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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

JOHN TOS, *et al*,
Petitioners and Plaintiffs
vs.
THE STATE OF CALIFORNIA *et al.*,
Respondents and Defendants

No. 34-2016-00204740

Assigned for all purposes to Dept. 28, Hon. Richard Sueyoshi

PETITIONERS' REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS ON FIRST CAUSE OF ACTION

Date:	October 26, 2018
Time:	11:00 AM
Department:	28
Judge:	Hon. Richard Sueyoshi
Action filed:	December 13, 2016
Trial Date:	Not Yet Set

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INTRODUCTION

If Respondents and Defendants State of California ("State") and California High-Speed Rail Authority ("Authority" and the foregoing, collectively, "Respondents") could honestly assert that AB 1889 made only minimal changes to Prop. 1A, and did not substantially change the "scheme or design which induced voter approval," (*Veterans of Foreign Wars v. State of California ("VFW")* (1974) 36 Cal.App.3d 688, 693), they might be able to defeat Petitioners' motion. Indeed, if AB 1889 had only made such minimal changes, Petitioners would never have filed this legal challenge. However, that is not the case.

Respondents do indeed argue that AB 1889 does not substantially change the terms of Prop. 1A. In doing so, however, they ignore a central holding of *California High-Speed Rail Authority v. Superior Court (CHSRA v. Sup.Ct.)* (2014) 228 Cal.App.4th 676, 706, 709 – that the "financial straitjacket" created by Street & Highways Code Section 2704.08[1] was intended *by the voters* to ensure the financial viability of the project being constructed by the Authority. Instead, Respondents assert that AB 1889 *properly* allows approval of second funding plans required under Section 2704.08(d) to authorize construction of projects that are not, once constructed, "suitable and ready for high-speed train operation." (Respondents' Opposition to Motion for Judgment on the Pleadings [hereinafter, "Opposition"] at p. 13:17-19.) Untrue. To the contrary, by allowing high-speed rail bonds to be used to construct projects that, as constructed, are not suitable and ready for high-speed train operation, AB 1889 does indeed substantially change the "scheme or design which induced voter approval."

Based on the mistaken conclusion that "suitable and ready for high-speed train operation" does not mean what it says, Respondents go on to assert that the Legislature could properly allow virtually any conventional passenger rail improvement project[2] to be approved for construction using bond funds, so long as the project *could eventually* become part of a high-speed-train-ready usable segment.[3] The "financial straitjacket" adopted by voters did not intend to allow that kind of

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[1] Unless otherwise indicated, all statutory references are to the California Streets & Highways Code.

[2] e.g., improvements to conventional passenger rail lines such as Amtrak, Caltrain, or Metrolink.

[3] In their "Background" section, Respondents assert that once Caltrain electrification is completed, high-speed rail trains would be able to run on the Caltrain corridor. (Opposition at p. 11:7-6.) That assertion is open to question. Respondents cite Exhibit A, p .2 in their Request for Judicial

risky investment, which might never result in the operational high-speed rail segment, or system, that the voters expected to be built.

Respondents' second line of attack is to claim that Petitioners' analysis of the voters' intent in adopting the above phrase is flawed and not properly supported. According to Respondents, the Legislature's intent, as shown through the legislative history of AB 3034, cannot also be attributed to the voters. This assertion directly contradicts the California Supreme Court's holding in *Rossi v. Brown* (1995) 9 Cal.4th 688, 700 fn. 7.[4]

Finally, Respondents argue that even if AB 1889 is constitutionally infirm, a judgment granting declaratory relief should be denied because there are disputed factual issues concerning the validity of Respondents' ninth and tenth defenses. (Opposition at pp. 29-31.) However, based on the undisputed facts of this case, those defenses cannot succeed. Respondents' attempts to avoid a judgment that AB 1889 is facially unconstitutional are unavailing. Petitioners' motion should therefore be granted.

ARGUMENT

I. AB 1889 PERVERTED, RATHER THAN CLARIFIED, THE MEANING OF THE PHRASE "SUITABLE AND READY FOR HIGH-SPEED TRAIN OPERATION."

