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

## ANSWER BRIEF


| COX, CASTLE & NICHOLSON LLP | NEARY AND O'BRIEN |
|---|---|
| *Andrew B. Sabey (SBN 160416)<br>asabey@coxcastle.com<br>Linda C. Klein (SBN 270016)<br>lklein@coxcastle.com<br>Stephanie Marshall (SBN 279652)<br>smarshall@coxcastle.com<br>555 California Street, 10th Floor<br>San Francisco, CA 94104<br>Telephone: (415) 262-5100<br>Facsimile: (415) 262-5199<br>*Attorneys for* Northwestern Pacific Railroad Company | Christopher J. Neary (SBN 69220)<br>cjneary@pacific.net<br>110 South Main Street, Suite C<br>Willits, CA 95490<br>Telephone: (707) 459-5551<br>Facsimile: (707) 459-3018<br>*Attorneys for* North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority |

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

**Federal Cases**

**State Cases**

**Federal Statutes**



**State Statutes**

**Federal Regulations**



**State Regulations**



**Surface Transportation Board Decisions**



**Other Authorities**

# I.

# INTRODUCTION

Petitioners would extend the reach of the California Environmental Quality Act (CEQA) so that citizen groups may use it to shut down the operation of federally-chartered interstate railroads. Petitioners seek to convince this Court that using CEQA litigation to halt an operating railroad is not "regulation," rather it is just proprietary self-governance. Petitioners' definition of "proprietary" would create an exception that swallows the rule, as virtually any state regulation could be characterized as a state's choice on how it wants to operate. Alternatively, Petitioners assert that CEQA is just market participation like any private business might undertake. They assert that, inherent in this market is the right of every citizen of the state to invoke public interest standing to sue to enforce CEQA against rail operations that involve public property. Given that application of Petitioners' theories would wreak havoc with the nationwide rail system, Petitioners must also convince this Court that the Interstate Commerce Commission Termination Action (ICCTA), the strongest, clearest federal statutory language designed to prevent such dysfunction, does not actually mean what it says.

Moreover, Petitioners firmly embrace that CEQA is mandatory for public agencies in this State. But then they argue that Respondent North Coast Rail Authority's (NCRA) preparation of an environmental impact report—which it prepared because it believed it was required by CEQA—was a *voluntary* act tantamount to waiving any right to invoke preemption. In any event, Petitioners' contortions cannot mask the fact that the ICCTA expressly preempts CEQA's application to the rail operations of a *private party*, real party and respondent Northwest Pacific Railroad Company (NWPCo). Even if the NCRA committed to prepare an EIR, that could not

bind NWPCo to forego the preemptive power of the ICCTA over its rail operations. Any attempt to impose such an open-ended preclearance process on NWPCo would itself be preempted as an undue burden on interstate rail operations.

No court has questioned whether the ICCTA preempts CEQA. Even *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314 ("*Atherton*"), which erred in its analysis of the market participation doctrine, assumed without deciding that the ICCTA preempts CEQA. The Opinion below forcefully concludes that the ICCTA categorically preempts CEQA. The Surface Transportation Board (STB), the expert federal agency with jurisdiction over rail operations nationwide, has consistently concluded that the ICCTA preempts CEQA.

Both courts and the STB have observed that the preemption language in the ICCTA demonstrates Congressional intent to preempt all state regulation of rail transportation. This preemptive intent extends to all state environmental and permitting laws that are preclearance requirements for state or local government to approve a proposed rail activity.

The Respondents respectfully urge this Court to find that the ICCTA preempts CEQA as it applies to rail operations. CEQA is not some proprietary, internal process, it is the quintessential, open-ended environmental preclearance law that the ICCTA was intended to preempt. Local agencies that believe they are required to prepare EIRs are not acting as "market participants," they are adhering to a state law. Finally, third party lawsuits, seeking writs of mandate challenging the legal adequacy of an EIR cannot credibly be characterized as part of a local agency's voluntary market participation.

## II.

## FACTS

### A. NCRA And NWPCo Obtain STB's Approval To Operate The Line

The Northwestern Pacific ("NWP") Railroad Line extends from Arcata in the north to Lombard in the south. (Administrative Record ("AR") 6596–6597.) Willits is the center of the NWP Line and the tracks to its north comprise the Northern or Eel River Division and the 142-miles of tracks to the south are the Southern or Russian River Division (the "Line"). (AR 6596.)

Rail service on the NWP Line dates to the 1870s. (AR 6597.) The NWP Line was privately owned and jointly operated by Santa Fe Railroad and Southern Pacific Railroad from the late 1800s until 1929, when Southern Pacific Railroad assumed exclusive operating rights. (*Id.*) Southern Pacific Railroad sold the Northern Division in 1984 to a start-up rail operator, which operated until December 1986, when it declared bankruptcy. (*Id.*; AR 4986.)

In 1989, California formed the NCRA for the purpose of ensuring continued freight rail service to the north coast area, and on September 18, 1996, NCRA acquired the right to operate the Line through an exemption approved by the STB. (AR 4584–4585.) NCRA thus became, and remains today, a "rail carrier" under the ICCTA (49 U.S.C., §10102 (5)) and as such has a duty imposed by federal law to provide common carrier freight rail service. (49 U.S.C., § 11101.) NCRA did not perform any CEQA review for its acquisition of the rail facilities or its pursuit of federal approval to operate.

Several years of severe weather in the region damaged portions of the Line. In 1998, the Federal Railroad Administration ("FRA") (primarily

responsible for the safety of railroad operations) issued Emergency Order No. 21, which prohibited operations on certain portions of the Line until the tracks were repaired. (AR 4592–4596.)

In anticipation that the Line would eventually be repaired, NCRA searched for a private operator. (*See* Cal. Gov. Code, § 93020 (a) [NCRA has authority to "lease real and personal property" related to operation of the Line]; Cal. Gov. Code, § 93023 (d) [NCRA has authority to select franchisee to "operate the railroad"].) NCRA first selected a company called Northwest Pacific Railway to operate the Line in 1998. (AR 6597.) NCRA performed no CEQA review in advance of that process and NWPY operated on the passable portions of the Line until it filed for bankruptcy in 2005. (AR 6598; Petitioners' Consolidated Appendix In Lieu of Clerk's Transcripts ("App.") 1:8 [Writ Petition, ¶ 24]). NCRA then put out a request for proposals and ultimately selected NWPCo to be the new operator.

In September 2006, NCRA and NWPCo entered into an agreement entitled "Agreement for the Resurrection of Operations Upon the Northwestern Pacific Railroad Line and Lease" (the "Operations Agreement"). (AR 6725–6786.) The Operations Agreement gave NWPCo the right to operate on the Line, subject only to NWPCo obtaining STB's approval. (AR 6735 [¶ VII.B.1].) The Operations Agreement also stated that it was conditioned upon NCRA "having complied with the California Environmental Quality Control Act ('CEQA') *as it may apply to this transaction.*" (AR 6731 [¶ IV.C] [emphasis added].) This clause refers to the potential application of CEQA to the NCRA's entry into the Operations Agreement itself. Whether CEQA applied to NCRA's entry into the Operations Agreement is now irrelevant. NCRA did not perform CEQA review for the transaction, and no party challenged NCRA's approval of the Operations Agreement in 2006.

NWPCo expressly reserved its right to claim preemption under the Operations Agreement, agreeing to comply with "any and all requirements imposed by federal or state statutes, or by ordinances, orders or regulations or any government body having jurisdiction . . . *subject to such exemptions from jurisdiction as may be set forth in the Interstate Commerce Commission Termination Act of 1995, 49 USC 10500 et seq.*" (AR 6744 [¶ VIII.J] [emphasis added].) The terms are explicit that nothing in the Operations Agreement would interfere with "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." (*Id.*)

NWPCo obtained STB approval to become the operator by filing a notice of an exemption with the STB. (AR 8206–8207.) NWPCo noted that the resumption of rail service was exempt from environmental review under 49 C.F.R. 11506 (b)(4) and (c)(1). Under this exemption, which the STB affirmed, NWPCo became a rail carrier under the ICCTA (49 U.S.C., §10102 (5)) and accepted the mandatory duty to provide common carrier freight rail service on the Line. (49 U.S.C., § 11101.)

### B. The STB Directly Regulated The Line By Approving Operations And Rejecting All Challenges To NWPCo's Operation

Petitioner Friends of the Eel River ("FOER") challenged NWPCo's August 2007 approval from the STB. (AR 8281–8347.) FOER's stated concern was "the environmental impacts associated with NWPCo's plans to restart operation of the North Coast Railway" (precisely what Petitioners profess concern over in this case). (AR 8282.) FOER asked the STB to revoke NWPCo's approval and require full environmental review before the resumption of rail services because the Line was going from zero operations to actual operations. (AR 8283–8284.) FOER argued that the transfer of operation "cannot be approved without environmental review." (AR 8283)

FOER submitted a copy of NCRA's separate publication of a Notice of Preparation of an Environmental Impact Report ("NOP") regarding resumed operations on a portion of the line and included in its petition a copy of NCRA's initial study prepared pursuant to CEQA. (AR 8292–8344.) FOER argued that the NOP showed that environmental review was required, and that NWPCo's exemption was flawed for failing to note the "significant environmental impacts" that a resumption of "nonexistent current operations" would allegedly cause. (AR 8283–8284.)

