September 16, 2013

The Honorable Vance W. Raye, Presiding Justice
Honorable Associate Justices
THIRD DISTRICT COURT OF APPEAL
Stanley Mosk Library and Courts Building
914 Capitol Mall
Sacramento, CA 95814

Re: Town of Atherton, et al. v. California High-Speed Rail Authority
Third Appellate District Case No. C070877
Sacramento County Superior Court Case Nos. 34-2008-80000022CUWMGDS and 34-2010-80000079CUWMGDS
AMICUS APPLICATION—Citizens for California High Speed Rail Accountability

Dear Presiding Justice Raye:

On behalf of our client, Citizens for California High-Speed Rail Accountability ("CCHSRA"), we respectfully submit CCHSRA's application for leave to file a supplemental letter brief as amicus curiae, the Declarations of Aaron Fukuda and Raymond L. Carlson in support of the application, and the attached proposed supplemental letter brief of CCHSRA as amicus curiae.

On July 8, 2013, the Court vacated the oral argument date of July 22, 2013, and ordered supplemental briefing as follows:

> The date previously set for oral argument is vacated pending further order of the court. The court orders supplemental briefing on the effect on this case of the June 13, 2013 decision by the Surface Transportation Board asserting jurisdiction over the HST system under 49 U.S.C. § 10501(a)(2)(A). The parties should address the points raised in the Attorney General's letter of June 26, 2013, and the Town of Atherton's letter of June 28, 2013. Specifically, the parties should address both of the following questions, regardless of their answer to the first question:
>
> 1. Does federal law preempt state environmental law with respect to California's high-speed rail system? (See *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025; *Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094.)
>
> ANSWER: The California Environmental Quality Act (Public Resources Code §§ 21000 et. seq. is not pre-empted by the Interstate Commerce Commission Termination Act.
>
> 2. Assuming that federal law does, in fact, preempt state law in this area, is the preemption in the nature of an affirmative defense that is waived if not raised in the

trial court or is the preemption jurisdictional in nature? (*See International Longshoremen's Ass'n, AFL-CIO v. Davis* (1986) 476 U.S. 380, 390-391 [90 L.Ed.2d 389]; *Elam v. Kansas City Southern Ry. Co.* (5th Cir. 2011) 635 F.3d 796, 810; *Girard v. Youngstown Belt Ry. Co.* (Ohio 2012) 979 N.E.2d 1273, 1280.)

ANSWER: Yes. Preemption is an affirmative defense and is waived if not asserted. Respondent failed to assert the defense below, and is now barred from so doing.

CCHSRA also disagrees with Respondent's claim that the STB's June 13, 2013 decision "is new legal authority relative to the STB's jurisdiction." The STB does not confer jurisdiction on itself.

Very truly yours,

GRISWOLD, LaSALLE, COBB,
DOWD & GIN, L.L.P.

By: _____
RAYMOND L. CARLSON

Enclosures
cc: Aaron Fukuda (w/encl.)
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INTRODUCTION
CEQA AFFORDS DUE PROCESS AND IS NOT PREEMPTED

As stated in its amicus application, Citizens for California High Speed Rail Accountability ("CCHSRA") is also challenging environmental aspects of the Authority's rail project. If the Court decides that CEQA[1] or a CEQA remedy is preempted by the ICCTA,[2] then amicus and its members will be deprived of an important opportunity to have their concerns heard under CEQA.

CEQA is a procedural or process orientated statute rather than an action orientated statute, which accords members of the public the opportunity (1) to be informed about the possible environmental consequences of state or local agency action; and (2) to comment on those impacts. Insofar as CEQA accords members of the public notice and an opportunity to be heard about the significant environmental impacts of publicly sponsored projects, the law has a due process component to it.

CCHSRA has an interest in the Court's ruling in the instant matter because the organization is currently challenging the Authority's failure to consider certain environmental impacts of the Fresno to Bakersfield

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[1]The California Environmental Quality Act, Public Resources Code §§ 21000 et seq.

[2]The Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, codified variously in 49 U.S.C. § 701 et seq., § 10101 et seq.

segment of the HSR system, which will have a negative impact on CCHSRA's members. If CEQA is preempted by the ICCTA now that the STB has "assumed jurisdiction" over the proposed HSR system, then CCHSRA's members will be foreclosed from exercising the important procedural rights safeguarded by CEQA.

As shown below, the ICCTA does not preempt CEQA under the present circumstances for several reasons. First, CEQA is not an environmental preclearance requirement that could prevent the HSR system from being constructed in the first place, and therefore does not pose an unreasonable burden on interstate commerce. Indeed, the fact that the People of the State of California have voluntarily imposed the requirements of CEQA upon themselves is an implied concession that the requirements of the law will not unreasonably burden interstate commerce. Second, even if CEQA is preempted by the ICCTA, the market participant exception to preemption applies here, and in any event, preemption is an affirmative defense that is waived if not raised in the pleadings. Here, the Authority failed to raise preemption as an affirmative defense, and instead has raised preemption for the first time on appeal. The doctrine of theory of trial also bars raising the issue for the first time on appeal.

PART ONE
THE DOCTRINE OF THEORY OF TRIAL PRECLUDES CONSIDERATION OF PREEMPTION

Where a case is tried on the assumption that a cause of action is stated, that certain issues are raised by the pleadings, that a particular issue is controlling, or that other steps affecting the course of the trial are correct, neither party can change this theory for purposes of review on appeal. 9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 407. "New theories may not be presented to the appellate court after trial. This is grounded on principles of waiver and estoppel, and is a matter of judicial economy and fairness to opposing parties. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 316, pp. 327-329; 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 366, pp. 419-420.)" Smith v. Commonwealth Land Title Ins. Co. (1986) 177 Cal. App. 3d 625, 629-630.

The doctrine of Theory of Trial also applies where the parties have assumed the applicability of a particular statute or ordinance. 9 Witkin, Cal. Proc. (5th ed. 2008) Appeal § 412. For example, in Sommer v. Martin (1921) 55 Cal. App. 603, the parties introduced a local traffic ordinance of the City of Los Angeles and stipulated that the whole ordinance should be deemed in evidence and that either party might read such sections thereof as they desired. The trial court gave two instructions based on the provisions of the ordinance. At no time was

the attention of the lower court called to the question as to whether the state statute or the ordinance of Los Angeles was controlling.

After the case was tried in the lower court, the Supreme Court decided the case entitled Ex Parte Daniels, and the appellants sought to apply to their case the doctrine announced in the Daniels case. The Appellate Court held that they could not apply the holding in Daniels since it relied upon a state statute when at the trial court the Appellants never raised the issue of state statute v. local ordinance. Since the "defendants did not raise the question in the lower court, they are not therefore entitled to raise the question in this court . . . It is a familiar rule that a party is restricted on appeal to the theory adopted at the trial and 'When a theory is thus adopted, and acted upon below, with the concurrence of both parties, a judgment ought not be reversed because the court instructs the jury in accordance with it.'" Sommer v. Martin supra, 55 Cal. App. 610 quoting Carver v. Carver (1884) 97 Ind. 497, 516.

There are, however, two exceptions to the general rule: (1) where after trial there is a change in judicially declared law which validates a theory that would under the case law as it existed at the time of trial necessarily have been rejected if presented to the trial court (Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57; Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256); and (2) where

the theory presented for the first time on appeal involves only a question of law determinable from a factual situation present in the record which was not actually or potentially open to question in the trial court (Panopulos v. Maderis, 47 Cal.2d 337, 340). An appellant may be permitted to change his or her theory when a question of law alone is presented on the facts appearing in the record. 9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 415. This exception does not apply where the facts are not uncontroverted. Id.

The first exception does not apply. There has been no "change in judicially declared law which validates a theory that would under the case law as it existed at the time of trial necessarily have been rejected if presented to the trial court." The Authority relies exclusively on the Surface Transportation Board's ("STB") June 13, 2013 Decision in STB Docket No. FD 35724. The STB's Decision is not "judicially declared law."

The second exception does not apply. The preemption issue is not a question of law alone, nor is it a question of law determinable from facts in the record that are not disputed.[3] The preemption issue does not arise until the STB "assumes jurisdiction." To do so, the STB makes its own determination of whether the intrastate rail transport is carried out

[3]Here there simply is no record in this appeal or in the trial court of the preemption issue as a legal or a factual matter.

