[ORAL ARGUMENT NOT YET SCHEDULED]

No. 15-71780

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

PETITIONERS' OPENING BRIEF

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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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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.

December 12, 2014, granted CHSRA's Petition for Declaratory Relief. (Decision dated 12/12/2014, 1 Excerpts 7, 14.)

Petitioners and others moved for reconsideration. Those motions were denied on May 4, 2015 (Decision denying reconsideration dated 5/4/2015, 1 Excerpts 1), making the order final and reviewable in this Court pursuant to 28 U. S. C. §§ 2321 and 2342 (5), 5 U. S. C. §702, and Federal Rules of Appellate Procedure, rule 15. The Petitions for Review were filed on June 11, 2015 and June 30, 2015 and thus were timely presented under 28 U. S. C. §2344.[6]

STATEMENT OF ISSUES

The main issue in this case is whether the ICCTA preempts the application of CEQA, a California law, to a project being undertaken by the State of California, through CHSRA. There are, however, several subissues under this issue that the Court will need to grapple with:

1. Whether the STB erred in finding that application of CEQA to CHSRA's rail project is preempted under the ICCTA where CEQA is primarily an information disclosure statute and, by its own provisions, does not interfere with the STB's plenary jurisdiction over the regulation of interstate rail service;
2. Whether the STB erred in finding that application of CEQA to CHSRA's rail project is preempted under the ICCTA where the Tenth Amendment of the Constitution prevents the federal government from interfering with a state's regulation of its own political subdivisions

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[6] The motions for reconsideration, which were timely filed under 49 U. S. C. § 722 and 49 C. F. R. § 1115.3, tolled the deadline for filing a petition for review. (*Interstate Commerce Commission v. Locomotive Engineers* 482 U.S. 270, 279 (1987).)

unless Congress specifically so intends, and where no such specific intention was indicated in the ICCTA;

3. Whether the STB erred in finding that application of CEQA to CHSRA's rail project is preempted under the ICCTA where a state's direction of its own commercial enterprise is exempt from preemption under the ICCTA under the market participant exception, and where citizen enforcement actions under CEQA are an explicit part of California's mechanisms for directing its rail enterprise's activities;
4. Whether the STB erred in finding that Petitioners' ability to enforce CHSRA's voluntary contractual agreement, under Proposition 1A, to comply with CEQA was preempted by the ICCTA.

STATEMENT OF THE CASE

This case arises out of the State of California's efforts to establish a state-run high-speed rail system extending across much of the state and including service to San Francisco, San Jose, the Central Valley Cities, Palmdale, the San Fernando Valley, Los Angeles, Anaheim, and San Diego. (See, Calif. Streets & Highways Code § 2704.04.)[7] In 1996 the California Legislature established CHSRA and designated it as the exclusive state agency empowered to develop and implement high-speed rail service in California. (Calif. Public Utilities Code §§ 185030, 185032(a); *Atherton,* 228 Cal. App. 4th at 323.)

In 2005, CHSRA certified a Final Programmatic Environmental Impact Report/Environmental Impact Statement ("Final PEIR/EIS") under CEQA and

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[7] Calif. Streets & Highways Code §§ 2704 through 2704.21 were enacted in 2008 by the voters of California as Proposition 1A, a $9.95 billion general obligation bond measure to help fund establishment of a high-speed rail system and related infrastructure and transportation improvements.

NEPA for its proposed statewide system and approved the preliminary configuration and characteristics of that system.[8] In 2008, CHSRA certified a second Final PEIR/EIS for the portion of the system extending from Merced to San Francisco, and approved a general alignment for that portion of the system. (*Atherton*, 228 Cal. App. 4th at 324.) That decision was subsequently challenged in state court by several of the Petitioners herein. (*Town of Atherton et al. v. California High-Speed Rail Authority ("Atherton I")*, Sacramento County Superior Court Case # 34-2008-0000022.)[9] The Court entered judgment against CHSRA and issued a writ of mandate ordering CHSRA to rescind its approvals and revise the EIR prior to reconsidering those approvals. (Petitioners' Motion for Judicial Notice ("Pet. MJN"), ¶ 1 and Exhibit A thereto.) In 2010, CHSRA certified a partially-revised Final PEIR, which was again challenged, both by the original plaintiffs and, in a new action, by additional plaintiffs (*Town of Atherton et al. v. California High-Speed Rail Authority ("Atherton II"),* Sacramento County Superior Court Caser #34-2010-80000789.)

Plaintiffs were again partially successful, and judgment was once more entered against CHSRA. (Pet. MJN ¶ 2 and Exhibit B thereto.) However, the plaintiffs in the two cases appealed several issues that the trial court had decided against them. The two appeals were consolidated in the Third District Court of Appeal. After briefing was complete and the case scheduled for oral argument, CHSRA asserted that recent action by the STB, assuming jurisdiction over the high-speed rail project, resulted in preemption of the CEQA claims. The court of appeal ordered supplemental briefing on the preemption issue, and several amicus

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[8] The Federal Railroad Administration ("FRA") has approved a Record of Decision for the each of the environmental decision documents prepared and certified by CHSRA, and has confirmed each of CHSRA's consequent decisions.

[9] No federal court challenge was made to the FRA's approval.

briefs were filed on both sides.[10] In August of 2014, the court of appeal issued a published decision, which held that preemption did not apply because of the market participant exception. (*Atherton,* 228 Cal. App. 4th at 323, 336-341.) CHSRA did not seek review of the decision by the California Supreme Court, but did request its depublication. That request was denied. (Pet. MJN ¶ 3 and Exhibit C thereto.)

In 2008, the Legislature, at the behest of CHSRA, placed on the ballot a $9.95 billion general obligation bond measure, Proposition 1A, to provide partial funding for the planning and construction of a high-speed rail system. (Petitioners' Motion for Judicial Notice, ¶ 4 and Exhibit D thereto.) The bond measure, passed by the voters in November 2008, placed procedural and substantive requirements on both the expenditure of the bond proceeds and the system to be constructed. Among those requirements were that the system be consistent with the already-approved EIRs for the project (Calif. Streets & Highways Code § 2704.04(a)), and that all project-level environmental clearances have been completed on a segment before CHSRA could seek bond funding to construct that segment. (Calif. Streets & Highways Code § 2704.08(c)(2)(K).)

CHSRA also issued two successive project-level Final EIR/EIS documents, one for the Merced-Fresno segment and one for the Fresno-Bakersfield segment, and approved alignments for both segments. Multiple challenges to both approvals were filed in state court, based on violations of CEQA. The Merced-Fresno lawsuits were settled, but the Fresno-Bakersfield lawsuits led CHSRA to seek a declaratory order from the STB, to wit, that injunctive relief in the lawsuits was preempted under the ICCTA. (1 Excerpts at 8.) The STB went further, and, on

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[10] In addition, the Union Pacific Railroad, which shares the use of part of the right of way involved, filed an amicus brief in support of neither parties.

December 12, 2014, issued a declaratory order totally preempting the application of CEQA to CHSRA's Fresno to Bakersfield HSR project. (1 Excerpts 7.)

