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 MENDOCINO RAILWAY'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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I. FRAP 35(B) STATEMENT

Under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976), a federal district court may stay or dismiss a federal action in "exceptional circumstances" if there are concurrent state and federal court proceedings. This Court considers eight factors derived from *Colorado River* to determine whether the rare move of surrendering federal jurisdiction is appropriate: "(1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court." *Seneca Ins. Co. v. Strange Land, Inc.*, 862 F.3d 835, 841-42 (9th Cir. 2017).

"By and large, the application of *Colorado River* abstention in the lower courts is a story of confusion and unpredictability," with "courts of appeals and their corresponding district courts . . . tak[ing] divergent approaches." Owen W. Gallogly, *Note: Colorado River Abstention: A Practical Reassessment*, 106 Va. L. Rev. 199, 206 (2020). This Court is no exception. The Panel decision is the latest in a series of *Colorado River* opinions that reflect intra-Circuit conflict and tension, and are at odds with the decisions of sister Circuits and even the United States Supreme Court.

Absent panel rehearing, rehearing *en banc* is warranted to "secure or maintain uniformity of the court's decisions" and those of sister Circuits (FRAP 35(a)(1), 35-1), and to resolve a "question of exceptional importance" (FRAP 35(a)(2)):

1. The Panel ruled that two of the factors—the first and second—were "neutral" and therefore carried *no weight* for or against federal jurisdiction. Opinion at 11, 20. This approach is at complete odds with the decisions of at least three sister Circuits, all of which weigh so-called "neutral" factors as *supporting* federal jurisdiction, consistent with the Supreme Court's instruction that each factor be given "weight," and that "the balance [be] heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983); *Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 648 (7th Cir. 2011); *Village of Westfield v. Welch's*, 170 F.3d 116, 122 (2d Cir. 1999); *Murphy v. Uncle Ben's, Inc.*, 168 F.3d 734, 738 (5th Cir. 1999); *Nat'l Cas. Co. v. Gonzalez*, 637 Fed. Appx. 812 (5th Cir. 2016).

2. The Panel interpreted the third factor—piecemealing—to mean that "duplication of judicial effort" and "the possibility of contradictory outcomes" justify surrender of federal jurisdiction. Opinion at 12. That analytic approach conflicts with other decisions of this Court and of the Third and Fifth Circuits, which hold that duplication and the risk of contradictory outcomes—present in nearly *all Colorado River* cases—do not weigh in favor of a dismissal. Instead, some "special concern" about piecemealing, as reflected in a federal law or policy favoring state over federal adjudication, must be shown. *Seneca Ins.*, 862 F.3d at

842; *United States v. Morros*, 268 F.3d 695, 706-07 (9th Cir. 2001); *Ryan v. Johnson*, 115 F.3d 193, 196-97 (3d Cir. 1997); *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1192 (5th Cir. 1988).

3. The Panel interpreted the fourth factor—the order in which the state and federal courts obtained jurisdiction—to require a comparison of the timing and relative progress of the state and federal *complaints*, versus the timing and relative progress of the allegedly-parallel federal *claims*. Opinion at 13. Thus, the Panel found dispositive the fact that the state-court action was filed about 10 months before Appellant's federal action, ignoring the fact that the state-court action did not even contain a federal *claim* until *after* Appellant filed its federal action. *Id.* This conflicts with the approach of sister Circuits, which focus on the relative timing and progress of the relevant parallel *claims*. *Chase Brexton Health Servs. v. Md.*, 411 F.3d 457, 466 (4th Cir. 2005); *Preferred Care of Del., Inc. v. Vanarsdale*, 676 Fed. Appx. 388, 395-96 (6th Cir. 2017).

4. The Panel inexplicably gave the fifth factor—that federal law provides the rule of decision—insubstantial weight. Opinion at 20. This is contrary to the Supreme Court's rule, reaffirmed by the Eighth Circuit, that the "presence of federal-law issues must *always* be a *major* consideration weighing against surrender" of federal jurisdiction. *Moses H. Cone*, 460 U.S. at 26 (emphasis added); *Spectra Communs. Group, LLC v. City of Cameron*, 806 F.3d 1113, 1122 (8th Cir. 2015) (same).

5. The Panel analyzed the seventh factor—"forum shopping"—in favor of dismissal, largely on the grounds that the Appellant filed its federal claim after

setbacks *as a defendant with no cross-claims* in state court. Opinion at 14-15. The Panel's analysis is contrary to other decisions of this Court, which have weighed this factor in favor of dismissal only when a plaintiff first files its claim in state court, suffers setbacks in that court over a number of years, then refiles the same claim in federal court in hopes of a different outcome—a tactic that Appellant decidedly did not deploy. *R.R. Street & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 982 (9th Cir. 2011); *United States v. State Water Res. Control Bd.*, 988 F.3d 1194 (9th Cir. 2021); *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989).

6. As to the final factor, the Panel held that the state and federal actions are sufficiently parallel so as not to preclude dismissal; this, despite the fact that the Panel readily acknowledged the "theoretical possibility" that "the State Action will not fully resolve the Federal Action." Opinion at 20. The decisions of this Court and other Circuits over how to interpret and apply the "parallelism" factor in particular are fraught with conflict and confusion. In this Court alone, there are two distinct lines of cases on the issue. One of them—led by the recent decision in *Ernest Bock, LLC v. Steelman*, 76 F.4th 827, 833, 838 (9th Cir. 2023)—holds that if there is "some possibility" that resolution of the state-court "may" lead to further work in the federal court, there is insufficient parallelism, and dismissal is barred. Another line of cases—now arguably led by the Panel's decision here—employs a far more permissive "parallelism" standard. The confusion is exacerbated by the fact that, as *Ernst Bock* notes, "[o]ther circuits"—such as the Third and Seventh Circuits—have adopted disparate approaches." *Id.* at 840-41 (citing *Ingersoll-Rand*

Fin. Corp. v. Callison, 844 F.2d 133, 134 (3d Cir. 1988) and *Loughran v. Wells Fargo Bank, N.A.*, 2 F.4th 640 (7th Cir. 2021).

