Civ. No. C070877

CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

TOWN OF ATHERTON *et al.*,

Plaintiffs/Appellants

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity,

Defendant/Respondent

On Appeal from the Judgment and Post-Judgment Order
of the Sacramento County Superior Court
Honorable Michael P. Kenny, Judge
Cases No. 34-2008-80000022CUWMGDS
and 34-2010-80000679CUWMGDS

APPELLANTS' JOINT SUPPLEMENTAL BRIEF ON FEDERAL PREEMPTION

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I. INTRODUCTION

Respondent and Defendant California High-Speed Rail Authority ("Respondent"), represented by the California Attorney General, has made the surprising last-minute assertion that the proceedings under the California Environmental Quality Act[1] ("CEQA") at issue in this case are preempted by the federal Surface Transportation Board's ("STB") assertion of jurisdiction over the state's high-speed rail project. The California Attorney General, the state's primary legal counsel, is generally the defender of California's laws against challenge.[2] Surrendering to federal authority in an attempt to override California's most important environmental law runs counter to that long and consistent record.

It should be noted that both Respondent and the Attorney General are components of the executive branch of California government. CEQA, by contrast, was written and passed by the legislative branch of state government. The executive branch is generally expected to faithfully execute and enforce the laws enacted by the legislative branch. (*See, .e.g, Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055.) Here, it appears that the executive branch's enthusiasm for implementing its vision of a high-speed train system has led it to seek to exempt that project from CEQA[3]. While the Office of the Attorney General often offers its interpretation of California laws, it does not have the prerogative to unilaterally alter or refuse to enforce California laws. (*Lockyer, supra.*)

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[1] Public Resources Code §21000 *et seq.*

[2] *See, e,g, Jevne v. Superior Court* (2005) 35 Cal.4th 935, 950 [attorney general, as amicus curiae, defends California arbitrator ethics standards against claim of federal preemption]; *Physicians Committee for Responsible Medicine v. McDonald's Corp.* (2010) 187 Cal.App.4th 554, 573 [attorney general, as amicus curiae, defends California Proposition 65 initiative against claim of federal preemption]; *Gibson v. World Savings & Loan Assn*. (2002) 103 Cal.App.4th 1291, 1295 [attorney general, as amicus curiae, defends assertion of unfair business practices under California law as not preempted by federal law].

[3] In the past, both the Governor and the Chair of Respondent's Board of Directors have toyed with the idea of exempting the project from CEQA. However, those forays have been rebuffed by the legislative leadership.

Under the separation of powers doctrine, only the judicial branch has that ability.

As will be shown, the Attorney General's attempt here to have the Court exempt the high-speed rail project from CEQA review through a claim of federal preemption is both ill-informed and ill-advised. The Interstate Commerce Commission Termination Act of 1995 ("ICCTA")[4] was intended to protect private railroads from burdensome state or federal economic regulation.[5] Its preemption provisions have no application to a state law intended solely to assure that California public agencies act with full knowledge and understanding of a project's environmental consequences. Indeed, CEQA and the National Environmental Policy Act[6] ("NEPA") (which the ICCTA does not preempt[7]) are similar and fully compatible statutes and CEQA includes specific provisions (Public Resources Code §21083.5 et seq.) detailing a joint process for environmental review of projects to which both CEQA and NEPA apply.

Further, even if the ICCTA was intended to generally protect railroad operations from any state regulation, in this case the rail operation involved is a state-run proprietary enterprise and the CEQA review involved here is a type of internal project review undertaken by the very agency proposing the project. As such, Respondent's approval of its own project, including the CEQA review of that project, as well as state court actions intended to assure that the CEQA review is done properly, are,

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

[5] Appellants' accompanying Motion for Judicial Notice highlights this emphasis by asking the Court to take judicial notice of the testimony of the chair of the STB before Congress in 1998 as it sought reauthorization. That testimony highlights the STB's role in financial regulation of railroads through rate proceedings [testimony at p.7], mergers [testimony at p.11], rail operations [testimony at p.13], and labor matters [testimony at p.15]. Nowhere is environmental regulation even mentioned.