The STB rejected FOER's challenges (AR 8539–8542), including the argument that additional environmental review was required:

> [T]he 100 percent [increase in railroad traffic] threshold [to trigger environmental review] does not apply where there recently have been no operations over a rail line. [Citations omitted.] Thus, the 100 percent threshold does not apply in this case, in which there have been no operations over the line in recent years . . . . And, because only three round-trip trains will be operated per week, NWPCo's operations will not exceed the eight trains per day threshold for environmental review, which is the applicable threshold when there have been no operations over a rail line. 49 C.F.R. 1105.7(e)(5)(i)(C).

(AR 8540–8541.) As discussed, FOER could have challenged the STB's decision by appeal to the federal court of appeals. (See 28 U.S.C., § 2321.) It did not, and the decision long ago became final.

### C. The CTC Released Repair Funds Based On Categorical Exemptions

After NWPCo obtained STB's certification, it was legally authorized to operate the Line. NWPCo did not need, and did not apply for, further approval from the NCRA to operate the line. The track, however, still needed to be repaired.

To that end, the NCRA had been working on obtaining the disbursement of the funding the State Legislature had allocated to the

NCRA for track repair back in the year 2000. (*See* Cal. Gov. Code, §§ 14556.40(a) (32), 14556.50.) The California Transportation Commission ("CTC") oversaw disbursement of the TCRA funds. (AR 6789–6810; *see also* App. 9:2365-84.) CTC Commissioners expressed their hope that NCRA could proceed with repair projects based on categorical exemptions so that the money could be used for the repairs. (App. 13:3450.) NCRA fully complied with any CEQA obligations for the repair work by preparing categorical exemptions, on which the CTC relied to release repair funds. (*E.g.*, AR 6905–6926; 7996–8041.)

In its construction funding approvals, the CTC expressly acknowledged that the repair work was proceeding on NCRA's categorical exemptions (not some promise that an environmental impact report ("EIR") would later be prepared). (AR 6905–6926; 7996–8041.) The CTC thus did *not* condition release of the repair funds on preparation of an EIR. A close examination of the funding agreement shows if the CTC had conditioned authorization of funds on certification of an EIR, the EIR would have been required as part of the application for funding. (AR 4638.) Indeed, if the CTC required an EIR as a condition precedent to funding the track repair work, it would not have released the money and allowed the track repair work to be completed *before* the NCRA certified an EIR.[1] The repair work was substantially completed by mid-2010 (AR 10644), nearly a year *before* NCRA certified its EIR in June 2011 (AR 18).

Petitioners never challenged the categorical exemptions NCRA and the CTC relied on for repair work, but the City of Novato did challenge one exemption that covered work in that city (the "*Novato*" case). (AR 8900

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[1] In April 2006, CTC adopted guidelines acknowledging its obligation to fund NCRA. (App. 9:2365–84; AR 2382–82.) These precluded the CTC from releasing money dependent upon an EIR until the EIR was complete. (AR 2382–82.)

[Consent Decree, ¶ I.A].) The *Novato* case was settled in 2008, by the parties entering into a Consent Decree. (AR 8899–8951.) None of the Petitioners is a party to the *Novato* Consent Decree and it is not at issue in this proceeding.

While the CTC did not require an EIR as a condition for disbursing funds for track repair, the NCRA nonetheless believed it was legally required under CEQA to prepare an EIR for its "project" of resumed rail operations. (AR 6315). The NCRA asked the CTC for permission to use some of the TCRA money to prepare that EIR. (AR 6796, 8575; see AR 3521.) The CTC did not require the EIR as a condition of funding; it funded NCRA's later preparation of the EIR because NCRA believed state law required it.

### D. NCRA's "Approval" Of NWPCo's Operations And Certification Of The EIR

Although the NCRA had no application for a discretionary approval before it, the NCRA proceeded in good faith to prepare an EIR, including responses to comments following circulation of a draft EIR. In June 2011, NCRA adopted Resolution No. 2011-02. (AR 18–74.) This resolution purports to do two things: (i) certify the EIR for a "project" loosely described as "resuming freight rail service from Willits to Lombard in the Russian River Division" (AR 18); and (ii) "approve" this project, even though NCRA (and the STB) had years earlier authorized NWPCo's operations on the Line (*id.*).

### E. NWPCo Resumed Operations On The Line In June 2011 And Operations Have Been Ongoing Since

The Federal Rail Administration lifted Emergency Order No. 21 in May 2011. (AR 10695–96.) NWPCo resumed operations on the Line in July 2011; operations have been ongoing since. (App. 13:3452 [NCRA Resolution 2013, ¶ VIII].)

### F. Petitioners Challenge Rail Operations and NCRA and NWPCo Demur

On July 20, 2011, Petitioners filed their writ petitions alleging CEQA violations. (App. 1:1–16 [FOER Writ Petition]; App 1:35–115 [Californians for Alternatives to Toxics ("CATS") Writ Petition].) Petitioners seek to halt railroad operations pending additional environmental review under CEQA. (App. 1:15; App. 1:63–64.)

NWPCo demurred to, and moved to strike, the petitions on grounds that Petitioners' CEQA claims are preempted by the ICCTA. The trial court (Judge D'Opal) overruled the demurrers. She found that Petitioners' CEQA claims were, in fact, preempted by the ICCTA (App. 7:1862), but NCRA was judicially estopped from raising the preemption defense because of certain statements NCRA allegedly made in connection with obtaining state funding for repair projects. (App. 7:1864.)

### G. The Trial Court's Ruling On The Merits Reaffirmed Preemption And Denied the Writ Petitions

After Judge D'Opal's interlocutory order, the cases were reassigned to the Honorable Roy O. Chernus. (App. 7:1874.)

While the cases were moving toward briefing on the merits, including preemption, the NCRA decided to clarify the fact that it recognized the preemptive effect of the ICCTA and acknowledged that its June 2011 "approval" of resumed rail operations was unnecessary. Thus, on April 10, 2013, NCRA rescinded Resolution No. 2011-02, the purported approval that gave rise to Petitioners' lawsuits. (App. 13:3448–3455.) No party challenged or otherwise sought to invalidate NCRA's rescission of Resolution No. 2011-02, and the time for doing so has now expired.

Thereafter, NWPCo and NCRA moved to dismiss Petitioners' petitions on the additional ground that they were moot, both from the inception of the lawsuits and based on NCRA's rescission of the challenged approval. (App. 12:3432–13:3496.) The parties briefed both the motion to

dismiss and the merits of Petitioners' petitions. The trial court denied the petitions, concluding that the ICCTA preempted Petitioners' CEQA claims. (App. 16:4391–4412.)

### H. The Court of Appeal's Opinion Reaffirmed Preemption, Declined To Apply The Market Participation Doctrine, And Found Preemption Did Not Violate The Tenth Amendment

The Opinion affirmed the trial court's ruling. To determine whether the ICCTA preempted CEQA's application to a private rail operator, the Opinion examined the text of ICCTA, *People v. Burlington N. Santa Fe R.R.* (2012) 209 Cal.App.4th 1513, and the decisions of federal courts and the STB. Consistent with ICCTA's plain language and the interpretation of that language by other courts and the STB, the Opinion held that the ICCTA preempts CEQA's application to NWPCo's operations. (Slip Op. at pp. 15–21.)

In addition the Opinion rejected Petitioners' claim that preemption is defeated by NCRA's "voluntary" agreement to comply with CEQA to receive TCRA funds. (*Id.* at p. 21–22.) According to the Opinion, even if the CTC's funding of NCRA's EIR was "viewed as a contract requiring preparation of an EIR regarding resumed railroad operations, a claim based on a breach of that obligation may only be enforced by a party having standing." (*Id.* at p. 22.) Since Petitioners had "not even alleged the existence of a contractual agreement by NCRA to prepare an EIR," Petitioners had no standing to attempt to enforce the alleged contract. (*Id.* at p. 24.)

The Opinion also found Petitioners lacked standing to raise the market participation doctrine as a way to defeat the ICCTA's express preemption of CEQA. (*Id.* at pp. 26–32.) Prior to ruling, the court ordered supplemental briefing on this issue in light of the just-issued *Atherton* decision. The Opinion found *Atherton* "overlook[ed] the genesis and

purpose of the market participation doctrine and does not adequately answer the question of how a third party's challenge to an EIR under CEQA can reasonably be viewed as part of the government's proprietary activities." (*Id.* at pp. 31–32.) The Opinion also noted that while *Atherton* "suggest[ed] the bond measure funding the [high-speed rail] was akin to a contractual agreement between the public entity and the electorate," thus giving any member of the electorate standing, the same was untrue for NCRA. (*Id.* at p. 32.) The Opinion thus considered and rejected *Atherton*'s conclusion that third-party petitioners have standing to use the market participation doctrine as a sword.

Finally, the Opinion rejected the claim that the ICCTA's preemption of CEQA violated the Tenth Amendment (*id.* at pp. 33–34), as well as Petitioners' other claims.

