SUPREME COURT
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Case No. S222472

In the Supreme Court of the State of California

FRIENDS OF THE EEL RIVER AND CALIFORNIANS FOR ALTERNATIVES TO TOXICS,
Plaintiffs and Appellants,

vs.

NORTH COAST RAILROAD AUTHORITY AND BOARD OF DIRECTORS OF NORTH COAST RAILROAD AUTHORITY,
Defendants and Respondents,

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Real Party in Interest and Respondent.

After a Decision by the Court of Appeal
First Appellate District, Division One, Case Nos. A139222, A139235

Appeal from Superior Court of the State of California for the County of Marin
Case Nos. CIV 1103605, CIV 1103591
The Honorable Roy Chernus, Presiding

PLAINTIFFS' SECOND REQUEST FOR JUDICIAL NOTICE

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MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Pursuant to Rules 8.520(9) and 8.252(a) of the California Rules of Court and Sections 452(d) and 459 of the Evidence Code, Plaintiffs Friends of the Eel River and Californians for Alternatives to Toxics hereby move this Court to take judicial notice of Exhibit A, attached hereto. This document was not presented to the trial court because it relates to the California Attorney General's filing of amicus brief in this proceeding.

Exhibit A contains a true and correct copy of Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint for Injunctive and Declaratory Relief, *Ass'n of Am. R.Rs. v. Cal. Office of Spill Prevention and Response*, Case No. 2:14-cv-02354-TLN-CKD (E.D. Cal. Oct. 30, 2014).

Evidence Code section 459 allows a reviewing court to take judicial notice of any matter specified in section 452. Section 452(d) allows a court to take judicial notice of "[r]ecords of . . . any court of record of the United States." Exhibit A is an official court record filed by the California Attorney General's Office in a proceeding before the U.S. District Court for the Eastern District of California, and it is relevant to the Attorney General's arguments with respect to the preemptive reach of the Interstate Commerce Commission Termination Act. In Exhibit A, the Attorney General argues that the ICCTA does not preempt generally-applicable state

laws. including "direct environmental regulations," that have only a remote or incidental effect on rail transportation. This assertion supports Plaintiffs' arguments in the present case that the ICCTA does not preempt the application of CEQA to a public rail agency's internal decisionmaking process regarding the repair and reopening of the North Coast Rail Line.

For the foregoing reasons, the Plaintiffs respectfully request that the Court grant this Motion.

Dated: August 26, 2015

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ASSOCIATION OF AMERICAN RAILROADS, UNION PACIFIC RAILROAD COMPANY AND BNSF RAILWAY COMPANY, Plaintiffs, **v.** **CALIFORNIA OFFICE OF SPILL PREVENTION AND RESPONSE, THOMAS M. CULLEN, JR., CALIFORNIA ADMINISTRATOR FOR OIL SPILL RESPONSE, in his official capacity, AND KAMALA D. HARRIS, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, in her official capacity,** Defendants.	Case No. 2:14-cv-02354-TLN-CKD **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF** Date: December 11, 2014 Time: 2:00 p.m. Dept: 2 Judge: The Honorable Troy L. Nunley Trial Date: None Set Action Filed: October 7, 2014

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Defendants California Office of Spill Prevention and Response (OSPR), Thomas M. Cullen, Jr., California Administrator for Oil Spill Response (Administrator), and Kamala D. Harris, Attorney General of the State of California (Attorney General) (collectively, Defendants), hereby move to dismiss the Complaint for Injunctive and Declaratory Relief on file in this action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), as set forth below.

INTRODUCTION

Acting in response to the potential threats posed by discharges of oil into state waters, the California Legislature passed S.B. 861, which became law on June 20, 2014. S.B. 861 amended and expanded the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, Cal. Gov't Code §§ 8574.1–8574.10, 8670.1–8670.95 and Cal. Pub. Res. Code §§ 8750–8760 (Lempert-Keene Act), to protect all waters of the state, not just marine waters. To that end, S.B. 861 imposes certain requirements on "facilities" located where an oil spill could impact state waters. The requirements, including oil spill contingency plans and certificates of financial responsibility, are designed to facilitate response and cleanup in the event of a spill, thereby promoting health and safety and protecting the natural resources of the state. One of the "facilities" that is now subject to these requirements is a railroad transporting oil as cargo; other facilities to be regulated include oil production facilities and pipelines transporting oil, among others.

Less than three months after S.B. 861 was enacted and while collaborating with the Administrator to develop implementing regulations, plaintiffs Association of American Railroads, Union Pacific Railroad Company, and BNSF Railway Company (the Railroads) filed this action, seeking injunctive and declaratory relief against OSPR, the Administrator, and the Attorney General. The Railroads allege that S.B. 861 is preempted by the Federal Railroad Safety Act, 49 U.S.C. §§ 20101–20167 (FRSA), the Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended in scattered sections of 49 U.S.C.) (ICCTA), the Locomotive Inspection Act, 49 U.S.C. §§ 20701–20703, and the Safety Appliance Act, 49 U.S.C. §§ 20301–20306. They also allege that S.B. 861 violates the Interstate Commerce Clause. However, these claims are premature and therefore should be dismissed.

