expressly states that it is a clarification of an earlier appropriation under the Bond Act: "[t]his act clarifies that early investments in the Bookends[14] and elsewhere along the system, as defined in SB 1029 of the 2011-12 Regular Session (Chapter 52 of the Statutes of 2012), which will ultimately be used by high-speed trains, are consistent with the intent of the Legislature in appropriating funding and is consistent with Proposition 1A." (Assem. Bill No. 1889 (2015-2016 Reg. Sess.), § 1, subd. (k).)

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[12] Even if plaintiffs had submitted adequate evidence of irreparable harm, they would not be entitled to a preliminary injunction. The FAC seeks to invalidate administrative determinations, which can only be challenged by petition for writ of mandate, and the merits of such a petition must be decided before injunctive relief may issue. (See *City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1467; see also *CHSRA*, *supra*, 228 Cal.App.4th at p. 707.)

[13] Plaintiffs are not seeking to enjoin construction of the Central Valley project using other funds, because this is a fight they have lost. In *Tos I*, Judge Kenny entered a judgment against Tos and Kings County holding that the Bond Act did not restrict the Authority from using non-bond funds to build the high-speed rail system. (O'Grady Decl., Exh. 3 at pp. 7-10.) Accordingly, a preliminary injunction prohibiting the Authority from using bond proceeds would not prevent the Authority from condemning Tos's property.

[14] "Bookends" refers to projects on the San Francisco Peninsula and in the Los Angeles metropolitan area.

While the Legislature's finding that a statute is simply a clarification of prior law is not binding on this Court, it is entitled to "due consideration." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244; *Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 590, fn. 13.) Here, the Bond Act does not otherwise describe the showing required to support a conclusion that, on completion of a project, "the corridor or usable segment thereof would be suitable and ready for high-speed train operation." (§ 2704.08, subd. (d)(2)(B).) AB 1889 clarifies that bond funds may be used for capital costs for a project that "would enable high-speed trains to operate immediately or after additional planned investments are made on the corridor or useable segment thereof and passenger train service providers will benefit from the project in the near term." In AB 1889, the Legislature exercised its statutory authority to impose "conditions and criteria" (§ 2704.06), specifically with respect to funds it appropriated in 2011. (§§ 2704.76, subd. (b); 2704.77, 2704.78, subd. (a) [referencing appropriation made by Senate Bill 1029 (2011-2012 Reg. Sess.)].)

The clarification provided by AB 1889 reflects the principle of incrementalism necessary to build a public works project of this scope, and the Legislature's recognition that for some period of time segments of the high-speed rail system may be used by conventional passenger rail. The Bond Act reflects this concept by providing that in selecting a usable segment, the Authority shall use criteria including "the need to test and certify trains operating at speeds of 220 miles per hour," and "the utility of those . . . usable segments . . . for passenger train service other than high-speed train service that will not result in any unreimbursed operating or maintenance cost to the Authority." (§ 2704.08, subd. (f); emphasis added.) Thus, the Legislature anticipated a period in which high-speed rail may not yet be running commercially, but the improvements would be used as test tracks, or for non-high-speed passenger train service, so long as the Authority would not have to financially support that service. The Central Valley Project will build this test track (see Plaintiffs' Memo at p. 4), which the Bond Act recognizes as necessary for the development of the high-speed rail.

The clarification provided in AB 1889 is also consistent with an opinion of the Legislative Counsel Bureau in 2012. (O'Grady Decl., ¶ 2 & Exh. 1 [Legislative Counsel Opinion (June 8,

2012)] at p. 15.) In analyzing the Authority's pre-appropriation plan for the Central Valley, which – in contrast to the Central Valley Funding Plan at issue here – did not include electrification and elements needed to run high-speed trains on the segment, the Legislative Analyst concluded that that earlier plan met the Bond Act requirement for being "suitable and ready for high-speed train operation." (*Ibid.*) The Legislative Counsel's opinion is a factor the Court should consider. (See *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 939-940.)

