NO. 14-2067

United States Court of Appeals
For the First Circuit

BROOK A. PADGETT;
CRAIG DAUPHINAIS; JENNIFER THOMAS; BRUCE W. SPINNEY,
AS THEY ARE MEMBERS OF THE BOARD OF SELECTMEN OF THE TOWN OF GRAFTON,
Petitioners,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES,
Respondents,

GRAFTON & UPTON RAILROAD COMPANY,
Intervenor.

PETITION FOR REVIEW OF A FINAL ORDER OF THE SURFACE TRANSPORTATION BOARD

REPLY BRIEF OF PETITIONERS

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I. ALL ISSUES PRESENTED IN THE TOWN'S BRIEF ARE PROPERLY BEFORE THIS COURT.

A. The Town Did Not Wave the Argument that the Preemption Provisions of the ICCTA Should be Narrowly Construed.

Since the time of the federal trial in January of 2013, the Town has asserted that there is a presumption against preemption that is applicable to this case, and that due to the presumption, G&U has the burden of demonstrating its entitlement to preemption of the Town's local regulations. The Town's first STB filing included its Requests for Findings and Rulings in which the Town stated that due to "the presumption against preemption, the party contending that preemption applies has the burden of persuasion," and that "the presumption of non-preemption places a 'considerable burden' on the railroad since the municipality was acting under the *traditionally local police power of zoning and health and safety regulation*, and thus the alleged encroachment upon federal jurisdiction does not occur by the municipality's legislating in a field of historic federal presence." R. 198 (emphasis supplied). Thus, since the inception of this case the Town has asserted that it was regulating under its reserved local police power, and therefore there was a presumption of non-preemption that G&U had the burden to refute.

The STB and G&U now argue that the issue before the STB was extremely narrow, but the record simply does not bear this out. To support its claim, the STB cites the recitation in the Decision that the "parties do not dispute

that the actions of the Town constitute local permitting and preclearance actions that are generally preempted with regard to facilities under the Board's jurisdiction." G&U Br. At 31. The fact that the Town acknowledged that the STB *generally* finds municipal permitting and preclearance requirements preempted, however, did not preclude the Town from arguing that G&U had failed to meet its burden the burden of establishing that the local land use and environmental regulations at issue here were *not* preempted.

In its pleadings before the STB, the Town did not simply challenge G&U's control of the facility, but argued more broadly that G&U *had not met its burden of demonstrating* its control, clearly putting in play the presumption against preemption recognized where regulation is pursuant to traditional police powers. *See, e.g.*, Town's STB Reply, R. 104 ("**G&U HAS NOT PRESENTED ANY EVIDENCE TO MEET ITS BURDEN OF ESTABLISHING THAT ITS PROPOSED TRANSLOAD OPERATION IS ENTITLED TO FEDERAL PREEMPTION"**) (emphasis in original). In fact, the record is replete with references to G&U's failure to carry its burden. *See, e.g.*, R. at 106, 110, 111, 113.

While the Town repeatedly pressed the argument that G&U had to shoulder the burden of refuting the presumption against preemption, G&U argued that it had no burden whatsoever to establish that it had the actual ability--as opposed to the mere "intention"—to finance and construct the largest LPG facility

in the Commonwealth. R. at 284 ("whether the project as conceived by G&U is commercially feasible is not an issue before the Board").[1] The argument that G&U had no burden could only be accepted if the presumption against preemption was not applied, as the two concepts go hand in hand. And—clearly--the STB did not apply the presumption, as is demonstrated by its repeated references to the *Town's* failure to disprove G&U's intentions. *See, e.g.*, Decision at 6 (the Town "fails to demonstrate . . . "); *Id.* at 7 ("the Town has not presented any evidence. . . ."); *Id.* ("the Town provides no evidence . . . ").

Even if the Town did not emphasize what G&U and the STB now refer to as the "scope" argument, the agency had the opportunity to pass on the issue as the STB's own statements in its decisions demonstrate, and thus it is properly presented for review.[2] *See Customs and Border Prot. v. Fed. Labor Relations Auth.*, 751 F.3d 665, 669–70 (D.C. Cir. 2014) (although an agency must have an "opportunity to pass" on an issue prior to judicial review, the "issue need not be

[1] G&U still makes this claim in its attempt to justify the STB's erroneous placement of the burden on the Town to disprove G&U's "intentions." G&U Brief at 54.

