IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

No. C070877

TOWN OF ATHERTON, ET AL.,
Petitioners/Appellants,
v.
CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity,
Respondent.

Appeal from the Judgment and Post-Judgment Order of the
Sacramento County Superior Court
Honorable Judge Michael P. Kenney
Case Nos. 34-2008-80000022CUWMGDS and 34-2010-80000679CUWMGDS

APPLICATION OF JOHN VAN DE KAMP, SAN LUIS OBISPO COASTKEEPER, ENDANGERED HABITATS LEAGUE, ENVIRONMENTAL WATER CAUCUS, PACIFIC ENERGY POLICY CENTER, LAGUNA GREENBELT, INC., NORTH COUNTY WATCH, COMMUNITIES FOR SUSTAINABLE MONTEREY COUNTY AND WEST COUNTY TOXICS COALITION FOR LEAVE TO FILE JOINDER IN PORTIONS OF *AMICUS CURIAE* CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY'S SUPPLEMENTAL LETTER BRIEF IN SUPPORT OF PETITIONERS/APPELLANTS TOWN OF ATHERTON, ET AL.

and

JOINDER TO PORTIONS OF SUPPLEMENTAL LETTER BRIEF OF *AMICUS CURIAE* ON FEDERAL PREEMPTION

CHATTEN-BROWN & CARSTENS
Jan Chatten-Brown (Bar No. 50275)
Douglas P. Carstens (Bar No. 193439)
Josh Chatten-Brown (Bar No. 243605)
2200 Pacific Coast Highway, Ste. 318
Hermosa Beach, CA 90254
Ph: 310-798-2400, Fax: 310-798-2402
Attorneys for John Van de Kamp, San Luis Obispo Coastkeeper, Endangered Habitats League, Environmental Water Caucus, Pacific Energy Policy Center, Laguna Greenbelt, Inc., North County Watch, Communities for Sustainable Monterey County, and West County Toxics Coalition

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I. INTRODUCTION.

The following named *amici curiae* respectfully request leave to file the attached joinder to portions of Citizens for California High-Speed Rail Accountability's ("CCHSRA's") supplemental letter brief *amicus curiae* in support of Petitioners/Appellants Town of Atherton, *et al.* in the above captioned case: John Van de Kamp, San Luis Obispo Coastkeeper, Endangered Habitats League, Environmental Water Caucus, Pacific Energy Policy Center, Laguna Greenbelt, Inc., North County Watch, Communities for Sustainable Monterey County and West County Toxics Coalition.[1]

Preemption in this case has enormous potentially damaging consequences for the California Environmental Quality Act (CEQA). While high speed rail may in the long run be beneficial in terms of reducing statewide greenhouse gas emissions after initially increasing them, *amici* are concerned that the preemption of CEQA – California's premier environmental law – by an imprecise federal law would have profoundly damaging long-term environmental repercussions. CEQA should apply to make sure the project, if done, is done as the best investment possible. *Amici* view the high speed train system as not merely a once in a generation public investment, but rather a once in a century or more decision. To such a momentous challenge, the best information, analysis of alternatives, and incorporation of suitable mitigation measures must apply, with full public involvement. For that, application of CEQA is absolutely vital.

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[1] On July 8, 2013, the Court vacated the oral argument date of July 22, 2013, and requested supplemental briefing on the issues of whether federal law preempts state environmental law with respect to California's high-speed rail system, and assuming preemption applies, whether preemption is an affirmative defense that is waived if not raised in the trial court. The Supplemental Letter Brief of the Town of Atherton was accepted for filing on September 23, 2013. Citizens for California High-Speed Rail Accountability's supplemental letter brief was accepted for filing on September 24, 2013.

