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KINGS COUNTY, et al., Petitioners, v. SURFACE TRANSPORTATION BOARD and UNITED STATES OF AMERICA, et al., PROPOSED AMICUS CURIAE BRIEF OF CENTER FOR BIOLOGICAL DIVERSITY IN SUPPORT OF NEITHER PARTY FOR ABSTENTION OR REVERSAL OF THE SURFACE TRANSPORTATION BOARD'S DECISION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-71780

KINGS COUNTY, et al.,
Petitioners,
v.
SURFACE TRANSPORTATION BOARD
and UNITED STATES OF AMERICA,
Respondents,

and

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
Intervenor and Respondent.

No. 15-72570

DIGNITY HEALTH,
Petitioner,
v.
SURFACE TRANSPORTATION BOARD
and UNITED STATES OF AMERICA,
Respondents,

and

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
Intervenor and Respondent.

PROPOSED AMICUS CURIAE BRIEF OF CENTER FOR BIOLOGICAL DIVERSITY IN SUPPORT OF NEITHER PARTY FOR ABSTENTION OR REVERSAL OF THE SURFACE TRANSPORTATION BOARD'S DECISION

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INTRODUCTION

This case raises significant jurisdictional and federalism issues that deserve the Court's careful consideration. At issue is a sweeping "Declaratory Order" untethered to any adjudicatory or rulemaking proceeding before the Surface Transportation Board ("STB").[1] In that order, STB overstepped its narrowly-defined statutory role in an attempt to override the preclusive legal effect of a final judgment of the California Court of Appeal and to inject itself into an unrelated case currently pending before the California Supreme Court over which it has no regulatory jurisdiction or institutional competence. In the latter proceeding, California's highest court must determine whether the state's bedrock environmental disclosure statute – the California Environmental Quality Act ("CEQA") – applies to a public railroad repair project. The fact-specific issues raised by that case cannot be properly adjudicated through this Court's review of STB's advisory opinion, which seeks to expand its own jurisdiction well beyond anything Congress envisioned.

Amicus Curiae Center for Biological Diversity, which has an abiding interest in proper implementation of CEQA, submits this brief to elaborate on three

[1] California High-Speed Rail Authority—Petition for Declaratory Order, FD 35861, 2014 WL 7149612 (Dec. 12, 2014).

points not fully addressed in Petitioners' Opening Brief.[2] First, STB's Declaratory Order is not judicially reviewable because it constitutes (1) a backdoor collateral attack on the preclusive effect of a final state court judgment over which this Court lacks original jurisdiction and (2) a non-binding advisory opinion, not a judicially-reviewable final action, under the test articulated in Bennett v. Spear, 520 U.S. 154, 177 (1997). But even if the Declaratory Order is reviewable, the Court should abstain from doing so until resolution of the parallel California Supreme Court case, which has been fully briefed and is awaiting argument. Finally, if this Court reaches the merits, it should conclude that STB's interpretation is inconsistent with the plain language and intent of the Interstate Commerce Commission Termination Act ("Termination Act") and is not entitled to deference.

BACKGROUND

The Declaratory Order offers STB's "views" on application of the Termination Act's remedy preemption provision to California's foundational environmental disclosure law for all public agency decision-making. 2014 WL 7149612, *3. Judicial review of STB's legal interpretation requires a more

[2] Pursuant to Fed. R. App. P. 29(c)(5), the Center certifies that its counsel authored this brief in its entirety. No person, other than the Amicus Curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief. Although not required by the rules, counsel for the Center also disclose that they represent petitioners in Californians for Alternative to Toxics, pending before the California Supreme Court. Those petitioners, however, played no role in the preparation or funding of this brief.

thorough analysis of the law and a fuller understanding of the relevant state court proceedings than the Declaratory Order provides.

I. The History of State and Federal Railroad Regulation.

In crafting the Termination Act and its predecessors, Congress has focused exclusively on the economic viability of the evolving railroad system, including specific concerns about the destabilizing effect of state rate regulation and state-mandated overbuilding or expansion of rail lines. As it stands today, the Termination Act gives STB carefully-circumscribed exclusive jurisdiction to (1) adjudicate complaints concerning discriminatory rates or practices by common carriers and (2) certify certain infrastructure activities – i.e., new line construction, existing line extensions, operator status changes, and line acquisition or abandonment – as part of the interstate rail network. Contrary to STB's expansive reading of the Act, Congress did not intend to invest the agency with plenary railroad regulatory or planning powers that usurp a state's ability to make decisions about how it spends money or what state law conditions attach to such expenditures.

A. The Interstate Commerce Act of 1887

American railroads were originally state-chartered and regulated pursuant to

historic state police powers.[3] Early state regulatory efforts included attempts, largely unsuccessful, to curb monopolistic behavior and corruption in the rapidly-expanding rail industry.[4] After the U.S. Supreme Court struck down Illinois' ability to regulate freight rates on interstate routes, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886), the federal government stepped in to regulate the economics of railroads with adoption of the Interstate Commerce Act ("ICA") in 1887.

The ICA was intended to protect shippers from the monopoly power of a rail industry fraught with market manipulation and rate discrimination. Sen. Rep. No. 104-176, at 2 (1995). The statute outlawed rebates and pooling, forced railroads to publish rates, and required the new Interstate Commerce Commission

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[3] Zachary Smith, Tailor-Made: State Regulation at the Periphery of Federal Law, 36 Transp. L.J. 335, 338 (2009) (citing James Ely, Jr., Railroads and American Law (2001); Herbert Hovenkamp, Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem, 97 Yale L.J. 1017, 1034 n.90 (1988) (the rail system developed through "state initiative and almost exclusively under state control" and "before 1887 federal regulation was virtually nonexistent").

[4] James W. Ely, Jr., "The Railroad System Has Burst Through State Limits": Railroads and Interstate Commerce, 1830-1920, 55 Ark. L. Rev. 933 (2003) ("Ely"); Paul Stephen Dempsey, The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure, 95 Marq. L. Rev. 1151, 1152 (2012) ("Dempsey I") ("Congress [in 1887] instituted regulation under the ICC largely to protect the public from the monopolistic abuses of the railroads. Between 1920 and 1975, however, the goal of the national transportation policy shifted to protection of the transportation industry from . . . unconstrained competition."); Paul Stephen Dempsey, Transportation: A Legal History, 30 Transp. L.J. 235, 254-65 (2003) ("Dempsey II").

("Commission") to ensure that rail fees were "just and reasonable." See id.; Smith at 339-40; Dempsey II at 265; Hovenkamp at 1035. Over the next few decades, Congress responded to early, narrow judicial interpretations of the ICA by enlarging the Commission's authority for interstate rail rates. Hovenkamp at 1035-44; Ely at 966-67; Dempsey I at 1163-64.

B. The Transportation Act of 1920

As the railroad industry matured, new economic concerns arose, related primarily to the different circumstances faced by fiercely competitive long-haul routes and often monopolistic short-haul routes. "Monopoly railroads earned monopoly profits, while competing railroads were driven into bankruptcy," Hovenkamp at 1035-44, and state regulatory attempts to limit monopoly profits from lucrative intrastate routes threatened the viability of the interstate system, which depended on those profits. Thus, in crafting the Transportation Act of 1920 to amend the ICA, Congress' concern "shifted from one of protecting the public from the market abuses of the transportation industry to one of preserving a healthy economic environment for common carriers." Dempsey II at 272.

