Case No. 15-71780
(consolidated with Case No. 15-72570)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KINGS COUNTY, et al., and
DIGNITY HEALTH,

Petitioners

v.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA,

Respondents, and

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF
THE SURFACE TRANSPORTATION BOARD

JOINT BRIEF OF RESPONDENTS

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March 23, 2016

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GLOSSARY

APA	Administrative Procedure Act
Authority	California High-Speed Rail Authority
Board	Surface Transportation Board
Center	The Center for Biological Diversity
CEQA	California Environmental Quality Act
CHST	California High-Speed Train System
CHST Jurisdiction Order	*Cal. High-Speed Rail Auth.—Constr. Exempt.—Merced, Madera and Fresno Cntys., Cal.*, FD 35724 (STB served June 13, 2013)
December 2014 Decision	*Cal. High-Speed Rail Auth.—Pet. for Declaratory Order*, FD 35861 (STB served Dec. 12, 2014)
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
FCA	False Claims Act
FRA	Federal Railroad Administration
Fresno-to-Bakersfield Order	*Cal. High-Speed Rail Auth.—Constr. Exempt.—Fresno, Kings, Tulare and Kern Cntys., Cal.*, FD 35724 (STB served August 12, 2014)
ICA	Interstate Commerce Act
ICC	Interstate Commerce Commission
ICCTA	ICC Termination Act of 1995

May 2015 Decision	*Cal. High-Speed Rail Auth.—Pet. for Declaratory Order*, FD 35861 (STB served May 5, 2015)
NEPA	National Environmental Policy Act
PER	Petitioners' Excerpts of Record
SER	Supplemental Excerpts of Record
STB	Surface Transportation Board

JURISDICTIONAL STATEMENT

Under the Interstate Commerce Act (ICA), as amended by the ICC Termination Act of 1995 (ICCTA),[1] the Surface Transportation Board (STB or the Board) has broad and exclusive jurisdiction over transportation by rail carrier that is part of the interstate rail network. 49 U.S.C. § 10501. The Board also has jurisdiction to issue a declaratory order to terminate a controversy or remove uncertainty concerning the ICA and its application. 5 U.S.C. § 554(e); 49 U.S.C. § 1321.[2]

The California High-Speed Rail Authority asked the Board for a declaratory order under 5 U.S.C. § 554(e) and former 49 U.S.C. § 721 determining whether injunctive relief under the California Environmental Quality Act (CEQA) is available in CEQA enforcement suits brought by private parties relating to the California High-Speed Train System (CHST), a rail project within the Board's jurisdiction. After instituting a proceeding and inviting public comment, on December 12, 2014, the Board issued the decision under review here explaining that CEQA is preempted under 49 U.S.C. § 10501(b) as applied to the CHST. Petitioners' Excerpts of Record (PER) 14-21 (*Cal. High-Speed Rail Auth.—Pet. for*

[1] Pub. L. No. 104-88, 109 Stat. 803 (1995).

[2] Formerly 49 U.S.C. § 721, now recodified at § 1321 (per the Surface Transportation Board Reauthorization Act of 2015).

Declaratory Order, FD 35861, slip op. at 8-15 (STB served Dec. 12, 2014) (*December 2014 Decision*)).

Two timely petitions for reconsideration were filed. On May 5, 2015, the Board (now with only two sitting members) issued an order stating that it was unable to reach a majority decision concerning reconsideration, thus leaving the *December 2014 Decision* in place. PER 1 (*Cal. High-Speed Rail Auth.—Pet. for Declaratory Order*, FD 35861, slip op. at 1 (STB served May 5, 2015) (*May 2015 Decision*)).

Under 28 U.S.C §§ 2321(a), 2342, and 2344, this Court has jurisdiction to review final orders of the Board when a petition for review is filed within 60 days of the issuance of the final decision. A petition for review of the *December 2014 Decision* and *May 2015 Decision* was timely filed in this Court on June 11, 2015, and a separate petition for review was timely filed in the D.C. Circuit on June 30, 2015. The D.C. Circuit case was transferred to this Court and consolidated with this proceeding. As explained below, however, because the Board's *December 2014 Decision* provided only guidance to the California courts on the preemption issue, the Court could find that it is not a final reviewable order.

ISSUES PRESENTED

1. Whether the Board has the authority to issue declaratory orders, and whether such declaratory orders in general – and this declaratory order in particular – are reviewable.

2. Whether the Board properly found that the federal preemption provision at 49 U.S.C. § 10501(b) forecloses application of California state environmental law to block construction of a federally licensed rail project that is part of the interstate rail network and, therefore, within the Board's jurisdiction.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the Addendum.

STATEMENT OF THE CASE

I. FEDERAL REGULATORY FRAMEWORK

"Congress and courts long have recognized a need to regulate railroad operations at the federal level" and "the preclusive effect of federal legislation in this area." *City of Auburn v. Unites States,* 154 F.3d 1025, 1029 (9th Cir. 1998). Indeed, the ICA is "among the most pervasive and comprehensive of federal regulatory schemes," *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Thus, § 10501 provides that "[t]he jurisdiction of the Board over

. . . transportation by rail carriers . . . is exclusive" and that "the remedies provided [in the ICA] with respect to regulation of rail transportation . . . preempt the remedies provided under Federal or State law." *See also* 49 U.S.C. § 10901 (exclusive licensing authority over construction of rail lines); *City of Auburn,* 154 F.3d at 1030*; Transit Comm'n v. United States*, 289 U.S. 121 (1933); *Alaska Survival v. STB*, 705 F.3d 1073, 1078 (9th Cir. 2013); *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010) (the Board's exclusive jurisdiction under § 10501(b) preempts state and local laws attempting to regulate rail transportation). As this Court has noted, it is "difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations" than § 10501(b).[3] The purpose of this broad preemption provision is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce. *See* H.R. Rep. No 311, 104th Cong., 1st Sess. 83 (1995); *Florida E. Coast Ry. v. City of West Palm Beach*, 266 F.3d 1324, 1338 (11th Cir. 2001); *Thomas Tubbs—Pet. for Declaratory Order*, FD 35792, slip op. at 5 (STB served Oct. 31, 2014), *aff'd,* 812 F.3d 1141 (8th Cir. 2015).

[3] *City of Auburn,* 154 F.3d at 1030 (quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)); *see also Green Mtn. R.R. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005); *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 530, 532-33 (5th Cir. 2012); *Wichita Terminal Ass'n, BNSF Ry. & Union Pac. R.R.—Pet. for Declaratory Order*, FD 35765, slip op. at 6 (STB served June 23, 2015).

Courts and the Board have consistently found that two broad categories of state regulation are "categorically" (*i.e.*, *per se*) preempted under § 10501(b): (1) permitting or preclearance requirements (including environmental, zoning, and other land-use requirements)[4] that, by their nature, could be used to deny a railroad the right to conduct rail operations or proceed with rail transportation activities the Board has authorized; and (2) attempts to regulate rail transportation matters that are regulated by the Board.[5] State and local laws that are not categorically preempted still may be preempted "as applied" if they have "the effect of unreasonably burdening or interfering with rail transportation."[6] Because Congress made the Board's jurisdiction exclusive, preemption applies to attempted regulation of railroad operations without regard to whether or not the Board actively regulates the railroad operations or activities involved.[7]

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[4] Preclearance laws in this context are laws that impose requirements that must be met before construction or operations can begin, often in the form of permit requirements. *See Norfolk S. Ry. v. City of Alexandria,* 608 F.3d 150, 160 (4th Cir. 2010); *City of Auburn,* 154 F.3d 1025.

