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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ASSOCIATION OF AMERICAN RAILROADS and AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION,

Plaintiffs,

v.

LIANE M. RANDOLPH, in her official capacity as Chair of the California Air Resources Board; STEVEN S. CLIFF, in his official capacity as Executive Officer of the California Air Resources Board; and ROB BONTA, in his official capacity as Attorney General of the State of California,

Defendants.

Case No. 2:23-cv-01154-JAM-JDP

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS

Date:	January 9, 2024
Time:	1:30 PM
Courtroom:	6 (14th Floor)
Judge:	Hon. John A. Mendez
Trial Date:	Not Set
Action Filed:	June 16, 2023

TO ALL PARTIES AND ATTORNEYS OF RECORD:

YOU ARE HEREBY GIVEN NOTICE that on January 9, 2024, or as soon thereafter as this matter may be heard, Liane M. Randolph, in her official capacity as Chair of the California Air Resources Board; Steven S. Cliff, in his official capacity as Executive Officer of the California Air Resources Board; and Rob Bonta, in his official capacity as Attorney General of the State of California (collectively, "Defendants") will and hereby do respectfully move to dismiss Plaintiffs' Amended Complaint.

This Motion to Dismiss is brought pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and under the primary jurisdiction doctrine. Defendants' motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice and attached papers, all documents in the Court's file, and other such written and oral argument as may be presented to the Court.

This motion is made following the conference of counsel pursuant to the Court's standing order which took place on October 20, 2023.

Dated: November 10, 2023

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ASSOCIATION OF AMERICAN RAILROADS and AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION,

Plaintiffs,

v.

LIANE M. RANDOLPH, in her official capacity as Chair of the California Air Resources Board; STEVEN S. CLIFF, in his official capacity as Executive Officer of the California Air Resources Board; and ROB BONTA, in his official capacity as Attorney General of the State of California,

Defendants.

Case No. 2:23-cv-01154-JAM-JDP

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Date: January 9, 2024
Time: 1:30 PM
Courtroom: 6 (Fourth Floor)
Judge: Hon. John A. Mendez
Trial Date: Not Set
Action Filed: June 6, 2023

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INTRODUCTION

Throughout the Clean Air Act (CAA), Congress has embraced cooperative federalism as an effective approach to reducing harmful air pollution. With respect to locomotives—the emission sources at issue here—Congress gave the U.S. Environmental Protection Agency (EPA) exclusive authority to set emission standards for *new* locomotives. But for emissions from locomotives that are *not new*—*e.g.*, locomotives that have been placed into service—Congress expressly allowed California to regulate, so long as EPA signs off on California's program. Locomotive emissions in California contribute significantly to harmful pollution that is adversely impacting public health. Those emissions are also preventing the State from meeting federal and state air pollution standards. Accordingly, the California Air Resources Board (CARB) adopted the "In-Use Locomotive Regulation" (Regulation) to require emission reductions from locomotives that are in-service in California. Two railroad trade associations (Plaintiffs) now challenge this Regulation, asserting preemption under the CAA, the Interstate Commerce Commission Termination Act (ICCTA), and the Locomotive Inspection Act (LIA), as well as dormant Commerce Clause violations. Plaintiffs' complaint should be dismissed.

Plaintiffs have not alleged facts sufficient to establish standing and ripeness as to their LIA claim. Specifically, they have not alleged that any of their members plan to violate the parts of the Regulation they claim are preempted by the LIA.

This Court also lacks jurisdiction over Plaintiffs' CAA claim, which rests on determinations Congress directed *EPA* to make. When EPA makes those determinations, only a Court of Appeals will have jurisdiction to review them. This Court may neither predetermine the outcome of EPA's pending proceeding nor override the CAA's judicial review provision.

In fact, this Court should dismiss Plaintiffs' entire complaint—including the CAA and LIA claims if the Court concludes it has jurisdiction over those—under the primary jurisdiction doctrine. Pursuant to the CAA, EPA will consider whether CARB is regulating within the zone (*non-new* locomotive emissions) that Congress expressly set aside for California. This is a question of first impression because California has not previously sought to regulate locomotive emissions or requested EPA's authorization to do so. And the answer to this question will decide

(or at least significantly affect) all of Plaintiffs' claims. This Court should dismiss the entire Complaint, without prejudice, to allow EPA to answer this potentially dispositive question of first impression through the administrative proceeding established by Congress.