1 Upon its effective date, S.B. 861 did not impose any affirmative obligations on the
2 Railroads or any other facilities subject to the new requirements. Rather, S.B. 861 expressly
3 provides that the Administrator shall adopt regulations implementing the statute. Those
4 regulations will specify the required components of an oil spill contingency plan and describe the
5 types of evidence of financial responsibility that will support issuance of a certificate of financial
6 responsibility, among other things. The Administrator's team has been working with
7 stakeholders and other government entities to develop draft regulations, but that collaboration is
8 ongoing and no draft language has been formally proposed.
9 Until the implementing regulations are finalized, the Railroads' claims are unripe.
10 Article III of the United States Constitution limits the Court's jurisdiction to actual cases or
11 controversies. Where, as here, a plaintiff brings a pre-enforcement challenge to a statute, there
12 must be a genuine threat of imminent prosecution. Such threat is absent in this case at this time.
13 The Administrator previously notified the Railroads, as well as other entities potentially subject to
14 the implementing regulations, that the new S.B. 861 requirements would not be enforced until
15 after the regulations are finalized, and the Railroads' own Complaint agrees that no enforcement
16 action should be taken until after regulations are finalized.
17 Even if the minimum constitutional requirements were met, the Court should decline
18 to exercise jurisdiction pursuant to the prudential components of the ripeness doctrine. Absent
19 the issuance of final implementing regulations, the preemption issues identified in the Complaint
20 are not fit for review. A complete preemption analysis will not be possible until the boundaries of
21 S.B. 861 are better delineated by the issuance of implementing regulations.[1] And, in light of the
22 fact no enforcement is imminent, there is no danger the Railroads will suffer hardship if the Court
23 withholds jurisdiction at this time. As such, the Court should dismiss the Complaint as unripe.
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[1] Defendants vehemently dispute Plaintiffs' assertion that the federal statutes on which Plaintiffs' preemption arguments are based apply to and preempt S.B. 861. Defendants are confident that the final regulations will substantiate this position. However, because S.B. 861 expressly requires the adoption of regulations that will explain and clarify the statute's reach, it is simply too soon for a complete preemption analysis.

Further, even if the Railroads' claims were ripe to proceed against the Administrator and the Attorney General, their claims against OSPR are barred by the Eleventh Amendment of the United States Constitution and therefore should be dismissed.

BACKGROUND: S.B. 861

I. THE LEMPERT-KEENE-SEASTRAND OIL SPILL PREVENTION AND RESPONSE ACT RESPONDED TO CONCERNS REGARDING DISCHARGES OF OIL INTO MARINE WATERS OF THE STATE.

The Lempert-Keene Act was originally enacted to address the significant threat posed by discharges of petroleum into marine waters of the State of California by vessels and marine facilities along the coast. Cal. Gov't Code § 8670.2 (amended June 20, 2014). The legislative findings and declaration explained that transportation of oil can be a significant threat to environmentally sensitive areas, and "California's coastal waters, estuaries, bays, and beaches are treasured environmental and economic resources which the state cannot afford to place at undue risk from an oil spill." Cal. Gov't Code § 8670.2(b), (e) (amended June 20, 2014). Further, the legislature found that the state government should improve its response and management of oil spills that occur in marine waters. Cal. Gov't Code § 8670.2(j) (amended June 20, 2014).

When first enacted, the Lempert-Keene Act required, *inter alia*, the administrator for oil spill response "to adopt and implement regulations governing the adequacy of oil spill contingency plans to be prepared and implemented and . . . for the best achievable protection of coastal and marine waters." Cal. Gov't Code § 8670.28(a) (amended June 20, 2014).

II. S.B. 861 EXPANDED THE ACT TO COVER ALL WATERS OF THE STATE.

In June of 2014, S.B. 861 expanded the Lempert-Keene Act and the Administrator's responsibilities to cover not only "coastal and marine waters," but "all aspects of any oil spill in waters of the state." *Id.*; see also Cal. Gov't Code § 8670.3(ag).[2] As part of the Act's expansion, S.B. 861 amended the Act to apply not only to vessels and marine facilities but also to inland facilities as well, including railroads transporting oil as cargo. Cal. Gov't Code § 8670.3(g)(1), (ae). Subject to limited exceptions not applicable here, "facility" is now defined as follows:

[2] "Waters of the State" for purposes of the Act does not include ground water. Cal. Gov't Code § 8670.3(ag).

> "Facility" means any of the following located in state waters or located where an oil spill may impact state waters:
>
> (A) A building, structure, installation or equipment used in oil exploration, oil well drilling operations, oil production, oil refining, oil storage, oil gathering, oil processing, oil transfer, oil distribution, or oil transportation.
>
> (B) A marine terminal.
>
> (C) A pipeline that transports oil.
>
> (D) A railroad that transports oil as cargo.
>
> (E) A drill ship, semisubmersible drilling platform, jack-up type drilling rig, or any other floating or temporary drilling platform.

Cal. Gov't Code § 8670.3(g)(1). Thus, S.B. 861 amended the Act to impose certain requirements on a variety of facilities located *wherever* an oil spill may affect state waters. A railroad is one of many facilities with that potential.

The Administrator is expressly authorized to adopt regulations to implement the Act. Cal. Gov't Code § 8670.7.5. As relevant to this lawsuit, S.B. 861 amended the Act to require facilities to have oil spill contingency plans, participate in drills, and demonstrate financial ability to pay for cleanup and damages connected with an oil spill in state waters.

A. Oil Spill Contingency Plans

With respect to oil spill contingency plans, the Act now provides, "***In accordance with the rules, regulations, and policies established by the administrator pursuant to Section 8670.28***, an owner or operator of a facility" must have an approved oil spill contingency plan when operating in waters of the state or where a spill could impact waters of the state. Cal. Gov't Code § 8670.29(a) (emph. added). Section 8670.28, in turn, provides that the Administrator shall adopt regulations governing the adequacy of oil spill contingency plans to be prepared and implemented under the Act. Cal. Gov't Code § 8670.28(a) ("The administrator . . . shall adopt and implement regulations governing the adequacy of oil spill contingency plans to be prepared and implemented under this article."). The Complaint concedes that the Administrator must issue these regulations. Compl., ¶ 39.

