Case No. S222472

In the Supreme Court of the State of California

FRIENDS OF THE EEL RIVER AND CALIFORNIANS FOR ALTERNATIVES TO TOXICS,
Plaintiffs and Appellants,

vs.

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. A 139222, A139235

Appeal from Superior Court of the State of California for the County of Marin
Case Nos. CIV 1103605, CIV 1103591
The Honorable Roy Chernus, Presiding

PLAINTIFFS' CONSOLIDATED RESPONSE TO BRIEFS OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND REAL PARTY IN INTEREST

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INTRODUCTION

The California High Speed Rail Authority ("HSRA") bases its preemption arguments on a misunderstanding. Congress did not give the Surface Transportation Board ("STB") "exclusive and plenary jurisdiction over railroad operations." The Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §§ 10101-11908, does not provide a pervasive scheme of national railroad regulation or planning that bars state exercise of police powers to protect the health and the environment. To the contrary, Congress entered the railroad regulatory arena in 1887 for the limited purpose of bringing economic stability to an emergent industry, and every statutory revision over the following century was directed at the same objective – facilitating a competitive market. In continually adjusting the law to meet the economic concerns of the time, Congress has consistently preserved traditional state powers to protect public health, safety, and the environment, even when those powers incidentally affect railroad operations.

The STB has no jurisdiction over the North Coast Railroad Authority ("NCRA") project at issue here – the potential rehabilitation and reopening of a rail line shut down for safety reasons by another federal agency. NCRA did not apply for or receive STB approval to restore service and recommence operation on its existing line. The single action that the STB took (and had authority to take) was certifying Defendant Northwest

Pacific Railroad Company ("NWPCo") as qualified to become the line operator should NCRA's putative lease with NWPCo be consummated and the rail line reopened. The STB did not approve day-to-day "operations" on the line, as HSRA implies, when it granted NWPCo's operator status license application. Nor does the STB have statutory authority to pass judgment on the wisdom of California's investment decision to repair and reopen the line. The STB merely granted new operator status if and when the line returned to service.

The express language in the ICCTA does not preempt how a railroad decides whether to rehabilitate a line and bring it back into service, such as through the environmental review process NCRA used here. Instead, the ICCTA preempts only those other state and federal remedies "with respect to the regulation of rail transportation." The California Environmental Quality Act ("CEQA") does not target *railroad economics*, or even railroads, for regulation and thus does not intrude into that area in which the ICCTA forbids states to regulate. As is undisputed, CEQA is a law of general application, intended to inform California public agency decisionmaking. It requires disclosure of potential adverse environmental impacts from public agency project approvals and mitigation of those impacts where feasible. Similarly, state law remedies for NCRA's failure to comply with CEQA in connection with its repair and reopening project do not conflict with any STB-approved activities or ICCTA remedies.

CEQA is California's tool to hold politically accountable subsidiary public agencies and the officials who fund and administer agency assets and decisions. Under the *Nixon-Gregory* doctrine, absent a clear statement from Congress, federal law may not "trench on" how a state chooses to constitute itself as a sovereign political entity. HSRA's attempt to avoid the *Nixon* clear-statement rule by arguing that Congress intended that public railroads be treated the same as private railroads is unavailing. Without an unambiguous and explicit statement that Congress intended the ICCTA to preempt how states govern the decisionmaking process of public rail authorities, courts may not interpret the ICCTA to preempt how California determines the legitimacy and legal enforceability of decisions made by a subsidiary agency to conduct state-owned business.

Moreover, as market participants, both public and private entities are free to consider the environmental effects of capital investments they make. HSRA cannot cite any ICCTA provision that preempts such internal decisionmaking. Instead, to avoid the determination that NCRA was acting on behalf of the State, as a market participant, HSRA falls back on its fundamental misconception that Congress intended plenary regulation of the rail industry, notwithstanding the ICCTA's clear intent to largely deregulate the rail industry and allow the market to operate freely. HSRA is thus incorrect when it argues that California cannot act as a market

participant, or proprietor, when deciding how to lease and invest millions of dollars in rehabilitating a decrepit rail line.

Finally, HSRA argues that even if there are voluntary agreements not subject to ICCTA preemption, where those agreements impose an unreasonable burden on railroad operations, their terms are preempted. But HSRA fails to apply the rule to the facts here, where agreements provided state funding necessary to repair and reopen the rail line and to secure authorization from the co-owner of the line for NWPCo to act as the future operator. These agreements further demonstrate that CEQA is not preempted here.

ARGUMENT

I. The ICCTA Does Not Preempt California's Requirement that Adequate CEQA Review Precede NCRA's Line Repair Project.

A. HSRA's Preemption Argument Rests on the Faulty Assumption of STB Jurisdiction over NCRA's Project.

HSRA's brief hinges almost entirely on an erroneous premise – that the CEQA "project" at issue here "is subject to STB jurisdiction and regulation under the ICCTA." California High-Speed Rail Authority Amicus Brief in Support of Respondents at 5 ("HSRA:5").[1] According to

[1] *See also, e.g.,* HSRA:10 (contending that "*the public rail agency is subject to STB jurisdiction* and is operating a railroad in interstate commerce pursuant to a license from the STB"); 38 (claiming this case involves "section 10501(b) and *actions subject to the STB's exclusive jurisdiction and regulation*"); 40 (claiming NCRA is "engaged in interstate

HSRA, the STB's approval of NWPCo as a potential operator established STB jurisdiction and therefore the ICCTA's preemptive reach over NCRA's repair and reopening project. This premise is wrong.

