ORAL ARGUMENT NOT YET SCHEDULED

No. 10-7135

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY, and PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT PRESERVATION COALITION,

Appellants,

v.

CONSOLIDATED RAIL CORPORATION, and

212 MARIN BOULEVARD, L.L.C., 247 MANILA AVENUE, L.L.C., 280 ERIE STREET, L.LC., 317 JERSEY AVENUE, L.L.C., 354 COLE STREET, L.L.C, 389 MONMOUTH STREET, L.L.C., 415 BRUNSWICK STREET, L.L.C., and 446 NEWARK AVENUE, L.L.C.

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[PROOF] JOINT BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

All parties appearing in the district court and in this Court are listed in the Brief for Appellants, except for National Trust for Historic Preservation, Preservation New Jersey, and Jersey City Landmarks Conservancy, which have submitted a brief as *amici curiae* in support of Appellants.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Appellee Consolidated Rail Corporation ("Conrail") states that Conrail is a freight railroad providing local service in Detroit, New Jersey, and Philadelphia. Conrail's parent company is Conrail, Inc., which in turn is owned by Green Acquisition, Inc., which is owned by CRR Holdings, LLC—a company in which CSX Corporation and Norfolk Southern Corporation each holds a 50 percent controlling interest. CSX Corporation and Norfolk Southern Corporation are publicly traded and, indirectly, hold more than 10% of Conrail's stock.

Appellees 212 Marin Boulevard, L.L.C., 247 Manila Avenue, L.L.C, 280 Erie Street, L.L.C., 317 Jersey Avenue, L.L.C., 354 Cole Street, L.L.C., 389 Monmouth Street, L.L.C., 415 Brunswick Street, L.L.C and 446 Newark Avenue, L.L.C. (the "LLCs") are New Jersey limited liability companies proposing to develop real estate in Jersey City. None of the LLCs has issued share or debt

securities to the public, and none has a parent company, subsidiary or affiliate that has issued shares or debt securities to the public.

Decision Under Review

This is an appeal from a final Memorandum Opinion and Order ("Mem. Op.") entered September 28, 2010, by the United States District Court for the District of Columbia, the Honorable Ricardo M. Urbina, District Judge, presiding, granting defendants' cross-motion for summary judgment and denying plaintiffs' motion for summary judgment. J.A. __.

Related Cases

Other than the district court below, this case has not previously been before this Court or any other court. The following related case was previously before this Court: *Consolidated Rail Corp. v. STB*, Nos. 07-1401, 07-1529, 08-1019, and 08-1052, reported at 571 F.3d 13 (2009).

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Page(s)

Cases

---

* Authorities upon which we chiefly rely on are marked with asterisks.

Statutes

Agency Decisions and Regulations

Other Authorities

GLOSSARY

App. Br.	Appellants' Brief
City	Appellant City of Jersey City, New Jersey
Coalition	Appellant Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition
Conrail	Appellee Consolidated Rail Corporation
FSP	Final System Plan of the United States Railway Association
HPC	Jersey City Historic Preservation Commission
ICC	Interstate Commerce Commission
ICCTA	ICC Termination Act of 1995
J.A.	Joint Appendix
JCRA	Jersey City Redevelopment Agency
LLCs	Appellees 212 Marin Blvd. L.L.C., 247 Manila Avenue, L.L.C., 280 Erie Street, L.L.C., 317 Jersey Avenue, L.L.C., 354 Cole Street, L.L.C., 389 Monmouth Street, L.L.C., 415 Brunswick Street, L.L.C., and 446 Newark Avenue, L.L.C.
Rail Act	Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974)
RTC	Appellant Rails To Trails Conservancy
STB	Surface Transportation Board
USRA	United States Rail Association
Zoning Board	Jersey City Zoning Board of Adjustment

JURISDICTIONAL STATEMENT

The district court, acting as the "Special Court" under the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, as amended, 45 U.S.C. §§ 701-719 ("Rail Act"), had jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and 45 U.S.C. § 719(b)(2). *See Consolidated Rail Corp. v. STB*, 571 F.3d 13 (D.C. Cir. 2009). The district court's Memorandum Opinion and Order was appealable and was timely appealed on October 21, 2010. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) and 45 U.S.C. § 719(e)(3).

ISSUES PRESENTED

1. The principal issue in this case is whether, in light of the evidence set forth by Appellants in their summary judgment papers, the district court correctly concluded that the Appellants do not have standing under Article III of the United States Constitution to pursue their claims.

2. A second issue raised by Appellants in a single paragraph in their brief is whether the district court erred in denying Appellants' motion for summary judgment.

STATUTES AND REGULATIONS

Except for the version of N.J. Stat. 48:12-125.1 in effect when Conrail sold the property at issue to the LLCs (*see* Statutory Addendum, *infra*), pertinent statutes and regulations are included in the addendum to Appellants' brief.

STATEMENT OF THE CASE

The backdrop of this case is set forth in *Consolidated Rail Corp. v. STB*, 571 F.3d 13 (D.C. Cir. 2009) ("*Conrail*"). There, this Court reviewed the special circumstances under which the United States Railway Association ("USRA") conveyed the "Sixth Street Embankment" ("Embankment") trackage at issue here to Conrail in 1976. *Id.* at 14-17. In *Conrail*, the Court rejected the arguments made by the parties that are Appellants here, as well as the Surface Transportation Board ("STB"), that the STB had jurisdiction to determine whether the rail trackage at issue was transferred to Conrail as a "line of railroad" subject to the STB's abandonment authority or as "spur and yard track" outside the STB's abandonment authority. *Id.* at 19-20. Instead, this Court concluded that the district court, acting as the Special Court under the Rail Act, had exclusive jurisdiction to decide the regulatory nature of this trackage as it was conveyed by USRA to Conrail. *Id.* at 20.

On October 7, 2009, Appellants filed a Complaint against Conrail that effectively asked the district court to reverse this Court's *Conrail* decision. Count I of that Complaint asserted that the STB has "primary or exclusive" jurisdiction to determine the nature of the Embankment trackage for regulatory purposes. Complaint ¶¶ 33-38, J.A. __. Count II suggested that the district court should defer to STB decisions that this Court had vacated and find that the Embankment

trackage is part of a "line of railroad" regardless of how it was conveyed by USRA in the Final System Plan ("FSP"). Complaint ¶¶ 40-49, J.A. __. Shortly after filing their Complaint, Appellants moved for summary judgment.

Conrail filed an opposition to Appellants' motion and a cross-motion for summary judgment, arguing that Appellants did not have standing to bring their claims and that, even if they did, their attack on this Court's decision in *Conrail* would have to be rejected. Conrail also presented evidence and argument establishing a genuine dispute of material fact regarding the status of the Embankment property—both at the time it was conveyed to Conrail under the FSP and subsequently.

Following further summary judgment briefing by the parties, the district court, the Honorable Ricardo M. Urbina, presiding, issued a thorough Memorandum Opinion and Order, carefully analyzing the standing issues and concluding that Appellants had failed to establish their standing to pursue the action. Mem. Op. 30, J.A. __. Judge Urbina rested this conclusion largely on Appellants' failure to show any concrete and actual or imminent injury.

In the case of Appellant City of Jersey City, the district court concluded that the City based its claim of injury on its alleged inability to acquire the Embankment property through the use of federal and/or state procedures and remedies applicable to the abandonment of lines of railroad. The court held,

however, that the City had failed to show that it could not acquire the property by purchasing it or through routine state-law condemnation procedures, or that the City would obtain benefits from federal or state abandonment procedures and remedies that were not available if it had purchased the property or acquired it in routine state-law condemnation proceedings. Mem. Op. 10-27, J.A. __.

With regard to Appellants Rails to Trail Conservancy ("RTC") and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("Coalition"), the court noted that their claim to standing rested principally on concerns about the effects of demolition of the stone and earth embankment structures on the Embankment property. As the court pointed out, the City designated all of the blocks containing those embankment structures as an historic landmark in 2003. Under the Jersey City municipal code, no structure can be altered on historic landmark property absent a waiver from the Jersey City Historic Preservation Commission, which the Commission has steadfastly refused to grant to the LLCs. Thus, the district court concluded, RTC and the Coalition had failed to demonstrate a need for federal judicial intervention to remedy either actual or imminent injury. Mem. Op. 27-30, J.A. __.

Accordingly, the district court dismissed Appellants' Complaint. Subsequently, Appellants timely filed their notice of appeal to this Court.

STATEMENT OF FACTS

A. The Limits Of The STB's Abandonment Authority

Under 49 U.S.C. § 10903(a)(1), a railroad may not "abandon any part of its railroad lines" without receiving prior authorization from the STB. For purposes of Section 10903, a "railroad line" is a narrowly defined term. It refers only to "main or branch lines" used for "through" service by "full trains." *Nicholson v. ICC*, 711 F.2d 364, 367-68 (D.C. Cir. 1983) (citing *Detroit & M. Ry. v. Boyne City, G. & A. R. Co.*, 286 F. 540, 546 (E.D. Mich. 1923)). It does not refer to ancillary yard tracks used "to switch cars in the making up and breaking up of freight trains" or other services "incidental" to the main line operation. *Id.* at 366; 49 U.S.C. § 10906 (STB has no authority over "abandonment, or discontinuance of spur, industrial, team, switching, or side tracks"). In particular, it does not refer to the "mass of tracks" in rail yards, including the yard arrival and departure tracks connecting main or branch lines to the yards. *Nicholson*, 711 F.2d at 367-68.