## III.

## STANDARD OF REVIEW

Preemption is a legal issue involving statutory construction and the ascertainment of legislative intent subject to de novo review. (*Kanter v. Warner-Lambert Co.* (2002) 99 Cal.App.4th 780, 789.) Likewise, a determination of whether the market participation doctrine applies to the facts of a case is subject to de novo review. (*Johnson v. Rancho Santiago Community College Dist.* (9th Cir. 2010) 623 F.3d 1011, 1016.)

## IV.

## ARGUMENT

In the context of rail construction and operation, the ICCTA preempts CEQA. The ICCTA contains "unquestionably broad" preemption language that sweeps up all state regulations that interfere with rail transportation. (*People v. Burlington N. Santa Fe R.R.* (2012) 209 Cal.App.4th 1513, 1524 ("*BNSF*").) Petitioners' attempt to use CEQA—

particularly CEQA litigation—to interfere with NWPCo's rail operations is preempted by federal law.

The ability of Petitioners to use CEQA litigation to interfere with rail operations on the Line arises *because* CEQA is a regulation. CEQA requires all public agencies to consider the environmental impacts of a discretionary decision prior to making it. (Pub. Resources Code, § 21000(g).) The public can prevent an agency from acting on its decision unless and until it complies with CEQA. (*Id.*, § 21167.) CEQA is the tool of choice for opponents of projects to seek to condition, delay, or halt them. The ICCTA expressly preempts such regulation of rail transportation.

Moreover, none of Petitioners' asserted exceptions to preemption applied here. Because rail transportation is an area historically regulated by the federal government, there are no Tenth Amendment concerns. The ICCTA's preemption of CEQA for rail operations also cannot be defeated under the guise that CEQA is just state "market participation" or that the requirement to prepare an EIR is a voluntary agreement, waiving preemption. The public's standing to enforce CEQA arises because CEQA is a mandatory regulation; not an option for public agencies to undertake voluntarily as if they were acting as market participants.

### A. Overview Of The Federal Regulation Of Railroads

Federal regulation of rail is longstanding and comprehensive. In 1887, Congress passed the Interstate Commerce Act ("ICA") (*see* 24 Stat. 379 (1887)), which created the Interstate Commerce Commission ("ICC") to regulate railroads. (*See* S. Rep. No. 176, 104th Cong., 1st Sess. (Nov. 21, 1995).) The ICA "[was] among the most pervasive and comprehensive of federal regulatory schemes." (*Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 318, 325–326.)

In 1995, Congress passed the ICCTA, which broadened the ICA's federal preemption over interstate railroad operations and replaced the ICC

with the STB. (49 U.S.C., §§ 10101, *et seq.*) "The purpose of the ICCTA was to 'eliminate many outdated, unnecessary, and burdensome regulatory requirements and restrictions on the rail industry.'" (*BNSF*, *supra*, 209 Cal.App.4th at p. 1517 [citation omitted].) Congress gave the STB authority to interpret and enforce the ICCTA (49 U.S.C., § 11101 (f)) and to directly regulate rail carriers (49 U.S.C., §§ 10102(1), 10501(b), 11101(f), 11321(a)). The STB also investigates and enforces the laws and regulations applicable to rail carriers. (49 U.S.C., §§ 11701–11707.) The STB's jurisdiction over these activities is exclusive:

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

(49 U.S.C., § 10501 (b) [emphasis added].)[2]

Before a rail carrier can operate, it must obtain permission—a certificate—from the STB. (49 U.S.C., §§ 10901, 10902.) The STB has regulations and procedures for obtaining certification (49 C.F.R., § 1150), and depending on the nature of the proposed activity, the applicant may

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[2] 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(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.

need to perform environmental review under federal law (49 C.F.R., § 1105.6).

Because the certification process can be lengthy, the ICCTA authorizes the STB to expedite approval by exempting a carrier's application from the normal review procedures, which can include review under the National Environmental Policy Act ("NEPA"). (49 U.S.C., § 10502; 49 C.F.R., §§ 1121.1, *et seq.*; 49 C.F.R., § 1150.31 *et seq.*) The ICCTA also gives the STB the exclusive right to enjoin a rail carrier for violation of its certificate to operate. (49 U.S.C., § 11702(1).)

STB rules and regulations establish a process for the STB to hear and resolve complaints arising from a carrier's operations or its compliance with applicable laws. (49 U.S.C., § 11701(b); see, e.g., AR 8539–8542 [FOER filed just such a case].) If the STB finds that a violation has occurred, it "shall take appropriate action to compel compliance." (49 U.S.C., § 11701(a).) The STB may enter a declaratory order pursuant to 5 U.S.C., § 554(e) and 49 U.S.C., § 721(a). STB orders are subject to judicial review in the federal court of appeals. (See 28 U.S.C., § 2321(a).) The federal court of appeal "has exclusive jurisdiction to enjoin, set aside, suspend . . . or to determine the validity of . . . all rules, regulations, or final orders of the Surface Transportation Board." (28 U.S.C., § 2342(5).)

**B. The ICCTA Preempts CEQA**

Given the ICCTA's comprehensive scheme of federal regulation, the ICCTA preempts CEQA's application to rail transportation. Nevertheless, Petitioners claim the ICCTA does not preempt CEQA's application to NWPCo's operation of the Line. (Appellants' Opening Brief (AOB) at pp. 14–27.) As explained below, Petitioners are incorrect.

1. Preemption Analysis

An evaluation of whether federal law preempts state law is rooted in the federal statute's language and, if not expressly stated, then in its

structure, purpose, and legislative history. (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 486; accord AOB at pp. 15–16.) Whether preemption is express or implied, when "a state statute conflicts with, or frustrates, federal law, the former must give way." (*BNSF*, *supra*, 209 Cal.App.4th at p. 1521; see *Gade v. Nat'l Solid Wastes Mgmt. Ass'n* (1992) 505 U.S. 88, 98 [Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."].)

Express preemption "occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law." (*Carrillo v. ACF Indus.* (1999) 20 Cal.4th 1158, 1162 [quotation marks and citation omitted].) Since preemption "is a question of congressional intent . . . when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." (*Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936.) Courts need only look to the language of the provision and "identify the domain expressly pre-empted." (*Medtronic*, *supra*, 518 U.S. at p. 484.)

In addition to express preemption, there are three categories of implied preemption: conflict, obstacle, and field. (*Deweese v. Nat'l R.R. Passenger Corp. (Amtrak)* (3d Cir. 2009) 590 F.3d 239, 245.) In each case, the question is whether compliance with the state regulation would conflict with, be an obstacle to, or regulate in an area federal law already covers, and thus impinge on the framework established by the Supremacy Clause. (See, e.g., *Carrillo*, *supra*, 20 Cal.4th at p. 1162; *Crosby v. Nat'l Foreign Trade Comm'n* (2000) 530 U.S. 363, 373–374 & fn. 8.)

Contrary to Petitioners' claim (AOB at p. 16), there is no blanket presumption against the existence of preemption when the statute itself contains preemption language. Instead, where the existence of the intention to preempt state law is explicit, it is only in determining the scope of that

preemption that courts apply the presumption against preemption. (*Medtronic*, *supra*, 518 U.S. at pp. 484–485.)

When examining the scope, it may be reasonably inferred that an express preemption provision is not intended to preempt state laws as to matters unrelated to the federal statute. (*Id.*) Since CEQA is a regulation that covers activities outside STB's purview, CEQA is entitled to the presumption of validity. While CEQA generally is presumed valid, the ability to use CEQA to regulate rail is not presumed valid because the federal government has historically regulated rail. "[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence" such as "railroad operations." (*Norfolk S. R.R. Co. v. City of Alexandria* (4th Cir. 2010) 608 F.3d 150, 160 fn. 12 ("*Norfolk*") [alteration and quotation marks omitted].)

2. The ICCTA Expressly Preempts CEQA

The ICCTA expressly preempts state interference with the construction, maintenance, and operation of the Line. (Contra AOB at pp. 17–27.)

As discussed, the ICCTA grants the STB 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(b)(2) [emphasis added].) And "the remedies provided under [the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." (§ 10501(b).) Section 10102 defines "transportation" to include "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use" as well as "services related to

that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." (§ 10102(9).) The activities challenged here, track repair and movement of property by NWPCo along those tracks, fall within the definition of "transportation." Accordingly, STB has exclusive jurisdiction over those activities, regardless of who owns the Line.

