Case No. S222472

IN THE SUPREME COURT OF CALIFORNIA

Friends of the Eel River and Californians for Alternatives to Toxics,
Plaintiffs and Appellants

v.

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 First District Court of Appeal
First Appellate District, Division One
Case Nos. A139222, Al39235

Appeal from the Marin County Superior Court,
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Honorable Roy Chernus, Judge

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS; PROPOSED BRIEF OF AMICI MADERA COUNTY FARM BUREAU AND MERCED COUNTY FARM BUREAU

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Attachment A: LIST OF ACRONYMS AND ABBREVIATIONS

Authority California High-Speed Rail Authority

CFBF California Farm Bureau Federation

CNPS California Native Plant Society

CSPF California State Parks Foundation

DEIR/S Draft Environmental Impact Report/Environmental Impact Statement

DFG California Department of Fish and Game*

DOC California Department of Conservation

EHL Endangered Habitats League

EIR/S Environmental Impact Report/ Environmental Impact Statement

EPA U.S. Environmental Protection Agency

F-B Section Fresno to Bakersfield Section of the HSR Project

FEIR Final Environmental Impact Report/Environmental Impact Statement

GWD Grasslands Water District

ICCTA Interstate Commerce Commission Termination Act

HSR High-Speed Rail

HST High-Speed Train

PEIR/S Program Environmental Impact Report/Environmental Impact Statement

HSR Project Statewide High-Speed Rail project

MJN Motion for Judicial Notice in support of Amici Curiae Brief

NRDC Natural Resources Defense Council

PCL Planning and Conservation League

POH Preserve Our Heritage

ROW Right-of-Way

M-F Section Merced to Fresno Section of the HSR Project

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* As of January 1, 2013, this agency was renamed the "California Department of Fish and Wildlife," but throughout much of the administrative process for the HSR Project, this agency's name was the "California Department of Fish and Game."

Attachment B: NOTE RE CITATIONS TO CEQA AND EXHIBITS

This Amici Curiae brief uses the following citation conventions regarding references to the California Environmental Quality Act ("CEQA") and the exhibits attached to the Motion for Judicial Notice ("MJN"), filed herewith:

CEQA is codified at Public Resources Code §21000, et seq. All statutory citations are to CEQA unless otherwise indicated, and shall consist of a section symbol (§) followed by the section number and, if any, the subdivision(s) cited thereto. For example, a citation to Public Resources Code, section 21100, subdivision (b), would appear as follows: §21100(b).

The CEQA Guidelines are codified at California Code of Regulations, title 14, chapter 3, section 15000, et seq. All citations to the CEQA Guidelines shall consist of the word "Guidelines" followed by a section symbol, the relevant section number, and, if any, the subdivision(s) cited thereto. For example, a citation to Cal. Code Regs, tit. 14, ch. 3, section 15003, subdivision (f), would appear as follows: Guidelines §15003(f).

Citations to exhibits to the MJN from the certified administrative record ("Record") for the M-F Section litigation are to the exhibit letter identified in the MJN and by the letter denoting the Record section (A through N) followed by page number(s). Where a page range or a series of pages are cited together, any duplicate leading page numbers are omitted. For example, a citation to Record Section B, pages 000047 and 000058 would appear as follows: Exh. E: B000047, 58.

Citations to other Exhibits attached to the MJN are to the exhibit letter identified in the MJN followed by the abbreviated name of the exhibit (as defined in the MJN), followed by page number(s). For example, a citation to Exhibit I to the Motion, the Final Judgment in the *Atherton II* case, Exhibit B to the Final Judgment, November 2011 Ruling on Submitted Matter Re Supplemental Return to Writ issued in *Atherton I*, pages 3 through 4 would appear as follows: Exh. I: Final Judgment in *Atherton II*, Exh. B, pp. 3-4.

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

APPLICATION OF MADERA COUNTY FARM BUREAU AND MERCED COUNTY FARM BUREAU TO FILE BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS

A. INTRODUCTION

Pursuant to California Rules of Court, Rule 8.520(f), applicants Madera County Farm Bureau and Merced County Farm Bureau (collectively, "Amici" or the "Farm Bureaus") respectfully request leave to file the attached brief of amicus curiae in support of Plaintiffs and Appellants Friends of the Eel River and Californians for Alternatives to Toxics. This application is timely made within 30 days after the filing of the reply brief on the merits.

B. PROPOSED AMICI AND THEIR INTERESTS

Amici have a direct and beneficial interest in the outcome of this appeal. Members of both organizations rely upon California's legal protections of agricultural lands and water supply, they use and enjoy California's natural and scenic resources, and they are directly and indirectly affected by decisions by the California High-Speed Rail Authority ("Authority") that cause significant environmental impacts on agricultural lands, wildlife habitat, air and water quality, and traffic congestion, among others. Amici have an interest in the Authority's compliance with CEQA and other environmental laws, and that interest is within the purposes and goals of these organizations. Amici have participated as plaintiffs in important California cases relevant to agricultural land and water resource protection. Finally, and importantly, Amici are representative of a wide spectrum of stakeholders throughout the state more broadly impacted by the HSR Project. These stakeholders have a keen interest in CEQA's continued application to the HSR Project.