The determination whether a particular track segment is a "railroad line" does not turn on what it is called. It "turns on the intended use of the track segment, not on the label or cost of the segment." *Id*. at 367. *See also New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 166 (5th Cir. 1966) ("If . . . the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then

such trackage is 'spur, industrial, team, switching or side tracks' and as such, not under Commission jurisdiction.").

B. Conrail's Acquisition Of The Embankment And Other Harsimus Cove Yard Property

Conrail acquired the Embankment property in 1976 under the auspices of the United States Railway Association ("USRA"), a new government corporation. The conveyance took place under unique circumstances. In the late 1960s and early 1970s, a "rail transportation crisis seriously threatening the national welfare was precipitated" by the successive bankruptcies of "eight major railroads in the northeast and midwest region of the country." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 108 (1974). Congress responded by passing comprehensive legislation, the Rail Act, which was designed to build on a "'clean slate'" a new railroad, Conrail, "from the wreckage that was the northeastern rail system." *City of Philadelphia v. Consolidated Rail Corp.*, 222 F.3d 990, 992 (D.C. Cir. 2000).

For that purpose, Congress established USRA, and empowered it to analyze the properties of the bankrupt railroads and designate in the FSP those properties that would be acquired by Conrail.[1] Yards, connecting spur and storage tracks, and

[1] Section 209(b) of the Rail Act, 45 U.S.C. § 719(e)(2), created a three-judge "[S]pecial [C]ourt" in which all judicial proceedings were consolidated with respect to the FSP and conveyances thereunder. In 1997, the Special Court was abolished and "all jurisdiction and other functions of the special court [were] assumed by the United States District Court for the District of Columbia." 45 U.S.C. § 719(b)(2). Appeals from decisions of the United States District Court for

other ancillary properties were automatically conveyed along with any associated rail lines designated for conveyance. *Conrail*, 571 F.3d at 15.

Among the properties USRA conveyed to Conrail pursuant to the FSP were the Embankment and other portions of Harsimus Cove Yard track in Jersey City. Conrail never considered the Embankment and other yard track a "line of railroad" and never operated it as anything other than yard track. Sheppard Decl. ¶¶ 13, 16-24, J.A. __; Ryan Decl. ¶¶ 6, 26, J.A. ___. Much of the property underlying the original trackage in the Harsimus Cove Yard had already been sold off by the estates of the bankrupt railroads before Conrail acquired what remained. Jersey City was eager to have the remaining property developed, and the City and the Jersey City Redevelopment Agency ("JCRA") began working with Conrail to sell off the property for redevelopment, either to private developers or to the JCRA, as soon as Conrail began operations in the area. Ryan Decl. ¶¶ 7, 29, J.A. __. By the mid-1980s, Conrail had sold off nearly 90% of the property in a half-dozen different transactions. Ryan Decl. ¶ 7, J.A. __. Conrail did not seek, and no one suggested it should seek, authorization from the Interstate Commerce Commission ("ICC") to sell off this track or the underlying land.[2] Conrail only retained

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the District of Columbia sitting as the Special Court are to the D.C. Circuit. 45 U.S.C. § 719(e)(3).

[2] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, abolished the ICC and established the STB as the successor to the ICC.

easements where it was necessary to be able to switch the few remaining shippers in the area. Ryan Decl. ¶¶ 9, 29, J.A. __.

The City was still not satisfied with the pace of development. Indeed, in 1984 the Mayor of Jersey City complained to the Chairman of Conrail that Conrail was not doing enough to dispose of "underutilized railroad property and trackage which services the remaining industrial facilities" in the Harsimus Cove area. Ryan Decl. ¶ 30, J.A. __. Conrail continued to seek to accommodate the needs of the few remaining shippers and the City's redevelopment objectives until the last shipper left the area in the late 1980s. At that point, all that was left was the Embankment property. When the City began to urge Conrail to remove the bridges and tracks and sell off the Embankment property, Conrail agreed to do so as soon as it completed a track connection elsewhere ("the Marion Connection") that would eliminate the need to use the Embankment trackage for turnaround space for a train moving to a shipper in another part of the county. In the interim, Conrail agreed to work with the City to dismantle the tracks and bridges on the Embankment property that were not needed for the turnaround operation. *Id*.

Conrail's work was constrained by its own limited budget, and did not proceed fast enough for the City. In 1994, the City joined with a developer, National Bulk Carriers, Inc., that had earlier bought a large block of property from Conrail east of Henderson Street in the Harsimus Cove area, to tear down the

bridge over Henderson Street (now Marin Boulevard). Ryan Decl. ¶ 31, J.A. __. When the Marion Connection was completed in 1994, Conrail removed the switch connecting the Embankment tracks to the Main Line and began planning for demolition of the remaining infrastructure on the Embankment property. The City repeatedly pressed Conrail to finish the job, but the demolition work was expensive, and Conrail did not finish it until 1997. *Id.* at ¶¶ 31-32.

The City then commissioned extensive redevelopment studies for the project, which were completed in July 1999. Ryan Decl. ¶ 32, J.A. __. At the same time, JCRA was in active negotiations with Conrail to acquire the property for redevelopment. Pursuant to those negotiations, the JCRA conducted extensive surveying, soil boring, demolition/clearance estimating, property appraisal, and other planning work. *Id*. At no time during any of these negotiations did anyone suggest that there was any need for Conrail to obtain abandonment authority from the STB. Ryan Decl. ¶¶ 28, 29, 31, J.A. __. The Embankment property was treated just like all of the other Harsimus Cove property that Conrail had sold off for redevelopment—as yard and spur track. Ryan Decl. ¶ 31, J.A. __.

C. Conrail's Disposition Of The Embankment Property

The City's redevelopment plans were sidetracked when a group of citizens petitioned the State of New Jersey to have most of the Embankment property designated as an "historic place." Because that designation would significantly

limit the redevelopment alternatives for the property by the City, both the City and Conrail opposed the designation, but the State nevertheless in 1999 placed the Embankment property on the State Register of Historic Places. Ryan Decl. ¶ 33, J.A. __. The City and the JCRA thereafter stopped talking to Conrail about acquiring the property and moved on to other projects. Since the City and the JCRA were no longer interested in the embankment parcels, Conrail in December 2001 sent out a bid notice to a number of potential developers, and in October 2002 formally put the parcels out for bid. Ryan Decl. ¶¶ 8, 33, J.A. __.

Conrail was careful to send both the notice and the bid package to the JCRA. Ryan Decl. ¶ 33, J.A. __. The JCRA and the City reviewed the package, but they still had no interest. Ryan Decl. ¶¶ 33-34, J.A. __. In January 2003, the City passed an ordinance designating the earth and stone Embankments as an "historic landmark," and Conrail informed all of the prospective bidders that the ordinance would require a successful bidder to obtain the consent of the Jersey City Historic Preservation Commission to proceed with any development. Ryan Decl.¶ 35, J.A. __.

Only one bidder, SLH Holdings Co., LLC ("SLH"), met Conrail's minimum bid requirements. Accordingly, Conrail began negotiations with SLH to sell the remaining parcels to the entities, the LLCs, that SLH had formed for that purpose. In October 2003, Conrail received a letter from the City proposing "opening a

dialogue" with Conrail to have a public entity acquire those parcels. Ryan Decl. ¶ 36, J.A. __. By then, Conrail had been attempting to dispose of the property since 1997, and it had entered into a contract to sell to SLH as a result of the bidding process. Conrail determined to proceed with the contract with SLH, but to remain open to any concrete proposals from other entities in the event the contracted sale was not completed. No such concrete proposal was ever forthcoming. *Id.*[3] In July 2005, Conrail closed the transaction with the LLCs. Ryan Decl. ¶¶ 8, 41, J.A. __.

It was only after Conrail had closed the sale and the LLCs had begun presenting their development plans to the Jersey City Planning Board that the City took the position that Conrail was required to obtain abandonment authorization from the STB before disposing of these last parcels from the Harsimus Cove Yard area.[4] The City petitioned the STB for a declaratory order that abandonment

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[3] In September 2004, the City Council passed an ordinance authorizing the City to purchase or condemn the Embankment property, but the City never made an offer to Conrail or to SLH or began condemnation proceedings to acquire the property. Ordinance 04-096 (Sept. 8, 2004), J.A. __.

[4] As part of their effort to obtain development approvals from the City, the LLCs sought a "hardship exemption" from the Jersey City Historic Preservation Commission ("HPC") to enable the LLCs to demolish part of the embankment structures. After several hearings, the HPC in June 2009 issued a resolution denying the LLCs' request. Jenkins Decl. ¶ 7, Exh. C, J.A. __. The LLCs appealed the HPC's decision to Jersey City Zoning Board of Adjustment, which affirmed the HPC's decision in August 2009. The LLCs then appealed the HPC's and Zoning Board's decisions to the New Jersey Superior Court. The Superior Court remanded the case to the Zoning Board for de novo hearings in September 2010. Proceedings are ongoing before the Zoning Board.

authorization was required, which the STB granted in August 2007. *City of Jersey City, et al—Pet. for Dec. Order*, STB Fin. Dkt. No. 34818, 2007 WL 2270850 (served Aug. 9, 2007); *see also City of Jersey City, et al—Pet. for Dec. Order*, STB Fin. Dkt. No. 34818, 2007 WL 4973945 (served Dec. 19, 2007).

