No. 23-15857

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MENDOCINO RAILWAY,

Plaintiff-Appellant,

v.

JACK AINSWORTH; CITY OF FOR BRAGG

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 4:22-cv-04597-JST
Hon. Jon S. Tigar

ANSWERING BRIEF OF APPELLEE CITY OF FORT BRAGG

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DISCLOSURE STATEMENT

Appellee City of Fort Bragg is a governmental entity and no statement is required pursuant to FRAP 26.1.

Date: November 6, 2023

JONES MAYER

/s/ *Krista MacNevin Jee*
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INTRODUCTION

The City of Fort Bragg commenced a state court action against Mendocino Railway relating to disputes between the parties regarding the City's local regulatory authority over state and local codes, zoning, nuisance activities, environmental regulations, permitting, inspections, code enforcement authority, etc. At the outset, Mendocino Railway made clear that it was a federally preempted railroad, subject *only* and *exclusively* by the Surface Transportation Board ("STB") and the Interstate Commerce Commission Termination Act ("ICCTA").

After Mendocino Railway attempted to obtain a dismissal of the City's state court action, unsuccessfully, Mendocino Railway then sought various appeals; improper removal of the action to federal court (which was later subject to remand); attempted transfers, through various procedures, to a different judge, etc. Mendocino Railway also preemptively filed this action, having been expressly informed that the California Coastal Commission was in the process of filing a complaint in intervention in the state court action in support of the City.

The within federal action was always about Mendocino Railway attempting to obtain a different forum, after having suffered setbacks in

state court. Thus, the district court validly evaluated the various factors for abstention under *Colorado River*, and concluded that abstention and dismissal was prudent and warranted under these extraordinary circumstances. Given the district court's careful consideration, the substantial facts supporting abstention, and additional bases for dismissal by this Court, including application of the more deferential standard for abstention under *Wilton/Brillhart*, application of the *Younger* abstention, and lack of overall federal jurisdiction as to merely a federal preemption *defense*, dismissal was eminently proper and justified on all theses grounds. This Court must, therefore, uphold the district court's decision.

JURISDICTIONAL STATEMENT

The City does not dispute that this Court has appellate jurisdiction due to the dismissal of Mendocino Railway's action and Mendocino Railway's timely appeal therefrom, pursuant to 28 U.S.C. § 1291. However, the City disputes jurisdiction of the federal courts over the underlying matter.

Although not addressed in the district court's order, the City's motion to dismiss also asserted lack of federal question jurisdiction, due

to no valid cause of action under a federal statute. U.S. Const., art. III, § 2 (federal courts have authority to hear cases "arising under [the] Constitution, the laws of the United States, and treaties."); 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.") Thus, either a federal law must create a cause of action, or a substantial question of federal law must be implicated in a state law cause of action. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983); *Merrell Dow Pharmaceuticals, v. Thompson*, 478 U.S. 804, 817 (1986).

Mendocino Railway's only cause of action is for a declaratory judgment. However, "[t]he Declaratory Judgment Act is procedural; it does not expand federal court jurisdiction. Federal-question jurisdiction may not be created by a declaratory-judgment plaintiff's 'artful pleading [that] anticipates a defense based on federal law.'" *Bacon v. Neer*, 631 F.3d 875, 880 (8th Cir. 2011) (change in original) (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950). Thus, a defense based on federal law does not *create* a cause of action over which federal courts have jurisdiction. *See* Part III, *infra*.

Thus, aside from the abstention issues, only one of which was actually addressed by the district court, the underlying action would be subject to dismissal in any event. An immunity defense, which is the primary claim asserted by Mendocino Railway in its Complaint in the underlying action, is insufficient to confer on this Court or the district court valid federal jurisdiction. "Neither a defense based on federal law nor a plaintiff's anticipation of such a defense is a basis for federal jurisdiction." *Stillaguamish Tribe of Indians v. Washington*, 913 F.3d 1116, 1118 (9th Cir. 2019). *See also, Chicago Tribune Co. v. Board of Trs. of the Univ. of Ill.*, 680 F.3d 1001, 1003 (7th Cir. 2012) ("it is blackletter law that a federal defense differs from a claim arising under federal law"). Notwithstanding the abstention issues in this appeal then, there is no basis for remand or further proceedings in this matter due to the fundamental lack of federal jurisdiction in the first instance.

ISSUES PRESENTED

I. Whether dismissal was properly granted pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), when the District Court carefully and correctly weighed

the eight factors in *Colorado River*, and concluded that "*only* the fifth factor weighs against dismissal, and the remaining factors weigh in favor of dismissal"; and, in the alternative, whether such abstention would have also been properly granted under the lesser standard applicable to Mendocino Railway's sole claim under the Declaratory Judgment Act, pursuant to *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995) and *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494-95 (1942). [ER-10 (italics added)]

A. Whether the first factor, regarding "which court first assumed jurisdiction over any property at stake," was properly found "'irrelevant because "the dispute does not involve a specific piece of property."' [ER-6 (quoting *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011)]

B. Whether the second factor, as to "the inconvenience of the federal forum" was properly found to be neutral, because the State court proceeding in Mendocino County and the federal forum were only "approximately 150 miles apart." [ER-6]

C. Whether the third factor regarding the "avoid[ance] [of] piecemeal litigation" was properly found to be an exceptional circumstance, due to the primary federal preemption issue claimed by Mendocino Railway to be squarely at issue in both actions. [ER-6, 7]

D. Whether the fourth factor as to "the order in which the forums obtained jurisdiction" was properly found to weigh in favor of abstention, in that "the state court action is largely past the pleading stage," was at that time set for trial, and was found to have "progressed further than the federal court action." [ER-6, 7]

E. Whether the fifth factor, regarding "federal law or state law provid[ing] the rule of decision on the merits," is more properly a factor weighing in *favor* of dismissal, since Mendocino's Railway's claim is merely a defense and does not present valid federal jurisdiction. [ER-6, 7-8]

F. Whether the sixth factor, regarding "state court proceedings . . . adequately protect[ing] the rights of the federal litigants," was properly found to favor dismissal,

because there is no question the state court has the authority and ability to address Mendocino Railway's claimed federal preemption defense, and Mendocino Railway did not claim otherwise. [ER-6, 8]

G. Whether the seventh factor relating to impermissible "forum shopping" by Mendocino Railway was properly found to favor dismissal, in that there were clear facts that Mendocino Railway sought the federal action in order to avoid unfavorable rulings in the state court. [ER-6, 9]

H. Whether the eighth factor, relating to "state court proceedings . . . resolv[ing] all issues before the federal court," properly favors abstention, in that state and federal actions need not be exactly parallel and were found "substantially similar," since both related to Mendocino Railway's claimed federal preemption defense and the defense would necessarily be resolved in the state action. [ER-6, 9-10]

I. Whether the more deferential *Wilton/Brillhart* abstention factors should have been applied, and justify abstention.

i. Whether this action would needlessly determine state law issues and be duplicative, warranting abstention.

ii. Whether abstention would properly discourage forum shopping.

II. Whether abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), would also have been proper, due to the pending civil enforcement state court action.

A. Whether the City's pending state enforcement action constituted on-going state proceedings.

B. Whether important state interests relating to enforcement of local and state regulations, at issue in the state court action, render Y*ounger* applicable.

C. Whether the state court action provides adequate opportunity for Mendocino Railway's already-asserted federal preemption defense to be decided.

III. Whether dismissal would have also been proper for a failure of Mendocino Railway to state any valid claim for federal

jurisdiction under the Declaratory Judgment Act, as to merely a federal preemption *defense*.