[2] In an earlier order, the STB stated that "a controversy exists as to whether G&U would be the financier, owner, and operator of the proposed transload facility *and whether* the Town's enforcement of state and local permitting and preclearance statute and regulations in connection with the facility is preempted under § 10501(b)." R. 380 (emphasis supplied). Also, the STB recognizes in its Decision that "Localities retain their reserved police powers to protect public health and safety as long as their actions do not discriminate against rail carriers or unreasonably burden interstate commerce." STB Decision at 9.

raised explicitly; it is sufficient if the issue was 'necessarily implicated' in agency proceedings"). Clearly, since the larger issue is whether the Town's regulations are preempted under the ICCTA, the "scope" of preemption has always been an issue; the STB clearly understood that the Town was asserting that its regulations were not properly subject to preemption. *See Haselwander v. McHugh*, 774 F. 3d 990, 997 (D.C. Cir. 2014) (even if specific arguments are not expressly made to an agency, they may still be raised on appeal if the agency "reasonably should have understood the full extent of" the argument).[3]

B. The Doctrine of Judicial Estoppel Is Inapplicable.

The Court should also reject G&U's argument that the Town is judicially estopped from asserting that its non-discriminatory regulations may survive preemption under the ICCTA which is based on a second STB proceeding that

[3] To the extent that the Town's lack of emphasis on any argument before the STB can be deemed a "waiver," this Court nonetheless has discretion to review questions of law "neither pressed nor decided below," and should do so in this case. *St. Luke's Hosp. v. Secy. of Health and Human Servs.*, 810 F. 2d 325, 328 (1st Cir. 1987) (collecting cases finding allowance of review of issues not first raised before the agency). *See also Maine General Medical Center v. Shalala*, 205 F. 3d 493, 500 (1st Cir. 2000) (courts with purely appellate functions have the power to review matters not raised below); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (the matter of what questions may be taken up and resolved for the first time on appeal is left primarily to the discretion of appellate courts); *Portela-Gonzalez v. Secy. of the Navy*,109 F.3d 74, 77 (1st Cir. 1997) (discussing exceptions to exhaustion requirement).

G&U instituted in October of 2013. Specifically, in response to Town officials' *requests* for information from G&U concerning the many truckloads of earth and gravel that were suddenly removed from a different parcel--72 Rear North Main Street, which abuts a pond and a brook and is located in the Water Supply Protection Overly District ("WSPOD")--G&U filed a second Petition in the STB. G&U's Addendum at 8 *et seq.*[4] G&U sought the "immediate entry" of an order authorizing it to continue construction of new tracks, claiming that the order was "necessary and appropriate" to stop the Town from preventing G&U from providing "essential transportation services." *Id.* In its Reply, the Town pointed out that no STB order was necessary, because the Town *was taking no action* to stop the railroad's activities at that site, a fact that was communicated directly to G&U's counsel and even reported in the newspaper before G&U filed its Petition. *Id.* at 11. The Town argued that G&U filed this second petition in a transparent attempt to prejudice the STB with respect to the already pending proceedings by implying that the Town was harassing G&U at every turn, when Town officials were simply inquiring into possible environmental impacts of G&U's sudden and aggressive earth removal activities. *Id.* The Town asked the Board to reject that attempt and dismiss the petition as moot. *Id.*

[4] The first page of its Petition is missing from G&U's addendum; STB filings are also available on-line at http://www.stb.dot.gov/FILINGS/

Thus, the Town's position was that it would not contest G&U's construction of tracks on a parcel that is *not* in a residential zone, will *not* include a potentially explosive and/or hazardous facility, and (as far as the Town is aware) will *not* have an industrial trucking operation as a component.[5] The Town's concern was limited to the short-term threat of run-off from G&U's aggressive earth removal, and not a long-term threat occasioned by the siting of an industrial propane and trucking operation in a residential zone and in the WSPOD. *Id.* at 12 ("The Town was unaware of any activity at this site and was concerned, given the environmentally sensitive receptors, that the excavation could potentially pose threats to the Town's aquifer, the pond, and/or the brook."). The G&U now asserts that the Town's failure to contest the track construction should estop it from arguing that its nondiscriminatory land use and environmental regulations may survive preemption under the ICCTA as legitimate police power regulations. That claim is both factually and legally baseless.

The doctrine of judicial estoppel is a judge-made doctrine with "hazy contours" designed to protect the integrity of the judicial system and prevent parties from improperly manipulating the machinery of the judicial process. *Healey v. Spencer*, 765 F.3d 65, 76 (1st Cir. 2014); *Knowlton v. Shaw*, 704 F.3d 1,

[5] The Town did, however, request that the G&U *voluntarily* provide a soil analysis and an engineer's opinion as to the potential impact of the earth removal on the Town's aquifer. G&U's addendum at 18. That request was ignored.

17 (1st Cir. 2013). To establish judicial estoppel, G&U must show that the Town is pressing a litigation position "clearly inconsistent" with—that is, mutually exclusive of--a position the Town successfully asserted previously, and that this new position would unfairly advantage the Town if the Court were to accept it. *United States v. Colon Ledee*, 772 F.3d 21, 29 (1st Cir. 2014).

The Town's position in the STB proceedings was not inconsistent with its current position. In fact, the STB's own Decision demonstrates that it understood that Town's position was much more nuanced than the G&U now claims. *See* G&U's addendum at 18 (STB references Town's assertion that its earth removal regulations may be within its police powers and thus not preempted; STB references "the potential applicability of, and compliance with, regulations [the Town] argues are within the Town's police powers").

