KAMALA D. HARRIS
Attorney General of California
RANDY L. BARROW
Supervising Deputy Attorney General
NICHOLAS STERN, State Bar No. 148308
LINDA GÁNDARA, State Bar No. 194667
CAROLYN NELSON ROWAN, State Bar No. 238526
ELIZABETH B. RUMSEY, State Bar No. 257908
MYUNG J. PARK, State Bar No. 210866
SCOTT LICHTIG, State Bar No. 243520
Deputy Attorneys General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-3840
Fax: (916) 327-2319
E-mail: Nicholas.Stern@doj.ca.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BNSF RAILWAY COMPANY and UNION PACIFIC RAILROAD COMPANY, Plaintiffs, **v.** **CALIFORNIA STATE BOARD OF EQUALIZATION, et al.,** Defendants.	3:16-cv-04311-RS **DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** Date: October 13, 2016 Time: 1:30 p.m. Courtroom: 3 Judge: Hon. Richard Seeborg Action Filed: July 29, 2016

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INTRODUCTION

Plaintiffs BNSF Railway Company and Union Pacific Railroad Company (collectively, the Railroads) are seeking a preliminary injunction that would prevent the Governor's Office of Emergency Services (OES) and the California Board of Equalization (BOE) from implementing a state law requiring railroads to collect a fee from the owners of hazardous materials when shipping those materials by rail in California.[1] A preliminary injunction is an extraordinary remedy and the Railroads fail to establish the necessary elements for this extraordinary relief.

First, the Railroads have not established that they will likely succeed on the merits. They claim that three federal acts and the dormant Commerce Clause preempt California's law, but an examination of the relevant authorities demonstrates that they will not succeed on any of these grounds.

Second, the Railroads fail to demonstrate that they will suffer irreparable harm. The Railroads contend that the implementation of this fee will cause their customers to ship their materials by truck rather than by rail and that administration of the fee will be difficult. However, the Railroads' only support for these contentions are declarations that are based solely on speculation. Third, the public's interest in assessing a minimal fee designed to protect the shippers of hazardous materials by mitigating the damage caused by a spill clearly outweighs the potential harm caused by having to collect the fee. Finally, an injunction prohibiting the collection of fees is contrary to the public's interest in protecting life, property, and the environment.

Accordingly, the Railroads' motion for a preliminary injunction should be denied.

BACKGROUND

I. CALIFORNIA'S NEED FOR IMPROVED EMERGENCY RESPONSE SERVICES

The recent increase in the domestic production of oil has led to a dramatic change in how oil is transported to California. Rail has emerged as a major means of transporting oil throughout

[1] Defendants California State Board of Equalization, its Executive Director, David J. Gau, and its Board Members, George Runner, Fiona Ma, Jerome Horton, Diane L. Harkey, and Betty T. Yee, take no position on the merits of this case. All arguments in this brief are made on behalf of OES and the other defendants only.

California, igniting a new set of concerns about derailments of trains carrying any hazardous materials. According to a report issued in 2014 by a working group assigned to study the safety of transporting oil by rail, "California is on the cusp of dramatic changes in how oil is transported to the state." Defs.' Gandara Decl., Ex. A at 1. Total petroleum spills by rail in California increased from 98 in 2010 to 182 in 2013. *Id*. at 2. Nationally, more crude oil was spilled in rail incidents in 2013 than was spilled in the nearly four decades before. *Id*. Some incidents in North America have been devastating, including the 2013 accident in Quebec where 63 tank cars of crude oil exploded, killing 47 people. *Id*.

These tragic rail accidents caused law makers to question the overall safety of railroads in California and the emergency response capabilities that are available to respond to a derailment carrying hazardous materials. California's high hazard areas for derailments are located primarily in the mountains, with at least one such site along every rail route in California. Defs.' Gandara Decl., Ex. A at 4. Areas of vulnerable natural resources are located throughout the State, including both rural and urban areas, and a rail accident almost anywhere in California would place waterways and sensitive ecosystems at risk. *Id*.

In 2015, OES analyzed the State's ability to respond to incidents related to the transport of hazardous materials across California's railways, finding significant gaps and deficiencies in California's "ability to reliably, effectively, and safely respond to and mitigate a catastrophic hazardous materials spill, release, or fire along our vast rail system." Pls.' O'Brien Decl., Ex. B at 2. Acknowledging that the entire emergency response system "is only as strong as its weakest link," the analysis outlined several "gaps" in California's existing emergency response system for rail routes "where emergency response resources, training, and capabilities are limited or *simply do not exist*." Pls.' O'Brien Decl., Ex. C at 3 (emphasis added). OES concluded that these deficiencies "must be addressed to build out a comprehensive and reliable hazardous materials response capability that can be sustained and ready to respond to and mitigate the cascading impacts of a derailment resulting in the catastrophic release of hazardous materials." *Id*. at 12.

OES highlighted areas in which local responders were particularly unprepared, including some rural areas and other jurisdictions outside of major urban cores. In several rural areas, OES

found a lack of qualified Haz-Mat Teams that could adequately respond to a derailment that releases hazardous materials. *Id*. at 4. In rural Northern California in particular, OES found limited or no Haz-Mat Teams that met the necessary response time criteria and operational standards located near several areas specifically designated as high-hazard areas for derailments. *Id*. at 5. Several jurisdictions outside urban areas have limited capabilities to adequately respond "in the event of even a moderate Haz-Mat incident, let alone a catastrophic scenario." *Id*. at 12. Even in some more populated areas along rail lines, OES found that no certified Haz-Mat teams existed *at all*. *Id*. at 5.

II. OES'S LEGISLATIVE MANDATE

California Senate Bill 84 (SB 84), enacted in 2015, required OES to establish a schedule of fees "to be paid by each person owning any of the 25 most hazardous material commodities … that are transported by rail in California…." Cal. Gov't Code § 8574.32(a)(1). The fee reflects the cost of providing specific benefits to the owners of hazardous materials being shipped by rail. Those benefits include preparations to respond to the release of hazardous materials from a rail car, efforts to contain the resulting damage and restore the use of the railroads for the owners of the hazardous materials, and mitigation of potential exposure of those owners to compensable damages. *Id.* § 8574.32(c).