STATEMENT OF THE CASE

Pursuant to Federal Rules of Appellate Procedure, Rule 28 (i), which provides that "any party may adopt by reference a part of another's brief," the City hereby adopts and incorporates herein by reference, the Statement of the Case in the Answering Brief of Appellee Jack Ainsworth, including Part I (Statement of Facts) and Part II (Procedural History).

SUMMARY OF THE ARGUMENT

The district court properly and fully considered all eight factors of *Colorado River* in determining that abstention was warranted in this matter. Indeed, the more deferential standard for *Wilton/Brillhart* abstention applies in this instance, due to the nature of Mendocino Railway's sole Declaratory Judgment Act cause of action. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494-95 (1942). In addition, *Younger* abstention also

applies, and serves as an alternate basis for this Court to uphold the district court's dismissal, due to an already-pending enforcement action by the City of Fort Bragg and the California Coastal Commission in the state court action. Finally, Mendocino Railway's sole cause of action under the Declaratory Judgment Act does not properly state any valid federal claim or basis for jurisdiction when there is no independent cause of action and Mendocino Railway's assertion of a preemption defense does not provide one.

STANDARD OF REVIEW

Generally, the issue "[w]hether the facts of a particular case conform to the requirements for a *Colorado River* stay or dismissal is a question of law," and it is reviewed "de novo" on appeal. *Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1032 (9th Cir. 2005). However, when the Court determines "that the *Colorado River* requirements have been met, [it] then review[s] for *abuse of discretion* the district court's decision to stay or dismiss the action," even though such "discretion must be exercised within the narrow and specific limits prescribed by the *Colorado River* doctrine." *United States v. State*

Water Res. Control Bd., 988 F.3d 1194, 1202 (9th Cir. 2021) (changes and quotations omitted) (italics added) (quoting *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 973 (9th Cir. 2011)).

Notwithstanding this standard of review, a different analysis applies, and more traditional, deferential abuse of discretion standard applies when a claim under the Declaratory Judgment Act is at issue. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494-95 (1942).

ARGUMENT

I. DISMISSAL WAS PROPERLY GRANTED PURSUANT TO *COLORADO RIVER* BASED ON THE DISTRICT COURT'S CAREFUL WEIGHING OF THE EIGHT FACTORS, NEARLY ALL OF WHICH WEIGHED STRONGLY IN FAVOR OF ABSTENTION.

The district court properly weighed all eight factors set forth in *Colorado River*, finding that nearly all favored abstention, and on balance they strongly did so. [ER-3-11; *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 816 n. 22 (1976).] Although Mendocino Railway takes the factors out of order, the factors are discussed herein in the order set forth in *Colorado River*, and as discussed in the district court's opinion.

A. First Factor: Property Was Properly Found Not to Be at Stake.

Mendocino Railway concedes that this factor does not apply. Mendocino Railway thus admits that the district court properly determined that this factor was irrelevant and "inapplicable." (Mendocino Railway's Opening Brief ("OB"), 31.)

B. Second Factor: Convenience of the Federal Forum Actually Favors Abstention, and is Not Merely Neutral.

Mendocino Railway further concedes that the second factor was not determinative, acknowledging the district court's finding that this factor was neutral. (OB, 32.) Notwithstanding, it is not clear that this factor is entirely neutral in this instance. In *Colorado River*, 300 miles was found to be "significant." The district court noted that the approximately 150 miles between federal and state court at issue in this instance did not warrant a stay. However, it relied on *Montanore Minerals Corp v. Bakie*, 867 F.3d 1160, 1167 (9th Cir. 2017), which found a 200-mile distance neutral, but which also noted that "'200 miles is a fair distance.'" *Id.*, at 1167 (quoting *Travelers Indem. Co. v. Madonna*, 912 F.3d 1364, 1368 (9th Cir. 1990)).

In contrast, in *African Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 800 (5th Cir. 2014) (emphasis added), the court found that an "additional *half-hour's drive* makes the federal forum only slightly less convenient." The court in *Standing Rock Housing Authority v. Tri-County State Bank*, Inc., 700 F. Supp. 1544, 1546-1547 (S.D. D.C. 1988), found that a "state court [that] is within 100 miles" of the federal court was not more convenient, and citing *Noonan South, Inc. v. County of Volusia*, 841 F.2d 380, 382 (11th Cir. 1988), relating to a "negligible" 50-mile distance.

Notwithstanding the distance, there are additional factors making the distance and inconvenience worthy of more than just a neutrality evaluation. The issues in the state court action are uniquely centered in Fort Bragg, in that the City is located wholly therein, Mendocino Railway's operations at issue in the City's action are largely or primarily within the City, and the City's claims relate, at least in part, to nuisance conditions occurring within the City. [ER-28-29] Thus, witnesses and evidence will largely be centered in Fort Bragg. Further, there is not merely a more than 150-mile distance between the City of Fort Bragg, at the location of the state court action at the Ten Mile

Branch of the Mendocino Superior Court, and the district court location in Oakland, but a *more then three-hour driving distance* between the two. Although this factor, alone, may have been insufficient to warrant abstention, it is not merely neutral, especially in consideration of the weight of all of the other factors in favor of abstention.

C. Third Factor: The Court Properly Found that Abstention Would Avoid Piecemeal Litigation.

The District Court found that there were exceptional circumstances present here because "the issue of federal preemption under the ICCTA is squarely before the state court." [ER-7] Indeed, the court found that this federal preemption defense was "the sole issue raised in Mendocino Railway's [federal] complaint." *Id.* The issues in both actions were thus found to be parallel and identical.

In point of fact, Mendocino Railway asserted the following defense in the state action:

> The declaratory and injunctive relief sought by Plaintiff are barred by . . . **federal preemption**, as embodied in statutory and constitutional law, because Defendant is . . . a railroad within the jurisdiction of the STB. *See, e.g.*, **49 U.S.C. §§ 10102, 10501(b)** . . . .

[ER-92 (bold added)][1] Similarly, Mendocino Railway alleged in this action that it is "within the STB's exclusive jurisdiction" and that the City and the Coastal Commission are *generally preempted by federal law* from "requir[ing] Mendocino Railway to obtain state and local land-use permits and other preclearance." [ER-112] Mendocino Railway admitted in its complaint that both the City and the Commission "assert that Mendocino Railway is not subject to the STB's exclusive jurisdiction, and is subject to their plenary land-use permitting and preclearance authority for all rail-related activities undertaken within the coastal zone." *Id.* Specifically, Mendocino Railway's complaint "seeks a declaration that the actions of the Commission and the City to regulate Mendocino Railway's operations, practices and facilities are preempted under **49 U.S.C. § 10501 (b)** and that Mendocino Railway's activities are subject to the **STB's exclusive jurisdiction**." [ER-112 (bold added)]

Mendocino Railway's affirmative defense is identical to the whole of its claim in this action, and this is a proper basis for finding the

[1] Although not included in the Excerpts of the Record, Mendocino Railway's answer to the Coastal Commission's Complaint in Intervention in the state court action asserts an identical defense.

Colorado River standards applicable. Piecemeal, duplicative litigation may be properly avoided "when the additional claim is highly related to the overlapping claims, and if the federal plaintiff's federal suit meets the other [*Colorado River*] requirements." *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1207 (9th Cir. 2021). Indeed, "'[t]he consideration that was paramount in *Colorado River* itself was the danger of piecemeal litigation.'" *Id.* (quoting *Moses H. Cone*, 460 U.S. 1, 19 (1983)) (changes omitted).