The Petitioners herein, among others, moved for reconsideration. (See, 1 Excerpts 1-2.) They also filed Petitions for Review in the 9th Circuit and the District of Columbia Circuit. (9th Circuit Case 15-70386, filed 2/9/2015; D.C. Circuit Case 15-1030, filed 2/9/2015.) Both petitions were eventually dismissed as premature. (See Petitioners' MJN, ¶ 5 and Exhibits E and F [Order of June 12, 2015 dismissing case No. 15-70386 (9th Cir.); Order of May 4, 2015 dismissing Case No. 15-1030].) The STB, on a 1-1 split vote, was unable to grant or deny the motions for reconsideration. Eventually, on May 4, 2015, the STB denied all motions for reconsideration on that basis. (1 Excerpts 1.)[11] Petitions for Review were then refiled in both the 9th Circuit and the District of Columbia Circuit. Pursuant to 28 U. S. C. § 2112 subd. (a), the District of Columbia Circuit case was transferred to the 9th Circuit, after which the two cases were ordered consolidated. (See, Order of Sept 2, 2015.) Meanwhile, CHSRA's unopposed motion to intervene in the proceedings was granted. (See, Order of July 16, 2015.)

SUMMARY OF ARGUMENT

The Petitions for Review were timely and proper, and STB erred in finding that CEQA was preempted as applied to CHSRA's high-speed rail project.

1. The Court has jurisdiction over these Petitions for Review. The STB's decision is now final and the petitions for review were filed within the statutory period under the Hobbs Act. Further, the Petitioners were all participants

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[11] The dissent to that denial noted that STB's decision went further than had been requested by CHSRA, and was explicitly intended to affect the California Supreme Court's consideration of *FOER,* even though neither the court nor any party to that case had requested STB's opinion on the issue. (1 Excerpts at 6.)

in the administrative proceeding before the STB, and each petitioner will suffer real injury if CEQA's provisions are allowed to be preempted.

2. The STB erred in finding that CEQA was fully preempted as applied to the CHSRA's high-speed rail project between Fresno and Bakersfield for each of the following reasons:

a) CEQA is not a regulatory statute that unduly burdens interstate rail transportation. CEQA's primary function is to ensure that decision makers and the public are fully informed about a project's potentially significant environmental impacts and ways in which those impacts may be mitigated or avoided. If it is not possible for impacts to be avoided or fully mitigated, CEQA still allows the project to be approved, so long as the lead agency adopts a statement of overriding considerations ("SOC") accompanying the approval. Further, while CEQA does require that the lead agency mitigate or avoid significant impacts where feasible, a lead agency may find a mitigation measure or alternative infeasible for a variety of reasons, including legal reasons.

Nor does private enforcement of CEQA by litigation affect preemption. The California Legislature has discretion in how it enforces its statutes. Only if injunctive relief was ordered or the project approval ordered entirely rescinded could it be said with any certainty that preemption was warranted. Neither of these is required by the CEQA statutes. Thus STB's determination of blanket preemption, not even requested by CHSRA, was premature, overbroad, and unwarranted.

It should also be noted that the issue of CEQA preemption for a public rail project is currently before the California Supreme Court, which can provide definitive interpretations of CEQA and its reach, including whether that reach could trigger preemption under 49 U. S. C. § 10501(b). Consequently, this Court should either stay these proceedings pending a decision in FOER or refer the

question of CEQA's stance as an informational versus regulatory statute to the California Supreme Court so that it can provide its opinion on whether and to what extent CEQA's reach under these circumstances would interfere with the STB's plenary jurisdiction over interstate rail transportation.

If the Court accepts this argument, which is based entirely on California law, it need not reach the constitutional issues in the case. (*Department of Commerce v. United States House of Representatives*, *525 U.S. 316* (1999).)

b) Under the Tenth Amendment, Congressional action is presumed to not intend to interfere with a state's regulation of its own political subdivisions unless Congress makes its intent to so interfere clear and unmistakable. The ICCTA contains no such Congressional statement of intent.

c) The market participant exception to preemption under the Commerce Clause presumes that while Congress may intend to preempt state or local regulation of interstate commerce, it does not intend to preempt actions that a state or local public entity may take as a participant in the marketplace. The ICCTA contains no statement overcoming this presumption. Further, the application of CEQA, including private enforcement as provided for by CEQA's statutory provisions, is consistent with the state's role here as the proprietor of its own high-speed rail enterprise, and is therefore not preempted.

d) By cooperating with the Legislature in placing Proposition 1A on the ballot for enactment by the voters, CHSRA voluntarily committed itself to CEQA compliance; and, with the voters' approval of the measure, that became the equivalent of a contractual agreement. Petitioners have a right, under California law, to enforce that agreement, and that right is not abrogated by ICCTA preemption.

ADDENDUM OF MATERIALS

The addendum of materials pursuant to Circuit Rule 28-2 may be found as a separately bound volume submitted herewith.

STANDING

Petitioners have Article III standing based on their interests and those of their members or constituents. Petitioners Kings County, Kings County Farm Bureau, California Citizens for High-Speed Rail Accountability, and Dignity Health are all Petitioners in state court lawsuits challenging CHSRA's approval of the Fresno to Bakersfield segment of its high-speed rail project for noncompliance with CEQA. (1 Excerpts 9 fn. 5.) If the STB ruling stands, those lawsuits will be preempted and those petitioners will lose their right under state law to have the impacts of that project segment, which will adversely affect each of those petitioners or their members or constituents, mitigated or avoided. In addition, Petitioners Kings County Farm Bureau and California Citizens for High-Speed Rail Accountability are both nonprofit corporations whose members own property that will be directly impacted by CHSRA's proposed project; Dignity Health is a nonprofit healthcare provider whose facilities will be adversely affected by the project, and Kings County is a subdivision of the state of California that owns property that will be adversely affected by the project and many of whose constituents will be adversely affected by the project in numerous ways, including heath impacts and loss of property. All of these petitioners would be directly benefited by requiring enforcement of the information disclosure and mitigation/avoidance requirements of CEQA by CHSRA.

Petitioners Community Coalition on High-Speed Rail, California Rail Foundation, and Transportation Solutions Defense and Education Fund were all petitioners in CEQA lawsuits challenging the programmatic EIR for the San

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.

Delegation of authority to the agency is most likely when the subject matter of the legislation is a technical subject for which the agency possesses special knowledge and skill. (*Id.* at 844.) (*See, e.g., King v. Burwell*, __ U.S. __, 135 S. Ct. 475 (2015) [where Internal Revenue Service had no special expertise in interpreting or interpolating within the language of the statute, deference to its interpretation was not called for].) When deference doe not apply, the court must, instead, take the lead, using the usual tools of statutory construction, in interpreting the statute's provision. (*Id.*)

Deference is less likely when the interpretation is one that expands the reach of a federal agency at the expense of federalism's respect for state sovereignty. In particular, although the Commerce Clause gives Congress the right to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," (Art. I, §8, cl. 3), that grant of power does not mean that the courts must abdicate any control over the expansion of that power. (*Nat. Fed. of Indep. Business v. Sibelius* 567 U.S. ___, 132 S. Ct. 2566 (2012).) Thus, for example, while the Federal Cigarette Labeling and Advertising Act[12] ("1965 Act") and the Public Health Cigarette Smoking Act of 1969[13] ("1969 Act") specifically prohibited state law from imposing requirements or prohibitions on advertising or promotion of cigarettes based on smoking and health, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), the U.S. Supreme Court held that preemption under the 1965 Act and the 1969 Act was limited by the specific language of the preemption clauses in those acts, and could not be expanded by implied preemption to cover a common law claim based on the inadequacy of the federally mandated warning. (*Id*. at 519; *see also, Quesada v. Herb Thyme Farms,*

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[12] Pub. L. 89-92, 79 Stat. 282, as amended 15 U. S. C. §§ 1331-1340.

