Case No. S222472

IN THE SUPREME COURT OF CALIFORNIA

Friends of the Eel River and Californians for Alternatives to Toxics
Plaintiffs and Appellants,

v.

North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority
Defendants and Respondents.

Northwestern Pacific Railroad Company
Real Party in Interest and Respondent

After a Decision by the Court of Appeal
First Appellate District, Division One
Case Nos. A139222, A139235

Appeal from the Marin County Superior Court,
Case Nos. CIV11-3605, CIV11-03591
Honorable Roy Chernus, Judge

PLAINTIFFS' OPENING BRIEF

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ISSUES PRESENTED

(1) Where a railroad is also a State agency, can the Interstate Commerce Commission Termination Act ("ICCTA") be construed to preempt the California Environmental Quality Act ("CEQA") and thus nullify California's sovereign authority to govern how its subdivisions make decisions that affect California's environment?

(2) Does the ICCTA preempt the application of CEQA to a State agency's proprietary acts with respect to a State-owned and funded rail line, as the Opinion holds, or is CEQA not preempted under the market participant doctrine, as the Third District held in *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314?

(3) Does the ICCTA preempt a State agency's voluntary commitments to comply with CEQA as a condition of: (i) receiving State funds for a State-owned rail line, and/or (ii) leasing State-owned property?

INTRODUCTION

In 1989, the California Legislature created the North Coast Railroad Authority ("NCRA") to solve a regional economic problem. Private rail carriers on the north coast were failing and threatening to abandon century-old operations on the area's lines. To support the floundering industry, the State entered the rail business. It created NCRA and empowered it to own, manage, and operate (either on its own or through a private vendor) a unified regional railroad. In creating NCRA, the State naturally established

core parameters to guide the agency's conduct, as it does with all public agencies. Most importantly, the State did not exempt NCRA from California's foundational public accountability laws, such as the Brown Act and—most relevant here—CEQA.

Like the private rail carriers before it, NCRA encountered great difficulty in running that rail business. After six years of operations hampered by pervasive rail dilapidation, decades of deferred maintenance, and severe storm damage, the federal government ultimately closed the rail line in 1998. The line was and remains plagued with toxic contamination from poorly maintained rail facilities and ecosystem damage to the Eel River, a state and federally-designated Wild and Scenic River.

The State therefore earmarked $60 million to repair and rehabilitate the line and required CEQA review as a condition of that funding. The CEQA process culminated in certification of the Environmental Impact Report ("EIR") for major repairs and reopening of the southern portion of the line, the project that is the subject of this case.

Through these actions, Friends of the Eel River and Californians for Alternatives to Toxics seek to hold NCRA accountable to its commitment and obligation under CEQA to fully consider the significant environmental impacts of restoring and reopening the polluted and dilapidated rail line. But NCRA and its lessee Northwestern Pacific Railroad Company ("NWPCo.") (collectively, "Defendants") have now repudiated NCRA's

obligation to comply with CEQA and contend that section 10501(b) of the ICCTA preempts CEQA here. (See 49 U.S.C. § 10501, subd. (b).)

The ICCTA does not preempt Plaintiffs' actions. Section 10501(b) only prohibits states from regulating rail transportation, which furthers the ICCTA's purpose of deregulating the industry and centralizing the economic regulation of rail transportation. Section 10501(b) does not expressly preempt California's internal decisionmaking process regarding whether and how to reopen a publicly-owned rail line. Moreover, Defendants' preemption defense cannot overcome firmly-established precedent that federal preemption must be narrowly construed to preserve the State's traditional and sovereign powers.

Defendants' preemption argument also overlooks three independent doctrines that defeat federal preemption here. First, controlling U.S. Supreme Court precedent—*Gregory v. Ashcroft* (1991) 501 U.S. 452 and *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125—instructs courts to construe federal preemption statutes to preserve states' plenary control over their subdivisions absent an "unmistakably clear" statement that Congress intended to intrude on that sovereign function. This doctrine avoids potential constitutional problems that would arise from reading federal statutes to permit interference with state sovereign functions. Here, California's Legislature exercised the State's sovereign power over public agencies by requiring NCRA to conduct CEQA review before carrying out

its project, and by granting the public a fundamental right to participate in the CEQA process and enforce CEQA's mandates. The ICCTA lacks the unmistakably clear and specific statement required to nullify these sovereign decisions.

Second, the U.S. Supreme Court has long held that under the market participant doctrine courts should not infer federal preemption of a state's proprietary, non-regulatory actions. (*Building & Constr. Trades Council v. Associated Builders & Contractors* (1993) 507 U.S. 218, 227.) Here, the ICCTA does not contain Congressional intent to preempt proprietary actions. Instead, its deregulatory purpose encourages free market forces. The State's actions in requiring CEQA compliance and enforcement were proprietary—they were a component of an internal business decision involving State funding and management of State-owned property.

Third, federal law does not preempt an entity's voluntary commitments because *self-imposed* obligations are not regulatory. Here, the State obligation to comply with CEQA was self-imposed and not preempted.

Each of these three doctrines separately shows that the ICCTA does not preempt CEQA here. Thus, a second-step implied preemption analysis under the ICCTA is not warranted. In any event, that analysis only confirms that here CEQA does not frustrate Congressional intent in enacting the ICCTA. Rather, reviewing environmental impacts and adopting feasible

mitigation are integral to California's process for determining whether and how to fund and reopen the line. The ICCTA simply does not reach such internal decisionmaking by a state agency. Thus, the ICCTA also does not preempt CEQA here under an implied preemption analysis.

For these reasons this Court should hold that the ICCTA does not trump State law designed to inform California's decisions about how to restore and reopen the rail line and should remand the case for a decision on the merits of Plaintiffs' CEQA claims. Otherwise, NCRA's rail project, including reopening the remainder of the rail line through the environmentally sensitive Eel River Canyon, will escape State environmental review altogether. If successful, this tactic could prove devastating to the natural resources California law is intended to protect.

STATEMENT OF THE CASE

A. The Legislature Established NCRA to Own and Manage the Northwestern Pacific Rail Line.

NCRA is a public agency created by the Legislature in 1989 to provide rail service in northern California, through Marin, Sonoma, Mendocino, Napa, and Humboldt counties. (Cal. Stats. 1989, Ch. 1085, Sec. 1. [codified at Gov. Code § 93000 et seq.].) The agency has statutory authority to use public and private funds to acquire, own, and operate property to ensure rail service, and has the option to contract with a private operator. (Gov. Code §§ 93001, 93010-11, 93020-23.) Historically, private

operators had failed to run the rail line profitably, "which led to the legislated public responsibility to maintain the transportation corridor for the economic vitality of the North Coast region." (AR:13:6612[1]; Gov. Code § 93003.)

To enable rail operations, NCRA acquired title or easements over both the northern portion of the line known as the Eel River Division (from Arcata in Humboldt County to Willits in Mendocino County) and the line's southern portion known as the Russian River Division (from Willits to Lombard in Napa County). (AR:2:621, 643, 8:4082, 4086, 4473.) NCRA acquired the easements from the predecessor to the Sonoma-Marin Area Rail Transit District, which owns a portion of the line in the Russian River Division. (AR:13:6596-97.) Public agencies now own all of the line, from Arcata to Larkspur and Lombard.

NCRA operated freight service over the line from 1992 until the line closed in 1998 pursuant to an emergency federal order that determined that the line, which had suffered extensive storm damage, was unsafe. (AR2:644, 9:4592-95, 13:6597.)[2] The line through the Eel River Canyon was and remains particularly unsafe, due to decades of inadequate maintenance coupled with extensive earth movements and landslides.

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[1] Citations to the Administrative Record appear as "AR:[volume]:[page]."
[2] In 1996 NCRA secured authorization from the newly-created Surface Transportation Board to operate freight and passenger excursion services on the line. (See AR:9:4584.)

(AR:8:4079-80, 9:4715.) California agencies brought a toxic cleanup action against NCRA, resulting in a 1999 Consent Decree that requires NCRA to remediate widespread contamination and implement practices to avoid future toxic spills. (App:8:77b:2027-51.)[3] These efforts included required restoration of the Eel River (App:8:77b:2029, 2039), which is a designated "wild" and "scenic" river under both the California Public Resources Code and federal Wild and Scenic Rivers Act (AR:20:10694).

After the rail closure, NCRA was unable to restore the dilapidated line absent significant funding. (AR:13:6299-300, 6537.) The line had been unprofitable since the 1980s and required extensive repairs. (AR:13:6536-37, 6550.) The Southern Pacific Company, a private rail company, had attempted to abandon the line in 1982, but was unsuccessful and sold it in 1989. (AR:13:6536.) Two successors, Eureka Southern and Rail-Ways Inc., filed for bankruptcy and a third operator became insolvent. (*Ibid.*) Estimates to restore just the southern portion of the line exceeded $17 million. (AR:13:6569.)