The CEQA "project" for which the challenged EIR was prepared is NCRA's decision to repair and reopen the line. The EIR here was intended to inform NCRA's decision whether to move forward with rehabilitating a dilapidated railroad that another agency, the Federal Railroad Administration, shuttered years ago for safety reasons. *See* AR:9:4592 (Dec. 9, 1998).[2] The STB did not assert any jurisdiction over NCRA's process for deciding whether and how to reestablish service along the Russian River Division of the railroad. It merely certified lessee NWPCo as a potential future operator of the line "upon consummation of the transaction." AR:16:8117, 8207. That "transaction" included CEQA compliance and consent by the Sonoma-Marin Area Rail Transit District, co-owner of the rail line. AR:13:6731.

As discussed further below, the STB does not have authority over rehabilitation work on an existing line or any say in the process a private or

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commerce by railroad and *under the STB's exclusive jurisdiction*, and facing CEQA lawsuits"); 49 (implying NCRA is a "public rail agencies constructing or operating *rail lines under STB jurisdiction*").

[2] Citations to the Administrative Record and to Plaintiffs' Consolidated Appendix appear, respectively, as "AR:[volume]:[page]" and "App:[volume]:[tab]:[page]."

public railroad uses to decide whether to proceed with that work. Nor does the STB's approval of a change in operator status preempt California's ability to make an informed decision about state-funded, discretionary infrastructure projects merely because CEQA compliance may affect how repairs are conducted, may result in judicial review, or may convince the state not to go forward with the project at all.

Were HSRA's legal theory correct, the STB could dramatically expand its legislatively-limited jurisdiction and effectively commandeer taxpayer revenue to compel state action, even if California ultimately decided to forego the project for financial, environmental, or other reasons. As explained below, Congress did not grant such plenary authority to the STB, which is not surprising since HSRA's position here is inconsistent with the most basic tenets of federalism. *E.g., Printz v. United States,* 521 U.S. 898 (1997).

B. The History of the ICCTA Reflects Evolving Congressional Concern About the Financial Viability of the Industry, Not an Intent to Preempt Traditional State Decisionmaking Authority.

HSRA's preemption analysis relies selectively on a statutory predecessor to the ICCTA – the Transportation Act of 1920 – but ignores the context in which Congress was legislating. The Transportation Act was designed to bolster the economic sustainability of the interstate rail transportation system as a whole. It did so by giving the federal

government more rate-setting authority and shielding interstate carriers from financially onerous state mandates to invest in capital-intensive new lines or operations for the benefit of local commerce. The Transportation Act was thus consistent with earlier and later versions of the law, all of which reflect Congress' focus on responding to the unstable economics of the rail industry – rapid expansion followed by contraction.[3]

In nearly 130 years of railroad legislating, Congress has never expressed an intent either to displace the states' ability to control their own public expenditures and decisionmaking processes or to preempt the exercise of traditional state police power protecting public health, safety, and the environment. Nor has Congress extended federal jurisdiction over repair work on existing lines. The ICCTA, in short, is not the all-pervasive federal regulatory regime that HSRA suggests. *See* Plaintiffs' Opening Brief at 17-22 ("OB:17-21"); Plaintiffs' Reply Brief at 3-4 ("RB:3-4").

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[3] Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 Marq. L. Rev. 1151, 1152 (2012) ("Dempsey I") ("Congress [in 1887] instituted regulation under the ICC largely to protect the public from the monopolistic abuses of the railroads. Between 1920 and 1975, however, the goal of the national transportation policy shifted to protection of the transportation industry from . . . unconstrained competition.").

1. The Interstate Commerce Act of 1887

American railroads were originally chartered under state law and regulated pursuant to historic state police powers.[4] But early state efforts to curb monopolistic behavior and corruption in the rapidly-expanding rail industry proved largely ineffective.[5] After the U.S. Supreme Court struck down Illinois' ability to regulate freight rates on interstate routes, *St. Louis & Pac. Ry. Co. v. Illinois,* 118 U.S. 557 (1886) (finding regulation unconstitutional under the Commerce Clause), the federal government stepped into the economic regulation of railroads for the first time with adoption of the Interstate Commerce Act ("ICA") in 1887. The ICA outlawed rebates and pooling, forced railroads to publish rates, and ultimately required the new Interstate Commerce Commission ("Commission") to ensure that rail fees were "just and reasonable." Smith at 339-40; Dempsey II at 265; Hovenkamp at 1035.

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[4] Zachary Smith, *Tailor-Made: State Regulation at the Periphery of Federal Law,* 36 Transp. L.J. 335, 338 (2009) (citing James Ely, Jr. *Railroads and American Law* (2001)); Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017, 1034 n.90 (1988) (noting that the rail system was developed "largely by means of state initiative and almost exclusively under state control" and that "before 1887 federal regulation was virtually nonexistent").

[5] *See* James W. Ely, Jr., *"The Railroad System Has Burst Through State Limits": Railroads and Interstate Commerce, 1830-1920*, 55 Ark. L. Rev. 933 (2003) ("Ely"); Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235, 254-65 (2003) ("Dempsey II").)

In response to early, narrow judicial interpretations of the ICA, Congress conveyed increasing authority on the Commission over the next three decades to regulate interstate rail rates. Hovenkamp at 1035-44; Ely at 966-67; Dempsey I at 1163-64. The economic challenge facing regulators at the time was that "[m]onopoly railroads earned monopoly profits, while competing railroads were driven into bankruptcy." Hovenkamp at 1035-44 (explaining that "railroad interests seemed destined to be either filthy rich or perpetually broke"). Fierce competition in long-haul interstate markets drove rates down to the point where carriers often could not cover fixed costs, while state regulators tried to prevent monopoly rents on more profitable short-haul intrastate routes, where lack of competition allowed a greater return. *Id.* at 1049-55. The Supreme Court eventually recognized that this short-haul/long-haul problem threatened the long-term economic health of the rail industry, and allowed the federal government increasing leeway to address *intrastate* rates in connection with the Commission's supervision of *interstate* routes. Ely at 969-73.