In deciding whether to approve an oil spill contingency plan, the Administrator reviews whether the plan complies with the rules, regulations, and policies adopted pursuant to

sections 8670.28 and 8670.29. Cal. Gov't Code § 8670.31. Sections 8670.28 and 8670.29 broadly discuss the minimum requirements of the regulations and content of oil spill contingency plans, but *the regulations* are to specify the standards against which the plans will be compared. *See* Cal. Gov't Code §§ 8670.28(a)(1)-(11), (c), 8670.29(a), (b), (d), (e), (i).

In addition, section 8670.10 provides that the Administrator, in coordination with federal, state, and local government entities, shall carry out drills to test oil spill contingency plans, but this necessarily requires the plans have already been developed and approved. Similarly, the Act provides that the plans are subject to public review, review by response personnel and relevant agencies, periodic review by the Administrator, and updating, but those provisions all assume that the Administrator has adopted regulations and reviewed and approved a facility's oil spill contingency plan in accordance with those regulations. *See* Cal. Gov't Code §§ 8670.19, 8670.28(b), 8670.29(f), 8670.29(g), 8670.30.5, 8670.31. The same is true for provisions requiring action in accordance with applicable contingency plans. *See* Cal. Gov't Code §§ 8670.28.5, 8670.25, 8670.27(a).

B. Certificates of Financial Responsibility

The Act requires an owner or operator of a facility where a spill could impact waters of the state to apply for and obtain a certificate of financial responsibility. Cal. Gov't Code § 8670.37.51(d). To receive a certificate of financial responsibility, the applicant must demonstrate the ability to pay for any damage that might arise during a reasonable worst case scenario spill, but the statute does not explain the meaning of the phrase "demonstrate the ability to pay." Cal. Gov't Code § 8670.37.53(c)(1). Rather, this is left to the adoption of regulations implementing the provision. Cal. Gov't Code § 8670.37.53(c)(2) ("The administrator shall adopt regulations to implement this section."). Further section 8670.37.54 gives examples of how financial responsibility may be demonstrated including, for example, evidence of insurance, but again provides for implementation by the Administrator. Cal. Gov't Code § 8670.37.54(b) ("In adopting requirements under this Article, the administrator may specify policy or other contractual terms, conditions, or defenses which are necessary or which are unacceptable in

1 establishing evidence of financial responsibility, in order to effectuate the purposes of this
2 article.").

3 **C. Enforcement Provisions**

4 Criminal, civil, and administrative penalties are available for certain types of
5 knowing, intentional, and negligent violations of the Act. Cal. Gov't Code §§ 8670.64(a)(4), (b),
6 (c), 8670.66(a)(4), (b), 8670.67(a)(1), (a)(4), (b), 8670.65. The Act also provides sanctions,
7 including the possibility that the Administrator *may* issue a cease and desist order under certain
8 circumstances. Cal. Gov't Code § 8670.69.4. As stated above, the Administrator is expressly
9 authorized to adopt regulations implementing the Act, which may give further guidance as to the
10 circumstances in which these penalties are available as well as to the specific penalties that should
11 be considered for different types of statutory violations. *See* Cal. Gov't Code § 8670.7.5.

12 **III. THE ADMINISTRATOR HAS NOT YET ADOPTED REGULATIONS IMPLEMENTING THE S.B. 861 AMENDMENTS.**
13

14 The Complaint concedes that the Administrator has not adopted regulations
15 implementing any of these provisions. Compl., ¶ 39, fn. 3; *see also* Lavin-Jones Decl., ¶ 5.
16 Although the Administrator has been meeting with stakeholders, including trade groups,
17 regarding the regulations, so far drafts are only preliminary. Lavin-Jones Decl., ¶¶ 4-5.

18 Noticeably absent from the Complaint are any allegations that the Administrator or
19 the Attorney General has threatened to enforce the challenged provisions against the Railroads *in*
20 *the absence of the regulations*. While the Complaint does allege that "State officials . . . persist
21 in threatening enforcement of [S.B. 861 provisions]," it does ***not*** allege that the Administrator or
22 the Attorney General have threatened to enforce any of the challenged provisions in the absence
23 of final regulations. Compl., ¶ 1. Indeed, any such allegation would be contradicted by other
24 statements in the Complaint recognizing that S.B. 861 should not be enforced until after the
25 Administrator adopts the implementing regulations. *See, e.g.*, Compl., ¶ 46 (alleging that the civil
26 and criminal penalties available under the Act will not have any force until *after* the
27 Administrator adopts the regulations called for in S.B. 861). It would also be contradicted by
28 letters sent from the Administrator to "Rail, inland production, pipeline and mobile unit transfer

operators," which generally described the process that would be followed to develop regulations implementing S.B. 861. Yamamoto Decl., Exs. A & B. The letters, referred to in the allegations of the Complaint (¶ 39 fn. 3), expressly informed rail operators that "OSPR will not enforce the provisions of Government Code section 8670.64 through 8670.67 as they relate to contingency plans and certificates of financial responsibility until *after* the emergency regulations have been promulgated." *See* Yamamoto Decl., Ex. B, p. 1 (emph. added).