Mendocino Railway is simply wrong that the extraordinary or rare circumstances that must be presented for a *Colorado River* abstention reside in any one factor. Instead, courts have made clear that the *totality* of the factors must be considered in such analysis. *See, e.g., Guo Haiyu Trading, Inc. v. Vanek*, 2018 U.S. Dist. LEXIS 185076, *24 (C.D. Cal. 2018) (unique facts based on weighing of factors). As Mendocino Railway even recognizes, "[t]he factors are not a 'mechanical checklist,'" but must be applied "'in a pragmatic, flexible manner with a view to the realities of the case at hand.'" *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1203 (9th Cir. 2021) (quoting *Moses H. Cone*, 460 U.S. at 16, 21)). See (OB, 23-24.) Thus, "'[t]he weight to be

given to any one factor may vary greatly from case to case, depending on the particular setting of the case.'" *State Water Res. Control Bd.*, 1203 (quoting *Moses H. Cone*, at 16)). Given the severity of the other factors weighing so strongly in favor of abstention, this factor also helps tips the scales, in that there is nearly complete overlap of the state and federal actions as to Mendocino Railway's core federal preemption defense, and there would thus be significant, unnecessary, and impermissible piecemeal litigation from allowing both to proceed at the same time. The district court was correct in its assessment that this factor favors abstention.

D. Fourth Factor: The Court Properly Found that the State Court Obtain Jurisdiction First, and that that Action Was Past the Pleading Stage.

Mendocino Railway would like to rewrite history in its assertion that its federal preemption defense was supposedly first asserted in the federal action. This is a misapplication of fact. The reality is that Mendocino Railway first asserted a federal preemption defense – *identical* to its claimed defense in the underlying federal action – in the state court action by way of its demurrer to the City's Complaint, filed

January 14, 2022, and its Answer to the City's Complaint, filed June 24, 2022. [ER-45-46, 51, 87] Mendocino Railway's claim that *it* was the *first* to assert a federal preemption claim in this action is specious, and its assertion that "the state court took jurisdiction over the relevant 'federal preemption' claim only after the federal court had done so" is inaccurate. Throughout the state court action, Mendocino Railway has always asserted its purported absolute, totally and complete preemption from any local regulatory authority – of any kind or sort – by federal law in the same exact manner that it has asserted in its declaratory relief claim in this action. The state court exercised "jurisdiction" over *this very issue* as soon as Mendocino Railway *first* asserted it in its demurrer – nearly *eight months* before Mendocino Railway commenced the within action in August 2022. [ER-45-46, 104]

Mendocino Railway's demurrer to the City's Complaint asserts as follows:

> To be a federally recognized railroad is to be regulated by the federal Surface Transportation Board ("STB" or "Board") under the Interstate Commerce Commission Termination Act ("ICCTA").
>
> That law gives plenary and exclusive power to the STB to regulate federally recognized railroads:
>
> "The jurisdiction of the Board over—

> (1) transportation by rail carriers, and the remedies provided in this part [49 USCS §§ 10101 et seq.] 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 construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is *exclusive*. Except as otherwise provided in this part [49 USCS §§ 10101 et seq.], the remedies provided under this part [49 USCS §§ 10101 et seq.] 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) (emphasis added).

The STB's exclusive jurisdiction over a federally recognized railroad means that state and local regulatory and permitting requirements are broadly preempted. U.S. Const. art. VI, cl. 2 (Supremacy Clause); 49 U.S.C. § 10501(b); *City of Auburn v. United States* (9th Cir. 1998) 154 F.3d 1025, 1030-31 (The ICCTA's preemptive scope is "broad."); *Friends of Eel River v. North Coast R.R. Auth'y* (2017) 3 Cal.5th 677, 703 (holding that "state environmental permitting or preclearance regulation that would have the effect of halting a private railroad project pending environmental compliance would be categorically preempted").

See City's Supplemental Excerpts of Record ("C-SER"). Notably, the above federal preemption defense of Mendocino Railway -- first asserted

in the *state action* -- is *identical* to its primary claim of federal preemption in its Complaint in this matter. [Compare ER-107-108] Thus, the City's action -- and Mendocino Railway's asserted defense in that state action – was first in time, *long before* the filing of this federal action.

Indeed, in addition to *Colorado River* abstention, "[t]he first-to-file rule is intended to 'serve[] the purpose of promoting efficiency well and should not be disregarded lightly.'" *Kohn Law Grp. v. Auto Parts Mfg. Miss.*, 787 F.3d 1237, 1239-1240 (9th 2015) (quoting *Alltrade v. Uniweld Prods.*, 946 F.2d 622, 625 (9th Cir. 1991)). The rule is properly applicable when the "[e]xamination of the complaints . . . indicates that the issues raised are identical" in two actions, the same parties are involved, the central questions are the same, and only the remedies differ, for instance. *Pacesetter Sys. v. Medtronic*, 678 F.2d 93, 95-96 (9th 1982). Such rule is discretionary, is "'appropriate for disciplined and experienced judges, [and] must be left to the lower courts.'" *Teichert v. Church of Jesus Christ of Latter-Day Saints*, 2023 U.S. Dist. LEXIS 166007, *8 (C.D. Cal. 2023) (quoting *Alltrade*, at 628). Where theories of liability "completely overlap[ ]" or "there is substantial overlap

between the two suits," application of the rule is proper. *Sousa v. Walmart*, 2023 U.S. Dist. LEXIS 143346, *20-21 (E.D. Cal. 2023) (internal quotations omitted) (quoting *Kohn*, at 1241).

To the extent Mendocino Railway seems to assert that its claim against the Coastal Commission in this action was somehow a unique or different federal preemption defense claim than the one it first asserted in the state court action in response to the City's Complaint, this is also a specious claim. (OB, 34.) In fact, the Coastal Commission joined in the City's existing claims. [ER-37] In particular, the Commission alleged that activities of Mendocino Railway required a Coastal Development Permit *from the City* and that the City had requested "the Commission to assume primary responsibility for enforcing the Railway's violations of the Coastal Act and [the City's] L[ocal]C[oastal]P[rogram]." [ER-38, 40]

In any event, Mendocino Railway's federal preemption defense did not change after it was first asserted in state court in response to the City's Complaint (demurrer and answer) [ER-91; C-SER], in response to

the Commission's Complaint in Intervention,[2] or in its affirmative assertions of that same defense as a cause of action for declaratory judgment in the federal action, as noted above. Mendocino Railway has always asserted in the state court action (whether in response to the City or later to the Commission), and in this action, that it is wholly subject to STB jurisdiction and federally preempted from *any* regulatory authority by either the City or the Commission. In fact, Mendocino Railway's Complaint in this action expressly acknowledges that the City's action sought to compel Mendocino Railway to comply with the City's "authority to pre-clear and approve work on railroad facilities through the City's land-use permitting processes," and that Mendocino Railway was entirely exempt from such authority by virtue of its purported exclusive regulation by the STB and supposed absolute federal preemption pursuant to 49 U.S.C. § 10501(b). [ER-111]

In addition, Mendocino Railway is wrong that there has not been "significant activity" in the state court action, and the two actions had not had substantially similar "relative progress." (OB, 34-35) As the

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[2] *See supra* note 2.

district court found at the time of the Motion to Dismiss, Mendocino Railway commenced its federal action "nearly two years after the state court action commenced," Mendocino Railway's Answer had already been filed in the state court action, and trial was scheduled therein.[3] [ER-9, 53, 55] There were, in fact, *significant* state court proceedings, even if there had not yet been discovery in the state action, including Mendocino Railway's demurrer, Mendocino Railway's unsuccessful Petition for Writ of Mandate to the Court of Appeal challenging the denial of the demurrer, and Mendocino Railway's unsuccessful Petition for Review to the California Supreme Court challenging the denial of a writ by the Court of Appeal. [C-SER; ER-49-51]