7. Finally, this petition involves a question of "exceptional importance." FRAP 35(a)(2). The issue of when and how to apply *Colorado River* concerns nothing less than a federal plaintiff's access to federal court to press federal statutory or constitutional rights—with *Colorado River* capable of being used to shut the federal courthouse door to federal plaintiffs of all stripes and claims. Given the intra- and inter-circuit conflict and confusion as to how to analyze and weigh the various *Colorado River* factors, and because the Panel's published decision only contributes to the unclarity and unpredictability of that doctrine, the Court should not hesitate to grant rehearing *en banc*.

II. INTRODUCTION

Appellant Mendocino Railway—a railroad within the exclusive jurisdiction of the Surface Transportation Board ("STB")—filed an action in federal district court, seeking declaratory and injunctive relief to establish, once and for all, its federal-preemption rights against Appellees California Coastal Commission and the City of Fort Bragg ("Agencies"). The federal action became necessary following the Agencies' relentless efforts over the years to impose land-use permitting and other pre-clearance requirements on the Railway's railroad-related operations. As detailed in the Railway's federal complaint, those requirements fly in the face of the Railway's status as an STB-regulated railroad, which bars all such state and local interference as federally preempted under the Interstate Commerce Commission Termination Act of 1995.

At the time the Railway filed its action, there was a pending state-court proceeding that the City had brought against the railroad. But the City's complaint alleged only a single state-law claim that the Railway was not a California public utility; at the time of the filing of this federal action, the City's complaint contained no federal-law claim of any kind. That only came *after* the Railway filed this federal case, when the Coastal Commission belatedly intervened in the City's state action to allege a similar (though not parallel) "federal preemption" claim against the Railway. Appellant's Op. Br. at 14; ER-104, ER-26, ER-31.

The Commission moved to dismiss the Railway's federal action under *Younger v. Harris*, 401 U.S. 37 (1971). The City followed suit, pressing for *Younger* abstention, though making a passing reference to *Colorado River*. The district court ultimately dismissed this action, not under *Younger*, but under *Colorado River*. Dkt. Nos. 15, 28; ER-4, 6.

In a published decision, the Panel upheld the dismissal. It did so after construing several of the *Colorado River* factors in ways that are at odds with other decisions of this Court and those of sister Circuits, and in tension even with United States Supreme Court precedents. The Panel's analysis is improperly imbued with a strong presumption *favoring* dismissal, as it searches for reasons *justifying* federal jurisdiction rather than its surrender—an approach that is anathema to Supreme Court precedent. *Moses H. Cone,* 460 U.S. 1, 25-26 (1983) (The "[t]ask . . . is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional'

circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the surrender of that jurisdiction.").

If the Panel's *Colorado River* analysis holds, dismissals of federal action in deference to similar state actions will become the rule, not the exception. That flies in the face of the Supreme Court's admonition that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction" and that only "exceptional circumstances" can justify eschewing "the virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 813, 817. Simply put, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Id.* at 813.

As detailed below, the Panel's decision adds to the ever-growing intra- and inter-Circuit confusion and unpredictability surrounding how federal courts should interpret and apply *Colorado River*. Panel rehearing should be granted to correct the *Colorado River* analysis in this case. Alternatively, the Court should grant rehearing *en banc* to clarify the nature and role of each of the *Colorado River* factors—and, in so doing, reaffirm the "strong presumption *against* federal abstention." *Seneca*, 862 F.3d at 842 (emphasis added).

III. ARGUMENT

Panel rehearing or rehearing *en banc* is necessary to correct the Panel's flawed decision in this case, and reconcile the intra- and inter-Circuit conflicts and tensions that exist as to how to interpret and apply the *Colorado River* factors.

A. Factor 1: The Existence of a *Res* or Specific Property

The Panel labeled the first factor—concerning which court first assumed jurisdiction over any property at stake—as "neutral," because this case does not concern specific property. The Panel weighed this factor neither for nor against federal jurisdiction. Opinion at 11, 20.

The Panel's analysis of the first factor conflicts with the decisions of the Second, Fifth, and Seventh Circuit Courts of Appeal, all of which weigh the absence of specific property as a factor *favoring* federal jurisdiction. *Village of Westfield*, 170 F.3d 116, 122 (2d Cir. 1999) (holding that first factor "points toward exercise of federal jurisdiction" and "weighs against a stay" where dispute doesn't involve *res* or property); *Murphy v. Uncle Ben's, Inc.*, 168 F.3d 734, 738 (5th Cir. 1999) ("This case does not involve any res or property over which any court, state or federal, has taken control. The absence of this factor is not, however, a neutral item, of no weight in the scales. Rather, the absence of this first factor weighs against abstention."); *see also Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 648 (7th Cir. 2011) ("[B]ecause of the presumption against abstention, absent or neutral factors weigh in favor of exercising jurisdiction.").

B. Factor 2: Inconvenience of the Federal Forum

The Panel also labeled the second factor—the inconvenience of the federal forum—as "neutral" and therefore of no weight, because the state and federal courthouses are less than 200 miles apart. Opinion at 11. This, again, conflicts with the approach taken by the Second, Fifth, and Seventh Circuits, which deem all so-

called "neutral" or "inapplicable" factors as supporting federal jurisdiction. *Huon*, 657 F.3d at 648; *Village of Westfield*, 170 F.3d at 122; *Murphy*, 168 F.3d at 738.

For example, in a *Colorado River* case where the state and federal forums were deemed equally convenient, the Fifth Circuit made clear that the second factor therefore had to weigh in favor of federal jurisdiction:

> "The parties and district court all consider this factor 'neutral' because the federal and state courts are equally convenient. This is incorrect. The inapplicability of the second factor weighs against abstention."

Nat'l Cas. Co. v. Gonzalez, 637 Fed. Appx. 812 (5th Cir. 2016).