Conrail and the LLCs appealed the STB's decisions to this Court, which vacated the STB's decisions. *Conrail*, 571 F.3d at 20. Appellants filed a petition for rehearing en banc, which the Court denied. *See* 571 F.3d at 13. Appellants then filed their Complaint in the district court, which dismissed their case for lack of standing. Mem Op. 30-31, J.A. __. Appellants now appeal the district court's decision to this Court.

SUMMARY OF ARGUMENT

Under Article III of the Constitution, standing is a jurisdictional requirement that must be met with evidence, not simply allegations, when challenged on a motion for summary judgment. As the parties invoking federal jurisdiction, Appellants Jersey City, RTC, and the Coalition bore the burden below of establishing standing. Their witnesses' affidavits, however, failed utterly to show that they had suffered concrete and actual or imminent injury that was fairly traceable to Conrail's conduct and that would be remedied by a ruling in their favor. Accordingly, the district court correctly dismissed their case for lack of standing.

The principal claim of Jersey City's witnesses was that the City wished to acquire the Embankment property for possible rail, trail, historic preservation, and open space use, and it needed the court to determine whether abandonment authority was first required from the STB. The principal fallacy in this argument is that both Conrail and the LLCs have consistently taken the position that STB abandonment authority is ***not*** required for the City to purchase or condemn the Embankment property. Thus, neither Conrail nor the LLCs pose an obstacle to the City's acquisition of the Embankment property, and Appellants themselves fully support such acquisition. As the district court determined, judicial intervention would not benefit the City, because if it prevailed in its position that STB abandonment authority is required, that would ***preempt*** the City's condemnation authority. Further, the City has not identified any party that could at this point invoke STB jurisdiction to challenge the City's right to proceed now to condemn the Embankment property. Thus, the City has identified no concrete condemnation benefit that it would receive from the exercise of federal jurisdiction.

Jersey City's witnesses also claimed that if the City were permitted to litigate the question of the STB's abandonment authority, and if it prevailed, the City could then invoke N.J. Stat. Ann. § 48:12-125.1 ("New Jersey Statute") to claim that (1) the City had been denied the opportunity that statute provides for the City to consider whether to purchase property slated for abandonment, and,

accordingly, (2) the sale to the LLCs should be voided. As the district court found, there are two obvious flaws in that claim. First, the City in fact was given ample notice and opportunity to bid on the Embankment property before Conrail accepted the LLCs' bid. Second, the City can void the sale to the LLCs by condemning the property. Accordingly, the City provided no evidence of any tangible benefit it would receive if it were able to invoke the New Jersey Statute. Moreover, the New Jersey Statute could not be applied in any event, since it is preempted by the federal abandonment scheme.

Appellants in their brief make much of remedies they claim would be available in an STB abandonment proceeding that allegedly would facilitate the acquisition or preservation of the Embankment property. Chief among the alleged acquisition remedies is a federal statutory provision, 49 U.S.C. § 10904, that enables third parties to make an "offer of financial assistance" ("OFA"), at fair market value, for the purpose of continuing rail ***freight*** service on a line that would otherwise be abandoned. As the district court found, however, none of Jersey City's witnesses stated any firm intention for the City to make an OFA. The City cannot claim injury-in-fact for standing purposes based upon the unavailability of a remedy it has no concrete commitment to use. Moreover, there is little likelihood that an OFA from the City would be accepted in any event, since Jersey City's

witnesses provided no evidence whatsoever that there is any realistic prospect of freight rail service being provided on the Embankment property.

Appellants also claim that if this Court permits their case to continue, and if they prevail, they can take advantage of the environmental and historic preservation reviews associated with STB abandonment proceedings to help keep the Embankment property from being demolished and developed. All of the claims of injury by RTA's and the Coalition's witnesses arise from the prospect of demolition and development of the Embankment property. The problem with these claims, as the district court observed, is that the Embankment property is already being kept from being demolished and developed by Jersey City's designation of the property as an historic landmark in 2003. The Jersey City Historic Preservation Commission and the Jersey City Zoning Board of Adjustment have both rejected the LLCs' waiver requests. While it is possible that the Jersey City authorities or the New Jersey courts may reverse this position at some point in the future, none of Appellant's witnesses claims that any such result is imminent, or even likely. Accordingly, Appellants are not facing any concrete injury-in-fact with respect to demolition and development of the Embankment property.

Appellants claim that since they are asserting "procedural injury" they need not demonstrate that the procedures they seek to invoke will actually help them.

This claim is wrong on two counts. First, this is not a procedural injury case. Appellants are not here claiming procedural failure by a government agency, and no remedy provided by this Court would be directed to an agency. Second, even if this were a procedural injury case, Appellants would still have to show concrete injury-in-fact that needs federal judicial intervention to remedy. None of Appellants' witnesses showed any such injury.

Finally, the Court should reject Appellant's one-paragraph claim that they are entitled to an award of summary judgment. Even assuming Appellants were found to have standing to pursue their claims, there are genuine disputes of material fact regarding the regulatory status of the Embankment property that would require a trial on the merits.

ARGUMENT

I. STANDARD OF REVIEW AND LEGAL FRAMEWORK

A. Standard Of Review

The district court's summary judgment order on standing is subject to *de novo* review. *See, e.g.*, *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). In reviewing the record in appeals of summary judgment orders, this Court has stated that "[w]e examine the facts in the record and reasonable inferences in the light most favorable to the nonmoving party, but do not accept bare conclusory allegations of fact." *Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997) (citation omitted).

B. Legal Framework

"In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1148 (2009) ("*Summers*"). Three elements constitute the "irreducible constitutional minimum" requirements for standing:

> First, the plaintiff must have suffered an injury-in-fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561(1992) ("*Lujan*") (internal citations, alterations, and quotation marks omitted).

"The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561 (citation omitted). Although Appellants "need not prove the merits of their case in order to demonstrate that they have Article III standing," they "must show that there is a substantial probability" that they will suffer harm to their "concrete and particularized interests." *Am. Library*

Ass'n v. FCC, 401 F.3d 489, 493 (D.C. Cir. 2005).[5] This showing is required regardless of whether the claim at issue involves harm to a substantive right or a procedural right. *Summers*, 129 S. Ct. at 1151. *See also Gettman v. DEA*, 290 F.3d 430, 433 (D.C. Cir. 2002); *Fund Democracy LLC v. SEC*, 278 F.3d 21, 27 (D.C. Cir. 2002).

The issue before the Court is not whether the Petitioners ***could*** have demonstrated standing through competent evidence, but whether they in fact have done so. *Am. Chemistry Council*, 468 F.3d at 820. When standing is raised at summary judgment, the party whose standing is at issue must submit affidavits that set forth "specific facts," and these affidavits must "'be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.'" *Ass'n of Flight Attendants v. DOT*, 564 F.3d 462, 465 (D.C. Cir. 2009) (quoting Fed. R. Civ. P. 56(e)(1)). *See also Lujan*, 504 U.S. at 561.

Furthermore, a party seeking to establish standing is bound by, and limited to, the record that the party created in the district court. Thus, in *Summers*, the

[5] Associational plaintiffs like RTC and the Coalition "must support each element of [their] claim to standing by affidavit or other evidence, and their burden of proof is to show a substantial probability that the [action complained of] causes at least one of its members an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Am. Chemistry Council v. DOT*, 468 F.3d 810, 818 (D.C. Cir. 2006) (internal quotation marks and citations omitted).

Court refused to consider affidavits filed after judgment in the district court and the filing of a notice of appeal. *See Summers*, 129 S. Ct. at 1150, n* ("If respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively."); *see also id.* at 1153.

As we now show, none of the Appellants has carried its burden of establishing standing.

II. THE CITY DOES NOT HAVE STANDING

A. The City's Possible Interest In Acquiring The Property Does Not Establish Injury-In-Fact

1. The City Presented No Evidence Of A "Firm Intention" To Acquire The Property

In the proceedings below, the City's claim of injury-in-fact focused on alleged impediments to its possible plans to acquire the Embankments. *See* Compl. ¶ 5, J.A.__ (Conrail's actions deprived the City of the opportunity to obtain the property under N.J. Stat. 48:12-125.1 or through "STB-administered remedies," thereby harming the City); Pls' Opposition to Defendant Conrail's Cross-Motion for Summary Judgment at 3 ("Conrail's abandonment . . . without first securing an abandonment authorization clearly injured the City by preventing it from lawfully exercising its legally protected right to condemn the line for public purposes.") (footnote omitted); *id.* at 13 (STB "public use condition" could be used to preserve property pending eminent domain proceedings); *id.* at 14 (STB "abandonment conditions" could require Conrail to make property available for

public acquisition); Affidavit of John J. Curley ¶ 3, J.A. __ ("Jersey City wishes to acquire the property for rail use . . . for historic preservation, for trail use, for open space use, and for a combination of these uses."); Declaration of the Honorable Jerramiah Healy, Mayor, Jersey City ¶¶ 4, 6, 7, J.A. __; Declaration of Robert D. Cotter (City Planning Director) ¶ 3, J.A. __.

As *Summers* makes clear, when a plaintiff seeks to predicate injury-in-fact on the contention that the defendant's action or inaction threatens future activities or interests of the plaintiff, the plaintiff must, at a minimum, establish a "firm intention" to engage in the activity. *Summers*, 129 S. Ct. at 1150 (plaintiffs' affidavit did not assert "any firm intention to visit" locations where government action might damage forests). A "vague desire" or a statement that the plaintiff "'wants'" (*id.* at 1150) to engage in the activity is not sufficient to satisfy the requirement of imminent injury: "'Such "some day" intentions—without any description of concrete plans, or indeed any specification of *when* the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.'" *Id.* at 1150-1151 (quoting *Lujan*, 504 U.S. at 564).

