NOS. 15-71780, 15-72570

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KINGS COUNTY, et al.,

Petitioners,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA,

Respondents,

CALIFORNIA HIGH-SPEED RAIL AUTHORITY,

Intervenor.

DIGNITY HEALTH

Petitioner,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA,

Respondents,

CALIFORNIA HIGH-SPEED RAIL AUTHORITY,

Intervenor.

ON PETITION FOR REVIEW OF FINAL ORDER OF SURFACE TRANSPORTATION BOARD

INTERVENOR'S BRIEF

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JURISDICTIONAL STATEMENT

The California High-Speed Rail Authority (Authority) concurs with the Jurisdictional Statement provided in the Joint Brief filed by Respondents Surface Transportation Board and the United States (Joint Resp'ts' Br.), save for the final sentence regarding the finality of the Board's December 12, 2014, Declaratory Order. Joint Resp'ts' Br. 1-2; Pet'rs' Excerpts of R. (PER) 7-23 (*California High-Speed Rail Auth.—Pet. For Declaratory Order,* FD 35861 (STB served Dec. 12, 2014) 2014 WL 7149612 (Declaratory Order)). The Authority's position is that the Declaratory Order is final and reviewable, as addressed in Section I, *infra*.

ISSUES PRESENTED

The Authority concurs with the recitation of the Issues Presented in the Joint Respondents' Brief.

STATUTES AND REGULATIONS

Except for the following, all applicable material is contained in the Respondents' Addendum:

- U.S. Const. amend. X
- 49 U.S.C. § 10502
- 40 C.F.R. §§ 1502.20, 1508.28
- Cal. Pub. Res. Code, §§ 21093, 21168.9

STATEMENT OF THE CASE

The Authority presents this comprehensive factual and procedural background to ensure a complete set of facts and to clarify and correct certain factual statements presented in the other briefs.

I. THE AUTHORITY, PROGRAMMATIC ENVIRONMENTAL REVIEW, AND EARLY DEVELOPMENT OF THE STATEWIDE HSR SYSTEM

In September 1996, the California Legislature passed the California High-Speed Rail Act, creating the Authority and charging it with preparing a plan for the construction, operation, and financing of a statewide, intercity high-speed rail system. Cal. Pub. Util. Code, §§ 185000-38; *id.*, §§ 185031, 185032.

The high-speed rail system will initially connect San Francisco to Los Angeles via electrically-powered high-speed trains travelling in excess of 200 miles per hour. *California High-Speed Rail Auth. – Constr. Exemption – Merced, Madera, & Fresno Ctys.*, Cal., FD 35724, slip op. at 4, 5 (STB served June 13, 2013) 2013 WL 3053064 (*CHST Jurisdiction Order*). Upon completion, the system will provide Californians with a safe, reliable mode of intercity transportation that will reduce congestion on freeways and at airports and will help meet the state's growing transportation demands. *Id.* at 6, 22-23.

The Authority, in cooperation with the Federal Railroad Administration (FRA), has used a "tiered" environmental review process under the California

Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) to develop the plan for California high-speed rail. *Id*. at 7-8 & n.48. The environmental review process has thus occurred in two distinct stages: program-level review of the high-speed rail system as a whole, followed by multiple project-level reviews of geographically more limited proposed rail line segments. *CHST Jurisdiction Order* 8; *see also id.* at Exhibit C, § 2.1.1 (describing "Tier 1" as examining high-speed rail system as a whole and "Tier 2" as examining nine individual rail line segments that together comprise whole system).

In 2005, the Authority and the FRA completed a joint programmatic environmental impact report/environmental impact statement (EIR/EIS) for the entire statewide HSR system (Statewide Program EIR/EIS), selecting the high-speed rail alternative over an alternative of expanding airports and freeways, and selecting preferred rail corridors and station locations for most of the state to study further in project-level EIR/EISs. *Id.* at 8. The Authority and FRA then completed a second programmatic EIR/EIS in 2008 focused on the high-speed rail connection between the San Francisco Bay Area and the Central Valley (Bay Area/Central Valley Program EIR/EIS), selecting preferred rail corridors and station locations in this area for further study in project-level EIR/EISs. *Id.* at 8 & n.49.

As a result of a CEQA lawsuit challenging the 2008 Bay Area/Central Valley Program EIR/EIS, the Authority circulated a Revised Bay Area/Central

Valley Program EIR in 2010. *Id.* at 8 & n.49. Two legal challenges to the 2010 revised program EIR eventually resulted in a decision in *Town of Atherton v. California High-Speed Rail Authority*, 228 Cal. App. 4th 314 (2014) [hereinafter *Atherton*] upholding the challenged CEQA analysis, but also holding that 49 U.S.C. section 10501(b) did not preempt CEQA remedies in the context of the program EIR due to the market participant doctrine. The Authority also completed a Partially Revised Final Program EIR in 2012, which concluded its programmatic environmental review. *CHST Jurisdiction Order* at 8, & n.49.

California has leveraged several sources to fund construction of the high-speed rail system. In November 2008, California voters passed a statewide ballot measure, Proposition 1A, that provides for $9 billion in general obligation bonds to partially fund construction of the system. *Id.* at 3. Of this sum, the Legislature appropriated approximately $2 billion for construction between Merced and Bakersfield. *Id.* The Authority competed for federal grants and received over $3 billion in federal funds, primarily for the initial construction between north of Fresno and Bakersfield. *Id.* at 4. The Legislature also allocated funds from the State's greenhouse gas emissions reduction fund to further support rail line construction. Cal. Health & Safety Code, §§ 39719(b)(2), 39719.1.

II. PROJECT-LEVEL ENVIRONMENTAL REVIEW, BOARD JURISDICTION, AND BOARD APPROVAL TO CONSTRUCT THE MERCED/FRESNO SEGMENT AND THE FRESNO/BAKERSFIELD SEGMENT

The Authority and FRA continued the tiered environmental process by completing a detailed project-level EIR/EIS for the rail line segment between Merced and Fresno in 2012, and making specific decisions about what rail line and stations to build. *CHST Jurisdiction Order* 8. After completing that process and because of questions as to whether the Board had jurisdiction, the Authority filed, under 49 U.S.C. section 10502, a petition for exemption from the prior approval requirements in 49 U.S.C. section 10901 seeking Board approval for construction of the Merced/Fresno rail line construction project.[1] *Id*. The Authority also filed a motion to dismiss with the Board, asserting the Board had no jurisdiction over the Merced/Fresno segment. *Id.* at 1-2, 11. *Id.* In June of 2013, the Board denied the motion to dismiss and concluded it had jurisdiction over the Merced/Fresno rail line construction project, as well as any subsequent rail line construction for the statewide system, because the high-speed rail system's connectivity with Amtrak makes it part of the interstate rail network. *Id.* at 11-15. The Board's June 2013

[1] The Board has licensing authority over rail line construction projects pursuant to 49 U.S.C. section 10901. The Board authorizes rail line construction projects either through an application process pursuant to section 10901, or through an exemption process under 49 U.S.C. section 10502, which exempts the project from having to comply with the more lengthy procedures of section 10901.

decision authorized construction of the Merced/Fresno rail line segment pursuant to 49 U.S.C. section 10502. *Id.* at 27-28. The Board received no challenge to its Merced/Fresno decision authorizing the rail line construction, and it is not being challenged in this proceeding.

The Authority and FRA completed a project-level EIR/EIS for the Fresno/Bakersfield rail line segment in April 2014, with the Board serving as a NEPA cooperating agency. *California High-Speed Rail Auth. – Constr. Exemption – Fresno, Kings, Tulare, & Kern Ctys.*, Cal., FD 35724, slip op. at 5-7 (STB served August 12, 2014) 2014 WL 3973120 (*Fresno/Bakersfield Order*). The Authority and FRA each made decisions about the specific railroad line and stations in this segment in May 2014 and June 2014, respectively. SER 4 (Authority decision); *Fresno/Bakersfield Order* 6-7 (FRA decision).

In June 2014, however, seven state court CEQA lawsuits were filed against the Authority challenging its Fresno/Bakersfield rail line segment EIR and construction project approvals. SER 4 & n.2. The CEQA lawsuits plead for preliminary and permanent injunctive relief in the form of a court order precluding the Authority from constructing the Fresno/Bakersfield rail line segment unless and until the Authority completes additional review under CEQA. SER 4.

In August 2014, while the state CEQA lawsuits were pending, the Board complied with NEPA and granted the Authority's petition for exemption from the

prior approval requirements of 49 U.S.C. section 10901 for construction of the Fresno/Bakersfield line. *Fresno/Bakersfield Order* 20-21. The Board received no challenge to its decision authorizing the Fresno/Bakersfield rail line construction project. Joint Resp'ts' Br. 10. The decision is therefore final and not subject to challenge in this current proceeding, but it is nevertheless relevant here because the state CEQA lawsuits are a de facto collateral attack on this Board decision.

III. THE DECLARATORY ORDER PROCEEDING

With Board permission to construct in hand, and with $ 3.49 billion in federal funding ($ 2.55 billion of which is time-limited stimulus funding[2]), matched with state funds, the Authority commenced work on the first portion of the high-speed rail system in the Central Valley between Merced and Fresno. *Fresno/Bakersfield Order* 4; SER 5.