In 2000, the Legislature stepped in and authorized $60 million to fund repairs, improvements, and remediation under the Traffic Congestion Relief Program ("Relief Program") administered by the California Transportation Commission ("Commission"). (Gov. Code, §§ 14556.40,

[3] Citations to Plaintiffs' Consolidated Appendix In Lieu of Clerk's Transcripts appear as "App:[volume]:[tab]:[page]."

subd. (a)(32), 14556.50, subd. (e), (i).) To obtain that money, NCRA, as the implementing agency and lead applicant, signed a Master Agreement governing work on the line in accordance with Commission guidelines that all funding recipients must follow. (AR:9:4632 [§ II.3.A.(2)], 4623-24 [§ I.1.A.(2),(5)(c), (6)]; App:9:84:2369 [§ 1.2], 2373 [§ 2.4]; see Gov. Code § 14556.11.) Notably, those guidelines state that funded agencies are "responsible for . . . [c]omplying with all legal requirements . . . including . . . CEQA." (App:9:84:2373.) NCRA acknowledged that, as the funding recipient, it shall be the "sole owner" of all improvements and property that are constructed, installed, or acquired with the funding. (AR:9:4634 [§ II.3.F.(1)].) Further, NCRA acknowledged that it "is obligated to continue operation and maintenance of [the] Project dedicated to the public transportation purposes for which [the] Project was initially approved." (*Ibid.*)

Before NCRA could secure the money, the Commission required it to devise a plan to rehabilitate the line to restore operations. (AR:9:4692.) In 2001, NCRA's publicly-appointed directors adopted a policy to guide reestablishment and maintenance of freight railroad service across the entire line (AR:9:4689), and a separate policy for CEQA compliance (AR:20:10633-37). The Commission also directed NCRA to complete a Strategic Plan and assess the line's capital needs. (AR:9:4692.) NCRA developed its first Strategic Plan in 2001 (*ibid.*), and a second in 2006

(AR:13:6611-625). An update to the second Strategic Plan confirmed NCRA's obligation to comply with CEQA before reopening the line to freight traffic. (App:8:77b:2092.) NCRA also prepared Capital Assessment Reports for the Commission in 2002 and 2005, which specify how NCRA would meet its duty to comply with CEQA. (AR:9:4741, 13:6315.)

To advance its efforts to reopen the line, NCRA issued a request for proposals to provide freight rail service on the line. (AR:13:6593-6610.) NCRA "envision[ed] a private-public partnership" with public ownership of the rail line and continued financial support for its repair and improvement, coupled with private franchisee operations on the line. (AR:13:6595; Gov. Code § 93020, subd. (f).) NCRA "solicit[ed] the creativity of the private marketplace to connect the dots between public capital, private capital and the emerging new economic justification for this railroad." (AR:13:6595.) After receiving five bids, NCRA ultimately selected NWPCo. as its contractor and memorialized the deal in a 2006 Lease Agreement ("Lease"). (AR:13:6723, 6725-86.) The parties agreed that NCRA was responsible for completing the CEQA process before the Lease became effective and railroad operations began. (AR:13:6731; App:5:48a:1414.)

The Commission disbursed the Relief Program money for the line to NCRA through a series of agreements. (See, e.g., AR:9:4623, 4692, 13:6801.) During this process, NCRA acknowledged to the Commission

that the project to reopen the Russian River Division would include an "environmental document under CEQA and NEPA" (AR:13:6792), and "Draft" and "Final EIR/EIS" documents would be prepared (AR:13:6802-03). The Commission funded work to establish an operable segment of the line in the Russian River Division, which included over two million dollars to prepare the EIR challenged in this case. (AR:13:6796.)

With funding moving forward, the private vendor NWPCo. submitted a 2007 Notice of Exemption to the Surface Transportation Board to obtain approval to change operators. (AR:16:8132.) In its submission, NWPCo. certified that its right to operate depended upon completion of the Lease terms, including NCRA's CEQA compliance and the Sonoma-Marin Area Rail Transit District's consent. (AR:16:8206-07, 13:6731.) In approving the change, the Board stated that "NWPCo certifies that upon consummation of the transaction, it will become a . . . rail carrier." (AR:16:8207.)

As part of its attempt to comply with CEQA to reopen the line through the Russian River Division, NCRA prepared two types of environmental documents: (1) "categorical exemptions" to cover routine maintenance and repair work, and (2) the EIR challenged in this case, which purported to evaluate environmental impacts from large-scale rehabilitation work and the ultimate reopening the Russian River Division. (AR:16:7997-8001.) NCRA's use of categorical exemptions triggered a

lawsuit by the City of Novato, which resulted in a Consent Decree that also required NCRA to comply with CEQA for certain agreed work, including track improvements to reduce freight noise. (AR:17:8899-8951, 8911.) Accordingly, NCRA included the work required by the Novato Consent Decree in the EIR challenged here. (AR:5:2043-51.)

In preparing the EIR, NCRA engaged multiple agencies and the public in a four-year environmental review process. (AR:1:1, 5:2020, 7:3467, 3472, 17:9031-10065.) But NCRA deferred environmental review for the remainder of the line in the Eel River Division until an unspecified date. (AR:1:22.) On June 20, 2011, NCRA certified its EIR for the Russian River Division and approved the major repair and reopening of the rail line. (AR:1:18-23.)

B. The Proceedings Below

On July 20, 2011, Plaintiffs Friends of the Eel River and Californians for Alternatives to Toxics filed mandamus petitions against NCRA for failure to comply with CEQA. (App:1:1:1-16, 1:5:35-65.) The petitions challenge numerous inadequacies in the EIR, most notably, its failure to consider that (1) rehabilitation and operation of the line would expose toxic chemicals and release them into the environment (App:1:5:54-55), and (2) reopening the line would lead to foreseeable environmental impacts to the Eel River Canyon (App:1:1:11-12).

After an unsuccessful attempt to remove the case to federal court (App:1:21:159-77), Defendants demurred to the petitions, arguing that the ICCTA preempts CEQA. (App:2:36:382-400, 3:40:792-93, 3:43:800-18, 5:46:1189-90). The trial court overruled the demurrer. (App:7:61:1842-43, 7:65:1863-64.) But after a merits hearing, a second judge held that the ICCTA preempted NCRA's CEQA obligations and denied the writ petitions. (App:16:133:4379.)

Plaintiffs appealed this ruling on July 8, 2013. Before the First District Court of Appeal issued its Opinion, the Third District Court of Appeal decided a materially similar preemption issue in *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314. *Atherton* held that under the market participant doctrine, the ICCTA does not preempt a California agency's obligation to comply with CEQA for a State-owned rail project. (*Id.* at p. 341.) Despite *Atherton's* "contrary conclusion on similar facts," on September 24, 2014, the appellate court in this case affirmed the trial court's preemption ruling. (Opinion at pp. 1, 30.) The court likewise rejected a related doctrine holding that parties cannot invoke preemption to avoid their voluntary commitments. (*Id.* at pp. 21-24.)

The appellate court also dismissed U.S. Supreme Court precedent holding that Congress cannot preempt states' regulation of their subdivisions without an "unmistakably clear" statement that Congress intended to do so. (*Id.* at pp. 33-35.) The court found that the ICCTA

expressly preempts CEQA without analyzing the statutory text for the required "unmistakably clear" statement. (*Ibid.*)

Plaintiffs sought rehearing of that decision on October 14, 2014. On October 17, the court denied the rehearing petition and modified the Opinion to delete a footnote, but did not alter the judgment.

This Court granted review on December 10, 2014.

STANDARD OF REVIEW

After a hearing on the merits, the trial court held that federal law preempted CEQA, and denied the writ petitions on that ground alone. (App:16:133:4377, 4388.) This presents a question of law that the Court reviews de novo. (*In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10.)

ARGUMENT

In enacting the ICCTA, Congress did not expressly preempt any state laws except those that regulate rail transportation. Neither the ICCTA preemption clause nor the statute's structure and purpose indicate Congressional intent to preempt a state's internal process for determining whether and how it will engage in the business of repairing and reopening a rail line. In California, that decisionmaking process must include compliance with CEQA, a public disclosure and accountability statute that applies to an agency's decision regarding the expenditure of public funds and the use of public property. Three independent preemption doctrines—

the *Gregory* and *Nixon* clear statement rule, market participant doctrine, and voluntary commitment doctrine—further defeat ICCTA preemption in this case. These doctrines recognize that a state's internal governance of its subdivisions and its proprietary actions in the marketplace are not preempted under the ICCTA. Moreover, the voluntary nature of NCRA's commitment to comply with CEQA demonstrates that CEQA compliance in this case would not frustrate Congressional intent to have a uniform system of economic regulation of the rail industry. To the contrary, CEQA compliance was an essential step to obtain the money needed to reopen the rail line.

I. The ICCTA Does Not Express Congressional Intent to Preempt the State Actions at Issue Here.

A. In Determining Preemptive Effect and Scope, Courts Consider Congressional Intent and Apply a Presumption Against Preemption.

The Court's analysis begins with the basic premise that preemption is an affirmative defense and Defendants bear "the burden of demonstrating a 'clear and manifest' congressional intent to preempt." (*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1065; *Dilts v. Penske Logistics, LLC* (9th Cir. 2014) 769 F.3d 637, 649.) Thus, "the purpose of Congress is the ultimate touchstone in every pre-emption case." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [quotation omitted].)

Congress may demonstrate preemptive intent by enacting an express preemption clause, or courts may infer conflict, obstacle, or field preemption. (*People ex rel. Harris v. Pac Anchor Trans., Inc.* (2014) 59 Cal.4th 772, 777, cert. den. *sub nom. Pac Anchor Trans. v. California,* No. 14-491 (2014) ___ U.S. ___; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516.) Preemption analysis is not, however, "[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict." (*Viva! Intern. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 939-40 [quotation omitted].) Moreover, the existence of an express preemption clause "does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." (*Altria Group Inc. v. Good* (2008) 555 U.S. 70, 76.) The role of reviewing courts, therefore, is to "identify the domain expressly pre-empted" by the statutory language. (*Medtronic, supra,* 518, U.S. at p. 484.) An express preemption clause supports a '"reasonable inference"' that Congress did not intend to preempt other matters not covered by the clause. (*Viva!, supra,* 41 Cal.4th at pp. 944-45 [quoting *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 288].)