The fee is based on the number of rail cars loaded with hazardous materials being transported within California. *Id.* § 8574.32(b)(2). Railroads are responsible for collecting the fee from the shipper and passing it on to BOE. *Id.* § 8574.32(b)(2), (4).

The fees must then be placed in the Regional Railroad Accident Preparedness and Immediate Response Fund (the Fund). *Id.* § 8574.44(a), (b). After reimbursing another state fund that provided start-up costs for this program, the fees may then be used on appropriation by the Legislature for specified purposes related directly to the release of hazardous materials being transported by rail. *Id.* § 8574.44(d), (e). Those purposes include planning, developing, and maintaining a capability for responding to large-scale hazardous materials accidents involving rail cars; acquiring and maintaining specialized equipment and supplies; and creating and supporting specialized, regional training facilities and emergency response teams. *Id.* § 8574.44(e). If

equipment acquired with fee revenue is used for emergency response services unrelated to railroad accidents, the Fund must be reimbursed. *Id.* § 8574.44(i).

The total fees to be collected during the 2016 and 2017 calendar years will not exceed $20 million per year. *Id.* § 8574.44(g)(1), (2). During the 2018 calendar year, the total fees will not exceed $10 million. *Id.* § 8574.44(g)(3)(A). No less than every three years, the Director of OES must reconsider and adjust the fee "with due consideration for existing and expected operational and continued resource requirements." *Id.* § 8574.32 (h)(1). Total fees must not exceed the reasonable costs incurred for the purposes identified in the statute. *Id.* § 8574.32(d).

III. OES'S IMPLEMENTATION OF THE FEE

OES's notice of emergency rulemaking explains that the fee is intended to reduce the likelihood of devastating harm resulting from the transportation of hazardous materials by rail. Pls.' O'Brien Decl., Ex. A at 2. The fee will advance that purpose by eliminating one of the greatest "gaps" in California's emergency response system, thereby reducing the potential liability of the owners of hazardous materials being transported by rail. *Id.* at 3.

The fee "will be utilized to build, develop, and enhance emergency response capabilities in the event of a hazardous material incident involving a railroad in California." Pls.' O'Brien Decl., Ex. B at 1. These emergency response capabilities "will benefit the owners of hazardous material commodities transported by rail in California [by] mitigating the impacts of hazardous material incidents by rail." *Id.*; *see also* Cal. Gov't Code § 8574.32(c). The fee is initially set at $45 per loaded rail car travelling in California that contains any quantity of the listed hazardous materials. Cal. Code Regs. tit. 19, § 2704(b). Once the Fund reaches the annual limit specified in Government Code § 8574.44(g), no further fees will be charged for the remainder of that calendar year, and refunds may be issued for any overpayments. Cal. Code Regs. tit. 19, §§ 2704(c), 2705(a).

STANDARD OF REVIEW

A preliminary injunction is "an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 23 (2008). It "may only be awarded upon a clear showing that the plaintiff is entitled to relief." *Id*. at 22. The moving parties "face a difficult task in

proving that they are entitled to this 'extraordinary remedy.'" *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *See Winter*, 555 U.S. at 20. Because the Railroads have failed to establish these essential elements, the Railroads' Motion for Preliminary Injunction should be denied. *DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011) (explaining that a plaintiff must prove all four prerequisites for injunctive relief).

ARGUMENT

I. THE RAILROADS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

A. Because the State Is Exercising Its Police Powers, There Is a Presumption Against Preemption.

The Court's preemption analysis begins with the presumption that a State's historic police powers to protect the health and safety of its citizenry are not superseded unless that is Congress's clear and manifest purpose. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (plurality opinion). The presumption applies when an express preemption provision is included within a federal statute. In such cases, the presumption applies with respect to the scope of the provision. *Medtronic*, 518 U.S. at 484.[2]

Courts have applied the presumption in cases involving railroads and the specific statutes at issue in this case. *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1327-29 & nn. 1-2 (11th Cir. 2001) (ICCTA); *Roth v. Norfalco LLC*, 651 F.3d 367, 375 (3d Cir. 2011) (HMTA). The proper focus for determining whether the presumption applies is the purpose of the state law. *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009). The SB 84 fee is intended to reduce the likelihood of devastating harm resulting from the transportation of hazardous materials by rail.

[2] When the text of an express preemption provision is clear, the preemption analysis begins and ends with the language of the statute itself. *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S.Ct. 1938, 1946 (2016). But when the language is not plain and clear on its face, the presumption against preemption should still apply to the Court's analysis regarding the *scope* of that express preemption provision. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

Expenditures from the revenue generated will directly address California's existing gaps in its ability to effectively respond to and recover from an incident involving the release of hazardous materials, mitigating the effects of the incident and potentially saving lives, property, and the environment. This is a proper exercise of the police power. *See Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 432, 434 (2005) (affirming state court ruling that a State's fee reflected a "'legitimate expression of the [S]tate's concern that the welfare of its citizens be protected,' and hence an appropriate exercise of the State's police power"); *V-1 Oil Co. v. Utah State Dept. of Public Safety*, 131 F.3d 1415, 1424 (10th Cir. 1997) ("There is no question that the proper handling of hazardous materials is a valid 'regulation of local aspects of interstate commerce' that 'is a power . . . essential to a State in safeguarding vital local interests.'"). Because SB 84 represents a proper exercise of the State's police power, the Court must "assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (internal quotations omitted).

B. SB 84 Imposes a Fee Not a Tax, Therefore the Railroad Revitalization and Regulatory Reform Act (4-R Act) Does Not Apply.

The Railroads contend that the fee under SB 84 is a "tax" and violates a provision of the Railroad Revitalization and Regulatory Reform Act (4-R Act), which prohibits the imposition of state taxes that discriminate against rail carriers. 49 U.S.C. § 11501(b)(4). However, SB 84 is a fee, not a tax, and therefore, the 4-R Act does not apply.

Specifically, the Ninth Circuit has articulated that, in the context of the 4-R Act, the examination of what constitutes a "tax" should focus on "the nature of the levy and the purpose of the pertinent constitutional or statutory provision." *Union Pacific R.R. Co. v. Pub. Util. Com'n of Or.*, 899 F.2d 854, 858 (9th Cir. 1990). For example, in *Union Pacific*, plaintiffs argued that the State of Oregon's levy on railroads was a tax and was prohibited by the 4-R Act. The levy was part of a program administered by the Oregon Public Utilities Commission that regulated the transportation of hazardous materials, "principally by maintaining inventories of such materials and requiring notice of their movement." *Id.* at 856. The statute required the Commission to

impose a fee or levy to "defray the cost of performing the regulatory duties imposed upon it." *Id.* Each railroad was required to pay a proportionate share to the total cost of railroad regulation. *Id.* And the payments collected were only to be used for the purpose of "paying the expenses of the commission in respect to railroads." *Id*. at 857 (internal citation omitted).

