Case No. S222472

In the Supreme Court of the State of California

FRIENDS OF 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 Appellant District, Division One, Case Nos. A139222, A139235

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

APPLICATION FOR LEAVE TO FILE A CONSOLIDATED, OVERSIZED ANSWER TO AMICI BRIEFS

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APPLICATION FOR LEAVE TO FILE A CONSOLIDATED, OVERSIZED ANSWER TO AMICI BRIEFS

To the Honorable Justice Tani G. Cantil-Sakauye, Chief Justice of the Supreme Court of the State of California:

Under Rule 8.520(f)(7) of the California Rules of Court, Respondents North Coast Rail Authority, the Board of Directors of North Coast Railroad Authority, and Northwestern Pacific Railroad Company (collectively, "Respondents") respectfully request permission from this Court to file a single, consolidated "oversized" answer to briefs of the five amici supporting Appellants Friends of Eel River and Californians for Alternatives to Toxics (collectively, "Appellants' Amici") in lieu of filing five separate briefs to respond to each individual amicus brief.

Good cause to do so is shown by the following:

1. Appellants' Amici filed five separate briefs, collectively totaling 34,223 words.
2. If Respondents responded separately to each brief, Respondents would have a right to file five individual answer briefs, each containing up to 14,000 words (see Rule 8.520(c).)
3. Appellants' Amici's briefs contain several different, but related arguments. For this reason, rather than file five answer briefs, Respondents believe a single brief is more economical for the Court and all parties.
4. Respondents are unable to respond to Appellants' Amici's briefs in a single answer brief of 14,000 words in part because Respondents would like to respond to the arguments and issues raised in the Appellants' Amici's briefs that were not already addressed in Respondents' Answer Brief on the merits.

5. To fully address the arguments in Appellants' Amici's briefs in a single answer, Respondents request an additional 1,700 words beyond the 14,000 word limit, for a total of 15,700 words.
6. Respondents informed opposing and amici counsel that it would be filing this motion and all counsel except Mr. Holder stated that they do not oppose it. Mr. Holder stated he had no objections to this motion, but had not heard back from his clients, Amici Madera County Farm Bureau and Merced County Farm Bureau, as to whether they had objections.

For the foregoing reasons, Respondents respectfully request that it be granted leave to file one consolidated oversized answer to Appellants' Amici Brief.

Dated: August 26, 2015

Cox, Castle & Nicholson LLP

By: _____
Andrew B. Sabey
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By: _____
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I.

INTRODUCTION

The narrow issue before the Court is whether the Interstate Commerce Commission Termination Act ("ICCTA") preempts CEQA as applied to the North Coast Rail Authority's ("NCRA") rail line (the "Line") and Northwestern Pacific Railroad's ("NWPCo") freight operations along the Line. There should be no question that the ICCTA preempts environmental pre-clearance requirements, such as CEQA, when they could be used to delay or stop Surface Transportation Board ("STB")-authorized rail operations, including NWPCo's operations.

Nevertheless, a group of amici have written to support Appellants' contention that the ICCTA does not preempt CEQA here: Center for Biological Diversity ("CBD"); Madera County Farm Bureau and Merced County Farm Bureau (the "Farm Bureaus"); Sierra Club, Coalition for Clean Air, Natural Resources Defense Council, Planning and Conservation League, and Communities for a Better Environment (collectively "Sierra Club"); South Coast Air Quality Management District and Bay Area Air Quality Management District (the "Air Districts"); and Town of Atherton, California Rail Foundation, Transportation Solutions Defense and Education Fund, Community Coalition on High-Speed Rail, and Patricia Hogan-Giorni (collectively, "Atherton") (together, "Appellants' Amici").

In attempting to enjoin the operation of a federally-chartered railroad, Appellants' Amici face the ICCTA, among the most comprehensive schemes of federal preemption to be found in any field of law. Their respective "ICCTA circumvention" theories fall into three general categories, each of which fails.

First, Appellants' Amici claim CEQA is not regulatory, and is instead a relatively benign information-gathering exercise designed to

disclose environmental pitfalls. The ICCTA, they claim, grants regulatory authority to the STB but does not proscribe lesser state activity intended to protect the environment. This argument fails because the ICCTA not only proscribes non-federal regulatory action, but also any action that would have the effect of interfering with the operation of an STB-authorized railroad. Every court that has considered the scope of the ICCTA's preemption clause has found that it reserves to the STB the exclusive right to regulate freight rail transportation. The plain language of section 10501, subdivision (b), and its larger statutory framework and history also demonstrates congressional intent to preempt CEQA remedies against a public agency-owned railroad when CEQA remedies would conflict with STB-authorized railroad actions.

The STB's jurisdiction over the Line is undisputed: NCRA's ownership of the Line and NWPCo's operation are within the STB's jurisdiction and were licensed by the STB. Given that Appellants seek to enjoin operation of NWPCo until CEQA preclearance is achieved, it is clear both that CEQA is regulatory and that imposing CEQA remedies here would interfere with the operation an STB-authorized railroad.

Despite the plain language of section 10501 and the numerous cases interpreting it, Amici urge this Court to ignore precedent and interpret the ICCTA's preemption clause more narrowly than the ordinary meaning of its plain language. Appellants' Amici go so far as to claim *City of Auburn*, the seminal Ninth Circuit case interpreting the scope of ICCTA preemption, which has been widely cited by other federal courts, was wrongly decided. This Court should decline Amici's invitation to create a conflict between state and federal interpretation of the ICCTA within California. Such a split will only lead to regulatory uncertainty and forum shopping, with petitioners racing to have disputes adjudicated in state court and respondents and defendants seeking federal review.

Second, Appellants' Amici attempt to employ the dormant Commerce Clause "market participant" doctrine whereby federal preemption can be circumvented by a state or local agency that is in the marketplace for goods or services as long as the agency's policy is not explicitly preempted and the agency is not attempting to achieve a regulatory purpose. There are multiple problems with this approach, as discussed later in this brief. If this Court agrees that the ICCTA expressly preempts state environmental pre-clearance laws like CEQA, it need not reach the question of whether the market participant exception can apply to these facts.

As the California Attorney General, writing for the California High Speed Rail Authority ("CHSRA"), further reinforces in her excellent brief, CEQA is a generally applicable legal requirement and not "market participation" because the preparation of an EIR and citizen suit involves neither voluntary action nor a market interaction. The state was not targeting procurement when it enacted CEQA; it was enacting a policy to ensure agencies' consider the environment and impose certain requirements when exercising their discretionary approval authority. (Pub. Resources Code, §§ 21000–21006.) Moreover, Appellants' Amici cannot overcome the inherent contradiction in their notion that citizens may act as a private attorney general to assert the state is acting as a market participant, when the ability to act as a private attorney general arises only when the state acts as a regulator.

Furthermore, no state or local agency was in the market for goods or services in 2011. NCRA had already granted exclusive operating rights to NWPCo in 2006, five years before Appellants' action. The state-sponsored repair work on the Line was completed months before the action. Regulation, not market participation, was at issue.

Third, Appellants' Amici argue that Respondents themselves gave up their right to preemption by contracting with the state or among themselves to voluntarily comply with CEQA obligations and attendant lawsuits. As noted by the appellate court, this theory fails because Appellants never pled a contract cause of action, much less their right to bring a contract action as a third-party beneficiary. Any such action, had it been pled, would require elemental proof, such as contract parties, terms, enforcement provisions, amendments, understandings of the parties, evidence of breach, etc. As non-parties to any contract entered into by the parties, Appellants' Amici cannot now assert their own one-sided interpretation of these unpled contracts.

Finally, Appellants' Amici fail to raise a valid public policy rationale to ignore preemption. Since the Line is regulated by the STB, the lack of CEQA regulation would not create a regulatory void. The California Environmental Protection Agency and the California Natural Resources Agency (and certain of their departments and boards) (collectively, "California EPA") provide an important supplement to the CHSRA brief by explaining, from the perspective of the state's environmental enforcement agencies, that the ICCTA preempts CEQA here because the NCRA did not have regulatory power to prevent freight rail operations after the STB authorized NWPCo to operate. The California EPA explains that finding preemption here is not some broadside against state environmental laws generally, but rather, a well-established application of the Supremacy Clause of the U.S. Constitution. Further, as the California EPA explains, the ICCTA does not preempt federal environmental regulation or state regulation that affects activities only tangentially related to rail transportation. For example, states retain authority to regulate how dirt is disposed when tracks are constructed and whether sidewalks are required along right-of-ways. But a state cannot regulate the operation of an existing

train route or other activities involved in rail transportation under the STB's jurisdiction.

II.

ARGUMENT

A. The ICCTA Preempts CEQAs Applied To The Operation And Maintenance Of NCRA's Freight Rail Line

As explained in the Answer Brief (pp. 11, 16–17) and by CHSRA (pp. 9–12), all courts examining the ICCTA have concluded that it contains "unquestionably broad" preemption language. (E.g., *People v. Burlington N. Santa Fe R.R.* (2012) 209 Cal.App.4th 1513, 1524 ("*BNSF*"); *Island Park, LLC v. CSX Transp.* (2d Cir. 2009) 559 F.3d 96, 104; *City of Auburn v. U.S. Government* (9th Cir. 1998) 154 F.3d 1025, 1031; *CSX Transp. Inc. v. George Public Service Comm'n* (N.D. Ga. 1996) 944 F.Supp. 1573, 1581.) As those courts have noted, the ICCTA's express preemption clause gives the STB exclusive jurisdiction over "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," as well as "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, subd. (b); see *BNSF*, *supra*, 209 Cal.App.4th at p. 1528.)[1] This language sweeps up all state regulations that interfere with federal regulation of rail transportation, but not state laws that merely touch upon

[1] Prior to the ICCTA, the preemption provision applied only if the state law was "inconsistent with an order of the Commission issued under this subtitle or is prohibited by this subtitle." (49 U.S.C., § 10501, subd. (c) (1978).) The revised section 10501 enacted as part of the ICCTA broadened preemption to cover "construction, acquisition, operation, abandonment, or discontinuance" of railroads, regardless of whether there was a direct conflict with a state order or statute.

railroads. (*BNSF*, *supra*, at p. 1524; *Adrian & Blissfield R.R. Co. v. Village of Blissfield* (6th Cir. 2008) 550 F.3d 533, 540; CHSRA Brief at pp. 12–13 and cases cited therein.)

Despite judicial consensus on the broad preemption of state regulation of rail transportation provided by the ICCTA, CBD advocates for an interpretation of the ICCTA's preemption clause that is at odds with the words of the statute. Specifically, CBD argues the ICCTA was enacted to "ensure that the states did not directly seek to regulate the rates, fees and schedules of rail carriers" and, therefore, laws that do not affect these three narrow issues are not be preempted. (CBD Brief at pp. 25, 31.) CBD's urged reading of the ICCTA's preemption clause conflicts with the plain language and legislative history of section 10501.

