SUPREME COURT OF CALIFORNIA

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, *ET AL.*,

Plaintiff and Respondent,

v.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO,

Defendant,

v.

JOHN TOS, HOWARD JARVIS TAXPAYERS ASSN., *ET AL.*,

Real Parties in Interest, Petitioners.

After the Denial of a Petition to Rehear a Published Decision
of the Court of Appeal, Third District (Case No. C075668)

PETITION FOR REVIEW

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THE URGENCY OF THIS CASE

Even though the Court of Appeal admitted that "[s]ubstantial legal questions loom in the trial court as to whether the high-speed rail project the California High-Speed Rail Authority (Authority) seeks to build is the project approved by the voters in 2008" and that "[s]ubstantial financial ... questions remain to be answered by the Authority in the final funding plan the voters required for each corridor or usable segment of the project" (Slip Op. at 3), and even though the Court acknowledged real parties' concern that "we should not enter judgment validating the bonds ... for a project that has morphed into something materially different from the project approved by the voters" (Slip Op. at 26), the Court nonetheless deemed its role in a bond validation proceeding too constrained to entertain that concern. It therefore reversed the judgment below and ordered the trial court to validate the bonds, thus freeing the Authority to put California taxpayers another $8.6 billion in debt for a pig in a poke, unless this Court acts.

ISSUE PRESENTED

Where the Legislature places a bond measure on the ballot for a public project distinctly specified therein and then, after the voters approve it, passes another bill appropriating the bond funds "for a project that has morphed into something materially different from the project approved by the voters," may the Court deny validation of the bond sale on the grounds that the materially different project never received voter approval as required by article XVI, section 1 of the state constitution?

GROUNDS FOR REVIEW UNDER RULE 8.500

Review is necessary to settle an important legal question of great public interest: What does article XVI, section 1, require the voters to approve? Just the sale of bonds? Or the sale of bonds for a project distinctly specified

therein? If the latter, then what is the remedy when the State abandons the project proposed to the voters and substitutes "something materially different from the project approved by the voters?" (Slip Op. at 26.) Does the Court have authority to deny validation of the bond sale and spare taxpayers the tremendous issuance and interest costs associated with a new $8.6 billion indebtedness? Or must the Court allow the bond sale to proceed knowing that only one of two consequences will follow: either a "materially different" project will be built without voter approval, or the taxpayers will have incurred the new indebtedness for nothing.

DENIAL OF REHEARING BELOW

The Court of Appeal issued its decision on July 31, 2014. Real Party Howard Jarvis Taxpayers Association ("HJTA"), together with real party First Free Will Baptist Church, timely filed a Joint Petition for Rehearing on August 12, 2014. The Court of Appeal denied the Petition for Rehearing on September 2, 2014. A copy of the Opinion, certified for publication, is attached hereto as Exhibit A.

FACTUAL BACKGROUND

The Legislature placed the high-speed rail bond measure on the November 2008 election ballot as Proposition 1A. For that particular measure, the Legislature suspended the Attorney General's authority to prepare the impartial ballot label, title and summary, and instead required the use of its own proponent-authored materials. (See generally *Howard Jarvis Taxpayers Assn. v. Bowen* (2011) 192 Cal.App.4th 110, holding that the Legislature's actions violated the Political Reform Act.)

Without regard for the usual word limits, the Legislature's glowing ballot materials promised voters a true high-speed train system connecting all of California's major population centers with 220 mph electric trains on

dedicated track that would whisk passengers to their destinations (for example, from San Francisco to Los Angeles in under 2½ hours) for about $50 per person. The system, which would cost "only" $25 billion, would be built with federal and private matching funds, and be self-funding once operational, requiring no new taxes or government subsidies. (Tab 87,[1] HSR01760-64.)

The voters approved Proposition 1A, but today all of its promises are in doubt, and several important ones have already been broken. As the Court of Appeal lamented, "[s]ubstantial legal questions loom in the trial court as to whether the high-speed rail project the California High-Speed Rail Authority (Authority) seeks to build is the project approved by the voters in 2008" and "[s]ubstantial financial ... questions remain to be answered by the Authority in the final funding plan the voters required for each corridor or usable segment of the project." (Slip Op. at 3.)

Despite these "substantial questions" as to whether today's project is the one approved by voters, or one not approved by voters, the High-Speed Rail Authority and the High Speed Passenger Train Finance Committee (collectively "State") filed this action seeking validation of the sale of $8.6 billion in Proposition 1A bonds to begin construction of today's project.

The trial court denied validation on narrow grounds: that one of the procedural steps preceding the bond sale was inadequate, as no evidence supported the Finance Committee's resolution of necessity. (Tab 1, HSR-00006:13.)

