BENJAMIN J. HORWICH (State Bar No. 249090)
ben.horwich@mto.com
JOHN F. MULLER (State Bar No. 300839)
john.muller@mto.com
DAVID J. FEDER (State Bar No. 302112)
david.feder@mto.com
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, California 94105
Telephone: (415) 512-4000
Facsimile: (415) 512-4077
Attorneys for Plaintiff BNSF Railway Company

RAYMOND A. ATKINS (*pro hac vice* motion pending)
ratkins@sidley.com
REBECCA K. WOOD (*pro hac vice* motion pending)
rwood@sidley.com
HANNA M. CHOUEST (*pro hac vice* motion pending)
hchouest@sidley.com
TOBIAS S. LOSS-EATON (*pro hac vice* motion pending)
tlosseaton@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711
Attorneys for Plaintiff Union Pacific Railroad Company

(additional counsel listed on signature page)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BNSF RAILWAY COMPANY and UNION PACIFIC RAILROAD COMPANY,

Plaintiffs,

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION, et al.,

Defendants.

Case No. 3:16-cv-04311-JCS

NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION

Judge: TBD
Date: September 6, 2016
Time: 9:00 a.m.
Ctrm.: TBD

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISION

TABLE OF AUTHORITIES
(continued)

Page

FEDERAL STATUTES

STATE STATUTES

TABLE OF AUTHORITIES
(continued)

Page

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

NOTICE OF MOTION

PLEASE TAKE NOTICE that on September 6, 2016, at 9:00 a.m. or as soon thereafter as convenient for the Court, Plaintiffs BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("Union Pacific") will bring for hearing this motion for a preliminary injunction.

RELIEF SOUGHT

Plaintiffs respectfully request a preliminary injunction prohibiting Defendants—certain California state agencies and officials—from further implementing or enforcing the hazardous material charge provisions of California Senate Bill 84 ("SB 84"), California's Fee Collections Procedures Law, and SB 84's implementing regulations, as identified in Plaintiffs' Complaint.

INTRODUCTION

California has recently implemented a new law, referred to here as "SB 84," that imposes a flat charge on the transportation of certain hazardous materials by rail—and *only* by rail—in California, to be collected by railroads from their customers and remitted to the State. But States may not regulate the rates and charges collected by railroads from their customers. That authority rests with the Surface Transportation Board ("STB"), the independent federal agency with exclusive jurisdiction over economic regulation of the railroad industry. The charge also singles out rail transportation for disfavored treatment (as compared to other competitive modes of transportation), which is forbidden by federal law several times over. Plaintiffs BNSF and Union Pacific therefore seek to preliminarily enjoin implementation and enforcement of SB 84.

Transportation by rail is the paradigmatic form of interstate commerce, and Congress has generally chosen to regulate rail transportation at the federal level. Under the express preemption clause in the ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, federal jurisdiction over the "rates," "practices," and "services" of rail carriers is exclusive. 49 U.S.C. § 10501(b). As courts have consistently held, ICCTA leaves economic regulation of railroads—of rates and of the relationship between railroads and their customers more generally—to the federal government. SB 84 is preempted by ICCTA because it would regulate the economics of rail transportation, dictating what charges carriers must collect, how they must collect them, and the type of rail services that incur the charges. ICCTA also preempts state laws that discriminate

against railroads, as compared to other similarly situated modes of transportation. SB 84 fails on this basis as well by imposing burdens on rail that other modes, like trucks, do not bear.

SB 84 also violates the federal Hazardous Materials Transportation Act ("HMTA"). HMTA prohibits "[un]fair" fees related to hazardous material transportation. *See* 49 U.S.C. § 5125(f). A charge that discriminates against rail cannot be "fair." HMTA also incorporates the "dormant" Commerce Clause's prohibition on discrimination against interstate commerce. Under that doctrine, it is settled that a State may not impose a charge on interstate commerce that favors intrastate activity over similar interstate activity. The Commerce Clause and HMTA thus preclude state statutes that, if adopted by every other State, would subject interstate commerce to burdens not borne by intrastate commerce. SB 84 flunks that test by imposing a flat charge on each rail car loaded with hazardous materials that passes through California, regardless of volume, risk, route, or distance. If every State adopted a comparable statute, a 500-mile shipment that traveled North-to-South within California would bear only half the charge imposed on a 500-mile shipment that traveled West-to-East from California into Arizona.

Thus, insofar as SB 84 labels the charge as a "fee" (*e.g.*, Cal. Gov't Code § 8574.32), it should be enjoined under ICCTA, under HMTA, and under the "dormant" Commerce Clause. If, on the other hand, the SB 84 charge is a "tax" within the meaning of federal law, the charge is plainly forbidden by the federal Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub. L. No. 94-210, 90 Stat. 31, which expressly and specifically prohibits discriminatory state taxation of railroads. *See* 49 U.S.C. § 11501(b). As set out above, SB 84 discriminates against rail by singling it out for a special charge that no other industry, including other modes of transportation, must bear. And a substantial argument exists for treating the SB 84 charge as a tax for purposes of the 4-R Act: It does not merely recoup, from a regulated industry, the costs of regulating that industry. Rather, it raises funds from rail transportation that are subject to legislative appropriation and will benefit other industries and the public at large. Indeed, the State has already indicated that the charge will fund hazardous material spill emergency response teams that will benefit other industries, like the trucking industry, at no cost to those industries.

In addition to this overwhelming showing on the merits, the remaining preliminary

injunction factors strongly favor Plaintiffs. The competitive disadvantages that rail will suffer from SB 84, the attendant harm to customer relationships, and the burden of compliance with SB 84 are all irreparable harms, for the State cannot be ordered to make Plaintiffs whole if SB 84 is later held invalid. The balance of the equities, moreover, tips sharply in favor of injunctive relief. SB 84 not only usurps federal regulatory authority over railroad transportation and interstate commerce, but does so in a way that actively discriminates against rail, contrary to clear federal mandates and the interests of public safety. By singling out rail transportation for a price increase, SB 84 would have the perverse effect—contrary to the public interest—of encouraging hazardous material owners to ship some of their most dangerous commodities by truck rather than rail, even though trucks are involved in roughly *15 to 20 times* as many incidents as rail while transporting an equivalent amount of hazardous materials. Injunctive relief is warranted.

BACKGROUND

I. FEDERAL AUTHORITY OVER RAILROADS

Railroads are the paradigm channels of interstate commerce. They are shielded from state regulation both by the "dormant" Commerce Clause and by numerous federal laws enacted pursuant to congressional authority to regulate commerce among the States. Both BNSF and Union Pacific are common carriers by rail, subject to the "nationally uniform system of economic regulation" for rail that Congress has adopted. S. Rep. No. 104-176, at 6. As common carriers, railroads must (outside of certain well-defined exceptions) provide rail service, at a customer's reasonable request, for the transportation of any commodities, including hazardous materials. To allow railroads to fulfill their federal common carrier obligations, a set of federal laws—"among the most pervasive and comprehensive of federal regulatory schemes," *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)—governs the activities of railroads and broadly shields them from state interference.