Plaintiffs' ICCTA and dormant Commerce Clause claims should be dismissed for additional reasons. Plaintiffs have attempted to bring facial (rather than as-applied) challenges and cannot do so under either theory. Some applications of the Regulation fall outside ICCTA's scope, and thus Plaintiffs cannot allege that *all* applications of the Regulation are preempted. Plaintiffs' facial dormant Commerce Clause challenge likewise fails because they cannot allege that application of the Regulation to purely intrastate transportation cognizably burdens interstate commerce. Nor can they show that the Regulation discriminates against out-of-state locomotives.

BACKGROUND

A. California's Locomotive Regulation

Despite decades of effort and notable improvement, tens of millions of Californians still live in areas where pollution levels significantly exceed state and federal air quality standards. ECF No. 18-10 at 1-2. To protect public health and attain air quality standards, California demands emission reductions from most sources of harmful pollution. *Id.* at 5, 13. The State is now demanding the same from locomotives operating in California. Most of these locomotives are old and emit significant quantities of pollution, including particulate matter (which is linked, *inter alia*, to cancer and cardiovascular diseases) and smog-forming pollutants (which worsen asthma and other respiratory ailments). ECF No. 18-3 at 14-15, 16-17, 60-61. These emissions and their adverse health impacts are concentrated in already overburdened and disadvantaged communities located near railroad operations. *Id.* at 14, 61; *see also* ECF No. 19-1.

The Regulation at issue addresses these harmful locomotive emissions through four main components: (1) Idling Requirements; (2) In-Use Operational Requirements; (3) Spending Account Requirements; and (4) Reporting, Recordkeeping and Registration requirements. ECF No. 18-3 at 20. The Regulation also requires an annual Administrative Payment of $175 per locomotive to cover implementation costs. *Id.* at 51.

Locomotive idling "emit[s] harmful pollutants." 73 Fed. Reg. 25,098, 25,101 (May 6, 2008). Accordingly, EPA has long required manufacturers to install devices on new locomotives that shut down the engine "after no more than 30 continuous minutes of idling." *Id.* at 25,125. Longer idling is allowed only under specific conditions—*e.g.*, to prevent engine damage. *Id.* CARB has nonetheless received complaints of excessive locomotive idling in California. ECF No. 18-3 at 23. The Regulation thus requires operators to keep idling devices in working condition and to operate them properly. Cal. Code Regs., tit. 13, § 2478.9(a), (c).

The In-Use Operational Requirements limit emissions from locomotives operating in California through age restrictions and zero-emission configuration requirements.[1] Beginning January 1, 2030, locomotives that are 23 years or older may not operate in California, unless they operate in a zero-emission configuration or have seen only limited use. Cal. Code Regs., tit. 13, § 2478.5(a)-(c). In addition, locomotives originally built after a specified point in time—2030 for many locomotives and 2035 for those that haul freight long distances—must operate exclusively in zero-emission configuration in California. *Id.* § 2478.5(b), (c).

Beginning July 1, 2026 (and each year thereafter), the Spending Account requires locomotive operators to set aside funds based on a conservative estimate of the health costs attributable to their California emissions in the prior year. Cal. Code Regs., tit. 13, § 2478.4(a), (b), (f). Lower-emitting locomotives will naturally incur lower Spending Account obligations, and zero-emitting locomotives will incur no obligations.[2] The set-aside amount can be reduced through the use of grant monies for qualified expenditures and through early adoption of zero-emission technologies. *Id.* § 2478.4(g); *see also e.g.*, Defendants' Request for Judicial Notice (RJN) Exh. B (grant number 16 includes funds to convert three locomotives to run on hydrogen instead of diesel). Funds set aside in the Spending Account may be used to purchase, lease, or rent clean locomotives (the qualifications for which become more stringent over time); to convert

[1] In zero-emission configuration, a locomotive emits no pollution of any kind—either because it is a zero-emission locomotive (*e.g.*, one that runs exclusively on electricity or hydrogen fuel cells) or because it can use either a diesel engine or a zero-emission power source to run its electric motor and uses the latter in California. Cal. Code Regs., tit. 13, § 2478.3(a).

[2] For example, Pacific Harbor Line's use of an all-electric locomotive at the ports of Long Beach and Los Angeles would incur no Spending Account obligation. RJN Exh. A.

dirtier locomotives into clean ones; to purchase, lease or rent zero-emission equipment or infrastructure; or for zero-emission pilot projects and demonstrations. *Id.* § 2478.4(d).