1. The Text And Legislative History Of The ICCTA Indicates That Its Preemption Is Broad

CBD claims the plain language and structure of the ICCTA demonstrates that the statute is concerned only with direct economic regulation. (CBD Brief at pp. 25–26.) But the plain language of the ICCTA at issue here explicitly grants the STB exclusive authority over NCRA's and NWPCo's railway operations and maintenance. Section 10501 of the ICCTA states the STB will have exclusive 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, subd. (b)(2) [emphasis added].) The same section also states, "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." (49 U.S.C., § 10501, subd. (b).) Thus, at least as to this third-party lawsuit seeking CEQA writ remedies, CEQA is preempted. (See CHSRA Brief at pp. 7–20.)

CBD argues that 49 U.S.C., § 10101 counsels a narrow reading of section 10501. (CBD Brief at p. 24.) Section 10101 sets forth the federal government's policies in regulating rail. While many of those policies relate to economics, not all do. Other policies express a desire to limit all regulatory barriers to rail transportation, protect public health and safety, encourage energy conservation, and expedite the handling and resolution of proceedings under the ICCTA. (E.g., 49 U.S.C., § 10101, subds. (2), (7), (8), (14), (15).) The wide-ranging policy concerns listed in section 10101 do not counsel a reading of section 10501 that limits the STB's jurisdiction to only rates and other direct economic regulation.

Nothing in the ICCTA's provisions giving the STB exclusive jurisdiction over the construction and operation of railroad lines (§§ 10501, 10901) indicates that the federal government was preserving state environmental regulation of the construction and operation of railroad lines.[2] The plain reading of section 10501 is reinforced by later sections of the ICCTA, which carve out a place for state environmental regulation of solid waste disposal. Specifically, section § 10910 states "[n]othing in section 10908 or 10909 [sections concerning the regulation of solid waste] is intended to affect the traditional police powers of the State to require a rail carrier to comply with State and local environmental, public health, and public safety standards that are not unreasonably burdensome to interstate

[2] Contrary to CBD's claim, it is irrelevant to the preemption inquiry that environmental laws are "traditionally local" police powers because the focus of the preemption inquiry is on "the effects of the law" rather than its "professed purpose." (*Gade v. National Solid Wastes Mgmt. Ass'n* (1992) 505 U.S. 88, 105–06.) To the extent the effects of state and local environmental and planning laws have been found to interfere with the STB's jurisdiction over "construction, acquisition, operation, abandonment, or discontinuance" (49 U.S.C., § 10501, subd. (b)(2)) of tracks or related facilities, they have been preempted. (E.g., *Green Mountain R.R. Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 643; *City of Auburn, supra*, 154 F.3d at p. 1031.)

commerce and do not discriminate against rail carriers." If the ICCTA's preemption provision were as narrow as CBD argues, Congress would not have needed to provide that sections 10908 and 10909 did not preempt state and local environmental standards; under CBD's reading no provision of the ICCTA would preempt state and local environmental standards. Section 10501 should not be interpreted in a way that makes words in section 10910 surplusage. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118 [refusing to interpret one subsection of a statute in a way that made other subsections surplusage].)

The legislative history also undercuts CBD's argument. (CHSRA Brief at pp. 20–26 [discussing the statutory framework and legislative history of the ICCTA].) The ICCTA was intended to preempt those state laws that, if left in place and permitted to vary among the states, "would greatly undermine the [rail] industry's ability to provide the 'seamless' service that is essential to its shippers and would weaken the industry's efficiency and competitive viability." (See Sen. Rep. No. 104–176, 1st Sess., p. 6 (1995).) This is not limited to direct economic regulation. (Answer Brief at p. 21; CHSRA Brief at pp. 23–25.) For instance, the House Reports cited by Appellants' Amici indicate an intention that the preemptive effect of the ICCTA be more broadly construed. (CBD Brief at p. 17 [quoting H.R. Conf. Rep. No. 104–311, 1st. Sess., pp. 95–96 (1995), which states "the Federal scheme of economic regulation and deregulation *is intended to address and encompass all such regulation and to be completely exclusive*." (emphasis added)].)

2. Every Case And STB Decision Interpreting The ICCTA's Preemption Clause Has Found It Is Broad, Encompassing More Than Just Direct Economic State Regulation

Cases interpreting the scope of ICCTA preemption have uniformly found that it is not limited to just direct economic regulation. Many cases

have concluded that the ability of state environmental regulation and pre-clearance requirements to affect the construction and operation of rail means those requirements are also preempted by the ICCTA. (See, e.g., *Green Mountain, supra*, 404 F.3d at p. 643; *City of Auburn, supra*, 154 F.3d at p. 1031; *City of Encinitas v. North San Diego County Transit Bd.* (S.D. Cal. 2002) 2002 WL 34681621, at *4.)

STB decisions agree with these cases, finding the ICCTA preempts state environmental regulation of rail operations. (See, e.g., *California High-Speed Rail Authority—Petition for Declaratory Order* (S.T.B. served Dec. 12, 2014) STB Finance Docket No. 35861, 2014 WL 7149612, at *7, reconsideration denied (S.T.B. served May 5, 2015) STB Finance Docket No. 35861, 2015 WL 2070594, review pending, *Kings County v. S.T.B.* (9th Cir., June 11, 2015 Case No. 15-71780 and Dignity Health v. S.T.B. (D.C. Cir., June 30, 2015) Case No. 15-1198 [finding the ICCTA preempts CEQA as applied to the planning and construction of an STB-authorized, state-owned rail line]; *DesertXpress Enterprises, LLC—Petition for Declaratory Order* (S.T.B. served Jun. 27, 2007) STB Finance Docket No. 34914, 2007 WL 1833521, at *3 [finding "state permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Act, will be preempted" by ICCTA]; *North San Diego County Transit Dev. Bd.—Petition for Declaratory Order* (S.T.B. served Aug. 21, 2002) STB Finance Docket No. 34111, 2002 WL 1924265, at *5 ["state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted to the extent that they set up legal processes that could frustrate or defeat railroad operations because they would, of necessity, impinge upon federal regulation of interstate commerce"]; *Joint Petition for Declaratory Order—Boston and Maine*

Corp. and Town of Ayer, MA (Apr. 30, 2001) STB Finance Docket No. 33971, 2001 WL 458685, at *5; Answer Brief at pp. 20–27.)

Appellants' Amici cite no persuasive authority for ignoring the above decisions. Atherton Amici attempt to distinguish *DesertXpress* by stating that "CEQA compliance was an adjunct to . . . regulatory approval" for construction and operation of a new rail line, and it was the regulatory approval rather than CEQA that the STB found the ICCTA preempted. (See Atherton Brief at p. 27, fn. 15.) Nowhere in *DesertXpress* does the STB make this distinction. Instead, the STB determined that because it "has exclusive jurisdiction over the planned new track, facilities, and operations [,] the Federal preemption under section 10501(b) attaches" and preempts all local regulation (the approval and CEQA). (*DesertXpress*, *supra*, at p. *3; see also *North San Diego County*, *supra*, 2002 WL 1924265, at *5–6 [both local permitting and environmental process preempted, with no distinction between the permit and the environmental process required to get the permit].)[3]

3. The Cases Cited By Amici Do Not Support An Interpretation Of The ICCTA's Preemption Clause That Limits It To Direct State Economic Regulation

CBD cites several cases that allegedly support their claim the ICCTA preempts only direct economic regulation by the state, and environmental laws are not such regulation. (CBD Brief at pp. 21–24.) But none of the cases cited supports this claim. (E.g., *New York Susquehanna & Western Railway Corp. v. Jackson* (3d Cir. 2007) 500 F.3d 238, 253 [confirming that the ICCTA preempts environmental regulation that could

[3] We agree with California EPA that CEQA obligations do not exist in a vacuum. There must be a discretionary decision at issue to trigger CEQA obligations. (California EPA Brief at p. 6.) Here, the NCRA had no discretionary decision to make in June 2011 regarding NWPCo's operations, so there was no approval to which CEQA could attach.

"unreasonably prevent, delay, or interfere with activities protected by the [ICCTA]"]; *Iowa, Chi. & E. R.R. Corp. v. Washington County* (8th Cir. 2004) 384 F.3d 557, 561 [state railroad bridge replacement law not preempted by ICCTA because finding of ICCTA preemption would require implied repeal of directly applicable Federal Highway Bridge Replacement and Rehabilitation Program and its implementing regulations allowing for joint state and federal authority]; *Florida East Coast Ry. Co. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324, 1331–32 & fn. 5 [zoning regulations preventing private aggregate mining company from operating mine on land leased from rail carrier not preempted by ICCTA because state regulation not being applied to rail carrier or rail transportation]; *Home of Economy v. Burlington Northern Santa Fe R.R.* (N.D. 2005) 694 N.W.2d 840, 846 [no preemption under the ICCTA because the Federal Rail Safety Act specifically addresses railroad grade crossing and provides for state authority, so reliance on the ICCTA misplaced]; *Native Village of Eklutna v. Alaska R.R. Corp.* (Alaska 2004) 87 P.3d 41, 57 [application of zoning ordinance to a quarry to be operated by rail carrier not preempted the zoning ordinance would not interfere with rail transportation].) That courts have found some state and local regulations are not preempted by the ICCTA in instances where rail transportation is not being regulated does nothing to support CBD's position that the ICCTA only preempts economic regulation.

CBD also cites *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314, 328, 331, to support its narrow reading of the ICCTA. (CBD Brief at pp. 19–20.) But *Town of Atherton* did "not wade into the various complexities and intricacies presented by the broader question of federal preemption, because on the specific record before [the court] it [was] clear that an exception to preemption, namely the market participation doctrine, applies." (*Id.* at p. 327; see *id.* at p. 333

["assuming without deciding that the ICCTA preempts CEQA as to the [high speed rail]"].) Since *Town of Atherton* did not analyze the scope of the ICCTA's preemption, it does not stand for the proposition that the scope is narrow. (See *id.* at p. 337 ["It is axiomatic that cases are not authority for propositions not considered" (citation and internal quotation marks omitted).].)

4. The FAAAA's Preemption Clause And Cases Interpreting It Are Irrelevant To Interpreting The ICCTA

Since no ICCTA case or STB decision supports a narrow interpretation of the ICCTA's preemption, some of Appellants' Amici rely on cases interpreting the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), which preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." (49 U.S.C., § 14501, subd. (c)(1).) The FAAAA's preemption clause uses different language, with a different focus and purpose, than the ICCTA preemption clause, and therefore preemption under these two statutes cannot be equated. (Compare 49 U.S.C., § 14501 with § 10501.) The FAAA's preemption clause also contains several exemptions, "including state laws regulating motor vehicle safety, size, and weight; motor carrier insurance; and the intrastate transportation of household goods." (*Dan's City Used Cars, Inc. v. Pelkey* (2013) 575 U.S. ___, 133 S.Ct. 1769, 1776, citing 49 U.S.C., § 14501, subd. (c)(2)(A)–(B).) "[S]tate laws 'relating to the price' of 'vehicle transportation by a tow truck,' if towing occurs without prior consent of the vehicle owner" are also exempted from the FAAAA's preemption. (*Id.*, citing 49 U.S.C., § 14501, subd. (c)(2)(C).) The ICCTA contains no similar exemptions for state laws regulating a freight rail carrier, such as NWPCo, over which the STB has exclusive jurisdiction. (49 U.S.C., § 10510, subd. (a)(1).) Because the FAAAA does not include an analogous preemption clause, cases

interpreting it are not particularly useful in construing preemption under the ICCTA.