The Farm Bureaus are California nonprofit corporations whose principal places of business are located in Madera County and Merced County, respectively. The purposes of the Farm Bureaus include protecting agricultural lands and preserving the agricultural heritage and the rural character of their environs. Together, the Farm Bureaus represent approximately 2,700 members, who reside in and/or engage in agricultural activities in their respective counties. Many of the Farm Bureaus' members own property that lies within or adjacent to planned alignments for the HSR Project. Between direct property acquisitions and severances, division irrigations systems and other vital infrastructure, the interference with agricultural activities caused by permanent rural road closures, and numerous other less paramount effects, Amici and their members will be significantly impacted by the California High-Speed Rail project ("HSR Project"). The interests of the Farm Bureaus and their members have been and will continue to be adversely affected by the HSR Project.

Rule 8.520(f)(4) Disclosure: No party or counsel for any party authored the attached amicus brief in whole or in part. Additionally, no party, counsel for any party, or any other person or entity made any monetary contribution intended to fund the preparation or submission of the brief, other than the Amici or their counsel in this proceeding.

Rules 8.520 and 8.208 Certificate of Interested Persons or Entities: There are no persons or entities that must be listed on this certificate pursuant to California Rule of Court 8.208.

C. NEED FOR FURTHER BRIEFING

Amici are familiar with the issues presented in this case and have reviewed the parties' briefing on the merits to this Court. Amici believe that further briefing is necessary to address matters not fully addressed by

the parties' briefs. In particular, the attached amicus curiae brief presents facts relevant to two of the three issues before this Court, namely:

(1) the state's choices when exercising its sovereign authority to govern how its agencies, including the Authority, make decisions that affect California's environment (Issue 1) and

(2) the nature of the various commitments to comply with CEQA as conditions of receiving bond funding and carrying out the HSR Project (Issue 3).

This brief also addresses the broader implications of this case for (i) longstanding CEQA precedent, (ii) the applicability of CEQA to the HSR Project in the future, and (iii) the risk of inviting increased federal preemption of California's laws.

As this Court has observed, amicus curiae, or "friend of the court" briefs, can perform a valuable role for the judiciary when they assist the Court by broadening its perspective on issues raised by the parties. (*See Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, 1177-81.) The accompanying brief seeks to broaden the Court's perspective on the important issues now before it.

D. CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court accept the accompanying brief for filing in this case.

DATED: May 28, 2015 Respectfully submitted,

JASON W. HOLDER
Attorney for Applicant Amici Madera County Farm Bureau and Merced County Farm Bureau

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PROPOSED AMICI CURIAE BRIEF OF MADERA COUNTY FARM BUREAU AND MERCED COUNTY FARM BUREAU IN SUPPORT OF PLAINTIFFS AND APPELLANTS

INTRODUCTION

The facts of this case are well briefed before this Court. Amici agree with the positions concerning preemption of CEQA taken by Plaintiffs and Appellants Friends of the Eel River and Californians for Alternatives to Toxics. Amici support but do not repeat those arguments in this brief. Rather, this brief focuses on the potential ramifications to impacted stakeholders, including the Farm Bureaus, if this Court would to rule that CEQA is preempted by the ICCTA in a manner that could extend to the HSR Project.[1] Such a ruling could negatively impact stakeholders throughout California who will be affected by the 800±mile-long HSR Project if and when it is completed. It would also allow the Authority to evade the environmental and political accountability that form the very core of CEQA's purposes.

Statement of Interest as Amici

Members of The Madera FB and Merced FB have litigated several cases to enforce the requirements of CEQA, including one case against the Authority alleging CEQA violations with respect to its project-level environmental review for the M-F Section of the HSR Project. Amici and their members have been and will continue to be impacted by the HSR Project. Through adopted resolutions and official assurances, the Authority has repeatedly committed itself to complying with CEQA's requirements for detailed project-level impact analysis and to fully mitigating impacts to the extent feasible. Preemption of CEQA, if extended to the HSR Project would undermine those commitments, could result in increased unmitigated

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[1] *See* Attachment A: List of Acronyms and Abbreviations, *supra*, for descriptions of defined terms.

impacts, and would eliminate citizen enforcement of CEQA for a project that will cause significant impacts from San Francisco Bay Area, through the heart of the Central Valley, and extending to San Diego. Thus, Amici have direct and beneficial interest in the outcome of the present appeal.

Statement of the Case

The Statement of the Case set forth by Plaintiffs and Appellants Friends of the Eel River and Californians for Alternatives to Toxics, while sufficient for the dispute concerning CEQA's application to the North Coast Railroad project, does not inform the Court of the factual and legal context for the HSR Project. Understanding this context is essential for this Court's consideration of the potential statewide ramifications of its ruling on the present appeal. Because the Court will resolve the conflict between the underlying appellate decision in this appeal and *Town of Atherton v California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, its decision could indirectly determine whether the state's most important environmental law applies to the state's largest-ever infrastructure project.

STATEMENT OF FACTS

I. The Authority Performed Widely-Criticized Programmatic Review for the HSR Project, Promising Detailed Review, Pursuant to CEQA, at the Project Level.

A. The HSR Project is Premised on Tiered Environmental Review and Tiered Approvals, in Compliance with CEQA.

The HSR Project, if completed, would include more than 800 miles of track, numerous stations and maintenance facilities, extensive electricity infrastructure, and other facilities on a 50 to 100-foot-wide grade-separated ROW stretching between San Diego and Los Angeles to the south and San

Francisco and Sacramento to the north. (*See* Exh. G: A000012-15.) [2] Initial planning for the HSR Project began in 1994, and program-level environmental review began in 2001. (*See* Exh. A: F133577.)

1. When Employing Tiered Environmental Review for the HSR Project, the Authority Deferred Analysis and Mitigation to Project-Level EIR/S Documents.