To determine the scope of preemption, courts necessarily begin with the statutory text, but "interpretation of that language does not occur in a

contextual vacuum." (*Medtronic, supra,* 518 U.S. at pp. 485-86.) Rather, courts "must be guided by two cornerstones of . . . pre-emption jurisprudence." (*Wyeth v. Levine* (2009) 555 U.S. 555, 565; *Brown, supra,* 51 Cal.4th at p. 1059 [quoting *Wyeth*].) First, because federal preemption "fundamentally is a question of Congressional intent" (*Brown, supra,* 51 Cal.4th at p. 1059 [quotation omitted]), courts look to the language of the preemption clause and the surrounding statutory framework as well as "the structure and purpose of the statute as a whole" (*Medtronic, supra,* 518 U.S. at p. 486 [quotation omitted]). Courts therefore consider "the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." (*Ibid.*)

Second, "because the States are independent sovereigns in our federal system," courts in every preemption case start with the assumption that Congress did not intend to displace state law absent a "clear and manifest purpose" to do so. (*Medtronic, supra,* 518 U.S. at p. 485 [quotation omitted]; *Brown, supra,* 51 Cal.4th at p. 1060 [quotation omitted]; *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 957 [quotation omitted].) This presumption against preemption applies to both the existence and scope of federal preemption (*In re Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1088), and helps ensure that the "federal-state balance" is not "disturbed unintentionally by Congress or unnecessarily by the courts" (*Brown, supra*, 51 Cal.4th at p. 1060 [quotation omitted]). As

this Court explained last year, "[p]rinciples of federalism dictate a distinct approach to the construction of statutes impinging on state sovereignty, one designed to ensure courts do not assume an incursion where none was intended." (*City of Los Angeles v. County of Kern* (2014) 59 Cal.4th 618, 631; see also *Gregory v. Ashcroft* (1991) 501 U.S. 452, 457-61 [requiring an "unmistakably clear" statement before construing a federal statute to interfere with states' sovereign affairs].)

B. Congress Did Not Intend the ICCTA to Displace Traditional State Functions that Do Not Regulate Rail Transportation.

To ascertain the "purpose of Congress," it is appropriate to examine the history of a statute as well as its text and overall regulatory scheme. (*Wyeth*, *supra*, 555 U.S. at p. 566.) Congress first established the Interstate Commerce Commission in 1887 to protect shippers from the monopoly power of a rail industry fraught with market manipulation and rate discrimination. (Sen. Rep. No. 104-176, 1st Sess., p. 2 (1995).) The Interstate Commerce Commission's role was to ensure just and reasonable rates and to address market problems. (*Ibid.*; Eldredge, *Who's Driving the Train? Railroad Regulation and Local Control* (2004) 75 U. Colo. L.Rev. 549, 558.) By the 1960's, however, with the rise of other forms of transportation, Congress began to view this regulatory scheme as a threat to the survival of rail transport. (Sen. Rep. No. 104-176, p. 3.) Following a series of railroad bankruptcies, Congress passed the Staggers Rail Act of

1980, which extensively reformed the Interstate Commerce Commission's authority, allowed increased competition in the rail industry, and deregulated mergers and abandonment of rail lines and operations. (*Ibid.*; Staggers Rail Act of 1980, Pub. L. 96-448 (Oct. 14, 1980) 94 Stat. 1895.) The Staggers Act also displaced state jurisdiction over economic regulation of rate increases and fuel surcharges and limited state powers over any "intrastate rate, classification, rule[], or practice[]" except as certified by the Interstate Commerce Commission. (Pub. L. 96-448, § 214; see also Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations* (2007) 34 Ecology L.Q. 1147, 1160.)

In 1995, Congress completed its economic deregulation of the rail industry by adopting the ICCTA, which abolished the Interstate Commerce Commission and transferred its remaining powers to the newly-created Surface Transportation Board. (Pub. L. 104-88, 109 Stat. 803.) The new statute repealed the Commission's historic function—economic regulation of railroads including tariff filings, rail fare regulation, financial assistance program, and minimum rate regulation—and expressly displaced all residual Commission-certified state economic regulation of rates, classifications, rules, and practices. (H.R. Rep. No. 104-311, 1st Sess., pp. 82-83, 95-96 (1995) ["State certification: Requires that States may only regulate intrastate rail transportation if certified by the ICC. Replaced by

direct preemption of State economic regulation of rail transportation"]; Strickland, Jr., *supra,* 34 Ecology L.Q., at p. 1161.)

As enacted, the ICCTA focuses on the economic regulation of rail carriers: the setting of rates, classifications, rules, and practices for rail carriers (49 U.S.C. §§ 10701-10747); rail carrier service, use, reporting, and accounting (*id.* §§ 11101- 11164); and consolidation, mergers, and acquisition of control of rail lines (*id.* §§ 11321-11328). In contrast to the Interstate Commerce Commission's original broad authority, the Surface Transportation Board's role in overseeing rail carrier activity is tightly circumscribed. As Congress summarized, the only federal regulatory authority retained in the ICCTA is the authority "necessary to maintain a 'safety net' or 'backstop' of remedies to address problems of rates, access to facilities, and industry restructuring." (H.R. Rep. No. 104-311, p. 93.) These backstop remedies, established at 49 U.S.C. sections 11701-11707 and 11901-11908, address Surface Transportation Board enforcement authority for statutory violations, establish rights and relief for failure to comply with the ICCTA's economic regulations (e.g., damage awards for violation of ICCTA regulations or Surface Transportation Board orders), and set forth applicable civil and criminal penalties. In short, the ICCTA "regulates the economics and finances of the rail carriage industry – and provides a panoply of remedies when rail carriers break the rules." (*New*

York Susquehanna and Western Ry. Corp. v. Jackson (3rd Cir. 2007) 500 F.3d 238, 252.)

Against this statutory framework, Congress adopted the preemption clause at issue here to ensure the integrity of its new regulatory scheme regarding rail carriers:

> The jurisdiction of the Board over—
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the *remedies provided under this part with respect to regulation of rail transportation* are exclusive and preempt the remedies provided under Federal or State law.

(49 U.S.C. § 10501, subd. (b) [emphasis added].) Thus, the remedies provided in Part A of the ICCTA (§§ 10101- 11908) are exclusive and preempt all other remedies "with respect to rates, classifications, rules . . . , practices, routes, services, and facilities" for the "regulation of rail transportation."

The House Conference Reports for the ICCTA explained that revised section 10501 retains "the exclusivity of Federal remedies with respect to the regulation of rail transportation" previously adopted in the

Staggers Act to assure uniform administration "while clarifying that the exclusivity is related to remedies *with respect to rail regulation – not State and Federal law generally*." (H.R. Conf. Rep. No. 104-422, 1st Sess., p. 167 (1995) [emphasis added].) The ICCTA thus preempts only those regulations that "collide with the scheme of economic regulation (and deregulation) of rail transportation," resulting in "the complete pre-emption of State economic regulation of railroads" while still ensuring that "States retain the police powers reserved by the Constitution." (*Ibid.*; H.R. Conf. Rep. No. 104-311, pp. 95-96.)

Congress thus modified the preemption provision already existing in the Staggers Act, which provided concurrent state jurisdiction over some economic matters (see Pub. L. 96-448, § 214), to conform to the ICCTA's elimination of any direct state economic regulation of rail carriers and to ensure uniform remedies for violations of provisions within the Surface Transportation Board's exclusive jurisdiction over rates, routes, classifications, and services. As the Eleventh Circuit summarized after a trenchant analysis of this statutory history, the "changes brought about by the ICCTA reflect the focus of legislative attention on removing *direct* economic regulation by the *States*, as opposed to the incidental effects that inhere in the exercise of traditionally local police power such as zoning." (*Florida East Coast Ry. Co. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324, 1337.)

C. The State Action Here Is Not Regulation Expressly Preempted by the ICCTA.

Interpretation of section 10501, subdivision (b) focuses on the plain language employed by Congress, with the assumption that the ordinary meaning of that language expresses legislative purpose. (*Cipollone, supra,* 505 U.S. at p. 532; *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 62-63 [plain wording of clause "necessarily contains the best evidence of Congress' pre-emptive intent"].) The operative words of section 10501, subdivision (b) are "regulation of rail transportation." The preemptive effect of the word "regulation" is "narrowly tailored" to "those state laws that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." (*Florida East, supra,* 266 F.3d at p. 1331; see also *Franks Inv. Co. LLC v. Union Pacific Rail Co.* (5th Cir. 2010) 593 F.3d 404, 410; *PCS Phosphate Co. v. Norfolk Southern. Corp.* (4th Cir. 2009) 559 F.3d 212, 218; *Adrian & Blissfield Railroad Co. v. Village of Blissfield* (6th Cir. 2008) 550 F.3d 533, 539.)

Likewise, the statute defines the term "transportation" as "related to the movement of passengers or property, or both, by rail." (49 U.S.C. § 10102, subd. (9); *Emerson v. Kansas City Southern Ry. Co.* (10th Cir. 2007) 503 F.3d 1126, 1129 ["[T]his definition . . . does not encompass

everything touching on railroads."]; see also *Dan's City Used Cars, Inc. v. Pelkey* (2013) 133 S.Ct. 1769, 1778-79 [finding that similar preemption language in the Federal Aviation Administration Authorization Act (FAAAA) "massively limits the scope of preemption" to only those actions "related to the movement" of property (citation omitted)].) Thus, the ICCTA's preemptive reach "does not categorically sweep up all state regulation that touches upon railroads." (*Island Park, LLC v. CSX Transp.* (2d Cir. 2009) 559 F.3d 96, 104.) As this Court recently held, the FAAAA does not preempt enforcement of California's generally applicable unfair competition law because an enforcement action does not implicate "Congress's concerns about regulation of motor carriers with respect to the transportation of property." (*Pac Anchor, supra,* 59 Cal.4th at p. 783.) Similarly, the ICCTA only preempts state law attempting to govern or manage the movement of passengers or property by rail.