Moreover, the FAAAA cases cited by Appellants' Amici are inapposite. For example, *Dan's City Used Cars* concerned a state law regulating the storage of vehicles after they are towed. *Dan's City Used Cars* focused on the statutory language of the FAAAA, which it found constituted "the best evidence of Congress pre-emptive intent" to find that the FAAAA did not pre-empt a state court negligence action. A unanimous United States Supreme Court found that the FAAAA's language could not be construed to evidence intent to preempt a state court negligence cause of action concerning the storage of the vehicle because the plain language of the FAAAA applies only to vehicle transportation. (*Dan's City Used Cars*, *supra*, 133 S.Ct. at pp. 1779–80.) *Dan's City Used Cars* does not stand for the proposition that the United States Supreme Court has narrowed the approach to preemption analysis. It confirms that the focus is on the words of the preemption clause and effect of the state regulation alleged to be preempted.

Further, *Dan's City Used Cars*' reasoning that preemption should not exist without clear congressional intent if preemption would "remove all means of judicial recourse for those injured by illegal conduct" (*id.* at p. 1781) does not apply here for at least two reasons. First, as discussed in Section II.D, *infra*, there is no regulatory void left if CEQA is preempted. Second, the ICCTA contains clear language indicating that the STB has exclusive jurisdiction over freight rail operations.

The other FAAAA cases cited by CBD offer no support for its contention regarding the ICCTA, and indicate only that state regulations that do not (or only remotely) affect the topics covered by the FAAAA are not preempted. (See *People v. Pac Anchor Transp. Inc.* (2014) 59 Cal.4th 772, 775, 786 [state labor and insurance law did not affect routes or

services, and any effect on prices passed on to consumers as a result of compliance with the laws was too attenuated, and thus not preempted]; *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, 1190 [compliance with California Prevailing Wage Law would result in additional costs to company has only a remote relation to prices, routes, and services, and so not preempted by FAAAA]; cf. *Rowe v. New Hampshire Motor Transp. Ass'n* (2008) 552 U.S. 364, 368 [state law forbidding tobacco retailers from using delivery service unless service follows particular delivery procedures directly affected the service provided by a motor carrier and was preempted].)

Unlike those cases, applying CEQA to NWPCo's operations falls squarely within the preemptive scope of the ICCTA. The injunctive relief sought by Appellants would directly affect the construction, operation (including maintenance), abandonment, and discontinuance of the Line—actions that the ICCTA has delegated exclusively to the STB. (See 49 U.S.C., § 10501, subd. (b)(2).) Because Congressional intent to preempt state laws affecting rail transportation is "clear and manifest," the ICCTA cannot be interpreted to preserve CEQA as applied to the Line as Amici claim. (Compare *CSX Transportation v. Easterwood* (1993) 507 U.S. 658, 663–64 [courts reluctant to find preemption unless congressional intent is clear and manifest]; accord *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 486; see CBD Brief at p. 31.)

5. *City of Auburn* Is Correctly Decided And This Court Should Decline To Create A Split Between California's and the Ninth Circuit's Interpretation Of The ICCTA

In addition to unreasonably interpreting the ICCTA, CBD asks this Court to disregard Ninth Circuit precedent, and an entire body of law based on that precedent, defining the scope of ICCTA preemption throughout the country. (CBD Brief at pp. 26–27.) Doing so would create the regulatory

patchwork ICCTA was intended to avoid. (See H.R. Conf. Rep. 104–311, p. 96 (1995).)

According to CBD, *City of Auburn, supra*, 154 F.3d 1025, erred in its interpretation of section 10501, subdivision (b), because that section "does not expressly preempt state environmental review statutes." (CBD Brief at p. 26.) CBD also claims *City of Auburn* reached its preemption conclusion by inappropriately "conflating environmental regulation with economic regulation." (*Id.*)

City of Auburn made neither mistake. To conclude that STB's authority is "explicit" and expressly preempts any state regulation that could interfere with it, the Ninth Circuit relied on the express language of section 10501, subdivision (b), which grants the STB exclusive jurisdiction over the regulation of rail transportation and applicable remedies. (*City of Auburn, supra*, 154 F.3d at p. 1030.) The Ninth Circuit did not conflate environmental regulation with economic regulation; it acknowledged the realities of environmental regulation, which can have economic effects caused by its ability to delay, modify, or stop projects.

The Ninth Circuit is not alone in acknowledging the reality that land use and environmental regulations can amount to economic regulation as applied to rail operations. Indeed, numerous courts have relied on *City of Auburn* when interpreting the scope of the ICCTA's preemption clause. (See, e.g., *Union Pacific R.R. Co. v. Chicago Transit Auth.* (7th Cir. 2011) 647 F.3d 675, 678, fn. 1, 683 [citing *City of Auburn* to support court's interpretation of the scope of the ICCTA's preemption]; *Green Mountain, supra*, 404 F.3d at p. 642 [citing to *City of Auburn* to conclude a Vermont environmental preclearance law was preempted by the ICCTA]; *Friberg v. Kansas City S. Ry.* (5th Cir. 2001) 267 F.3d 439, 443–44, fn. 14 [citing to *City of Auburn* to conclude the ICCTA preempted state statute prohibiting standing trains at intersections]; *City of Seattle v. Burlington Northern R.*

Co. (Wash. Ct. App. 2001) 105 Wash.App. 832, 835–37 [relying on *City of Auburn* to find the ICCTA preempted city traffic regulations affecting track switching and roadway blocking]; *Wis. Central Ltd. v. City of Marshfield* (W.D. Wis. 2000) 160 F.Supp.2d 1009, 1013 [agreeing with *City of Auburn*'s reading of the ICCTA's preemption provisions and finding state condemnation law as applied to rail carrier's passing track preempted].) Indeed, 108 opinions have cited *City of Auburn*, with only 11 of those distinguishing *City of Auburn*. (Westlaw Keycite of *City of Auburn*, *supra*, 154 F.3d 1025, as of Aug. 18, 2015.)

Given the numerous state and federal courts across the country that have relied on *City of Auburn*, this Court should hesitate before rejecting it. (See *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320–21 ["While we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight. Where lower federal precedents are divided or lacking, state courts must necessarily make an independent determination of federal law, but where the decisions of the lower federal courts on a federal question are 'both numerous and consistent,' we should hesitate to reject their authority" (citations omitted).].)

If this Court rejects *City of Auburn*, rail carriers would be uncertain of the scope of the ICCTA's preemption in California. Rail carriers may be forced to comply with environmental regulations in California that would be preempted elsewhere, creating exactly the type of patchwork regulation the ICCTA is intended to prevent. Or, more likely, California rail carriers would claim the ICCTA preempts California's environmental regulations that interfere with rail transportation and attempt to adjudicate any dispute in federal court, where *City of Auburn* would be controlling law. Typically courts try to avoid such results because they lead to uncertainty and promote forum shopping. (See *Barrett v. Rosenthal* (2006) 40 Cal.4th 33,

58 [declining to support an interpretation of a federal statute that "diverges from the rule announced in [a Fourth Circuit opinion] and followed in all other jurisdictions" because it "would be an open invitation to forum shopping"].)

6. The ICCTA Preempts The Actions At Issue Here

Atherton Amici acknowledge that the ICCTA's preemption clause is broad, but claim CEQA is not preempted because it is focused on public participation and information disclosure. (Atherton, pp. 24–31.) As comprehensively explained by CHSRA, CEQA is a preclearance requirement that, among other things, authorizes a court to compel a public agency to rescind its project approval and to enjoin project implementation. (See CHSRA Brief at pp. 14–19.) In fact, an injunction is one of the remedies Appellants seek. (App. 1:15, 1:63–64.) CEQA is thus more than an information disclosure law. The time it takes to prepare the disclosure CEQA requires, which can hold up project construction and operations, and the remedies CEQA authorizes, would interfere with STB's exclusive jurisdiction over the Line.

Atherton Amici also argue that because CEQA would be applied to "a single, specific, state-operated rail carrier," CEQA is not preempted. (Atherton Brief at p. 10–11.) To support this claim, Atherton Amici cite to section 10501, subdivision (b), and its statement that the jurisdiction of the STB over "transportation by *rail carriers* . . . is exclusive." According to Atherton Amici, this language means the ICCTA preempts only state regulation applicable to the rail industry, and not individual rail carriers. (Atherton Brief at p. 10.) But the "s" on the end of "carriers" does not indicate the STB has jurisdiction only over the rail industry. Instead, it refers to a collective of individual carriers, including carriers such as the NCRA with just one line, or NWPCo, which operates on one line. These carriers are subject to the STB's jurisdiction and exclusive remedies.

The Atherton Amici also wrongly suggest the NCRA is not a "rail carrier." The ICCTA defines "rail carrier" as "a person providing common carrier railroad transportation for compensation . . . ." (49 U.S.C., § 10102, subd. (5).) NCRA was formed in 1989 for the purpose of operating freight rail service to the north coast area. (AR 4584.) The STB has confirmed NCRA is a "rail carrier" subject to its jurisdiction. (AR 4575–77 [characterizing NCRA as "Class III rail carrier"]; see AR 4584–85.) Thus the STB exclusively regulates NCRA's rail transportation. Moreover, it is NWPCo's freight operations that are at issue; it is undisputed that NWPCo is a rail carrier. (AR 8207.)

B. Amici's "Market Participation" Theories Fail Because CEQA Is Not A Proprietary Action

As CHSRA explains, the market participation doctrine does not apply in this case because the ICCTA expressly preempts the activities at issue here. (CHSRA Brief at pp. 36–42; Answer Brief at p. 33.) The market participation doctrine is a presumption about congressional intent in a particular federal statute. (*Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.* (9th Cir. 2007) 498 F.3d 1031, 1042.) The doctrine does not apply if the federal statute "contains any express or implied indication by Congress that the presumption embodied by the market participant doctrine should not apply to preemption under the Act." (*Id.* [internal quotation marks omitted]; see *City of Charleston v. A. Fisherman's Best, Inc.* (4th Cir. 2002) 310 F.3d 155, 178–79 [finding Congress did not intend "that a proprietary capacity exception such as that found in ERISA and the NLRA applies to the Magnuson Act"].) As explained above, the ICCTA contains express language indicating Congress intended to preempt state interference with the STB's jurisdiction over rail construction and operations. This language rebuts the presumption embodied in the market participation

doctrine.[4]

Appellants' Amici claim Respondents' conclusion that "ICCTA expressly preempts unreasonable interference with rail transportation, whether by regulation or proprietary action" is unsupported by citation to authority and thus waived. (Air Districts Brief at p. 12, see Atherton Brief at p. 7.) As demonstrated by the discussion above and Respondents' previous citation to the ICCTA's express preemption language (see Answer Brief at pp. 14–31) and to cases explaining the test to determine if the market participation exception applies, including *Building and Construction Trades Council v. Associated Builders and Contractors* (1993) 507 U.S. 218 ("*Boston Harbor*") and *Engine Manufacturers*, *supra*, 498 F.3d 1031 (Answer Brief at pp. 33–34), Respondents' contention is well-supported by citation.