The amended statute attempted to address perceived "freeriding by the states," which imposed low intrastate rail rates and intrastate route mandates at the expense of the industry's overall financial viability. Ely at 976 (citing R.R. Comm'n of Wisconsin v. Chicago, B. & Q. R. Co., 257 U.S. 563, 588 (1922)). It

did so by augmenting the Commission's powers, allowing it to supervise the rail industry's issuance of securities and to regulate intrastate rates affecting interstate commerce. Ely at 974; Dayton-Goose Creek Ry. Co. v. United States, 263 U.S. 456, 478 (1924). The statute also provided "that no interstate carrier shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation over such additional or extended line of railroad unless and until the Commission shall certify that public convenience present or future requires it, and that no carrier shall abandon all or any portion of its line or the operation of it without a similar certificate of approval." R.R. Comm'n of Cal. v. S. Pac. Co. 264 U.S. 331, 344 (1924) (discussing paragraphs 18 to 21 of section 402). By requiring federal authorization for new construction, expansion, and operation of rail lines, Congress intended both to prevent overbuilding of expensive infrastructure and to bar "states from requiring carriers to provide service at a loss, a step which contradicted the national policy of building a strong rail system." Ely at 974-75.

Despite its ability to regulate interstate rates and its new certification authority for line construction and expansion, the Commission still lacked direct authority to regulate intrastate rail rates, and the Transportation Act also explicitly exempted from the new infrastructure certification requirements "the construction

or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state." R.R. Comm'n of Cal., 264 U.S. at 345 (quoting paragraph 22 of section 402).

C. The Staggers Rail Act of 1980

Following the rise of competing forms of transportation and a series of railroad bankruptcies, Congress took up the industry's economic viability once again in the Staggers Rail Act of 1980. See generally Maureen E. Eldredge, Who's Driving the Train? Railroad Regulation and Local Control, 75 U. Colo. L.Rev. 549, 558 (2004). This statutory amendment "began the substantial economic deregulation of the surface transportation industry and the whittling away of the size and scope of the [Commission]," H.R. Rep. No. 104-311, at 82 (1995), by extensively reforming the Commission's authority, allowing increased competition in the rail industry, and easing the way for mergers and abandonment of rail lines and operations. Sen. Rep. No. 104-176 at 3. The Staggers Act "deregulated most railroad rates, legalized railroad shipping contracts, simplified abandonments, and stimulated an explosion of service and marketing alternatives." H.R. Rep. No. 104-311, at 91.

But even after this considerable overhaul, states retained a role in economic regulation, albeit with federal oversight. The Staggers Act allowed states to exercise "jurisdiction over intrastate rates, classifications, rules, and practices for

intrastate transportation" if they submitted "intrastate regulatory rate standards and procedures" to the Commission for review and certification. Pub. L. 96-448, § 214(b), 94 Stat. 1895 (Oct. 14, 1980) (formerly 49 U.S.C. § 11501(b)). To effectuate this provision, Congress for the first time expressly preempted state economic regulation of railroads (rates, schedules, classifications, etc.) unless the Commission certified the state rules. This new preemption language, codified in section 10501(d), provided:

> The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

Id. (formerly 49 U.S.C. § 10501(d)).

The Conference Report explained that this provision preempted only state financial regulation of the industry:

> The Conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. Accordingly, the Act preempts state authority over rail rates, classifications, rules, and practices. States may only regulate in these areas if they are certified under the procedures of this section.
>
> The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available.

H.R. Rep. No. 96-1430, at 106 (1980) (Conf. Rep.). The Staggers Act thus made clear that state legislatures and state courts could not regulate railroad economics, even on intrastate lines, without federal concurrence.

The Staggers Act did not, however, substantively change the provisions of the earlier Transportation Act governing federal supervision over construction, extension, and abandonment of lines. New sections 10901 through 10906 of the amended statute merely recodified the requirement (from section 402, paragraphs 18-21 of the Transportation Act) that federal "public convenience and necessity" approval was required for construction, extension, acquisition, operation, and abandonment of lines connected to the interstate system (and thus under the Commission's jurisdiction). Pub. L. 96-448, § 214(b). And new section 10907 reiterated (from section 402, paragraph 22 of the Transportation Act) that "[t]he Commission does not have authority under sections 10901-10906 of this title over . . . the construction, requisition, operation, abandonment or discontinuance of spur, industrial, team, switching or side tracks if the tracks are located, or intended to be located, entirely in one state." Id.

D. The Interstate Commerce Commission Termination Act of 1995

With the Termination Act of 1995, Congress completed the economic deregulation begun under the Staggers Act, further curtailing federal regulatory authority over the railroad industry. The new law repealed many of the

Commission's historic economic regulatory functions, including tariff filing, rail fare regulation, financial assistance programs, and minimum rate regulation. H.R. Rep. No. 104-311, at 82-83. As Congress noted, the only federal regulatory authority retained in the Termination Act is the authority "necessary to maintain a 'safety net' or 'backstop' of remedies to address problems of rates, access to facilities, and industry restructuring." H.R. Rep. No. 104-311, at 93. To effectuate this economic deregulation, the Termination Act did away with the Commission and replaced it with the more narrowly-empowered STB.

To prevent states from stepping back into the field of economic regulation and undermining Congress' deregulation efforts, the Termination Act withdrew all state authority to regulate interstate rates and simultaneously "extend[ed] exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907." Id. at 95.[5] "This changed the federal government's relationship with the states, which had previously played a meaningful role in regulating railroad rates and operations." Carter H. Strickland, Jr., Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations, 34 Ecology L.Q. 1147, 1161 (2007).

[5] Notably, while the Termination Act conveyed exclusive federal jurisdiction over such spurs and side tracks, it explicitly allowed carriers to enter into private contracts regarding the use of those facilities and excepted them from STB "public convenience and necessity" licensing authority. 49 U.S.C. § 10906.

While the Termination Act thus consolidated exclusive federal jurisdiction over the economics of railroad operations, it did not substantively change the narrow breadth of federal licensing jurisdiction over railroad infrastructure. Today, STB has two functions. First, it retains its historic authority to prescribe reasonable rates, classifications, rules, and practices for common carriers connected to the interstate rail system and to adjudicate disputes over common carrier obligations – now expanded to both interstate and intrastate carriers. 49 U.S.C. §§ 10701-10747 (rates) and 11101-11164 (operations). And second, STB may grant or deny applications for "public convenience and necessity" certifications authorizing construction of line extensions or new lines, abandonment or acquisition of existing lines, or changes in operator status (except with respect to spur, industrial, team, switching, or side tracks, which are entirely guided by private contract and decision-making). Id. §§ 10901-10910 (licensing).[6] STB's enforcement authority is likewise limited; it may undertake an investigation in response to a carrier or shipper complaint and bring (or ask the Attorney General

[6] In 2008, Congress amended the statute again, through the Clean Railroads Act, to specifically address solid waste rail transfer facilities. 49 U.S.C. §§ 10908-10910. While these provisions are not at issue here, they demonstrate that when Congress wants to step in and micromanage state and local land use decisions, it can and will do so. It is telling that Congress has never attempted to override state or local siting criteria except in the context of solid waste facilities (and even then, Congress provided a "savings clause" in section 10910 for "State and local environmental, public health, and public safety standards" that do not violate dormant Commerce Clause standards).

to bring) civil actions to enjoin violations of licensing requirements or orders. 49 U.S.C. §§ 11701-11703.[7] STB has no authority, however, to engage in rail system planning or to command that private or public railroads construct, expand, or repair rail lines. In other words, STB's statutory jurisdiction is narrow and specific, not "plenary."

The Termination Act included several conforming changes "to reflect the direct and complete pre-emption of State economic regulations of railroads," H.R. Rep. No. 104-311, at 95-96:

> (1) deleting the language of prior section 10501(b) regarding federal certification requirements for state rate-setting because state rate-setting is no longer allowed;
>
> (2) moving the "jurisdiction" and "preemption" language of prior section 10501(d) into section 10501(b); and
>
> (3) deleting prior section 10907 language that exempted the construction or extension of wholly intrastate rail lines from federal licensing certification and adding new language to revised section 10501(b) to clarify that "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State" in order to clarify that states do not play a role in "public convenience and necessity" certifications.

See H.R. Rep. No. 104-422, at 167 (1995) (Conf. Rep.) ("In light of the exclusive Federal authority over auxiliary tracks and facilities, this subject is integrated into

[7] Injured persons also may bring their own civil suit to enforce the statute. 49 U.S.C. §§ 11704-11707. The statute provides specific civil and criminal penalties for violations. Id. §§ 11901-11908.

the statement of general jurisdiction."); S. Rep. No. 104-176, at 6 (1995) ("The bill would also eliminate Federal certification and review procedures for State regulation of intrastate rail transportation.").