"as part of the interstate rail network." The determination of whether intrastate passenger rail service is part of the interstate rail network is a "fact-specific determination." STB June 13, 2013 Decision at 11-12 (citations omitted).

Here the STB engaged in a pseudo-fact finding inquiry regarding the interconnection of the Authority's proposed rail road with the interstate railroad system. The STB relied almost solely on the Merced to Fresno EIR/EIS for its facts. STB June 13, 2013 Decision at 13-14 nn. 64-74. The STB assumed a continuous line from Merced to Fresno connecting to Amtrak stations. However, the Chowchilla "wye" section of the line has been removed from the Merced-Fresno EIR/EIS and will be the subject of further CEQA review under the settlement between the City of Chowchilla and the Authority in the CEQA case filed by the City against the Authority.[4] Thus there will be no connectedness to the Merced terminus or Amtrak station with the "wye" section removed from the Merced-Fresno EIR/EIS. This was either unknown to the STB or ignored by it.

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[4] City of Chowchilla v. California High-Speed Rail Authority, et al., Sacramento County Superior Court Case no. 34-2012080001166. See Carlson Dec. Ex. A for the Settlement Agreement; in ¶¶ 4-5 the parties agree that the "wye area" is removed from the Final EIR/EIS approved May 3, 2013. The "wye area" will be the subject of a separate CEQA document.

Also unknown or ignored by the STB is the fact that the existing Amtrak station in Fresno is on the BNSF line, and the Authority's alignment through Fresno and the proposed station adjoin the UPRR right of way which is south of downtown Fresno. Carlson Dec. ¶ 5. There will be no interconnectedness to the Amtrak station in Fresno.

These factual issues, and no doubt there are many others, show the peril of the STB's rushed decision-making in 78 days (shorter even than Napoleon's Hundred Days) from the Authority's STB filings on March 27, 2013, to issuance (without hearing, presentation of evidence or examination of witnesses) of the STB's Decision on June 13, 2013. This short compressed time frame, made on the basis of extra-record clamors that the Authority needed to "begin construction" in the Summer of 2013, forced the STB to rely not on facts produced through normal adjudication, but on the purely speculative statements of the Authority's own documents. The whole tenor on the Authority's side was that the matter needed to be "decided," or the STB's own processes would be overtaken by events, presented with a fait accompli.

PART TWO
PREEMPTION IS AN AFFIRMATIVE DEFENSE AND IS WAIVED IF NOT ASSERTED

The quotation below succinctly explains what case law says on the idea of whether the affirmative defense of preemption can be

waived: it can and is. Although the discussion occurs in the context of ERISA preemption, the theory is the same for any federal preemption.

> Rule 8(c) of the Federal Rules of Civil procedure states that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." Where such affirmative defenses are not pled in the response to a pleading they are typically held to be waived and cannot be introduced into litigation at any later stage. Federal preemption under ERISA has been viewed by many courts to constitute just such an affirmative defense under Rule 8(c).
>
> Those circuits that have explicitly decided the issue of whether or not federal preemption defenses fall under Rule 8(c) have consistently reasoned from the holding of the United States Supreme Court in Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986). See, e.g. Saks v. Franklin Covey Co., 316 F.3d 337, 349-350 (2d Cir. 2003). The Supreme Court in Davis held that preemption issues determining the choice of forum[5] are properly classified as jurisdictional and cannot be waived. See Davis, 476 U.S. at 390-391. However, the Court expressly stated that this rule does not extend to preemption issues that affect the parties' choice of law. Id.; see also Saks, 316 F.3d at 349. Therefore, the Court in Saks found that, "[t]he circuits that have addressed the waiver issue have agreed that the converse of the Davis rule also holds: Where federal preemption affects only the choice of law, the defense may be waived if not timely raised." Id.
>
> At least five circuits have followed this or a similar line of reasoning to determine that preemption defenses affecting choice of law, like ERISA preemption, may be waived if not timely raised. See, e.g., Wolf v. Reliance Standard Life Ins. Co., 71 F.3d 444, 448-449 (1st Cir. 1995); Saks, 316 F.3d at 349-350; Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1497 (9th Cir. 1986) (holding that ERISA preemption of state contract claims is an affirmative defense waived if not timely pled); see also Rehab. Inst. of Pittsburgh v. Equitable Life Assurance Soc'y of United States, 131 F.R.D. 99, 101 (W.D. Pa. 1990), aff'd without opinion,

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[5]The Authority has acceded to the state forum.

> 937 F.2d 598 (3d Cir. 1991) (holding that the defendant should have been put on notice from prior case law that it was required to "plead preemption as an affirmative defense" and affirmed that "ERISA preemption is a waivable affirmative defense"); and Dueringer v. Gen. Am. Life Ins. Co., 842 F.2d 127, 129-30 (5th Cir. 1988) (where an ERISA preemption defense was held to be waived because the defendant did not raise it until appeal). Although considering a different matter of whether a choice of law provision could preclude the assertion of ERISA preemption, this Court referenced with approval the above cited cases, finding "these five circuit opinions correctly held that such procedural waiver of ERISA preemption is permissible." Allstate Ins. Co. v. My Choice Medical Plan for LDM Techs, Inc., 298 F. Supp. 2d 651, 655-56 (E.D. Mich. 2004) (Gadola J.).

Old Line Life Ins. Co. of Am. v. Garcia, 2007 U.S. Dist. LEXIS 85248, 2-4 (E.D. Mich. Nov. 19, 2007).

State law is in accord. The answer to a complaint "shall contain" a statement of any new matter constituting a defense. Code of Civil Procedure § 431.30(b)(2).

> It was said in Bank of Paso Robles v. Blackburn, 2 Cal.App. 146 [83 P. 262], that facts which constitute no part of the plaintiff's cause of action come clearly within the definition of "new matter." And again in Shropshire v. Pickwick Stages, 85 Cal. App. 216 [258 P. 1107], "new matter" was said to be something relied on by a defendant which is not put in issue by plaintiff. Reason and fairness forbid a different rule. A plaintiff comes to court prepared to prove his case and to meet affirmative defenses pleaded in the answer. He could not be expected to meet special defenses which are not pleaded and has a right to be protected against them.

Jetty v. Craco (1954) 123 Cal. App. 2d 876, 880-881.

The rule on preemption waiver is clear. If the preemption argument affects the choice of forum then it is jurisdictional and cannot be waived. Where the preemption affects only the choice of law, then

the defense is waivable. As explained in Gilchrist v. Jim Slemons Imports, Inc. 803 F.2d 1488, 1497 (9th Cir. 1986):

> Slemons did not assert a preemption argument in the district court. As a general rule, we will not consider on appeal an issue that was not raised in the district court absent exceptional circumstances. See Villar v. Crowley Maritime Corp., 782 F.2d 1478, 1483 (9th Cir. 1986). Slemons has provided us with no reasons why it failed to raise this issue before the district court. See Alexopulos v. Riles, 784 F.2d 1408, 1411 (9th Cir. 1986). Slemons contends, however, that its preemption argument is a question of subject matter jurisdiction that may be raised at any time. See Csibi v. Fustos, 670 F.2d 134, 136 n.3 (9th Cir. 1982).
>
> In International Longshoremen's Association v. Davis, 476 U.S. 380, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986), the Supreme Court considered whether a preemption argument based on the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-168, "is in the nature of an affirmative defense that must be asserted in the trial court or be considered forever waived or whether it is in the nature of a challenge to a court's power to adjudicate that may be raised at any time." Id. at 1907. Davis filed a suit against the International Longshoreman's Association (the Association), alleging state law fraud and misrepresentation. The Association defended the suit on the merits in the state court and did not raise a preemption argument until it filed a motion for judgment notwithstanding the verdict. Id. at 1909. On appeal in the Supreme Court of Alabama, the Association argued that preemption was not a waivable affirmative defense and that the state law claims were preempted by the NLRA. The Alabama Supreme Court concluded that the Association had waived the preemption argument by failing to plead it as an affirmative defense. Id.
>
> In determining whether the state procedural ground was an adequate and independent ground for the decision, the Supreme Court concluded that it was necessary to decide "whether Garmon [359 U.S. 236] pre-emption is a waivable affirmative defense such that a state court may adjudicate an otherwise pre-empted claim if the Garmon defense is not timely raised or whether the Garmon pre-emption is a nonwaivable foreclosure of the state court's very jurisdiction to adjudicate." Id. at 1911. The Court concluded that "when a state proceeding or regulation is claimed