Finally, the Regulation requires operators to register basic information (*e.g.*, the operator's name and headquarters address, each locomotive's serial number and date of acquisition, etc.). Cal. Code Regs., tit. 13, § 2478.10. Operators must also report other data annually, including information about each instance of locomotive idling exceeding 30 minutes and information necessary to calculate the operator's Spending Account obligation. *Id.* § 2478.11.

B. Regulation of Locomotive Emissions under the Clean Air Act

The CAA requires EPA to establish emissions standards for "new" locomotives. 42 U.S.C. § 7547(a)(5). EPA's regulations provide that a locomotive ceases to be "new" when the earlier of two events occurs: (1) the locomotive's equitable or legal title is transferred to an ultimate purchaser or (2) the locomotive is placed into service (or back into service if the locomotive has been remanufactured). 40 C.F.R. § 1033.901. Congress prohibited States from setting standards for "new" locomotives, *id.* § 7543(e)(1)(B), but permitted state regulation of non-new locomotive emissions, subject to EPA's approval. Specifically, in Section 209(e)(2)(A), Congress permitted California to adopt emission "standards and other requirements" for "any nonroad vehicles or engines other than those referred to in subparagraph (A) or (B)," *id.* § 7543(e)(2)(A), where subparagraph (B) refers to "*new* locomotives," *id.* § 7543(e)(1)(B) (emphasis added).[3] Any such California regulations require authorization from EPA. *Id.* § 7543(e)(2)(A).

A Section 209(e)(2)(A) authorization proceeding begins with a request from California that includes the State's determination that its nonroad vehicle "standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(e)(2)(A). EPA must then consider California's request in a public proceeding. *Id.*; 40 C.F.R. § 1074.101(b). If none of the three statutory bases for denial are established by the record, EPA "shall" grant the authorization. 42 U.S.C. § 7543(e)(2)(A). EPA's action is reviewable only in the appropriate Court of Appeals. *Id.* § 7607(b)(1). Other States may adopt California's authorized standards as their own, if they so choose, subject to certain conditions. *Id.*

[3] Subparagraph (A) refers to certain construction and farm equipment not at issue here.

§ 7543(e)(2)(B).[4] *See also Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1081 (D.C. Cir. 1996) (describing this statutory regime).

C. Procedural History

The Regulation became final under California law in October 2023 and will be effective January 1, 2024. RJN Exh C. As described above, however, most of the requirements take effect much later. Pursuant to stipulation and order, ECF No. 17, Plaintiffs filed their First Amended Complaint (FAC) on October 13, 2023, ECF No. 18. On November 8, 2023, CARB requested authorization from EPA pursuant to CAA Section 209(e)(2)(A). RJN Exh. D.

LEGAL STANDARD

"The party asserting federal subject matter jurisdiction bears the burden of proving its existence." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). "In a facial attack" under Rule 12(b)(1), "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). But "[i]n resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment," and "[t]he court need not presume the truthfulness of the plaintiff's allegations." *Id.*

On a motion to dismiss under Rule 12(b)(6), the Court "determines whether Plaintiffs pled enough facts to state a claim to relief that is plausible on its face." *Woods v. U.S. Bank N.A.*, 831 F.3d 1159, 1162 (9th Cir. 2016) (internal quotation marks omitted). "A complaint may fail to show a right to relief either by lacking a cognizable legal theory or by lacking sufficient facts alleged under a cognizable legal theory." *Id.* While the Court must generally "accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs," the Court need not "accept as true allegations that contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or

[4] This statutory structure mirrors the one EPA and the States have been implementing for over half a century with respect to new motor vehicles. 42 U.S.C. §§ 7543(a), 7543(b), 7507.

unreasonable inferences." *In re Gilead Sci. Sec. Litig.*, 536 F.3d. 1049, 1055 (9th Cir. 2008) (internal quotation marks omitted).