And when Mendocino Railway's demurrer, and appellate challenges thereto, were exhausted, it sought other procedural means to avoid The Honorable Clayton Brennan in state court. After filing its

[3] The trial date was later vacated, due to Mendocino Railway's *improper* removal of the state court action to federal court. [ER-15] Norther District Case No. 22-CV-06317-JST. The state court action was subsequently remanded by The Honorable Jon S. Tigar, who presided over both matters. That remand order is not subject to appeal. Trial has not yet been set in the remanded state court action – only because, yet again, Mendocino Railway has sought to delay any hearings on the merits by The Honorable Clayton Brennan, by way of a motion for stay by Mendocino Railway, which has just been denied by Judge Brennan on November 2, 2023. Mendocino Railway's Motion for Request for Judicial Notice, Exhibit a, p. 18. That motion was based, in part, on this pending appeal, and Mendocino Railway's apparent belief that this appeal may be successful due to a more favorable standard of review as to abstention.

Petition for Review with the Supreme Court, and just prior to that court's summary denial, Mendocino Railway sought to obtain a transfer of the City's state court action away from Judge Brennan by relating the case to an already-pending eminent domain case relating to private property in another city with another party. [ER-53] When that maneuver was unsuccessful, Mendocino Railway sought to obtain an order disqualifying Judge Brennan, which was also unsuccessful. [ER-53-54]

No wonder the state court action did not proceed fully into discovery yet. Mendocino Railway's game of musical chair has been unending. And now, it tries to imply that the federal and state actions are equal in their progression, but without fully acknowledging the significant effort that has been required to be expended by the City and the Commission in response to Mendocino Railway's many procedural efforts to move the state court action out of state court altogether, and away from Judge Brennan, in particular. In terms of the Court's evaluation for purposes of *Colorado River*, such extensive proceedings in the state court action – regardless of whether discovery has been able to reasonably be conducted thus far -- weigh in favor of abstention.

Given all of the above circumstances, the timing of the state court action, and its significant and lengthy proceedings in state court, as well as Mendocino Railway's answer, the initial setting of a trial date, and improper removal, all support the District Court's finding that this factor weighs in favor of abstention. Mendocino Railway's mere reduction of the actions to the bare stage of their pleadings and discovery belies the true nature of the significant proceedings and organized machinations in which Mendocino Railway has engaged.

E. Fifth Factor: Even Though the District Court Found Federal Law Provided the Rule of Decision on the Merits, this Factor Also Supports Abstention, Since Mendocino Railway's Mere *Defense* of Federal Preemption is Insufficient to Confer Federal Jurisdiction.

The district court found that Mendocino Railway's primary assertion of a federal preemption defense meant that federal law provided the rule of decision on the merits of this claim, and that such defense was at issue in both actions. [ER-8 (citing 49 U.S.C. §§ 10102, 10501 (b))] However, the district court merely concluded on this basis

that "this factor weighs against dismissal," and ignored two key distinctions that favor abstention on this factor as well. [ER-8]

First, the district court failed to recognize that the fact "[t]hat federal law supplies the rule of decision . . . is *less significant* when the state court has *concurrent jurisdiction* over the claim." *Nakagawa Wine Co. v. ITN Consolidators, Inc.*, 2019 U.S. Dist. LEXIS 238501, *9 (C.D. Cal. 2019) (italics added) (citing *Nakash*, 882 F.2d 1411, 1416 (9th Cir. 1989) ("If the state and federal courts have concurrent jurisdiction over a claim, this factor becomes less significant"). Indeed, California state courts provide an adequate forum in which Mendocino Railway can have its federal preemption defense decided. *See e.g., Stone v. Powell*, 428 U.S. 465, 517 (1976) (quotations omitted) (rejecting notion that "federal judge . . . more competent, or conscientious, or learned" on federal law "than his neighbor in the state courthouse"); *Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1056 (9th Cir. 2018) ("In our federal system, the States possess sovereignty concurrent with that of the Federal Government, limited only by the Supremacy Clause. [citation] State courts enjoy a 'deeply rooted presumption' that they have jurisdiction to adjudicate all claims arising under state or federal law.");

Indeed, "'state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States,' unless Congress 'affirmatively divest[s] state courts of their presumptively concurrent jurisdiction' over federal law claims." *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1207 (9th Cir. 2021) (quoting *Yellow Freight Sys. v. Donnelly*, 494 U.S. 820, 823, (1990)); *GTE Mobilnet v. Johnson*, 111 F.3d 469, 475 (6th Cir. 1997) ("'State courts normally have concurrent jurisdiction of federal issues unless such jurisdiction is withdrawn by federal statute.'") (quoting *CSXT v. Pitz*, 883 F.2d 468, 472 (6th Cir. 1989), cert. denied, 494 U.S. 1030 (1990) (no exclusive jurisdiction of federal courts as to railroad safety or preemption)).

More importantly, the fact that federal preemption issues may be decided in both cases, and that these will be decided on the basis of federal law, is not a basis for retaining jurisdiction, when these issues are raised merely as a matter of a federal preemption *defense*. Since there is no proper federal cause of action, abstention is proper. *See* Part III., *infra*.

F. Sixth Factor: The Court Correctly Concluded the State Court Action Can Adequately Protect Mendocino Railway's Asserted Federal Preemption Defense.

As noted, federal and state courts have *concurrent* jurisdiction, and there is *no* presumption that a state court cannot also make valid determinations of federal law. Indeed, even a defense of preemption under the ICCTA can be made in "the considered judgment of the state court." *Beatty Grp. v. Great W. Ry. of Colo.*, 2020 U.S. Dist. LEXIS 54383, at *10 (D. Colo. 2020) (quotations omitted) (quoting *Tres Lotes v. BNSF Ry. Co.*, 61 F. Supp. 3d 1213, 1218 (D.N.M. 2014)).

In addition, there is likely to be much room in the state court action for valid determinations of *state law* and state regulatory authority -- well within the contours of any federal preemption that may apply. Contrary to Mendocino Railway's assertions, even assuming *arguendo* that it is a railroad subject to federal preemption, such preemption and regulation of the activities of railroads by federal law is *not* complete or absolute. *See, e.g., Cook v. Union Pac. R.R.*, 2011 U.S. Dist. LEXIS 133494, at *14-17 (D. Or. 2011) (state statutes regulating "the size of the ballast and the slope of the right of way along

the Union Pacific tracks" found only "to have a remote or incidental effect on rail transportation"); *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1131 (10th Cir. 2007) (no ICCTA/STB preemption or regulatory authority over railroad's dumping or maintenance of vegetation); *Rushing v. Kansas City Southern Railway Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001) (finding "the ICCTA did not preempt plaintiffs' claims for negligence and nuisance based on the railroad's construction of an earthen berm") (discussed in *Emerson*).

In fact, "not all state and local regulations are preempted [by the ICCTA]; local bodies retain certain police powers which protect public health and safety." *Emerson*, at 1133 (quotations omitted). *See also, Friends of the Eel River v. N. Coast R.R. Auth.*, 230 Cal.App.4th 85, 105 (2014):

> The ICCTA "does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce. [Citations.] For instance, the STB has recognized that [the] ICCTA likely would not preempt local laws that prohibit the dumping of harmful substances or wastes, because such a generally applicable regulation would not constitute an unreasonable burden on interstate commerce. [Citations.]" (*Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094, 1097.