Nonetheless, Appellants' Amici skip the preemption inquiry required by the market participation doctrine analysis and argue that the market participation exception applies because there are proprietary actions at issue. They are wrong.

Even if the Court decides to evaluate the market participant doctrine beyond the initial preemption inquiry, it should conclude that the doctrine does not apply to regulatory enforcement of state laws like CEQA. To determine whether an action is proprietary and not subject to preemption under the market participation doctrine, courts assess whether the action at

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[4] The Air District Amici challenge Respondents' reliance on *North San Diego County*, *supra*, 2002 WL 1924265, on the basis that the "STB had no occasion to consider the scope of the market participation doctrine as it applies to ICCTA." (Air Districts Brief at p. 10.) Although the STB did not consider market participation, it did consider the scope of ICCTA preemption, concluding it preempted California's environmental permit and other pre-approval requirements. (*North San Diego County*, *supra*, 2002 WL 1924265, at *6.) As such, the opinion supports the conclusion that the market participation doctrine's presumption is rebutted.

issue either (1) "essentially reflect[s] the [governmental] entity's own interest in its efficient procurement of needed goods and services," or (2) is so narrow in scope that it "defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." (*Cardinal Towing & Auto Repair, Inc. v. City of Bedford* (5th Cir. 1999) 180 F.3d 686, 693; see also *American Trucking Ass'ns, Inc. v. City of Los Angeles* (2013) __ U.S. __, 133 S.Ct. 2096, 2098 [confirming that "coercive mechanism[s], available to no private party, [have] the force and effect of law" and are regulations, not proprietary actions].) As a general environmental policy not narrowly focused on the state's participation in market activity or on specific procurement goals, CEQA is regulation and preempted by the ICCTA. (CHSRA Brief at pp. 43–47.)

1. None of the Actions Listed By Amici As Market Participation Is Proprietary

The market participant doctrine, a vestige of the dormant Commerce Clause of the United States Constitution, permits the state to procure goods and services when acting on its own account and without regulatory intent in the same manner as private parties, i.e., exempt from federal preemption. Appellants' market participation cases cite examples of public agencies engaged in specific market activity (see *Boston Harbor*, *supra*, 507 U.S. at pp. 231–32 [state reaching labor agreements on own construction project]; *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794 [state subsidizing instate scrap dealers as part of vehicle recycle effort]; *Engine Mfrs. Ass'n*, *supra*, 498 F.3d at pp. 1045–46 [air district imposing energy efficiency rules on its own fleet]; *Cardinal Towing*, *supra*, 180 F.3d at p. 693 [city granting exclusive licenses to towing contractors to insure efficient service].)

But neither California nor its local agency, the NCRA, was in the marketplace for goods or services. Appellants' Amici do not, and cannot,

specify the conduct that (1) was proprietary and (2) as a result of its proprietary nature required evaluation under CEQA, and (3) is part of the 2011 writ petitions at issue in this case.

The following actions have been suggested by various Amici as the supposed proprietary action:

Alleged Proprietary Action	Reason Action Not Proprietary or Not At Issue
Legislature formed NCRA to purchase the Line[5]	The Legislature is exempt from CEQA. (14 Cal. Code Regs., § 15378, subd. (b)(1).) This decision was made in 1989 and unchallenged.
NCRA's purchase of the Line	NCRA acquired the right to operate the Line on September 18, 1996, through an exemption approved by the STB. (AR 4584–85.) NCRA did not perform CEQA review. No party challenged that decision on any grounds and 2011 was too late to do so. (Pub. Resources Code, § 21167.)
NCRA receipt of funds from the California Transportation Commission ("CTC") for track repairs (Air Districts Brief at pp. 10–11, 25;	NCRA complied with CEQA for the repair work for which the CTC released funds by preparing categorical exemptions. (AR 6905–26, 7996–8041.) The release of funds was not challenged and 2011 was too late to do so. (AR 6801–10, see AR 10644 [repair work

[5] The Legislature established NCRA to purchase and operate the Line. (Gov. Code, §§ 93001, 93003.) The Legislature authorized NCRA to conduct "engineering and other studies related to the acquisition of any railroad line," but did not direct NCRA to conduct studies regarding operations. (*Id.*, § 93023, subd. (a).) This makes sense considering that the Line was operational at the time the state sought to purchase it. There was no reason to require CEQA review for a change in ownership. (See 14 Cal. Code Regs., §§ 15061, subd. (b)(3), 15301.) In contrast, the High Speed Rail is a new system to be designed and built by the State. The Legislature thus authorized CHSRA to "[c]onduct engineering and other studies related to the selection and acquisition of rights-of-way and the selection of a franchisee, including, but not limited to, *environmental impact studies*, socioeconomic impact studies, and financial feasibility studies." (*Id.*, § 185034, subd. (1) [emphasis added].)

Atherton Brief at p. 15.)	complete almost one year before NCRA certified its EIR]; see Pub. Resources Code, § 21167.)
NCRA's entering into the Operations Agreement with NWPCo in 2006. (Sierra Club Brief at pp. 11–12.)	Whether CEQA applied to NCRA's entry into the Operations Agreement is irrelevant. NCRA did not perform CEQA review for the transaction, no party challenged NCRA's approval of the Operations Agreement in 2006, and 2011 was too late to do so. (See AR 6725-86 [Operations Agreement]; Pub. Resources Code, § 21167.)

None of the above-listed actions demonstrates that NCRA's 2011 EIR was the product of market participation. (CHSRA Brief at p.p. 48–49.)

Appellants' Amici specifically argue that the Operations Agreement is a proprietary action that is not preempted by the ICCTA because NCRA can enforce environmental controls on its own property. (See, e.g., Sierra Club Brief at p. 16 [alleging "[NCRA] was in the business of leasing the right to use real property that it owned—and thus was a market participant"]; Air Districts Brief at p. 8 [claiming NWPCo must comply with CEQA because "it is a subcontractor and lessee of NCRA" and "has been made subject to CEQA as a condition . . . of entering the market for providing rail services"].) In 2006, five years before Appellants' action, NCRA had entered into the Operations Agreement with NWPCo, granting NWPCo exclusive authority to operate the railroad for a period up to ninety-nine years. (AR 6725-86.) No additional operators were required or permitted. Appellants' Amici statement that NCRA was in the business of leasing its property is thus erroneous. NCRA had already leased the right to use its property for freight operations by 2011 and was "not in the marketplace" to lease its property or for any other reason.

In addition, this argument fails to account for the fact that the Operations Agreement does not require NWPCo to comply with mitigation

measures or other requirements that NCRA could impose pursuant to CEQA. (See Section II.C.2, *infra*.) That the Operations Agreement contains no such requirement distinguishes this case from those cited by Appellants' Amici.

For instance, *Sprint Spectrum L.P. v. Mills* (2d Cir. 2002) 283 F.3d 404, found a school district's ("School District") lease with Sprint that limited the radio frequency ("RF") emissions permitted from a cell tower constructed on school property was proprietary and not preempted by the Telecommunications Act. (*Id.* at pp. 408, 420.) The dispute arose when Sprint wanted to install equipment that would increase the RF emissions from its facilities above those allowed in the lease and the School District, as lessor, objected. (*Id.* at p. 411.) *Sprint Spectrum* concluded that the lease provision limiting the RF emissions was not expressly preempted by the Telecommunications Act's preemption language (47 U.S.C., § 332, subd. (c)(7)). (*Id.* at p. 420.) The court then found the market participation exception to preemption applied because "the actions of the School District in entering into the Lease agreement [were] plainly proprietary." (*Id.*) There was "no state or local statute or ordinance or guideline with respect to the RF Emissions levels." (*Id.*) As the court noted, because "nothing in the law requires a communications company to operate at the FCC Guidelines maximum permissible radiation exposure levels, the private owner could elect not to grant a communications company a lease for the construction and operation of a cellular tower unless the company agreed to limit its RF emissions to a lower level." (*Id.* at p. 421.) The School District, in its capacity as property owner rather than public entity, was "permitted to do the same." (*Id.*)

Assuming the Operations Agreement required CEQA, the facts in *Sprint Spectrum* are still distinguishable for at least two reasons. First, the ICCTA does expressly preempts the NCRA's ability to regulate NWPCo's

operations. (49 U.S.C., § 10501, subd. (b).) Second, NCRA would have been using CEQA as a government regulator rather than as a private land owner since CEQA's substantive and procedural requirements, and especially CEQA's remedies, have no analogy to private action. (Answer Brief at p. 41; see Pub. Resources Code, §§ 21167 [procedure to attack a "public agency on the grounds of non-compliance" with CEQA], § 21168.9 [available remedies].)

Santa Monica Airport Association v. Santa Monica (9th Cir. 1981) 659 F.2d 100, 103–4, concluded an airport could require compliance with noise regulations that were "not a regulation of airspace or aircraft in flight" under the "municipal proprietors" exception to the preemption provided by the Federal Aviation Acts. While the "municipal proprietor" exception to the Federal Aviation Acts may not apply to the ICCTA in light of its different preemption language, even if it did, NCRA never exerted its "municipal proprietor" rights to compel compliance with CEQA. And if NCRA had required CEQA compliance before allowing NWPCo's STB-authorized operations in 2011, that would have frustrated the ICCTA's purpose to give the STB exclusive jurisdiction over freight rail operations. In such circumstances, the municipal proprietors exception does not apply. (See *Santa Monica Airport Ass'n*, *supra*, at p. 104 [municipal proprietors exception does not apply if regulation would "frustrate" federal control.)

2. CEQA Itself Is Not A Proprietary Action

Ignoring that CEQA is a generally applicable state policy regulating all discretionary government actions that may cause significant environmental impacts, Appellants' Amici insist CEQA is proprietary. To do so, Appellants' Amici ask this Court to envision a "private" business meeting wherein the state decides to take environmental considerations into account as part of its internal business decision-making process. (Sierra

Club Brief at pp. 10-11; Air Districts Brief at pp. 11–13, 19–24; Atherton Brief at p. 10.)[6]

This hypothetical begs the question—who is the state? The California Legislature passed CEQA imposing state law requirements on all state and local agencies. That is classic regulation. It is not as if NCRA acting on its volition conjured up a CEQA-compliance process for its internal decisionmaking. This hypothetical scenario also ignores that citizen enforcement actions only exist if there is a state regulation to be enforced; citizen enforcement actions cannot be brought to compel a private business to comply with its proprietary, internal decision making process. (See CHSRA Brief at p. 47.) Thus CEQA compliance is not some choice by the agency and is not analogous to private businesses performing environmental due diligence. (See *Boston Harbor*, *supra*, 507 U.S. at p. 231–232 [action may qualify as market participation only where analogous private conduct would be permitted].) Instead, as Appellants pled and Appellants' Amici admit, CEQA is a state law that (absent preemption) would require NCRA to conduct CEQA review, with its substantive and procedural requirements that private actors could not replicate. (See Air Districts Brief at p. 13.)

