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 Five
Case Nos. A139222, A139235

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

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS AND [PROPOSED] BRIEF OF *AMICUS CURIAE* CENTER FOR BIOLOGICAL DIVERSITY IN SUPPORT OF APPELLANTS

Clare Lakewood (SBN 298479)*
Kassia R. Siegel (SBN 209497)
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Ste 800
Oakland, CA 94612
Tel: (510) 844.7100
Fax: (510) 844.7150

Counsel for Proposed Amicus Curiae Center for Biological Diversity

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 Five
Case Nos. A139222, A139235

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

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS AND [PROPOSED] BRIEF OF *AMICUS CURIAE* CENTER FOR BIOLOGICAL DIVERSITY IN SUPPORT OF APPELLANTS

Clare Lakewood (SBN 298479)*
Kassia R. Siegel (SBN 209497)
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Ste 800
Oakland, CA 94612
Tel: (510) 844.7100
Fax: (510) 844.7150

Counsel for Proposed Amicus Curiae Center for Biological Diversity

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Federal Cases

California Cases

Other States Cases

STATUTES

Federal Statutes

California Statutes

REGULATIONS

Federal Regulations

California Regulations

ADMINISTRATIVE DECISIONS

OTHER AUTHORITIES

APPLICATION FOR LEAVE TO FILE AMICUS CURIAEBRIEF IN SUPPORT OF PLAINTIFF AND APPELLANTS FRIENDS OF THE EEL RIVER AND CALIFORNIANS FOR ALTERNATIVES TO TOXICS

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.250(f) of the California Rule of Court, Center for Biological Diversity hereby applies for leave to file the *amicus curiae* brief that follows this application.

I. IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The Center for Biological Diversity ("Center") is a non-profit organization whose mission is to ensure the preservation, protection and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health. The Center has more than 900,000 members and online activists nationwide, and has offices in California and several other states. The Center works through science, law and creative media to secure a future for all species, great or small, hovering on the brink of extinction.

In California, the Center has been a party in numerous CEQA lawsuits where land use activities threaten the Center's conservation interests. The Center has a particular interest in ensuring that the impacts of these activities are fully disclosed, and that decision-makers are fully informed and have the opportunity to reflect on the impacts of proposed activities. In addition to litigating when necessary, the Center frequently engages in the opportunities CEQA provides for public comment and

public participation in the decision-making process. The Center uses such opportunities to alert agencies to environmental impacts that are of particular concern to the Center, and about which the Center often has specialized knowledge that may assist the decisionmaker. The Center thus has a significant interest in the outcome of this case.

II. NEED FOR FURTHER BRIEFING

Amicus is familiar with the issues before this Court and the scope of their presentation. Amicus believes that further briefing is necessary to highlight the fundamental and unique role that CEQA plays in requiring decisionmakers to document and reflect upon the environmental implications of their actions.

This amicus brief is also submitted to assist the Court in understanding the potential ramifications of this case on projects in California that have some connection with railway operations. CEQA sets out the process that the State Legislature has determined public agencies should follow in order to ensure sound and well-informed decisionmaking in the context of action that will impact the environment. The Interstate Commerce Commission Termination Act ("ICCTA") is a federal law concerned solely with economic regulation of railroads. Yet Defendant and Respondents argue for an interpretation of ICCTA that would eliminate CEQA review for any project with some connection to rail operations. Absent CEQA, California public agencies would have to approve or deny

significant projects without meaningful environmental information and mitigation that the state Legislature has decided best serve state agencies and the public. No analogous federal process would stand in its place. Such an interpretation goes far beyond the jurisdictional scope of ICCTA's preemption clause.

III. CERTIFICATE REGARDING AUTHORSHIP AND FUNDING

No party or counsel in the pending case authored the proposed amicus curiae brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No person made any monetary contribution intended to fund the preparation or submission of this brief.

IV. CONCLUSION

For the reasons described above, Amicus respectfully requests that the Court accept the accompanying brief for filing in this case, in support of Plaintiff and Respondents Friends of the Eel River and Californians for Alternatives to Toxics.

Dated at Oakland, California on June 11, 2015.

Respectfully submitted,

By: 

Clare Lakewood
Attorney for [Proposed] Amicus Curiae
CENTER FOR BIOLOGICAL DIVERSITY

BRIEF OF AMICUS CURIAE CENTER FOR BIOLOGICAL DIVERSITY IN SUPPORT OF APPELLANTS

PRELIMINARY STATEMENT

The Interstate Commerce Commission Termination Act ("ICCTA") (49 U.S.C. § 10101 *et seq.*) was enacted to abolish direct economic regulation of rail carriers, while ensuring sufficient continuing oversight to prevent market abuses. The "economic regulation" imposed by the statute is limited only to a narrow range of regulations dealing expressly with fees, rates, schedules and tariffs. It is not a statute that comprehensively regulates the rail transportation industry. The scope of ICCTA is limited because Congress intended that ICCTA merely complete the process of deregulation of the rail transportation market begun through prior legislative efforts.

Congress first became involved in economic regulation of the rail industry in the nineteenth century, following market abuses by rail monopolies, to protect the public and ensure fair rates for rail carriers. By the late twentieth century, however, this economic regulation came to be perceived as an unnecessary burden on an industry struggling to survive. Focusing only on direct economic regulation, Congress began to loosen its control of the economics of the rail industry. The ICCTA was the culmination of this program of deregulation, abolishing the federal Interstate Commerce Commission and removing from the states their

remaining power to set rail rates. Accordingly, section 10501(b) of ICCTA preempts "the remedies provided under [ICCTA] with respect to regulation of rail transportation." (49 U.S.C. § 10501(b).) Consistent with Congress' focus on economic deregulation, ICCTA is concerned only with direct economic control of the market; with rates and charges, schedules and railroad restructuring. It does not affect the exercise of state police powers, save those that attempt to directly regulate economic aspects of the rail industry.

Yet Respondents would have the Court stretch the language of ICCTA's preemption clause well beyond the bounds of Congressional intent. Respondents argue for a holding of sweeping preemption that would eliminate the application of any state law that may have an incidental economic effect on rail carriers. If adopted, such an interpretation will prevent the State of California from engaging in the process of reflective self-governance and environmental protection that the Legislature, in passing the California Environmental Quality Act ("CEQA") (Pub. Res. Code § 21000-21177), imposed.

Moreover, for many rail projects, a complete regulatory void would result. Under ICCTA and its attendant regulations, National Environmental Policy Act ("NEPA") (42 U.S.C. § 4321 *et seq.*) review is carried out only for certain rail projects. If CEQA is preempted, any rail infrastructure project that involves maintenance of an existing line, rather than new line

construction – no matter how expensive or large, no matter its impact on the environment – would proceed without any environmental review whatsoever. In repairing lines and building warehouses, wharves, refueling station, terminals, railyards and spur lines, rail carriers would effectively be above the state laws that protect not only the environment, but also basic public safety and welfare. CEQA's informational disclosure provisions, which serve as the state's most basic community-right-to-know law, would also be subverted.