The Town pointed out that it had only "*requested* the [G&U] *voluntarily* provide it with information so that the Town could be assured that neither its water supply nor its natural resources were under threat," G&U's Addendum at 13 (emphasis in original), and that therefore STB action was unnecessary. Therefore the Town's acknowledgment that it may not have the right "to assert any preclearance requirements against G&U where the railroad is undertaking an activity that constitutes transportation," *Id.*, is irrelevant to this case. Read fairly, the Town's position was that it was taking no action against G&U but was merely

attempting to determine what was happening at the site and thus STB action was not needed. That position and the Town's position before this Court are not mutually exclusive.

As the proponent of judicial estoppel, G&U must affirmatively show that the Town succeeded in persuading the STB to adopt its position, *Knowlton*, 704 F.3d at 11; *Healey*, 765 F. 3d at 77, which G&U also cannot do since the Town has been unable to persuade the STB of anything. Rather, in spite of the Town's clear communication that *it would take no action to stop the track construction*, the STB issued a declaratory order exactly as requested by G&U. Thus, the STB did not accept the Town's position and G&U therefore cannot show that the Town stands to derive any "unfair advantage" from any change of position in this Court. *Healey*, 765 F. 3d at 77.

C. The Town Did Not Waive Review of NEPA Compliance.

The fact that the Town did not raised NEPA in its STB pleadings does not constitute a waiver of that issue. As this court noted about this in this precise context, "the agency bears the primary responsibility to ensure that it complies with NEPA." *U.S. v. Coal. for Buzzards Bay*, 644 F.3d 26, 34 (1st Cir. 2011). (Internal citation omitted). The burden of ensuring NEPA compliance does not shift from the agency that is proposing an action to those who wish to challenge that action. *Id.* There is no indication in the record prior to the issuance of the

final order that the STB would fail to meet its NEPA obligations; the Town had no reason to affirmatively anticipate the Board's failure to comply.

II. NO DEFERENCE IS DUE THE STB'S LEGAL CONCLUSION THAT PREEMPTION APPLIES.

Both the STB and G&U assert that the Court should give deference to the STB's legal conclusion that the preemption provisions of the ICCTA are applicable by attempting to frame that conclusion as a factual finding. That is incorrect. This Court has held squarely that whether federal law preempts state law is a legal question subject to plenary review. *S. Bay Mgmt., Inc. v. Unite Here*, 587 F. 3d 35, 40 (1st Cir. 2009); *accord Wyeth v. Levine*, 555 U.S. 555, 576 (2009). Neither party distinguishes that precedent.

Instead, in support of its claim that this Court should give deference to the STB's decision, G&U cites this Court's decision in *Ayer*. G&U Br. at 18, *citing Bos. & Me. Corp. v. Town of Ayer*, 330 F. 3d 12, 16-17 (1st Cir. 2003) ("*Ayer*").[6] That case provides no support for G&U's position. In *Ayer*, the rail carrier was constructing a new automobile unloading facility in a "heavy industry" district with no third party involvement. *Ayer*, 191 F. Supp. 2d at 258-59. Unlike G&U in this case, in *Ayer* the rail carrier sought substantial input from the Town

[6] There are several decisions in the *Ayer* case. The STB Decision, Docket No. FD-33971, was issued on April 30, 2001; there were thereafter two District Court decisions, *Bos. & Me. Corp. v. Town of Ayer*, reported at 191 F. Supp. 2d 257 (2002), and 206 F. Supp. 2d (2002); finally, this Court's decision, as cited above.

regarding protection of water resources, and even incorporated the Town's environmental consultant's mitigation measures into its plans in order to protect the aquifer. STB Docket No. FD-33971 (Decision 4/30/01 at 4). The rail carrier also submitted plans and documents to the Town detailing the steps it would take to prevent contamination. *Id.* The rail carrier also filed a notice of intent with the Conservation Commission and underwent Site Plan review by the Planning Board. *Id.*

In response, the Town's Board of Health determined that the new facility would constitute a "noisome trade" not permitted anywhere within the Town's limits. *Id.* Additionally, the Planning Board issued a permit for the new facility, but made it subject to 36 conditions. *Id.* One condition required the rail carrier to "provide the Town of Ayer with an adequate water supply" in the event of contamination from the facility, and "prior to the beginning of construction" provide the Town with a "detailed plan describing how [the rail carrier] will provide an adequate water supply to the Town if such contamination occurs." *Id.* at 13-14.

Given the rail carrier's efforts to respond to the Town's environmental concerns and the Town's subsequent actions prohibiting the facility outright and/or making any construction contingent on onerous conditions, the STB found that the Town's later attempts to use federal environmental statutes was "a mere pretext."

Id. at 9. That factual determination was upheld by the district court, *Ayer*, 191 F. Supp. 2d 257, 260 (D. Mass. 2002), which awarded attorney's fees to the rail carrier. *Ayer*, 206 F. Supp. 2d 128 (D. Mass. 2002).