> to be pre-empted by the NLRA under Garmon, the issue is a choice-of-forum rather than a choice-of-law question. As such, it is a question whether the State or the Board has jurisdiction over the dispute." Id. at 1912. From the Court's conclusion we identify the following rule: a preemption argument that affects the choice of forum rather than the choice of law is not waivable; thus, it can be raised for the first time on appeal.
>
> Slemons cannot seriously contend that Gilchrist's choice of a federal forum was inappropriate by arguing that the state law claim for breach of an implied covenant of good faith and fair dealing is preempted by the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code §§ 12900-12996, or the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. The district court properly had jurisdiction over the state-law claim, however denominated, in connection with its jurisdiction over the federal Act claims because the state and federal claims arose out of "a common nucleus of operative facts." United Mine Workers v. Gibbs, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966); see Bale v. General Telephone Co., 795 F.2d 775, 778 (9th Cir. 1986). The existence of a state-law bar to recovery does not destroy jurisdiction over a state-law claim. Moreover, the existence of a federal preemption defense does not generally affect jurisdiction. See Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 13-14, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983); Williams v. Caterpillar Tractor Co., 786 F.2d 928, 931-32 (9th Cir. 1986) (Williams). Under the "artful pleading" doctrine, ostensible state-law claims may be recharacterized as federal claims if federal law "provides both a superseding remedy replacing the state law cause of action and preempts that state law cause of action." Williams, 786 F.2d at 932 (emphasis in original) (footnote omitted). Even if the state-law claim in this case could be recharacterized as a federal ERISA claim, such recharacterization would clearly fall within the district court's jurisdiction. See 29 U.S.C. § 1132(a)(1)(B), (e)(1). Slemons's preemption argument therefore implicates only a choice-of-law question that is waived unless it is timely raised. Consequently, we reject Slemons's contention that its preemption argument may be raised for the first time on appeal.

Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1497 (9th Cir. Cal. 1986).

Similarly, amicus urges this Court to reject the Authority's argument that the preemption issue may be raised for the first time in this appeal. The preemption issue raises only a choice of law question and was waived for failure of assertion below.

PART THREE
PRUDENTIAL CONCERNS PRECLUDE PREEMPTION

The Authority has raised the preemption issue literally at the last minute, with all briefing completed and the case set for argument. The Authority requests this Court to opine on an issue that is not asserted in the pleadings, is not pled as a defense in its answer, with no record on the preemption issue either in the trial court and this Court.

The Authority knew of the need to go before the STB at least four years ago if not earlier. In its October 1, 2009 application for a High-Speed Intercity Passenger Rail (HSIPR) grant for its Merced to Fresno section, the Authority stated that "Additionally, CHSRA will address potential jurisdiction of the Surface Transportation Board (STB) over any aspect of the HST project and work to ensure timely completion [of] all prospective regulatory oversight responsibilities consistent with the project delivery schedule."[6] (Emphasis added) Although knowing of its obligations with respect to the STB and the

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[6]See the Authority's "Merced/Fresno HSR Design/Build High-Speed Intercity Passenger Rail (HSIPR) Program Track 2–Corridor Programs: Application Form" dated 10/01/09, at p. 23 (pdf 23); http://www.cahighspeedrail.ca.gov/fed_stimulus.aspx.

ICCTA, the Authority failed to make any filings with the STB until five months ago, when the Authority filed its Petition for Exemption and simultaneous Motion to Dismiss with the Board on March 27, 2013.

The Authority's June 26, 2013 letter ignores the fact that on April 18, 2013 the STB denied the Authority's motion "to dismiss the Petition [for exemption] for lack of jurisdiction (Motion to Dismiss), asserting that the Project does not require Board approval under 49 U.S.C. § 10901 because it will be located entirely within California, will provide only intrastate passenger rail service, and will not be constructed or operated "as part of the interstate rail network" under 49 U.S.C. § 10501(a)(2)(A)." STB Decision dated April 18, 2013 at 1; Carlson Dec. Ex. C.

The STB denied the Authority's motion to dismiss, stating: "The record currently before the Board, along with other publicly available materials, provides sufficient information for the Board to conclude that it has jurisdiction over construction of the California HST system, including the Project." Id. at 2.

The STB's Decision on the merits of the Authority's Petition for the construction exemption is dated June 13, 2013. Two months earlier the STB had decided that it had jurisdiction but the Authority did not timely inform the Court.

The above recitation shows that the Authority is gaming the system. It delays any filing with the STB for 3½ years (from 10/1/09 to 3/27/13), claims it is exempt from STB oversight, files a motion to dismiss its petition for exemption "because [the high-speed rail project] will be located entirely within California, will provide only intrastate passenger rail service, and will not be constructed or operated "as part of the interstate rail network" under 49 U.S.C. § 10501(a)(2)(A)." STB April 18, 2013 Decision at 1. The STB decides it does have jurisdiction, denies the motion on that basis; the Authority waits for another two months to inform the Court of the development.

Preemption under the ICCTA is a complex, difficult, and controversial subject. See, for example: Stucky, Note: Protecting Communities from Unwarranted Environmental Risks: A NEPA Solution for ICCTA Preemption, 91 Minn. L. Rev. 836 (2007) (fueling facility on railroad land overlying sole source drinking water aquifer); Strickland, Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations, 34 Ecology L.Q. 1147 (2007) (waste transfer stations on railroad land). Now the Authority wants this Court to decide a question that could have been presented years ago, had the Authority done what it committed to do in its October 1, 2009 HSIPR grant application.

The Authority argues that now that the STB has "assumed jurisdiction" over the high-speed train project, a "CEQA remedy" is preempted. Deciding this issue implicates numerous open-ended questions. Does preemption of a "CEQA remedy" mean CEQA compliance by the Authority is not preempted, that only the remedy is preempted? Does the Authority remain subject to and required to comply with CEQA? If so, how can compliance be achieved without enforcement through the private right of action? How can the remedy granted by a statute be preempted, but not the remainder of the statute itself or the obligation to obey and comply with the statute? How can the substance and the remedy of a statute be cleaved?

Under all the circumstances, the preemption issue should either not be decided, out of prudential considerations; or if decided that there is "preemption", it should be held to be barred by the doctrine of theory of trial, and/or waived by not being asserted as an affirmative defense in the court below. Alternatively, the matter could be remanded to the trial court on the issue of preemption. This would allow full development of the record on this issue, avoiding a rushed ad hoc decision by this Court made without benefit of a proper record.

PART FOUR
A CEQA REMEDY IS NOT PRE-EMPTED BY THE STB ACTION

I. Introduction.

There is a jurisprudential presumption against preemption--which is a question of congressional intent. Cipollone v. Liggett Group, Inc., (1992) 505 U.S. 504, 516. A reviewing court starts with the presumption that states' historic police powers shall not be superseded by federal law unless that is shown to be the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218, 230; Maryland v. Louisiana (1981) 451 U.S. 725, 746 ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law"); see also Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). The party seeking to overcome the presumption against preemption bears a "considerable burden." De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997). In addition, the scope of preemption, if any, is to be determined while keeping this presumption in mind. Medtronic, supra, 518 U.S. at 485. Thus, the preemption provision at issue is to be read narrowly in light of the presumption against pre-emption. Cipollone, supra, 505 U.S. at 518. "That approach [a narrow reading] is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." Medtronic, supra, 518 U.S. at 485.

The Authority argues that now that the STB has "asserted jurisdiction" over the construction of the Authority's proposed high speed rail system, and has approved the Authority's (or Federal Railroad Administration's) National Environmental Protection Act ("NEPA") review of the Merced to Fresno segment, the requirements of CEQA are preempted with respect to the proposed rail system, and California state courts lack jurisdiction to review the adequacy of the Authority's CEQA analysis.

