No. 23-15857

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MENDOCINO RAILWAY,

Plaintiff-Appellant,

v.

JACK AINSWORTH, ET AL.

Defendants-Appellees.

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

APPELLANT'S COMBINED REPLY TO ANSWERING BRIEFS

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I. INTRODUCTION

The district court erred when it dismissed this action on *Colorado River* grounds. *Colorado River* cannot be invoked because there is substantial doubt that resolution of the State Action could completely resolve this case. And even if it applied, the other factors are either neutral or weigh in favor of this action's reinstatement. The arguments advanced by the Commission and City (collectively, "the Agencies") are based largely on a rewriting of the dispute's procedural history and relevant pleadings, and on a strategy to keep this quintessentially-federal action out of federal court.

Nor can the district court's dismissal be saved by *Younger*—which, at a minimum, requires that a quasi-criminal prosecution have been pending when Mendocino Railway ("MRY") filed its federal complaint. The State Action, consisting at the time of a strictly civil dispute over MRY's "public utility" status under California law, does not supply the requisite predicate for *Younger* dismissal. And the district court knew this: Though the Agencies moved almost exclusively for *Younger* dismissal, the court could not, in good faith, dismiss this action on those grounds.

The Court should reverse with instructions to reinstate this case.

II. ARGUMENT

A. *Colorado River* Does Not Support Dismissal

1. The Threshold Eighth Factor

a. The State Action Doesn't Necessarily Resolve This Action

Under this factor, *Colorado River* cannot be invoked "[w]hen one possible outcome of parallel state court proceedings is continued federal litigation," leaving the federal court with "something further to do." *Ernest Bock, LLC v. Steelman*, 76 F.4th 827, 841 (9th Cir. 2023). Here, a ruling in favor of MRY on the Agencies' claims would leave the federal court with "something further to do," thereby precluding *Colorado River* dismissal.

The State Action involves two plaintiffs, each with distinct claims. The City's sole cause of action is for a declaration that MRY is not a public utility under state law. ER-26, 31. The City seeks no declaration concerning MRY's status as a federal common-carrier railroad or concerning federal preemption. If the City loses its claim, and the state court rules that MRY is a public utility, the City will obtain no injunction. *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 65 (2015) ("A cause of action must exist before a court may grant a request for injunctive relief."). There will be no occasion for the court to consider whether the City's permitting authority is federally preempted, leaving something further for the federal court to do in this case. The Agencies don't dispute potential outcome.

The same is true of the Commission's limited claim for declaratory relief in the State Action. The Commission demands a declaration that the Coastal Act and LCP "apply to the Railway's actions" and that "application of the Coastal Act and

the City's LCP to the Railway's actions" is "not preempted by any state or federal law." Commission MJN, Exh. A, Prayer ¶¶ 1-2. The Commission's claim is premised exclusively on its *permitting* authority under the Coastal Act and LCP. The Commission's claim doesn't reach its *non-permitting* authority under the federal Coastal Zone Management Act ("CZMA") to pre-clear projects not requiring a permit.

One potential outcome is a state-court declaration that the Commission's permitting authority under the Coastal Act and LCP is federally preempted. That would resolve the specific controversy identified by the Commission. But it would not resolve whether the Commission has authority under the CZMA to delay or halt any development not otherwise requiring a permit. *California Charter Schools Assn. v. LAUSD*, 60 Cal. 4th 1221, 1234 (2015) ("In passing judgment on cases requesting declaratory relief, we decide only actual controversies and refrain from issuing advisory opinions.").

Because at least "one possible outcome of" of the State Action "is continued federal litigation," *Colorado River* cannot be invoked.

b. The Agencies' Contrary Arguments Lack Merit

The district court and Agencies all rely on the view that, for *Colorado River* to apply, "it is sufficient" if the two proceedings are "substantially similar." ER-9 (district court quoting *Montanore Minerals Corp. v. Bakie*, 867 F.3d 1160, 1170 (9th Cir. 2017) and *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989); CCC AB 27; City AB 50 (citing ER-9). But that view was repudiated last year when this Court disavowed *Montanore* and *Nakash*'s approach to the eighth factor,

viewing it as in "tension" with another line of cases imposing a more exacting standard. *Ernest*, 76 F.4th at 839-40. "Substantial similarity" is thus not enough.

As the *Ernst* Court reaffirmed, it is "a serious abuse of discretion to grant a *Colorado River* stay if there is any substantial doubt as to whether parallel state-court litigation will be an adequate vehicle for the *complete* and *prompt* resolution of the issues between the parties." *Ernest*, 76 F.4th at 841 (cleaned up). In the Court's judgment, that more exacting approach to the eighth factor "is most consistent with the Supreme Court's instruction." *Id.*

Skirting this clarified standard, the Agencies argue that the State and Federal Actions are similar enough to justify dismissal, highlighting that MRY raised a federal-preemption *defense* to the City's state-court claim. *E.g.,* CCC AB 28. But even when assessing parallelism, courts compare *causes of action*, not affirmative defenses. *Rogers v. Rivera*, 2016 U.S. Dist. LEXIS 186758, *12 (D.N.M. 2016) ("[W]hile most of the facts pertinent to Plaintiff's state and federal claims are the same or similar, his *causes of action* are different." (emphasis added)). Further, the fact that the State and Federal Actions may share a similar *issue* does not answer whether resolution of the state proceedings will doubtless resolve this case. Here, it will clearly not.

The City's sole claim in the State Action is for a declaration that MRY is not a state public utility. The City's cause of action turns solely on whether MRY satisfies California's definition of "public utility," which doesn't require adjudication of any federal issue—including MRY's federal-preemption defense. MRY's federal-preemption defense is irrelevant to the City's state-law claim.