ARGUMENT

I. PLAINTIFFS' LIA CLAIM SHOULD BE DISMISSED FOR LACK OF JURISDICTION

Plaintiffs claim the LIA preempts the requirements that operators "keep" EPA-mandated idling devices on their locomotives and "ensure that th[is] equipment remains in working order." FAC ¶ 117. But Plaintiffs have not alleged that any of their members has "a concrete plan to violate the law in question" as required, in a pre-enforcement challenge like this one, to establish "a realistic danger of sustaining a direct injury." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (internal quotations omitted); *see also Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 652 (9th Cir. 2021). Plaintiffs do not allege that any member plans to remove EPA-mandated idling devices for purposes other than maintenance; or plans to leave these devices inoperable for more than 30 days after discovering a malfunction. *See* Cal. Code Regs., tit. 13 § 2478.9(b), (c). It is, thus, unclear how they are imminently injured by a prohibition against taking either of those actions. Whether this issue "is viewed as one of standing or ripeness," Plaintiffs failure to allege "when, … where, or under what circumstances" their members would violate the challenged Idling Requirements leaves this Court without a case or controversy. *Thomas*, 220 F.3d at 1139; *see also Ass'n of Am. R.R. v. Cal. Off. of Spill Prevention & Response*, 113 F. Supp. 3d 1052, 1058 (E.D. Cal. 2015) (dismissing claim where plaintiffs did not allege plan to engage in specific conduct criminalized by challenged statute).

II. PLAINTIFFS' CAA PREEMPTION CLAIM SHOULD BE DISMISSED FOR LACK OF JURISDICTION OR FAILURE TO STATE A CLAIM

Plaintiffs claim that the Spending Account Requirements and the In-Use Operational Requirements are "preempted under section 209(e)(1) and/or section 209(e)(2)" of the CAA. FAC ¶ 113. This Court should reject Plaintiffs' presentation of an unripe claim and their attempt to end-run around the CAA's procedures for agency action and judicial review.

There is no ripe preemption case or controversy under Section 209(e)(2) because any such claim turns on whether or not EPA grants the requested authorization. FAC ¶ 108 (arguing for

preemption "because the EPA has not granted any … authoriz[ation]"); *see also* 42 U.S.C. § 7543(e)(2)(A). Plaintiffs' claim is not "fit for decision" because it cannot "be decided without considering contingent future events that may or may not occur as anticipated." *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1132 (9th Cir. 2015) (internal quotation marks omitted).[5] There may ultimately be a ripe controversy if Plaintiffs (or others) disagree with EPA's authorization decision when issued, but only the appropriate Court of Appeals will have jurisdiction over that controversy, should it arise. 42 U.S.C. § 7607(b)(1); *see also e.g.*, *Dalton Trucking, Inc. v. EPA*, 846 F. App'x 442, 443 (9th Cir. 2021) (reviewing Section 209(e)(2)(A) authorization); *Am. Trucking Ass'ns, Inc. v. EPA*, 600 F.3d 624, 625 (D.C. Cir. 2010) (same). This Court has no jurisdiction to prejudge the outcome of EPA's proceeding—by, for example, declaring that EPA may or may not grant the authorization. EPA is not even a party to this litigation, and, of course, "courts do not intrude on the agency's turf and thereby meddle in the agency's ongoing deliberations." *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 578 (9th Cir. 2019); *see also In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015) (declining "to prevent EPA from issuing a final rule"). This Court, thus, lacks jurisdiction over any claim under Section 209(e)(2).[6]

The same is true of Plaintiffs' claim under Section 209(e)(1)(B). EPA will consider whether California has contravened that section's prohibition against state regulation of emissions from "[n]ew locomotives or new engines used in locomotives," 42 U.S.C. § 7543(e)(1)(B), as part of the agency's Section 209(e)(2)(A) proceeding. EPA may deny a requested authorization if "California standards and accompanying enforcement procedures are not consistent with [Section 209]." *Id.* § 7453(e)(2)(A)(iii). EPA's regulations interpret this text as requiring California's regulatory program to be "consistent with section 209(a), *section 209(e)(1)*, and section 209(b)(1)(C)," meaning, *inter alia*, that California may not "regulate engine categories that are

[5] This case is distinct from *Pacific Merchant Shipping Association v. Goldstene*, 517 F.3d 1108, 1111, 1115 (9th Cir. 2008), because there CARB had not sought Section 209(e)(2)(A) authorization and disputed that it was necessary to do so.

[6] Even if this Court concluded it has jurisdiction to decide Plaintiffs' CAA preemption claim, that jurisdiction would almost certainly be divested by the "subsequent EPA action." *Cal. Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 510 (9th Cir. 2015).

permanently preempted from state regulation" under Section 209(e)(1), including new locomotives. 80 Fed. Reg. 76,685, 76,686 (Dec. 10, 2015) (emphasis added); *see also* 88 Fed. Reg. 77,004, 77,007-08 (Nov. 8, 2023) (EPA will consider whether California regulations are "prohibited by section 209(e)(1)(B)"). Thus, this Court lacks jurisdiction over Plaintiffs' claims under 209(e)(1)(B), just as it does over Plaintiffs' claim based directly on Section 209(e)(2)(A).