In support of this argument, the Authority relies upon the provisions of the ICCTA, 49 U.S.C. §§ 10101 et seq., and specifically upon 49 U.S.C. § 10501(b), which states that except as otherwise provided by the ICCTA, the remedies created under the act "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." Relying on City of Auburn v. U.S. Government (9th Cir. 1998) 154 F.3d 1025 (Auburn[7]),

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[7]The facts in Auburn distinguish it. The line in Auburn was of long standing. Burlington Northern was reacquiring a 151 mile portion of Stampede Pass between Cle Elum and Pasco previously sold to the Washington Central Railroad. Burlington planned to improve certain existing facilities (such as snowsheds) on railroad right of way land of long standing. In the case at bench, no railroad exists, no contiguous railroad right of way exists, no construction easements exist, no railroad construction is in progress. The Auburn court did not specifically identify what "preclearance" or "permit" requirements were at issue, or how they would unreasonably interfere with the interstate railroad network. At issue here is CEQA which is an information gathering and disclosure process, not a permitting process. The permits the Authority will require, e.g. to bridge the San

the Authority argues that, with respect to rail carriers, all state and local environmental preclearance and permitting requirements are preempted by the ICCTA because such requirements have the potential to delay or prevent construction activities authorized by the STB.

The Authority's argument ignores a long line of judicial and administrative precedents which hold that the ICCTA does not categorically preempt every state or local law affecting railroad construction activities. These authorities make clear that the ICCTA preempts only those laws that pose unreasonable burdens to interstate commerce, and that discriminate against railroad operations.

In the present circumstances, CEQA does not pose an unreasonable burden to interstate commerce or discriminate against railroad operations because it is not an environmental preclearance requirement that can be used to deny a railroad company the ability to proceed with activities that the STB has authorized. Rather, like NEPA, CEQA imposes procedural requirements on state and local decision makers to inform those decision makers and the public of the potential significant impacts that the proposed state action may have on the environment. Furthermore, the People of the State of California, acting

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Joaquin River (currently undergoing fishery restoration pursuant to the San Joaquin River Restoration Settlement Act, subtitle A of Title X of the Omnibus Public Land Management Act of 2009, Pub. L. 111-11) and other rivers and streams, emanate from other federal, state and local authorities and agencies, not from CEQA itself.

both at the ballot box and through the Legislature, have voluntarily imposed the requirements of CEQA on the proposed railroad project. This voluntary commitment by the people and state to engage in an environmental review process is an implied admission that the requirements of CEQA will not pose an unreasonable burden here on interstate commerce. Accordingly, the Authority's preemption argument lacks merit.

II. The ICCTA Does Not Preempt Every State or Local Law Affecting Railroad Construction and Operations.

A. The ICCTA Preempts Only State and Local Laws that Pose Unreasonable Burdens to Interstate Commerce, and that Discriminate Against Railroad Operations.

The ICCTA includes various preemption provisions. See, e.g., City of Auburn, supra, 154 F.3d at 1030 [relying in part on provisions of the ICCTA stating explicitly that the STB has exclusive jurisdiction over mergers and acquisitions of railroad companies]. Some provisions of the ICCTA completely preempt state or local laws relating to railroad operations and construction, while others do not. See Fayard v. N.E. Vehic. Servs. LLC (1st Cir. 2008) 533 F.3d 42, 48 (Fayard).)[8]

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[8]The question in Fayard was whether the ICCTA completely preempted a state law nuisance claim so as to confer on federal courts subject matter jurisdiction over the claim. As explained by the court, where a federal law completely preempts a state law cause of action, and federal law establishes an analogous cause of action, a federal court may assume jurisdiction over the state law cause of action notwithstanding the fact that preemption is an affirmative defense, and a defense arising under federal law to a state law claim ordinarily

Here, the Authority relies upon 49 U.S.C. § 10501(b) as the basis for its claim that the ICCTA preempts the requirements of CEQA now that the STB has "assumed jurisdiction" over the Authority's rail project. As indicated above, this statute states that except as otherwise provided by the ICCTA, the remedies under the act "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." Section 10501 is widely interpreted by state and federal courts, and by the STB, as expressing a Congressional intent that the ICCTA should preempt state and local laws that interfere with the STB's authority over railway operations and construction. However, unlike more specific provisions of the ICCTA, section 10501 does not completely preempt all state and local laws affecting railways. See Fayard, supra, 533 F.3d at 48.

Section 10501 "preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws of general application having a more remote or incidental effect on rail transportation." People

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does not create federal question subject matter jurisdiction over the state law claim. (Fayard, supra, 533 F.3d at 44-45.) Applying this "complete preemption doctrine," the court held that the ICCTA does not completely preempt state law nuisance claims against railroad companies, even though the ICCTA might, for example, completely preempt a claim under state law against a railroad company for charging excessive fares. (Id. at 48.)

v. Burlington No. Santa Fe R.R. (2012) 209 Cal. App. 4th 1513, 1528 (Burlington Northern) (internal quotation marks omitted.)

Thus, for example, a state may not impose permitting or preclearance requirements on rail carriers if such requirements could be used to deny carriers the ability to proceed with activities that the STB has authorized. Ibid. Generally, however, the determination of whether a state law affecting railroad construction or operations is preempted by section 10501 requires a fact specific assessment of whether the law poses an unreasonable burden on interstate commerce. See ibid.; see also Jones v. Union Pac. R.R. Co. (2000) 79 Cal. App. 4th 1053, 1060-1061. Opinions of the STB are in accord with this analysis. See, e.g., Jt. Pet. for Decl. Order – Boston & Maine Corp. and Town of Ayer, MA (STB 2001) 2001 WL 458685, at pp. *5-6 (Boston & Maine).

New York Susquehanna & Western Railway Corporation v. Jackson (3d Cir. 2007) 500 F.3d 238 (N.Y. Susquehanna) is instructive in illustrating the limits to section 10501's preemptive effect. That case involved the question of whether the State of New Jersey could impose regulations on facilities used to transfer solid wastes between railroad cars and trucks. Id. at 242. The district court ruled that regulations imposed by the state on such "transloading" facilities were per se preempted by the ICCTA. Ibid. The Third Circuit agreed with the district court that the transloading of solid waste involved transportation

activities undertaken by a rail carrier, and therefore fell within the purview of the STB under the ICCTA. Id. at 246-251. That did not mean, however, that any regulation by New Jersey of transloading activities fell within the express preemption provision of section 10501. Id. at 252. According to the court, state health and safety regulations are not preempted by section 10501 if those regulations do not pose an unreasonable burden on railroading, and are not applied in a manner that discriminates against railroad companies. Id. at 252-253.

Thus, for example, state law may require that during the construction of a railway line, excavated land may not be dumped into local waterways, and the railroad company may be required to bear the cost of disposing of construction wastes. Ibid. Likewise, permanent structures constructed in a state as part of a railroad line, such as a transloading facility, may be subject to state and local building, plumbing, and electrical codes. N.Y. Susquehanna, supra, 500 F.3d at 253. In the case of New Jersey's transloading facility regulations, the district court erred in ruling that all of New Jersey's regulations were per se preempted by the ICCTA. Id. at 257. Rather, because some of the regulations imposed by the state potentially fell within the categories of regulations deemed reasonable by the circuit court, the district court was required to make a regulation-by-regulation determination of

whether each particular regulation imposed by the state was preempted.[9] Ibid.

Similarly, it would be a mistake to declare categorically that all state and local environmental preclearance requirements are preempted by the ICCTA. Instead, as explained below, a court must make a fact specific inquiry into the nature of a given requirement and its impact on interstate commerce.

B. The ICCTA Does Not Preempt a State or Local Preclearance Requirement that Could Not, by Its Nature, Be Used to Deny a Railroad Company the Ability to Proceed with Activities that the STB Has Authorized.

The Authority argues that state and local environmental preclearance and permit requirements are always preempted by ICCTA. This is not the law. Although ordinarily state and local zoning laws, land use regulations, and permitting requirements are preempted by ICCTA, that is not always true. See N.Y. Susquehanna, supra, 500 F.3d at 253-254.

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[9]The STB is in accord with the Third Circuit's analysis. In Boston & Maine, the STB decided that certain state and local environmental permit requirements imposed on a rail carrier were preempted by the ICCTA. However, the STB made clear that specific permit conditions imposed on the carrier would not impose unreasonable burdens on interstate commerce, including the requirements that the carrier: (1) use best management practices during the construction of the railway, (2) "implement appropriate precautionary measures at the railroad facility," and (3) engage in environmental monitoring and testing. (Boston & Maine, supra, 2001 WL 458685, at p. *7.)