II. AMICI CURIAE BACKGROUND.

John Van de Kamp served as Attorney General of California from 1983 to 1991. As Attorney General, Mr. Van de Kamp created the Public Rights Division, which strengthened environmental enforcement among other areas. Mr. Van de Kamp is committed to ensuring that the protections provided by CEQA and other local and state environmental laws continue to exist without being preempted by federal law. Mr. Van de Kamp's previous cases defending California laws against preemption during his tenure as Attorney General include the following: *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp* (9th Cir. 1992) 965 F.2d 723 [California's Roberti-Roos Assault Weapons Control Act not preempted by the federal civilian marksmanship program because Congress manifested no intent to preempt state gun control efforts, and because the California legislation did not interfere with the congressional objective of encouraging civilian marksmanship as preparation for military service]; *Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 428 [concluding that the state's general authority to approve apprenticeship programs fell within the scope of the preemption clause of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.), but that this authority was saved from preemption by virtue of the general savings clause of that statute and the fact that it is explicitly provided for in the federal laws and regulations governing apprenticeship programs]; and *In re Manuel P.* (1989) 215 Cal.App.3d 48, 63 [concluding that the federal government did not preempt California from ordering nonresident juveniles returned to their country of origin].

San Luis Obispo Coastkeeper, a program of Environment in the Public Interest, is organized for the purpose of ensuring that public officials charged with responsibilities for water quality, land use planning, and

environmental protection comply fully with sound planning principles and with all environmental laws of the State. San Luis Obispo Coastkeeper has consistently participated in CEQA issues, including water pollution, environmental impact, and endangered species permit process via comments on particular permits, or when necessary bringing enforcement actions. As such, San Luis Obispo Coastkeeper, Environment in the Public Interest, and its members have a direct interest in the CEQA process and application by State and local agencies responsible for compliance with CEQA regulations.

The Endangered Habitats League (EHL) is dedicated to the protection of the diverse ecosystems of Southern California and to sensitive and sustainable land use for the benefit of all the region's inhabitants. CEQA is a cornerstone of their efforts. EHL believes it is established practice for CEQA to apply to California lead agencies, and for federal environmental law to provide additive benefits where applicable, and that public benefit lies in not exempting projects from CEQA.

The Environmental Water Caucus (EWC) seeks to achieve comprehensive, sustainable water management solutions for all Californians. EWC and its members employ political, legal and economic strategies to restore ecological health, improve water quality and protect public trust values throughout the San Francisco Bay-Sacramento/San Joaquin Delta estuary and the Central Valley/Sierra Nevada watersheds. The EWC was formed in 1991. Active members include most groups advocating for equitable and sustainable California water resource use.

Pacific Energy Policy Center is an unincorporated non-profit organization founded in 2005 to provide energy related policy advice to the governor, the state legislature and California's energy regulatory agencies. Pacific Energy Policy Center believes that CEQA should apply to all major projects that will affect California's energy systems and air quality.

Laguna Greenbelt, Inc. was organized to engage in and otherwise promote for the benefit of the general public the preservation and acquisition of natural resources of the County of Orange, including but not limited to fresh and sea water resources, marsh land, swamps, woodland, slopes, ridgelines and open spaces and plant and animal life therein and to engage in and otherwise promote the study of, and to engage the public, regarding local natural resources including plants, animals, birds and other wildlife. As a direct result of this advocacy, Laguna Beach is surrounded by 22,000 acres of protected wilderness parks and preserves. Laguna Greenbelt, Inc. could not have achieved this without the provisions of CEQA, including but not limited to the required analyses and mandatory findings, plus other provisions that protect the public's right to full disclosure of impacts that must be considered and mitigated before a development project can be approved.

North County Watch was founded in 2001 as a local non-profit, non-partisan organization committed to balanced and responsible development in and around northern San Luis Obispo County. Its purpose is to promote economic and environmental policies that maintain and enhance the uniqueness of our community. North County Watch advocates for compliance with CEQA for projects affecting north San Luis Obispo County during the planning process, the administrative hearing process and, at the judicial level. Their filing and settlement of lawsuits in 2011 challenging industrial scale photovoltaic plants on the Carrizo Plain in violation of CEQA included additional oversight and biological monitoring of the construction phases of the plants.