The STB has agreed that "state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety." *Maumee & Western Railroad Corporation and RMW Ventures, LLC—Petition for Declaratory Order,* STB Finance Docket 34354 (March 2, 2004). *See also, New York Susquehanna and W. Ry. Corp.*, STB Fin. Docket No. 33466, 6 (Sept. 9, 1999) (STB has recognized that "not all state and local regulations that affect railroads are preempted"), cited in *Fla. E. Coast Ry. v. City of W. Palm Beach*, 110 F. Supp. 2d 1367, 1377 (S.D. Fla. 2000)).

Further, the STB does not have jurisdiction over excursion railroads. *See, e.g., Denver & Rio Grande Railway Historical Foundation—Petition for Declaratory Order*, STB Finance Docket 35496 (August 15, 2014). It also does not have jurisdiction over rail lines that do not operate in interstate commerce. *See, e.g., Borough of Riverdale Petition for Decl. Order the New York Susquehanna and Wester Railway Corp.*, STB Finance Docket 33466, 1999 STB LEXIS 531, 4 S.T.B. 380 (1999) ("preemption does not apply to operations that are not part of the national rail network" or "to state or local actions under their retained

police powers so long as they do not interfere with railroad operations or the Board's regulatory programs") (citing *Hi Tech Trans, LLC-- Petition for Declaratory Order--Hudson County, NJ*, STB Finance Docket No. 34192, 2003 STB LEXIS 475 at *10-11, 2003 WL 21952136 (2003), aff'd *Hi-Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004) ("no preemption for activity that is not part of 'rail transportation'").

As the *Fayard* Court further noted as to the important underlying interests of preserving State court jurisdiction:

> [A]bsent a clear cut federal cause of action, a danger exists of creating gaps in protection by categorically supplanting state claims with non-existent federal remedies. By contrast, where the state claim is left intact, federal interests are still largely protected: nothing prevents a preemption defense from being asserted, albeit in state courts.

Fayard v. Ne. Vehicle Servs., 533 F.3d 42, 49 (1st Cir. 2008).

As the Fifth Circuit has found, in discussing the same principle found in the Eleventh Circuit, "Congress narrowly tailored the ICCTA pre-emption provision to displace only regulation, i.e., those state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. . . . The text of Section 10501(b), with its emphasis on the word regulation,

establishes that only laws that have the effect of managing or governing rail transportation will be expressly preempted." *Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404, 410 (5th Cir. 2010) (quotations and changes omitted) (quoting *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). *See also, Maumee & Western Railroad Corporation and RMW Ventures, LLC -- Petition For Declaratory Order*, STB Finance Docket No. 34354, 2004 STB LEXIS 140, *3 (March 2, 2004) ("Federal preemption [under 49 U.S.C.§ 10501] does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety."); *Shupp v. Reading Blue Mt. & N. R.R.*, 850 F. Supp. 2d 490, 501 (M.D. Pa. 2012) ("ICCTA does not present complete preemption of all state law") (remanding to state court due to no federal defense of preemption) (citing *New York Susquehanna and Western Railway Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007)); *Allied Erecting & Dismantling Co. v. Ohio Cent. R.R.*, 2006 U.S. Dist.

LEXIS 76542, at *15 (N.D. Ohio 2006) ("section 10501(b) does not completely preempt all regulations that affect railroads").

Also, as the district court further noted, "Mendocino Railway does not 'claim that the state court would . . . lack the power to enter any orders to protect its rights.'" [ER-8 (omissions in original) (quoting *Montanore Minerals Corp v. Bakie*, 867 F.3d 1160, 1169 (9th Cir. 2017))] In fact, Mendocino Railway concedes that it does not dispute that its preemption claim can be decided by the state court. (OB, 36)

In any event, "this factor 'is more important when it weighs in favor of federal jurisdiction.'" *R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 981 (9th Cir. 2011). Since it does not, it is little value, whether it "weighs in favor of dismissal," as found by the district court, or "neutral" as Mendocino Railway argues. Thus, when this factor does not weigh in favor of federal jurisdiction, as here, it is really "'unhelpful.'" *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1370 (9th Cir. 1990). This factor thus does not aid Mendocino Railway's appeal. It is at most irrelevant, or else it provides some minimal support for abstention. However, on balance with all of the other strong

factors favoring abstention, this factor helps tip the balance and at least supports the district court's determination.

G. Seventh Factor: The Court Properly Found that Mendocino Railway Has Engaged in Impermissible Forum Shopping By its Federal Action.

The facts fully support the district court's finding that the seventh factor supports abstention, in that there is clear justification for the conclusion that "Mendocino Railway 'has become dissatisfied with the state court and now seeks a new forum.'" [ER-9]

Mendocino Railway makes two incorrect claims in support of this factor. First, Mendocino Railway asserts its action herein was "the first time a 'federal preemption' claim was asserted." (OB 39) Second, it claims it purportedly had a "legitimate reasons to come to federal court" because of some supposed "exclusively federal claim." *Id.* (quotations omitted). Neither assertion is accurate.

As noted previously, Mendocino Railway did not, for the *first time* assert a federal preemption claim in *this action* (commencing August 9, 2022). Instead, it had already asserted that claim in state court, in its demurrer (filed January 14, 2022) and answer (filed June 24, 2022). [C-

SER; ER-45-46; 91] In fact, the state court considered Mendocino Railway's federal preemption claim in its demurrer ruling, noting that "Mendocino Railway asserts that the Surface Transportation Board, under the authority of the Interstate Commerce Commission Termination Act, has plenary regulatory power and exclusive jurisdiction over federally recognized railroads." [ER-81]

As the state court rightly recognized, "[n]ot all state and local regulations that affect railroads are preempted. State and local regulation is permissible where it does not interfere with railroad operations. . . . If local control does not interfere with interstate rail operations, then preemption does not apply. " [ER-82] Thus, even assuming *arguendo* that Mendocino Railway's claim of preemption were generally applicable to it, even that asserted preemption may not apply in specific instances, or where the regulation does not interfere with interstate rail operations. In any event, the state court concluded that "the applicability of preemption is necessarily a 'fact-bound' question." [ER-83]

Moreover, the fact that Mendocino Railway attempted in this action to transmute its federal preemption *defense* into a federal cause

of action not only fails to demonstrate that it was not engaging in forum shopping, but also fails to set forth a valid federal claim at all (*see* Part III., *infra*).

In fact, on June 27, 2022, the City informed the state court, in pleadings filed in opposition to Mendocino Railway's attempt to relate the City's state action to another matter, in order to have the action transferred away from Judge Brennan, that the Coastal Commission was considering whether to intervene in the state court action at its regular meets on July 13-15, 2022. (*See* Appellee Ainsworth's Supplemental Excerpt of Records ("SER") 16.) Rather than maintaining Mendocino Railway's *already asserted* federal preemption *defense* in the state court action, Mendocino Railway preemptively filed this action. [ER-104] And it did not do so merely against the California Coastal Commission's Executive Director, as to the Commission's then-anticipated complaint in intervention, but also against the City – notwithstanding the fact that Mendocino Railway's preemption claims had *already* been asserted in the state court action, and would already be decided in that action as between those parties. [ER-26-31]