Of course, if the state court were to declare that MRY is *not* a public utility, the court would consider the City's request for an injunction compelling MRY to submit to its permitting authority. But it is only if the City prevails on the "public utility" claim that MRY's federal-preemption defense could come into play, with the Court evaluating whether and how MRY's status as a federal railroad might limit such an injunction. As explained above, one outcome of the City's case is that it loses its "public utility" claim and, with it, any injunction—without state-court adjudication of any federal-preemption issue.

The fact that MRY has raised the defense also doesn't answer whether the Commission's state-court claims will resolve this action. In the State Action, the Commission defines the "controversy" about which it seeks a declaration as "whether MRY's development activities in the coastal zone are subject to the *Coastal Act and the City's LCP*." CCC RJN, Exh. A, ¶ 14 (emphasis added). The Commission demands a "declaratory judgment that sets forth the parties' legal rights and obligations *with respect to the California Coastal Act and the City's LCP*" only. *Id.* ¶ 15 (emphasis added). The focus is on those laws' "*permitting* requirements." *Id.* ¶ 13 (emphasis added).

MRY makes the same federal-preemption defense to the Commission's complaint as it does to the City's[1]: "The declaratory and injunctive relief sought by the Commission"—i.e., a declaration and injunction establishing the Commission's permitting authority under the Coastal Act and LCP—"are barred by . . . federal preemption . . . ." ER-91. A ruling against the Commission would result in a declaration that its permitting authority under the Coastal Act and LCP is federally preempted. On the other hand, a ruling against the Commission would *not* result in the broad declaration—sought in *this* case, but not in the State Action—that "the actions of the Commission and the City to regulate [MRY's] operations, practices and facilities are preempted under 49 U.S.C. § 10501(b) and that [its] activities are subject to the STB's exclusive jurisdiction." ER-113. That broad declaration encompasses, not just the Commission's *permitting* authority under the Coastal Act and LCP, but any and all authority to "preclear" MRY's activities. *Id.*; ER-112, ¶ 29 (asserting preemption of "state and local land-use permits and other preclearance").[2]

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[1] The answer to the Commission's complaint was filed after the underlying motions to dismiss were decided. However, as the City acknowledges, the federal-preemption defenses to the Commission's and City's complaints are "identical." City AB 25 n.1.

[2] The Commission argues that the state court will necessarily decide state preemption, federal preemption, or both, thereby making the Federal Action moot. CCC AB 33-34. But the Commission elides the possibility, as described above, that the City's "public utility" claim fails and the state court never resolves whether

Indeed, the state court has made clear it will take a "fact-bound" approach to any federal-preemption defense, declaring that "[n]ot all state and local regulations that affect railroads are preempted." ER-82-83. In other words, the state court will narrowly answer the federal-preemption question, if and as it arises in the case. Irrespective of how the state court decides whether the Commission's *permitting* authority is federally preempted, the state court will not reach the question (posed only in this case) whether *all* pre-clearance requirements are federally preempted.

Given the outcomes described above, it is substantially doubtful that federal litigation will be unnecessary after resolution of the State Action. Therefore, the eighth factor decidedly precludes dismissal of the Federal Action.

The Commission claims that MRY's federal complaint does not reach the Commission's *non-permitting* authority, including under the CZMA. It points to the fact that MRY has at times used the term "preclearance" to encompass land-use permitting. CCC AB 30. This is true, but unremarkable. Requiring a land-use permit is a type of preclearance requirement. And MRY uses the term "preclearance" in its federal complaint as an umbrella term to encompass *both* permitting and non-permitting authority; in no case has MRY ever used the term to

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the City's land-use authority is preempted—a question that only the City's request for injunctive relief implicates. The Commission also ignores the reality that the state court *cannot* resolve whether the Commission's CZMA authority is preempted, since the Commission's complaint doesn't put that authority at issue.

mean *only* the Commission's permitting authority to the exclusion of *other* non-permitting authority.

For example, in its claim for a declaratory judgment, MRY asserts that federal preemption precludes the Commission's efforts to "require [MRY] to obtain state and local land-use permits *and other preclearance*"—making it clear that MRY intended, not just permitting requirements, but also other oversight authority as well. ER-112 (emphasis added). Further, in describing the parties' dispute, MRY describes the Commission's position that MRY is subject to its "plenary land-use permitting *and preclearance authority*." *Id.* (emphasis added); ER-111. To equate "permitting" with "preclearance" would be to violate the rule against superfluity. *Jacobs v. Liberty Surplus Ins. Corp.*, 2021 U.S. Dist. LEXIS 177689, *13 (N.D. Cal. 2021) ("The rule against superfluity counsels that drafters would probably not say the same thing twice in different ways, placing a thumb on the scale against such an interpretation.").

Moreover, MRY broadly seeks "a declaratory judgment that the actions"—any and all actions—"of the Commission . . . to regulate [MRY's] operations, practices and facilities are preempted under 49 U.S.C. § 10501(b)," such that MRY may "undertake any and all rail-related activities . . . without preclearance or approval from the Commission." ER-113. MRY's prayer easily encompasses the Commission's non-permitting authority. MRY further seeks a broad injunction against the Commission, prohibiting it from "imposing and enforcing any land-use permitting *or other preclearance requirement*." *Id.* (emphasis added). Again, what "other preclearance requirement" does the Commission have the authority to

impose besides the Coastal Act/LCP's permitting requirement? While the Commission doesn't say, it also doesn't deny the obvious answer: the CZMA requirement to submit certain projects affecting coastal resources to its review. Thus, contrary to the Commission's argument (CCC AB 30-31), MRY's allegations do not come close to "mirror[ing]" the Agencies' state-court claims, which are limited to challenging MRY's "public utility" status and to establishing only permitting authority under the Coastal Act and LCP.