The Ninth Circuit observed that Oregon's levy:

> is an integral part of a program to regulate the railroad business in Oregon. It is imposed only upon those who participate in and profit from the business regulated. It is paid directly to the Commission and does not go into Oregon's general fund; it produces no revenues for the general expenses of government but is devoted exclusively to defraying the costs of the regulatory program itself.

Id.

The court found that "[s]ince the Oregon assessment is limited by the cost of the regulatory program, and the revenues raised must be segregated from Oregon's general fund and used only to finance the program, there could be no fear the State would assess Union Pacific unfairly or for the purpose of raising general revenue in violation of the spirit of the 4-R Act." *Id*. at 858. The Ninth Circuit focused on the nature of the levy and the purpose of the pertinent statute. It distinguished between "taxes" used to raise revenue for the general support of government and "fees" used to cover the costs of regulating specific industries. *Id.* at 859 (citing *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580 (1884)); *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers v. United States*, 138 F.2d 992, 994-95 (6th Cir. 1943); *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983); *Brock v. Washington Metropolitan Area Transit Authority*, 796 F.2d 481, 488-89 (D.C. Cir. 1986). Accordingly, the Ninth Circuit held that the Oregon levy was a fee to recoup costs of a regulatory program and not a tax to raise general revenues. *Union Pacific*, 899 F.2d at 859. Thus, "excluding such a levy from the bar against discriminatory taxes is consistent with the purposes of [the 4-R Act]." *Id*.

Congress did not intend the 4-R Act to bar the kind of fee imposed by SB 84. This fee is specific to a regulatory purpose – it is to be paid by each person owning any of the listed hazardous material commodities that are being transported by rail in California. The total amount of the fee reflects benefits provided to the owners of the hazardous materials, including preparations to respond to the release of hazardous materials from a rail car, containment of the

resulting damage, restoration of the use of the railroads for the owners of the hazardous materials, and mitigation of those owners' potential liability for damages.

While the fees will also help the general public by creating a better emergency response system for the hazardous materials being transported by rail, the fees are still not considered a prohibitory "tax" under the 4-R Act. As *Union Pacific* observed, the "tax" in the 4-R Act does not include "charges imposed upon members of an industry to recoup the cost of regulating that industry, *even though the regulatory program is principally intended to and does benefit the general public rather than industry members*." *Union Pacific*, 899 F.2d at 860 (emphasis added).

Here, the SB 84 fee is principally intended to benefit the ratepayer and does not go to the general support of the state government. The fee is required to be placed in the Regional Railroad Accident Preparedness and Immediate Response Fund. Cal. Gov't Code § 8574.44(a), (b). The fee must be used for specified purposes related directly to the release of hazardous materials being transported by rail. *Id.* § 8577.44(d), (e). The total fee must not exceed the reasonable costs incurred for the purposes identified in the statute. *Id.* § 8574.32(d).

Thus, just as with Oregon's levy in *Union Pacific*, the levy in SB 84 is a fee, properly imposed on those who profit from transporting hazardous materials by rail in California to cover the costs of emergency response services for that transportation. Since it is a fee, not a tax, SB 84 does not violate the 4-R Act.[3]

Although the Railroads rely on *Bidart Bros. v. California Apple Com'n*, 73 F.3d 925, 927 (9th Cir. 1996), it does not apply in the present context. Pls.' Br. at 20-22. *Bidart* involved the question of whether the levy was a "tax" within the meaning of the Tax Injunction Act (TIA), which limits the jurisdiction of federal courts in enjoining "'the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of

[3] Even if the SB 84 fee were a tax, which it is not, it would not violate the 4-R Act because it does not discriminate against rail. "'Discrimination' is the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.'" *CSX Transp. Inc., v. Alabama Dept. of Revenue*, 562 U.S. 277 (2011). As discussed below, the SB 84 fee does not discriminate because it was passed to enable the State to fill gaps in its ability to respond to rail accidents and releases of hazardous materials. Since the fee is to fund emergency response to rail spills, distinguishing between hazardous materials shippers who use rail and those who do not is not only reasonable, it is the only fair way of allocating the fee.

such state.'" *Bidart*, 73 F.3d at 927 (quoting 28 U.S.C. § 1341). The court looked at the purpose of the TIA and its legislative history to articulate a three-part test for the specific context of determining whether an assessment imposed by a state entity is a tax within the meaning of the TIA. *Id*. at 931-33.

Bidart's analysis is inappropriate here because the statute in this case does not involve the TIA but instead the completely different statutory scheme in the 4-R Act. As the Ninth Circuit observed, the definition of "tax" divorced from its context is a "metaphysical exercise in which courts do not have occasion to engage. The term comes before judges embedded in legal contexts from which the word gains concrete and specific meaning." *Union Pacific*, 899 F.2d at 858 n.6 (quoting *Brock v. Washington Metro. Area Transit Auth.*, 796 F.2d 481,489 (D.C. Cir.1986)). In accord with this observation, courts have analyzed "taxes" in a variety of ways depending upon the statutory context. *See, e.g., National Cable Television Ass'n. v. United States*, 415 U.S. 336, 340–41 (1974); *New England Power Co. v. U.S. Nuclear Regulatory Commission*, 683 F.2d 12, 14 (1st Cir.1982); *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir.1983). The Ninth Circuit's analysis of "taxes" under the 4-R Act in *Union Pacific* is the operative case, not *Bidart*.

C. The State Is Authorized to Implement Fair Fees for Emergency Response; Therefore SB 84 Is Not Preempted by the Hazardous Materials Transportation Act.