The Authority was faced with significant uncertainty about commencing construction of the Fresno/Bakersfield rail line, however, because although the Board had authorized that construction, the state CEQA lawsuits were seeking to prevent or significantly delay that construction. SER 2, 10. To resolve this uncertainty, the Authority filed a Petition for Declaratory Order (Petition) with the Board in October 2014, asking the Board to determine whether the CEQA lawsuits

[2] The portion of federal funds authorized by the American Recovery and Reinvestment Act of 2009 (ARRA) are time limited in that the Authority must spend the funds by September 30, 2017. 31 U.S.C. § 1552(a).

could result in a court order stopping Board-authorized construction of the Fresno/Bakersfield rail line, or whether section 10501(b) preempted CEQA injunctive remedies here. SER 2. In its Petition, the Authority explained that in other contexts, section 10501(b) had been held to preempt state-law remedies including CEQA, even in the context of public rail agencies. SER 6-9. It also explained that the *Atherton* decision did not apply to the distinguishable facts at issue for the Fresno/Bakersfield rail line construction and the project-level EIR.[3] SER 12-15. Further, the Authority explained that another California court of appeal had issued a published decision in *Friends of the Eel River v. North Coast Railroad Authority*, prev. pub. at 230 Cal. App. 4th 85 (2014), review granted 339 P.3d 329 [hereinafter *Friends of the Eel River*] disagreeing with the application in *Atherton* of the "market participant doctrine" as an exception to section 10501(b) preemption of CEQA in the context of a public agency railroad undertaking Board-authorized actions. SER 15-16. The Board opened a proceeding and received numerous responses to the Petition. PER 9 n.4-6; *id.* at 10 n.8.

On December 10, 2014, the California Supreme Court granted review of *Friends of the Eel River*. PER 10 n.7. On December 12, 2014, the Board issued

[3] Respondents mistakenly state that the Authority, in its Petition, characterized *Atherton* as holding that CEQA applied to the Fresno/Bakersfield rail line. Joint Resp'ts' Br. 10-11. The statement is incorrect. The Authority's Petition explained that *Atherton* was about the Bay Area/Central Valley Program EIR, not the project-level EIR for the Fresno/Bakersfield line. SER 12-13.

the Declaratory Order being challenged in this case. PER 7-23. As set forth in the Declaratory Order, the Board concluded that CEQA is preempted by § 10501(b) in connection with the Fresno/Bakersfield rail line construction. PER 16.

The Authority filed the Board's Declaratory Order with the trial court in each of the pending CEQA lawsuits on the Fresno/Bakersfield rail line segment on December 23, 2014. Intervenor's Motion for Judicial Notice (Motion for Judicial Notice), Exs. A, D.

Petitioners and another party filed petitions for reconsideration with the Board on December 29 and 30, 2014, and petitioners filed a motion for stay of the Declaratory Order on February 19, 2015. PER 1-2. On May 5, 2015, the Board declined to grant reconsideration or a stay. PER 1, 3.

While these motions before the Board were pending, on February 19, 2015, the Authority moved for a stay of the state trial court proceedings in each of the CEQA cases on the Fresno/Bakersfield rail line segment. Motion for Judicial Notice, Exs. B, E. The Authority's stay motion explained that based on the Board's Declaratory Order, the Authority would normally move for dismissal of the CEQA claims on preemption grounds, but instead sought a stay in light of the California Supreme Court granting review in *Friends of the Eel River* *Id*. at 1, 3, 6. The trial court granted the stay motions on March 27, 2015, and entered the stay

orders in each case on May 15, 2015. Motion for Judicial Notice, Exs. C, F. The cases remain pending, but stayed.

IV. PROCEEDINGS ON APPEAL

Petitioners Kings County, et al., sought review of the Declaratory Order in this Court on June 11, 2015. Petitioner Dignity Health sought review in the Court of Appeal for the District of Columbia Circuit on June 30, 2015. The Board filed an unopposed motion to consolidate the cases in this Court. The Court ordered the cases consolidated on September 2, 2015. Petitioners filed an opening brief on December 7, 2015, along with a Motion for Stay or Referral to the California Supreme Court. The Board and the Authority opposed the motion. That motion remains pending. On December 28, 2015, proposed amicus curiae Center for Biological Diversity (CBD) moved for leave to file an amicus curiae brief, and for an oversized amicus curiae brief. The Board and the Authority opposed the motion as stated in their filings. The motion remains pending. The Board and the United States filed a Joint Answer Brief on March 23, 2016.

SUMMARY OF ARGUMENT

The Authority is uniquely positioned to address the reviewability of the Declaratory Order: it petitioned for the Declaratory Order, and the Order has had direct and immediate legal consequences on the Authority's decisions about

Fresno/Bakersfield rail line construction. For this reason, the Declaratory Order is final and reviewable by this Court.

As the public agency charged with constructing California's high-speed rail system, the Authority is operating in a complex regulatory landscape that requires it to conform to a uniform federal regulatory scheme, while also satisfying the edicts of applicable state law. The Authority petitioned for the Declaratory Order to determine the viability of the CEQA remedies being sought against it in the state court lawsuits because it perceived a conflict between the Board's grant of authority to construct the Fresno/Bakersfield rail line segment and the injunctive remedies that would block that construction. The Declaratory Order provided clear direction that has allowed the Authority to determine how to proceed with its construction of the Fresno/Bakersfield line; it thus has legal consequences.

The Authority acknowledges that *Atherton* offers some guidance on this federal-state regulatory interplay at the programmatic level of environmental review for general decisions about whether to pursue the high-speed rail system as a whole, and if so generally where. But the decisions at hand in *Atherton* were far in advance of construction, and not about project-level environmental review for the specific Fresno/Bakersfield rail line segment construction project the Board authorized, and that is the subject of the Declaratory Order. *Atherton* concerned a fundamentally different factual setting – one in which no construction

authorization had been (or could be) issued by the Board, and in which the Board had not issued a declaratory order on federal preemption. *Atherton* thus has no collateral estoppel effect that would render the Declaratory Order unreviewable, and does not control the outcome here on the merits of the challenge to the Declaratory Order.

The Court can and should reach the preemption issue in this case. But the issue is an exceedingly narrow one: whether section 10501(b) preempts CEQA in the context of a state agency building a railroad line that is subject to the Board's exclusive jurisdiction and that the Board has expressly authorized the state agency to build. On the merits, and solely with respect to those narrow circumstances, the Court should uphold the Declaratory Order. The plain language of section 10501(b) is sufficient to compel this conclusion here, and because it reflects the Board's persuasive analysis of preemption in the context of the uniform federal regulatory scheme for rail line construction projects – an area squarely within the agency's expertise – the Declaratory Order is also entitled to considerable weight under *Skidmore v. Swift*, 323 U.S. 134 (1944).

Petitioners' sovereignty arguments do not undermine the Board's interpretation of section 10501(b) preemption. The high-speed rail system is the state's attempt to introduce a new mode of transport for its citizens. California's choice to embark upon construction of this project that is part of the interstate rail

system is subject to certain external constraints, including uniform federal oversight over rail line construction and operations. But the state retains its ability to make important sovereign choices with regard to the high-speed rail system; Petitioners cannot show that section 10501(b) preemption as set forth in the Declaratory Order violates the Tenth Amendment or otherwise impermissibly intrudes on California's sovereignty.

Petitioners' market participant doctrine arguments likewise do not undermine the Board's interpretation of section 10501(b) preemption in this context, which involves a rail line construction project for which the Board has exclusive licensing jurisdiction. And the "voluntary agreement" argument is misplaced because the Declaratory Order neither interprets nor seeks to affect how California funds the high-speed rail system.

The Authority respectfully requests that the Court uphold the Board's Declaratory Order and its finding of section 10501(b) preemption on the specific and narrow circumstances of this case.

ARGUMENT

I. THE COURT HAS JURISDICTION TO REVIEW THE BOARD'S DECLARATORY ORDER BECAUSE IT HAS LEGAL CONSEQUENCES.

The initial issue is whether the Court has jurisdiction to review the challenged Declaratory Order. Petitioners claim the Court has jurisdiction pursuant to 5

U.S.C. section 554(e) and 49 U.S.C. section 721[4] to review the Board's final orders. Pet'rs' Br. 2-3. Proposed amicus curiae CBD, on the other hand, contends the Declaratory Order in this case is an unreviewable advisory opinion. CBD Br. 29-33. The Board appears to take a middle ground, conceding that the Court *could* (but not necessarily should) find this particular Declaratory Order not reviewable because it was intended only to guide the state courts in pending litigation. Joint Resp'ts' Br. 20, 22. The Authority agrees with Petitioners' view that the Declaratory Order is final and reviewable. Legal consequences flow from the order, because notwithstanding any limiting language or its advisory nature, the clarity in the Declaratory Order about preemption has allowed the Authority to determine how to proceed with its construction of the Fresno/Bakersfield line.

A. The Board's Order Meets the Finality Test in *Bennett v. Spear* Because It Has Legal Consequences.

CBD argues the Declaratory Order is not a final order under the Hobbs Act because it is "nothing more than an advisory opinion intended to second-guess a final state court judgment." CBD Br. 29. The critical question for finality under the Hobbs Act is not the label on the order or the intent behind it, but whether the order: (1) "mark[s] the 'consummation' of the agency's decisionmaking process" and (2) is "one by which 'rights or obligations have been determined' or from

[4] This section is now codified at 49 U.S.C. section 1321.

which 'legal consequences will flow'." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations and quotation marks omitted); see also *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006) (discussing *Bennett* finality test); *US West Comm'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1054-1055 (9th Cir. 2000) (applying *Bennett* finality test to review under the Hobbs Act). While CBD contends the Declaratory Order fails to meet the second part of the *Bennett* finality test, CBD's cursory interpretation of "legal consequence" is flawed.