Finally, even if this Court had jurisdiction to predetermine the answers to questions Congress tasked EPA with answering, it should dismiss the CAA claim on the alternative ground that Plaintiffs have not sufficiently stated this claim. A locomotive ceases to be "new" when its equitable or legal title is transferred to an ultimate purchaser or when the locomotive is placed into service. 40 C.F.R. § 1033.901. A similar definition applies to the remanufactured locomotives referenced in Plaintiffs' Complaint: "A remanufactured locomotive or engine ceases to be new when placed back into service." *Id.*; *see also* FAC ¶ 107. Plaintiffs have not alleged that the titles of locomotives subject to the Spending Account or In-Use Operational Requirements have never been transferred or that these locomotives have not been placed into service. Plaintiffs have therefore not stated a claim that these requirements apply to new locomotives and could be preempted under Section 209(e)(1)(B).

III. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED UNDER THE PRIMARY JURISDICTION DOCTRINE

The primary jurisdiction doctrine requires dismissal of Plaintiffs' entire Complaint—including the LIA and CAA claims, if the Court concludes it has jurisdiction there. "[P]rimary jurisdiction is properly invoked when a claim is cognizable in federal court but requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002) (internal quotation omitted). When the doctrine applies, courts dismiss "without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008).[7] A central issue here—whether this Regulation is within the scope of Section 209(e)(2)(A)—fits squarely in

[7] Alternatively, courts may stay the litigation to avoid prejudice to the plaintiff—*e.g.*, where "the statute of limitations may prevent … refiling." *Syntek*, 307 F.3d at 782.

EPA's special competency, as shown above. That issue is one of first impression because California has not previously sought authorization to regulate emissions from non-new locomotives. This will, thus, be the first time EPA will decide "whether a State rule addressing non-new locomotives or engines would impermissibly relate to the control of emissions from new locomotives or engines under section 209(e)(1)." 88 Fed. Reg. at 77,008. The Ninth Circuit has "approved of the use of the primary jurisdiction doctrine" where agencies were similarly required to apply federal statutes to new factual contexts for the first time. *Clark*, 523 F.3d at 1115 (agency to address "whether a federal statute applies to a new technology"); *see also Syntek*, 307 F.3d at 781 (agency to address "whether decompiled object code qualifies for registration as source code under the Copyright Act"). And this court has dismissed a complaint under the primary jurisdiction doctrine (and on ripeness grounds) where Plaintiffs prematurely challenged a California regulation before the necessary federal approval had been obtained. *See Cmty. Health Ctr. All. for Patient Access v. Baass*, No. 2:20-CV-02171, 2023 WL 4564798, at *6 (E.D. Cal. July 17, 2023) (recounting procedural history).

While there is no "fixed formula," the primary jurisdiction doctrine applies "where there is: (1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Clark*, 523 F.3d at 1115 (internal quotation marks omitted). All four factors are satisfied here.

The first factor is met because there is a need to resolve the issue of whether some or all of this Regulation is within the scope of Section 209(e)(2)(A)'s express permission for California regulation. That is a central question for Plaintiffs' CAA preemption claim, as discussed above. But the import of that question does not end there. If the Regulation is within Section 209(e)(2)(A)'s scope, then that CAA provision will have to be harmonized with the preemption provisions in ICCTA and the LIA in order to resolve Plaintiffs' claims under those statutes. *See Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1156 (9th Cir. 2020) (harmonization analysis required "when the ICCTA has appeared to conflict with another federal

law"). This Court may ultimately "conclude that the ICCTA and the [CAA] are easily harmonized by reading [Section 209(e)(2)(A)] to protect from preemption the [emission standards and other requirements] specifically authorized in that section." *BNSF Railway Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 762 (9th Cir. 2018). That would make resolution of Plaintiffs' preemption claims contingent upon EPA's determination as to whether the Regulation, in whole or in part, is within the scope of Section 209(e)(2)(A). And the same likelihood of a contingent outcome exists for Plaintiffs' dormant Commerce Clause claim because "any action taken by [California] within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652–53 (1981); *see also People ex rel. State Air Res. Bd. v. Wilmshurst*, 68 Cal. App. 4th 1332, 1345 (1999) (rejecting Commerce Clause claim "[i]n light of" Congress' express choice to "allow California to forge [its own] emissions standards" for new motor vehicles). In sum, "[u]ntil we know whether and, if so, to what degree" the Regulation comports with Section 209(e)(2)(A), this Court "cannot evaluate" any of Plaintiffs' claims. *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1090 (9th Cir. 2006).