The Town appealed to this Court, but the parties settled all matters with the exception of the fee award. *Ayer*, 330 F. 3d at 14. Thus, the *only* issue reached by this Court was that the fee award was improper; it reversed and vacated. *Id.* at 19. *Ayer* bears no factual resemblance to this case, nor does it present any of the same legal issues. Thus, this Court should reject G&U's claim that under *Ayer*, deference is "particularly appropriate" here. G&U's brief at 18.[7]

The STB and G&U also cite the Second Circuit's decision in *Green Mountain* to support their contention that the STB's legal determination regarding ICCTA preemption should be accorded deference. The Second Circuit, however, *expressly declined* to reach the issue of whether the STB's preemption determinations are entitled to deference under *Chevron*. *Green Mountain RR*

[7] The STB also cites *Ayer* for several propositions, none of which this Court reached, let alone decided. *See, e.g.*, STB Br. at 4 (citing *Ayer* for the proposition that preemption applies even where the Board does not license and/or regulate the activity involved), STB Br. at 5 (citing *Ayer* as holding that local implementation of federal environmental statutes is preempted under the ICCTA where it unreasonably interferes with interstate commerce); STB Br. at 28 (citing *Ayer* as holding that local permitting and preclearance requirements are categorically preempted). The only proper citation to *Ayer* in the STB's brief is its statement that this Court referred to the STB's decision in that case as "finely crafted." *Ayer*, at 16. That, of course, has no bearing whatsoever on this case.

Corp. v. Vermont, 404 F. 3d 638, 645, n. 2 (2nd Cir. 2005). It also stated that "direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption." *Id.* at 643 (citation omitted). Further, *Green Mountain* explicitly recognized that the "legislative history of the Termination Act supports the approach" that while the federal scheme of *economic* regulation of rail carriers is exclusive, "States retain the police powers reserved by the Constitution . . . ." *Id.* Thus, that case cannot be used to override direct precedent in this Circuit holding that the determination of whether federal law preempts state law is a legal question subject to *de novo* review. *S. Bay Mgmt., Inc.*, 587 F. 3d at 40.

III. THE PRESUMPTION AGAINST PREEMPTION IS APPLICABLE.

The STB and G&U both assert that the presumption against preemption is not applicable due to the history of federal regulation of railroads. STB's Br. at 26, G&U's Br. at 38. The fallacy of exclusive federal regulation of railroads was refuted in the Town's main brief at pp. 25-35 and will not be repeated here.

The STB also asserts that the presumption "can be overcome" since §10501(b) and its statutory framework explicitly preempt "state and local permitting and zoning laws with respect to activities falling within the Board's jurisdiction," citing *Green Mountain*. STB brief at 26-27. That argument is

unsound. First, *all* presumptions "can be overcome," but first they must be applied; that did not happen here.

Second, as set forth in the Town's main brief at 35-38 and *infra* at 14-19, the preemption provision of §10501(b) does *not* explicitly preempt local permitting and zoning laws. Contrary to the STB's assertion (almost invariably repeated in its own decisions), there is no clear statement preempting local land use and environmental laws. The exclusive jurisdiction clause is not a clear statement of Congressional intent to preempt because it is linked to and limited by applicable STB "remedies."[8] In other words, Congress specifically limited the STB's preemptive powers to situations in which the ICCTA provides other remedies, and the ICCTA does not provide any "remedies" for land use violations or environmental injury.[9]

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[8] § 10501(b): The jurisdiction of the [Surface Transportation] Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(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, the remedies provided in this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

[9] In fact, the gaping regulatory void left by the STB's interpretation of the Act also counsels against acceptance of its position. See *Pacific Gas and Electric Co. v.*

Additionally, the preemption provision is specifically limited to "*regulation of rail transportation.*" This means something different from any law that impacts a rail carrier, the law preempted must actually seek to regulate rail transportation. *Florida East Coast*, 266 F. 3d at 1338; *see also* Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps,* 34 Ecology L.Q. 1147, 1210-1211 (2007). Thus, G&U's reliance on *Norfolk Southern v. City of Alexandria,* 608 F. 3d 150 (4th Cir. 2010), is misplaced.[10] In that case, the rail carrier began operating an ethanol transloading facility in which it transferred bulk shipments of ethanol onto tanker trucks for distribution. *Id.* at 154. In response, the City made it a criminal offense to haul bulk materials except pursuant to a permit, and thereafter issued a "haul permit" to the rail carrier which it was required to renew every 30 days. *Id.* at 155. The permit dictated the single allowable route, limited hours during which hauling was permitted, and limited the

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State Energy Resources and Development Comm'n., 461 U.S. 190, 207-08 (1983) (Court declines to preempt state regulation of utility economics despite exclusive federal franchise over nuclear safety issues, stating that it "is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the states to continue to make these judgments" regarding economic feasibility of power plants.)

