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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

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

Petitioners,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY; JEFF MORALES, CEO OF THE CHSRA; GOVERNOR JERRY BROWN; STATE TREASURER, BILL LOCKYER; DIRECTOR OF FINANCE, ANA MATASANTOS; SECRETARY (ACTING) OF BUSINESS, TRANSPORTATION AND HOUSING, BRIAN KELLY; STATE CONTROLLER, JOHN CHIANG; AND DOES I-V, INCLUSIVE,

Respondents.

Case No. 34-2011-00113919

OPPOSITION TO PETITION FOR WRIT OF MANDATE

Date: February 11, 2016
Time: 9:00 a.m.
Dept: 31
Judge: The Hon. Michael P. Kenny

Action Filed: November 14, 2011

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INTRODUCTION

Petitioners have not met their burden. They have not shown that the High-Speed Rail Authority's interim design decisions for the high-speed rail system will make it impossible to achieve design characteristics provided in the Bond Act. Nor have petitioners addressed the substantial evidence in the administrative record supporting the Authority's design decisions. Instead, what they have shown is that the Authority is diligently working to design a system to achieve those characteristics, but that petitioners disagree with the expert analyses the Authority considered to ensure that it is doing so.

Petitioners' strategy — to selectively identify evidence in the record that supports the Authority's decisions and then second-guess it — is precluded by fundamental principles of administrative review. Petitioners cannot challenge the Authority's decisions by asking the Court to exercise its independent judgment, re-weigh evidence, or otherwise inquire into the wisdom of the Authority's decisions. The technical analyses (predicting the effect of various system design alternatives on trip-time, operating headway, ridership, and more) are evidence in the administrative record supporting the Authority's decisions. Petitioners simply cannot show that the Authority's design decisions were arbitrary, capricious, or lacking in evidentiary support by attacking that evidence and assumptions on which those analyses rest.

Petitioners' system design claims fall into two categories: a facial challenge to a statute that now requires the Authority to build a "blended system" on the San Francisco Peninsula if it uses bond funds to build there, and a challenge to the Authority's discretionary decisions in designing the system as a whole. The facial challenge fails because the challenged statute is authorized by the Bond Act, and because the Legislature in any event has constitutional authority to amend the Bond Act as long as it does not make substantial changes. The claims that the Authority's discretionary design decisions do not comply with the Bond Act fail, as a threshold matter, because there are no final agency decisions for this Court to review. All of the design decisions that petitioners challenge are preliminary and may well change before bond funds are committed to construction. But even if the challenges to the Authority's design decisions were ripe for judicial review, they would fail on the merits. There is ample evidence in the

administrative record demonstrating that in making these preliminary decisions, the Authority considered all the relevant factors, and is able to demonstrate rational connections between those factors, the choices made, and the purposes of the Bond Act. Finally, even if petitioners had shown that the Authority's design of the system violates the Bond Act (and they have not), that would not be grounds to prevent the Authority from spending funds not governed by the Bond Act, including federal funds, cap and trade funds, or any other funds appropriated to it by the Legislature.

This Court has generously afforded petitioners every opportunity to make a case. After almost five years of litigation all claims asserted have proven meritless, and final judgment should now be entered against petitioners and in favor of all respondents.

BACKGROUND

I. THE CALIFORNIA HIGH-SPEED RAIL PROJECT

The Legislature enacted the California High-Speed Rail Act in 1996 ("Rail Act"). (Pub. Util. Code, § 185000, et seq.) The Rail Act created the High-Speed Rail Authority, and gave it exclusive authority and responsibility to develop a high-speed rail system linking the State's major population centers. (*Id.*, §§ 185020, 185030, 185032, subd. (a), 185034.) After years of Authority planning, including completion of two programmatic environmental documents (AR 706; AR 707[1]), and approval of a generally-described high-speed rail system subject to the Authority's further development and study, the Legislature enacted and put on the ballot, and the voters approved as Proposition 1A, bond legislation to partially fund the design and construction of a portion of the first phase of the system. (See Sts. & Hy. Code, § 2704 et seq., "Bond Act".[2]) The Bond Act limits the use of proceeds from the sale of the bonds authorized ("bond funds") (§ 2704.08), and allocates the use of bond funds among projects (§ 2704.095). It also describes basic parameters for the design of the high-speed rail system to be built with bond funds.

[1] Citations to the administrative record are to document numbers, with cites to particular pages by bates number, where applicable.

[2] All further statutory references are to the Streets and Highways Code unless otherwise indicated.

(§ 2704.09.) Of particular relevance here, the Bond Act provides that the system "shall be designed to achieve":

- maximum nonstop service travel time between San Francisco and Los Angeles Union Station of two hours and 40 minutes, including maximum nonstop service travel time between San Francisco and San Jose of 30 minutes;
- maximum "achievable" time between successive trains of five minutes; and
- alignments that should, "to the extent feasible," follow existing transportation or utility corridors and be "financially viable, as determined by the authority."

(§ 2704.09, subds. (a), (c), (g).) Complying with and reconciling the demands of these characteristics, however, is in the Authority's discretion. (Pub. Util. Code, §§ 185030, 185032, 185034, 185036.)

Although the Rail Act and the Bond Act give the Authority broad discretion, they also impose several layers of oversight and checks on the Authority. Every two years, the Authority must submit a business plan to the Legislature to keep it apprised of the Authority's progress. (Pub. Util. Code, § 185033, subd. (a).) The Authority's planning, engineering, financing, and other technical determinations are all subject to independent review and oversight by a panel of experts on intercity and commuter passenger train service called the "independent peer review group" ("Peer Review Group").[3] (See *id.*, § 185035, subds. (a)-(c).) The State Auditor must periodically audit the Authority's use of bond funds. (§ 2704.04, subd. (e).) Before even requesting an appropriation of bond funds from the Legislature for eligible capital costs, the Authority must submit an initial funding plan to the Governor, Director of Finance, the Peer Review Group, and the Legislature. (§ 2704.08, subd. (c)). A capital cost appropriation, however, does not empower the Authority to spend bond proceeds to construct the system. Before actually committing any appropriated bond funds to construction, the Authority must approve and submit a second, more detailed, funding plan to the Director of Finance, the Peer Review Group, and the Chairperson of the Joint Legislative Budget Committee. (§ 2704.08, subd. (d)(1).) That second

[3] The biographies for the members of the Peer Review Group are at AR 417.

funding plan must be submitted with a report prepared by an independent consultant concluding, among other things, that the project to be constructed will be ready for high-speed train operation and passenger service, and that such service will not require an operating subsidy. (§ 2704.08, subd. (d)(2).) Only when the Director of Finance concludes that "the plan is likely to be successfully implemented as proposed" may the Authority commit bond funds to construction. (§ 2704.08, subd. (d).)

The Legislature has also enacted laws that modify the Bond Act. (See, e.g., Stats. 2010, ch. 293, § 1 [adding Chapter 20.5 "Implementation of the [Bond Act]", codified at § 2704.75].) Some of these laws also limit the Authority's discretion. For example, when the Legislature appropriated bond funds for construction in 2012, it prohibited the Authority from expanding the blended system on the San Francisco Peninsula to "a dedicated four-track system." (Senate Bill No. 1029, Stats. 2012, ch. 152, §§ 1-3.) The following year, the Legislature made that limitation more specific. It enacted Senate Bill 557 (Stats. 2013, ch. 216, codified at §§ 2704.76, 2704.77), which provides that, to the extent bond funds appropriated by S.B. 1029 are allocated to projects in the San Francisco to San Jose segment, such funds "shall be used solely to implement a rail system . . . that primarily consists of a two-track blended system to be used jointly by high-speed rail trains and . . . (Caltrain)." (§ 2704.76, subd. (b), italics added.) S.B. 557 further provides that "any track expansion . . . beyond the blended system approach identified in the [Authority's business plans] and approved by the High-Speed Rail Authority . . . shall require approval" by all nine parties to a memorandum of understanding, an agreement which contemplates that high-speed rail and Caltrain will share tracks on the San Francisco Peninsula. (§ 2704.77.)