Respondents begin their attack by arguing that AB 1889 is permissible because the phrase "suitable and ready for high-speed train operation" does not mean what its words say. Respondents point to the statement of legislative intent in Section 2704.04(a). They focus on the fact that the bond funds were to be used to *initiate* construction of a high-speed rail *system*. That is true, and AB 1889 might have been permissible if Prop. 1A, like its predecessor Prop. 1, had gone no further in specifying conditions precedent for the use of bond funds for construction. However, the scheme that induced voter approval included far more than Section 2704.04(a). Thus Prop. 1A

Notice. As explained in Petitioners' Response to Respondents' Objections to Petitioners' RJN, judicial notice does not include accepting the truth of matters stated therein *if* they are reasonably subject to dispute. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 760-761.) On p. 2-2 of Exhibit M to Petitioners' RJN, The Authority's own business plan implicitly acknowledges that even after electrification, the Caltrain corridor will not yet be "suitable and ready for high-speed train operation."

[4] See, Petitioners' Response to Respondents' Objections to Petitioners' Request for Judicial Notice in Support of Motion for Judgment on the Pleadings etc., Section B.

added to the definitions included in Section 2704.01[5] the terms "corridor" and "usable segment". Those two terms became central to the newly added subsections (c) and (d) of Section 2704.08, the provisions that the court of appeal referred to as a voter-intended "financial straitjacket."

As explained more fully in Petitioners' opening brief, the Legislature, in writing Prop. 1A, realized that a $9 billion bond measure could not come close to providing even half the funds needed to construct an entire high-speed rail system. Nevertheless, the Legislature did intend to fund, and build, entire, *working* usable high-speed rail segments. It counted on the guarantee of successful construction of such segments to convince voters/taxpayers that the measure was worth voting for, because it would result in working high-speed rail segments, not a boondoggle.

Consequently, it not only required the Authority to certify that only such complete and operational segments would be built with the bond funds, but also required an independent consultant to confirm to that effect. Thus, § 2704.08(c) and (d) require: 1) identifying the corridor or usable segment thereof to be constructed, 2) identifying the estimated full cost to construct the segment and also first identifying and then showing the availability of all the funds needed to fully construct that segment, 3) providing estimates of the ridership and operating revenue from the high-speed rail segment to be constructed (which must operate without public subsidy), and finally 4) first certifying, and then confirming through an independent expert's evaluation that the segment could be successfully constructed as proposed and, if so constructed, would be suitable and ready for high-speed train operation.

Respondents essentially ask the Court to ignore these provisions, calling them no more than a "laundry list". (Opposition at p. 18:3.) Yet, in interpreting a statutory provision, "a court must give meaning to every word in the statute and avoid a construction that renders any of the law's terms surplusage." (*Reno v. Baird* (1998) 18 Cal.4th 640, 658.) This is particularly true of bond measures, where the voters are opening their pocketbooks based on what is promised in the ballot

[5] Respondents note that "suitable and ready for high-speed train operation" is not defined in § 2704.01. True enough. So are a host of other terms in the bond measure, including "passenger train," "major population centers," "adverse impact," "operating and maintenance costs," and "operating headway." All of these terms are important in defining and setting requirements for the high-speed rail system. They were not defined because the Legislature felt that the meaning of these terms, like that of "suitable and ready for high-speed train operation," would be self-evident to the voters. (*See, e.g., Estate of Gilbert* (1957) 148 Cal.App.2d 761, 774-775 [Legislature understood commonly-used meaning of "ancestor" and "descendant" without needing to specifically define those terms].)

measure. As the court of appeal recognized in *CHSRA v. Sup.Ct., supra,* these provisions were intended by the Legislature, and the voters, to have real and meaningful effect.

