## INTRODUCTION

Plaintiff's ex parte application for a temporary restraining order is without merit. There is no urgency here. Plaintiffs seek to enjoin expenditures from the proceeds of bonds that will not be sold or available to the Authority until more than a month from now. Even if there were urgency, plaintiffs cannot meet the legal standard for issuance of a temporary restraining order. First, plaintiffs have failed to demonstrate that they will suffer harm adequate to support this type of preliminary relief. Second, plaintiffs cannot show a likelihood of success on the merits of their claims, because the administrative action they challenge was constitutionally valid. Finally, a temporary restraining order or injunction would harm the public interest, by putting billions of public dollars at risk. Should the Court grant the application, it should also 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 Legislature proposed and 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]) It 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 on construction costs or to acquire real property, 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 an independent consultant report

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

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 clarifies the meaning of an otherwise undefined statute providing that on completion, certain projects approved under the above-described section 2704.08, subdivision (d) will be "suitable and ready for high-speed train operation." (2015 California Assembly Bill No. 1889, California 2015-2016 Regular Session, § 2(k).) 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 *and* passenger train service providers will benefit from the project in the near-term." (§ 2704.78, subd. (a), emphasis added.)

Almost three weeks ago, the Director of Finance 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 primarily federal funds. (See Plaintiffs' Request for Judicial Notice, Ex. 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").

The State currently does not anticipate selling bonds to pay for the Central Valley Funding Plan (which is the expenditure plaintiffs' application for temporary restraining order seeks to prevent), until around April 20, 2017, and it anticipates the bond sales will close and the funds will not be available until around April 27, 2017. (Declaration of Blake Fowler, filed herewith, ¶¶ 3-4.)

## II. ALLEGATIONS OF THE COMPLAINT.

The First Amended Complaint (FAC) challenges the validity of the two pre-expenditure funding plans adopted by the Authority, and submitted to the Director of Finance for approval. It

alleges two causes of action. 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 Central Valley Funding Plan and the Peninsula Funding Plan have been approved by the Director of Finance, the Authority will spend bond funds illegally 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

The standard for issuance of a temporary restraining order and a preliminary injunction are the same. "[T]rial courts should evaluate two interrelated factors when deciding whether or not to issue [a restraining order]. 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 [restraining order] were denied as compared to the harm that the defendant is likely to suffer if the [order] were issued." (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251, quoting *IT Corp. v. Cnty. of Imperial* (1983) 35 Cal.3d 63, 69-70, internal punctuation in original.) 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.) Plaintiffs have not demonstrated any urgency, irreparable harm, or a likelihood of success on the merits. Accordingly, the application should be denied.

## II. PLAINTIFFS HAVE NOT DEMONSTRATED URGENCY OR IRREPARABLE HARM.

Plaintiff's application fails at the threshold for failure to submit evidence of urgency or irreparable harm. There is no urgency because the funds in dispute will not be available to the Authority until the end of April, after the bonds are sold and close. (Declaration of Blake Fowler, ¶¶ 3-4.)[2]

There is no irreparable harm because 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* (2003) 30 Cal.4th 528, 555, quoting *Cohen v. Bd. of Supervisors* (1986) 178 Cal.App.3d 447, 454, emphasis omitted.) Nor is it sufficient that the taxpayer alleges a constitutional violation. (*Ibid.*)

Thus, an ex parte application must be accompanied by a declaration containing an "affirmative factual showing" on "competent evidence based on personal knowledge or irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." Cal. Rules of Ct., Rule 3.1202(c). Plaintiffs' declarant, William H. Warren, testifies 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." (Dec. of William H. Warren in Support of Ex Parte App. for TRO and OSC Re: Prelim. Inj. ("Warren Decl.") ¶¶ 9-11.) Warren goes on to speculate that "starting in April 2017," the Authority will start spending bond proceeds. (*Id.*, ¶ 15.) He identifies no harm other than

[2] Plaintiffs suggest that the Authority may be planning to sign contracts for construction of the Central Valley project. (Plaintiffs' Memo at p. 6.) The Funding Plan discloses that the Authority had already entered into construction contracts for Central Valley project, and that construction has been ongoing since 2013. (Plaintiffs' Request for Judicial Notice, Ex. C at pp. 5-8, 30-37.) There can be no urgency associated with contracts in effect for more than two years.

generalized harm to the taxpayers' pocketbook, and his declaration is therefore inadequate as a basis for preliminary injunctive relief, let alone a temporary restraining order.[3]

## 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 the Legislature has both statutory and constitutional authority to amend the Bond Act, and plaintiffs cannot demonstrate that in enacting AB 1889, which merely clarified a provision of the Bond Act, the Legislature exceeded its statutory or constitutional authority.