In its summary judgment submissions, the City failed to set forth legally adequate evidence of a "firm intention" or "concrete plans" (*Summers*, 129 S. Ct. at 1150-1151) to acquire the Embankment property. Nowhere in the declarations of the City's declarants Curley, Healy, and Cotter is there ***any*** commitment, much

less a firm commitment, to acquire the property. Indeed, the declarations presented in the district court appear to have been carefully crafted not to represent to the district court (and the public) that the City was firmly committed to acquiring the property. These declarations do no more than aver an interest in possibly acquiring the property at some uncertain date in the future. As a result, the City did not present evidence of the "*concrete interest*s" (*id.* at 1151) necessary to establish that Conrail's actions or inaction caused or "threaten[] imminent and concrete harm to the interests" of the City (*id.* at 1150).

2. Even If The City Had A Firm Intention To Acquire The Property, Its Supposed Injury Is Entirely Self-Inflicted

Even if the City had presented evidence of a current firm intention to acquire the property, it still could not establish the requisite injury for standing purposes.

First, beginning in 1997, Conrail spent years working with the JCRA and the City for the City to acquire the Embankment property. As the district court noted, it is undisputed that in December 2001 and October 2002 Conrail gave the City the opportunity to bid on the property, and the City determined that it had no interest. Because it was given ample opportunity to acquire the property, the City cannot now complain that it was injured by its choice not to acquire the Embankment property before it was sold to the LLCs. Mem. Op. 17-18, J.A. __. The City's injury—if any—is "self-inflicted" and not fairly traceable to Conrail's subsequent sale of the Embankment property to the LLCs. This Court has made

clear that such self-inflicted injury cannot support standing. *See Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1290 (D.C. Cir. 2007) ("*Public Citizen I*"); *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing. Such harm does not amount to an 'injury' cognizable under Article III. Furthermore, even if self-inflicted harm qualified as an injury it would not be fairly traceable to the defendant's challenged conduct.") (citations omitted).

Confronted with the City's own inaction, Appellants in their brief suggest that the City was barred from purchasing or condemning the property until Conrail "sought and received abandonment [authority from the STB]." App. Br. 34 n.8. That was not, of course, why the City declined to bid on the property when it had the opportunity. The evidence is undisputed that the City at that point was simply not interested. Mem. Op. 17, J.A. __.

Second, putting the City's past dilatoriness to one side, Appellants also cannot predicate a viable injury-in-fact claim on their assertion that the City cannot ***now*** condemn the property under its local eminent domain authority because federal law preempts state condemnation procedures. *See, e.g.*, App. Br. 26.[6] Here

[6] Appellants go so far as to argue that "there is no genuine dispute regarding the regulatory status of the line. *See* App. Br. 29 (heading). We address that argument in Section V, below.

too, the City's supposed injury is self-inflicted, because the only impediment to the City's ability to initiate condemnation proceedings is its own litigation posture. Indeed, as the district court properly concluded, federal judicial intervention would not advance, but impede, the City's professed goal of condemning the Embankment property—because the position Appellants advocate, if adopted by the court, would preempt the very state eminent domain law the City seeks to invoke. Mem. Op. at 15, J.A. __.

Faced with the material defects that the district court recognized in their injury claim, Appellants insist that the district court's analysis improperly assumed that Appellants would not prevail on the merits. App. Br. 31. But this is not what the district court did. Rather, the district court assessed whether the City suffered actual or imminent injury to an interest in acquiring the property and concluded that the City had injured itself and, ironically, that the City would be worse off if it ***prevailed*** in the case. This is an altogether appropriate inquiry in assessing standing. After all, when the outcome of litigation could not make any difference with regard to the very injury of which the plaintiff complains, the case obviously does not address an actual or imminent injury. *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 944 (D.C. Cir. 2004) (no standing when plaintiffs "would be no better off than they are under the [ ] current policies"); *Borg-Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831, 834 (D.C. Cir. 2001) (no standing

when "even if the district court were to grant the relief [the plaintiff] seeks in this case the company would gain nothing"); *America W. Airlines, Inc. v. Burnley*, 838 F.2d 1343, 1345 (D.C. Cir. 1988) (no standing when "if the merger were overturned . . . [the plaintiff] would be no better off").[7]

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[7] Citing three cases (App. Br, 39-40), Appellants criticize the district court for allegedly focusing on the availability of alternative remedies, rather than Appellants' allegations (App. Br. 39) and "second-guessing" (App. Br. 40) the City's interests. The district court, however, did not run afoul of the principles articulated in these cases.

In *Community Nutrition Institute v. Block*, 698 F.2d 1239 (D.C. Cir. 1983), *rev'd on other grounds*, 467 U.S. 340 (1984), this Court held that consumers who were deprived of a lower-priced alternative to whole milk suffered injury-in-fact despite the fact that they could obtain an alternative product that would ameliorate their injury. *See* 698 F.2d at 1247. Here, the district court did not assess whether the City could substitute something else for the Embankment property (thereby ameliorating the alleged injury), but rather considered whether there is an actual or imminent injury to the City's interest in acquiring the property, and whether the City is responsible for any injury that it claims.

Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3d Cir. 1971), was a statutory standing case under Title VII, 42 U.S.C. § 2000e, *et seq*., in which plaintiff claimed that he was discriminated against in seniority and vacation schedules, and that he was discharged by his employer and discriminated against by his union on the basis of race. Hackett's injuries under Article III were clear and had already occurred. Here, Appellants' alleged injuries do not exist.

Redden v. ICC, 956 F.2d 302 (D.C. Cir. 1992), also fails to support Appellants' criticism of the district court. In the proceedings below, the district court pointed out that the procedural remedies sought by Appellants would inevitably exacerbate the very injury of which they complain—that is, their alleged inability to acquire the Embankment for use by the City. In *Redden*, by contrast, this Court found it irrelevant that there were possible future scenarios that would, on the whole, leave plaintiff worse off than it would have been if it had not brought the case at all.

Appellants argue in their brief, however, that they would benefit from an adjudication of the regulatory status of the property, because, if the City simply condemns the property through its local eminent domain authority, there might be a cloud on the City's title to the property. App. Br. 29. Appellants also argue that, in such circumstances, the City might find itself subject to common carrier obligations as the successor to a rail carrier. App. Br. 28.

These speculative and remote risks cannot establish injury-in-fact. Appellants have never identified ***anyone*** who reasonably could be expected to attack the City's title on the basis of the jurisdictional status of the property.

Certainly, having argued vigorously in the district court and to this Court that the property is ***not*** subject to STB jurisdiction, neither Conrail nor the LLCs would be a position to attack the City's title to the property on the grounds that the property ***is*** subject to the STB jurisdiction. The STB is not a likely protester either. As the district court pointed out (Mem. Op. at 13 n.12, J.A. __), the STB had ample notice of the judicial proceedings in the district court, but did not participate. Nor could the City base standing on the remote possibility that a shipper might later protest the condemnation of the property (or seek to hold the City to a common carrier obligation to provide freight rail service). No train service has been provided on the Embankment property in many years, there is no

infrastructure for providing such service, and no shipper has requested service.[8] Ryan Decl. ¶ 31-32, J.A. __.

Appellants' alleged "cloud on the title" injury, therefore, amounts merely to an allegation of a (remotely) ***possible*** future harm—harm that ***might*** arise someday if the City finally decides to acquire the property and if, after using its local eminent domain authority to do so, someone (Appellants do not say who) challenges the City's title to the property. Such claims of possible future risks of harms are inherently suspect grounds for standing. *See Public Citizen, Inc. I*, 489 F.3d at 1294 (stating "there is a powerful argument that 'increased-risk-of-harm' claims . . . fail to meet the constitutional requirement that a plaintiff demonstrate harm that is 'actual or imminent, not conjectural or hypothetical'") (quoting *Lujan*, 504 U.S. at 560). The D.C. Circuit has allowed standing based on increased risk of harm, "when there was at least *both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account." *Id.* at 1295 (citations omitted; emphasis in original). Appellants have not come close to establishing either prong of the standard set forth in *Public Citizen I.*

[8] Of course, as discussed below, if the City were serious about an intent to acquire the property through an OFA, the City would be undertaking common carrier obligations on its own initiative. Thus, it is unclear why the City would view the hypothesized demand for common carrier service as a threat or risk.

B. The City's Alleged Desire To Invoke N.J. Stat. 48:12-125.1 Does Not Support Its Standing Claim

1. The City Has Not Demonstrated Any Injury Caused By Lack Of Access To The New Jersey Statute's Procedures

Appellants also seek to base their standing on a deprivation of the opportunity for the City to acquire the property through the procedures provided by N.J. Stat. 48:12-125.1 ("New Jersey Statute"). When Conrail sold the Embankment property to the LLCs, the New Jersey Statute required a railroad to offer rail property approved for abandonment by the STB to state and local governments for 90 days before selling it to private entities. Mem. Op. 16, J.A. __. The purpose of the statute was to give governmental authorities "an opportunity to acquire, by purchase or condemnation, railroad rights of way proposed to be abandoned." Jenkins Decl. ¶ 6, Exh. B, J.A. __; *see also* Statutory Addendum, *infra*. The City claimed below that it would benefit from application of the statute because it would "afford[ ] the City a protected 90 day period in which to decide whether it wished to acquire the [Embankment] property." Curley Aff. ¶ 7, J.A. __. This statute does not support Appellants' standing.