Finally, the Commission claims the district court cannot declare that all the Commission's preclearance authority over MRY is federally preempted, because there are insufficient allegations and evidence of a controversy about the Commission's preclearance power under the CZMA in particular. CCC AB 31. But, as described above, the federal complaint squarely puts *all* the Commission's preclearance authority—permitting and otherwise—in dispute. ER-112-113; ER-113.

Indeed, in a letter to MRY, the Commission itself acknowledged the parties' ongoing dispute over the Commission's preclearance authority under the CZMA over the same railroad work identified in MRY's federal complaint. MJN, Exh. B. The complaint describes MRY's purchase from Georgia-Pacific LLC of land adjacent to its railroad station, which MRY intended to "develop[] . . . for rail-related uses." ER-110-11. MRY's complaint also describes improvements made to its "dry shed," which it uses for "storage of rail cars and other railroad equipment." ER-110. The Commission's letter admonished MRY that those *same* activities triggered the requirement of a "a coastal development permit *and/or federal*

consistency review" under the CZMA. MJN, Exh. B (emphasis added). The Commission thus misrepresents the record when it claims that the facts establishing MRY's right to declaratory relief concerning its CZMA authority "have not occurred" and "likely never will." CCC AB 31. Those facts have not only already occurred, but will persist absent resolution of this action.

Even if *Colorado River* applied, the remaining factors weigh against dismissal. Though some factors may be neutral, "the facial neutrality of a factor is a basis for retaining jurisdiction, not for yielding it." *Woodford v. Cmty. Action Agency of Greene County*, 239 F.3d 517, 522 (2d Cir. 2001). This flows from the Supreme Court's admonition that the task "is not to find some substantial reason for the exercise of federal jurisdiction by the district court," but "to ascertain whether there exist exceptional circumstances, the clearest of justifications, that can suffice under *Colorado River* to justify the surrender of that jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26 (1983).

2. First Factor

The parties agree that the first factor is irrelevant because the dispute does not involve a specific piece of property.

3. Second Factor

The district court found the second factor concerning the inconvenience of the federal forum to be neutral, given that the distance between the state court in Fort Bragg and the federal court in Oakland is only 150 miles. ER-6; *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1368 (9th Cir. 1990) ("Although 200

miles is a fair distance, it is not sufficiently great that this factor points toward abstention.").

While the Agencies cite the inconvenience of "relevant witnesses" having to travel to Oakland, they never identify these witnesses or explain how they might be inconvenienced. But the relevant witnesses can be easily identified. As described below, the key witnesses who will testify as to MRY's historic and current operations between Fort Bragg and Willits, including its freight and non-tourist passenger services, will not be inconvenienced by litigating this case in Oakland.

MRY's and its officers' principal office is in Davis, California—only 68 miles from Oakland, which is far more convenient to reach than the 183-mile trek to Fort Bragg. Railway's Supplemental Motion for Judicial Notice ("SMJN"), Exh. 3. Moreover, MRY confirms that any of its Fort Bragg employees with first-hand knowledge of its operations would not be inconvenienced by having to travel to Oakland to testify.

Other witnesses to MRY's historic and current operations include CPUC inspectors who have inspected MRY over the years and thus know MRY's operations. ER-27 (City admitting that MRY "is subject to CPUC jurisdiction"); Cal. Pub. Util. Code § 309.7 (CPUC mandated to inspect regulated railroads). Those witnesses are located in San Francisco, Sacramento, or Los Angeles, all of

which are much closer to Oakland than to Fort Bragg.[3] Still other witnesses to MRY's historic and current operations are principals and employees of Sierra Northern Railway ("SNR"), with whom MRY has contracted to perform certain railroad services on its behalf. SNR's principal place of business is also in Davis. SMJN, Exh. 4. For SNR witnesses, Oakland is a far more convenient than Fort Bragg.

Further, Oakland is much more convenient than Fort Bragg for all the parties' attorneys who must appear for hearings and throughout the trial. The Commission's primary attorney in this dispute, Patrick Tuck, and his co-counsel, David Alderson, have their offices in Oakland—just a two-minute walk from the court. The City's attorney has her office in Fullerton, and MRY's counsel has his office in Los Angeles.

The City notes that its "witnesses and evidence will be largely centered in Fort Bragg." City AB 24. It doesn't say who those witnesses are, but it appears the City means its employees or officials. The City's claim turns fundamentally on MRY's day-to-day freight and non-tourist passenger operations. It is unlikely that any City employee or official has first-hand knowledge of MRY's operations. In any event, the City gives no indication—even in its district court briefing below—

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[3] https://www.cpuc.ca.gov/industries-and-topics/rail-safety/rail-transit-safety/rail-operations-contacts.

where any of its unidentified witnesses are located or how a federal forum would inconvenience them. Even assuming that one or more City witnesses would be inconvenienced by appearing in Oakland, any such inconvenience would not outweigh the considerable inconvenience to MRY, its many witnesses, and all of the parties' attorneys of having to appear in Fort Bragg versus Oakland. On balance, this factor actually weighs in favor of the federal forum. *Cf. Dana Innovations v. Trends Elecs. Int'l Inc.*, 2023 U.S. Dist. LEXIS 70203, *23 (C.D. Cal. 2023) ("Given the relative inconvenience of each forum is roughly equal in absolute value, differing primarily in which party bears it, the court finds this factor does not favor staying this action.").

