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GOVERNMENT CODE §6103

8 *Attorneys for Petitioners and Plaintiffs John Tos et al.*

9 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11 JOHN TOS *et al.*,  
12 Petitioners and Plaintiffs  
13 vs.  
14 STATE OF CALIFORNIA *et al.*,  
Respondents and Defendants

No. 34-2016-00204740  
Assigned for all purposes to Hon. Richard K.  
Sueyoshi, Department 28

PETITIONERS' AND PLAINTIFFS'  
REPLY BRIEF IN SUPPORT OF MOTION  
TO BIFURCATE FOR EARLY  
DETERMINATION OF FIRST CAUSE OF  
ACTION

Date: February 16, 2018  
Time: 10:00 AM  
Department: 28  
Judge: Hon. Richard K. Sueyoshi  
Action filed: December 13, 2016  
Trial Date: Not Yet Set

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20 **INTRODUCTION**

21 As Petitioners explained in their opening brief, a motion to bifurcate is extremely simple. The  
22 only issues are: first, would bifurcation further the Court's convenience in handing this case or be  
23 conducive to expediting and economizing the case's handing; and second, conversely, would bifurcation  
24 prejudice Respondents, and specifically Respondents' right to a trial by jury on any claim. (See, *Orange*  
25 *County Water Dist. v. Alcoa Global Fasteners, Inc.* ("Alcoa") (2017) 12 Cal.App.5th 252, 353.)  
26



1 Section 526a, may involve not only legal issues but also contested factual issues that could even require a  
2 court trial.<sup>1</sup>

3 By contrast, the First Cause of Action, for declaratory relief on whether AB 1889 is facially  
4 unconstitutional by violating Article XVI Section 1 of the California Constitution, presents a purely legal  
5 issue that can be decided entirely on the pleadings and documents and facts subject to the Court's judicial  
6 notice.<sup>2</sup> (See, e.g., *Shaw v. People Ex Rel. Chiang* (2009) 175 Cal.App.4th 577, 616 [action for  
7 declaratory relief finding that certain legislative enactments violated Article II Section 10 subdivision(c)  
8 of the California Constitution by attempting to modify a voter-approved initiative bond measure without  
9 voter ratification]; see also, e.g., *American Federation of Labor v. Unemployment Ins. Appeals Bd.*  
10 (1996) 13 Cal.4th 1017, 1028; *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 211  
11 *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 679 fn. 31 [cases where declaratory relief actions were  
12 decided by motions for judgment on the pleadings].)

13 Bifurcating the First Cause of Action would allow the determination of that claim without having  
14 to wait for the other more complex causes of action to unfold. Indeed, in all likelihood it would be  
15 decided in three months or less by cross-motions for judgment on the pleadings.<sup>3</sup>

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16 <sup>1</sup> The degree to which factual issues are in dispute cannot yet be determined, because neither the  
17 State of California nor the California High-Speed Rail Authority has yet filed an answer.

18 <sup>2</sup> Respondents argue (RO at p. 9:11-12) that the declaratory relief claim is not "a purely legal  
19 issue" because it falls under the Court's equitable jurisdiction. Respondents confuse legal (versus  
20 equitable) jurisdiction with legal (versus factual) issues. Declaratory relief certainly falls within  
the Court's equitable jurisdiction, but declaratory relief claims are often decided as matters of law,  
especially when they center on statutory and constitutional interpretation. (See, *Shaw, supra*, 175  
Cal.App.4th at p. 595 [standard of review for matters of statutory interpretation].)

21 <sup>3</sup> Respondent asserts that an action for declaratory relief must take into account the public interest,  
and that the public interest here so clearly favors Respondents that the Court should summarily  
22 find AB 1889 constitutional. (RO at p. 10: 9-10.) Respondent can only point to one case, *Cota v.*  
*County of Los Angeles* (1980) 105 Cal.App.3d 282, as supporting consideration of the public  
23 interest in deciding a claim for declaratory relief. However, the public interest there was actually  
invoked on the issue of injunctive relief under C.C.P. § 526a. (*Id.* at p. 292.) In fact, that case did  
24 not even involve declaratory relief, but reverse validation under C.C.P. § 863. (*Id.* at p. 285.) It is  
therefore irrelevant. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 943  
25 ["Cases are not authority ... for issues not raised and resolved."].) Nor have Petitioners been able  
26 to find a single published case where a declaratory relief action was decided upon, or even  
addressed, the public interest – other than that, when a case involved a matter of great public  
interest, as this case does, declaratory relief should not be withheld. (*Farm Sanctuary, Inc. v.*

1 As explained in Petitioners’ opening brief, a court determination that AB 1889 either is or is not  
2 unconstitutional would greatly simplify determination of the remaining causes of action. On the two  
3 mandamus claims, if the record shows that Respondents relied on AB 1889 in granting their approvals,  
4 and that without AB 1889, the Final Funding Plans could not have been found to be “suitable and ready  
5 for high-speed train operation,” then if AB 1889 is found unconstitutional, approving those funding plans  
6 would have been an abuse of discretion and a violation of the mandatory requirements of Prop. 1A,  
7 *requiring* issuance of a writ of mandate. Similarly, on the C.C.P. § 526a cause of action, if AB 1889 is  
8 (or is not) unconstitutional, then expenditures of public funds (e.g., bond funds) that must rely on AB  
9 1889 are (or are not) illegal and subject to injunctive relief.

10 All that, however, is in the future. The important thing in considering the motion to bifurcate is  
11 that allowing early determination of the First Cause of Action, whatever that determination is, will  
12 simplify and shorten the Court’s consideration of the remainder of the case.