Nonetheless, Appellants' Amici claim that CEQA is proprietary because it is directed to "the risk to human health and the environment

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[6] Sierra Club attempts to analogize state-mandated CEQA compliance requirements with a private company's due diligence inquiries focusing on potential financial liability for site cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), which imposes strict liability for the cost of cleanup on the current owner of contaminated property, even if the owner did not pollute. (Sierra Club Brief at pp. 10–11.) Sierra Club ignores that those due diligence inquiries are not mandated by the state. If a company forgoes such due diligence, that company has not violated any law and the citizenry cannot sue as private attorney generals alleging the company was legally obligated to conduct due diligence.

posed by *the project*." (Sierra Club Brief at p. 12 [emphasis added]; see Atherton Brief at p. 11 [claiming CEQA "cannot be considered an attempt to regulate the rail industry" because it is California's way to control its rail carrier].) But CEQA is not just directed at *the project* or even just California-owned railroads; it is directed at all actions requiring a public agency's discretionary approval. Thus it is irrelevant that CEQA "cannot be considered an attempt to regulate the rail industry." CEQA is a state law that regulates every industry that must come before a public agency seeking discretionary approval. This fact reinforces CEQA's regulatory purpose, as its "primary goal [is] to encourage a general policy rather than address a specific proprietary problem[.]" (*Cardinal Towing*, *supra*, 180 F.3d at p. 693.)

Similarly, Appellants' Amici claim that CEQA is not regulation, but instead "California's control of its own proprietary rail carrier." (Atherton Brief at p. 11, Air Districts Brief at p. 24; but see CHSRA Brief at pp. 27–34 [explaining why there are no Tenth Amendment concerns with the ICCTA preempting CEQA under the facts here].) Atherton Amici cite *Tocher v. City of Santa Ana* (9th Cir. 2000) 219 F.3d 1040, to support this claim, but it does not. In *Tocher*, the portions of a towing ordinance concerning contracts between towing companies and the city for towing services were not preempted because the contracting provisions directed the procurement of services in the market. (*Id.* at 1049; see *Cardinal Towing*, *supra*, 180 F.3d at p. 693.) Unlike the regulation in *Tocher*, CEQA does not regulate the voluntary procurement of services in the market, but instead mandates how agencies must make any discretionary decision that may impact the environment, regardless whether the decision involves a market transaction. (CHSRA Brief at p. 44, citing *State of New York ex rel. Grupp v. DHL Express (USA), Inc.* (2012) 19 N.Y.3d 278, 286–87; see *Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 768

[discharging regulatory responsibilities under state and federal law not responsive to market forces and not engaging in any market].)

The other cases cited by Appellants' Amici to support their claim that CEQA is proprietary serve only to reaffirm that CEQA is regulatory.

For example, in *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel* (4th Cir. 1994) 20 F.3d 1311, a South Carolina program that granted preferential treatment to in-state vendors in the bidding process for the state's procurement of certain goods was determined to be market participation. (*Id.* at p. 1318.) The court distinguished South Carolina's preferential treatment program from other statutes that might "mandate[] local obedience to its strictures," which would be regulation. (*Id.* at p. 1319.)

In *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania* (3d Cir. 1990) 916 F.2d 903, 912, the Pennsylvania Steel Products Procurement Act, which required suppliers contracting with a public agency in connection with public works projects to provide American-made steel, was market participation. (See also *Engine Mfrs. Ass'n*, *supra*, 498 F.3d at pp. 1045–46 [although formulated to advance an environmental policy, Fleet Rules directing state and local governmental entities to only purchase, lease, or contract[7] for use of vehicles meeting certain emissions standards concerned the procurement of goods and was market participation]; *Hughes*, *supra*, 426 U.S. 794 [state provision providing "bounty" for car hulks to be processed for scrap metal was market participation even though state's purpose was to get car hulks off of roadways].)

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[7] The Air District Amici attempt to use this case to demonstrate that contracting, or agreeing, to do something is market participation. (Air Districts Brief at p. 9.) However, as to the Fleet Rules in *Engine Manufacturers*, the market participation was not the act of contracting, but the procurement of goods (vehicles) or services (use of vehicles) as a market actor.

Each of the above cases involves the procurement of goods and does not concern regulations that "mandate local obedience." Unlike the rules or programs in these cases, CEQA is compulsory for all public agencies deciding whether to approve a project that may have a significant effect on the environment. It does not direct the procurement of goods or services in the market, is not voluntary, is not analogous to conduct engaged by private actors, and thus is not market participation. (See *Engine Mfrs. Ass'n*, *supra*, 498 F.3d at p. 1041.)

3. Even If CEQA Was Considered A Proprietary Action, Appellants Lack Standing To Sue To Enforce NCRA's Alleged Market Promises

Sierra Club Amici claim Appellants must have standing to assert market participation as a "defense" to NCRA and NWPCo's claim that CEQA is preempted in this case. (Sierra Club Brief at p. 12.) Sierra Club misapprehends Respondents' position. Respondents are pointing out the inherent flaw in Appellants' attempt to rely on the rules that authorize citizens to enforce state laws when they simultaneously claim they are not enforcing the law. Put simply, once Appellants pivoted from their writ petitions invoking citizen standing to compel compliance with CEQA to some new theory based on NCRA's alleged proprietary, internal decisions, Appellants needed a new basis to be in court. They have none.

Third-party CEQA enforcement actions are not proprietary. Appellants did not allege any facts suggesting they have standing to enforce NCRA's agreements or any other of NCRA's "market transactions." Appellants only alleged injury was the inability to analyze and comment on an environmental document required by law, as is their right as California citizens. (See App 1:3, ¶ 2 ["Respondent's failure to comply with CEQA has deprived [FOER] and its members of their ability to analyze and comment on the environmental impacts, of and possible alternatives to,

reopening the Northwestern Pacific Railroad"], 1:52, ¶ 58 ["Petitioner is an organization comprised of individuals who have participated on behalf of CATs in review of the RRD Project and are concerned about the effects of the proposed RRD Project on the environment. Petitioner has standing to bring this action."].)

Based on Appellants' allegations, Appellants' right to sue Respondents arises solely from "citizen standing," which is a standing exception that "applies where the question is one of public right and the object of the action is to enforce a public duty." (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 914 [citations and internal quotation marks omitted].) The purpose of the public interest exception to otherwise applicable standing requirements is to guarantee "citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*Id.* at p. 914 [citations and internal quotation marks omitted].)

If, as Appellants' Amici claim, NCRA was not obligated by law to comply with CEQA, but rather made an internal, proprietary decision, then citizen standing is unavailable. (See Slip Op. at p. 32 [explaining this principle as articulated in a series of cases (the "*Grupp* Cases") concerning attempted third-party enforcement of states' false claims acts].)[8] Absent

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[8] Atherton Amici suggest the holdings of the *Grupp* Cases turn on the fact that false claims acts allow treble damages. Not so. The reason courts found Grupp lacked standing to raise market participation as an exception to a preemption defense was that Grupp relied on the private attorney general provision in the false claims act statute to sue. "[W]hen a party relies on a state law of general application to challenge a state proprietary action, that challenge operates as a regulation, rather than a part of the proprietary action being challenged." (Slip Op. at p. 32; see *DHL Express (USA), Inc. v. State ex rel. Grupp* (Fla.Dist.Ct.App. 2011) 60 So.3d 426, 429 [Although Florida "was a market participant when it contracted with DHL, it acts as a regulator in authorizing suits under the False Claims Act . . . . In the latter role, the state (and respondents on the state's behalf) is not a market participant."].)

citizen standing, Appellants lack standing to sue because they failed to plead necessary facts or allegations to assert any other basis for standing.

Contrary to Appellants' Amici's claim, the Court of Appeal's discussion of Appellants' inconsistent theories (i.e., that CEQA is not regulation, but that NCRA failed to comply with mandatory requirements under the law) and their effect on standing is not "antithetical to the theory of California civil procedure" (Sierra Club Brief at pp. 14–15), but an important clarification of the foundational legal principle of standing.

C. Amici's "Voluntary Agreement" Theories Fail Because Facts Do Not Support Their Theories And Appellants Have Not Asserted a Breach of Contract Claim

Appellants' Amici also argue that if the ICCTA preempts CEQA, that preemption is overcome by NCRA's voluntary agreement to comply with CEQA. (Atherton Brief at pp. 14–15; Air Districts Brief at pp. 13–16, 25–28.) This argument fails because neither NCRA nor NWPCo "voluntarily" agreed to comply with CEQA for the actions at issue here and Appellants never asserted a breach of contract claim. (See Slip Op. at p. 26 ["No such claim [for breach of contract] has been asserted by [Appellants], who have not even alleged the existence of a contractual agreement by NCRA to prepare an EIR."].)

1. NCRA Did Not Voluntarily Agree To Prepare An EIR To Obtain State Funds

Appellants' Amici mistakenly claim NCRA was obligated to prepare an EIR because it "voluntarily agreed to" do so to receive state funds or it was "imposed as a condition" of such funding. (Air Districts Brief at p. 13; see Atherton Brief at p. 21.)

Appellants' Amici's argument is based on Appellants' misreading of the agreement between the CTC and NCRA. In September 2006, NCRA applied for and received state funds from the CTC to undertake repairs necessary to reopen the southern portion of the Line and study

environmental impacts. (AR 6789–810.) The repair funds were allocated by the Legislature in 2000 (see Gov. Code §§ 14556.40, subd. (32), 14556.50) and made available through the Traffic Congestion Relief Program ("TCRP") administered by the CTC.

To obtain the funds, NCRA entered into an agreement (the "Master CTC Agreement") with the CTC. (AR 4623.) That agreement's condition regarding CEQA states, "No [state] agency shall request funds nor shall any [state] agency, board or commission authorize expenditures of funds for any [project] effort, except for feasibility or planning studies, which may have a significant effect on the environment unless such a request is accompanied by an environmental impact report per mandated by [CEQA]." (AR 4638.) The TCRP Guidelines confirmed that CTC was precluded from releasing money dependent on an EIR until an EIR was complete. (App. 9:2365–84 [TCRP Guidelines, § 5.5].)

The CTC did not require an EIR in advance of disbursing the funds for track repairs; the funds were disbursed years before the EIR was completed. (Compare AR 6801–10 [funds released in 2006] with AR 18, 10644 [EIR certified in 2010, after repairs completed].) Instead, the CTC authorized NCRA to proceed with the TCRP-funded repairs based on categorical exemptions, and NCRA did. (AR 6905–6926; 7996–8041.) To the extent Appellants' Amici suggest the CTC breached its obligation to refrain from disbursing funds until there was a legally adequate EIR, that claim is time barred and barred because Appellants did not exhaust, name, or sue the CTC. (See Pub. Resources Code, §§ 21167, 21167.6.5.)