[5] *City of Auburn*, 154 F.3d at 1030-31; *Green Mtn.,* 404 F.3d at 642-43; *Franks Inv. Co. v. Union Pac. R.R.,* 593 F.3d 404, 410-11 (5th Cir. 2010); *CSX Transp., Inc.—Pet. for Declaratory Order,* FD 34462, slip op. at 3 (STB served May 3, 2005); *Bos. & Me. Corp. & Town of Ayer—Joint Pet. for Declaratory Order*, 5 S.T.B. 500, 507 (2001), *recons. denied* (STB served Oct. 5, 2001).

[6] *Franks Inv.*, 593 F.3d at 414; *see Tubbs*, 812 F.3d at 1144-46.

[7] *See Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1068-69 (10th Cir. 2010) (preemption applies to state tort claim related to spur track, which the Board does not actively regulate); *Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186, 1188 (10th Cir. 2008) (same).

Preemption, while broad, is not unlimited. States and localities retain their police powers to protect the health and safety of their citizens. *Green Mtn.,* 404 F.3d at 643. Thus, generally applicable, non-discriminatory regulations (*e.g.* fire and electrical regulations) are not preempted, unless they unreasonably interfere with rail transportation. *Id.* In addition, federal statutes, including federal environmental statutes such as the Clean Air Act and the Clean Water Act, are given effect unless they irreconcilably conflict with the ICA. *See Ass'n of Am. R.R.*, 622 F.3d at 1097; *Town of Ayer*, 5 S.T.B. at 508. Thus, the Board undertakes an environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, in all rail construction licensing proceedings under 49 U.S.C. § 10901. As part of the NEPA review process – which, in rail construction, generally involves preparation of a full Environmental Impact Statement (EIS) because of the potential for significant environmental impacts – the Board considers and typically adopts appropriate environmental mitigation conditions in response to concerns raised by parties, including state and local entities, during the Board's proceeding. *Alaska Survival*, 705 F.3d at 1078; *City of Auburn*, 154 F.3d at 1031-32; 49 C.F.R. §§ 1105.1-1105.12.

II. THE PROCEEDINGS BEFORE THE BOARD

A. The California High Speed Rail Project

California's planned CHST, to be built in sections, will be an 800-mile high-speed rail corridor from San Francisco to San Diego. *See Cal. High-Speed Rail Auth.—Constr. Exemption—Merced, Madera and Fresno Cntys., Cal.*, FD 35724, slip op. at 4 (STB served June 13, 2013) (*CHST Jurisdiction Order*). The CHST will connect and coordinate with Amtrak to enable passengers to travel both within and outside California. *Id.* at 12-14. The California High Speed Rail Authority (the Authority) is the state agency responsible for the development and construction of the CHST.

California plans to pay for the CHST in part from a grant from the Federal Railroad Administration (FRA) and in part from a California bond measure known as Proposition 1A. *Id.* at 3-4. Because FRA grant funds are being used, FRA has led the federal environmental review of this project under NEPA. *Id.* at 4, 7. Before the Board ruled in the *CHST Jurisdiction Order* that this project was interstate in nature, the Authority had proceeded under California state law. Therefore, during the initial environmental review process, the Authority was the lead agency for compliance with CEQA – the state environmental regulatory scheme that the Board subsequently found to be federally preempted. *Id.* at 7-8. The Authority also participated in FRA's NEPA review. *Id.* at 7-9.

Under CEQA – if it applies – the Authority, as the state agency proposing to approve or carry out a project that may have a significant effect on the environment, would be required to prepare an Environmental Impact Report (EIR) that provides detailed information about the environmental effects of the CHST; explains how the effects can be mitigated; and considers rail project and route alternatives. Cal. Pub. Res. Code § 21002 *et seq.* Significantly, CEQA also bars a state agency from approving a project without imposing all feasible mitigation measures or alternatives and permits third parties to bring CEQA enforcement suits and obtain injunctive relief based on an alleged lack of mitigation. *Id.*

NEPA, similar to CEQA, requires *federal* agencies (not state agencies) to examine the potential environmental effects of proposed major federal actions and to inform the public concerning their effects. *Baltimore Gas & Elec. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983). Under NEPA, the Board generally must prepare an EIS addressing the potential significant environmental impacts when deciding whether to authorize a rail construction project as proposed, deny the proposal, or approve it with conditions, including environmental conditions. However, in contrast to CEQA, NEPA only requires that the agency consider mitigation measures – not necessarily adopt them. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-53 (1989).

The combined NEPA/CEQA review process for the CHST began with a joint Programmatic EIS and EIR issued by FRA and the Authority in 2005, and revised in 2010 and 2012, that examined the potential environmental impacts of the project as a whole. *CHST Jurisdiction Order* at 7-8. FRA and the Authority, with the Board acting as a cooperating agency following issuance of the *CHST Jurisdiction Order*, have since completed more targeted environmental reviews of the two sections of the CHST approved to date. *Id.* at 7-10, 28; *Cal. High-Speed Rail Auth.—Constr. Exemption—Fresno, Kings, Tulare and Kern Cntys., Cal.,* FD 35724, (STB served August 12, 2014) (*Fresno-to-Bakersfield Order*).

In 2013, the Authority asked the Board to determine whether it had jurisdiction over the rail construction project. The Board found that the CHST is part of the interstate rail network and that it falls within the Board's jurisdiction under 49 U.S.C. § 10501 because the CHST's extensive connections with Amtrak are integral to the project. *CHST Jurisdiction Order* at 11-15.

This finding meant that Board licensing of the proposed construction was required under 49 U.S.C. § 10901. It also triggered NEPA review by the Board, whose first step was to evaluate FRA's Programmatic EIS. FRA's Programmatic EIS analyzed the effects of implementing the entire CHST, selected a preferred alternative for the entire route, and imposed extensive mitigation measures. *Id.* at

8-9. After taking the hard look required by NEPA, the Board adopted FRA's Programmatic EIS. *Id.* at 9-11, 25-28.

To date, the Authority has asked the Board to approve the construction of two sections of the CHST: the section from Merced to Fresno and from Fresno to Bakersfield (Fresno-to-Bakersfield Line). The Board participated as a cooperating agency in FRA's section-specific NEPA review, adopting FRA's EIS, but adding its own environmental mitigation measures. *Fresno-to-Bakersfield Order*; *CHST Jurisdiction Order* (approving construction of the Merced-to-Fresno Line).

No party sought judicial review of the *CHST Jurisdiction Order* or the *Fresno-to-Bakersfield Order*, and they are not at issue in this case.

B. The STB Declaratory Order Under Review

On October 9, 2014, the Authority filed a separate petition asking the Board, under 5 U.S.C. § 554(e) and former 49 U.S.C. § 721 (now 49 U.S.C. § 1321), for a declaratory order holding that CEQA injunctive remedies that may prevent or delay construction of the Fresno-to-Bakersfield Line are preempted. Supplemental Excerpts of Record (SER) 002-017 (Authority October 9, 2014 Petition for Declaratory Order (*Authority Petition*)). The Authority explained that one California appellate court had held that CEQA applied to the Fresno-to-Bakersfield

Line;[8] but that another California appellate court had held that CEQA was preempted from applying to a different rail line – even one owned and operated by a California state agency – if the STB had jurisdiction over the line.[9] SER 012-016 (*Authority Petition* at 12-16). In addition, the Authority stated that in seven CEQA lawsuits pending in California Superior Court, the plaintiffs were seeking injunctive relief that would, if successful, prevent or delay the Authority from moving forward with construction of CHST sections authorized by the STB.[10] SER 004 (*Authority Petition* at 4).

The Board opened a declaratory order proceeding in response to the petition. After extensive public comment, it issued the *December 2014 Decision* to "inform interested parties and the California Supreme Court of [the Board's] views on federal preemption of CEQA . . . as they relate to this matter involving railroad transportation within the Board's jurisdiction under § 10501(b)." PER 11

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[8] *Town of Atherton v. Cal. High-Speed Rail Auth.*, 175 Cal. Rptr. 3d 145 (Cal. Ct. App. 2014) (finding that under the market participant doctrine – which shields state action from federal preemption when that action is proprietary in nature and not regulatory – there is no preemption of CEQA as it relates to the CHST).