[13] Pub. L. 91-222, 84 Stat. 87, as amended, 15 U. S. C. §§ 1331-1340.

Inc., Calif. Supreme Ct. slip opinion, case No. S216305, (issued Dec. 3, 2015) at pp. 10-29 [Supreme Court rejected express, obstacle, and implied preemption of a state court lawsuit based on false advertising and unfair competition claims as not within Congressional intent in enacting the express preemption provisions of The Organic Food Act; *See*, 7 U. S. C. §§ 6503(a), 6505 subd. (a)(1), 6506 subd. (a)(1)(A)].)

Similarly here, "Chevron deference" should not extend to STB's inferential conclusions about preemption: that the ICCTA's preemption clause precluded applying 10th Amendment or market participant exceptions to preemption. The reach of that preemption clause could go no further than the Congressional intent shown by its plain language.

Chevron deference is even less merited when the STB's decision was not the result of formal rulemaking, or even a formal adjudicative proceeding, but rather a more abbreviated informal proceeding. As was stated in *United States v. Mead Corp*. 533 U.S. 218, 228 (2001):

> [The] fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have often looked to the degree of the agency's care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency's position.

Thus here the court should carefully examine the STB's explanation of how the state laws in question affect Congress' intended regulatory scheme, and accept that justification for preemption only if its logic is persuasive. (*See also*, *EEOC v. Arabian American Oil Co*., 499 U.S. 244, 257 (1991).)

Finally, this case also involves the interpretation of California law, and specifically CEQA. While federal agencies can address the interpretation of state laws, state court interpretations of the state's own laws are entitled to considerable deference, and should not be rejected unless manifestly unreasonable. (*See, Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) [a state's common law is binding in federal

jurisdictions].) Alternatively, under the doctrines of "Pullman Abstention" and "Colorado River Abstention," the federal court may choose to stay the federal litigation to allow state court litigation on the issues involved to reach a definitive conclusion. (*See, e.g., American Intern. Underwriters v. Continental Ins. Co*., 843 F. 2d 1253, 1257 (9th Cir. 1988) [explaining the bases for abstention when concurrent state jurisdiction and state law issues are involved].) The federal court may also directly refer California law questions to the California Supreme Court for its definitive interpretation of state law. (*See, e.g*., *Perry v. Schwarzenegger*, 628 F. 3d 1191 (9th Cir. 2011).)

ARGUMENT

I. PREEMPTION WAS NOT WARRANTED BECAUSE CEQA IS NOT A REGULATORY STATUTE THAT COULD INTERFERE WITH STB'S PLENARY JURISDICTION OVER THE REGULATION OF RAIL LINES.

A. Federal preemption under the ICCTA only occurs if the federal, state, or local law or regulation interferes with the STB's regulation of rail transportation by imposing an undue burden on interstate commerce.

The ICCTA's preemption clause, 49 U. S. C. § 10501 subd. (b), states that the remedies under the ICCTA are exclusive and preempt remedies provided under federal or state law with respect to regulation of rail transportation. However, such preemption is limited to laws or regulations that would arguably conflict with the STB's plenary jurisdiction over the subjects included in that clause. In *Assn. of Am. Railroads v. South Coast Air Quality Mgmt. Dist* 622 F.3d 1094 (9th Cir. 2010), this Court held that such preemption applies only when the challenged law or regulation imposes an unreasonable burden on interstate commerce. (*Id.* at 1097, 1098.) This narrows the question to whether CEQA compliance, in and of itself, creates such a burden.

B. CEQA does not interfere with STB's regulation of rail transportation, and hence is not preempted.

The STB Decision points to case law holding that the ICCTA preempts state and local permitting laws for establishing rail service, and specifically to *City of Auburn v. United States Government* 154 F. 3d 1025 (9th Cir. 1998). (1 Excerpts at 17.) However, that case, and the other cases cited by STB, make clear that what the ICCTA preempts are state or local statutes or regulations that attempt to regulate, and could thereby interfere with, interstate rail transportation. In particular, *City of Auburn* states that even an environmental statute *may* trespass on the exclusive jurisdiction of the STB:

> [G]iven the broad language of § 10501 (b)(2), (granting the STB exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines) the distinction between "economic" and "environmental" regulation begins to blur. For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.
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> (*Id.* at 1031.)

In *City of Auburn*, local authorities had attempted to impose *permit* requirements on the Burlington Northern Railway's proposed reopening of Stampede Pass. (*Id.* at 1027-1028.) While these permits were apparently primarily environmental in nature, they nevertheless would have been requirements for the project to proceed, and their denial would have defeated the project. The court therefore properly found that they were preempted by the ICCTA. Similarly, in *Green Mountain Railroad Corp. v. State of Vermont ("Green Mountain")* 404 F. 3d 638 (2nd Cir. 2005), Vermont's Act 250, a state environmental land use statute, required the railroad to obtain preconstruction *permits* for land development. (*Id.* at 639.) The court ruled that such permit requirements were likewise preempted by the ICCTA.

In *Assn. of Am. Railroads,* regulations approved by the South Coast Regional Air Quality District were similarly preempted under the ICCTA because they attempted to regulate air quality in connection with railroad yard operations and, in doing so, attempted to manage or govern rail transportation.[14]

In each of these cases, an outside public agency other than the STB was attempting to regulate, by way of issuing a permit or enacting regulations – and thereby potentially veto – a private rail project over which the STB had jurisdiction. Thus, for example, in *City of Auburn,* the city required the Burlington Northern Santa Fe Railroad to obtain a local land use permit. In *Green Mountain,* the State of Vermont required the private railroad company to obtain a state permit to build a train barn. In *Assn. of Am. Railroads*, the South Coast Air Quality District attempted to issue regulations controlling rail operations at a private rail yard. In *Boston and Maine Corp. and Town of Ayer*, *MA* – Joint Petition for Declaratory Order, No. FD 33971, 2001 WL 458685, a town conservation commission similarly sought to impose potentially onerous conditions on approving a private railroad project.

CEQA, by contrast, provides information and direction, but not necessarily coercion. It serves as an "environmental alarm bell" to alert governmental officials, and the public, to a project's potential environmental impacts and to inform public officials and the public of ways in which significant impacts might be mitigated or avoided. (*Sierra Club v. State Bd. of Forestry ("Sierra Club I")* 7 Cal. 4th 1215, 1229 (1994).)