Nevertheless, on October 7, 2014, the Railroads filed this suit seeking to enjoin the Act's enforcement. Compl., ¶ 1.

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

A. Standard of Review Under Federal Rule of Civil Procedure, Rule 12(b)(1).

Under Article III of the United States Constitution, federal courts may adjudicate only cases or controversies; they may not issue advisory opinions. U.S. Const. art. III, § 2, cl. 1; *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007). The Court's subject matter jurisdiction is limited to matters "ripe" for adjudication, and if a case is not ripe, it should be dismissed. Fed. R. Civ. P. 12(b)(1); *Chandler v. State Farm Mutual Automobile Insurance Co.*, 598 F.3d 1115, 1121, 1122 (9th Cir. 2010).

When a defendant brings a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of establishing the federal court's jurisdiction. *Rattlesnake Coal. v. U.S. EPA*, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007); *Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d 1224, 1230 (E.D. Cal. 2003). In fact, because federal courts have limited jurisdiction, the Court must presume lack of jurisdiction until the plaintiff proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376-78 (1994).

A challenge to jurisdiction "can be either facial, confining the inquiry to the allegations of the complaint, or factual, permitting the court to look beyond the complaint." *Savage v. Glendale Union High School Dist.*, 343 F.3d 1036, 1039 fn. 2 (9th Cir. 2003). The Court "'may review any evidence, such as affidavits and testimony, to resolve factual disputes

concerning the existence of jurisdiction.'" *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

B. In the Absence of Final Regulations, the Railroads' Claims Are Not Ripe for Adjudication.

The "ripeness" doctrine prevents premature adjudication of claims that do not yet have a concrete impact on the parties. *Exxon Corp. v. Heinze*, 32 F.3d 1399, 1404 (9th Cir. 1994). "The Supreme Court instructs that ripeness is 'peculiarly a question of timing,' [citation], designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134,1138 (9th Cir. 1999) (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974) and *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)).[3] The doctrine is "born of Article III of the Constitution; the same provision that grants judges their authority constrains its use. [It] ensure[s] that an adequate factual and legal context will sharpen and cabin judicial decision-making. [It] preserve[s] the separation of powers and safeguard[s] democracy by constraining the authority of the unelected judiciary to pass judgment on the acts of legislatures." *Thomas*, 220 F.3d at 1142-43 (O'Scannlain, J., concurring).

The ripeness doctrine contains both constitutional and prudential components. *Thomas*, 220 F.3d at 1138. The Railroads' Complaint is unripe under both components.

1. The Railroads Do Not Satisfy the Constitutional Component of the Ripeness Doctrine Because their Complaint Is a Pre-Enforcement Challenge and There Is No Threat of Imminent Prosecution.

Article III mandates that there must exist a "case or controversy," and that the issues presented must be definite and concrete, not hypothetical or abstract. *Thomas*, 220 F.3d at 1139. The Court considers "whether the plaintiffs face 'a real danger of sustaining a direct injury as a result of the statute's operation or enforcement,' [citation], or whether the alleged injury is too 'imaginary' or 'speculative' to support jurisdiction." *Id.* (citation omitted). The controversy must

[3] The constitutional component of the ripeness inquiry coincides with standing's injury in fact requirement. *Thomas*, 220 F.3d at 1138. "'[B]ecause the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline." *Thomas*, 220 F.3d at 1138.

1 be "substantial" and "of such immediacy and reality to warrant the issuance of a declaratory
2 judgment." *Boating Industry Associations v. Marshall*, 601 F.2d 1376, 1384 (9th Cir. 1979).
3 The mere existence of a statute is *not* sufficient to create a ripe case or controversy.
4 *Thomas*, 220 F.3d at 1139; see also *Boating Industry Associations*, 601 F.2d at 1384. In fact, the
5 ripeness doctrine "seeks to avoid the premature adjudication of cases when . . . the nature and
6 extent of the statute's application are not certain." *BNSF Railway Co. v. Box*, 470 F. Supp. 2d
7 855, 862 (C.D. Ill. 2007).
8 "When a litigant brings a preenforcement challenge, 'a generalized threat of
9 prosecution will not satisfy the ripeness requirement.'" *Loyd's Aviation, Inc. v. Center for*
10 *Environmental Health*, No. 1:11-CV-01078, 2011 WL 4971866, at *2 (E.D. Cal. Oct. 19, 2011)
11 (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009)). Rather, "there must be a
12 'genuine threat of imminent prosecution.'" *Loyd's Aviation, Inc.*, 2011 WL 4971866, at *2; *see*
13 *also Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1016 (N.D. Cal. 1998) (where no regulations or
14 programs had been adopted under Proposition 227, ripeness issue turned on whether plaintiffs'
15 alleged injuries were so inevitable and imminent that judicial intervention would be appropriate).
16 "Plaintiffs must face a 'realistic danger of sustaining a direct injury as a result of the statute's
17 operation or enforcement.'" *Loyd's Aviation, Inc.*, 2011 WL 4971866, at *2. "Thus, '[w]hen
18 plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is
19 likely, or even that a prosecution is remotely possible," they do not allege a dispute susceptible to
20 resolution by a federal court.'" *Id.*; *see also Pacific Gas & Elec. Co. v. State Energy Resources*
21 *Conservation & Development Comm'n*, 461 U.S. 190, 203 (1983).
22 To evaluate whether a genuine threat of prosecution exists, the Court considers:
23 "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether
24 the prosecuting authorities have communicated a specific warning or threat to initiate
25 proceedings, and the history of past prosecution or enforcement under the challenged statute." *Id.*
26 "A plaintiff must establish all three elements in its favor in order to survive a motion to dismiss
27 on ripeness grounds." *Loyd's Aviation, Inc.*, 2011 WL 4971866, at *3.
28

1 Applying these principles, the Eastern District dismissed a complaint seeking a
2 declaratory judgment that Proposition 65 was preempted by federal law and an injunction against
3 the law's enforcement. *Loyd's Aviation, Inc.*, 2011 WL 4971866, at *4. The Court found
4 plaintiffs' preemption claims were not ripe because plaintiffs did not face a realistic danger of
5 sustaining direct injury as a result of the enforcement of Proposition 65 by the defendants. *Id.*, at
6 *3.