[9] *Friends of the Eel River v. N. Coast R.R. Auth.*, 178 Cal. Rptr. 3d 752 (Cal. Ct. App. 2014) (disagreeing with *Atherton* and holding that the market participant doctrine does not block preemption of CEQA as it relates to a state owned and run rail line over which the Board has jurisdiction). *Eel River* was appealed to the California Supreme Court, where it is fully briefed. *Friends of the Eel River v. N. Coast R.R. Auth.*, Case No. S222472.

[10] Some of the Petitioners in this Court are also plaintiffs in the pending CEQA enforcement suits.

(*December 2014 Decision* at 5). The Board issued its opinion to "assist in the resolution of the conflict between *Atherton* and *Eel River* on federal preemption of CEQA in cases involving rail line construction." *Id.*

In its decision, the Board concluded that the application of CEQA to the CHST project is preempted by 49 U.S.C. § 10501(b). PER 15-20 (*December 2014 Decision* at 9-14).[11] As the Board explained, longstanding precedent establishes that state and local environmental permitting or preclearance requirements, such as CEQA, are categorically preempted from application to a railroad project within the Board's jurisdiction because, by their nature, they can be used to deny or significantly delay construction of a rail line that the Board has authorized.[12] PER 14 (*December 2014 Decision* at 8). In addition, the Board found, because "environmental review under CEQA attempts to regulate where, how, and under

[11] Even though the Authority had sought a ruling only as to CEQA's injunctive remedy provisions, Cal. Pub. Res. Code § 21168.9, the Board explained that, because of the difficulties in separating CEQA's injunctive remedy provisions from a California state court's ability to enforce compliance with CEQA itself, the decision would address the application of preemption to CEQA as a whole with regard to the CHST. PER 16 (*December 2014 Decision* at 10).

[12] Among the precedent that the Board cited were: *City of Auburn,* 154 F.3d 1025; *Green Mtn.*, 404 F.3d at 643; *DesertXpress Enters., LLC—Pet. for Declaratory Order*, FD 34914, slip op. at 5 (STB served June 27, 2007); *N. San Diego Cnty. Transit Dev. Bd.—Pet. for Declaratory Order*, FD 34111, slip op. at 9 (STB served August 21, 2002); and *Norfolk S. Ry.—Pet. for Declaratory Order*, FD 35701, slip op. at 6 & n.14 (STB served Nov. 4, 2013). *See also, e.g., Tex. Cent. Bus. Lines*, 669 F.3d at 530, 532-33 (local construction regulation preempted); *City of Alexandria,* 608 F.3d at 160 (local ordinance and permit requirement preempted).

what conditions the Authority may construct the Line, the application of CEQA here would constitute an attempt by a state to regulate a matter directly regulated by the Board." PER 18 (*December 2014 Decision* at 12). The Board also explained why the market participant doctrine does not bar preemption. PER 18-20 (*December 2014 Decision* at 12-14).[13]

While the Board acknowledged that the Authority had previously litigated the issue of whether § 10501(b) preempts CEQA as applied to the CHST in *Atherton*, it held that neither *res judicata* nor collateral estoppel barred it from offering its views regarding federal preemption and that it would issue a declaratory order to "assist [the California state courts] in the resolution of the conflict between *Atherton* and *Eel River* on federal preemption of CEQA." PER 11, 13 (*December 2014 Decision* at 5, 7). Finally, the Board explained that its opinion did not interfere with California state sovereignty because it was not making any determination regarding the use of funding from Proposition 1A and whether use of Proposition 1A funds independently imposed CEQA obligations on the Authority. PER 20-21 (*December 2014 Decision* at 14-15).

[13] The Board found that the market participant doctrine does not block the clearly articulated congressional policy in § 10501(b) favoring preemption, particularly where the private party CEQA enforcement suits at issue here are not state proprietary actions to which the doctrine is applicable. PER 18-20 (*December 2014 Decision* at 12-14).

After the Board declined to grant reconsideration, Petitioners sought judicial review. Additionally, the Center for Biological Diversity (the Center or Amicus) – which had not participated in the Board's proceeding – sought the Court's permission to file an overlength brief on December 28, 2015. The Board moved to strike the Center's proposed amicus brief because it principally addressed issues that had not been raised, and hence that had been waived, by Petitioners. Because the Court has referred that motion, along with the other pending motions, to the merits panel, the Board is, out of an abundance of caution, addressing the issues raised in the Center's proposed amicus brief. By doing so, however, the Board does not waive its objections to the presentation of these issues to the Court, nor does it believe that the Court should consider them.

SUMMARY OF ARGUMENT

The Center, whose over-long proposed amicus brief has so far not been permitted by the Court, claims that the Board lacks authority to issue declaratory orders, and that the Court lacks jurisdiction to review them. But it is well settled that the Board has the authority under the APA and its own statute to issue declaratory orders, and this Court has found that it has the jurisdiction under the Hobbs Act to review such declaratory orders. However, because this particular order merely provided guidance to the California courts on the preemption issue,

the Court could find it unreviewable for lack of finality under general principles of administrative law.

If the Court reaches the merits of the preemption issue, clear precedent in this Court holds that state and local environmental preclearance laws like CEQA are categorically preempted under § 10501(b), as they attempt to regulate rail construction projects within the Board's jurisdiction. *City of Auburn,* 154 F.3d 1025. Petitioners' and the Center's attempts to avoid this precedent are unsound.

Although Petitioners claim that CEQA is just an informational statute that does not interfere with Board jurisdiction, CEQA imposes significant substantive requirements concerning project alternatives and potentially burdensome mitigation, and makes injunctive remedies available for third-parties to enforce those substantive requirements. Thus, it plainly could be applied so as to block this federally authorized project, thereby impinging on the Board's exclusive jurisdiction.

Petitioners also fail to show that the Board's order interferes with California's sovereignty. Congress has given the Board plenary, exclusive authority over rail transportation that is part of the interstate rail network even when provided by a state entity. Moreover, the Board explicitly avoided Tenth Amendment issues here by making it clear that the State could impose conditions, even conditions rooted in CEQA, on its funding of the Authority's program. The

Board's finding that CEQA – including CEQA enforcement suits seeking to block the project, outside of the funding context – is preempted is well within the bounds of established preemption law.

Nor does the market participant doctrine block preemption because Congress has clearly expressed its intent to give the Board exclusive jurisdiction over rail transportation. In any event, CEQA enforcement suits such as those that Petitioners' have brought are not state proprietary actions. Rather, because they seek to impose state environmental standards, CEQA enforcement suits are regulatory actions not subject to the market participant doctrine.

ARGUMENT

I. THE STANDARD OF REVIEW IS NARROW.

The Board's interpretation of the scope of preemption under § 10501(b) is reviewed under the Administrative Procedure Act, and the Board's decision should not be overturned unless it is "arbitrary, capricious, an abuse of discretion," "otherwise not in accordance with law" or "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E); *DHX, Inc. v. STB,* 501 F.3d 1080, 1086 (9th Cir. 2007). This review standard is "narrow" and "the reviewing court may not substitute its judgment for that of the agency." *DHX,* 501 F.3d at 1086; *Public Util. Dist. No. 1 v. FEMA*, 371 F.3d 701, 706 (9th Cir. 2004) (citing *Envtl. Def. Ctr., Inc. v. EPA*,

344 F.3d 832, 858 n. 36 (9th Cir. 2003)); *see also In re Transcon Lines*, 89 F.3d 559, 563–64 (9th Cir. 1996).

This Court has explicitly held that STB determinations on the scope of preemption under § 10501(b) are entitled to *Chevron*[14] deference. *Ass'n of Am. R.R.*, 622 F.3d at 1097 (citing *DHX*).[15] Petitioners' and the Center's arguments that *Chevron* deference is not due here[16] ignore this Court's directly applicable precedent to the contrary.