First, as noted above, Appellants have not presented evidence that the City had or has a "firm intention" to acquire the property. Accordingly, the City cannot base injury-in-fact on procedures that might have facilitated acquisition efforts. ***Second***, as also noted above, Conrail worked closely with the City and the JCRA

for several years to negotiate a sale of the property. It is undisputed that, in December 2001 and October 2002, Conrail gave the City the opportunity to bid on the property, and the City determined that it had no interest in the property. The City cannot claim, therefore, that it did not have much more than 90 days to consider whether it wished to acquire the property. Mem. Op. 17-18, J.A. __.

Third, as the district court discussed, Appellants nowhere demonstrated below "why the application of the New Jersey Statute would leave them in any better position than they are in today." Condemnation of the property under the City's local eminent domain authority would nullify the sale to the LLCs and permit the City to acquire the property for just compensation. Mem. Op. 18, J.A. __.

Appellants attempt to buttress their position on appeal by claiming that they will be injured if they cannot have recourse to the New Jersey Statute because application of the statute would give them the right to meet the price the LLCs paid Conrail for the property—rather than paying the current market value of the property. App. Br. 37. The problem with this claim is two-fold.

In the first place, their argument rests on amendments to the statute that were not made until January 2010. As the district court observed in its decision, "[t]he plaintiffs have presented no argument that these provisions apply retroactively to Conrail's sale of the property to the LLCs." Mem. Op. 16 n.13, J.A. __. At the time of the bidding and sale process for the Embankment property, the New Jersey

Statute merely accorded government entities 90 days to decide whether to acquire the property—whether by negotiation or condemnation. The City passed on the opportunity to bid on the property. The condemnation route, however, has always been available to the City, with or without the New Jersey Statute.[9] Having stalled for almost a decade in exercising its condemnation rights, the City cannot be heard now to complain that it must pay fair market value when and if it ever gets around to acquiring the property.

In the second place, even assuming that the 2010 amendments were applicable, Appellants have not shown what the market value of the property is. Thus, they have not established that the City would pay less if it could invoke the 2010 amendments than if it paid fair market value.[10]

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[9] Appellants claim that the condemnation process is burdensome and exposes the City to the risk of initiating condemnation proceedings without knowing how large the final award will be. App. Br. 37. But the New Jersey Statute provided no shortcut to condemnation. Absent the City bidding on the property or otherwise negotiating a price, the New Jersey Statute left the City to the same condemnation remedy it has always had.

[10] Significantly, Appellants claimed below that the City was not required to demonstrate that application of the New Jersey Statute would result in any tangible benefit to the City. Mem. Op. 18, J.A. __. There, they based their claim on "procedural rights" cases that provide that a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all of the normal standards for redressability and immediacy. *Id.* Because this is a claim that Appellants on appeal make generally to justify their failure to demonstrate concrete injury with respect to federal as well as state abandonment remedies, we address Appellants' "procedural rights" argument in Section II.E., below.

Because the City had so clearly failed to establish any injury or causation in connection with the New Jersey Statute, the district court did not reach another ground Conrail provided for rejecting the plaintiffs' reliance on that statute—i.e., that the statute is preempted by federal law. Mem. Op. 11 n.11 & 21 n.14, J.A. __. This Court need not reach that issue either, since the City's failure to establish injury or causation provides more than ample grounds for the Court to conclude that Appellants' reliance on that statute was misplaced. Nevertheless, Conrail and the LLCs contend that the unconstitutionality of the New Jersey Statute also vitiates Appellants' standing claims based on that statute. Accordingly, we address the issue below.

2. The New Jersey Statute Is Unconstitutional

If this Court permitted this case to proceed, and the district court on remand found that the Embankment trackage was conveyed in the FSP and conveyance documents as a "line of railroad," it would be subject to the abandonment requirements of the federal ICC Termination Act of 1995 ("ICCTA"). *See* 49 U.S.C. §§ 10903-10905. In particular, under Section 10905 and its implementing regulations, the STB determines when a property proposed for abandonment may be encumbered by a "public use condition." 49 C.F.R. § 1152.28. If the STB finds that the property is appropriate for public uses, the STB may prohibit disposal of the property for 180 days from the date of the STB's abandonment approval,

"unless the properties have first been offered, on reasonable terms, for sale for public purposes." 49 C.F.R. § 1152.28(b). This remedy, like other remedies provided in the ICCTA relating to interstate rail transportation, is "exclusive," and preempts any state law remedies. 49 U.S.C. § 10501(b). *See Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 449-50 (D.C. Cir. 2010) (ICCTA provides both for "exclusive" STB jurisdiction and for express preemption of any state-law remedies).

The New Jersey statute not only purports to regulate in an area exclusively reserved for the STB, but it conflicts with the STB's settled implementation of federal law by holding a transaction "void" if the requisite state-law notice is not given. Under 49 U.S.C. § 10905, the STB may prevent "disposal" of property for up to 180 days, but it may not force a railroad to engage in negotiations with a public entity or "void" an agreement by the railroad to sell the rail line to a private party.[11]

[11] *See, e.g., Ga. Sw. Div., S.C. Cent. R.R. Co.—Abandonment Exemption*, STB Docket No. AB-385 (Sub-No. 1X), 1996 WL 39972, at *4 (served Feb. 2, 1996) (observing that "[t]his agency has consistently held that . . . we cannot compel a carrier to sell a line for public purposes" and rejecting argument that ICC had authority under [former Section 10906, now Section 10905] to void railroad's prior contractual commitment to a private party). *See also Conn. Trust for Historic Pres. v. ICC*, 841 F.2d 479, 483 (2d Cir. 1988) (upholding ICC's interpretation and application of current Section 10905); *In Re Conservation Law Found.*, 782 A.2d 909, 913 (N.H. 2001) (holding New Hampshire statute that would regulate and diminish the post-abandonment sales value of rail line was preempted by the ICCTA).

Appellants argued below, citing *Hayfield N. R.R. Co. v. Chicago & N. W. Transp. Co.*, 467 U.S. 622, 633-34 (1984), that the New Jersey Statute was not preempted, because the STB does not have jurisdiction over rail property "post-abandonment." The first fallacy in this argument is that the New Jersey Statute applies ***pre***-abandonment, merely upon the STB's authorization of abandonment. Further, as the court in *In Re Conservation Law Foundation* emphasized, *Hayfield* was decided long before enactment of the ICCTA, which broadened the preemption language of 49 U.S.C. § 10501(b). 782 A.2d at 912.

Finally, the statute enforced in *Hayfield* differed from the statute involved in *In Re Conservation Law Foundation* and the statute involved in this case. *Id.* In *Hayfield*, the Supreme Court emphasized that the state law involved there was a condemnation statute, and "state law normally governs the condemnation of ordinary real property." 467 U.S. at 632. Like the statute involved in *In Re Conservation Law Foundation*, however, N.J.S.A. 48:12-125.1 is not an ordinary state condemnation statute. Conrail does ***not*** contend that the City is preempted from condemning the Embankment properties using routine state-law eminent domain procedures. On the contrary, Conrail has long taken the position that there is no legal impediment to the City acquiring those properties by eminent domain. What Conrail would object to, ***if*** the properties were deemed to be a line of railroad subject to the STB's preemptive regulation and ***if*** the City ever invoked the New

Jersey Statute in connection with an STB abandonment proceeding, is the notion that the statute could be used to impose a different "public use" notice requirement on Conrail than the exclusive federal law requires, and that the state statute could be used to "void" a sale of the property by the railroad that federal law would sanction.[12]

In sum, Appellants have failed to demonstrate that their inability to invoke the New Jersey Statute causes them any concrete injury. In addition, the New

[12] This is not a case where there is no direct federal regulation and the Court must assess the extent to which, as applied, the state regulatory scheme nevertheless impermissibly conflicts with the federal regulatory scheme. *See, e.g., N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252-55 (3d Cir. 2007) (discussing criteria for determining whether state environmental permitting requirements unduly interfered with rail operations not directly regulated by the STB). This case involves ***direct*** STB regulation under a specific statutory provision, 49 U.S.C. § 10905, governing a "public use" moratorium on a railroad's disposition of its property. Both the courts and the STB have held under the ICCTA that where a state statute attempts to regulate in an area that the STB regulates directly, there is no inquiry into whether the state statute conflicts with the STB's general regulatory authority. The state statute is preempted ***per se***. *See, e.g., New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008) ("'[T]here can be no state or local regulation of matters directly regulated by the Board—such as the construction, operation, and ***abandonment of rail lines*** (*see* 49 U.S.C. 10901-10907) . . . .' [T]he preemption analysis for state regulations in this first category is addressed to 'the act of regulation itself' and 'not to the reasonableness of the particular state or local action.'") (citing *CSX Transp., Inc.—Pet. for Declaratory Order*, STB Fin. Docket No. 34662, 2005 WL 1024490, at *2-3 (served May 3, 2005) (emphasis added)). *See also Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318, 323 (1981) (ICC has plenary authority over abandonment process).

Jersey Statute cannot support any claim of injury because it is preempted by the ICCTA.