Communities for Sustainable Monterey County represents groups in eight local cities in Monterey County. Their mission is to meet the challenge of declining resources and climate change by helping communities transition to sustainable practices. They amplify the voice of the public on good land use decisions. The group is governed by US Mayors Climate Change Protection Agreement and the Urban

Environmental Accords which are to adopt and enforce land-use policies that reduce sprawl, preserve open space, and create compact, walkable urban communities and pass legislation that protects critical habitat corridors and other key habitat characteristics from unsustainable development. The CEQA process is essential to their efforts in allowing the public to have a voice in the process of land use decisions.

West County Toxics Coalition is a grassroots Environmental Justice organization based in North Richmond, California. West County Toxics Coalition has been in existence for approximately thirty years, focused on organizing in low-income communities to address issues relating to the Chevron Refinery and other projects that have a negative impact on low-income communities, and primarily communities of color.

III. INTEREST OF AMICI CURIAE.

Amici curiae are committed to maintaining a strong CEQA that is not preempted by federal law, since federal preemption would provide substantially reduced analysis and mitigation of proposed projects' environmental impacts. Enforcing CEQA's mandates will ensure that all components of proposed projects receive careful consideration of any and all potential environmental impacts.

IV. NEED FOR AMICI CURIAE PARTICIPATION.

Amici curiae bring unique, independent, and statewide perspectives to the issues in this case. Whereas many other parties involved in the present appeal have interests of concern to specific communities in or near potential alignments of the High Speed Train system, *amici* represent a variety of individuals and groups with broad environmental concerns, including the potential weakening of CEQA should this Court conclude that federal preemption applies and was not waived.

V. FINANCIAL INTEREST.

The law firm of Chatten-Brown and Carstens represents Kings County, the Kings County Farm Bureau, and CCHSRA in administrative proceedings related to the High Speed Train system, but neither these parties nor any other party or counsel for a party to the pending appeal authored the proposed joinder to portions of the supplemental brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of the joinder to the supplemental letter brief.

Dated: October 1, 2013

Respectfully Submitted,

Jan Chatten-Brown
Douglas P. Carstens
Josh Chatten-Brown
Attorney for *Amici Curiae*

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JOINDER IN PORTIONS OF CITIZENS FOR HIGH-SPEED RAIL ACCOUNTABILITY SUPPLEMENTAL LETTER BRIEF *AMICUS CURIAE* IN SUPPORT OF PETTIONERS/APPELLANTS TOWN OF ATHERTON, *ET AL.*

CHATTEN-BROWN & CARSTENS
Jan Chatten-Brown (Bar No. 50275)
Douglas P. Carstens (Bar No. 193439)
Josh Chatten-Brown (Bar No. 243605)
2200 Pacific Coast Highway, Ste. 318
Hermosa Beach, CA 90254
Ph: 310-798-2400, Fax: 310-798-2402

Attorneys for John Van de Kamp, San Luis Obispo Coastkeeper, Endangered Habitats League, Environmental Water Caucus, Pacific Energy Policy Center, Laguna Greenbelt, Inc., North County Watch, Communities for Sustainable Monterey County, and West County Toxics Coalition

Amici curiae John Van de Kamp, San Luis Obispo Coastkeeper, Endangered Habitats League, Environmental Water Caucus, Pacific Energy Policy Center, Laguna Greenbelt, Inc., North County Watch, Communities for Sustainable Monterey County, and West County Toxics Coalition (collectively, "*Amici*") hereby join portions of the *amicus curiae* supplemental letter brief of Citizens for California High-Speed Rail Accountability ("CCHSRA") filed on September 24, 2013. Specifically, *Amici* join Part Three ("Prudential Concerns Preclude Preemption," pages 12-16), Part Four, Roman Numeral II ("The ICCTA Does Not Preempt Every State or Local Law Affecting Railroad Construction and Operations," pages 19-23), Part Four, Roman Numeral 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," pages 30-34) and Part Five ("The Market Participant Exception Applies Even Were There Preemption," pages 34-49) of the amicus letter brief of CCHSRA.