2. The Transportation Act of 1920

These concerns moved Congress to enact the Transportation Act of 1920. Dempsey II at 272 ("After World War I, [federal] policy . . . shifted from one of protecting the public from the market abuses of the transportation industry to one of preserving a healthy economic

environment for common carriers."). Congress was concerned with "freeriding by the states," with state-imposed low rates for intrastate rail traffic threatening the overall financial viability of the industry. Ely at 976 (citing *R.R. Comm'n of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 588 (1922)). To address this concern, the Transportation Act augmented the Commission's powers, conveying new authority to supervise the rail industry's issuance of securities and to regulate intrastate rates when they affected interstate commerce. Ely at 974; *Dayton-Goose Creek Ry. Co. v. United States,* 263 U.S. 456, 478 (1924).

Relevant here, the Transportation Act also provided "that no interstate carrier shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation over such additional or extended line of railroad unless and until the Commission shall certify that public convenience present or future requires it, and that no carrier shall abandon all or any portion of its line or the operation of it without a similar certificate of approval." *R.R. Comm'n of Cal. v. S. Pac. Co.* 264 U.S. 331, 344 (1924) (discussing paragraphs 18 to 21 of section 402). This new statutory language did not provide plenary federal jurisdiction over rail operations, but instead targeted specific activities, and there is no evidence that Congress intended the Commission to engage in affirmative planning for a national rail system, or to oversee repairs of

regulations governing the interstate rail market. *See, e.g., City of New Orleans v. Tex. & Pac. Ry. Co.*, 195 F.2d 887, 889 (5th Cir. 1952) (public railroad subject to federal law "so long as it engages in interstate and foreign commerce"). Contrary to HSRA's argument, however, these cases do not go further and preempt state statutes that are unrelated to federal rail regulation and that instead only govern public state and local entities generally.[14] *Cf. Pac Anchor*, 59 Cal. 4th at 783-84 (upholding California's generally-applicable unfair competition law that did not directly regulate matters covered by the FAAAA). There is no conflict between California's interests in making public rail authorities comply with CEQA and the holdings in *United States v. California* and *Taylor*.

Further, HSRA's preemption argument focuses exclusively on federal requirements applied to rail carriers, arguing that they displace state-law obligations that otherwise control California agencies. HSRA:30-34. Yet this exclusive focus on federal law conflicts with the analysis required by clear-statement precedent. "The Supreme Court has applied *Gregory* [by] focusing on the state functions necessarily affected by operation of the [federal] statute, and not exclusively on the actual conduct

[14] STB decisions addressing federal regulation of public railroads (HSRA:32-33) are also irrelevant. NCRA's obligation to comply with federal law is undisputed. To the extent that HSRA asks this Court to read these decisions as limiting California's sovereign authority over its subdivisions, the Court should decline to do so. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 172-74 (2001).

proscribed by Congress." *United States ex rel. Long v. SCS Bus. & Tech. Institute, Inc.,* 173 F.3d 870, 888 (D.C. Cir. 1999). This one-sided analysis leads HSRA to overlook the important sovereign interests that would be nullified by preemption in this case, and assumes a conflict between CEQA and Congress' power to regulate rail where none exists.

As previously explained, through CEQA, the Legislature established requirements for public-agency decisionmaking and accountability when agencies take actions that may cause significant environmental impacts. OB:29-32, 36; RB:18. CEQA is but one of many agency-governance and accountability statutes through which California exercises sovereign control over its subdivisions. *See Nixon*, 541 U.S. at 140-41; *see also* Gov't Code §§ 6250-6277 (California Public Records Act); §§ 11120-11132 (Bagley-Keene Act); §§ 54950-71132 (Brown Act); §§ 81000-91094 (Political Reform Act).

In fact, the sovereign interests that CEQA advances extend further than the self-governance principles that *Nixon* protected. California expresses its sovereignty through laws that reach the heart of representative government in this State. *Gregory*, 501 U.S. at 461; *Agua Caliente Band of Cahuilla Indians v. Superior Court,* 40 Cal. 4th 239, 249, 256-59 (2006) (acknowledging that the Political Reform Act's regulation of electoral process furthers "a state interest that is beyond . . . commercial and regulatory interests"). This Court has held that CEQA's environmental

review process facilitates informed democracy by promoting agency accountability to the electorate. An EIR "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 Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988); *see also Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Ass'n,* 42 Cal. 3d 929, 936 (1986) (the "privileged position" that the public holds in the CEQA process "is based . . . on notions of democratic decision-making"). Consequently, requiring an agency "to fully comply with the letter of [CEQA]," including its public disclosure provisions, facilitates "appropriate action come election day should a majority of the voters disagree" with an agency's decision. *People v. County of Kern,* 39 Cal. App. 3d 830, 842 (1974).

For these reasons, the sovereignty issues here reach further than those in *Nixon*. There, the state sovereignty at stake was limited to the state's authority to control its subsidiary agencies. CEQA serves a similar purpose, but because it is also an instrument that California selected to enhance political accountability in public decisionmaking, the clear-statement requirement operates with greater force here.