A. The ICC Termination Act of 1995

ICCTA grants the federal STB exclusive authority to regulate numerous aspects of rail facilities and operations. *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998). The statute contains an express preemption clause:

> The Jurisdiction of the [STB] over—
>
> (1) the transportation by rail carriers, and the remedies provided [by ICCTA's rail provisions] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers; and
>
> (2) the . . . operation . . . of . . . tracks, or facilities . . .
>
> is exclusive. Except as otherwise provided in [ICCTA's rail provisions], the remedies provided under [ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). " 'It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.' " *City of Auburn*, 154 F.3d at 1030.

At "the core of ICCTA preemption" is a prohibition on state "economic regulation" of railroad activities, in favor of a uniform federal regulatory regime. *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 451 (D.C. Cir. 2010) (internal quotation marks omitted, collecting cases). Balkanized state regulation is the antithesis of this congressional design and would be particularly damaging to rail operations because of their interstate character and inability to relocate operations to another State. As the Senate explained when it enacted ICCTA:

> The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the "seamless" service that is essential to its shippers and would w[e]aken [sic] the industry's efficiency and competitive viability.

S. Rep. No. 104-176, at 6 (1995). Courts have thus consistently held that ICCTA "preempt[s] state economic regulation of railroad operations." *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1293 (D. Mont. 1997); *see Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 806 (5th Cir. 2011); *PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 219 (4th Cir. 2009) (Congress enacted ICCTA to "eliminate[e] direct economic regulation of railroads by the states").

The federal courts and the STB have recognized that ICCTA categorically preempts "matters directly regulated by [the STB]," including "railroad rates." *See Emerson v. Kan. City S. Ry.*, 503 F.3d 1126, 1130 (10th Cir. 2007) (quoting *CSX Transp., Inc.—Petition for Declaratory Order*, 2005 WL 1024490, at *2-*4 (STB May 3, 2005)). Under the Interstate Commerce Act, "rates" broadly include any "rate or charge for transportation." 49 U.S.C. § 10102(7). Likewise, States may not regulate "the economic relationships between shippers and carriers." *Griffioen v.*

Cedar Rapids & Iowa City Ry. Co., 785 F.3d 1182, 1191 (8th Cir. 2015); *accord Norfolk S. Ry. Co.—Petition for Declaratory Order*, FD 35950, 2016 WL 787579, at *3 (STB Feb. 24, 2016).

Even state rules that merely affect matters within the STB's exclusive jurisdiction are preempted "unless they are rules of general applicability that do not unreasonably burden railroad activity." *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010) ("*AAR*"). State laws that discriminate against railroads, as compared to other industries or modes of transportation, cannot survive this standard. *See N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 254 (3d Cir. 2007) ("for a state regulation to pass muster, it must address state concerns generally, without targeting the railroad industry"); *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010) (States may not "discriminate against rail carriers").

B. The Hazardous Materials Transportation Act

Transportation of hazardous materials is regulated extensively at the federal level. In 1975, Congress passed the Hazardous Materials Transportation Act ("HMTA"), Pub. L. No. 93-633, 88 Stat. 2156 (1975), to "protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce." 49 U.S.C. § 5101. HMTA governs carriage of hazardous material by any mode of transportation, including rail, and authorizes the Department of Transportation ("DOT") to issue regulations that "govern safety aspects, including security, of the transportation of hazardous material." 49 U.S.C. § 5103(b)(1)(B). DOT has promulgated such regulations, addressing both spill prevention and emergency response. *See, e.g.*, 49 C.F.R. pt. 172, subpt. H ("Training"), subpt. I ("Safety and Security Plans"); subpt. G ("Emergency Response Information"). Additional regulations specifically address transportation by rail. *See, e.g.*, 49 C.F.R. pt. 174, subpt. B ("General Operating Requirements"), subpt. C ("General Handling and Loading Requirements"); subpt. G ("Detailed Requirements for Class 3 (Flammable Liquid) Materials").

By delegation from the Secretary of Transportation (*see* 49 C.F.R. § 1.89(j)), the Federal Railroad Administration ("FRA") oversees rail compliance with the Hazardous Materials Regulations, 49 C.F.R. Pts. 171-180 ("HMR") that implement HMTA. FRA has discharged that responsibility by establishing requirements and taking action to ensure "the safe transportation of

hazardous materials." *See, e.g.*, Emergency Restriction/Prohibition Order, United States Dep't of Transp., DOT Docket No. DOT-OST-2014-0067 (May 7, 2014) (imposing notification requirements on the railroads and seeking to address "the subsequent releases of large quantities of crude oil into the environment."); *Hazardous Materials: Emergency Response Information Requirements*, United States Dep't of Transp., PHMSA-2015-0099, Notice No. 15-7 (Apr. 17, 2015) (issuing 2015 advisory reminding railroads of their duties under the HMR to provide detailed emergency response information to emergency responders in the event of a rail accident).

Within this framework, HMTA specifically limits the fees that a State may impose "related to" transportation of hazardous materials, forbidding such fees unless they are "fair and used for a purpose related to transporting hazardous material." 49 U.S.C. § 5125(f). DOT has explained that the "most appropriate" test for the "fairness requirement" is asking whether a fee " 'discriminate[s against] or unduly burden[s] interstate commerce.' " *Preemption Determination No. 21(R); Tenn., Hazardous Waste Transporter Fee and Reporting Requirements*, 64 Fed. Reg. 54,474, 54,478 (Oct. 6, 1999) (quoting 140 Cong. Rec. S11324 (Aug. 11, 1994) (statement of Sen. Exon)).

C. The Railroad Revitalization and Regulatory Reform Act of 1976

The 4-R Act likewise prevents state law from improperly targeting railroads. Congress enacted the 4-R Act to, among other things, "further[] railroad stability" by "prohibit[ing] discriminatory state taxation." *Burlington N. R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). Congress concluded that States had "over-taxed" railroads by "at least $50 million each year." *Id.* (quoting H.R. Rep. No. 94-725, at 78 (1975)). The Act addressed Congress's concern that railroads "are easy prey for State and local tax assessors." S. Rep. No. 91-630, at 3 (1969).

The 4-R Act thus bars a State from assessing certain discriminatory property taxes or "[i]mpos[ing] another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). Section 11501(b)(4)'s reference to "another tax" "is a catch-all" that "is best understood . . . to encompass any form of tax a State might impose, on any asset or transaction" (apart from certain property taxes specifically addressed elsewhere in the statute). *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 285 (2011) ("*CSX I*"). A law that "target[s]" railroads by singling them out for heavier taxation facially "discriminates" and is thus preempted by the Act;

more broadly applicable taxes can also discriminate by imposing heavier burdens on railroads than on their competitors). *See Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496, 510 (7th Cir. 2011); *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1303 (8th Cir. 1991); *cf. Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1143 (2015) ("*CSX II*").[1]

II. THE PREEMPTED STATE STATUTE AND REGULATIONS

SB 84 imposes a charge on the transportation by rail in California of 25 hazardous materials identified in regulations adopted by defendant California Governor's Office of Emergency Services ("Cal OES"), including diesel fuel, ethanol, gasoline, chlorine, and anhydrous ammonia. Cal. Gov't Code § 8574.32(a)(1); *see* Cal. Code Regs. tit. 19, § 2701(b) (identifying materials). Both BNSF and Union Pacific transport each of the 25 designated types of hazardous materials. Anderson Decl. ¶ 12; Simon Decl. ¶ 6. The SB 84 charge is initially set at $45 for each rail car loaded with any quantity of hazardous material (aside from residues in emptied cars), though Cal OES must periodically adjust the fee. Cal. Gov't Code § 8574.32(b)(1) and (h)(1); Cal. Code Regs. tit. 19, § 2704(b) and (d). The charge applies only to transportation by rail; no comparable charge applies to other modes of transportation.

