IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

TOWN OF ATHERTON, et al., Plaintiffs and Appellants, **v.** **CALIFORNIA HIGH-SPEED RAIL AUTHORITY,** Defendant and Respondent.	Case No. C070877

Sacramento County Superior Court

Case No. 34-2008-80000022-CUWMGDS
Case No. 34-2010-80000679-CUWMGDS
Honorable Michael P. Kenny, Judge

RESPONDENT'S ANSWER TO LETTER BRIEF OF AMICUS CURIAE CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY

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INTRODUCTION

Earlier this year, Citizens for California High-Speed Rail Accountability ("CCHSRA") and its members urged the Surface Transportation Board ("STB") to assume jurisdiction over and fully regulate California's high-speed train project between Merced and Fresno by requiring an approval process under 49 U.S.C. section 10901. In a motion to dismiss, the California High-Speed Rail Authority ("Authority") argued against STB jurisdiction. In June, the STB determined that California's high-speed train system would be part of the interstate rail network, and thus that the STB had jurisdiction over construction and operation of the entire system. The STB exempted the proposed Merced to Fresno construction from the section 10901 approval process, imposed environmental conditions, and approved construction of that segment of the project. Neither CCHSRA nor anyone else appealed the STB decision, and it is final.

Under clear Ninth Circuit precedent in *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025, one of the legal consequences of STB jurisdiction is that state environmental review laws are preempted under the Interstate Commerce Commission Termination Act (the "ICCTA"). CCHSRA argues in its amicus curiae brief, however, that the ICCTA does not preempt a California Environmental Quality Act ("CEQA") remedy in this case because: (1) unlike the state environmental review law in *City of Auburn*, CEQA cannot be used to prevent the high-speed train system from being constructed; (2) the market participant exception eliminates any preemptive effect of the ICCTA on CEQA; and (3) prudential considerations suggest the Court should find no preemption or not reach the issue. The Court should reject each argument.

CCHSRA's arguments about the scope of preemption under the ICCTA misinterpret *City of Auburn*, which did not turn on the details of Washington's state environmental review statute, but on the Ninth Circuit's interpretation of the scope of preemption under 49 U.S.C. section 10501(b). CCHSRA's attempt to distinguish *City of Auburn* on the ground that the case involved a private railroad is based on the erroneous premise that the ICCTA applies differently to privately-owned than state-owned railroads. Moreover, CCHSRA's claim that the ICCTA does not preempt CEQA because California voters voluntarily subjected the high-speed train system to CEQA under the Proposition 1A statute is wrong because the statute on its face does not require CEQA compliance. Instead, the statute refers to "all necessary project level environmental clearances," which means simply those required by law. Now that the high-speed train system is under STB jurisdiction, compliance with the National Environmental Policy Act ("NEPA") is the "necessary" environmental clearance.

CCHSRA's argument related to the market participant exception to preemption misapplies the exception: just because the Authority has made a general policy decision on a train route to focus future environmental studies, informed by a CEQA document, does not mean the market participant exception applies. The analysis must begin from the premise established by *City of Auburn*: the ICCTA preempts state environmental review laws. The market participant exception stands for the proposition that federal preemption cannot prevent a state from acting in its proprietary capacity. This exception creates a level playing field for the state when it acts in a proprietary capacity, ensuring that it does not have fewer powers than a similarly situated private actor. But the Authority has not asserted any proprietary prerogatives related to CEQA and the Revised Final

Program Environmental Impact Report ("Program EIR"). The Authority has a broad range of proprietary powers and remains free to act in its proprietary capacity and assert the market participant exception in the future, but it has not done so here. And it is the State that must invoke the exception. The market participant exception cannot be used by third parties to force the Authority to take actions where such action would not be required of similarly situated private railroads. Applying the market participant exception in this case would tilt the playing field against the state, not level it, turning the exception on its head.

CCHSRA's arguments on prudential considerations, waiver, and the theory of trial doctrine are equally misplaced. The scope of ICCTA preemption is a question of law that can be addressed for the first time on appeal. Moreover, prudential considerations do not overcome the lack of state court subject matter jurisdiction to impose preempted remedies.

The Authority recognizes the unusual posture of this case that raises preemption for the first time on appeal. Addressing preemption under the ICCTA now is necessary because the appellants seek a writ of mandate to require the Authority to rescind its Bay Area to Central Valley route decision and revise and recirculate the Program EIR. Because the STB has asserted jurisdiction, however, the high-speed train system is subject to regulation under the ICCTA and this federal law facially preempts a CEQA remedy in this case. The Authority has been defending in court the Bay Area to Central Valley Program EIR and route decision since 2008. A writ of mandate under CEQA in this case could further burden, delay, or prevent progress on the high-speed train system and is preempted.

ARGUMENT

I. The ICCTA Preempts a CEQA Remedy In This Case.

CCHSRA argues that the ICCTA does not facially preempt CEQA (Pub. Resources Code, § 21000 et seq.) (CCHSRA Brief, pp. 17-18), that under an "as applied" analysis no preemption occurs because CEQA does not burden interstate commerce (*id.*, pp. 23-30), and that there is no preemption because the State's voters voluntarily imposed CEQA requirements on the high-speed train project (*id.*, pp. 30-33). CCHSRA is wrong on each of these arguments.

A. Under *City of Auburn*, The ICCTA Facially Preempts State Environmental Review Laws, So An "As Applied" Analysis Is Not Appropriate.

CCHSRA feebly attempts to distinguish *City of Auburn* in a footnote, ignores subsequent authorities following its facial preemption holding, and then suggests that the preemptive effect of the ICCTA on CEQA requires an "as applied" inquiry. (CCHSRA Brief, p. 17 fn. 7; *id.*, pp. 18-24.) CCHSRA is incorrect.