The State conduct here does not implicate the "regulation of rail transportation," but rather the decisionmaking process of a public agency under the sovereign control of the State. The California Legislature created NCRA as a public entity to purchase and provide service along a rail line where the private market had failed. The State made public funding of the rehabilitation work for the public rail line contingent on full CEQA compliance, as is generally required for every discretionary public funding and project approval decision. (AR:9:4638, 13:6792, 6801-03;

App:9:84:2373; Pub. Res. Code § 21080, subd. (a).) Through this process, NCRA was required to analyze and disclose the project's environmental impacts and consider potential mitigation measures for those impacts. (Pub. Res. Code § 21002.) CEQA also includes the public's right to enforce these obligations. (Pub. Res. Code § 21167.) CEQA compliance before approving a project to spend substantial public resources on reopening this line was particularly important because the line had proved so difficult to maintain and posed potentially substantial liability for remediation of toxic contamination. (See AR:8:4079-80, 9:4715, 13:6299-300; App:8:77b:2027-48.) In short, by requiring compliance with CEQA, California was simply getting its house in order before making a final decision to reopen the rail line.

The ICCTA does not supplant the State's internal decisionmaking process regarding whether and how to re-operate the rail line. The environmental review and decision process here is no more "regulation" of rail transportation than would be the internal corporate decision process of a private rail carrier evaluating whether to reopen the rail line. For example, a private carrier might assess market potential, evaluate local support or opposition, investigate environmental liabilities associated with moving forward, and undertake myriad other due diligence activities to gage the wisdom of proceeding. This internal decisionmaking could affect future rail transportation because the outcome would determine whether and how the

private carrier finalizes and implements its project. But it does not constitute "regulation of rail transportation" under the ICCTA, and no one could seriously argue that the ICCTA intrudes on such internal corporate business planning activities.

That NCRA was bound by law and agreement to comply with California's basic environmental review and disclosure requirements before undertaking or approving its project does not morph these pre-decisional activities into "regulation of rail transportation." Nor does the prospect that NCRA's inadequate legal compliance might lead to judicial review alter the inquiry. Instead, the public's right to enforce these obligations is an essential element of California's internal process and intrinsic to the State's sovereign decision to publicly fund and reopen rail service along the north coast corridor. The express language of the ICCTA does not even mention, much less preempt, a state's internal decisionmaking and enforcement process. (See 49 U.S.C. § 10501, subd. (b).)

The appellate court nonetheless found that CEQA compliance is categorically preempted as a "preclearance requirement" that constitutes "*per se* interference with interstate commerce." (Opinion at p. 32 [quotation omitted].) However, nothing in the ICCTA refers to "preclearance requirements." Rather, the court leaned heavily on *City of Auburn v. United States Gov.* (9th Cir. 1998) 154 F.3d 1025, and *Green Mountain Railroad. Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, for its holding. (Opinion at

pp. 17-18.) Those cases involved the imposition of *permitting* requirements—what the appellate court termed "preclearance" requirements—on *third-party private* rail carrier operations. In the *Auburn* proceedings, for instance, the Surface Transportation Board recognized that "the Cities' admitted goal is to constrain [Burlington Northern's] train operations . . . [and thereby] force [Burlington Northern] to fund infrastructure improvements to the line." (*Cities of Auburn and Kent, WA—Petition for Declaratory Order—Burlington Northern Railroad Company—Stampede Pass Line* (July 2, 1997) STB Docket No. 33200, 1997 WL 362017, at *6 .) Likewise, *Green Mountain* involved a construction permitting requirement for a proposed transloading facility along a private railroad track. (*Green Mountain, supra,* 404 F.3d at p. 640.)

By contrast, CEQA compliance here was not an obligation imposed on a third party as the result of a local permitting scheme, but a requirement of State law and a consequence of the State's internal decisionmaking process. It is this '"conduct,"' and '"not the formal description of governing legal standards,"' that '"is the proper focus of concern in pre-emption cases."' (*New York Telephone Co. v. New York State Dept. of Labor* (1979) 440 U.S. 519, 532, fn. 21 [quoting *Motor Coach Employees v. Lockridge* (1971) 403 U.S. 274, 292].) In *New York Telephone*, the Supreme Court rejected a claim that the National Labor Relations Act preempted New York's payment of benefits to striking workers. Even though such

payments "altered the economic balance between labor and management," the court found they did not conflict with the federal statute's goal to provide a uniform, national system for addressing labor disputes because the purpose of New York's "program is not to regulate the bargaining relationships . . . but instead to provide efficient means of" achieving state unemployment insurance policies. (*New York Telephone, supra*, 440 U.S. 519 at pp. 532-33.)

Like New York's decision to provide unemployment benefits to striking workers even though doing so affected labor-management relations, California's decision to comply with CEQA—a statute of general applicability—as a part of its internal process for determining how to spend public funds on a public rail line is not a "regulation" preempted by the ICCTA. Even if CEQA compliance ultimately affects the manner in which the State proposes to provide rail transportation on California's north coast, the process through which the agency makes that decision is not preempted. Rather, that process represents one core function of a public agency in California when it chooses to reenter the rail market.

II. The ICCTA Does Not Preempt California's Sovereign Control of Its Agencies.

Even if CEQA compliance generally could conceivably fall within the text of the ICCTA's express preemption clause, U.S. Supreme Court precedent would bar preemption because this case involves California's

sovereign self-governance. Under the U.S. Constitution's federalist system, the "States possess sovereignty concurrent with that of the Federal Government." (*Gregory, supra,* 501 U.S. at p. 457.) The "balance of powers between the States and the Federal Government" works to "ensure the protection of 'our fundamental liberties.'" (*Id.* at p. 458 [quoting *Atascadero State Hospital v. Scanlon* (1985) 473 U.S. 234, 242].) Thus, when Congress intends to alter this usual balance of powers, "it must make its intention to do so *unmistakably clear* in the language of the statute." (*Id.* at p. 460 [quoting *Atascadero* (emphasis added)]; *City of Los Angeles, supra,* 59 Cal.4th at p. 631.)

This clear statement principle, sometimes referred to as the "super-strong clear statement rule," operates with greater force than other clear statement doctrines. (*John v. United States* (9th Cir. 2001) 247 F.3d 1032, 1042.) Courts apply this rule to avoid potential constitutional infirmities that could result from reading federal statutes to "interpos[e] federal authority between a State and its . . . subdivisions." (*Nixon v. Missouri Municipal League* (2004) 541 U.S. 125,140-41; see also *Parker v. Brown* (1943) 317 U.S. 341, 351 ["an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress"].)

California has exercised its broad sovereign authority over public agencies by requiring them to comply with CEQA before carrying out

public projects and by allowing citizens to enforce that requirement. The ICCTA contains no unmistakably clear statement preempting this sovereign decision. Consequently, the ICCTA does not preempt this suit.

A. CEQA Obligations and Enforcement for Public Projects Are Expressions of California's Sovereign Decisionmaking.

1. The Legislature Exercised California's Sovereignty by Directing Public Agencies to Comply with CEQA When Carrying Out Public Projects.

California's governance of how subsidiary agencies like NCRA manage public affairs and the role citizens play in that statutory scheme is a core sovereign power. "Through the structure of its government . . . a State defines itself as a sovereign." (*Gregory, supra,* 501 U.S. at p. 460.) Consequently, '"[t]he number, nature and duration of the powers conferred upon [public agencies] . . . rests in the absolute discretion of the State."' (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 254-55 [quoting *Hunter v. Pittsburgh* (1907) 207 U.S. 161. 178-79].) States determine as a matter of local policy "the extent and character of the powers of . . . subdivisions and the manner of their exercise. The power of a state in such matters is absolute." (*In re Pfahler* (1906) 150 Cal. 71, 79 [citing *Claiborne County v. Brooks* (1884) 111 U.S. 400].) Statutes "that 'go to the heart of representative government'" are likewise an expression of a state's sovereignty. (*Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 257-59 [quoting *Gregory, supra,*

501 U.S. at p. 461; holding that remedies under California's Political Reform Act are not preempted by Congress's power under the Indian Commerce Clause].)

CEQA is a key element in the legislative design for California agencies, through which California enforces its public policy to ensure environmental protection. CEQA ensures "that the long-term protection of the environment shall be the guiding criterion in public decisions." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74 [quoting Pub. Res. Code § 21001, subd. (d)].) To achieve that goal, all public agencies must conform their decisionmaking processes to the statute's procedures and substantive mandates to "give prime consideration to preventing environmental damage when carrying out their duties." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112 [citing Pub. Res. Code § 21000, subd. (g)]; Pub. Res. Code §§ 21001, 21063.) Agencies cannot make spending decisions or use public property in a manner that may affect the environment without first complying with CEQA. (Pub. Res. Code § 21080, subd. (a).)

In enacting CEQA, the Legislature also enshrined informed environmental decisionmaking and political accountability in the State's governmental structure. Environmental review both "alert[s] the public and its responsible officials to environmental changes before they have reached ecological points of no return," and "demonstrate[s] to an apprehensive

citizenry that the agency has . . . considered the ecological implications of its actions." (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*(1998) 47 Cal.3d 376, 392 [quotations omitted].) The CEQA process thus allows an informed public to "respond accordingly to action with which it disagrees." (*Ibid.*; see also *People v. County of Kern* (1974) 39 Cal.App.3d 830, 842 [CEQA facilitates "appropriate action come election day should a majority of the voters disagree" with an agency's decision].)