While Judge Cadei characterized these provisions as "only a metric in the administrative process," that comment was made in ruling on a demurrer that raised only two issues: whether the various claims were ripe and whether the specific funding plan approvals needed to be challenged through mandamus. Indeed, the demurrer was granted with leave to amend, and the second amended petition and complaint squarely addressed both issues, adding causes of action for mandamus and allegations showing that the claims were ripe. Judge Cadei's comments dismissing "suitable and ready for high speed train operation" as not justiciable were, to put it bluntly, dicta.[6]

In fact, these provisions are the heart of the "financial straitjacket" that, as the court of appeal noted, the voters intended to ensure the financial viability of the project being constructed. (*CHSRA v. Sup.Ct., supra*, 228 Cal.App.4th at p. 706.) Essentially, not only did the Authority have to certify that any project being constructed would have sufficient funding to result in a fully-constructed corridor or usable segment thereof, but an independent expert was required to confirm that the project could be successfully constructed with the available funds, and that, when so constructed, it would be suitable and ready for high-speed train operation. AB 1889 effectively releases the Authority from the voter-dictated straitjacket. No longer would the Authority have to show that a segment was ready to operate with high-speed trains. Now, just benefiting a conventional rail passenger service provider would be enough. An actual operational high-speed rail segment was left as a mere potentiality in the distant future.[7]

Respondents note that beyond the $9 billion in bond funds for high-speed rail planning and construction, Prop. 1A contained an additional $950 million for "connectivity" projects explicitly designated for intercity, commuter, and urban conventional rail lines. (§ 2704.095.) That section allows those funds to be used for conventional rail projects that could also become part of the high-

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[6] *See, e.g., Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 388 [comments made in decision that were outside of the issues being decided were dicta and neither law of the case nor binding]. Nor were Judge Cadei's assertions even addressed in the briefing on the demurrer.

[7] Respondents argue that so long as the change in a bond's purpose benefits, rather than prejudicing, voters or bondholders, the change is permissible. (Opposition at p. 15:1-2.) They cite a variety of cases, but those cases either did not involve bonds subject to Article XVI Section 1 of the Constitution (e.g., irrigation district bonds) or did not even require an election. In fact, AB 1889 does prejudice voters and bondholders by unsettling their reliance that segments built with bond funds will be immediately capable of high-speed train use.

speed rail system.[8] However, allowing the connectivity funds to be used on a project that might become part of the high-speed rail system is quite different from the converse – allowing high-speed rail construction funds to be used to build an improvement for conventional rail use. Likewise, the fact that the Authority was directed, in choosing a segment, to take into account the need to test and certify high-speed trains operating at 220 mph, did not mean a segment could be nothing more than a test track with no ability to actually run high-speed trains between stations.

The question is not whether construction of a high-speed rail segment could *also* benefit a conventional passenger rail operation, or even whether, in constructing a high-speed rail segment, the segment could be used for testing high-speed rail trains prior to being put to commercial use. Rather, the question is whether, in approving the conditions set forth in Section 2704.08(d), the voters intended to hold the Authority accountable to only approve funding plans that would, with the available funds, build a working high-speed rail segment. AB 1889, in diluting, and for all practical purposes destroying, that accountability, did in fact effect a partial repeal of the bond act's provisions.

II THE LEGISLATIVE HISTORY OF PROP. 1A IS HIGHLY RELEVANT TO THE INTENT OF THE VOTERS IN ENACTING IT.

Struggling to avoid the implications of the extensive legislative history provided for AB 3034, the measure that placed Prop. 1A on the ballot,[9] Respondents concoct the fallacious doctrine that the intent of Prop. 1A's drafter – i.e., the 2008 Legislature – is not to be considered in determining the voters' intent. (Opposition at p. 20:17-18.) Their cited cases, however, address a much narrower, and irrelevant, point – that after-the-fact evidence of an individual legislative author's intent has little weight because it may not reflect the intent of the Legislature in enacting the bill, nor would it have been known to the voters. (*See, e.g., Rossi, supra*, 9 Cal.4th 700, fn. 7.) But as that same footnote explained, in the absence of evidence to the contrary, the *Legislature's*

[8] Respondents characterize Caltrain, one such connecting service, as "intercity rail service." (Opposition at p. 19:14.) It is, however, explicitly a commuter rail service to and from San Francisco and San Jose. Respondents also cite to a Section 2707.04 in the bond act. There is no such section.