II. STB DECLARATORY ORDERS ARE PERMISSIBLE AND GENERALLY REVIEWABLE.

A. The STB Can Issue Preemption Declaratory Orders, and this Court Can Review Them Under the Hobbs Act.

The Center – but not Petitioners – argues that the Board lacks authority to issue declaratory orders in this context, and that this Court lacks jurisdiction to review Board declaratory orders concerning federal preemption. Center Br. at 24-27. But the Hobbs Act provides the federal courts of appeals with jurisdiction to

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[14] *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

[15] The Board is "uniquely qualified to determine whether state law is preempted by Section 10501(b)." *N.Y. & Atl. Ry. v. STB*, 635 F.3d 66, 70 (2d Cir. 2011) (quotation and citation omitted); *see also Emerson v. Kansas City S. Ry.*, 503 F.3d 1126, 1130 (10th Cir. 2007); *Green Mtn.*, 404 F.3d at 642-43; *Tubbs*, 812 F.3d at 1144 (applying *Chevron* deference).

[16] Petitioners' Opening Brief (Pet. Br.) at 11-13; the Center's Proposed Amicus Brief (Center Br.) at 47-50.

review "*all* rules, regulations, or final orders" of the STB. 28 U.S.C. § 2342(5) (emphasis added); *see also* § 2321(a). The Center ignores the decades of precedent from this Court and other circuits reviewing STB preemption declaratory orders under the Hobbs Act.[17] This Court and other courts also have regularly reviewed declaratory orders from other agencies and on other issues.[18]

Citing the *Attorney General's Manual on the APA* from 1947, the Center argues (Center Br. at 26-27) that the Board lacked the authority to issue the declaratory order here because § 554 applies only to "case[s] of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . ." But the Center's interpretation limiting when an agency can issue a declaratory order under § 554(e) has been squarely rejected by the courts,

[17] *See*, *e.g.*, *City of Auburn,* 154 F.3d 1025 (reviewing both a declaratory order addressing preemption and the adequacy of the STB's NEPA review of a Board-authorized acquisition); *Tubbs*, 812 F.3d at 1144 (reviewing a STB preemption declaratory order); *N.Y. & Atl. Ry.*, 635 F.3d at 69-70 (same); *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005) (same).

[18] *See, e.g., Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-99 (9th Cir. 1996) (FCC declaratory order on preemption reviewable under the Hobbs Act); *W. Coast Truck Lines, Inc. v. Am. Indus., Inc.*, 893 F.2d 229, 233 (9th Cir. 1990) (reviewing declaratory order from the Interstate Commerce Commission (ICC), the Board's predecessor, on unreasonable practices); *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 915-16 (5th Cir. 1993) (reviewing ICC declaratory order on whether it had jurisdiction over certain shipments); *Central Freight Lines v. ICC*, 899 F.2d 413, 417 (D.C. Cir. 1990) (same).

including this Court.[19] As the D.C. Circuit explained, "'the limitations in the introductory clause [of § 554] were not drafted with declaratory orders in mind.'" *British Caledonian Airways*, 584 F.2d at 993-94 n.23 (quoting Kenneth C. Davis, *Administrative Law Treatise § 4.10*, at 201 (Supp. 1970)); *accord Wilson*, 87 F.3d at 397-98.[20] Indeed, the Board's predecessor agency, the ICC, issued many declaratory orders, and "[t]he Supreme Court has assumed the practice to be proper." *United Transp. Union*, 52 F.3d at 1079 n.10.

Moreover, the agency has the "inherent authority" to issue declaratory orders under the ICA, former 49 U.S.C. § 10321 (later § 721 and now § 1321). *United Transp. Union*, 52 F.3d at 1079 n.10. Section 1321(a), which the agency cited here in issuing its declaratory order (PER 10, *December 2014 Decision* at 4), gives the agency the authority to "carry out" the provisions of the ICA "and, in listing the agency's powers, states that others are not excluded." *United Transp. Union*, 52 F.3d at 1079 n.10. Thus, the Center's suggestion that the Board lacked authority to

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[19] *Wilson*, 87 F.3d at 397-98 & n. 4 (the APA, 5 U.S.C. § 554(e), "grants . . . authority to issue 'declaratory orders'"); *United Transp. Union-Ill. Legislative Bd. v. ICC*, 52 F.3d 1074, 1079-80 n.10 (D.C. Cir. 1995); *British Caledonian Airways, Ltd. v. CAB*, 584 F.2d 982, 993-94 n.23 (D.C. Cir. 1978).

[20] *See also* Kenneth C. Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 Harvard L. Rev. 193, 230 (1949) (the statutory placement of the introductory clause and the declaratory order provision "seem[ed] to have little rational foundation and [was] probably the product of inadvertence"); Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 Admin. L. Rev. 1097, 1111-12 (2004).

issue its declaratory order under the APA or its own statute – or that declaratory orders generally are not reviewable under the Hobbs Act – is unsound. *See* Emily S. Bremer, *Declaratory Orders: Final Report to the Administrative Conference of the United States* 14–24 (Oct. 30, 2015) (detailing the Board's long history of issuing, and the courts of reviewing, declaratory orders), available at https://www.acus.gov/sites/default/files/documents/declaratory-orders-final-report.pdf.pdf.

B. The Court Could Find that this Opinion is Advisory and Hence Not Reviewable.

Unlike most declaratory orders that the Board issues, the Board's declaratory order here expressly stated that it was issued to provide guidance to the California state courts to assist in the resolution of the preemption issues pending before them, given the differing outcomes of the California intermediate appellate courts in *Eel River* and *Atherton*. As a result, because of the express limiting language of the declaratory order and the unique circumstances here, the Court could find that the Board's advisory declaratory order has no legal effect on the parties.

As it explained in its decision, the Board understood that *the Authority* had previously litigated the question of § 10501(b) preemption of CEQA as it relates to the CHST project in the *Atherton* litigation. *See* PER 13 (*December 2014 Decision* at 7). Thus, the Board was aware of the argument that the Authority may have

been collaterally estopped from raising the issue again.[21] However, the Board was also aware that in *Eel River* a different district of the California Court of Appeal had found that § 10501(b) does preempt CEQA for rail transportation within the Board's jurisdiction, and that the California Supreme Court had accepted review of that case. PER 10 n. 7, 11-13 (*December 2014 Decision* at 4 n.7, 5-7).[22] Because two California appellate courts had already addressed the preemption issue and come to differing conclusions, the Board decided to issue a declaratory order to "provid[e] its views" on preemption in order to "assist" the California Supreme Court and interested parties "in the resolution of the conflict between *Atherton* and *Eel River* on federal preemption of CEQA in cases involving rail line construction." PER 11, 13 (*December 2014 Decision* at 5, 7).

To be reviewable under the Supreme Court's *Bennett* two-part test for finality, an agency decision not only must be the consummation of the agency's decision-making process, but also must have an effect on the parties. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Thus, an order is final if "rights or obligations have been determined" by it or "legal consequences will flow" from it. *Id*.

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[21] The Board was not a party in *Atherton* or *Eel River*.

[22] The Board has previously explained that the Board and the courts have concurrent jurisdiction to resolve preemption issues under § 10501(b) applying existing Board and court precedent. *See 14500 Limited LLC—Pet. for Declaratory Order*, FD 35788, slip op. at 2 (STB served June 5, 2014); *Mid-America Locomotive and Car Repair, Inc.—Pet. for Declaratory Order*, FD 34599, slip op. at 3, 5 (STB served June 6, 2005).