Based on the plain meaning of the above language, the ICCTA "preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws of general application having a more remote or incidental effect on rail transportation." (*BNSF*, *supra*, 209 Cal.App.4th at p. 1528 [citing cases] [alteration and quotation marks omitted].) Two types of state laws are "categorically" preempted: "(1) 'any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the [STB] has authorized' and (2) 'state or local regulation of matters directly regulated by the [STB ]—such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service.'" (*Id.*; see *Adrian & Blissfield R.R. Co. v. Village of Blissfield* (6th Cir. 2008) 550 F.3d 533, 539–540 [explaining and adopting from the STB this test for express preemption].) "Because these categories of state regulation are *per se* unreasonable interference with interstate commerce, the preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the action of regulation itself." (*Adrian & Blissfield*, *supra*, 550 F.3d at p. 540 [quotation marks omitted].)

a. *CEQA Can Be Used To Delay or Deny NCRA And NWPCo The Ability To Conduct Their STB-Authorized Activities*

CEQA falls into the first category of state law noted above because by its nature, it could be used to deny NCRA and NWPCo the ability to conduct some part of their operations. Despite Petitioners' characterization of CEQA as just a "legitimate business factor" considered in "the course of business" (AOB at p. 45), CEQA is, as Petitioners elsewhere readily acknowledge (AOB at pp. 30–32, 37), a regulation by which California mandates public agencies consider the environment prior to approving a project. (See *Mountain Lion Found. v. Fish & Game Comm'n* (1997) 16 Cal.4th 105, 112.) CEQA allows public agencies to deny a project or condition its approval on compliance with mitigation measures, and through the public process and litigation, has the potential to delay and deny projects. (See *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 12 [potential for CEQA to "degenerate[e] into a guerilla war of attrition by which project opponents wear out project proponents" and thus win by default]; *Bd. of Supervisors v. Superior Court* (1994) 23 Cal.App.4th 830, 837 [acknowledging CEQA's potential to delay projects]; see also 14 Cal. Code Regs., § 15003(j) ["[CEQA] must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development or advancement."].) Even with its short statute of limitations, CEQA litigation has "obvious potential for financial prejudice and disruption." (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 500.) As this Court recently recognized, CEQA's potential to delay projects through litigation prompted the Legislature to enact Public Resources section 21083.1 to "limit judicial expansion of CEQA requirements" and to "reduce the uncertainty and litigation risks facing local governments and project applicants by

providing a 'safe harbor' to local entities and developers who comply with the explicit requirements of the law." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1107 [quotation marks omitted].) CEQA, with its well-recognized potential to delay or halt projects, could unreasonably interfere with rail transportation and is therefore expressly preempted by the ICCTA.

Despite ICCTA's broad preemption language and CEQA's acknowledged ability to interfere with projects, Petitioners inexplicably claim that CEQA does not manage or govern rail transportation. (AOB at p. 22.) As discussed above, CEQA is the quintessential example of a state law that could interfere with rail. It is the tool of choice in California for project opponents to delay or defeat projects. Petitioners' use of CEQA in this case makes that point.

Petitioners also claim the ICCTA's preemption language should be narrowly construed. (AOB at p. 22.) Petitioners rely on easily distinguished cases upholding state and local provisions that "entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions" (*Green Mountain Railroad Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 643 ("*Green Mountain*")), and thus had only an incidental effect on rail transportation, or no effect at all, to support their claim. For example, *Florida East Coast* concerned the effect of local zoning regulations on a construction supply company leasing property from a railroad that was zoned for multi-family residential uses. (*Florida East Coast Ry. Co. v. City of West Palm Beach* (11th Cir. 2001) 226 F.3d 1324, 1326–1327.) There, the court held the ICCTA did not preempt the city from enforcing its zoning laws against the construction supply company because that company's activities "were not 'rail transportation.'" (*Id.* at p. 1336.) *Franks Investment Co. LLC v. Union Pacific R.R. Co.* (5th Cir. 2010) 593 F.3d 404, 415 (en banc), *Island Park*

*LLC v. CSX Transportation* (2nd Cir. 2009) 559 F.3d 96, 103–106, and *Adrian & Blissfield, supra*, concerned either private railroad crossings or installation of sidewalks in the railroad right-of-way, which are activities even the STB has concluded "are *not* typically preempted" because they generally do not unreasonably burden rail transportation. (*Adrian & Blissfield, supra*, 550 F.3d at p. 540; see *Island Park, supra*, 559 F.3d at pp. 105–106.)

In contrast, as discussed below, numerous courts and the STB have concluded environmental preclearance requirements such as CEQA do unreasonably burden rail transportation and are categorically preempted.

b. *The Legislative History Supports Finding CEQA Is Preempted*

Despite its broad preemption language, Petitioners argue that the ICCTA's legislative history shows Congress intended to preempt only direct economic regulation of rail by the states and not other state regulations. (AOB at p. 21.) The ICCTA's language supports finding that Congress intended to preempt all regulation that could interfere with rail transportation, not just "economic" regulation. (*City of Auburn v. United States* (9th Cir. 1999) 154 F.3d 1025, 1030 [nothing "supports [appellant's] argument that, through the ICCTA, Congress only intended preemption of economic regulation of the railroads"].) Since there is no ambiguity that the ICCTA preempts state regulations such as CEQA that could unreasonably burden or halt rail transportation, resorting to legislative history is unnecessary. (See, e.g., *IT Corp. v. Solano Cnty. Bd. of Supervisors* (1991) 1 Cal.4th 81, 98 ["To determine legislative intent, we *first* consult the statutory words themselves. . . . If the statutory language is ambiguous, we examine the legislative history" (citations omitted).].)

If the Court finds the ICCTA ambiguous and looks to the legislative history, that history indicates Congress intended the ICCTA to preempt

state pre-clearance requirements that could interfere with rail transportation. (See *City of Auburn, supra*, 154 F.3d at p. 1030 [noting legislative history supports finding the ICCTA preempts state environmental pre-clearance requirements].) For example, the House Conference Reports for the ICCTA, on which Petitioners rely, provide:

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

(H.R. Conf. Rep. No. 104-311, pp. 95-96 [emphasis added]; see also *id.* at p. 93 ["The bill keeps bureaucracy and regulatory costs at the lowest possible level, consistent with affording remedies only where they are necessary and appropriate."].) CEQA, which can be used to delay or halt rail, is not the type of incidental state regulation that withstands ICCTA preemption. (Cf. App. 1:15 [FOER's prayer for relief requests the Court halt NWPCo's operations]; see App. 1:63–64 [CATS request the same].)

The cases Petitioners cite as limiting the ICCTA's preemption to direct economic regulation (AOB at pp. 19–21) actually demonstrate that ICCTA preempts environmental regulation as well. For example, *New York Susquehanna and Western Railway Corp. v. Jackson* (3rd Cir. 2007) 500 F.3d 238 specifically advised that "[w]hat matters [for determining preemption under the ICCTA] is the degree to which the challenged regulation burdens rail transportation, not whether it is styled as 'economic' or 'environmental.'" (*Id.* at p. 252.) Some "environmental permitting requirements are preempted because they unreasonably prevent, delay, or interfere with activities protected by the [ICCTA]." (*Id.* at p. 253; see also *Florida East Coast, supra*, 266 F.3d at p. 1337 [Legislative history

"emphasize[d] the focus of the ICCTA on removing direct state regulation of railroads" and removing "regulatory requirements that vary among the States" that could "undermine the industry's ability to provide the 'seamless' service that is essential to its shippers.") CEQA is exactly the type of regulation that could unreasonably delay or disrupt service by rail.

c. *Other Courts Have Found State Preclearance Laws Preempted*

Other courts examining the ICCTA's language and legislative history have uniformly found state environmental preclearance laws such as CEQA to be preempted when applied to rail transportation.

Among several courts to reach this conclusion is the Ninth Circuit in the *City of Auburn*. Like Petitioners here, appellant there argued that Congress enacted the ICCTA to preempt state economic regulation and did not intend to preempt "the traditional state police power of environmental review" as applied to railroads. (*City of Auburn*, *supra*, 154 F.3d at p. 1029.) The Ninth Circuit rejected this argument:

> We believe the congressional intent to preempt this kind of state and local [environmental] regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it. [Citation omitted.] Because congressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause, we affirm the STB's finding of federal preemption.

(*Id.* at p. 1031.) As *City of Auburn* noted, nothing "supports Auburn's argument that, through the ICCTA, Congress only intended preemption of economic regulation of the railroads." (*Id.* at p. 1030.)

In *Green Mountain*, the Second Circuit concluded the ICCTA preempted application of Vermont's version of CEQA to a rail carrier's proposal to build facilities to serve railroad operations even though it was not direct "economic" regulation. (404 F.3d at p. 643.) Although Vermont's environmental statute did not directly target railroads, as applied, "the

railroad [was] restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary rulings of a state or local agency." (*Id.*) *Green Mountain* thus found the statute was preempted because it "(i) unduly interfere[d] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations" and "(ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely," which amounted to economic regulation. (*Id.* [citations omitted].)