7 Here too, the Railroads do not present a ripe case or controversy under Article III.
8 The Railroads do not allege that the Administrator or the Attorney General has communicated a
9 specific warning or threat to initiate proceedings against the Railroads at this time in the absence
10 of regulations. Further, as explained in the Background section above, the Administrator has not
11 yet finalized regulations implementing S.B. 861. When he does, the facilities that are subject to
12 the Act will have a responsibility to submit oil spill contingency plans, but until regulations are
13 issued, the precise contents of the plans are unknown. Similarly, regulations have not yet been
14 adopted detailing how the proof of financial responsibility requirement might be satisfied, Cal.
15 Gov't Code §§ 8670.37.53(c)(2), 8670.37.54(b), so it is unclear how a facility could obtain a
16 certificate at this time. Simply put, the nature and extent of S.B. 861's application are uncertain.
17 As explained above, the regulations may also give further guidance as to how the statute will be
18 enforced.

19 Absent implementing regulations, an enforcement action against the Railroads for
20 lack of an oil spill contingency plan or certificate of financial responsibility would be premature.
21 Though the Act does provide for penalties in the event a facility operates without an approved
22 plan or certificate, the statute requires the Administrator to review a submitted plan to determine
23 whether it complies with the Administrator's regulations adopted pursuant to California
24 Government Code sections 8670.28 and 8670.29. Cal. Gov't Code § 8670.31(b). Thus, it would
25 defy both the terms of the statute and common sense to impose penalties on railroads lacking
26 approved plans or certificates before issuance of the regulations governing the contents of such
27 plans and the forms of proof that are acceptable. The Railroads admit this important fact in their
28 Complaint. Compl., ¶ 46. Further, the Administrator previously informed the Railroads that

1 there would be no enforcement until after the regulations were promulgated. Yamamoto, Ex. B,
2 p. 1; Compl., ¶ 39 n.3. As such, absent final implementing regulations, the Railroads do not face
3 a realistic danger of sustaining direct injury. The Railroads cannot claim that a prosecution is
4 likely or even that a prosecution is remotely possible, and the Railroads do not allege a dispute
5 susceptible for resolution by the Court.

6 **2. The Court Should Decline to Exercise Jurisdiction Under the**
7 **Prudential Component of the Ripeness Doctrine.**

8 Even if the Railroads' claims were ripe for purposes of Article III, the Court should
9 decline to exercise jurisdiction under the prudential component of the ripeness doctrine. *See*
10 *Thomas*, 220 F.3d at 1141. Under the prudential component, the Court considers "'the fitness of
11 the issues for judicial decision and the hardship to the parties withholding court consideration.'"
12 *Id.* (citing *Abbott Laboratories*, 387 U.S. at 149). Neither factor supports the Court's exercise of
13 jurisdiction in this case at this time.

14 **a. The Complaint Does Not Raise Issues Fit for Judicial Review.**

15 A court should dismiss a case where the issues are not fit for judicial review. Thus,
16 courts generally avoid deciding pre-enforcement challenges that do not permit enforcement
17 agencies to refine their policies. *Ammex, Inc. v. Cox*, 351 F.3d 697, 708 (6th Cir. 2003); *see also*
18 *U.S. v. Power Co., Inc.*, 2008 WL 2626989, *4 (D. Nev. 2008) ("That the City of Las Vegas, as
19 the primary governmental entity charged with construing the challenged law, has not yet had an
20 opportunity to construe the ordinances at issue weighs against exercise of jurisdiction.").

21 Further, courts should not decide "'constitutional questions in a vacuum.'" *Thomas*,
22 220 F.3d at 1141. While a purely legal question may be fit for judicial review, a preemption
23 argument requiring at least some factual development is not. *Thomas*, 220 F.3d at 1141-42. "'A
24 concrete factual situation is necessary to delineate the boundaries of what conduct the government
25 may or may not regulate.'" *Id.* As described in more detail below, a preemption claim may
26 require additional factual development where implementing regulations have not yet been
27 adopted or where there has not yet been an attempt to enforce a statute. In those cases, it is too
28 early to understand the boundaries of a statute and how it will be applied.

1 Applying this reasoning, the court in *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1026
2 (N.D. Cal. 1998), found a facial challenge to Proposition 227 was not ripe. The Railroads had
3 asked the court to bar implementation of the initiative in an anticipatory manner, before issuance
4 of regulations.

5 > "It is axiomatic that a statute is not facially invalid simply because it is possible to
6 > contemplate circumstances in which the application of the statute could result in [violation of federal law] where there is no evidence to support the claim that the terms of the statute in themselves produce that result."
7
8 > . . .
9 > Courts regularly deny anticipatory review when further development by state officials may reduce or avoid constitutional problems, or change the nature of the issues presented. . . . This is particularly so where relevant programs have not yet been
10 > adopted or applied.