The facts in *Nixon* further demonstrate why preemption of CEQA is unavailable here. Like regulation of railways, regulation of the telecommunications industry falls well within Congress' commerce power. Unlike the STB's limited regulatory authority, however, Congress chose to give broad regulatory authority to the Federal Communications Commission. *See Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 700 (1984) (Congress gave the FCC "broad responsibilities to regulate all aspects of interstate communication"); *Freeman v. Burlington Broads., Inc.*, 204 F.3d 311, 320 (2d Cir. 2000) (recognizing "the FCC's broad authority" over telecommunications). Despite this broad federal authority over telecommunications, *Nixon* refused to uniformly apply, to both state and private telecommunication providers, Congress' prohibition on states restricting the "ability of any entity" to offer telecommunication services. *Nixon*, 541 U.S. at 140-41.

Moreover, *Nixon* resolved a much greater conflict between Missouri law and federal law than is alleged to exist between CEQA and the ICCTA. In *Nixon*, Missouri's law specifically targeted the subject matter of the Telecommunications Act's preemption clause – the entry of "an entity" (i.e., a municipality) into the telecommunications market. *Nixon*, 541 U.S. at 129. Nonetheless, the Court would not read that federal preemption clause to interfere with the state's control over telecommunication services offered by its subdivision. *Id.* at 140-41. Here, while ICCTA preemption

is limited to state regulation of rail transportation, CEQA does not target the railroad industry. As a law of general application, CEQA's effect on railroads is, at most, indirect and incidental. Compared with *Nixon*, it is even harder to find congressional intent to preempt how California controls public railroads through CEQA.

If a conflict did arise between California's exercise of its sovereign interests through CEQA and federal regulation in the ICCTA, *Nixon* and *Gregory* still require an unmistakably clear statement before the state's sovereign interest gives way. But HSRA, like Defendants, is unable to identify any ICCTA text or legislative history that clearly shows congressional intent to preempt state control of the decisionmaking processes of public rail agencies. The "context of section 10501(b)" (HSRA:34) does not suffice.

C. The Court Should Be Skeptical of Rail Agencies' Attempts to Shed the Legislature's and the People's Sovereign Control.

In enacting California's open-meeting laws, the Brown Act and the Bagley-Keene Act, the Legislature observed that the people of California "do not yield their sovereignty to the agencies that serve them." Gov't Code §§ 11120, 54950. To the contrary, "the people insist on remaining informed so that they may retain control over the [agencies] they have created." *Id.*

Though it is subject to the sovereign control of the Legislature and the electorate, HSRA purports to represent the views of "the State" regarding ICCTA preemption of CEQA. *See* HSRA:2. But HSRA is simply the agency that the Legislature created to pursue California's high speed rail project. *See* Cal. Pub. Util. Code §§ 185020-185511. HSRA does not speak for the State any more than other public agencies in California. *Cf. In re Pfahler*, 150 Cal. at 80 (defining "state" to encompass "the entire body of the people, who together form the body politic, known as the 'state'").

Indeed, the amicus briefs in this case reveal marked disagreement among California agencies regarding the ICCTA's preemptive reach. As a single-purpose rail agency, HSRA's desire for ICCTA preemption is understandably aligned with NCRA. But other agencies established by the Legislature recognize the impropriety of extending ICCTA preemption to this case. *See* Brief of Amici Curiae South Coast Air Quality Management District and Bay Area Air Quality Management District. Even the position taken by the California Environmental Protection Agency and the Natural Resources Agency is in tension with the position of HSRA and NCRA. *See* Section I.C.

As discussed, HSRA and NCRA must comply with numerous California laws (including CEQA) that apply only to public agencies in this state. Indeed, the Legislature has imposed specific obligations on HSRA.

See, e.g., Cal. Pub. Util. Code §§ 185033-185511 (requirements for submitting business plans to the Legislature); § 185033.5 (requirements for submitting project update reports to the Secretary of Transportation); § 185036.1 (requirement relating to purchasing California-made equipment). Rail agencies like HSRA and NCRA cannot, solely by virtue of their rail carrier status, disregard such directives from the Legislature and their ultimate responsibility to the people of California.

Because "preempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players," *Nixon* found "it highly unlikely that Congress intended to set off on such uncertain adventures." *Nixon*, 541 U.S. at 126. The Court should be similarly skeptical of HSRA's and NCRA's attempt to shed their statutory obligations, and should preserve California's sovereign control over these subdivisions.

III. The ICCTA Does Not Preempt CEQA's Requirements Pertaining to State Proprietary Conduct.

In addition to the clear-statement doctrine, the market participant doctrine defeats preemption here. In authorizing HSRA and NCRA to use public funds and resources to pursue opportunities in the rail market, the State acted as a proprietor of public property. Under the market participant doctrine, courts presume that state and local requirements governing such market activities are not preempted unless Congress evidences contrary

intent. In *Atherton*, HSRA unsuccessfully argued against the market participant doctrine, contending that it does not save from ICCTA preemption CEQA's requirements for the State's proprietary rail projects. HSRA renews that failed argument here. But despite HSRA's contention, the market participant doctrine is both "available" in the context of ICCTA preemption and defeats any such preemption here.

A. The Market Participant Doctrine Applies to Preemption Under the ICCTA.

Some courts conduct a threshold inquiry to determine whether the market participant doctrine is available under a particular statutory scheme. They consider whether a statute "contains 'any express or implied indication by Congress'" that it intended to preempt state proprietary activities. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.,* 498 F.3d 1031, 1042 (9th Cir. 2007) (quoting *Bldg. & Constr. Trades Council v. Associated Builders & Contractors,* 507 U.S. 218, 231 (1993)) ("*Boston Harbor*")).