II. PROCEDURAL HISTORY

Petitioners filed this action in November 2011. The operative pleading is the Second Amended Complaint ("SAC").[4] After a writ proceeding was held on claims challenging the validity of the Authority's first funding plan (submitted prior to its request for an appropriation, pursuant to section 2704.08, subdivision (c)), this Court ruled that the first funding plan did not

[4] In a third amendment to the complaint, petitioners dismissed claims relating to validity of the bonds.

comply with the Bond Act in certain respects (Ruling on Submitted Matter: Petition for Writ of Mandate, filed August 16, 2013), and later issued a writ requiring the Authority to rescind the funding plan (Ruling on Submitted Matter: Remedies on Petition for Writ of Mandate, filed November 25, 2013). The Court of Appeal subsequently vacated the writ. *California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 718 (*CHSRA*).

Thereafter, petitioners stipulated to limit their remaining claims, and "to dismiss all other Code of Civil Procedure § 526a claims." (Letter stipulation, filed January 9, 2014, hereafter "Issues Stipulation"). The Court granted the Authority's motion to limit the scope of evidence at trial of the remaining claims to the administrative record for the 2012 and 2014 business plans. (Order Granting Respondents' Motion for Order That the Scope of Evidence Be Limited to the Administrative Record, filed August 13, 2014.) It is the claims in the Issues Stipulation that are currently before this Court.

Specifically, petitioners claim that the current design of the high-speed rail system, as reflected in those plans, violates the Bond Act as follows:

> The currently proposed high-speed rail system does not comply with the requirements of Streets and Highways Code §2704.09 in that it cannot meet the statutory requirement that the high-speed train system to be constructed so that maximum nonstop service travel time for San Francisco - Los Angeles Union Station shall not exceed 2 hours and 40 minutes [hereafter, "the trip-time claim"];
>
> The currently proposed high-speed rail system does not comply with the requirements of Streets and Highways Code §2704.09 in that it will not be financially viable as determined by the Authority and the requirement under §2704.08(c)(2)(J) that the planned passenger service by the Authority in the corridors or usable segments thereof will not require a local, state, or federal operating subsidy [hereafter, "the financial viability/operating subsidy claim"];
>
> The currently proposed "blended rail" system is substantially different from the system whose required characteristics were described in Proposition 1A, and the legislative appropriation towards constructing this system is therefore an attempt to modify the terms of that ballot measure in violation of article XVI, section 1 of the California Constitution and therefore must be declared invalid [hereafter, "the blended system claim"];

(See Issues Stipulation.) Petitioners also preserved a remedy claim:

> If Plaintiffs are successful in any of the above three claims, Proposition 1A bond funds will be unavailable to construct any portion of the Authority's currently-proposed high-speed rail system. Under those circumstances, the $3.3 billion of federal grant funds will not allow construction of a useful project. Therefore, under those circumstances the Authority's expenditure of any portion of the $3 billion of

federal grant funds towards the construction of the currently-proposed system would be a wasteful use of public funds and would therefore be subject to being enjoined under Code of Civil Procedure § 526a [hereafter, "the injunctive relief claim"].

(See Issues Stipulation.)

ARGUMENT

Petitioners' remaining claims fail for several reasons. The blended system claim fails because petitioners cannot demonstrate that S.B. 557 conflicts with the Bond Act or the California Constitution. Petitioners' administrative challenges (the trip-time claim, including the blended system claim and a host of newly asserted claims, as well as the financial feasibility/operating subsidy claim) fail on several grounds. First, the challenged design decisions are not final and so are not ripe for review. Second, these claims fail on the merits because there is ample evidence in the administrative record that supports the Authority's design decisions. Finally, because the Bond Act by its terms governs only the use of bond funds, even if petitioners could establish that the Authority's design decisions violated the Bond Act (and they have not), that would not be grounds to prevent it from using other funds lawfully appropriated by the Legislature.

I. STATE LAW REQUIRES A BLENDED SYSTEM ON THE SAN FRANCISCO PENINSULA AND IS VALID.

As petitioners acknowledge, their administrative challenge to a blended system on the San Francisco Peninsula has been overtaken by the Legislature's adoption of S.B. 557. (See Opening Br., p. 5.) Thus, their challenge to any of the Authority's discretionary decisions to adopt a blended system is moot; instead, petitioners are challenging an act of the Legislature.

The blended system claim fails at the threshold and should be dismissed because petitioners have not argued and thus have abandoned the only blended system claim preserved by the Issues Stipulation, that it modifies the Bond Act in violation of article XVI, section 1 of the Constitution. (See *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538 [holding that failure to brief a constitutional issue constitutes a waiver or abandonment].) Petitioners' brief does not even argue article XVI, section 1. Instead, without having sought either to amend the Issues Stipulation or the complaint, petitioners have brazenly rewritten the claim in the Issues Stipulation (compare

Issues Stipulation with Opening Br., p. 1) and argue only that the blended system violates the Bond Act. (Opening Br., pp. 5-12.)

The newly-identified grounds on which petitioners challenge the blended system should not be considered by this Court, because they fall clearly outside the Issues Stipulation. But, even if the Court were to entertain these new claims, they would fail for two reasons: a blended system is not at odds with either the Bond Act or the environmental impact reports ("EIR") referenced in the Bond Act, and even if it were, S.B. 557 would be a valid amendment to the Bond Act.

A. The Blended System Must Be Upheld Unless S.B. 557 Presents a Total and Fatal Conflict with the California Constitution.

In enacting S.B. 557, the Legislature required the Authority to design and construct a blended system along the Caltrain corridor. (§ 2704.76.) Therefore, petitioners' blended system claim is a facial constitutional challenge to the validity of a statute, not a challenge to a discretionary decision by the Authority. 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.)

B. A Blended System Is Consistent With the Bond Act.

Contrary to petitioners' unsupported claims, nothing in the Bond Act restricts the Authority or the Legislature from including a blended system in the San Francisco Peninsula as part of the

design of the system. Instead, the Bond Act, like the Rail Act, encourages sharing of resources. (§§ 2704.08, subd. (f)(4) [requiring the Authority, in choosing corridors, to consider whether they include facilities that will enhance connectivity of the system to other modes of transit], subd. (g)(1)(B) [providing that bond funds may be used to make existing facilities compatible with high-speed rail]; 2704.09, subd. (g) [calling for alignment of system to follow existing corridors to reduce impacts on communities and the environment], subd. (i) [calling for the system to be built to minimize urban sprawl and impacts on the environment].)

There also is nothing in the Official Voter Information Guide for Prop. 1A that is inconsistent with a blended system. (AR 1.) Nor is there anything in the legislative history of the Bond Act that suggests that the Legislature intended to foreclose a blended system. To the contrary, the Senate Committee on Transportation and Housing report on hearings in 2007 and 2008 in anticipation of possible changes to the proposed bond act found that "Regional innovation in commuter rail services currently being planned in northern and southern California are expected to be compatible with high-speed rail. . . ." (AR 143:AG004858-AG004859, emphasis in original omitted.)

In short, the blended system on the Caltrain corridor that S.B. 557 requires is entirely consistent with the Bond Act.

C. The Blended System Is "Consistent With" the Program EIRs.

Petitioners mistakenly rely on a declaration of legislative intent, arguing that a blended system violates the Bond Act because it is not "consistent with the Authority's certified environmental impact reports of November 2005 and July 9, 2008." (§ 2704.04, subd. (a).[5]) Petitioners argue that because these EIRs contain illustrations of a four-track configuration between San Francisco and San Jose, a "two-track 'blended system' option" is inconsistent with

[5] In its entirety, section 2704.04, subdivision (a), provides: "It is the intent of the Legislature by enacting this chapter and of the people of California by approving the bond measure pursuant to this chapter to initiate the construction of a high-speed train system that connects the San Francisco Transbay Terminal to Los Angeles Union Station and Anaheim, and links the state's major population centers, including Sacramento, the San Francisco Bay Area, the Central Valley, Los Angeles, the Inland Empire, Orange County, and San Diego consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008."

the EIRs, and therefore violates the Bond Act. (Opening Br., pp. 6-8.) This argument fails for two reasons. First, the Bond Act contemplates modification of these program-level EIRs, which were in fact modified in 2012.[6] Second, the blended system is in fact consistent with the 2005 and 2008 EIRs.