The SB 84 charge is nominally imposed on the owner of the hazardous material, but SB 84 establishes a scheme under which the railroad carrying the hazardous materials must collect the charge (from the owner or the person paying the freight charges) and remit it, together with a quarterly "return," to defendant Board of Equalization, which administers and collects the SB 84 charge in accordance with California's Fee Collection Procedures Law. Cal. Gov't Code § 8574.32(b)(2); Cal. Code Regs. tit. 19, §§ 2701, 2704.

This scheme further provides that railroads that "transport[] hazardous materials by rail car shall register with the [B]oard" pursuant to the Revenue and Taxation Code. Cal. Gov't Code § 8574.34. Any SB 84 charge collected but not yet remitted by the railroad to the Board is

[1] A tax need not be imposed directly on a railroad to fall within the 4-R Act's prohibition. The Act also "prohibits any tax that *results* in discriminatory treatment of a common carrier by railroad, even if the effect is indirect." *ACF Indus., Inc. v. Dep't of Revenue of State of Or.*, 961 F.2d 813, 817 n.2 (9th Cir. 1992), *rev'd on other grounds*, 510 U.S. 332 (1994). And it applies even to state charges that, while not denominated as "taxes," are taxes in substance under federal law. *See Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000).

deemed a debt owed to the State by the railroad. Cal. Gov't Code § 8574.32(b)(3). Further, a railroad that does not comply with the State's Fee Collection Procedures Law—by keeping the necessary records and collecting and remitting the SB 84 charge—is subject to civil and criminal sanctions under California's tax laws. *See* Cal. Rev. & Tax. Code §§ 55042, 55121, 55361-55362.

The SB 84 charge is a uniform flat per-rail-car fee, regardless of the nature, risk, or quantity of the hazardous material, and regardless of the distance traveled or the route taken by the train. Thus, if a rail car in interstate commerce enters California already loaded with hazardous materials, the SB 84 charge is imposed upon entry into the State and must be collected by the railroad operating the train containing the rail car. Cal. Gov't Code § 8574.32(b)(1)(A). If the rail car is loaded with hazardous materials in California, the SB 84 charge is imposed upon loading, again to be collected by the railroad operating the train. Cal. Gov't Code § 8574.32(b)(1)(B). The railroad must also collect the SB 84 charge for intermodal cargo containers transferred to rail—that is, containers that travel by multiple modes of transportation, such as trucking, rail, or ocean carrier. Cal. Code Regs. tit. 19, § 2702. Once an SB 84 charge has been paid, no additional charge may be assessed "for further transporting the same hazardous materials in the same rail cars on a different railroad within the state." Cal. Gov't Code § 8574.32(b)(5).

SB 84 authorizes railroads to collect an amount not to exceed 5% of the SB 84 charge to offset their administrative costs of collecting and remitting the charge. Cal. Gov't Code § 8574.32(b)(4)(B). This amount is separate from and "in addition to" the SB 84 charge: "No portion of the [charge itself] is to be retained or withheld." Cal. Code Regs. tit. 19, § 2706.

The imposition of charges under SB 84 is imminent. Necessary implementing regulations were finalized on June 20, 2016. The Board of Equalization recently told the state court hearing a challenge to SB 84's validity under the California Constitution that the Board "anticipates that it will give notice to the railroads by October 1, 2016" and "anticipates that it will then send returns to the railroads on approximately December 29, 2016, for the quarter beginning October 1 and ending December 31[, 2016]." Stock Decl. Ex. A; *see* Cal. Code Regs. tit. 19, § 2704(a). In all events, by law the State must begin collecting the charge no later than six months after the regulations were promulgated. Cal. Gov't Code § 8574.32(b)(1). Accordingly, Plaintiffs will

need to implement billing procedures for collection of the charge beginning October 1. Stock Decl. ¶¶ 15-20; Anderson Decl. ¶¶ 16-17.

The collected charges are to be deposited in the Regional Railroad Accident Preparedness and Immediate Response Fund in the State Treasury (the "Fund"), which SB 84 creates. Cal. Gov't Code § 8574.44. SB 84 provides no assurance that the collected charges will be used in a manner related to hazardous materials safety—let alone *rail* hazardous materials safety. SB 84 does not itself appropriate monies deposited in the Fund, but instead relies on the Legislature to appropriate those monies in future budgets. Cal. Gov't Code § 8574.44(e) & (g)(1)-(2). It envisions that the Fund will be used, subject to appropriation by the Legislature, *first*, to pay certain administrative expenses, Cal. Gov't Code § 8574.44(b) and (d); *second*, to reimburse another government account for monies previously loaned to the Fund to pay for Cal OES's activities, Cal. Gov't Code § 8574.44(e) & (g)(1); and *third*, by Cal OES "to pay for [specified] purposes related to the transportation of hazardous materials," Cal. Gov't Code § 8574.44(e). California's Budget Act of 2016 appropriates $9,987,000 from the Fund "for administrative costs associated with [Cal OES's] railroad tank car hazardous material activities" and $579,000 for the Board of Equalization. SB 826 (June 27, 2016), Items 0690-001-3260 and 0860-001-3260.

Although the purposes specified under section 8574.44(e) nominally relate to development of response capabilities that could be useful in the event of a hazardous material incident involving a railroad, the use of the Fund under section 8574.44(e) is not limited to activities that would be of exclusive, or even primary, benefit to railroads. For example, the Fund may be used to pay for hazardous material incident response training that would be beneficial to those responding to a hazardous material incident involving a truck. Likewise, state and local agencies are permitted to use the equipment funded by the rail-specific SB 84 charge for non-railroad purposes. Cal. Gov't Code § 8574.44(i). SB 84 provides that "reimbursement" for such use must be deposited into the fund, governed by a state fire service and rescue emergency mutual aid plan developed and adopted by Cal OES. Cal. Gov't Code §§ 8574.44(i), 8619.5. But SB 84 does not reimburse training or planning expenses when those preparations are used to respond to a non-rail hazmat incident.

III. FACTUAL BACKGROUND

Commodities to which the SB 84 charge applies are transported not only by railroads but also by motor carriers (and some by pipeline). Anderson Decl. ¶ 14. But no comparable charge is imposed on the transport of the same commodities by other modes. When SB 84 was adopted, the California Legislature did *not adopt* another bill—Assembly Bill 102—which would have applied the hazmat charge scheme enacted in SB 84 to both railroads *and motor carriers*. Cal. Assem. Bill No. 102 (as amended March 26, 2015) (Feder Decl. Ex. C).