Indeed, it clearly was not the fact that Mendocino Railway had some separate or different preemption claim at issue in this action, but that, as the district court clearly saw, Mendocino Railway merely "'filed suit in a new forum after facing setback in the original proceeding.'" [ER-9 (quoting *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 846 (9th Cir. 2017)] Specifically, since Mendocino Railway's demurrer as to, in part, its federal preemption defense had been unsuccessful, its petition writ review in the California Court of Appeal was denied, and its petition for review in the California Supreme Court was denied, Mendocino Railway was stuck with an adverse ruling on its demurrer in state court. [ER-9] It had also exhausted other, unsuccessful state court procedures to attempt to move the state court action away from Judge Brennan, the judge who had issued the original order denying Mendocino Railway's demurrer, such as seeking to have the state action related to another, unrelated eminent domain action in another courthouse, seeking to have Judge Brennan disqualified, and seeking to improperly remove the state action to federal court. [ER-51-53; *see also* Ainsworth Motion for Request for Judicial Notice, Exhibits C & E]

This is "forum shopping[, which] weighs in favor of a stay when the party opposing the stay seeks to avoid adverse rulings made by the state court." *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1206 (9th Cir. 2021). Indeed, in "[t]o avoid forum shopping, courts may consider 'the *vexatious or reactive* nature of either the federal or the state litigation.'" *R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 981 (9th Cir. 2011) (italics added) (quoting *Moses H. Cone*, 460 U.S. 1, 17 n.20 (1983)). In fact, "judicial economy is not the only value that is placed in jeopardy. The legitimacy of the court system in the eyes of the public and fairness to the individual litigants also are endangered by duplicative suits that are the product of gamesmanship or that result in conflicting adjudications." *La Duke v. Burlington N. R. Co.*, 879 F.2d 1556, 1560 (7th Cir. 1989) (quoting *Lumen Constr., Inc. v. Brant Constr. Co.*, 780 F.2d 691, 694 (7th Cir. 1985)). *See also, Guo Haiyu Trading, Inc. v. Vanek*, 2018 U.S. Dist. LEXIS 185076, *23 (C.D. 2018) ("After litigating for more than a year in the Oregon state court and dissatisfied with the proceedings in state court, Plaintiffs now seek a new forum for their claims.") Based on these facts, there is support

for this factor weighing in favor of abstention and the district court properly found so.

H. Eighth Factor: The Court Properly Found that the Two Actions Were Substantially Similar and that Mendocino Railway's Federal Preemption Defense Will Necessarily and Fully Be Decided in the State Court Action.

The eighth factor, relating to "whether the state court proceedings will resolve all issues before the federal court," was also found to weigh in favor of abstention, in that the state and federal actions need not be exactly parallel and were found to be "substantially similar," since they both related to Mendocino Railway's claim of a federal preemption defense, which would necessarily be resolved in the state action. [ER-6, 9-10]

In opposition to the eighth factor, Mendocino Railway attempts to manufacture a difference between its federal preemption defense in this action and its same defense in the state court action, as a purported means to claim the state court action will somehow not resolve *all* of its claims. This grasping at straws is not supported, and is insufficient to

overturn the district court's valid weighing of the totality of the factors under *Colorado River* factors.

Mendocino Railway asserts that its action is somehow different because the issue of pre-clearance authority of the Coastal Commission under the Coastal Zone Management Act will remain an issue in the federal action, even if all issues in the state action are decided against Mendocino Railway. (OB, 29) This is a distinction without a difference, and a vain attempt at trying to manufacture justification for continued federal jurisdiction over its purportedly unique federal preemption defense in this action.

In fact, Mendocino Railway's assertion that its federal preemption defense in this action is somehow distinct or broader than the Commission's claims in its Complaint are specious on their fact. The Commission's Complaint expressly indicates that the dispute between it and Mendocino Railway relates to past and future work and/or development activities by Mendocino Railway in the coastal zone for which Mendocino Railway has not or will not "always seek a CDP *or other authorization* for doing so." [ER-38 (italics added).] More importantly, Mendocino Railway's defense in the state court action has

always included claimed exclusive regulation by the STB, which includes being "broadly preempt[ed] [from] environmental pre-clearance review and land-use permitting," "federal preemption," and the "jurisdiction of the STB," pursuant to, e.g., 49 U.S.C. §§ 10102 and 10501 (b). [ER-89-91] Also, this preemption defense has always and broadly included claimed exclusive regulation by the ICCTA and/or the STB, and general federal preemption, pursuant to 49 U.S.C. § 10501 (b). [ER-74, 81-84]

Mendocino Railway also fails to recognize that any allegations relating to the purported difference as to its claims pursuant to other authority of the Coastal Commission are merely hypothetical "pre-clearance authority over federally-licensed or federally-funded projects." (OB p. 13) In fact, it has previously asserted that much of its rail activities are *not* regulated or licensed by the STB. *See, e.g.*, 49 U.S.C. § 10901, et seq. (STB licensing authority over certain railroad line activities); 49 U.S.C. § 10906 (no authority over spur, switching, side tracks). In particular, "[s]ubject matter jurisdiction does not exist over claims which are not ripe for adjudication." St. Paul Fire & Marine Ins. Co. v. Nonprofits United, 91 Fed. Appx. 537, 538 (9th Cir. 2004).

Further and more importantly, Mendocino Railway has no valid federal claim. As set forth below, a federal preemption defense – particularly as to future, hypothetical applicability of regulations -- does not create a federal cause of action under federal law. The Declaratory Judgment Act cannot make Mendocino Railway's preemption defense into a valid federal claim. *See, e.g., Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983) (Declaratory Judgment Act provides specific remedy, not independent basis for jurisdiction).

I. Notwithstanding the Above Factors, the *Wilton/Brillhart* Factors Actually Apply, and Also Dictate Abstention, Under the Deferential Abuse of Discretion Standard.

In *Wilton*, the Supreme Court found that, when a claim under the Declaratory Judgment Act is at issue, "a standard vesting district courts with greater discretion [is justified] . . . than that permitted under the 'exceptional circumstances' test of *Colorado River* and *Moses H. Cone*." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). The Court found that:

> Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments

> have drawn to a close. In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.

Id. at 288. This Court has construed that "*Wilton* rejected de novo appellate review, citing the institutional advantage of trial courts in exercising discretion," and that appellate review involving "the Declaratory Judgment Act is deferential, under the abuse of discretion standard." *Gov't Emples. Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th 1998). Indeed, the *Dizol* Court emphasized that

> it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation. [Citation.] If there are parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court. . . . [F]ederal courts should generally decline to entertain reactive declaratory actions.

Id. at 1225. Thus, "abstention may be invoked more readily when a declaratory judgment action is presented." *UA Theatre Circuit, Inc. v. FCC*, 147 F. Supp. 2d 965, 977 (D.C. Az. 2001).

The intersection of the Declaratory Judgment Act and a federal preemption defense is key. This is primarily due to the fact that "[t]he Supreme Court has held that federal question jurisdiction for a

declaratory judgment suit cannot be established by raising an issue of federal law that would be an affirmative defense to a suit by the declaratory judgment defendant." *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 395 (5th 2003) (citing *Franchise Tax Board of the State of California v. Constr. Laborers Vacation Trust for Southern California*, 463 U.S. 1, 16 (1983)). In fact, "even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a *defense* to a threatened cause of action," "it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim." *Heat Surge, LLC v. Lee*, 2009 U.S. Dist. LEXIS 55613, *17-18 n.6 (N.D. Cal. 2009) (italics added) (quoting *Public Service Commission v. Wycoff*, 344 U.S. 237, 248 (1952)). Thus, "[f]ederal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Id.* And of course here, Mendocino Railway did *not* even commence this federal action before its federal preemption defense was *already pending* in state court.