This is not the outcome Congress intended when it sought to deregulate the rail industry. The courts that have decided to the contrary have done so without adequate consideration of the full text of the preemption provision, and without full consideration of the legislative history of ICCTA and the statutes that preceded it. In context, it is clear that the preemption provision is intended to preempt only direct economic regulation by the states - interference with rates, charges, schedules and railroad restructuring. Congress' clear intention was that exercise of state police powers, including those embodied in environmental and land use planning statutes, continue. Accordingly, CEQA, a statute that does not grant any agency the power to refuse or prohibit a project, but merely requires public participation and government reflection upon the decisionmaking process, is not preempted by ICCTA.

ARGUMENT

I. Preemption test

The underlying rationale of the preemption doctrine, as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that "interfere with or are contrary to, the laws of congress." (*Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co* (1981) 450 U.S. 311, 317.) Preemption may occur in three circumstances. First, Congress may "define explicitly the extent to which its enactments preempt state intent" (express preemption). (*English v. General Electric Co.* (1990) 496 U.S. 72, 78.) Secondly, in the absence of explicit statutory language, state law is preempted where Congress intended that federal law occupy the field exclusively (field preemption). (Ibid.) Finally, state law is preempted to the extent that it actually conflicts with federal law, or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," (conflict preemption). (Ibid., quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67.) The categories are not necessarily rigidly distinct. (*English v. General Elec. Co.*, 496 U.S. at p. 79, fn. 5.)

Where, as here, a statute contains an express preemption clause, the task of statutory construction must focus "on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent." (*People ex rel. Harris v. Pac Anchor Transportation, Inc.*

(2014) 59 Cal.4th 772, 778.) However, the text of the preemption clause alone is not the sole source for determining the scope of the preemptive clause, because "interpretation of [statutory] language does not occur in a contextual vacuum." (*Medtronic v. Lohr* (1996) 518 U.S. 470, 485.) Accordingly, consideration must be given to the "structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 816, quoting *Medtronic, supra* 518 U.S. at p. 486.) In all preemption cases, the Court should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Brown v. Mortensen* (2011) 51 Cal.4th 1052,1060.) When determining whether a federal law does overcome the presumption against preemption, "[t]he purpose of Congress is the ultimate touchstone." (*Medtronic, supra,* 518 U.S. at p. 485, quoting *Retail Clerks v. Schermerhorn* (1963) 375 U.S. 96, 103; see also *Wyeth v. Levine* (2009) 555 U.S. 555, 565.)

Once the preemptive scope of the federal law is determined, consideration must be given to whether the state law falls within the scope of the preemption. (*Perez v. Campbell* (1971) 402 U.S. 637, 644.) Not every state law that touches upon the federally regulated subject matter is

invalid. The preemption doctrine "does not and could not in our federal system withdraw from the States either the power to regulate where the activity regulated is a merely peripheral concern a federal law." (*San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 243). In deciding whether federal law does withdraw the states' power to legislate, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'' (*Bldg. & Constr. Trades Council v. Associated Builders & Contractors* (1993) 507 U.S. 218, 224.) The role of this presumption is to "provide[] assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts." (*Brown v. Mortensen, supra,* 51 Cal.4th at p. 1060, citations and quotations omitted.)

II. Federal Regulation of Rail Carriers Has Always Been Concerned With Direct Economic Regulation

Federal Regulation of Railways Arose from a Need to Regulate Activity Beyond the Reach of the States

The states have a long history of involvement in rail regulation. Throughout most of the nineteenth century the states were the primary source of railroad regulation. (Ely, *"The Railroad System Has Burst Through Gate Limits": Railroads and Interstate Commerce, 1830-1920* (2003) 55 Ark. L.Rev. 933, 937.) The power of the states to regulate rail rates was initially upheld by the Supreme Court, even where such

regulations impacted interstate commerce. (See *Munn v. Ill.* (1876) 94 U.S. 113.) The result was state-level rate legislation that favored local interests by requiring interstate carriers to charge higher rates than intrastate carriers. (Ely, *The Railroad System Has Burst Through Gate Limits, supra*, at p. 942.)

This early state dominance of economic regulation of railways did not continue, however. In *Wabash, St. Louis & Pac. Ry. v. Ill.* (1886) 118 U.S. 557, the Supreme Court struck down an Illinois statute regulating interstate freight transportation rates, finding that "if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to." (Id. at p. 572.) While the decision "utterly demolish[ed] the pretension of the State legislatures to regulate the rates of freight and fare on goods and passengers passing through the States" (Ely, *The Railroad System Has Burst Through Gate Limits, supra*, at p. 945, quoting The Nation, Oct. 28, 1886), the Supreme Court continued to give the states leeway to regulate railroad operations to protect the safety of passengers and the public. (Ely, *The Railroad System Has Burst Through Gate Limits, supra,* at pp. 945.)

Federal Regulation of Railways by the Interstate Commerce Commission Has Always Been Confined to Direct Economic Regulation and Deregulation of the Rail Industry

While the Supreme Court had held that state attempts to regulate interstate rail rates were unconstitutional, the problems of indiscriminate construction, market manipulation, rates abuses and discriminatory practices from the rail industry remained. Farmers and consumers began demanding rate control, while merchants and shippers demanded equal treatment with competitors. (Sen.Rep. No. 104-76, 1st Sess., p. 2 (1995) Thus, in 1887, Congress enacted the first federal legislation requiring that all rates be "reasonable and just," and established the ICC to administer the law. (Ibid).

The ICC's jurisdiction expanded throughout the early twentieth century, eventually encompassing not only rail transport, but pipeline transportation, truck and bus industries, and even communications systems. (Sen.Rep. No. 104-76, 1st Sess., p. 2-3 (1995).) In the second half of the twentieth century, the rail industry's dominance of the transport industry waned dramatically. The collapse of the rail industry, rather than market abuses by rail carriers, became the issue of primary concern to government. By the 1970s, six major northeastern railroads and one Midwestern line were bankrupt. (Id. at p. 3.) As a result, President Carter created a taskforce to streamline the ICC and reduce regulation. (Ibid.)

The deregulation that followed was only ever concerned with undoing federal interference in the economics of the rail industry. It did not look to remove rail carriers from the scope of any incidental state or federal regulation. The first major federal rail regulation reform legislation, the Railroad Revitalization and Regulatory Reform Act of 1976 ("RRRRA") provided as its goal the earnings of "adequate revenues" by rail carriers. (Sen.Rep. No. 104-76, 1st Sess., p. 3 (1995).) This was to be achieved through ratemaking and regulatory reform, economic restructuring of rail carriers, and financing mechanisms. (Railroad Revitalization and Regulatory Reform Act of 1976 (Pub.L. 94-210 (Feb. 5, 1976)) § 101(a).) None of the reforms in the RRRRA sought to touch upon the exercise of state police powers, including state planning and environmental laws.