Petitioners' argument founders on an incomplete reading of the Bond Act, which contemplates the possibility of subsequent modification of the project described in the 2005 and 2008 EIRs. The Bond Act provides that bond funds may be spent to construct the system "consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008, *as subsequently modified* pursuant to environmental studies conducted by the authority." (§ 2704.06, italics added.) The meaning of section 2704.04, subdivision (a) cannot properly be understood in isolation; it must be construed in the context of the Bond Act as a whole. (*Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 294; *People v. Murphy* (2001) 25 Cal.4th 136, 142.) Read in this context, section 2704.04, subdivision (a) cannot reasonably be read to restrict the Authority's discretion to design the system based on illustrations in program-level EIRs.[7] Section 2704.06 makes it clear that the Legislature recognized that the system analyzed in the 2005 and 2008 EIRs could be modified. The two provisions can and should be harmonized.

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[6] Petitioners do not and cannot argue that the blended system is inconsistent with the 2012 Bay Area to Central Valley Partially Revised Final Program EIR ("2012 PRFPEIR"), which modified the 2005 and 2008 EIRs. An initial blended system in the San Francisco Peninsula is discussed at length in the 2012 PRFPEIR. (AR 707:H7.018141, H7.018161, H7.018233-H7.018240, H7.018246, H7.018253-H7.01254, H7.018260, H7.018261, H7.018289, H7.018293, H7.018305-H7.018314, H7.018769-H7.018774; H7.018775-H7.018777; H7.018778, H7.018790-H7.018792.) Indeed, this Court previously determined that the blended system is consistent with the 2012 PRFPEIR. (See *Town of Atherton v. California High Speed Rail Authority,* Case No. 34-2008-80000022 (*Atherton*), Ruling on Submitted Matter: Respondents' Return and Motion to Discharge Preemptory Writs of Mandate, filed February 25, 2013, pp. 11-12.)

[7] Even if the two sections conflicted, section 2704.06 would control. (*Eller Media Co. v. Community Redevelopment Agency* (2003) 108 Cal.App.4th 25, 38 [holding that legislative intent "is not gleaned solely from introductory statements such as a preamble, but is gleaned from the law as a whole, which includes particular directives," and under the canon of ejusdem generis, "enumeration of specific items will be controlling over general statements," internal quotations and citation omitted].)

More fundamentally, petitioners' argument fails on its own terms because the blended system is consistent with the 2005 and 2008 EIRs. The phrase "consistent with" does not mean "without any deviation from," as petitioners contend. It merely requires compatibility. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com'n* (2008) 164 Cal.App.4th 1, 8-9 [interpreting a statutory requirement that airport land compatibility plans be "consistent with" an Air Force Air Installation Compatible Use Zone ("AICUZ") and holding that "consistent with" required only compatibility and allowed more restrictive development standards than those in the AICUZ].) For example, land use decisions must be "consistent with" a city or county's general plan, and a "project is consistent with the general plan if, considering all its aspects, it will further the objectives and the policies of the general plan and not obstruct their attainment." (*Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994, internal quotations and citations omitted.)

Petitioners' argument also misunderstands the nature of the 2005 and 2008 EIRs, which are program EIRs. A program EIR commonly is used in conjunction with tiering, in which high-level EIRs (such as on general plans or policy statements) are followed by subsequent narrower project EIRs. (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1176-1177 (*Bay-Delta*); see *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 343-345 [discussing tiering and program EIRs]; *id.* at p. 346 [tiering allowed details about high-speed rail vertical alignment on Peninsula to be deferred to project-level EIR]; CEQA Guidelines, Cal. Code Regs., tit. 14, § 15152, subd. (d) [tiering of environmental documents appropriate where later project is consistent with previously approved program].) As the Authority's 2012 PRFPEIR explained, the blended system expresses in more detail how a San Francisco to San Jose second-tier project could be implemented. (AR 707:H7.018141, H7.018308-H7.018309.) As a more detailed plan to be addressed in a later, project-level environmental document, the blended system is consistent with the 2005 and 2008 program EIRs. In enacting what became the Bond Act, the Legislature understood the function of a program EIR and was aware that project-specific details would be addressed in subsequent

analysis. (See *Singh v. Superior Court* (2006) 140 Cal.App.4th 387, 400 [noting that the Legislature is presumed to know existing law].)[8]

D. The Legislature Has Statutory and Constitutional Authority to Amend the Bond Act to Require a Blended System.

Finally, petitioners' blended system claim fails because, even if the blended system were inconsistent with the Bond Act, the Legislature is empowered both by the Bond Act and by the Constitution to amend the Bond Act, and S.B. 557 would be a valid amendment.

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 the portion of S.B. 557 that limits the use of appropriated bond funds on the San Francisco Peninsula to build only a blended system, the Legislature exercised that authority. (§§ 2704.76, subd. (b); 2704.77.)

Even if the Bond Act did not expressly authorize the Legislature to impose conditions on the use of bond proceeds, the Legislature would have constitutional authority to impose such conditions by amending 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.

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[8] Moreover, the reference to the program EIRs was intended only to capture the high-speed rail project at a high level. It took the Legislature years to put the Bond Act on the ballot for voter ratification. In its 2008 iteration, the statutory language was changed from the 2000 Business Plan (which was in an earlier iteration) to the program EIRs (Legis. Counsel's Dig., Assem. Bill No. 3034 (2008 Reg. Sess.) Stats. 2008, ch. 267, No. 4, Deering's Adv. Legis. Service, p. 204), suggesting that the Legislature was focused on the overall plan of the system, not details relating to individual segments of the system.

In contrast, S.B. 557 does not "subvert the purpose" of the Bond Act, or substitute an "alien purpose" for that of the voters. The requirement that the system share track with Caltrain on the San Francisco Peninsula, at least initially, is calculated to reduce construction costs substantially, and would affect only about 50 miles of what ultimately will be an 800 mile rail system. This does not constitute a "repeal [of] an important feature of the bond law." (*Veterans of Foreign Wars*, *supra*, 36 Cal.App.3d at p. 693.) Indeed, the blended system is wholly consistent with specific goals of the Bond Act, including "reduc[ing] impacts on communities," and using "financially viable" alignments. (§ 2704.09, subds. (g), (i).)

Finally, deference to the Legislature's decision to require, at least initially, a blended system is appropriate given the judicially 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].) At most, the blended system would add only a handful of minutes to the travel times and impose insignificant restrictions on headway capacity in a 50 mile piece of an 800 mile project. (See AR 340:AG011049; AR 59:AG002149; AR 586.) The difference between a four-track and a two-track configuration on the Peninsula is tangential to the substance of the entire high-speed rail project. In short, S.B. 557 is a permitted amendment, not a repeal, of the Bond Act.

II. THE CHALLENGES TO THE AUTHORITY'S ADMINISTRATIVE DECISIONS ARE NOT RIPE.

The evolving nature of the planning process for large public works projects (*CHSRA*, *supra*, 228 Cal.App.4th at p. 703) renders all of petitioners' challenges to the Authority's design decisions premature at this time. A basic prerequisite to judicial review of administrative acts is

the existence of a ripe controversy. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 169). Petitioners' remaining claims are not ripe, and therefore should be dismissed.