Finally, any documentary "evidence" can be introduced just as easily in Oakland as it can in Fort Bragg, especially when most (if not all) such evidence can be produced in electronic form.

4. Third Factor

The Agencies argue that, because federal preemption is at issue in both the State and Federal Actions, the third factor requires dismissal of the Federal Action in order prevent piecemeal or duplicative litigation. CCC AB 18-20; City AB 26-27. But that is not the test under the third factor. A "general preference for avoiding piecemeal litigation" based on parallel lawsuits "is insufficient to warrant abstention." *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 842-43 (9th Cir. 2017). The reason is obvious: "Any case in which *Colorado River* is implicated will inevitably involve the possibility of conflicting results, piecemeal litigation, and some duplication of judicial efforts." *Id.* If the mere existence of

parallel actions—and the concomitant risk of piecemeal or duplicative proceedings—were sufficient, the rare exception of a *Colorado River* dismissal would swallow the rule that federal courts have an "the virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 817 (1976).

Something more is required—namely, a "special concern counseling in favor of federal abstention, such as a clear federal policy of avoiding piecemeal adjudication." *Seneca*, 862 F.3d at 842. The third factor favors dismissal "*only* when there is evidence of a strong federal policy that all claims should be tried in the state courts." *United States v. Morros*, 268 F.3d 695, 706-07 (9th Cir. 2001) (emphasis added). The paradigmatic example is "when Congress has passed a law expressing a preference for unified state adjudication." *Id.*; *Travelers*, 914 F.2d at 1369 (citing "federal legislation evincing a federal policy to avoid piecemeal litigation").

Colorado River involved precisely that kind of congressional policy. There, the United States sued Colorado water users in federal district court, seeking a declaration of its water rights. Thereafter, one of the water users filed an action in Colorado state court, seeking to join the United States as a party under the McCarran Amendment, 43 U.S.C. § 666, which allows such joinder in water-rights cases. Several defendants in the federal case moved for abstention on the ground that the U.S.'s state and federal water-rights claims should be adjudicated in the state case. *Colorado River*, 424 U.S. at 805-06. In upholding the district court's dismissal, the Supreme Court focused on the most important factor: the McCarran

Amendment, which evidenced a "clear federal policy" that the state court system was the preferred means for avoiding the piecemeal adjudication of water disputes. *Id*. at 819.

The Agencies identify no such "clear federal policy" favoring state-court resolution of the kind of federal-preemption claim at issue here. At bottom, the Agencies just urge the Court to dismiss the case based on an aversion to perceived piecemeal and duplicative litigation. But that is insufficient under the third factor. *Seneca*, 862 F.3d at 842-43.

The Commission's remaining arguments are equally meritless. First, the Commission argues that the State Action "includes several state law claims, as well as MRY's state law preemption defense, which are not before the federal court." CCC AB 19. While the State Action includes the claim that MRY is not a public utility under California law, allowing the Federal Action to proceed will not affect litigation of that claim. Indeed, if the Federal Action is reinstated, the Commission could abandon its limited federal claim in the State Action, allowing that claim to be resolved in the Federal Action (where the Commission's claim is subsumed by MRY's claim) and just litigating the "public utility" claim alongside the City in state court. That would avoid all of the purported piecemealing and duplication that the Agencies bemoan.

Second, the Commission contends that MRY's filing of the Federal Action improperly asked the federal court to "adjudicate rights that [are] implicated in a vastly more comprehensive state action." CCC AB 20 (internal citation and quotation marks omitted). But the Commission has it exactly backward. When

MRY filed its Federal Action, there was no "comprehensive state action" for definitively adjudicating MRY's federal-preemption rights. When MRY filed the Federal Action, there was only the City's *state-law* claim; the Commission wasn't even a party to the State Action yet. Adjudication of that state-law claim therefore could not have resolved MRY's federal-preemption rights as against the City and the Commission. There is *still* no "comprehensive state action."

Moreover, when served with MRY's federal complaint, the Commission could have allowed the federal court to resolve MRY's broad federal-preemption claim. But it chose not to. Instead, the Commission chose to forum-shop and ask the state court to "adjudicate federal rights that [were already] implicated in a vastly more comprehensive [federal] action." CCC AB 20. Thus, it is the *Commission* that has caused the perceived piecemealing and duplication of litigation that the Agencies now object to.

5. Fourth Factor

Under this factor, the Court considers the order in which the state and federal cases were filed, as well as "how much progress has been made in the two actions" when the federal action was filed. *Moses*, 460 U.S. at 21.[4] The Agencies

[4] The City cites a number of decisions concerning the federal-comity doctrine. City AB 31-32. But that doctrine applies only when two similar actions are pending in different federal districts.

all but concede that the state proceedings have not progressed much beyond MRY filing answers to their complaints. CCC AB 21-22; City AB 3-36. The record reflects no discovery or state resolution of any "foundational legal claims." *Seneca*, 862 F.3d at 843. Indeed, the Agencies have done little to prosecute their claims since the State Action was remanded over eight months ago, in May 2023. ER-4.

The City's failure to prosecute is particularly egregious. The City filed its case in October 2021, but it has done nothing since then to press its "public utility" claim against MRY. As much as they would like to blame MRY,[5] it's the City and Commission's own inaction and neglect—as the plaintiffs in the State Action—that have caused the state proceedings to stall.

As for the order in which the courts obtained jurisdiction, the Agencies cannot deny that, when MRY filed this Federal Action, the state court had jurisdiction *only* over the City's "public utility" claim. There was no "parallel" federal-preemption claim to speak of because the Commission had not yet forum-shopped its way into the State Action.