The Staggers Rail Act of 1980 ("Staggers Act") more comprehensively reformed regulation of economic aspects of the rail industry. Perceiving a "great disparity between interstate and intrastate rail rates, caused partly by a lack of uniform standards and partly by state regulatory delay," the Staggers Act "effected a basic change in the regulatory spheres of state agencies and the ICC." (*Indianapolis Power & Light Co. v. Interstate Commerce Com.* (7th Cir. 1982) 687 F.2d 1098, 1100.) Prior to the Staggers Act, states had the power to regulate rates charged by intrastate rail lines, so long as the state regulations were fair and did not interfere with interstate commerce. The Staggers Act instead

provided that states could regulate intrastate railroads only if the state rate regulations mirrored federal standards. (*Interstate Commerce Comm'n v. Texas* (1987) 479 U.S. 450, 453-54.)

However, like previous federal regulatory efforts, The Staggers Act limited its intervention only to reforms directly concerned with economic aspects of the rail industry. Finding that "modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential," the Act sought to increase competition by removing anti-trust immunity over collective ratemaking, reducing rail rate regulation, and easing the way for mergers. (Sen.Rep. No. 104-76, 1st Sess., p. 3 (1995).)

Congress expressly removed state jurisdiction over certain aspects of rate regulation, including "general rate increases, inflation-based rate increases and fuel adjustment surcharges." (H.R.Rep. No. 96-1430. 96th Sess. (1980), reprinted in US. Code Cong. & Admin. News, p. 4115.) It also established a federal procedure for approval of state administration of the provisions of the Interstate Commerce Act. (Ibid; Pub.L. 96-448 (Oct. 14, 1980) § 214(b).) That is, subject to the federal certification process, direct economic regulation of rail carriers was shared between federal and state governments. To enforce this new system, under which federal economic regulation was exclusive, but could be administered by the states, Congress inserted a preemption clause:

> The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

(Pub.L. 96-448 (Oct. 14, 1980), § 214(d), italics added.)

Federal oversight did not encompass every regulation that might touch upon rail carriers. Rather, rail carriers had the right to petition the Interstate Commerce Commission only for review of the decision of any State authority "in which the lawfulness of an *intrastate rate, classification, rule, or practice is determined*, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle" (Pub.L. 96-448 (Oct. 14, 1980) § 214(c), italics added.) Direct economic regulation was the only sphere in which there was shared federal and state regulatory control. There was no federal attempt to regulate, or to limit the states' power to regulate, environmental or other planning laws as they applied to railways.

Furthermore, states expressly retained their power to impose economic regulation, including rate-setting, on purely intrastate rail activities. Thus the Staggers Act retained 1978 amendment that expressly stated that:

The Commission does not have authority under sections 10901-10906 of this title over—

(1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State; or

(2) a street, suburban, or interurban electric railway that is not operated as part of a general system of rail transportation.

(Pub.L. 95-473 (Oct. 17, 1978) § 10907.)

III. Congress's Intention in Passing ICCTA Was to Complete the Project of Federal Deregulation of the Rail Carrier Market, and to Prevent States From Interfering with Deregulation

The ICCTA was introduced to complete the work of the Staggers Act. Observing "that the surface transportation industry is competitive and that few economic regulatory activities are required to maintain a balanced transportation network," Congress intended to further deregulate the rail carrier market, and to abolish the ICC. (H.R.Rep. No. 104-311, 1st Sess., p. 82 (1995) The ICCTA intended to transfer continuing governmental duties to the Department of Transportation, and to abolish the system of certification of state regulatory agencies to exercise federal authority. Any limited remaining functions would be exercised only by the newly-created STB.

The statutory changes brought about by the ICCTA demonstrate a continued legislative focus upon the impact of direct economic regulation by the states, rather than any incidental impact arising from the exercise of traditionally local police powers, such as planning and environmental laws. The regulatory burdens that were abolished were those concerned with rates, tariffs and securities laws. Tariff filing obligations were abolished, as was regulation of passenger rail fares. Securities jurisdiction and the financial assistance program were reformed. (H.R.Rep. No. 104-311, 1st Sess., p. 82 (1995).) The emphasis was not on freeing railroads from *all* forms of regulation, but only from direct economic regulation.

The House Committee Report accompanying the Interstate Commerce Commission Termination Bill referred only to regulation needed to address rates, facility access, and industry restructuring. At the time the bill was being discussed, CEQA had been in place for some 25 years. Yet the House Committee Report is completely silent as to any need, or intention, to eliminate state and local environmental and planning laws. There is no indication that such laws were in any way contributing to the financial difficulties facing the railways, or that reform was required in that area.

The intention that states would retain their police powers was so clear that a proposed "disclaimer regarding residual State police powers

[was] eliminated as unnecessary." (H.R.Rep. No. 104-311, 1st Sess., p. 95-96 (1995).) Congress' expressed intention was that while:

> States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme.

(Id. at p. 96, italics in original.)

It is clear that the federal scheme, as set out in the ICCTA, was of limited scope. It was concerned not with preempting any and all state regulations that might have some conceivable, incidental economic effect on a rail carrier, but rather only with preempting regulation dealing directly with rates and tariffs, railroad restructuring, and financial assistance. The preemption clause reflects only Congress's explicit concern that the states might seek to continue the type of economic regulation that Congress had abolished. Thus the House Report went on to state:

> The abolition of railroad securities jurisdiction formerly administered by the ICC places the railroad industry for securities purposes in the same position as other industries—being subject to Federal securities regulation by the Securities and Exchange Commission, and as applicable, State securities or ''blue sky'' laws.

> It is not consistent with the intent to have all economic regulation of rail transportation governed by uniform Federal standards for State securities laws to be employed as a means of reasserting preempted forms of economic regulation.

(Ibid.)

The intent to preempt state regulation only in areas of direct economic regulation is echoed in other reports on the Interstate Commerce Commission Abolition Bill. For example, the Senate Committee Report on the Bill stated not that state authority to regulate railroads was preempted, but rather that:

> [N]othing in this bill should be construed to authorize States to *regulate railroads in areas where Federal regulation has been repealed by this bill* ... The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the ''seamless'' service that is essential to its shippers and would weaken the industry's efficiency and competitive viability.

(Sen.Rep. No. 104–176, 1st Sess., p. 6 (1995), italics added.) The concern expressed is for the provision of a nationally uniform framework for direct

economic regulation, not the removal of any regulation that may incidentally have an economic impact on a rail carrier.