C. The City's Alleged Desire To Invoke Federal Abandonment Remedies Does Not Support Its Standing Claim

Aside from access to the New Jersey statute, Appellants argue federal judicial intervention is required here to avoid injury that the City allegedly will suffer from being denied access to STB-administered remedies available in abandonment proceedings. Chief among those remedies is supposedly the City's ability under 49 U.S.C. § 10904 to make an "Offer of Financial Assistance" ("OFA") to continue freight rail service. App. Br. 6. Appellants also cite the City's ability to invoke the "public use provisions" of 49 U.S.C. § 10905 and the "railbanking" provisions of 16 U.S.C. § 1247(d), as well as the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq. App. Br. 6-8. As we discuss below, none of these supposed remedies provides any basis for the City to claim standing here.

1. The City Presented No Evidence Of A Firm Intention Either To Make An Offer Of Financial Assistance Or To Provide Freight Rail Service

The purpose of the OFA process in an abandonment proceeding is to provide an opportunity for a party to acquire the line, at fair market value, in order to continue freight rail service. *See, e.g., Borough of Columbia v. STB,* 342 F.3d 222,

226 (3d Cir. 2003). Where, as here, the line has been out of service for more than two years and qualifies for a "class exemption" from abandonment application requirements, an interested party must first file a notice of intent to file an OFA and then the party must file the OFA itself. 49 C.F.R. § 1152.27(c)(2). The STB will reject an OFA if it determines that the offeror is "not genuinely interested in providing rail service or that there is no likelihood of future traffic." *Union Pac. R.R. Co.—Abandonment & Discontinuance of Trackage Rights Exemption—In Los Angeles County, CA*, STB Docket No. AB-33 (Sub-No. 265X), 2008 WL 1968728, at *1 (served May 7, 2008) ("*Los Angeles County*").

The district court determined that it did not need to reach the question whether the City could succeed with an OFA, "because the plaintiffs have offered no evidence that Jersey City would, in fact, submit an OFA if it were to succeed in this action." Mem. Op. 22, J.A. __. Appellants argue that the City submitted a notice of intent to file an OFA and that suffices to demonstrate that the City would in fact carry through with filing an OFA. App. Br. 21. That argument is wrong on at least two counts. First, the filing of an OFA notice does not commit a party to actually file an OFA and pursue the OFA process to completion. Second, the City's ***witnesses***, as opposed to its ***lawyers***, made no commitment to utilize the OFA process to acquire the property. Nothing in the City's declarations and

affidavit manifests a "firm intention" (*Summers*, 129 S. Ct. at 1150) to file an OFA. Indeed, they do not even mention the OFA process. Mem. Op. 24, J.A. __.

Even in their brief to this Court, Appellants hedge on their commitment to follow through on an OFA, stating that one possible scenario is that "Plaintiffs can elect not to request an OFA or abandonment conditions . . . ." App. Br. 32. This is a remarkable concession in the context of this case, and flies in the face of their assertion that the district court erred in concluding that the City did not present evidence of a firm commitment to file an OFA.

Moreover, the City presented no evidence that, compared with the local eminent domain procedures that the City has refused to invoke, the OFA process would provide any advantages in acquiring the property. Appellants argue, citing the City's witness Curley, that the City "expressly averred that [the City] can only protect its interest in acquiring the Harsimus Branch 'at reasonable cost by seeking orders sufficient to require Conrail to submit to STB abandonment authorization.'" App. Br. 36 (quoting Curley Aff. ¶ 16, J.A. __). This is not what Curley said. Rather, he stated that, because (on his understanding) local eminent domain authority was preempted until Conrail received abandonment authority, the only way to acquire the line at reasonable cost would be to go through the STB abandonment process:

> Since it is now clear that Conrail has not received any abandonment authorization, since under federal law

> local eminent domain authority is preempted until Conrail receives such authority, and since all negotiations with Conrail and its chosen developer have been futile to date, Jersey City can only protect its interests in preserving the Harsimus Branch at reasonable cost by seeking orders sufficient to require Conrail to submit to STB abandonment authority.

Curley Aff. ¶ 16, J.A. __. Thus, Curley did ***not*** express the view that the OFA process (which he did not even mention) was better for the City than use of the City's local eminent domain authority.

Appellants also assert that "[t]his Court is required to accept Plaintiffs' verified statements, which Conrail did not controvert, that STB abandonment jurisdiction *would* 'benefit its [City's] efforts to condemn the property.'" App. Br. 36 (quoting Mem. Op. at 18, J.A. __). As just noted, the City's witnesses did not address whether STB jurisdiction would benefit the City even if local eminent domain authority were available. But that aside, in reviewing summary judgment decisions on standing, courts are ***not*** required to accept conclusory assertions that are not supported by specific facts. *See Ass'n of Flight Attendants*, 564 F.3d at 465; *Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 545 (D.C. Cir. 2003) (declarations setting forth conclusory assertions of injury, without specific facts, are insufficient).[13] *See also Summers*, 129 S. Ct. at 1150-1151 (carefully

[13] Appellants argue that *Association of Flight Attendants* is not relevant because they established a firm intent to file an OFA. *See* App. Br. 43. As we have shown, they are wrong.

scrutinizing assertions of injury-in-fact); *Gettman*, 290 F.3d at 434-35 (same); *Public Citizen I*, 489 F.3d at 1290-91 (same); *Public Citizen, Inc. v. NHTSA*, 513 F.3d 234, 238-41 (D.C. Cir. 2008) ("*Public Citizen II*") (same).

Finally, the City's attempt to base injury-in-fact on an inability to participate in the OFA process also fails because there is no credible evidence that the City would be eligible to acquire the properties at issue in the case through the OFA process. Because the purpose of the OFA process is to preserve ***freight*** rail service, the STB will reject OFAs that are not supported by specific evidence of demand for such service. *See Roaring Fork R.R. Holding Auth.—Abandonment Exemption—in Garfield, Eagle, & Pitkin Counties, CO*, 4 S.T.B. 116, 119 (1999) ("The OFA process is designed for the purpose of continuing to provide freight rail service, and is not to be used to obstruct other legitimate processes of law (whether federal, state, or local) when continuation of such service is not likely."), *aff'd sub nom. Kulmer v. STB*, 236 F.3d 1255 (10th Cir. 2001); *Los Angeles County*, 2008 WL 1968728, at *1 (rejecting OFA application where there was no evidence of shipper interest or commitment to use freight rail service if it could be made available).

Here, the City's witnesses carefully avoided stating any concrete plans for the City to provide ***freight*** rail service over the Embankment property. That is not surprising, since there has not been any freight service for years, there is no freight

rail infrastructure in place, and the City has assiduously worked to develop all of the Harsimus Cove Yard properties for non-freight-rail use. Ryan Decl. ¶ ¶ 29-32, J.A. __. Moreover, even if an intent to provide such service could be discerned in the City's evidentiary materials, the City's lack of concrete plans to offer freight rail service on the property and the extremely remote chances that it actually would be able to do so render it highly unlikely that the City could qualify for an OFA. Thus, any alleged inability of the City to avail itself of the OFA remedy cannot support a showing of actual or imminent injury.

2. The Other Federal Procedural Remedies Cited By The City Also Do Not Support Standing

Appellants also argue that the City has been denied access to other federal remedial schemes that, they contend, would benefit the City. For the reasons described above, there is no need for an in-depth response to Appellants' argument in this respect. To take the most glaring defect in their evidence, Appellants have failed to establish that the City has the kind of "concrete interest" in acquiring the property that is required for claiming injury as a result of the deprivation of a procedural remedy. *See Summers*, 129 S. Ct. at 1151. Therefore, we will note just a few salient points with regard to Appellants' discussions of the federal remedies as it relates to the injuries alleged by the City.

With regard to a federal public use condition, 49 U.S.C. § 10905, Appellants' chief argument seems to be that a 180-day delay in disposition of the

property could be used to provide time for the City to condemn it. App. Br. 46 n.10. This argument is unavailing. As noted above, the City has not provided evidence of a "firm intention" (*Summers*, 129 S. Ct at 1150) to acquire the property, and nothing is stopping the City from condemning the property ***now***, so the respect in which the absence of this federal remedy injures the Plaintiffs is utterly mysterious.

Appellants also now cite the federal "railbanking" statute, 16 U.S.C. § 1247(d), as a basis for a injury. *See* App. Br. 6-7, 27. We do not believe that Appellants made any such argument below. That is not surprising, since the railbanking statute applies only if a railroad chooses, in lieu of abandonment, to ***agree*** to "bank" a rail line for possible future freight rail use and, in the interim, to permit the right of way to be used for a trail.[14] Since Conrail has sold the property, it obviously is not going to agree to "bank" it for future freight rail use.[15]

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[14] Under the Trails Act, 16 U.S.C. § 1247(d), and the STB's implementing regulations, 49 C.F.R. § 1152.29, if the rail carrier "does not intend to negotiate an agreement" for trail use, the application of the Trails Act fails even if the track in question is subject to the STB's abandonment authority (*id.* at § 1152.29(b)(1)(ii)).

[15] Appellants' citation to the "Highline" case in support of their "railbanking" argument is misplaced. App. Br. 31 n.7, 33 (citing *Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994)). There, Conrail took the position that the rail line in question was subject to the STB's abandonment authority and ***opposed*** its abandonment. 29 F.3d at 709. As Appellants themselves acknowledge, Conrail "***agreed*** to 'railbank' the corridor for interim trail/future railroad use." App. Br. 31 n.7 (emphasis added).