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[5] The City claims that "[t]here were, in fact, *significant* state court proceedings" preventing the City from prosecuting its claim. City AB 34-35. But the City doesn't explain how any of MRY's actions—its demurrer, motion to strike, and non-substantive motions concerning who would preside over the City's claim—prevented the City from conducting discovery or otherwise pressing its case. Nothing MRY did barred the Agencies from initiating discovery at any time 10 days after service of their summonses on MRY (starting in December 2021 for the City and November 2022 for the Commission).

The Agencies counter that by the time the Federal Action was filed, MRY had already raised a federal-preemption *defense* in the State Action. But courts obtain jurisdiction over claims, not defenses. *United States v. Kernen Constr.*, 349 F. Supp. 3d 988 (E.D. Cal. 2018) ("In federal court, jurisdictional inquiries only apply to claims."). In any event, MRY first raised its federal-preemption defense in state court in January 2022, when it demurred to and moved to strike the City's complaint. ER-97; City AB 28-29. MRY filed its Federal Action against the City and the Commission (who wasn't yet a party to the state action) just seven months later.[6] Coupled with the fact that the state proceedings haven't progressed beyond MRY's answers, the timing of the state- and federal-court filings favors retaining jurisdiction.

6. Fifth Factor

The Commission agrees that that the fifth factor—whether federal law provides the rule of decision—"weighs against dismissal." CCC AB 22.

The City, however, asserts that this factor justifies dismissal, though for reasons that confusingly speak to the *sixth* factor, *infra*. The City otherwise doesn't deny that federal law provides the rule of decision.

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[6] The City falsely claims that MRY commenced the Federal Action "nearly two years after the state court action commenced." City AB 34. MRY filed its Federal Action less than 10 months after the City filed its state action. ER-26, 104.

This factor clearly weighs against dismissal.

7. Sixth Factor

The sixth factor—whether a state court can adequately protect a federal litigant's rights—is neutral. Logically, this factor can weigh only *against* dismissal when the state court provides inadequate protection. A federal litigant whose rights can be protected in state court cannot, on that basis, "be deprived of its right to the federal forum" for the simple reason that "there is no ban on parallel proceedings." *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1193 (5th Cir. 1988). Indeed, if the adequacy of a state-court forum were sufficient to shut the federal courthouse doors on a federal litigant, then the rare exception to retaining jurisdiction would swallow "the rule . . . that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court." *Colorado River*, 424 U.S .at 817. After all, in nearly all cases implicating *Colorado River*, a state court will be able to protect a federal litigant's rights.

The Commission cites one precedent—*Montanore*—where the Court concluded that the sixth factor weighed in favor of a stay. In reaching that conclusion, the *Montanore* Court appears to have relied, mistakenly, on *R.R. Street*. In *R.R. Street*, the Court concluded that "there is no question that the state court has authority to address the rights and remedies at issue in this case." *R.R. Street*, 656 F.3d at 981. But the *R.R. Street* Court never held, as *Montanore* asserts, that the sixth factor "may weigh in favor of a stay." *Montanore*, 867 F.3d at 1169. In fact, the *R.R. Street* Court treated the sixth factor as neutral, explaining: "this factor is more important when it weighs in favor of federal jurisdiction." *Id.*

(cleaned up). That is consistent with other decisions of the Court such as *Travelers*, 914 F.2d at 1370, where the Court held that "the possibility that the state court proceeding might adequately protect the interests of the parties is not enough to justify the district court's deference to the state action."

The weight of this Court's precedents, as well as the logic of the sixth factor, supports the view that this factor cannot justify a dismissal or stay.

After a protracted and largely irrelevant argument on the merits of MRY's federal-preemption claim and repeated assertions that the state court can adjudicate it, the City itself ultimately concedes that the sixth factor "is [of] little value" and "is really unhelpful" in this case. City AB 44. It thereafter qualifies by saying that the factor may "provide[] some minimal support for abstention." *Id.* But it provides no relevant argument or authority for its tepid qualification.

8. Seventh Factor

The seventh-factor—forum-shopping—is either neutral or favors retaining jurisdiction. The Agencies ignore the procedural history, especially of the State Action, in a doomed effort to paint MRY's filing of this case as forum-shopping.

First, the state court has issued one substantive ruling in this case: a decision overruling MRY's demurrer and motion to strike *the City's "public utility" claim and attendant request for injunction*. This decision merely allowed the City's "public utility" claim to proceed. And, while the state court held that MRY's federal-preemption defense did not support dismissing or striking any allegations from the City's complaint, the demurrer ruling did not (and could not) adjudicate the *merits* of that defense. Thus, the state court's only substantive ruling did not

result in any loss for MRY on the merits of its federal-preemption or other defenses, but only required MRY to answer the City's complaint.

If MRY had wanted to avoid a past or future ruling on the "public utility" claim—the only claim then-pending in state court—MRY would have supplemented its federal claim in federal court with a "public utility" claim. But that was not MRY's purpose when it filed the Federal Action. Rather, MRY wanted a resolution of an ongoing dispute, not just with the City, but with the Commission as well, concerning MRY's status and federal preemption rights as a railroad within the STB's exclusive jurisdiction. It bears repeating that no "federal railroad" claim was pending in the State Action when the Railway filed its Federal Action. And, of course, the state court hadn't adjudicated the merits of any such claim. Thus, there would have been no reason for MRY to, as the Commission ironically asserts, "forum shop its federal preemption argument in the district court." CCC AB 25.

With a clear picture of the history and nature of the State and Federal Actions, it is easy to see that MRY was simply "act[ing] within [its] rights in filing a suit in the forum of [its] choice." *Travelers*, 914 F.2d at 1371. It wasn't looking to avoid past or future adverse rulings from the state court, which hadn't ruled on any "federal railroad" claim; rather, it was seeking to resolve a dispute between itself and the Agencies—one of which wasn't even a party to the state action—and properly chose a federal forum for its federal claim.