The 2005 Statewide PEIR/S relied on promises of future, more detailed, project-level review pursuant to CEQA. (*See, e.g.*, Exh. A: F133576 [PEIR/S Summary]; 706 [introduction to impact analysis chapter, stating that detailed impact analysis will be conducted at project level].) Specifically, the Statewide PEIR/S deferred to the project level detailed impact analysis for the following significant impacts:

a) Traffic on smaller roadways and arterials (*See id.*: F133714, 34);

b) Noise and vibration impacts (F133838-40);

c) Environmental justice and land use impacts (F133880-81, 94-96);

d) Severance impacts to agricultural lands (F133901, 914-15; *see also* F139757-59);

e) Aesthetic and visual quality impacts (F133933-36; *see also* F139759-60);

f) Public utilities impacts (F133946-48; *see also* F139760-F139761);

g) Hazardous materials impacts (F133950-54; *see also* F139762-63);

h) Cultural resources impacts (F133962, 73, 85-86);

i) Geology and Soils impacts (F133998-4001);

j) Water quality impacts (F134003, 4010-11, 4021-24); and

k) Impacts to wetlands and other biological resources (F134026-27, 52, 58, 62-63).

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[2] *See* Attachment B: Note re Citations to CEQA and Exhibits, *supra*, for citation conventions.

When responding to comments from agencies and the public, the Authority repeated its promises of more detailed review and formulation of mitigation measures. Federal and state agencies, along with many other commenters, criticized the Statewide PEIR for failing to adequately investigate baseline conditions, performing impermissibly generalized impact analysis, and failing to identify specific mitigation measures. (*See, e.g.*, Exh. A: F134509-10, 511, 515-16 [Corps comments and responses], 517-33 [EPA comments and responses], 657-67 [CDFG comments and responses], 134957-66, 82-84 [GWD introductory comments and responses], 135060-64, 70-72 [NRDC introductory comments and responses], 152-56 [CNPS comments and responses].) Those comments are too numerous to recite here, so Amici describe a few notable examples that are characteristic of the Authority's deferred approach to impact analysis and repeated promises to develop mitigation, pursuant to CEQA, at the project level.

DFG commented:

> The inadequate project description in the [Draft Statewide PEIR/S] made it difficult to adequately evaluate project-related impacts and feasible mitigation measures on biological resources and wetlands ... ¶¶ [and] [s]ite-specific surveys, on-site visits, and consultation with species experts and agency biologists will be necessary to further analyze the project impacts ... and develop site-specific mitigation measures."

(Exh. A: F134657-58 [also noting "[t]he evaluation of project impacts was extremely limited"].)

In response, the Authority did not address the lack of detailed analysis, but promised:

> "specific design methods and features ... will be applied during the project level studies and implementation of the HST system to avoid, minimize, and mitigate potential impacts ... [s]ite specific analysis will be completed in subsequent project level environmental review,"

and "[s]pecific potential impacts related to the topics suggested in the comment will be addressed in the subsequent project level analysis."

(*Id.*: F134664-65.)

The DOC commented

> It appears that the farmland acreage that would be converted is underestimated in the document.... The method of determining the amount of land that would be converted from agriculture ... is limited to the actual footprint.... The assumptions made were limited to and based on the amount of area that would be physically occupied ..., but the document does not discuss indirect impacts, and indicates in the impact analyses that these acreages are conservative. The analyses do not consider the construction of ancillary facilities and supporting infrastructure, nor does the document address growth-inducing impacts.... The [DOC] recommends that although discussion of implementation of specific mitigations may be premature, the project should provide for the adoption of different mitigations."

(*Id.*: F134563.)

In response, the Authority justified its deferral of analysis by stating:

> The program level analysis is focused on identifying, avoiding and minimizing potential direct impacts and thus minimizing any associated indirect impacts. Potential indirect impacts will be addressed during the project level environmental review when sufficient detail is available regarding specific alignment location and facilities placement.... The detail of engineering associated with the project level environmental analysis will allow the Authority to further investigate ways to avoid, minimize and mitigate potential impacts to agricultural resources. Only after the alignment is refined and the facilities are fully defined through project level analysis, and avoidance and minimization efforts have been exhausted, will specific impacts and mitigation measures be addressed. Feasibility of mitigation must be determined in relation to specific impacts as considered at the project level.

(*Id.*: F134567.)

GWD commented:

> The [Authority's] approach in this case fails to provide the requisite level of review required by CEQA. The DEIR/S fails to adequately describe the Project setting, to adequately describe the Project itself,

> to analyze Project impacts, and to mitigate impacts that it does identify with specific, enforceable mitigation measures. Rather, the document repeatedly defers critical analysis and Project description on the grounds that the DEIR/S is a program EIR/S. The DEIR/S' vague and tentative analysis with respect to numerous project elements precludes a full and proper analysis of Project impacts. Equally flawed, the DEIRIS repeatedly determines that Project impacts would not be significant based solely on assumptions that vague and unspecified mitigation measures would be identified in later documents.

(*Id.*: F134963.) The GWD also criticized in detail the Statewide PEIR/S as improperly deferring mitigation for impacts. (F134964-65.)