A. The Challenges to the Design of the System Are Premature.

Petitioners' claims challenge "the *currently proposed* high-speed rail system" (Issues Stipulation, italics added), which by its terms acknowledges that the system design they challenge today is not final, but continues to evolve and change, and thus that their claims are not reviewable. When the Authority commits bond funds to a specific plan pursuant to section 2704.08, subdivision (d), the validity of those expenditures will be reviewable. (See *CHSRA, supra,* 228 Cal.App.4th at pp. 701-704 [holding that petitioners' challenges to whether bond funds would "be applied only to the specific object" described in the Bond Act was "premature" in advance of a final funding plan, quoting and citing Cal. Const., art. XVI, § 1].)

The rationale of the ripeness doctrine is applies fully to petitioners' claims. That rationale "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." (See, e.g., *Pacific Legal Foundation v. California Coastal Com, supra*, 33 Cal.3d at p. 171, quoting *Abbott Laboratories. v. Gardner* (1967) 387 U.S. 136, 148-149, disapproved on other grounds by *Califano v. Sanders* (1977) 430 U.S. 99.) It is undisputed that the Authority has not adopted or submitted a funding plan pursuant to section 2704.08, subdivision (d). Petitioners' claims, therefore, cannot be ripe.[9]

The Court of Appeal noted in *CHSRA* that the design of the high-speed rail system is continuing to evolve. (*CHSRA, supra,* 228 Cal.App.4th at pp. 703-704.) It noted that courts have been "particularly attuned to the fluidity of the planning process for large public works projects," that the "development of a high-speed rail system for the state of California is even more

[9] That is not to say that approval of a final funding plan will render any particular design decisions ripe for resolution. Whether a particular challenge to a design decision will be ripe for decision will depend on the content of the plan.

complex" than others, and for that reason concluded that "[w]e cannot and should not decide whether any future use of bond funds will stray too far from the . . . purpose and parameters of the Bond Act." (*Ibid.*) Similarly, the Court of Appeal concluded that the Authority's first funding plan, prepared and submitted pursuant to section 2407.08, subdivision (c), "plays an . . . interlocutory and advisory role midstream in the approval process" because "bond proceeds cannot be committed and construction cannot begin until the final funding plan is sent to the Joint Legislative Budget Committee and approved by the Director of the Department of Finance." (*Id.* at p. 713.) This analysis strongly suggests that unless and until there is a second funding plan that seeks authorization to encumber funds for a particular project, petitioners' claims regarding compliance with the Bond Act are not ripe for review. Petitioners have not identified any subsequent development or decision that would support a different conclusion than the one reached by the Court of Appeal in mid-2014.[10]

Petitioners' contention that the Frank Vacca memorandum (AR 407; see AR 356) represents a formal decision of the Authority (Opening Br., p. 14) confuses a formal assessment, which reviews an evolving system plan at a particular point in time, with a final agency decision. The record is clear that the Authority will continue to assess whether its system design complies with the Bond Act's travel time characteristics as the project design progresses. (See AR 411: AG017554 ["The Authority focus on system trip time will continue throughout the project; new baselines will be issued concurrent with Environmental milestones and Authority Business Plans"]; AR 411:AG017556 ["Trip Performance Calculation or TPC analysis, is part of an on-going process"]; *ibid.* ["The TPC's are 'snap-shots' of evolving alignment options that will solidify when the RODs [Record of Decision] from the environmental efforts are completed for each section"].)

[10] The financial feasibility/operating subsidy claim is *facially* unripe in the absence of a second funding plan to commit bond funds, because until that second funding plan, the Bond Act does not require the Authority to demonstrate that the system will not require an "operating subsidy." (§ 2704.08, subd. (d).)

B. Petitioners' Speculation About Future Decisions Are Both Unfounded and Fail to Show that the Authority Cannot Meet the Design Characteristics of the Bond Act, Either Now or in the Future

Petitioners engage in a great deal of speculation and make many unwarranted assumptions about the Authority's future plans, but fail to demonstrate that any decision the Authority has actually made will make it impossible for the Authority to design the system to achieve the characteristics described in the Bond Act. (§ 2704.09 ["high-speed rail system . . . shall be designed to achieve" certain design characteristics].)[11] For example, petitioners speculate that problems may arise in the Tehachapis that will preclude the Authority from making the San Francisco to Los Angeles run in two hours and 40 minutes. But the Authority has not yet approved any funding plan, or even issued a draft project environmental document for a segment of the system that would include the Tehachapis.[12] The Authority is still in the early planning stages for a segment that would include the Tehachapis, and is developing a range of alternative alignments, including a shorter alignment that may potentially reduce travel time. (AR 661:AG027503-AG027513, AG027521.) There is no basis for concluding that the Authority has "made a decision that currently precludes compliance with" the Bond Act.[13]

Petitioners likewise speculate that a blended system in the San Francisco Peninsula will not be able to achieve a travel time of 30 minutes between San Francisco and San Jose. (Opening Br., pp. 9-10.) But the Authority has not submitted a funding plan for that section of the high-speed rail system, nor has it completed environmental review for that corridor. Thus, petitioners' assumption that, for example, the Authority will use the identical track and infrastructure of the

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[11] The only final design decisions the Authority has made involve the Merced-Fresno and Fresno-Bakersfield segments of the system, which petitioners do not challenge. Project-level EIRs have been completed for those segments, the Authority has entered into design-build contracts, and construction is underway. Nothing in petitioners' Opening Brief suggests that any design decisions the Authority has made about the Merced-Fresno and Fresno-Bakersfield segments, or that are reflected in the design-build contract[s] for those segments, will make it impossible for the Authority to comply with the Bond Act.

[12] That is, an environmental document that complies with the National Environmental Policy Act, the California Environmental Quality Act, or both, depending on what is required at the time.

[13] Ruling on Submitted Matters: Motion to Augment Administrative Record and Motion to Compel Further Responses, filed August 18, 2015.

existing Caltrain system has no basis in the record. Indeed, the 2012 Business Plan includes an estimate of $1.5 billion for improvements to track structures and track in the San Francisco – San Jose segment. (AR 64:AG002242; see AR 602:AG024292 [AREMA Manual noting that modest improvements to conventional rail infrastructure can allow its use for high-speed rail operation up to 125 mph].) The travel time analysis that the Authority performed for that segment of Phase I was based on then "currently proposed alignments." (AR 356:AG013543.) The Authority is not committed to that, however, but instead might improve travel time using "tilt technology [and] more aggressive alignments." (AR 356:AG013543-AG013544, AG013547; AR 407:AG017435.) In short, to the extent petitioners are challenging the Authority's planning decisions (as opposed to challenging a statute), their claims are not ripe for review and must be dismissed.

III. THE AUTHORITY'S DECISIONS REGARDING THE DESIGN OF THE SYSTEM ARE REASONABLE AND SUPPORTED BY THE ADMINISTRATIVE RECORD.

A. The Authority's Discretionary Decisions Must Be Upheld Unless Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

Even if petitioners' claims were ripe, they would fail on the merits of mandamus review. Petitioners fail to address the evidence supporting the Authority's determinations or explain why it is insufficient, and instead second guess the Authority and its outside experts on a variety of highly technical matters. That sort of challenge is clearly foreclosed, however, because "[w]here, as here, the administrative agency performs a discretionary quasi-legislative act, judicial review is at the far end of a continuum requiring the utmost deference. An agency's exercise of discretionary legislative power will be disturbed *only* if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. This is a highly deferential test." (*CHSRA, supra,* 228 Cal.App.4th at p. 699, internal quotations and citations omitted.) The Authority's decisions must be upheld unless shown to be arbitrary, capricious, or entirely lacking in evidentiary support. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 574 (*Western States*) [holding that, in a mandamus proceeding challenging a quasi-legislative administrative decision requiring agency expertise, "[a] court's task is not to weigh conflicting evidence and determine who has the better argument . . . . We have neither the resources nor scientific expertise to engage in such analysis, even if the standard of review

permitted," internal quotations and citation omitted]; see also (*Carrancho v. California Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1265 (*Carrancho*).)