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[14] Subsequently, the Air District submitted the same rules to the California Air Resources Board for approval by U.S. E.P.A. and incorporation in the California's State Implementation Plan under the Clean Air Act. The district court concluded that this action was not preempted. (*Assn. of Am. Railways v. South Coast Air Quality Mgmt. Dist* (C.D. CA, 2012) Case 2:06-cv-01416-JFW-PLA, Document 269, filed 2/24/2012

CEQA also – and not just incidentally – provides the opportunity for the public to participate and be involved in the project approval process. Indeed, a central tenet of CEQA is that California citizens have not just the right, but the *responsibility* to contribute to the preservation and enhancement of the environment. (Calif. Public Resources Code § 21000 subd. (e).) Through its comment and response process, CEQA provides California citizens the opportunity to have their voices heard by the California public agency that will make decisions about whether and how a project moves forward to approval. Because CEQA requires the public agency to go on record not only about its approval decision, but also about the reasons underlying that decision, CEQA is a statute of accountability. (*Sierra Club I,* 7 Cal. 4th, at 1229.)

> If CEQA is scrupulously followed, the public will know *the basis* on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees.... The EIR process protects not only the environment but also informed self-government.

(*Id.* [emphasis added])

Thus, the focus of CEQA is on public disclosure of information about a project's potentially significant environmental impacts and how those impacts might be avoided or mitigated, and to involve the public in the discussion of those impacts. Further, CEQA does not, in and of itself, either approve or reject a project. Rather, analysis of a project under CEQA provides the public agency's decision makers with information that informs their decisions on the merits.[15]

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[15] STB's decision cites to its prior order in *DesertXpress Enterprises, LLC –* Petition for Declaratory Order (1 Excerpts at 9) as indicating that CEQA compliance is generally preempted for rail projects. Not so. The *DesertXpress* ruling is distinguishable in that DesertXpress was a private rail carrier seeking STB's regulatory approval for its application. While no state or local entity had yet asserted a conflicting regulatory authority, DesertXpress nevertheless sought and received STB's declaration that any state or local approvals, and any

> The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. *CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.*
>
> (*Laurel Heights Improvement Assn. v. Regents of University of California ("Laurel Heights I")* 47 Cal. 3d 376, 393 (1988) [emphasis added] [quoting from *Bozung v. Local Agency Formation Com*., 13 Cal. 3d 263, 283, (1975)].)

Indeed, CEQA allows an agency to approve a project in spite of its having significant and unavoidable environmental impacts. The only requirement on granting such an approval is that the agency, in approving the project, must adopt a statement of overriding considerations ("SOC") that explains to the public the agency's rationale for approving the project in spite of its impacts.[16] (Calif. Public Resources Code § 21081 (b); *Sierra Club v. Contra Costa County ("Sierra Club II")* 10 Cal. App. 4th 1212, 1222 (1992).)

STB's decision also asserts that CEQA contains "action-forcing" provisions that prohibit an agency from approving a project with significant environmental impacts if there are feasible mitigation measures or alternatives that would reduce or avoid the impacts. (1 Excerpts at 19; see Calif. Public Resources Code §§ 21002, 21002.1(b).) That is, indeed, an important feature of CEQA, and one that is not part of NEPA. However, CEQA and its case law clarify that "feasible," as used in determining whether to approve a project, includes legal or public policy

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requirement for CEQA compliance associated with such approvals, was preempted. Similarly, in *North San Diego County Transit Development Board* – Petition for Declaratory Order, No. FD 34111, 2002 WL 1924265 (STB August 19, 2002), CEQA compliance would have been in the context of the agency's applying for a state Coastal Act permit from the City of Encinitas. In both cases, it was the state or local regulatory approvals that were primarily preempted by the ICCTA's preemption clause. Since no state or local discretionary approval was required, the requirement for CEQA compliance disappeared as well.

[16] Of course, the SOC must be supported by substantial evidence. (*Sierra Club II*.)

considerations. More specifically, an alternative or mitigation measure can be found infeasible not only for technological or economic grounds (*see, e.g., Sequoyah Hills Homeowners Assn. v. City of Oakland,* 23 Cal. App. 4th 704, 715 (1994)), but also for legal or public policy reasons. (Public Resources Code § 21081 subd. (a)(3); *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* 210 Cal. App. 4th 184, 198 (2012); *Rialto Citizens for Responsible Growth v. City of Rialto* 208 Cal. App. 4th 899, 948 (2012); *California Native Plant Society v. City of Santa Cruz* 177 Cal. App. 4th 957, 998, 1000 *et seq*. (2009); *see also, City of Marina v. Board of Trustees of California State University* 39 Cal. 4th 341, 353, 368 (2006) [CSU Trustees asserted that legal considerations made contributing to offsite mitigation measures infeasible – Supreme Court reversed, concluding that such a contribution, if voluntary, was not legally prohibited, and was therefore not infeasible].) Legal considerations could, and indeed inevitably would, include circumstances such as when implementation of a mitigation measure or alternative would contradict, limit, or significantly delay[17] proceeding with a project as approved by the STB.

In short, CEQA, unlike federal, state, or local statutes or regulations that could be used to defeat a rail project, does <u>not</u> stand in the way of approving a project consistent with the STB's plenary jurisdiction.[18] All it requires is that,

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[17] Not every delay can be said to place an undue burden on interstate commerce justifying preemption. How much delay would be considered unacceptable is an issue that is not yet before this Court.

[18] Depending on the complexity of a project, there may be a certain amount of delay involved in doing the necessary environmental review. However, CEQA review is usually coterminous with NEPA review, which is not preempted by the ICCTA. The delay often complained about under CEQA, like that under NEPA, is most often due to claims that the review was not done properly. A rigorous review will generally eliminate or greatly reduce the risk of litigation, and its associated delay. Further, in California it is presumed that official acts have been regularly

before granting such an approval, the agency considering the approval have adequate information about the project, its potential environmental impacts, and how those impacts might feasibly be avoided or mitigated.

The agency, upon consideration of the restrictions on feasible mitigation measures and alternatives because of STB's jurisdiction over the project and upon issuance of an appropriate SOC, could approve the project regardless of the severity of the legally unavoidable impacts it might cause. In this respect, it differs fundamentally from the statutes at issue in, for example, *City of Auburn* and *Green Mountain*, and the regulation involved in *Assn. of Am. Railroads*. Consequently, CEQA compliance is not preempted by ICCTA's §10501 (b).[19]

Concern may be expressed that allowing STB rulings to override what might otherwise be considered feasible mitigation measures or alternatives would "gut" CEQA and reduce it to a meaningless statute. Such is not the case. As explained earlier, CEQA has multiple purposes, including providing a voice for Californians in the project approval process – a voice that must be heard and responded to – and making public agencies responsible to the public they claim to serve. Even if STB jurisdiction can override some of CEQA's identified mitigation measures or alternatives, those benefits remain. Further, it is certainly not a given that all mitigation measures or alternatives arising from the CEQA process will be

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performed. (Calif. Evidence Code § 664; *Fukuda v. City of Angels* 20 Cal. 4th 805, 812 (1999).) Successful litigation to challenge a CEQA review should therefore not be presumed.