Despite CCHSRA's dismissive discussion of *City of Auburn*, it is the leading case on the preemptive scope of the ICCTA on state environmental review laws and plainly holds that 49 U.S.C. section 10501(b), facially preempts such laws. (*City of Auburn*, *supra*, 154 F.3d at pp. 1029, 1031.) Moreover, CCHSRA fails to grapple with the many subsequent authorities that have cited *City of Auburn* with approval or followed its precedent in identifying state environmental review laws as one of two types of laws that the ICCTA facially preempts. (*Green Mountain Railroad Corporation v. State of Vermont* (2d Cir. 2005) 404 F.3d 638, 642-43 ["*Green Mountain*"]; *Adrian & Blissfield Railroad Co. v. Village of Blissfield* (6th Cir. 2008) 550

F.3d 533, 539-40; *New York Susquehanna and Western Railway Corp. v. Jackson* (3d Cir. 2007) 500 F.3d 238, 253-54 citing *Green Mountain, supra*, 404 F.3d at p. 643; *Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094, 1097-98.)[1]

CCHSRA incorrectly suggests the *City of Auburn* court was unclear about what type of state or local environmental regulation was at issue. (CCHSRA Brief, p. 17, fn. 8.) The dispute in *City of Auburn*, however, plainly centered on, "the STB's finding of federal preemption of state and local *environmental review* laws in approval of the reopening of the Stampede Pass line. . . ." (*Id.* at p. 1027.) Washington has a state environmental review statute that, like CEQA, was modeled on NEPA (42 U.S.C. § 4321 et seq.), so the nature of the underlying state environmental review statute provides no basis for distinguishing *City of Auburn* from this case. (*Public Utility Dist. No 1 of Clark County v. Pollution Control Hearings Bd.* (Wash. Ct. App. 2007) 137 Wash.App. 150, 158; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565, fn. 4.) And, more importantly, the ICCTA's preemption analysis is not addressed to the particulars of the state environmental regulation as applied in a

[1] CCHSRA's reliance on *Fayard v. N.E. Vehicle Servs. LLC* (1st Cir. 2008) 533 F.3d 42, to argue that ICCTA may "completely" preempt some state and local laws, but does not preempt CEQA, is erroneous. (CCHSRA Brief, pp. 19-20 and fn. 8.) CCHSRA is equating the doctrine of "complete preemption" for purposes of federal court subject matter jurisdiction with defensive preemption under the supremacy clause whereby a federal law may preempt application of a state law where Congress occupies the field. (*Fayard, supra*, 533 F.3d at pp. 45-46.) These two concepts are distinct, despite the use of the term "preemption" in both. (*Id.*) *City of Auburn* and the cases following it address defensive preemption under the supremacy clause.

specific factual setting, but to the act of regulation itself and the scope of the federal statute. (*City of Auburn*, *supra*, 154 F.3d at p. 1031; *Green Mountain*, *supra*, 404 F.3d at p. 644.)[2]

CCHSRA's argument in support of an "as applied" preemption analysis in this case misinterprets the cases it cites. (CCHSRA Brief, pp. 21-23.) For example, *New York Susquehanna* does not, as CCHSRA implies, undermine *City of Auburn* and the ICCTA's facial preemption of state environmental review laws. First, the *New York Susquehanna* case did not concern state environmental review laws. The *New York Susquehanna* court acknowledged, like the *City of Auburn* court and the STB itself, that some state and local rules related to police powers may survive preemption. (*New York Susquehanna*, *supra*, 500 F.3d at pp. 253-55.) At the same time, however, the court of appeal reinforced that some state environmental laws may be so open-ended they cannot survive a facial challenge. (*Id.* at pp. 254-55.) Thus, while the *New York Susquehanna* court ultimately used an "as applied" preemption analysis to evaluate certain narrow state regulations governing solid waste rail transfer facilities, the court endorsed a facial preemption analysis of broader state laws like CEQA, where the

[2] CCHSRA tries to further distinguish *City of Auburn* on the fact that the railroad in that case already existed. (CCHSRA Brief, p. 17, fn. 8.) The fact that the railroad at issue in *City of Auburn* already existed is not dispositive of the preemptive effect of the ICCTA, because the statute plainly governs rail line construction, including both repairs to existing rail lines and construction of new rail lines. (49 U.S.C. § 10501(b)(2); *R.J. Corman Railroad Co./Pennsylvania Lines Inc. – Construction and Operation Exemption*, No. FD 35153, 2012 WL 1852948, at *6-7 (S.T.B. May 21, 2012) [construction of new railroad line requires prior STB approval either through approval process under 49 U.S.C. § 10901 or exemption under 49 U.S.C. § 10502].)

law could allow "too much room to delay and burden rail travel." (*Id.* at p. 255, fn. 9 endorsing *Green Mountain, supra*, 404 F.3d at p. 643.)

CCHSRA also misreads *Green Mountain* when it argues that "[t]he question of preemption depends on whether a particular regulation poses an unreasonable burden on interstate commerce" and suggests this means an "as applied" preemption analysis is appropriate. (CCHSRA Brief, p. 24 and fn. 10 citing *Green Mountain, supra*, 404 F.3d at pp. 642-43.) The court of appeals in *Green Mountain* specifically held the disputed Vermont environmental statute mandating a pre-construction permit was akin to regulations "consistently struck down by federal courts and by the Transportation Board" by allowing a state or local regulatory body to deny a railroad the right to construct or by allowing such a body to "delay construction of railroad facilities almost indefinitely." (*Id.* at p. 643.) This holding follows the *Green Mountain* court's in-depth discussion of and concurrence with *City of Auburn* and STB decisions. (*Id.* at p. 642.) *Green Mountain* thus supports facial preemption of state environmental review laws, not an as-applied preemption analysis.