The House Report describing the bill as it appeared in its final form made clear that state criminal laws would survive preemption, because they were not the target of the ICCTA scheme. The Report stated that:

> The Conference provision [of 49 U.S.C. § 10501(b)] retains this general rule [of increased exclusivity for Federal remedies], while clarifying that *the exclusivity is limited to remedies with respect to rail regulation—not State and Federal law generally.* For example, criminal statutes governing antitrust matters not pre-empted by this Act, and laws defining such criminal offenses as bribery and extortion, remain fully applicable unless specifically displaced, *because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation.*

(H.Rep. No. 104–422, 1st Sess., p. 167 (1995), italics added.) Like environmental laws, state criminal laws have the potential to incidentally impact upon a rail carrier. Like environmental laws, they have the potential to have some kind of economic impact upon a rail carrier. However, Congress had no interest in preempting such incidental impacts.

Thus, "[w]ith respect to rail transportation, the ICCTA seeks to implement a '[f]ederal scheme of minimal regulation for this intrinsically interstate form of transportation,' and to retain only regulations 'that are

necessary to maintain a "safety net" or "backstop" of remedies to address problems of rates, access to facilities, and industry restructuring.'" (*Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 328, citations omitted.)

The Preemption Clause Was Not Amended to Expand the Scope of Federal Preemption, But to Remove State Authority to Impose Economic Regulations on Intrastate Rail

In 1995, the preemption provision in the Staggers Act was replaced with ICCTA's current preemption clause, which reads:

> (b) 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(b).)

The more general expression of exclusive jurisdiction in section 10501(b) of ICCTA did not broaden the scope of the preemption provision but rather expanded the federal government's exclusive economic regulation a greater number of railways – namely, for the first time, those located *entirely within a state*. Prior to ICCTA, "[f]ederal law … recognized exclusive state authority over 'the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State …'" (*Fla. E. Coast Ry. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324, 1337; quoting Pub.L. 95-473 (Oct. 17. 1978) § 10907(b).) Such authority included the power to approve activity and impose economic regulations.

In order to clarify that ICCTA ended the states' prior authority over wholly intrastate carriers, and to emphasize "the exclusive Federal authority over auxiliary tracks and facilities," (H.R.Rep. No. 104-422, 1st Sess., p.167 (1995)), ICCTA amended the Staggers Act preemption clause to clarify that the STB has jurisdiction over "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." (49 U.S.C. § 10501(b)(2), italics added.) This language is drawn from the clause that previously reserved economic regulation and approval of intrastate rail for the states alone. Its inclusion verbatim indicates Congress's intention that section 10501(b) of ICCTA be "reflect the direct pre-emption of State economic regulation of railroads." (H.R.Rep. No. 104-422, 1st Sess., p.167 (1995)). The expression "construction, acquisition, operation, abandonment, or discontinuance," reflects the specific economic activities of rail carriers that require STB approval (see 49 U.S.C. § 10102 part (9).) Thus, 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.* (3d Cir. 2007) 500 F.3d 238, 252.) It does not expand the scope of preemption to preclude the exercise of state police powers other than the direct economic regulation of railways.

IV. The Language and Structure of Section 10501(b) and ICCTA Are Consistent With Congress' Intention that the Scope of Preemption Be Narrow

A Narrow View of Preemption Gives Meaning to All the Text of Section 10501(b)

Section 10501(b) applies only to state laws "with respect to regulation of rail transportation." 49 U.S.C. § 10501(b). The language of this section can be contrasted with 49 U.S.C. § 11341(a), which provides

that, with regard to mergers and acquisitions, railroad companies are exempt from "antitrust laws and from all other law, including State and municipal law." Section 10501(b) does not preempt "all other law," and therefore necessarily must preempt some narrower class of state law.

The provision does not preempt laws "with respect to rail transportation." It preempts laws "with respect to *regulation of* rail transportation" (italics added). It is a "cardinal principle of statutory construction" that courts must "give effect, if possible, to every clause and word of a statute." (See *Bennett v. Spear* (1997) 520 U.S. 154, 173, citations and quotations omitted.) Accordingly, the preemption of law "with respect to *regulation of* trail transportation" must mean something qualitatively different than a law "with respect to rail transportation." (*Fla. E. Coast Ry. v. City of West Palm Beach* (11th Cir. Fla. 2001) 266 F.3d 1324, 1331.)

Other courts have given the expression "regulation of rail transportation" meaning by interpreting the provision to apply only to laws that "have the effect of 'manag[ing]' or 'govern[ing]' rail transportation . . . while permitting the continued application of laws having a remote or incidental effect on rail transportation." (Ibid.) This interpretation has been adopted in other cases considering section 10501(b), which have found that state laws regarding highway safety, tort claims and zoning all can coexist with ICCTA. In *Iowa, Chi. & E. R.R. Corp. v. Washington County* (8th Cir.

2004) 384 F.3d 557, 561, the court held that a state law requiring railroad bridge replacement was not preempted by ICCTA. In *Rushing v. Kansas City S. Ry. Co.* (S.D.Miss. 2001) 194 F.Supp. 2d 493, a nuisance claim arising out of damage from stormwater runoff from railroad property was held not to be regulation of rail transportation and thus not preempted. In *Native Vill. of Eklutna v. Ala. R.R. Corp.* (Alaska 2004) 87 P.3d 41, 57, the court found that ICCTA did not preempt a local zoning requirement for a conditional use permit for a quarry operated by a railroad. And in *Home of Econ. v. Burlington N. Santa Fe R.R.* (N.D. 2005) 694 N.W.2d 840, the court held that ICCTA does not preempt the exercise of state police powers to control public access to rail lines.

The Structure of ICCTA Demonstrates a Concern Only With Direct Economic Regulation

That ICCTA was never concerned with broad-ranging economic impacts upon railway transportation is evident from the very name of the statute. The long title of the Act is "An Act [t]o abolish the Interstate Commerce Commission, to amend subtitle IV of title 49, United States Code, [and] to reform economic regulation of transportation ..."

The policy of the United States Government as stated in section 10101 is devoted almost exclusively to issues of revenue, rates and competition for the protection of both railway companies and the public. There is an express intention to minimize regulatory control in order to

"establish reasonable rates," allow "rail carriers to earn adequate revenues," and "foster sound economic competitions in transportation and to ensure effective competition and coordination between rail carriers," while also "prohibit[ing] predatory pricing and practices," and "maintain[ing] reasonable rates where there is an absence of effective competition." (49 U.S.C. § 10101.) All aspects of this policy are concerned with direct economic regulation – regulation of fees, schedules and tariffs – and deregulation of the rail industry. Congress's stated policy is carried out through the implementation of standards for rates, classifications and through routes (49 U.S.C. § 10701); the exemption of rate agreements from antitrust laws (49 U.S.C. § 10706); prohibiting discrimination by rail carriers (49 U.S.C. § 10741); providing for authorization of construction and operation of rail lines (49 U.S.C. § 10901); and providing mechanisms for the consolidation, merger and acquisition of rail carriers (49 U.S.C. §§ 11323-11328). However, there is no indication that Congress intended, through the abolition of certain direct federal economic regulations imposed upon the rail industry, to remove railways entirely from the reach of state and local environmental laws, or any other exercise of state police powers that incidentally impacts railways.