[9] As noted in cases such as *Monette-Shaw v. San Francisco Bd. of Supervisors* (2006) 139 Cal.App.4th 1210, 1215, one of the primary elements in the agreement between the voters and the public agency is the agency's order placing the bond measure on the ballot. Here, that order was AB 3034.

intent in drafting a ballot measure, as reflected by legislative history, will often be presumed to reflect the intent of the voters enacting the measure. (*Accord, People v. Goodliffe* (2009) 177 Cal.App.4th 723, 731.)[10]

In fact, the intent of Prop. 1A's drafter, that is the 2008 Legislature, is central to determining the meaning and effect of the measure. (*Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 213 ["The fundamental rule of statutory (or voter initiative) construction is that we must ascertain the intent of the drafters so as to effectuate the purpose of the law."], *accord, Esberg v. Union Oil Co. of Cal.* (2002) 28 Cal.4th 262, 268, *California Assn. of Professional Scientists v. Brown* (2013) 216 Cal.App.4th 421, 430 (3rd appellate dist.) ["Under well-established rules of statutory construction, we must ascertain the intent of the drafters so as to effectuate the purpose of the law. … Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent."]; *see also Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 260 ["The first step in interpreting an ambiguous constitutional provision is to look at the intent of the framers."]

Respondents argue that because the ballot title and summary, drafted by the Legislature, does not directly address Section 2704.08's provisions, they were "presumably" not important to the Legislature, or the voters. (Opposition at p. 21:13-15.) They provide no authority to support this "presumption." To the contrary, *People v. Cordova* (2016) 248 Cal.App.4th 543, 557 noted that if a ballot measure's language is clear, it must be followed even if not mentioned in the ballot pamphlet. (But see*, People v. Valencia* (2017) 3 Cal.5th 347, 366 fn. 7 [overruling *Cordova* majority opinion to the extent that language in a measure can be overruled by court if it is apparent that it is contrary to voters' intent, as shown by other evidence].)

Respondents also cite extensively from Judge Cadai's ruling denying Petitioners' motion for a preliminary injunction. (Opposition at pp. 22, 23.) But that motion was made at a much earlier stage of the case, based on an earlier pleading, and the material presented to the court did

[10] Respondents point to *Santos v. Brown* (2015) 238 Cal.App.4th 398, 426, and *Associated Students of North Peralta Community College v. Bd. of Trustees* (1979) 92 Cal.App.3d 672, 679-680 for the proposition that "the intent of legislators cannot be equated with voters intent." (Opposition at p. 26: 7-8.) Certainly the intent of *individual legislators*, especially as expressed post-election, cannot be presumed to reflect the intent of the voters – or of the legislature that approved placing the measure in the ballot. *Rossi, supra*, 9 Cal.4th at p. 700 fn. 7, however,

not include the extensive legislative history presented with this motion. Even more importantly, Judge Cadei's ruling was on a motion for preliminary injunction, and such rulings are not determinative on the merits of the case. (*Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1994) 7 Cal.4th 860, 879, fn. 10.)

Judge Cadei's analysis focused on the voter handbook materials (title & summary, analysis by legislative analyst) rather than the actual wording of the measure. As already explained, while those materials may be helpful in resolving ambiguities in a measure's text, only in very exceptional cases, where it is clear that a portion of the measure's wording contradicts clear evidence of the voters' intent, can these aids override the language of the measure. (*See, People v. Valencia, supra*, 3 Cal.5th at p. 366 fn. 7; *see also, Goodliffe, supra*, 177 Cal.App.4th at p. 726 [plain language of statute may be overridden only under rare circumstances that word is misused contrary to clear intent of enactment or a literal reading would lead to absurd results].) Such was not the case here.