"Legal consequences will flow" from an agency action when it "has a 'direct and immediate . . . effect on the day-to-day business' of the subject party." *Oregon Natural Desert Assn.*, 465 F.3d at 987 (citing *Ukiah Valley Med. Ctr. v. FCC*, 911 F.2d 261, 264 (9th Cir. 1990)). Courts consider "whether the [action] has the status of law or comparable legal force, and whether immediate compliance with its terms is expected." *Id.*, internal quotation omitted. In the context of interpretative orders, an order will have legal consequences if it "touches vital interests" and "sets the standard" for how particular business will be done. *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399 (9th Cir. 1996) (applying *Frozen Food* test for legal consequences in context of FCC Order).

The Board's Declaratory Order here has legal consequences for the Authority in at least three respects. First, the order "touches the Authority's vital

interests" by determining the viability of a section 10501(b) preemption defense to pending state court CEQA claims that collaterally attack the Board's construction authorization for the Fresno/Bakersfield line. *Wilson*, 87 F.3d at 399 (FCC declaratory ruling was final and reviewable where it determined viability of pending federal and state law claims in separate district court suit). The California court of appeal in *Atherton* emphasized the importance (and absence there) of a "formal declaratory order from the STB" to judicial resolution of section 10501(b) preemption questions and the Board's unique qualifications to determine the scope of its jurisdiction. *Atherton*, 228 Cal. App. 4th at 332 n.4. The Authority filed the Board's Declaratory Order with the trial court in each of the remaining five state CEQA lawsuits to aid in the court's assessment of the scope of its jurisdiction to entertain the CEQA claims.[5] Motion for Judicial Notice, Exs. A, D. The Board's interpretation of preemption may not be binding on the state trial court; however, the Board's views merit weight and this weight results in a legal consequence in

[5] The Authority did not seek a stay of the state trial court proceedings when it petitioned for the Declaratory Order. Upon receiving the Board's order, the Authority was positioned to move to dismiss these cases on preemption grounds. Instead, the Authority sought a stay of the trial court proceedings because the California Supreme Court granted review of *Friends of the Eel River* just two days before the Board issued its declaratory order. PER 10 n.4. The Authority's stay motion described the Board's preemption conclusions in the Declaratory Order, but also recognized the potential importance of the California Supreme Court's decision in *Friends of the Eel River* to how the trial court would address the preemption issue. Motion for Judicial Notice, Exs. B, E.

that the state court might reach a different view than if it was free to consider the issue "on a blank slate." Cf. *Ciba-Geigy v. U.S. EPA*, 801 F. 2d 430, 437 (D.C. Cir. 1986) (citing *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 697 (D.C. Cir. 1971)); *see infra* § III.A (discussing weight to accord Board decision).

Second, the Declaratory Order has had an "immediate and practical impact" on the Authority's "day-to-day business" related to construction of the Fresno/Bakersfield rail line. *Frozen Food Express*, 351 U.S. at 43-44 (ICC order was reviewable where it had "immediate and practical impact on carriers"); *West Coast Truck Lines, Inc. v. American Indus., Inc.*, 893 F.2d 229, 233 (9th Cir. 1990) (ICC order was reviewable when it had "a 'direct and immediate . . . effect on the day-to-day business' of the parties" (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980))). The Authority sought the Declaratory Order in 2014 because of the considerable uncertainty over whether the petitioners in the state CEQA lawsuits could use their state-law claims to halt Board-authorized railroad line construction. PER 8, 11; SER 5 & n.5. An injunction halting construction not only would put the Authority's time-limited federal funds at risk of loss, it also would risk cost inflation and delay damages under the Authority's executed design/build construction contract. PER 7 (uncertainty regarding preemption could impact Authority's ability to proceed with construction); *id.* at 8, 11; SER 5 & n.5.

The Declaratory Order removed the uncertainty and facilitated the Authority's ability to proceed with the Fresno/Bakersfield railroad line construction the Board authorized (and that no one challenged via Hobbs Act review), armed with a shield to the interference, delay, and cost associated with work stoppage. *Frozen Food Express*, 351 U.S. at 43-44; *West Coast Truck Lines, Inc.*, 893 F.2d at 233.

Third, while the Declaratory Order is focused solely on construction of the Fresno/Bakersfield railroad line, it also "sets the standard" for availability of CEQA remedies for similarly situated future Authority rail line segment construction projects the Board may authorize. *Frozen Food Express*, 351 U.S. at 44-45; *Wilson*, 87 F.3d at 399. The order is neither tentative nor ambiguous about the preemptive scope of section 10501(b) for a Board-approved rail line construction project, and suggests that if the Board were presented with the same facts and circumstances, the same preemption analysis would result. *Central Freight Lines v. ICC.*, 899 F.2d 413, 417-418 (5th Cir. 1990) (ICC order was reviewable because it removed uncertainty and settled rights by allowing party to rely on ICC certificate as authorization for its actions so long as facts remained as presented to ICC). These tangible legal consequences of the Declaratory Order demonstrate its reviewability.

Having failed to participate in the Declaratory Order proceeding, it is unsurprising that CBD has failed to grapple with the above facts reflected in the

Authority's Petition for Declaratory Order. CBD instead cites *Coalition for a Healthy California v. FCC*, 87 F.3d 383, 386 (9th Cir. 1996), but the case is distinguishable. In *Coalition for a Healthy California*, the FCC declined to issue a declaratory order with a general interpretation of whether section 315 of the Communications Act mandated the "fairness doctrine." *Id.* at 385. The FCC's decision declining to issue a declaratory order was not reviewable because it involved no resolution of the merits of a specific dispute. *Id.* at 386. Here, by contrast, the Board's Declaratory Order resolved a specific dispute between adverse parties over the availability of state law remedies sought by certain petitioners. PER 11.

CBD also cites *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593-594 (9th Cir. 2008), but that case is distinguishable as well. *Fairbanks* involved a non-reviewable "jurisdictional determination" that did not have legal consequence because it did not alter any rights or obligations or have "the status of law or comparable legal force." *Id.* at 594 (citation omitted). If an interested party asks the Board or a court to halt Fresno/Bakersfield railroad line construction based on alleged non-compliance with CEQA, the Board has offered its legal conclusion in a manner that has "legal force." *Id.*

Moreover, even orders that an agency labels as an "advisory opinion" will constitute final agency action for purpose of review, "where they 'constitute[] final

and authoritative statements of position by the agencies to which Congress ha[s] entrusted the full task of administering and interpreting the underlying statutes.'" *Unity08 v. Federal Election Comm'n*, 596 F.3d 861, 865 (D.C. Cir. 2010) (citing *Am. Federation of Gov't Employees, AFL-CIO v. O'Connor*, 747 F.3d 748, 753 n.10 (D.C. Cir. 1984)). The Board's Declaratory Order is precisely this type of final and authoritative statement to resolve a controversy over whether litigants can collaterally attack the Fresno/Bakersfield rail line construction authority by filing a CEQA lawsuit in state court and obtaining an injunction. PER, at 15-16. It is reviewable based on its legal consequences. See *West Coast Truck Lines*, 893 F.2d at 233-234 (ICC declaratory order on rate reasonableness obtained by party to pending district court litigation resolved actual controversy and was reviewable only through timely appeal under Hobbs Act).

B. Board Declaratory Orders Interpreting The Scope of Preemption Under Section 10501(b) For Specific Rail Projects Are Generally Final And Reviewable.

CBD further argues that the Declaratory Order is not reviewable because the Board lacks the authority and competence to opine on the preemptive scope of section 10501(b). CBD Br. 31-33. This is not so. Numerous decisions demonstrate that Board declaratory orders interpreting the scope of preemption under section 10501(b) are reviewable under the Hobbs Act. Joint Resp'ts' Brief 17-18 and 22-23; see *City of Auburn v. United States*, 154 F.3d 1025, 1027-1029

(9th Cir. 1998) (reviewing two declaratory orders on preemption); *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141, 1143 (8th Cir. 2015) (reviewing declaratory order on preemption of pending state-law claims against railroad); *Padgett v. Surface Transp. Bd.*, 804 F.3d 103, 107 (1st Cir. 2015) (reviewing declaratory order on preemption of state and local law claims intended to prevent construction of rail transloading facility); *Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 116 (1st Cir. 2015) (reviewing declaratory order on whether section 10501(b) preempted state and local regulation of transloading facility); *New York & Atlantic Railway Co. v. Surface Transp. Bd.*, 635 F.3d 66, 68 (2d Cir. 2011) (reviewing declaratory order that transloading facility was not rail transportation and thus there was no federal preemption of state and local regulation).

City of Auburn in particular supports the reviewability of the Board's Declaratory Order in this case. In *City of Auburn*, this Court reviewed two Board declaratory orders that are very similar to the one challenged here. The declaratory orders on preemption in that case addressed whether section 10501(b) preempted local permit requirements and related environmental review on a railroad rehabilitation project subject to the Board's exclusive jurisdiction, and which the Board had approved. 154 F.3d at 1027-1029. The Declaratory Order challenged in this case is identical in key respects because it addresses whether section 10501(b) preempts CEQA here, on a rail line construction project subject to the

Board's exclusive jurisdiction, and which the Board has expressly approved. PER 15-16. *City of Auburn* plainly supports the reviewability of the Board's Declaratory Order here.