NCRA did not "abandon its obligations" to prepare an EIR. (Contra Air Districts Brief at p. 13.) As the record shows, NCRA asked for and received $2 million of CTC funding to pay for an EIR because it believed that it was statutorily required to prepare an EIR for resumed operations. The CTC's disbursement of funds to assist with the EIR does not show the

CTC conditioned disbursement of repair funds on the preparation of an adequate EIR. Quite the contrary—the CTC disbursed all the funding *before* the EIR was certified. Further, NCRA did precisely what it told the CTC it would do with the $2 million—it prepared an EIR. There was no promise to defend that EIR through litigation or to waive applicable defenses in litigation, such as federal preemption.[9]

In addition, NCRA did not "only later" change its position about its agreement since it fulfilled its environmental review requirements and made no voluntary promise to be subject to CEQA litigation. (*Id.*; see Farm Bureau Brief at p. 17 [arguing CHSRA should be judicially estopped from claiming preemption].) The claim that NCRA took contrary positions mirrors Appellants' judicial estoppel claim rejected by the trial and appellate courts. (See App. 7:1863, 16:4399–4403; Slip Op. at pp. 37–42.) No reason exists to reexamine this issue, which is outside the scope of the question this Court agreed to review.

Should the Court delve into estoppel, it will find Appellants failed to demonstrate that the trial court abused its discretion in finding none. Judicial estoppel is an "extraordinary remedy" courts invoke only when a party's inconsistent behavior would otherwise cause a miscarriage of justice. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 131.) It "should be applied with caution and limited to egregious circumstances." (*Id.* at p. 132.) "[C]ourts invoke judicial estoppel to prevent judicial fraud from a litigant's deceitful assertion of a position completely inconsistent with one previously asserted, thus compromising the integrity of the administration of justice by creating a risk of conflicting judicial determinations." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832; see *MW*

[9] Of course, NWPCo is not a party to the Master CTC Agreement and cannot be charged with any voluntary waiver of its defenses.

Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc. (2005) 36 Cal.4th 412, 422–23.)

Courts consider five factors in determining whether to apply judicial estoppel:

> (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

(*MW Erectors*, *supra*, 36 Cal.4th at p. 422.) Appellants bear the burden of showing that these factors apply. (Evid. Code, § 500.)

This burden is higher in cases where, as here, judicial estoppel is asserted against a public agency. Courts have noted that a party "'faces daunting odds in establishing estoppel against a governmental entity in a land use case.'" (*Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 259 [citation omitted]; see *Smith v. County of Santa Barbara* (1992) 7 Cal.App.4th 770, 775 [estoppel against an agency reserved for "the most extraordinary case where the injustice is great and the precedent set by the estoppel is narrow"].) Judicial estoppel against an agency generally has been applied only if the agency asserted the exact opposite in a prior judicial proceeding. (*Cf. Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1280 [addressing a situation when a city may be subject to judicial estoppel]; see *County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 34 [refusing to estop two water districts from claiming they were indispensable parties because the districts were the recipients of the challenged Water Board approval even though the districts previously stated "they would not request Board approval or argue that approval was necessary"].)

The trial court found the threshold requirement for judicial estoppel—that the "same party" took inconsistent positions—was not met. (App. 16:4400.) The trial court's conclusion on this factual point is supported by substantial evidence. NCRA (and as discussed below NWPCo) never disavowed the preemptive effect of the ICCTA or its right to assert preemption. NCRA's purported representation that it would prepare an EIR does not directly conflict with its claim that federal preemption defeats a CEQA claim that the EIR it prepared is legally deficient. This case does not present circumstances justifying estoppel against NWPCo, and much less NCRA, a public agency.[10]

Nonetheless, Atherton Amici suggest that the California Department of Transportation ("Caltrans") decision to prepare EIRs for two mass transit projects indicates that state rail agencies "have a history of complying with CEQA" and claiming preemption now is an inconsistent position. (Atherton RJN at p. 2; see Atherton Brief at p. 21, fn. 13.) Not only is NCRA not Caltrans, but Atherton Amici fail to appreciate that the ICCTA exempts state regulation of mass transit provided by a local government authority from STB's jurisdiction. (49 U.S.C., § 10501, subd. (c)(2); see *Peninsula Corridor Joint Powers Bd.—Petition for Declaratory Order* (S.T.B. served July 2, 2015) STB Finance Docket No. 35929, 2015 WL 4065035, at *3 [finding no preemption of a Bay Area public transportation rail project].) The ICCTA defines "local government authority" to include "a political subdivision of a State" and "an authority of at least one (1) State or political subdivision of a State." (49 U.S.C., § 5302, subd. (10).) Under this definition, Caltrans is a "local government authority" and its mass transit

[10] Given the factual nature of an estoppel inquiry, a decision here will not apply elsewhere and thus cannot determine whether CHSRA should be judicially estopped from arguing federal preemption of CEQA. (Cf. Farm Bureau Brief at pp. 16–17.)

projects are outside the scope of the ICCTA. Thus, Caltrans must comply with CEQA when approving public, mass transit projects.

Unlike those projects, the NCRA's freight rail repairs and NWPCo's freight rail operations are within the STB's exclusive jurisdiction. Accordingly, state regulation that could interfere with that jurisdiction, such as CEQA, is preempted by the ICCTA. (See 49 U.S.C., § 10501, subd. (b); see also *North San Diego County*, *supra*, 2002 WL 1924265, at *5–6 [holding City's attempt to "require that NCTD apply for and obtain an environmental permit [under CEQA] and other pre-approvals as a prerequisite to building a passing track" was preempted by the ICCTA]; *Desertxpress*, *supra*, 2007 WL 1833521, at *1–3 [holding "state permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Act, will be preempted" for a project proposing to construct a "200-mile interstate high speed passenger rail system"].)

To the extent that NCRA did adopt conflicting positions, the conflict resulted from mistake or ignorance, which does not give rise to judicial estoppel. (See *Gottlieb*, *supra*, 141 Cal.App.4th at p. 131 [judicial estoppel only appropriate where first position was not taken as result of mistake, ignorance, or fraud].) Any inconsistency in positions taken by NCRA regarding preemption are not the result of bad faith "gamesmanship" as insinuated by Appellants' Amici (Farm Bureau Brief at p. 15), but rather resulted from ignorance and uncertainty regarding the applicability of ICCTA's preemption to CEQA. (See *ABF Capital Corp.*, *supra*, 130 Cal.App.4th at p. 833 [concluding that inconsistency in defendant's position resulted from ignorance, and was not deceitful].)

The circumstances of this case are close to those presented in *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, holding that an agency that voluntarily undertakes environmental review in

an effort to comply with CEQA does not lose its right to challenge CEQA's application. (Cf. Farm Bureau Brief at p. 16–17.) In *Del Cerro*, the City of Placentia (the "City") prepared and certified an EIR for a project that separated a vehicular roadway from railroad tracks and approved the project. (*Id.* at p. 176.) Del Cerro sued the City, claiming the City's approval of the project based on a faulty EIR violated CEQA. (*Id.*) Intervener Orange County Transportation Authority demurred to the petition on grounds that grade separation projects are exempt from CEQA under Public Resources Code section 21080.13. (*Id.* at pp. 176–77.) Del Cerro then argued that "by preparing and certifying the EIR as if CEQA applied, the City waived any right to later invoke a potential CEQA exemption." (*Id.* at p. 179.) In rejecting this contention, the court reasoned that the applicability of an exemption is a legal question, not a factual assertion, and waiver and estoppel do not apply. (*Id.* at pp. 179–80 [citing *Santa Barbara County Flower & Nursery Growers Ass'n v. County of Santa Barbara* (2004) 121 Cal.App.4th 864, 869 ("*Santa Barbara*")].)

Here, as in *Del Cerro*, there is no changed position with respect to a fact. NCRA did what it said it would do, including prepare an EIR. *Del Cerro* stands for the rule that when a public agency prepares an EIR that it later determines is unnecessary, it is not estopped from arguing the EIR is not required. (See *Del Cerro*, *supra*, 197 Cal.App.4th at pp. 179–80.) That is precisely what occurred with NCRA in this case. NCRA is not prevented from contending that any requirement under CEQA to prepare an EIR is preempted by the ICCTA.

2. NWPCo Did Not Voluntarily Agree To Be Regulated By NCRA Or Appellants Pursuant To CEQA

Appellants' Amici assert, without citation to any facts, that NWPCo "voluntarily agreed to comply with CEQA." (Air Districts Brief at p. 27; see *id.* at pp. 8, 25.) The absence of a citation to any evidence is a telling

omission. Neither Appellants nor their Amici can point to any such agreement because none exists; none was pled or even implied in the writ petitions.

The agreement between NCRA and NWPCo regarding NWPCo's operation of the Line (the "Operations Agreement") contains no promise that NCRA or NWPCo would prepare an EIR or that NWPCo would comply with mitigation measures should NCRA attempt to regulate its operations. The Operations Agreement states only that it is conditioned upon NCRA "having complied with the California Environmental Quality Control Act ('CEQA') *as it may apply to this transaction*." (AR 6731 [emphasis added].) The language "as it may apply" reveals that whether CEQA applies at all to entry into the Operations Agreement was, at best, uncertain. Moreover, "this transaction" means entry into the Operations Agreement. (App. 13:3451.) No one challenged the absence of any CEQA compliance for that transaction despite the binding nature of the agreement.

Moreover, NWPCo expressly reserved its right to raise preemption under "the Interstate Commerce Commission Termination Act of 1995, 49 USC 10500 et seq." (AR 6744.) NCRA also agreed that nothing "shall diminish by this [Operations] Agreement any rights under law or regulation to which NWP[Co] is entitled as a railroad providing common carrier service on any portion of the NWP Line." (AR 6744.) Such rights include the right to be governed exclusively by STB. (See 49 U.S.C., § 10510, subd. (b).) Once NWPCo obtained STB approval on August 24, 2007, it was authorized to operate the Line as soon as the FRA lifted Emergency Order No. 21. (See AR 6734 [Operations Agreement, ¶ VII.A].) The Operations Agreement gave NCRA no further discretion or approval authority over NWPCo's operations, including authority to impose CEQA mitigation measures. (See App. 13:3448–55 [NCRA rescinded its purported "approval" of the resumption of operations on the Line and clarified that

NWPCo acquired the right to operate upon the STB's approval].) In short, NWPCo did not agree that its right to operate would be regulated by either NCRA or Appellants under CEQA.