Reflecting these changes and the overall structure of the revised statute, the recodified jurisdiction/preemption clause now provides:

> The jurisdiction of the Board over—
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. 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.

49 U.S.C. §10501(b). Thus, like the Staggers Act, the Termination Act ensured that the remedies provided in Part A (§§10101- 11908) preempt all other state and federal remedies "with respect to rates, classifications, rules, practices, routes, services, and facilities" for the "regulation of rail transportation." Id. § 10501(b).

As to the addition of section 10501(b)(2), Congress explained that it did not convey plenary STB jurisdiction over all aspects of construction – or pre-construction. Rather, the new language was intended solely to extend STB's

economic regulatory jurisdiction to activities on wholly intrastate lines that had previously been subject to federally-certified state regulation:

> The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.

H.R. Rep. No. 104-311, at 95-96 (emphasis added).

II. The California High-Speed Rail Authority Litigation.

The California High-Speed Rail project has a long planning history, dating back to the early 1990s. See Town of Atherton v. California High-Speed Rail Authority ("Atherton"), 228 Cal. App. 4th 314, 323-26 (2014); Cal. Pub. Util. Code § 185010 (1996). As planning efforts progressed, California sought and obtained voter approval for general obligation bonds to begin funding a High-Speed Rail system. In November 2008, voters approved ballot Proposition 1A, authorizing the use of revenue from these bonds for further planning, engineering, and construction of the system. Cal. Sts. & High. Code § 2704.04. The ballot proposition provided that prior to seeking appropriation of the bond proceeds for any segment of the system, the California High-Speed Rail Authority ("Authority") must prepare and submit a detailed funding plan that demonstrates, among other

things, completion of all project-level environmental review necessary to proceed with construction. Id. § 2704.08(c)(2)(K).

To comply with their respective obligations under CEQA and the National Environmental Policy Act ("NEPA"), the Authority and the Federal Railroad Administration[8] completed a joint programmatic Environmental Impact Report/Environmental Impact Statement ("EIR/EIS") for the project in 2008, which then became the subject of various judicial challenges. Atherton, 228 Cal. App. 4th at 325-26. In 2011, the trial court agreed, but only in part, with the challengers' claim that the programmatic EIR/EIS was inadequate and set aside the Authority's resolution certifying the document; the challengers appealed the partial denial of their writ claims. Id. at 327.

While this state appeal was pending, the Authority simultaneously sought two rulings from STB. On March 27, 2013, the Authority filed both (1) a Petition for Exemption from the Termination Act's application requirements for construction of a new rail line under 49 U.S.C. § 10901, and (2) a Motion to

[8] The Federal Railroad Administration is an agency within the U.S. Department of Transportation, created by statute in 1966, whose stated mission is "to enable the safe, reliable, and efficient movement of people and goods." See https://www.fra.dot.gov/Page/P0002. In anticipation of providing some federal funding for the High-Speed Rail project, it served as "lead agency" under NEPA. As noted above, STB is an entirely different, independent executive agency charged by the Termination Act with limited railroad licensing and common carrier dispute resolution authority.

Dismiss its own concurrently filed Petition for Exemption.[9] The Petition explained in detail how the Authority and the Federal Railroad Administration had partnered to complete an extensive tiered CEQA/NEPA process for the project, Petition for Exemption at 5-9, and requested "exemption" from Termination Act requirements on the grounds that the High-Speed Rail system will facilitate passenger rail transportation as Congress intended. Id. at 9-13. The Petition argued that regulation by STB was "not needed to protect shippers from the abuse of market power" because the line will not service shippers and thus regulation to "safeguard against the potential for market power abuse is unwarranted." Id. at 13. In its simultaneously-filed Motion to Dismiss, the Authority argued that construction of the project was exempt from STB prior approval because it will be located entirely within California and will not be operated as part of an interstate rail network. Motion to Dismiss at 5-8.

In response, STB concluded that it did have jurisdiction over the High-Speed Rail project and thus denied the Authority's Motion to Dismiss. California High-Speed Rail Authority—Construction Exemption—Merced, Madera & Fresno Ctys., Cal., FD 35724, 2013 WL 1701795, at *2 (Apr. 18, 2013). After further

[9] All of the Authority's filings with STB are available on the STB website at http://www.stb.dot.gov/FILINGS/all_search.nsf/%28search-98.234.191.241-68285%29?OpenView&Count=5000. Amici Curiae requests that the Court take judicial notice of these filings. Fed. R. Evid. 201.

consideration of the joint programmatic and project-specific EIR/EISs and the Federal Railroad Administration's Record of Decision and Mitigation Plan, and after purportedly conducting an independent review of the environmental documents, STB granted the Petition for Exemption and approved the new construction without a full Termination Act application process. California High-Speed Rail Authority—Construction Exemption—Merced, Madera & Fresno Ctys., Cal., FD 35724, 2013 WL 3053064 (June 13, 2013). In declining to, as some commenters urged, "revisit the determinations on the viability and desirability of the Project already made by these various Federal, state, and local government interests," STB explained that

> The Board's grant of authority to construct a rail line (whether under § 10901 or by exemption under § 10502) is permissive, and not mandatory—that is, the Board does not require that an approved line be built. . . . investors rather than the Board will determine if a proposed line will be financially viable.
>
> [F]unding decisions have already been made by bodies directly empowered to make those decisions, including FRA and the voters of California. Neither our statute nor Board or court precedent suggest that we must use the full application process of § 10901 to revisit or override those decisions, particularly given the significant amount of public information and participation regarding the funding decisions available in this case.

Id. at *12-13 (emphasis added).

In the meantime, briefing of the challengers' state court CEQA appeal proceeded. After the appeal had been fully briefed and calendared for argument, the Authority requested – and the appellate court granted – a continuance of the

hearing and supplemental briefing on the potential preemptive effect of STB's decision to exercise jurisdiction over the project (but exempt it from full review). Atherton, 228 Cal. App. 4th at 328-29. Following supplemental briefing and argument, the Court of Appeal issued a lengthy opinion on July 24, 2014, finding (1) no preemption under the Termination Act and (2) no merit to challengers' CEQA claims. The Court noted that STB's decisions made no mention of preemption, let alone a finding of preemption. Id. at 333. It explained, moreover, that California's publicly-funded High-Speed Rail project differed from the local private railroad regulatory permitting cases on which the Authority relied in its belated preemption arguments, concluding that "[i]t is less clear and certainly subject to dispute whether requiring review under CEQA before deciding on the alignment of the [rail line] from the Central Valley to the San Francisco Bay Area has a comparable potential effect to deny the railroad the ability to conduct its operations and activities." Id. The Court concluded that "[w]e need not, however, wade further into these weeds" because, even if CEQA were generally preempted by the Termination Act, the public High-Speed Rail project is excepted from preemption under the "market participation doctrine." Id. 333-41.

Unhappy with this ruling, the Authority filed a Petition for Declaratory Order with STB on October 9, 2014, rather than seeking further judicial review. In that Petition, the Authority argued that because STB has "exclusive and plenary"

jurisdiction over construction of new rail lines and because a CEQA citizen suit could potentially delay such construction, the Termination Act preempts any injunctive relief available under state law. Petition for Declaratory Order at 9-10. Notably, the Authority limited its request to STB review of injunctive relief under CEQA, stating that STB "need not rule generally on whether CEQA in its entirety is preempted by the [Termination Act] . . . because the CEQA process is complete." Id. (also explaining that "the Authority does not seek declaratory relief regarding non-injunctive remedies, such as an order requiring revised environmental analyses or additional environmental mitigation but no work stoppage").