The Authority and the Finance Committee filed this petition for writ of mandate challenging the judgment against them in the validation action, and challenging an interlocutory ruling in a related case pending before the

[1] All "tab" citations are to the Authority's Appendix of Exhibits.

Sacramento County Superior Court, *Tos, et al. v. California High Speed Rail Authority, et al.*[2]

In its brief in the Court of Appeal, HJTA defended the trial court's procedural ruling in the validation action, but also urged the Court of Appeal, if it disagreed with the procedural ruling, to either consider on its own, or remand to the trial court for consideration, HJTA's main argument below, to wit, that today's project never received voter approval as required by article XVI, section 1, of the California Constitution.[3]

The Court of Appeal reversed the judgment in the validation action. It held that the Finance Committee's resolution of necessity needed no evidence to support it, for the Committee exercises the broadest possible discretion and the fact that it adopted the resolution of necessity is conclusive proof that it found the bond sale necessary. (Slip Op. at 21.)

As to HJTA's argument that today's project never received voter approval, the Court of Appeal ruled that a validation action is not the venue for deciding whether the voters' wishes are being carried out. "To allow real parties in interest to prematurely challenge future potential uses of the bonds would undermine the purpose of the validation action." (Slip Op. at 29-30.)

HJTA believes the Court of Appeal erred because the Court was not presented with "future *potential* uses of the bonds," but rather a firm commitment by the State to use the bonds for today's project. Therefore real

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[2] *Tos* is a mandamus action seeking to prevent construction of the initial segment of track in Central California on grounds that the Authority's plans violate several provisions of the system's enabling act. HJTA is not a party to the *Tos* case, and therefore confines this Petition for Review to the main question it raised in the validation action.

[3] Answer to Alternative Writ of Mandate by Real Party Howard Jarvis Taxpayers Assn., filed March 14, 2014, at pp. 7 *et seq.*

party's challenge is not "premature," as the Court suggests. Because today's project is missing an essential element that the State must show before the Court will validate its bond sale–the voter approval required by the constitution–the judgment of the trial court denying validation should have been affirmed.

ARGUMENT

I

THE CONSTITUTION REQUIRES VOTER APPROVAL OF NOT JUST THE BOND SALE, BUT ALSO THE PROJECT

Section 1 of Article 16 of the California Constitution provides, in relevant part:

> The Legislature shall not, in any manner create any debt or debts . . . unless the same shall be authorized by law *for some single object or work to be distinctly specified therein* which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due . . . but no such law shall take effect unless ... it shall have been submitted to the people and shall have received a majority of all the votes cast for and against it at such election; and all moneys raised by authority of such law *shall be applied only to the specific object therein stated* or to the payment of the debt thereby created. (Cal. Const., art. XVI, § 1.)

The state constitution, in plain language, requires that the works to be funded by a bond measure shall be "distinctly specified" in the measure presented to the voters, and that any bonds to be issued under authority of such measure "shall be applied only to the specific object therein stated."

It is clear from this language that the Legislature is required to obtain

not just voter approval of the "debt," but also of the "object or work." They are a package. The Legislature "shall not" create any debt "unless the same shall be authorized ... *for* some single object or work ... distinctly specified therein." And that authorization comes from the voters. The package–that is, the project and the bond proposed to fund it–must be described in a "law" (*i.e.*, a bill passed by the Legislature), "but no such law shall take effect unless ... it shall have been submitted to the people and shall have received a majority of all the votes ." Even after approval, the bond and its project remain a package. The constitution does not allow a bait and switch. For the bonds "*shall be applied only to the specific object therein stated*."

Assembly Bill 3034 (2007-2008 Reg. Sess.) ("AB 3034") placed Proposition 1A on the November 2008 General Election ballot. Proposition 1A proposed the issuance of $9 billion in bonds for a high speed rail system with certain "distinctly specified" criteria set forth in AB 3034 (now Streets and Highways Code sections 2704-2704.21) which were printed in the ballot. (Tab 87, HSR01766.)

Among those criteria, voters were promised: (1) a "220 MPH transportation *system*" (Tab 87, HSR01760); (2) that passengers could travel from city to city in specified *maximum* trip times (*id.*, HSR01767 [St. & Hwy. Code § 2704.09]); (3) that the proposed bond funds would account for no more than 50% of the cost of any segment of construction because there would be other "private and public *matching* funds required, including, but not limited to, federal funds" (Tab 87, HSR01760; St. & Hwy. Code § 2704.08(a)); and (4) that the sources of all funds would be identified and committed *before* any Proposition 1A bond funds were expended (*id.*, HSR01766-67 [St. & Hwy. Code § 2704.08(d)]).