[19] It should be noted that NEPA, like CEQA, is an informational, rather than an action-forcing, statute. Thus NEPA is likewise not preempted by the ICCTA. This is expressly shown by the fact that the STB relied upon the NEPA analysis done by the Federal Railroad Administration in making its determinations on the high-speed train application before it. (*See*, *California High-Speed Rail Authority--Construction Exemption--in Fresno, Kingsd, Tulare, and Kern Counties, Cal.* (STB, August 11, 2014, Decision 43700), Exhibit G to Petitioners' MJN.)

inconsistent with STB jurisdiction. If a mitigation measure or alternative does not conflict with STB's jurisdictional authority, the requirement to implement feasible mitigation measures or alternatives that will reduce or avoid a project's significant impacts remains a mandate that public rail agencies must obey.

C. The citizen suit provisions for CEQA enforcement, as part of the Legislature's intended enforcement scheme for CEQA, does not convert CEQA into a regulatory statute.

The STB's order also claimed that CEQA compliance was preempted because it could involve litigation initiated by outside parties to enforce compliance. (1 Excerpts at 20.) The STB held that even if the agency's CEQA review was not directly preempted, the *potential* for a third party lawsuit challenging the agency's approval of its own project based on CEQA noncompliance required preemption of CEQA review. (*Id.*) The STB decision misunderstood the role of citizen lawsuits in CEQA enforcement.

When the California Legislature enacted CEQA, it explicitly provided for citizen enforcement of its provisions. (Calif. Public Resources Code § 21167 *et seq.*; *Rich v. City of Benicia* 98 Cal. App. 3d 428, 437 (1979). The Legislature, recognizing that the state had only limited resources available for enforcement, provided for private enforcement of CEQA by any interested party. These provisions are similar to those of many federal statutes, including the Clean Air Act (42 U. S. C. § 7604), the Clean Water Act (33 U. S. C. § 1365), NEPA, and other federal statutes under the Administrative Procedures Act (5 U. S. C. § 702) where such citizen enforcement is an integral part of the federal statutory scheme and does not generally invoke preemption under the ICCTA. (*See, Assn, Amer. RR v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) ["If an apparent conflict existed between ICCTA and a federal law, then the courts must strive to harmonize the two laws, giving effect to both laws if possible."].)

The same should be true for CEQA. Therefore, a lawsuit filed challenging the project's approval for noncompliance with CEQA should not in and of itself trigger preemption. Only if injunctive relief were ordered or the project approval ordered entirely rescinded could it be said that preemption *might* be warranted. Neither of these remedies is required by the CEQA statutes. Indeed, even if a court found a CEQA violation, the remedy would not necessarily interfere with, or even delay, the approved project. (*See,* Calif. Public Resources Code § 21168.9 subd. (b); *see also, e.g.*, *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* 57 Cal. 4th 439, 464-65 (2013) [while EIR did not fully comply with CEQA's informational mandate, violation did not result in demonstrable harm, and therefore approval could remain in place]; *Laurel Heights I")* 47 Cal. 3d at 423 [equitable principles favored denying injunctive relief despite successful CEQA challenge].) Thus CEQA preemption by the STB decision was both premature and unwarranted.

The STB's decision erroneously pointed to the court of appeal's decision in *Friends of Eel River v. North Coast Rail Authority,* formerly published at 230 Cal. App. 4th 85 (2014) [effectively depublished pursuant to Calif. Rules of Court, rule 8.1105 subd. (e) when the California Supreme Court accepted review of the case], as justifying pre-emption of CEQA. (1 Excerpts at 20 fn.23.) That case involved the proposed repair and reactivation of a publicly owned freight line north of San Francisco. While the North Coast Rail Authority had initially agreed to conduct CEQA review of the project in return for receiving a state assistance grant, it later invoked preemption under the ICCTA when local environmental groups sued, claiming the EIR for the project was inadequate. The court of appeal's decision attempted to analogize a CEQA enforcement action to the lawsuit involved in *DHL Express (USA), Inc. v. State of Florida ex rel. Grupp ("Grupp")* 60 So.3d 426,

reh'g den. (Apr. 26, 2011), rev. den. (Fla. 2012) 81 So.3d 415, cert. den. 132 S.Ct. 2753 (2012).

Grupp involved an attempt by private individuals to assert Florida's false claims statute against a private shipping company's rate surcharges. As *Grupp* explained, Florida's purpose in enacting its false claims statute went far beyond merely enforcing proper conduct in contracts with the state, a type of action that would be permissible under the market participant exception. (*See, e.g.*, *American Airlines, Inc. v. Wolens* 513 U.S. 219 (1995) [plaintiffs' objections to retroactive change in terms of contract made with airline, while within the scope of matters subject to preemption, was not preempted because it merely involved enforcing contract terms entered into between the company and the individuals involved].) If the action in *Grupp* had similarly been limited to enforcing the contract between the state and DHL, it would not have been preempted, because Florida would have been acting as a market participant. (*Grupp,* 60 So.3d at 429.) The court concluded, however, that the false claims statute, by invoking the potential for treble damages, went far beyond a market participant's interest in contract enforcement and attempted (by the veiled threat of imposing treble damages) to use Florida's regulatory power to influence DHL's, and other potential defendants', future behavior in the market. (*Id.*) Under the test of whether this constituted regulation (*Johnson v. Rancho Santiago Comm. College Dist.,* 623 F. 3d 1011, 1021 (9th Cir. 2010)), Florida's law was therefore subject to preemption.[20]

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[20] The same result was reached for the same reasons in *State of New York ex rel Grupp v. DHL Express (USA), Inc. ("Grupp II"),* 970 N.E.2d 391, 397 (N.Y. 2012) and in *Grupp v. DHL Express (USA), Inc. ("Grupp III"),* 240 Cal.App.4th 420 (2015).

Here, by contrast, CHSRA's application of CEQA to its own conduct and its own project would have no effect on the overall rail transportation market. (*See, Atherton,* 228 Cal. App. 4th at 341.) STB's, and the *Friends of Eel River* court of appeal decision's reliance on *Grupp* was therefore misplaced. Indeed, citizen enforcement is the primary method by which CEQA is enforced. (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors,* 79 Cal. App. 4th 505, 517 (2000).) The court of appeal in *Atherton,* recognized this fact and explicitly found that, as participants in the CEQA process, the plaintiffs/appellants could properly bring an enforcement action without straying outside the boundaries of the market participant exception. (*Atherton,* 228 Cal. App. 4th at 340, 341.) Instead of following California courts' published interpretation of state law, however, the STB erroneously adhered to the interpretation contained in the depublished *Friends of Eel River* court of appeal decision. (1 Excerpts 18 [citing to 178 Cal.Rptr. 3d at 774-78].)