The question of preemption depends upon whether a particular regulation poses an unreasonable burden on interstate commerce. See Green Mnt. R.R. Corp. v. Vermont (2d Cir. 2005) 404 F. 3d 638, 642-643 (Green Mountain).[10] Thus, ICCTA preempts only those permit and preclearance requirements that, by their nature, could be used to deny a rail carrier the ability to conduct some part of its operations or to proceed with activities which the STB has authorized. Burlington Northern, supra, 209 Cal. App. 4th at 1528. For reasons explained below, CEQA is not such a regulation. Moreover, the State of California's voluntary imposition on itself of the requirements of CEQA is an implied admission and determination that those requirements do not pose an unreasonable burden on interstate commerce.

III. CEQA Is Not a Preclearance Requirement that Could, by Its Nature, Be Used to Deny the Authority the Ability to Proceed with Activities that the STB Has Authorized.

CEQA is not an environmental preclearance requirement that can be used to deny a rail carrier the ability to proceed with activities that

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[10]The court in Green Mountain decided that a state or local permit requirement imposes an unreasonable burden on interstate commerce if the permit is discretionary. (See Green Mountain, supra, 404 F.3d at pp. 642-643.) In N.Y. Susquehanna, the Third Circuit indicated that the permit requirements should be reasonably specific, but otherwise disagreed with the standard set forth by the Second Circuit in Green Mountain, noting that to some extent, all permit requirements confer some level of discretion on the agency administering the requirement. (N.Y. Susquehanna, supra, 500 F.3d at p. 254.)

the STB has authorized. Rather, like NEPA, which the Authority essentially concedes applies to the its project, CEQA merely imposes procedural requirements on state and local decision makers to inform those decision makers and the public of the potential significant impacts that a proposed project may have on the environment. As explained by the authors of a leading CEQA treatise:

> Unlike most environmental laws, CEQA does not require project implementation through substantial regulatory standards or prohibitions. Instead of prohibiting agencies from approving projects with adverse environmental effects, CEQA requires only that agencies inform themselves about the environmental effects of their proposed activities, carefully consider all relevant information before they act, give the public an opportunity to comment on the environmental issues, and avoid or reduce significant environmental impacts when it is feasible to do so.

Kostka and Zischke, Practice Under the California Environmental Quality Act (2d ed. 2013) Cal. CEB, § 1.1, p. 2. To be sure, unlike NEPA, CEQA requires mitigation when feasible to limit significant impacts of a project on the environment, but any "assertion of a fundamental difference between NEPA as a procedural statute and CEQA as a substantive or action requiring statute can be overstated." Id. at § 22.5, pp. 1111-1112. As noted by the authors of the same treatise:

> The primary purpose of both statutes is to require that information be provided to decision makers and the public before environmental decisions are made. CEQA is substantive in the sense that project alternatives or mitigation measures must be adopted if they are feasible and would reduce a project's significant impacts. The definition of "feasibility" in this context

> is broad enough, however, to give policy makers substantial (but not unlimited) discretion in determining whether alternatives or mitigation measures are feasible. [Citations.] [¶] Moreover, CEQA's goals include the balancing of concerns (e.g., housing) against the need for environmental protection. [Citations.] In the authors' view, both statutes operate primarily as environmental full disclosure laws and do not reach the merits of agency decisions to approve or reject particular projects or agency actions.

Ibid.

Importantly, CEQA applies only to state or local activities; it is not a permitting or preclearance statute in the traditional sense. See Friends of Mammoth v. Bd. of Sup's. (1972) 8 Cal. 3d 247, 262 (CEQA applies to any non-exempt project constructed, acquired, developed, permitted, or funded by public authorities). CEQA analysis is required of a private project only if a permit is required before that project may proceed, or if the project will be funded by the public. Ibid. Thus, whenever a state or local agency in California lacks authority, because of preemption under the ICCTA, to impose a permit requirement on a private rail carrier, there will be no basis upon which to subject the carrier to the requirements of CEQA.[11]

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[11]Presumably, a public agency could still require CEQA analysis as a condition for funding a private railroad project. There does not appear to be any authority for the proposition that ICCTA preempts the sovereign right of the People of California to undertake an environmental analysis of private railroading activities before voluntarily committing public funds to those activities.

It is, however, only the permit requirement, and not CEQA, that would be preempted under these circumstances because only the requirement to obtain the permit has the potential to block or delay the project. The CEQA process itself would not serve to block or delay the project, but would instead serve merely to guide the appropriate agency's decision of whether and under what conditions the permit should be granted.

Here, the proposed rail project is subject to CEQA review not because it is a private project subject to the state or a local government's permitting authority, but because the project is an activity being carried out directly by a state agency. In this context, the purpose of CEQA clearance is not to determine whether the Authority may proceed with construction. Rather, as applied here, CEQA is simply a procedure under state law to aid the Authority in implementing its obligation under state law to study and minimize environmental impacts to the extent feasible. See Streets & Highways Code § 2704.09, subdivisions (i), (j) [requiring that the proposed rail system be constructed in a manner that minimizes environmental impacts]; but see Pub. Res. Code, § 21004 [stating that a measure is necessarily infeasible if it is beyond the lead agency's power to require that measure, such that the Authority cannot be made to impose mitigation measures on itself that are forbidden by the STB because such measures could substantially interfere with

interstate commerce]; but see also N.Y. Susquehanna, supra, 500 F.3d at 252-253 [listing examples of mitigation measures that would not pose unreasonable burdens on interstate commerce, such as requirements concerning the dumping of excavated earth during construction]; Boston & Maine, supra, 2001 WL 458685, at p. *7 [listing similar examples, including the requirement that best management practices be employed during construction]. Through this process, the Authority may discover that certain environmental impacts of the proposed project cannot be mitigated below the level of significance, but such a discovery would not prevent the Authority from proceeding with construction. See 14 Cal. Code Regs. § 15093 [stating that the lead agency must balance unavoidable significant impacts against the economic, legal, technical, and social benefits of the proposed project, and may adopt a statement of overriding consideration, supported by substantial evidence, explaining why the project should proceed despite the inability to mitigate all environmental impacts below the level of significance]. Theoretically, the Authority could decide, based upon its CEQA analysis, not to proceed with construction of the rail project, but this is not a decision that CEQA mandates that the Authority make. Ibid.

As noted by the Authority, the STB has found in one specific context that CEQA was preempted by ICCTA. See generally Desert XPress Enterprises, LLC – Pet. for Decl. Order (STB 2007) 2007 WL

1833521 (Desert XPress).[12] In Desert XPress, a private company sought, prior to construction of any railway line, and prior to the development any actual controversy over a specific permit requirement, a declaration from the STB that the construction of the company's proposed line would be exempt from any state or local permitting requirements, including CEQA (which is not in itself a permitting statute). Desert XPress, at p. *1. The STB ruled in favor of the company without considering or discussing (1) the nature of CEQA as an internal process of public agencies in California as opposed to a permitting requirement that could be used to block a project, or (2) the fact that CEQA would not apply in the absence of any authority on the part of a state or local agency to grant or deny a permit for part of the company's operations. Desert XPress, supra, 2007 WL 1833521, at p. * 3.

In the absence of such analysis, Desert XPress is not authority for the proposition that once the STB asserts jurisdiction over a railway line to be constructed, owned, and operated by the State of California, the state thereafter loses any power it may have otherwise possessed to

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[12]The Authority also cites Northern San Diego County Transit Development Authority – Pet. for Decl. Order (STB 2002) 2002 WL 1924265 for the proposition that CEQA is preempted by the ICCTA in the context of railway construction. However, the main issue presented was whether a rapid transit district could be required to obtain a coastal permit before constructing railway facilities; CEQA was not specifically discussed in the STB's opinion. Id. at *2.

undertake its own self-conducted environmental review process regarding its own rail project.

IV. The State of California's Voluntary Commitment to Undertake an Environmental Review Process Is a Concession that the Process Does Not Pose an Unreasonable Burden on Interstate Commerce.

The State of California has voluntarily committed itself to undertake an extensive environmental review process of the proposed rail project before committing funds for the construction of that system. In the absence of a specific statutory or categorical exception, CEQA applies to all discretionary projects proposed to be carried out by a public agency in California. See Pub. Res. Code, §§ 21080, 21084; 14 Cal. Code Regs. §§ 15300 et seq. Nothing in California law excludes projects proposed to be carried out by the Authority from compliance with CEQA.