This is a validation action. The State is the plaintiff. The State is

asking the Court to approve a sale of bonds and insulate the sale from future court challenges. The State has the burden of proof. (Evid. Code § 500). It has the burden to prove that it has the legal authority to sell these bonds. One of the chief elements it must show is that these bonds are for a project that the voters approved as required by the constitution.

The State has made absolutely no attempt in this case to satisfy the above burden of proof. It has instead, at every turn, attempted to unbundle the package by arguing that it only wants the bonds validated, and the Court must postpone to another day any scrutiny of how the bonds will be expended. The Court of Appeal, unfortunately, accepted this argument: "The Attorney General points out that whether or not any particular later expenditure of bond funds would comply with the Bond Act is not relevant to the validity of bond authorization." (Slip Op. at 30.)

If this logic prevails, the bonds will be sold, and that bell cannot be un-rung with its huge up-front issuance costs and decades of interest payments. Then, in a future action demonstrating what HJTA has already demonstrated here–that today's project breaks the promises made to voters in Proposition 1A–the Court will be faced with a predicament: Should the Court allow a project to proceed which was never shown to the voters or approved as required by the constitution? Or should the Court halt the project, knowing the State cannot afford the project it originally promised, in which case the taxpayers will have incurred an $8.6 billion indebtedness for nothing?

Doesn't it make more sense to keep the package of project and bond bundled together, as they were presented to the voters for approval, and as they are joined in the constitution? The State, as plaintiff, should be required to show that these bonds are for a project approved by the voters. Since it has made no such showing, validation of the bonds must be denied.

II

TODAY'S PROJECT WAS NOT APPROVED BY THE VOTERS

The bonds proposed by this validation action are not for the specific object distinctly specified in Proposition 1A on the November 2008 ballot. The project that the Authority plans to build, and for which these bonds have been specifically appropriated by the Legislature, deviates in significant ways from the project presented to the voters in 2008, enough so that this Court must conclude that *these* bonds were never approved by the voters as required by the state constitution.

A. The Required "High" Speeds Will Not be Met

When the state's electorate voted on Proposition 1A, the proposed high speed rail system was supposed to cost $25 billion to complete.[4] "[T]hree days after Proposition 1A was approved by California voters, the CHSRA released its 2008 Business Plan estimating the project would cost $33 billion, with $12-$16 billion in federal funds, and a completion date of 2020."[5] "One year later in 2009, the estimate jumped to $43 billion, assuming $17-$19 billion in federal funds, with a completion date of 2020. In November 2011, the CHSRA's Draft 2012 Business Plan had the costs skyrocket to a range of $98-$118 billion, with approximately $52 billion in federal funds, and a delayed

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[4] Staff Report, "Summary of Subject Matter," for May 28, 2013 Oversight Hearing on California High Speed Rail by Congressional Subcommittee on Railroads, Pipelines, and Hazardous Materials (hereafter "Subcommittee Staff Report") available at https://transportation.house.gov/Uploaded Files/documents/2013-05-28-Railroads_Hearing_SSM.pdf (last accessed Mar. 11, 2014).

[5] *Id.*

completion date of 2033."[6]

Public and political criticism of this quadrupled price tag led the Authority in April 2012 to release a Revised 2012 Business Plan, reducing the cost estimate to $68 billion, lowering the hope of federal assistance to $42 billion, and advancing the completion date to 2028. "[O]n its face, it appear[ed] the CHSRA was able to save $30 billion in costs, [but] the CHSRA essentially revised its plan to a 'blended approach' that did not assume the 200 mph capable infrastructure from end-to-end, but instead used shared infrastructure in the North and South ends."[7] (The Authority recently released a draft "2014 Business Plan," but it is simply an update, reporting on progress made to implement the 2012 Plan.)[8]

The Authority's Revised 2012 Business Plan describes the new "blended approach" as "partially sharing existing commuter rail infrastructure and facilities. This will result in a full rail connection from San Francisco to Los Angeles, offering passengers a 'one-seat-ride' from end to end. In the Bay Area, the high-speed rail trains will use upgraded existing Caltrain infrastructure between San Jose and San Francisco. In the Los Angeles Basin, Metrolink infrastructure will provide the connection for high-speed trains between Anaheim/Los Angeles and the Central Valley." (Tab 373, HSR07106.)

Under the new plan, only the Central Valley route, from San Jose in the

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[6] *Id*.

[7] *Id*.