In reviewing quasi-legislative planning decisions and determinations, courts "exercise a highly deferential and limited review, 'out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority.'" (*CHSRA, supra*, 228 Cal.App.4th at p. 699, quoting *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 211-212.) The reviewing court may consider only the evidence in the administrative record, and does not exercise independent judgment, reweigh evidence, or otherwise inquire into the wisdom of the decision. (See *Carrancho, supra*, 111 Cal.App.4th at p. 1265.) Review is especially deferential when it comes to matters requiring technical expertise because "our high court has made it clear agencies should be given wide latitude to solve such problems without judicial interference." (*Id.* at pp. 1276-1277 & fn. 8.) In short, a challenge can only be based on a lack of evidence to support a decision; it cannot be based, as petitioners argue, on second-guessing the adequacy of the evidence. The Authority is entitled to rely on the technical advice of its own staff and may choose among the opinions of experts. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 900.)

This standard precludes the petitioners' attempt to challenge the Authority's design decisions by asking the Court to reevaluate the adequacy of the evidence in the record. Unlike formal environmental review documents, the studies petitioners challenge are not required by law and no law permits review of their adequacy. The studies are not themselves decisions of the Authority subject to mandamus review; rather, they are technical studies that the Authority considered to insure that the interim decisions it was making were on track to design a system to achieve the design characteristics provided in the Bond Act. They are evidence that supports those decisions. The fact that these studies are in the record, that the Authority considered them in making its planning decisions, and that they support those decisions, is sufficient to overcome petitioners' challenge.

B. The Authority Considered the Relevant Factors and Reasonably Concluded That the System Is Being Designed to Meet All of the Design Characteristics in the Bond Act.

All the claims challenging the Authority's administrative decisions fail at the threshold, because petitioners consider only the evidence that purportedly supports their own conclusions, and utterly fail to acknowledge the evidence in the administrative record that supports the Authority's decisions. "It is petitioners' burden to "lay out the evidence favorable to the [Authority] and show why it is lacking. Failure to do so is fatal." (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934-935.) In any event, the Authority's determinations are supported by evidence in the record.

1. The Analysis That the System Is Being Designed to Achieve the Travel Time and Headway Parameters in the Bond Act Supports the Authority's Interim Design Decisions.

The Authority's experts conducted an analysis of trip-time between San Francisco and Los Angeles Union Station. (AR 356-AR 364; AR 407; AR 411; AR 413) Their conclusion that the current system design is consistent with the trip time standards set forth in section 2705.09 is well supported in the administrative record. (See AR 064; AR 153; AR 196; AR 246; AR 296; AR 340; AR 353; AR 356-AR 364; AR 407; AR 411; AR 413; AR 470; AR 526; AR 527; AR 572; AR 602; AR 661.)

The experts' analysis was based on a two-track blended system in the San Francisco Peninsula. The experts first considered a maximum assumed speed limit of 125 miles per hour ("mph") on the Peninsula, but ultimately selected for their analysis a maximum assumed speed limit of 110 mph for that segment. (AR 356:AG013548-AG013549; AG013552: AR 407:AG017436-AG017437, AGO17740; AR 411:AG017565-AG017567.) For purposes of the analysis, the experts construed section 2704.09, which provides that "[t]he high-speed rail system to be constructed pursuant to this chapter shall be *designed to achieve* the following characteristics" to indicate system capacity rather than likely commercial passenger operations. (See AR 356:AG013543-AG013545; AG013547-AG013552; AR 407; AR 411:AG017556,

AG017563; AR 413:AG017608-AG017609.)[14] The experts also assumed that section 2704.09, subdivision (b), which sets forth "service travel times" standards meant that the travel time analysis should include actual, real world conditions, taking into account civil speed limits, curves, grades, rider comfort, and appropriate deceleration and stopping at the San Francisco and Los Angeles stations. (See AR 411; AR 356:AG013543-AG013544.) They assumed, however, that "pad time," the extra time that a commercial operator would include in a passenger timetable to accommodate unanticipated delays, should not be included. (See AR 411; AR 413:AG017608-AG017609.) This methodology was discussed by the Peer Review Group in its report to the Legislature in August 2013. (AR 413.)

The Authority's experts measured the two hour and 40 minute travel time between San Francisco and Los Angeles Union Station from Caltrain's existing station at Fourth and King Streets in San Francisco, which will also serve as a high-speed rail station, consistent with the language in section 2704.09, subdivision (b)(1), which specifies Los Angeles Union Station but does not indicate a particular terminus in San Francisco from which trip time must be measured. This methodology was consistent with the San Francisco terminus used in the feasibility study prepared by LTK Engineering for Caltrain. (See AR 353; see AR 353:AG013030, AG013037-AG013039, AG013042; AG013046-AG013049.) The Authority's experts concluded that the system design could meet the two hour and 40 minute goal with eight minutes to spare. (See AR 356–AR 364; AR 407; AR 411; AR 413:AGO17608.)

This analysis was submitted for review by the Peer Review Group. (AR 411.) That body reported to the Legislature that, as then conceived, the non-stop travel time between Los Angeles and San Francisco was designed to be two hours and 32 minutes. (AR 413:AG017608.)[15] The

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[14] Anticipated commercial operations are taken into account in the Authority's ridership and revenue and operating and maintenance ("O&M") costs. (See AR 413:AG017609.)

[15] The Authority's travel time analysis does not have the level of detail that exists with respect to the Authority's financial analyses because it is not a subject that is required to be included in the Authority's business plans (Pub. Util. Code, § 185033, subdivision (b)(1)), and, unlike some of the financial analysis required by S.B. 1029 (e.g., § 3, items 7, 9; § 9, items 4, 8, 9), the Legislature has not required that the Authority submit an analysis of its travel time and other system capacity analyses.

Authority's determinations cannot be deemed arbitrary, capricious, or entirely lacking in evidentiary support. This Court should decline petitioners' invitation to reweigh this evidence. (*Western States*, *supra*, 9 Cal.4th at p. 574.)

2. The Analysis That the System Is Being Designed to Achieve 30-Minute Travel Time Between San Francisco and San Jose Supports the Authority's Interim Design Decisions.

As shown above, the Authority's determination that its system is being designed to achieve maximum travel time between San Francisco and Los Angeles Union Station of two hours and 40 minutes, which includes the segment between San Francisco and San Jose, is not arbitrary or capricious. Petitioners did not preserve in the Issues Stipulation, and should not be allowed to raise here, their new argument that the blended system design on the Peninsula will prevent trains from traveling between San Francisco and San Jose in 30 minutes.

Even if the Court were to consider this argument, it would fail on the merits. The Authority reasonably determined that its interim design was on track to meet the 30-minute San Francisco to San Jose travel time. It analyzed the San Francisco-San Jose segment as part of its San Francisco to Los Angeles trip time analysis.[16] It made a series of four calculations with slightly different variables, as reflected in the charts supporting the Vacca draft and final memoranda:

- San Francisco to Santa Clara[17] at 125 mph – 26:06. (AR 286:AG008970.)
- San Francisco to Santa Clara at 110 mph – 27:49. (AR 286:AG008970.)
- San Francisco to Santa Clara at 110 mph – 27:51. (AR 289: AG008940.)
- San Francisco to San Jose at 110 mph – 30:22. (AR 289: AG008940.)

The calculations are consistent, and show that a decrease in speed from 125 to 110 mph adds less than 1.5 minutes.[18] The analysis was presented to the Peer Review Group (AR 407, AR

[16] The experts measured the trip time as a segment of the longer San Francisco to Los Angeles distance, and did not include a stop in San Jose. (See AR 356; AR 407; AR 411:AG017565-AG017567.) The other segments are San Jose-Merced, Merced-Fresno, Fresno-Bakersfield, Bakersfield-Palmdale and Palmdale-Los Angeles. (See AR 357-AR 362.)