Furthermore, Prop. 1A[13] requires the Authority to comply with CEQA. See, e.g., Streets & Highways Code §§ 2704.04(a), (b)(4); 2704.04(c) [duty to mitigate – a hallmark of CEQA]; 2704.06; 2704.08(b), (c)(2)(K) [requiring the Authority to certify completion of all project level environmental clearances necessary to proceed with construction before applying to the Legislature for an appropriation of

[13]Approved by voters at the November 4, 2008 General Election as Proposition 1A, the "Safe, Reliable, High-Speed Passenger Train Bond Act for the 21st Century."

bond funds], (g)(1)(C) [duty to mitigate], (g)(2) [duty to mitigate]; 2704.09(g) [duty to follow existing transportation corridors], 2704.09(i) [duty to minimize urban sprawl and impacts to the environment]; 2704.09(j). Thus, voters understood that the project would be subject to CEQA.

Nothing in the ICCTA prevents private rail carriers from utilizing their own internal processes for deciding whether or under what conditions to construct a rail line. If the ICCTA preempts CEQA in the present context, then not only is it difficult to imagine how the state might implement any of the other processes and requirements that it has imposed upon itself in Prop. 1A and other laws governing the Authority, but the state would also be unique amongst rail carriers in California as not being able to impose internal guidelines and review procedures upon itself. This is an absurd result that Congress could not have contemplated in enacting the ICCTA.

Importantly, the STB has held that a rail carrier's voluntary commitments to the public can be enforced against it. See Boston & Maine, supra, 2001 WL 458685, at p. *5, citing Twp. of Woodbridge, NJ, et al. v. Consolidated Rail Corp., Inc. (STB 2000) 2000 WL 1771044, at pp. *3-4 [deciding that a locality could sue to enforce a stipulation and order settling a public nuisance suit against a railway company, even if the underlying preemption claim that was resolved

through the stipulation and order was preempted by the ICCTA]. This is because such commitments reflect the carrier's own determination and admission that such commitments do not unreasonably interfere with interstate commerce. Ibid.

Here, the state has imposed the requirements of CEQA on itself through Prop. 1A approved by the voters. This is an implied admission and determination that the application of CEQA to the construction of the proposed rail system will not impose a unreasonable burden on interstate commerce, and accordingly, the public may enforce CEQA's requirements against the Authority. See Ibid.

One may consider the entire preemption inquiry misplaced. On the express preemption provisions of ICCTA, the Authority leans heavily on Auburn, which perhaps too hastily concluded that preemption flowed from the statutory provision of 49 U.S.C. § 10501(b)(2) because of the NEPA remedies that the STB provides in licensing or exemption cases.

In relevant part, this statutory express preemption provision states:

> 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.

If this language is applied as in Auburn and as the Authority wishes, it would preempt NEPA and a "NEPA remedy." But no one

contends the project is not subject to NEPA, and the STB leans on NEPA to justify its Decision.

Auburn misconstrued the preemption language because the NEPA remedies the STB can grant are NOT "remedies provided under this part with respect to regulation of rail transportation." That portion of the ICCTA is silent on NEPA authority or remedies. The STB's environmental remedies authority flows only from NEPA, 42 U.S.C. §§ 4321-4347, which requires environmental review whenever there is major federal action likely to have a significant effect on the environment. Major federal action includes any project which requires federal approval, such as approval by the STB. Accordingly, the applicable "remedies provided by this part" are those authorizing construction or operation of a rail line--not the environmental remedies provided under NEPA which, of course, does not preempt CEQA.

Another way of looking at the matter is that is that CEQA (and NEPA) is an informational, rather than a regulatory, statute, and the remedies provided under NEPA (or CEQA) are not "remedies with respect to regulation of rail transportation." A remedy for a NEPA or a CEQA violation does not shut down or reject a project; it just requires that the NEPA or CEQA violation be corrected and the decision-making process for the project be repeated with proper NEPA/CEQA compliance.

V. Conclusion.

For the foregoing reasons, the Petitioners' CEQA claims are not preempted by federal law, specifically ICCTA.

Indeed, as remarked immediately above, the Authority's focus on the preemption issue is misplaced. The preemption language in 49 U.S.C. § 10501(b)(2) is limited to "remedies [. . .] with respect to regulation of rail transportation." CEQA is not such a remedy any more than NEPA, which is conceded to apply to the project.

PART V
THE MARKET PARTICIPANT EXCEPTION APPLIES EVEN WERE THERE PREEMPTION

I. Introduction.

The Market Participant Exception arises when a State (or one of its subordinate agencies) participates, in its proprietary capacity, in a market that is subject to federal regulation through statutory preemption (express or implied) or the dormant Commerce Clause.[14] The Market Participant doctrine is designed to mediate and reconcile the competing

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[14]The dormant Commerce Clause forbids States from discriminating against interstate commerce; but such "discrimination" is not forbidden where the Market Participant Exception applies. See Hughes v. Alexandria Scrap, Inc. 426 U.S. 796 (1976) (market participant exception applicable to state preference for buying scrap processed in-state); see also Reeves, Inc.v. Stake, 447 U.S. 429 (1980) (sale of cement from state-owned cement plant); White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204 (1983) (hiring of workers on state-funded project).

constitutional principles of federalism and State sovereignty versus the command of the Supremacy Clause.

In brief, the Market Participant exception to federal preemption, as set forth in Boston Harbor, states that (1) when a State acts entirely in its proprietary, as opposed to its regulatory, capacity, and (2) where analogous private conduct would be permitted, the courts will not infer, in the absence of any express or implied indication, that Congress intended that a State may not manage its own property when it pursues its purely proprietary interests. Building & Constr. Trades Council v. Assoc. Builders & Contractors, 507 U.S. 218 (1992).[15] Although stated in a series of negatives, this formulation has been used by the federal circuit courts in a number of cases over the past 20 years.

II. In 2008 the State of California Had the Right, as a Market Participant, to Require that the High-Speed Railroad It Was "Buying" and Would "Own" Must Comply with CEQA.

The California Legislature and the voters made a conscious choice to apply CEQA to its biggest public works project ever, possibly excepting the still-unfinished State Water Project.

California's voters, by adopting Prop. 1A in 2008, decided to spend $9 billion dollars of their own taxpayer money to invest in, build,

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[15] "In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." 507 U.S. at 231-232.

own, and operate a high-speed rail system that connected its principal cities—a classic proprietary project, indeed perhaps the largest single project in the history of the West. The environmental impact of this megaproject on numerous California cities, towns, rural communities, farms, schools, businesses, etc. would be huge and irreversible.

The State Legislature, prior to the submission of Prop. 1A to the voters, had the option of exempting this project from environmental review under CEQA. Instead, the Legislature chose to include in Prop. 1A a requirement that prior to any funding request, the Authority had to certify that "The authority has completed all necessary project level environmental clearances necessary to proceed to construction." Streets & Highways Code § 2704.08 (c)(2)(K) incorporated in Prop. 1A. There is no doubt that these "environmental clearances" refer to CEQA. By incorporating this provision in Prop. 1A, it became a promise to the voters in the nature of a contract upon adoption by the voters.[16] It is doubtful that the Proposition would have passed if the project had not been subject to environmental review under CEQA.

[16]O'Farrell v. County of Sonoma (1922) 189 Cal. 343; Monette-Shaw v. San Francisco Bd. of Supervisors (2006) 139 Cal.App.4th 1210, 1215.

III. The Market Participant Doctrine Generally Exempts From Federal Preemption a State's Proprietary "Regulation" of its Own Subordinate State Agencies.