Similarly, *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D. Cal. 2002) 2002 WL 34681621, found the ICCTA preempted appellant's CEQA claims. There, a public rail carrier (NCTD), after engaging in the city's permitting process, decided to construct its line without a permit and without preparing an EIR. (*Id.* at *1.) Appellant's CEQA claim was preempted by the ICCTA because "environmental or permit regulations" could prevent the rail carrier from constructing the track, which "would be tantamount to economic regulation by a local government over a rail carrier." (*Id.* at *4.) Such regulation is preempted by the ICCTA and "jurisdiction over these claims [is] exclusively" reserved to the STB. (*Id.*)

Several other courts have reached similar conclusions. (*See, e.g., Norfolk, supra*, 608 F.3d at p. 160 [ICCTA preempted application of a city's ordinance regulating "bulk materials" to rail carrier's railroad operation facility because "requiring a rail carrier to obtain a locally issued permit before conducting rail operations—generally referred to as 'permitting' or 'preclearance' requirements—will impose an unreasonable burden on rail transportation."]; *Railroad Ventures, Inc. v. Surface Transportation Bd.* (6th Cir. 2002) 299 F.3d 523, 560–563 [affirming

STB's decision to invalidate an agreement between rail carrier and township requiring rail carrier to construct an overpass or underpass prior to resuming rail operations]; *Soo Line R.R. Co. v. City of Minneapolis* (D. Minn. 1998) 38 F.Supp.2d 1096, 1100–1101 [ICCTA preempts local ordinance requiring rail carrier to obtain demolition permit before demolishing railroad buildings]; *Canadian Nat'l Ry. Co. v. City of Rockwood* (E.D. Mich. 2005) 2005 WL 1349077, at *2, 6-7 [ICCTA preempts city, county and state regulations that, when applied to rail carrier, required carrier to obtain various soil erosion and solid waste permits].)[3]

Each court considering the application of state environmental preclearance regulations to rail transportation has found those regulations preempted—Petitioners ask this Court to be the first to rule to the contrary. Specifically, Petitioners claim those cases are wrongly decided because the ICCTA does not use the phrase "preclearance requirements," and therefore "preclearance requirements" are not expressly preempted. (AOB at pp. 25–26.) As *City of Auburn* and *Green Mountain* explained, the ICCTA vests the STB "with exclusive jurisdiction over 'transportation by rail carriers,'" including the activities at issue here: repair, maintenance, and operation of railroad facilities and tracks. (See *Green Mountain*, *supra*, 404 F.3d at p. 642; *City of Auburn*, *supra*, 154 F.3d at p. 1030–1031.) Because open-ended preclearance requirements such as CEQA can "unduly interfere with interstate commerce by giving the [public agency] that ability to deny the carrier the right to construct facilities or conduct operations" and "can be time-consuming, allowing a [public agency or subsequent litigation] to delay" the proposed project "almost indefinitely," those requirements are at

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[3] Petitioners cite no cases to the contrary. Even *Atherton* assumed without deciding that the ICCTA preempts CEQA. (*Atherton*, *supra*, 228 Cal.App.4th at p. 333.)

odds with STB's exclusive jurisdiction. (*Green Mountain, supra*, 404 F.3d at p. 643 [quotation marks omitted].) Thus open-ended "preclearance" requirements are categorically preempted even though Section 10501 does not use the phrase "preclearance."

Petitioners also claim that *City of Auburn* and *Green Mountain* are distinguishable because those cases concerned private railroads. But that fact is irrelevant to the preemption analysis because the STB's jurisdiction over rail transportation is exclusive, regardless whether the rail is owned by a state or private entity.[4] (See, e.g., *Cal. High-Speed Rail Authority—Petition for Declaratory Order* (Dec. 12, 2014) STB Finance Docket No. 35861, 2014 WL 7149612, at *11 ("*HSRA*"), appeals filed Feb. 9, 2015, to Ninth Circuit (Case No. 15-70386) and District of Columbia Circuit (Case No. 15-1030) [holding CEQA preempted for rail line owned by a state agency]; *N. San Diego Cnty. Transit Dev. Bd.—Petition for Declaratory Order* (August 21, 2002) STB Finance Docket No. 34111, 2002 WL 1924265, at *6 ("*San Diego County Transit*") [same].)

Applying ICCTA preemption equally to private and public entities serves the purpose of preemption, which is to secure uniformity of the rules and regulations that apply to rail transportation, and is supported by U.S. Supreme Court decisions regarding rail transportation. (See *Hilton v. South Carolina Public Rys. Comm'n* (1991) 502 U.S. 197, 203 [in Federal Employer's Liability Act case, Court declined to "throw into doubt" prior U.S. Supreme Court decisions "holding that the entire federal scheme of railroad regulation applies to state-owned railroads."]; *California v. Taylor* (1957) 353 U.S. 553, 566–567 [Congress intended Railway Labor Act "to

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[4] The Line has a long history of private ownership and private and federal funding. (AR 6596–6601.) In fact, private and federal funds continue to be used to maintain and operate the railroad (*Id*; see AR 6738 [NWPCo funds regular rail maintenance].)

apply to any common carrier by railroad engaged in interstate transportation, whether or not owned or operated by a State."]. Further, any application of CEQA by NCRA would result in the regulation of NWPCo, a private rail carrier, making this case analogous to *City of Auburn* and *Green Mountain.*

d. *STB Decisions Support Finding CEQA Is Preempted*

The STB, like the courts, "has likewise ruled that 'state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce.'" (*Green Mountain*, *supra*, 404 F.3d at p. 642 [quoting *Joint Petition for and Declaratory Order—Boston and Maine Corp. and Town of Ayer, MA* (Apr. 30, 2001) STB Finance Docket No. 33971, 2001 WL 458685, at *5, aff'd, *Boston and Maine Corp. v. Town of Ayer* (D. Mass. 2002) 191 F.Supp.2d 257]; *HSRA*, *supra*, 2014 WL 7149612, at *7 ["the Board concludes that CEQA is categorically preempted by § 10501(b)"]; *DesertXpress Enterprises, LLC—Petition for Declaratory Order* (June 27, 2007) STB Finance Docket No. 34914, 2007 WL 1833521, at *3 ("*DesertXpress*") [STB found that it had exclusive jurisdiction over "the planned new track, facilities and operations" and that CEQA was thus preempted]; *San Diego County Transit*, *supra*, 2002 WL 1924265, at *6 [state-law claims under CEQA preempted by the ICCTA as to a line owned and operated by a public entity because state or local laws that set up processes that could defeat railroad operations would impinge on federal regulation of interstate commerce].)

"As the agency authorized by Congress to administer the Termination Act, the [STB] is uniquely qualified to determine whether state law should be preempted by the Termination Act." (*Green Mountain*, *supra*, 404 F.3d at p. 642 [ellipsis and quotation marks omitted].) Courts thus defer to the STB's preemption determinations. (See, e.g., *Chicago &*

*N.W. Transp. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 321 ["considerable deference" to rail abandonment decision]; *Ass'n of American R.R. v. S. Coast Air Quality Mgmt. Dist.* (9th Cir. 2010) 622 F.3d 1094, 1097 ["We find further guidance on the scope of ICCTA preemption from the decisions of the [STB], to which we owe *Chevron* deference."]; *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.* (7th Cir. 1999) 169 F.3d 474, 476 [STB's decision exempting rail carrier's lease of tracks reviewed "under the high level of deference accorded to an agency's reasonable interpretation of the statutes which the agency administers."].) Petitioners offer no reason for this Court to stray from the STB's prior holdings that the ICCTA preempts CEQA.

Because CEQA could interfere with rail transportation by, among other things, imposing restrictions on railroad reconstruction, delaying related work, or halting rail operations, the ICCTA expressly preempts it.

3. Even If Not Expressly Preempted, The ICCTA Preempts CEQA As Applied To The Line

If the Court finds that the ICCTA does not expressly preempt CEQA, it should conclude that CEQA is impliedly preempted. (Contra AOB at pp. 52–58.) Notably, state actions that are not expressly preempted can be preempted as applied based on "a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation." (*BNSF*, *supra*, 209 Cal.App.4th at p. 1528, quoting *Adrian & Blissfield*, *supra*, 550 F.3d at p. 540 [quotation marks omitted].)[5]

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[5] Petitioners criticize the Opinion's use of the "obstacle" preemption test adopted by the STB and numerous courts, including *BNSF*, *Green Mountain*, *City of Auburn*, and *Adrian & Blissfield R.R. Co.* (See AOB at p. 54, fn. 7, citing Opinion at p. 17.) But the criticism is nothing more than semantics.

Here, the "action" for the purposes of the preemption analysis is Petitioners' third-party enforcement of CEQA against NCRA and NWPCo. (Cf. *HSRA*, *supra*, 2014 WL 7149612, at *11.) Petitioners challenge NCRA's "resumption of operations of the North Coast Pacific Railroad . . . to allow freight traffic from Willits to Lombard, California," which they define as "the Project." (App. 1:2:1–4 [FOER's petition]; see App. 1:35:25–36:3 [CATS' similar challenge].) Petitioners seek the following relief: NCRA be ordered to "vacate and set aside their certification of the EIR, and approval of the Project," "comply with CEQA and the CEQA Guidelines, and to take any other action as required by Public Resources Code section 21168.9," "for a temporary stay, temporary restraining order, and preliminary and permanent injunctions restraining Respondents . . . from taking any action to implement, or further approve, or construct the Project, pending full compliance with the requirements of CEQA," for "preliminary and permanent injunctions restraining Real Parties in Interest . . . from taking any action to implement or construct the Project," "[f]or costs of the suit," and "[f]or attorneys' fees." (App. 1:15; see App. 1:63–64 [CATS' similar prayer for relief].) If Petitioners are successful, the resulting writ could (1) halt NWPCo's operations, (2) prevent NCRA from "reapproving" operations until it prepares a further or revised EIR that satisfies a court of law, (3) remove the track that has been installed as part of the "Project," and (4) require NCRA to impose operating restrictions on NWPCo as required by CEQA mitigation measures. Such a writ would unreasonably interfere with railroad transportation. Petitioners' CEQA litigation is undoubtedly preempted by the ICCTA.