CCHSRA also misreads the STB's decision in *Boston & Maine* to further argue in favor of an "as applied" test. (CCHSRA Brief, p. 23, fn. 9.) However, this STB decision does not contradict the holding in *City of Auburn*; rather, it reaffirms it. (*Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, No. FD 33971, 2001 WL 458685, at *4-5 (S.T.B. April 30, 2001) [*"Boston & Maine Corporation"*].) In fact, the STB uniformly holds that the ICCTA facially preempts state environmental review laws, including CEQA. (See, e.g., *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, No. FD 34914, 2007 WL 1833521, at * 3 (S.T.B. June 25, 2007); *Vermont Railway,*

Inc. – Petition for Declaratory Order, No. FD 34364, 2005 WL 15470, at *2 (S.T.B. Jan. 4, 2005); *North San Diego County Transit Development Board – Petition for Declaratory Order,* No FD 34111, 2002 WL 1924265, at *3-5 (S.T.B. August 19, 2002); *Green Mountain Railroad Corporation – Petition for Declaratory Order*, No. FD 34052, 2002 WL 1058001, at *3-4 (S.T.B. May 28, 2002); *Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington Northern Railroad Company - Stampede Pass Line*, No. FD 33200, 1997 WL 362017, at *4, 5 (S.T.B. July 1, 1997).)

B. CEQA Is A Substantive Environmental Review Law Similar To The State Environmental Review Law at Issue in *City of Auburn*, and Therefore Is Facially Preempted By The ICCTA.

CCHSRA also claims that an "as applied" inquiry is appropriate because facial preemption only applies to those state laws that, by their nature, could be used to deny a rail carrier the ability to conduct some part of its operations or proceed with activities the STB has authorized. (CCHSRA Brief, p. 24 citing *People v. Burlington Northern Santa Fe Railroad* (2012) 209 Cal.App.4th 1513, 1528.) CCHSRA argues that CEQA is merely "informational," and therefore is not preempted. (*Id.*, at pp. 25-26.) CCHSRA is once again wrong.

Contrary to CCHSRA's claim, CEQA is not a mere "informational" statute. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112, 134.) If CEQA were simply a paper exercise in information collection and distribution, and nothing more, then it conceivably might escape the ICCTA's preemptive effect. (See *Boston & Maine Corporation, supra*, 2001 WL 458685, at *7 [local requirement to share information with community may be reasonable and survive preemption].) CEQA, however, includes a substantive mandate and

significant remedial provisions whereby a state court can issue a writ ordering the lead agency to rescind its project approval, stop physical disturbance like construction, and undertake further environmental review before proceeding with a project. (*Mountain Lion Foundation*, *supra*, 16 Cal.4th at p. 134; Pub. Resources Code, §§ 21081, 21168.9; *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 681-82; see *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 12 [recognizing project delay may result even from unsuccessful CEQA litigation].)[3]

CCHSRA argues, nonetheless, that CEQA is not a permitting or preclearance statute "in the traditional sense" because CEQA simply informs related permit decisions that may be required, which are allegedly the real focus of preemption. (CCHSRA Brief, pp. 26-27.) This argument is off the mark in light of *City of Auburn*, which addressed "preemption of state and local *environmental review* laws" in addition to "permitting requirements." (*City of Auburn*, *supra*, 154 F.3d at p. 1027, 1031; emphasis added.) As discussed above in section I.A, CEQA is an environmental review statute akin to the Washington state environmental review law the Ninth Circuit held was facially preempted in *City of Auburn*. (*City of Auburn*, *supra*, 154 F.3d at p. 1031; *Green Mountain*, *supra*, 404 F.3d at p. 643.) There is no basis to distinguish CEQA.

CCHSRA's argument is further undermined by the fact that, following *City of Auburn*, one federal district court and the STB have held CEQA *is* a state environmental review statute that the ICCTA preempts. (*City of*

[3] The various amici that have joined in CCHSRA's amicus brief make arguments that underscore CEQA's substantive mandates and its strong remedial provisions.

Encinitas v. North San Diego County Transit Development Bd. (S.D. Cal. Jan. 14, 2002) 2002 WL 34681621, at *1, 4 [case involved writ petition for CEQA violation and court held ICCTA preempted CEQA claim]; *North San Diego County Transit Development Board, supra*, 2002 WL 1924265, at *5-6 and fn. 7 [noting that CEQA was a claimed state-law violation in the case that was among preempted state regulations]; *DesertXpress Enterprises, LLC, supra*, 2007 WL 1833521, at *5 [CEQA preempted].) CCHSRA's attempt to craft a distinction for CEQA is unavailing.

C. In the ICCTA, Congress Did Not Distinguish Between Publicly-Owned and Privately-Owned Railroads.

CCHSRA also argues that the ICCTA does not facially preempt CEQA in this case because a state agency has applied state law to itself, and since the Authority has control over the decision to proceed, CEQA cannot be used to stop the project. (CCHSRA Brief, p. 27.) CCHSRA claims that this distinguishes the current case from cases like *DesertXpress*, involving a privately owned railroad and the potential application of CEQA to that railroad by a public entity. (CCHSRA Brief, pp. 28-30.) These arguments are wrong because they make the incorrect assumption that Congress intended uniform federal regulation of only privately-owned railroads.

Nothing in the plain language of the ICCTA indicates Congress intended to distinguish between publicly-held and privately-held railroads. Rather, the STB's jurisdiction and the ICCTA regulatory framework apply generically to "rail carriers," "railroads," and "transportation." (49 U.S.C. § 10102(5), (6), (9).) The distinguishing factor is whether a particular railroad is part of the interstate rail network and under STB jurisdiction, not who owns the railroad. (*DesertXpress Enterprises, LLC, supra*, 2007 WL 1833521, at *3 [private railroad proposal part of interstate rail network and

under STB jurisdiction]; *All Aboard Florida – Operations LLC and All Aboard Florida – Stations – Construction and Operation Exemption,* No. FD 35680, 2012 WL 6659923, at *1-4 (S.T.B. Dec. 21, 2012) [private railroad proposal not part of interstate rail network and not under STB jurisdiction]; *North San Diego County Transit Development Board, supra,* 2002 WL 1924265, at *5; [publicly-owned railroad proposal part of interstate railroad network and under STB jurisdiction]; *The New York City Economic Development Corporation – Petition for Declaratory Order*, No. FD 34429, 2004 WL 1585810 (S.T.B. July 15, 2004), *1, 3 [publicly-owned railroad proposal part of interstate rail network and under STB jurisdiction].)