[17] Santa Clara, rather than San Jose, was used in earlier modeling. San Jose borders Santa Clara on the north, east and south. (*Nadler v. Schwarzenegger* (2006) 137 Cal.App.4th 1327, 1332.) Extending the trip from Santa Clara to San Jose adds about two minutes; see AR 289:AG008940.)

[18] Petitioners incorrectly state, without support, that the difference is two minutes.

(continued...)

411), which reported to the Legislature that, as then conceived, the system was designed to achieve a 30 minute travel time between San Francisco and San Jose. (AR 413; see *id.*, p. AG017608.)

3. The Analysis That the System Is Being Designed to Achieve the Bond Act's Headway Design Characteristic in the San Francisco Peninsula Supports the Authority's Interim Design Decisions.

Petitioners' new claim that the blended system design prevents the Authority from being able to meet the achievable operating headway described in the Bond Act (§ 2704.09, subd. (c)), falls outside the Issues Stipulation, and should be rejected for that reason.[19]

Petitioners' claim should also be rejected on the merits. The Bond Act provides that "[a]chievable operating headway (time between successive trains) shall be five minutes or less." (§ 2704.09, subd. (c).) Because this provision in the Bond Act does not refer to "high-speed trains" (which is a defined term (§ 2704.01, subd. (d)), but to any "successive trains," the report on which petitioners rely does not support their claim that the blended system will preclude achieving this design characteristic.[20] (See Opening Br., p. 9.) That report, prepared by LTK Engineering Services for the Peninsula Corridor Joint Powers Board ("JPB") (AR 353), determined that a blended system on the Peninsula was "operationally viable." (AR 353:AG013023.) It also concluded that the blended system as an operational matter could accommodate ten trains per hour — assuming six Caltrain and four high-speed trains — a six minute interval between trains. (AR 353:AG013065, AG013074.) It further concluded that, by employing positive train control, which is planned for the high-speed rail system, "the minimum supportable headway would decrease from approximately six minutes (realized under the current

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(...continued)
(Opening Br., p. 19.)

[19] Like travel time, the headway criteria in section 2704.09, subdivision (c) is not a subject that the Authority is required to address in the Business Plan.

[20] The Legislative Counsel reviewed the LTK analysis and concluded that it was reasonable to construe the Bond Act's minimum headway characteristic to refer to a mix of both high-speed and commuter trains. "Because the bond act appears to contemplate shared operations, suggesting that the operating headway requirement is not intended to be met with high-speed trains alone, it appears reasonable to interpret this design characteristic in a manner that requires 12 trains per hour, regardless of the type of train." (AR 69:AG002387.)

wayside signal system) to approximately three minutes" (AR 353:AG013045), which is in fact well within the five minute interval provided in the Bond Act.

4. The Analysis That the Planned High-Speed Rail System Will Not Require an Operating Subsidy Supports the Authority's Interim Design Decisions.

Petitioners' claim that the current design of the system violates the Bond Act because the system is not financially viable fails at the outset because there is no over-arching "financial viability" requirement in the Bond Act. The Authority cannot violate a provision that does not exist.[21]

The only mention of "financial viability" in the Bond Act is limited to the Authority's choice of alignment. It provides:

> In order to reduce impacts on communities and the environment, the alignment for the high-speed train system shall follow existing transportation or utility corridors to the extent feasible and shall be financially viable, as determined by the authority.

(§ 2704.09, subd. (g).) Fairly read, this means that in determining the alignment of the system, and how closely it should follow existing transportation or utility corridors, the Authority need not blind itself to the relative costs of different alignments, but instead should factor in financial feasibility. The argument made in petitioners' supplemental brief, that the Authority cannot meet this overarching "financial viability" requirement similarly fails because there is none.

The Authority also reasonably determined that, as then currently designed, neither the system as a whole nor any useable segment will require an operating subsidy. Those determinations were supported by detailed analysis of both ridership and revenue forecasts and O&M costs. (AR 6, AR 8; AR 12; AR 14; AR 57; AR 66; AR 67; AR 70; AR 71; AR 226-AR 229, AR 333-AR 338; AR 340; AR 343-AR 345; AR 347: AR 365-AR 368; AR 376-AR 378; AR 385; AR 389-AR 390; AR 392; AR 396; AR 406; AR 409; AR 410; AR 412; AR 413; AR 416; AR 421-AR470; AR 487.)

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[21] Petitioners' claim that the current system "does not comply with . . . the requirement under § 2704.08(c)(2)(J) that the planned service . . . will not require a local, state, or federal operating subsidy" (see Issues Stipulation), is foreclosed by the Court of Appeal's decision in *CHSRA, supra,* 228 Cal.App.4th at p. 706.

The Authority's analyses were reviewed by several bodies with specific, relevant, expertise. An expert technical advisory panel on ridership and revenue has reviewed the Authority's ridership and revenue modeling since 2010, and provided recommendations.[22] (AR 422-428; see AR 429-470.)

In addition, the Legislature's 2012 appropriation of bond funds required the Authority to include in its 2014 Business Plan a proposed approach for improving both its demand projections and O&M cost models, and to provide a study by the Union Internationale des Chemins de fer ("UIC"), examining how the Authority's estimated operating costs compare to high-speed rail systems in other countries. (S.B. 1029, § 9.) The Authority complied with these requirements (AR 340:AG011053, AG011085-AG011099; AR 336-337; AR 396), and the UIC study concluded that there were no "fatal flaws" in the Authority's analysis, and that "the O&M costs preparation was thorough." (AR 336:AG010943; AR 396:AG015495.) Moreover, the Authority considered and addressed specific findings by the UIC. (See AR 337; AR 340:AG011093-11096; see AR 345:AG012185, AG012208.)[23]

The Peer Review Group also reviewed the Authority's analyses and the UIC study and then reported its findings to the Legislature. (AR 413.) The Peer Review Group found that the

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[22] Biographies for the ridership and revenue panel members are at AR 471.

[23] Petitioners argue that a draft slide presentation that cites no underlying data proves that the Authority underestimated construction costs in its 2014 Business Plan. Construction costs are irrelevant to the operating subsidy analysis, and so bear only on petitioners' meritless claim that section 2704.09, subdivision (g) includes an overarching financial viability requirement. In any event, petitioners' arguments relating to this document are factually baseless. Petitioners suggest, without evidence, that the Authority improperly ignored documentation supporting the slide presentation and simply re-used its 2012 capital cost numbers in the 2014 Business Plan. This is incorrect. The document is simply a draft presentation. The "technical" documents petitioners claim "underlaid" the slide presentation (Supplemental Br., p. 4.) are not construction cost analyses, are not referred to in that slide presentation, and appear completely unrelated. Contrary to petitioners' claim, the record shows that Authority did not simply reuse their 2012 construction costs analysis. The 2014 Business Plan contains an updated analysis. (AR 340:AG011079-AG011082.) The results were not the same as, but were consistent with those in the 2012 Business Plan. (Compare AR 340:AG011079-AG011082 with AR 57:AG002014-AG002017.) Finally, the U.S. Government Accountability Office (GAO) reviewed the Authority's construction costs analysis. (AR 487) The GAO found that the Authority substantially met their best practices for producing accurate cost estimates. (AR 487:AG020381-AG020382.) The GAO report also noted that the FRA had reviewed the Authority's cost estimates and found them to be reasonable. (AR 487:AG020379.)

Authority's most recent ridership and revenue forecasting marked an improvement over that in the 2012 Business Plan, and that its analysis was adequate. (AR 413:AG017607.) In its review of the Authority's operating and maintenance cost modeling, the Peer Review Group concluded that it was "much improved from the Revised 2012 Business Plan both in terms of the structure of the model and the incorporation of probabilistic analysis of the results." (AR 413:AG017609.)