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.) In enacting AB 1889, providing that "suitable and ready for high-speed rail" permits bond funds to 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," the Legislature exercised that authority 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].)

Even if the Bond Act did not expressly authorize the Legislature to impose conditions on the use of bond proceeds, the Legislature has constitutional authority to amend 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

[3] Even if plaintiffs had submitted adequate evidence of irreparable harm, they would not be entitled to a temporary restraining order. 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 [holding that trial court should not have granted a preliminary injunction pending a ruling on the merits of a challenge to an administrative decision that should have been brought as a petition for writ of mandate, rather than an action for declaratory relief].) See also *California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 707 (*CHSRA*), in which the Third District Court of Appeal so held in another case brought by the same counsel representing plaintiffs in this case, on behalf of some of the same plaintiffs (Jon Tos and County of Kings). A demurrer to plaintiffs' FAC is pending on this ground, and is set for hearing on April 18, 2017.

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." And in fact, AB 1889 made no change to the purpose for which bond proceeds are used—they are still being 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 (Plaintiffs' Memo. at p. 6), 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 decades of 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 676. 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].) In short, plaintiffs cannot show that they are likely to prevail on their claim that AB 1889 is a repeal of the Bond Act, rather than a permissible clarification or amendment of the Bond Act.

When considering acts of the Legislature, courts 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 quotations and citation omitted.) Thus, "[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.)

AB 1889 expressly states that it is a clarification of the Bond Act.

> This act clarifies that early investments in the Bookends[4] and elsewhere along the system, as define 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

(AB 1889, § 1, subd. (k).) While the Legislature's finding that a subsequent 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, 250; *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 what showing is 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 provision.

That clarification is consistent with Bond Act provisions that reflect the principle of incrementalism necessary to build a public works project of this scope, and its recognition that for some period of time segments of the high-speed rail system will be used by conventional

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

passenger rail.[5] That incrementalism is implicit in the Bond Act is further supported by the statute 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 explicitly anticipated a period in which high-speed rail would 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 Funding Plan 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 at p. 15.) In analyzing the Authority's pre-appropriation plan for the Central Valley, which – in contrast to the Central Valley Funding

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[5] For example, Proposition 1A distinguishes between high-speed rail or high-speed trains, on the one hand, and passenger service or trains, on the other hand. (See § 2704.01 subd. (d) ["'High-speed train' means a passenger train capable of sustained revenue operating speeds of at least 200 miles per hour where conditions permit those speeds."]; *id.*, subd. (e) ["High-speed train system" means a system with high-speed trains . . . ."]; § 2407.08, subd. (c)(2)(B)) [initial funding plan is to provide information about the terms of any agreement the Authority proposes to enter into with another party for "construction or operation of passenger train service" along a usable segment]; *id.*, subd. (c)(2)(E) [initial funding plan must include "projected ridership and operating revenue based on projected high-speed train operations" in the usable segment, emphasis added]; *id.*, subd. (c)(2)(F) [initial funding plan must identify "All known or foreseeable risks associated with the construction and operation of high-speed passenger train service along the . . . usable segment, emphasis added] ; *id.*, subd. (c)(2)(H) [initial funding plan must certify that the usable segment "would be suitable and ready for high-speed train operation"]; *id.*, subd. (c)(2)(I) [initial funding plan must certify that "[o]ne or more passenger service providers can begin using the tracks or stations for passenger train service]; *id.*, subd. (c)(2))J) [initial funding plan must certify that "planned passenger service by the authority in the . . . usable segment . . . will not require a local, state, or federal operating subsidy"]; *id.*, subd. (d)(1)(F) [final funding plan must describe terms and conditions of "any agreement proposed to be entered into by the authority and any other party for the construction or operation of passenger train service" in the usable segment]; *id.*, subd. (d)(2)(C) [consultant's report must indicate that "upon completion, one or more passenger service providers can begin using the tracks or stations for passenger train service"]; *id.*, subd. (d)(2)(D) [consultant's report must indicate that "the planned passenger train service to be provided by the authority, or pursuant to its authority, will not require operating subsidy]; § 2704.095, subds. (b)-(d), (h)-(i) [describing allocation of connectivity funds for "passenger rail service"]).