With regard to the City's lack of access to other STB abandonment conditions—i.e., the processes provided by NHPA and NEPA—the district court correctly noted that Appellants had "not explain[] how the imposition of abandonment conditions or the withholding of STB abandonment approval would help Jersey City acquire the property and develop it for public uses, the municipality's principal interest in this litigation." Mem. Op. 25, J.A. __. Appellants have not made good on that deficiency here, and, in any case, it would be too late to do so now, having failed to present evidence in the district court establishing how these schemes would facilitate their acquisition of the property. *See Summers*, 129 S. Ct. at 1150 n.*, 1153. Nor, for the reasons stated above, must this Court credit Appellants' bald assertions that these schemes would be beneficial to the City.

D. The City Cannot Base Standing On An Interest In Keeping The Embankment Property "Intact"

Appellants now argue that the various federal remedies (and the STB abandonment scheme in general) would benefit the City by keeping the property "intact." *See*, *e.g.*, App. Br. 3, 20, 27, 31-32, 34 n.8, 44; *see also id.* at 51-52 (claiming injury because Conrail's sale to the LLC "has broken up the line"). It is not altogether clear what Appellants mean in positing a City interest in keeping the property "intact."

In some instances in the Appellants' brief, it appears that the City's interest in keeping the property intact is simply to preserve the status quo in case the City decides to ***acquire*** it in the future. *See*, *e.g.* App. Br. 3, 20, 27. This comports with Mayor Healy's reference to "measures generally available at the Surface Transportation Board to encourage preservation of the property intact for restored rail use, light rail use, trail use, historic preservation and so forth." Healy Decl. ¶ 4, J.A. __. If ***this*** is the interest in keeping the property "intact," it cannot provide support for the City's injury-in-fact claim because it merely rephrases the City's acquisition injury claim, which, as we have shown, is insufficient to support the City's standing.

If, however, the City wants to invoke STB jurisdiction to keep the property "intact" because of threats that the Embankments will be demolished, the City's injury-in-fact claim would fail because it is altogether speculative that the Embankments ever will be demolished. As the undisputed evidence below showed, the Embankments were designated an historic landmark in January 2003, and City agencies have refused to issue permits for their demolition or redevelopment. *See* Ryan Decl. ¶33, J.A. __; Curley Aff. ¶ 18, J.A. __; *see also* Mem. Op. 29, J.A. __. The demolition and redevelopment of the Embankments has been the subject of litigation for years (Jenkins Decl. ¶ 7 & Ex. C, J.A.__;

Curley Aff. ¶ 18, J.A. __), and to this day, it remains utterly conjectural whether the demolition of the Embankments ever will occur. *See* Mem. Op. 29, J.A. __.

Finally, if the City is positing an abstract interest in keeping the property "intact" that is not moored to a desire to acquire the property or to concerns about its demolition, then Appellants not only are raising an entirely new claim to standing for the first time on appeal but also are presenting an entirely abstract (rather than concrete) interest that cannot establish an injury-in-fact. *See Summers*, 129 S. Ct. at 1151; *Lujan*, 504 U.S. at 573 n.8 (party can enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing"). Thus, however construed, the interest in keeping the property "intact" is not a basis for the City's standing.

E. The City Cannot Avoid The Article III Requirement That It Demonstrate Concrete Injury-In-Fact By Invoking "Procedural Injury"

As they did below, Appellants seek to avoid the settled requirement that they demonstrate concrete injury-in-fact by claiming that this is a "procedural rights" case and that, accordingly, the City need not demonstrate that the procedures it seeks to invoke will actually benefit the City. App. Br. 44-53. As we discuss below, Appellants are wrong in claiming that this is a "procedural rights" case, and

they are wrong in claiming that the invocation of "procedural rights" absolves them of any requirement to show concrete injury-in-fact.

1. This Is Not A "Procedural Injury" Case

As the district court discussed, the Supreme Court has stated that "'a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.'" Mem. Op. 18 (quoting *Lujan*, 504 U.S. at 572 n.7), J.A. __. Where a plaintiff asserts it has been denied a procedural right, "'the case law relieves the plaintiff of the need to demonstrate that (1) the agency action would have been different but for the procedural violation, and (2) the court-ordered compliance with the procedure would alter the final result.'" Mem. Op. 19 (quoting *Nat'l Parks & Conservation Ass'n v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005)).

As the district court concluded, however, this Court has provided strong grounds for concluding that the "relaxed" standards endorsed by the procedural rights cases only apply where a plaintiff is challenging a procedural failure by a government agency. Mem. Op. 19 (citing *St. John's United Church of Christ v. FAA*, 520 F.3d 460, 463 (D.C. Cir. 2008) ("*St. John's*")). In *St. John's*, the Court stressed that the rule providing for a "relaxed" redressability standard in procedural cases "applies only when a party challenging an agency's procedural failure cannot 'establish with any certainty' that the *agency* would reach a different decision" and

"the redressability obstacle the petitioners face[d] [was] uncertainty over what *Chicago* would do—not the FAA." 520 F.3d at 463 (citation omitted; emphasis in original).

Similarly, this Court has stated that "[t]he point of the lower standard for redressability in a procedural-injury case is that the injury in such a case is not associated only with the substantive decision the ***agency*** reached but also with the ***agency's*** failure to follow proper procedures in reaching that decision. Therefore, in a procedural-injury case, a plaintiff need not show that better procedures would have led to a different substantive result." *Renal Physicians Ass'n v. HHS.*, 489 F.3d 1267, 1278-79 (D.C. Cir. 2007) (emphasis added and citations omitted). *See also Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) ("Sometimes, the Article III injury in these types of cases is called a 'procedural injury,' the thought being that plaintiffs suffer harm from the ***agency's*** failure to follow NEPA's procedures, compliance with which might have changed the ***agency's*** mind.") (emphasis added); *id.* (discussing NHPA and stating that "[p]laintiffs' alleged injury is similar to that under NEPA—if the ***Secretary*** had taken into account the effect of the new . . . redevelopment plan ***he*** might have placed conditions on the transfer of the land.") (emphasis added); *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) ("To establish injury-in-fact in a 'procedural injury' case, petitioners must show that 'the ***government*** act performed without the

procedure in question will cause a distinct risk to a particularized interest of the plaintiff.'") (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996)) (emphasis added); *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 51 (D.C. Cir. 1999) (stating that "in cases involving alleged procedural errors, the plaintiff must show that the ***government*** act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff") (internal quotation marks and citations omitted; emphasis added).

Here, there is no agency defendant before the Court. Appellants are not complaining about any agency action at all, and no remedy provided by this Court would be directed to an agency. Rather, Appellants have sued ***Conrail***, and are complaining that Conrail has substantively wronged them. They are not complaining about a decision of the STB. There is, therefore, no basis for concluding that this case is subject to a relaxed standard of redressability or immediacy.[16]

[16] Relying on two cases, Appellants argue that procedural injury standards have been applied in suits against private parties. *See* App. Br. 49 (citing *Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2004), and *Ass'n of Irritated Residents v. C&R Vanderheim Dairy*, 2007 WL 2815038 (E.D. Cal. 2007)). These cases do not support Appellants' attempt to expand the scope of procedural injury standing, however, because nothing on the face of either decision indicates that the defendants argued that relaxed standing requirements should not be applied in suits against private entities.

2. Even If This Were A "Procedural Injury" Case, The City Would Still Have To Demonstrate Concrete Injury-In-Fact

As the district court determined, even if this were a "procedural rights" case, Appellants would still have to demonstrate concrete injury-in-fact to support their claim that the City has standing. Mem. Op. 19-21. The Supreme Court recently addressed that issue directly in *Summers* and concluded that the "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." 129 S. Ct. at 1151. While a procedural claim "can loosen the strictures of the redressability prong of our standing inquiry," "the requirement of injury in fact is a hard floor of Article III jurisdiction." *Id.*

This Court likewise has held that a plaintiff cannot avoid the requirement that it demonstrate concrete injury-in-fact by claiming it has been denied procedural rights. *See, e.g., Ctr. For Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009) ("'a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest'") (quoting *Fla. Audubon Soc'y*, 94 F.3d at 664-65); *Ctr. For Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005) (even if the plaintiffs suffered a procedural harm, they lacked standing because

they "fail[ed] to demonstrate how they suffer[ed] actual injury to a concrete, particularized interest, caused by the challenged conduct").

As discussed above, Appellants have cited several state and federal procedures they say the City could invoke if the district court permitted their case to continue—and if they prevailed—but they have not shown how the City has suffered actual injury-in-fact. In their brief, Appellants rely heavily on NEPA and NHPA cases to argue that that they need not show that exercising their procedural rights will necessarily result in protection of the Embankment property. App. Br. 44-47. But that puts the rabbit in the hat. It assumes that the Embankment property is at imminent risk of being demolished and developed absent federal intervention, when in fact it is completely speculative under the City's historic preservation laws and procedures whether demolition and development will ever be permitted. Certainly, as the district court concluded, "it cannot be said at this juncture that the demolition and development of the Embankment is 'certainly impending.'" Mem. Op. 29 (quoting *Lujan*, 504 U.S. at 564 n.2), J.A. __.

While the Supreme Court in *Lujan* said that in procedural rights cases the "immediacy" requirement was relaxed, in *Summers* the Court made clear that it had no intention of jettisoning the requirement that plaintiffs demonstrate "imminent harm" to satisfy Article III standing requirements. The majority in *Summers* expressly rejected the dissent's suggestion that the Court eliminate the

requirement of "imminent harm" and substitute a "realistic threat" standard in its place. 129 S. Ct. at 1152-53. The Court stressed that even in procedural rights cases plaintiffs must demonstrate concrete harm, *id.* at 1151, and throughout the opinion emphasized the threat of harm must be "actual" and "imminent," *id.* at 1149-1153.[17]

Even assuming, therefore, that the application of NEPA and NHPA procedural requirements could delay demolition and development of the Embankment ***if*** demolition and development of the Embankment were ***imminent***, the City cannot base a claim of standing upon the speculative possibility that at some point in the future the Jersey City authorities or a New Jersey court will reverse the City's current historic preservation stance, that the City will not condemn the property for public use, and that the LLCs will be permitted to proceed with demolition and development under local law.