The U.S. Government Accountability Office (GAO) also conducted a study of, among other things, the reasonableness of the Authority's revenue and ridership forecasts. (AR 487.) It concluded that "[t]he Authority's ridership and revenue forecasts to date are reasonable and the methods used to develop them followed generally acceptable travel-demand-modeling practices." (AR 487:AG020387.) The GAO's study also examined the Authority's cost analyses, finding that the Authority "has attempted to ensure accuracy and eliminate bias in their estimate by conducting sensitivity analysis, parametric checks, and the use of peer review," and noting that the Authority has fully met the best practice of regularly updating cost estimates "to reflect significant changes in the program so that it is always reflecting current status." (AR 487:AG020437.)

C. Petitioners' Arguments Amount to a Disagreement with the Authority's Experts, and Do Not Show That the Authority Acted Unreasonably or Arbitrarily

Planning for the high-speed rail system involves highly technical analysis, both as to system design and financial assessments. "[I]n these technical matters requiring the assistance of experts and the collection and study of statistical data, courts let administrative boards work out their problems with as little judicial interference as possible." (*Carrancho*, *supra*, 111 Cal.App.4th at p. 1277 fn. 8; see *CHSRA*, *supra*, 228 Cal.App.4th at p. 699 [holding that courts should "exercise a highly deferential and limited review" of the Authority's discretionary, quasi-legislative acts].) Against this standard, petitioners' claims completely fail. They principally disagree with the Authority's technical assessments. Such disagreements fail to show the Authority's conclusions were arbitrary, capricious, or lacking in evidentiary support.

1. Petitioners' disagreements with the trip-time analysis are not grounds for challenging the Authority's interim design decisions.

Petitioners' trip-time claim reduces to three arguments: (1) the Authority's modeling unreasonably assumes an unoccupied train going at the fastest possible speed, without regard to passenger safety or comfort, or even for the braking limitations of the trainsets (see Opening Br., p. 15); (2) the model uses alignments through the Tehachapis that exceed the Authority's own guidelines (*id.* at p. 17); and (3) largely due to the blended system on the San Francisco Peninsula, the Authority cannot make the 30 minute travel-time goal between San Francisco and San Jose, or by extension the two hour, 40 minute goal between San Francisco and Los Angeles. (*Id.* at pp. 9-11, 19-20.) None of these arguments has merit.

First, contrary to petitioners' claims (see Opening Br., p. 15), the Authority's analysis does take into account rider comfort and safety, as well as speed restrictions based on steep grades, curves, and train switches. (AR 356:AG013544; AR 411:AG017558; AG017562-AG017565.) The Authority's calculation is based on "real world" conditions, including alignments from the 2012 Business Plan and existing trainset technology. (AR 356:AG013543-AG013544, AG013547-AG013552; AR 411; see AR 411:AG017754.) The simulation model the Authority used takes into account the track infrastructure profile, including track infrastructure and geometry, horizontal and vertical profiles, civil speed limits, and platform locations (AR 411: AG017558; see AR 356:AG013543-AG013544); characteristics of the rolling stock, including weight, length, braking characteristics, tractive and braking effort, and rolling resistance (AR 411: AG017558, AG017561, AG017562); and track speed restrictions and slowing for curves. (AR 411:AG017558, AG017565-AG017567; AR 356:AG013453-AG013544.)

The Authority has considered its expert consultants' report analyzing trip time, which includes the assumption that the calculation need not include a schedule pad time, and even petitioners concede that pad time is not necessarily implied from "service" time. (Opening Br. p. 15.) The Peer Review Group accepted that methodology, and flagged that issue for the Legislature. (AR 413:AG017608.) The Authority's reliance on its experts' analysis is neither arbitrary nor capricious.

Petitioners' argument that some of the alignment grades in the Tehachapis exceed the Authority's guidelines is likewise without merit. (Opening Br., p. 17.) Not only is it wildly premature to draw conclusions about what the final alignments through the Tehachapis will be, but the Authority's guidelines are just guidelines, and the Authority may waive them. (See AR 296:AG009198; AR 400.12:AG015780.2348; AR.400.13.) They are not mandatory minimum requirements, and cannot form the basis for a challenge.

Finally, petitioners' argument that the system will not be capable of a 30 minute trip time between San Jose and San Francisco, and as a result will not make two hours, 40 minutes between San Francisco and Los Angeles, is based on a string of flawed legal and factual assumptions, including their incorrect assumption that the Bond Act requires that the 30 minute travel time be measured from the San Francisco Transbay Terminal. Petitioners' remaining arguments that high-speed rail will not be able to make the San Francisco to San Jose segment in 30 minutes are largely based on an LTK feasibility study prepared for the Peninsula Joint Powers Authority, at the urging of the Legislature. (Opening Br., p. 10.) That study estimated the travel time at 37-39 minutes assuming a maximum speed of 110 miles per hour, but it was just a feasibility analysis, and assumed for its limited purpose that no changes would be made to the existing Caltrain infrastructure. (AR 353:AG013038.) However, the Authority is not planning to run high-speed trains on existing infrastructure, but will be straightening out and banking curves, as well as upgrading track in various locations, to decrease travel time. (AR 356:AG013548-AG01549; AR 407:AG017436-AG017437; 22900; AR 286:AG008924; AR 64:AG002242; see AR 602:AG024292.)[24] More fundamentally, the Authority was not bound by the LTK study. (See *Tooker v. San Francisco Bay Area Rapid Transit Dist.* (1972) 22 Cal.App.3d 643, 650 [holding that BART's acceptance of its engineers' feasibility report did not render the design details of that study binding on BART].) The Authority was entitled to rely on its own analysis, which the Peer

[24] LTK also did not calculate non-stop travel, but rather assumed a two-minute stop in Millbrae. (AR 353:13073.)

Review Group reviewed and accepted, and on which it reported to the Legislature.[25] (AR 413:AG017608-AG017609.)

Petitioners further argue that the Authority should somehow be "estopped" from implementing any plan that has the high-speed rail traveling in excess of 125 mph through any "urban" areas, including the San Jose-Burbank segment, i.e., cities in the Central Valley. This claim is based on a blatant misreading of various public presentations that were given by the Authority in 2010 and 2011. (Opening Br., p. 18; see AR 526: AG02216.) From the presentations, it is clear that the term "urban areas" referred to large metropolitan centers like Los Angeles and San Francisco, *not* the Central Valley. (Compare AR 526:AG0232226 ["[o]perating speed of up to 110 mph between Los Angeles and Anaheim"] with AR 526:AG02223 [referring to "[t]rue high speeds" in the Central Valley]. See also AR 527:AG022237 [noting that trains will travel at 220 mph for long stretches in the Central Valley].)

Finally, petitioners argue that a travel time calculation based on calculations they have made based on unsupported assumptions and on an alignment *they* selected – *different* from that chosen by the Authority – cannot support a minimum travel time from San Francisco to Los Angeles of two hours and 40 minutes. (Opening Br., p. 19.) This argument should be rejected out of hand. Petitioners concede that their calculation is based on "approximate distances" based on Caltrans maps which are not a part of the administrative record, and not on the Authority's own alignment. (Petitioners' Request for Judicial Notice, p. 2; see Opening Br., p. 19.) But even were that not the case, petitioners' disagreement with the Authority's experts does not render the Authority's decision arbitrary or capricious. (*Western States*, *supra*, 9 Cal.4th at p. 574; *Carrancho*, *supra*, 111 Cal.App.4th at p. 1276-1277.)

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[25] Petitioners incorrectly state that the "PRG recommends a 5% pad;" but this recommendation was instead made by a group of Tianjin engineers, commenting on an operating schedule, not the requirements of the Bond Act. (AR 115:AG003945.) The Peer Review Group distinguished between the system's ultimate operations schedule and "the TPC [trip performance calculation] analysis of minimum travel time that could be achieved based on the system's design parameters." (AR 413:AG017609.)

2. Petitioners' disagreements with the financial analysis are not grounds for challenging the Authority's interim design decisions.

Petitioners' various complaints about the Authority's financial analyses are likewise flawed. First, contrary to their claims, and as discussed above, the Bond Act does not require the Authority to identify sources of construction funding before adopting a final funding plan or a second preliminary funding plan, and it has not adopted either such a plan. (§ 2704.08, subds. (c) (d).)