[6] 42 U.S.C. §4321 *et seq.*

[7] *See, e.g., Mid States Coal. for Progress v. Surface Transp. Bd.* (8th Cir. 2003) 345 F.3d 520, 533 [STB approval process can include preparation of Environmental Impact Statement under NEPA].

under the longstanding market participant exception, not subject to federal preemption.[8]

Finally, in 2008 California's voters passed Proposition 1A, a ballot measure that authorized the issuance of $9 billion in state general obligation bonds to help "jump start" the high-speed rail project. One of the provisions of that measure (Streets & Highways Code §2704.08(c)(2)(K)) requires, as a prerequisite for obtaining an appropriation of bond funds for use in the project, that Respondent certify that it has completed "all necessary project level environmental clearances necessary to proceed to construction." Other provisions of the bond act made clear to the voters that such environmental clearances specifically included CEQA review.[9] Thus California's voters have affirmatively chosen to apply CEQA to the project and specifically conditioned receipt of $9 billion in state bond funds upon CEQA compliance. This mandate, specific to Respondent and dictated by the California electorate, its ultimate legislative body, is independent of any other general requirement for CEQA compliance. While the STB may have preemptive authority over railroad operations, it has no authority over the ability of California's voters to condition the use of bond funds on specific performance requirements.

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[8] The Attorney General is presumably very aware of the market participant exception, having argued its broad application before the U.S. Supreme Court. (*Chamber of Commerce of U.S. v. Brown* (2008) 544 U.S. 60.)

[9] See, e.g., Streets & Highways Code §2704.04(a) [bonds intended to construct high-speed rail system consistent with Respondent's certified EIRs of 2005 and 2008], 2704.04(b)(4) [bond measure provisions not intended to prejudice Respondents determination of alignment for Central Valley to San Francisco Bay segment and certification of EIR for that segment].

ARGUMENT

I. WHILE THE ICCTA MAY PREEMPT STATE ENVIRONMENTAL PERMIT REQUIREMENTS, CEQA IS AN INFORMATIONAL RATHER THAN A REGULATORY STATUTE.

Respondent's brief cites the preemption provision of the ICCTA, 49 U.S.C. §10501(b), which preempts other federal and state remedies with respect to the regulation of rail transportation. (Respondent's Supplemental Brief on Preemption ["RSB"] at p. 8.) Respondent then points to case law that holds that the ICCTA preempts state and local permitting laws for establishing rail service, and specifically to *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025. (RSB at pp. 10-11.) However, *City of Auburn* and the other cases cited by Respondent make clear that what the ICCTA preempts are state or local statutes or regulations that attempt to regulate rail transportation. In particular, *City of Auburn* states that even an environmental statute *may* trespass on the exclusive jurisdiction of the FRA:

> For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line. (Id. at 1031.)

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

In *Assn. of Am. Railroads v. South Coast Air Quality Mgmt. Dist.* (9th Cir. 2010) 622 F.3d 1094, regulations approved by the South Coast Regional Air Quality District similarly were preempted under the ICCTA because they attempted to regulate air quality in connection with railroad yard operations[10] and, in doing so, attempted to manage or govern rail transportation.

CEQA, by contrast, is essentially an informational statute. It serves as an "environmental alarm bell" to alert governmental officials, and the public, to a project's potential environmental impacts and to inform public officials and the public of ways in which significant impacts might be mitigated or avoided. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229.)

> If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. (*Id.*)

CEQA does not, in itself, either approve or reject a project. Rather, analysis of a project under CEQA provides the public agency's decision makers with information that informs their decisions on the merits.[11]

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[10] Subsequently, the Air District submitted the same rules to the California Air Resources Board for approval by U.S. E.P.A. and incorporation in the California's State Implementation Plan under the Clean Air Act. The District Court concluded that this action was not preempted. (Case 2:06-cv-01416-JFW-PLA, Document 269, filed 2/24/2012.)