The purpose of the HMTA is to protect against the risks inherent in the transportation of hazardous materials. 49 U.S.C. § 5101. While the HMTA preempts some categories of state laws, it does not preclude all state regulation of hazardous materials. 49 U.S.C. § 5125; *see also Com. of Mass. v. U.S. Dept. of Transp*., 93 F.3d 890, 891 (D.C. Cir. 1996) (discussing scope of HMTA preemption). In particular, the HMTA expressly permits States to impose fees relating to the transport of hazardous materials, as long as the fees are fair and for purposes relating to the transport of hazardous materials, such as "planning, developing, and maintaining a capability for emergency response." 49 U.S.C. § 5125(f)(1); *Com. of Mass.*, 93 F.3d at 895.

The SB 84 fee is expressly for the purpose of "planning, developing, and maintaining a capability for emergency response."

1. SB 84 does not unfairly discriminate against rail.

SB 84 does not unfairly focus on rail transport. Although the Railroads argue that the SB 84 fee is not fair because it "favors one mode of hazardous material transportation (truck) over another (rail) without justification," Pls.' Br. at 16:21-22, there is ample justification for SB 84's focus on rail transport. As already noted, SB 84 was passed in response to concerns about the State's ability to respond to a rail spill involving hazardous materials. A single train can carry far more hazardous material than a truck. For example, unit trains carrying crude oil are generally between 70 to 100 cars long, with each car carrying between 25,000 to 300,000 gallons of crude oil.[4] Defs.' Gandara Decl., Ex. A at 1, 13 n.27. The potential impact of a derailment or other rail accident dwarfs the threat posed by an accident involving a truck. The working group concluded that California's current emergency response system for releases of hazardous materials along rail routes was inadequate and recommended that the State strengthen its emergency preparedness and response programs to deal with the threats posed by rail transport of oil. *Id*. at 6. No similar risks were identified for the transportation of hazardous material by truck.

Based on that study, OES conducted an analysis of the gaps in California's emergency response system for its rail routes and found a lack of preparedness, particularly in rural and remote areas of the State. Accordingly, the Legislature passed the SB 84 fee to fund the costs of preparing "to respond to the release of hazardous materials from a rail car or a railroad accident involving a rail car . . . ." Cal. Gov't Code § 8574.32(c). The Legislature specified that the total amount of the fee must reflect the cost of providing specific benefits to the owners of hazardous materials being shipped by rail. *Id.* §§ 8574.32(d), 8574.44. Because this fee is designed to bolster the State's emergency responses to the releases of hazardous materials shipped by rail, it is fair to impose the fee only on those who are transporting hazardous materials by rail.

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[4] A unit train is a freight train carrying a single commodity that is bound for a single destination.

2. The SB 84 Fee Does Not Unfairly Discriminate Against Interstate Commerce.

The SB 84 fee is also fair because it does not discriminate against interstate commerce. This aspect of HMTA's fairness determination is informed by Commerce Clause principles. As noted by the Railroads, guidance for the application of these Commerce Clause principles can be found in Department of Transportation (DOT) decisions assessing HMTA preemption of particular charges relating to hazardous materials. Pls.' Br. at 16:27-17:8. However, the Railroads mistakenly argue that DOT applies the four-part test adopted by the Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Pls.' Br. at 16:27-17:8 (citing *Preemption Determination No. 21(b): Tenn. Hazardous Waste Transporter Fee and Reporting Requirement*, 64 Fed. Reg. 54474, 54476 (1999) (*PD 21(b)*)). Instead, as one of the plaintiffs here previously acknowledged, DOT explained that the applicable test is the three-part test applicable to user fees that was articulated by the Supreme Court in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17 (1972).[5] *See PD 21(b)*, 64 Fed. Reg. at 54476, 54478 (concluding that "reasonableness" test in *Evansville* "appears to be the most appropriate one for interpreting the fairness requirement in 49 U.S.C. 5125(g)(1)"); *see also Preemption Determination No. 22(R): New Mexico Requirements for the Transportation of Liquefied Petroleum Gas*, 68 Fed. Reg. 55080, 55084 (applying *Evansville* factors to uphold a vehicle inspection fee); *N.H. Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 46-47 (1st Cir. 1984) (applying *Evansville* and upholding fee to fund hazardous waste cleanup). *Evansville* provides the correct test here, and because SB 84 readily meets *Evansville*'s requirements, it falls within the HMTA's preemption exemption.

Specifically, *Evansville* involved a $1 per commercial airline passenger fee to defray the costs of construction and maintenance of a local airport. *Evansville*, 405 U.S. at 709. The

[5] In contrast to the position it has taken in this litigation, in its comments to OES regarding the proposed emergency regulations to implement SB 84, Union Pacific stated: "The U.S. Department of Transportation has determined that [sic] fairness test is derived from the Supreme Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972)." Defs.' Gandara Decl., Ex. B at 3.

airlines were required to collect and remit the fee, less 6% allowed to cover their administrative costs of assessing the fee. *Id*. Delta Airlines challenged the fee, claiming that it violated the dormant Commerce Clause. The Supreme Court rejected the challenge, explaining that a fee does not violate the Commerce Clause as long as it: 1) is based on some fair approximation of the use or privilege for use; 2) is not excessive in comparison with the benefit conferred or the costs incurred by the entity imposing the fee; and 3) does not discriminate against interstate commerce.[6] *Id.* at 717-20; *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 369 (1994) (discussing application of *Evansville*). Under *Evansville*, the party challenging the law has the burden of persuasion. *Industria y Distribuction de Alimentos v. Trailer Bridge*, 797 F.3d 141, 145 (1st Cir. 2015).

SB 84 meets each of the *Evansville* conditions. First, the fee is based on a fair approximation of the costs imposed. *Evansville*, 405 U.S. at 716-17. This approximation of costs need not be perfect. It is sufficient if the fee roughly approximates the actual costs of the program. *Id*. "This is essentially a question of allocation; we ask whether the government is charging each individual entity a fee that is reasonably proportional to the entity's use, and whether the government has reasonably drawn a line between those it is charging and those it is not." *Industria y Distribuction de Alimentos*, 797 F.3d at 145. The SB 84 fee is imposed on each loaded rail car carrying a hazardous material within California, regardless of whether the travel is wholly intrastate or crosses state lines. Cal. Gov't Code § 8574.32(b)(1). Thus, the fee is linked to the loads of hazardous material actually transported in California, so that each shipper pays its fair share of the cost of emergency preparedness.