Like any other public agency in California, NCRA must comply with CEQA. When it created NCRA, the Legislature did not exempt the agency from CEQA's obligations. (Compare Gov. Code § 93000 et seq. [NCRA's enabling act, which never mentions CEQA] with Pub. Res. Code §§ 21080.01-21080.07 [exempting specific public projects from CEQA review].) The Traffic Congestion Relief Act—the legislation NCRA has used to fund work on the rail line—likewise anticipates California's requirement for environmental review of NCRA's project. (See Gov. Code §§ 14556.13, subd. (b)(1), 14556.50.) And here, CEQA compliance is particularly important to the public and California given the history of environmental contamination (App:8:77b:2027-43) and safety problems that have plagued the rail line (AR:9:4592-95 [1998 federal emergency order forcing closure of the line, only a portion of which has since reopened]). It is squarely within the Legislature's sovereign power to

require NCRA to comply with CEQA before it spends public resources to repair and reopen the publicly-owned rail line.

2. Citizen Enforcement Actions Are Central to the State's Sovereign Control of Its Subdivisions.

The appellate court found that even if CEQA's requirements are not preempted, the ICCTA bars citizen enforcement of those requirements. This holding runs afoul of *Gregory* and *Nixon*. Like requiring agencies to comply with CEQA, allowing citizens to enforce agencies' obligations under CEQA reaches to the heart of the State's sovereign control over its agencies and its courts. (See *City of Los Angeles, supra,* 59 Cal.4th at pp. 631-34 [states "have a uniquely strong interest" in the control of their courts and federal statutes should be construed to "imping[e] least on state sovereign prerogatives"]; see also *Raygor v. Regents of Univ. of Minn.* (2002) 534 U.S. 533, 544 [requiring an unmistakably clear statement before a federal statute could toll actions against a state entity in state court].)

The Legislature and California courts have long favored private actions against public agencies to vindicate public rights like CEQA. (See *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 170.) California's writ of mandate statutes are the vehicles for such suits. (See Civ. Proc. Code §§ 1085, 1094.5.) The State's public interest standing doctrine allows citizen suits "to ensure that no governmental body impairs or defeats the purpose of legislation

establishing a public right." (*Green v. Obledo* (1981) 29 Cal.3d 126, 144.) California's fee-shifting statutes for public interest suits similarly recognize that "privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in [state] constitutional or statutory provisions." (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1218 [interpreting Code of Civil Procedure section 1021.5]; see also *Committee to Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 Cal.App.3d 633, 639 [citizen suits are necessary to "guard the guardians" (quotation omitted)].) And CEQA itself anticipates public enforcement actions against agencies that violate the statute. (See Pub. Res. Code §§ 21167, 21168, 21168.5.)

"Congress does not readily interfere" with states' sovereign control of the remedies available in state courts. (*Gregory, supra,* 501 U.S. at pp. 461, 464; *Agua Caliente, supra,* 40 Cal.4th at pp. 257-59; see also *Medtronic, supra,* 518 U.S. at p. 485 ["Congress does not cavalierly pre-empt state-law causes of action"].) Thus, allowing Plaintiffs' public interest suits to enforce NCRA's CEQA obligations also falls within California's sovereign decisionmaking.[4]

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[4] The Ninth Circuit Court of Appeals is reviewing a recent split decision of the Surface Transportation Board that also tried to sever CEQA's mandates from citizen enforcement remedies. (See *California High-Speed Rail Authority—Petition for Declaratory Order* (Dec. 12, 2014) S.T.B. Docket No. FD 35861, 2014 WL 7149612, *11; Plaintiffs' Request for Judicial

(footnote continued on next page)

B. The ICCTA Lacks the Unmistakably Clear Statement Needed to Preempt California's Sovereign Control of Its Agencies.

In *Nixon*, the U.S. Supreme Court applied the clear statement rule from *Gregory* to hold that section 253 of the federal Telecommunications Act of 1996 did not preempt a Missouri statute barring the state's subdivisions from offering telecommunications services. (*Nixon, supra,* 541 U.S. at pp. 129-30.) Although the federal act explicitly preempted "state and local laws and regulations expressly or effectively 'prohibiting the ability of any entity' to provide telecommunications services," the Supreme Court upheld Missouri's ban. (*Id.* at pp. 128-29.) The Court observed that "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its power." (*Id.* at p. 140.) Thus, the Supreme Court held that the Telecommunication Act's term "any entity" *was not* sufficiently clear to preempt Missouri's prohibition despite the apparent breadth of that term. (*Id.* at pp. 130-31.) The Court refused to read the express preemption clause to intrude on

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(footnote continued from previous page)
Notice, Exh. A.) This decision offered no analysis of the role citizen suits play in enforcing California agencies' CEQA obligations, and warrants no deference. Courts do not defer to an agency's interpretation that alters the federal-state framework and stretches the boundary of Congressional authority by curtailing the states' sovereign control of their internal affairs. (See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) 531 U.S. 159, 172-74.)

Missouri's sovereign domain because the Act did not explicitly address states' sovereign authority over their subdivisions. (*Id.* at pp. 140-41.)

The appellate court dismissed *Nixon* without analyzing the ICCTA's text for a clear expression of Congressional intent to displace a state's governance of its own rail agencies. (See Opinion at pp. 33-34.) In fact, no such statement exists.

Section 10501(b) lacks unmistakably clear intent to "alter the usual constitutional balance between the States and the Federal government" by preempting California's control over its agencies. (*Gregory, supra,* 501 U.S. at p. 460 [quotation omitted]; *Nixon, supra,* 541 U.S. at pp. 140-41.) Although the ICCTA grants jurisdiction to the Surface Transportation Board over aspects of rail transportation and preempts state law remedies "with respect to regulation of rail transportation," it is devoid of language eliminating either (1) a state's ability to control its own rail agency, or (2) state-law enforcement actions against public agencies for violations of public rights. (See 49 U.S.C. § 10501, subd. (b).)

If Congress intended to interfere with states' sovereign self-governance, the ICCTA would need to be unmistakably clear that Congress "in fact faced, and intended to bring into issue" this core function. (*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 65 [quotation omitted].) Like the Telecommunications Act preemption clause in *Nixon*, the statutory text here "fails to indicate whether Congress focused on the [statute's]

effect on State sovereignty" when enacting the ICCTA. (*City of Abilene, Tex. v. FCC* (D.C. Cir. 1999)164 F.3d 49, 53 [interpreting the same Telecommunications Act preemption clause as *Nixon*].) Without an unmistakably clear statement specifically intended to impinge on states' sovereign self-governance, *Gregory* and *Nixon* instruct courts "not [to] construe the statute to reach so far." (*Ibid.*)

The appellate court's preemption decision dramatically interferes with California's governance of its political subdivisions. California has enacted a regime of public governance statutes that set rules of conduct for agencies that ultimately ensure transparency and accountability to the Legislature and the public. (See, e.g., Gov. Code §§ 6250 et seq. [Public Records Act's disclosure requirements for public agency records]; §§ 11120 et seq. [Bagley-Keene Act's open meeting requirements for State agencies]; §§ 54950 et seq. [Brown Act's open meeting requirements for local agencies]; §§ 81000 et seq. [Political Reform Act's ethics rules for public officials and campaign contribution disclosure requirements].) CEQA is properly situated within this constellation of California statutes that the ICCTA does not clearly preempt. Public agencies like NCRA cannot invoke federal preemption to shield their State-funded actions from the political and legal oversight established by the Legislature and the people of California.

Notably, *Nixon* confronted identical concerns to those presented here. The Supreme Court recognized that a state's chosen manner for controlling its subdivisions is "indistinguishable from choices that express what the government wishes to do with the authority and resources it can command." (*Nixon, supra,* 541 U.S. at p. 134.) If state self-governance were preempted, a "State or municipality could give the power, but it could not take it away later." (*Id.* at p. 137.) Similarly, as an agency created by the Legislature, NCRA cannot retain legislatively-granted authority while simultaneously jettisoning legislatively-imposed obligations like CEQA. (See *Dan's City, supra,* 133 S.Ct. at pp. 1780-81.) The Supreme Court rejected such an anomalous result in *Nixon*. This Court should reject it as well.

III. The ICCTA Does Not Preempt CEQA Compliance that Is an Element of State Proprietary Action or Voluntary Commitments.

Even if this Court were to determine that State-required CEQA compliance did not constitute a core sovereign function subject to the unmistakably clear statement required by *Nixon* and *Gregory,* the market participant and the voluntary commitment doctrines independently lead to the same result: CEQA is not preempted here. As explained above, the ICCTA only preempts state "regulation of rail transportation." (49 U.S.C. § 10501, subd. (b); see *Florida East, supra,* 266 F.3d at p. 1331.) Here, nothing within the ICCTA indicates an intent to bar state proprietary

actions. To the contrary, the statute was passed to allow participants in the rail industry greater latitude in making decisions regarding proprietary operations. Similarly, a public agency's self-imposed and voluntary commitments are not "regulation of rail transportation" and therefore are not preempted by the ICCTA.

A. Under the Market Participant Doctrine, CEQA Compliance Is Not Preempted Here.

1. State Actions that Constitute Direct Participation in the Marketplace Are Proprietary.

The U.S. Supreme Court has long relied on the market participant doctrine to hold that federal law does not bar a state's proprietary actions. (See, e.g., *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794 ("*Alexandria Scrap*").) This doctrine recognizes that public agencies, like private entities, enter the market in numerous ways—from managing public property, to undertaking public works projects, to buying and selling goods and services—to carry out their responsibilities. (See *Building & Constr. Trades Council v. Associated Builders & Contractors* (1993) 507 U.S. 218, 227 ("*Boston Harbor*").) In so doing, a state acts as a proprietor rather than a regulator. Because "pre-emption doctrines apply only to state *regulation*," absent an express or implied indication of Congressional intent to the contrary, courts will not infer that federal law prevents states from directing or negotiating the terms and conditions of their proprietary interactions. (*Id.* at pp. 227, 231-32 [emphasis in original] [National Labor Relations Act did

not preempt state agency requirement that all contractors adhere to prehire labor agreement]; see also *Alexandria Scrap*, *supra*, 426 U.S. at pp. 806-09 [Maryland law subsidizing in-state processors of abandoned vehicle hulks was valid market activity that did not violate dormant Commerce Clause].)