[11] Respondent, at p.13 of its brief, cites to the STB's order in *DesertXpress Enterprises, LLC* – Petition for Declaratory Order, No. FD34914, 2007 WL 1833521 (STB June 25, 2007) as indicating that CEQA compliance is generally preempted for rail project. However, that ruling is distinguishable in that DesertXpress was a private rail carrier seeking regulatory approval for its application. CEQA compliance would have been an adjunct to that regulatory approval, and therefore would arguably be subsumed within a more general preemption of such a state regulatory approval. Similarly, in *North San Diego County Transit Development Board* – Petition for Declaratory Order, No. FD 34111, 2002 WL 1924265 (STB August 19, 2002), CEQA compliance would have been in the context of applying for a state Coastal Act permit. Since the permit requirement was preempted under the ICCTA, so was CEQA compliance. Here, Respondent would not be acting as a regulator, but as the rail line's proprietor. (See below.)

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

CEQA allows an agency to approve a project in spite of its having significant and unavoidable environmental impacts. The only requirement on granting such an approval is that the agency, in approving the project, adopt a statement of overriding considerations ("SOC") which explains to the public the agency's rationale for approving the project in spite of its impacts. (Public Resources Code §21081(b).) Indeed, Respondent herein adopted such a SOC in approving the project at issue herein. (1 SAR 110 *et seq*.)

Respondent may argue that CEQA contains "action-forcing" provisions that prohibit an agency from approving a project with significant environmental impacts if there are feasible mitigation measures or alternatives that would reduce or avoid the impacts. (Public Resources Code §§ 21002, 21002.1(b).) That is, indeed, an important feature of CEQA, and one that is not part of NEPA. However, CEQA and its case law clarify that "feasible," as used in determining whether to approve a project, includes policy considerations; specifically, an alternative or mitigation measure can be found infeasible because it is undesirable, e.g., it fails to fully satisfy the objectives associated with the project. (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 198; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 948; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 998, 1000 *et seq*.)

In short, CEQA, unlike federal, state, or local statutes or regulations that could be used to defeat a rail project, does <u>not</u> stand in the way of granting a project approval[12]. All it requires is that before granting such an

[12] Depending on the complexity of a project, there may be a certain amount of delay involved in doing the necessary environmental review. However, CEQA review is usually coterminous with NEPA review, which is not preempted by the ICCTA. The delay often complained about under CEQA,

approval the agency considering the approval have adequate information about the project, its potential environmental impacts, and how those impacts might be avoided or mitigated. The agency, upon issuance of an appropriate SOC, can then approve the project regardless of the severity of the impacts it might cause. In this respect, it differs fundamentally from the statutes at issue in, for example, *City of Auburn* and *Green Mountain*, and the regulation involved in *Assn. of Am. Railroads*. Consequently, CEQA compliance is not, in itself, preempted by ICCTA §10501.[13]

II. RESPONDENT'S CONSIDERATION OF APPROVAL FOR THE BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN PROJECT, AND ITS ASSOCIATED CEQA ANALYSIS, FALLS UNDER THE MARKET PARTICIPANT EXCEPTION TO PREEMPTION UNDER THE ICCTA.

The central question presented by Respondent's preemption argument is whether Respondent had any authority at all to reject the Bay Area to Central Valley High-Speed Train Project. In this respect, Respondent was and is in a fundamentally different position than the local officials involved in *City of Auburn*, as well as the other ICCTA preemption cases cited by Respondent.