[10] Contrary to G&U's argument, in addition to the Eleventh Circuit, several circuits have adopted a narrower interpretation of the preemption provisions in the ICCTA, largely limiting preemption to economic--as opposed to safety and environmental—laws. *See, e.g., Iowa, Chi. & E. R.R. Corp. v. Washington County*, 384 F. 3d 557 8th Cir. 2004); *Tyrell v. Norfolk Southern Ry. Co.*, 248 F. 3d 517 (6th Cir. 2001); *Hi Tech Trans v. New Jersey*, 382 F. 3d 295 (3rd Cir. 2004).

rail carrier to 20 trucks per day. *Id.* The Court rejected the City's argument that its actions were taken pursuant to its reserved police powers because those actions failed both prongs of the "police power" test: they were both discriminatory and placed an unreasonable burden on rail carriage. *Id.* at 160. Thus the Court held that the City's regulations were preempted by the ICCTA.[11]

G&U also cites *Succar v. Ashcroft*, 394 F. 3d 8 (1st Cir. 2005), for the proposition that courts must give effect to the unambiguously expressed intent of Congress. G&U's Br. at 43. Although the Town does not dispute that principle, the Town urges application of the several additional principles discussed in *Succar:* (1) it is the courts that must interpret statutes; *Id.* at 10; (2) statutory provisions should be viewed in their larger statutory context with reference to what Congress was attempting to accomplish; *Id.* at 10, 27; (3) even where statutory language appears to be clear, it is appropriate to "look to the legislative history to check our understanding and determine whether there is a clearly expressed intention" in the Legislative history which may not comport entirely with the statutory language. *Id.* at 31-32.

[11] G&U asserts that the presumption argument was "summarily rejected by the 4th circuit," referring to a footnote in which the Court rejected the City's argument that the presumption against preemption was applicable based on what it referred to as the "history of significant federal presence" in the field, *Id.* at 160, n. 12, but this was mere *dicta* given the Court's holding that the City was indeed regulating rail transportation.

In this case, as set forth in the Brief of Amicus Congressman James McGovern, the larger statutory context of the ICA and the ICCTA and the legislative history of the ICCTA underscore that: (1) the purpose of the ICA was to prevent the prevalent abuse of captive shippers by railroads at a time when there were few alternatives available to shippers; (2) for decades, the States and ICA shared regulatory authority over rail carriers; (3) the extension of federal reach under the general jurisdiction section of the ICCTA only supplanted what had been the States' previous role in railroad regulation; and (4) except with respect to direct economic regulation, Congress did not intend to preempt State or federal law.[12] McGovern Br. at 2 *et seq.*

In response to the telling fact that every single use of the word "regulation" in the ICCTA is preceded by the word "economic," G&U notes only that the two examples of noneconomic regulation given in the Conference Report cite to criminal statutes. G&U Brief at 26. Although that is correct the examples are just that: examples. The expression of particular examples cannot eviscerate the

[12] The fact that this was not the intent of Congress at the time of the ICCTA's passage is also supported by the fact that even after passage of the Act, rail carriers continued to apply for local land use and environmental permits. *See, e.g.*, Ayer, Green Mountain, Norfolk Southern. ICCTA case law was extensively shaped by the STB's early declaratory orders in which it aggressively asserted its right to define the scope of preemption even where it lacked regulatory authority, and as a result many rail carriers stopped seeking to comply with local regulation. *See* Maureen E. Eldredge, Who's Driving the Train? Railroad Regulation and Local Control, 75 U. Colo. L. Rev. 549, 573-75 (2004).

principle underlying those examples, which is that the "exclusivity" of the federal remedies "is limited to remedies with respect to rail regulation—not State and Federal law generally." 1995 U.S.C.C.A.N. Vol. 1 at 852. Although criminal law is one kind of "general" state law enacted pursuant to traditional police powers, so is nondiscriminatory land use and environmental regulation. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

G&U also seizes upon the word "balkanization" to support its assertion that nondiscriminatory land use and environmental regulation would "completely frustrate" the purpose of the statute. G&U Br. at 43. Although the single use of the word "balkanization" has been copiously utilized to support extensive preemption under the ICCTA because it brings to mind "patchworks" of regulations impossible to keep track of or follow, that one reference simply cannot bear the weight that has been placed upon it.[13] The word "balkanization" appears exactly once: in the section-by-section analysis in the House Report, 1995 U.S.C.C.A.N. at 807, analyzing Section 10301, General Jurisdiction:

> This provision replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers

[13] The other oft-used reference to a "patchwork" of local regulation emanates from the STB's own statement in its *Ayer* decision that the ICCTA "is intended to prevent a patchwork of local regulation." This statement is entitled to no deference.

> is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

Id. at 807-08 (emphasis in original). Thus, like other statements in the Congressional record, that commentary makes clear that what is prohibited is state "*economic* regulation," not state law *generally*.

The G&U asserts that leaving in place nondiscriminatory land use and environmental regulations passed to protect health, safety, and the environment "would leave railroads subject to different regulatory provisions by thousands of towns and cities." Brief at 43. To the extent that is true at all, it is certainly an overstatement. In this case, a properly narrow construction of the preemption provisions in the ICCTA would serve only to prevent the G&U from siting a massive propane facility and accompanying industrial trucking operation on a newly acquired parcel of land that is--and always has been--located in a residential district and in the Town's Water Supply Protection Overlay District; a narrow interpretation would not necessarily prevent G&U from siting such a facility anywhere along its 16.5 miles of right-of-way that is in an industrial zone and not on top of an aquifer.