Courts undertake "a single inquiry" to determine whether a state action is proprietary, rather than regulatory: "whether the challenged program constituted direct state participation in the market." (*Reeves, Inc. v. Stake* (1980) 447 U.S. 429, 430, 435, fn. 7, 447 [citation omitted (state agency's policy of selling cement from state-owned plant only to state residents during shortage was proprietary and therefore did not violate dormant Commerce Clause)].) Federal courts have interpreted this inquiry to identify two types of state action that fall within the market participant doctrine. First are actions that "essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances." (*Cardinal Towing v. City of Bedford, Tex.* (5th Cir. 1999) 180 F.3d 686, 693.) Second are actions that have a "narrow scope" such that they "defeat an inference that [a state's] primary goal was to encourage a general policy rather than address a specific proprietary problem." (*Ibid.*) State action need only meet one of these tests to qualify for the market participant doctrine and defeat preemption. (*Johnson v. Rancho Santiago Community College Dist.* (9th Cir. 2010) 623 F.3d 1011, 1024; see also

Atherton, supra, 228 Cal.App.4th at p. 335 [adopting the *Cardinal Towing* test and agreeing with the Ninth Circuit that it applies in the alternative].)

It is the substance, not the form, of the governmental action that matters. (*Tocher v. City of Santa Ana* (9th Cir. 2000) 219 F.3d 1040, 1048-50, abrogated on other grounds in *City of Columbus v. Ours Garage and Wrecker Service* (2002) 536 U.S. 424.) Actions that take the form of a rule, policy, order, or law may qualify for the market participant doctrine so long as they involve a state's own interests in the marketplace. (See, e.g., *Alexandria Scrap, supra,* 426 U.S. at pp. 797-98 [state statute]; *Reeves, supra,* 447 U.S. at pp. 432-33, 440 [agency policy]; *Omnipoint Communications, Inc. v. City of Huntington Beach* (9th Cir. 2013) 738 F.3d 192, 199-201 [initiative measure]; *Tocher, supra,* 219 F.3d at pp. 1048-50 [city ordinance].) Further, the state's interests extend beyond price to other factors such as environmental or other policy considerations. (*Boston Harbor, supra,* 507 U.S. at p. 231; *Alexandria Scrap*, *supra*, 426 U.S. at p. 809; *Engine Manufacturers Assn. v. South Coast Air Quality Management Dist.* (9th Cir. 2007) 498 F.3d 1031, 1046-47.)

In *Engine Manufacturers*, after remand from the U.S. Supreme Court to consider the issue, the Ninth Circuit held that the express preemption provision in Clean Air Act section 209 did not bar the South Coast Air Quality Management District's fleet purchasing rules. (*Engine Manufacturers, supra,* 498 F.3d at p. 1043 [on remand from the U.S.

Supreme Court, *Engine Manufacturers Assn. v. South Coast Air Quality Management Dist.* (2004) 541 U.S. 246, 259].) The challenged rules required state and local governments or their operators to purchase vehicle fleets that met certain fuel or emissions standards. (*Id.* at p. 1045.) Section 209 provides that no state "shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." (42 U.S.C. § 7543, subd. (a).) The Ninth Circuit concluded that this language "contains nothing to indicate a congressional intent to bar states from choosing to use their own money to acquire or use vehicles that exceed the federal standards." (*Engine Manufacturers*, *supra,* 498 F.3d at p. 1043.) Because the fleet rules governed legitimate state spending decisions, the court held they were proprietary and not preempted by the Clean Air Act. (*Ibid.*) The court rejected the argument that the rules could not be proprietary because they sought to achieve the policy goal of cleaner air: "'[E]fficient procurement' means procurement that serves the state's purposes – which may include purposes other than saving money," including environmental goals. (*Id.* at p. 1046.)

Applying this precedent in circumstances materially similar to those here, *Atherton* held that the ICCTA does not preempt a CEQA challenge to the adequacy of an EIR prepared by the High-Speed Rail Authority (a public rail agency) for a portion of the High-Speed Rail line. (*Atherton,*

supra, 228 Cal.App.4th at pp. 336-41 [citing numerous U.S. Supreme Court and federal circuit market participant cases].) *Atherton* held that when a public rail agency is acting in its capacity as the owner of property (e.g., a rail line) or a purchaser or provider of goods and services (e.g., construction, engineering, and rail services), those actions fall within the market participant doctrine. (*Ibid.*) The rail carrier is a subdivision of the State, which has a legitimate proprietary interest in the "efficient procurement of needed goods and services" that "serves the state's purposes." (*Id.* at 335-36 [quoting *Cardinal Towing, supra,* 180 F.3d at p. 693]; *Engine Manufacturers, supra,* 498 F.3d at p. 1046.) "Undergoing full CEQA review . . . serves the state's interest in reducing adverse environmental impacts as part of its proprietary action in owning and constructing" the rail line. (*Atherton, supra,* 228 Cal.App.4th at pp. 335-36.) Thus, *Atherton*'s holding falls well within market participant doctrine case law.

2. NCRA's CEQA Review for the Project Was Not Regulation of Rail Transportation, but Internal Decisionmaking Essential to the State's Participation in the Marketplace.

As in *Atherton*, CEQA review for this project is intrinsic to NCRA's role as a public rail agency that acts in the marketplace. NCRA's CEQA review fits within the market participant test for several independent reasons. First, the State is clearly acting as a proprietor through its political

subdivision, NCRA, the nominal owner and manager of the rail line. (AR:13:6595-96; Gov. Code §§ 93001, 93010.) "Proprietor" is defined as one "who has the legal right or exclusive title to something: Owner." (Merriam-Webster's Collegiate Dict. (10th ed. 1996).) Likewise, it is clear that the Legislature mandated CEQA compliance with respect to NCRA's management of the rail line, including the decision to reopen the line. (See Pub. Res. Code § 21080 [requiring CEQA compliance for public agency projects]; Gov. Code § 93000 et seq. [NCRA authorizing legislation, which does not exempt agency from CEQA]; AR 13:6596; *Atherton, supra,* 228 Cal.App.4th at p. 337.) Thus, just as with the agency actions in *Reeves* and *Boston Harbor*, NCRA's CEQA review was simply a component of the State's proprietary decision to own and manage this public rail project. (*Reeves, supra,* 447 U.S. at pp. 430, 440; *Boston Harbor, supra,* 507 U.S. at p. 233.)

Second, in appropriating transportation funding for reopening the rail line, the State reiterated its direction for CEQA compliance in the approval of projects that spend those funds. (Gov. Code §§ 14556.11, 14556.40, subd. (a)(32), 14556.50; see App:9:84:2373 [Commission guidelines requiring a funded project's "Implementing Agency" to comply with "the requirements of CEQA"].) In fact, the Legislature appropriated over two million dollars to pay for preparation of NCRA's EIR. (Gov. Code § 14556.13, subd. (b)(1) ["environmental review" to be included in scope

of funded work]; AR 13:6796 [allocating over two million dollars for EIR]; compare *Atherton, supra,* 228 Cal.App.4th at p. 338 [noting that Proposition 1A provided funds for environmental review].) The State's direction for CEQA compliance—built into the legislation appropriating funds for the project—was separately stated in agreements between NCRA and the Commission, the agency responsible for disbursing the funds. (See, e.g., AR:9:4638 [master agreement specifying NCRA as the agency responsible for ensuring CEQA compliance], 13:6801 [program supplement incorporating provisions of master agreement].)

"[T]he Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." (*Building and Const. Trades Dept., AFL-CIO v. Allbaugh* (D.C. Cir. 2002) 295 F.3d 28, 35.) Here, the State has a proprietary interest in ensuring that: (1) the funds it spends on environmental review for the public rail project result in an EIR that fully complies with CEQA, and (2) funding the reopening of the rail line results in a project that fully accounts for the State's environmental policy to assess and reduce significant environmental impacts where feasible. Just as the State's direction to subdivisions to spend State money on vehicle fleets in a particular manner was protected proprietary conduct in *Engine Manufacturers* (*supra,* 498 F.3d at p. 1045), the State's direction to NCRA

to spend money for the rail line subject to CEQA compliance is similarly proprietary and not preempted.

Third, pursuant to its legislative authorization, NCRA directly participated in the market to lease the rail line and engage a rail operator. (Gov. Code § 93020, subd (f); AR 13:6595 [NCRA seeking "private-public partnership"].) NCRA "solicit[ed] the creativity of the private marketplace . . . for this railroad." (AR 13:6595.) In entering the marketplace to secure an operator, NCRA made CEQA compliance a term of engagement, which its private vendor NWPCo. fully accepted in the course of its business. (AR 13:6731, 6725-86; see also App:5:48a:1414 ["The lease agreement itself has a condition precedent that NCRA comply with CEQA prior to NWP Co. taking possession of the property"].) Courts routinely hold that conditions placed in leases or contracts for services are proprietary and not regulatory. (See, e.g., *Boston Harbor, supra,* 507 U.S. at pp. 232-33 [terms of contract labor agreement not preempted]; *Sprint Spectrum LP v. Mills* (2d Cir. 2002) 283 F.3d 404, 420 ["the actions of the School District in entering into the Lease agreement [are] plainly proprietary"].)