Second, the Agencies accuse MRY of a "pattern and practice" of "prevent[ing] the Mendocino County Action from proceeding in the state court."

CCC AB 25; City AB 48 (same). But of the *four* actions the Commission describes, only *one* of them (if successful) would have prevented the state court from retaining jurisdiction over the State Action. That was MRY's removal of the State Action when the Commission forum-shopped its narrower federal-preemption claim into state court. MRY's three other actions would have resulted in either a temporary stay of the state proceedings or in another state-court judge hearing the State Action.

Third, the Commission provides no explanation whatsoever for *its* forum-shopping. Why did it wait more than a year after the City filed its state-court complaint to intervene in the City's case? After having been served with MRY's federal complaint, why did the Commission decide to run to state court to intervene in the City's "public utility" case—a state-law action with no federal-preemption claim—and file a (narrower) version of MRY's federal lawsuit? The Commission doesn't say, but its conduct points to a tactical decision to reactively *avoid* a federal forum for (in its view) a more preferable state forum. *R.R. St.*, 656 F.3d at 981.

B. *Younger* Does Not Justify Abstention or Dismissal

1. No Quasi-Criminal Proceeding Was Pending When MRY Filed Its Federal Action

Younger is strictly limited to "three exceptional categories" of cases that must be pending at the time the federal action is filed: "(1) parallel, pending state criminal proceedings, (2) state civil proceedings that are akin to criminal prosecutions, and (3) state civil proceedings that implicate a State's interest in

enforcing the orders and judgments of its courts." *ReadyLink Healthcare, Inc. v. State Compensation Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014) (cleaned up). The Commission concedes, and the City doesn't dispute, that "the date for determining whether *Younger* applies is the date the federal action is filed." *Id.* (cleaned up); CCC AB 35.

No one argues that the State Action falls under the first or third category. The Commission claims the State Action falls under the second category, spending much of its brief trying to show that the State Action is really a quasi-criminal prosecution meant to punish MRY. CCC AB 37-41. The City ducks the threshold question entirely, arguing that all that matters is that strong local interests be at stake. City AB 62. The City has thus waived any argument that the threshold requirement for *Younger* has been met.

Turning to the question of whether the State Action pending when MRY filed the Federal Action constituted a quasi-criminal proceeding, the answer is clearly "no." MRY filed its Federal Action on August 9, 2022. At that time, the State Action consisted only of its "public utility" claim, and an attendant request for an injunction requiring MRY to submit to its permitting authority. ER-31. The City's claim bears none of the hallmarks of a quasi-criminal proceeding. It isn't "in aid of and closely related to criminal statutes," and it isn't "aimed at punishing some wrongful act through a penalty or sanction." *Applied Underwriters, Inc. v. Lara*, 37 F.4th 579, 589 (9th 2022) (identifying the presence of either or both of those characteristics as the *sine qua non* of "*Younger*-eligible civil enforcement actions"). "[T]he complete lack of sanctions being sought against [MRY] belie any

punitive character to the [City's] action," which is the "feature [that] underscores why *Younger* abstention is not proper in this case." *Id.*

The Commission argues that the State Action "is a nuisance enforcement proceeding" like the ones to which *Younger* applied in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), *Citizens for Free Speech, LLC v. County of Alameda*, 953 F.3d 655 (9th Cir. 2020), and *Herrera v. City of Palmdale*, 918 F.3d 1037 (9th Cir. 2019). CCC AB 37. First, the Commission cites allegations in the City's complaint that MRY has refused to submit to the City's permitting authority. CCC AB 38. These allegations do not transform the City's claim into a *Younger*-qualifying nuisance action. As the City itself admits, "no nuisance cause of action is asserted by the City." City AB 58.

In contrast to the Commission's cited nuisance cases, the City's claim doesn't seek to sanction or punish MRY in any way. The City's claim doesn't demand the railroad's closure or the forced sale of any of its assets as in *Huffman*, 420 U.S. at 596-98. 604. The City's claim doesn't rest on any formal investigation or charge of an actual nuisance violation, nor does it demand punitive fines or confiscation of MRY's property as in *Citizens*, 953 F.3d at 657. Further, the City's claim doesn't seek the appointment of a receiver to take possession of MRY's property, an injunction punitively depriving MRY of revenue, or penalties as punishment for "pos[ing] a severe life and health and safety hazard," as in *Herrera*, 918 F.3d at 1045. At bottom, the City's action presents a purely civil dispute over MRY's "public utility" status and whether the City can assert permitting authority over it.

Second, the Commission cites its own complaint to repackage the State Action as a nuisance-abatement case. But "at the time the federal action was filed," the Commission hadn't filed its complaint. *Rynearson v. Ferguson*, 903 F.3d 920, 924 (9th Cir. 2018). Only the City's action was pending. The Commission's complaint is thus irrelevant. But even if the Commission's complaint had been pending when MRY filed this case, the complaint doesn't come close to instituting a *Younger*-qualifying nuisance-abatement proceeding.

This is because, as the Commission candidly admits in the final pages of its brief, it is simply "seeking a determination regarding [its] regulatory authority and MRY's asserted preemption arguments," and an injunction compelling MRY's compliance with the Coastal Act and LCP's permitting requirements. CCC AB 44-45. The Commission doesn't seek a determination that any of MRY's past work was a nuisance.