HSRA claims that *Atherton* was wrongly decided because it supposedly failed to undertake this analysis. HSRA:41. *Atherton*, however, recognized this threshold inquiry but found that HSRA impliedly conceded "that the [market participant] doctrine applies" to ICCTA preemption by expressly reserving HSRA's right to assert the doctrine in future ICCTA preemption cases. 228 Cal. App. 4th at 337 n.5.

HSRA now turns away from that earlier concession by arguing that the ICCTA will never accommodate the market participant doctrine. The ICCTA does not support HSRA's new position. The statute does not contain an express statement preempting states' proprietary decisions regarding rail transportation. Consequently, HSRA contends that the ICCTA impliedly preempts proprietary decisionmaking, arguing that applying the market participant doctrine here "would be contrary to both congressional and state intent." HSRA:40. HSRA is incorrect on both counts.

First, there is no "state intent" to remove either NCRA or HSRA from their respective obligations to comply with CEQA when carrying out State proprietary activities. The Legislature has never exempted these rail agencies from CEQA. *See* Cal. Gov't Code §§ 93000-93034 (lacking CEQA exemption for NCRA); Cal. Pub. Util. Code §§ 185000-185511 (lacking CEQA exemption for HSRA). Instead, the Legislature has repeatedly assumed that both agencies must comply with the Act. For instance, the Legislature appropriated over $60 million to NCRA under the State's Transportation Congestion Relief Program, which anticipates that funded agencies will comply with CEQA. Cal. Gov't Code §§ 14556.40(a)(32), 14556.13(b)(1) 14556.50(e), (i); *see also* App:9:84:2373 (Relief Program funding guidelines making recipient agencies responsible for "[c]omplying with all legal requirements . . . including . . . CEQA").

The Legislature likewise presented the Proposition 1A funding plan for the high-speed rail project to California's voters for approval, expecting that HSRA would continue to comply with CEQA. *Atherton*, 228 Cal. App. 4th at 338; *see also* Cal. Pub. Util. Code § 185033 (biennial business plans to the Legislature include the "expected schedule for completing environmental review . . . for each segment or combination of segments of Phase 1" of that project).

Nor did Congress, in enacting the ICCTA, impliedly preempt state proprietary activity in the rail market. HSRA primarily argues that applying the market participant doctrine here is contrary to the ICCTA's "preemption principles" and would defeat Congress's intent "to have uniform and exclusive federal regulation." HSRA:39-40. But this is not the correct threshold inquiry. Instead, courts consider only whether "Congress intended to extend the [federal statute's] reach to preempt state proprietary action." *Engine Mfrs.*, 498 F.3d at 1043. Nothing in the ICCTA implies that Congress intended to foreclose state proprietary activity in the rail market. Rather, numerous cases cited by HSRA acknowledge that public entities can enter the rail market, just like private entities. *See* HSRA:40.

Moreover, while HSRA acknowledges the *deregulatory* purpose of the ICCTA (HSRA:24-25), it fails to reconcile its "uniformity" argument with the largely-deregulated rail market. The goal of both the Staggers Act

and the ICCTA was to reduce federal regulation over interstate rail and encourage free market activity. *See* Section I; 49 U.S.C. § 10101(2) (statutory policy "to minimize the need for Federal regulatory control over the rail transportation system"). Deregulation allows both public and private entities to decide for themselves how to engage the rail market, and Congress likely expected that Burlington Northern, Union Pacific, and the State of California would make these decisions differently, not uniformly. Nothing in the ICCTA forecloses either private or state proprietors from setting their own criteria governing such decisions. *Cf. Tocher v. City of Santa Ana,* 219 F.3d 1040, 1048-50 (9th Cir. 2000) (upholding public market participation despite the FAAAA preemption clause intended to set national standards for conducting towing business), *abrogated on other grounds in City of Columbus*, 536 U.S. at 432.

Likewise, applying the market participant doctrine in ICCTA preemption cases does not intrude on the STB's limited jurisdiction. The STB never "specifically authorized" NCRA's repair activities here. HSRA:41; *see* Section I. Moreover, grants of federal regulatory jurisdiction do not by themselves demonstrate congressional intent to preempt state market behavior. *See Engine Mfrs.*, 498 F.3d at 1042-43 (market participant doctrine available despite EPA's regulatory jurisdiction under the Clean Air Act); *Atherton*, 228 Cal. App. 4th at 329-41 (applying the market participant doctrine to ICCTA preemption claim *after* the STB

exercised jurisdiction over the high-speed rail project). Thus, the ICCTA does not imply any congressional intent to preempt California's proprietary decisions in the rail market and foreclose the availability of the market participant doctrine.

B. NCRA's Obligation to Comply with CEQA When It Pursues Proprietary State Activity Is Not Preempted.

The market participant doctrine recognizes that public entities, like private entities, engage markets in numerous ways to pursue their unique interests. *See Boston Harbor*, 507 U.S. at 227. As Plaintiffs have explained, federal courts have adopted alternative tests to determine whether a particular state action falls within the market participant doctrine. *See* OB:39 (citing *Cardinal Towing v. City of Bedford, Tex.,* 180 F.3d 686 (5th Cir. 1999), and *Johnson v. Rancho Santiago Cmty. Coll. Dist.,* 623 F.3d 1011 (9th Cir. 2010)). Here, the relevant test is whether the challenged state action reflects the state's "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*, 180 F.3d at 693 (emphasis added); *cf. Children's Hosp. & Med. Ctr. v. Bonta,* 97 Cal. App. 4th 740, 768 (2002) (declining to apply the market participant doctrine where there was "no genuine private market regarding the delivery of" healthcare at issue there).