Amici have an interest in the Court's ruling on the preemption issues raised by the High-Speed Rail Authority ("Authority") because the application of federal preemption by the Interstate Commerce Commission Termination Act ("ICCTA")(see 49 U.S.C. § 70, *et seq.*) in this case could significantly weaken the protections provided for California by the Legislature through the California Environmental Quality Act ("CEQA")(see Pub. Resources Code §21000 *et seq.*) California voters assumed these protections would be in place when they approved Proposition 1A, the ballot measure to fund the High Speed Train System. (CCHSRA Amicus Letter Brief, p. 48.) A conclusion that such protections do not apply would derogate voters' reliance on state environmental laws being in place. Furthermore, a precedent could be set whereby claims would be made that CEQA is preempted in other contexts where the

ICCTA or other federal laws may apply. Such preemption of state laws intended to protect public health, safety, and welfare would be detrimental to the interests of *Amici* since federal environmental laws are not as protective of California's environment or public participation as CEQA is.

Amici underscore the citation in the CCHSRA amicus letter to the work of Carter Strickland (CCHSRA Amicus Letter Brief, p. 14, citing Strickland, *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations,* 34 Ecology L.Q. 1147, 2007.) Strickland's treatise explained:

> The [Surface Transportation] Board's promulgated rules [fn.] only provide for review of the environmental impacts of its regulatory decisions under the national Environmental Policy Act of 1969 (NEPA). [Fn.]. . . . [O]nce the adverse environmental effects of a proposed action have been identified and evaluated, the Board may decide to subordinate environmental values to other considerations.

(Strickland, *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations, supra,* 34 Ecology L.Q. 1147, 1183.) However, CEQA is significantly different from NEPA. Whereas NEPA is essentially a "procedural" statute (*id.*, at p. 1183), CEQA has significant substantive requirements that make it stronger than NEPA in protecting the environment and ensuring informed public participation in government decisions:

> [T]he Legislature has also declared it to be the policy of the state "that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects...." ([Pub. Resources Code] § 21002.) "Our Supreme Court has described the alternatives and mitigation sections as 'the core' of an [Environmental Impact Report]." (*Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1029 [].) In furtherance of this policy, section 21081, subdivision (a), "contains a 'substantive mandate'

> requiring public agencies to refrain from approving projects with significant environmental effects if 'there are feasible alternatives or mitigation measures' that can substantially lessen or avoid those effects." (*County of San Diego v. Grossmont–Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 98, [], italics omitted; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134, [].)

(*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 597.)

If only NEPA were to apply to the High Speed Train system, the protections of state environmental law envisioned by the Legislature, and assumed by the voters of California in approving Proposition 1A, could be shunted aside. Strickland's treatise predicted that with the expansion of federal preemption, local and state environmental protection laws would be increasingly displaced: "Given their success in preempting state laws, railroads can be expected to continue their attempts to evade otherwise applicable environmental laws." (*Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations, supra,* 34 Ecology L.Q., at p. 1185.) There is no evidence of a fact-specific assessment that CEQA would pose an "unreasonable burden on interstate commerce." (CCHSRA Amicus Letter Brief, p. 21.)

Amici oppose the unwarranted displacement of state law intended to protect public health, safety, and welfare, especially where no showing of unreasonable burden on interstate commerce has been made.

Dated: October 1, 2013

Respectfully Submitted,

Jan Chatten-Brown
Douglas P. Carstens
Josh Chatten-Brown

I, Douglas P. Carstens, counsel for *amici*, certify that the total word count of this Application of John Van de Kamp, San Luis Obispo Coastkeeper, Endangered Habitats League, Environmental Water Caucus, Pacific Energy Policy Center, Laguna Greenbelt, Inc., North County watch, Communities for a Sustainable Monterey County and West County Toxics Coalition for Leave to File Joinder in Portions of Amicus Curiae Citizens for California High-Speed Rail Accountability's Supplemental Letter Brief in Support of Petitioners/Appellants Town of Atherton, et al., including footnotes, but excluding this certificate, is 2,373 words. I rely on the word count of the Microsoft Word program upon which this brief was prepared in making this determination.