This case is simpler than other market-participant cases because it is limited to the State of California voluntarily applying the challenged regulation (CEQA) to itself. In doing so, it focuses entirely on its own state interests, the environmental health and safety of its communities and citizens. Its application of CEQA to its own proprietary railroad project neither affects nor regulates any other market participants. In contrast, virtually all the leading Market Participant cases involve a State scheme that uses a State agency's purchasing power or licensing authority to regulate the conduct of independent third parties—in effect, the imposition of "downstream restraints" on non-state entities.[17] See, e.g., South-Central Timber v. Wunnicke, 467 U.S. 82, 99 (1984) ("In

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[17]See, for example, the following cases:

Boston Harbor, supra, 507 U.S. at 226-227 (state developer of huge construction project required its contractors to enter into Project Labor Agreements);

Wisconsin Dept. of Industry v. Gould, Inc., 475 U.S. 282 (1986) (state law forbid its contracting with employers with certain number of federal labor law violations);

Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) (city refusal to renew taxi licenses of taxi operators who had not settled labor dispute);

Chamber of Commerce v. Brown, 554 U.S. 60 (2008) (state law forbid private employers with state contracts from using any portion of state funds to influence its employees regarding unionization)

sum, the State may not avail itself of the market participant doctrine to immunize its downstream regulation of the timber processing market in which it is not a participant.")[18] That problem requires the courts to differentiate between proprietary and regulatory state conduct, a task not required here because California's environmental compliance provisions required by Proposition 1A apply directly and solely to the Authority, a subordinate state agency.

The fact that CEQA, by its terms, generally applies to both private and governmental projects does not mean that both are preempted by the ICCTA in the absence of a clear indication that Congress intended to restrain a State's regulation of its own subordinate entities. This is entirely different from a State's regulation of a private railroad. None of the preemption cases cited by the Authority involved a State's determination of the conduct of its own subordinate agencies, and are thereby inapposite.

A good place to start is this passage from Boston Harbor:

> A State does not regulate, however, simply by acting within one of these protected areas [that are subject to pre-emption]. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state regulation. 507 U.S. at 227. (emphasis added)

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[18]This was in Part III of the Court's opinion, a plurality opinion in which only four justices joined.

A State is not regulating, within the meaning of the preemption doctrine, when the only conduct it seeks to control are the actions of its own subordinate agencies. This point was made explicitly in the Ninth Circuit's decision in Engine Mfrs. Assn v. South Coast Air Quality Mgt. Dist., 498 F.3d 1031 (9th Cir. 2007). The court ruled that regulations requiring the purchase of certain clean fuels and vehicles (the "Fleet Rules") was not preempted insofar as they applied to various state agencies--in contrast to their application to private fleet operators where preemption might apply.

> This [alleged] conflict between [the Clean Air Act provisions] and the Fleet Rules might support a holding that the Rules are preempted as applied to private fleet operators. However, it does not support a holding that the [Clean Air Act provisions] preempt the Rules as applied to state and local governments acting in their capacity as fleet operators. The [Clean Air Act] requirement that a state's SIP [State Implementation Plan] give fleet operators a choice among fuels and vehicles is entirely consistent with the state's own ability to choose to purchase particular fuels and vehicles in its proprietary capacity as a fleet operator. 498 F.3d at 1044 (emphasis added).

Of particular significance is the Ninth Circuit's reliance in Engine Mfrs. Assoc. on Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh, 295 F.3d 28, 34-35 (D.C. Cir. 2002) which upheld under the market-participant doctrine an Executive Order that prohibited federal agencies and entities receiving federal construction funds from requiring contractors to enter into, or prohibiting them from entering into, project labor agreements:

The D.C. Circuit Court in Allbaugh ruled:

> "Here the Government correctly notes that "the impact of [the] procurement policy [expressed in Executive Order No. 13,302] extends only to work on projects funded by the government." Because the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as "regulatory." 295 F.3d at 36.
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> "'[T]here is simply no logical justification for holding that if an executive order establishes a consistent practice regarding the use of [such labor agreements], it is regulatory even though the only decision governed by the executive order are those that the federal government makes as a market participant.' (internal quotation marks and alteration omitted)" 295 F.3d at 35, quoted with approval in Engine. Mfrs. Assn., 498 F.3d at 1041.

Similarly, in Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 1999) the court determined that the city's rotational tow list, applicable to nonconsensual towing of illegally parked or abandoned vehicles, was not covered by the preemption provisions of the Federal Aviation Administrative Authorization Act (FAAA) that regulated towing operations.

> By its express terms, [the city's rotational tow ordinance] applies only to nonconsensual tows. The provision, therefore governs only the relationship between the City and towing companies selected to the rotational tow list, and was established in order to create a reliable list of towing companies who could render quick and efficient towing services for the City. Under these circumstances, the rotational tow list is the classic example of a municipality acting as a market participant; the City is merely establishing rules and regulations to guide the formation of contracts for towing services provided exclusively to the City. . . .The limited scope of [the rotational tow ordinance], covering only contracts between the City and towing companies, is not a veiled attempt to regulate the motor carrier industry and is,

> therefore, not preempted by [the applicable FAAA provisions.] 219 F.3d at 1049.[19]

Similarly, the U.S. Supreme Court noted in Boston Harbor that there could have been a different outcome in its earlier decision in Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) had the City of Los Angeles purchased taxi services from Golden State in order to transport city employees.

> In that situation, if the strike had produced serious interruptions in the services the city had purchased, the city would not necessarily have been pre-empted from advising Golden State that it would hire another company if the labor dispute were not resolved and services resumed by a specific deadline. 507 U.S. at 227-228.

The same principle was recognized by the Second Circuit in Sprint Spectrum v. Mills, 283 F.3d 404 (2d Cir. 2002). The Court of Appeals applied the market-participant doctrine to uphold restrictions placed by a school district on a telecommunications company that wanted to upgrade a cell-phone tower it had leased on a high school roof with more powerful radio frequency emissions than were acceptable to the school district--which believed the restrictions were necessary to protect the health and safety of the school children. The court rejected the telecommunication company's claim that these restrictions were preempted by the Telecommunications Act. Id. at 410.

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[19]Accord, Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686 (5th Cir. 1999)(same analysis for single towing operator, rather than rotational list).

Thus, the Ninth Circuit, the Second Circuit, the Fifth Circuit and the D.C. Circuit have upheld the basic principle--that a state entity is not engaged in "regulation" within the meaning of the preemption doctrine when managing its own property for its own proprietary purposes.

IV. Other Objections to the Market Participant Exemption Were Rejected by the Ninth Circuit in the Engine Mfrs. Assoc. Decision.

A number of other key issues growing out of Boston Harbor were decided in the Ninth Circuit's Engine Mfrs. Assn. decision:

> The market-participant doctrine is applicable where there is an express preemption provision.

The decision in Engine Mfrs. Assn. makes short work of the argument that the market-participant exception is inapplicable where, as in that case, there is an express preemption provision in the the applicable law. It noted that "Boston Harbor does not support a distinction between express and other forms of preemption." 498 F.3d at 1044. It cited its decision in Tocher v. City of Santa Ana, 219 F.3d 1040, 1050 (9th Cir. 2000), holding that the market participant doctrine protected a city ordinance from express preemption under the FAAA. Ibid. Accord, Assoc. Gen. Contractors v. Metro Water Dist., 159 F.3d 1178, 1182-1185 (9th Cir. 1998) (ERISA express preemption); Cardinal Towing & Auto Repair v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999) (FAAAA express preemption).

The Market-participant doctrine is applicable to a public entity's proprietary decisions to protect its environment.

In response to the argument that a state's environmental concerns were outside the scope of the market-participant doctrine, the Ninth Circuit in Engine Mfrs. Assoc. stated:

> "That a state or local governmental entity may have policy goals that it seeks to further through its participation in the market does not preclude the doctrine's application, so long as the action in question is in the state's own market participation. See, e.g. Alexandria Scrap, 426 U.S. at 809, 96 S.Ct 2488 ("Maryland entered the market for the purpose, agreed by all to be commendable, as well as legitimate, of protecting the state's environment. As a means of furthering this purpose, it elected a payment in the form of bounties to encourage the removal of automobile hulks from Maryland streets and junkyards.")." 498 F.3d at 1046.

The Ninth Circuit also rejected the argument that the challenged Fleet Rules did not constitute "efficient procurement" by state and local governments.

> "Appellants read the word 'efficient' too narrowly. 'Efficient' does not merely mean 'cheap.' In context, '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." 498 F.3d at 1046.