CEQA's citizen enforcement provisions are a reasonable, cost-effective alternative to providing for enforcement by the Attorney General or another state public agency. A private party who steps into the shoes of the Attorney General to enforce California's requirements on its own agency therefore does not convert CEQA into a regulatory statute any more than would an enforcement action by the Attorney General[21] or an investigation by the State Auditor or the Joint Legislative Audit Committee. All are merely methods used by the State of California to ensure that state agencies are properly implementing the Legislature's mandated informational and public participation requirements through CEQA.

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[21] Such an enforcement action could not have occurred for the high-speed rail project, as the Office of the Attorney General represents CHSRA in defending against CEQA challenges, and indeed itself raised the CEQA preemption issue. (*See, Atherton,* 228 Cal.App.4th at 324-327.)

II. THE TENTH AMENDMENT PRECLUDES THE ICCTA'S PREEMPTION OF A STATE'S REGULATION OF ITS OWN SUBORDINATE AGENCIES.

The State of California has sovereign and absolute authority to establish the extent and character of the powers vested in its state agencies. (See, e.g., *Nixon v. Missouri Municipal League* 541 U.S. 125, 140-141 (2004).) As a result, the Supreme Court has found that a statute invoking express federal preemption, such as the ICCTA, cannot "interpos[e] federal authority between a state and its municipal subdivisions" absent an "unmistakably clear" congressional intent to do so in the language of the statute, which the ICCTA does not provide. (*Id.*; see, 49 U. S. C. § 10501(b).)

Here, the California Legislature has expressly required CHSRA to comply with state environmental laws for the protection of the public. (Calif. Streets & Highways Code § 2704.08, subd. (c)(2)(K); see Senate Daily Journal, 2011-2012 Reg. Sess., pp. 4447-4448 [letter from Sen. Mark Leno stating the legislature's intent that Section 2704.08 refer to both CEQA and NEPA][22].) The STB, however, found that the ICCTA preempted CEQA review by CHSRA. (Decision, 1 Excerpts at 21.) This directly interposed federal authority between the State and CHSRA – by allowing CHSRA to continue to have discretionary approval authority over the High Speed Rail Project while at the same time excusing CHSRA from complying with a state environmental law governing the exercise of that discretion.

This result was flatly inconsistent with federal law. Both the United States and California Supreme Courts have long held that a State has absolute power over its internal affairs, including "the extent and character of the powers which its various political organizations shall possess." (*Platt v. San Francisco* 158 Cal. 74,

[22] *See, Atherton,* 228 Cal.App.4th at 338-339 [discussion of Leno letter].

82 (1910); *see also, Claiborne v. Brooks* 111 U.S. 400, 410 (1884) ["the extent and character of the powers (of a State's) various political and municipal organizations . . . is a question that relates to the internal constitution of the body politic of the State"].) The California Supreme Court recently reiterated this rule in *California Redevelopment Assn. v. Matosantos* 53 Cal. 4th 231 (2011), holding that the state has plenary power to both create and abolish its political subdivisions, as well as to determine the nature of the powers held by those entities. (*Matosantos*, 53 Cal. 4th at 255 [citing *Hunter v. Pittsburgh,* 207 U.S. 161, 178-179 (1907); *Board of Supervisors v. Local Agency Formation Com,* 3 Cal. 4th 903, 914-915 (1992)].)

Any federal preemption statute that would "threaten[] to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power . . . ." (*Nixon*, 541 U.S. at p. 140.) "'If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'" (*Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991) [quoting *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985)]; *see, Nixon*, at pp. 140-141; *see also*, *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996) [presumption that Congress did not intend to preempt state law is hard to overcome].)

Nixon is closely on point. In *Nixon*, a Missouri statute barred state political subdivisions from providing telecommunications services or offering them for sale. (*Nixon*, 541 U.S. at p. 129.) A group of Missouri municipalities sought relief under the federal Telecommunications Act of 1996, 47 U. S. C. § 253, which preempted "state and local laws and regulations expressly or effectively 'prohibiting the ability of any entity' to provide telecommunications services." (*Id.* at p. 128.) The Court noted, "[i]n familiar instances of regulatory preemption under the

Supremacy Clause, a federal measure preempting state regulation in some precinct of economic conduct carried on by a private person or corporation simply leaves the private party free to do anything it chooses consistent with the prevailing federal law." (*Id.* at p. 133.) "But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations." (*Id.*) The problem with freeing a state political subdivision from the State's own limiting authorities is that "the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, 'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them *in its absolute discretion*.'" (*Id.* at p. 140 [emphasis added] [quoting *Wisconsin Public Intervenor v. Mortier* 501 U.S. 597, 607-608 (1991)].) Put in other words, the state is normally given absolute discretion in deciding how much power a political subdivision is allowed to exercise. By interposing federal preemption, Congress is allowing a federal agency to take control of a state-created entity, destroying the state's discretionary control of that entity.

As in *Nixon*, where State law prohibited state political subdivisions from providing or offering for sale telecommunications services, the California Legislature has made plain here that CHSRA's decision-making process is subject to numerous state laws dictating its form, function, and powers (see, e.g., Calif. Pub. Util. Code § 185020, *et seq.*), including state environmental laws such as CEQA. (Calif. Streets & Highways Code § 2704.08, subd. (c)(2)(K); *see*, Senate Daily Journal, 2011-2012 Reg. Sess., pp. 4447-4448 [letter from Sen. Mark Leno stating the legislature's intent that Section 2704.08 refer to both CEQA and NEPA].) The STB's decision that CHSRA's state-mandated environmental review process is preempted by the ICCTA directly "interpos[ed] federal authority" between the state and CHSRA by directly overriding the state's express direction

about how CHSRA should address potential environmental impacts of its projects. (*Nixon*, 541 U.S. at 140.)

STB can point to no express language in the ICCTA providing that a state, such as California, may not place conditions on the discretionary authority of a state agency by requiring it to first evaluate and consider the environmental consequences of its actions. Indeed, the STB's earlier decision approving construction of the Fresno-Bakersfield High-Speed Rail Project (Petitioners' MJN, ¶ 6 and Exhibit G) confirms that the STB did not intend its decision to preempt CHSRA's ability to conduct further review under CEQA, and the STB's August 11, 2014 Decision discussed at length the joint CEQA/NEPA environmental review conducted by CHSRA.[23] That Decision referred to ongoing CEQA review for further high speed rail segments under the programmatic EIR/EIS process, and referenced further review by another state regulatory agency, the State Historic Preservation Office ("SHPO").[24] Under CHSRA's and STB's current line of reasoning, that review would appear subject to preemption. The STB's August 2014 Decision contains no suggestion that California CEQA and SHPO review would cease under STB jurisdiction.

CEQA is among the state laws that determine the extent and character of a state agency's powers, and imposes certain procedural and substantive limitations on any discretionary approval undertaken by CHSRA, particularly those that may impact the environment.[25] (See, e.g., Calif. Public Resources Code § 21080; 1

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[23] See Exhibit G to Petitioners' MJN at pp. 5-7, 55 [STB Office of Environmental Assessment recommends that STB adopt all mitigation measures included in MMEP (Mitigation Monitoring and Enforcement Plan), which specifically includes mitigation measures under CEQA.