Dated: October 1, 2013

Douglas P. Carstens

PROOF OF SERVICE

I am employed by Chatten-Brown & Carstens LLP in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2200 Pacific Coast Highway, Ste. 318, Hermosa Beach, CA. On October 1, 2013, I served the within documents:

APPLICATION OF JOHN VAN DE KAMP, SAN LUIS OBISPO COASTKEEPER, ENDANGERED HABITATS LEAGUE, ENVIRONMENTAL WATER CAUCUS, PACIFIC ENERGY POLICY CENTER, LAGUNA GREENBELT, INC., NORTH COUNTY WATCH, COMMUNITIES FOR SUSTAINABLE MONTEREY COUNTY AND WEST COUNTY TOXICS COALITION FOR LEAVE TO FILE JOINDER IN PORTIONS OF AMICUS CURIAE CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY'S SUPPLEMENTAL LETTER BRIEF IN SUPPORT OF PETITIONERS/APPELLANTS TOWN OF ATHERTON, ET AL.

and

JOINDER TO PORTIONS OF SUPPLEMENTAL LETTER BRIEF OF AMICUS CURIAE ON FEDERAL PREEMPTION

VIA UNITED STATES MAIL. I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. I enclosed the above-referenced document(s) in a sealed envelope or package addressed to the person(s) at the address(es) as set forth below, and following ordinary business practices I placed the package for collection and mailing on the date and at the place of business set forth above.

Danae Aitchison Deputy Attorney General Office of the Attorney General 1300 I Street, Suite 125 Sacramento, CA 94244-2550	Attorney for Respondent California High-Speed Rail Authority
Stephanie F. Zook Deputy Attorney General Office of the Attorney General 1300 I Street, Suite 125 P.O. Box 944255 Sacramento, CA 94244-2550	Attorney for Plaintiffs and Cross-Defendants High-Speed Rail Authority and High-Speed Passenger Train Finance Committee
Michael J. Brady 1001 Marshall St., Suite 500 Redwood City, CA 94063-2052	Attorney for County of Kings, John Tos and Aaron Fukuda
Stuart M. Flashman 5626 Ocean View Drive Oakland, CA 94618-1533	Attorney for Petitioners/Appellants, Town of Atherton, et al.; Attorney for County of Kings, John Tos and Aaron Fukuda re Bond Validation, Case No. 34-2013-00140689

Trevor Grimm Jonathan M. Coupal Bobbie K. Ross Howard Jarvis Taxpayers Association 921 Eleventh Street, Suite 1201 Sacramento, CA 95814	Attorney for Howard Jarvis Taxpayers Association
Mark L. Nations, Chief Deputy Nicole M. Misner, Deputy County Counsel Kern County Counsel Kern County Administrative Center 1115 Truxtun Avenue, Fourth Floor Bakersfield, CA 93301	Attorneys for County of Kern
Mark Harrison First Free Will Baptist Church 2236 E. California Ave. Bakersfield, CA 93307-2005	
Michael R. Barr Blaine I. Green Andrew D. Bluth Pillsbury Winthrop Shaw Pittman, LLP Four Embarcadero Center, 22nd Floor P.O. Box 2824 San Francisco, CA 94126-2824	Attorney for Union Pacific Railroad Company
Bernard G. LeBeau Thomas Feher LeBeau Thelen, LLP 5001 East Commerce Center Dr., Suite 300 P.O. Box 12092 Bakersfield, CA 93389-2092	Attorney for Eugene Voiland
Nomi L. Castle David Romyn Robert Nida Castle & Associates A Professional Law Corporation 8383 Wilshire Blvd., Suite 810 Beverly Hills, CA 90211-2425	Attorneys for Tutor Perini Corporation and Petrini/Zachry/Parsons, a joint venture
Hon. Michael P. Kenney c/o Clerk of the Court Sacramento County Superior Court 720 Ninth Street Sacramento, CA 95814	
Colleen Carlson, County Counsel Erik Kaeding, Deputy County Counsel 1400 West Lacey Blvd., Building No. 4 Hanford, California 93230	Attorneys for Amicus Curiae County of Kings, a Political Subdivision of the State of California
Raymond L. Carlson Griswold, LaSalle, Cobb, Dowd	

& Gin, L.L.P. 111 E. 7th Street Hanford, CA 93230	

I declare that I am employed in the office of a member of the bar of this court whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 1, 2013, at Hermosa Beach, California.

Daniel P. Seeck