C. The Fact-Specific, Limiting Language In The Declaratory Order In This Case Does Not Render It Unreviewable.

Finally, the Board suggests the Court *could* find the Declaratory Order is not final and reviewable because it contains specific "limiting 'advisory' language" that distinguishes it from other declaratory orders. Joint Resp'ts' Br. 20-23. The Board explains that it was cognizant that certain parties to the Declaratory Order proceeding claimed that the Authority was collaterally estopped from raising preemption under section 10501(b) based on *Atherton*. *Id.* at 20-21. The Board characterizes its order as deliberately side-stepping resolving the merits of the collateral estoppel issue by being only advisory. *Id.* at 21. Yet, the Declaratory Order was much broader than the discussion of *Atherton* and *Friends of the Eel River* intended to advise the California Supreme Court. PER 14-18. Thus, simply because the Board labels its decision as advisory does not make it non-reviewable. See *West Coast Truck Lines*, 893 F.2d at 233 (ICC declaratory order was reviewable, rather than a mere advisory opinion "not intended to have any legal effect"); *Isbrandtsen Co. v. United States*, 211 F.2d 51, 55 (D.C. Cir. 1954) (finality of agency action depends on legal consequences, not label given by agency). Federal agencies may contend their administrative decisions lack finality

and cannot be reviewed, but courts find jurisdiction based on the legal effect of the decision, regardless of the agency's intention. See *Oregon Natural Desert Ass'n*, 465 F.3d at 990 (disagreeing with Forest Service argument that annual grazing instruction was not final and reviewable agency action). Simply because the Board declined to address the collateral estoppel issue does not render its federal preemption decision non-final.

Moreover, the fact that the Declaratory Order was intended to advise a state court of the Board's interpretation of section 10501(b)'s preemptive scope does not undermine the order's reviewability. Joint Resp'ts' Br. 21 (citing PER 10 n. 7, 11-13). Hobbs Act review applies to interpretive orders, provided that those orders have legal consequences. *US West Comm'ns, Inc.,* 224 F.3d at 1055. The Authority's purpose in seeking the Declaratory Order was to provide it to the state trial court handling the CEQA lawsuits so the trial court could benefit from the Board's views on section 10501(b) preemption in the specific context of the Board-approved Fresno/Bakersfield rail line construction project. SER 16. Yet, this situation is essentially identical to other declaratory orders the Board has issued while state court litigation was pending, which offered the Board's views on section 10501(b) preemption in the context of pending state-law claims, and which courts reviewed. *Tubbs*, 812 F.3d at 1143 (Board declaratory order on scope of section 10501(b) preemption that was issued while state court tort claims stayed

was final and reviewable under 28 U.S.C. §§2321, 2342(5)); *Padgett*, 804 F.3d at 106 (Board declaratory order on scope of section 10501(b) preemption that was issued while state court litigation stayed was final and reviewable under 28 U.S.C. § 2342). [6]

II. *ATHERTON* HAS NO PRECLUSIVE EFFECT ON THIS CASE AND DOES NOT DICTATE THE OUTCOME ON THE MERITS.

While the Board's order is final and reviewable on its merits, it is also necessary to address whether the Authority is collaterally estopped from raising the preemption defense in light of the appellate decision in *Atherton*. Petitioners claim *Atherton* resolved the preemption issue against the Authority and the Board improperly ignored this in its Declaratory Order. Pet'rs' Br. 1, 32. CBD argues the Board was required to, and this Court should, apply collateral estoppel based on the preemption holding in *Atherton*. CBD Br. 27-29. These arguments fail to establish the prerequisites to collateral estoppel under California law because they

[6] CBD characterizes the Declaratory Order as a mere "informal statement" of the Board's views that is unrelated to any agency proceeding, rendering it unreviewable. CBD Br. 24, 25, 29. The Board has amply explained why the Board's declaratory order proceedings are properly interpreted as agency proceedings on a record that are reviewable. Joint Resp'ts' Br. 18-19; *Wilson*, 87 F.3d at 397. The Declaratory Order here is analogous to the "formal orders" reviewed in *City of Auburn*, rather than the "informal opinion" described in *City of Auburn* that the Board issued without a proceeding. 154 F.3d at 1028.

mischaracterize *Atherton*, which involved a fundamentally different preemption issue than this case.

A. The Preemption Issue Decided In *Atherton* Is Not Identical To The Preemption Issue In This Case.

A fatal flaw to CBD's issue preclusion argument is that the preemption issue in this case is not identical to the one the Authority litigated and lost in *Atherton.* CBD Brief at 29. Federal courts follow state law to determine whether a prior state court judgment has a preclusive effect in a later case. *Palomar Mobilehome Park Ass'n v. City of San Marcos,* 989 F.2d 362, 364 (9th Cir. 1993). Issue preclusion in California will attach only where the issue one seeks to preclude from relitigation is *identical* to that decided in the prior proceeding. *Lucido v. Superior Court,* 51 Cal. 3d 335, 341 (1990).[7] "The identical issue requirement addresses whether identical factual allegations are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." *Id.* at 342 (internal quotation omitted). Collateral estoppel, therefore, does not apply where facts have materially changed or new facts have occurred which did not exist at the time of

[7] In California, five factors must be met for issue preclusion to apply: (1) the issue a person seeks to relitigate must be identical to that decided in the former proceeding; (2) it must have been actually litigated in the former proceeding; (3) it must have been necessarily decided in the former proceeding; (4) the decision must have been final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party in the former proceeding. *Lucido,* 51 Cal. 3d at 341.

the prior judgment. *Union Pac. R.R. v. Santa Fe Pac. Pipeline*, 231 Cal. App. 4th 134, 179-185 (2014) (no issue preclusion where facts and circumstances changed as to rental value of easements between two cases); *U. S. Golf Ass'n v. Arroyo Software Corp.,* 69 Cal. App. 4th 607, 616 (1999).

The party asserting collateral estoppel bears the burden of establishing each of the requirements. *Lucido*, 51 Cal. 3d at 341. Because offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use, courts scrutinize offensive collateral estoppel more closely. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329 (1979). And where there is doubt about applying issue preclusion, it does not apply. *Flynn v. Gorton*, 207 Cal. App. 3d 1550, 1554 (1989); *see also Eichler Homes, Inc. v. Anderson*, 9 Cal. App. 3d 224, 234 (1970).

The preemption issue here is not based on "identical factual allegations" as in *Atherton* because the material facts and circumstances are significantly different. *Lucido*, 51 Cal. 3d at 342. *Atherton* assumed, but never decided, whether section 10501(b) preempted CEQA remedies in a state court challenge to a program EIR, a broad planning and environmental analysis document the Authority prepared pursuant to CEQA's tiering rules. *Atherton,* 228 Cal. App. 4th at 331-332; 342-344; Cal. Pub. Res. Code, § 21093; see also 40 C.F.R. §§ 1502.20, 1508.28 (NEPA tiering rules). The Authority used the program EIR to inform its decisions about where to engage in further *study* of future specific rail line segments in project-

level EIRs, but it did not rely (and could not have relied) on the program EIR to decide precisely where to *construct* a particular line of railroad. The Authority's decisions about what rail lines to construct were simply not ripe at the program level. *See In re Bay-Delta Programmatic Environmental Impact Report*, 43 Cal. 4th 1143, 1169-1174 (2008) (explaining CEQA tiering as focusing program EIR on broad planning-level decisions ripe for review); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800-801 (9th Circ. 2003) (same in context of NEPA tiering and program EIS). The program EIR also did not provide an independent basis for the Authority to seek permission from the Board to *construct* any rail line, and consequently the Authority did not seek Board construction authority for specific rail lines until years later. The *Atherton* court therefore never had occasion to address section 10501(b) preemption in a fact setting where CEQA remedies could directly interfere with *construction* the Authority has decided to undertake *and that the Board has in fact authorized*. [8]

In marked contrast to *Atherton*, this case involves section 10501(b) preemption in a distinct fact setting that involves a project-level EIR, an Authority

[8] The Board's statement that the Authority represented that *Atherton* addressed the Fresno/Bakersfield rail line construction project is mistaken. Joint Resp'ts' Br. 10-11. The Petition unequivocally explains that *Atherton* involved preemption analysis as to the Authority's Bay Area/Central Valley Program EIR and general decision for the route to study further, but did not involve a rail line construction decision. SER 12-16.

decision to construct a specific segment of rail line, and Board authorization to construct that segment of rail line. In May of 2014, the Authority certified a *project-level* EIR/EIS for its compliance with CEQA and relied on its detailed environmental analysis to support its decision to construct a specific railroad line between Fresno and Bakersfield. SER 4. Then, using its project-level EIR/EIS as a guide and a basis for its decision to move forward with the construction, the Authority applied to the Board for authority to construct its selected Fresno/Bakersfield rail line. SER 4; PER 7-8. The Board relied upon the project-level EIR/EIS to comply with NEPA and authorized construction of the Fresno/Bakersfield railroad line. *Fresno/Bakersfield Order* 1-2, 5-7; PER 7-8. These facts are materially different than in *Atherton,* so collateral estoppel simply does not apply. *Union Pac. R.R.,* 231 Cal. App. 4th at 179 (collateral estoppel not intended to prevent a re-examination of the same question between the same parties where facts have "materially changed or new facts have occurred which have altered the legal rights or relations of the litigants"); *Hartenstine v. Superior Court*, 196 Cal. App. 3d 206, 216 (1987) (no issue preclusion where preemption affirmative defense in first case directed at different claim than presented in second case).

B. *Atherton* Is Expressly Limited To The Issues Presented In That Case And Endorses A Declaratory Order Proceeding Before the Board To Address Preemption.