[24] See Exhibit G to Petitioners' MJN at p. 20.

[25] Such provisions are also contained in the Proposition 1A bond measure.

Kostka & Zischke, *Practice Under the California Environmental Quality Act*, (CEB, 1993) § 1.19, pp. 17-18.) Here, there is no question that CHSRA retains discretionary approval authority over its high-speed rail project. This discretionary approval authority remains subject to California's own directive to comply with state environmental laws for the protection of the public. Because preemption here would directly interfere with California's internal control of its own agency's exercise of discretion, the ICCTA does not preempt CHSRA's environmental review obligations under CEQA.

In light of the foregoing, the cases cited by STB are inapplicable here. Nearly every case cited, including *City of Auburn* and *Association of American Railroads*,[26] involves a *private* rail carrier, seeking relief against external regulation by state and local governments. STB cites only one STB decision (other than *Friends of Eel River, supra*) involving a publicly owned rail carrier, *North San Diego County Transit Development Board* – Petition for Declaratory Order (S.T.B. Aug. 19, 2002) No. FD 34111, 2002 WL 1924265. However that case is inapposite because no claim of 10th Amendment protection was raised. (*See, Atherton,* 228 Cal. App. 4th at 336-337 [cases are not authority for propositions not considered].)

The cases involving private rail carriers are plainly distinguishable. Unlike those cases, no permit is involved. Instead, California has imposed limitations on

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[26] In addition to *City of Auburn* and *Association of American Railroads*, STB cites *Adrian & Blissfield R. Co. v. Village of Blissfield,* 550 F. 3d 533, 535 (6th Cir. 2008); *New Orleans & Gulf Coast Ry. Co. v. Barrois,* 533 F.3d 321, 325-326 (5th Cir. 2008); *Green Mountain CSX Transp., Inc. v. Georgia Public Service Com'n,* 944 F. Supp. 1573, 157 (N.D.Ga. 1996) 5; *DesertXpress Enterprises*; and *Boston and Maine Corporation and Town of Ayer, MA* - Joint Petition for Declaratory Order, No. FD 33971, 2001 WL 458685 (S.T.B. Apr. 30, 2001); all of which involve private rail carriers seeking relief from external regulation.

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

III. THE MARKET PARTICIPANT EXCEPTION REMOVES A STATE'S DIRECTION OF ITS OWN RAIL ENTERPRISE FROM THE AMBIT OF PREEMPTION BY THE ICCTA.

In *Atherton,* the Third District Court of Appeal concluded that application of CEQA to the California high-speed rail project was not preempted under the ICCTA because the CHSRA was acting, not as a regulator, but as the proprietor of the proposed rail line, and as such was exempt from preemption under the market participant exception. (*Atherton,* 228 Cal. App. 4th at p. 323.) The situation here is almost identical. In both cases, the State of California, acting through its legislatively created rail authority, was involved in planning and constructing a state high-speed rail system.[28] In both cases, CHSRA was carrying out a state-mandated duty to conduct a CEQA analysis prior to making discretionary decisions to carry out a project that might significantly and adversely affect the environment.

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is obligated to implement all feasible mitigation measures, whereas under NEPA, it must merely engage in "a reasonably complete *discussion* of possible mitigation measures." (*See*, Calif. Publ. Resources Code § 21002.1, subd. (b); *Tracy First v. City of Tracy,* 177 Cal. App. 4th 912, 937 (2009) [CEQA]; *cf. N. Alaska Envtl. Ctr. v. Kempthorne,* 457 F. 3d 969, 979 (9th Cir. 2006) [emphasis added] [NEPA].) Under NEPA, the public has no assurance that the drastic alteration of the environment imposed by high-speed rail will be mitigated to the extent feasible. California voters approved the high-speed rail project under Proposition 1A with the expectation that the environmentally destructive effects of this wholly *intrastate* project would be mitigated to the extent feasible. (*See*, Calif. Streets & Highways Code § 2704.08, subd. (c)(2)(K); Calif. Publ. Resources Code § 21002.1, subd. (b).) Despite this clear mandate, STB has allowed CHSRA to invoke federal preemption, a doctrine only intended to reduce burdens on interstate commerce, to violate the express will of California voters, who placed specific environmental preconditions upon the power they granted to CHSRA to build an enormous and potentially environmentally damaging project. It is difficult to imagine a circumstance where federal preemption would execute a more egregious and destructive invasion of state sovereignty.

[28] CHSRA is explicitly part of the executive branch of the State of California. (*See*, Petitioners' MJN, ¶ 7 and Exhibit H.)

(Calif. Public Resources Code §§ 21001.1, 21002.)[29] In both cases, CHSRA undertook CEQA review and prepared an EIR for its proposed rail project, but the adequacy of the EIR was challenged by public and private entities seeking to enforce the mandate of California's voters and its Legislature. Finally, in both cases, CHSRA repudiated its duty to comply with CEQA by asserting that CEQA review was preempted by the ICCTA.

STB, ignoring the California Court of Appeal's published decision in *Atherton,* acceded to CHSRA's request and declared that CEQA compliance was preempted. In doing so, however, it ignored the fact that CHSRA's project and its CEQA compliance fell squarely within the market participant exception to preemption.

A. The market participant exception allows a state, acting as a market participant, to avoid federal preemption.

The market participant exception to preemption under the U.S. Constitution's Commerce Clause was formulated to recognize that government agencies do not always act in a regulatory capacity. "The basic distinction drawn in *Alexandria Scrap* [*Hughes v. Alexandria Scrap* 426 U.S. 794, 810 (1976)] between States as market participants and States as market regulators makes good sense and sound law." (*Reeves v. Stake* 447 U.S. 429, 436 (1980).) Essentially,

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[29] It should be noted that the Legislature had the option, which it did not exercise, of exempting CHSRA, or its high-speed rail project, from the application of CEQA. (*See*, *e.g.*, Calif. Public Resources Code §21080.13 [statutory exemption for railroad grade separation projects].) To the contrary, the Legislature, with the active support of CHSRA, promised California's voters through Proposition 1A that CHSRA would comply with CEQA and that the project it would build would be CEQA-compliant. (See, Calif. Streets & Highways Code §§2704.04(a) [Legislature and voters intended that project be consistent with certified EIRs for project], 2704.08(c)(2)(K) [project would complete all project-level environmental clearances prior to seeking use of bond funds for construction].)

the market participant exception allows a state, acting as a participant in the market, to take any action that a similarly placed private commercial entity could take, including discriminating among potential customers. In particular, it allows a state to show a preference for customers within its own state over customers in other states, so long as it is acting as a participant in the marketplace, rather than a regulator of that marketplace. Thus, for example, in *Reeves,* the State of North Dakota could preferentially fill orders placed with a state-run cement plant if those orders had been placed by a North Dakota resident business. (*Id.* at 432-33.) The court held this was permissible because it was acting, not as a regulator of the overall cement marketplace, but as would the owner of a private cement plant in deciding on its business partners. The cases since that time have agreed that when a state is acting as a participant in the market, rather than as a regulator, federal preemption of state action does not generally apply. The exception is grounded, as is the Tenth Amendment exception, by considerations of state sovereignty, "the role of each state 'as the guardian and trustee for its people." (*Id.* at 438.)