In response, the Authority referred to standard responses regarding the general level of review in this PEIR/S and the detailed impact reviews anticipated under the project-level studies." (Exh. A: F134983 [adding "[t]he additional evaluations to be completed in these studies will review the types of issues raised in this comment"].) With respect to the specific criticisms concerning deferred mitigation, the Authority promised "[s]pecific mitigation measures will be addressed during subsequent project-level environmental review, based on additional information regarding location and design of the facilities proposed." (*Ibid.*)

NRDC, CNPS, Defenders of Wildlife, PCL, CSPF, EHL, and other environmental organizations echoed these and other public agency comments and the Authority responded with similar justifications for deferred analysis and mitigation. (*See* Exh. A: F135060-61, 070-71 [NRDC introductory comments and Authority responses]; F135152, 156 [CNPS introductory comments and Authority responses]; F135163-164, 175-76 [Defenders of Wildlife introductory comments and Authority responses], F135259-65, 344-46 [PCL introductory comments and Authority responses]; F135355-56, 360-61, 363-67 [CSPF introductory comments and Authority responses]; F135385-387 [EHL comments and Authority responses].)

2. The Authority Certified the Statewide PEIR/S and Approved the HSR Project Program, but Deferred its Decision on a Bay Area to Central Valley Alignment, and Ordered Another First-Tier Program-level PEIR/S, all Pursuant to CEQA.

The Authority's 2005 approval document for the HSR Project relies on CEQA tiering and the requirement for project-level review in accordance with CEQA requirements. Specifically, Resolution #HSR 05-01 states that (1) the PEIR/S was prepared in compliance with CEQA, (2) all applicable CEQA requirements were satisfied when analyzing the environmental effects of the HSR Project at the program-level, (3) and that:

> the Authority has considered the environmental effects of the proposed HST System as presented in the Final PEIR and finds that *with the inclusion of the described design practices and mitigation strategies*, as discussed in the Final PEIR and the attached Findings, the potential adverse impacts of the HST System will be avoided, reduced and minimized; that the HST System *includes feasible mitigation strategies identified at the program-level of analysis that will be applied and refined at the project level to further avoid and reduce impacts*; and that *additional mitigation strategies and strategies will be considered for specific sites as appropriate at the conclusion of project-level studies*.

(Exh. B: F139731-33 [Resolution #HSRA 05-01], emphasis added.) Based on these findings, the Authority approved the HST System "*as conditioned by, the design practices and mitigation strategies*, which are described in the Findings attached hereto as Exhibit A and reflected in the [MMRP] attached hereto as Exhibit B, and *which shall be incorporated into and be a part of the approved HST System*. (*Id.* at F139733, emphasis added; *see also* F139812.) The MMRP states "[p]roject-level activities will undergo future environmental analysis *as required by NEPA and CEQA* tiering from this EIS/EIR." (F139812, emphasis added.) The Authority approval resolution directed staff to conduct program-level review, in accordance

with CEQA requirements, for the Bay Area to Central Valley alignment and project-level studies for the nine sections of the HSR Project.

B. When Approving and Codifying the Bond Measure for the HSR Project, the Voters and the Legislature Intended for CEQA to Apply.

In 2008, the voters of California passed Proposition 1A (the "Bond Act"), which authorized the issuance of $9.95 billion in bond funding the HSR Project. (*See California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 685 (*CHSRA*), reh'g denied (Sept. 2, 2014), review denied (Oct. 15, 2014).) The Bond Act provided, in part, that:

> It is the intent of the Legislature by enacting this chapter and of the people of California by approving the bond measure pursuant to this chapter to initiate the construction of a high-speed train system that connects the San Francisco Transbay Terminal to Los Angeles Union Station and Anaheim, and links the state's major population centers, including Sacramento, the San Francisco Bay Area, the Central Valley, Los Angeles, the Inland Empire, Orange County, and San Diego *consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008.*

(Sts. & Hy. Code, §2704.04, emphasis added.) The Bond Act authorized construction of the HSR Project "consistent with the ... certified environmental impact reports of November 2005 and July 9, 2008, *as subsequently modified pursuant to environmental studies conducted by the [A]uthority.*" (*Id.* at §2704.06, emphasis added).

C. Courts Invalidated the 2008 and 2010 Bay Area PEIR/S Documents and Rejected Claims Based on the Promise of Subsequent Project-Level Environmental Review Pursuant to CEQA.

The Bay Area PEIR/S was the subject of multiple rounds of litigation and was invalidated twice. (*See* Exh. I: Final Judgment in *Atherton II*; *see also Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 324-327 (*Town of Atherton*)

[relevant factual and procedural background].) When rejecting some claims concerning the Bay Area to Central Valley PEIR/S, the trial court and later the Third District Court of Appeal relied on the Authority's assurances and commitments to conduct detailed project-level review pursuant to CEQA. (*See id.*, Ruling on Submitted Matter (Exhibit A to Final Judgment), pp. 26, 30-33, 37; *see also Town of Atherton, supra*, 228 Cal.App.4th at p. 346.)

D. When Approving the M-F Section, the Authority Deferred Analysis and Mitigation for Alignments Within the Chowchilla Wye Box and Ordered Further Analysis of Alignments Pursuant to CEQA.

The HSR Project requires a "wye," a connection between the north-south alignment through the Central Valley and the east-west connection to the Bay Area. (*See* Exh. E: B007835; *see also* Exh. G: A000015 [map depicting wye area].) Even before releasing the DEIR/S for the M-F Section, the Authority knew that its analysis of alternative alignments within the central wye "box" was incomplete. (*See* Exh. C: G000414-415.) Rather than postpone release of the EIR/S to complete this analysis, the Authority Board decided to defer analysis and a decision on the wye alignment until after the EIR/EIS for the San Jose to Merced section was completed. (*See* Exh. D: G000511.) The FEIR/S explained that deferring analysis for the wye alignment "will allow the Authority and FRA to make a decision on the north-south alignment between Merced and Fresno based on the Merced to Fresno Section Project EIR/EIS, and to make a decision on the east-west alignment and wyes based on the upcoming San Jose to Merced Section Project EIR/EIS." (Exh. E: B000175-176.)