The *Atherton* decision itself provides a further basis to reject CBD's collateral estoppel argument because *Atherton* expressly limited its holding to the legal and factual issues in that case. "As we will explain, we need not decide the broader question of federal preemption because we find *the specific circumstances of this case* establish an exception to federal preemption under the market participant doctrine." *Atherton,* 228 Cal. App. 4th at 323 (emphasis added). Further, "[t]he Authority argues 'on the limited issues before the Court in this appeal, the ICCTA preempts any CEQA remedy.' We assume based on this argument that the Authority's preemption claim is *limited to the issues in this particular case*." *Id.* at 327, n.2 (emphasis added).

Furthermore, *Atherton* expressly recognized that the appropriate mechanism to resolve questions regarding ICCTA preemption of state law would be a request to the Board. *Id.* at 332 n.4 ("A request to the STB for a declaratory order of preemption would be the remedy for the Authority's claim of federal preemption, just as it was in *City of Auburn*."). *Atherton* thus endorsed the very step the Authority took here to obtain the Declaratory Order regarding section 10501(b) preemption for the Fresno/Bakersfield rail line construction project. *Atherton's* self-limiting language and endorsement of a Board declaratory order proceeding

establishes that it has no preclusive effect. The Board committed no error in declining to give the *Atherton* preemption holding preclusive effect in the Declaratory Order and neither CBD nor Petitioners have met their burden of establishing that collateral estoppel applies here.

C. The Public Interest Exception to Collateral Estoppel Applies.

Finally, even if this Court were to find the preemption issue litigated in *Atherton* identical to that presented in this case - and it certainly is not - a well-recognized exception to collateral estoppel applies. The California Supreme Court has expressly recognized a "public-interest exception" that applies even where "formal prerequisites for collateral estoppel are present." *City of Sacramento v. State of California*, 50 Cal. 3d 51, 64 (1990). "[W]hen the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed." *Id*. (internal quotation omitted); *Louis Stores, Inc. v. Dept. of Alcoholic Beverage Ctrl.*, 57 Cal. 2d 749, 757-758 (1962) (collateral estoppel is weaker as to questions of law than fact); *Jones v. Bates*, 127 F.3d 839, 850 (9th Cir. 1997) (applying California's public interest exception to collateral estoppel where "warranted by the overwhelming public importance of the issues involved.").

The narrow question here of whether section 10501(b) preempts CEQA for the Fresno/Bakersfield rail line construction project, or whether the market

participant doctrine provides an exception to that preemption, constitutes a pure question of law and one of significant public interest. While there is a strong public interest in CEQA enforcement generally, there is an equally strong public interest in favor of preemption in this case. California has obtained more than $ 3 billion in federal grant funding which is supporting Fresno/Bakersfield rail line construction now. SER 5. A substantial portion of these federal funds are time limited and will be lost if not expended by September 2017. *Id.* An injunction that halts or delays the construction thus not only risks the loss of significant federal funds to the state, it harms this landmark state transportation project, an important component of the state's strategy to reduce greenhouse gas emissions. *City of Sacramento*, 50 Cal. 3d at 64-65 (public interest exception to collateral estoppel applied where failure to re-examine purely legal issue would risk failure to comply with federal law and cost California employers millions). Accordingly, the public interest exception to collateral estoppel applies here and allows the Court to consider the preemption issue.

III. THE COURT SHOULD UPHOLD THE DECLARATORY ORDER ON THE MERITS.

The narrow issue before the Court on the merits is whether the Board correctly interpreted section 10501(b) to preempt the CEQA claims in the state trial court that collaterally attack the Board's approval of Fresno/Bakersfield rail line construction. Resp'ts' Br. 3. The Board's decision was correctly decided.

Section 10501(b) includes an express preemption clause. *Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1096-1097 (9th Cir. 2010). This Court has endorsed the view that section 10501(b) is clear and unambiguous with respect to the Board's exclusive jurisdiction over rail line "construction, acquisition, operation, [and] abandonment." *City of Auburn*, 154 F.3d at 1030 ("plain language . . . of the ICCTA explicitly grant[s] the STB exclusive authority over" acquisition and reopening of rail line project at issue, and state remedies interfering with Board-approved actions are preempted). No party here disputes that the Board has authorized construction of the Fresno/Bakersfield line, constituting "construction" that is within the Board's "exclusive" jurisdiction, pursuant to section 10501(b)(2). *Fresno/Bakersfield Order* 20-21. In this narrow circumstance here, because the Board has "exclusive authority" over Board-authorized Fresno/Bakersfield rail line construction, the Court may reach the same conclusion that the Board reached in the Declaratory Order and find that preemption applies. *City of Auburn*, 154 F.3d at 1030.

The Court does not need to apply any special weight to the Board's analysis in the Declaratory Order to uphold the Board's conclusions, in light of the clarity in the language of section 10501(b). However, the Declaratory Order in fact merits considerable weight because it offers the Board's persuasive interpretation of the preemptive effect of section 10501(b), in the context of a rail line construction

project under the Board's exclusive jurisdiction. Petitioners and CBD suggest the Board's views on preemption merit little to no deference and that the Board erred in finding preemption. Pet'rs' Br. 11-13; CBD Br. 47-50. The Board, on the other hand, argues it is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837 (1984) and that section 10501(b) preempts the CEQA claims on the specific facts here. Resp'ts' Br. 17. Yet the Court need not apply *Chevron* because it can uphold the Board's preemption analysis, even under the lesser deference afforded in *Skidmore*, 323 U.S. at 140.

Finally, the Board's views on preemption in the Declaratory Order are not undermined by the additional arguments petitioners present regarding state sovereignty, the market participation doctrine, and construing state funding sources as voluntary agreements.

A. In Determining The Scope Of Section 10501(b) Preemption, The Court Should Be Guided By The Board's Interpretation, Which Is Eligible For *Skidmore* Deference.

Interpreting the scope of section 10501(b) preemption is indisputably a task for the Court in determining whether to uphold the Declaratory Order. *Wyeth v. Levine*, 555 U.S. 555, 576-577 (2009); *Funbus Systems, Inc. v. Cal. Public Utilities Comm'n*, 801 F.2d 1120, 1126 (9th Cir. 1986). When a federal statute contains express preemption language, "the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the

best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *see also Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 642 (9th Cir. 2014). An appropriate statutory construction also brings in the "structure and purpose of the statute as a whole [], as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 486 (1996) (internal citation omitted); *see also Dilts*, 769 F.3d at 642. Furthermore, every preemption analysis, and particularly where Congress legislates in a field states have traditionally occupied, "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see Wyeth*, 555 U.S. at 565.

In clarifying the primacy of the Court's legal determinations with respect to preemption, *Wyeth v. Levine* highlighted agencies' "unique understanding of the statutes they administer" and their recognition of Congressional purposes and objectives. 555 U.S. at 577. This Court has likewise recognized that the Board's views on the preemptive scope of section 10501(b) provide important guidance. *Ass'n of Am. R.Rs.,* 622 F.3d at 1097. The Board's interpretation of section

10501(b) preemption in the context of the Fresno/Bakersfield rail line construction project, over which it has licensing jurisdiction pursuant to 49 U.S.C. section 10901, is thus eligible for deference under *Skidmore v. Swift*, 323 U.S. at 140. As discussed below, the Declaratory Order is persuasive and accordingly merits *Skidmore* deference.

CBD cites *Wyeth v. Levine*, in arguing that agencies have "no special authority to pronounce on pre-emption." CBD Br. 48-49. In *Wyeth*, the Supreme Court explained that evaluating a federal agency's opinion on *obstacle* preemption (not express preemption, as is the situation here) involves not "defer[ring] to an agency's *conclusion* that state law is pre-empted," but rather "attend[ing] to an agency's explanation of how state law affects the regulatory scheme." *Id*. at 577 (emphasis in original). But this is not an obstacle preemption case; the ICCTA has an express preemption provision. *Ass'n of Am. R.Rs.,* 622 F.3d at 1096-1097. The Board has argued that it is entitled to *Chevron* deference, but the more appropriate analysis is the *Skidmore* standard for deferring to an agency's opinion. That standard requires the Court to examine the Board's analysis and uphold its decision on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Dilts*, 769 F.3d at 650 (quoting *Skidmore*, 323 U.S. at 140).

This Court has not previously addressed the appropriate weight to give the Board's analysis of the preemptive scope of section 10501(b), in the context of direct review of a declaratory order. *See City of Auburn*, 154 F.3d at 1030 (no discussion of weight afforded to Board's interpretation of section 10501(b).) The other federal courts of appeal that have considered the appropriate level of deference afforded on direct review of Board preemption decisions post-*Wyeth* have come to varying conclusions. *See Tubbs*, 812 F.3d at 1144 (applying *Chevron* deference with spare discussion); *N.Y. & Atlantic Ry.*, 635 F.3d at 70 (applying *Skidmore*, not *Chevron*, deference where result would be the same under either standard); *Riffin v. Surface Transp. Bd.*, 592 F.3d 195, 197 (D.C. Cir. 2010) (where Board found no preemption, level of deference is open question, citing *Wyeth*); *Grosso*, 804 F.3d at 116-117 (citing *Wyeth* and applying *Skidmore*, not *Chevron,* deference); *see also Ass'n of Am. R.Rs.,* 622 F.3d at 1097 (*Chevron* deference to Board's views on preemption, albeit not in context of direct appellate review of Board decision); *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 446 (D.C. Cir. 2010) (citing *Wyeth* and declining to apply *Chevron* deference, albeit not in context of direct appellate review of Board decision); *Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404, 413-414 (5th Cir. 2010) (same).

The Authority believes that *Skidmore* sets the appropriate standard of review for direct review of a Board decision on the preemptive scope of section 10501(b).