HSRA echoes Defendants' argument that this test is not satisfied because "[o]nly public agencies must comply with CEQA's procedural and substantive mandates." HSRA:46-47. But that fact is irrelevant under the market participant doctrine. Numerous courts have upheld standards for proprietary actions that apply to public agencies but not private entities. *See White v. Mass. Council of Const. Emp'rs, Inc.*, 460 U.S. 204 (1983); *Engine Mfrs.*, 498 F.3d at 1045-46; *Tocher*, 219 F.3d at 1048-50; *Big Country Foods, Inc. v. Bd. of Educ. of Anchorage School Dist., Anchorage, Alaska,* 952 F.2d 1173, 1178-79 (9th Cir. 1992). There is no requirement that public and private proprietors act identically. *See Rancho Santiago,* 623 F.3d at 1026-28.

Moreover, "'efficient procurement' means procurement that serves the state's purposes – which may include purposes other than saving money – just as private entities serve their purposes by taking into account factors other than price." *Engine Mfrs.*, 498 F.3d at 1045-46. It is undisputed that private entities may, as part of their proprietary actions, embrace environmental standards in their decisionmaking processes. *Id.* at 1047 (citing private programs for procuring less-polluting vehicles]; *see also Servs. Emps. Int'l Union, Local 99 v. Options—A Child Care and Human Services Agency,* 200 Cal. App. 4th 869, 873, 877 (2011) (private childcare provider agreed to Brown Act compliance). Neither the parties nor amici have identified a provision in the ICCTA that would prevent such private

behavior. RB:23-24. Consequently, the ICCTA does not preempt CEQA's application to state proprietary actions, which serves California's purpose of considering and, where feasible, reducing the environmental impacts of public actions before resources are irretrievably committed to those endeavors. *Laurel Heights*, 47 Cal. 3d at 392.

C. Contrary to HSRA's Assertion, Market Participant Cases Protect from Preemption State Rules Governing Proprietary Activity.

HSRA contends that this case does not involve state proprietary conduct because "a public agency's actions to comply with CEQA, standing alone, are not market participation." HSRA:44. This argument misunderstands both CEQA and the market participant doctrine.

First, an agency's actions and obligation to comply with CEQA do not "stand alone." CEQA always applies to decisions regarding "discretionary projects proposed to be carried out or approved by public agencies." Cal. Pub. Res. Code § 21080(a). Relevant here, discretionary projects subject to CEQA include "actions undertaken by any public agency including but not limited to public works construction" and publicly-financed activities. Cal. Code Regs., tit. 14, § 15378(a)(1), (2). Thus, CEQA operates only in conjunction with discretionary agency actions to pursue the state's proprietary interests, including NCRA's discretionary actions to lease the rail line, fund line repair and rehabilitation, and carry out its project. *See* Agency:7-8 (stating same). HSRA is simply wrong to

claim that "*voluntary* action by [NCRA] making choices in a specific free market . . . [is] lacking in this case." HSRA:44.

HSRA's attempt to define NCRA as a separate proprietor "regulated" by CEQA does not change this analysis. HSRA:47-49. NCRA exists only as an agent of the State of California; it has no legally distinct status. *City of Columbus*, 536 U.S. at 425 (state subdivisions "are created as convenient agencies to exercise such of the State's powers as it chooses to entrust to them"). Under the market participant doctrine, it is irrelevant that "not only the state, but also some of its political subdivisions, are directed to take" actions. *Engine Mfrs.*, 498 F.3d at 1045-46; *Big Country Foods,* 952 F.2d at 1179 (9th Cir. 1992) ("A state should not be penalized for exercising its power through smaller, localized units; local control fosters both administrative efficiency and democratic governance."). NCRA's spending and contractual actions in furtherance of its statutory mission to own and operate the NWP line, including spending on major repairs to reopen the line and on an EIR to evaluate the impacts of that work, merely advance the state's proprietary interests. *See* AR:13:6796, 16:8080, 8572; Gov't Code § 93020 (empowering NCRA to "acquire, own, operate, and lease ... property" to pursue its mission).

Second, the market participant doctrine does not support HSRA's attempt to sever CEQA and its enforcement mechanisms from state proprietary conduct. Rather, under the doctrine, courts evaluate the

standards that govern proprietary actions as a component of the larger state proprietary decisionmaking process. For instance, in *Engine Manufacturers*, plaintiffs argued that the Clean Air Act preempted "fleet rules" adopted by the South Coast Air Quality Management District, which set various environmental standards for vehicles purchased or leased by state or local agencies. 498 F.3d at 1036-37. In establishing these rules, the South Coast Air District did not itself procure goods in the marketplace. Rather, the District's rules set standards that "govern[ed] purchasing, procuring, leasing, and contracting for the use of vehicles by state and local governmental entities." *Id.* at 1045. The Ninth Circuit held that the environmental standards required for these proprietary actions ultimately reflected California's "interest in its efficient procurement of needed goods and services," and thus the rules were not preempted. *Id.* at 1048; *but see* 1049 (fleet rules that governed *private* purchases fell outside of the market participant doctrine).