IV. WITH PROPER APPLICATION OF THE PRESUMPTION, THE STB COUL NOT HAVE FOUND LOCAL LAW PREEMPT ON THE RECORD BEFORE IT.

The STB recognized—as it had to on this record—that G&U's original plans "delegated control to the propane facility to the Propane Companies," and that G&U's "restructured" plans likely were an attempt to qualify for preemption. Decision at 6. Inexplicably, however, the STB gave no weight to G&U's clear attempted abuse of the preemption doctrine, simply stating that it was "free to structure its transaction" to meet its current needs. Id.

The STB acknowledged that the financial structure of a facility *is relevant* to determining whether it will be controlled and operated by a rail carrier or is instead a third-party business fully subject to state and local regulation.[14] Decision at 7. However, the STB stated that "G&U has provided evidence that the rail carrier and its owner intend to finance the project."[15] Decision at 7. As pointed

[14] This finding is contrary to G&U's urging. See R. 284. G&U also stated that while it is "confident in its ability to construct and operate on its own," "it alone bears the risk" that its belief "may not be fulfilled." *Id.* In actuality, the Town, the abutters, and all Grafton residents will bear the "risk" should the facility be constructed and later prove infeasible.

[15] Again, aside from Priscoli's promises and intentions, *set forth only by way of affidavit*, the documents G&U submitted go only to the issue of whether the Propane Companies were still involved; G&U submitted no financial documents whatsoever to demonstrate that it has the funds Priscoli vaguely claims to have. *See* STB decision at 7 ("Priscoli's verified statement demonstrates that he has sufficient assets."). The STB did not require a single document that is customarily used in making determinations as to financial capacity to undertake obligations,

out in the STB's brief, the Board "found no reason to disbelieve G&U's *promise* to hire the personnel needed for safe operation of the facility." STB Brief at 13. Thus, the STB simply took Priscoli at his word as to his "intentions," finding his verified statement in which he claims to have "sufficient assets" and expects great profit, to constitute "substantial evidence" that G&U can construct and operate the facility on its own.[16]

Whether a rail carrier's mere statements of "intentions" and "promises"—which by their very nature are entirely irrefutable—could ever constitute evidence sufficient to support a finding of preemption, they certainly could not in this case, at least not without some reasoned analysis of the pervasive and troubling credibility issues raised by the Town. The STB relied without explanation on these statements even though G&U's own marketing materials were deceptive,[17] it had attempted to conceal its original plans from the Town, it had incredibly (but

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such as balance sheets, tax returns, or appraisals of property claimed to be available for collateral or financing.

[16] The reference to "substantial evidence" by the STB is troubling on its own, as substantial evidence is an *appellate* test for the sufficiency of an agency finding.

[17] With regard to the site, indisputably in a residential district surrounded by homes, G&U's marketing materials stated that 42 Westboro Road was in an "INDUSTRIAL zone" [emphasis in original] with "Adjacent Users Commercial and Industrial." R. 193. The material further invited any business to locate their industrial facility there, on its "approvals not required Site." R. 193.

conveniently) transformed its plans when facing a new tribunal,[18] and it presented no actual plan (beyond "intentions") for the financing, construction, and operation of the facility. These facts all supported at least an inference of the *intentional abuse* of the preemption doctrine and should have been directly addressed by the STB.

With regard to the claim that the Town somehow had access through discovery to present rebuttal information, that claim should also be rejected. In addition to relying on irrefutable statements of Priscoli's *intentions,*[19] the STB

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[18] The abrupt announcement of G&U's flush cash flow and new-found ability to proceed alone coincided exactly with the matter's arrival on the STB's door step. G&U attempts to deal with this inconvenient fact suggested that much time passed between the "conception" of its original plan and its new plan to proceed alone. That construct is belied, however, by Priscoli's testimony, which did not limit G&U's inability to finance, construct, operate, or require a reliable supply of propane to bygone days. *See, e.g.*, R. 102 (Mr. Priscoli's "greatly experienced" opinion in January of 2013 was that "this project would be unfinanceable conventionally *today* until – until it had a proven three to four year track record of business and P and L statements and all that.")(emphasis supplied); *Id.* (in January of 2013, G&U did not have the funds from any "internally generated source" and could not obtain funds "in any traditional form on reasonable terms and conditions from commercial lenders."); *Id.* (G&U lacks the propane rail cars and other specialized propane equipment and needs a volume supply commitment); R. 111 ("Spicer has a lot of experience. They're a big company. So they are involved for the purpose of lending their expertise in making sure that the gas gets pumped properly, which I would assume is in the Town's best interests having someone who knows what they're doing actually pumping the gas.").