In each of those cases, a public agency other than the STB was attempting to regulate by way of issuing a permit or enacting regulations, and thereby potentially reject, a private rail project over which the STB had jurisdiction. Thus, for example, in *City of Auburn*, the city required the Burlington Northern Santa Fe Railroad to obtain a local land use permit. In *Green Mountain Railroad*, the State of Vermont required that private railroad company to obtain a state permit to build a train barn. In *Assn. of*

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like that under NEPA, is most often due to claims that the review was not done properly. A rigorous review will generally eliminate or greatly reduce the risk and associated delay of litigation.

[13] It should be noted that NEPA, like CEQA, is an informational, rather than an action-forcing, statute. Thus NEPA is likewise not preempted by the ICCTA. This is expressly shown here by the fact that the STB relied upon the NEPA analysis done by the Federal Railroad Administration in making its determinations on the high-speed train application before it. (See, S.T.B. Decision FD 35724, *Calif. High-Speed Rail Auth.* – Construction Exemption, submitted with Respondent's June 26, 2013 letter to the Court, at p.2.)

Am. Railroads, the South Coast Air Quality District attempted to issue regulations to control operations at a private rail yard. In *Boston and Maine Corp. and Town of Ayer, MA* – Joint Petition for Declaratory Order, No. FD 33971, 2001 WL 458685, a town conservation commission sought to require conditions on approving a railroad project.

In this case, however, Respondent is itself the applicant to the STB for approval of *its own* project. No permit or regulation is involved. Thus Respondent is acting, not as a public agency attempting to regulate a private third party, but as the proprietor of an enterprise, albeit a publicly owned and financed enterprise, making decisions about *its own* rail program. The case law is abundantly clear that in such a situation the state agency falls under the market participant exception to federal preemption doctrine.

A. FEDERAL PREEMPTION UNDER THE ICCTA ONLY OCCURS IF THE FEDERAL, STATE, OR LOCAL LAW OR REGULATION UNREASONABLY INTERFERES WITH INTERSTATE COMMERCE.

While the ICCTA's preemption clause (49 U.S.C. §10501(b)) appears very broad, preempting remedies provided under Federal or State law with respect to regulation of rail transportation, nevertheless it is limited to regulations that would arguably conflict with the STB's plenary jurisdiction over the subjects included in subsections (1) and (2) of that clause. In *Assn. of Am. Railroads, supra*, the Ninth Circuit Court of Appeal held that such preemption only applies when the challenged law or regulation imposes an unreasonable burden on interstate commerce. (*Id.* at 1097, 1098.) This narrows the question to whether Respondent's decision on approving its own project would unduly burden interstate commerce. As explained below, actions falling under the market participant exception to commerce clause preemption are not preempted.

B. THE MARKET PARTICIPANT EXCEPTION ALLOWS A GOVERNMENTAL AGENCY TO REGULATE ITS OWN BEHAVIOR WITHOUT FEDERAL PREEMPTION.

The market participant exception to preemption under the U.S. Constitution's Commerce Clause was formulated in recognition that government agencies do not always act in a regulatory capacity. "The basic

distinction drawn in *Alexandria Scrap* [*Hughes v. Alexandria Scrap* (1976) 426 U.S. 794, 810] between States as market participants and State as market regulators makes good sense and sound law." (*Reeves v. Stake* (1980) 447 U.S. 429, 436.) The cases since that time have generally recognized that when a state is acting as a participant in the market, rather than as a regulator, federal preemption of state action generally does not apply.

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

> When the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them. (*Id*. at 233 [quoting from dissent in Court of Appeal's decision].)

Likewise, in *Tocher v. City of Sana Ana* (9th Cir. 1999) 219 F.3d 1040, the Ninth Circuit Court of Appeal held that a city's use of a rotational list to determine which company to employ to tow illegally parked and abandoned vehicles was not preempted by the express preemption provision of the Federal Aviation Administration Authorization Act ("FAAAA"), which generally preempts local or state regulations affecting motor vehicle carriers such as trucking companies. The rationale for the law's preemption clause, parallel with that of the ICCTA, which was passed at approximately the same time, was to promote deregulation of the

trucking industry. (*Id.* at 1049.) However, the court held that in this case the City of Santa Ana's "regulation" was not preempted. That was because the city was only establishing rules and regulations for *its own* contracts with tow companies, not those of the public in general.