Many commenters complained that this incomplete analysis was a form of piecemealed review that compromised the decision-making and public disclosure processes. (*See, e.g.*, Exh. E: B008102, 13 [Chowchilla

comment 456-2 and response], 8497-98, 512 [CFBF comment 706-11 and response], 8972, 81 [Madera FB comment 666-2 and response], 9128-29, 34 [Merced FB comments 616-1 and 616-4 and responses], 9190-91, 210 [POH comment 780-4 and response]; see also H000539-42, 550, 576 [POH comments re FEIR].)

When certifying the EIR/S for the M-F Section, and approving the northern and southern portions of the section the Authority Board directed staff to study wye alternative alignments and to "return to the Board with recommendations, including coverage, *in further CEQA documentation*...." (Exh. G: A000006-07 [Resolution #HSRA 12-20], 15 [map depicting approved portions of M-F Section and wye box].)

E. The Authority Sought and Received a Declaratory Order From the STB on the Issue of CEQA Preemption as Applied to the HSR Project.

In October 2014, after being sued by seven parties alleging noncompliance with CEQA with respect to the EIR/S for the F-B Section, the Authority submitted a petition for a declaratory order to the STB, seeking to preempt CEQA injunctive remedies. (*See* Exh J: STB Decision Granting Declaratory Order, pp. 1-2.) In December 2014, the STB granted the order, but issued an even broader ruling than requested by the Authority, stating CEQA is "categorically preempted" as applied to the F-B Section. (*Id.*, p. 10.)

ARGUMENT

I. As a Matter of Law, the Authority's Tiering Edifice, Together with Statutory Requirements, Preclude CEQA Preemption for the HSR Project.

The Authority's entire tiering strategy to HSR Project environmental review and approval depends upon continued compliance with CEQA. A ruling in this appeal that could extend to the HSR Project would

substantially interfere with and undermine the legal structure for the HSR Project, as established by the Authority's past promises, assurances, and commitments.

The resolution passed by the Authority's Board in 2005 unequivocally commits the agency to CEQA compliance throughout the environmental review and approval process for the HSR Project. (*See* Exh. B: F139731-33 [Resolution HSRA# 05-01, stating approval conditioned by design practices and mitigation strategies described in CEQA findings and the MMRP "shall be incorporated into and be a part of the approved HST System"], 812 [MMRP].) Authority resolutions passed in 2012 reiterate the Authority's commitment to CEQA compliance. (*See* Exh F: A000004-05 [Resolution HSRA# 12-19, stating "the Authority has chosen to use a tiered environmental review and decision making process to identify preferred alignments and station locations for the high-speed train system"]; *see also* Exh. G: A000006-07 [Resolution HSRA# 12-20.)

Once a lead agency proceeds with tiered environmental review pursuant to CEQA, it must complete that process by conducting project-level review. "In the context of program and plan-level EIR's, the use of tiered EIR's is *mandatory* for a later project that meets the requirements of [§21094(b)]." (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1165, review denied (Mar. 11, 2015), citing §21094(a).) Among other requirements, the second-tier project-level EIRs must be *consistent* with the first-tier program level EIR. (*See, e.g.*, §21093(a) [declaring that tiering EIRs will promote "construction of ... development projects by[, *inter alia*] ... ensuring that environmental impact reports prepared for later projects which are *consistent* with a previously approved ... program ... concentrate upon environmental effects which may be mitigated or avoided in connection with the decision on each later project.].)

> Once a general project impact has been analyzed in the broadest first-tier EIR, the agency saves time and resources by relying on that first-tier analysis in later, more specific environmental analysis documents, *provided of course that passage of time or factors peculiar to the later project phase do not render the first-tier analysis inadequate.*

(*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431, fn. 7, as modified (Apr. 18, 2007) (*Vineyard Area Citizens*), citing §21083.3 and Guidelines §15152(d)-(f).).) Preempting CEQA would make all project-level EIRs (except the already certified and beyond challenge M-F Section FEIR/S) inconsistent with the approved HSR Project program, as approved in 2005.

Preempting CEQA would also interfere with the Authority's adopted mitigation strategy. When a CEQA lead agency adopts an MMRP, it commits itself to adhering to those findings and implementing the mitigation program (*See* §21081.6(a)(1) ["The reporting or monitoring program *shall* be designed to *ensure* compliance during project implementation"], emphasis added; *see also* Guidelines, §15126.4(a)(2) ["Mitigation measures *must* be fully enforceable through permit conditions, agreements, or other legally *binding* instruments"], emphasis added.) Otherwise, the mitigation measures adopted at the PEIR/S stage could not be considered sufficiently "binding." (*See Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 465 [an agency may approve or carry out a project with potential adverse impacts "if *binding* mitigation measures have been 'required in, or incorporated into' the project..."], citing §21081(a) and Guidelines §15091, emphasis added.) "The purpose of these [monitoring] requirements is to *ensure that feasible mitigation measure will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded.*" (*Federation of Hillside & Canyon Associations v. City of Los Angeles*

(2000) 83 Cal.App.4th 1252, 1261, emphasis added; *see also Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 450 (*Lincoln Place II*) ["Once incorporated, mitigation measures cannot be defeated by ignoring them or by "attempting to render them meaningless by moving ahead with the project in spite of them"].)