Finally, environmental concerns are a legitimate business factor that private entities also consider. (See, e.g., *Alexandria Scrap, supra,* 426 U.S. at p. 809 ["Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment."]; *Engine Manufacturers*, *supra*, 498 F.3d at p. 1047 [noting

that "FedEx and UPS, have, for their own purposes, adopted programs to introduce less-polluting vehicles into their fleets"].) For example, leases or purchase agreements often include environmental due diligence or survey clauses. (See, e.g., *Trovare Capital Group, LLC v. Simkins Industries, Inc.* (7th Cir. 2011) 646 F.3d 994, 996 [environmental studies necessary to private sale agreement]; *Keywell Corp. v. Weinstein* (2d Cir. 1994) 33 F.3d 159, 161 [environmental due diligence part of purchase agreement].) Any rail entity (whether public or private) has good reason to adopt management and accountability practices that facilitate the discovery of significant environmental impacts to avoid environmental harm and any resulting liability before the effects become too difficult or expensive to manage. (See *Emerson, supra,* 503 F.3d. at pp. 1128, 1131 [liability for improper disposal of railroad ties despite ICCTA].) This is especially true given the history of toxic contamination and extensive liability for cleanup of this rail line. (See App:8:77b:2027-43 [Consent Decree with resource agencies, which requires NCRA to address contamination and other harms on rail line].)

In sum, because NCRA's CEQA obligation stems from California's interest in managing its State-owned railroad in an environmentally sound manner, it reflects the State's "own interest in its efficient procurement of needed goods and services." (*Cardinal Towing, supra,* 180 F.3d at p. 693.) Such environmental interests are legitimate market considerations. Thus, as

in *Atherton*, CEQA compliance for the public rail project here is proprietary under the first *Cardinal Towing* test and falls outside the realm of ICCTA regulatory preemption.

3. Plaintiffs' CEQA Suit Is a Component of the Proprietary Action.

The appellate court recognized the proprietary nature of NCRA's CEQA review, but held that citizen enforcement is not part of that proprietary action. (Opinion at p. 29.) The court stated that it would "stand the market participation doctrine on its head" to allow Plaintiffs to use the doctrine against an agency that is arguing for preemption. (*Ibid.*) *Atherton* correctly rejects this reasoning because there is "no authority supporting the argument that the power to 'invoke' the doctrine is reserved for [a public agency] to selectively assert in order to exempt those projects of its choosing from federal preemption." (*Atherton, supra,* 228 Cal.App.4th at pp. 339-40.) Because preemption is fundamentally a question of Congressional intent (*Boston Harbor, supra,* 507 U.S. at pp. 224, 231), no party may control whether preemption applies. Similarly, no party may dictate whether the challenged action "constituted direct state participation in the market" and thus is subject to the market participant doctrine. (*Reeves, supra,* 447 U.S. at p. 435, fn. 7.) These are legal questions for the Court to decide. (*In re Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1089, fn. 10; *Engine Manufacturers, supra,* 498 F.3d at p. 1035.)

Further, there is no authority, and the appellate court cited none, for the proposition that CEQA's enforcement provisions should somehow be severed from its environmental review provisions for the purpose of the market participant analysis. A state directive does not lose its proprietary nature simply because it contains an enforcement mechanism. The Ninth Circuit held in *Engine Manufacturers* that fleet rules were not preempted under the market participant doctrine even though the rules contained penalties for non-compliance. (*Engine Manufacturers, supra,* 498 F3d. at p. 1048.) The court concluded that such "enforcement provisions" do not "have the effect of transforming the [rules] from proprietary to regulatory action." (*Ibid.*) Similarly here, CEQA's citizen suit enforcement is a mechanism the State has chosen, as a proprietor, to ensure the efficacy and integrity of the management objectives it has chosen for NCRA, its subsidiary. Authorization of citizen suits is not a separate regulatory action.[5]

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[5] The appellate court also relied on recent New York and Florida false-claims act cases to construe Plaintiffs' suits as preempted regulation. (See Opinion at 30 [citing *State of New York ex rel. Grupp v. DHL Express (USA), Inc.* (2012) 19 N.Y. 3d 278; *State ex rel. Grupp v. DHL Express (USA), Inc.* (2011) 922 N.Y.S.2d 888; *DHL Express (USA), Inc. v. State ex rel. Grupp* (Fla.Dist.Ct.App. 2011) 60 So.3d 426].) *Atherton* correctly distinguished those cases because—unlike the state proprietary behavior at issue here—they regulated third party behavior through the imposition of civil penalties and treble damages as punitive and deterrent measures. (*Atherton, supra*, 228 Cal.App.4th at pp. 336-41.) This Court is reviewing a recent Second District opinion addressing that same legal issue. (See *Grupp*
(footnote continued on next page)

California was fully aware of provisions for CEQA enforcement when it directed NCRA to comply with the CEQA in the reopening of the rail line. The Legislature could easily have exempted the rail line from these provisions (or from CEQA entirely), but it did not. (See, e.g., Pub. Res. Code § 21168.6.6 [circumscribing CEQA enforcement provisions for certain projects].) The State's proprietary interest in ensuring that environmental impacts from the project are recognized and mitigated in the manner the State has chosen—through CEQA review—includes a full public (and if necessary, judicial) vetting of the completeness and integrity of NCRA's CEQA process. Citizen enforcement of CEQA compliance regarding this publicly-owned line is merely California's management of its own proprietary affairs, not regulation of private rail transportation.

B. The ICCTA Does Not Preempt Self-Imposed Commitments to Undertake CEQA Compliance.

A separate legal doctrine provides that the ICCTA does not preempt commitments a railroad enters voluntarily. (See, e.g., *Fayard v. Northeast Vehicle Services* (1st Cir. 2008) 533 F.3d 42, 49.) As arms-length transactions between willing parties, such commitments reflect the railroad's choices, not regulation subject to preemption, even when they relate to rail transportation. (See *PCS Phosphate, supra,* 559 F.3d at

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(footnote continued from previous page)
v. DHL Express (USA), Inc. (2014) 225 Cal.App.4th 510, review granted July 30, 2014, S218754.)

pp. 219-20 [voluntary "agreements do not fall into the core of economic regulation that the ICCTA was intended to preempt"].)

These cases reflect the same principle underlying the market participant doctrine: Freely-entered bargains reflect the workings of market forces, not regulation. (See, e.g., *Boston Harbor, supra,* 507 U.S. at p. 233.) If the parties do not like the potential outcomes of a deal, they can choose not to enter it. (See, e.g., *Northern Illinois Chapter of Associated Builders and Contractors, Inc. v. Lavin* (7th Cir. 2005) 431 F.3d 1004, 1006 [holding that a funding "condition differs from regulation because [the beneficiary] may decline the offer"]; *Hotz v. Rich* (1992) 4 Cal.App.4th 1048, 1055 [holding that a deed restrictions is not regulation "because operators could choose not to buy or lease properties subject to such restrictions"]; *Friends of East Willits Valley v. County of Mendocino* (2002) 101 Cal.App.4th 191, 201 [same].) In this light, NCRA's CEQA obligation is not regulation, but rather a provision it accepted in return for $60 million in State money. (See, e.g., AR:9:4638; *Atherton, supra,* 228 Cal.App.4th at p. 339.) Further, NWPCo.—the vendor of rail services for the rail line—freely agreed to CEQA compliance as a condition precedent to operations. (AR:13:6731.)

The appellate court held that the voluntary commitment cases are inapplicable on the grounds that Plaintiffs allegedly do not have standing to enforce NCRA's agreements to comply with CEQA. (Opinion at pp. 22-

25.) But Plaintiffs' lawsuits do not, and need not, seek to enforce a contract. Rather, Plaintiffs brought their writ of mandate actions to require NCRA to comply with CEQA in reopening the rail line.[6] Defendants argued preemption as an affirmative defense to those actions. Neither federal nor California law limits which plaintiffs may argue against an affirmative defense. In fact, standing and the merits of an affirmative defense such as preemption "are two separate questions, to be addressed on their own terms." (*Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc.* (3rd Cir. 2001) 267 F.3d 340, 346; see also *Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468, 1473-74 [addressing standing separately from preemption argument].)

Plaintiffs do not cite the State's self-imposed commitments to CEQA compliance or Defendants' agreements to perform the same to support a breach of contract claim, but rather as evidence that defeats Defendants' preemption defense. Such commitments show that CEQA compliance is not regulation here and that ICCTA preemption does not apply. As *Atherton* correctly held, Plaintiffs' argument that preemption does not apply for this reason "is part of" their writ of mandate action. (*Atherton, supra,* 228

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[6] As Defendants have conceded, Plaintiffs indisputably have standing to bring their writ actions to enforce CEQA. (See, e.g., Joint Response Brief of Respondent and Real Party in Interest at p. 75 [Plaintiffs "had standing to seek enforcement of CEQA to the extent that it applied"]; *Save the Plastic Bag Coalition, supra,* 52 Cal.4th at p. 170; App:1:1:2-3, 1:5:36-37; AR:7:3590, 19:9704, 20:10577.)

Cal.App.4th at p. 340; see also *Friends of East Willits, supra,* 101 Cal.App.4th at pp. 194, 201 [addressing voluntary commitment exception to preemption in writ of mandate action brought by third party for violations of CEQA and the Williamson Act].) Plaintiffs need not plead or prove a separate breach of contract violation.