Ignoring reality, Petitioners claim that the "action" at issue here is California's choice to review environmental impacts of public projects rather than Petitioners' CEQA enforcement litigation. They claim California's internal environmental review process would not "result in a

patchwork of regulations" on rail. (AOB at pp. 54–55.) If the action was only about California's policy that public agencies conduct environmental review prior to making decisions, then Petitioners would have no lawsuit, as NCRA conducted extensive environmental review. (AR 132–3412 [the draft and final EIR for the Project].) Instead, as indicated by the prayer for relief, the action is about controlling NWPCo's operations and imposing CEQA burdens on any future repair or operation of the Line. Since this action could result in burdens different than would be encountered in other states or on other lines, the action could create a "patchwork of regulations" over the rail, and is preempted.

Petitioners cite *People v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772 ("*Pac Anchor*") (AOB at pp. 55–56), but it does not support their argument. *Pac Anchor* examined whether an action under California's unfair competition law based on a trucking company's alleged violation of state labor and insurance laws is "related to a price, route, or service," which are the areas preempted by the Federal Aviation Administration Authorization Act. (*Id.* at p. 775.) There were no findings that the action would affect routes or services. As to prices, the Court found any effect "too tenuous, remote, [and] peripheral to have pre-emptive effect." (*Id.* at p. 786 [ellipsis and quotation marks omitted].)

Unlike the potential effects of the litigation at issue in *Pac Anchor*, there is nothing tenuous or remote about this litigation's ability to interfere with rail transportation, as evidenced by Petitioners' prayer for an order halting NWPCo's operations. If environmental permitting requirements affecting the construction of a rail carrier's transloading and storage facilities are preempted "because proposed . . . facilities are integral to the railroad's operation and are easily encompassed within the Transportation Board's exclusive jurisdiction over 'rail transportation'" (*Green Mountain, supra*, 404 F.3d at p. 644), then the CEQA action here, directly attacking

rail operation, also is "easily encompassed" within the STB's exclusive jurisdiction and preempted.

Additionally, Petitioners argue the STB does not have exclusive jurisdiction over NCRA's choice to not operate the Line and since this action implicates that choice, it is not preempted. (AOB at pp. 56–57.) Petitioners ignore 49 U.S.C., § 10903, which requires NCRA to obtain authorization from STB before it can "(A) abandon any part of its railroad lines; or (B) discontinue the operation of all rail transportation over any part of its railroad lines." *Purcell v. United States* (1942) 315 U.S. 381, a case cited by Petitioners, does not help them. *Purcell* supports a conclusion that the STB has jurisdiction over line abandonments and operations. (*Id.* at p. 385 [The decision to abandon a line "is a matter which the experience of the Commission qualifies it to decide. And under the statute [the Interstate Commerce Act], it is not a matter for judicial redecision."].) Accordingly, a decision by NCRA to *not* reopen the Line, but instead abandon it, or a decision today to halt NWPCo's operations, is within STB's exclusive jurisdiction. (See AR 8206–8207 [STB approves NWPCo to operate the Line].)

Petitioners nevertheless claim the STB reserved to NCRA the right to require NWPCo comply with CEQA. Petitioners base this claim on STB's statement NWPCo had to consummate its transaction with NCRA to be a "Class III rail carrier," and the transaction allegedly required CEQA compliance. (AOB at p. 56; AR 8207.) The STB also noted its rules governing consummation, however, indicating consummation is within the STB's jurisdiction. (AR 8207.) In addition, as addressed in the facts, the Operations Agreement did not unambiguously require NCRA to undertake CEQA as to the reopening of the Line—only to undertake CEQA as it may apply to NCRA's decision to enter into the lease. (Opinion at pp. 22–23.)

In sum, every issue that could be affected by this litigation—Line repair, operation, consummation, and abandonment—is within the STB's exclusive jurisdiction and thus preempted by the ICCTA. (49 U.S.C., § 10501(b); *see King County, WA–Petition for Declaratory Order–Burlington Northern R.R.–Stampede Pass Line* (Sept. 25, 1996) 1 S.T.B. 731, 734 ("*King County*") ["The power to authorize the construction of rail lines and the power to authorize railroads to operate over them has been vested exclusively in the Board by section 10901 of the ICCTA."].)

### C. The ICCTA's Preemption Of CEQA Is Not Defeated By Tenth Amendment Concerns

Petitioners argue that preemption is being invoked to "shield [the NCRA's] State-funded actions" from state "political and legal oversight" and thus preemption would violate the Tenth Amendment's protection of California's control over its subdivisions. (AOB at pp. 24, 36, 37.) This is incorrect because the issuance of the state funds to NCRA for repairs was based on categorical exemptions from CEQA that Petitioners never challenged and are not at issue here. (AR 6905–6926, 7996–8041). At issue is California's ability to regulate the *rail operations of a private entity*, NWPCo, using CEQA's environmental preclearance requirements.

Even if the case concerned California's ability to regulate NCRA, Petitioners' arguments concerning the "balance of powers between the States and the Federal Government" (AOB at p. 28) remain unavailing because the power to regulate rail is not held by the states. (See *CSX Transportation, Inc. v. Georgia Public Serv. Com.* (N.D. Ga. 1996) 944 F. Supp. 1573, 1586 ["railroads are instrumentalities of interstate commerce over which [the federal government's] authority to regulate even purely intrastate matters under the Commerce Clause has not been and cannot be doubted."]; *Scheiding v. General Motors Corp.* (2000) 22 Cal.4th 471, 481 ["Railroads have been subject to comprehensive federal regulation for

nearly a century. . . . There is no comparable history of longstanding state regulation . . . of the railroad industry."].) There is nothing for the ICCTA to "displace" (AOB at p. 35) from the realm of state-regulated issues. (See *United States v. Locke* (2000) 529 U.S. 89, 108 ["'assumption' of nonpre-emption is not triggered" when the State regulates rail].)

Because rail has not been historically regulated by the states, Petitioners' citation to cases that involve issues historically state-regulated and internal to state governance do not support their claim that preempting CEQA as to rail operations would disrupt the balance between state and federal governments. (Cf. *City of Los Angeles v. County of Kern* (2014) 59 Cal.4th 618, 632–634 [holding that narrow reading of federal tolling law appropriate where it affects *state* statutes of limitations for *state* cases]; *Gregory v. Ashcroft* (1991) 501 U.S. 452, 473 [authority of state to determine qualifications of its own judges]; *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 138 [state's ability to restrict its own delivery of telecommunications service not preempted].) For example, Petitioners cite *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, for the statement that statutes that "go to the heart of representative government" such as CEQA are expressions of state sovereignty not lightly preempted. (AOB at p. 29.) This statement concerns statutes affecting the actual makeup of local government, i.e., who can be judges, and not all statutes that include opportunities for public participation. While states' control over picking its judges is a historic state function not easily preempted, regulating rail is not.

Petitioners also claim the ICCTA does not contain a "clear statement" of Congress's intent to preempt state regulation as required assuming state self-governance is implicated. (See AOB at p. 28). Yet many courts, including the Opinion, have found the ICCTA "expressly preempts all state laws that may reasonably be said to have the effect of

managing or governing rail transportation." An "expressly stated" preemption clause is an indication of Congress's "unmistakably clear" intent to displace state regulation. (*South-Central Timber Dev., Inc. v. Wunnicke* (1984) 467 U.S. 82, 91.) Congress left no doubt that the ICCTA would preempt state regulation of rail transportation, even if that regulation also related to state self-governance.

## D. The ICCTA's Preemption Of CEQA Is Not Defeated By The Market Participation Doctrine

Similar to Petitioners' Tenth Amendment arguments, the market participation doctrine also has no application here and cannot defeat the ICCTA's express preemption of CEQA.

While acknowledging CEQA reflects this state's policy to consider environmental issues (AOB at p. 30), Petitioners fail to explain how that policy, particularly enforcement by third party writ petitions, is proprietary. If the market participation doctrine allowed residents to step into the state government's shoes to enforce its preempted policies against state actors, the doctrine would eviscerate preemption.

### 1. The Market Participation Doctrine Is Not An Exception To Express Preemption

The market participation doctrine is sometimes called an exception to preemption, but really works as a rebuttable presumption that "pre-emption doctrines apply only to state regulation," and not to states acting as proprietors of goods and services. (*Building & Constr. Trades Council v. Associated Builders & Contractors* (1993) 507 U.S. 218, 227 ("*Boston Harbor*").) This presumption arises because "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." (*Reeves, Inc. v. Stake* (1980) 447 U.S. 429, 436–37 [citation omitted].) Accordingly, courts are to presume that "[i]n the absence of any *express or implied* indication by Congress that a State may not manage its own property when it pursues its purely proprietary

interests, *and where analogous private conduct would be permitted*," Congress did not mean to restrict state conduct. (*Boston Harbor*, *supra*, 507 U.S. at pp. 231–232 [emphasis added]; see *Engine Manufacturers Ass'n v. S. Coast Air Quality Mgmt. Dist.* (9th Cir. 2007) 498 F.3d 1031, 1042 [a court must consider whether the relevant federal act contains "any express or implied indication by Congress that the presumption embodied by the market participant doctrine should not apply"].) If the federal act contains such an express or implied indication, the market participation does not apply. (*Boston Harbor*, *supra*, 507 U.S. at pp. 231–232.)