Here, the adopted MMRPs would be useless if the Authority could disregard its commitment to conduct CEQA project-level review and abandon the adopted mitigation program based on a claim of preemption. This is not what the legislature intended when enacting §21081.6(a). (*See Lincoln Place II, supra*, 155 Cal.App.4th at pp. 446 ["As part of the enforcement process, mitigation measures are subject to monitoring and reporting to *ensure* the measures will be implemented"].)

Accordingly, the explicitly tiered environmental review, together with the Authority's adopted commitments, CEQA findings, and MMRP, mandate continued compliance with CEQA. This conclusion is supported by the Third District Court of Appeal's persuasive reasoning on this topic. The *Town of Atherton* Court's analysis concerning the Authority's duty to comply with CEQA was grounded on governing statutes:

> The Authority, as a public entity, is required to comply with CEQA on all projects. (Pub. Resources Code, §21080.) The Legislature did not exempt the [HSR Project] from compliance with CEQA. The reasonable inference, therefore, was that the Legislature intended the [HSR Project] to comply with CEQA and that Proposition 1A was presented to the voters with the expectation that CEQA would apply and the voters ratified the proposition based on this expectation.
>
> This reasonable inference is reinforced by various provisions of Proposition 1A that refer to past and future environmental studies for the [HSR Project]. In providing for funds to construct the [HSR Project], Proposition 1A indicates that construction will be "consistent with the [Authority's] certified environmental impact reports of November 2005 and July 9, 2008." (Sts. & Hy. Code, §2704.04, subd. (a).) The proceeds from the sale of nine billion dollars of bonds shall be available for planning and capital costs

> "consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008, as subsequently modified pursuant to environmental studies conducted by the authority." (*Id.*, §2704.06.) There is a limitation upon the amount of bond proceeds used for environmental studies. (*Id.*, §2704.08, subd. (b).) The funding plan must certify that "[t]he authority has completed all necessary project level environmental clearances necessary to proceed to construction." (*Id.*, §2704.08, subd. (c)(2)(K).)

(228 Cal.App.4th at pp. 337-338.) The appellate court's sound reasoning provides a legitimate basis for this determination.

For all of these reasons, the Authority is legally compelled to continue its tiered environmental review process for the HSR Project in full compliance with CEQA.

II. A Ruling that Would Extend CEQA Preemption to the HSR Project Would Upend a Long Process That Stakeholders and Sister Agencies Have Depended Upon and Could Trigger Supplemental Programmatic Environmental Review.

A. The Authority's Efforts to Preempt CEQA Betray Past Assurances and Commitments.

As discussed above, state and local agencies, environmental organizations, and individuals have all depended on the Authority's oft-repeated assurances that project-level review will be performed pursuant to CEQA and that specific enforceable mitigation measures will be adopted at the project level to reduce significant impacts. Some parties may have decided to forgo challenging the Statewide PEIR/S based on these assurances.

Now, to the detriment of all impacted stakeholders, the Authority has actively sought to preempt CEQA's remedies through administrative rulings, thereby threatening to break central promises to all who have expressed concerns about HSR Project impacts and the need for mitigation. (*See* Exh. J: STB Decision, p. 1.) This Court has criticized similar prior

efforts by private parties as "cynical gamesmanship." (*People ex rel. Sneddon v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189-190, as modified (Oct. 4, 2002) (*Sneddon*).) The game being played here has the highest of stakes, because it involves a statewide project that will affect all Californians, and especially those within the HSR Project's ROW, for decades to come.

B. If Preemption Results in Substantial Changes to the Authority's Adopted Mitigation Program for HSR, Supplemental Environmental Review Could be Required.

If this Court determines that only CEQA's remedies are preempted, but not its substantive requirements, then the *only* way in which the Authority could modify or delete the CEQA tiering approach and mitigation strategies it adopted at the program level of environmental review would be to complete supplemental environmental review at the program level, pursuant to CEQA. Partial preemption of CEQA, if applied to the HSR Project, could be information "of substantial importance" showing (1) the project will have "significant effects not discussed in the previous EIR," (2) "[s]ignificant effects previously examined will be substantially more severe" than stated in the prior review, and/or (3) "new mitigation measures now exist, or are now feasible, but are not being adopted by the project's proponents." (*See Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1057-58, citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1126–1129.) Absent complete preemption of CEQA, all three categories of information could independently trigger supplemental environmental review at the program level.

In addition, if a mitigation measure later becomes "impractical or unworkable," the "governing body must state a legitimate reason for deleting an earlier adopted mitigation measure, and must support that

statement of reason with substantial evidence." (*Lincoln Place Tenants Ass'n v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1509, as modified on denial of reh'g (Aug. 11, 2005) (*Lincoln Place I*).) This too could provide an independent basis for subsequent programmatic review. (*See Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 359, as modified on denial of reh'g (Sept. 4, 2001).)

Thus, a finding of partial preemption of CEQA could upset the whole apple cart by requiring the Authority to revise its programmatic analysis and reconsider its tiered approach and mitigation program.

C. To Prevent Injustice and Prejudice to Stakeholders, Courts May Exercise Judicial Estoppel to Prevent an Assertion of Preemption by the Authority.