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[6] The First Circuit Court of Appeal has likened this test to the balancing test in *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970). *Selevan v. New York Thruway Authority*, 584 F.3d 82, 97 (1st Cir. 2009). The *Selevan* court explained "*Evansville* addressed in a specific context the same concerns addressed in *Pike* while also adopting the Supreme Court's analysis of 'discrimination' under the dormant Commerce Clause." *Id*. As such, some courts have upheld fees applying the *Pike* balancing test. *See V-1 Oil Co.*, 131 F.3d at 1423-24, 1427 (applying *Pike* balancing test and upholding licensing and certification fees on out-of-state liquefied petroleum gas facilities); *Franks & Son, Inc. v. State*, 966 P.2d 1232, 1241 (Wash. 1998) (applying *Pike* balancing test to gross weight regulatory fee on trucks). Similarly, SB 84 is constitutional under the *Pike* balancing test.

Second, the fee is not excessive in relation to the costs incurred by the State. *Evansville*, 405 U.S. at 719. All of the SB 84 fees must be used to cover the State's costs of preparing "to respond to the release of hazardous materials from a rail car or a railroad accident involving a rail car . . . ." Cal. Gov't Code § 8574.32(c); see also § 8574.44(e). Thus, the amount of the fee is reasonably related to the State's costs of preparing for and responding to a rail spill of hazardous materials. *Id.* § 8574.32(c).

Nonetheless, the Railroads argue that the fee is unfair, claiming it will fund training and equipment that may be used to respond to non-rail incidents as well as rail-related incidents. Pls.' Br. at 19:5-20. Local agencies will be required to reimburse the Fund for any use of equipment for other emergencies, reducing the fee accordingly. Cal. Gov't Code § 8574.44(i). Therefore, any use of the equipment for truck accidents does not deplete the Fund or otherwise occur at the fee payers' expense. Further, this incidental use is not inconsistent with the purpose of the fee, which is to have an emergency response team, with appropriate equipment, standing by in the event a rail car releases hazardous materials. Because the response team and equipment will be available in the event of a rail incident, the fee payer will get the full benefit of this fee regardless of whether the training and equipment assists in responding to other emergencies. In any event, the mere possibility that a fee may also result in an incidental benefit to non-fee payers does not render it unfair or excessive.

Third, the fee does not discriminate against interstate commerce. As used in the context of the dormant Commerce Clause, "discrimination" means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994). SB 84 is not facially discriminatory because it applies equally to interstate and intrastate transportation of hazardous materials. *See Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30, 31 (9th Cir. 1991) (noting that airport fee is not discriminatory because it "applies to inter- and intrastate passengers equally"). Although the Railroads argue that the fee is discriminatory because it may shift traffic away from California rail routes, they provide no evidence that the fee will do so. *See Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1231 (9th Cir. 2010) (plaintiff has burden of producing

substantial evidence of actual discriminatory effect). Rather, the Railroads provide a single declaration which merely speculates that the SB 84 fee "*could* make the difference between shippers routing their shipments through a California port or switching to a viable alternative port . . . ." Pls.' Simon Decl. at ¶ 15, 6:4-6 (emphasis added). However, the declarant fails to identify any shipper who is contemplating such a change and provides no comparison of costs to show that such a change even is economically viable. This type of speculation fails to meet the Railroads' burden of presenting substantial evidence of an actual discriminatory effect. *Black Star Farms*, 600 F.3d at 1231; *International Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 405 (9th Cir. 2015).

The Railroads ignore *Evansville*'s commerce clause test. Instead, they argue that the SB 84 fee should be struck down under *Complete Auto's* commerce clause test for state and local taxes. Pls.' Br. at 16:27-19:4. In particular, the Railroads argue that the SB 84 fee is not "fairly apportioned for *Complete Auto* purposes because it fails to meet the internal consistency test." Under that test, courts consider whether interstate commerce would be placed at a disadvantage if every State adopted a tax that was comparable to the challenged tax. *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

However, *Complete Auto* and the internal consistency test do not apply to fees such as those imposed under SB 84. *See Pharmaceutical Research and Manufacturers of America v. County of Alameda*, 768 F.3d 1037, 1044 (9th Cir. 2014) (explaining the *Complete Auto* test does not apply outside of the tax context). The cases relied on by the Railroads do not indicate otherwise. *See* Pls.' Br. at 17:14-18 (citing *Comptroller of the Treasury of Md. v. Wynne*, 135 S.Ct. 1787, 1802 (2015) and *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1105 (9th Cir. 2013)). For example, *Wynne* involved income taxes, not an apportioned fee such as the one here. *Wynne*, 135 S.Ct. at 1792. And in *Rocky Mountain Farmers Union*, the court declined to apply the internal consistency test to the facts before it. *Rocky Mountain*, 730 F.3d at 1105.

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The Railroads also attempt to liken the SB 84 fee to the "flat taxes" for truck registration that were struck down in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987).[7] But *Scheiner* did not hold that the internal consistency test applies to a fee that meets the *Evansville* test. *Scheiner* is not applicable here. *Scheiner* involved what the Court called "flat taxes" that consisted of two annual flat fees, one for affixing a "marker" on a truck and the other based on the number of truck axles. *Id*. at 271, 273-74. The challengers argued that "the entire economic burden of each tax fell on out-of-state vehicles" because: (1) in-state truckers did not have to pay the marker fee because it was "deemed" part of their registration fee, and (2) the in-state registration fee had been reduced in an amount that "neatly offset the newly imposed axle tax." *Id*. at 275-76. The out-of-state truckers also argued the flat fees taxes were discriminatory because "both taxes imposed a much heavier charge per mile of highway usage by out-of-state vehicles." *Id*.

The *Scheiner* Court held both fees unconstitutional. 483 U.S. at 269. But it distinguished the challenged flat taxes from fees, such as the SB 84 fee, that vary "with miles traveled or with some other proxy for value obtained from the State." *Id*. at 291. And the Court distinguished *Evansville* because, unlike the fee in *Evansville*, Pennsylvania's taxes "discriminate[d] against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State, and they [did] not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads." *Id.* at 290. Thus, the Court stated that "the marker fee and axle tax are wholly unlike the user fees we upheld in" *Evansville*. *Id*. at 289.