Each mode has a risk of accidental release, but SB 84 singles out rail transportation for unique charges, distorting the market for transportation of the hazardous material commodities and making rail less competitive. This follows because a customer seeking to transport hazardous materials will avoid the charge if it ships its commodity by truck instead, and because trucking companies will never face the administrative burdens of collecting the charges and remitting them to the State that railroads will. The SB 84 charge will simply encourage some shippers of hazardous materials to substitute away from rail and toward trucks. As Michael Williams, Ph.D., explains, "empirical evidence shows that buyers of transportation services substitute between transportation modes." Williams Decl. ¶ 32. A study of cross-price elasticity of demand between rail and trucking services has found that "in response to a 10% increase in the price of rail services . . . the quantity demanded of trucking services increases by approximately 15%." *Id.* ¶ 33. As a result, the SB 84 charge "not only will adversely affect railroads . . . but also will artificially enhance the competitive positioning and profitability of non-rail transportation services for hazardous materials," including trucks. *Id.* ¶ 34. Where shippers continue to use rail, the charge will be borne partly by the shipper and partly by the railroad. *Id.* ¶¶ 20-27, 30. And, of course, basic economics teaches that increasing the price of rail transportation will reduce the amount of rail transportation. *Id.* ¶¶ 15-19, 27, 30. Unsurprisingly, market participants fully expect that an increase in the cost for rail will cause substitution toward other modes, reduce demand for rail, and suppress economic activity in California. *See* Boerstling Decl. ¶¶ 6-9; Bowling Decl. ¶¶ 7-8; Casey Decl. ¶¶ 12-13; Delussey Decl. ¶¶ 8-10; Dietz Decl. ¶¶ 11-14; Louchheim Decl. ¶ 8; Rothrock Decl. ¶¶ 10-12; Simon Decl. ¶¶ 11-17; Anderson Decl. ¶¶ 13-14.

The market response to SB 84's targeting of rail will have the anomalous result of *increasing risk* to the extent shippers substitute a riskier mode of transportation (trucks) for a safer one (rail). Nationally, railroads and trucks carry roughly equal amounts of hazardous material, as measured by ton-mileage, but trucks have roughly 15 to 20 times more hazardous material incidents than railroads. Brady Decl. ¶ 9; Williams Decl. ¶ 37 & fig. 9. The consequences of those accidents come in similar proportions: As the California Legislative Analyst Office noted in its report on SB 84, 92% of costs in the last ten years related to hazardous material accidents (involving both damages and responses costs) have involved truck accidents, not railroads. Legislative Analyst's Office, *Hazardous Materials Emergency Response Memorandum* at 1 (March 16, 2015) (O'Brien Decl. Ex. D) ("LAO Report").

Compounding these burdens, California plans to give trucking companies the benefits from the regime without subjecting them or their customers to its costs. In the state court challenge to SB 84, California's attorney informed the court that Cal OES has purchased (or will purchase) a dozen hazardous material response vehicles at cost of approximately *$1 million per vehicle*, in part through a loan that SB 84 promises to repay with the hazmat charges collected on rail activities. Feder Decl. Ex. D. Cal OES has stated that it will distribute the vehicles to local agencies, which in turn can use the response vehicles for "non-rail HazMat response" at a nominal fee of $160 an hour, which just "cover[s] maintenance cost." Cal OES Type II HazMat Apparatus Requirement Letter 3 (Feb. 10, 2016) (O'Brien Decl. Ex. F) ("Cal OES Letter"). The non-rail uses of the vehicles are highlighted by the numerous pieces of equipment in the vehicle inventory that are suitable only for response to non-rail hazmat events. O'Brien Decl. ¶ 18. The effect is that charges imposed on rail transportation alone will cover the capital expense of response equipment for the far more frequent hazardous material incidents involving trucks. Thus, trucking companies will not face upward pressure on prices because they face no comparable fee, but they will enjoy reduced exposure to liability for incidents addressed with railroad-funded response vehicles.

ARGUMENT

Generally, "[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." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). On the merits—"the most important" factor under *Winter*, *see Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015)—the SB 84 charge is prohibited as a matter of federal law on multiple and independent grounds.[2] The State's scheme, if it takes effect, will irreparably harm Plaintiffs by forcing them to modify their systems to collect a charge that makes their services less competitive, harming Plaintiffs' finances and driving their customers' business elsewhere. Plaintiffs will have no way to recoup those financial losses or be compensated for the damage to their customer relationships. And the equities and public interest overwhelmingly favor an injunction because SB 84 will have the perverse effect of encouraging shippers to forsake rail and use *more dangerous* modes of transportation for hazardous materials (*e.g.*, trucks) to transport their most hazardous cargo.

I. PLAINTIFFS ARE HIGHLY LIKELY TO SUCCEED ON THE MERITS

Federal law forbids California's hazmat charge—whether it is a "fee" (as the State labels it) or a "tax". As a fee, it is preempted by ICCTA because it interferes with the economic relationships between railroads and their customers (and, worse yet, discriminates against rail). The charge also impermissibly discriminates against both rail specifically and interstate commerce in general, thus violating HMTA and the "dormant" Commerce Clause. Alternatively, if the charge is properly viewed as a "tax," it plainly runs afoul of the 4-R Act's ban on state taxes that discriminate against rail.

A. The ICC Termination Act Preempts the SB 84 Charge

"ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation." *AAR*, 622 F.3d at 1097 (internal quotation marks omitted).

[2] This merits showing alone is dispositive of Plaintiffs' 4-R Act claim; the "standard requirements for equitable relief need not be satisfied" because the Act "specifically authorizes a district court to grant injunctive relief to prevent a violation of the statute." *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983); *accord Burlington N. R.R. Co. v. Dep't of Revenue of State of Wash.*, 934 F.2d 1064, 1074-75 (9th Cir. 1991). "[A] railroad seeking injunctive relief under the 4-R Act need only demonstrate that there is 'reasonable cause' to believe a violation of the 4-R Act 'has occurred or is about to occur.'" *BNSF Ry. Co. v. Tenn. Dept. of Revenue*, 800 F.3d 262, 268 (6th Cir. 2015); *accord Atchison, Topeka & Santa Fe Railway v. Lennen*, 640 F.2d 255, 259-61 (10th Cir. 1981).

"[T]he core of ICCTA preemption is economic regulation"—that is, "regulation of the relationship [between] shippers and carriers." *Fayus Enters.*, 602 F.3d at 451 (internal quotation marks omitted). ICCTA preempts the SB 84 charge, and the attendant procedures for collecting it, because they directly govern what shippers must pay, and what carriers must collect, for carriage by rail. And even setting that aside, SB 84 imposes a discriminatory burden on rail transportation because it exclusively concerns transportation by rail: Owners of hazardous materials are subject to the charge only when the material is shipped by rail, only rail carriers must collect that charge, and only rail carriers must remit the charge to the State under threat of civil and criminal sanctions. The regime applies to nothing but rail transportation. These facts, alone, dictate that the scheme is preempted under controlling precedent.