[17] Immediately after quoting the *Lujan* footnote's reference to the relaxation of the redressability and "immediacy" requirements in procedural injury cases, the Court noted that Congress may "loosen the strictures of the redressability prong of our standing inquiry. . . . Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Id.* at 1151. *Summers*, thus, prompts a question about whether the Supreme Court still subscribes to the relaxation of the "immediacy" requirement in procedural injury cases, but it leaves no doubt that procedural injury plaintiffs must satisfy the dimension of imminence that ensures that "the alleged injury is not too speculative" (*Lujan*, 504 U.S. at 565 n.2).

III. RTC AND THE COALITION HAVE NOT ESTABLISHED INJURY-IN-FACT

In the district court, a number of RTC and Coalition members submitted declarations in support of standing. These declarants set forth a variety of hopes and concerns about the Embankments, predicting injuries they allegedly would suffer if the Embankment were demolished and how they would utilize the structures if the City acquired them for park, trail, and transportation purposes; and setting forth their views on procedural rights and injuries. *See generally* Declaration of Werner Bergsten, J.A.__ (effects of demolition on his aesthetic, historical, and economic interests; risks of flooding, air quality problems, and vibration during demolition; and loss of opportunity to participate in NHPA and NEPA processes); Joint Declaration of Stephen Gucciardo & Maureen Crowley, J.A.__ (effects of demolition of Embankments on pollution and run-off , nearby buildings, neighborhood quality of life and real estate values; possible benefits of site preservation; claiming deprivation of procedural rights); Declaration of Dale Hardman, J.A.__ (stating that he would benefit from use of Embankment as park and greenway and expressing "concern[]" about the effect of removal of Embankments on air quality, neighborhood buildings, Hudson River, and anadramous fish); Declaration of Michael Selender, J.A.__ (demolition of Embankments would not be compatible with his desire to continue to view the

property and his hopes to use it for hiking and/or biking; concern about loss of participation rights).

Clearly, if, as we have shown, the ***City*** cannot rest ***its*** standing on an alleged frustration of the City's "vague desire" (*Summers*, 129 S. Ct. at 1150) to acquire the property, ***RTC and the Coalition*** cannot base claims of injury-in-fact on the ***City's*** alleged inability to acquire the property, either. A claim of standing based on another party's "'some day' intentions" (*id.* at 1151) cannot succeed.

The principal basis for RTC's and the Coalition's claim of injury-in-fact, however, is the concern that the Embankments will be demolished. *See*, *e.g.*, App. Br. 52 ("[E]stablishing the STB's jurisdiction over the Harsimus Branch will remove the threat of demolition . . . ."). With regard to these concerns, we have shown that the threat of demolition is entirely speculative. *See* Section II.D., *supra*.

RTC and the Coalition cannot base their standing on the proposition that federal remedies could reduce the risks of an utterly speculative harm. This would not even satisfy the "'*realistic* threat'" standard that the Court in *Summers* rejected as insufficient. *Summers*, 129 S. Ct. at 1152. Appellants cannot predicate injury-in-fact on the entirely conjectural risk that the Embankments will be demolished. *See, e.g.*, *Lujan*, 504 U.S. at 560; *Public Citizen II*, 513 F.3d at 239-241; *Public Citizen I*, 489 F.3d at 1294.

IV. APPELLANTS HAVE NOT ESTABLISHED THAT THEIR ALLEGED INJURIES ARE REDRESSABLE

If, as we have argued, relaxed standards of redressability are not applicable here, Appellants clearly have also failed to satisfy the redressability element of Article III standing.

First, Appellants have not shown how their desired relief will enhance their prospects of acquiring the property. An order of this Court (or the district court) deeming the property a line of railroad would not itself trigger the federal or state remedies that the Appellants have invoked as a basis for standing. To the contrary, these remedies would require action by a party or parties—at a minimum, the STB—not before this Court. Moreover, because the City could invoke its local eminent domain authority to condemn the property at any time, it is unclear how the order sought by Appellants could make any difference to their acquisition-related injury, except by frustrating it, as the district court perceptively noted. *See* Mem. Op. 13, J.A. __.

Second, Appellants have not shown that it is "'likely,' as opposed to merely 'speculative'" (*Lujan*, 504 U.S. at 561), that an order of this Court or the district court could affect the prospects for demolition. Indeed, that is in the hands of a third-party not before this Court, as well.

Thus, Appellants do not have standing.[18]

V. GENUINE DISPUTES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT IN FAVOR OF APPELLANTS

In a one-paragraph argument, Appellants argue that there is no genuine dispute that the property is subject to STB jurisdiction, and, therefore, the district court should have granted Appellants' motion for summary judgment. This argument ignores the declarations and documentary evidence submitted by Conrail that established a genuine dispute both with regard to the regulatory status of the Harsimus Branch before it was conveyed to Conrail and Conrail's use of the line

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[18] Although the amicus brief largely duplicates Appellants' arguments, amici make two independent arguments that can be quickly addressed.

First, amici argue that the City—as a "quasi-sovereign"—should be accorded standing because of its "duty to protect the interests of all of its citizens in the use and development of lands within its domain." Amicus Br. 16. A city, however, may not appear as *parens patriae* to assert quasi-sovereign interests in the well-being of its citizens. *See Conn. v. Am. Elec. Power Co*. 582 F.3d 309, 339 n.17 (2d Cir. 2009) (citing *Cmty. Commnc'ns Co. v. Boulder*, 455 U.S. 40, 53-54 (1982)); *U.S. v. City of Pittsburg, Cal.*, 661 F.2d 783, 786-787 (9th Cir. 1981).

Second, amici argue that the district court's ruling would preclude anyone from ever having standing to seek a judicial determination of the regulatory status of this or similar property. Amicus Br. 27-28. Nothing in the district court's ruling, however, would preclude, for instance, Conrail or the LLCs from seeking such a determination under certain circumstances. More importantly, even if no one would have standing to raise this issue, that would not be a reason to finesse the law of standing. "[A]n inescapable result of any standing doctrine is that at least some disputes will not receive judicial review. That analysis of a party's standing should sometimes dictate this result is not a reason to reject either the result or the analysis." *Fla. Audubon Soc'y*, 94 F.3d at 665-666.

after it was conveyed. Ryan Decl. ¶¶ 6-7, 11-27, J.A. __; Hand Decl. ¶¶ 24-43, 48-49, J.A.__; Sheppard Decl. ¶¶ 12-24, J.A. __.

Appellants also ignore Conrail's argument that Appellants' challenge to the district court's exclusive jurisdiction to interpret the FSP and conveyance documents is inconsistent with this Court's decision in *Conrail*, and is barred by doctrines of collateral estoppel, stare decisis, and res judicata. Consolidated Rail Corporation's Cross-Motion for Summary Judgment 13-22, J.A. __; Conrail's Reply to Plaintiffs' Opposition to Conrail's Motion for Summary Judgment 3-6, J.A.__.

Contrary to Appellants' conclusory arguments, there ***is*** a genuine dispute of material fact with regard to the regulatory status of the Embankment property, and, if Appellants are found to have standing to pursue their claims, a trial on the merits will be required.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 21st day of April, 2011, I caused the foregoing to be served by means of the Notice of Docket Activity that is generated by the Court's CM/ECF System upon the following counsel of record:

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STATUTORY ADDENDUM

N.J. Stat. 48:12-125.1 (eff. Jan. 18, 1968)

New Jersey Statutes Annotated

Title 48. Public Utilities

Chapter 12. Railroads

Article 21A. Abandonment and Sale of Rights of Way; Notice, Etc.

48:12-125.1 **Railroads rights of way; acquisition by state or political subdivisions; notice of abandonment**

In order to permit the State and its political subdivisions to receive notice of, and be afforded an opportunity to acquire, by purchase or condemnation, railroad rights of way proposed to be abandoned, any railroad company which makes application to the Interstate Commerce Commission for authority to abandon any part of its right of way on which passenger or freight services are operated, or to abandon, sell or lease any of its right of way over which services have previously been abandoned and title to such right of way currently remains with the railroad shall, within 10 days of making such application, serve notice thereof upon the State and upon each county and municipality in which any part of the right of way proposed for abandonment is located. No sale or conveyance of any part of such right of way shall thereafter be made to any person other than the State, a county or municipality for a period of 90 days from the date of approval by the Interstate Commerce Commission of the application for abandonment or from the date of service of the notice in this section required, whichever occurs later, unless prior thereto each government agency entitled to such notice shall have filed with the railroad company written disclaimer of interest in acquiring all or any part of said right of way. Any sale or conveyance made in violation of this act shall be void.

As used in this act "right of way" means the roadbed of a line of railroad, not exceeding 100 feet in width, as measured horizontally at the elevation of the base of the rail, including the full embankment or excavated area, with slopes, slope ditches, retaining walls or foundations necessary to provide a width not to exceed 100 feet at the base of rail, but not including tracks, appurtenances, ballast nor any structures or building erected thereon.