11 *Id.* at 1026.

12 As explained in more detail below, the absence of final regulations renders this case
13 unfit for judicial review. Regardless of which federal statute is cited as a basis for preemption, at
14 this stage, the Railroads' claims are hypothetical and based on speculation as to how the
15 Railroads *think* S.B. 861 will be applied and enforced. As such, the Court should decline to
16 exercise jurisdiction over this case.

17 **(1) Without S.B. 861's Implementing Regulations, It Is Too Soon to Conduct an Analysis of Whether DOT**
18 **Regulations "Substantially Subsume" the Same Subject Matter for Purposes of FRSA Preemption.**
19

20 Though the FRSA provides that laws in the area of railroad *safety* "shall be nationally
21 uniform to the extent possible," the statute contains important exceptions. 49 U.S.C. § 20106(a).
22 For example, a state regulation may address "an essentially local safety or security hazard." *Id.*
23 § 20106(a)(2). And "[a] State may adopt or continue in force any law, rule, regulation, or order
24 related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or
25 issues an order covering the subject matter of the State requirement." *Id.* § 20106(a)(2).
26 "[T]his is not an easy standard to meet: 'To prevail on the claim that the regulations
27 have preemptive effect, petitioner must establish more than that they "touch upon" or "relate to"
28 that subject matter, for "covering" is a more restrictive term which indicates that preemption will

lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law.'" *Southern Pacific Transportation Co. v. Public Utility Commission of the State of Oregon*, 9 F.3d 807, 812 (9th Cir. 1993) (emph. in original) (citing *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993)). When considering whether a federal regulation substantially subsumes the subject matter of a state regulation, the court does not look to broad categories such as railroad safety; rather, the court applies a "level of specificity" in its analysis. *Southern Pacific Transportation Co.*, 9 F.3d at 813. For example, in *Southern Pacific Transportation Company*, the Ninth Circuit concluded a federal regulation on the subject of train whistle *capacity* did not preempt Oregon regulations restricting the *use* of train whistles. *Id.* at 813. And in *Union Pacific Railroad Company v. California Public Utilities Commission*, the Ninth Circuit again compared federal and state regulations with specificity before concluding the federal regulation did not "substantially subsume" the subject matter of the state regulation. 346 F.3d 851, 863-68 (9th Cir. 2003) (finding federal regulation addressing internal operating rules including TTD rules[4] and requiring compliance testing and training did not preempt a state regulation requiring railroads to comply with their own internal TTD train configuration rules and providing civil penalties for violations of those rules).

The Railroads' Complaint alleges that DOT regulations cover the subject matter of "oil spill prevention and response plans" "in whole or in relevant part." Compl., ¶ 50.[5] The Complaint also alleges that DOT regulations cover the subject matter of "transportation of hazardous materials." Compl., ¶¶ 2, 21, 22, 51. However, the Court must apply a much greater level of specificity in its analysis. *Southern Pacific Transportation Co.*, 9 F.3d at 813.[6] Given that even the subject of "train whistles" has been found too broad, subjects such as "transportation

[4] "TTD is a general term covering almost any subject that affects a train's ability to stay on the tracks," including train configuration. *Id.* at 862.

[5] The Complaint's lack of specificity in this regard provides further support for the fact it is too soon to compare the subject matters regulated.

[6] The Complaint alleges that the DOT regulations cover the subject matters of techniques, training, equipment, processes, and procedures for delivering hazardous materials by rail. Complaint, ¶ 51. Even these categories are too broad for a complete analysis under section 20106(a)(2). The FRSA requires a specific comparison of the matter regulated. What exactly is regulated under each law? How?

1 of hazardous materials" and even "oil spill prevention plans" and "training" do not satisfy the
2 level of specificity required for an FRSA analysis. Until the regulations are finalized and one can
3 determine precisely what and how facilities, including railroads, will be regulated under S.B. 861,
4 any FRSA claim is unripe.

5 **(2) Whether a State Regulation Is Permissible under ICCTA**
Is a Fact-Intensive Question.
6

7 ICCTA does ***not*** preempt all state regulation affecting rail transportation. *New York*
8 *Susquehanna and Western Railway Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007). The
9 question of whether a state regulation is permissible under ICCTA is inherently fact-intensive.
10 *Id.* at 253. While pre-construction permitting programs *may* unreasonably interfere with railroad
11 operations, less burdensome and non-discriminatory regulations may be permissible. *Id.* The
12 Court must analyze each individual regulation to determine whether it is preempted by ICCTA,
13 considering whether the regulations are reasonable, certain, and non-discriminatory. *Id.* at 256.
14 Accordingly, in the absence of final regulations, a court should refuse to exercise
15 jurisdiction over an action seeking a judgment declaring a state statute preempted by ICCTA.
16 *Louisiana Dept. of Agriculture & Forestry v. Louisiana Railroad Ass'n*, No. 09-996, 2010 WL
17 4393899, **4-5 (M.D. La. Oct. 1, 2010).
18 In *Louisiana Dept. of Agriculture & Forestry*, the state legislature had enacted a
19 statute pertaining to railroad crossings, which required the promulgation of rules and regulations
20 implementing the statute no later than January 1, 2009. As of October 16, 2009, no regulations
21 had been promulgated, though a preliminary draft had been prepared. In the context of a motion
22 to remand, the railroad defendants claimed subject matter jurisdiction based on complete federal
23 preemption by ICCTA. *Id.*, at *2. The court found the case was not ripe, reasoning that the
24 preemption argument required at least some factual development because the statute imposed no
25 initial obligation or restriction on the railroad. *Id.*, at *2. The court explained: the railroad
26 defendant's "complete preemption argument relies on its assertion that the nature of the law as
27 enacted—***and as it believes it will be enforced***—will have the effect of giving the [state]
28 permitting or pre-clearance authority, and therefore the power to regulate rail transportation.

