

[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 15-71780, 15-72570

STB No. FD 35861

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KINGS COUNTY; KINGS COUNTY FARM BUREAU; CALIFORNIA
CITIZENS FOR HIGH-SPEED RAIL ACCOUNTABILITY;
COMMUNITY COALITION ON HIGH-SPEED RAIL; CALIFORNIA
RAIL FOUNDATION; TRANSPORTATION SOLUTIONS DEFENSE
AND EDUCATION FUND; and DIGNITY HEALTH

Petitioners

v.

UNITED STATES OF AMERICA AND SURFACE
TRANSPORTATION BOARD

Respondents

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

Intervenor and Respondent

PETITION FOR REVIEW OF FINAL ORDER OF THE UNITED
STATES SURFACE TRANSPORTATION BOARD

**PETITIONERS' MOTION FOR STAY OF PROCEEDINGS OR, IN
THE ALTERNATIVE, TO REFER ISSUES UNDER CALIFORNIA
LAW TO CALIFORNIA SUPREME COURT**

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Petitioners Kings County, Kings County Farm Bureau, California Citizens for High-Speed Rail Accountability, Community Coalition on High-Speed Rail, California Rail Foundation, Transportation Solutions Defense and Education Fund, and Dignity Health hereby move the Court to stay the proceedings in this case until the California Supreme Court can reach a decision on the pending case, *Friends of Eel River et al. v. North Coast Rail Authority et al.* (“FOER”) (Case No. S222472), or, in the alternative, that the Court refer to the California Supreme Court, under Calif. Rules of Court Rule 8.548, the following questions

1) The proper scope of the California Environmental Quality Act (“CEQA”), and specifically whether and if so, to what extent, it conflicts with the provisions of the Interstate Commerce Commission Act of 1995 (“ICCTA) and therefore must be preempted as applied to the California High-Speed Rail Authority’s (“CHSRA”) high-speed rail project; and

2) Whether, in applying CEQA to CHSRA and its high-speed rail project, the State of California is acting as a regulator or as the proprietor of a state-owned enterprise that could be exempt from preemption by the ICCTA under the market participant exception.

Dated: December 7, 2015

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SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case raises the question of first impression before the federal courts of whether the application of CEQA to a state rail agency when considering its own rail project is subject to preemption under the ICCTA as placing an undue burden on interstate commerce. However, the exact issue has already been considered and decided in a published opinion of a California court of appeal. (*Town of Atherton et al. v. California High-Speed Rail Authority*, 228 Cal.App. 4th 314 (2014)). The same general issue, whether application of CEQA to a California public rail project is preempted by the ICCTA, is also currently pending before the California Supreme Court. (*Friends of Eel River et al. v. North Coast Rail Authority et al.* (“*FOER*”), case no. S222472.)

While some of the issues in this case, such as the interpretation of the ICCTA’s preemption clause, are primarily federal issues, the nature of CEQA as it applies to a state agency, and the more general nature of CEQA, whether regulatory or informational, are basically questions of California law. Those issues are essential to the California Supreme Court’s current review of *FOER*. Consequently, it would be appropriate to allow the

California Supreme Court to rule on these state law issues prior to this Court taking up the federal issues in this case. The purpose of this motion is to provide the Court with two alternative methods for addressing this – abstention and referral.

Petitioners had already unsuccessfully sought a stay of proceeding from the STB on the same grounds being sought here. (See 1 Record Excerpts at 2, 3.) Petitioners now ask that, based on Pullman abstention and/or Burford abstention, the Court stay these proceedings pending the California Supreme Court's decision in *FOER*. Alternatively, Petitioners ask that the Court refer the state law questions involved in this case to the California Supreme Court, so that it may provide its definitive interpretations of CEQA as applied here.

ARGUMENT

I. UNDER ABSTENTION DOCTRINE, THIS CASE SHOULD BE STAYED UNTIL THE CALIFORNIA SUPREME COURT HAS DECIDED THE STATE LAW ISSUES INVOLVED IN IT.

Federal courts are generally very at home applying both state and federal laws. However, it sometimes happens that the same issue, or indeed the same case, is being simultaneously considered in both state and federal courts. In such cases, the federal court has to decide whether, on the one hand, to continue forward with the case, or, on the other hand, to dismiss or

stay it so that the state court can decide the state issues involved. This process is called abstention. (See, -- *Allegheny County v. Mashuda Co.*, 360 U.S. 185 (1959) [general discussion of abstention in the federal courts].) There are various forms of abstention, depending on the situation. Two forms are relevant here: “Pullman Abstention” and “Burford Abstention.”