[8] See Press Release, "High-Speed Rail Authority Releases Draft 2014 Business Plan, Updates 2012 Business Plan," available at http://www.hsr.ca.gov/docs/newsroom/Authority_Releases_Draft_2014_Business_Plan_020714.pdf (last accessed Mar. 12, 2014).

north through the Tehachapi Mountain tunnel in the south, will consist of newly built high-speed track capable of supporting speeds over 200 mph. The routes beyond those points, referred to in the plan as "bookends," will consist of existing track and will be shared with existing low speed freight and multi-stop commuter trains. The bookend from San Jose to San Francisco will be the existing Caltrain line, with a design maximum track speed of 110 mph. (Tab 255, HSR03795.) The southern bookend will run from the San Fernando Metrolink station in Sylmar to Los Angeles, then to Anaheim, with a design maximum track speed of 125 mph. (Tab 373, HSR07106.)

Streets and Highways Code section 2704.01, which appeared on the Proposition 1A ballot, provides the following definition: "(d) 'High-speed train' means a passenger train capable of *sustained* revenue operating speeds of *at least* 200 miles per hour where conditions permit those speeds." At the time this definition was codified, then-current high speed rail plans called for newly-built, dedicated high speed track throughout the system from end to end. The only "conditions" that could slow the train's speed were related to terrain, such as grades and curves. The definition did not contemplate long stretches of slow track from one major region of the state to another.

Accordingly, the Proposition 1A ballot summary promised voters that, if passed, Proposition 1A "[e]stablishes a clean, efficient 220 MPH transportation *system*." (Tab 87, HSR01760.) The official ballot question for Proposition 1A asked: "[S]hall $9.95 billion in bonds be issued to establish a clean, efficient *high-speed* train service *linking Southern California,* the Sacramento/San Joaquin Valley, *and the San Francisco Bay Area* .... (Tab 87, HSR01759.) In the argument in favor of Proposition 1A, then-Vice Chair of the Authority, Fran Florez, assured voters that "Proposition 1A will bring California: [] Electric-powered High-Speed Trains running up to 220 miles an

hour *on modern track, safely separated from other traffic* generally along existing rail corridors." (Tab 87, HSR01762.)

The plan accompanying today's proposed bonds, however, calls for shared low-speed track in both the northern bookend connecting the Silicon Valley to the San Francisco Bay and the southern bookend connecting the San Fernando Valley to Anaheim, and is thus substantially different from the "object or work ... distinctly specified" in Proposition 1A. (Cal. Const., art. XVI, § 1.) The difference is great enough to conclude that the voters never approved these bonds.

B. ***The Mandated Trip Time Requirements Cannot be Met***

California Streets and Highways Code section 2704.09, which appeared on the Proposition 1A ballot, provides in relevant part that:

> "The high-speed train system to be constructed pursuant to this chapter shall be designed to achieve the following characteristics: ...
>
> (b) *Maximum* nonstop service travel times for each corridor that *shall not exceed* the following:
>
> (1) San Francisco-Los Angeles Union Station: two hours, 40 minutes.
>
> (2) Oakland-Los Angeles Union Station: two hours, 40 minutes.
>
> (3) San Francisco-San Jose: 30 minutes.
>
> (4) San Jose-Los Angeles: two hours, 10 minutes.
>
> (5) San Diego-Los Angeles: one hour, 20 minutes.
>
> (6) Inland Empire-Los Angeles: 30 minutes.
>
> (7) Sacramento-Los Angeles: two hours, 20 minutes."

These maximum trip times promised on the ballot and required by statute cannot be achieved with the high-speed/low-speed blended system that the Authority plans to build today and for which it has requested the issuance of bonds.

In an attempt to show that the blended system can comply with these promises, the Authority had a self-serving memo prepared by its own program manager, Frank Vacca, opining that trains operating on the planned blended system can meet the mandatory trip times. The memo states, for example, that the 2 hour, 40 minute maximum trip time from San Francisco to Los Angeles can be met (with hardly a minute to spare) provided the reader indulges certain generous assumptions, including the following: (1) that at the southern end of the system, the track is *not* blended (*i.e.*, after the planned blended system is built, a future generation replaces the blended track in the southern bookend with genuine dedicated high speed track),[9] (2) that at the northern end of the system, Caltrain has none of its trains on the shared track so that a high speed train can travel unimpeded at the 110 mph maximum design speed for Caltrain's track,[10] and (3) that future, as-yet-undeveloped technology will

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[9] Vacca memo at Tab 255, HSR03795, assuming "infrastructure consists of proposed *full high speed rail only* improvements between San Jose and Los Angeles combined with blended service alignments on the Caltrain Corridor between San Francisco and San Jose."