IV. The ICCTA Does Not Impliedly Preempt Plaintiffs' Case.

As discussed above, section 10501(b) does not expressly preempt NCRA's obligation to comply with California's environmental review and disclosure law. Without a clear statement to prohibit a state's management of its subdivisions, no federal statute can impliedly preempt California's application of CEQA to its own projects. (See *Nixon, supra,* 541 U.S. at p. 140; *City of Dallas, Tex. v. FCC* (5th Cir. 1999) 165 F.3d 341, 347-48.) Moreover, Plaintiffs have demonstrated that the ICCTA does not expressly or impliedly preempt a state's proprietary actions. (*Boston Harbor, supra,* 507 U.S. at pp. 231-32.) Therefore, the Court need not perform a separate implied preemption analysis.

Nonetheless, Plaintiffs address conflict and obstacle preemption because some courts analyze implied preemption under the ICCTA. (See, e.g., *PCS Phosphate, supra,* 559 F.3d at p. 221.) This implied preemption analysis only confirms that the ICCTA does not preempt the application of CEQA here.

A. Implied Preemption May Be Found Only Where the Actions at Issue Would Interfere with Congressional Intent to Provide a Uniform System of Regulation of Rail Transportation.

Conflict or obstacle preemption exists only "when it is impossible to comply with both state and federal law simultaneously," or "when state law stands as an obstacle to the accomplishment and execution of congressional objectives." (*Pac Anchor, supra,* 59 Cal.4th 778.) In assessing conflict preemption, the Court "performs[s] its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption [or] an agency's mere assertion that state law is an obstacle to achieving its statutory objectives." (*Wyeth, supra,* 555 U.S. at p. 576.) When conducting an "implied" preemption analysis under the ICCTA, courts assess whether preemption exists "as applied" to the facts of the specific case. (*Franks, supra,* 593 F.3d at pp. 414-15.) This is a fact-based inquiry, and the burden of proof lies with the party asserting preemption. (*Ibid.*)

In enacting the ICCTA, Congress sought to avoid a patchwork of state economic regulation and the balkanization of the railroad industry. (*Florida East, supra,* 266 F.3d at p. 1339; cf. *Dan's City, supra,* 133 S.Ct. at p. 1780 [interpreting the deregulatory scheme of FAAAA].) Thus, the implied preemption question under the ICCTA is whether NCRA's CEQA compliance *in this case* would "frustrate Congress's intent or stand as an

obstacle to the accomplishment and execution of" uniform regulation of rail transportation. (*Bronco Wine, supra,* 33 Cal.4th at p. 994.) Some courts and the Board have stated the inquiry as whether the challenged action "as applied" would have "the effect of unreasonably burdening or interfering with [interstate] rail transportation." (*Franks, supra,* 593 F.3d at p. 414.)[7] Under either formulation, the action here is not preempted.

B. Applying CEQA to the Funding, Rehabilitation, and Reopening of the Rail Line Does Not Frustrate Congressional Intent or Unreasonably Interfere with Rail Transportation.

As demonstrated, California's long-standing commitment to adequate environmental review and disclosure before funding or approving a public project is an intrinsic component of the State's internal decisionmaking process. These State activities do not conflict with the ICCTA's purpose. They reflect a State policy choice to review the potential

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[7] While the long-established test for obstacle preemption is whether the state or local action frustrates Congressional intent, the Surface Transportation Board has employed, and the appellate court here adopted, a different test: whether the action constitutes an "unreasonable interfere[nce] with interstate commerce." (Opinion at p. 17.) That test appears nowhere in standard preemption analysis and seems to have been conjured by the Surface Transportation Board from an amalgamation of (1) dormant Commerce Clause jurisprudence (which holds that a non-discriminatory state law survives constitutional muster "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits" (*Dept. of Revenue of Ky. v. Davis* (2008) 553 U.S. 328, 339 [quotation omitted]); and (2) the express preemption/savings clause in the Federal Railroad Safety Act, which provides that states may adopt a railroad safety law that "does not unreasonably burden interstate commerce" (49 U.S.C. § 20106, subd. (a)).

environmental impacts of public projects and then to make informed decisions about how to spend limited public resources. For example, after the environmental review process, the State could decide that rehabilitation or necessary environmental mitigation is too expensive to proceed with a project, or that significant environmental impacts disclosed through the EIR process counsel for design or other project changes. This self-imposed review does not result in a patchwork of regulations, as it is intended to ensure the rail project is thoroughly vetted so that, if and when it reopens, it will be both economically and environmentally sustainable.

Preemption does not bar such environmental planning even when it may have some connection to operations of a rail line. This Court rejected a similar claim in the context of the FAAAA, which regulates the motor carriers industry, holding that a federal statute did not preempt California unfair competition law claims to enforce violations of state employment, labor and insurance laws, even if "the People's [unfair competition law] action may have some indirect effect on defendants' prices or services." (*Pac Anchor, supra,* 59 Cal.4th at pp. 786-87 [noting FAAAA was passed to end patchwork of state regulation and "nothing in the congressional records establishes that Congress intended to preempt states' ability" to enforce general laws not targeted at the regulated industry]; see also *Dilts, supra,* 769 F.3d at pp. 640, 643 [noting Justice Scalia's observation that, ultimately, "everything is related to everything else" and holding that

application of California's wage and hour laws to a motor carrier is peripheral and thus not preempted by the FAAAA (quotation omitted)]; *New York Telephone Co., supra,* 440 U.S. at p. 532 [state unemployment insurance program that affected balance between labor and management was not preempted because it did not regulate private behavior in labor market and therefore would not interfere with uniform system of labor regulation].) Thus, full CEQA compliance required to open this public rail line, and as a condition of public funding and leasing, does not frustrate Congress' purpose of ensuring uniform national regulation for "rates, classifications, rules, . . . practices, routes, services, and facilities of such carriers" if and when the rail line is reopened and operating. (49 U.S.C. § 10501, subd. (b).)

Nor does the ICCTA's exclusive jurisdiction over rail operations demonstrate an implied intent to preempt CEQA compliance for restoring and reopening the line. (See *ibid.*) The Surface Transportation Board's jurisdiction does not extend to the State's internal process for deciding what is necessary to reopen the line, even if the Board has some jurisdiction over *operations* once the line is reopened. In fact, the Board itself recognized when it approved a change in the operator status for this line that the change would become effective only after completion of the terms of NCRA's lease with the private vendor NWPCo.—a lease that was predicated on compliance with CEQA. (AR:16:8207, 13:6731.)

These internal decisions are not within the ICCTA's reach. Thus, for example, if California were to decide after CEQA review that it would be too expensive to operate the line, the Surface Transportation Board could not force California to do so. (*Purcell v. United States* (1942) 315 U.S. 381, 385 [rail operators cannot be forced to operate unprofitable line]; see also *Printz v. United States* (1997) 521 U.S. 898, 930 [the federal government cannot commandeer the officers and agencies of a state].) In fact, the Board determined here that NCRA's decision in the past not to "expend public funds to reopen the line [was] manifestly reasonable." (AR:13:6815.)

The State only agreed to disburse funds for NCRA's project after NCRA expressly committed to CEQA compliance. Preemption here would interfere with the State's decision to make funding of the line contingent on a full consideration of impacts to the environment and the public fisc. Preemption not only would affect operation of the line's Russian River Division, but also would preclude State environmental review of the Eel River Division, which traverses sensitive ecological areas. Without adequate CEQA review, the State could be saddled with ongoing and substantial liability for operation on that unstable part of the line. (See, e.g., AR:9:4587, 4715.)

That CEQA review or citizen enforcement could make future operation more costly does not provide a basis for "as applied" preemption of traditional state functions. (E.g., *Pac Anchor, supra,* 59 Cal.4th at p. 786

[even though the State's enforcement of labor and insurance laws "may have some indirect effect on defendants' prices or services, that effect is too tenuous, remote, [and] peripheral . . . to have pre-emptive effect" under FAAAA (quotation omitted)]; *Adrian, supra,* 550 F.3d at p. 541 ["state actions are not preempted merely because they reduce the profits of a railroad" under ICCTA]; *New Orleans & Gulf Coast Ry. Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 335 [same]; *Florida East*, 266, *supra,* F.3d at p. 1338, fn. 11 [same]; *New York Susquehanna, supra,* 500 F.3d at p. 254 [same].) Indeed, NCRA's voluntary agreement to comply with CEQA "reflects the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." (*Atherton, supra,* 228 Cal.App.4th at p. 339 [quotation omitted]; see also *PCS, supra,* 559 F.3d at p. 221.)

From the beginning, NCRA incorporated CEQA review into the cost of doing business to reopen the line. It even received state funding to prepare the EIR challenged here. (AR:13:6796.) Defendants have not met—and cannot meet—their factual burden to demonstrate that applying CEQA in this case frustrates the ICCTA's intent to eliminate a patchwork of state economic regulations or results in an unreasonable interference with rail transportation. Indeed, without the State's decision to create NCRA and to fund and reopen the line, which was explicitly conditioned on CEQA compliance, there would be no rail transportation on this line at all.

CONCLUSION

The State's internal decisions are not within the ICCTA's reach. Plaintiffs respectfully request that the Court hold that the ICCTA does not preempt CEQA here, and remand the case with directions to rule on the merits of Plaintiffs' CEQA claims. Without such a ruling, CEQA, California's foundational public accountability law, would go unenforced.

DATED: February 23, 2015

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CERTIFICATE OF WORD COUNT
(California Rules of Court 8.504(d)(1))

The text of this Plaintiffs' Opening Brief consists of 13,327 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to prepare this brief.

ELLISON FOLK

PROOF OF SERVICE

Friends of the Eel River v. North Coast Railroad Authority, et al.
Supreme Court of California
Case No. S222472

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On February 23, 2015, I served true copies of the following document(s) described as:

PLAINTIFFS' OPENING BRIEF

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 23, 2015, at San Francisco, California.

Sean P. Mulligan

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