The lack of a distinction between publicly- and privately-owned railroads is logical considering that many states have acquired railroad lines from private entities and continue to own and operate the lines – subject to STB jurisdiction. (*See, e.g., Mississippi Central Railroad Co. – Lease and Change in Operators Exemption – Line of Mississippi-Alabama Railroad Authority*, No. FD 35757, 2013 WL 4772664 (S.T.B. Sept. 6, 2013); *South Dakota Railroad Authority – Acquisition Exemption – The Burlington Northern and Santa Fe Railway Company*, No. FD 34125, 2001 WL 1712687 (S.T.B. Jan. 18, 2001); *Pennsylvania Northeast Regional Railroad Authority – Acquisition Exemption – Lackawanna County Railroad Authority*, No. FD 34846, 2006 WL 1529115 (S.T.B. June 5, 2006); *West Virginia State Rail Authority – Acquisition Exemption – CSX Transportation, Inc.*, No. FD 33421, 1997 WL 377973 (S.T.B. July 10, 1997); *Norfolk Southern Railway Company and Atlantic and East Carolina Railway Company - Lease and Operation Exemption – North Carolina Railroad Company*, No. FD 32820, 1995 WL 756152, at *1, fn. 2 (S.T.B.

Dec. 22, 1995).) That the Authority, a state entity, will own and (with contractors) operate and maintain a line that the STB has determined is part of the interstate rail network, is hardly unique. (*The New York City Economic Development Corporation, supra*, 2004 WL 1585810, at *3 [state environmental review laws preempted for City's rail project to extend state-owned rail lines].)

Reflecting that the ICCTA on its face applies to all railroads, irrespective of the nature of their ownership, the STB preemption cases make no distinction between publicly- and privately-owned railroads. (Compare *DesertXpress Enterprises, LLC, supra*, 2007 WL 1833521 at * 4-5 [new railroad line in California and Nevada proposed by private entity] and *North San Diego County Transit Development Board, supra*, 2002 WL 1924265, at * 5 [new passing track proposed by public entity railroad owner]; see also *North San Diego County Transit Development Board – Petition for Declaratory Order - Petition for Declaratory Order*, No. 34111, 2002 WL 31058576, at * 3 (S.T.B. Sept. 17, 2002) [affirming prior holding that passing track by public entity railroad subject to preemption of state environmental review laws].) CCHSRA's effort to distinguish *DesertXpress* because it was a private railroad proposal therefore fails.

CCHSRA attempts to diminish the importance of *North San Diego County Transit Development Board* by incorrectly suggesting that the case was not really about CEQA. (CCHSRA Brief, p. 29, fn. 12.) This is untrue. The underlying dispute involved a lawsuit the City of Encinitas filed in San Diego County superior court seeking a writ of mandate for violation of CEQA, as well as for violations of other laws. (*North San Diego County Transit Development Board, supra*, 2002 WL 1924265, at *2 and fn. 7.) In the related *City of Encinitas* case, the federal district court

confirms that the ICCTA preempted the CEQA claim the City of Encinitas advanced against a publicly-owned railroad. (*City of Encinitas*, *supra*, 2002 WL 34681621, at *1, 4.)

D. Proposition 1A Does Not Require Further Programmatic CEQA Compliance.

Finally, CCHSRA argues that "Prop. 1A requires the Authority to comply with CEQA," and that "the state has imposed the requirements of CEQA on itself through Prop. 1A." (CCHSRA Brief, pp. 30-31 citing Sts. & Hy. Code, §§ 2704.04, subds. (a), (b)(4), (c); 2704.06; 2704.08, subds. (b), (c)(2)(K), (g)(1)(C), (g)(2); 2704.09, subds. (g), (i), (j); *id.*, p. 32.) Thus, CCHSRA argues that this alleged "voluntary commitment" escapes preemption. (CCHSRA Brief, pp. 31-32.) This argument suffers two fatal flaws.

First, although voluntary commitments made by a railroad can be enforceable and not raise preemption concerns, Proposition 1A [the "Bond Act"] as a statute, is not a voluntary commitment in the sense recognized in the authority cited by CCHSRA. (*Boston & Maine Corporation*, *supra*, 2001 WL 458685, at *5 [discussing general principle that voluntary agreement railroad enters into not preempted]; Sts. & Hy. Code, § 2704, et seq.) The voluntary commitment cases involve contracts, not a situation where the supposed voluntary commitment was a statute. (*PCS Phosphate Co., Inc. v. Norfolk Southern Corp.* (4th Cir. 2009) 559 F.3d 212, 221 [enforceable voluntary commitment involved relocation agreement for moving rail line serving mine]; *Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.* (D.Me. 2003) 297 F.Supp.2d 326, 332-333 [adopting STB reasoning about voluntary *contracts*].)

Second, contrary to CCHSRA's representations, no provision of the Bond Act requires CEQA compliance. CCHSRA cites no such provision. And in fact, the Bond Act never mentions CEQA.

Section 2704.04, subdivision (a), merely references certified program-level environmental impact reports that were in existence at the time of the Bond Act's passage in 2008 for purposes of stating the Legislature's intent to initiate construction of a high-speed train system as generally described in these documents. While section 2704.04, subdivision (b)(4), indicates that the Bond Act does not prejudice the Authority's certification of the Program EIR and decision on a Bay Area to Central Valley route, it does not impose any CEQA requirement. Rather, it simply indicates the Authority has the ability to change its general route decision for the Bay Area. In fact, section 2704.06 reinforces this flexibility with language specifically contemplating that there could be subsequent modifications to the high-speed train project as described in the then-existing certified program-level environmental documents. Section 2704.04, subdivision (c), generally references environmental mitigation as a permissible use of funds, but does not require CEQA.