Judge Cadei considered the "distinctly specified" single object or work to be the entire high-speed rail system. In doing so, he improperly read out of the statute the detailed requirements of Section 2704.08, which were integral to defining the project for which the bond funds could properly be used. Those details, and the need to construct complete, working usable high-speed rail segments, are just as much a part of the measure's description of the "distinctly specified" single object of Prop. 1A as the general intent to begin construction of the system. The two provisions are complementary, not contradictory. AB 1889, however, directly contradicts the express language of Section 2704.08(d). Contrary to Judge Cadai's ruling, AB 1889 therefore does constitute a partial repeal of the measure's provisions.

Respondents argue that AB 1889 did not change any of the oversight provisions of the measure touted by the legislative analyst and the argument in favor of the measure. Not so. Central to the provisions of Section 2704.08(d) is the requirement for one or more reports, prepared by an independent financial analyst, that were to accompany the funding plan's review by the Director of Finance. Under Section 2704.08(d), those reports needed to confirm that the funding plan under review proposed constructing a usable segment that could be successfully

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makes clear that the *Legislature's* intent in approving a measure for placement in the ballot <u>*can*</u> be inferred to reflect the intent of the voters.

completed, and when so completed, the segment would be suitable and ready for high-speed train operation. However, under AB 1889, the latter requirement effectively disappeared, as did the effective oversight touted to the voters, and the financial straitjacket noted by the court of appeal.[11]

III. THE 2016 LEGISLATURE HAD NO AUTHORITY TO INTERPRET OR "CLARIFY" THE INTENT OF PROP. 1A.

More basically, even if the meaning of "suitable and ready for high-speed train operation" were ambiguous (which it is not), Respondents provide no authority for allowing the Legislature, some eight years after Prop. 1A's approval by the voters, to definitively "clarify" that ambiguity. The California Supreme Court has repeatedly held that the Legislature may not retroactively change the meaning or effect of an earlier-enacted statue.

> …[A] legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. (*California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213 [187 P.2d 702]; *Bodinson Mfg. Co. v. California E. Com*. (1941) 17 Cal.2d 321, 326 [109 P.2d 935]; *see Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8 [185 Cal.Rptr. 582].) Indeed, there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies. (*Cf. Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 51-52 [276 Cal.Rptr. 114, 801 P.2d 357].) Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244.)

The caution against allowing the Legislature to reinterpret an earlier enactment is especially appropriate when the earlier enactment was done by the voters, rather than the Legislature. As has been recognized by a long line of cases, once a bond measure has been placed before and approved by the voters, the legislative body that formulated the measure has no power to modify the voters' intent in enacting the measure. (*O'Farrell v. County of Sonoma* (1922) 189 Cal. 343, 348-349; *see also, CHSRA v. Sup.Ct., supra,* 228 Cal.App.4th at p. 701 [citing

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[11] Respondents complain about Petitioners' reference to an Assembly Floor Report for AB 1889. They complain that, "The floor report is irrelevant because it was not before the voters when they approved the bond act." (Opposition at p. 24:15-16.) However, the floor report was not referenced to interpret Prop. 1A, but AB 1889. That bill's legislative history is very relevant to *its* interpretation. That is, the members of the 2016 Legislature, in enacting AB 1889, were intent on modifying the meaning of Prop. 1A to ensure that the Authority's actions would not be constrained by Prop. 1A's financial straitjacket.

O'Farrell].) The legislative history of AB 3034 may be relevant to determining the voters' intent in approving Prop. 1A, but the opinion of the 2016 Legislature about that intent can have little, if any, value.[12]

IV. RESPONDENTS ARE NOT ENTITLED TO HAVE THE COURT GRANT JUDGMENT ON THE PLEADINGS IN THEIR FAVOR WITHOUT ALLOWING PETITIONERS A FULL OPPORTUNITY TO CONTEST THEIR ARGUMENTS AND EVIDENCE.