(citations and quotations omitted). Where an agency decision has "no legal force or practical effect upon [a party's] daily business other than the disruptions that accompany any major litigation," it is not considered final and reviewable. *FTC v. Standard Oil of So. Cal.*, 449 U.S. 232, 243 (1980).[23]

The Court could find that this particular declaratory order has had no legal or practical effect on any party – and that it instead merely provided guidance to the California courts to assist in the resolution of the on-going preemption issues they are currently addressing. Indeed, in the year since the Board has issued its order, no changes have occurred in any of the CEQA enforcement actions pending before the California courts except for the dismissal of two as a result of settlements. The only other development has been that the Superior Court has stayed the CEQA suits challenging the Fresno-to-Bakersfield Line in order to await the California Supreme Court's ruling on federal preemption in the *Eel River* case.

Most Board declaratory orders on preemption, which do not contain the limiting "advisory" language present in this case, have been fully subject to judicial review as rulings that are intended to have binding effect on the parties'

[23] *See also AT&T Co. v. EEOC*, 270 F.3d 973, 975-76 (D.C. Cir. 2001) (an agency statement expressing its view of the law absent enforcement or other direct legal effect is not ripe for review); *Nat'l. Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("recommended" protocols not intended to impose prohibitions or restrictions are not agency decisions from which legal consequences flow or by which legal rights or obligations have been determined and are not ripe for review).

state law claims. *See, e.g., Tubbs*, FD 35792, slip op. at 3 (resolving preemption question referred by state court), *aff'd,* 812 F.3d at 1145-46; *City of Lincoln—Pet. for Declaratory Order*, FD 34425, slip op. at 3-5 (STB served Aug. 12, 2004) (resolving controversy over preemption of eminent domain action), *aff'd,* 414 F.3d at 861-62. Because the Court could find that this declaratory order has had no practical or legal effect on the parties, and merely provided guidance to assist ongoing litigation, the Court could conclude that the Board's advisory declaratory order in this case is unreviewable and dismiss the petitions for review.[24]

Should the Court determine that the order is reviewable, however, Respondents address the remaining arguments raised by Petitioners and the Center below.[25]

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[24] The California Supreme Court is addressing a split in its intermediate appellate courts concerning the preemption of CEQA under § 10501(b), and the Board simply provided its views on that issue to assist that court in resolving this divide. For this reason, and contrary to the Center's claims (Center Br. at 27-29), the Board's advisory opinion is not a legal collateral attack on *Atherton.*

[25] While the Supreme Court declined to exercise jurisdiction in the unique circumstances of *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976), Center Br. at 34-38, the Court there reaffirmed "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" and held that "[g]enerally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction. . . ." *Colorado River,* 424 U.S. at 818 (internal citations and quotations omitted). Thus, only "exceptional circumstances [] justify [such a] stay. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983); *see also Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369, 1372 (9th Cir. 1990). The Center has not shown such exceptional circumstances, or any reason why deferring review until

III. THE BOARD PROPERLY FOUND THAT § 10501(b) PREEMPTION APPLIES.

As the Board explained, CEQA is categorically preempted because it is a state preclearance requirement that, by its nature, could be used to deny or significantly delay the Authority's right to construct the sections of the CHST that the Board has specifically authorized. Thus, it impinges on the Board's exclusive jurisdiction over rail transportation by potentially imposing a patchwork of construction or operational requirements for rail transportation that is part of the interstate rail network. PER 14, 16 (*December 2014 Decision* at 8, 10). *See City of Auburn*, 154 F.3d at 1027-31. The Board correctly held that CEQA is preempted.

A. The Plain Language of § 10501(b) and Longstanding Precedent Establish That CEQA is Preempted Here.

The question of whether a state law is preempted by federal law is answered by looking at Congressional intent. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). "The starting point" for this inquiry is "'the language [of the statute] itself.'" *City of Auburn*, 154 F.3d at 1029-30 (quotations omitted); *see also Green Mtn.*, 404 F.3d at 641.

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after the California Supreme Court rules would be any less piecemeal than hearing it now. Center Br. at 34-38. Furthermore, the Center is both factually and legally incorrect that the *Colorado River Doctrine* factors otherwise support a stay. *Id.*

As this Court recognized in *City of Auburn*, the plain language of Section 10501(b), as broadened by ICCTA, provides that the jurisdiction of the Board over "transportation by rail carriers" is "exclusive." Section 10501(b) also expressly provides that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." In addition, 49 U.S.C. § 10901 gives the Board exclusive licensing authority over the construction of rail lines that, like the CHST, are part of the interstate rail network.[26] *See Alaska Survival,* 705 F.3d at 1078. Accordingly, the Board properly found that allowing the application of CEQA in this context would permit states and localities to intrude into whether to authorize rail construction, and what mitigation to impose – "matters that are directly regulated by the Board." PER 14, 16 (*December 2014 Decision* at 8, 10).[27]

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[26] Although the parties suggest that CHST is an intrastate line of purely local concern, Pet. Br. at 30 n.27, the Board has found, and it is now settled law, that the CHST project is a part of interstate commerce that is within its jurisdiction. *See CHST Jurisdiction Order* at 11-15.

[27] *Accord City of Auburn,* 154 F.3d at 1029-30 (§ 10501(b) grants STB exclusive authority over railway projects licensed by the Board); *Tex. Cent. Bus. Lines*, 669 F.3d at 530, 532-33 (state and local laws that attempt to regulate matters that the Board regulates, which includes facility construction, are federally preempted); *CSX Transp. Inc.*, FD 34462, slip op. at 3.

Like the local environmental regulations that were found to be preempted in *City of Auburn,*[28] application of CEQA to CHST construction would subject the project to state regulation, contrary to congressional intent to give the Board exclusive jurisdiction over rail transportation. CEQA requires, as a precondition to construction, that the Authority engage in an environmental review process that can alter the route and other elements of the construction and impose mitigation measures on the rail line beyond what would be required under NEPA, and that can even result in injunctive relief. *See* Cal. Pub. Res. Code § 21002, *et seq.* As a result, the Board properly found that application of CEQA to the CHST, a rail construction project that is licensed by the Board, indisputably amounts to regulation preempted by § 10501(b). PER 16 (*December 2014 Decision* at 10); *see e.g., City of Auburn*, 154 F.3d at 1030-31; *Green Mtn.*, 404 F.3d at 642-45.

Moreover, the application of CEQA to this project could significantly delay or even stop construction of the CHST sections authorized by the Board, thereby infringing on the Board's exclusive jurisdiction over the proposed construction.[29]

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[28] In *City of Auburn*, the city sought to require the railroad to mitigate various impacts (noise, traffic congestion), to have mitigation plans for potential discharge or spill of material transported along bodies of water, and to study and mitigate impacts on wetlands, and streams, or other natural systems along the right-of-way. *See King County—Pet. for Declaratory Order*, 1 S.T.B. 731, 734 (STB served Sept. 25, 1996), *aff'd*, *City of Auburn*, 154 F.3d 1025.

[29] CEQA expressly includes injunctive relief as an available remedy for noncompliance and authorizes courts to rescind agency approval decisions. Cal.

Indeed, there are currently five pending CEQA compliance lawsuits, including suits brought by Petitioners, which request both preliminary and permanent injunctive relief until they are satisfied with the Authority's compliance with CEQA. The injunctive relief under CEQA sought in these cases is the type of delay that regulates rail transportation and so is categorically preempted under § 10501(b). *See City of Auburn*, 154 F.3d at 1030-31; *Green Mtn.*, 404 F.3d at 643; *City of Alexandria,* 608 F.3d at 160.