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[19] When the G&U first filed its petition in the STB asserting that it had scuttled all dealings with the Propane Companies, the Town was understandably incredulous. The Town acknowledges that, by the conclusion of the STB proceedings, G&U did

admits in its brief that "the Board does not typically order discovery in declaratory order proceedings," but only does so "when the party seeking discovery has shown it was warranted." STB brief at 21, n. 30. Over and over, the Town attempted to demonstrate that further information was especially warranted in this case and should be required by the STB.[20]

The STB's failure to require more than a self-serving and vague plan of "intention" is more than just a legal error. That failure leaves the Town in the

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supply largely irrefutable documentary evidence that the particular iterations of LLCs and parent companies (with the possible exception of NGL) that comprise "the Propane Companies" are *currently* not participants in the development of the LPG facility. However, just as the Town had no way of discovering the existence of the Propane Companies until Judge Hillman ordered G&U to produce documents, the Town was similarly unable to know the identity of any third-party participants during the STB proceedings without the STB requiring production of such information.

[20] The Town requested that the Board require G&U to set forth the specifics of its proposed facility, including specifics on financing, operation and supply. R. 115. The Town also requested that the Board solicit information from State agencies and/or other interested parties. R. 115. The Town asserted that "by seeking leave to file certain selected documents . . . G&U seeks to retain complete control of the documents that comprise the record, and it is obviously free to keep to itself any documents not in support of its claims." R. 376. The Town asked the STB to institute a broad declaratory judgment proceeding at which it would *require all relevant documents to be produced*. R. 376-77 (emphasis supplied). The STB instituted the proceedings, citing the Town's assertion that it should conduct "a full investigation" to prevent the "abuse of the preemption doctrine." R. 380. Although the STB did not order discovery, it directed G&U "to submit any additional information and argument. R. 380. The Town trusted the STB to require G&U to submit the caliber of financial documentation customarily used to determine the financial ability to undertake a multi-million dollar project prior to making any finding that the G&U had established its right to federal preemption. In retrospect, that trust was misplaced.

impossible position of having to simply live with any version of the currently "intended" plan that eventually materializes, *see* Decision p. 8, or, if and when third parties appear on the scene, go back to the STB--while continuing to lack any access to information concerning the legal relationships between G&U and the third parties—and again attempt the Sisyphean task of *disproving* that the requirements of preemption are met.

The STB acknowledges in its Brief that "[i]f the facts or circumstances concerning the future construction and operation of the facility change, the Board's decision may no longer be applicable." P. 23 n. 33. But that is cold comfort to the families who will be living in the shadow of the largest propane facility in the Commonwealth, suffering the noise, vibration, dust, and other ill-effects caused by the transloading and industrial trucking operation. It is little comfort to the parents of five- through seven-year-old children who will be attending elementary school within a quarter of a mile of the facility,[21] or to Grafton residents who draw their

[21] As stated by the Department of Fire Services, "[t]he design, construction, installation, testing, and maintenance of these tanks is regulated under the Commonwealth's general police powers to protect the public safety and welfare from potential dangers of fire or explosion hazards due to tank or container leakage of flammable or combustible liquids, as well as the fire or explosion hazards presented by the proposed storage of approximately 320,000 gallons of [propane] by G&U." R. 237. Although the STB left those state regulations largely intact, G&U has at no time submitted to DFS "plans which provide adequate specificity to allow DFS to conduct a proper fire safety analysis, which would assist the local

water from the aquifer proximate to the planned facility, which under the STB decision is left unprotected..

V. NEPA APPLIES BECAUSE THE BOARD'S DECLARATORY ORDER IS A PREQUISITE FOR THE RAILROAD TO PROCEED AND IS A MAJOR FEDERAL ACTION.

A. The STB's Declaration of Preemption is an Approval Necessary for the Railroad to Proceed

With respect to NEPA, the STB is falsely modest about the vast power of its own authority, arguing that its declaratory order with regard to the preemption is merely "to provide guidance to the parties." This characterization is wrong. In practical and legal effect, the STB's decision is an approval of G&U's proposed transloading facility: G&U cannot move forward as contemplated without the STB's determination that the Town's regulations are preempted because the Town's ordinances would otherwise apply, altering, if not barring, G&U's proposed actions at this site. While it may be well settled in the STB's own opinions that "railroads are not required to obtain Board approval under section 10901 to build or expand facilities that are ancillary to a railroad's operations," STB Brief at 33, as a matter of practice that is not always true. In situations where local or state law would otherwise impact or prohibit such actions, a railroad will

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officials in determining important public safety issues regarding storage quantities, operations or fire safety emergency plans." R. 235.

indeed need STB action—in the form of a declaration of preemption—unless the local or state entity voluntarily relinquishes its own authority. That declaration is therefore tantamount to approval of the project.[22]

The STB also attempts to distinguish between situations where the Board exercises regulatory "approval" authority in granting a license—to which the Board acknowledges the NEPA process applies—and those where a declaratory order addresses preemption issues. STB Brief at 31. However, this is a false distinction. The instances the STB cites where it exercises "regulatory" authority, *e.g.*, authorizing construction, abandonment or acquisition of a rail line, do not differ fundamentally from declaratory order proceedings in which it makes preemption determinations.