In *Cardinal Towing & Auto Repair v. City of Bedford, Texas ("Cardinal Towing")* (5th Cir.) 1999 180 F.3d 686, analyzing preemption under the FAAAA, the court applied a two-part test to determine whether state or local governmental actions were preempted by the federal statute's express preemption clause:

> 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? (*Id.* at 693.)

The court concluded that the city, which was contracting with a private towing company for towing services for nonconsensual towing of vehicles, was acting in its own proprietary interest in procuring services, and the narrow scope of the action (contracting with a single private towing company) did not have a primary goal of encouraging a general policy.

Most recently, in *Johnson v. Rancho Santiago Community College Dist*. (9th Cir. 2010) 623 F. 3d 1011, the 9th Circuit applied the *Cardinal Towing* two-part test for federal preemption under two federal statutes, the National Labor Relations Act and the Employment Retirement Income Security Act, the latter of which, like the ICCTA, contains an express preemption clause. In doing so, it analyzed whether the test required satisfying both, or only one prong to qualify for the market participant exception. (*Id*. at 1024.) The court concluded that:

> The Cardinal Towing test thus offers two alternative ways to show that a state action constitutes non-regulatory market participation: (1) a state can affirmatively show that its action is proprietary by showing that the challenged conduct reflects its interest in efficiently procuring goods or services, or (2) it can prove a negative—that the action is not regulatory—by pointing to the narrow scope of the challenged action. We see no reason to require a state to show both that its action is proprietary and that the action is not regulatory. (*Id*.)

C. UNDER BOTH PRONGS OF THE *JOHNSON/CARDINAL TOWING* TEST, RESPONDENT'S APPROVAL OF ITS BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN PROJECT IS NOT SUBJECT TO PREEMPTION BY THE ICCTA.

Applying the two-part *Johnson/Cardinal Towing* test to Respondent's approval of its Bay Area to Central Valley High-Speed Train Project, the result is similar to that found in *Johnson, supra*. Neither the decision nor its accompanying CEQA compliance is preempted by the ICCTA.

On the first prong, Respondent is seeking solely to make efficient market-based decisions on the nature of its own high-speed rail operation before bringing it before the STB for that agency's review and approval. This interest is shown, for example, by Respondent's concern for issues such as ridership and revenue. (*See, e.g.*, 4 SAR 9458 *et seq*., Final Bay Area/California High-Speed Rail Ridership and Revenue Forecasting Study, Statewide Model Validation)

Respondent may argue that its concern for environmental impacts falls outside of the reach of "efficient procurement of goods and services" and falls instead in the prohibited realm of attempting to influence rail transportation policy. However, a proprietary interest in one's own project, whether public or private, need not be limited to purely pecuniary considerations. Especially when the proprietor is a public agency, its legitimate proprietary reach extends to how its enterprise will affect the welfare of its customers/citizens.

Further, both private and public enterprises share an interest in maintaining the goodwill of the public and presenting themselves as corporate "good citizens." Thus, for example, many private corporations,

including such major companies as Chevron, Shell Oil Company, and Pacific Gas & Electric Company, have established programs to promote energy efficiency, alternative fuel development, and sustainability, even though they may not, in the short run, be the most effective generators of corporate profits.[14] Indeed, Google, Inc. has adopted as its corporate motto, "Don't Be Evil." (*See*, Exhibit A to Appellants' Request for Judicial Notice.)