[10] Compare Vacca memo at Tab 255, HSR03795 (assuming "a 110 mph maximum speed with an unimpeded path") with Peer Review Group comments dated Aug. 14, 2013, at p.6 ("Capacity simulations completed jointly by Caltrain and the Authority show that interactions between Caltrain and potential HSR schedules will produce an actual non-stop HSR run time from San Francisco to San Jose of 37 to 39 minutes"), available at http://www.hsr.ca.gov/docs/about/business_plans/FINAL_Draft_2014_Business_Plan.pdf, at p.93 (last accessed Mar. 11, 2014) (MJN, Ex. 2).

enable trains to maintain 220 mph speeds up and down hills.[11] (Memo from Frank Vacca to Jeff Morales dated February 11, 2013, titled "Phase 1 Blended Travel Time," Tab 255, HSR03795.)[12]

Mr. Vacca refers to trip times based on these assumptions as "pure run times." However, fanciful "pure run times" are not what was promised to the voters or required by statute. The ballot and statute refer instead to "*service* travel times." As required by Streets and Highways Code section 2704.09(b), for example, the "*service* travel time" from San Francisco Transbay Terminal to Los Angeles Union Station shall not exceed 2 hours, 40 minutes.

To determine whether the Authority's blended system will achieve the required service travel times, this Court must look not to Mr. Vacca's "pure run time" memo, but to the actual service schedules proposed for the blended system. The most recent proposed service schedules appear in a support document for the Authority's 2014 Business Plan, titled "2014 Service Planning Methodology," MJN, Ex. 3. A sample service schedule is set forth in Figure 3 on numbered page 8. The table shows both local (multi-stop) and express service options. Consulting the column for express service from San Francisco to Los Angeles, a train departing at 6:00 a.m. from San Francisco would arrive in Los Angeles at 9:08 a.m., for a trip time of 3 hours, 8 minutes,

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[11] Vacca memo at Tab 255, HSR03795 (the fastest electric locomotive built today has a 220 mph maximum speed, and only on a flat track. Moreover, "[a] speed restriction to approximately 150 mph may be required to mitigate a safety issue related to wheel adhesion in the downhill direction").

[12] Other assumptions include: (1) that when all environmental reviews are concluded, the Authority's preferred track alignments will have been approved at every location, and (2) that maintaining a speed of 220 mph through urban areas in the Central Valley will be acceptable to the affected communities.

or almost half an hour more than the maximum time permitted by statute.

Real party HJTA is not alone in reaching this conclusion. According to the Reason Foundation's[13] in-depth due diligence report on the high-speed rail system, "it is estimated that the fastest non-stop trains from San Francisco to Los Angeles over the Phase 1 Blended System would operate at from 3:50 to 4:49 (higher-speed scenario v. lower-speed scenario)." (Reason Foundation, California High-Speed Rail: An Updated Due Diligence Report (Apr. 11, 2013), at p.7, available at http://reason.org/studies/show/california-high-speed-rail-report (last accessed July 29, 2013).)

Similarly, Californians Advocating Responsible Rail Design[14] studied the Authority's shift to a blended system and commented,"The most significant change in the Authority's revised Business Plan was the adoption of a 'blended' system. The good news was that it could be less impactful to communities and be cheaper to construct. The bad news was that it would further compromise travel times." (CARRD, "The blended system can deliver 2 hour 40 minute travel times: Fact or fantasy?," available at http://www.calhsr.com/business-plan/the-blended-system-can-deliver-2-hour-40-minute-travel-times-fact-or-fantasy/ (last accessed July 29, 2013).) As CARRD notes:

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[13] The Reason Foundation "produces respected public policy research on a variety of issues and publishes the critically-acclaimed Reason magazine. ... Reason produces rigorous, peer reviewed research and directly engages the policy process, seeking strategies that emphasize cooperation, flexibility, local knowledge, transparency, accountability and results." (REASON FOUNDATION, Frequently Asked Questions – What is Reason Foundation?, available at http://reason.org/about/faq/ (last accessed July 29, 2013).)

[14] Californians Advocating Responsible Rail Design ("CARRD") is a network of volunteer professionals engaged, through public comment, in the planning of California's high-speed rail project for the purpose of advocating the public's interests and compliance with Proposition 1A.

"In March, Caltrain released the final results of a study assessing the feasibility of a blended system. There was a way to fit high speed rail trains into a blended schedule, but the travel times would suffer. In the best case, trains would take about 20 minutes more than previously assumed to get from San Francisco to San Jose.

Even if Caltrain and high speed rail trains were to reach the same maximum speed, Caltrain makes many local stops over the 50 mile corridor. This means the average speed between Caltrain and high speed rail would differ substantially. This limits the capacity of the corridor and the travel times for high speed rail trains.

We were surprised to see no mention of the impact of the blended system on travel times in the business plan. We were even more surprised to see a presentation at the April board meeting that claimed the blended system would deliver a 2 hour 40 minute travel time. Not only did this defy logic, but the ridership report supporting the business plan showed that the fastest scheduled trains were going to take 3 hours, which would be consistent with the results from the Caltrain study.

