[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 15-71780, 15-72570

STB No. FD 35861

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KINGS COUNTY; KINGS COUNTY FARM BUREAU; CALIFORNIA CITIZENS FOR HIGH-SPEED RAIL ACCOUNTABILITY; COMMUNITY COALITION ON HIGH-SPEED RAIL; CALIFORNIA RAIL FOUNDATION; TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND; and DIGNITY HEALTH

Petitioners

v.

UNITED STATES OF AMERICA AND
SURFACE TRANSPORTATION BOARD

Respondents

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

Intervenor and Respondent

PETITION FOR REVIEW OF FINAL ORDER OF THE UNITED STATES SURFACE TRANSPORTATION BOARD

NOTICE OF ERRATA IN PETITIONERS' OPENING BRIEF

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To the Court and all parties to the above-entitled action:

PLEASE TAKE NOTICE of errata inadvertently included in Petitioners' Opening Brief as filed with the Court and served on the parties.

The errata are as follows:

Following page ii – insert Corporate Disclosure Statement.

Pages vii-x – correct formatting, placement, and duplication errors in Table of Authorities.

Page 1 – add closing parenthesis in footnote 4.

Page 2 – italicize "See" at line 12.

Page 11 – add "d" to evaluate ("evaluated") on line 4 under Standard of Review.

Page 30 – change comma to period at line 20.

Page 37 – insert "D" in footnote 32.

The corrected pages are attached hereto.

Dated: December 9, 2015

Respectfully submitted.

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By /S/ Stuart M. Flashman

CORPORATE DISCLOSURE STATEMENT

On behalf of all of the petitioners in case numbers 15-71780 and 15-72570, there are no parent corporations or publicly held corporations that hold more than 10% of the stock in any of the petitioners.

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FEDERAL CASES#

FEDERAL STATUTES#

FEDERAL CONSTITUTIONAL PROVISIONS#

FEDERAL REGULATIONS

FEDERAL REGULATORY PROCEEDINGS#

CASES - OTHER STATES#

OTHER AUTHORITIES#

CALIFORNIA RULES OF COURT#

FEDERAL COURT RULES#

INTRODUCTION

This is a case of first impression in the federal courts over the reach of preemption under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA").[1] Respondent Federal Surface Transportation Board ("STB") granted a petition filed by Respondent/Intervenor California High-Speed Rail Authority ("CHSRA") declaring that application of the California Environmental Quality Act[2] ("CEQA") to CHSRA's high-speed rail project between Fresno and Bakersfield was preempted. (Decision dated 12/12/2014, 1 Excerpts of Record ["Excerpts"] at 7.) Petitioners have asked for the Court's review of that decision, which they believe is erroneous in multiple ways. Unlike other preemption cases under the ICCTA that have been before this and other federal appellate courts, this case involves the State of California's application of a state environmental law to itself, rather than to a private railroad. It also involves a state law whose focus is not primarily on regulation, but, like the National Environmental Policy Act[3] ("NEPA"), upon which it was patterned,[4] on disclosing information to the public and decision-makers.

While this is the first time this issue has been raised in the federal courts, the exact issue has been addressed in California state court. In *Town of Atherton et al. v. California High-Speed Rail Authority ("Atherton")* 228 Cal. App. 4th 314 (2014), a case from the California Third Appellate District, CHSRA raised

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[1] Public Law 104-88, codified at 49 U. S. C. §10101 *et seq*.

[2] Calif. Public Resources Code § 21000 *et seq*.

[3] Public Law 91-190, 83 Stat. 852 (1969) codified at 42 U. S. C. §4321 *et seq*.

[4] CEQA and other state environmental laws based on NEPA have often been referred to as "Little NEPAs". (See, e.g., Sive & Chertock, *"Little NEPAs" and their Environmental Impact Assessment Procedures* ALI-ABA: Environmental Litigation June 2005 (2005).)

preemption very late in the appellate process, but it was fully briefed (including multiple amicus briefs) and directly addressed in the published decision. In addition, the same issue has also been raised in *Friends of Eel River et al. v. North Coast Rail Auth. et al. ("FOER"*, case #S222472), a case currently being reviewed by the California Supreme Court. That case is now fully briefed, again including multiple amicus briefs,[5] and awaits only oral argument before being decided.

Because of the close relationship between this case and *FOER*, and the importance of considering the interpretation of CEQA under California law, Petitioners request that the Court either stay further action in this case pending the California Supreme Court's decision in *FOER*, or refer this case to the California Supreme Court for its definitive opinion on whether, or the extent to which, CEQA acts as a regulatory statute in the current situation. (*See*, concurrently filed Petitioners' Motion for Stay of Proceedings or, in the Alternative, to Refer Issues Under California Law to California Supreme Court.)

STATEMENT OF JURISDICTION

Petitioners Kings County, Kings County Farm Bureau, California Citizens for High-Speed Rail Accountability, Community Coalition on High-Speed Rail, California Rail Foundation, Transportation Solutions Defense and Education Fund, and Dignity Health ("Petitioners") petition for review of the final order of the Surface Transportation Board under 5 U. S. C. § 554(e) and 49 U. S. C. § 721, asserting that CEQA is entirely preempted as applied to CHSRA's high-speed rail project between Fresno and Bakersfield. That decision, originally made on

[5] The amici include some of the parties herein, the Union Pacific Railroad Company, multiple environmental groups, and several state and regional government agencies.