In granting the petition and issuing the Declaratory Order at issue here, STB went well beyond what the Authority sought. It concluded that "CEQA is categorically preempted by § 10501(b) in connection with this Line," Declaratory Order, 2014 WL 7149612, at *7, "because environmental review under CEQA attempts to regulate where, how, and under what conditions the Authority may construct the Line." Id. at *9. Acknowledging that the state law requirements of Proposition 1A informed the Court of Appeal's decision in Atherton and that those requirements implicated sovereignty concerns regarding the state's ability to dictate the terms of its publicly-funded projects, STB correctly declined to "opine" on these issues. Id. at *11 ("Whether CEQA compliance is required before the

Authority is allowed to obtain or use Proposition 1A funding is a question of state law for a state court to decide.") Yet STB concluded that CEQA is "categorically preempted" notwithstanding these pivotal state law concerns.

In response to a motion for reconsideration of the Declaratory Order by some of the Petitioners here, the dissenting member of the three-person STB observed that the two-person majority "gratuitously" made a "questionable finding that no one even sought" that the Termination Act categorically preempted CEQA. California High-Speed Rail Authority—Petition for Declaratory Order, FD 35861, 2015 WL 2070594, at *6 (May 4, 2015); see also Declaratory Order, 2014 WL 7149612, at *12 (order is "overreaching" and STB should decline to issue the order). The dissenting member pointedly objected that "there is now no means of enforcing CEQA with respect to the Project," and "deviations from any of the CEQA provisions included in the Board's own-approved EIR/EISs will not be challengeable." Id. at *13.

III. The North Coast Railroad Authority Litigation.

Separate and unrelated to the High-Speed Rail matter, another CEQA case concerning a massive repair and rehabilitation project for a dilapidated railroad along the North Coast of California, from Lombard in Napa County to Arcata in Humboldt County, has been working its way through the state courts. After the private rail carrier failed and the North Coast line fell into disrepair, the California

Legislature created the North Coast Railroad Authority ("NCRA"), a public agency, to acquire and rehabilitate the line and to provide rail service. Cal. Gov't Code § 93000 et seq. Following storm-related damage to the line in 1998, the Federal Railroad Administration issued an emergency order closing the railroad as unsafe. The California Legislature stepped in again, this time authorizing over $60 million to fund repairs, improvements, and remediation of rail-related toxic contamination. Id. §§ 14556.40(a)(32), 14556.50. To obtain the money, NCRA contractually assumed responsibility for applicable legal requirements, including compliance with CEQA. The state awarded NCRA more than $2 million to prepare an Environmental Impact Report for the repair project, and NCRA engaged in a four-year CEQA process. Friends of Eel River v. North Coast Railroad Auth., 230 Cal. App. 4th 85, 95-100, 178 Cal. Rptr. 3d 752, 760-63, as modified on denial of reh'g (Oct. 17, 2014), review granted and opinion superseded sub nom. Friends of the Eel River v. N. Coast R.R. Auth., 339 P.3d 329 (Cal. 2014) (hereinafter "Eel River").

While these efforts were ongoing, in 2006 NCRA entered into a lease with private contractor Northwestern Pacific Railroad Company ("Northwestern Pacific") to operate the line, an agreement that became effective once the CEQA process was completed. 178 Cal. Rptr. 3d at 762. Although STB did not have or exercise Termination Act jurisdiction over NCRA's proposed repair and reopening

of the North Coast line,[10] lessee Northwestern Pacific filed a notice of exemption for a change in operator on the line. STB granted Northwestern Pacific's Termination Act exemption for a change in operator status "upon consummation of the transaction." Northwestern Pacific R.R. Co.—Change in Operators Exemption—North Coast R.R. Auth., Sonoma-Marin Area Rail Transit Dist. & Nw. Pac. Ry. Co., LLC, FIN 35073, 2007 WL 2407261 (Aug. 16, 2007)

Unrelated to STB's action, Friends of the Eel River and Californians for Alternatives to Toxics filed lawsuits in state superior court challenging the adequacy of NCRA's final Environmental Impact Report under CEQA (unlike the High-Speed Rail project, there was no parallel NEPA document for the North Coast repair project). NCRA removed the cases to federal court, claiming that the Termination Act completely preempted petitioners' state law CEQA claims, and the environmental groups moved to remand to state court. Californians for Alternatives to Toxics v. North Coast Railroad Authority, No. C-11-04102 JCS, 2012 WL 1610756 (N.D. Cal. May 8, 2012). The federal district court granted the

[10] The courts and STB agree that the Termination Act does not provide federal jurisdiction over repair activities. Lee's Summit, MO v. Surface Transp. Bd., 231 F.3d 39, 42 n.3 (D.C. Cir. 2000); Detroit/Wayne County Port Authority v. I.C.C., 59 F.3d 1314 (D.C. Cir. 1995); Swanson Rail Transfer, LB—Declaratory Order—Swanson Rail Yard Terminal, Fed Carr. Case. P37354, 2011 WL 2356468, *2 (June 14, 2011); Union Pac. R.R. Co.—Petition for Declaratory Order—Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, 1998 WL 525587, *3-4 (Aug. 19, 1998) (citing Texas & Pacific v. Gulf, Colorado & Santa Fe Ry., 270 U.S. 266 (1926)).

remand motion, finding that the Termination Act did not confer jurisdiction on STB to hear state law CEQA claims (i.e., there is no "complete preemption" under the statute) and that NCRA's affirmative defense of preemption did not confer federal question jurisdiction on the district court. Id.

The preemption issue was subsequently litigated in the state trial court, and the CEQA claims were dismissed on preemption grounds. The trial court judgment was affirmed on appeal, Eel River, 178 Cal. Rptr. 3d at 783, and the California Supreme Court granted review. Briefing in the California Supreme Court concluded in October 2015, and the case is awaiting oral argument. (Notably, after the high court accepted Eel River for review, the Authority sought and obtained a stay in all seven CEQA challenges related to the High-Speed Rail project, pending the California Supreme Court's decision. See Authority's Notice of Motion and Motion for Stay of Action (Feb. 19, 2015), attached to the Declaration of Deborah A. Sivas.)

On November 19, 2015, in an attempted end-run around the pending California Supreme Court proceeding, Northwestern Pacific filed a Petition for Expedited Declaratory Order asking STB to declare that the Termination Act

preempts CEQA's application to operation of the North Coast line.[11] That petition had not yet been resolved.

ARGUMENT

I. STB's Declaratory Order Is an Improper Collateral Attack on Atherton for Which There Is No Federal Question Jurisdiction and No Hobbs Act or APA Judicial Review.

As demonstrated above, the Declaratory Order at issue here is not connected to STB enforcement under the Termination Act or agency adjudication under the Administrative Procedures Act ("APA").[12] At best, it is an advisory opinion, issued by STB "to provide [its] views on the preemption issue." 2014 WL 7149612, at *3. At worst, it is an ill-conceived – and arguably improper – backdoor attempt to override the Court of Appeal's decision in Atherton and influence the California Supreme Court's resolution of Eel River, which involves a repair project over which STB has no jurisdiction. In either case, the Declaratory Order's sweeping conclusion that "CEQA is categorically preempted" does not

[11] All filings in connection with matter are available on STB's website at http://www.stb.dot.gov/home.nsf/EnhancedSearch?OpenForm&Seq=1&Type=F

[12] STB issued the Declaratory Order pursuant to 5 U.S.C. § 554(e) – also known as APA section 5(e) – which authorizes agencies to issue declaratory orders "to terminate a controversy or resolve uncertainty" in formal APA adjudications. "Adjudications" are "required by statute to be determined on the record after opportunity for an agency hearing." Id. § 554(a). The Declaratory Order was not part of any APA "adjudication" before STB with respect to the High-Speed Rail project.

create original jurisdiction in this Court, where none otherwise exists, and is not a judicially reviewable final order from which legal consequences will flow. Accordingly, the Court should dismiss the petition.