On April 18th, CARRD testified at an Assembly hearing on High Speed Rail about the inconsistencies in the travel times and asked for substantiation of the 2 hour 40 minute travel time assertion and presented copies documenting the discrepancies to the committee and to California High Speed Rail board members.

> The Authority declined to provide any analysis backing up the claim that had been made at their board meeting.
>
> Kathy Hamilton of the San Francisco Examiner who witnessed the altercation at the committee meeting immediately made a Public Records Request for the documents used to derive the travel times in the board presentation. By law, the Authority should respond within 10 calendar days.
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> On May 31, 2012 (43 days later), Ms. Hamilton received the following response: *"The answer is that no document exists. These were verbal assertions based on skill, experience, and optimism. ... I have been informed that a memo is in the process of being drafted on this very issue and I will provide that to you as soon as it's complete."*

To real party HJTA's knowledge, no memo other than the fanciful Vacca memo exists. In any event, the State, which has the burden of proof in a validation action, has failed to show any documentation to the Court that the trip times required by statute and promised in Proposition 1A are possible.[15]

The record establishes, then, that today's project, with its slow-speed northern and southern bookends, offers significantly longer service travel times than the travel times required for the "object or work ... distinctly specified" in Proposition 1A. (Cal. Const., art. XVI, § 1.) The difference is great enough to conclude that the voters never approved these bonds.

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[15] Real party HJTA sought information on this point through discovery in the trial court. The Authority responded only with objections. (Tab 72, HSR01202.)

C. The State Has Not Identified Matching Funds

Streets and Highways Code section 2704.08(a), which appeared on the Proposition 1A ballot, provides: "Proceeds of [Proposition 1A] bonds ... *shall not be used for more than 50 percent* of the total cost of construction of each corridor *or usable segment thereof* of the high-speed train system." Section 2704.04 requires, "The authority shall pursue and *obtain other* private and public funds ... to augment the proceeds of this chapter." The official ballot question for Proposition 1A asked:

> "[S]hall $9.95 billion in bonds be issued to establish a clean, efficient high-speed train service linking Southern California, the Sacramento/San Joaquin Valley, and the San Francisco Bay Area, with at least 90 percent of bond funds spent for specific projects, *with private and public matching funds required*, including, but not limited to, federal funds, funds from revenue bonds, and local funds, and all bond funds subject to independent audits?" (Tab 87, HSR01759.)

The official title and summary described the proposal as providing, among other things, that "at least 90% of these bond funds shall be spent for specific construction projects, *with private and public matching funds required,* including, but not limited to, federal funds, funds from revenue bonds, and local funds." (Tab 87, HSR01760.) In the argument in favor of Proposition 1A, then-Vice Chair of the Authority, Fran Florez, assured voters that "Proposition 1A will protect taxpayer interests. ... Matching private and federal funding to be identified BEFORE state bond funds are spent." (Tab 87, HSR01762.)

Dictionary.com defines the verb "match" as "to equal [or] be equal to," and specifically defines "matching funds" to mean "funds that will be supplied

in an amount matching the funds available from other sources." Proposition 1A's frequent use of these terms, together with the requirement in Streets and Highways Code section 2704.08(a) that "[p]roceeds of [Proposition 1A] bonds ... *shall not be used for more than 50 percent* of the total cost of construction of each corridor *or usable segment thereof*," makes clear that no more than half of the funding for any usable segment of the high-speed rail system may come from Proposition 1A bond revenue because Proposition 1A bond revenue must be *matched* with equal funding from other sources, including "private and federal funding."

Streets and Highways Code section 2704.08(c) requires that, prior to any request by the Authority for construction funding from Proposition 1A bonds, the Authority shall issue "a detailed funding plan for that corridor or usable segment thereof." Section 2704.08(c)(2) addresses the content of the funding plan, stating (among other things) that:

> "The plan shall include ... (D) The sources of all funds to be invested in the corridor, or usable segment thereof, and the anticipated time of receipt of those funds based on expected commitments, authorizations, agreements, allocations, or other means."

The Funding Plan for the construction that the Authority proposes to fund with the bonds at issue in this validation action appears in the record at Tab 323. The Funding Plan expressly incorporates by reference the Draft 2012 Business Plan (Tab 324) which, as noted earlier, was superseded by the Revised 2012 Business Plan (Tab 373) which in turn has been updated by the Draft 2014 Business Plan (available at http://www.hsr.ca.gov/docs/about/business_plans/FINAL_Draft_2014_Business_Plan.pdf (last accessed Mar. 12, 2014) ("2014 Business Plan")). Each Business Plan contains additional detail

about the Authority's funding efforts.