1. ICCTA categorically precludes States from directly regulating the economic relationship between a railroad and its customers

The effect of SB 84 and its implementing regulations is to regulate the economics of transportation by rail, the very "core" of ICCTA's prohibition on state interference. *See Fayus Enters.*, 602 F.3d at 451. By imposing an additional charge on rail service for certain customers, SB 84 directly interferes with the "rates," "practices," and "services" of rail carriers in California by specifying the amount carriers must collect, how they must collect it, and the rail services that incur the charge. The fact that this additional charge will be remitted to the State does not make it any less of an economic regulation. "[I]t is freshman-year economics that higher prices mean lower demand, and that consumers are sensitive to the full price that they must pay, not just the portion of the price that will stay in the seller's coffers." *Sanchez v. Aerovias De Mexico, S.A. de C.V.*, 590 F.3d 1027, 1030 (9th Cir. 2010) (quoting *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36 (1st Cir. 2007)). According to Dr. Williams, "as a matter of basic economics, when a charge is imposed on the sale of a product or service, the price paid by buyers increases[,] and, therefore, the quantity purchased will decrease." Williams Decl. ¶ 27. Furthermore, "when a charge is imposed on the sale of a product or service, the price received by sellers decreases[,] and therefore, the quantity supplied will decrease." *Id.* "These changes will occur because . . . the imposition of a charge changes the price paid by buyers and the price received by sellers, causing

them to make changes in the quantities they demand and supply." *Id.*[3]

The STB has made clear that ICCTA preempts state regulation of rates. *See CSX Transp., Inc.*, 2005 WL 1024490, at *2-*4 (citing 49 U.S.C. §§ 10501(b), 10701-10747, 11101-11124). That interpretation of ICCTA's preemptive reach is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See AAR*, 622 F.3d at 1097. Even setting deference aside, courts have consistently found state interference with carrier rates to be within the realm of economic regulation preempted by ICCTA and the parallel deregulatory statutes that govern air carriers and motor carriers. *See, e.g., Fayus Enters.*, 602 F.3d at 452 (state antitrust claims preempted where plaintiffs sought to challenge "the manner in which [railroad] rates were computed"); *Sanchez*, 590 F.3d at 1030 (state law challenge to foreign tourism tax included in airfare preempted because tax related to price); *Buck*, 476 F.3d at 36 (state law challenge to fees on nonrefundable plane tickets preempted because fees related to price); *Flores-Galarza*, 318 F.3d at 336 (finding preempted, as related to price, a state regime requiring interstate package carriers to either (1) obtain proof that the recipient had paid an excise tax, or (2) prepay the excise tax itself and obtain reimbursement from the recipient).[4]

These decisions reflect the broader principle that States may not regulate "the relationship [between] shippers and carriers." *Fayus*, 602 F.3d at 451; *see also Griffioen*, 785 F.3d at 1191

[3] SB 84 would also impose new administrative collection costs on railroads. Government Code section 8574.32(b)(4)(B) expressly acknowledges this effect by endorsing a rail carrier's collection of an administrative charge equal to up to 5% of the fee imposed on customers. But "[t]erms of service determine cost. To regulate them is to affect the price." *Fed. Express Corp. v. California Pub. Utils. Comm'n*, 936 F.2d 1075, 1078 (9th Cir. 1991); *see United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 326 (1st Cir. 2003) (finding regime requiring carriers to collect and remit a tax would impose administrative costs on the carriers and thereby "necessarily have a negative effect on . . . prices"). Indeed, the 5% cap in section 8574.32(b)(4)(B) is itself preempted by ICCTA: Just as a State cannot tell a rail carrier what it *must* charge, a State cannot tell a rail carrier what it *must not* charge. ICCTA leaves such matters to market forces and STB oversight.

[4] Precedents on the analogous preemption provisions of the Airline Deregulation Act (ADA), Pub. L. No. 95-504, 92 Stat. 1705 (1978), and the Federal Aviation Administration Authorization Act (FAAAA), Pub. L. No. 103-305, 108 Stat. 1569 (1994)—applicable to air and motor carriers, respectively—are instructive here. *Cf. Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005) (holding ICCTA's preemption formulation *broader* than the "related to" preemption formulation, which is used by the ADA and FAAAA).

(noting ICCTA's focus on the "economic relationships between shippers and carriers"). Considerably less direct interventions into rates have been found to constitute state economic regulation. *See, e.g.*, *Fed. Express Corp.*, 936 F.2d at 1077 (California law regulating bills of lading for freight transported by truck preempted as economically regulating airlines); *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1198 (9th Cir. 1999) (state regulation of limitation on liability for loss or damage to cargo in air transport preempted as economically regulating airlines); *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011) (state tipping law preempted as applied to curbside baggage fees, as such fees economically regulated airlines).

The ostensible purpose of SB 84—raising revenue to fund state emergency activities—does not alter this analysis because that purpose does not diminish the law's economic effects or change the fact that it directly regulates rail transportation. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992) (emphasis added) ("[W]hatever the purpose . . . of the state law, pre-emption analysis cannot ignore the *effect* of the challenged state action on the pre-empted field."); *City of Auburn*, 154 F.3d at 1031 (recognizing that " 'environmental' permitting regulations . . . will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line"). Because SB 84 "may reasonably be said to have the *effect* of managing or governing rail transportation," *AAR*, 622 F.3d at 1097-98 (emphasis added), it is preempted.

2. ICCTA also forbids state discrimination against rail carriers

Even if SB 84 could plausibly be read as not directly regulating the rates and charges a carrier collects from its customers (and thus categorically preempted by ICCTA), it would still be preempted by ICCTA because, in application, it singles out rail carriers for disfavored treatment without justification. That is because state regulations that do not regulate rates and charges directly, but merely have an "incidental" impact on those rates and charges, are nonetheless preempted by ICCTA if they either unreasonably burden interstate commerce or discriminate against railroads. "The non-discriminatory prong [of ICCTA preemption analysis] is particularly useful in determining whether a state is regulating principally to discriminate against a specific industry." *N.Y. Susquehanna*, 500 F.3d at 254; *see AAR*, 622 F.3d at 1098 (relying on *New York*

Susquehanna and holding that the challenged state rules regarding railroad emissions were preempted because they applied "exclusively and directly to railroad activity,"). "[E]valuating the non-discriminatory prong requires comparing the substance of the [hazardous materials] regulations that apply to railroads with those that apply to similar industries that deal in [hazardous materials]." *N.Y. Susquehanna*, 500 F.3d at 256. As discussed above, SB 84 impermissibly imposes unique costs on rail transportation, placing rail at a disadvantage relative to other modes of transportation—not only without justification, but contrary to rational policy, in view of the relative safety record of railroads and trucks. It is therefore preempted by ICCTA for the independent reason that it uniquely burdens railroads.