In *Engine Manufacturers Assn. v. South Coast Air Quality Management Dist.* (9th Cir. 2007) 498 F.3d 1031, 1046-1047 the Ninth Circuit held that a state agency's requirement that public agencies' proprietary projects be conducted in an environmentally benign manner fell within the market participant exception to preemption under the Clean Air Act. Similarly here, the State of California's requirement[15] that Respondent comply with the environmental disclosure requirements of CEQA, and, indeed, that Respondent's proprietary project seek to avoid harmful environmental impacts, is within the ambit of "efficient" procurement by a genuine market participant.

As to the second prong, Respondent's action here merely approved its own project, which would then eventually be submitted for consideration by the STB. Respondent's application of CEQA compliance to that project was mandated both by California statute and by the Proposition 1A bond measure that would eventually provide funding for the project.[16] However, neither Respondent's approval of the project nor its CEQA analysis was primarily intended to encourage a general policy; not even as environmentally benign a policy as making the railroad project

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[14] *See, e.g.*, Park & Koehler, *The Responsible Enterprise: Where citizenship and commerce meet* in Business Trends 2013 (Canning & Kosmowski, edit., Deloit University Press, 2013) pp. 38-45, Exhibit B to Appellants' Request for Judicial Notice..

[15] This requirement is set forth not only in the CEQA statute itself, but in the bond act (Proposition 1A) that provides partial funding for the Project. That act requires that Respondent certify to the legislature and the Department of Finance, prior to even requesting funding for project construction activities, that all project level environmental clearances necessary to proceed to construction had already been obtained.

[16] See, Streets & Highways Code §2704.08(c)(2)(K).

"environmentally friendly." As explained above in section I, the CEQA review of the policy merely provided Respondent with information on the project's environmental consequences that the State (and its voters) felt was important for Respondent to have in hand before making its internal decision on moving the project forward.

Respondent's actual decision of whether to move the project forward was, like the Air Quality Management District's decision on applying an air quality regulation to the state's own fleet of vehicles in *Engine Manufacturers Assn.*, restricted to its own proprietary interest. Indeed, it was considerably narrower than the Air District's decision. That decision applied to all of the state's vehicles. Respondent's decision applied only to its own proposed rail line.

Thus just based on the narrow nature of Respondent's decision, which affected nothing but the agency itself, it is not subject to preemption. Comparison of the decision here with, for example, the air district's decision in *Assn. of Am. Railroads*, *supra*, only fortifies this conclusion. In that case, the adoption of the regulation was intended to affect not the air board, but private commercial railroad lines using the rail yard in question. (*Id*. at 1096.) The air board's action was intended to influence and regulate not itself, but external entities involved in rail transport, thereby directly impinging on the STB's plenary jurisdiction over those matters. (*Id.* at 1098.) Here, Respondent's CEQA-guided decision on moving its own project forward no more impinged on STB's jurisdiction than would, for example, Union Pacific Railroad's internal decision about whether to move forward to the STB its own proposal to establish a new freight line.

Having satisfied both prongs of the *Johnson/Cardinal Towing* test, Respondent's decision-making on its Bay Area to Central Valley High-Speed Train Project, and for that matter on its overall high-speed rail program, as well as the CEQA environmental review associated with those decisions, falls well within the market participant exception to federal preemption. Therefore, neither Respondent's decision to approve its own project, nor the associated CEQA review, is subject to preemption under the ICCTA.

D. THE ICCTA'S PREEMPTION CLAUSE DOES NOT EXPRESSLY OR IMPLIEDLY PREEMPT THE ACTIONS OF A STATE PURSUING ITS OWN PROPRIETARY INTERESTS.

Respondent might finally, in desperation, grasp at the argument that the ICCTA's preemption clause was broad enough to preclude application of the market participant exception. This argument was considered and rejected, as applied to the Clean Air Act, in *Engine Manufacturers. Assn.*, *supra*, 498 F.3d at 1044. Similar considerations call for its rejection here as well.