The Funding Plan, at Tab 323, page HSR05180, explains that it is a plan for funding one of two "usable segments," which it calls Initial Operating Sections, or "IOS." The two options are IOS North and IOS South. Either IOS would contain a "first construction segment," a piece of track about 130 miles long between Madera and Bakersfield.

IOS North and IOS South are referred to as options because, at the time the Funding Plan was prepared, the Authority had not yet decided which usable segment it would build first. Since then, however, the Authority in its Draft 2014 Business Plan has committed to building the southern section first. Exhibit 1.1 on page 16 of the Draft 2014 Business Plan[16] describes this usable segment, or IOS, as running from "Merced to San Fernando Valley," a distance of approximately 300 miles, with stations at each end, a projected completion date of 2022, and a construction cost of "$31 billion."

Of that $31 billion dollars, the only funds that have been identified to date as "anticipated" or "expected" are: (1) the $8.6 billion in Proposition 1A bonds sought by this validation action, (2) "[f]ederal grants authorized under the American Recovery and Reinvestment Act (ARRA) and under the High-Speed Intercity Passenger Rail Program (HSIPR) ... combin[ing] to $3.316 billion" (Tab 323, HSR05185), and (3) a $250 million (*i.e.*, $0.25 billion) appropriation of revenue from the state's new "cap and trade" program in the Governor's proposed budget for fiscal year 2014-15. As summarized by the Draft 2014 Business Plan:

"The first construction segment of the IOS will be funded with

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[16] Available at http://www.hsr.ca.gov/docs/about/business_plans/FINAL_Draft_2014_ Business_Plan.pdf (last accessed Mar. 12, 2014).

> a mix of Proposition 1A funds and federal funds. A total of $6 billion has been appropriated for the first construction segment. After completion of the first construction segment of the IOS and funding of book-end investments, $4.2 billion of Proposition 1A bond proceeds remains available to partially fund the remainder of the IOS. ... The Governor's 2014-15 Budget– submitted to the Legislature–proposes to use Cap and Trade proceeds as an investment in statewide rail modernization in order to reduce greenhouse gases and modernize the state's interregional transportation system (with $250 million for high-speed rail and $50 million for urban, commuter and intercity rail projects). The ongoing commitment of Cap and Trade funds for rail modernization is important in several key respects ... First, combined with the remaining Proposition 1A bond funds, it will allow the Authority to proceed without delay and continue construction past the initial Madera to Bakersfield segment .... Second, a committed, long-term source of funding will allow the Authority to leverage both public and private financing and, depending on the level of commitment, *potentially* finance the completion of the IOS." (2014 Business Plan at 53-54.)

In sum, approximately $12 billion has been identified of the $31 billion needed to construct the IOS, and most of that (over 71%) is from the Proposition 1A bonds, in violation of the matching fund requirement that "[p]roceeds of [Proposition 1A] bonds ... shall not be used for more than 50 percent of the total cost of construction of each corridor or usable segment thereof." (St. & Hwy. Code § 2704.08(a).)

The Funding Plan and the three Business Plans describe a variety of existing federal programs which *could* provide funding for the California high-speed rail program, if Congress were inclined to offer further support, but the Authority candidly admits there are "uncertainties in future federal funding." (2014 Business Plan at 68.) As for private funding, none has materialized to date. The Authority can only hope that "[o]nce the IOS begins operation, allowing high-speed passenger service revenue forecasts to be demonstrated, the IOS [will] have a material value to a *potential* private-sector investor ...." *Id.* at 55.

As quoted above, Streets and Highways Code section 2704.08(c)(2)(D) requires the Authority to identify funding for the entire IOS, not just a piece of track in the middle of nowhere that it can afford to build today. It requires the Authority to identify sources of funds that are more than merely theoretical. They must be "expected" with enough confidence that their "anticipated time of receipt" can be calendared. This is clear from the language of the statute requiring the Authority, in its Funding Plan, to specify the "*anticipated time of receipt* of those funds based on *expected* commitments, authorizations, agreements, allocations, or other means." Such language indicates that the identification of funds must be based on a reasonable present expectation of receipt on a projected date, and not merely a hope or possibility that funds may become available.

Whether one views the Authority's current plan as a proposal to proceed without known funding sources, or as a proposal to switch from a project half funded by matching funds to a project primarily funded by California taxpayers, it is not the project described in the Proposition 1A ballot that voters approved. The plan for the bond issuance at bar is different enough for the Court to conclude that the voters never approved these bonds.