3. Even If NCRA Had Voluntarily Agreed To Prepare An EIR Or NWPCo Voluntarily Agreed To Be Regulated By CEQA, Appellants Lack Standing To Enforce Such Agreements

Even if there had been some voluntary agreement by NCRA or NWPCo to comply with CEQA, Appellants failed to bring a claim for breach of contract. Appellants' lawsuits are writ of mandamus actions; they have not alleged a purported "contractual" duty to comply with CEQA. (App. 1:1–16; 1:35–65.) A writ action, by its very nature, seeks enforcement of legal obligations, not contractual obligations, which are normally not subject to mandamus enforcement. (See Cal. Civ. Proc. Code, §§ 1085, 1904.5; *Shaw v. Regents of Univ. of Cal.* (1997) 58 Cal.App.4th 44, 52 ["As a general proposition, mandamus is not an appropriate remedy for enforcing a contractual obligation against a public entity."].) And because Appellants failed to raise a contract claim, they are not in the same position as the petitioners in the cases cited by the Air District Amici who avoided ICCTA preemption based on "voluntary agreements." (See Air Districts Brief at p. 26.)

For example, in *PCS Phosphate Company, Inc. v. Norfolk Southern Corp.* (4th Cir. 2009) 559 F.3d 212 ("*PCS*"), the court was faced with "straightforward breach of covenant or contract claims" between two contracting parties. (*Id.* at p. 225.) In concluding that preemption did not apply, the court emphasized that the "carefully negotiated bargains that are at the center of these agreements drive our conclusions—[defendant] cannot escape its obligation by disputing the parties' intent or hiding behind the ICCTA." (*Id.*)

In *Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co.* (D. Maine 2003) 297 F.Supp.2d 326, plaintiff alleged in Count V that "Defendants have breached a contract into which they have voluntarily entered with respect to the rail transportation of materials from the Pejepscot Industrial Park." (*Id.* at p. 333.) Following the STB's guidance when evaluating defendants' motion to dismiss, the court held it would not dismiss Count V so plaintiff could attempt "to establish that such a contract was formed and that Defendants have breached it." (*Id.* at pp. 333–34.) The court noted that "Defendants [would] have the opportunity to assert that any such contract, as interpreted by [plaintiff], is unreasonably burdensome to interstate commerce" and should not be enforced. (*Id.* at p. 333 & fn. 6.)

In the STB decision *Town of Woodbridge v. Consolidated Rail Corp., Inc.* (S.T.B. served Dec. 1, 2000) STB Docket No. 42053, 2000 WL 1771044 , the plaintiff, a township, filed an action with the STB seeking a ruling that: (i) its agreements with defendant concerning noise abatement were enforceable; and (ii) those agreements were enforceable in federal court or state court. The STB granted the requested relief, concluding that the rail operator's "own commitments (as reflected in the contracts that it entered into voluntarily) are not preempted." (*Id.* at p. *3.)[11]

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[11] In a follow-up decision in the same case, the STB clarified that nothing in its earlier opinion should bar the defendant from arguing that, "as a matter of contract interpretation," interpreting the contract in the urged manner would burden interstate commerce. (*Town of Woodbridge v. Consolidated Rail Corp., Inc.* (S.T.B. served Mar. 23, 2001), STB Finance Docket No. 42053, 2001 WL 283507, at *2.) The STB has, in fact, invalidated contracts when they have interfered with ICCTA's preemption clause. (*Railroad Ventures, Inc. v. Surface Transp. Board* (6th Cir. 2002) 299 F.3d 523, 560–63 [affirming STB's order voiding an agreement between a carrier and a township based, in part, on preemption].) Thus, even where there is a contract, courts and the STB acknowledge that contract enforcement can run afoul of the ICCTA's preemption provisions.

In *Joint Petition for Declaratory Order–Boston & Maine Corp. & Town of Ayer, MA*, STB Finance Docket No. 33971 (Apr. 30, 2001) 2001 WL 458685, at *5, the STB states, "a town may seek court enforcement of *voluntary agreements that the town had entered into with a railroad*, notwithstanding section 10501, subdivision (b), because the preemption provisions should not be used to shield the carrier from its own commitments." This statement reinforces that for the town to enforce such a contract, it must bring a contract enforcement action.

Despite the fact that all of the "voluntary agreement" cases arose based on contract claims, Amici argue that Appellants did not need to bring a contract claim to enforce an alleged voluntary agreement. (Air Districts Brief at pp. 14, 27.) Appellants' Amici misrepresent *Services Employees International Union, Local 99 v. Options—A Child Care and Human Services Agency* (2011) 200 Cal.App.4th 869 ("*SEIU*") to support their claim. (Air Districts Brief at pp. 14, 27.) In *SEIU*, a labor union filed a complaint against a government agency for "(1) violation of the Brown Act and (2) *breach of contract.*" (*SEIU, supra*, 200 Cal.App.4th at p. 874 [emphasis added].)[12] *SEIU* did not need to address whether plaintiffs could recover under a third-party beneficiary theory without bringing a contract claim because plaintiffs brought such a claim.

Further, *Shaw v. Regents of University of California, supra*, 58 Cal.App.4th 44, and *Wenzler v. Municipal Court* (1965) 235 Cal.App.2d 128, do not aid Appellants' Amici's cause. (See Air Districts Brief at

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[12] Appellants' Amici claim the appellate court did not properly distinguish *SEIU* because it relied on an inapplicable portion of the case, finding that the Brown Act did not apply to the defendant, when distinguishing it. (Cf. Air Districts Brief at p. 14.) Not so. The appellate court correctly found that "[t]he decision in SEIU is distinguishable because in that case the plaintiffs had included a cause of action for breach of contract" and Appellants here did not. (Slip Op. at p. 26.)

p. 15.) Both cases underscore the differences between writ and breach of contract actions.

Shaw concerned an employee's action to enforce his contract with the University of California (the "University"). (58 Cal.App.4th at pp. 51–52.) The University argued that the trial court should have treated the contract claim as a writ of mandamus because the employee's complaint was really a challenge to an administrative decision. *Shaw* disagreed, finding that the employee sought an interpretation of his written contract and, because "[a]s a general proposition, mandamus is not an appropriate remedy for enforcing a contractual obligation against a public entity," the employee properly brought a contract claim. (*Id.* at p. 52.)

Wenzler further explained why "mandamus is not an appropriate remedy for enforcing a contractual obligation against a public entity," offering two reasons. (235 Cal.App.2d at p. 132.) First, "contracts are ordinarily enforceable by civil actions, and the writ of mandamus is not available unless the remedy by civil action is inadequate." (*Id.*) Second, "the duty which the writ of mandamus enforces is not the contractual duty of the entity, but the official duty of the respondent officer or board." (*Id.*) Thus a contract claim typically must be brought as a civil action, and no such action was filed here.[13]

The Air District Amici argue that to the extent Appellants had to bring a contract claim, this Court should treat Appellants' writ petitions as complaints alleging breach of contract. (Air Districts Brief at p. 15.) But because Appellants failed to plead the existence of a contract, who the parties to the contract are, what the breach was, or any other element of a

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[13] Appellants belatedly suggested that the appellate court should "remand the case to allow them to amend their pleadings to include a third party beneficiary theory." (Slip Op. at p. 26, fn. 6.) The appellate court declined to do so because the case had "proceeded well beyond the pleadings stage." (*Id.*)

breach of contract claim, Amici cannot retroactively recast Appellants' writ petitions as claims for breach of contract. Appellants' Amici avoid ever specifying the contract they claim Appellants are seeking to enforce. Is it the agreement between NCRA and the CTC? The CTC was not made a party to this action. Nor is it clear which party is alleged to have breached or the term of the contract that was breached. Is it the Operation Agreement between NCRA and NWPCo? Both parties were named but again, the term allegedly breached is not identified, nor is the date the cause of action accrued. Neither NCRA nor NWPCo, the only parties to the Operation Agreement, is aware of any breach.

Amici cite an inapposite case, *California Teachers Association v. Governing Board* (1988) 161 Cal.App.3d 393, 399 ("*CTA*"), to support the claim that Appellants' petitions could be treated as complaints alleging breach of contract. There, a "Petition for Writ of Mandate" seeking "an order compelling the District to commence arbitration pursuant to [a] Contract's arbitration clause" (*CTA*, *supra*, 161 Cal.App.3d at p. 397) was instead treated as a complaint to compel arbitration during a post-judgment cost motion (*id.* at pp. 398–400). Although filed as a petition for a writ, the case had proceeded through trial as a contract dispute: the Teachers Association asked the School District (the "District") to take actions based on identified, specific terms of a contract (*id.* at p. 396); the District failed to do so and requested the Teachers Association "initiate proceedings pursuant to the [c]ontract's 'Grievance' provisions" (*id.*); the Teachers Association then requested the District enter into arbitration, "also pursuant to the [c]ontract" (*id.* at pp. 396–97); and when the District failed to do so, the Teachers Association sued to enforce the arbitration provision (*id.* at p. 397). The trial court ordered the parties to arbitrate based on the contractual obligation, but arbitration failed and the Teachers Association ultimately lost the case by failing comply with discovery. (*Id.*) The Teachers

Association then sought "to avoid an award of attorneys' fees and costs against them by distinguishing their 'mandate' proceedings from a 'petition to compel arbitration' pursuant to a contractual provision," arguing that the trial court lost jurisdiction to dismiss the mandate proceedings and award costs and fees to the District during arbitration. (*Id.* at pp. 397–98.) The appellate court disagreed. (*Id.* at p. 400.) Despite the "name on the pleading" (*id.* at p. 399), the case had proceeded as an action to compel arbitration rather than as a writ of mandate case, and therefore the trial court had retained jurisdiction during arbitration and could award attorneys' fees and costs to the prevailing party. (*Id.* at pp. 399–400.)

In contrast, this case proceeded solely as a writ petition based on NCRA's alleged legal obligation to comply with CEQA, and not on a contract theory. And contrary to Amici's claim, Appellants would not "need to show exactly the same thing" to prove a breach of contract claim "as they needed to show under CEQA." (Air Districts Brief at p. 15.) Unlike a CEQA claim, to bring a claim for specific performance of a contract under a third-party beneficiary theory, Appellants would have to plead and prove both the existence of a contract and a breach of its terms and their status as intended beneficiaries. (See *Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949, 959–60 [third party beneficiary's right to sue for specific performance]; *Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 642 [elements of specific performance].)

As noted above, a claim for breach of contract would present a number of factual issues that have remained undeveloped because they are irrelevant in a petition for writ of mandate under CEQA. If the Appellants contended that the operative contract was the CTC's Master Agreement, those factual issues include: "Should the master agreement be construed to require an EIR? Did NCRA's preparation of an EIR satisfy this condition?" (Slip Op. at p. 27.) Appellants would need to prove such facts by a

preponderance of evidence and have not done so. (*Id.*) Accordingly, Appellants' petitions for writ of mandate under CEQA cannot be converted into claims for specific performance of a contract. In addition, the CTC was not named as a party, nor is it clear whether the terms of the contract obligated the CTC, as opposed to the NCRA, to ensure CEQA compliance.