B. CEQA Is Not Just an Informational Statute.

Although Petitioners claim that CEQA is merely informational, the statute contains substantive, action-forcing requirements. *See e.g.* Pet. Brief at 17 (public participation affects "whether and how" a project moves forward); 18 ("an important feature of CEQA" prohibits agencies from approving a project with significant impacts if there are feasible mitigation measures or alternatives); 28 (CEQA "imposes certain procedural and substantive limitations on discretionary approval undertaken by [the Authority]"). CEQA establishes stringent requirements for the imposition of mitigation measures.[30] Furthermore, CEQA bars public agencies from approving projects for which there are feasible

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Pub. Res. Code § 21168.9; *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 764 P.2d 278, 303 (Cal. 1988).

[30] *See* Cal. Pub. Res. Code § 21081; *Mountain Lion Found. v. Fish & Game Comm'n*, 939 P.2d 1280, 1298-99 (Cal. 1997) (explaining CEQA's substantive requirement that feasible alternatives and mitigation measures be adopted before approval of a project).

alternatives or mitigation. *See* Cal. Pub. Res. Code § 21081. Thus, there can be little doubt that CEQA can require a rail construction applicant to make significant changes to its construction projects, including, but not limited to, alteration of the intended and authorized route of a new rail line. *Id.*

CEQA also includes the right to seek injunctive relief through enforcement suits in state courts. Cal. Pub. Res. Code § 21168.9; *see also Laurel Heights*, 764 P.2d at 303. This injunctive provision can be used to require a state agency to rescind its approval of a project, conduct additional environmental review before construction can begin, adopt additional mitigation measures, modify a construction project in various ways, and potentially delay construction for years. *See id.* These remedies all can significantly burden the Authority.

Thus, Petitioners' argument (Pet. Br. at 20-24) that CEQA is not a preempted regulatory statute until injunctive relief is actually ordered is unsound, as CEQA's requirements, by their nature, can be used to deny or significantly delay an entity's right to construct a line that the Board has specifically authorized, thereby impinging upon the Board's exclusive jurisdiction over rail transportation.[31] It is this potential regulation itself that conflicts with the Board's

[31] PER 14, 16 (*December 2014 Decision* at 8, 10) (citing *City of Auburn*, 154 F.3d at 1032; *Green Mtn.,* 404 F.3d at 642-45; *DesertXpress,* FD 34914, slip op. at 9; N. *San Diego,* FD 34111, slip op. at 7).

exclusive authority and jurisdiction. *Green Mtn.,* 404 F.3d at 644; *City of Auburn*, 154 F.3d at 1031.

C. This Court Has Rejected the Environmental/Economic Distinction That the Center Advances.

The Center, but not Petitioners, claims that, the Board's jurisdiction is limited to economic regulation and, because CEQA does not involve economic regulation of rates, schedules, and classifications, its application to the CHST is not preempted by § 10501(b). Center Br. at 40-45. However, in *City of Auburn,* the Court rejected the same argument, holding that "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." 154 F.3d at 1031. The Court reaffirmed this holding in *Association of American Railroads*, stating, "[b]oth we and our sister circuits have rejected the argument . . . that ICCTA preempts only economic regulation." 622 F.3d at 1098.[32] Thus, the Center's argument is foreclosed in this Circuit.

There is also nothing contrary in the cases the Center cites. Center Br. at 41-44. *Florida East Coast Railway*, 266 F.3d at 1338, held that a local residential zoning ordinance was not preempted with respect to property that a railroad leased

[32] S*ee also N.Y. Susquehanna W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (rejecting environmental v. economic distinction); *Green Mtn.*, 404 F.3d at 644 ("the distinction [between environmental and economic regulation] is not useful").

to a third party for *non-rail*-related storage because application of the zoning ordinance would not "impede the interstate functioning of the railroad industry" under the circumstances presented. 266 F.3d at 1338. It had nothing to do with regulation of railroad property used in interstate commerce. *Illinois Commerce Comm'n v. ICC*, 879 F.2d 917 (D.C. Cir. 1989), merely held that state regulation of unlicensed ancillary "spur" track was not preempted under the narrower pre-ICCTA preemption provision. This case, of course, involves a rail line subject to full Board licensing under 49 U.S.C. § 10901 and the post-ICCTA preemption statute. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014), Center Br. at 43-44, does not address § 10501(b) preemption.

Moreover, contrary to the Center's claims that the Board's authority is limited to economic regulation, Center Br. at 42-44, the Board in fact does regulate more than economic aspects of rail construction. Because the licensing of a new rail line is a "major federal action" under NEPA, the Board must conduct a thorough environmental review of any proposed new line, and take potential environmental impacts into consideration when deciding whether to grant construction authority. As part of its NEPA review, the Board examines route alternatives and potential mitigation measures, and typically imposes numerous environmental conditions on the authority it grants. *See* 49 C.F.R. §§ 1105.1-1105.12; *Alaska Survival*, 705 F.3d at 1079 (discussing the Board's NEPA review

of a rail construction project). Here, the Board conducted NEPA environmental reviews, in conjunction with FRA, of both CHST sections it has authorized thus far, and imposed environmental conditions in addition to the extensive mitigation plans required by FRA. *See Fresno-to-Bakersfield Order* at 16-21; *CHST Jurisdiction Order* at 25-28.

Petitioners' assertion (Pet. Br. at 21-22) that CEQA is not preempted because citizen enforcement of NEPA, the Clean Water Act, and the Clean Air Act is not preempted is incorrect. Federal and state laws are, necessarily, treated differently in the preemption context. *Ass'n of Am. R.R.*, 622 F.3d at 1097 ("[i]f an apparent conflict exists between ICCTA and a *federal* law, then the courts must strive to harmonize the two laws, giving effect to both laws if possible. If an apparent conflict exists between ICCTA and *a state or local* law, however, different rules apply.") (internal citations omitted) (emphasis added); *see also United States v. St. Mary's Ry. W.*, 989 F. Supp. 2d 1357, 1361-63 (S.D. Ga. 2013) (Clean Water Act can be harmonized with and is not preempted by § 10501(b)).

D. The Board Did Not Interfere With the Implementation of Proposition 1A.

Petitioners argue unpersuasively that the Board's preemption finding was improper because the Authority voluntarily agreed to comply with CEQA under the bond measure Proposition 1A. Pet. Br. at 36-38. In fact, the Board took care not to "interpret the requirements of Proposition 1A." *See* PER 19-20 (*December*

2014 Decision at 13-14); *see also* PER 21 (*December 2014 Decision* at 15) ("we do not opine here on whether Proposition 1A requires the Authority to comply with CEQA as a condition of its funding" because that "is a question of state law for a state court to decide."). Thus, CEQA could still apply to, and be enforced against, the CHST project as a condition of receiving funding from Proposition 1A, as the Board does not regulate funding of public or private rail construction.[33] The Board's declaratory order says only that application of CEQA to block the construction authority granted by the Board outside of the Proposition 1A context is preempted. In other words, CEQA cannot be used to prohibit construction if the Authority uses unrestricted funds. However, CEQA could still apply to the CHST if Proposition 1A requires it to obtain funds under that statute, and the Authority uses such funds.

E. The Board's Declaratory Order Does Not Violate the Tenth Amendment.

The Board's decision – which simply advised the California Supreme Court of the Board's views on preemption – is not binding on the state court and thus does not interfere with California's state sovereignty in violation of the Tenth Amendment, as Petitioners suggest. Pet. Br. at 25-30.

[33] The Board's grant of authority to construct a rail line is permissive, not mandatory – that is, the Board does not require that the approved line be built, it only authorizes the construction. *Fresno-to-Bakersfield Order* at 11 (and cases cited therein). Thus, "it is not [the Board's] role to determine whether the Authority has complied with state or Federal funding requirements." *Id*.