C. Factor 3: The Desire To Avoid Piecemeal Litigation

The Panel concluded that the third factor—"the potential for piecemeal litigation"—supported dismissal. Opinion at 12. The Panel reasoned that there was an "almost guaranteed duplication of judicial effort . . . and the possibility of contradictory outcomes." *Id.* But the Panel's analysis directly conflicts with this Court's decisions and those of the Third Circuit, which reject those very same concerns as purported reasons for surrendering federal jurisdiction. And for good reason: "Any case in which *Colorado River* is implicated will inevitably involve the possibility of conflicting results, piecemeal litigation, and some duplication of judicial efforts." *Seneca*, 862 F.3d at 842. If duplication of effort and the risk of contradictory outcomes weighed in favor of dismissal, the rare exception of a *Colorado River* dismissal would swallow the rule that federal courts have the "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817.

The Fifth Circuit has been clear that, in evaluating the third factor, concerns about duplicative judicial effort and contradictory outcomes are not valid justifications for surrendering jurisdiction. Something more is required. As the Fifth Circuit explained in *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1192 (5th Cir. 1988), "duplicative litigation is not a factor to be considered," and "[b]ecause this case does not involve jurisdiction over a res or property, . . . there is no danger of inconsistent rulings affecting property ownership" such that "the avoidance of piecemeal litigation does not weigh in favor of abstention."

In *Seneca*, this Court held that, in evaluating the third factor, there must be "*special concerns* associated with resolving the issues in a piecemeal fashion via parallel proceedings." *Seneca*, 862 F.3d at 842 (emphasis added). A mere "general preference for avoiding piecemeal litigation is insufficient to warrant abstention." *Id.* Rather, "there must be *exceptional circumstances* present that demonstrate that piecemeal litigation would be particularly problematic." *Id.* at 843 (emphasis added). In *Seneca*, the Court rejected the district court's conclusion that "piecemealing" justified dismissal, because—like the Panel in this case—the district court "failed to identify any *special concern* counseling in favor of federal abstention, such as a 'clear federal policy' of avoiding 'piecemeal adjudication of water rights' expressed via federal legislation." *Id.*at 843 (quoting *Colorado River*, 424 U.S. at 819). Here, the Panel identified no "special concern"—as reflected in, say, a "federal policy"—about piecemealing.

Another decision of this Court reaffirmed the importance of identifying a "federal policy" or other basis for establishing a "special concern" about

piecemealing. In *United States v. Morros*, 268 F.3d 695, 706-07 (9th Cir. 2001), the Court held that "*Colorado River* stands for the proposition that when Congress has passed a law expressing a preference for unified state adjudication, courts should respect that preference," and that there must be "evidence of a strong federal policy that all claims should be tried in the state courts."

The Third Circuit has adopted a similar view of the third factor. In *Ryan v. Johnson*, 115 F.3d 193 (3d Cir. 1997), the Court discussed in great detail how the third factor is to be evaluated. It rejected the notion—adopted by the Panel in this case—that "the mere possibility of piecemeal litigation justifies *Colorado River* abstention." *Id.* at 198. Instead, the Court described the only circumstances under which the third factor may justify dismissal:

> "[I]t is evident that the 'avoidance of piecemeal litigation' factor is met . . . only when there is evidence of a strong federal policy that all claims should be tried in the state courts. . . . [T]here must be a strongly articulated *congressional policy* against piecemeal litigation in the specific context of the case under review. . . . Indeed, if the mere possibility of concurrent state-federal litigation satisfies *Colorado River*'s 'piecemeal adjudication' test, the test becomes so broad that it swallows-up the century-old principle . . . that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction. If this were the law, it is difficult to conceive of any parallel state litigation that would not satisfy the 'piecemeal adjudication' factor and militate in favor of *Colorado River* abstention."

Id. 197-98 (cleaned up) (emphasis in original).

D. Factor 4: The Order in Which the State and Federal Courts Obtained Jurisdiction

The Panel analyzed the fourth factor by comparing apples to oranges. The Panel found that the state case was filed before the federal case, so that this factor

weighed in favor of dismissal. Opinion at 13. But at the time the federal case was filed, there was no state action alleging a federal-preemption claim; the state action was based exclusively on the City's *state-law* claim that the Railway was not a California public utility. Appellant's Op. Br. at 14; ER-104, ER-26, ER-31. The federal-preemption claim was raised for the first time in the federal case *before* a late-joining intervenor—the Coastal Commission—expanded the causes of action alleged in the state case by alleging a similar federal claim. *Id.*

The Fourth and Sixth Circuits have analyzed the fourth factor more strictly than the Panel did. Those Courts evaluate the order in which the state and federal forums took jurisdiction *over the relevant "parallel" claim* (which, in this case, would be the federal-preemption claim). *Preferred Care of Del., Inc. v. Vanarsdale*, 676 Fed. Appx. 388, 395-96 (6th Cir. 2017) (weighing factor in favor of abstention because "the state court has already disposed of the issue central to both the state and federal action"); *Chase Brexton Health Servs. v. Md.*, 411 F.3d 457, 466 (4th Cir. 2005) (as to fourth factor, finding that plaintiffs filed their "federal *claim*" before the other proceedings (emphasis added)).

E. Factor Five: Whether Federal Law Provides the Rule of Decision

As to the fifth factor, the Panel rightly found that "all agree that the Federal Action is governed by federal statute and federal preemption law." Opinion at 14. But, consistent with its proclivity for minimizing the weight given to any factor favoring federal jurisdiction, the Panel gave the fifth factor little weight. Opinion at 20 (noting the factor weighed against dismissal, but "not substantially so"). The

Panel effectively relied on the state and federal courts' concurrent jurisdiction—a feature present in *all Colorado River* cases—to minimize the factor's weight. *Id.*

The Panel's interpretation of how that factor is to be evaluated conflicts with the Supreme Court's mandate that the "presence of federal-law issues must *always* be a *major* consideration weighing against surrender" of federal jurisdiction. *Moses H. Cone*, 460 U.S. at 26 (emphasis added). The Panel's analysis also conflicts with the Eighth Circuit's approach which, while recognizing that state and federal courts may have concurrent jurisdiction over a federal claim, "acknowledge[s] that the fifth factor weighs against abstention because 'the presence of federal-law issues must always be a major consideration weighing against surrender.'" *Spectra Communs. Group, LLC v. City of Cameron*, 806 F.3d 1113, 1122 (8th Cir. 2015).