Even if the Bond Act did not expressly authorize the Legislature to impose conditions and criteria on the use of bond proceeds, AB 1889 would be a constitutional amendment of the Bond Act. The Legislature may amend a bond measure that is proposed by the Legislature and ratified by the voters without constitutional limitation so long as the amendment does not impliedly repeal the bond act by making "substantial changes in the scheme or design which induced voter approval" of the bond measure, such as by appropriating funds for "an alien purpose." (*Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 693-694; see Cal. Const., art. XVI, § 1.) For example, in *Veterans of Foreign Wars*, *supra*, 36 Cal.App.3d at p. 692, the Legislature diverted bond proceeds designated for a veterans farm and home purchase program to pay salaries and other expenses associated with county veterans service offices, which the court of appeal held was a partial repeal by implication of the bond act. Plaintiffs have not even alleged such "substantial changes." (See *id.* at p. 693.) AB 1889 made no change to the purpose for which bond funds are used—they must be used to build a high-speed train system.

Plaintiffs' reliance on *O'Farrell v. County of Sonoma* (1922) 189 Cal. 343, 348-349 and *Peery v. City of Los Angeles* (1922) 187 Cal 753, 767-769, is misplaced. Those decisions are not only distinguishable on their facts, but the contract theory on which their analysis is based has been eroded by subsequent case law, as reflected in both *Veterans of Foreign Wars*, *supra*, 36 Cal.App.3d at p. 693, and *CHSRA*, *supra*, 228 Cal.App.4th at p. 703. These cases do *not* hold that a bond act must be implemented in strict compliance with its terms, as plaintiffs argue. (Plaintiffs' Memo. at p. 6.) To the contrary, in *CHSRA* the Court recognized "fluidity of the planning process for large public works projects." (*CHRSA*, *supra*, 228 Cal.App.4th at p. 703.)

"[T]he Supreme Court has allowed substantial deviation between the preliminary plans submitted to the voters and the eventual final project. [...] '[T]he authority to issue bonds is not so bound up with the preliminary plans . . . that the proceeds of a valid issue of bonds cannot be used to carry out a modified plan if the change is deemed advantageous.'" (*Ibid.*, quoting *Cullen v. Glendora Water Co.* (1896) 113 Cal. 503, 510; see also, e.g., *City of San Diego v. Millan* (1932) 127 Cal.App. 521, 536 [holding that bond act providing for construction of arched masonry dam was not violated by legislatively-mandated design change to an earth-filled rock embankment dam].)[15]

In applying these principles to AB 1889, the court must presume that a statute is valid "unless its unconstitutionality clearly, positively, and unmistakably appears." (*People v. Falsetta* (1999) 21 Cal.4th 903, 912-913.) This deference and the presumption of validity afforded all legislative acts arise because the California Legislature "may exercise any and all legislative powers which are not expressly . . . denied to it by the [California] Constitution." (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.) "In other words, [courts] do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited." (*Ibid.*, internal quotations and citation omitted.) Any "restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used." (*Ibid.*, internal citation omitted.) Thus,

[15] Plaintiffs mistakenly rely on a statement in *CHSRA* that the Bond Act created a "financial straitjacket." (Plaintiffs' Memo. at pp. 1, 6, 10.) But this takes the phrase out of context. The Court of Appeal said that "the voters clearly intended to place the Authority in a financial straitjacket by establishing a *mandatory multistep process* to ensure the financial viability of the project." (*CHSRA*, *supra*, 228 Cal.App.4th at p. 706, emphasis added.) That multi-step process includes supervision of the program by the Legislature and the Director of Finance, with input from the statutorily-mandated peer review group, the independent consultant, and others. (§§ 2704.06, 2704.08, subds. (c), (d); Pub. Util. Code, §§ 185033, 185033.5, 185035.) Plaintiffs do not claim that the Authority failed to follow that process, because it was followed to the letter. (See FAC, ¶¶ 47-48, 53, Plaintiffs' Memo. at pp. 1-2, 4.) Nothing in *CHSRA* suggests that the voters intended to prevent the Legislature from establishing criteria based on project needs and objectives, and the Court of Appeal's recognition of the flexibility the Supreme Court allows in the implementation of large infrastructure projects financed through bonds suggests otherwise.