1 Thus, ***in the absence of final regulations, procedures or orders by the [state] to enforce the***
2 ***statute, or which describe how it will enforce the statute, the nature of the law in relation to rail***
3 ***transportation cannot be accurately predicted and the court cannot determine whether the law***
4 ***is completely preempted*** . . . ." *Id.*, at *4 (emph. added) (citations and footnotes omitted). The
5 state had not issued any orders, nor had it taken any other action to enforce the statute. While a
6 preliminary draft of proposed regulations was prepared, the final regulations could look very
7 different from those initially proposed. "***Without final rules and regulations, or any other steps***
8 ***to carry out the law, the [railroad defendant's] argument that the effects/results of the***
9 ***legislation make it a permitting or pre-clearance statute are based on conjecture rather than***
10 ***facts***." *Id.*, at *5 (emph. added); *cf. BNSF Railway Co. v. Box*, 470 F. Supp. 2d 855, 863 (C.D. Ill.
11 2007) (finding the issues were sufficiently developed where statute affirmatively obligated
12 plaintiffs to act upon statute's effective date).
13 Here too, the Railroads' arguments that ICCTA preempts S.B. 861 are based on
14 speculation as to how the Railroads *think* S.B. 861 will be enforced. For example, the Railroads
15 apparently believe the law will impede their ability to carry out their common carrier obligations
16 and that the law will constitute a "pre-clearance" statute. They claim S.B. 861 will require
17 railroads to take steps to *prevent* spills, Compl., ¶ 4, and they assert that a railroad will be barred
18 from continuing its operations in the state if the Administrator does not ultimately approve a
19 railroad's contingency plan. Compl., ¶ 38. But these are not the words of S.B. 861. Again, this
20 is simply speculation as to how S.B. 861 will be implemented. Unlike in *Box*, the issues are not
21 sufficiently developed for review because the Railroads will have no affirmative obligations with
22 respect to oil spill contingency plans until after the regulations are finalized. The Administrator
23 has not yet issued regulations regarding the content of oil spill contingency plans, so it is too soon
24 to know what exactly will be required.
25 Further, S.B. 861 states that the Administrator *may* issue a cease and desist letter in
26 certain circumstances but provides other enforcement options as well. See Cal. Gov't Code §§
27 8670.64-8670.67, 8670.69.4. As this time, it is not known whether the Administrator will *ever*
28 use this provision against a railroad. The implementing regulations may give further guidance as

to the circumstances in which each type of penalty are available as well as to the specific penalties that should be considered for different types of statutory violations. Just as in *Louisiana Dept. of Agriculture & Forestry*, the implementing regulations (and likely an enforcement action) are needed before a determination can be made as to whether S.B. 861 will be used to prevent railroads from operating in the state without an approved oil spill contingency plan.

Similarly, the Railroads also contend they will be required to obtain a "certificate of financial responsibility" from the state upon a showing that they are "sufficiently capitalized" to cover damages resulting from a spill. Compl., ¶ 4. The Railroads allege, "S.B. 861 asserts State oversight of carriers' financial condition . . . ." Compl., ¶ 35; *see also* Compl., ¶ 45. Again, this is speculation. The regulations may well provide that a "certificate of financial responsibility" could issue upon proof that does not require "oversight of carriers' financial condition." Thus, the ICCTA preemption claim is not fit for review at this time.

(3) Preemption Analysis Under Other Federal Laws Requires Similar Speculation.

The Railroads assert that federal regulations under the Locomotive Inspection Act or the Safety Appliance Act occupy the "field of railroad safety equipment," Compl., ¶ 29, but the Complaint does not identify any statutory text that would be preempted by these statutes. The Complaint also alleges that the Interstate Commerce Clause prohibits a State from imposing "ostensibly local regulations on railroads that will have the effect of forcing modifications to a train's makeup and equipment whenever it enters the State . . . ." Compl., ¶ 30.

The Railroads appear to believe that the "best achievable technology" requirement will be used to force railroads to make modifications to their trains and to impose a new "standard of care with respect to the use of rail technologies." Compl., ¶ 52. But this is yet another case of speculation—the Railroads describe what they *think* might happen under S.B. 861. The regulations might well be limited to technologies for response and cleanup. This analysis is simply premature in the absence of regulations implementing the "best achievable technology" requirement.

1 The regulations will thus explain and clarify S.B. 861's reach. Instead of rushing to
2 judgment on hypothetical claims, the Court should permit the Administrator to develop and refine
3 the regulations, a collaborative process in which the Railroads have been heavily engaged, before
4 allowing the Railroads' claims to proceed. It is likely that when the regulations are issued, it will
5 be clear that the federal statutes cited by the Railroads' do not apply and there is no preemption.
6 Even assuming *arguendo* that there may be constitutional issues, at the very least the regulations
7 may reduce or avoid constitutional problems or change the nature of the issues presented.
8 Accordingly, the case is not fit for judicial review at this time.