In contrast, by basing the fee on each rail car loaded with a hazardous material, SB 84 is based on a proxy that fairly approximates the cost to the State. Thus *Evansville* provides the

[7] The Railroads also cite to two state court decisions that rely on *Scheiner* to strike down flat fees on the transportation of hazardous materials. Pls.' Br. at 17 n.5 (citing *Am. Trucking Ass'ns, Inc. v. State of New Jersey*, 852 A.2d 142 (N.J. 2004) and *Am. Trucking Ass'ns, Inc. v. State of Wisconsin*, 556 N.W.2d 761 (Wis. Ct. App. 1996)). Both of these decisions are inapposite because they involved flat annual fees that were not tied to miles travelled, trips made, or some other proxy for value obtained from the State. *State of New Jersey*, 852 A.2d. at 167 (noting that State could have apportioned the fee "based on several measures of activity including manifests, mileage or tonnage hauled," but failed to do so); *State of Wisconsin*, 556 N.W.2d at 767 (noting that State acknowledged that the number of shipments made tends to reflect degree of risk, but State failed to apportion fee on that basis).

appropriate commerce clause test in this case. Because the SB 84 fee meets *Evansville's* conditions, it does not violate the Commerce Clause and falls within the HMTA's safe harbor for fees to fund emergency response programs for hazardous waste spills.

D. The Interstate Commerce Commission Termination Act of 1995 Does Not Preempt SB 84.

In the HMTA, Congress specifically reserved state authority to impose fair fees related to the transportation of hazardous materials by rail. As such, ICCTA's general preemption of state rail transportation regulation cannot be interpreted to negate this authority. Even when ICCTA is read in isolation, as the Railroads do – without harmonizing it with the HMTA – it does not preempt SB 84 because this exercise of California's police power does not discriminate against rail transportation. Further, the Railroads fail to cite a single case indicating that ICCTA preempts States from imposing such a fee. Therefore, the Railroads have not met their burden and ICCTA does not preempt SB 84.

In 1995, the year after Congress restructured the HMTA, it passed the Interstate Commerce Commission Termination Act, which deregulated the railroad industry. *See New York Susquehanna and W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007). Under ICCTA, the Surface Transportation Board (STB) has exclusive jurisdiction over rail transportation and states are preempted from regulating the following:

> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
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> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities ….

49 U.S.C. § 10501(b). The Railroads contend that this provision preempts SB 84.

Unlike ICCTA, the HMTA specifically addresses the subject of SB 84: the transportation of hazardous materials by rail. And the HMTA specifically allows States to impose fair fees related to hazardous materials transportation. 49 U.S.C. § 5125(f)(1). As demonstrated above, SB 84 falls squarely within this authority.

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ICCTA did not repeal this provision of the HMTA. "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 549-550 (1974). Instead of assuming that Congress intended to impliedly repeal the earlier act, the Court should seek to harmonize the two acts. *Id.* at 551 ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). "If an apparent conflict exists between ICCTA and a *federal* law, then the courts must strive to harmonize the two laws, giving effect to both laws if possible." *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).

Here, the Railroads have not offered any showing that Congress intended to repeal the HMTA. Moreover, the HMTA and ICCTA are easily harmonized: imposition of a fee allowed by the HMTA does not constitute a regulation of rail transportation, rates, or services; after all, such fees do not prevent railroads from charging whatever rates and providing any services that the STB allows. This interpretation gives effect to both acts of Congress without making any artificial assumptions about congressional intent regarding either of them.

Furthermore, this interpretation is consistent with the rule that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one …." *Id.* at 550-51. The provision in the HMTA reserving state authority, 49 U.S.C. § 5125(f)(1), is a specific provision applicable to a very specific situation. ICCTA's preemption provision, on the other hand, applies generally to rail transportation. Therefore, ICCTA's general preemption provision cannot be interpreted to control or nullify the HMTA's specific reservation of state authority.

In sum, since the HMTA specifically authorizes SB 84, and since ICCTA did not repeal that authority, the Court need not examine whether ICCTA, when read in isolation, would otherwise preempt SB 84. But even if the Court were to read ICCTA in isolation, ICCTA would still not preempt SB 84, as explained next.

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1. Background: The limited scope of ICCTA preemption.

The Railroads interpret the scope of ICCTA preemption much too broadly. In fact, ICCTA does not preempt all state laws that affect rail transportation: "Because the Act's subject matter is limited to deregulation of the railroad industry, courts and the Board have rightly held that it does not preempt *all* state regulation affecting transportation by rail carrier." *N.Y. Susquehanna*, 500 F.3d at 252 (citations omitted). ICCTA only "preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. What matters is the degree to which the challenged regulation burdens rail transportation …." *Id.*

2. SB 84 does not directly regulate rates or services.

ICCTA categorically preempts state laws that "would directly conflict with exclusive federal regulation of railroads." *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533, 540 (6th Cir. 2008) (internal quotes omitted). Two broad categories are preempted: (1) any form of state permitting that could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized; and (2) state "regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service." *Id.* (internal quotes omitted). ICCTA categorically preempts state law only if the law "directly" attempts to manage or govern rail transportation. *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 807-08 (5th Cir. 2011). For instance, ICCTA does not preempt state law requiring railroads to pay for pedestrian crossings over their tracks. *Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 541 (6th Cir. 2008). And state laws are not preempted "merely because they reduce the profits of a railroad" or have high compliance costs. *Id.*

SB 84 does not fall within either facially preempted category and does not directly manage or govern rail transportation. First, SB 84 imposes a fee on hazardous material shippers – not directly on railroads. Cal. Gov't Code § 8574.32. Second, it does not mandate that railroads raise, lower, or maintain their rates; they can still charge whatever they choose, subject to STB oversight. And SB 84 leaves it up to the railroads whether they charge shippers an additional

administrative fee for collecting the hazardous materials fee. *Id.* So it does not directly manage or govern the railroads in a significant way. Rather the effect of SB 84 on rail transportation is remote and tenuous.

The Railroads attempt to bolster their claim that SB 84's effect on rail transportation is direct and substantial with the Williams Declaration.[8] Pls.' Br. 13:23. However, Williams's estimate of cross-price elasticity of demand between rail and trucks is based on a single study from 1998 using outdated data. Pls.' Williams Decl. at 17:9-18 & Ex. G. Further, Williams's analysis does not take into account that rail is the only transportation option for some routes, so there is no competition. Pls.' Delussey Decl. at 2:11-15 ("Rail is the only viable mode available to Sulfuric Acid producers and shippers."); Pls.' Boerstling Decl. at 2:17-19. Also, the Railroads present no evidence showing the *percentage* increase in hazardous material transportation charges the SB 84 fee might induce or demonstrate whether this increase would be sufficient to result in a significant switch to truck transportation.