"[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." (*Ibid.*, internal quotations and citations omitted.)

In short, plaintiffs cannot show that they are likely to prevail on their claim that AB 1889 is an improper clarification of the Bond Act, much less an effective repeal of that initiative.

B. Other Arguments that AB 1889 Is Unconstitutional Lack Merit.

Plaintiffs' other arguments that AB 1889 is invalid should similarly be rejected. These arguments rely on attributions of voter intent, and suggest that the funds will be "dissipate[ed]" if used to build the Central Valley segment. (Plaintiffs' Memo. at p. 6.) However, that segment will be a core component of the high-speed rail. (Plaintiffs' RJN, Ex. C at pp. 1-2, 5.) Nor is there any evidence that the voters were particularly focused on, or were led to have assumptions about, the meaning of "suitable and ready for high-speed train operation" as that phrase is used in the Bond Act. For example, there is nothing in the Official Voter Information Guide for Prop. 1A that is inconsistent with AB 1889. (O'Grady Decl., ¶ 3 & Exh. 2.) The Guide focuses on the role of the Legislature, the Department of Finance and the peer review group in supervising the Authority, and does not even mention the "suitable and ready" requirement. (*Id.* at pp. 3-9.)

Plaintiffs' remaining argument, based on the text of section 2704.08, subdivision (d), would require the Court to read into the statutory language additional words – "at that point" – to justify invalidating AB 1889. (Plaintiffs' Memo at p. 9.) The Court should decline this invitation. "Ordinarily [courts] are not free to add text to the language selected by the Legislature." (*Hampton v. County of San Diego*, (2015) 62 Cal.4th 340, 350.) And plaintiffs cite no authority for the proposition that a Court may add text to the language of a statute *for the purpose of invalidating it.* Plaintiffs are thus unlikely to prevail on the merits of their claims.

C. Plaintiffs Also Have Failed to Show That They Are Likely to Succeed in Establishing That, But for AB 1889, the Central Valley Segment Will Not Be Suitable and Ready for High-Speed Train Operation.

Even assuming *arguendo* that AB 1889 was somehow flawed, plaintiffs have not shown any likelihood that the Authority abused its discretion in determining that the project will be suitable and ready for high-speed train operation under the original terms of the Bond Act. Plaintiffs concede, as they must, that the project will have all of the components necessary for

operating high-speed trains on the corridor for the testing that is necessary before revenue operations can commence. (See Plaintiffs' Memo. at p. 11.)[16] But they argue that "operation" means "revenue service" (*id.* at p. 12), a phrase that appears nowhere in the Bond Act (see § 2704.01 et seq.). Plaintiffs' argument relies solely on section 2704.01, subdivision (d), which sets out the *speed requirements* for the high-speed passenger train. The Central Valley Funding Plan itself indicates that trains will be able to achieve a speed of at least 200 miles per hour, even while the segment is being used as test track (Plaintiffs' RJN, Exh. C at p. 2), and the independent consultant's report indicates the plan includes all improvements necessary to do so (Declaration of Stuart Flashman in Supp. of Ex Parte App. for TRO, Exh. B. at p. 32).[17] Thus, plaintiffs cannot show that the validity of the Central Valley Funding Plan relies on AB 1889.

IV. THE PUBLIC INTEREST WEIGHS AGAINST ISSUANCE OF AN INJUNCTION.

Even if plaintiffs had met their burden on irreparable harm or likelihood of success on the merits (and they have not), the public interest would weigh against an injunction. "When, as here, the plaintiff seeks to enjoin public officers and agencies in the performance of their duties, the public interest must be considered." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Board, supra*, 23 Cal.App.4th at pp. 1472-1473.) Here, an injunction could significantly harm the public interest.