A. The Court Should Dismiss the Petition for Lack of Jurisdiction.

As a threshold matter, the Court should dismiss this case for lack of subject matter jurisdiction. STB's Declaratory Order was not the result of a statutorily-authorized agency investigation, adjudication on a record, enforcement action, or licensing process over which this Court normally has Hobbs Act jurisdiction. 28 U.S.C. § 2342. Rather, it is an informal statement of STB's legal views, couched as a "declaratory order" but unrelated to any agency proceeding, for which there is no federal jurisdiction.

The subject matter of the Declaratory Order – which opines on the applicability of a federal preemption defense to pending state law CEQA claims – does not affect jurisdiction, or the lack thereof. Preemption is an affirmative defense properly heard in the underlying state court action and does not provide an independent basis for federal court jurisdiction. See Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987); Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 14 (1983), superseded by statute on other grounds, 28 U.S.C. § 1441(e); Californians for Alternatives to Toxics, 2012 WL 1610756, *8 & *11 (remanding the Eel River case to state court for lack of federal jurisdiction). Here,

the Authority can and did assert preemption as an affirmative defense in the pending state court CEQA actions. STB cannot create independent federal jurisdiction to consider the very same defense again merely by issuing an interpretative statement.

Nor does STB's (arguably incorrect) invocation of APA section 5(e) establish jurisdiction. The Attorney General's Manual on the APA – which represents "the Government's own most authoritative interpretation of the APA" and to which the U.S. Supreme Court has "repeatedly given great weight," Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) – is instructive here. It explains that agency authority over declaratory orders is akin to the authority of courts under the Declaratory Judgment Act:

> The purpose of section 5 (d) [now 5(e)], like that of the Declaratory Judgment Act (28 U.S.C. 400), is to develop predictability in the law.
>
> This grant of authority to the agencies to issue declaratory orders is limited by the introductory clause of section 5 so that such declaratory orders are authorized only with respect to matters which are required by statute to be determined "on the record after opportunity for an agency hearing."

Department of Justice, Attorney General's Manual on the Administrative Procedures Act 59 (1947), available at http://archive.law.fsu.edu/library/admin/1947iv.html. As the Supreme Court held in Franchise Tax Bd., the Declaratory Judgment Act did not "extend" federal courts' jurisdiction, but merely "enlarged the range of remedies available." 463 U.S. at 15 (quoting Skelly Oil Co. v. Phillips

Petroleum Co., 339 U.S. 667 (1950)). Thus, "if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking." Id. at 16.

The same analysis applies here. STB's issuance of a "declaratory order" under APA section 5(e) cannot transform an affirmative defense in a state court action into a claim arising under federal law over which federal courts may exercise jurisdiction. It should not matter that the APA, and not the Declaratory Judgment Act, provides the vehicle by which STB action is now being reviewed. See Franchise Tax Bd., 463 U.S. at 18-20 (applying the Skelly Oil rule even though the claim originated as a state declaratory claim – and not under the federal Declaratory Judgment Act – because not doing so would backdoor in state claims as federal claims simply by pleading a state declaratory claim).

B. The Court Should Give Preclusive Effect to the Final State Court Judgment in Atherton.

The Declaratory Order constitutes an improper attempt to collaterally attack the final judgment in Atherton, which should be given preclusive effect by this Court. Indeed, STB's action here is akin to the Federal Communications Commission's "declaratory ruling" in Town of Deerfield, New York v. Fed. Communications Comm'n, 992 F.2d 420 (2d Cir. 1993), where the agency opined through a declaratory order that a local ordinance was preempted by federal law after the state court found that it was not preempted and a federal court gave

preclusive effect to the state court judgment. The Second Circuit held that "in deciding to disregard or override the judgment" of the prior courts through a declaratory ruling, "the FCC contravened several statutory and constitutional principles." Id. at 427. Deerfield concluded that (1) the state court had jurisdiction over, and concurrent authority to decide, petitioner's preemption claims, and (2) a federal court must give preclusive effect to the state court judgment. Id. at 428-29. The FCC's post-judgment attempt "to arrogate to itself the power to (a) review or (b) ignore the judgments of the courts" on the question of preemption was thus "impermissible." Id. at 30.

Likewise here, the doctrine of collateral estoppel instructs that this Court should give no legal effect to STB's belated Declaratory Order, which opines that Atherton was wrongly decided. A "'federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered' under the Constitution's Full Faith and Credit Clause and under 28 U.S.C. § 1738." Holcombe v. Hosmer, 477 F.3d 1094, 1097 (9th Cir. 2007) (quoting Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75, 81 (1984)). "A party's ability to relitigate an issue decided in a prior state court determination depends on the law of the state in which the earlier litigation occurred." Kinslow v. Ratzlaff, 158 F.3d 1104, 1105 (10th Cir. 1998). In California, collateral estoppel or issue preclusion attaches to bar relitigation of

the same issue where (1) the issue is identical to the one decided in the prior proceeding; (2) the issue was actually litigated and decided in a final ruling on the merits; and (3) the party barred by preclusion is the same as, or in privity with, the party in the prior proceeding. Lucido v. Superior Court, 51 Cal. 3d 335, 341 (1990). In this case, the Authority fully litigated the preemption issue in Atherton and elected not to pursue further judicial relief, rendering that Court of Appeal decision final and binding on the Authority as to the High-Speed Rail project. STB's post-judgment disagreement with the state court's reasoning cannot override or alter the judicial decision and thus should not be afforded any legal effect.

C. The Declaratory Order Does Not Constitute a Judicially-Reviewable "Final Order" Under the Hobbs Act.

Even if this Court has subject matter jurisdiction, STB's Declaratory Order does not constitute a judicially reviewable "final order" under the Hobbs Act. 28 U.S.C. §§ 2342, 2344. The Hobbs Act "final order" requirement "is analytically equivalent" to the APA's "final agency action" requirement and must, therefore, be evaluated under the finality factors articulated in Bennett, 520 U.S. at 177-78. US West Communications, Inc. v. Hamilton, 224 F.3d 1049, 1055 (9th Cir. 2000). The second Bennett factor – whether the agency action is "one by which rights or obligations have been determined, or from which legal consequences will flow" – is not satisfied here because the Declaratory Order is nothing more than an advisory opinion intended to second-guess a final state court judgment.

As this Court explained in dismissing a petition for review that challenged the Federal Communication Commission's failure to issue a requested declaratory order:

> [E]ven if the FCC had issued a general declaratory order as the Coalition requested, any review by this court would amount to an advisory opinion prohibited under Article III of the Constitution. While the FCC might properly issue such a general declaration which does not settle an actual controversy between adverse parties, this court cannot. As the Supreme Court has explained, "This Court ... reviews judgments, not statements in opinions.... However appropriate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions."

Coalition for a Healthy California v. F.C.C., 87 F.3d 383, 386 (9th Cir. 1996) (citations omitted).

For the same reason, the Court has declined to review an Army Corps' "jurisdictional determination" as to the applicability of the Clean Water Act:

> [The determination] does not itself command Fairbanks to do or forbear from anything; as a bare statement of the agency's opinion, it can be neither the subject of "immediate compliance" nor of defiance. Up to the present, the Corps has "expresse[d] its view of what the law requires" of Fairbanks without altering or otherwise fixing its legal relationship. This expression of views lacks the "status of law or comparable legal force."

Fairbanks North Star Borough v. U.S. Army Corps of Engineers, 543 F.3d 586, 593-94 (9th Cir. 2008) (citations omitted); see also e.g., Belle Co. v. U.S. Army Corps of Engineers, 761 F.3d 383, 394 (5th Cir. 2014) cert. denied sub nom. Kent Recycling Servs., LLC v. U.S. Army Corps of Engineers, 135 S. Ct. 1548 (2015)

(Army Corps jurisdictional determination does not "alter the legal regime" as required by Bennett).