In fact, the Railroads' evidence suggests that it would *not* be sufficient. They claim that "a price increase of as little as $1.00/ton will result in freight being shifted to alternative modes or ports." Pls.' Simon Decl. at 6:3-4. Since they also assert that a rail car can carry 80 tons of hazardous material, Pls.' Louchheim Decl. at 2:2-3, it would appear that SB 84's $45 per rail car fee amounts to less than the $1.00/ton threshold for having any effect at all on shippers' choice of transportation.

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[8] With all their assertions about "freshman-year economics," e.g., Pls.' Br. 13:19, the Railroads omit a basic economics lesson that is essential for free markets to be competitive, one which has long been recognized by the Courts and Congress: negative externalities must be internalized. According to the Supreme Court, "Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013) (discussing Takings Clause); *see also Transp. Leasing Co. v. State of Cal. (CalTrans)*, 861 F. Supp. 931, 953 (C.D. Cal. 1993) (Congress designed CERCLA so that those who benefit from a commercial activity *internalize* their environmental costs). Here, for markets to be competitive, the cost of emergency response preparedness for catastrophic spills from rail cars during the transportation of hazardous materials should not be borne by citizens generally, but should be internalized by the shippers themselves – that is what SB 84 does.

Since the Railroads have not demonstrated that SB 84 will have any effect on rail transportation, and certainly not an effect that is direct rather than remote and tenuous, ICCTA does not categorically or facially preempt SB 84.

3. The Railroads' as-applied challenge fails because SB 84 does not discriminate against railroads.

The Railroads also claim that ICCTA preempts SB 84 as applied. Under as-applied challenges, ICCTA preempts state laws that "discriminate against railroads" or are "unduly burdensome," but "States retain their police powers, allowing them to create health and safety measures." *Adrian & Blissfield R.R. Co.*, 550 F.3d at 541. The Railroads contend that SB 84 is preempted because it discriminates against railroads. Pls.' Br. 15:19-23. (They do not address the other prong of as-applied challenges, unreasonable burden, although that prong is considered the "touchstone" of an as-applied challenge. *Adrian & Blissfield R.R. Co*., 550 F.3d at 541)

Contrary to the Railroads' contention, just because a law "applies specifically to railroads does not make it discriminatory." *Id.* Instead, ICCTA preempts States from using their police powers "as a pretext for interfering with or curtailing rail service." *Id.* (internal quotation marks and citation omitted). In other words, a state law is discriminatory if its principal purpose is to discriminate against a specific industry. *N.Y. Susquehanna*, 500 F.3d at 254. "This is a fact-intensive inquiry." *Id.* at 253.

For example, where a city's "real goal in creating an environmental permitting process was to constrain (rather than render safe) a railroad's operations," the permitting process was discriminatory and thus preempted by ICCTA. *Id.* at 254. On the other hand, ICCTA did not preempt a state law that required a railroad to build a sidewalk across its tracks. *Adrian & Blissfield R.R. Co.*, 550 F.3d at 541. In *Adrian & Blissfield R.R. Co.*, the court explained that the sidewalk requirement applied just to the railroad because it was the railroad that bisected the town. *Id.* at 542. In other words, while a pedestrian crossing a street can be injured by a truck, a pedestrian having to cross tracks presents a unique risk. As such, the law justifiably applied only to the railroads.

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Likewise, the Legislature's purpose in passing SB 84 was to protect public safety and benefit shippers, not to constrain rail operations. As discussed in more detail above, SB 84 addresses the unique and serious risks presented by hazardous materials transported by rail, at times along rural or mountainous routes, where a single derailment can lead to a catastrophic spill. Thus, SB 84 is a proper, non-discriminatory exercise of California's police powers, and it is not preempted.

4. The Railroads do not cite to any cases where ICCTA preempts a fee.

The Railroads do not cite to any cases where ICCTA preempted a state-imposed fee, let alone a fee related to hazardous material transportation expressly permitted by the HMTA. Rather, they cite cases applying the Airline Deregulation Act (ADA) or the Federal Aviation Administration Authorization Act (FAAAA), and that do not even discuss ICCTA. Those cases are inapplicable because they not only interpret entirely different acts addressing different industries, but also because they interpret different preemption language.

The FAAAA preempts laws "related to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c)(1), while ICCTA preempts regulation of "*transportation* by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities, 49 U.S.C.A. § 10501(b)(1) (emphasis added). "Transportation" is a defined term in ICCTA, and it affects the scope of ICCTA preemption only. 49 U.S.C. § 10102(9). The FAAAA contains a safety exemption to its preemption provision that applies to hazardous cargo, 49 U.S.C. § 14501(c)(2)(A), and it affects the scope of FAAAA preemption only. The two preemption clauses, including their respective defined terms and exemptions, are too dissimilar to conclude that the interpretation of one provision applies to the other.

The ICCTA cases the Railroads do cite are readily distinguishable. In *Fayus Enterprises v. BNSF Ry. Co.*, 602 F.3d 444 (D.C. Cir. 2010), shippers sued the railroads for allegedly conspiring to impose fuel surcharges, in violation of state anti-trust laws. The court held that the shippers' claim was preempted because it would amount to state economic regulation of the shipper-carrier relationship. *Id.* at 451. But the court also pointed out that "[r]ailroad-shipper transactions

indeed pose a problem quite different from environmental regulation," and that "exercises of police powers relating to public health or safety" are not preempted unless they "are either discriminatory or unduly burdensome." *Id.* Since SB 84 is an exercise of police power, unlike the state laws in *Fayus*, that case is inapplicable here.

The Railroads also rely on *C.S.X. Transportation, Inc. – Petition for Declaratory Order*, 2005 WL 1024490 (STB May 3, 2005), Pls. Br., 14:2-15, in which the District of Columbia attempted to ban trains transporting hazardous materials from coming within 2.2 miles of the United States Capitol Building. The STB held that the District's law was facially preempted because it directly regulated rail routes. *Id.* at *2-*3. Since the issue was facial preemption, the STB did not need to consider whether it was a proper exercise of the police power. *Id.* at *2. By contrast, as already discussed, SB 84 does not directly regulate routes, rates, services, or any of the other categorically preempted areas. As a result, whether SB 84 is a proper exercise of the police power, which was also demonstrated above, is an appropriate consideration here and shows that ICCTA does not preempt SB 84.