Plan at issue in the present litigation – did not include electrification and elements needed to run high-speed trains on the segment, the Legislative Analyst concluded, without the benefit of AB 1889, that that earlier plan met the Bond Act requirement for being "suitable and ready for high-speed train operation." (*Ibid.*)

Plaintiffs' arguments on the merits rely on their attributions of voter intent, and suggests that the funds will be "dissipated" if used to build the Central Valley segment; however, that segment will be a core component of the high-speed rail, so there will be no dissipation. 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 & Ex. 2.) The Guide focuses on the role of the Legislature, the Department of Finance, the statutorily-mandated peer review committee in supervising the Authority, and does not even mention the "suitable and ready" requirement. (*Id.* at pp. 3-9.) For all these reasons, plaintiffs are unlikely to prevail on the merits of their claims.

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

Even if plaintiffs met their burden on irreparable harm or likelihood of success on the merits (and they have not), the public interest would weigh against a temporary restraining order. "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 1459, 1472-1473.) Here, an injunction could significantly harm the public interest.

The Authority has received an FRA grant pursuant to the American Recovery and Reinvestment Act ("ARRA") ($2.55 billion) as well as a further FRA grant pursuant to a 2010 appropriations act ($928 million), each of which is memorialized in separate Cooperative Agreements between the FRA and the Authority. (O'Grady Decl. ¶¶ 5-6 & Exhs. 4, 5.) 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. 4 at pp. 51-52.) The Authority is required to match the ARRA federal grant money, approximately

dollar for dollar. (*Id.*, Exh. 4 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 memorialized in a Funding Contribution Plan ("FCP"). (O'Grady Decl., Exh. 4 at pp. 2-3, 34-35, 62-63; Exh. B to Warren Declaration.) Most of the ARRA federal grant money has already been spent, and all of it soon will be (see Warren Declaration, ¶ 11), meaning that state funds will have to be spent soon and as required by the FCP to begin matching the federal ARRA funds for the ongoing Central Valley construction.

Failure to timely match the federal ARRA funds as set forth in the schedule in the FCP 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. 4 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. 4 at pp. 35; see also 49 CFR § 18.52.) 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 (for state highway projects, for example) the federal money withheld to effectuate the repayment. Plaintiffs do not argue that taxpayers would be materially advantaged by shifting the funding from bond funds to other funding sources. Further, demand for repayment of ARRA monies expended also could lead the FRA to attempt to cancel the $928 million in 2010 appropriations granted but not yet spent (O'Grady Decl., Exh. 5 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. 4 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.

## V. ANY ORDER ISSUED SHOULD BE CONDITIONED ON PLAINTIFFS' POSTING OF A SUBSTANTIAL BOND.

If, notwithstanding the arguments discussed above, the Court were to issue a temporary restraining order, it should condition that order of the posting of a substantial bond. (*Allen v. Pitchess* (1973) 36 Cal.App.3d 321, 329-330 [holding that court has discretion to require a bond to protect against the impact of a temporary restraining order if it is found to have been improperly issued].) Even a deferral of action on a project of this magnitude can result in millions of dollars in losses. As plaintiffs have noted, 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 it contractors, which will likely require Caltrain to utilize $20 million in project contingencies. (O'Grady Decl., ¶ 7 & Exh. 6 .) While it is hard to predict what all of the ramifications of a temporary restraining order in this case may be and what damages will result, plainly a substantial bond, to secure the billions of dollars at risk, is warranted here, with a larger bond to be required if a preliminary injunction were to issue.

## CONCLUSION

For the forgoing reasons, the Court should deny plaintiffs' ex parte application for a temporary restraining order and decline to enter an order to show cause.

Dated: March 22, 2017

Respectfully Submitted,

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