While STB is entitled to opine on any subject, it does not have statutory authority, or any particular competence, to decide the important federalism and state sovereignty issues that undergird preemption analysis. As explained above, the Termination Act limits STB's jurisdiction and regulatory authority to (1) certifying new or expanded lines, new operators of an existing line, and abandonment of old lines and (2) adjudicating common carrier disputes. While STB frequently offers its opinion on preemption in connection with its license proceedings, the agency has no special expertise in relevant state laws, like CEQA and Proposition 1A, or in balancing national and state interests. See generally Ernest A. Young, Executive Preemption, 102 Nw. U. L. Rev. 869 (2008) (arguing that preemption doctrine is a particularly important safeguard for protecting state autonomy and the constitutional concept of federalism and that democratically unaccountable federal agencies have strong incentives to overread their statutory authority). Indeed, as discussed below, STB has confused the preemption doctrine with dormant Commerce Clause jurisprudence, using that error to significant expand its own jurisdiction at the expense of local communities and in contradiction to clear congressional intent to limit the agency's reach.

The recent decision in American Tort Reform Ass'n v. Occupational Safety & Health Admin., 738 F.3d 387 (D.C. Cir. 2013), is particularly instructive. There, a tort reform organization challenged language in OSHA's revised hazardous communication standard which reflected the agency's view that the standard preempted state regulatory requirements but not state tort claims. Id. at 390. Because OSHA has no explicit statutory authority to determine the preemptive effect of its organic act, the agency's legal opinion regarding preemption was not a "legislative rule" with the "force of law," but merely "an interpretative statement that 'advise[s] the public of the agency's construction of the statute[ ] ... it administers.'" Id. (quoting Shalala v. Guernsey Memorial Hosp., 514 U.S. 87, 99 (1995)). Like STB here, OSHA had issued numerous statements expressing its views on the preemptive effect of its hazardous communications standard and reiterated those statements in its revised final rule. Id. at 391-92. The Court held that such interpretative statements are not subject to judicial review unless OSHA relies on them to take action in a particular case:

> When an agency issues an interpretative rule or statement, an interpretative guideline, or a policy statement with respect to a matter that it is not empowered to decide, the interpretative rule, statement, guideline, or policy statement merely informs the public of the agency's views on the subject. It does not, however, create "adverse effects of a strictly legal kind" because it cannot "command anyone to do anything or to refrain from doing anything." As a result, controversies over such interpretative rules, statements, guidelines, and policy statements typically cannot result in justiciable disputes.

Id. at 393 (quoting National Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 809 (2003)).

Here, STB's own filings on the High-Speed Rail project concede that the agency has no legal authority to require that California construct a new rail line and no business instructing state decision-makers on the viability of such an endeavor; its only role is to permissively respond to the state's application for federal certification of construction when a new line connects to the existing interstate rail system. 2013 WL 3053064 , at *12 (this action is "permissive," not "mandatory"). Moreover, while acknowledging that the state's decisions are governed by state laws like CEQA and Proposition 1A over which it has no expertise, STB nevertheless offers its "views" that CEQA is "categorically preempted" by the Termination Act – a sweeping legal opinion that seeks to expand federal law beyond anything Congress envisioned and to limit the ability of states and local communities to make their own decisions in a way that protects their residents, their treasury, and their environment. Because the Declaratory Order, issued solely to contradict a final state court judgment, has no legal effect, this Court should conclude that it is not a judicially reviewable "final order" under the Hobbs Act.

II. The Court Should Abstain from Deciding this Case in Recognition of Important State Interests in Environmental Protection.

Even if this case is properly before the Court, it should abstain from reaching the merits until resolution of the parallel Eel River case, which raises substantially similar preemption issues. Although various mandatory abstention doctrines arguably apply here – Petitioners, for instance, address both Pullman and Burford abstention – the prudential abstention doctrine articulated in Colorado River Water Conservation District v. U.S., 424 U.S. 800 (1976), is also directly relevant to the facts of this case. There, after finding that no formal abstention doctrine squarely applied, the Supreme Court nevertheless dismissed the case on consideration of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Id. at 817 (internal quotations and citation omitted).

This Court has developed an eight-factor test for assessing whether Colorado River warrants abstention, six of which are relevant here:

> (1) the desire to avoid piecemeal litigation; (2) the order in which the forums obtained jurisdiction; (3) whether federal law or state law provides the rule of decision on the merits; (4) whether the state court proceedings can adequately protect the rights of the federal litigants; (5) the desire to avoid forum shopping; and (6) whether the state court proceedings will resolve all issues before the federal court.

R.R. St. & Co. v. Transp. Ins. Co., 656 F.3d 966, 978-79 (9th Cir. 2011) (numbers altered from (3)-(8) to (1)-(6)). All of these factors favor abstention here.

A. State Interests Are Paramount in the Pending CEQA Litigation, Favoring Abstention.

As a threshold matter, abstention is warranted because the pending Eel River case and the seven stayed High-Speed Rail CEQA cases implicate important state interests. See United States v. California, 639 F. Supp. 199, 204 (E.D. Cal. 1986) (relying on Younger, Pullman, and Colorado River abstention principles to dismiss case in similar posture because "California has a fundamental interest" in (1) "enforcing its Environmental Quality Act," and (2) "the efficient operation of its state court system"). In that case, the federal government brought a declaratory and injunctive relief action seeking to enjoin, on federal preemption grounds, California and its Attorney General from enforcing CEQA against an airline. Dismissing on abstention grounds, the court explained that the federal suit "in effect, would nullify" a state trial court decision – then on appeal – that CEQA applied, "would result in a serious interference with the fundamental operation of the state court system," and would wade into "a sensitive area of social policy [of enforcement of environmental laws] into which a federal court should not intrude unnecessarily." Id. at 200-01, 206-07.

Similarly, in Woodfeathers, Inc. v. Washington Cty., 180 F.3d 1017 (9th Cir. 1999), this Court dismissed an action challenging the constitutionality of an enforcement action based on a county solid waste ordinance, citing Younger abstention principles, because the pending state appeal "implicates important state

interests." Id. at 1021. See also Transamerica Occidental Life Ins. Co. v. DiGregorio, 811 F.2d 1249, 1253 & nn.4-5 (9th Cir. 1987) (upholding abstention where litigant attempted to use declaratory action in response to state court action "to deprive a plaintiff of his choice of forum or to encourage a race to judgment" in federal court; citing long line of 9th Cir. cases disapproving of such maneuvers); FedEx Ground Package Sys., Inc. v. Ingenito, 86 F. Supp. 3d 1121, 1124 & 1127 (E.D. Cal. 2015) (FedEx's federal declaratory judgment action in anticipation of a state civil enforcement action – later filed, alleging violations of the state hazardous waste laws – dismissed; important state interest in the exercise of police powers in "matters relating to public health" present).

The question in these abstention cases is not whether the state law at issue is preempted, but whether preemption is "readily apparent" on the face of the record before the Court. Woodfeathers, 180 F.3d at 1021-22. Here, the issue of whether CEQA preempts the state's internal decision-making process before a rail line is built or operated is an issue of first impression before the California Supreme Court, with two split appellate decisions. Thus, federal preemption is not readily apparent on the record before this Court, and abstention is warranted.

B. The Remaining Colorado River Factors Also Favor Abstention.

Here, the interest in avoiding piecemeal litigation, the order in which the state courts obtained jurisdiction, the state courts' ability to afford the Authority

full relief, and the interest in discouraging forum shopping all favor abstention.

"Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." Am. Int'l Underwriters, (Philippines), Inc. v. Cont'l Ins. Co., 843 F.2d 1253, 1258 (9th Cir.1988). A decision by this Court plainly would be duplicative of Atherton, the other stayed High-Speed Rail CEQA challenges, and Eel River – all cases that the state courts are fully competent to hear and that are, in fact, being adjudicated. The Atherton and Eel River cases, as well as the other (now-stayed) CEQA challenges to the adequacy of the Authority's EIR, have been pending for several years and preceded the Authority's eleventh-hour Petition for Declaratory Order, STB's Declaratory Order itself, and Appellants' Petition for Review to this Court. See, e.g., Authority's Petition for Declaratory Order at 4, n.2 ("Each of the [seven state CEQA] lawsuits is currently in the Superior Court for the State of California, Sacramento County"). The parallel legal issues raised by STB's Declaratory Order are now squarely before the California Supreme Court and should be decided there.