The *Mayaguezanos* case, cited by the STB, is instructive. There, this Court noted that NEPA does not apply where there "is mere approval by the federal government of an action by a private party where that approval is not required for the private party to go forward." *Mayaguezanos v. United States*, 198 F.3d 297, 301-302 (1st Cir. 1999) (citations omitted). In determining whether

[22] Even the CEQ's definition of a "major federal action" contemplates a broad array of approval, including "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or *other* regulatory decision . . . ." 40 C.F.R. §1508.18(b)(4) (emphasis added).

NEPA applies to an action of a private party, this Court " focus[es] . . . on the indicia of control over the private actors by the federal agency" and in particular "look[s] to whether federal approval is the prerequisite to the action taken by the private actors and whether the federal agency possesses some form of authority over the outcome." Id. Thus, as the preemption determination in this case is a prerequisite for G&U to go forward with the construction of the proposed facility, indicia of control is strong and NEPA is applicable.

Similarly, under *DOT v. Pub. Citizen*, 541 U.S. 752 (2004), and *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U. S. 766 (1983), a close causal relationship between the environmental impact and the alleged cause (here, federal agency action) can trigger NEPA. Notwithstanding the STB's characterization of its declaratory order as mere "guidance," the reality is that its pronouncement that the Town's land use and environmental laws are preempted is the functional equivalent to the approval of a license, without which G&U cannot go forward. Thus, the causal connection between the STB's determination that preemption applies and the impact on the environmental interests protected by the Town's by-laws is not remote: the STB's declaration of preemption immediately abrogates the Town's ability to protect those interests.

The case *Ross v. Fed. Highway Admin.*, 162 F.3d 1046, 1053 (10th Cir. 1998) is also instructive on this point. *Ross* held that NEPA applied to a portion of

a highway project even after the state withdrew its application for federal funding for that portion because it was "so imbued with a federal character that . . . it could not be defederalized." Indeed, it is improbable that a project such as the one proposed by G&U could defeat the reach of local laws and be constructed without bootstrapping itself to the pervasive federal character of preemption. The federal character of a preemption declaration is so central to G&U's project that the project cannot survive without it.[23]

B. The STB has Authority to Consider Environmental Factors and Control the Outcome

The STB argues "no NEPA review is required in situations where environmental review would have no impact on the decision making process," citing *Public Citizen*, but the holding in that case is far more nuanced. There, the agency conducted an Environmental Assessment (EA) and made a Finding of No Significant Impact (FONSI) relating to regulations it promulgated in response to

[23] This case is distinguishable from other cases cited by the STB for the proposition that a mere "legal determination" by an agency that does not authorize action by a private party is not a "major Federal action." The declaratory order here does in fact authorize G&U to proceed and thus the Board has actual power to control the outcome. STB Brief at 33 n. 52. *See, e.g. Sugarloaf Citizens Ass'n v. FERC,* 959 F.2d 508, 513-514 (4th Cir. 1992) (NEPA not applicable to agency "certification" decision because that certification was not necessary for the facility to come to "fruition"); *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 334 (D.C. Cir. 1991) (Conclusion that NEPA not applicable when agency determines that it lacks jurisdiction is "common sense" and distinguishable from when an agency "affirmatively determines" it has jurisdiction, to which NEPA could apply).

the President's lifting of a moratorium on the entry of Mexican carriers into the United States. 541 U.S. at 761-62. In its EA, the agency considered the impact of its regulations but not the impact of the increase in Mexican carriers due to the lifting of the moratorium. *Id.* Noting that the agency had no authority to impact the moratorium itself, the Supreme Court held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a "cause" of the effect . . .[and] the agency need not consider these effects in its EA when determining whether its action is a "major Federal action." *Id.* at 770. Here, there is no action equivalent to the lifting of the moratorium that can be considered the actual "cause" of the effect on the environment and thus limit the Board's legal ability to undertake the NEPA process; the effect on the environment will flow directly from the STB's preemption decision. It should be noted as well that in *Public Citizen,* the agency indeed undertook an EA.

Contrary to the STB's assertion that its "determination of whether state and local permitting and preclearance laws are preempted . . . in no way turns on what environmental impact a particular activity is likely to have," the STB does indeed have the ability to consider these impacts and fashion the preemption ruling around those considerations. In fact, as a matter of practice, the STB does this routinely in excepting the reach of its preemption powers where certain public

health and safety issues are concerned. R. at 613 ("State and local electrical, plumbing, and fire codes typically have been found to be applicable even when preemption applies"). There is nothing explicit (or even implicit) in §10501(b) that allows the STB to carve out exceptions to preemption for electrical and plumbing codes but not environmental regulations. Moreover, one of the purposes of NEPA is to force decision makers to consider environmental impacts, see *Buzzards Bay*, at 6. That did not happen here.

CONCLUSION

For the foregoing reasons, this Court should grant the Town's petition and reverse the STB's declaration of preemption.

Respectfully submitted,

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/s/*Ginny S. Kremer*

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CERTIFICATES OF COMPLIANCE AND SERVICE

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This Brief does not comply with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,810 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), but the Petitioners have filed a Motion for Leave to Exceed the word limitation.

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2015, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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