The Tenth Amendment reserves to the states powers not delegated to the federal government. Congress has broad authority to regulate rail transportation that is part of the interstate rail network, and the power to regulate such interstate commerce has not been reserved to the states. Indeed, it is because of the intrinsically interstate nature of rail transportation on the national rail system, that "Congress and the courts long have recognized a need to regulate railroad operations at the federal level." *City of Auburn*, 154 F.3d at 1029; *see State of Ariz. v. Atchison, Topeka & Santa Fe R.R.*, 656 F.2d 398, 407 (9th Cir. 1981) (Congress' power to regulate interstate commerce, including railroad property that is entirely intrastate, is "unmistakably broad"); *CSX Transp.,* 944 F. Supp. at 1586 ("[R]ailroads are instrumentalities of interstate commerce over which Congress's authority to regulate even purely intrastate matters under the Commerce Clause has not been and cannot be doubted.").

Because of Congress' broad Commerce Clause power, the Supreme Court has rejected Tenth Amendment challenges to the application of federal laws to railroads – including even state-owned railroads. *United States v. California*, 297 U.S. 175, 185-86 (1936) (state-owned railroad subject to the federal Safety Appliance Act); *California v. Taylor*, 353 U.S. 553, 568 (1957) (state-owned railroad subject to the federal Railway Labor Act). Indeed, because of Congress' broad authority over railroads, courts, the ICC, and the STB have consistently

treated state-owned and other publicly-owned railroads the same as private railroads under the ICA. As the Fifth Circuit explained, as long as a state-owned railroad operates in interstate commerce, it is subject to uniform federal law under the ICA, "like any other railroad." *City of New Orleans v. Texas & Pac. Ry.*, 195 F.2d 887, 889 (5th Cir. 1952); *accord, Staten Island Rapid Transit Oper. Auth. v. I.C.C.*, 718 F.2d 533, 539-40 (2d Cir. 1983); *Int'l Longshoreman's Ass'n, AFL-CIO v. N. Carolina Ports Auth.*, 463 F.2d 1, 3-4 (4th Cir. 1972).[34]

Thus, Petitioners' argument, Pet. Br. at 29-30, that the Tenth Amendment protects a state's "internal" regulation of its railroad activities from federal preemption fails. As the Supreme Court has explained, once a state chooses to engage in interstate commerce by rail, it subjects itself to federal law and jurisdiction under Congress' Commerce Clause power.[35] If a state were able to escape the uniformity of federal law governing the construction of railroad lines

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[34] *See also City of New Orleans by and Through Pub. Belt R.R. Comm'n v. S. Scrap Material Co.*, 491 F. Supp. 46, 48 (E.D. La. 1980); *Alaska R.R. Corp. – Constr. & Oper. Exemption – A Rail Line Extension to Port MacKenzie, Alaska*, FD 35095 (STB served Nov. 21, 2011), *aff'd sub nom., Alaska Survival*, 705 F.3d 1073; *United States v. Belt Line R.R.*, 56 I.C.C. 121, 121-22 (ICC served Dec. 8, 1919); *Cal. Canneries Co. v. S. Pac. Co.*, 51 I.C.C. 500, 502-03 (ICC served Dec. 4, 1918).

[35] *See Taylor*, 353 U.S. at 568 ("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."); *United States v. State of California*, 297 U.S. at 185-86 (finding that California subjected itself to federal safety requirements "by engaging in interstate commerce by rail").

that are part of the interstate rail network by simply stating that it was applying its own "internal" requirements, the exception would swallow the rule, and Congress' plenary authority over interstate commerce would be eviscerated.

Petitioners' "internal" v. "external" argument, Pet. Br. at 26-30, also fails because the attempted state regulation at issue here is not "internal." As the Board explained, the relevant actions subject to preemption here are the pending CEQA enforcement lawsuits brought by Petitioners and others, not any internal decisions of the Authority. PER 20 (*December 2014 Decision* at 14, including n. 24). The State of California, in this case, is not attempting to impose state-law requirements on its own project – external third-parties are attempting to do so. Such third-party lawsuits seeking to regulate rail transportation under state law must yield to the uniform and exclusive federal jurisdiction of the Board as established by Congress in the ICA.

Petitioners' reliance on *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), Pet. Br. at 25-28, is misplaced. In *Nixon*, the Court held that, while Section 101(a) of the federal Telecommunications Act of 1996 authorizes preemption of a state law prohibiting "any entity" from interfering with the provision of telecommunications services, the federal statute was fatally unclear as to whether "any entity" covered the state's own subdivisions. 541 U.S. at 128-29. Unlike *Nixon,* this case does not involve a state's power to control its subdivisions'

participation in a marketplace. The Board's order, while it preempts CEQA and lawsuits like the pending CEQA enforcement suits that seek to impose state regulatory requirements on a federally licensed railroad construction project, leaves the state free to determine what powers to give or deny the Authority.

Indeed, the Board's decision here specifically declined to address whether California's funding statute (Proposition 1A) could require the Authority to comply with CEQA as a condition of that funding measure. PER 21 (*December 2014 Decision* at 15). Rather, consistent with *Nixon*, the Board explained that whether CEQA compliance is required as a condition of Proposition 1A funding "is a question of state law for a state court to decide." *Id*.

F. The Market Participant Doctrine Does Not Affect the Application of § 10501(b) Preemption Here.

It is generally presumed that "Congress intends to preempt only state *regulation*, and not actions a state takes as a *market participant*." *Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1022-23 (9th Cir. 2010) (emphasis added). Thus, "[t]he market participant doctrine distinguishes between a state's role as a regulator, on the one hand, and its role as a market participant, on the other." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1040 (9th Cir. 2007). Preemption generally does not apply to a state's actions taken in its market participant, or proprietary, role. *See id.*

However, the market participant doctrine is not an exception to preemption *per se*, but rather a presumption concerning congressional intent. *Johnson*, 623 F.3d at 1022; *Engine Mfrs*. 498 F.3d at 1042. "Because congressional intent is the key to preemption analysis," in determining whether the market participant doctrine is even available, the Court must first consider whether the ICA "contains 'any express or implied indication by Congress' that the presumption embodied by the market participant doctrine should not apply to preemption under [§ 10501(b)]."[36] The express regulatory language of § 10501(b) and the long history of federal regulation of rail transportation demonstrate Congress' intent that the market participant doctrine should not apply to ICA preemption. *See City of Auburn*, 154 F.3d at 1029.[37]

Even if the market participant doctrine were potentially available, it would not bar preemption in this case. To determine whether the market participant doctrine applies, the Court has adopted the Fifth Circuit's two-part test in *Cardinal*

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[36] *Engine Mfrs*. 498 F.3d at 1042 (quoting *Bldg. & Constr. Trades Council v. Associated Builders & Contractors* (*Boston Harbor*), 507 U.S. 218, 231 (1993)); *see also City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 178-79 (4th Cir. 2002) (finding no express or implied indication that the Magnuson Fishery and Conservation Act was subject to "proprietary capacity exception" to preemption).

[37] The Board's broad and exclusive federal jurisdiction contrasts with that at issue in *Engine Manufacturers*. There the Court held that the market participant doctrine was potentially applicable because the "Clean Air Act largely preserves the traditional role of the states in preventing air pollution." 498 F.3d at 1042. No such traditional role exists for states concerning the regulation of rail transportation under the ICA.

Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999). *See Johnson*, 623 F.3d at 1023-24. This test provides "two questions to help determine whether state action constitutes market participation not subject to preemption:"

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

Johnson, 623 F.3d at 1023-24 (quoting *Cardinal Towing*, 180 F.3d at 693). These questions "'seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.'" *Johnson*, 623 F.3d at 1024 (quoting *Cardinal Towing*, 180 F.3d at 693).