F. Factor Seven: "Forum Shopping"

The Panel concluded that the seventh factor—"forum shopping"—weighed in favor of dismissal, even though Appellant never filed, let alone lost, *any* claim in state court before filing in federal court. Opinion at 15. Other decisions of this Court have more strictly interpreted this factor, focusing on whether the federal plaintiff filed its federal case only after asserting and losing the same claim in state court—typically, years after setbacks in its original choice of forum.

In *R.R. Street & Co. v. Transp. Ins. Co.,* 656 F.3d 966, 982 (9th Cir. 2011), this Court analyzed the seventh factor as follows: "Neither can we say that Street/National Union were merely forum shopping by filing the Federal Action. Prior to filing the Federal Action, Street/National Union had not previously asserted their claims against Transport, and we are cautious about labeling as

'forum shopping' a plaintiff's desire to bring *previously unasserted claims* in federal court" (emphasis added). *See also United States v. State Water Res. Control Bd.*, 988 F.3d 1194 (9th Cir. 2021) (explaining that "when a party waits three-and-a-half years, or two-and-a-half years, after initially filing in state court, [to file its federal action] that can weigh in favor of a stay"); *Nakash*, 882 F.2d at 1417 (plaintiff brought claims in federal court after three and a half years of litigating the same claims it had brought in state court).

Again, other panels of this Court apply the seventh factor in favor of dismissal only when previously *asserted* claims filed in state court are re-filed in federal court. The Panel's interpretation and application of the seventh factor conflicts with these decisions.

G. Factor 8: Parallelism

Finally, the Panel concluded the eighth factor—parallelism—justified dismissal. Opinion 16-20. While conceding it was "a theoretical possibility that a federal controversy will remain after the state proceedings are complete," the Panel nevertheless concluded that such a possibility was insufficient to bar dismissal. Opinion at 18.

There is an intra- and inter-circuit conflict, and significant confusion, over just how parallel two actions must be in order to justify dismissal. As this Court recently explained in *Ernest Bock*, 76 F.4th at 833, 838, there is "tension in our decisions" and "conflicting authority on the question," with one line of cases requiring only loose parallelism, while another (including *Ernest Bock*) following the stricter rule that if "it appears at least possible"—if there is "one *possible*

outcome"—that "parallel state court proceedings" will result in "continued federal litigation," dismissal is barred. *Id.* at 839, 841 (emphasis added) (describing *Nakash*, 882 F.2d 1411, and *Montanore Minerals Corp. v. Bakie*, 867 F.3d 1160 (9th Cir. 2017) as applying more permissive "parallelism" standard); *Ernest Bock*, 76 F.4th at 840-41 (observing that "[o]ther circuits have adopted disparate approaches" and comparing *Ingersoll-Rand Fin. Corp. v. Callison*, 844 F.2d 133, 134 (3d Cir. 1988) (stay improper under this factor because party "*may* at some point still be entitled to a federal forum" if the state court ruled in a certain way) with *Loughran v. Wells Fargo Bank, N.A.*, 2 F.4th 640 (7th Cir. 2021) (applying a more permissive "parallelism" standard favoring dismissal)).

Although the Panel here sought to downplay this intra-circuit conflict by trying to distinguish between "theoretical" and "realistic possibility," that conflict is difficult to deny. *See, e.g.*, *Lawson v. Univ. of Hawai'i*, 2024 U.S. Dist. LEXIS 150791 (D. Haw. Aug. 22, 2024) ("Under the *Nakash* and *Bakie* line of cases, the common factual allegations and parties would likely satisfy the parallelism requirement," but "the parallelism requirement is not met under the *Ernest Bock* analysis."). The Panel ultimately aligned itself with this Court's older precedents and the Seventh Circuit's approach, applying a more permissive "parallelism" standard that allowed dismissal of the Railway's action. Opinion at 18. There is doubtless an intra-Circuit conflict concerning how to interpret and apply the eighth factor, which is especially important given that it is often treated as the "threshold" factor that "should be addressed as a preliminary matter" before the other seven factors are weighed. *State Water*, 988 F.3d at 1203.

IV. CONCLUSION

With this Panel decision, this Court has strayed far from the clear path set by *Colorado River* and *Moses H. Cone*, which clearly admonish against permissive application of the *Colorado River* factors in a way that inevitably makes a stay or dismissal the rule, rather than the exception. The Panel Decision deepens the conflict and confusion within this Circuit, and also conflicts with the decisions of sister Circuits. For all these reasons, the Court should grant panel rehearing or rehearing *en banc*.

Date: October 11, 2024

Respectfully submitted,

s/ *Paul Beard II*

Attorney for Appellant
MENDOCINO RAIWAY

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 35 and Circuit Rule 35-4 and 40-1, I hereby certify that:

1. This brief complies with the type-volume limitations of Circuit Rule 40-1 and because this brief contains 4,193 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman typeface.

Dated: October 11, 2024 s/ *Paul Beard II*

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2024, I electronically filed the foregoing *Petition for Panel Rehearing and Rehearing En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: October 11, 2024 s/ *Paul Beard II*

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MENDOCINO RAILWAY, a California corporation, *Plaintiff-Appellant*, v. JACK AINSWORTH, in his official capacity as Executive Director of the California Coastal Commission; CITY OF FORT BRAGG, a California municipal corporation, *Defendants-Appellees*.	No. 23-15857 D.C. No. 4:22-cv-04597-JST OPINION

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Argued and Submitted May 15, 2024
San Francisco, California

Filed August 29, 2024

Before: Sidney R. Thomas, Consuelo M. Callahan, and Gabriel P. Sanchez, Circuit Judges.

Opinion by Judge Callahan

SUMMARY*

Colorado River Doctrine

The panel affirmed the district court's judgment dismissing Mendocino Railway's federal lawsuit against the City of Fort Bragg and the California Coastal Commission under the *Colorado River* doctrine, which authorizes federal courts to refrain from exercising jurisdiction where there are parallel state court proceedings.