In section 2704.08, subdivision (b), refers to "environmental studies" and subdivision (g) refers to "environmental studies" and mitigation of impacts in the context of permissible use of bond proceeds, but neither subdivision imposes a CEQA requirement. The only language in the Bond Act that even refers to an environmental review or clearance requirement is in section 2704.08, subdivision (c)(2)(K), which requires that the Authority include, identify, or certify in a funding plan it must submit to the Governor and the Legislature before seeking an appropriation the following:

> The authority has completed all necessary *project level* environmental clearances necessary to proceed to construction.

(Sts. & Hy. Code, § 2704.08, subd. (c)(2)(K); emphasis added.) This provision is plainly focused on project-level environmental review. It has no relevance to this case, involving a CEQA challenge to the Program EIR. (*Id.*)[4] (See *In re Bay-Delta, etc.* (2008) 43 Cal.4th 1143, 1169-1170.)

Furthermore, section 2704.08, subdivision (c)(2)(K), does not mention CEQA. Instead, it refers to "necessary" environmental clearance, indicating that the Bond Act requires whatever environmental clearance is "necessary" under the law. (*Id.*) Now that the high-speed train system is subject to STB jurisdiction under the ICCTA, compliance with NEPA is the only necessary environmental clearance.

CCHSRA argues, however, that extending the allegedly flawed logic of *City of Auburn* would lead to preemption of NEPA as well. (CCHSRA Brief, pp. 32-33.) This argument is wrong. NEPA will apply to any action that the STB must take that qualifies as a "major federal action," be that an approval under 49 U.S.C. section 10901 or the grant of an exemption under 49 U.S.C. section 10502. (*DesertXpress Enterprises, LLC, supra*, 2007 WL 1833521, at *3; *Cities of Auburn and Kent, WA, supra*, 1997 WL 362017, at *3, 6.) In fact, the STB complied with NEPA in its June 2013 decision. (*California High-Speed Rail Authority – Construction Exemption*, No. FD 35724, 2013 WL 3053064, at * 5-6 (S.T.B. June 13, 2013).) Similarly, other federal environmental laws will be harmonized

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[4] CCHSRA refers to section 2704.09, but that provision does not impose CEQA requirements either. The language in section 2704.09 describes general environmental considerations, not a mandate to comply with CEQA. (Sts. & Hy. Code, § 2704.09, subds. (g), (i), (j).)

with the ICCTA and will apply to the high-speed train project. (*Association of American Railroads*, *supra*, 622 F.3d at p. 1098; *DesertXpress Enterprises, LLC*, *supra*, 2007 WL 1833521, at *3.)

CCHSRA further argues that preemption of CEQA "in the present context" would be an absurd result because it would mean the state could not apply its own internal Bond Act procedures (allegedly CEQA compliance) upon itself in the same way a private rail carrier would. (CCHSRA Brief, p. 31.) The claim is incorrect. As discussed above, the Bond Act imposes no "internal procedures" that mandate further CEQA compliance at the program EIR level, which is the only issue in this case.

Finally, CCHSRA again suggests that because CEQA is a mere informational statute, CEQA remedies cannot shut down or stop a rail project. (CCHSRA Brief, p. 33.) As discussed above, this argument is disingenuous because it ignores the remedial provisions of the law that provide for a state law remedy in the form of a writ of mandate. (Pub. Resources Code, § 21168.9.) Under *City of Auburn*, the application of CEQA to the Program EIR and the Authority's programmatic route decision is a facially preempted environmental review requirement.

II. The Market Participant Exception Protects State Actions Taken in the State's Proprietary Capacity; It Does Not Apply To Tilt the Playing Field Against the State And It Does Not Apply Where the State Has Not Invoked It.

CCHSRA posits a second theory for why the ICCTA does not preempt CEQA: namely, that the "market participant exception" to preemption applies in this case. (CCHSRA Brief, pp. 34-48.) The market participant exception is designed to let states develop rules or standards for the state's proprietary interactions with the marketplace. (*Bldg. & Const.*

Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc. (1993) 507 U.S. 218, 231-32 ["*Boston Harbor*"].) CCHSRA's theory is wrong because the market participant exception does not fit here. This case is fundamentally different than *Boston Harbor* and the other cases that form the market participant exception to federal statutory preemption.

Here, the Authority's conduct that the appellants' challenge in this case is the Program EIR's compliance with CEQA. However, the Authority has not acted in a proprietary capacity to develop its own rules or standards for environmental review of the programmatic route decision or the high-speed train project in general. In preparing its Program EIR, the Authority was simply complying with a state environmental review statute, CEQA, in good faith until the STB assumed jurisdiction over the project, thereby preempting any further CEQA remedy.

Another fundamental error in CCHSRA's theory is that it does not recognize that the market participant exception is for the *state* to invoke. It ensures that the state can act in its proprietary capacity just like any other similarly situated private actor, thereby leveling the playing field in the market. The application of CCHSRA's theory here would turn the market participant exception on its head, by turning the exception from a defense that protects state proprietary actions taken in the state's discretion into a third-party enforcement tool.

A. The Market Participant Exception Protects The State's Ability to Develop Rules and Standards For its Market Transactions; Because the Authority Has Not Acted to Develop Rules and Standards, the Market Participant Exception Does Not Apply.

The market participant exception is an important tool for states, allowing them to act in their proprietary capacities just as private parties might. The market participant exception arises where a state seeks to promote rules or standards in its interactions with a marketplace that is subject to a federal statutory scheme. (*Boston Harbor*, 507 U.S. at pp. 231-32.) Without an exception for conduct as a market participant, a state could be hindered in its ability to contract or procure goods and services in the marketplace relative to a similarly situated private party. (*Reeves, Inc. v. Stake* (1980) 447 U.S. 429, 439 ["Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints [as private market participants]".].) Put another way, a private party is free to negotiate the terms of its contracts without fear that it could be "making rules" in an area reserved for a federal regulatory scheme. The market participant doctrine guarantees that the mere fact that a government agency acting in the market place *could* regulate should not prevent that agency from taking actions in the marketplace that are non-regulatory in nature.