Application of the first *Cardinal Towing* prong to the pending CEQA state lawsuits makes clear that the private CEQA enforcement suits are not state proprietary actions similar to those of private parties acting in the marketplace. *See Johnson*, 623 F.3d at 1023-24. The market participant doctrine is invoked *defensively* by a state or locality seeking to shield its activity in the marketplace from federal preemption. *See*, *e.g.*, *id.* at 1016, 1024-27; *Engine Mfrs.*, 498 F.3d at 1035, 1045-46. In marked contrast, Petitioners here invoke the market participant

doctrine *offensively* against a state – which has not advanced the market participant doctrine to protect its activities from federal preemption. PER 19 (*December 2014 Decision* at 13). Indeed, the state, through its agency, the Authority, argues that the pending CEQA enforcement actions do *not* constitute state proprietary actions protected by the market participant doctrine. *See* PER 8-9, 18-20 (*December 2014 Decision* at 2-3, 12-14).

The Board also reasonably concluded that the market participant doctrine does not apply because the pending CEQA enforcement suits seek to regulate whether and under what mitigation conditions, the Authority can construct a new rail line as part of the interstate rail network. *See* PER 18 (*December 2014 Decision* at 12).[38] These issues, however, are within the Board's exclusive jurisdiction and control under 49 U.S.C. §§ 10501(b) & 10901.

Thus, this case is very different from those relied on by Petitioners, which all involve states or localities participating in the marketplace, similar to a private party, and not acting as a regulator. *See* Pet. Br. at 32-34 (citing *Reeves v. Stake*, 447 U.S. 429, 436 (1980) (state can prefer in-state customers at state-run cement plant); *Boston Harbor*, 507 U.S. at 227, 232-33 (state agency can require project labor agreement when participating in labor market); *Tocher v. City of Santa Ana*,

[38] Petitioners concede (Pet. Br. at 30-31 n.27) that their suits seek to override the Board's authority and impose CEQA's substantive environmental policy requirements on a rail construction project under the Board's exclusive federal jurisdiction.

219 F.3d 1040, 1049-50 (9th Cir. 2000) (locality's rotational towing list is market participation, not regulation), *abrogated on other grounds by Tillison v. City of San Diego*, 406 F.3d 1126, 1131 (9th Cir. 2005)).[39]

Petitioners characterize CEQA lawsuits as "citizen enforcement" actions akin to shareholder derivative suits against private corporations. Pet. Br. at 35-36. However, nowhere do Petitioners explain how a shareholder derivative suit against a private corporation could be considered to be a proprietary action in the marketplace by that corporation.

Petitioners suggest that the Authority's voluntary participation in the CEQA process, rather than the pending CEQA enforcement suits, is the relevant action to examine. Pet. Br. at 31, 35. Even viewed that way, however, the state is still acting as a regulator and, the market participant doctrine does not apply. *See Children's Hosp. & Med. Ctr. v. Bonta*, 118 Cal. Rptr. 2d 629, 649-50 (Cal. Ct. App. 2002) (when an agency discharges "conventional regulatory responsibilities"

[39] Indeed, this case is more analogous to the circumstances in the so-called "Grupp" cases. In those cases, courts repeatedly rejected attempts by third-party plaintiffs to invoke the market participant doctrine to avoid federal preemption of state False Claims Act (FCA) claims against package delivery services for allegedly overcharging the respective states. The plaintiffs, the courts held, through their FCA claims, sought to regulate the carriers by imposing the states' general policy goals, and they were not acting as private parties in the marketplace. *See Grupp v. DHL Express (USA), Inc.*, 192 Cal. Rptr. 3d 538, 548-49 (Cal. Ct. App. 2015); *DHL Express (USA), Inc. v. State*, 60 So. 3d 426, 429 (Fla. Dist. Ct. App. 2011); *State v. DHL Express (USA), Inc.*, 970 N.E.2d 391, 397 (N.Y. 2012).

imposed on it by state law, it "is not participating in an open market but simply carrying out a traditional state regulatory responsibility").

Because of the regulatory nature of the CEQA enforcement actions, Petitioners also cannot satisfy the second *Cardinal Towing* prong, which provides that the market participant doctrine can apply if "the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." *Johnson*, 623 F.3d at 1023-24 (quoting *Cardinal Towing*, 180 F.3d at 693). Here, the pending CEQA enforcement actions are neither narrow in scope, nor directed towards addressing a specific proprietary problem. Rather, they seek to apply CEQA's general policy goals concerning potential effects on the environment to a rail construction project that is subject to exclusive federal jurisdiction and similar, though not identical, federal environmental policy goals under NEPA.

CONCLUSION

For the foregoing reasons, the Court should dismiss, or in the alternative, deny the Petitions for Review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Barbara A. Miller, hereby certify the following:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 10,452 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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

s/ Barbara A. Miller
Barbara A. Miller
Office of the General Counsel
Surface Transportation Board

March 23, 2016.

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Respondents state that there are no other cases pending before this Court that are related to the instant case.

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2016, I electronically filed the foregoing Joint Brief of Respondents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

I certify that the participants in the case that are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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Surface Transportation Board

March 23, 2016.

Case No. 15-71780
(consolidated with Case No. 15-72570)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KINGS COUNTY, et al., and
DIGNITY HEALTH,

Petitioners

v.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA,

Respondents, and

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF
THE SURFACE TRANSPORTATION BOARD

RESPONDENTS' ADDENDUM

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March 23, 2016

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5 U.S.C. § 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved-

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a [1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of-

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for-

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable

to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not-

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply-

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

28 U.S.C. § 2321. Judicial review of Board's order and decisions; procedure generally; process

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Surface Transportation Board shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Surface Transportation Board other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49, run, be served and be returnable anywhere in the United States.

28 U.S.C. § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210e, 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

49 U.S.C. § 1321. Powers

(a) In general.--The Board shall carry out this chapter and subtitle IV. Enumeration of a power of the Board in this chapter or subtitle IV does not exclude another power the Board may have in carrying out this chapter or subtitle IV. The Board may prescribe regulations in carrying out this chapter and subtitle IV.

* * *

49 U.S.C. § 10102. Definitions

In this part—

(1) "Board" means the Surface Transportation Board;

(2) "car service" includes (A) the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier, and (B) the supply of trains by a rail carrier;

(3) "control", when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means;

(4) "person", in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person;

(5) "rail carrier" means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;

(6) "railroad" includes—

(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
(B) the road used by a rail carrier and owned by it or operated under an agreement; and
(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation;

(7) "rate" means a rate or charge for transportation;

(8) "State" means a State of the United States and the District of Columbia;

(9) "transportation" includes—

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, 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; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property; and

(10) "United States" means the States of the United States and the District of Columbia.

49 U.S.C. § 10321 (1995). Powers

(a) The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

* * *

49 U.S.C. § 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is–

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in–

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over–

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or

facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(c)(1) In this subsection–

(A) the term "local governmental authority"–

(i) has the same meaning given that term by section 5302(a) of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term "mass transportation" means transportation services described in section 5302(a) of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over–

(A) mass transportation provided by a local government authority; or

(B) a solid waste rail transfer facility as defined in section 10908 of this title, except as provided under sections 10908 and 10909 of this title.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to–

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

49 U.S.C. § 10901. Authorizing construction and operation of railroad lines

(a) A person may—

(1) construct an extension to any of its railroad lines;
(2) construct an additional railroad line;
(3) provide transportation over, or by means of, an extended or additional railroad line; or
(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,

only if the Board issues a certificate authorizing such activity under subsection (c).

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice, including notice to the Governor of any affected State, of the beginning of such proceeding.

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

(d)(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if—

(A) the construction does not unreasonably interfere with the operation of the crossed line;
(B) the operation does not materially interfere with the operation of the crossed line; and
(C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the parties are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Board for determination. The Board shall make a determination under this paragraph within 120 days after the dispute is submitted for determination.