To the contrary, it is the express policy of ICCTA to "operate transportation facilities and equipment without detriment to the public health and safety." (49 U.S.C. § 10101(8).) The ICCTA itself did not

provide anything approaching comprehensive regulation in this area, but required only that carriers "furnish safe and adequate car service." (49 U.S.C. § 11121(a)(1).)

In the absence of any expression in ICCTA of an intention to preempt general exercises of state police power, the preemption of state "regulation with respect to rail transportation" must be understood to be limited to the kind of regulation with which ICCTA is concerned. That is, it preempts only direct regulation of the economics and finances of the rail industry by states. This narrow field of concern is consistent with the statutes that preceded ICCTA, and with the legislative history of ICCTA itself.

V. *Auburn* Erred in Its Interpretation of Section 10501(b) of ICCTA

In *City of Auburn v. United States* (1998) 154 F.3d 1025, the Ninth Circuit held that "the congressional intent to preempt this kind of state and local regulation of rail lines [i.e., environmental permitting requirements] is explicit in the plain language of the ICCTA and the statutory framework surrounding it." (*City of Auburn v. United States* (1998) 154 F.3d 1025, 1031.) But section 10501(b) does not expressly preempt state environmental review statutes. There is no language in ICCTA to such effect. Rather, the court was only able to reach its conclusion that preemption was "explicit," by conflating environmental regulation with economic regulation. It found that "'environmental' permitting regulations

... will in fact amount to 'economic regulation,' if the carrier is prevented from constructing, acquiring, abandoning, or discontinuing a line." (Ibid). Yet the court cites no authority for this conclusion.

As set out above, the scope of preemption is correctly determined by looking to Congressional intent. And it is clear from the history, context, language and structure of ICCTA that Congress was not interested in preempting state laws that might incidentally impact upon a rail carrier. Rather, with section 10501(b) of ICCTA, Congress intended to make clear that the states, which in the era of the Staggers Act had retained the power to impose economic regulations on the construction, abandonment, acquisition and discontinuance of intrastate rail lines, no longer had such authority.

VI.A Narrow Interpretation of Preemption is Consistent with the Interpretation of Analogous Clauses in Other Legislation

This Court, like the Supreme Court of the United States, has found that a preemption clause similar to section 10501(b) of ICCTA does not extend so far as to preempt law that incidentally affects the preempted subject matter. (*Dan's City Used Cars, Inc. v. Pelkey* (2013) 575 U.S. ___ [133 S.Ct. 1769]; *People ex rel. Harris v. Pac Anchor Transportation, Inc.*, *supra*, 59 Cal. 4th 772.) These cases considered section 14501(c)(1) of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA")

which, like section 10501(b) of ICCTA, preempts state laws with respect to "transportation." (49 U.S.C. § 14501(c)(1).)

The FAAAA was enacted for similar reasons to ICCTA. "In 1978, Congress determin[ed] that 'maximum reliance on competitive market forces' would favor lower airline fares and better airline service, and it enacted the Airline Deregulation Act." (*Rowe v. New Hampshire Motor Transp. Assn.* (2008) 552 U.S. 364, 367-368, quotations omitted.) "In order to ensure that the States would not undo federal deregulation with regulation of their own that Act included a pre-emption provision that said 'no State ... shall enact or enforce any law ... relating to rates, routes, or services of any air carrier.'" (Ibid, at p. 368.) "In 1980, Congress deregulated trucking... [I]n 1994, Congress similarly sought to pre-empt state trucking regulation... In doing so, it borrowed language from the Airline Deregulation Act and wrote into its 1994 law language that says: '[A] State ... may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." (Ibid, at p. 368, quoting 49 U.S.C. § 14501(c)(1).)

In *Dan's City Used Cars, Inc. v. Pelkey, supra*, 133 S.Ct. at 1780, in the context of interpreting the preemption clause in the FAAAA, the United States Supreme Court observed that, "[c]oncerned that state regulation 'impeded the free flow of trade, traffic, and transportation of interstate commerce,' Congress resolved to displace '*certain* aspects of the State

regulatory process.'" (Ibid, citations omitted, italics in original.) The target at which the preemption clause aimed is not described as being any state law that might have an effect on carrier prices, routes or services, but rather "a State's direct substitution of its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." (Ibid, citing *Rowe, supra*, 552 U.S. at p. 372.)

Thus the Court held that the "the breadth of the words 'related to' [in 40 U.S.C. § 14501(c)(1)] does not mean the sky is the limit." (*Dan's City Used Cars, supra*, 133 S.Ct at p. 1778.) Mindful that section 14501(c)(1) of the FAAAA "does not preempt state laws affecting carrier prices, routes, and services in only a tenuous, remote or peripheral manner," the Supreme Court found that state laws governing the disposal of abandoned vehicles were not preempted by the FAAAA. (Ibid.)

The Ninth Circuit has followed the approach adopted in *Rowe* and *Dan's City*. Thus, the FAAAA does not preempt generally applicable employment laws that affect prices, routes and markets. (*Californians for Safe & Competitive Dump Truck Transportation v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, 1190.)

This Court likewise held that, "the FAAAA was intended to prevent state regulatory practices including 'entry controls, tariff filing and price regulation, and [regulation of] types of commodities carried.'" (*People ex*

rel. Harris v. Pac Anchor Transportation, Inc., supra, 59 Cal. 4th at pp. 779-780, quoting H.Rep. No. 103-677, 2d Sess., p. 86 (1994), reprinted in 1994 U.S. Code Cong. & Admin. News, p. 1758.) In that case, this Court found that, even though the scope of state unfair competition law is "broad, and its coverage is sweeping," it was not preempted by the FAAAA. (Ibid.) The Court relied on the fact that the unfair competition laws the subject of the preemption claim "apply to all employers, not just trucking companies." (Id. at p. 786.)

Defendants in *Pac Anchor, supra,* relied on similar reasoning to that used by Respondents in this case to argue that CEQA is preempted by ICCTA. In *Pac Anchor, supra,* defendants argued that state unfair competition laws should be preempted by the FAAA, even if the state laws' effect on motor carrier transportation was remote, because such state laws threatened Congress' deregulatory purpose. That is, the laws would have an indirect economic effect on motor carrier transportation. This Court rejected that argument. It found that the Congressional record indicated a concern with ending a patchwork of state regulations, not with preempting state laws to tax motor carriers, to enforce labor and wage standards, or to exempt motor carriers from generally applicable insurance laws. (Ibid.)