For example, in *Building & Constr. Trades Council v. Assoc. Builders & Contractors ("Boston Harbor Cases")* 507 U.S. 218 (1993), the Massachusetts Water Resources Agency ("MWRA") negotiated an agreement with the Building & Construction Trades Council to govern construction of sewage treatment facilities that MWRA owned. The agreement required that all contractors bidding on the project abide by the agreement. Associated Builders & Contractors, representing nonunion contractors, sued, claiming that the agreement was preempted under the National Labor Relations Act. The Supreme Court rejected that claim. It held that a state authority, when acting as the owner of a construction project and absent specific indication by Congress of a prohibitory intent, was free to take action as the owner, rather than as regulator.

> When the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them.

(*Id.* at 233 [quoting from dissent in Court of Appeal's decision].)

Likewise, in *Tocher v. City of Santa Ana* 219 F. 3d 1040 (9th Cir. 1999), this Court held that a city's use of a rotational list to determine which company to employ to tow illegally parked and abandoned vehicles was not preempted by the express preemption provision of the Federal Aviation Administration Authorization Act (49 U. S. C. § 14501), which generally preempts local or state regulations affecting motor vehicle carriers such as trucking companies.

The rationale for that law's preemption clause, parallel with that of the ICCTA, which was passed at approximately the same time, was to promote deregulation of the trucking industry. (*Tocher*, 219 F. 3d at 1049.) However, the court held that the City of Santa Ana's "regulation" was not preempted, because the city was only establishing rules and regulations for *its own* contracts with tow companies, not those of the public in general.

STB argues that, for preemption purposes, there is no difference between a public and private rail line; that preemption applies equally to both. (*See*, 1 Excerpts 20 fn.24 [citing to *California v. Taylor*, 353 U.S. 553, 561-68 (1957)].) STB's citations are inapposite. None of the cases cited by STB, other than *Friends of Eel River,* which has now effectively been depublished and superseded by the Supreme Court's grant of review, addressed the market participant exception. Indeed, in *Taylor,* the statute involved, the Railroad Labor Act of 1926 ("RLA", 44 Stat. 577, 45 U. S. C. §151 *et seq*.), was specifically intended by Congress to reach into the internal labor negotiations of railroad companies and require the use of standards and procedures for relations between railroads and their employees. (*Id.*

at 557-558.) That specific intent of Congress directly preempted the state's civil service laws, as it would equally any private railroad company's labor procedures. However, the ICCTA, unlike the RLA, does not provide any indication that Congressional intended to reach into the internal operations of a railroad, either public or private. Without evidence of that intent, the market participant exception is presumptively applicable.

B. CHSRA's high-speed rail project is a proprietary project of the State of California.

The California Legislature established CHSRA explicitly to plan, construct, and operate a state-owned high-speed rail system. (See, Calif. Public Utilities Code § 185030.) In doing so, it made the State of California the proprietor of a rail enterprise.

The fact that California's Legislature, and its voters, specified an environmental review process that must be followed by its newly-created public enterprise places these two cases in an entirely different category than, for example, *City of Auburn,* or *Green Mountain, supra*, cases where a government entity was attempting to regulate, through a permit requirement, a private railroad line's operations. In this case, as in *Atherton*, the application of the market participant exception must be considered.[30]

C. As the proprietor of a state-created public rail enterprise, California has the authority to dictate procedures, including enforcement mechanisms, for that enterprise's operations, regardless of the ICCTA.

STB's decision, like that in *Friends of Eel River,* asserts that the ICCTA's preemption clause prohibits application of the market participant exception to

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[30] While *North San Diego Transit Development Bd.,* also involved a public rail entity, the market participant exception was apparently not raised in that case. (*See, Atherton,* 228 Cal.App.4th at 336-337.)

CEQA because of CEQA's citizen enforcement provisions. (1 Excerpts at 19.) STB asserts that even if the market participant exception could be asserted by CHSRA itself, it cannot be asserted by a third party as a plaintiff in a CEQA enforcement action. (*Id.*)

What STB and *Friends of Eel River* fail to take into account is that CEQA enforcement actions are not hostile third party suits aimed at disrupting a railroad's operations. Rather, they are an essential part the State of California's statutory scheme for enforcing its control over its proprietary enterprise. As such, they are an integral part of the overall CEQA statute. As Petitioners have already explained (see Section I.C, *supra*), the California Legislature explicitly incorporated citizen enforcement suits into the CEQA statute as a way of supplementing the State's limited enforcement capabilities. This is little different from how a private company might authorize derivative lawsuits by company shareholders to ensure that important company policies were properly implemented. In neither case, unlike the RLA, does the ICCTA indicate Congress' intent to reach into and preempt the enterprise's internal affairs.[31]

IV. PETITIONERS' ABILITY TO ENFORCE CHSRA'S VOLUNTARILY ASSUMED DUTY TO ABIDE BY CEQA IS NOT PREEMPTED BY THE ICCTA.

In *Fayard v. Northeast Vehicle Services* 533 F. 3d 42, 49 (1st Cir. 2008), the First Circuit Court of Appeal held that, despite the ICCTA's preemption clause, a railroad's voluntary commitment to an action is not preempted by ICCTA. In addition to the market participant exception, Petitioners, to the extent they are or represent California voters and taxpayers, have a right to enforce the material

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[31] If either a public or private rail enterprise attempted to countermand or modify an STB decision without authorization from STB, STB could initiate an enforcement action. (*See*, 49 U. S. C. § 11701 et seq.) That would not, however, constitute preemption.

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.)

CHSRA's high-speed rail project, and specifically the Fresno to Bakersfield segment of that project, will barely even connect to the interstate rail system, and is explicitly intended to create a high-speed rail system to connect and promote passenger travel between some of the principal cities *within* California (*See*, Calif. Streets & Highways Code § 2704.04(a)), it would require a great stretch of the imagination to assert that *anything* involved in its construction, and certainly not the mere fact of requiring consideration of the project's potential negative impacts on the environment, would place an undue burden on interstate commerce.

CONCLUSION

While the STB does have plenary jurisdiction over interstate rail operations, that jurisdiction does not automatically preempt any and all state laws that might affect a railroad. Here in particular, there are multiple reasons why the STB erred in finding that CEQA compliance by CHSRA in evaluating and approving the Fresno-Bakersfield segment of its proposed high-speed rail system was preempted under the ICCTA's §10501 (b) preemption clause. For these reasons, Petitioners respectfully request that the STB's declaratory order on preemption be reversed.

Dated: December 9, 2015

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STATEMENT OF RELATED CASES

There are no related cases currently pending in the 9th Circuit Court of Appeals

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)because this brief contains 11,706 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 Ver. 14.2.1 using 14 point Times New Roman typeface.

Signature: /S/ Stuart M. Flashman

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Date: December 7, 2015

Certificate of Service

I hereby certify that I electronically filed the foregoing Petitioners' Opening Brief and Petitioners' Addendum to 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 7, 2015.

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

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