A. PULLMAN ABSTENTION SHOULD BE APPLIED HERE TO POTENTIALLY AVOID HAVING TO ADDRESS A FEDERAL CONSTITUTIONAL ISSUE.

Pullman abstention takes its name from the case *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). In that case, the intervenor Pullman porters sought to raise several serious constitutional issues. The Supreme Court, however, noted that it that recourse to constitutional arguments might well be avoided, depending on the interpretation of Texas state law. (*Id.* at 499-500.) However, the Supreme Court noted that while the district court had attempted to predict what the result of state litigation would be, only the state courts themselves, and specifically the Texas Supreme Court, could say with certainty the definitive meaning of the Texas laws involved.

Likewise here, the Surface Transportation Board (“STB”) concluded that CEQA, as applied to CHSRA and its high-speed rail project, was a state regulatory statute. It also concluded that because private parties had filed suit under CEQA’s “citizen suit” provisions to challenge CHSRA’s

compliance with CEQA, neither the market participant exception nor the Tenth Amendment exception to preemption could apply. All of these decisions involved the interpretation of CEQA, a California statute. Yet none of these questions had been addressed by the California Supreme Court, and the one still-published intermediate state court decision addressing these issues came to the opposite conclusion from the STB.

Especially since the California Supreme Court is currently considering these very issues in another case, it would seem the more prudential course would be to stay this case pending the Supreme Court's decision in *FOER*.¹

B. BURFORD ABSTENTION SHOULD BE APPLIED TO STAY THIS CASE UNTIL THE CALIFORNIA SUPREME COURT CAN RULE ON *FOER*.

The second applicable category of abstention comes from the case *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). That case, was a diversity jurisdiction case involving a dispute over a Texas oil field. The question there was not constitutional issues, but whether the issues involved in a Texas oil field dispute, because of their importance to the State of Texas, were better left to be resolved in state court if at all possible, because

¹ The state court CEQA lawsuits that were the impetus for CHSRA's petition to the STB have all been stayed by the trial court pending a decision in *FOER*, so there is no need for haste in reaching a decision here.

involvement of the federal courts would be likely to disrupt the orderly management of those disputes in the state court. (*Id.* at 326-327.)

Similarly here, CEQA is unquestionably an important statute to the State of California, and the question of the extent to which it is a regulatory statute is important not only in this context, but in how the California courts and legislature deal with its interpretation and modification. Given that importance, it would be far preferable for California courts to opine first on the nature of CEQA review, as well as on the status of enforcement suits under CEQA. For this reason as well, Petitioners suggest that the Court stay this case pending the Supreme Court's decision in *FOER*.

II. THE COURT SHOULD REFER THIS CASE'S STATE LAW ISSUES TO THE CALIFORNIA SUPREME COURT.

Even if the Court is not inclined to stay this case until *FOER* is decided, it is still important that California's judicial branch provide its interpretations of CEQA and its application in this case. California Rule of Court Rule 8.548 allows the U.S. Supreme Court or any federal court of appeal to request that the California Supreme Court decide an issue under California law that could decide the case before the federal courts. This Court has repeatedly taken advantage of that option, perhaps most notably in *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir., 2011). It would be opportune to refer the California law issues involved in this case as well.

Two California courts of appeal have addressed the issue of how CEQA applies to a California public rail project and have come to diametrically opposite conclusions. The STB chose to side with the court of appeal's decision in Friends of Eel River, even though the Supreme Court had accepted review of the case and thereby effectively depublished that decision.² STB brushed aside the Third District's Court of Appeal's decision in Town of Atherton, even though Respondent and Intervenor CHSRA had requested that the case be depublished and the Supreme Court rebuffed the request. With the Supreme Court poised to decide how CEQA review will be interpreted in this important context, it remains important for this Court's decision to be informed by the California Supreme Court's analysis of the state law issues. For that reason, if the Court prefers not to stay this case, it should nonetheless refer the California law issues of the nature of CEQA and of citizen enforcement suits under CEQA to the California Supreme Court.

CONCLUSION

Because it might avoid having to address the constitutional question of whether CEQA is preempted under the Commerce Clause, and more

² The very fact that the Supreme Court accepted review of that case, rather than simply depublish the decision, indicates that the Supreme Court feels that the issue of CEQA importance is one of importance to the State.

specifically under the preemption clause of the ICCTA, and because the issue of interpreting CEQA and its citizen enforcement provisions is an important issue to the State of California, Petitioners respectfully request that the Court either stay this case until the California Supreme Court can decide *FOER*, or, in the alternative, refer the two major California law issues involved in this case to the California Supreme Court for its decision.

Dated: December 7, 2015

Respectfully submitted,

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Certificate of Service

I hereby certify that I electronically filed the foregoing Petitioners' Motion for Stay of Proceedings, or, in the Alternative, to Refer Issues Under California Law to California Supreme Court with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on December 7, 2015.

The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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