Indeed, the Commission's complaint identifies only a few of MRY's activities that, in the Commission's mistaken view, should be permitted. It cites MRY's alleged replacement of a roundhouse and storage shed, a lot-line adjustment, and future development of recently acquired land. CCC MJN, Exh. A, ¶ 4. Yet nowhere does the Commission's complaint suggest that *any* of these activities—or even the mere refusal to obtain a land-use permit—itself constitutes a nuisance. Even under California law's broad definition of "nuisance," such a characterization of MRY's activities would be absurd. Cal. Civ. Code § 3479.

Finally, the Commission points to its request for "civil liability" and "exemplary damages." CCC AB 38. The Opening Brief at 46-52 explains why that

request does not convert the Commission's action into a quasi-criminal civil-enforcement proceeding. In brief, that monetary exaction is intended, not to sanction or punish MRY, but "to secure [its] obedience to statutes and regulations." *Kizer v. County of San Mateo*, 53 Cal. 3d 139, 147-48 (1991). In fact, the Commission's complaint admits that even the "exemplary damages" it seeks are expressly designed "to deter further violations by the Railway"—not to sanction it. CCC MJN, Exh. A, ¶ 21.

The Commission largely sidesteps MRY's arguments and authorities, dismissing them as involving "different issues and contexts." CCC AB 42. The Commission only flatly states that "exemplary damages" are criminal sanctions that trigger *Younger*, with citations to *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732 (9th Cir. 2020) and *Landgraf v. US1 Film Products*, 511 U.S. 244 (1994). But neither precedent supports the Commission's argument.

In *Bristol-Meyers*, this Court applied *Younger* where a state action was brought "under a statute that *punishes* those who engage in deceptive acts in commerce," and the state sought "civil penalties and punitive damages *to sanction* the companies for their allegedly deceptive labeling practices." *Bristol-Meyers* 979 F.3d at 738 (emphasis). As explained above, the Commission itself admits that its claims do not punish MRY in any way, but only "[s]eek a determination regarding [its] regulatory authority" over MRY and an injunction requiring it to "comply with local and state laws." CCC AB 44-45.

In *Landgraf*, the Supreme Court construed a provision of the Civil Rights Act containing the term "punitive damages." The Court observed that the "very

labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions." *Landgraf*, 511 U.S. at 282. Whatever the term "exemplary damages" may imply in the context of the Civil Rights Act, the "exemplary damages" that the Commission seeks under state law have their own meaning and rationale: to deter violations of the Coastal Act. CCC MJN, Exh. A, ¶ 21.

2. The "State Interest" Factor Weighs Against *Younger* Abstention

Younger applies only if the government shows that important state interests are involved. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). *Trainor v. Hernandez*, 431 U.S. 434, 448 (1977) (Blackmun, J., concurring) (burden is on government). But where the threshold issues are federal, the federal proceeding does not implicate an important state interest sufficient to justify *Younger* abstention. *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1995) (denying *Younger* abstention where threshold issue was whether state had jurisdiction to prosecute Indians pursuant to state gaming laws); *Fort Belknap Indian Cmty. v. Mazurek*, 43 F.3d 428, 432 (9th Cir. 1994) (denying abstention where threshold issue was whether state had jurisdiction to prosecute Indians in state court for state liquor-law violations).

In *Winnebago Tribe v. Stovall*, 341 F.3d 1202 (10th Cir. 2003), Indian tribes sued Kansas officials in federal court for declaratory and injunctive relief, arguing that federal law barred a state tax. The federal action came *after* state officials had begun to seize tribal property and initiate criminal proceedings against the tribal

members who refused to pay. *Id.* at 1204. The district court denied the state's motion to dismiss under *Younger*. The Tenth Circuit affirmed, holding:

> The central and threshold issues in the case are federal Indian law issues, i.e. whether federal law bars the state from imposing the tax, whether federal law preempts the state tax scheme as applied to plaintiff Indian tribes, and whether the state's enforcement violates tribal sovereign immunity, issues which must be resolved before the state criminal proceedings can go forward. The state prosecutions are based on allegations that assume the state can apply its law to these parties.

Id. at 1205.

So, too, here. The State Action "is based on allegations that assume [the Agencies] can apply [their] law[s] to [MRY]." *Id.* The "central and threshold issue[]" in the Federal Action is federal—i.e., whether the Agencies' permitting authority over MRY is federally preempted. *Id.* Even a strong local interest in land-use regulation, as described in *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998), is insufficient in these circumstances to justify dismissal.

3. If Reinstated, This Federal Action Would Not Enjoin the State Action

"If [*Younger*'s] threshold elements are met," the Court "considers[s] whether the federal action would have the practical effect of enjoining the state proceedings." *ReadyLink,* 754 F.3d at 759. Though failing to meet *Younger*'s threshold elements, the Commission argues for abstention based on speculation that reinstatement of this case "may cause the state court to stay the Mendocino County Action in whole or in part until the district court decides the federal

preemption issue, thus effectively enjoining the state action." CCC AB 43. The fundamental premise of the Commission's argument is that MRY makes "identical [federal preemption] claims" that will have to be litigated in both actions. *Id.* But the Commission errs.

First, when MRY filed its federal complaint, the State and Federal Actions did not share "identical claims." The State Action contained only the City's "public utility" claim, with the possibility (though not certainty) that MRY's federal-preemption rights *might* be implicated if the court reached the City's request for an injunction. The Commission's limited version of MRY's federal complaint came *after* MRY filed its complaint. Thus, this action could not practically enjoin the state proceedings, which at the relevant time centered on the City's state-law claim.

Second, even if the Court considers the Commission's federal claim, reinstatement of this case would not have the effect of enjoining the state proceedings. This case centers exclusively on *federal* preemption of the Agencies' land-use preclearance requirements. It therefore wouldn't enjoin state adjudication of the Agencies' claims that *state* law, like the Public Utilities Code, doesn't preempt their permitting authority.