The second and third factors are also met. The issue of Section 209(e)(2)(A)'s scope is within EPA's jurisdiction, *see supra* Sec. I, and EPA has regulatory authority "to implement" that section, 42 U.S.C. § 7543(e). The CAA "subjects an industry or activity"—locomotive emissions—"to a comprehensive regulatory authority," *Clark*, 523 F.3d at 1115, by delegating to EPA and California, respectively, the authority to regulate new and non-new locomotive emissions, 42 U.S.C. §§ 7547(a)(5), 7543(e)(2)(A).

And the fourth factor is satisfied because determining whether California is regulating new or non-new locomotive emissions requires both expertise and uniformity of administration. Congress concluded EPA has the relevant expertise when it delegated the authority to regulate new locomotive emissions, 42 U.S.C. § 7547(a)(5), and the authority to grant or deny California's requests concerning non-new locomotives, *id.* § 7543(e)(2)(A). And EPA has stated it will utilize this expertise to make the requisite determination on a "case-by-case basis." 88 Fed. Reg. at 77,008. Congress's structure also allows for only one regulatory program applicable to new and

non-new locomotive emissions (EPA's and CARB's, respectively), guaranteeing uniformity for each category of locomotives. The importance of uniformity is further confirmed by Congress's decision to confine judicial review of each EPA action to a single Court of Appeals. *Id.* § 7607(b)(1). Permitting EPA to exercise its expertise and determine the application of Section 209(e)(2)(A) to the Regulation would serve "precisely the purpose of the primary jurisdiction doctrine to avoid the possibility of conflicting rulings by courts and agencies concerning issues within the agency's special competence." *Davel*, 460 F.3d at 1090.

Finally, while "courts must also consider whether invoking primary jurisdiction would needlessly delay the resolution of claims," that concern is not implicated here. *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015). For one thing, Plaintiffs will have the opportunity to present evidence to EPA about the adequacy of the lead-time provided for the various parts of the Regulation. *See* FAC ¶ 86 (alleging Plaintiffs' members "must engage in costly actions well before" a July 1, 2026 effective date). If EPA concludes there is a lead-time issue, based on the record, the agency may deny the authorization for an initial period, as it has occasionally done with other California regulations. *E.g.*, 42 Fed. Reg. 31,639, 31,640 (June 22, 1977) (finding "insufficient lead time to comply with the requirements" of a California regulation). For another, any delay here is far from needless. This is not a case that "must eventually be decided on a controlling legal issue wholly unrelated to determinations" Congress delegated to the agency. *Astiana*, 783 F.3d at 761 (internal quotation marks omitted). Quite the opposite: EPA's determination as to whether the Regulation (in whole or in part) is within the scope of state regulation expressly anticipated by Section 209(e)(2)(A) is necessary to decide Plaintiffs' claims definitively (as opposed to contingently). *See supra* at 9:20-10:15.

IV. PLAINTIFFS' ICCTA PREEMPTION CLAIM SHOULD BE DISMISSED

A. Plaintiffs Have Attempted to State a Facial ICCTA Preemption Claim but Cannot Do So

Although the Complaint does not expressly state that Plaintiffs intend to mount a facial (rather than as-applied) ICCTA preemption challenge, the allegations and prayer for relief indicate that intent. *E.g.,* FAC ¶ 9 ("The Regulation is preempted in full under the ICCTA."); *id.*

at 33 (seeking injunction against enforcement "in any way"); *see also Knox v. Brnovich*, 907 F.3d 1167, 1180 n. 10 (9th Cir. 2018). "To sufficiently allege a facial challenge, a plaintiff 'must establish that no set of circumstances exist[s] under which the [challenged law] would be valid.'" *Flynt v. Shimazu*, 466 F. Supp. 3d 1102, 1109 (E.D. Cal. 2020) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). *Salerno*'s "no set of circumstances" rule applies to facial preemption challenges. *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104, 1104 n.6 (9th Cir. 2016). There are locomotives operating in California—and governed by the Regulation—that are plainly outside the scope of ICCTA preemption. Plaintiffs, thus, cannot state a facial claim.