Because the Authority is not a party to this action, it is not directly invoking preemption in a judicial proceeding. It also may not directly invoke preemption at present because the Authority chose not to seek this Court's review of the *Town of Atherton* decision. Instead, it may indirectly gain preemption through a ruling on this appeal. This procedural posture is unfortunate for Amici and countless other stakeholders impacted by the HSR Project; for if the Authority had directly invoked CEQA preemption as a shield to defend against CEQA challenges, litigants could seek equitable relief from the Court based on the inconsistent positions taken by the Authority in litigation. As the Supreme Court observed long ago:

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

(*Davis v. Wakelee* (1895) 156 U.S. 680, 689.) The well-established doctrine of judicial estoppel may be used to prevent a party from asserting federal preemption. (*See Lydon v. Boston Sand & Gravel Co.* (lst Cir. 1999) 175 F.3d 6, 13 [applying judicial estoppel to estop a party from taking a position directly inconsistent with the position the party successfully took previously].)

Here, the Authority prevailed on several CEQA claims based on assurances of project-level review. (*See* Exh. I: Final Judgment in *Atherton II*, Exh. A, Ruling on Submitted Matter, pp. 26, 30-33, 37; *see also Town of Atherton, supra*, 228 Cal.App.4th at p. 346.) The Authority induced tribunals to adopt the earlier position and to accept it as true. An assertion by the Authority of CEQA preemption would directly contradict those assurances made to the trial court and Court of Appeal.

Thus, even if the Authority could change course at this advanced stage of tiering process, eschew its own promises and commitments to comply with CEQA going forward, and disregard the statutes that mandate CEQA compliance (which it cannot), California courts could exercise their discretion and prevent it from doing so through the doctrine of judicial estoppel. The Authority should not be able to game the system and achieve indirectly through this appeal that which it might be prevented from accomplishing directly.

III. Preemption of CEQA as Applied to HSR Would "Defang" the Environmental Review Process.

A. CEQA is NEPA with Teeth.

While the purposes and provisions of CEQA and NEPA (42 U.S.C.A. §§4321 et seq.) are similar, there are important distinctions. Chief among these is CEQA's unique substantive mandate.

"The purpose of CEQA is not to generate paper, but to *compel* government at *all levels* to make decisions with environmental consequences in mind." (Guidelines, §15003(g), citing *Bozung v. LAFCO* (1975) 13 Cal.3d 263, emphasis added.) CEQA requires much more than mere consideration of these consequences.

First, under CEQA, the lead agency must thoroughly investigate the extent to which a proposed activity may have a significant impact on the environment. If, after this investigation, the lead agency determines that "[t]here is substantial evidence, in light of the whole record . . . . that a project may have a significant effect on the environment, the agency shall prepare a draft EIR." (Guidelines, §15064(a)(1).) While such a determination triggers multiple mandatory procedures, it also imposes the substantive duties to: (1) investigate, describe and evaluate "feasible measures which could minimize" those significant effects on the environment (i.e., "mitigation measures") (Guidelines, §15126.4(a)(1)); and (2) investigate, describe and evaluate "alternatives to the project...." (Guidelines, §15126.6(a).) Following this process, the key substantive requirement of CEQA is to require the lead agency to adopt mitigation measures or alternatives which will "mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (§21002.1(b).) The adoption of alternatives or mitigation measures must be "fully enforceable through permit conditions, agreements, or other legally-binding instruments." (§§21002, 21081(a); Guidelines, §15126.4(a)(2).) An agency must also make specific findings relating to mitigation measures recommended for significant impacts identified in the EIR. (§21081(a); Guidelines, §15091(a).) (*See Citizens for Quality Growth v. City of Mt Shasta* (1988) 198 Cal.App.3d 433, 441.)

Unlike CEQA, NEPA does not impose any enforceable substantive requirements, only procedural ones. (*See Strycker's Bay Neighborhood Council v. Karlen* (1980) 444 U.S. 223, 227-228; *see also Vermont Yankee Nuclear Power Corp. v. NRDC* (1978) 435 U.S. 519, 558 (1978) ["NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural"]; *see also Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 299 ["The federal act, NEPA, has been held to create only procedural, not substantive, rights"], citing *Morris v. Tennessee Valley Authority* (1972) 345 F.Supp. 321, 324.) In *Robertson v. Methow Valley Citizens Council* the U.S. Supreme Court summarized its procedural view of NEPA as follows:

> The sweeping policy goals announced in §101 of NEPA are thus realized through a set of "action-forcing" procedures that require that agencies take a "hard look" at environmental consequences .... Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that *NEPA itself does not mandate particular results, but simply prescribes the necessary process .... Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed--rather than unwise--agency action.*

((1989) 490 U.S. 332, 350-351, emphasis added.) For this reason, CEQA is often described as "NEPA with teeth."

Other environmental statutes cannot substitute for CEQA. In *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, this Court found that CEQA review of delisting decisions played an important role not served by other environmental statutes. In so doing, this Court declined to follow federal NEPA precedent. It concluded that:

> In light of the distinctions between CEQA and NEPA, between CESA and ESA, and between a delisting and a listing, and recognizing the utility of the CEQA process to a delisting decision under CESA, we conclude *Andrus* does not constitute persuasive authority for exempting a delisting decision under

> CESA from the requirements of CEQA on the basis of an irreconcilable statutory conflict.

(*Mountain Lion Foundation*, *supra*, 16 Cal.4th at p. 123.)

B. CEQA Serves Important State Policies.

Almost 30 years ago, in the seminal case *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 (*Laurel Heights I*), this Court summarized the importance of CEQA and the EIR document, as follows:

> The EIR is the primary means of achieving the Legislature's considered declaration that *it is the policy of this state* to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." The EIR is therefore "the heart of CEQA." An EIR is an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." The EIR is also intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." Because the EIR must be certified or rejected by public officials, *it is a document of accountability*. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. The EIR process protects not only the environment but also informed self-government.