Following *Skidmore* offers less deference to the Board than applying *Chevron* deference, but under either standard the result is the same: upholding the Declaratory Order's conclusion that preemption applies under the circumstances at issue here. *See N.Y. & Atlantic Ry.,* 635 F.3d at 70.[9]

B. The Declaratory Order's Analysis Of Federal Regulation Of Rail Line Construction Merits *Skidmore* Deference Because It Is Demonstrably Persuasive.

The Court should uphold the Declaratory Order's conclusion that preemption applies in the circumstances of this case because it persuasively sets forth the Board's views as to the express preemption clause in section 10501(b), with respect to rail line construction, by means of reasoning that is thorough and consistent. *Skidmore*, 323 U.S. at 140.[10] The Board has the necessary knowledge of the federal scheme of rail line construction regulation. *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 642-43 (2d Cir. 2005) ("As the agency authorized by

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[9] There is no support for Petitioners' suggestion that the Declaratory Order should be due less deference simply because it came to an expansive conclusion regarding the agency's jurisdiction. Pet'rs' Br. 12-13. In *City of Arlington v. FCC*., 133 S. Ct. 1863, 1871-1873 (2013), the Supreme Court explained that the level of deference owed an agency interpretation of a statute it is charged with administering (including statutes that touch on preemption) does not depend on whether that interpretation expands or contracts that agency's reach. *Id*. at 1871-1873.

[10] The presence of an express preemption clause does not bar further analysis by a court based on implied preemption principles. *See Chae v. SLM Corp*., 593 F.3d 936, 942-944 (9th Cir. 2010). However, such a further analysis is not necessary here (and has not been briefed here) because the Declaratory Order can be upheld on the strength of its express preemption analysis.

Congress to administer the Termination Act, the Board is 'uniquely qualified to determine whether state law…should be preempted' by the Termination Act") (quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1584 (N.D. Ga. 1996)).

In the Declaratory Order, the Board set forth its thorough analysis of the scope of federal regulation of rail line construction under the ICCTA. PER 14-21. The Board identified the Supreme Court's statement in *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co*., 450 U.S. 311, 318 (1981) that the Interstate Commerce Act, the precursor to the ICCTA, is "among the most pervasive and comprehensive of federal regulatory schemes." PER 14. Employing tools of statutory construction, the Board analyzed its "exclusive" jurisdiction under the ICCTA. *Id.* The Board then analyzed the text of the ICCTA's express preemption provision, section 10501(b), together with the legislative history of the ICCTA, in the context of the issue presented here: a state railroad agency's rail line construction within the Board's jurisdiction, that the Board had authorized. PER 14; H.R. Rep. No. 104-311 at 95-96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 808. The Board concluded that Congress's intent was for exclusive federal jurisdiction with respect to the circumstances at issue here. PER 16 (Declaratory Order focuses on preemption with respect to rail line construction authorized by Board); 14 (Board interprets 10501(b) under the circumstances at issue here to

"prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.")[11]

The Board's analysis is fully consistent with Congress's long-standing emphasis on national uniformity for regulating rail line construction that is part of the interstate rail network. In adopting the Transportation Act of 1920, Congress established uniform and exclusive federal regulation over interstate rail line construction, operations and abandonment. *Transit Comm'n v. United States*, 289 U.S. 121, 127-128 (1933) (scope of jurisdiction of Board predecessor ICC defined "to the exclusion of state regulation"); *see also Alabama Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 346 n.7 (1951) (referencing "exclusive authority"). The exclusive jurisdiction over interstate rail line construction, operations, and abandonments continued essentially unchanged through Congress's adoption in 1980 of the Staggers Rail Act. *See generally Illinois Commerce Comm'n v. ICC*, 879 F.2d 917, 921-925 (D.C. Cir. 1989) (reciting history of federal rail regulation). The Staggers Act featured elements of cooperative federalism, allowing states to obtain ICC certification in order to regulate purely intrastate lines pursuant to

[11] Although the Board did not discuss the presumption against preemption in its analysis in the Declaratory Order, the presumption would not change the result here in light of the express preemption language in section 10501(b) and the Board's exclusive jurisdiction over rail line construction that is part of the interstate rail network. *City of Auburn*, 154 F.3d at 1029-1031.

federal standards. *See, e.g.,* Staggers Rail Act of 1980, Pub. L. No. 96-448, § 214, 94 Stat. 1895 (superseded).

The 1995 ICCTA substantially deregulated the railroad industry and further consolidated regulation of rail line construction at the federal level by extending it to intrastate lines that are part of the interstate rail network, thereby eliminating the cooperative federalism aspects of the Staggers Act. *See Florida E. Coast Ry. Co v. City of W. Palm Beach*, 110 F. Supp. 2d 1367, 1373 (S.D. Fla. 2000) *aff'd*, 266 F.3d 1324 (11th Cir. 2001); *see also CSX Transp., Inc.,* 944 F. Supp. at 1582. Congress's stated intent behind the ICCTA was that "the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive." H.R. Rep. 104-311 at 808; *see also DesertXpress Enterprises, LLC—Petition for Declaratory Order*, FD 34914, slip op. at 8-16 (STB served May 7, 2010), 2010 WL 18222102 (explaining background and history underpinning scope of Board jurisdiction).

An important aspect of this uniformity is that both public and private rail carriers are subject to the exclusive jurisdiction of section 10501(b). The courts have consistently interpreted the term "rail carrier" to encompass both private and public railroads. *See California v. Taylor*, 353 U.S. 553, 561-562 (1957) (interpreting term "carrier by railroad" to include state agency railroads, by relying on extensive authorities holding federal railroad laws apply uniformly to railroads

in interstate commerce). This holding of *California v. Taylor* applies with equal force in the context of the ICCTA, which not only continued but expanded Congress' emphasis on exclusive federal regulation of railroads in interstate commerce to ensure uniformity. *See, e.g., City of New Orleans v. Texas & Pa. Ry. Co*., 195 F.2d 887, 889 (1952). As the Board elaborates in its brief, were public agency rail carriers and their rail construction projects not subject to the Board's exclusive jurisdiction, it would hinder the uniformity goals underpinning the ICCTA. Joint Resp'ts' Brief, 34-35.

The Board has recognized that the CEQA remedies at issue here include injunctive relief, which could "significantly delay or even stop construction of the CHST sections authorized by the Board." Joint Resp'ts' Brief 26 & n.29; see Cal. Pub. Res. Code § 21168.9; see also PER 14 (Declaratory Order analyzed how state law affects regulatory scheme in general). The Board has consistently taken the position that state laws that may interfere with its exclusive jurisdiction over rail line construction are preempted. *See DesertXpress Enterprises, LLC—Petition for Declaratory Order*, FD 34914, slip op. at 5 (STB served June 25, 2007) 2007 WL 1833521; *see also Wichita Terminal Ass'n, BNSF Ry. Co. & Union Pac. R.R.—Petition for Declaratory Order*, FD 35765, slip op. at 10 (STB served June 23, 2015) 2015 WL 3875937 ("The interstate rail network could not function properly if states and localities could impose their own potentially differing standards for

the design, construction, maintenance and repair of rail lines—activities that are an integral part of, and directly affect, rail transportation.")

The Board has likewise been consistent in its analytical approach to section 10501(b) preemption. It developed a test for analyzing the scope of section 10501(b) preemption, and has consistently applied that test. *CSX Transp., Inc. – Petition for Declaratory Order*, FD 34662, slip op. at 3-5 (STB served May 3, 2005), 2005 WL 1024490; *see, e.g., Jie Ao & Xin Zhou—Petition for Declaratory Order*, FD 35539, slip op. at 5 (STB served June 6, 2012), 2012 WL 2047726 (applying *CSX Transp*. test); *City of Milwaukie, Or.—Petition for Declaratory Order*, FD 35625, slip op. at 3 (STB served March 20, 2013), 2013 WL 1221975 (same); *Grafton & Upton Railroad Company—Petition for Declaratory Order*, FD 35752, slip op. at 8 (STB served September 17, 2014), 2014 WL 4658736 (same). Further, a host of federal courts of appeal have explicitly adopted or followed its approach to preemption under section 10501(b). *See New Orleans & Gulf Coast Ry. v. Barrois,* 533 F.3d 321, 332 (5th Cir. 2008); *accord Green Mountain R.R.*, 404 F.3d at 643 (2d Cir. 2005); *New York Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 254 (3d Cir. 2007); *Adrian & Blissfield R. Co. v. Village of Blissfield,* 550 F.3d 533, 540 (6th Cir. 2008); *Union Pac. R.R. v. Chicago Transit Authority,* 647 F.3d 675, 679 (7th Cir. 2011); *Emerson v. Kansas City So. Ry. Co.* 503 F.3d 1126, 1130 (10th Cir. 2007).

Using its persuasive approach, the Board correctly found that the plain language of section 10501(b) and its larger statutory framework and history demonstrate clear Congressional intent for preemption here, especially with respect to rail line construction that the Board has authorized. The CEQA claims pending in state court conflict with the Board's exclusive jurisdiction to license a rail agency's construction of rail lines that are part of the interstate rail network. 49 U.S.C. § 10901. The Court can affirm the Board's conclusion without resorting to any deference, but the Declaratory Order certainly qualifies for *Skidmore* deference.