The Railway has resisted the City's and Commission's efforts to regulate the use and maintenance of Railway properties in the City. The City filed a state court action seeking declaratory and injunctive relief requiring the Railway to comply with local laws regulating the use and maintenance of Railway properties in the City. The Railway asserted that the declaratory and injunctive relief sought by the City were barred by state and federal preemption. The Railway subsequently filed this federal action, seeking a declaration that the actions of the City and the Commission to regulate the Railway were preempted, and an injunction preventing the City and the Commission from interfering with the Railway's operations.

Applying the eight-factor *Colorado River* balancing test, the panel held that the district court did not abuse its discretion in dismissing the federal action. Only the consideration that federal law provides the rule of decision weighs against dismissal of the federal action, but not substantially so given that the state court has concurrent

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

jurisdiction to adjudicate federal preemption issues. Neither an inadequate state court forum nor insufficiently parallel proceedings, which preclude the use of a *Colorado River* dismissal, are present here. The forum shopping and piecemeal litigation considerations strongly favor dismissal, and the order in which the forums obtained jurisdiction also supports that outcome. The remaining factors are neutral. On balance, therefore, this case meets the requirements for a *Colorado River* dismissal.

COUNSEL

Paul J. Beard, II (argued), Pierson Ferdinand LLP, Los Angeles, California, for Plaintiff-Appellant.

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OPINION

CALLAHAN, Circuit Judge:

Mendocino Railway ("Railway") has resisted efforts by the City of Fort Bragg ("City") and the California Coastal Commission ("Commission") to regulate the use and maintenance of Railway properties in the City. After the City sued the Railway in state court, the Railway responded by suing the City and the Commission in federal court. The Railway appeals the district court's dismissal of its federal case under the *Colorado River* doctrine, which authorizes federal courts to refrain from exercising jurisdiction where there are parallel state court proceedings. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I.

A.

The Railway operates a railroad line between Fort Bragg, California and Willits, California, colloquially known as the "Skunk Train."[1] Related to its operation of the railroad, the Railway owns multiple structures and properties within the City, and since 2019 has acquired a total of approximately 300 acres of land adjacent to the Fort Bragg railway station. The Railway has undertaken a variety of improvements, repairs, and maintenance work related to the further development of this property.

[1] The railroad line was originally built in 1885, and historically has operated tourist and non-tourist passenger services as well as freight services. The Fort Bragg station is a fully developed rail facility.

Starting in 2017, the City began discussions with the Railway regarding the repair of dilapidated structures on Railway property and the Railway's purported failure to obtain proper permits for its use of the property. This includes permits under the California Coastal Act of 1976 ("Coastal Act"), Cal. Pub. Res. Code § 30000 *et seq.*, which applies to development in the coastal zone and which the City implements through its local coastal program ("LCP"). The Railway refused to obtain any permits, arguing that as a public utility it was not subject to local regulation.

The Railway was also in discussions with the Commission during this time. The Commission is the state entity that administers the Coastal Act, including overseeing LCPs, issuing permits, and pursuing administrative and civil enforcement actions. Additionally, the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*, grants the Commission authority to review certain federal agency actions to ensure consistency with the Coastal Act. *See id.* § 1456. The Commission sent letters to the Railway in June and December of 2019 regarding the Commission's permitting jurisdiction, requesting information on the Railway's development activities, and discussing the possible need for a permit under the Coastal Act or a consistency determination under the CZMA.[2]

B.

In October 2021, the City sued the Railway in Mendocino County Superior Court. *City of Fort Bragg v. Mendocino Railway*, Case No. 21CV00850 (the "State

[2] We grant the Railway's requests for judicial notice of the state court docket (Exhibit 1) and the December 2019 letter from the Commission to the Railway (Exhibit 2).

Action"). The City's complaint seeks a declaration that the Railway is not a public utility and therefore is "subject to the City's ordinances, regulations, codes, local jurisdiction, local control and local police power and other City authority." The City also seeks an injunction ordering the Railway to comply with local laws. The Railway demurred, arguing the state court lacked subject matter jurisdiction given the Railway's public utility status and that City regulation was federally preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") because of the Railway's status as a federally recognized railroad. The state court overruled the demurrer on April 28, 2022, finding the Railway's argument that federal law preempted "all" local laws and regulations to be overly broad, and noting the issue was not appropriate to decide on demurrer given the fact-bound nature of the preemption inquiry.

After unsuccessful petitions to the California Court of Appeal and the California Supreme Court,[3] the Railway filed its answer in the State Action on June 24, 2022. The Railway asserted preemption as an affirmative defense, stating that "[t]he declaratory and injunctive relief sought by [the City] are barred by state and federal preemption . . . because Defendant is a [California Public Utilities Commission]-regulated public utility and a railroad within the jurisdiction of the [federal Surface Transportation Board]."

[3] We grant the Commission's request for judicial notice of the Commission's complaint in intervention (Exhibit A) and the California Supreme Court docket denying the petition for review (Exhibit B), and deny the request as to the City and Commission motions to remand the State Action (Exhibits C and D), and the order granting the remand (Exhibit E).

In July 2022, the City requested that the Commission assume responsibility for enforcement of the Coastal Act and the City's LCP against the Railway. The Commission agreed and sent a Notice of Violation to the Railway on August 10, 2022. The notice asserted that the Railway was undertaking unpermitted development which required a coastal development permit and might also require a consistency determination. It outlined the potential civil fines and administrative penalties that could be assessed against the Railway should it fail to obtain the proper permits.

On August 9, 2022 (the day before the Commission sent the notice), the Railway filed the federal action underlying this appeal in the United States District Court for the Northern District of California (the "Federal Action"). The Railway sued the City and Jack Ainsworth in his official capacity as Executive Director of the Commission. The Railway's complaint references a variety of actions it has pursued or will pursue related to maintenance and other work on its railway-related properties. The Railway seeks a declaration that "the actions of the Commission and the City to regulate [the Railway's] operations, practices and facilities are preempted under 49 U.S.C. § 10501(b)"; that the Railway's "activities are subject to the [Surface Transportation Board's] exclusive jurisdiction;" and that the Railway "has the right under the ICCTA to undertake any and all rail-related activities within the coastal zone . . . without preclearance or approval from the Commission or the City." The Railway also seeks an injunction preventing the City and the Commission from interfering with its operations, including by imposing "any land-use permitting or other preclearance requirement." It further states it has

not sought, and does not intend to seek, a permit from either the City or the Commission.