The line of cases interpreting the preemption clause in the FAAAA is relevant here. Like section 10501(b) of ICCTA, the preemption clause in the FAAAA appears to be broad – it preempts any laws that "relate to

prices, routes, and services." (49 U.S.C. §14501(c)(1).) In interpreting that expression, the Supreme Courts of the United States and California have considered carefully the kind of state regulation "relating to" the federal law that is preempted. On the basis that Congress' concern was only with state legislation that directly regulated motor carrier transport prices, routes and services, both Courts have upheld the validity of state laws that have an incidental effect on prices, routes and services. As discussed above, ICCTA was enacted with a similar purpose – to ensure that the states did not directly seek to regulate regarding the rates, fees and schedules of rail carriers. Accordingly, the same kind of interpretive approach should be applied to section 10501(b) of ICCTA as was to FAAAA. Section 10501(b) should be interpreted to preserve state law, including CEQA, which have merely incidental effects on rail carrier rates, schedules and fees.

VII. Interpreting Preemption Broadly Will Result in a Regulatory Void Not Intended by Congress

In taking a narrow approach to preemption in *Dan's City*, the Supreme Court was influenced by the fact that a broad interpretation of the preemption clause would have the result that "no law would govern," the parties' dispute over vehicle towing. Vehicle owners would have no recourse for damages, and towing companies would have no legal authorization to dispose of abandoned vehicles. (*Dan's City Used Cars,*

Inc. v. Pelkey, supra, 133 S.Ct. 1769 at p. 1780-81). "No such design," the Court held, "can be attributed to a rational Congress." (Id. at p. 1781.)

A broad interpretation of section 10501(b) of ICCTA would result in the creation of a regulatory void, the kind that cannot be attributed to a "rational Congress." As discussed above, ICCTA is not a comprehensive regulatory scheme. It is concerned only with direct economic regulation of rail transportation. The STB requires review under the National Environmental Policy Act ("NEPA") only for a sub-set of rail projects, being only those projects that require STB authorization. The preemption of CEQA would leave a regulatory gap that will result in many rail projects in the state proceeding without any kind of environmental review.

Yet, rail operations are not benign activities. The construction and operation of rail lines can have serious environmental impacts. Railroad rights-of-way may be "contaminated through chemical spills caused by derailments, treatment of wooden railroad ties, engine maintenance and railcar repair, railcar cleaning, and acts of third parties, such as waste disposal." (Villa, *Cleaning Up at the Tracks: Superfund Meets Rails-to-Trails* (2001) 25 Harv. Envtl. L.Rev. 481, 486-487.) If section 10501(b) is interpreted to preempt CEQA, the result will be the creation of a regulatory void, in the absence of any evidence that Congress intended such a result.

By nature of the preemption clause, there would be no opportunity for state-level review of the environmental impacts of the project. For many

projects, the federal environmental review regime would not apply either. This is because NEPA applies only where there is federal government "action,"(42 U.S.C. § 4322(1)(c).) and the STB engages in action that triggers NEPA review only in a narrow range of circumstances.

Title 49 of the Code of Federal Regulations, section 1105.6, sets out the circumstances in which action under ICCTA requires an environmental assessment or environmental impact statement, documents prepared pursuant to NEPA. (49 C.F.R. § 1105.6.) The regulations provide that a NEPA document is only required for construction or abandonment of a line; discontinuance of rail services; acquisition, lease, operation, consolidation, merger or control of a line if it will result in significant changes to carrier operations or construction or abandonment of a line; and rulemaking, policy statements and legislative proposals. (49 C.F.R. § 1105.6.) Importantly, maintenance of existing rail lines is not activity requiring environmental review. This is so even where, as in this case, the maintenance involves significant construction activity.

Additionally, no NEPA review is required for the acquisition, lease, operation, consolidation, merger or control of a line where an action "does not result in significant changes in carrier operations." (49 C.F.R. § 1105.6(c)(2).) That is, where the action does not result in at least:

(A) An increase in rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of rail line affected by the proposal, or

(B) An increase in rail yard activity of at least 100 percent (measured by carload activity), or

(C) An average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day on any affected road segment, quantify the anticipated effect on air emissions.

(49 C.F.R § 1105.7(e)(5).)

NEPA review is only required for the reopening of an abandoned rail line if at least eight trains per day will run on the line. (*Lee's Summit v. Surface Transp. Bd.* (D.C. Cir. 2000) 231 F.3d 39, 42.) Thus the recommencement of less frequent rail services in an area, with or without maintenance activity, may proceed without any kind of federal environmental impact review.

Because construction and maintenance on an existing line is excluded from review under NEPA, activity escaping review can include such substantial projects as the construction of a new spur, industrial, team, switching or side track; construction or expansion of any facilities that assist the railroad in providing existing operations; and, as here, line upgrades involving substantial new construction.

Numerous projects with obvious, detrimental environmental consequences could evade environmental review entirely should statutes like CEQA be found preempted. In *Friends of the Aquifer, City of Hauser, Idaho, Hauser Lake Water Dist., Rodger, Larkin, Kootenai Envtl. Alliance, R.R. & Clearcuts Campaign* (S.T.B. 2001) STB Finance Docket No. 33966, 2001 WL 928949, the construction of a refueling terminal directly over a town's only drinking water aquifer received no review under either NEPA or state law. In *Boston & Maine Corp. v. Town of Ayer* (S.T.B. 2000) STB Finance Docket No. 33971, 2001 WL 458685, a 57.7 acre construction project that included an access road, eight rail tracks, a maintenance building and parking for 3,000 cars did not require NEPA review. In *Hughes v. Consol-Pennsylvania Coal Co.* (3d Cir. 1991) 945 F.2d 594, the construction of 14.5 miles of rail track was deemed a 'spur' that did not require a license from the STB and thus escaped NEPA review. In *Nicholson v. Interstate Commerce Com.* (D.C. Cir. 1983) 711 F.2d 364, 366, construction on agricultural land of a classification yard with "numerous tracks" to make and break up freight trains was not subject to either STB approval or NEPA review. And in *Ridgefield Park v. New York Susquehanna & W. Ry. Corp.* (N.J. 2000) 163 N.J. 446, the construction of a sidetrack to locate five rail cars and two permanent, 20,000 gallon diesel tank cars with pumping equipment, the construction of a tower to facilitate loading sand into locomotive tanks, and the installation of a hand-pumped

septic system, were not subject to federal environmental review. All were also found to be outside the purview of state zoning and nuisance laws.

In this case, the rehabilitation work proposed is far more extensive than the work considered in these cases; in fact, it essentially amounts to the building of a new line. Indeed, an expert had previously concluded that the railroad's "ties, rails, roadbeds, signal circuits and crossing protection have deteriorated so far that the railroad must be rebuilt from scratch." (AR:8:78:2156. [1]) The work would include not only replacement of some 20,500 railroad ties, but also the addition of 10,000 tons of new ballast rock along the line, 50 miles of track surfacing, 141.5 miles of track repair, complete reconstruction of 4,300 feet of track, and the removal of vegetation along 114.5 miles. (AR:8:78:2155.) The removal of vegetation also requires systemwide spraying of herbicides to control regrowth of vegetation. (AR:8:78:2147.) Culverts must be repaired and replaced, erosion repaired, and debris removed from slopes and ditches. (Ibid.) Thirty-one bridges require repairs that include replacing bridge piles, frames, guards, handrails and decks, and repairing erosion. (Ibid.) In short, the reopening of this rail line requires extensive work that will have a variety of impacts on aesthetics, air quality, soil and water quality, greenhouse gas emissions, noise, transportation and traffic.