In fact, "exceptional circumstances" are not required in a court's determination to abstain in connection a declaratory relief claim. As this Court concluded: "'[a] district court may, in its discretion, stay or dismiss a federal case in favor of related state proceedings' in only two circumstances: '(1) when an action seeks only declaratory relief, ***or*** (2) when exceptional circumstances exist [under *Colorado River*].'" *Ernest Bock, LLC v. Steelman*, 76 F.4th 827, 842 (changes in original) (9th Cir. 2023) (emphasis added) (quoting *Scotts Co. LLC v. Seeds, Inc.*, 688 F.3d 1154, 1158 (9th Cir. 2012)).

As to the applicable analysis, "*Brillhart* sets forth the primary factors for consideration. A district court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation." *Huth v. Hartford Ins. Co.*, 298 F.3d 800, 803 (9th Cir. 2002) (citing *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494-95 (1942)). Under these factors, the district court's analysis still stands on solid footing.

i. There Would Be Needless Determination of State Law Issues and Duplicative Adjudications, and So Abstention is Proper and Must Be Upheld.

As noted above, Mendocino Railway's preemption claim is not absolute. Thus, even in this action, there would likely need to be unnecessary determinations of state law, in that the scope and nature of the City's action (and the disputes between the parties in that action, which are inextricably tied to Mendocino Railway's federal preemption defense herein) include: application of building code requirements; inspections of Mendocino Railway's buildings/property; the applicability of "local codes, regulations and/or requirements applicable to such operations and activities [of Mendocino Railways;] . . . the condition of real property"; activities that "constitute a public nuisance and/or violations of law"; "local jurisdiction, local control, and local policy power and other City authority"; "dangerous building[s]"; generally, "compliance with the law, as applicable"; "regulat[ing] such nuisance and dangerous conditions, and to compel compliance with applicable law"; and "comply[ing] with all City ordinances, regulations, and lawfully adopted codes, jurisdiction and authority, as applicable." [ER-

29-31] The City's state action thus seeks enforcement of its police power and regulatory authority, as well as state codes which the City has the obligation to enforce, and violation of which constitutes a nuisance per se, even if no nuisance cause of action is asserted by the City. *See, e.g.*, Cal. Govt. Code §38771; *City of Corona v. Naulls*, 166 Cal. App. 4th 418, 424 (2008) (nuisance per se); *Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal. App. 4th 1160, 1207 (1996) (same); Cal. Health & Saf. Code § 17922 (cities adopt by reference state codes for building, plumbing, electrical, fire, etc.).

Mendocino Railway's claim in this action consists entirely of its assertion that it is federally preempted from these very enforcement matters. Thus, state law issues relating to nuisance conditions, building code compliance, compliance with local and State environmental requirements, etc. are intertwined with Mendocino Railway's federal preemption defense, and must necessarily be decided in both action. This intersection is unavoidable.

In addition, there would necessarily be duplicative litigation if this Court were to reverse, in that the state court action would proceed simultaneously with the same claims required to be adjudicated in this

action in connection with the federal preemption defense. Thus, "where another suit involving the same parties and presenting opportunity for ventilation of the same state law issues is pending in state court, a district court might be indulging in 'gratuitous interference,' [citation] if it permitted the federal declaratory action to proceed." *Wilton*, 515 U.S. at 283. Under these circumstances, abstention is proper, and the district court's exercise of discretion must be upheld.

Moreover, to the extent Mendocino Railway seeks to enforce a federal preemption *defense* in federal court, this Court is without jurisdiction, as such a claim does not present valid federal question jurisdiction. (*See* Part III., *infra*) On these bases, both the first and second *Wilton/Brillhart* factors support abstention in this matter.

ii. Abstention Under the Circumstances Presented Would Properly Discourage Forum Shopping.

As discussed previously in connection with the similar factor under *Colorado River*, the *Wilton/Brillhart* factor which evaluates forum shopping is the same and weighs in favor of abstention. Indeed, the facts set forth previously demonstrate just the concern posed by this factor, namely a "reactive declaratory judgment action." *Allstate Ins.*

Co. v. Tucknott Elec. Co., 2014 U.S. Dist. LEXIS 151249, *11 (N.D. Cal. 2014). In light of the significant attempts Mendocino Railway made to challenge Judge Brennan's adverse demurrer ruling, and various unsuccessful attempts to move the state court action away from the state court and Judge Brennan, it was well within the district court's discretion to find that this factor weighs in favor of abstention.

II. *YOUNGER* ABSTENTION IS PROPER DUE TO THE NATURE OF THE STATE COURT ACTION AND MENDOCINO RAILWAY'S ABILITY TO ADDRESS ITS FEDERAL PREEMPTION CLAIM IN THAT ACTION.

This Court "has applied the *Younger* abstention based upon three factors: 1) an on-going state judicial proceeding; 2) important state interests are implicated; and 3) there was an adequate opportunity to raise federal . . . claims." *Gilbertson v. Albright*, 381 F. 3d 965, 969 (9th Cir. 2004) (citing *Younger v. Harris*, 401 U.S. 37 (1971). These factors are met here. And, even though the district court did not reach the *Younger* abstention issue raised by the City and Ainsworth in their motions to dismiss, this Court may review on appeal all bases for a motion to dismiss. *Plaskett v. Wormuth*, 18 F.4th 1072, 1082 (9th Cir. 2021) (citing *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th

Cir. 2003) ("We may affirm a district court's judgment on any ground supported by the record.")

A. The City's State Action Was Pending When this Action Was Commenced, Constituting On-going State Proceedings.

Mendocino Railway asserts that this factor is not met because there was purportedly no "parallel" proceeding pending in state court on the same claims that it asserts in this action. (OB p. 43) The "parallel" requirement, however, is a factor in *Colorado River* analysis, not *Younger*. Although there must be some relationship between the state and federal actions, "inquiry on prong one of the *Younger* test" goes to the "narrow question" whether a state suit is "pending at the time the federal suit was filed." *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998). Unquestionably, there was a state court proceeding pending at the time this action was filed, so this factor is met. [ER-51-52; 104] It is really the next factor which addresses the *nature* of the state court action.

B. Since Important State Interests Are at Issue in the State Court Action, *Younger* Abstention is Applicable and is Met.

This Court has recognized that, "[a]s a matter of comity, federal courts should maintain respect for state functions and should not unduly interfere with the state's good faith efforts to *enforce its own laws* in its own courts." *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 223 (9th Cir. 1994) (italics added). Thus, the critical issue on this factor is enforcement of important state interests, even if the state action is *civil*.

Mendocino Railway make the assertion that the City's claims must be criminal or quasi-criminal in order for *Younger* abstention to apply. However, the Supreme Court has held that "the principles of *Younger* are applicable even though the state proceeding is civil in nature." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975). The key is whether there are "strong, local, i.e., municipal, interests," at stake, such as "land-use regulation [which] qualif[ies] as important state interests for purposes of *Younger* abstention." *San Remo Hotel*, 145 F.3d at 1104 (quotations omitted). State court proceedings can be

either "akin" to criminal proceedings, or involve enforcement by the government of important state interests. In particular,

> For civil enforcement actions that are akin to criminal proceedings, however, "a state actor is routinely a party to the state proceeding and often initiates the action," the proceedings "are characteristically initiated to *sanction the federal plaintiff … for some wrongful act*," and "[i]nvestigations are commonly involved, often culminating in the filing of a formal complaint or charges."

ReadyLink Healthcare, Inc. v. State Compensation Insurance Fund, 754 F.3d 754, 759 (9th Cir. 2014) (emphasis added) (quoting *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 79 (2013)).