Petitioners' critiques of the Authority's heavily-vetted ridership and revenue analysis and O&M cost analysis are also insufficient grounds for challenging the Authority's determinations, and are simply baseless. For example, petitioners claim that the Authority's analysis is defective because the 2005 stated preferences survey did not identify the IOS South. (See Opening Br., p. 25.) But the Authority used the 2005 survey only as a secondary data source and principally used the 2010-2012 California Household Travel Survey (AR 349), an approach with which the expert technical panel on ridership and revenue agreed. (AR 422:AG017755.) Moreover, stated preferences surveys do not assess the appeal of a specific segment (such as San Francisco to Los Angeles), but instead use variables such as trip time, transfers, and wait time to assess the attractiveness of different modes. (AR 470; see AR 367:AG013874-AG013877.)

Petitioners' claim that the Authority "grossly overestimated" ridership (Opening Br., p. 27), is also wholly unsupported. In fact, the Authority's estimate of a 6.8 percent market share is conservative compared with Europe and Japan, where high-speed rail has a market share ranging from a low of 32 percent (France) to a high of 80 percent (Japan). (AR 6: AG000100-AG000101.) Indeed, Petitioners' own purported expert report includes a chart which concludes "For travel time of 4 hrs or less, HS rail captures 50+% of combined air/rail travel on a route." (AR 392:AG015396.)

Petitioners' arguments on O&M costs fare no better. Their principal claim is that the Authority should have, but did not, follow UIC's recommendation to use both a "top down" (macro-economic) analysis, where costs are compared to other similar enterprises, as well as a "bottom up" (micro-economic) analysis, which estimates various component costs. (Opening Br,

pp. 29-30-31.) Petitioners are mistaken; the Authority used both micro- and macro-economic analyses. (See AR 345; *id.* , pp. AG012164, AG012211-AG012216; AR 409; *id.*, pp. AG017471-AG017472; AR 336:AG010947, AG010948.) Petitioners' arguments based on a 2012 "study" by a group of high-speed rail critics adds nothing. That document not only predates the Authority's more recent analysis, but its critique was considered by the Authority and rejected as flawed. (AR 264; AR 271; AR 272.)

Petitioners have many more quibbles, none of which undermine the Authority's conclusion that the system will not require an operating subsidy. This Court should reject petitioners' invitation to second-guess the myriad of highly technical judgments and analysis, by both the Authority and its outside experts, that went into the preparation and review of the Authority's financial analyses. (*Western States*, *supra*, 9 Cal.4th at p. 574 ["A court's task is not to weigh conflicting evidence and determine who has the better argument"]; see *Carrancho*, *supra*, 111 Cal.App.4th at p. 1276-1277.) The Authority's conclusion that its planned system will not require an operating subsidy is well supported by the administrative record.

IV. BECAUSE THE BOND ACT ONLY GOVERNS THE USE OF BOND FUNDS, A VIOLATION OF THE BOND ACT WOULD NOT BE GROUNDS TO ENJOIN THE AUTHORITY FROM SPENDING OTHER FUNDS APPROPRIATED TO IT BY THE LEGISLATURE.

Even if petitioners could establish that the design of the system cannot comply with the Bond Act (and they have not done so), they would not be entitled to the remedy they seek, which is to stop the construction of high-speed rail in the Central Valley by preventing the Authority from spending any money on the high-speed rail system, including legislative appropriations of federal grant monies and cap and trade auction revenues. Petitioners' contrary argument, that section 2704.09 "sets minimum requirements for any HSR system to be built by [the Authority]," is entirely unsupported and without merit. (Opening Br., p. 34) By its terms, the Bond Act governs the use of bond funds, and nothing more. By its terms, section 2704.09 applies only to "the high-speed train system to be constructed *pursuant to this chapter*."[26] (§ 2704.09, italics added.)

[26] Petitioners' bald assertion is flawed in other ways as well. For example, there is no support for the argument that section 2704.09 sets any "minimum requirements" at all. By its (continued...)

Petitioners' argument seeks to do indirectly what this Court and the Court of Appeal have both held they cannot do directly: impermissibly intrude on the Legislature's plenary appropriations authority. The Bond Act does not restrict the Legislature's appropriation authority. (*CHSRA, supra*, 228 Cal.App.4th at p. 714, quoting this Court's decision; *id.* at p. 715.) "Judicial intrusion into legislative appropriations risks violating the separation of powers doctrine." (*Id.* at p. 714.) "If 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.*, citations and quotations omitted.) "[I]n the absence of a clear directive from the people to constrain the discretion of the Legislature, we will not circumscribe legislative action or intrude on the Legislature's inherent right to appropriate the funding for high-speed rail." (*Id.* at p. 715.) A court may not nullify a specific and valid exercise of such fundamental budgetary powers. (See *Butt v. State* (1992) 4 Cal.4th 668, 702-703.)

To enjoin the Authority from spending cap and trade or federal funds lawfully appropriated to it, as petitioners' urge this court, would effectively nullify the Legislature's appropriation. The Legislature has approved expenditure of those funds. And, the Bond Act does not circumscribe the Authority's power to spend funds, other than bond funds, lawfully appropriated to it by the Legislature. The Rail Act gives the Authority the power to construct a high-speed rail system *either*, "[u]pon approval by the Legislature, by the enactment of a statute, *or* approval by the voters of a financial plan providing the necessary funding for the construction of a high-speed network . . . ." (Pub. Util. Code, § 185036, italics added.) This law contemplates that the Legislature may appropriate funds apart from any funds approved by the voters, and that the Authority may spend both kinds of funds to construct a high-speed rail system. Thus, because the Legislature has plenary power to appropriate funds other than bond funds to the Authority, because the Authority has plenary power to use such funds when the Legislature approves such funding, and because nothing in the Bond Act restricts either the authority of the Legislature or

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(...continued)
terms, it provides parameters for design characteristics, and nothing more.

the Authority in this regard, petitioners' argument that the Bond Act restricts funds from any source is plainly meritless.

Petitioners' argument that the Court should enjoin the use of cap and trade funds and federal funds because, without bond funds to match federal funds, the Authority will not be able to complete the ICS before expiration of federal grant funding, and will be subject to a demand that it return all federal funds, is similarly meritless. It fails because, as a factual matter, the argument is entirely unsupported, and based on pure speculation. (Opening Br., pp. 34-35.) As demonstrated above, even if bond funds were unavailable, the Legislature could appropriate to the Authority, and the Authority could spend, funds from any other source.

It also fails for lack of legal support. Code of Civil Procedure section 526a does not authorize this Court to interfere with the Legislature's decision to appropriate funds to fund construction of high-speed rail in the Central Valley, or the Authority's discretionary decisions on how to spend those funds. (*Daily Journal Corp. v. City of Los Angeles* (2009) 172 Cal.App.4th 1550, 1557-1558.) "Section 526a does not allow the judiciary to exercise a veto over the legislative branch of government merely because the judge may believe the expenditures were unwise." (*Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138.) Otherwise, the discretion would reside not in the agency to which it was delegated by the Legislature, but in the taxpayer. (*Daily Journal Corp. v. City of Los Angeles, supra*, 172 Cal.App.4th at pp. 1558-1559.)

CONCLUSION

For the reasons set forth above, the Court should dismiss the writ petition, deny all other claimed relief, and enter judgment against petitioners and in favor of respondents.

Dated: January 15, 2016

Respectfully Submitted,

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SA2011103275

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: ***Tos, et al. v. California High Speed Rail Authority, et al.***

No.: **34-2011-00113919**

I declare:

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

On January 15, 2016, I served the attached **OPPOSITION TO PETITION FOR WRIT OF MANDATE** by placing a true copy thereof enclosed in a sealed envelope with the **GOLDEN STATE OVERNIGHT**, 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 January 15, 2016, at San Francisco, California.

Susan Chiang
Declarant

Signature

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