(*Id.* at p. 392, citations omitted and emphasis added.) Almost a decade later, this Court declared that CEQA is to be interpreted to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Mountain Lion Foundation*, *supra*, 16 Cal.4th at p. 112.)

Since then the Courts of Appeal have made similar observations concerning important purposes and functions of CEQA. (*See, e.g.*, *Environmental Protection Info., Inc., v. Johnson* (1985) 170 Cal.App.3d

604, 622 ["Full compliance with the letter of CEQA is essential to the maintenance of its important public purpose"]; *see also PCL v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 920 [concluding EIR failed to fulfill "the most important purpose of CEQA, to fully inform the decision makers and the public of the environmental impacts of the choices before them"], as modified on denial of reh'g (Oct. 16, 2000); *Assoc. of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392 ["An EIR is an educational tool not just for the decisionmaker, but for the public as well.... It is for this reason that CEQA's investigatory and disclosure requirements must be carefully guarded"].)

C. Preemption of CEQA, if Applied to the HSR Project, Would Allow the Authority to Evade Accountability.

"The fundamental goals of environmental review under CEQA are information, participation, mitigation, *and accountability*." (*Lincoln Place II*, *supra*, 155 Cal.App.4th at pp. 443–444, emphasis added.) "Political accountability, informed self-government and environmental protection are promoted by the information and disclosure functions of CEQA." (*POET, LLC v. California Air Resources Board* (2013) 217 Cal.App.4th 1214, 715, fn. 23 citing *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 717.) When CEQA's procedural and substantive mandates are followed, the public is assured that (1) it will be able to meaningfully participate in decision making and (2) environmental factors have been identified and analyzed, and significant impacts will be mitigated to the extent feasible, and (3) decisionmakers will be accountable for their policy decisions. The public, being duly informed, can respond accordingly to action with which it disagrees. (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 842 ["Only by requiring [the CEQA lead agency] to fully comply with the letter of the law can a subversion of the important public purposes of CEQA be avoided, and only by this process

will the public be able to determine the environmental and economic values of their elected and appointed officials, thus, allowing for appropriate action come election day should a majority of the voters disagree"]; Guidelines, §15003(e).)

If the Court finds the federal preemption of CEQA applies broadly to railroads in California, such that the Authority will no longer be required to satisfy CEQA's requirements, including those pertaining to information disclosure and mitigation, the Authority will be able to evade the environmental and political accountability that California's legislature (and the voters) intended. In addition, the Authority's credibility when making future decisions would be significantly eroded because the public would understand that it cannot rely upon the agency's promises, assurances, and commitments.

IV. A Finding of Preemption Here Could Also Have the Unintended Negative Consequence of Easing the Argument for Preemption of Other California Laws.

California's Attorney General is the "chief law officer of the State." (Cal. Const., art. V, § 13.) Until now, the Attorney General has typically fulfilled this role by opposing efforts to preempt state law by generally more lax federal laws. (See, e.g., *Capital Research and Management Co. v. Brown* (2007) 147 Cal.App.4th 58, 65; *see also Gibson v. World Savings & Loan Assn.* (2002) 103 Cal.App.4th 1291, 1295, as modified (Dec. 24, 2002); *see also Lopez v. World Savings & Loan Assn.* (2003) 105 Cal.App.4th 729, 738; *see also People ex rel. Sneddon, supra,* 102 Cal.App.4th 181, 190.) In doing so, the Attorney General has satisfied its constitutional duties to "*uniformly* and adequately" enforce the state's laws.

Now, with HSR Project, the Authority and the Attorney General have taken the opposite position and have argued that preemption under the ICCTA does apply. In *Town of Atherton*, the Court of Appeal noted this

reversal of position, observing that "[t]his case is unusual to say the least; the state entity, represented by the state's Attorney General, is inexplicably arguing for federal preemption instead of defending the application of state law." (*Town of Atherton, supra*, 228 Cal.App.4th at p. 339.) The Court of Appeal correctly observed the unusual position taken by the state's leading law enforcer. This position concerning preemption as applied to the HSR Project is not only inexplicable it is also unfortunate, because it could lead to further preemption of California's protective laws.

CONCLUSION

For the reasons set forth above, Amici respectfully request this Court hold that CEQA, as it applies to railroads in California, is not preempted by the ICCTA. In the alternative, Amici request that any holding that applies federal preemption to CEQA be strictly limited to the facts of this appeal.

Dated: May 28, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, Rules 8.520(c) and 8.520(f))

I hereby certify that this brief Amicus Curiae has been prepared using proportionately spaced 13-point Times New Roman font. In reliance on the word count feature of the Microsoft Word for Windows software used to prepare this brief, I further certify that the total number of words of this brief is 6,454 words, exclusive of those materials not required to be counted.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on May 28, 2015.

Respectfully submitted,

By: _____

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PROOF OF SERVICE

Friends of the Eel River v. North Coast Railroad Authority, et al.
Supreme Court of California
Case No. S222472

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 339 15th Street, Suite 202, Oakland, CA 94612.

On May 29, 2015, I served true copies of the following document(s) described as:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS; PROPOSED BRIEF OF AMICI MADERA COUNTY FARM BUREAU AND MERCED COUNTY FARM BUREAU

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Holder Law Group's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 29, 2015, at Oakland, California.

By
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