The market participant exception thus levels the playing field for states, preventing a state from being at a disadvantage in market interactions just because it is the state. The market participant exception is designed to identify "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." (*Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.* (5th Cir.

1999) 180 F.3d 686, 693.) Otherwise, preemption could "hobble" government agencies, preventing them from being able to efficiently and fairly negotiate the terms for necessary goods and services. (*Id.*, at p. 692.) Allowing CCHSRA to assert the market participant exception here over the Authority's objection, however, would lead to the opposite result.

The cases that follow *Boston Harbor* in identifying a market participant exception concern, e.g., an ordinance governing a city's own towing services (*Tocher v. City of Santa Ana* (9th Cir. 2000) 219 F.3d 1040, 1049, *abrogated on other grounds by City of Columbus v. Ours Garage and Wrecking Service* (2002) 536 U.S. 424), the state's rules regarding emissions standards for its own purchase of a vehicle fleet (*Engine Mfrs. Assn v. South Coast Air Quality Mgt. Dist.* (9th Cir. 2007) 498 F.3d 1031, 1045-49), and a school district's lease terms with a wireless service provider (*Sprint Spectrum v. Mills* (2d Cir. 2002) 283 F.3d 404, 420-21). These cases underscore the point that the market participant exception applies to public entities exercising control over their own conduct in market transactions, just as any private enterprise could.[5]

Here, the Program EIR has informed the Authority's Bay Area to Central Valley route decision, in which it has chosen to focus future,

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[5] Of course, states may also invoke the market participant exception in choosing to achieve policy goals through their *proprietary* conduct. (See, e.g., *Engine Mfrs.*, 498 F.3d at p. 1046 [" 'efficient procurement' means procurement that serves the state's purposes—which may include purposes other than saving money—just as private entities serve their purposes by taking into account factors other than price in their procurement decisions."]; cf. *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.* (1986) 475 U.S. 282, 287 [holding law forbidding state's contracting with NLRA violators did not constitute market participation by state].)

second-tier environmental studies on the Pacheco Pass. But in contrast to the nature of the proprietary actions disputed as preempted in *Boston Harbor* and its progeny, the Authority has not and is not presently developing and committing to its own environmental review procedures for the high-speed rail project or otherwise establishing rules for market transactions. Rather, the Authority has simply complied with the mandates of CEQA in good faith by preparing the Program EIR and defending its adequacy under CEQA, until the STB assumed jurisdiction and thereby preempted any further CEQA remedy. So although the Authority has made a policy decision to focus future environmental studies on the Pacheco Pass route into the Bay Area, and also complied with CEQA, the market participant exception simply does not apply to provide a CEQA remedy. Any reliance on CEQA in this case to force a state entity to take actions that the Authority in its discretion law has elected not to pursue, would turn the market participant exception on its head.

A recent state court analysis of federal preemption of a state False Claims Act action and discussion of the market participant exception, illustrates why the market participant exception is not triggered by the presence of a generally applicable state regulatory law – here CEQA – standing alone. In *DHL Express (USA), Inc. v. State of Florida, ex rel. Grupp* (Fla. 2011) 60 So.3d 426, *reh'g denied* (Apr. 26, 2011), *review denied,* (Fla. 2012) 81 So.3d 415, *cert. denied,* (U.S. 2012) 132 S.Ct. 2753 ["*Grupp*"], plaintiffs brought a qui tam claim on behalf of the state under Florida's False Claims Act against a shipper of goods, arguing fraudulent conduct related to the shipper's imposition of surcharges. In response to an argument that the federal Airline Deregulation Act and the Federal Aviation Administration Authorization Act (FAAAA) preempted the cause of action,

the plaintiffs asserted that the state acted as a market participant in procuring the shipper's services, and thus, preemption should not apply. (*Grupp*, 60 So.3d at p. 429.)

The court in *Grupp* agreed that the state was a market participant in acquiring the services, but rejected the market participant argument with respect to a false claims remedy: the preemption inquiry was triggered by plaintiffs' filing of an action under the False Claims Act, a state law. The court recognized that the remedies available through Florida's False Claims Act triggered a broader, regulatory purpose. (*Grupp*, 60 So.3d at p. 429 ["Although the State of Florida was a market participant when it contracted with DHL, it acts as a regulator *in authorizing suits* under the False Claims Act which, as noted above, serve to deter future behaviors on the part of the defendants." (emphasis added)].) In other words, instead of the state regulating its own conduct, the suit involved regulation by a private party invoking a state statute. (Accord, *State of New York ex rel. Grupp v. DHL Express (USA), Inc.* (N.Y. 2012) 970 N.E.2d 391, 397 [reaching a similar result in finding that New York's False Claim Act authorizes remedies that that are regulatory in nature and therefore not subject to the market participant exception].)

In planning and eventually constructing the high-speed train system, the Authority has considered and will continue to consider environmental issues.[6] Here, however, the Authority's policy decision about a general train route is *not* the basis of appellants' legal challenge in this case. Like

[6] As discussed in section I.D, above, NEPA will apply to the high-speed train project and other federal environmental laws will be harmonized with the ICCTA and applied to the project.

Grupp, the law that is being prosecuted by a third party, CEQA, is what triggers the preemption inquiry in this case. As was the case with the state false claims law in *Grupp*, the mere presence of California's environmental review law does not trigger the market participant exception and thereby subject the Authority to a state law remedy. The market participant exception simply does not fit in this case.

B. The Market Participant Exception Cannot Be Used *Offensively* To Subject The Authority To Remedies That the ICCTA Preempts.