The Ninth Circuit concluded that there is "no basis for concluding that purchasing less-polluting vehicles is not a purpose that a state may pursue as a market participant." Id. at 1047. This ruling was recently confirmed by the Ninth Circuit in Johnson v. Santiago Community College Dist., 623 F. 3d 1011 (9th Cir. 2010) ("Even though the state

entity pursued environmental, as opposed to economic, goals through its participation in the market, the market participant doctrine still applied."); cf. Sprint Spectrum v. Mills, 283 F.3d 404 (2d Cir. 2002) (market participant exemption applicable to school district's limiting high-frequency emissions from cell phone tower on roof of high school because of concern for health and safety of students).

Lack of evidence that Congress intended that preemption apply to state proprietary action.

Under Boston Harbor the courts are not to infer a congressional intent to preempt a state's action as a market participant unless Congress "indicat[es] . . . that a State may not manage its own property when it pursues its purely proprietary interests." 507 U.S. at 231-232, quoted in Engine Mfrs. Assoc., 498 F.3d at 1044. After review of the preemption provisions of the Clean Air Act, the Ninth Circuit concluded that they "do not contain any express or implied indication of congressional intent that they should extend to state proprietary action." Id. at 1044.

The same is true here of the preemption provisions of the ICCTA. There simply is no reference in the statutory text or its legislative history to the market-participant doctrine, or to state management of its own property as a market participant.

V. Recent Ninth Circuit Cases Provide Two Alternatives For Qualifying for the Market Participant Exception.

The Ninth Circuit's most recent discussion of the market-participant exception to federal pre-emption is in Johnson v. Rancho Santiago Community College Dist., 623 F. 3d 1011 (9th Cir. 2010). The most relevant portion of the decision is quoted here:

> In light of [Wisconsin Dept. of Industry v.] Gould, [Inc., 475 U.S. 282 (1986)], to determine whether a state entity's direct participation in the market falls within the market participant exception to preemption, we must determine whether the state action is simply proprietary or "tantamount to regulation." As a guide to making this determination, we have adopted the two-prong test that the Fifth Circuit established in Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir.1999). See Engine Mfrs., 498 F.3d at 1041; Olympic Pipe Line Co. v. City of Seattle, 437 F.3d 872, 881 (9th Cir.2006). The Cardinal Towing test offers 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? Id.
>
> [. . .]
>
> In applying this test, we have not yet conclusively settled whether a state action must satisfy both prongs, or only one, to qualify as market participation exempt from preemption. We held in Lockyer that "a state need not satisfy both questions," but we subsequently vacated that opinion after the Supreme Court reversed it on other grounds. See Chamber of Commerce v. Lockyer, 463 F.3d 1076, 1084 (9th Cir.2006) (en banc), *rev'd on other grounds sub nom.* Chamber of Commerce v. Brown, 554 U.S. 60, 128 S.Ct. 2408, 171 L.Ed.2d 264 (2008) and *vacated by*

> 543 F.3d 1117 (2008). Although we are not bound by our vacated decision in Lockyer, we find its reasoning persuasive and accordingly hold that a state action need only satisfy one of the two Cardinal Towing prongs to qualify as market participation not subject to preemption. [. . .] 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". (emphasis added)

A good example of a decision allowing an alternative showing to qualify for the market participant exception to federal preemption is Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh, 295 F.3d 28, 34-35 (D.C. Cir. 2002).[20] In Allbaugh the market participant exception was approved, notwithstanding its wide application; the challenged Executive Order applied to dozens of federal agencies and hundreds, if not thousands, of federally funded construction contracts. The stated basis for the market participant exemption was that the federal government was acting only in its proprietary capacity by regulating subordinate agencies on projects being constructed with its own federal funds. 295 F.3d at 36; see also, Engine Mfrs. Assoc., 498 F.3d at 1041.

Here, both of the Cardinal Towing alternatives apply.

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[20]Cited and quoted with approval by the Ninth Circuit in Engine Mfrs. Assoc., 498 F.3d at 1041.

As the Ninth Circuit held in Engine Mfrs. Assoc., requiring a state agency's proprietary project to comply with environmental requirements is within the scope of "efficient" procurement by a genuine market participant. Here, as in the first prong of Cardinal Towing, "the challenged action essentially reflects 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."

Cardinal Towing's second prong focuses on whether the challenged policy is of general application or limited to a specific project. Although CEQA is a statute of general application, the Prop. 1A requirement of CEQA environmental "clearances" applies only to the specific project approved by the voters. The comparable megaproject to clean up Boston harbor, approved in Boston Harbor, was also a huge construction project that was to cost billions of dollars and take ten years to complete.[21] California's requirement that the Authority comply with CEQA on its rail project is as fully "proprietary," as was the decision of the state agency in Boston Harbor to require its

[21]"[T]he agreement approved in Boston Harbor, [. . .] covered $6.1 billion of spending over ten years. [507 U.S]. at 221, 113 S.Ct. 1190. Although the agreement approved in Boston Harbor covered the "one particular job" of cleaning up Boston Harbor, that one job almost certainly could have been characterized as many component projects." Johnson v. Rancho Santiago Community College Dist., 623 F. 3d 1011, 1028 (9th Cir. 2010). The same is true here.

contractors to enter into project labor agreements. No more is required under this second prong.

VI. The State's Voter-approved Voluntary Commitment to CEQA Scrutiny of its High-Speed Rail Project.

Importantly, the STB has held that a rail carrier's voluntary commitments to the public that it would comply with certain environmental conditions can be enforced against it even if it would otherwise be preempted. See, Boston & Maine Corp. and Town of Ayer, MA (STB 2001) 2001 WL 458685, at p. *5, citing Twp. of Woodbridge, NJ, et al. v. Consolidated Rail Corp., Inc. (STB 2000) 2000 WL 1771044, at pp. *3-4 in which the STB upheld its prior ruling:

> In our December 2000 decision, at 5, we found that Woodbridge may seek court enforcement of the two noise abatement agreements it had entered into with Conrail (dated May 2, 1996, and August 16, 1999) notwithstanding 49 U.S.C. 10501(b). We explained that Conrail had voluntarily entered into the agreements, and thus the preemption provision should not be used to shield the carrier from its own commitments.

Here, the state imposed the requirements of CEQA on itself for its own rail project, through Prop. 1A, pursuant to which the voters approved the issuance of $9 billion of general obligation bonds. Under long-standing California law such a bond measure is characterized as a contract between the entity placing the measure on the ballot and the voters approving it. O'Farrell v. County of Sonoma (1922) 189 Cal. 343; Monette-Shaw v. San Francisco Bd. of Supervisors (2006) 139 Cal.App.4th 1210, 1215. Accordingly, the voter-approved state

commitment to CEQA review of the high-speed rail project should be upheld as a voluntary contractual agreement even if it might otherwise be deemed preempted. Moreover, Prop. 1A is an implied admission if not determination by the state that the application of CEQA to the construction of the proposed rail system will not impose a unreasonable burden on interstate commerce. The STB recognizes that it has no jurisdiction over issues arising under Prop. 1A.[22]

PART SIX — CONCLUSION

Preemption is precluded by the doctrine of theory of trial. Arguendo were there preemption, it was waived for failure of assertion in proceedings below. Prudential considerations weigh most strongly against even consideration of the preemption issue. On the merits, there is no preemption. Arguendo were there preemption, under the market participant doctrine, preemption is not applicable to the Authority's rail project.

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[22]"[A]ny ongoing controversy about implementation of the state's bond funding process that some commenters have noted [references omitted], is a matter to be resolved under the laws of California, and not by this agency." STB June 13, 2013 Decision at 20 n.104.

DATED: September 16, 2013.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of the Supplemental Letter Brief Amicus Curiae of Citizens for California High Speed Rail Accountability uses 14 point Times New Roman Font (except cover letter in 12 point Times New Roman) and consists of 12,469 words as counted by the word-processing program used to generate the Brief, being exclusive of caption, tables, exhibits and this certification.

DATED: September 16, 2013.

Respectfully Submitted,

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PROOF OF SERVICE
CCP §§ 1011, 1013, 1013a, 2015.5; FRCP 5(b)

I am employed in the County of Kings, State of California. I am over the age of 18 years and not a party to the within action; my business address is 111 E. Seventh Street, Hanford, CA 93230.

On, September 16, 2013, I served the following document(s): [Proposed] Supplemental Brief Amicus Curia of Citizens for California High Speed Rail Responsibility on the interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

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[] (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on September 16, 2013, at Hanford, California.

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KATIE ASKINS