C. This Case Does Not Implicate *Wilton/Brillhart* Abstention

The City argues—for the first time on appeal—that this case is governed by the laxer abstention doctrine articulated in *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942) and *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

City AB 53. The *Wilton/Brillhart* doctrine, which allows district courts to surrender federal jurisdiction more easily than *Colorado River*, doesn't apply here.

Under *Wilton/Brillhart*, a "district court may, in its discretion, stay or dismiss a federal case in favor of related state proceedings" when "an action seeks only declaratory relief." *Scotts Co. LLC v. Seeds, Inc.*, 688 F.3d 1154, 1158 (9th Cir. 2012). But when a declaratory-judgment claim is related to an "independent non-declaratory judgment claim"—such as a claim "for injunctive relief"—*Wilton/Brillhart* is inapplicable. *Vasquez v. Rackauckas*, 734 F.3d 1025, 1040 (9th 2013); *see also vonRosenberg v. Lawrence*, 781 F.3d 731, 735 (4th Cir. 2015) (same); *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 879 (8th Cir. 2002) (same); *Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 652 (5th Cir. 2000) (same).

Here, in addition to seeking declaratory relief, MRY seeks an "injunction prohibiting Defendants from taking any action that would materially interfere with [its] operation of its railroad as a federally regulated common carrier, including by imposing and enforcing any land-use permitting or other preclearance requirement as the pre-condition of any rail-related development on [its] property or facilities." ER-113. That is an independent claim because it "would continue to exist if the request for a declaration dropped from the case." *Scotts*, 688 F.3d at 1159 (cleaned up). *Wilton/Brillhart* abstention is thus inapplicable.

There's another reason why the City can't invoke *Wilton/Brillhart*: a predicate for *Wilton/Brillhart* abstention is "parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is

filed." *Gov't Emples. Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998). As already noted, when MRY filed its federal complaint, the State Action contained only the City's "public utility" claim, which differs from MRY's "federal railroad" claim. And the State Action was between the City and MRY only, whereas MRY's Federal Action named the Commission, as well. There was no identity of issues and parties.

Finally, the *Wilton/Brillhart* factors aren't satisfied here. While the City claims "there would likely need to be unnecessary determinations of state law" in this case, this is not so. City AB 57. MRY's claims turn primarily on a single question of federal law: does the federal STB have exclusive jurisdiction over MRY? ER-113. If so, then all land-use permitting and preclearance requirements are federally preempted—full stop. The "scope and nature of the City's *actions*" are not in dispute (City AB 57): the City is attempting to assert permitting authority over all of MRY's railroad-related activities. This factor weighs against abstention.

The City also warns against "duplicative litigation." City AB 58. But as noted above, at the time of the federal complaint's filing, the State and Federal Actions did not involve the same claims. Thus, this factor likewise weighs against abstention.

Finally, the City raises the specter of "forum shopping." City AB 59. But for the same reasons described above with respect to the *Colorado River* analysis, MRY cannot credibly be said to have "forum shopped" its federal claim into

federal court. The only party that has engaged in forum shopping is the Commission. Based on the record, this factor weighs against abstention.

D. The Federal District Court Has Jurisdiction Over This Case

The City claims that this action should be dismissed for lack of subject matter jurisdiction. City AB 65. The thrust of the City's argument is that MRY's lawsuit is nothing more than an anticipatory defense to the City's action in state court. But the City errs.

MRY brought an action for declaratory and injunctive relief from land-use regulation of its rail-related operations on the ground that federal preemption—through ICCTA—bars such regulation. ER-113. It is hornbook law that a plaintiff may seek declaratory and injunctive relief from state and local regulation on the ground that federal law preempts such regulation. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). Such an action arises under federal law, invoking the federal court's subject matter jurisdiction under 28 U.S.C. § 1331. As the Supreme Court has explained, a "plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw*, 463 U.S. at 96 n.14; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (resolving preemption dispute in similar jurisdictional posture); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (same).

Like the plaintiff in *Shaw*, MRY claims that federal law preempts regulation of its railroad operations and thereby presents a federal question over which the federal court has jurisdiction.

The cases cited by the City are distinguishable, largely because they don't involve suits seeking to preempt government interference with federal rights. For example, in *Chicago Tribune Co. v. Bd. of Trustees*, 680 F.3d 1001, 1003 (7th Cir. 2012), the Seventh Circuit held that the federal plaintiff's claim arose under *state* law and should therefore have been filed in state court, and that the plaintiff was improperly using the declaratory-judgment statute "to have the federal court blot out a potential federal defense to its own potential state-law suit" to which it was the "natural plaintiff." MRY is not using the declaratory-judgment statute to preemptively "blot out" a potential federal defense of the City or Commission to MRY's potential suit in state court; the City and Commission *have* no federal defense pertinent to any of the claims raised in the State and Federal Actions.

Likewise, in *Stillaguamish Tribe of Indians v. Washington*, 913 F.3d 1116 (9th Cir. 2010), plaintiff filed a federal action "to head off a threatened lawsuit." *Id.* at 1118. The plaintiff was "asserting a defense to a threatened lawsuit, not contending that federal law preempts state law," so there was no subject matter jurisdiction. *Id.* at 1119. Here, MRY *is* contending that federal law preempts state and local preclearance of its railroad activities, not asserting a defense to a threatened suit.

III. CONCLUSION

The Court should reverse with instructions to reinstate the Federal Action.

Date: January 26, 2024

Respectfully submitted,

s/ Paul Beard II

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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