Similarly, in *White v. Massachusetts Council of Construction Employers, Inc.*, the Supreme Court considered an as-applied challenge to an executive order setting workforce standards for construction projects financed by the city of Boston. 460 U.S. at 205-06, 209. The court held that "applying . . . the executive order to projects funded wholly with city funds" was protected under the market participant doctrine because "the Commerce Clause establishes no barrier to conditions" that govern the

market behavior of public entities. *Id.* at 209, 214-15. Other market participant cases employ the same method of analysis. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 797-98, 809-10 (1976) (upholding statutes enacted to encourage market transactions for protecting Maryland's environment); *Tocher*, 219 F.3d 1040, 1048-49 (upholding ordinance authorizing the creation of "rules and regulations to guide [a city's] formation of contracts for towing services"); *Big Country Foods*, 952 F.2d at 1175 (upholding Alaska statute requiring school districts to pay more to purchase in-state milk).[15]

Thus, HSRA is incorrect that the focus of market-participant cases "is whether the particular challenged action or state law is its market participation" (HSRA:43), and that applying CEQA to the proprietary actions of public rail entities falls outside of the doctrine. HSRA:49. Like other market participant cases, applying CEQA to publicly-financed rail projects properly furthers the State's proprietary interest in ensuring that agencies consider environmental impacts when spending public resources on publicly-pursued projects. *Engine Mfrs.*, 498 F.3d 1031.

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[15] In contrast, the market participant doctrine does not shield states' exercise of their spending powers to regulate private conduct in a manner that would interfere with the National Labor Relations Act. *Chamber of Commerce of U.S. v. Brown,* 554 U.S. 60 (2008); *Wis. Dept. of Indus., Labor and Human Relations v. Gould Inc.,* 475 U.S. 282, 287 (1986).

Nor does CEQA's citizen enforcement mechanism transform state requirements for proprietary action into preempted regulations. *Engine Manufactures* rejected an almost identical argument: "we do not see how action by a state or local government that is proprietary when enforced by one mechanism loses its proprietary character when enforced by some other mechanism." *Engine Mfrs.*, 498 F.3d at 1048 (upholding rules that contained enforcement mechanisms).

HSRA's attempts to distinguish this holding are unavailing. *See* HSRA:50. First, CEQA's codification in the Public Resources Code provides no meaningful basis for distinction. Just like CEQA, the vehicle emission rules in *Engine Manufacturers* were adopted separately from the proprietary behavior they governed. Nor did the Clean Air Act's preemption waiver for certain California air regulations dictate the outcome in *Engine Manufacturers*. *See* HSRA:51. The Ninth Circuit observed that there was "no contention that California has obtained a waiver for the [challenged] Fleet Rules." *Engine Mfrs.*, 498 F.3d at 1043 n.3.

For similar reasons, HSRA incorrectly suggests that the "unprecedented" posture of this case casts doubt on employing the market participant doctrine. HSRA:34-35. First, at least one non-California case has allowed plaintiffs to rely on the doctrine to defeat preemption as against public agencies. *See Elec. Contractors, Inc. v. Dept. of Edu.*, 303 Conn. 402, 449-54 (2012). Moreover, *Atherton* properly rejected HSRA's

argument, observing that "there is no authority supporting the argument that the power to 'invoke' the doctrine is reserved for [public agencies] to selectively assert in order to exempt those projects of [their] choosing from federal preemption." 228 Cal. App. 4th at 339 (it is "unusual to say the least" that a public agency was asserting federal preemption "instead of defending the application of state law"). As a question of law, the applicability of the market participant doctrine does not turn on the identity of the party that asserts it.

Ultimately, it is the purpose, not the form, of the state action that matters. *Tocher*, 219 F.3d at 1048-50. State statutes that are intended to regulate private behavior fall outside of the market participant doctrine.[16] For instance, the False Claims Act provisions in the *Grupp* cases regulated the conduct of a private entity, DHL, not the conduct of public entities. *See New York ex rel. Grupp v. DHL Express (USA), Inc.*, 19 N.Y.3d 278 (2012); *New York ex rel. Grupp v. DHL Express (USA), Inc.*, 922 N.Y.S.2d 888 (2011); *DHL Express (USA), Inc. v. Florida ex rel. Grupp,* 60 So.3d 426 (Fla. Dist. Ct. App. 2011). Similarly, the spending regulations in *Gould* and *Chamber of Commerce v. Brown* set standards for private

[16] HSRA mistakenly relies on *Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293 (Tex. Ct. App. 2001), HSRA:43, 50, which did not consider the market participant doctrine. *Whitten* found that Texas regulation of private tow operations was not covered by the "safety regulation exception" to preemption, which is unique to the FAAAA. 56 S.W.3d at 304-08.

individuals and entities that received public funds and contracts, purposefully regulating their behavior through the states' spending power. *Chamber of Commerce v. Brown*, 554 U.S. 60; *Gould*, 475 U.S. at 287.

In contrast, enactments that are intended to govern a public entity's proprietary actions – like the fleet rules upheld in *Engine Manufacturers*, the workforce standards applied in *White*, and CEQA here – are properly protected by the market participant doctrine.

IV. Defendants' Voluntary Agreements to Comply with CEQA Are Not Preempted.

HSRA does not dispute the general rule that voluntary agreements are not subject to preemption. HSRA:51-53; *see Flynn v. Burlington N. Santa Fe Corp.*, 98 F. Supp. 2d 1186, 1189 (E.D. Wash. 2000) ("no authority" under ICCTA for the proposition that a carrier is "precluded from voluntarily complying with local permitting regulations"). Rather, HSRA asserts that if specific facts show a voluntary agreement unreasonably interferes with railroad operations, the presumption against preemption may be rebutted. HSRA:53-54. HSRA offers only a theoretical argument without facts relevant to this case.