The Authority has received an FRA grant pursuant to ARRA ($2.55 billion) as well as a further FRA grant ($928 million), each of which is memorialized in separate Cooperative Agreements between the FRA and the Authority. (O'Grady Decl., ¶¶ 9-10 & Exhs. 8-9.)

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[16] As discussed above, the Legislative Counsel concluded that the Authority's earlier plan for the Central Valley segment that did not have electrification and other components needed for ultimate high-speed train operations satisfied the Bond Act, without the benefit of the clarification provided by AB 1889. (O'Grady Decl., Exh. 1 [Legislative Counsel Opinion (June 8, 20012)] at p. 15.) After receiving that opinion, the Legislature appropriated bond funds for the Central Valley segment. (Senate Bill No. 1029 (2011-2012 Reg. Sess.) (Stats. 2012, ch. 152, § 9).) It is that appropriation that the Authority seeks to access in the Central Valley Funding Plan.

[17] Plaintiffs' statement that the test track is intended merely "to test the feasibility of the proposed high-speed rail operation" is incorrect, and not supported by the Central Valley Funding Plan on which plaintiffs ostensibly rely. (Plaintiffs' Memo. at p. 12.) The test track will be used "to enable the rolling stock, signaling system, and the electrification system to be tested and commissioned and for all of those systems to be certified." (Plaintiffs' RJN, Ex. 3 at p. 4.)

Pursuant to the ARRA Cooperative Agreement with the FRA, the Authority is committed to ensure that the Central Valley construction results in a completed project usable for train service. (*Id.*, Exh. 8 at pp. 51-52.) The Authority is required to match the ARRA federal grant money, approximately dollar for dollar. (*Id.*, Exh. 8 at pp. 2-3, 34-35, 62-63.) The FRA and the Authority have agreed that the ARRA funds, which must be fully expended by September 2017, may be spent first, to be followed by the State's match to those ARRA funds, before the 2010 grant funds may be spent. (See Warren Decl., ¶ 11.) The match must be provided on a schedule set in a Funding Contribution Plan. (O'Grady Decl., Exh. 8 at pp. 2-3, 34-35, 62-63; Warren Decl., Exh. B.) Most of the ARRA federal grant money has already been spent, and all of it soon will be (see Warren Decl., ¶ 11), meaning that state funds will have to be spent soon to begin matching the federal ARRA funds for the ongoing Central Valley construction.[18]

Failure to timely match the federal ARRA funds as scheduled could have disastrous consequences for the Authority and the State. Most damaging is the potential for FRA to demand repayment of the federal grant monies already disbursed to the Authority, which the terms of the ARRA Cooperative Agreement would allow. (O'Grady Decl., Exh. 8 at pp. 34-35.) The federal government can enforce that repayment requirement by withholding and redirecting back to the U.S. Treasury other federal funds that would otherwise be provided to California, such as highway funds. (*Id.*, Exh. 8 at pp. 35.) Thus, a demand for repayment of the ARRA funds could result in a loss of $2.55 billion dollars to the State of California. Ultimately, the California taxpayers would pay for this, either through direct usage of other state funds (such as general fund monies) to make the repayment, or indirect usage of state funds to backfill the federal money withheld to effectuate the repayment.[19] Further, demand for repayment of ARRA monies expended also could lead to FRA attempt to cancel the other $928 million grant not yet spent

[18] Plaintiffs' Memorandum argues (in contradiction of their own witness) that the Authority can use funds from the Greenhouse Gas Reduction Fund (cap and trade) to pay for construction (Plaintiffs' Memo. at p. 13), while at the same time plaintiff TRANSDEF is suing the Air Resources Board seeking to cut off that funding. (See O'Grady Decl., ¶ 7 & Exh. 6.)

[19] Plaintiffs do not, and plausibly cannot, argue that taxpayers would be materially advantaged by shifting the funding from bond funds to other funding sources.