B. The Hazardous Materials Transportation Act and the "Dormant" Commerce Clause Forbid the SB 84 Charge Because It Discriminates Against Railroads and Interstate Commerce

HMTA also preempts the SB 84 charge. Under HMTA, a State "may impose a fee related to transporting hazardous material"—which SB 84 openly does—"only if the fee is fair and used for a purpose related to transporting hazardous material." 49 U.S.C. § 5125(f)(1). Because SB 84 is discriminatory—both against rail in favor of other modes and against interstate commerce in favor of intrastate commerce—it is not "fair" under Section 5125(f). And for similar reasons, SB 84 independently violates the Interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

As to discrimination against rail transportation, a fee cannot be "fair" under Section 5125(f) if it unjustifiably discriminates against rail. The plain meaning of "fair" includes the quality of being "[f]ree of bias." Black's Law Dictionary 615 (7th ed. 1999). A fee that favors one mode of hazardous material transportation (trucks) over another (rail) without justification is not "fair." Moreover, Section 5125(f) must be read in *pari materia* with ICCTA and the 4-R Act, which both incorporate this antidiscrimination principle. *See Dep't of Water & Power of City of L.A. v. Bonneville Power Admin.*, 759 F.2d 684, 693 n.13 (9th Cir. 1985) ("[S]tatutes dealing with the same subject must be read together and harmonized where possible."). SB 84 is thus preempted on this basis.

As to discrimination against interstate commerce, DOT has repeatedly explained that Section 5125(f) incorporates the four-part "dormant" Commerce Clause test adopted by the

Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). *See Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995) (explaining that under *Complete Auto* the Court will "sustain[] a tax against Commerce Clause challenge when the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State"); *Preemption Determination No. 21(R): Tenn. Hazardous Waste Transporter Fee and Reporting Requirement*, 64 Fed. Reg. 54,474, 54,476 (1999).[5] The SB 84 charge fails this test in at least two independent respects.

First, the second prong of *Complete Auto* requires that a charge be "fairly apportioned," which helps to ensure that no State will disrupt the competitive playing field among interstate and intrastate commerce. 514 U.S. at 183-85. Of relevance here, under this prong a charge must be "internally consistent," a criterion that is violated when a charge disfavors interstate commerce by subjecting it to cumulative burdens not borne by intrastate commerce. *Id.* at 185. Courts examine "whether [a particular state law's] identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1802 (2015); *accord Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1105 (9th Cir. 2013) (asking if "widespread adoption of similar regulation [by other States] would impermissibly interfere with interstate trade"). The internal consistency test does not require a showing of actual discrimination against any particular entity engaged in interstate commerce; it "asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Jefferson Lines*, 514 U.S. at 185.

Accordingly, courts have struck down charges—typically flat fees for unlimited activity

[5] Some courts have reached an identical result by reasoning instead that 49 U.S.C. § 5125(f) preserves "dormant" Commerce Clause principles of their own force, because it does not " 'manifest [Congress's] unambiguous intent . . . to permit or to approve . . . a violation of the Commerce Clause[.]' " *Am. Trucking Ass'ns, Inc. v. State of New Jersey*, 852 A.2d 142, 156-58 (N.J. 2004) (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992)); *accord Am. Trucking Ass'ns, Inc. v. State of Wisconsin*, 556 N.W.2d 761 (Wis. Ct. App. 1996).

within a single State—that make it more expensive to engage in activity that crosses state lines than to engage in otherwise identical intrastate activity. For example, the Supreme Court struck down a Pennsylvania flat charge assessed on all trucks of a certain weight because the charge "exert[ed] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.' " *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286-87 (1987). (By contrast, standard motor vehicle registration fees, which entail registration in only one State in order to operate in all States, create no similar disincentive to interstate activity.) The Pennsylvania charge favored intrastate activity, for if every State had the same charge, trucks would have an incentive to confine their trips to a small number of States, in order to reduce the fees they pay. *See id.* Conversely, courts have referred approvingly to charges apportioned in a way that treats interstate and intrastate activity alike, such as a fee that "var[ies] directly with miles traveled," *id.* at 291.

SB 84 fails the internal consistency test because, if every State adopted a comparable regime, the cumulative charges would plainly favor intrastate commerce over interstate commerce. For example, a rail shipment that traveled 500 miles West-to-East from California to Arizona would incur two flat charges, while an identical shipment that traveled 500 miles North-to-South within California would incur only one. Accordingly, shippers and railroads would have an incentive to conduct their business within a State's boundaries, rather than among States. *See Rocky Mountain*, 730 F.3d at 1105 (a regulation will run afoul of the Commerce Clause if it does not "maintain state boundaries as a neutral factor in economic decisionmaking") (quoting *Scheiner*, 483 U.S. at 283). Such fees impermissibly raise "a financial barrier around the State." *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1281 (7th Cir. 1992).

By effectively placing a charge on entry into California, SB 84 penalizes the mere crossing of state boundaries and acts as a clog on interstate commerce. If every State enacted a similar charge, railroads would have an incentive to structure their routes to minimize the number of boundary crossings, even if a different route with more boundary crossings would otherwise be optimal. This directly impedes the free flow of interstate commerce because "the inevitable effect" of such a charge is "to threaten the free movement of commerce," *Scheiner*, 483 U.S. at

284; *see S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 770-71 (1945) ("the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference") (striking down Arizona statute regulating the length of railroad trains).

Second, because SB 84 charges only railroads and rail shippers for services that will be of equal or greater benefit to motor carriers and truck shippers, that charge is not "fairly related to the services provided by the State" to rail transportation under the fourth *Complete Auto* prong. *Jefferson Lines*, 514 U.S. at 183; *see Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17 (1972) (state charge imposed on interstate transportation violates the Interstate Commerce Clause unless it is "based on some fair approximation of [the payer's] use or privilege for use"). It is doubtful that the equipment and training purchased with SB 84 charges is a "service[] provided by the State" that Plaintiffs "use." *See* O'Brien Decl. ¶ 20 ("Nothing in the State's plan would result in any change to Union Pacific's current emergency response operations."). But even if it were, the fact that charges on rail transportation will be *subsidizing* that training and equipment when it is used to respond to non-rail hazardous materials incidents means by definition that railroads and rail shippers will be paying more than their fair share—indeed, they alone will be paying the entire cost. On either this basis or SB 84's lack of internal consistency, HMTA forbids the hazmat charge. And, for the same reasons, SB 84 independently violates the dormant Commerce Clause because it impermissibly discriminates against interstate commerce.

C. If the SB 84 Charge Is Not a Fee, Then It Is a Discriminatory Tax Preempted by the Railroad Revitalization and Regulatory Reform Act

If SB 84 imposes a "fee," then it should be enjoined for the reasons above. If, on the other hand, SB 84 imposes a "tax," it should be enjoined under the 4-R Act, which prohibits a State from imposing a "tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4).