"In order for federal preemption to apply under the ICCTA, the activity in question must first fall within the statutory grant of jurisdiction to the Surface Transportation Board [STB]." *Or. Coast Scenic R.R. v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016). For the STB to have jurisdiction, the relevant activity must be "(1) 'transportation' (2) 'by rail carrier' (3) 'as part of the interstate rail network.'" *Id.* at 1073 (quoting 49 U.S.C. § 10501(a)). Where locomotives do not cross state lines, that third prong can be "a fact-specific determination." *All Aboard Fla. – Operations LLC & All Aboard Fla. – Stations LLC*, No. FD 35680, 2012 WL 6659923, at *3 (S.T.B. Dec. 21, 2012) (considering passenger locomotives). There are also statutory exemptions from STB's jurisdiction, such as the one for "public transportation provided by a local government authority." 49 U.S.C. § 10501(c)(2).

The STB and its predecessor agency, the Interstate Commerce Commission (ICC), have determined that some California passenger railroad activities are outside their jurisdiction. *Napa Valley Wine Train, Inc. Petition for Declaratory Ord.*, 7 I.C.C.2d 954, 969 (I.C.C. July 18, 1991);[8] *Peninsula Corridor Joint Powers Board – Petition for Declaratory Ord.*, No. FD 35929, 2015 WL 4065035, at *3 (S.T.B. July 2, 2015) (Caltrain commuter passenger service). ICCTA preemption does not apply to these California activities or others like them—*e.g.*, locomotives that provide only intrastate commuter rail service or intrastate excursion passenger service. *See also Denver & Rio Grande Ry. Hist. Found. Petition for Declaratory Ord.*, No. FD 35496, 2015 WL 1310043, at *3 (S.T.B. Mar. 20, 2015) (citing *Napa Valley Wine Train*, 7 I.C.C.2d at 965-

[8] The ICC was replaced by the STB. Pub. L. No. 104-88, 109 Stat. 803 (1995).

68). Plaintiffs allege that "AAR's passenger railroads operate intercity passenger trains and provide commuter rail service," FAC ¶ 14, presumably referring to AAR member San Joaquin Regional Rail Commission which operates a commuter service between Stockton and San Jose. RJN Exh. E. Plaintiffs also allege that one of ASLRRA's members (Mendocino Railway) "operates … passenger locomotives" exclusively in California. FAC ¶ 18. Other regulated locomotives provide similar intrastate-only services. RJN Exh. F.

Plaintiffs' facial challenge fails because some locomotives operating in California—and subject to the Regulation—are outside the scope of ICCTA preemption. *Puente Arizona*, 821 F.3d at 1104 (state law "not facially preempted" because it has "obvious" valid applications).[9] The fact that other applications of the Regulation might be within the scope of ICCTA preemption "cannot, in itself, revive Plaintiffs' facial challenge." *Flynt*, 466 F. Supp. 3d at 1109.

B. Plaintiffs Have Not Stated an As-Applied ICCTA Preemption Claim and Lack Standing To Do So

The Complaint fails to identify the "subset of the [Regulation's] applications" that are allegedly preempted. *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011). The Complaint thus cannot be understood as stating an as-applied ICCTA claim. Nor could Plaintiffs amend the Complaint to state such a claim because these trade association Plaintiffs lack standing to bring that challenge.

Assuming, *arguendo*, that this Court ultimately agreed with Plaintiffs that ICCTA preempts part or all of the Regulation where ICCTA applies, this Court would need the "participation of individual members in the lawsuit" to craft a remedy. *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 950 (9th Cir. 2019) (internal quotation marks removed). For example, an injunction that simply prohibited CARB from enforcing the Regulation against locomotives operated by "rail carriers" as "part of the interstate rail network" would be unadministrable because it is not always immediately obvious whether those elements are satisfied for a particular

[9] The Regulation also applies to "industrial operator[s]" that "move their company products but [do not] provide rail services to other companies or to passengers." Cal. Code Reg., tit. 13, § 2478.3. These operators may not "serve the public indiscriminately" and, thus, may not be "rail carriers" subject to STB jurisdiction. *Am. Orient Exp. Ry. Co. v. STB*, 484 F.3d 554, 557 (D.C. Cir. 2007). Moreover, Plaintiffs' Complaint does not establish that *all* freight activities in California are provided as "part of the interstate rail network."

locomotive's activities. Indeed, whether the STB has jurisdiction—*e.g.*, whether the particular rail operations are part of the interstate rail network—can be a "fact-specific determination." *All Aboard Fla.*, 2012 WL 6659923, at *3. Associational standing is unavailable in light of the need for this kind of "*ad hoc* factual inquiry." *Rent Stabilization Ass'n of N.Y. v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993).