C. Petitioners' Sovereignty Arguments Do Not Undermine The Board's Interpretation of Section 10501(b).

Petitioners nevertheless ask the Court to reverse the Board's interpretation of section 10501(b) in the Declaratory Order on the ground that it either directly violates the Tenth Amendment or improperly fails to invoke the "clear statement" rule, which petitioners claim requires the Court to conclude that section 10501(b) does not preempt CEQA remedies in this case. Pet'rs' Br. 25-30. The Board has amply briefed this issue and the Authority concurs with that analysis. Joint Resp'ts' Br. 32-36. The Authority addresses the Tenth Amendment and sovereignty argument separately, however, to provide its perspective on the state/federal balance, to emphasize why petitioners' sovereignty argument is belied

by case authority in the specific context of railroad regulation, and to explain why Petitioners' reliance on a Telecommunications Act case is misplaced.

1. The Board's Interpretation of Section 10501(b) Preemption Is Consistent With The Tenth Amendment And Respects State Sovereignty.

Petitioners' Tenth Amendment argument fails at the outset because it ignores the Supreme Court authorities rejecting their position, and never acknowledges that the Declaratory Order actually respects, rather than undermines, state sovereignty. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. Const., amend X. However, "'[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.'" *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1153 (9th Cir. 2013) (citing *New York v. United States*, 505 U.S. 144, 156-157 (1992)). Reviewing courts "'have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under' a constitutionally enumerated power." *Id.* at 1153-1154 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

California v. Taylor, 353 U.S. 553, which petitioners do not even discuss much less distinguish in their sovereignty argument, is closely analogous to this case because it involved sovereignty considerations in the context of a federal

railroad law applied to a California state agency railroad that was operating in interstate commerce and under ICC jurisdiction. At issue was whether the Railway Labor Act's bargaining requirements preempted state civil services law for employees of the State Belt Railroad, a common carrier railroad operated by the State's Board of Harbor Commissioners. *Id.* at 556. California argued that Congress had no constitutional power to preempt state civil service laws because this would interfere with the State's 'sovereign right' to control its employment relationships. *Id.* at 568. The Court disagreed:

> If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships.

Id. at 568. The fact that state civil service rules for railroad employees had to "give way" to nationally uniform collective bargaining pursuant to federal law did not unconstitutionally intrude on state sovereignty. *Id.* at 560, 568.

California v. Taylor supports the Board's interpretation of section 10501(b) in the Declaratory Order. California has again embarked on interstate commerce by rail. Cal. Pub. Util. Code §§ 185020, 185030, 185032 (creating Authority and charging it with planning and implementing HSR system fully integrated with state's existing intercity, commuter, and urban rail systems); *CHST Jurisdiction Order* 11-15 (Board has jurisdiction over HSR system in light of its connectivity with Amtrak intercity rail); PER 7 (noting Board jurisdiction over

Fresno/Bakersfield rail line construction project). The State has thus exercised its sovereign discretion to construct and operate a railroad in interstate commerce. PER 14, 16. By doing so, it has chosen to subject itself to the uniform and exclusive set of federal requirements under the ICCTA for rail line construction. *Id*. The fact that the claims in the CEQA lawsuits "give way" to the exclusive federal remedies under section 10501(b) does not unconstitutionally intrude on the State's sovereignty here any more than it did when federal law displaced state civil service laws for a state agency railroad's employees. *California v. Taylor*, 353 U.S. at 568.

Another flaw in petitioners' sovereignty argument is that it is essentially identical to the "traditional governmental functions" approach to the Tenth Amendment that the Supreme Court adopted in *National League of Cities v. Usery*, 426 U.S. 833 (1976), but expressly rejected two decades later in *Garcia*, 469 U.S. at 557. But even in *National League of Cities*, with its expansive view of the Tenth Amendment, the Supreme Court preserved its prior jurisprudence that states operating railroads in interstate commerce are *not* immune from federal regulation due to their sovereign character. *National League of Cities*, 426 U.S. at 854 n.18 (*overruled in Garcia*, 469 U.S. 528). And in *Garcia*, the Court reinforced its decision in *California v. Taylor* in holding that when Congress acts pursuant to its Commerce Clause power, the Tenth Amendment does not limit its ability to

require public agencies to conform to a uniform federal regulatory scheme, with attendant preemption of state law, despite their sovereign character. 469 U.S. at 554-55.

Accordingly, the fact that the California Legislature has plenary power to create, abolish, and determine the power of state agencies does not fully answer the preemption question in this case. Pet'rs' Br. 25-26; *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 255 (2011). Even assuming, without conceding, that a state's general ability to subject a state agency to third party enforcement of CEQA may be an attribute of state sovereignty, applying section 10501(b) preemption in the context of a state agency that is engaging in interstate commerce by rail does not violate the Tenth Amendment. *California v. Taylor*, 353 U.S. at 568.

Fundamentally, what Petitioners fail to recognize is that the Board's interpretation of section 10501(b) respects, rather than undermines, state sovereignty in the specific regulatory context here. California has broad discretion to determine whether it wants to directly engage in interstate commerce by rail in the first instance. *Fresno/Bakersfield Order* 4. The Authority, as the agency charged with building the rail system, can gather environmental, financial, and operational information of its choosing in advance of seeking Board permission to construct a particular rail line segment, as it did with the Fresno/Bakersfield line.

Id. at 5 (recognizing CEQA work done in advance of Authority seeking petition for exemption). Like any private rail carrier, the Authority decides in the first instance whether it wants to construct a rail line subject to the Board's jurisdiction, and if so, how and when it will seek Board permission to construct that particular rail line. Then, based upon the Board's authorization to construct and the conditions, if any, placed on that rail line construction, it is the Authority's decision as to whether it will in fact construct the line, with full cognizance of the Board's jurisdiction. *Fresno/Bakersfield Order* 1, 8 (explaining Authority's decision to apply for permission to construct Fresno/Bakersfield line); Joint Resp'ts' Br. 32 n.33 (describing Board construction authority as permissive). The State retains the ultimate sovereign prerogative to stay out of the railroad industry entirely or to place further conditions on the Authority's ability to exercise its judgment in the future as long as such conditions conform to federal law. Joint Resp'ts' Br. 36. Thus, even though section 10501(b) preempts third party CEQA lawsuits against the Authority, the State has substantial discretion that preserves its sovereignty within the context of federal regulation of rail line construction.

2. Section 10501(b) is Unmistakably Clear That Congress Intended Nationally Uniform Regulation of Rail Line Construction Projects.

Petitioners' reliance on the "clear statement" rule to avoid section 10501(b) preemption also fails. Pet'rs' Br. 25-30. The "clear statement" rule requires that

when Congress intends to alter the traditional federal/state balance of powers, its intent must be "unmistakably clear" in the statute. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Where congressional intent to preempt state law is clear, rather than ambiguous, the rule is satisfied. *Armstrong v. Wilson*, 124 F.3d 1019, 1024 (9th Cir. 1997). Because section 10501(b) is unmistakably clear that Congress intended to require uniform federal regulation of all "rail carriers," even those that happen to be political subdivisions or agencies of a state, and intended uniform federal regulation of all rail construction projects, even where undertaken by a state agency, the "clear statement" rule is satisfied.

The clarity is evident in section 10501 as a whole. Subdivision (a) states that "the Board has jurisdiction over transportation by rail carrier." 49 U.S.C. § 10501(a). Subdivision (b) makes that jurisdiction exclusive for rail line construction, even for tracks intended to be located entirely in one state. 49 U.S.C. § 10501(b). Subdivision (b) makes the remedies under the ICCTA exclusive, and preempts state law remedies "with respect to regulation of rail transportation." *Id.* Earlier in the ICCTA, Congress defined the term "rail carrier" as "a person providing common carrier railroad transportation for compensation. . . ." 49 U.S.C. § 10102(5). "Railroad" includes the road used by a rail carrier. 49 U.S.C. § 10102(6)(B). "Transportation" is defined to include, "a . . . property, facility, instrumentality, or equipment of any kind related to the movement of passengers or

property, or both, by rail, regardless of ownership or an agreement concerning use. . . ." 49 U.S.C. § 10102(9).

When Congress used the term "rail carrier" in section 10501, and defined it to mean "a person providing common carrier railroad transportation for compensation," it clearly intended the term to include *all* rail carriers, regardless of their ownership, as part of its effort to promote nationally uniform regulation. The Supreme Court interpreted nearly identical language in the Railway Labor Act, "any carrier by railroad, subject to the Interstate Commerce Act," as including a state agency rail carrier, even though the Act did not use those specific words. *California v. Taylor*, 353 U.S. at 561. The Court reached this result because Congress had consistently enacted legislation that uniformly applied to all rail carriers engaged in interstate commerce, including state agency carriers, based on the statutory frameworks emphasizing national uniformity regulating railroads. *Id.* at 562-564 (citing cases involving the Safety Appliance Act, Federal Employers' Liability Act, and Carrier's Taxing Act.)

Prior to Congress enacting section 10501(b) in 1995, courts consistently interpreted the Interstate Commerce Act to apply to railroads owned and operated by public agencies in the same manner as railroads owned and operated by private entities. *City of New Orleans*, 195 F.2d at 889 (city operated belt railroad "subject to the federal law and the Interstate Commerce Commission, like any other

railroad."); *International Longshoremen's Ass'n, AFL-CIO v. N. Carolina Ports Auth.*, 463 F.2d 1, 3-4 (4th Cir. 1972) (North Carolina Ports Authority was common carrier subject to Interstate Commerce Act, and Railway Labor Act for operation of terminal railroad); *Staten Island Rapid Transit Operating Auth. v. ICC*, 718 F.2d 533, 539-540 (2d Cir. 1983) (local public agency qualified as carrier under Interstate Commerce Act); *see also Los Angeles Met. Transit Auth. v. Public Utils. Comm'n*, 59 Cal. 2d 863, 868-870 (1963) (term "common carrier" in state statute inclusive of both public and private transportation utilities).