The ICCTA expressly preempts unreasonable interference with rail transportation, whether by regulation or proprietary action. The presumption that Congress did not intend to preempt state proprietary actions affecting rail operations is thus rebutted.

2. CEQA Is Regulation, Not Market Participation

Assuming arguendo that the ICCTA does not expressly preempt the open-ended regulatory process CEQA embodies, and therefore the presumption that underlies the market participation doctrine has not been rebutted, the next step in the analysis is to determine whether CEQA (particularly third-party CEQA litigation) is regulatory or, as Petitioners' claim, proprietary. (*See, e.g.*, *White v. Mass. Council of Const. Employ., Inc.* (1983) 460 U.S. 204, 208 ["single inquiry" is limited to ascertaining "'whether the challenged program constituted direct state participation in the market'" or is instead a regulatory program].) To determine whether a state program is regulation or market participation, courts ask two questions: (1) "does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances," and (2) "does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general

policy rather than address a specific proprietary problem." (*Cardinal Towing v. City of Bedford* (5th Cir.1999) 180 F.3d 686, 693 ("*Cardinal Towing*").) The questions are in the alternative, and the goal is to determine whether the challenged government interaction with the market is "so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." (*Id.*)

CEQA is regulatory and private parties in similar circumstances cannot choose to comply with it. (Cf. AOB at pp. 42–47.) CEQA requires a "lead agency" (i.e., the government) to determine potential environmental impacts prior to making discretionary decisions, public hearings, and in connection with any permit to be issued, enforceable mitigation measures. (*See, e.g.*, Pub. Resources Code, § 21081.6(b) ["[a] public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions"]; *see also Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 380–381 [explaining CEQA].) CEQA compliance is required any time a public agency undertakes a "project," and is not narrowly focused on market-oriented actions. (14 Cal. Code Regs., § 15378; cf. AOB at p. 37 [CEQA is a "legislatively-imposed obligation"].) Because CEQA is regulation, third parties can act as private attorneys general and police an agency's compliance with its strictures. (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166.) CEQA's requirements and enforcement provisions are not so focused and in keeping with the ordinary behavior of private parties that a regulatory impulse can be safely ruled out. (Cf. *Wisconsin Dep't of Industry, Labor and Human Relations v. Gould, Inc.* (1986) 475 U.S. 282, 290–291 [noting "government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints" under the market participation analysis].)

Petitioners make three arguments about how CEQA compliance is a proprietary act outside the scope of the ICCTA's express preemption, but each fails.

a. *State Decided To Enter The Rail Market Without CEQA*

Petitioners claim CEQA is proprietary because it could inform NCRA's decision to enter into the marketplace for rail. (AOB at p. 43.) The CEQA review at issue could not have informed a decision about entering into the rail marketplace because by the time the EIR was certified, the Legislature had already formed NCRA to be the owner and operator of the Line, NCRA had acquired the Line from bankruptcy, STB had approved NCRA as the Line's rail carrier, and NCRA had already completed Line repair. (See AR 18–20; see also AR 4721 ["NCRA was formed April 1992 to ensure continuation of railroad service in Northwestern California"]; Cal. Gov. Code, § 93000 et seq. [intent of Legislature to ensure "railroad service" by establishing the NCRA.) The only actions that the CEQA analysis at issue here could inform are NWPCo's *operation* of the Line (AR 19), which is wholly within the STB's exclusive jurisdiction.

NCRA's alleged market participation of purchasing CEQA is distinctly different than the challenged actions in the cases Petitioners cited. It is different than South Dakota's decision as a seller of cement to give priority to its residents (*Reeves, supra*, 447 U.S. at p. 440), Boston's decision as an employer to employ only workers who agreed to its prehire agreement (*Boston Harbor, supra*, 507 U.S. at p. 231), and California's decision to purchase vehicles with high fuel-efficiency standards for its fleets (*Engine Manufacturers, supra*, 498 F.3d at p. 1043). In those cases, the states were acting as other private actors in the same marketplace were allowed to act. Private actors in the rail marketplace cannot subject rail operations to CEQA preclearance requirements.

Petitioners analogize state agencies' obligation to conduct CEQA review to private entities' choice to consider the environment before making a purchasing decision. (AOB at pp. 45–46.) While environmental concerns are a legitimate business factor considered by private parties, and NCRA can consider the environment, that fact alone does not convert "the State's environmental policy" (AOB at p. 44) into a proprietary act. Petitioners suggest that *Emerson v. Kansas City Southern Ry. Co.* (10th Cir. 2007) 503 F.3d 1126, shows the ICCTA does not preempt a rail carrier's environmental liability under state law and therefore it would be prudent for NCRA to consider the environment. (AOB at p. 46.) *Emerson* does not concern state environmental claims, it addresses tort law. (*Emerson*, *supra*, 503 F.3d at pp. 1128, 1131 [state tort claim not preempted by ICCTA because it had "no pre-approval component" and "the applicable remedy under state law would not deny the Railroad the ability to operate or to proceed with STB-approved activity"].) Petitioners' observation about potential tort liability is irrelevant.

Petitioners also cite *Engine Manufacturers* as evidence that environmental considerations constitute proprietary actions protected from preemption by the market participation doctrine (AOB at pp. 40–41), but that case is distinguishable. *Engine Manufacturers* concerned whether state rules applying to certain government fleet operators mandating that they purchase vehicles with fuel efficiencies in excess of those required by the Clean Air Act were preempted by the Clean Air Act. (498 F.3d at p.1042–1043.) There, no party disputed "the market participation doctrine applies" (*id.* at p. 1043) because "[t]he Clean Air Act largely preserves the traditional role of the states in preventing air pollution" (*id.* at p. 1042) and includes an express "[r]etention of State authority" (*id.*). (See *id.* at p. 1045 [noting different statutory schemes call for different definitions of "proprietary"].) In contrast, the ICCTA contains language indicating that

Congress intended to preempt all state interference with rail transportation, whether regulatory or proprietary, including that from CEQA.

b. *Legal Requirements Are Not Market Participation*

Petitioners further claim CEQA is proprietary because the state requires public agencies to agree to perform CEQA to obtain state funds. (AOB at p. 43.) But Petitioners did not challenge NCRA when it received money from CTC nor challenge CTC for funding NCRA in 2006. The CTC is not a party to this lawsuit and the track repairs it funded have long since been completed. (See AR 19.) Instead, Petitioners have challenged NCRA's EIR that purportedly analyzes the impacts of the Line's "resumed operations," which has nothing to do with state funding. (*See id.*; App. 1:2:16–19, App. 1:63:20–25) Further the state's broad policy to require CEQA review for projects funded by the state lacks "the narrow scope" necessary to "defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." (*Cardinal Towing*, *supra*, 180 F.3d at p. 693; cf. AOB at p. 44 [admitting that the state imposes CEQA on funding contracts to impose its "environmental *policy* to assess and reduce significant environmental impacts wherever feasible" (emphasis added)].)

Petitioners' characterization of CEQA as market participation is similar to Alaska's claim that its requirement (imposed by contract) timber taken from state lands be processed in Alaska prior to export was market participation. (*South-Central Timber*, *supra*, 467 U.S. at p. 84–85.) But Alaska was not acting as a market participant because Alaska's scheme was mandatory on purchasers (*id.* at p. 95), imposed restrictions on commerce (*id.* at p. 96), and had "a substantial regulatory effect outside [the timber processing] market" (*id.* at p. 97). The same can be said of California's requirement that agencies comply with CEQA to obtain state funds, since it is mandatory on agencies, imposes restrictions on commerce (here rail

transportation), and would regulate not just NCRA, but NWPCo and any downstream supplier of rail goods and services needed for the Line. (Cf. *id.* at p. 98 [acknowledging that absent a narrowly defined market, "the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce"].) *South-Central Timber's* reminder is thus equally apt here: the market participation doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." (*Id.* at p. 97.)

c. *The Operations Agreement Recognizes ICCTA Preemption*

Petitioners alternatively argue that the proprietary action at issue is NCRA's Operations Agreement with NWPCo. The Operations Agreement stated that it was conditioned upon NCRA "having complied with the [CEQA] *as it may apply to this transaction.*" (AR 6731 [emphasis added].) This clause refers to the potential application of CEQA to the NCRA's entry into the Operations Agreement itself. Whether CEQA applied to NCRA's entry into the Operations Agreement is now irrelevant. NCRA did not perform CEQA review for the transaction, and no party challenged NCRA's approval of the Operations Agreement in 2006.