CCHSRA also misapprehends who may invoke the market participant exception, and in what context. Public entities invoke the market participant exception in order to support the entity's attempt to participate in a marketplace in a manner that federal preemption might otherwise prevent it from doing. (See *Cardinal Towing, supra,* 180 F.3d at pp. 690-91.) The market participant exception is used in a *defensive* capacity, in order to rebuff challenges to the public entity's ability to interact in the market. (See, e.g., *id.*) Here, by contrast, the Authority is not invoking the market participant exception; rather, a private third party (CCHSRA) seeks to invoke it. CCHSRA is attempting to wield the market participant exception *offensively*, to impose a state environmental review remedy that the ICCTA preempts. Adopting this approach to the exception would in effect force the state to take action in its proprietary capacity, rather than respecting the state's prerogative to take proprietary actions in its discretion. It would subject the state to more and different regulation than private railroads under the ICCTA, antithetical to the market participant exception's purpose. (See also *Grupp*, *supra*, 60 So.3d at p. 429 [*Grupp* plaintiffs not in a position to invoke market participant exception].)

All the cases CCHSRA cites to demonstrate the existence of the market participant exception involve its *defensive* use by public agencies seeking to protect actions they have elected to take and to have a level playing field with similarly situated private entities. (See *Tocher, supra,* 219 F.3d at p. 1049 [City of Santa Ana argued its ordinance regulating non-consensual towing subject to market participant exception]; *Sprint Spectrum, supra,* 283 F.3d at p. 412 [school district argued its lease terms governing wireless emissions subject to market participant exception]; *Engine Mfrs., supra,* 498 F.3d at pp. 1042-44 [agency argued its Fleet Rules subject to market participant exception]; *Johnson v. Rancho Santiago Community College Dist.* (9th Cir. 2010) 623 F.3d 1011, 1022-24 [community college district argued its project stabilization agreement subject to market participant exception].)

The Authority has the prerogative to invoke the market participation exception in the future, as it sees fit, when it is exercising its proprietary functions. But to date it has not exercised any such prerogative as it relates to environmental review and the Program EIR, the only subject of this lawsuit. Subjecting the Authority to remedies that cannot be invoked against private railroads, as third-party CCHSRA attempts to do here, would burden a public entity, contrary to the intent of the market participant exception. That is, instead of leveling the playing field for the Authority's benefit, the market participant exception would tilt the playing field to the detriment of the Authority. CCHSRA has cited no law that supports such an inverted application of the exception.

C. All of CCHSRA's Cases Identifying a Market Participant Exception Involve Different Federal Statutes.

This Court need go no further to conclude that the market participant exception does not apply in this case. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105 [practice of construing statutes, when reasonable, to avoid constitutional questions].) Nevertheless, it bears mention that CCHSRA fails to cite any case applying the market participant exception to preserve state environmental review laws otherwise preempted by 49 U.S.C. section 10501(b). All of the cases CCHSRA cites for its claim that the market participant exception applies here involve other federal statutes with different federal preemption schemes. (CCHSRA Brief, pp. 38-42; see *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh* (D.C. Cir. 2002) 295 F.3d 28, 34-35 [National Labor Relations Act (NLRA)]; *Tocher, supra*, 219 F.3d at pp. 1046-47 [Federal Aviation Administration Authorization Act (FAAAA)[7]]; Golden State Transit Corp. v. City of Los Angeles (1986) 475 U.S. 608, 617-18 [NLRA]; *Sprint Spectrum, supra*, 283 F.3d at pp. 416-17 [Telecommunications Act]; *Engine Mfrs., supra*, 498 F.3d at pp. 1042-44 [Clean Air Act]; *Johnson, supra,* 623 F.3d at pp. 1022-24 [NLRA; Employee Retirement Income Security Act].)

CCHSRA's attempt to muddy the waters of ICCTA preemption with the market participant exception goes nowhere. The market participant exception simply does not fit here. *City of Auburn* governs in this case.

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[7] The preemption statute at issue in *Tocher, supra*, 219 F.3d 1040, 49 U.S.C. § 14501, was enacted as part of the FAAAA, which the ICCTA later amended.

III. CCHSRA's Prudential Arguments Do Not Overcome Preemption.

Finally, CCHSRA argues that under the doctrine of theory of trial (CCHSRA Brief, pp. 3-7), waiver (*id.* at pp. 7-12), and prudential considerations (*id.* at pp. 12-15), the Court should not address preemption or should find the Authority waived the defense. CCHSRA is raising arguments that go well beyond the issues that the appellants have chosen to address in their supplemental brief. Regardless, the prudential considerations do not overcome the preemptive effect of federal law in this case and the removal of state court subject matter jurisdiction.

For example, the doctrine of theory of trial does not bar this Court's review of the preemptive effect of 49 U.S.C. section 10501(b), on CEQA because the issue is solely one of law. (*Watson v. Department of Transportation* (1998) 68 Cal.App.4th 885, 890 [exception to doctrine of theory of trial occurs where issue is one of law alone]; *Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [change in theory permitted on appeal if solely question of law].) Moreover, a court has discretion to decline to follow the doctrine where applying it would lead to a fundamental error of law. (*Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 639-40 [failure to state a claim is "fundamental error" that can be reached for first time on appeal].) That is the case here, because, like a failure to state a claim, a court's exercise of jurisdiction where federal law preempts such jurisdiction would be a fundamental error of law.

CCHSRA suggests the STB jurisdictional decision was based on a "pseudo-fact finding inquiry," that the scope of the ICCTA's preemption of state environmental review laws depends on disputed facts, and therefore the issue cannot be raised for the first time on appeal. (CCHSRA Brief, p.

5-7.) However, CCHSRA cannot collaterally attack the STB's jurisdictional decision now through this state court proceeding because only the federal courts of appeals have jurisdiction to address STB decisions. (*County of Dutchess v. CSX Transp., Inc.* (S.D.N.Y. Sept. 10, 2009) 2009 WL 2913684, at *4.) CCHSRA had an opportunity to appeal the STB decision, and having failed to do so, the decision, including all of its factual conclusions related to STB jurisdiction, is now final.