"It is now well established that a showing that the railroads have been targeted [for taxation] is enough to prove discrimination" under the 4-R Act. *Kan. City S. Ry. Co.*, 653 F.3d at 510; *see also Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 346-47 (1994) (if only

railroads were subject to a tax, "one could say that the State had singled out railroad[s] . . . for discriminatory treatment"); *Burlington N. R.R. Co. v. City of Superior*, 932 F.2d 1185, 1187 (7th Cir. 1991) (railroad made irrebuttable showing of discrimination "simply by proving that [a] tax was imposed on an activity . . . in which only a railroad engages"); *Trailer Train Co.*, 929 F.2d at 1303 ("a tax that applies only to [railroads] necessarily discriminates"). Here, SB 84 facially targets railroads. It applies to no other industry or mode of transportation. Nor is any comparable tax imposed on other modes of hazardous material transportation under state law. *Cf. CSX II*, 135 S. Ct. at 1143. In fact, the California Legislature considered legislation to impose a similar charge on other modes of hazardous materials transportation *and did not adopt that bill*. *See supra*, p. 10. SB 84 therefore discriminates against rail carriers in violation of the 4-R Act.

The only question, then, is whether the SB 84 charge is properly viewed as a tax for 4-R Act purposes. Because this Court has jurisdiction whether the charge is a fee or a "tax" (*see* Complaint ¶¶ 13-14), and the SB 84 charge is preempted whether it is a fee or a "tax," this Court need not definitively classify the charge, especially in this preliminary proceeding. Nonetheless, a substantial argument exists for treating the charge as a tax under the three-factor test articulated in *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 930 (9th Cir. 1996). *First*, "[a]n assessment imposed directly by the legislature is more likely to be a tax than an assessment imposed by an administrative agency." *Id.* at 931. Here, the Legislature imposed the charge via SB 84, leaving Cal OES only to establish the precise dollar amount within legislative guidelines. Moreover, railroads must remit collected funds "to the [Board of Equalization] . . . at the time [a] return is required to be filed," Cal. Gov't Code § 8574.32(b)(2), and "[t]he return [is] required to be filed pursuant to Section 55040 of the Revenue and Taxation Code," Cal. Gov't Code § 8574.38. The Board of Equalization, of course, administers California's tax laws, including the familiar "fil[ing]" of a tax "return."

Second, an assessment imposed broadly is more likely to be a tax than one imposed narrowly, though "an assessment upon a narrow class of parties can still be characterized as a tax." *Bidart*, 73 F.3d at 931-32 (citing examples of narrowly imposed taxes). Here, any "narrow[ness]" in the imposition of the SB 84 charge is a function of its discriminatory character; a non-

discriminatory version of the SB 84 charge would be applied to a broad class of owners, shippers, and transporters of hazardous materials, not merely railroads.

Third—and most importantly, *see id.* at 932—the funds collected via SB 84 are "expended for general public purposes" rather than "used for the regulation or benefit of the [rail industry]." *Id.* at 931. Although a charge "designed to recoup the costs of a regulatory program from members of the industry regulated" is a fee, a charge designed "to raise general revenues" is a tax. *Hexom v. Or. Dep't of Transp.*, 177 F.3d 1134, 1136 (9th Cir. 1999). The State acknowledged the general public purposes of SB 84 when it promulgated the emergency implementing regulations, which it said were necessary "for the public peace, health and safety, and general welfare." Cal. OES, Addendum: Finding of Emergency at 2 (O'Brien Decl. Ex. B); *see also* Cal. OES, Notice of Emergency Rulemaking at 1 (O'Brien Decl. Ex. A) (claiming a need "to address a situation that calls for immediate action to avoid serious harm to the public peace, health and safety, and the general welfare"). SB 84's operation reveals its public purpose as well. The hazmat charge has only the loosest connection to the costs of administering hazardous material incident response programs—let alone rail programs. Rather, any benefit to the railroad industry is indirect and attendant to the benefit to the general welfare. Local first responders are quintessential public services provided by state and local authorities using general tax revenues. All members of the public benefit from these services. In fact, railroads operating in California *already* have extensive private resources and *already* support public resources to respond to rail hazmat accidents. LAO Report at 1 (O'Brien Decl. Ex. D); Brady Decl. ¶¶ 5-8; O'Brien Decl. ¶¶ 8-14. Finally, the funds raised by SB 84 can only be spent "upon appropriation by the Legislature." Cal. Gov't Code § 8574.44(e). This caveat hollows out any claim that the proceeds will inevitably be used for rail-related purposes, for "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law . . . merely declares a policy to be pursued until the legislature shall ordain otherwise.' " *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985). The purposes of future appropriations are apparently a matter of legislative grace—just as with ordinary tax revenue.

The result is that California is resurrecting the discriminatory environment that Congress

meant to eradicate with the 4-R Act. *See Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, 442 (9th Cir. 1996) ("[I]n adopting the 4-R Act, Congress'[s] purpose was to remedy discrimination against the railroads and place them on an even playing field with other state taxpayers."); *Dep't of Revenue, State of Fla. v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) ("The legislative history and broad language of [the 4-R Act] show Congress possessed a general concern with discrimination *in all of its guises* . . . .") (quoting *S. Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983)). Because the SB 84 charge squarely violates that prohibition, there is at least "reasonable cause" to believe a 4-R Act violation is about to occur, and the charge should be enjoined. *See BNSF Ry.*, 800 F.3d at 268.

II. A PRELIMINARY INJUNCTION IS WARRANTED

Each of the other *Winter* factors discussed below also favors a preliminary injunction. *See* 555 U.S. at 20. In addition (*see supra*, note 2), if the charge is a "tax" under the 4-R Act, a preliminary injunction is warranted even without further inquiry because there is "reasonable cause to believe" that the 4-R Act will be violated.

A. SB 84 Will Cause Plaintiffs Irreparable Harm in the Marketplace and in Their Own Operations

Plaintiffs face two types of irreparable harm. *First*, the SB 84 charge would put Plaintiffs at a competitive disadvantage in the marketplace, costing Plaintiffs revenue and profits, as well as customer goodwill. "A rule putting plaintiffs at a competitive disadvantage constitutes irreparable harm." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015) (law that imposed "higher labor costs" on businesses but not their competitors gave rise to irreparable harm); *see Warner Bros. Entm't Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1013 (C.D. Cal. 2011) (finding irreparable harm where "Defendants are able to offer their services at significantly lower prices than their competitors because Defendants pay no licensing fees . . . and do not incur the costs necessary to comply with Plaintiffs' quality controls or security measures").

For all the reasons discussed, SB 84 will put railroads at a competitive disadvantage vis-à-vis other modes of transportation, particularly trucks. Shippers will not need to pay the fees to ship hazardous materials by truck, and motor carriers will not need to bear the administrative

burden of collecting and remitting those fees. Motor carriers will nevertheless reap benefits from the charges imposed on rail transport, given that local agencies will be able to cheaply rent rail-funded response vehicles to respond to non-rail incidents.

The effects of this competitive disadvantage can be projected using "freshman-year economics." *Sanchez*, 590 F.3d at 1030. The SB 84 charge will "(1) increase the price paid for rail transportation services of hazardous materials; (2) decrease the price received by railroads for the transportation of hazardous materials; and (3) decrease the quantity of hazardous materials shipped [by] rail." Williams Decl. ¶ 30. The result of the increase in the price of rail transportation services will cause "buyers to increase their demand for alternative forms of transportation, causing the demand . . . for pipeline, trucking, and waterborne transportation services of hazardous materials to [increase]." *Id.* ¶ 31. "In the new market equilibrium, buyers of transportation services for hazardous materials [will] reduce their purchases of rail transportation and increase their purchases of pipeline, trucking, and waterborne transportation." *Id.* Quite apart from the loss of intangible customer goodwill, Plaintiffs also will suffer significant but unquantifiable financial losses from lost business or being forced to absorb some of the SB 84 charge. *Id.* ¶ 30.