Zoning, land use, business licenses, and other local business regulation enforcement comes within *Younger*, affecting enforcement of important state interests. *Night Clubs v. City of Fort Smith*, 163 F.3d 475, 480 (8th Cir. 1998) ("it is well-established that for abstention purposes, the enforcement and application of zoning ordinances and land use regulations is an important state and local interest") (and cases cited therein). Indeed, a "State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). *See also, World Famous Drinking Emporium, Inc. v. Tempe*, 820

F.2d 1079, 1083 (9th 1987) (city's civil action enforcing nuisance and closely tied to zoning "clearly involves an important state interest"); *United States v. Morros*, 268 F.3d 695, 707 n.86 (9th Cir. 2001) ("suggestions that *Younger* is inapplicable because of its original criminal context are no longer valid"); *Herrera v. City of Palmdale*, 918 F.3d 1037, 1044 (9th Cir. 2019) ("The Supreme Court has . . . recognized that a state nuisance proceeding may warrant *Younger* abstention from federal claims.") (citing *Huffman*, 420 U.S. at 607).

Since the City's and the Commission's enforcement of local ordinances and plans, building codes, nuisance conditions, environmental regulations, etc., is they very type of enforcement satisfying *Younger*, abstention is proper. This is the very type of civil action protected under *Younger*.

C. The State Court Action Provides an Adequate Opportunity for Mendocino Railway's Federal Preemption Defense to Be Decided.

Finally, there is the question under *Younger* whether federal claims can be adequately addresses in state court. As noted previously, there is concurrent jurisdiction here over Mendocino Railway's federal

preemption defense, which means that the state court is *equally* capable of determining Mendocino Railway's federal claims. In addition, where federal preemption is "not readily apparent," abstention is proper. *Woodfeathers, Inc. v. Washington County*, 180 F.3d 1017, 1022 (9th Cir. 1999). This factor is also met, and thus *Younger* provides an additional basis for this Court to uphold the district court's discretion in abstaining and dismissing the underlying action.

III. MENCODINO RAILWAY'S ACTION FAILS TO SET FORTH ANY VALID BASIS FOR FEDERAL JURISDICTION, AND THIS SERVES AS AN ADDITIONAL GROUND FOR DIMISSAL.

The United States Constitution establishes that federal courts have authority to hear cases "arising under [the] Constitution, the laws of the United States, and treaties." U.S. Const., art. III, § 2. With respect to the original jurisdiction of the courts to hear matters based on a federal question, Congress has provided authority similar to the Constitution: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Even though both of the above provisions refer broadly to matters "arising under" federal law, the Supreme Court has applied the language more narrowly. *See, e.g.,*

Merrell Dow Pharmaceuticals, v. Thompson, 478 U.S. 804, 813 (1986) (federal question jurisdiction requires a cause of action based on federal statute). Mendocino Railway's Complaint in this matter present no federal question that meets these standards, or which can be adjudicated by this Court.

Federal question jurisdiction under Title 28 United States Code section 1331 exists in two types of cases: (1) when it is apparent on the face of plaintiff's complaint that the plaintiff's cause of action was created by federal law; or (2) when the plaintiff's cause of action was created by state law, but resolution requires determination of a substantial question of federal law and the implicated federal law provides the plaintiff with a cause of action. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983) (there is a federal question if the law creates the cause of action); *Merrell Dow*, 478 U.S. at 817 (federal question exists if an element of the state cause of action is a federal statute that creates a federal cause of action for plaintiff).

Notably, the Complaint does not rely upon a cause of action created by federal law. Instead, it relies on the Declaratory Judgment

Act to assert subject matter jurisdiction in this Court. [ER-112-113] This is insufficient.

To be sure, the Act creates a federal *remedy* in a case of actual controversy, but it "does not provide an *independent* jurisdictional basis for suits in federal court. *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983) (italics added) (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-74 (1950). As here, "where the complaint in an action for declaratory judgment seeks in essence to assert a defense to [a] state court action, it is the character of the . . . action, and not of the defense, which will determine federal-question jurisdiction in the District Court." *Public Service Comm. v. Wycoff Co.*, 344 U.S. 237, 248 (1952). If a claim in federal court "does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a . . . cause of action." *Id.*

As the Eighth Circuit has recognized, "[t]he Declaratory Judgment Act is procedural; it does not expand federal court jurisdiction. Federal-

question jurisdiction may not be created by a declaratory-judgment plaintiff's 'artful pleading [that] anticipates a defense based on federal law.'" *Bacon v. Neer*, 631 F.3d 875, 880 (8th Cir. 2011) (change in original) (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950).

This Court has also found, similarly, in circumstances that are instructive here: "In an effort to engineer federal jurisdiction, the Stillaguamish Tribe of Indians ('the Tribe') sued the State of Washington in federal court, seeking a declaration that the Tribe's sovereign immunity barred any lawsuit arising from a particular contract with Washington. The trouble with this approach is that the Tribe's anticipatory defense to a state court lawsuit does not net federal jurisdiction." *Stillaguamish Tribe of Indians v. Washington*, 913 F.3d 1116, 1118 (9th Cir. 2019). The *Stillaguamish* Court found "the district court lacked subject matter jurisdiction" as to the "Tribe's sovereign immunity defense." *Id.* The court concluded that "[n]either a defense based on federal law nor a plaintiff's anticipation of such a defense is a basis for federal jurisdiction." *Id.* *See also, Chicago Tribune Co. v. Board of Trs. of the Univ. of Ill.*, 680 F.3d 1001, 1003 (7th Cir. 2012) ("it

is blackletter law that a federal defense differs from a claim arising under federal law").

In fact, the Complaint only arises as a defense to the state court action and this action is thus directly prohibited by the principles states above. It is well-established that anticipation of a federal defense does not establish federal jurisdiction. *See Louisville & Nashville Rd. Co. v. Mottley*, 211 U.S. 149, 152 (1908); *City Nat'l Bank v. Edmisten*, 681 F.2d 942, 945 (4th Cir. 1982) (anticipation of federal defense does not establish federal jurisdiction). The claims in the Complaint simply do *not* arise directly from a federal cause of action or implicate a federal law that provides Plaintiff with any valid, *independent* cause of action. Thus federal question jurisdiction under section 1331 does not exist. There is no federal cause of action to support the derivative declaratory relief sought by Mendocino Railway under the Declaratory Judgment Act. The Court thus lacks subject matter jurisdiction over the Complaint and it must be dismissed, regardless of this Court's findings on the abstention claims raised in Mendocino Railway's appeal.

Mendocino Railway's mere "vague references to state rights that conflict with federal law are not sufficient." *New Orleans & Gulf Coast*

Ry. Co. v. Barrois, 2006 U.S. Dist. LEXIS 106531, at *11 (E.D. La. 2006) Further, it is Mendocino Railway's burden to "prov[e] by a preponderance of the evidence that subject matter jurisdiction exists." *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008). Since it cannot do so, and its federal preemption defense is not a valid, independent federal cause of action, this is an additional, fatal flaw in the action, warranting dismissal.

CONCLUSION

For all the foregoing reasons, this Court should uphold the district court's dismissal of the within action. The district court either properly abstained under *Colorado River*, could have alternatively properly abstained under *Younger*, or this Court can find a lack of federal jurisdiction over Mendocino Railways attempts to assert a non-existent cause of action for a federal preemption defense.

Dated: November 6, 2023

JONES MAYER

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

I am the attorney for Appellee City of Fort Bragg.

This brief contains 11,348 words, excluding the items exempted by Fed. R. App. P. 32(f), and relying on the word count of the word-processing system used to prepare the document. The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature s/ *Krista MacNevin Jee* Date: November 6, 2023