Subsequently, back in state court, the Railway moved to disqualify the judge who had overruled the demurrer, and the motion was denied. The Commission moved to intervene in the State Action on October 6, 2022. The Commission's complaint-in-intervention references the Railway's maintenance work "as well as other activities undertaken by the Railway." It notes the Railway's contention that federal law preempts the permitting requirements of the Coastal Act, and asks the state court to declare that the Coastal Act and LCP apply to the Railway's actions and "are not preempted by any state or federal law." In addition, the Commission's complaint seeks civil penalties and exemplary damages for the Railway's alleged violations of the Coastal Act.

On October 20, 2022, the Railway removed the State Action to the United States District Court for the Northern District of California, invoking federal question jurisdiction on the grounds that the State Action required resolution of federal questions arising under the ICCTA. The City and the Commission moved to remand the action to state court, and on May 11, 2023, the district court granted the motion.[4]

Meanwhile, the Commission and the City filed a joint motion to dismiss the Federal Action based on, *inter alia*, the *Colorado River* doctrine. On May 12, 2023, the district court granted the joint motion, and the Railway filed a timely notice of appeal.

[4] Judge Tigar was assigned to both the Federal Action as well as the removed State Action.

II.

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817. In *Colorado River*, the Supreme Court recognized that, in exceptional circumstances, "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" can support a stay or dismissal of federal litigation in favor of parallel state proceedings. *Ernest Bock, LLC v. Steelman*, 76 F.4th 827, 836 (9th Cir. 2023) (citing *Colorado River*, 424 U.S. at 813, 817 (internal quotations and citations omitted)).[5] However, a stay of federal proceedings in favor of state proceedings "is the exception, not the rule." *Colorado River*, 424 U.S. at 813. "Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Id.* at 817. (internal quotation omitted).

Our review of a *Colorado River* dismissal proceeds in two steps. First, we review *de novo* whether the facts of a

[5] Generally, a stay rather than a dismissal is appropriate under *Colorado River* as a stay ensures the federal forum will remain available if needed. *See Montanore Mins. Corp. v. Bakie,* 867 F.3d 1160, 1166 (9th Cir. 2017). As recognized by the district court, however, "*Colorado River* itself involved dismissal of a federal action." The district court here determined dismissal was appropriate given "the strength of the factors and the degree to which their balance tips sharply in [the City and Commission's] favor." The Railway does not raise this issue on appeal, so we decline to consider it here. *See R.R. Street & Co. v. Transport Ins. Co.*, 656 F.3d 966, 978 n.8 (9th Cir. 2011) (affirming a *Colorado River* dismissal and declining to address the stay-versus-dismissal issue when it was not raised on appeal).

particular case meet the requirements for a *Colorado River* dismissal. *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 840 (9th Cir. 2017). Second, if the requirements are met, we review for abuse of discretion the district court's decision to dismiss the case. *Id.* "The underlying principle guiding this review is a strong presumption against federal abstention." *Id.* at 842.

After determining there are concurrent state and federal court proceedings involving the same matter (as there are here), we use an eight-factor balancing test to determine if a *Colorado River* stay or dismissal is appropriate. We consider:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

R.R. Street & Co. v. Transport Ins. Co., 656 F.3d 966, 978–79 (9th Cir. 2011). These factors are not applied as a "mechanical checklist," but rather in "a pragmatic, flexible manner with a view to the realities of the case at hand." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16, 21 (1983). "[S]ome factors may weigh for or

against the exercise of jurisdiction while others primarily serve as a bar to stay or dismissal." *R.R. Street*, 656 F.3d at 979. "Any doubt as to whether a factor exists should be resolved against a stay" or dismissal. *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990).

A.

We agree with the parties and the district court that the first factor of jurisdiction over property at stake is inapplicable given there is no specific property in dispute. *See R.R. Street*, 656 F.3d at 979. We also agree that the second factor addressing inconvenience of the federal forum is neutral given the state and federal courthouses are less than 200 miles apart. *See Montanore*, 867 F.3d at 1167 (treating a distance of 200 miles as neutral); *Travelers*, 912 F.3d at 1368 (finding 200 miles "not sufficiently great that this factor points toward abstention").[6]

B.

The third factor focuses on piecemeal litigation. "Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *Am. Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988). The district court found this factor favored dismissal given "the issue of federal preemption under the ICCTA is squarely before the state court" and federal

[6] We grant the Railway's request for judicial notice of statements of information for the Railway's business filed with the California Secretary of State (Exhibits 3 and 4). We deny the Railway's request for judicial notice of emails exchanged between the Commission and the Federal Railway Administration (Exhibit 5) as well as emails between the Commission and the Railway (Exhibit 6), and the Commission's request for judicial notice of the Commission's public hearing notice.

adjudication of the claim would "necessarily duplicate the state court's efforts and risk the possibility of . . . different results."

Some of our cases have noted that the mere potential for piecemeal litigation is not sufficient on its own to warrant a stay. *See, e.g.*, *Seneca*, 862 F.3d at 842–43 ("A general preference for avoiding piecemeal litigation is insufficient . . . . Instead, there must be exceptional circumstances present that demonstrate that piecemeal litigation would be particularly problematic."); *Travelers*, 914 F.2d at 1369 (finding no exceptional circumstances in an insurance dispute dealing with ordinary contract and tort issues). However, we have also found the potential for piecemeal litigation to favor a stay when concurrent cases would resolve common questions that could result in "waste [of] judicial resources and cause confusion in the continuing disputes between the parties." *See, e.g.*, *Ernest Bock*, 76 F.4th at 837 (citing *R.R. Street*, 656 F.3d at 979–80); *Montanore*, 867 F.3d at 1168 (finding this factor favored a stay when the same issue was present in both cases and "crucial in both proceedings," leading to duplication of judicial effort and arguably conflicting results).