Respondents claim that they, rather than Petitioners, are entitled to judgment on the pleadings for declaratory relief. However, Respondents, though offered the opportunity, declined to file a cross-motion. Instead, they now invite the Court, on its own motion and without the opportunity for Petitioners to fully respond to their assertions (an opportunity that would have been available in a cross-motion) to rule in Respondents' favor. That might be possible after a full trial, when both sides have been able to fully present their evidence, but not on Petitioners' motion for judgment on the pleadings. (See, *e.g., Hayward Area Planning Assn. v. Alameda County Transportation Authority* (1999) 72 Cal.App.4th 95, 110 [party may not be granted judgment when potentially disputed material facts remain to be determined].)

V. RESPONDENTS CAN POINT TO NO MATERIAL FACTUALLY CONTESTED ISSUE REQUIRING A TRIAL ON THEIR CLAIMED DEFENSES TO THIS MOTION.

Respondents further argue that even if the Court found Petitioners were otherwise entitled to a judgment for declaratory relief, Respondents should be allowed to present evidence in support of their ninth and tenth affirmative defenses. The ninth defense is that declaratory relief should be denied because it is not necessary or proper in the current circumstances. The tenth defense asserts that it should be denied because it "could cause severe harm to the public interest while providing no substantial benefit to petitioners." (Opposition at p. 29:20-21.)[13]

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[12] Respondents also point to the 2012 opinion of the legislative counsel, which they claim supports AB 1889's redefinition of "suitable and ready for high-speed train operation. (Opposition at pp. 28-29.) As with the 2016 Legislature's opinion, a 2012 opinion by the Legislature's legal counsel has minimal value in determining the intent of the 2008 voters. (*Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 399, fn. 9 [opinion letter from Legislative Counsel written two years after subject amendment "provide[d] no indication of how [the amendment] was understood at the time it was enacted by those who voted to enact it."].)

[13] Additionally, in a parenthetical footnote, Respondents dispute Petitioners' argument that judicial economy favors granting declaratory relief because it would avoid a multiplicity of future

As to the ninth defense, while the Court has discretion in determining whether to consider and grant declaratory relief:

> This discretion is not boundless: "Where . . . a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction . . .(*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 647.)

More specifically:

> Where, therefore, a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction; and if it does enter a dismissal, it will be directed by an appellate tribunal to entertain the action. Declaratory relief must be granted when the facts justifying that course are sufficiently alleged." (*Columbia Pictures Corp. v. DeToth* (1945) 26 Cal.2d 753, 762.)

Thus, contrary to Defendant's contention, if a claim for declaratory relief has been properly asserted, the court has no discretion to deny relief. Nor is it a defense that mandamus relief could address the approvals already granted, so long as the claim for declaratory relief goes beyond those approvals.

> The mere circumstance that another remedy is available is an insufficient ground for refusing declaratory relief, and doubts regarding the propriety of an action for declaratory relief pursuant to Code of Civil Procedure section 1060 generally are resolved in favor of granting relief. (*Filarsky v. Superior Court* 28 Cal.4th 419, 433.)

In their Tenth Affirmative Defense, Respondents argue that the alleged harm to the public interest justifies denying declaratory relief. (Opposition at p. 30.) They try to argue by analogy that, like a writ of mandate, it may be denied where it would provide no real benefit and its denial would not result in prejudice. *(Id*.) Here, however, there is very real prejudice in allowing Respondents to continue to rely on AB 1889 if it is, in fact, in violation of Article XVI Section 1 of the California Constitution. Under AB 1889, the Authority can authorize expenditure of bond

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mandamus actions on approvals for individual funding plans. Respondents argue, without competent supporting evidence, that only $425 million of the Legislature's 2012 appropriation subject to AB 1889 remains unallocated. (Opposition, p. 29 fn. 19.) They further assert, again without evidence, that the remaining amount "must be spent in the Los Angeles area," (*Id.*) and "may well be allocated to a single funding plan." (*Id.*) Perhaps, but the remaining amount could equally, if not more likely, be frittered away on many small local projects such as grade separations, each consuming $50 to $100 million.

funds on conventional rail projects that may never become part of an operational high-speed rail system. The money spent on those project is no longer available to build projects that *would* result in actual working high-speed rail segments.