Even if these harms could be reduced to dollars and cents, they would remain irreparable because Plaintiffs "can obtain no remedy in damages against the state because of the Eleventh Amendment." *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009) (where plaintiffs "will be unable to recover damages . . . even if they are successful on the merits of their case, they will suffer irreparable harm"), *vacated on other grounds*, 132 S. Ct. 1204 (2012); *see also Cal. Hosp. Ass'n v. Maxwell-Jolly*, 776 F. Supp. 2d 1129, 1140 (E.D. Cal. 2011) ("[W]here the party seeking injunctive relief is legally precluded from pursuing damages—for example, if a claim is barred by the Eleventh Amendment—irreparable harm is established."). Here, California and its officials would be immune from any claim by Plaintiffs for money damages occasioned by the improper SB 84 charge. *See BV Eng'g v. UCLA*, 858 F.2d 1394, 1395 (9th Cir. 1988).

Second, Plaintiffs would be injured by being forced to incur the out-of-pocket expenditures, redeployment of resources, and administrative burdens required to put in place the

systems necessary to collect and remit the unlawful charges mandated by SB 84. Anderson Decl. ¶¶ 15-17; Stock Decl. ¶¶ 11-22. This harm is magnified by the fact that these new systems would be a departure from Plaintiffs' otherwise uniform national practices. Opening the door to a multiplicity of regional requirements in this critical domain will complicate the railroads' protocols, procedures, and training regimens. Anderson Decl. ¶ 18; Stock Decl. ¶ 23; O'Brien Decl. ¶ 14. These harms, too, will be irreparable. *See Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd.*, No. CV-F-02-5017, 2002 WL 34499459, at *7 (E.D. Cal. June 11, 2002) (finding irreparable harm in preemption challenge to state regulations "based on the excessive cost of [regulatory] compliance when coupled with the inability to recoup those costs"); *see also Am. Trucking Ass'ns, Inc. v. City of L.A.*, No. 08-4920, 2010 WL 4313973, at *3 (C.D. Cal. Oct. 25, 2010) (granting injunction pending appeal in preemption challenge to local regulation "because there is no evidence that [plaintiffs] can recoup their economic losses through a damage award or by some other means").

B. The Balance of the Equities Tips Sharply in Plaintiffs' Favor and an Injunction Is in the Public Interest

The equities and the public interest also favor awarding a preliminary injunction. SB 84 is contrary to Congress's intent to establish a uniform regulatory regime for rail, as made clear by ICCTA, HMTA, and the 4-R Act. If California is dissatisfied with the limitations on state authority in this field, it should voice those concerns through the federal regulatory and legislative process, not by unilaterally regulating where Congress has, after extensive deliberation, reserved that power for the national government. "[I]t is clear that it would not be equitable or in the public's interest to allow the state to continue to violate the requirements of federal law . . . . In such circumstances, the interest of preserving the Supremacy Clause is paramount." *Cal. Pharmacists Ass'n*, 563 F.3d at 852-53; *see Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1179 (D. Colo. 2001) ("The public interest element . . . is satisfied when the injunction seeks to enforce express federal preemption from state encroachment because Congress has already found that exclusive federal regulation in such matters is in the public interest.").

Preliminarily enjoining SB 84 would hardly leave railroads operating in California without

oversight, or appropriate incentives, to avoid release of hazardous materials and to ensure rapid cleanup of any spills. As described above, HMTA already provides an extensive federal regulatory regime governing transport of hazardous materials, including with respect to training, handling and loading requirements, safety and security planning, and emergency response. Those regulations are administered by a specialized, expert federal agency, FRA. Accordingly, as the Legislative Analyst's Office explained in reviewing SB 84, "[r]ailroads have staff to specifically respond to railroad accidents involving hazardous materials," "railroads that transport hazardous materials . . . have informal agreements to assist one another in the response and clean up if an accident occurs," "railroads have emergency response materials stockpiled around the state," and "[r]ailroads also have equipment to prevent or mitigate leakage from damaged tank cars and trucks that can transfer hazardous materials out of damaged containers." LAO Report at 2 (O'Brien Decl. Ex. D). Accordingly, both BNSF and Union Pacific oversee their own emergency response teams, have emergency response equipment and responders strategically staged across the State, and provide free hazmat response training to thousands of local emergency responders each year in California. Brady Decl. ¶¶ 5-8; O'Brien Decl. ¶¶ 8-14.

Indeed, enjoining SB 84 would *preserve* public safety. By imposing additional costs on rail transportation, SB 84 encourages shippers to take their business to other modes, particularly trucks, where possible. Yet trucks are much more prone to spills than rail. As described above, trucks are involved in roughly 15 to 20 times as many hazardous material accidents as railroads, even though trucks and rail carry roughly the same amount of hazardous materials on a ton-mileage basis. Brady Decl. ¶ 9; Williams Decl. ¶ 37 & fig. 9. Likewise, 92 percent of costs from hazardous material accidents in the last ten years have involved trucks, not railroads. LAO Report at 1 (O'Brien Decl. Ex. D). The very discrimination that makes SB 84 unlawful is what will, perversely, increase the risk of hazardous material spills, directly contrary to the public interest.

CONCLUSION

This Court should preliminarily enjoin Defendants from implementing or enforcing SB 84, the Fee Collection Procedures Law, and SB 84's implementing regulations against Plaintiffs.

Respectfully submitted.

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MUNGER, TOLLES & OLSON LLP
BENJAMIN J. HORWICH
JOHN F. MULLER
DAVID J. FEDER

By: /s/ *Benjamin J. Horwich*
BENJAMIN J. HORWICH[6]

Attorneys for Plaintiff BNSF Railway Company

SIDLEY AUSTIN LLP
RAYMOND A. ATKINS
(*pro hac vice* motion pending)
REBECCA K. WOOD
(*pro hac vice* motion pending)
HANNA M. CHOUEST
(*pro hac vice* motion pending)
TOBIAS S. LOSS-EATON
(*pro hac vice* motion pending)

CAROL LYNN THOMPSON (State Bar No. 148079)
SIDLEY AUSTIN LLP
555 California Street, Suite 2000
San Francisco, California 94104
Telephone: (415) 772-1291
Facsimile: (415) 772-7400
cthompson@sidley.com

MELISSA B. HAGAN (State Bar No. 297408)
(application for admission pending)
Senior Counsel - Environmental Law &
National Environmental Counsel
UNION PACIFIC RAILROAD COMPANY
13181 Crossroads Parkway North, Suite 500
City of Industry, California 91746
Telephone: (562) 566-4609
Facsimile: (402) 501-2401
mbhagan@up.com

By: */s/ Carol Lynn Thompson*
CAROL LYNN THOMPSON

Attorneys for Plaintiff Union Pacific Railroad Company

[6] I attest that the concurrence in the filing of this document has been obtained from the other signatory.