In the end, the Authority's Petition for Declaratory Order to STB amounts to nothing more than transparent "forum shopping" to circumvent proper state court jurisdiction in the pending High-Speed Rail cases and the Eel River case. See, e.g, Cerit v. Cerit, 188 F. Supp. 2d 1239, 1251 (D. Haw. 2002) (describing classic forum shopping as filing in federal court in an attempt to obtain a different result).

That forum shopping "weighs strongly in favor of abstention." See Nakash v. Marciano, 882 F.2d 1411, 1417 (9th Cir. 1989). Thus, the Court should abstain and dismiss this action or, in the alternative, stay the matter pending a decision in Eel River.[13]

III. On the Merits, There Is No Termination Act Preemption in This Case.

If the Court reaches the merits of the Declaratory Order, it should conduct a full and proper federal preemption analysis, applying the standards articulated by the Supreme Court, not the short-cut evaluation presented by STB. Such an analysis leads inextricably to the conclusion that there is no federal preemption in this case.

A. Courts Must Proceed with Caution in Finding Preemption.

Federal preemption analysis "must be guided by two cornerstones of [the Supreme Court's] pre-emption jurisprudence." Wyeth v. Levine, 555 U.S. 555, 565 (2009). First, preemption is fundamentally a question of congressional intent. Id. (citing Medtronics, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). To determine the

[13] Dismissal here is also consistent with Brillhart v. Excess Insurance Co. of America, 316 U.S. 491, 494-95 (1942) (court has discretion to dismiss a declaratory judgment action when "the questions in controversy . . . can better be settled in" a pending state court proceeding), and Wilton v. Seven Falls Co., 515 U.S. 227, 289-90 (1995) (court may decline to entertain a federal declaratory judgment action when state court proceedings "'present[] opportunity for ventilation of the same state law issues'"). The three factors relevant in making a Brillhart/Wilton determination are (1) avoiding needless determination of state law issues; (2) discouraging forum shopping; and (3) avoiding duplicative litigation. Government Employees Ins, Co., v. Dizol, 133 F.3d 1220, 1225 (9th Cir. 1998).

scope of preemption, courts look not only to the preemption clause, but also to the statutory structure and purpose. Wyeth, 555 U.S. at 588; Medtronics, 518 U.S. at 486. Second, in all preemption cases, courts "start with the presumption that the 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., 331 U.S. 218, 230 (1947). This presumption applies "particularly" where "Congress has 'legislated . . . in a field which the States have traditionally occupied.'" Wyeth, 555 U.S. at 565; see also Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1141 (9th Cir. 2015).

With respect to environmental matters, states have unquestionably retained their sovereign police powers "to adopt a wide range of laws in order to protect the health, safety, and welfare of its own residents." Pacific Merchant Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1162 (9th Cir. 2011), cert. denied, 133 S. Ct. 22 (2012). CEQA is a law so adopted. Cal. Pub. Res. Code § 21000 ("The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern."). The party seeking to overcome the presumption against preemption thus bears a heavy burden. De Buono v. NYSA–ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997). The scope of preemption, if any, is to be determined while keeping this presumption in mind. Medtronics, 518 U.S. at 485. That is, because states are "independent sovereigns,"

courts "have long presumed that Congress does not cavalierly pre-empt state-law causes of action." Id. Accordingly, "[t]he applicable preemption provision must be read narrowly 'in light of the presumption against pre-emption of state police power regulations.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (2008) (quotations omitted).

B. The Termination Act Does Not Expressly Preempt CEQA.

On its face, section 10501(b) of the Termination Act does not expressly – or "categorically" – preempt CEQA. It 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." 49 U.S.C. § 10501(b) (emphasis added). CEQA does not regulate rail transportation or provide any remedy with respect to the "regulation" of rail "transportation."[14] And it certainly does not implicate the economic regulation of rates, schedules, and classifications with which Congress was concerned when it drafted the preemption language in the Staggers Act, as recodified substantially unchanged in the Termination Act. Rather, CEQA is a state environmental

[14] "Transportation" is defined as "related to the movement of passengers or property, or both, by rail" and "services related to that movement." 49 U.S.C. § 10102(5), (9). Even if CEQA's environmental review and disclosure obligations are considered regulations, they are not related to rail movements. See Dan's City Used Car, Inc. v. Pelkey, 133 S. Ct. 1769, 1779 (2013) (state consumer and tort claims are not related to "movement" under a similar statute).

disclosure law which, in this case, must be satisfied before the Authority moves forward with planning and funding a public railroad.

As other courts have found, "Congress narrowly tailored the [Termination Act] preemption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001). This plain language analysis "is bolstered by the history and purpose of the ICCTA itself," which shows that the Termination Act's statutory changes "reflect the focus of legislative attention on removing direct economic regulation by the States, as opposed to the incidental effects that inhere in the exercise of traditionally local police powers such as zoning." Id. at 1337. As the Third Circuit has explained:

> The Termination Act regulates, *inter alia*, rail carriers' rates, terms of service, accounting practices, ability to merge with one another, and authority to acquire and construct rail lines. . . . Thus it regulates the economics and finances of the rail carriage industry—and provides a panoply of remedies when rail carriers break the rules.

New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (noting that "the Act's subject matter is limited to deregulation of the railroad industry"); see also Illinois Commerce Comm'n v. Interstate Commerce

Comm'n, 879 F.2d 917, 925 (D.C. Cir. 1989) (Staggers Act's "central focus" was "economic regulation of railroads").

STB's preemption analysis in the Declaratory Order confuses the agency's "public convenience and necessity" licensing jurisdiction over construction of new lines with the separate and different preemption language related to "regulation of rail transportation." STB insists that section 10501(b) "prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., rail carrier rates, services, construction, and abandonment)." 2014 WL 7149612, *6. The "e.g.," clause in this statement is simply wrong as a matter of statutory construction. While STB regulates and adjudicates carrier rates and services under sections 10701-10747, it does not regulate or engage in planning for rail line construction and abandonment. Rather, under sections 10901-10910, STB permissively licenses these components of the interstate system in response to carrier applications to ensure against overbuilding and monopolistic behavior. For public and private railroads alike, all of the planning and funding that precedes new line construction and existing line rehabilitation is governed by state and local land use and financial requirements. STB's only role is to certify (or not) these planned infrastructure improvements as appropriate for the interstate rail system.

By conflating jurisdiction with preemption and then overstating the reach of its certification jurisdiction, STB reaches the erroneous – and, frankly, startling –

legal conclusion that all "state or local permitting or preclearance requirements, including environmental permitting or preclearance requirements, are categorically preempted as to any rail lines or facilities." 2014 WL 7149612, *6. STB's expansive interpretation is entirely at odds with the Supreme Court's cautious preemption jurisprudence and with this Court's admonition that "because 'everything is related to everything else,' . . . understanding the nuances of congressional intent is particularly important" for preemption analysis. Dilts v. Penske Logistics, LLC, 769 F.3d 637, 643 (9th Cir. 2014) (quoting California Div. of Labor Standards Enf't v. Dillingham Const., N.A., Inc., 519 U.S. 316, 335 (1997) (Scalia, J., concurring)).

In Dilts, the Court interpreted the statutory preemption language of the Federal Aviation Administration Authorization Act ("FAAAA") – a statute which, like the Termination Act, borrowed language from the Airline Deregulation Act with the intent of facilitating reliance on competitive market forces and ensuring that states would not undo federal deregulation efforts. 769 F.3d at 643-44. Similar to Termination Act section 10501(b), the FAAAA provides that "States may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Dilts narrowly read "with respect to transportation" to preempt state laws that "operate at the point where carriers provide services to customers at specific

prices," but not "generally applicable background regulations that are several steps removed from prices, routes, or services . . . even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide." 769 F.3d at 646. "Such laws are not preempted even if they raise the overall cost of doing business or require a carrier to re-direct or reroute some equipment." Id.