CCHSRA claims the ICCTA's preemption of state environmental review laws is a waivable affirmative defense because it represents a "choice of law" rather than a "choice of forum" issue. (CCHSRA Brief, pp. 7-8.) CCHSRA is wrong. Despite its lengthy quotation of cases discussing preemption under other federal statutes, CCHSRA fails to address the cases and STB decisions holding that under 49 U.S.C. section 10501(b), preemption of state environmental review laws *is* about the choice of forum because Congress eliminated state court subject matter jurisdiction to enforce state laws that regulate rail transportation. (*In the Matter of Metropolitan Transportation Authority* (N.Y. 2006) 32 A.D.3d 943, 946 [New York courts lacked subject matter jurisdiction to address issue within exclusive jurisdiction of STB]; *Village of Big Lake v. BNSF Railway Company, Inc.* (Mo. 2012) 382 S.W.3d 125, 129-131 [Missouri court properly dismissed preempted state-law claims against railroad]; *In re Application of Burlington Northern Railroad Co. v. Page Grain Co.* (Neb. 1996) 545 N.W.2d 749, 751 [Nebraska courts lacked subject matter jurisdiction over regulation of rail service agencies]; *Greenville County Economic Development Corporation – Petition for Declaratory Order*, No. FD 34487, 2005 WL 1767438 (S.T.B. July 27, 2005), at *2 [ICCTA

"divested state courts of subject matter jurisdiction over transportation by rail carriers as part of interstate rail network"].)

CCHSRA's final argument suggests that the Authority has unclean hands because it was "gaming the system." (CCHSRA Brief, pp. 12-15.) CCHSRA makes two arguments: first, CCHSRA claims the Authority improperly delayed filing papers with the STB for years; and second, the Authority failed to alert this Court of Appeal of the STB's April 18, 2013, decision. (*Id.* at pp. 12-13.) CCHSRA then claims that the preemption issue is "a complex, difficult, and controversial subject" that the court should not even reach. (*Id.* at pp. 14-15.) These arguments are incorrect.

As CCHSRA concedes, the Authority had previously identified that the STB had "*potential* jurisdiction." (CCHSRA Brief, p. 12 emphasis added.) Based on its own assessment, the Authority filed a motion to dismiss with the STB asserting that the STB did not have jurisdiction over the high-speed train system. (*California High-Speed Rail Authority*, *supra*, 2013 WL 3053064, at *7 (S.T.B. June 13, 2013).) In a detailed decision, the STB disagreed and concluded "we find that the HST System will be constructed as part of the interstate rail network. Therefore, the Board has jurisdiction here." (*Id.* at *10.) The STB then granted the Authority's concurrently filed petition for exemption. (*Id.* at *17, 19.)

This process worked properly and did not involve any intentional delay or improper conduct by the Authority. The Authority submitted its motion to dismiss and petition for exemption to the STB in 2013, rather than earlier, because it was only in 2013 that a portion of the high-speed train system was poised for construction and the STB's role, if any, had to be addressed. (*Id.* at *1 [Merced to Fresno segment would be first section of high-speed train system constructed].) This process, which was identical

to that used by another passenger rail proponent, All Aboard Florida, was neither improper nor unusual. (*All Aboard Florida, supra*, 2012 WL 6659923, at *1 [rail proponent concurrently filed motion to dismiss for lack of jurisdiction and petition for exemption under 49 U.S.C. § 10502 for construction].)

Furthermore, the Authority correctly alerted the Court of the STB's June 13, 2013, decision, which included a full explanation for STB jurisdiction. In its April 18, 2013, decision denying the Authority's motion to dismiss, the STB deferred explaining the basis for its jurisdiction. (*California High-Speed Rail Authority – Construction Exemption,* No. FD 35724, 2013 WL 1701795, at *2 (S.T.B. April 18, 2013).) It would have been difficult at best to properly portray the impact of the STB's jurisdictional determination on this case without knowing the STB's rationale for jurisdiction. The Authority therefore properly waited to alert the Court of the June 13, 2013, STB decision, with its full jurisdictional rationale. Regardless, the issue in this case is one of subject matter jurisdiction. Equitable doctrines such as unclean hands or laches do not trump a lack of subject matter jurisdiction. (*In re William T.* (1985) 172 Cal.App.3d 790, 802 [subject matter jurisdiction cannot be conferred by consent, waiver, estoppel, or unclean hands].)

CONCLUSION

If an entity, public or private, will construct and operate a rail line as part of the interstate rail network, it is subject to the uniform federal regulatory scheme under the ICCTA. The STB has determined that the California high-speed train system is part of the interstate rail network, and its construction and operation is therefore subject to federal regulation

under the ICCTA. State law remedies, such as the CEQA remedy the appellants seek in this case, are not available. The Authority therefore respectfully requests that the Court of Appeal remand the case and order dismissal.

Dated: November 1, 2013

Respectfully submitted,

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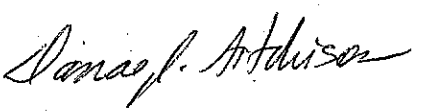

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Amicus Brief uses a 13 point Times New Roman font and contains 7,998 words based on the word count function in Microsoft Word, exclusive of caption page, tables, and this certification.

Dated: November 1, 2013

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DECLARATION OF SERVICE

Case Name: ***Town of Atherton et al. v. California High-Speed Rail Authority***

Case No.: **Court of Appeal, Third Appellate District Case No. C070877**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **November 1, 2013**, I served the attached **RESPONDENT'S ANSWER TO LETTER BRIEF OF AMICUS CURIAE CITIZENS FOR CALIFORNIA HIGH- SPEED RAIL ACCOUNTABILITY** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows,
(and also *VIA E-MAIL* to Stu@stuflash.com):

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on
November 1, 2013, at Sacramento, California.

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Declarant

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