---

[1] Citation to the Administrative Record is by volume, tab and page number, *e.g.* AR:8:78:2155.

If this Court concludes ICCTA preempts CEQA on the basis that CEQA may have some indirect economic impact on a rail carrier, none of these effects would need to be disclosed or considered by public agencies in evaluating projects related to rail traffic. Such a conclusion could also be read even more broadly to preempt any planning, zoning, or local public safety laws that may have similar incidental economic effects. Neither CEQA nor local land use laws are directly concerned with regulating economic aspects of the rail industry, but it is conceivable that either might have an incidental effect on a rail carrier's finances. If the preemption clause is extended to preempt any regulation that incidentally has an economic impact on a rail carrier, the result may be that rail carriers will be able to engage in a panoply of significant infrastructure projects not requiring STB authorization, irrespective of state environmental laws and local planning and zoning laws.

Moreover, it is not only actions by rail carriers that could evade review. Amicus Center for Biological Diversity is involved in CEQA processes for several approvals by local agencies which involve the rail transport of crude oil. Due to the domestic oil boom in North Dakota and elsewhere, crude oil is increasingly shipped to California refineries by rail. Local agencies have argued that they are not obligated to disclose or analyze the environmental, safety or health effects of these hazardous train shipments because CEQA review is preempted by ICCTA.

For example, one such project, the "Alon Bakersfield Refinery Crude Flexibility Project," entails refinery upgrades and construction of related facilities to allow the refinery to receive up to 60 million barrels of crude oil per year by rail. This oil would pass through California communities and sensitive wildlife habitat, posing severe safety risks. Much of California's rail infrastructure is aging and unsafe, and much of the oil shipped today is Bakken crude from North Dakota which is more volatile and explosive than heavy crude oil. In July 2013, a train carrying Bakken crude derailed in Lac-Mégantic, Canada, and exploded, killing 47 people and decimating half of downtown.

CEQA provides one of the few processes by which Californians may access information about these ultra-hazardous crude-by-rail shipments, and participate in decisions that will increase the amount of crude oil shipped through their local communities. The sweeping interpretation of ICCTA preemption that Respondents urge would allow such projects to evade environmental, health, safety, and community-right-to-know safeguards, a result never intended by Congress.

The only reasonable reading of ICCTA's preemption provision—one consistent with Congress's clearly stated intent—is that it preserves the ability of the states to exercise their police powers in areas not regulated at the federal level. The expression "regulation of rail transportation" should be interpreted to preserve the application of environmental review laws that

have an incidental effect on rail transportation. (*Fla. E. Coast Ry. Co. v. City of West Palm Beach, supra,* 266 F.3d at p. 1331.)

VIII. The Purpose and Function of CEQA Is to Set Out a Process for Informed Decision-Making and Self-Governance

CEQA does not directly regulate the economics of rail carriers. Given that section 10501(b) of the ICCTA intended only to preempt direct economic regulation of rail carriers by the states, CEQA does not fall within the scope of ICCTA's preemption clause. To determine whether a state law is preempted, the Court must consider "the target at which the state law aims." (*Oneok, Inc. v. Learjet, Inc.* (2015) 575 U.S. ___ [191 L.Ed. 2d 511, 522]; see also *Dan's City Used Cars, Inc. v. Pelkey, supra*, 133 S.Ct. 1769, 1780.)

As this Court has recognized from the statute's inception, CEQA's primary purpose is to protect the environment though informed decisionmaking, public accountability, and implementation of feasible measures to reduce or avoid environmental damage. In enacting CEQA, the California legislature exercised its proprietary power to self-govern, and its traditional police powers to protect the health and welfare of its citizens. It did so by setting out an ordered system to ensure that government agencies reflect upon the consequences of their actions and make fully informed decisions. (See, e.g., Pub. Res. Code § 21000, subd. (g) (requiring "that major consideration is given to preventing environmental damage"); §

21002 ("the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects"); § 21002.1, subds. (a), (b).)

This Court has long held that informed decision making and public participation are central to CEQA's fundamental environmental protection purpose. (See, e.g., *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [purpose of EIR "is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made"]; *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1998) 47 Cal.3d 376, 394 ["A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding whether to approve a proposed project . . ."]; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75 ["an EIR serves to guide an agency in deciding whether to approve or disapprove a proposed project"].)

Informed decision making, moreover, is essential not only to environmental protection, but also to participatory democracy. "Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can

respond accordingly to action with which it disagrees." (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., supra*, 47 Cal. 3d at p. 392.) The CEQA process thus "protects not only the environment but also informed self-government." (Ibid.) It is because the EIR is an educational tool for the public as well as the decisionmaker that "CEQA's investigatory and disclosure requirements must be carefully guarded." (*Assoc. of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392.) CEQA protects the environment by enhancing participatory democracy and informed self-governance while requiring public agencies to mitigate the damage caused by their projects where feasible. CEQA does nothing that comes even close to the direct economic regulation of rail carriers preempted by ICCTA.

By the same token, CEQA cannot interfere with authority under ICCTA with respect to "rates, classifications, rules …, practices, routes, services and facilities." CEQA in and of itself does not grant agencies any authority or power to refuse a project, to refuse to grant necessary licenses or permits, or to refuse to proceed with a project on the basis of its environmental impacts. Nothing in CEQA allows an agency to prevent a rail carrier from "constructing, acquiring, operating, abandoning, or discontinuing a line." Any such discretionary power is sourced in an agency's enabling legislation. (See CEQA Guidelines, Cal. Code Regs., tit. 14, § 15040). CEQA merely requires that a particular process be followed

to ensure that a power wielded by an agency is exercised in a manner that promotes participatory democracy, reflection upon environmental impacts, and informed decisionmaking.

CEQA does require that agencies adopt *feasible* mitigation measures to substantially lessen or avoid otherwise significant adverse environmental impacts. (Pub. Res. Code. §§ 21002, 21081, subd. (a); CEQA Guidelines, §§ 15002, subd. (a)(3), 15021, subd. (a)(2), 15091, subd. (a)(1); *Laurel Hills Homeowners Assn. v. City Council* (1978) 83 Cal.App.3d 515, 521.) "Feasible" mitigation measures include only those measures that are "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors." (Pub. Res. Code § 21061.1.) "CEQA does not demand what is not realistically possible, given the limitation of time, energy and funds." (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 376, citation omitted.)