As even Judge Cadai recognized, the voters intent in approving Prop. 1A was to construct a high-speed rail system – the first in this country. They did not vote $9 billion in bond funds to build a series of projects providing incremental improvements to existing conventional rail systems. The incremental loss of bond funds to the uses the voters intended is a prejudice that is serious and ongoing, for so long as the Authority is allowed to rely on AB 1889.

Finally, despite their claimed analogy to writ relief, Respondents can present no case where a court has denied declaratory relief based solely on harm to the public interest. Respondents point to *Cota v. County of Los Angeles* (1980) 105 Cal.App.3d 282, 292. (Opposition at p. 30.) In that case, the plaintiff had indeed sought a declaration that defendant's expenditures for a new county juvenile hall were illegal. However, the court of appeal, affirming the trial court, found no illegal expenditures and hence no reason to grant the requested declaratory relief. Parenthetically, the court noted that the *injunctive relief* also requested could be barred based on harm to the public interest. (*Id*.)

Contrary to Respondents' argument, when an unconstitutional expenditure is occurring, the courts have not been reticent in declaring the unconstitutionality of the acts or statutes involved, regardless of any damage to the public interest. *VFW, supra*, cited prominently by Respondents, is such a case, where bond-derived revolving loan fund assets were being used to support uses beneficial to veterans, for whom the loan fund had been established. Nevertheless, the court held that the use of those funds contrary to the intent of the voters was a violation of Article XVI, Section 1. (*Id.* at 36 Cal.App.3d p. 695.) Similarly, in *Shaw v. People Ex Rel. Chiang* (2009) 175 Cal.App.4th 577, gas tax "spillover" funds designated by a voter-approved initiative to be used for transportation planning and mass transportation purposes were, instead, being used for, among other things, transporting school children and developmentally disabled persons. There is no question that these transportation uses benefited the public interest. Nonetheless, the court determined that those expenditures needed to be declared invalid as violating the voters' intent in adopting Prop. 116. (*Id*. at p. 608.)

CONCLUSION

Using Prop. 1A funds to construct improvements for conventional rail operators may well provide a public benefit, but it is not the benefit the voters of California sought when they approved Prop. 1A. The voters expected the funds to build high-speed rail usable operating segments, and perhaps incidentally also benefit conventional rail lines. AB 1889 turns the voters' purpose on its head. By allowing benefit to conventional rail lines to become, in itself, a basis for allowing projects to use bond funds for their construction, AB 1889 allowed "the tail to wag the dog." (*See, Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541.) The Court should grant the motion for judgment on the pleadings and find that AB 1889 is facially unconstitutional in violation of Article XVI, Section 1 of the California Constitution.

Dated: September 25, 2018

Respectfully Submitted

Michael J. Brady
Stuart M. Flashman

Attorneys for Petitioners and Plaintiffs
John Tos et al.

by 
Stuart M. Flashman

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above-titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On September 26, 2018, I served the within PETITIONERS' REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS ON FIRST CAUSE OF ACTION; PETITIONERS' RESPONSE TO RESPONDENTS' OBJECTIONS TO PETITIONERS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS ON FIRST CAUSE OF ACTION, FOR DECLARATORY RELIEF and PETITIONERS' OBJECTIONS TO RESPONDENTS' REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS on counsel for the respondents and defendants herein by placing a true copy thereof enclosed in a sealed envelope with overnight mail postage thereon fully prepaid and depositing it in a U.S. Post Office mailbox at Oakland, California addressed as follows:

Sharon O'Grady, Deputy Attorney General
Paul Stein, Supervising Deputy Attorney General
Office of California Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-7004
Sharon.OGrady@doj.ca.gov
Paul.stein@doj.ca.gov

In addition, on the above-same day, at approximately 9 AM, I served electronic copies of the above-same documents, formatted as pdf files, as e-mail attachments, via electronic mail, on the above-same counsel at the e-mail addresses listed above.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on September 26, 2018.

Stuart M. Flashman