9 **b. The Railroads Will Not Suffer Hardship if the Court Withholds**
10 **Consideration of this Matter at this Time.**

11 The absence of regulations also means the Railroads will not suffer any substantial
12 hardship if the Court withholds consideration of this matter. "[T]he absence of any real or
13 imminent threat of enforcement, particularly, criminal enforcement, seriously undermines any
14 claim of hardship." *Thomas*, 220 F.3d at 1142. Here, there is no threat of any immediate
15 enforcement, as the regulations have not been finalized. Accordingly, the Railroads will not
16 suffer any hardship if the Court withholds consideration at this time.

17 Whether based on the constitutional "case or controversy" requirement or prudential
18 factors, this case is not ripe for review and should be dismissed.

19 **II. THE RAILROADS' CLAIMS AGAINST OSPR SHOULD BE DISMISSED BECAUSE THEY**
20 **ARE BARRED BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

21 Assuming for the sake of argument that the preemption issues were ripe for review,
22 the Railroads' action against defendant OSPR cannot proceed because OSPR is immune from suit
23 under the Eleventh Amendment to the United States Constitution. A motion to dismiss claims
24 barred by the Eleventh Amendment is properly made as a motion to dismiss for failure to state a
25 claim upon which relief may be granted under Federal Rule of Civil Procedure section 12(b)(6).
26 *Smith v. Reyes*, 904 F. Supp. 2d 1070, 1072–73 (S.D. Cal. 2012).[7]

27 [7] Although there is some ambiguity as to whether a motion to dismiss claims barred by the
28 Eleventh Amendment is properly raised as a motion to dismiss for lack of jurisdiction pursuant to
(continued...)

Here, the Court need not look beyond the face of the Complaint to find the Railroads' claims against OSPR are barred by the Eleventh Amendment. The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Eleventh Amendment grants sovereign immunity to the states against any suit brought in federal court. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996).

Pursuant to the Eleventh Amendment, any action is barred in federal court against a State, an "arm of the State," its instrumentalities, or its agencies, regardless of whether the plaintiff seeks damages or injunctive relief. *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Yakama Indian Nation v. Wash. Dep't of Revenue*, 176 F.3d 1241, 1245 (9th Cir. 1999) (the Eleventh Amendment sovereign immunity extends to actions for declaratory and injunctive relief).

The Railroads brought suit against OSPR for injunctive and declaratory relief on grounds that provisions of S.B. 861 allegedly are preempted by federal law. Compl., ¶¶ 1-6. The Lempert-Keene Act establishes an Administrator who is appointed by the Governor to implement the Act and who is a Chief Deputy Director of the California Department of Fish and Wildlife. Cal. Gov't Code §§ 8670.4, 8670.5, 8670.6, 8670.7. OSPR was established by the Administrator in 1991 to accomplish the mandates of the Act. The Railroads concede that OSPR is a division of the California Department of Fish and Wildlife. Compl., ¶¶ 4-5. The California Department of Fish and Wildlife is a department under the California Natural Resources Agency. Cal. Fish & Game Code § 700. As such, OSPR is a state agency or instrumentality of the state of California, is protected by the Eleventh Amendment from any suit brought in federal court, and should be dismissed from this case.

(...continued)
Federal Rule of Civil Procedure 12(b)(1) or a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), *see Andrews v. Daw*, 201 F.3d 521, 524 n.2 (4th Cir. 2000), here the motion should be granted under either theory.

1 **CONCLUSION**

2 The Eleventh Amendment bars the Railroads' suit against OSPR. But the Court
3 should not even reach that issue because it lacks jurisdiction to hear the Railroads' claims at this
4 time. Absent regulations implementing S.B. 861, it is simply too soon to analyze the complex
5 preemption issues that are the subject of the Railroads' Complaint. The effect of the
6 regulations—how S.B. 861 will be applied and enforced—is not yet known. The Railroads face
7 no genuine threat of imminent prosecution and will suffer no hardship if the Court withholds
8 judgment until after implementing regulations are issued. Accordingly, the Railroads' claims are
9 not yet ripe, and the Complaint should be dismissed.

10

11 Dated: October 30, 2014

Respectfully Submitted,

12 KAMALA D. HARRIS
Attorney General of California
13 RANDY L. BARROW
Supervising Deputy Attorney General

14

15

16 */s/ Nicholas Stern*
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19 *California Administrator for Oil Spill Response, and Kamala D. Harris, Attorney*
20 *General for the State of California*

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CERTIFICATE OF SERVICE

Case Name:	**ASSOCIATION OF AMERICAN RAILROADS, et al. v. CALIFORNIA OFFICE OF SPILL PREVENTION AND RESPONSE, et al.**	No.	**2:14-cv-02354-TLN-CKD**

I hereby certify that on October 30, 2014, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF;

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

DECLARATION OF JULIE YAMAMOTO IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF;

DECLARATION OF JOY LAVIN-JONES IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF; AND,

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On October 30, 2014, I served the attached

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF;

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF;

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DECLARATION OF JOY LAVIN-JONES IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF; AND,

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Louis P. Warchot
Association of American Railroads
425 3rd Street SW, Suite 1000
Washington, DC 20024

Jacob D. Flesher
Jeremy J. Schroeder
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Rocklin, CA 95765

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 30, 2014, at Sacramento, California.

Kim Lahn	*/s/ Kim Lahn*
Declarant	Signature

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CERTIFICATE OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On August 26, 2015, I served the foregoing **PLAINTIFFS' SECOND REQUEST FOR JUDICIAL NOTICE** on each person named below by placing a true and correct copy thereof in a sealed envelope, with postage thereon fully prepaid, in the United States Mail at Stanford, California, addressed to each recipient respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed August 26, 2015 at Stanford, California.

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