III

DENYING VALIDATION IS NOT A PREMATURE REMEDY BECAUSE THE STATE IS COMMITTED TO TODAY'S PROJECT

The Court of Appeal ruled that it would be "premature" to consider, at the validation of bonds stage, whether the bonds are for the project approved by the voters because "there is no final funding plan and the design of the [project] remains in flux." (Slip Op. at 29.)

As argued above, however, the fact that "there is no final funding plan" is a reason for *denying* validation, not a reason for granting it. Streets and Highways Code section 2704.08(a), which appeared on the ballot, provides: "Proceeds of [Proposition 1A] bonds ... shall not be used for more than 50 percent of the total cost of construction of each corridor or usable segment thereof," and section 2704.08(c) requires that, prior to any request by the Authority for construction funding, it must issue "a detailed funding plan for that corridor or usable segment thereof" including "[t]he sources of all funds to be invested in the corridor, or usable segment thereof." The State's inability to identify any source(s) for the required matching funds is reason enough for denying validation.

The other reason given by the Court of Appeal for granting validation, without deciding the "premature" contention that these bonds are for an unapproved project, is that "the design of the [project] remains in flux." (Slip Op. at 29.) This statement, however, is more untrue than it is true. While the Court of Appeal "reject[s] the ... contention that Senate Bill No. 1029 and the revised business plan set forth the uses of the bond proceeds" (*id.* at 29, footnote 7), closer examination of the bill, which expressly incorporates the plan, reveals a firm financial commitment to today's project.

Senate Bill 1029 in the 2011-2012 legislative session amended the Budget Act of 2012 by adding appropriations of Proposition 1A bond funds for construction of the high-speed rail system.

Section 1 of the bill appropriated $1.1 billion "for 'Bookend' funding, as articulated in the 2012 High-Speed Rail Authority Final Business Plan," and $713 million specifically for improving the "commuter rail lines and urban rail systems that provide direct connectivity to the high-speed train system ... or that are part of the construction of the high-speed train system." For the northern bookend, the bill mandated that funds shall be expended "consistent with the blended system strategy identified in the April 2012 California High-Speed Rail Program Revised 2012 Business Plan, [and] shall *not* be used to expand the blended system to a dedicated four-track system." In other words, no more talk about different routes other than the Caltrain and Metrolink routes; we're committed to "'Bookend' funding," and here's money to improve those lines for "direct connectivity to the high-speed train system." And no more talk about building dedicated track for high-speed rail to run at high speeds alongside the Caltrain line; we're appropriating these bond funds *only* for the shared slow-track plan, "consistent with the blended system strategy identified in the April 2012 California High-Speed Rail Program Revised 2012 Business Plan." We'll revoke this appropriation if you try to use it for "a dedicated four-track system." Similar language appears in Section 2 of the bill.

Section 3 of the bill appropriated another $1.1 billion "for early improvement projects in the Phase 1 blended system, consistent with the Metropolitan Transportation Commission Memorandum of Understanding, as approved by the High-Speed Rail Authority on April 12, 2012, in High-Speed Rail Authority Resolution 12-11." In other words, this too is for proceeding

with the "blended" system, with its north and south bookends, but this money is for the southern bookend where the State's high-speed trains will slow down and share track with Metrolink commuter trains "consistent with the Metropolitan Transportation Commission Memorandum of Understanding, as approved by the High-Speed Rail Authority."

Section 5 of the bill makes Proposition 1A bond funds payable for "capital outlay" within the bookend regions. A total of $5,135,000 is payable for "San Francisco to San Jose – acquisition," $2,566,000 for "Palmdale to Los Angeles – Acquisition," $4,299,000 for "Los Angeles to Anaheim – Acquisition," and $37,055,000 for "Los Angeles to San Diego – Acquisition." In other words, it commits bond funds to the acquisition of property necessary to turn the bookend plan into reality.

Senate Bill 1029 committed the bonds that are the subject of this validation action to a spending plan that moves decisively beyond what the Opinion, at pages 28 and 29, calls "fluidity" and "flux." The State's plan for spending bond proceeds has reached a point of no return. There is no chance the State will ever go back to a true high-speed system as promised to the voters in Proposition 1A, with its $110 billion price tag.

That being the case, the time to protect taxpayers is now, by denying validation of this bond sale while it is still possible to spare them the cost of repaying $8.6 billion plus issuance and interest costs.

/ / /

CONCLUSION

For the reasons above, this Court should grant review, reverse the decision of the Court of Appeal, and affirm the judgment denying validation.

DATED: September 3, 2014.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.504(d) of the California Rules of Court, that the attached petition, including footnotes, but excluding the caption page, tables, signature block, exhibits, and this certification, as measured by the word count of the computer program used to prepare the brief, contains 6,815 words.

DATED: September 3, 2014.

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