Rail line construction projects that the Board licenses pursuant to its authority in 49 U.S.C. section 10901 (or through its exemption powers at 49 U.S.C. section 10502) are therefore treated uniformly, irrespective of whether the project proponent is a public or private entity. See, e.g., *Alaska R.R. – Constr. & Operation Exemption – Rail Line Extension to Port Mackenzie, AK*, FD 35095, slip op. at 1 (STB served Nov. 21, 2011), 2011 WL 5857339 (Board authorized state-owned Alaska railroad to construct and operate new rail line), *affirmed Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073 (9th Cir. 2013); *DesertXpress Enterprises, LLC and DesertXpress HSR Corp. – Constr. & Operation Exemption – in Victorville, Cal. & Las Vegas, Nev.,* FD 35544, slip op. at 2 (STB served Oct. 25, 2011), 2011 WL 5083161 (Board authorized private entity to construct and operate new rail line).

Further, when Congress enacted section 10501(b) in 1995, it intended to *strengthen*, not diminish, the comprehensive scheme of uniform federal regulation of railroads. *Florida E. Coast Ry.*, 266 F.3d at 1337-1338 (discussing the ICCTA's elimination of prior, limited state role and provision of federal uniformity); see also H.R. Rep. 104-311 at 96, *as reprinted in* 1995 U.S.S.C.A.N. at 808 (expressing intent for federal scheme of railroad regulation in the ICCTA to be "completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.") In light of this regulatory framework, there is no doubt that Congress intended to regulate *all* rail carriers and *all* rail line construction projects uniformly, and hence for preemption to apply uniformly.

Petitioners' insistence that even greater clarity about congressional intent is necessary to find section 10501(b) preemption here not only turns the foregoing jurisprudence on its head, it actually undermines uniformity by carving out special rules for rail line construction projects pursued by political subdivisions of a state. But the "clear statement" rule and federalism concerns do not sanction ignoring the congressional intent evidenced in the statute as a whole. *Armstrong*, 124 F.3d at 1024-1025; *Yeskey v. Pennsylvania Dep't of Corr.*, 118 F.3d 168, 172 (3rd Cir. 1997). The "clear statement" rule also does not require this Court to find specific

"magic words" in section 10501(b) in order to conclude that Congress intended to subject all railroads, and all rail line construction projects to a uniform scheme of regulation. *See also Alaska v. EEOC*, 564 F.3d 1062, 1066-67 (9th Cir. 2009) ("magic words" not required in federal statute to find Congress intended to abrogate state sovereign immunity where intent gleaned from statute as a whole). In any event, the term "rail carrier" in section 10501, and the ICCTA's emphasis on national uniformity to be achieved by exclusive federal regulation over rail line construction, more than satisfies the clear statement rule. See *John v. United States*, 247 F.3d 1032, 1037 (9th Cir. 2001) (interpreting Alaska National Interest Lands Conservation Act to satisfy clear statement rule that Congress intended to alter federal/state balance).

3. *Nixon v. Missouri Municipal League* Does Not Control This Case Because the Federal Statute At Issue There Was Ambiguous.

Nixon v. Missouri Municipal League, 541 U.S. 125 (2004), on which Petitioners rely, does not govern this case because the federal statute there was ambiguous about treating public and private entities uniformly. In *Nixon*, the Court analyzed a Telecommunications Act provision that preempted state or local laws that expressly or effectively "prohibit[ed] the ability of any entity" to provide telecommunications services and a state statute that prohibited state political subdivisions from doing so. *Nixon*, 541 U.S. at 128 (citing 47 U.S.C. § 253). The

Court held the term "any entity" in the federal statute was ambiguous as to whether Congress intended to treat governmental telecommunications providers "on par" with private firms, therefore the Court found no preemption of the state law. *Id.* at 141. Here, in contrast, the ICCTA, its statutory framework and history, and similarly comprehensive federal railroad laws are replete with indications of congressional intent to treat public agency and private railroads "on par" in order to create and maintain a uniform national interstate rail system. *California v. Taylor*, 353 U.S. at 566-568; *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 687 (1982), overruled in part by *Garcia*, 469 U.S. 528; *see also Se. Pa. Transp. Auth. v. Pa. Public Util. Comm'n*, 826 F. Supp. 1506, 1521-1522 (E.D. Pa. 1993).

D. Petitioners' Market Participant Doctrine and "Voluntary Agreement" Arguments Do Not Undermine The Board's Interpretation of Section 10501(b).

Petitioners further argue the Court should reverse the Declaratory Order because the market participant doctrine provides an exception to preemption in this case. Pet'rs' Br. 31-36. Petitioners cite *Atherton*, in which the California Court of Appeal held that the market participant doctrine eliminated section 10501(b) preemption of CEQA remedies in the context of the Authority's Bay Area/Central Valley Program EIR. They claim this case is "almost identical" and that the Board erred by not following it. Pet'rs' Br. 31-32. As the Board

thoroughly explained, the market participant doctrine does not eliminate section 10501(b) preemption in the specific context of this case, involving a rail line construction project under the Board's exclusive jurisdiction and that the Board has approved. Joint Resp'ts' Br. 36-41; PER 16-20.

Meriting emphasis is that the facts of this case pose a conflict between section 10501(b) and CEQA that was simply not present in *Atherton*, and hence not considered in that court's assessment of section 10501(b) preemption or its market participant doctrine analysis. See *supra*, Section II. The *Atherton* court not only limited its holding to the specific facts of that case, its holding emphasized a lack of conflict between ICCTA and CEQA where no Board construction authorization was implicated. 228 Cal. App. 4th at 332. Here, in contrast, allowing CEQA to block rail line construction would be in clear conflict with the Board's authorization of that construction and represents the type of "interference with rail transportation" that the *Atherton* court found lacking in that prior case. *Id.* *Atherton's* market participant doctrine holding, with its distinct facts and self-limiting language, therefore does not govern the outcome here.

Furthermore, "the market participant doctrine is not a wholly freestanding doctrine, but rather a presumption about congressional intent." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1042 (9th Cir. 2007). That presumption is rebuttable. "Because congressional intent is the key to

preemption analysis, we must consider whether [a federal law] contains 'any express or implied indication by Congress' that the presumption embodied by the market participant doctrine should not apply to preemption under the Act." *Id.* at 1042, citing *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U.S. 218, 231 (1993); *see also City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 178-179 (4th Cir. 2002) (no indication in Magnuson Act of proprietary exception to preemption). As the Board explains, the plain language of section 10501(b) and the larger statutory framework and history demonstrates that the market participant doctrine does not apply in the context of the rail construction project here. Resp'ts' Br. 37; *see also id.* at 38-41.

Petitioners' final claim is that the Board should have interpreted section 10501(b) to not preempt CEQA remedies against the Authority because the Authority voluntarily agreed to abide by CEQA when it placed Proposition 1A on the ballot and the voters passed the measure. Pet'rs' Br. 36-38. Petitioners' voluntary agreement/Proposition 1A argument is off the mark because Proposition 1A is not relevant to the preemption analysis in the Declaratory Order. The Authority's Petition to the Board for a declaratory order did not seek the Board's views on section 10501(b) preemption of Proposition 1A funding conditions. SER 2-17.

Rather, the Authority raised the question of section 10501(b) preemption solely in the context of the Fresno/Bakersfield rail line construction project the Board approved, and that certain of Petitioners collaterally attacked in the state court lawsuits with their purely CEQA claims. The state court CEQA lawsuits sought injunctive relief based in CEQA, not Proposition 1A. See SER 4 & nn. 2-3. The Board therefore took care to emphasize that its section 10501(b) preemption holding was not interpreting Proposition 1A. PER 19-21. "Whether CEQA compliance is required before the Authority is allowed to obtain or use Proposition 1A funding is a question of state law for a state court to decide." PER 21. The Court need not delve into Proposition 1A, but should uphold the Board's precision in the Declaratory Order of addressing section 10501(b) preemption only as to CEQA, and only under the circumstances at issue here. [12]

CONCLUSION

For the foregoing reasons, the Court should reach the merits and uphold the Declaratory Order.

[12] Petitioners' argument is also misplaced because Proposition 1A, to the extent it imposes a CEQA compliance requirement before the Authority can seek an appropriation of bond funds, imposes this limit only on segments of the high-speed rail system that will use bond funds, and does not impose limits on other funding the legislature may appropriate, including federal funds. See Motion for Judicial Notice, Ex. G, Judgment Denying Petition and Complaint *John Tos v. California High-Speed Rail Authority*, Sacramento Superior Court Case No. 34-2011-00113919, at 9.

Dated: May 6, 2016

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NOS. 15-71780, 15-72570

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KINGS COUNTY, et al., Petitioners, **v.** **SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA,** Respondents, **CALIFORNIA HIGH-SPEED RAIL AUTHORITY,** Intervenor.
DIGNITY HEALTH Petitioner, **v.** **SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA,** Respondents, **CALIFORNIA HIGH-SPEED RAIL AUTHORITY,** Intervenor.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: May 6, 2016

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 12,680 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

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[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

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☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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May 6, 2016
Dated

/s/ Danae J. Aitchison
Danae J. Aitchison
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name:	Kings County, et al. v. Surface Transportation Board	No. 15-71780
	Dignity Health v. Surface Transportation Board	No. 15-72570

I hereby certify that on May 6, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

INTERVENOR'S BRIEF

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 6, 2016, at Sacramento, California.

Danae J. Aitchison	/s/ Danae Aitchison
Declarant	Signature

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