13 **II. RESPONDENTS’ ARGUMENTS ON THE CONSEQUENCES OF BIFURCATION**  
14 **ARE BOTH SPECULATIVE AND WRONG.**

15 Respondents spend most of their argument addressing what they claim are the pitfalls of granting  
16 bifurcation. Much of what they say is speculation. With the exception of the Director of Finance,  
17 Respondents have not even answered the petition and complaint, nor is there any indication that they  
18 have begun preparing the administrative records for the two mandamus causes of action. While the  
19 Second Amended Petition lays out numerous factual and legal issues, much will depend on what facts  
20 Respondents admit to, and what defenses they tender in their answers. Even so, some of their assertions  
21 are, even at this point, simply incorrect.

22 Respondents claim that a court must evaluate the effects on the public interest before determining  
23 whether a claim for declaratory relief should be considered or summarily denied. Indeed, Respondents  
24 go so far as to assert that, based on the public interest, the Court should summarily find AB 1889

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25 *Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 503-504.) Respondents’ argument  
26 should therefore be rejected out of hand.

1 constitutional. As explained in footnote number 3, neither the statute nor the case law supports these  
2 assertions.<sup>4</sup>

3 While it is true that Code of Civil Procedure Section 1061 gives a trial court discretion to reject a  
4 claim where a declaration would not be necessary or proper, the courts have made it clear that a court's  
5 discretion to refuse to entertain an action for declaratory relief is quite limited.

6 The discretion to refuse to entertain an action in declaratory relief vested in the trial  
7 court by section 1061 is not unlimited. It may be exercised only when there is a  
8 basis in fact for the conclusion that the declaration is not necessary or proper.  
[citations] Here there is an inadequate factual basis for the conclusion drawn by the  
trial court.

9 Any doubt should be resolved in favor of granting declaratory relief. [citation]  
10 While the court may refuse to entertain the action where "the rights of the  
11 complaining party have crystallized into a cause of action for past wrongs, [and] all  
12 relationship between the parties has ceased to exist ..." [citation], it may not exclude  
13 the action where the alternative remedy of suing upon the matured breach is not as  
"speedy and adequate or as well suited to the plaintiff's needs as declaratory relief."

14 (*Warren v. Kaiser Foundation Health Plan, Inc.* (1975) 47 Cal.App.3d 678, 683  
[citations omitted].)

15 In this case, while two claims have matured into mandamus claims, the Second Amended  
16 Petition also alleges that additional Final Funding Plans are being prepared that will also rely on AB 1889  
17 (SAP at ¶¶ 77-80. 89). The action for declaratory relief goes beyond the mandamus claims, and even  
18 beyond the claims for illegal and wasteful expenditure of public funds, to address the important long-term  
19 policy question of whether the State's action in enacting AB 1889 without voter approval was proper and  
20 valid, and therefore whether Respondents and Defendants are entitled to continue to rely upon that statute  
in adopting, approving, and implementing Final Funding Plans for California's high-speed rail system.<sup>5</sup>

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21 <sup>4</sup> Respondents have submitted a 355-page request for judicial notice in support of their opposition  
22 brief. Much of this consists of documents submitted in this case under the earlier First Amended  
23 Complaint, which has now been superseded by the current Second Amended Petition and  
24 Complaint. Respondents assert all these documents are relevant to showing that the public interest  
favors finding AB 1889 constitutional. As explained, the public interest is not a factor to be  
considered in a claim for declaratory relief. Consequently, Respondents' request for judicial notice  
is irrelevant and should be denied on that basis.

25 <sup>5</sup> Respondents also parenthetically assert that the Court has similar discretion in a mandamus  
26 claim, presumably also based on harm to the public interest. (OB at p. 10 fn.6.) Such is not the  
27 case. While a court has discretion in considering a mandamus claim, it is a legal discretion, "not a

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**CONCLUSION**

For all the above reasons, and those stated in Petitioners’ initial memorandum of points and authorities, Petitioners respectfully request that the motion to bifurcate be granted.

Dated: February 8, 2018

Respectfully submitted,

Michael J. Brady  
Stuart M. Flashman

Attorneys for Petitioners and Plaintiffs

by: *Stuart M. Flashman*  
Stuart M. Flashman

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capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.” (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666.) The cases do not allow a court to flatly deny relief just based on the grounds that it would cause harm to a public agency or public project.

## PROOF OF SERVICE BY MAIL AND ELECTRONIC 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.

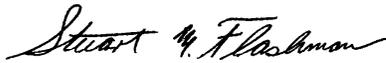
On February 9, 2018, I served the within PETITIONERS' AND PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION TO BIFURCATE FOR EARLY DETERMINATION OF FIRST CAUSE OF ACTION; PETITIONERS' AND PLAINTIFFS' OPPOSITION TO RESPONDENTS' REQUEST FOR JUDICIAL NOTICE on counsel for the Respondents and Defendants by placing a true copy thereof enclosed in a sealed envelope with first class 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  
Tamar Pachtar, Deputy Attorney General  
Office of California Attorney General  
455 Golden Gate Ave., Ste. 11000  
San Francisco, CA 94102-7004  
[Sharon.OGrady@doj.ca.gov](mailto:Sharon.OGrady@doj.ca.gov)  
[Tamar.Pachtar@doj.ca.gov](mailto:Tamar.Pachtar@doj.ca.gov)

In addition, on the above-same day, I also served the above-same document, converted into a pdf file, on the above-same parties via electronic service as an e-mail attachment sent to the e-mail addresses shown above from my e-mail account at [stu@stufash.com](mailto:stu@stufash.com).

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 February 9, 2018.



Stuart M. Flashman