(O'Grady Decl., Exh. 9 at pp. 3, 33, 40), resulting in a potential total loss of $3.5 billion dollars. Lastly, the FRA also could prevent any further funding grants to the Authority (O'Grady Decl., Exh. 8 at pp. 34-35), which could result in further losses to the State in the future, and which could be devastating to the development of the high-speed rail in California. None of this would be in the public interest.

This loss of funds would have very human impacts. California's Central Valley is still struggling economically, with high unemployment and low wages relative to the state as a whole. (See O'Grady Decl., ¶ 12 & Ex. 11 at pp. ES-2, ES-6 - ES-7, 1-1 - 1-4, 4-51 – 4-53.) The high-speed rail program provides much-needed jobs (*id.* at p. 4-54 [construction of high-speed rail is projected to bring 100,000 direct and indirect jobs to the Central Valley between 2015 and 2020]), and will also help the Central Valley to become more accessible to the state's major metropolitan areas (*id.*, Ex. 11 at pp. 1-5 – 2-10). An analysis prepared for the Treasury Department estimates *net economic benefit* from the California high-speed rail project to be between $130.3 and $260.6 billion. (*Id.*, Ex. 7 at pp. 4, A-20 – A-21.) Finally, construction on the segment is well underway. (See Glen Decl., ¶ 9; Declaration of Scott Jarvis in Opp. to Motion for Preliminary Injunction ("Jarvis Decl."), ¶¶ 4-6.) Design-build contacts have been entered into for the whole of the segment. (*Id.*, ¶¶ 4-6.) the Authority already has possession of most of the land parcels needed for the Central Valley Segment, and has already spent more than $1.7 billion on the project. (Glen Decl., ¶ 10; Jarvis Decl., ¶ 4-7.) More than 1,900 persons are employed on the project in construction and construction management. (Jarvis Decl., ¶ 11.) And the project is currently providing work for more than 182 small businesses. (*Id.*, 10.) A preliminary injunction that could create uncertainty about the future of the project will harm, not further, the public interest.

V. PLAINTIFFS SHOULD BE REQUIRED TO POST A BOND.

If the Court were to issue a preliminary injunction, it must require an undertaking or cash deposit in lieu of an undertaking. (Code. Civ. Proc., §§ 529, 995.710.) The bond should be sufficient to cover any damage to the State caused by a wrongly issued injunction. (*Id.*, § 529.) The bond amount should take into account all reasonably foreseeable costs resulting from the injunction, including the costs of the Authority's defense in this action. (*ABBA Rubber Co. v.*

Seaquist (1991) 235 Cal.App.3d 1, 14-15.) Even a deferral of action on a project of this magnitude can result in millions of dollars in losses. For example, the Caltrain electrification project is on hold because the Federal Transit Authority deferred action on a $650 million grant for the project. (Plaintiffs' Memo. at p. 4, fn. 4.) Caltrain has announced that as a result it was required to reach deadline extensions with its contractors, which will likely require Caltrain to utilize $20 million in project contingencies. (O'Grady Decl., ¶ 12 & Exh. 11.) And the Caltrain electrification project is only one-sixth the size of the Central Valley project.[20] While it is hard to predict all the potential adverse consequences of a preliminary injunction and ensuing damages, plainly a substantial bond, to secure the billions of dollars at risk, is warranted here.

CONCLUSION

Defendants respectfully request that the Court deny the preliminary injunction motion.

Dated: April 6, 2017

Respectfully Submitted,

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[20] Total construction cost for the Central Valley segment is estimated to be about $7.8 billion (see Plaintiffs' RJN, Ex. C at p. 19), compared with about $1.3 billion for the Peninsula segment (see O'Grady Decl., ¶ 14 & Ex. 13 at pp. 6, 19).

DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Tos, John, et al. v. California High-Speed Rail Authority**
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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **[GOLDEN STATE OVERNIGHT]**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On April 6, 2017, I served the attached **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed 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 April 6, 2017, at San Francisco, California.

Susan Chiang
Declarant

Signature

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