The same logic applies here. CEQA is a generally applicable background law for public projects, and it operates at the pre-project planning stage, not at the point where carriers provide rail transportation services to shippers at specific prices. The fact that environmental disclosure and mitigation may alter a proposed rail project or make it more costly is irrelevant to the express preemption analysis. Indeed, if STB's "categorical preemption" argument were correct, then the joint NEPA process in which the Federal Railroad Administration engaged here would likewise be preempted, as would STB's own NEPA processes, because section 10501(b) applies equally to "remedies provided under Federal and State law." Just as a successful CEQA enforcement action may temporarily enjoin and delay a proposed rail project while the public agency corrects errors in an EIR, a successful NEPA challenge may prompt a federal court to "hold unlawful and set aside" a defective EIS. 5 U.S.C. § 706(2).

Wisely, STB has never argued that NEPA compliance and enforcement is preempted. In fact, STB has promulgated its own NEPA regulations to guide various Termination Act decisions, 49 C.F.R. §§ 1105.1-1105.12, and this Court routinely reviews the adequacy of STB's NEPA compliance. Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073 (9th Cir. 2013); Northern Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067 (9th Cir. 2011). If NEPA review of rail projects is compatible with the language of section 10501(b), so too is CEQA review.

C. Compliance with CEQA Does Not Frustrate or Conflict with Congressional Intent Behind the Termination Act.

STB also fundamentally erred in its implied – or "as applied" – preemption analysis. As a threshold matter, it is worth noting that the Declaratory Order applies the wrong test for implied preemption. Implied "conflict pre-emption exists where 'compliance with both state and federal law is impossible,' or where 'the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1595 (2015) (internal quotations and citations omitted). The Declaratory Order misstates this test, suggesting that state laws are impliedly preempted "if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-specific determination based on the circumstances of each case." 2014 WL 7149612, *6. STB's much broader "unreasonable burden"

standard seems to have been borrowed from Commerce Clause jurisprudence, see National Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1148 (9th Cir. 2012) ("[a] critical requirement for proving a violation of the dormant Commerce Clause is that there must be a substantial burden on interstate commerce"), although no party has raised concerns here that the High-Speed Rail project constitutes state economic protectionism. See Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1087 (9th Cir. 2013) (in contrast to the preemption doctrine, explaining the modern dormant Commerce Clause "is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors'").

In any event, the Supreme Court in Oneok emphasized "the importance of considering the target at which the state law aims in determining whether that law is pre-empted." 135 S. Ct. at 1599. There, the Court held that a state antitrust lawsuit for false price reporting, wash trades, and anticompetitive collusive behavior was not preempted by the Federal Energy Regulatory Commission's jurisdiction over interstate natural gas rates, including federal authority to issue rules and regulations to prevent "any manipulative or deceptive device or contrivance" for interstate sales. Id. at 1601. In so holding, the Court emphasized that the target of the antitrust lawsuit (collusive retail rates) was properly actionable under a state law of general applicability, even though application of

that law "might well raise pipelines' operating costs, and thus the costs of wholesale natural gas transportation." Id. at 1601.

Similarly, the Supreme Court held in Dan's City that state law consumer protection claims were not within the "target at which [Congress] aimed" in the FAAAA; that target was "a State's direct substitution of its own governmental commands for competitive market forces." 133 S. Ct. at 1774. As this Court acknowledged in Dilts, the Termination Act takes aim at the same target.

Dan's City and Oneok are directly relevant here. As was true for the generally applicable state law at issue in each of them, CEQA does not target rail transportation or stand as an obstacle to accomplishing Congress' intent to deregulate the rail industry and make the market more competitive. CEQA generally targets environmentally sound and transparent decision-making by public officials, and in this case, specifically targets full accountability by a public agency spending billions of taxpayer dollars to build an ambitious public rail project. The fact that a CEQA enforcement action could delay the High-Speed Rail project or compel the Authority to evaluate other alternatives or mitigation measures does not alter the relevant legal analysis for conflict preemption, which does not exist here.

D. STB's Legal Interpretation Is Not Entitled to Deference.

As the Supreme Court noted in Wyeth, agencies have "no special authority to pronounce on pre-emption absent delegation by Congress." 555 U.S. at 577.

Unlike some federal statutes, the Termination Act does not convey authority on STB to interpret the scope of federal preemption under section 10501(b). See, e.g., 21 U.S.C. § 360k (authorizing FDA to determine the scope of the Medical Devices Amendment's pre-emption clause); 30 U.S.C. § 1254(g) (authorizing Secretary of the Interior to determine preemption under federal surface coal mining program); 47 U.S.C. § 253(d) (authorizing FCC to determine that a state or local law is preempted); 49 U.S.C. § 5125(d) (authorizing Secretary of Transportation to determine preemption under Hazardous Materials Transportation Act). The weight afforded STB's interpretation of the preemption clause depends, therefore, on its thoroughness, consistency, and persuasiveness. Wyeth, 555 U.S. at 577.

For the reasons identified above, no deference to STB's preemption analysis is warranted here. First, although STB is an agency of limited authority with no congressional mandate for comprehensive planning or plenary infrastructure regulation, it improperly used the APA's "declaratory order" vehicle, outside the confines of any adjudicatory proceeding, to override the preclusive effect of a final state court decision, at the behest of the unsuccessful party. Second, the Declaratory Order conflated STB's historic rate regulation power with its much more limited infrastructure licensing jurisdiction in opting for a broadly preemptive regime that would abrogate the states' traditional planning and funding authority for public rail projects. Third, STB failed to apply the Supreme Court's

preemption jurisprudence, instead invoking dormant Commerce Clause principles to analyze implied preemption. And fourth, the Declaratory Order's truncated preemption discussion effectively ignored applicable rules of construction (e.g., presumption against preemption, congressional intent), as well as relevant recent Supreme Court and Ninth Circuit precedent. These serious defects render STB's interpretation wholly unpersuasive.

At the end of the day, STB's position is perhaps best encapsulated in its admonition that CEQA "could be used to deny or significantly delay an entity's right to construct a line that the Board has specifically authorized, thus impinging upon the Board's exclusive jurisdiction over rail transportation." 2014 WL 7149612, *7. This statement improperly seeks to expand STB's limited role in the construction of new rail lines beyond anything that Congress envisioned when it terminated the Interstate Commerce Commission and deregulated the economics of the rail industry. Although STB has permissive discretion to certify a new line as part of the interstate rail system in response to a license application, the agency has no statutory power to create a "right to construct" new lines in violation of state law. Nor can STB commandeer the California state treasury to compel the financing and completion of a proposed new line prior to full compliance with the state's bedrock environmental disclosure law – a project condition that the voters themselves mandated. With issuance of the Declaratory Order, STB has

overstepped and overreached – and offered defective legal reasoning for its conclusions. Accordingly, the Court should not accord any deference to STB's flawed legal opinion.

CONCLUSION

Amicus Curiae respectfully requests that the Court dismiss, or in the alternative stay resolution of, this case. If the Court reaches the merits, it should hold that the Termination Act does not expressly or impliedly preempt CEQA in this case.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCEPURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 11,865 words, exclusive of tables, signature blocks, and cover sheet, as calculated by the word processing program on which it was drafted.

Dated: Dec. 28, 2015

/s/ Deborah A. Sivas
Deborah A. Sivas

CERTIFICATE OF SERVICE

I hereby certify that on I electronically filed the foregoing PROPOSED AMICUS CURIAE BRIEF OF CENTER FOR BIOLOGICAL DIVERSITY IN SUPPORT OF NEITHER PARTY FOR ABSTENTION OR REVERSAL OF THE SURFACE TRANSPORTATION BOARD'S DECISION with the Clerk of the Court by using the CM/ECF system on December 28, 2015. All but one party to the case are registered CM/ECF users and were served by receipt of electronic notification through the Court's CM/EFC system.

In addition, I certify that the following party, who is not registered on CM/ECF was served by first class mail, postage prepaid:

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