Francisco to Merced segment of CHSRA's high-speed rail project. (*Atherton,* 228 Cal. App. 4th at 324, 326.) That lawsuit was instrumental in establishing the only published case law on ICCTA preemption of CEQA for a public rail project. These petitioners have an interest in protecting that decision because there are plans for extension of the high-speed rail project through areas where they, or their members, have personal, transportation policy, and environmental interests that would be threatened if CHSRA is not required to comply with CEQA. All of these petitioners would also be directly benefited by requiring enforcement of the information disclosure and mitigation/avoidance requirements of CEQA by CHSRA, and will be harmed through the loss of that benefit if CEQA review is denied due to preemption.

STANDARD OF REVIEW

In this case, there are no disputed factual issues. The primary issue before the Court is determining the proper scope of federal preemption under 49 U. S. C. § 10501 subd. (b), the preemption clause within the ICCTA. A federal agency's interpretation of its governing statute is often evaluated under a standard of reasonableness (*Chevron U. S. A. Inc. v. Natural Res. Def. Council, Inc. ("Chevron")*, 467 U.S. 837, 843 (1984); *Northern Plains Resource Center v. Surface Transportation Bd*. 668 F.3d 1067, 1076 (9th Cir. 2011)). If the statute's language is clear, the unambiguous intent of Congress must be followed. (*Chevron,* 467 U.S. at 842-3.) If the specific issue is not directly addressed, but it appears that Congress intended for the agency to fill any gaps left in the legislation, the agency's construction will be given deference, so long as it is reasonable. (*Id.* at 843-844.)

Such "Chevron deference" is not, however, inevitable. Congress does not always intend that the agency resolve ambiguities in the legislation's language.

its own agency – CHSRA – requiring CHSRA to comply with state environmental laws, including CEQA. Thus, rather than being an external regulatory barrier to a project, CEQA in this case serves as an *internal* control, compelled by the California Legislature, governing the procedure through which CHSRA approves discretionary actions that might significantly affect the environment in carrying out its project. (*See,* Calif. Streets. & Highways Code § 2704.08, subd. (c)(2)(K); Senate Daily Journal, 2011- 2012 Reg. Sess., pp. 4447-4448. *See also*, Pub. Resources Code § 21080, subd. (a).) At CHSRA's request, STB invokes federal preemption as grounds for CHSRA to avoid state law that places conditions on its exercise of discretion. No such relief is available, because CHSRA cannot escape the fact it is an agency of the State of California, subject to the state's self-imposed internal controls; not a private rail carrier.

In short, nothing in the ICCTA purports to intrude upon California's sovereignty, and even the STB itself contemplates further state regulatory activity regarding CHSRA's future decisions and approvals. While the ICCTA may provide for STB jurisdiction over certain aspects relating to the construction and operation of the high speed rail project, any such preemptive authority does not permit the STB to intrude upon the internal controls and limitations the state has placed upon CHSRA, its own agency. Those controls require CHSRA to comply with state environmental laws, including CEQA. STB preemption would unconstitutionally interfere with the State of California's sovereign authority. Accordingly, CHSRA's environmental review obligations under CEQA, and specifically the availability of injunctive relief in CEQA litigation, are not preempted by the ICCTA.[27]

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[27] STB asserts that the public and the environment will be adequately protected under federal environmental laws, such as NEPA. (Decision, 1 Excerpts at 16.) This ignores a key difference between CEQA and NEPA. Under CEQA, CHSRA

promises that CHSRA's made to California voters by voluntarily cooperating in placing Proposition 1A on the ballot. Those promises included that CHSRA would comply with CEQA. (Calif. Streets & Highways Code §§ 2704.04(a), 2704.08(c)(2)(K).)

It is well established under California law that a California bond measure, once placed on the ballot and approved by the voters, acts as a contract, or contract-like agreement between the government and the voters. (*O'Farrell v. County of Sonoma,* 189 Cal. 343, 348-349 (1922); *Mills v. S.F. Bay Area Rapid Transit Dist.,* 261 Cal. App.2d 666, 668 (1968).) As a consequence, in California any taxpayer has the right to seek enforcement of a bond measure's provisions. (*See, e.g., Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist. ("Taxpayers")* 215 Cal. App. 4th 1013 (2013.)

Proposition 1A, while placed on the ballot by the Legislature, was authored in large part, and approved *in toto*, by CHSRA.[32] Because Proposition 1A promised the voters that California's high-speed rail project would comply with CEQA, that provision of the bond measure is enforceable by anyone with standing to enforce the measure, including taxpayers; any of whom have the right to enforce based on the constitutional provisions governing bond measures. (*See, Taxpayers, supra*.) Thus, even if the Court were to find that the market participant exception did not preclude preemption by the ICCTA, Petitioners herein have standing to enforce California's, and CHSRA's, voluntary commitment, through cooperating in placing Proposition 1A on the ballot and in urging its passage, to CEQA compliance for the State's high-speed rail project, so long as the result does not place an unreasonable burden on interstate commerce. Especially given that

[32] The ballot argument in favor of the measure was signed by CHSRA's vice-chair. (See Exhibit D to Petitioners' Request for Judicial Notice.)

Certificate of Service

I hereby certify that I electronically filed the foregoing Notice of Errata in Petitioners' Opening Brief with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on December 9, 2015.

The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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