II. THE RAILROADS FAILED TO DEMONSTRATE ANY OF THE OTHER REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

In addition to failing to establish they are likely to succeed on the merits, the Railroads have failed to meet their burden of showing that SB 84 will likely – not just possibly – cause them irreparable harm. *Winter*, 555 U.S. at 20. This alone warrants denial of the motion. The Railroads are not responsible for paying the SB 84 fee; instead, the owners of hazardous materials are responsible for the fee. If the Railroads ultimately prevail on the merits, those fee payers can seek refunds in a manner consistent with the Fee Collection Procedures Law. *See* Cal. Gov't Code § 8574.36; Cal. Rev. & Tax. Code §§ 55001-55381. A preliminary injunction is not necessary to preserve that right. The fact that reimbursement or sufficient compensation will ultimately be available through the normal course of litigation weighs heavily against a claim of "irreparable" harm. *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015).

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The Railroads assert that an injunction is still necessary to spare them the expense of establishing new systems to administer the fee. Pls.' Br. at 12. However, they make little effort to prove that the alleged harm from such administrative duties will be significant. The Railroads state that the fees "will significantly complicate billing practices," Pls.' Stock Decl. at ¶ 14, and that BNSF "*may* have to be in recurring dialogs . . . and *may* require research, fact finding, dispute resolution, escalation of disputes and other activity with our customers," Pls.' Anderson Decl. at ¶ 15 (emphasis added). The Railroads must put forward credible evidence of irreparable injury in order to meet their burden, and these types of speculative declarations are not credible evidence.

Additionally, the Railroads provide no evidence quantifying the costs of upgrading or changing their billing systems. As such, their showing of injury is merely speculative, and "does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). In response to similarly vague and speculative declarations from the railroads in a concurrent state court challenge to SB 84, a California Superior Court denied a preliminary injunction motion, finding the declarations insufficient to establish irreparable harm: "The evidence regarding these costs is extremely thin." Defs.' Gandara Decl., Ex. C at 13.

The Railroads also argue that SB 84 will put railroads at a competitive disadvantage vis-à-vis other modes of transportation, particularly trucks. Pls.' Br. at 22. Again, the Railroads offer only speculation, not proof. For instance, one declarant states that the SB 84 fee will give an "incentive" to shippers to avoid rail transportation, but she does not state the $45 per tank car fee is actually enough to cause any shipper to switch to some other mode of transportation. Pls.' Rothrock Decl. at ¶ 11. Another declarant states that a "shipper will, if possible, avoid certain modes of transportation" because of "regulatory burdens," but she does not say that the SB 84 fee will cause even a single shipper to stop transporting hazardous materials by rail. Pls.' Boerstling Decl. at ¶ 6. In the concurrent state court challenge to SB 84, where these types of speculative declarations about switching to trucks were also presented, the court stated: "That some owners

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may consider switching to trucks in order to avoid the fee does not demonstrate that they will actually do so once the fee goes into effect . . . ." Defs.' Gandara Decl., Ex. C at 13.

Accordingly, having presented no concrete evidence of a likely loss of market share or the administrative burden of collecting the fee, the Railroads have failed to meet their burden of showing that SB 84 would cause them irreparable harm.

In contrast, California stands to suffer irreparable harm if the injunction is granted. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Maryland v. King*, 567 U.S. 1, 2-3 (2012) (Roberts, J., in chambers).

As previously explained, California's public interest in implementing SB 84 is indisputable and overwhelming. In recent years, California has seen a dramatic increase in transport of crude oil by rail, accompanied by a jump in total petroleum spills. Defs.' Gandara Decl., Ex. A at 1-2. The risk of a hazardous material incident along California's railways is significant. For example, oil spills pose a threat to human health and safety and may even result in the loss of human life. Defs.' Gandara Decl., Ex. A at 2-4. High-hazard areas for train derailments are located in remote mountain areas, as well as near population centers, schools, and hospitals, and along earthquake fault lines. Pls.' O'Brien Decl., Ex. C at 4-5. "[A] rail accident almost anywhere in California would place waterways and sensitive ecosystems at risk." Pls.' O'Brien Decl., Ex. C at 5.

Despite the serious risk of harm posed by a hazardous material spill along California's railways, significant gaps and deficiencies currently exist in California's ability to respond to and mitigate a catastrophic accident. Pls.' O'Brien Decl., Ex. B at 2. "Particularly, rural and remote portions of the state lack the necessary response equipment and specialized training to support a multi-agency emergency hazardous material (Haz-Mat) response." Pls.' O'Brien Decl., Ex. B at 2. Even in urban areas where some ability to respond to a minor or moderate event exists,

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resources may be insufficient to respond to and mitigate a catastrophic event. Pls.' O'Brien Decl., Ex. C at 12.[9]

The purposes of SB 84 are to protect the health and safety of Californians, protect the environment, and benefit shippers by closing these gaps and improving the ability to respond to, and mitigate the effects of, an incident involving the transportation of hazardous materials by rail. Pls.' O'Brien Decl., Ex. A at 2-3. The fee will be used to build, develop, and enhance emergency rail response capabilities. Pls.' O'Brien Decl., Ex. A at 2. California's first responders will be better equipped and trained to effectively respond to a release in more areas of the State, thereby mitigating the effects of the incident. Pls.' O'Brien Decl., Ex. A at 3. This mitigation will save lives and property and could mean the difference between cleanup and permanent environmental damage. Pls.' O'Brien Decl., Ex. A at 3. Given the immediate and vital need for preparedness and improved emergency rail response capabilities, an injunction preventing enforcement of SB 84 would most certainly not be in the public interest.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Railroads motion for preliminary injunction be denied.

Dated: September 13, 2016

Respectfully Submitted,

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

/s/Nicholas Stern
NICHOLAS STERN
Deputy Attorney General
Attorneys for Defendant
Board of Equalization

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[9] While BNSF and Union Pacific assert they have their own emergency teams and response equipment, such private and industry resources were taken into account as part of the gap analysis. Pls.' O'Brien Decl., Ex. C at 7-8, 9-10, 13-15.