In each review conducted under CEQA, the lead agency has the power to approve a project, irrespective of its environmental impacts, if the agency determines that it is not feasible to lessen or avoid the impacts, and the identified benefits of the project outweigh the unavoidable environmental impacts. (Pub. Res. Code, §§ 21002, 21002.1, subd. (c); CEQA Guidelines, § 15043 subd. (a), (b); *San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal.App.3d 584.) CEQA does

not bar a project from proceeding, provided the lead agency complies with CEQA's requirements for approving a project despite significant, unavoidable environmental effects. (See Pub. Resources Code, § 21081, subd. (a)(3), (b); CEQA Guidelines, § 15093.)

To ensure the integrity of the CEQA process, the Legislature elected to allow citizen enforcement of the statute. However, this is not directly relevant to the preemption inquiry. In deciding questions of preemption, "a court's concern is necessarily with 'the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.'" (*Chi. & N. W. Transp. Co. v. Kalo Brick & Tile Co., supra,* 450 U.S. at p. 317-318).

Even if the possibility of CEQA litigation were relevant to determining the preemption question (which it is not), it would not tip the scales toward preemption. The Legislature put mechanisms in place that prevent projects being delayed. For example, "CEQA provides unusually short statutes of limitations on filing court challenges to the approval of projects under the act." (CEQA Guidelines, § 15112, subd. (a).) These limitations periods are strictly construed. (*Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847, 861 [CEQA limitation period still applies to CEQA claims when they are joined with non-CEQA claims governed by different limitation periods]. See also, e.g. *Lee v. Lost Hills Water District* (1978) 78

Cal.App.3d 630, 634.) In so doing, the Legislature expressed an intent to strike a balance between ensuring that public agencies fully follow the CEQA process and preventing CEQA from becoming overly burdensome. "The Legislature has obviously structured the legal process for a CEQA challenge to be speedy, so as to prevent it from degenerating into a guerilla war of attrition." (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 12.)

Citizen enforcement is rarely invoked in any event. The Department of Justice, using the City and County of San Francisco as a case study, has determined that, over the 18-month period covered by its study, approximately 99.7 percent of projects reviewed under CEQA were *not* challenged in court. (Cal. Dep't. Justice, Quantifying the Rate of Litigation Under the California Env'tl. Quality Act (CEQA) (2012).) This result is consistent with the outcome of a 1991 survey-based study. In that study, researchers at the University of Illinois found, based on self-reported activity by local governments across California, a litigation rate of one lawsuit per 354 CEQA reviews. (Id. at p. 4.) When objectively assessed, it is clear that the CEQA process is working as intended, allowing informed public participation in the government decisionmaking process, and ensuring that decisionmakers meaningfully consider the environmental impacts of their decisions. Nothing in ICCTA or its long legislative history

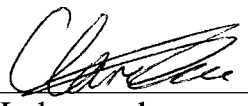
shows Congress intended to bring CEQA's forty-plus years of successful environmental protection and informed self-government to a halt.

CONCLUSION

For the reasons set forth above, amicus respectfully requests that Appellants' appeal be granted and the case remanded with instructions to the trial court to set aside its writ and judgment.

Dated at Oakland, California on June 11, 2015.

Respectfully submitted,

By: 

Clare Lakewood
Attorney for Amicus Curiae
CENTER FOR BIOLOGICAL DIVERSITY

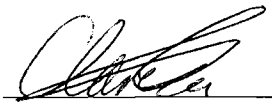
CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, Rules 8.520(c) and 8.520(f))

I, Clare Lakewood, certify that this Brief of Amicus Curiae Center for Biological Diversity has been prepared using double-spaced 13-point Times New Roman font.

Relying on the word count feature of Microsoft Word for Windows software, I certify that the total number of words of this brief is 9,300 words, including footnotes.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 11, 2015.



Clare Lakewood
Attorney for Amicus Curiae
CENTER FOR BIOLOGICAL DIVERSITY

PROOF OF SERVICE

I, Andrea Weber, declare as follows:

I am employed in the County of Alameda, State of California. I am over the age of eighteen and my business address is 1212 Broadway, Suite 800, Oakland, CA 94612.

On June 12, 2015, I served the following document(s) entitled:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS AND BRIEF OF *AMICUS CURIAE*, CENTER FOR BIOLOGICAL DIVERISTY IN SUPPORT OF APPELLANTS

by placing a copy thereof enclosed in a sealed envelope addressed as follows:

For Appellant Friends of the Eel River:
Amy Bricker
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102

For Appellant Californians for Alternatives to Toxics:
Sharon E. Duggan
336 Adeline Street
Oakland, CA 94607

For Respondents North Coast Railroad Authority and Board of Directors of the North Coast Railroad Authority:
Christopher J. Neary
Neary & O'Brien
110 South Main Street, Suite C
Willits, CA 95490

For Respondent Northwestern Pacific Railroad Company:
Andrew B. Sabey
Cox, Castle & Nicholson LLP
555 California St, 10th Floor
San Francisco, CA 94104

For Proposed Amici Curiae Town of Atherton, California Rail Foundation, Transportation Solutions Defense and Education Fund, Community Coalition on High-Speed Rail and Patricia Hogan-Giorni
Stuart M. Flashman
Law Offices of Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533

For Proposed Amicus Curiae South Coast Air Quality Management District
Kurt R. Wiese, General Counsel
South Coast Air Quality Management District
21865 Copley Drive,
Diamond Bar, CA 91765

For Proposed Amicus Curiae Bay Area Quality Management District
Brian C. Bunger, District Counsel
Bay Area Quality Management District
939 Ellis Street,
San Francisco, CA 94109

For Proposed Amici Curiae Madera County Farm Bureau and Merced County Farm Bureau
Jason W. Holder, SBN 232402
Holder Law Group
339 15th St., Suite 202
Oakland, CA 94612

For Proposed Amici Curiae Sierra Club, Coalition for Clean Air, Natural Resources Defense Council, Planning and Conservation League, and Communities for a Better Environment
David Pettit
Natural Resources Defense Council, Inc.
1314 Second Street
Santa Monica, CA 90401

For Proposed Amicus Curiae California High-Speed Rail Authority
Kamala D. Harris, Attorney General of California
Attn: John A. Saurenman, Senior Assistant Attorney General
1300 I St, Suite 125
P.O. Box 944255
Sacramento, CA 94244

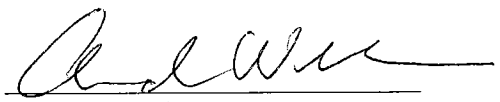
For Proposed Amicus Curiae California EPA
Kamala D. Harris, Attorney General of California,
Attn: Robert W. Byrne, Senior Assistant Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Marin County Superior Court
Clerk of Court
P.O. Box 4988
San Rafael, CA 94913-4988

I served the document by enclosing copies in envelopes and delivering the sealed envelopes to a United States Postal Service collection location, prior to the last pick-up on the day of deposit, fully prepaid First Class Mail.

In addition I electronically served the California Court of Appeal, First District, pursuant to that court's rules.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this Proof of Service was executed on June 12 , 2015, in Alameda County, California.



Andrea Weber