As with the Clean Air Act, nothing within the ICCTA indicates that Congress intended to prevent a state, acting in its proprietary role as the owner of a rail line, from making decisions about how to conduct that rail business. It would be highly anomalous, indeed a violation of the Tenth Amendment, for the federal government to assert it could, through the STB, dictate to a sovereign state about submitting that state's own proposal to the STB, especially when Respondent's proposed rail line would operate solely within the State of California.

III. RESPONDENT'S ARGUMENT THAT NEPA, RATHER THAN CEQA, SHOULD GOVERN ITS PROJECT'S ENVIRONMENTAL REVIEW WAS A CHOICE OF LAWS DEFENSE THAT WAS WAIVED BY NOT BEING RAISED IN THE TRIAL COURT.

As explained above, Respondent's review of its own project under CEQA was not preempted as a matter of jurisdiction by the ICCTA. Consequently, any argument that Respondent should have been allowed to review its project under NEPA only was not jurisdictional. Rather, it was a choice of laws claim. The governing law in such cases, as already provided to the Court, is *Karlsson v. Ford Motor Co*. (2006) 140 Cal.App.4th 1202, 1236. As in that case, a claim first raised on appeal is deemed waived.

CONCLUSION

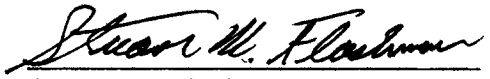
It is perplexing that the Attorney General, the chief legal officer within California's executive branch of government, is seeking to undermine the enforcement of CEQA, one of the most significant

environmental laws enacted by California's legislative branch. Presumably, the Attorney General believes that Respondent's compliance with NEPA is "good enough." Yet the legislative branch, despite pressure from some sectors, has resolutely rejected attempts to emasculate CEQA, such as eliminating CEQA compliance for projects (like this one) evaluated under NEPA.

Regardless of the motive, Respondent's, and the Attorney General's, assertion of preemption is misplaced. CEQA is not a regulatory statute like those that have triggered preemption. Rather it is a disclosure statute that aids in informed decision-making. Further, the legislative and voter mandates that Respondent comply with CEQA in evaluating its decisions on its own high-speed rail system fall squarely within the Market Participant Exception to federal preemption. For all these reasons, Respondent's assertion that application of CEQA to the high-speed rail project is preempted by the ICCTA should be rejected.

Dated: September 16, 2013

Respectfully submitted,

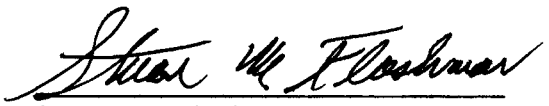


Stuart M. Flashman
Attorney for Appellants

CERTIFICATION

I, Stuart M. Flashman, as the attorney for the appellants herein, hereby certify that the above brief, exclusive of caption, tables, exhibits, and this certification, contains 4,919 words, as determined by the word-counting function of my word processor, Microsoft Word for Windows 2002.

Dated: September 16, 2013



Stuart M. Flashman

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On September 17, 2013, I served the within APPELLANTS' SUPPLEMENTAL BRIEF ON FEDERAL PREEMPTION on the parties listed below by placing true copies thereof enclosed in sealed envelopes with first class postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

Danae Aitchison, Deputy Attorney General *
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Hon. Michael Kenny, Dept. 31
c/o Clerk of Court, Sacramento County Superior Court
Gordon D. Schaber Courthouse
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Sacramento, CA 95814-1398

In addition, on the above-same day, I served a copy of the above-same document, converted to "pdf" format, on the California Supreme Court through the Court of Appeal's website electronic filing address.

In addition, on the above-same day, I also served the within APPELLANTS' JOINT MOTION FOR JUDICIAL NOTICE and COVER LETTER on the party indicated above by an asterisk by placing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland California. In addition, on the above-same day, I served electronic copies of all the above-same documents, converted to "pdf" format, as an e-mail attachment, to the party shown by an asterisk at the e-mail address shown above.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on September 17, 2013.

Stuart M. Flashman