Appellants also would have to allege facts sufficient to show they are third-party beneficiaries with standing to sue to enforce the agreements. (See, e.g., *H.N. and Frances C. Berger Found. v. Perez* (2013) 218 Cal.App.4th 37, 43–46 [upholding a demurrer because the plaintiff failed to present evidence that the parties entering the agreements at issue intended to benefit the plaintiff or class of individuals encompassing the plaintiff].) Appellants have never alleged those facts, however, because such a showing is unnecessary in a CEQA writ action. (See App. 1:1–16, 1:35–65; see *Rialto Citizens for Responsible Growth, supra*, 208 Cal.App.4th at p. 912.)

As the Atherton Amici and the opinion below note, a finding that Appellants lack standing to enforce NCRA's alleged contracts would not dictate the same result in *Town of Atherton*. (Atherton Brief at pp. 20–23; Slip Op. at p. 34.) *Town of Atherton* suggests CHSRA entered into an agreement to comply with CEQA when voters approved Proposition 1A, a bond measure to fund high-speed rail. (228 Cal.App.4th at pp. 338–39; see *id.* at p. 340 [CHSRA's "discretion is not unfettered; it must follow the directives of the electorate. As explained *ante*, one of those directives is compliance with CEQA."].) Since the agreement was arguably between all California voters and CHSRA, any voter would have standing to enforce it. (Compare *Monette-Shaw v. San Francisco Bd. of Supervisors* (2006) 139 Cal.App.4th 1210, 1215 with *Berclain America Latina v. Baan Co.* (1999) 74 Cal.App.4th 401, 405.) The Air District Amici's discussion about third-party enforcement of CHSRA's obligations under Proposition 1A is thus

misplaced. (Air Districts Brief at p. 14.) There was no third-party enforcement; the petitioners in that case, as California residents, were parties to the alleged contract formed by Proposition 1A. The same is not true here.[14]

Respondents agree with Appellants' Amici that voluntary agreements can be a useful tool to allow California's agencies to meet environmental goals. (See Air Districts Brief at pp. 27–28.) But here, where Appellants did not bring a contract claim and have not alleged standing to enforce such claims, Appellants' Amici's "voluntary agreement" arguments are irrelevant. Further, as CHSRA explains, when a voluntary agreement results in unreasonable interference with the STB's exclusive jurisdiction, it can still be preempted by the ICCTA. (CHSRA Brief at pp. 53–54.) Appellants' requested remedies, including injunctive relief and halting NWPCo's operations would unreasonably interfere with the STB's approval of those same operations, and thus are preempted.

D. A Finding That CEQA Is Preempted In This Case Will Neither Leave A Regulatory Void Nor Interfere With Rail Operators' Voluntary Agreements

Appellants' Amici variously contend that preempting CEQA's regulation of freight rail operations will leave a regulatory void because NEPA is inadequate, and in the case of the Air Districts, they complain that absent preemption they could exert more authority to impose more clean air

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[14] The existence and scope of a voluntary agreement are fact-specific questions. For this reason, should the Court address whether a voluntary agreement exists here, its decision would not control *Town of Atherton*. (Cf. Farm Bureau Amici at pp. 10–14 [arguing that CHSRA should be held to its voluntary agreement].) In addition, the Farm Bureau Amici's concern that a decision will affect CHSRA's alleged promise to prepare tiered environmental review (*id.* at pp. 15–17) also is unfounded. This case does not concern an alleged agreement to conduct tiered environmental review and thus will not decide whether such a promise as applied to the CHRA's actions would unreasonably interfere with the STB's jurisdiction.

regulations on freight rail operators like BNSF and Union Pacific.

The allegation that preemption will lead to a regulatory void is empty hyperbole. No regulatory void was created here by the STB's finding that the Line was exempt from environmental review. The STB's exclusive jurisdiction pursuant to 49 U.S. C. § 10501, subdivision (b), over acquisition of rail facilities was triggered when NCRA transferred part of its primary obligation as owner of the exclusive freight easement to provide common carrier rail service to NWPCo, with the NCRA retaining its residual common carrier obligation. In applying its regulations, the STB recognized that the transaction was exempt from further environmental review. (AR 8206–7.) Although one of the Appellants, Friends of the Eel River, challenged the STB determination of exemption, the STB denied Friends of the Eel River's request, finding that the threshold of eight trains per day had not been exceeded. (AR 8540–41.) The Friends of the Eel River had a judicial remedy under 8 U.S.C., § 2321 to appeal the STB decision, but chose not to, and the STB ruling is final. Categorical exemptions like those employed by the STB are recognized as exclusions under NEPA and as statutory and categorical exemptions under CEQA. (See, e.g., Pub. Resources Code, § 21084, subd. (a); 14 Cal. Code Regs., § 15300 *et seq.*)

Although the ICCTA grants the STB the authority to regulate rail operations, Appellants' Amici incorrectly claim that a plain reading of the ICCTA's preemption language would result in a regulatory void. (CBD Brief at p. 31–32.) But even under the accepted reading of the ICCTA, state and federal regulation of rail occurs. (*Boston and Maine Corp. and Town of Ayer, MA, supra*, 2001 WL 458685, at *5 ["state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety."]; *Ass'n of Am. R.R. v. South Coast Air Quality Mgmt. Dist.* (2010) 622 F.3d

1094, 1098.) Moreover, the STB can require compliance with the National Environmental Policy Act (NEPA) and other federal environmental statutes. (*Boston and Maine Corp. and Town of Ayer, MA, supra*, at *5 ["[N]othing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes."].)

The Farm Bureau Amici suggests that the STB's environmental review pursuant to NEPA is not a meaningful substitute for compliance with CEQA. (Farm Bureaus Brief at p. 19.) Appellants' Amici ignore that CEQA was modeled after NEPA, as this Court acknowledged in *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565, fn. 4. The similarities are so striking that this Court has recognized that judicial interpretation of NEPA is persuasive in interpreting CEQA. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86, fn. 21.) Moreover, the differences between NEPA and CEQA do not point to the conclusion that CEQA review is required to protect the environment, and certainly those differences do not mandate the rejection of preemption, which is a federal policy rooted in the Supremacy Clause of the United States Constitution. The argument that an impermissible regulatory void is created by the application of NEPA is really a challenge to the structure of NEPA itself, which is not an issue this Court should entertain.

The Air Districts' argument that they have entered into voluntary memoranda of agreements (MOAs) with freight rail carriers (Air Districts Brief at p. 27) implicitly acknowledges that the Air Districts do not have regulatory authority over freight rail carriers.[15] If the Air Districts had regulatory authority they would not seek MOAs; they would regulate. It also

[15] And because the Air Districts' MOAs and concession agreements discussed on pages 19–24 of their brief are not at issue here, a finding that no voluntary agreement to comply with CEQA exists here would not undermine the validity of the Air Districts' agreements. (Contra Air Districts Brief at pp. 19–24.)

acknowledges that rail carriers have made voluntary agreements within the state to operate in certain ways that help mitigate environmental impacts, and have done so despite the absence of state regulatory authority. NWPCo is no different. NWPCo has agreed to a series of "best management practices" in the operation of the Line and has adhered to those practices. (See, e.g., AR 2793–822 [Draft BMPs]; AR 10965 [amending agreement to include proposed environmental protection measures].) NWPCo does not seek to use preemption as a shield from its own agreements.

Preempting Appellants' CEQA lawsuit has no bearing on NWPCo's voluntary agreement to adhere to the management practices and measures it agreed to honor, which are similar in nature to the MOAs that the Air District touts with other freight rail carriers. Affirming the court of appeal here will not change anything; it will simply maintain the well-established status quo that the ICCTA preempts state regulation of freight rail operations.

E. This Action Is Effectively Moot And Remand Is Unnecessary, But This Court Can Issue An Opinion Addressing This Case's Legal Issues Of Continuing Public Interest

This case is moot because a writ granting petitioners their requested relief would have no practical impact.[16] (See *Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503 [A case is moot "when a court ruling can have no practical impact or cannot provide the parties with effective relief."].) The petitions seek a writ that would require NCRA to rescind Resolution No. 2011-02, which purported to approve the resumption of railroad operations on the Line, because NCRA did not adequately comply with CEQA, and not reapprove those operations unless and until NCRA so complies. (App. 1:1–15.) But Appellants cannot demonstrate that they are

[16] NWPCO and NCRA raised the mootness argument both in a motion to dismiss the petition and during briefing on the merits. The trial court declined to deny the petition on this ground.

entitled to the relief they seek from this Court. Indeed, in acknowledgment of its mistaken belief that it had authority to regulate NWPCo's operations under CEQA, NCRA has already rescinded the challenged resolution. (App. 13:3448–55.) No party challenged NCRA's rescission.

That said, this Court can issue an opinion advising whether the ICCTA preempts CEQA as to the actions at issue here based on the exception for public interest issues. (See *Saltonsall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 849; accord Atherton Brief at pp. 16–17.) "Although courts generally avoid issuing advisory opinions" on moot controversies, here, the Court retains power to decide the issue under the mootness exception for issues of public interest. (*Id.* at p. 849.) Under this exception, the Court "may resolve controversies that are technically moot if the issues are of substantial and continuing public interest" and likely to recur in the future. (*Id.* at p. 849.) The issue of whether the ICCTA preempts CEQA regarding decisions related to the maintenance and operation of rail lines owned by public agencies is, as the number of amici briefs proves, of substantial public interest.[17] Further, given the number of lawsuits pending against CHSRA, at least some of the issues raised in this case are likely to recur. Accordingly, the appropriate "remedy" is an opinion that advises agencies the extent to which the ICCTA preempts CEQA as applied to rail operations, and a rejection of Appellants and Amici's contention that CEQA compliance is a proprietary action.

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[17] Atherton Amici claim an opinion is needed to address the conflicting holdings of *Town of Atherton* and the appellate court on preemption. (Atherton Brief at p. 17.) Not so. *Town of Atherton* assumed that the ICCTA preempts CEQA, which is consistent with the appellate court's holding that the ICCTA preempts CEQA. (Compare *Town of Atherton*, *supra*, 228 Cal.App.4th at p. 332–33 & fn. 4 ["[a]ssuming without deciding that the ICCTA preempts CEQA as to the HST"] with Slip Op. at pp. 21–22 ["concluding the ICCTA expressly preempts CEQA review of proposed railroad operations"].)

III.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court find that CEQA compliance is not a proprietary action and that ICCTA preempts CEQA as it applies to the freight rail operations at issue.

Dated: August 26, 2015

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

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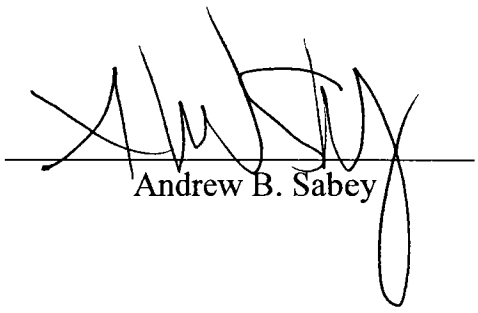

Andrew B. Sabey

CERTIFICATE OF SERVICE
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CASE NUMBER: Supreme Court of California Case No. S222472

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Peggy Sanchez

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CASE NAME: ***Friends of the Eel River, Californians for Alternatives to Toxics v. North Coast Railroad Authority, et al.***

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