We agree with the district court that this factor weighs in favor of dismissal. Although the State Action includes state law claims, both it and the Federal Action squarely raise the ICCTA preemption issue which the respective courts will be required to address. Given the almost guaranteed duplication of judicial effort on the preemption question and the possibility of contradictory outcomes, the potential for piecemeal litigation supports dismissal. *See Ernest Bock*, 76 F.4th at 837.

C.

The district court also found dismissal supported by the fourth factor, the order in which the forums gained jurisdiction, because the State Action was filed first and had progressed further than the Federal Action. This factor considers not only the filing dates of each action, but also "the progress made in each case 'in a pragmatic, flexible manner with a view to the realities of the case at hand.'" *Seneca*, 862 F.3d at 843 (citing *Moses H. Cone*, 460 U.S. at 21). When a state action has been progressing for multiple years with extensive discovery, substantive motions, orders deciding multiple issues, or interlocutory appeals, this factor favors abstention. *See Montanore*, 867 F.3d at 1168; *see also R.R. Street*, 656 F.3d at 980 (finding significant progress weighing in favor of a stay when the state court had interpreted provisions of a contract, conducted discovery, scheduled phased litigation, and issued an order concerning foundational legal matters).

Although the State Action was filed first in time, it preceded the Federal Action by less than a year, which is less time than other cases have found to be significant. *See, e.g.*, *Montanore*, 867 F.3d at 1168 (state court litigation had been underway for six years). Additionally, while the State Action has moved beyond the pleadings stage, it does not appear that the state court has resolved any "foundational legal claims" but rather decided the issues were inappropriate for decision on demurrer. At the time the Railway filed the Federal Action, there had not been any discovery, and no trial date had been set. Although we do not give this factor as much weight as the district court appears to have done, we agree that this factor favors dismissal.

D.

On the fifth factor, all agree that the Federal Action is governed by federal statute and federal preemption law as the ICCTA determines whether the Railway falls within the scope of the statute's preemption clause. *See* 49 U.S.C. §§ 10102, 10501(b). "[T]he presence of federal-law issues must always be a major consideration weighing against surrender." *Moses H. Cone*, 460 U.S. at 26. We agree with the district court that this factor therefore weighs against dismissal but note that where (as here) "state and federal courts have concurrent jurisdiction over a claim, this factor becomes less significant." *Nakash v. Marciano*, 882 F.2d 1411,1416 (9th Cir. 1989).

E.

The sixth factor looks to whether the state court proceeding can adequately protect the rights of the federal litigants. If it cannot, "a district court may not stay or dismiss the federal proceeding." *R.R. Street*, 656 F.3d at 981. We agree with the district court, and the Railway concedes, that the Railway's federal preemption claim can be adjudicated by the state court. This factor thus does not preclude dismissal. *Seneca*, 862 F.3d at 845 (noting that "inadequacy of the state forum . . . may preclude abstention" but an adequate state forum "never compel[s] abstention").

F.

The forum-shopping factor considers "whether either party improperly sought more favorable rules in its choice of forum or pursued suit in a new forum after facing setbacks in the original proceeding." *Seneca*, 862 F.3d at 846. A "chronology of events suggest[ing] that both parties took a somewhat opportunistic approach to [the] litigation" is not

sufficient to support a *Colorado River* dismissal. *R.R. Street*, 565 F.3d at 981. However, any indication that a party "sought to manipulate the litigation or behaved vexatiously to wind up in the forum of its choosing" supports a finding of forum shopping. *Seneca*, 862 F.3d at 846.

The district court found this factor to weigh in favor of dismissal given the Railway filed its Federal Action after the state court overruled its demurrer, an unfavorable outcome. At the time the district court considered this motion to dismiss, the Railway had also attempted to disqualify the state court judge and remove the State Action to federal court. Although only the City's state-law claims—which do not implicate the Railway's status under federal law—were officially pending at the time the Railway filed the Federal Action, the Railway had already raised federal preemption as an affirmative defense in the State Action. As noted by the district court, the Federal Action is "premised entirely on the [preemption] argument rejected on demurrer." Furthermore, when the Railway filed the Federal Action, it was aware of the Commission's immediate intention to file a complaint-in-intervention raising the federal preemption issue. In consideration of these actions by the Railway, we "reasonably infer" that the Railway had become "dissatisfied with the state court and [sought] a new forum." *Montanore*, 867 F.3d at 1169–71 (weighing forum shopping in favor of a *Colorado River* stay when the plaintiff "filed in federal court a few months after it received an unfavorable decision in state court," noting "the federal proceeding was aimed at the same goal" and the plaintiff had sought to have the state judge removed from the case) (internal quotation omitted). The forum shopping factor weighs in favor of dismissal.

G.

Under the parallelism factor, the eighth and final consideration of a *Colorado River* analysis, we evaluate whether the state court proceeding is substantially similar to the federal proceeding. "Exact parallelism . . . is not required. It is enough if the two proceedings are substantially similar." *Nakash*, 882 F.2d at 1416 (quotations and citations omitted). However, "the existence of a substantial doubt as to whether the state proceedings will resolve the federal action precludes a *Colorado River* stay or dismissal." *R.R. Street*, 656 F.3d at 982 (internal quotations omitted).

The district court found the proceedings to be substantially similar given the Railway's ICCTA preemption defense in the State Action was the sole issue in the Federal Action. The district court therefore found it "difficult for the Court to conceptualize [the Federal Action] as anything but a spinoff of the [State Action]." The Railway, however, argues that our recent decision on this parallelism factor in *Ernest Bock, LLC v. Steelman*—decided after the district court's order—precludes dismissal here.