V. PLAINTIFFS' DORMANT COMMERCE CLAUSE CLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

Plaintiffs allege that the Regulation violates the dormant Commerce Clause because, they claim, "[r]ailroads' only options for complying … are to change locomotives at the California border, or to replace their entire nationwide fleets." FAC ¶ 121. The *Salerno* "no set of circumstances" rule applies to facial dormant Commerce Clause claims. *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 444 (9th Cir. 2019). Plaintiffs cannot satisfy that rule as to this claim, any more than they could as to their ICCTA preemption claim.

Indeed, even accepting Plaintiffs' legal premise *arguendo*, their dormant Commerce Clause claim could only be stated as to locomotives that cross one of the State's borders or are part of a nationwide fleet. But Plaintiffs themselves allege that at least some railroads operate locomotives only in California. FAC ¶ 14 (alleging AAR members provide "commuter rail service"); *id.* at ¶ 18 (identifying two ASLRRA members who operate exclusively in California). Plaintiffs do not and cannot explain how application of the Regulation to those purely intrastate locomotives would require changes to *other* locomotives that may cross state borders or would affect the nationwide fleets of *other* operators. Plaintiffs have not stated, and cannot state, a facial dormant Commerce Clause claim.

The Complaint also contains no facts indicating that *any* operators will have to change locomotives at the border or replace nationwide fleets. Indeed, it is entirely unclear how the Idling, Spending Account, or Reporting Requirements could have such effects. Moreover, the Complaint contains *no* allegations about border crossings or the locomotives involved in them or about the current or projected makeups of any nationwide fleets.[10] Plaintiffs do allege "the

[10] The relevance of these facts indicates that these trade associations lack standing to bring this dormant Commerce Clause claim. *See supra* at 13:18-14:5.

railroads are moving aggressively to pursue lower- and zero-emissions locomotive technologies." FAC ¶ 3. But that allegation cuts *against* Plaintiffs' claim because it suggests operators would have little trouble using those technologies in California when required (in 2030, 2035 and later).

Finally, Plaintiffs attack the Administrative Payment provision of the Regulation, arguing it "independently violates the Dormant Commerce Clause" under *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 285 (1987). FAC ¶ 124. But Plaintiffs have alleged no facts approaching those in *Scheiner* where Pennsylvania's complex scheme for generating funds "to improve and maintain its highways and bridges" did "not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads." *Scheiner*, 483 U.S. at 270, 290. The Administrative Payment simply "recover[s] the estimated costs of … administering this Locomotive Regulation." Cal. Code Regs., tit. 13, § 2478.12(a). The Supreme Court has upheld "flat," per-vehicle charges imposed for precisely this purpose, observing that the costs of regulating trucks "would seem more likely to vary per truck … than to vary per mile traveled" and, thus, "a per-truck, rather than a per-mile, assessment is likely fair." *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 435-36 (2005). Just as the plaintiffs in that case adduced "little, if any, evidence that the $100 fee imposes any significant practical burden upon interstate trade," *id.* at 434, Plaintiffs here allege no facts that, if proven, would establish the requisite burden from California's $175 charge. And the Court rejected the very premise Plaintiffs rely on here—namely, that "*Scheiner*… requires invalidation of the $100 flat fee, even in the absence of such [facts]." *Id.* at 436. Plaintiffs' conclusory allegation that "[t]he imposition of such a flat fee on transportation companies engaged in interstate commerce," by itself, establishes "an impermissible burden on interstate commerce" is insufficient to state a claim. FAC ¶ 124.

CONCLUSION

Defendants respectfully request that this Court dismiss Plaintiffs' Complaint, with prejudice, for lack of jurisdiction over the LIA and CAA claims and failure to state claims under ICCTA and the dormant Commerce Clause. Alternatively, Defendants respectfully request that any remaining claims be dismissed under the primary jurisdiction doctrine.

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Respectfully submitted,

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