Here, there is no question that Defendants voluntarily agreed to comply with CEQA on numerous occasions. AR:9:4620-46 (Master Agreement with State); AR:13:6731 (Lease Agreement between NCRA and NWPCo); App:8:77b:2055, 2064, (2006 NWPCo Business Plan);

AR:17:8911 (Novato Consent Decree). Defendants also voluntarily agreed that the right to operate under the lease was subject to Sonoma-Marin Area Rail Transit District's consent, execution of equipment lease and tax approvals (AR:13:6731), and NWPCo's compliance with the State Consent Decree (AR:13:6746).

Moreover, as HSRA concedes, the question of unreasonable interference is a fact-based inquiry. HSRA:51. Defendants cannot possibly demonstrate that enforcement of CEQA interferes with interstate commerce. To the contrary, the facts here show unequivocally that CEQA compliance is a benefit, not a burden, because it was an integral element of the public funding to enable rail transport. OB:48-51. NCRA freely elected to receive over $31 million in state funds with conditions, including CEQA compliance, to start trains hauling freight in interstate commerce again. This public financial support was also critical to the NCRA partnership with NWPCo to reopen the line. *See, e.g.,* AR:13:6595, 6600-01, 6739, 6750.

Enabling commerce is the opposite of interfering with commerce. *See Mason & Dixon Lines Inc. v. Steudle*, 683 F.3d 289, 294 (6th Cir. 2012) (no dormant Commerce Clause violation when completion of state-funded road construction contract "encourage[s] the flow of commerce"); AR:17:8901-02 (in Novato Consent Decree, Defendants averring CEQA review is not "unreasonable burden on interstate commerce"). A contrary

interpretation is antithetical to the ICCTA's very purpose, which was enacted to allow railroads to be competitive against other modes of ground transportation.

As discussed, the only relevant transaction before the STB was a conveyance to NWPCo of NCRA's right to operate; the STB lacks jurisdiction over line rehabilitation, repair and maintenance. *See* Section I.C. Since NWPCo and NCRA had agreed in the lease to condition NWPCo's operation rights on NCRA's CEQA compliance, the STB could not have approved anything different from rights given by the lease. The STB could not approve rights NCRA did not have, including the right to proceed without CEQA compliance to which NCRA committed in the Master Agreement and its internal directive.[17]

Voluntary CEQA compliance here does not unreasonably burden railroad operations; in fact, the facts establish that CEQA compliance *facilitates* operations. As HSRA concedes, Defendants have the burden to establish facts that a voluntary agreement constitutes an unreasonable burden on railroad operations. *Wichita Terminal Ass'n, BNSF Ry. & Union*

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[17] The STB acknowledged that NWPCo's right to operate was subject to conditions outside of its jurisdiction: "NWPCo. invoked the Board's authority to acquire the common carrier obligations and, *after repairs*, to conduct rail operations on the line." AR:16:8540 (emphasis added). Thus, the STB recognized that rail operations could occur after repairs, which under state law and the voluntary commitments of NCRA required CEQA review.

Pac. R.R. Co.— Petition for Declaratory Order, FD No. 35765, 2015 WL 3875937, at *7 (S.T.B. June 22, 2015) ("voluntary agreements between rail carriers and state or local entities are not enforceable under § 10501(b) where [ ] the *railroad demonstrates* that enforcement of its agreement would unreasonably interfere with the railroad's operations") (emphasis added). Because Defendants have never presented facts to rebut the presumption that the voluntary agreements benefit railroad operations, HSRA's reliance on *Woodbridge* is unavailing. *Twp. of Woodbridge v. Consol. Rail Corp., Inc.*, FD No. 42053, 2001 WL 283507, at *2-3 (S.T.B. Mar. 22, 2001). There is no onerous contract enforcement or law that unreasonably interferes with the line's operations. The STB's HSRA decision is not binding authority. *See Mullaney v. Woods,* 97 Cal. App. 3d 710, 719 (1979); RB:11-12. Moreover, the STB's notion that a "potential . . . effect" of CEQA compliance through a third-party enforcement action would be sufficient to preempt voluntary agreements, absent specific facts, contravenes well-established case law. *See Franks Inv. Co.*, 593 F.3d at 414-15.

CONCLUSION

The ICCTA reflects a century of congressional concern over economic regulation of railroads – such as unfair competition between rail carries, fair and non-discriminatory rates, and rail line expansions that might undo the rail industry. The statute is not intended to wrest state

decisionmaking from California's legislature or its people. Plaintiffs respectfully request that the Court reverse the Court of Appeal and remand the case with directions to rule on the merits of Plaintiffs' CEQA claims.

DATED: Aug. 26, 2015

Respectfully submitted,

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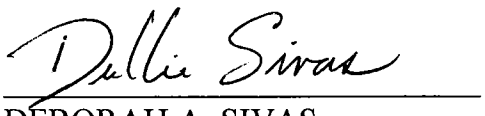
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, I hereby certify that this brief contains 13,961 words, including footnotes, but excluding the tables of contents and authorities, signature block, and this certificate. I have relied on the word count of the Microsoft Word program used to prepare this Certificate.



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CERTIFICATE OF SERVICE

LYNDA F. JOHNSTON declares:

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On August 26, 2015, I served the foregoing **PLAINTIFFS' CONSOLIDATED RESPONSE TO BRIEFS OF AMICI CURIAE IN SUPPORT OF RESPONDENTS AND REAL PARTY IN INTEREST** on each person named below by placing a true and correct copy thereof in a sealed envelope, with postage thereon fully prepaid, in the United States Mail at Stanford, California, addressed to each recipient respectively as follows:

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