In *Ernest Bock*, we reversed a *Colorado River* stay after determining the state court proceeding might not fully resolve the issues before the federal court and thus the "proceedings [were] not sufficiently parallel to justify abdication of federal jurisdiction." 76 F.4th at 842. In that case, the original state court action was a contract dispute related to liability under a commercial mortgage with related claims and counterclaims for fraud and breach of the implied covenant of good faith and fair dealing. *Id.* at 833. After the state court found in its favor, the plaintiff filed suit in federal district court to challenge alleged actions by the defendants

to shield funds from the $11 million judgment, asserting claims for violation of state and federal fraud and racketeering laws. *Id.* While the federal suit was pending, the state appellate court vacated and remanded the underlying state judgment, thus setting up parallel proceedings where both the state and federal courts would necessarily address the same threshold issue of whether certain contract guarantees were enforceable. *Id.* at 834.

In reversing the district court's grant of a *Colorado River* stay, we found the lack of parallelism dispositive. We focused on a line of cases finding use of *Colorado River* inappropriate when the state proceeding could result in an outcome that would still require additional litigation in the federal case. *See Ernest* Bock, 76 F.4th at 839–40 (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 912–13 (9th Cir. 1993) (finding that when one of two possible state court outcomes would require additional federal litigation, a *Colorado River* stay could not issue); and *U.S. v. State Water Res. Control Bd.*, 988 F.3d 1194, 1204 (9th Cir. 2021) ("We have repeatedly emphasized that a *Colorado River* stay is inappropriate when the state court proceedings will not resolve the entire case before the federal court.")). We held that, because the state court could find the contract obligations enforceable, requiring additional action in federal court to address the alleged fraudulent transfer of assets and racketeering claim, there was substantial doubt as to whether the state proceedings would fully resolve the federal action. *Id.* at 841–42 (citing *Moses H. Cone*, 460 U.S. at 28). Therefore, the use of a *Colorado River* stay was precluded.

In this case, the district court relied on the standard articulated in our pre-*Ernest Bock* cases that exact parallelism is not required and actions that are a "spin-off"

of state litigation can be found sufficiently similar to warrant a stay. *See Nakash*, 822 F.2d at 1417; *Montanore*, 867 F.3d at 1170. The Railway argues that because the Federal Action contains claims that are broader than those in the State Action—and therefore may possibly require continued federal litigation after a decision by the state court—*Ernest Bock* precludes a dismissal. Specifically, the Railway asserts that the Federal Action addresses not only whether the ICCTA preempts the Commission's authority under the Coastal Act, but also the Commission's federal consistency approval authority under the CZMA. The Railway further suggests that the state court could find the Railway is a public utility under state law without reaching the issue of federal preemption. According to the Railway, these possible outcomes would lead to continued federal litigation.

The Railway overreads our decision in *Ernest Bock*. In *Ernest Bock*, there was a realistic probability—bordering on certainty—that one of the two anticipated outcomes in state court (i.e., the state court finding the contract guarantees enforceable) would then require additional proceedings in federal court. *See* 76 F.4th at 840 n.17 (noting the state court proceedings could result only in "binary outcomes"). The fraud and racketeering claims in the federal court, while incorporating the same underlying issue of contract validity, were distinct from the state court claims. That is not the case here. Although there is a theoretical possibility the State Action will not fully resolve the Federal Action, there does not appear to be a realistic probability that a federal controversy will remain after the state proceedings are complete. If the state court holds the Commission lacks authority to regulate the Railway's activities on state law grounds due to the Railway's status as a public utility, there would be no remaining threat of regulation for the federal

court to address—rendering the federal preemption arguments moot if not addressed by the state court. If the State Action does reach the federal preemption issue, it would resolve the only issue in the Federal Action.

The Railway's argument that the Federal Action is broader than the State Action is unpersuasive. The Railway's federal complaint does not allege any other instances of an existing conflict with the City or the Commission outside of those being litigated in the State Action. To the extent the Railway asserts it raises generalized claims of preemption of the City's or Commission's regulatory authority that are not mooted or otherwise addressed by the State Action, those claims would be unripe given the fact-specific nature of the preemption analysis under the ICCTA. The Railway's arguments as to the Commission's CZMA federal consistency authority are similarly unpersuasive. The federal complaint does not raise a CZMA claim as it fails to mention the CZMA even once, and the Railway's complaint did not allege any specific action that the Commission asserts falls within its CZMA review authority.

Ernest Bock did not abrogate our prior precedent. *See* 76 F.4th at 840 n.17 (noting the outcome was reconcilable with *Nakash*, where it was unclear the state court proceedings would result in an outcome that would require federal litigation). The "binary outcomes" scenario at issue in *Ernest Bock* is not present here. *Id.* As the district court aptly stated, "it is difficult . . . to conceptualize [the Federal Action] as anything other than a spinoff of the [State Action]." *See Nakash*, 822 F.2d at 1416–17. The state and federal proceedings here are sufficiently parallel such that there is no substantial doubt the State Action will completely resolve the Federal Action. This consideration of whether

state court proceedings will resolve the federal issues does not preclude dismissal under *Colorado River*.

III.

"Ultimately, 'the decision whether to dismiss a federal action because of parallel state-court litigation' hinges on 'a careful balancing of the [relevant] factors . . . with the balance heavily weighted in favor of the exercise of jurisdiction.'" *R.R. Street*, 656 F.3d at 983 (citing *Moses H. Cone*, 460 U.S. at 16). Here, only the consideration that federal law provides the rule of decision weighs against dismissal of the Federal Action, but not substantially so given the state court has concurrent jurisdiction to adjudicate federal preemption issues. Neither an inadequate state court forum nor insufficiently parallel proceedings, which would preclude the use of a *Colorado River* dismissal, are present here. The forum shopping and piecemeal litigation considerations strongly favor dismissal, and the order in which the forums obtained jurisdiction also supports that outcome. The remaining factors are neutral. On balance, therefore, this case meets the requirements for a *Colorado River* dismissal and there was no abuse of discretion by the district court in dismissing the Federal Action.[7]

The dismissal by the district court is **AFFIRMED**.

[7] Because we affirm the district court's dismissal under *Colorado River*, we do not address the alternative arguments raised by the City and Commission regarding *Younger* abstention and *Wilton/Brillhart* abstention.