Further, the Operations Agreement explicitly recognizes ICCTA preemption. NWPCo agreed to comply with "any and all requirements imposed by federal or state statutes, or by ordinances, orders or regulations or any government body having jurisdiction . . . *subject to such exemptions from jurisdiction as may be set forth in the Interstate Commerce Commission Termination Act of 1995, 49 USC 10500 et seq.*" (AR 6744 [emphasis added].) The Operations Agreement also states "[n]othing herein shall diminish by this 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." (*Id.*) No provision of the Operations Agreement indicates NCRA used or planned to use CEQA as part of its decision to select NWPCo as the operator of the Line or to impose conditions on NWPCo's operations and maintenance obligations.

In sum, CEQA is regulation not market participation.

3. Even If Environmental Review Is Proprietary, Third Party Litigation Is Regulatory

Even if, as Petitioners claim, a state agency's choice to comply with CEQA can be viewed as "proprietary" and preparing the EIR a component of this proprietary action (AOB at pp. 47–49), CEQA's standing provisions, which allow any member of the public to bring a writ proceeding "challenging the adequacy of the review under CEQA is not part of this proprietary action." (*HSRA*, *supra*, 2014 WL 7149612, at *10 [quotation marks omitted].) This is true for at least two reasons.

First, as the STB correctly noted, "when a state invokes the market participation doctrine, it usually does so 'defensively' to protect its actions from federal preemption." (*Id.*; see Opinion at p. 31.) When third-party petitioners claim to have standing to bring a CEQA lawsuit based on the market participation doctrine, however, "[p]etitioners seek to stand the market participation doctrine on its head and use it to avoid the preemptive effect of a federal statute the state entity is seeking to invoke." (Opinion at p. 31.) Such a use is "antithetical to the purpose underlying the doctrine." (*Id.*)

Second, there is an irreconcilable conflict between invoking the market participation doctrine to insulate CEQA from preemption on the claim that CEQA is proprietary, but then invoking CEQA's public interest standing for the ability to sue the NCRA and NWPCo for allegedly violating CEQA. Public interest standing exists solely *because* CEQA is

regulatory. (*Save the Plastic Bag Coalition, supra*, 52 Cal.4th at p. 166.) As this Court has explained, "where the question is one of *public right* and the object of the mandamus is to procure the *enforcement of a public duty*, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." (*Id.* (emphasis added) (quotation marks omitted); see *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 914 ("*Rialto*") [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*" (emphasis added) (citations and quotation marks omitted).].)

California Code of Civil Procedure section 1021.5 underscores the regulatory role of public interest standing. "Section 1021.5 codifies the private attorney general doctrine" and "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions." (*Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg* (2012) 206 Cal.App.4th 988, 992.) The purpose of section 1021.5 is to compensate "all litigants and attorneys who step forward to engage in public interest litigation when there are insufficient financial incentives" to do so. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1211.) Successful petitioners with public interest standing in CEQA cases are awarded attorneys' fees under section 1021.5 based the fact that by enforcing CEQA, petitioners conferred a significant benefit on a large segment of the public. (See, e.g., *City of Maywood v. L.A. Unified Sch. Dist.* (2012) 208 Cal.App.4th 362; *Healdsburg Citizens for Sustainable Solutions, supra*, 206 Cal.App.4th 988; *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852.)

Since the market participation doctrine can be invoked only when the state acts as a market participant with no interest in setting policy, i.e., when a state seeks to secure services it needs and does not attempt to protect society as a whole by regulating others (*Cardinal Towing*, *supra*, 180 F.3d at p. 691), that doctrine does not support allowing citizens to act as regulators by bringing CEQA lawsuits (see, e.g., *Rialto*, *supra*, 208 Cal.App.4th at p. 914). Petitioners' legal action here is the most eloquent rebuttal to their attempt to invoke the market participation exception.

The *Grupp* cases highlight the conflict between invoking standing under a private attorney general theory and invoking standing to assert the market participation doctrine. The *Grupp* cases concern a third party (Grupp) filing state law claims alleging that DHL improperly billed various states it had contracted with to provide courier services. (See *DHL Express (USA), Inc. v. State, ex. rel. Grupp* (Fla. Dist. Ct. App. 2011) 60 So.3d 426; *State of N.Y. ex rel. Grupp v. DHL Express (USA), Inc.* (2012) 19 N.Y.3d 278; *Grupp v. DHL Express (USA), Inc.* (2014) 170 Cal.Rptr.3d 349, rev. granted July 30, 2014, 329 P.3d 192.[6]) Grupp had standing to bring false claims act litigation against DHL based solely on private attorney general provisions contained in state false claims acts. (*Id.*) Private attorney general provisions, like public interest standing, allow citizens to step into the shoes of the attorney general to enforce the law.

In each of the *Grupp* cases, the courts concluded that Grupp could not assert the market participation doctrine because to the extent Grupp had

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[6] After *Atherton* cited *Grupp*, this Court granted review. (See *Grupp v. DHL Express* (2014) 329 P.3d 192 [granting review based in part on *PAC Anchor*, *supra*, 59 Cal.4th 772, which considers an action under California's unfair competition law based on a trucking company's alleged violation of state labor and insurance laws].) We cite *Grupp* here only to provide a complete response to Petitioners' cite of *Atherton* in footnote 5 on page 48 of their brief.

standing, that standing came from state false claims acts, i.e., regulation, and Grupp's attempt to enforce that regulation was not market participation. (See, e.g., *DHL Express (USA), Inc.*, *supra*, 60 So.3d at p. 429 [Florida "act[ed] as a regulator in authorizing suits [by the public] under the False Claims Act."]; *State of N.Y.*, *supra*, 19 N.Y.3d at p. 286 ["[P]laintiff's reliance on the [False Claims Act,] which establishes public policy goals and is thus regulatory in nature, renders the market participant exception inapplicable."] Even though Florida, New York, and California may have acted as market participants when contracting with DHL, and may have been able to bring breach of contract suits against DHL based on the false fuel surcharges, Grupp was acting as a regulator, attempting to enforce broad state policies, and thus lacked standing to invoke the market participation doctrine.

Similar to Grupp, Petitioners have standing to assert CEQA claims against NCRA and NWPCO only under the public interest exception. (See App. 1:2–3, ¶ 2 [standing assertion in petition based on public interest], App. 1:52, ¶ 58 [same].) Accordingly, even if NCRA or NWPCO acted as market participants in procuring environmental review for railroad facilities or operations, FOER and CATs did not. FOER and CATs act only as self-appointed regulators policing NCRA's and NWPCO's alleged non-compliance with this state's broad environmental policy goals embodied in CEQA. The inherently regulatory of this litigation defeats a claim that the litigation is market participation.

Based on *Engine Manufacturers*, Petitioners argue that "enforcement provisions" alone do not transform proprietary to regulatory action. (AOB at p. 48.) But the enforcement provisions in *Engine Manufacturers* are not akin to CEQA's private attorney general provision, as it was unclear whether the enforcement provisions even applied to government agencies that failed to follow the rules regarding procurement of vehicles meeting

certain requirements. (*Engine Manufacturers*, *supra*, 498 F.3d at p. 1048.) Further, the enforcement mechanism in *Engine Manufacturers* could only be enforced by a party in the applicable market (the market to procure vehicles for fleets). (*Id.*) Citizen suits, however, are enforceable against the government and can be brought by any person even if they are not part of the market transaction, reflecting their regulatory nature. As such, they are not market participation.

### E. Neither NCRA Nor NWPCo Voluntarily Agreed To Waive ICCTA Preemption

Neither NWPCo nor NCRA voluntarily agreed to waive ICCTA preemption. NWPCo has consistently asserted the ICCTA preempts state environmental review of its operations. (See, e.g., App. 2:376:27–377:4 [motion to strike Petitioners' claims due to preemption].) NCRA did not voluntarily agree to waive ICCTA preemption for rail operations. (See Opinion at p. 25.) As Petitioners have stated more than once, "California has exercised its broad sovereign authority over public agencies by *requiring* them to comply with CEQA before carrying out public projects." (AOB at pp. 28–29 [emphasis added].) That NCRA believed it was legally required to comply with this generally applicable regulatory regime defeats any notion that the NCRA was acting voluntarily when it prepared an EIR. (See, e.g., AR 4741 [NCRA 2002 report states that "NCRA, as a state created railroad authority, is *required* to comply with the provisions of CEQA prior to its decisions concerning the carrying out or approving a project (emphasis added).]; AR 6315 [same].) Nor does NCRA's mistaken belief waive its right to claim CEQA is preempted. (See *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 180–181 [city's preparation of an EIR for a project did not waive its right to claim the project was categorically exempt from CEQA in later litigation].)

Even if NCRA promised the CTC it would was going to prepare an EIR, or NWPCo allowed the NCRA to include a clause permitting the NCRA to consider CEQA compliance before entering into the Operations Agreement, those promises do not indicate NCRA voluntarily agreed to be sued by Petitioners because third parties generally have no standing to sue to enforce voluntary contracts. (See, e.g., *Jenkins v. JPMorgan Chase Bank, NA* (2013) 216 Cal.App.4th 497, 515 ["an unrelated third party . . . lacks standing to enforce any agreements"].) Moreover, to the extent contracts exist, Petitioners have disavowed any effort to enforce them. (Opinion at p. 24.)

The conclusion that Petitioners lack standing to enforce an alleged voluntary commitment here is not necessarily contrary to *Atherton. Atherton* concerned the HSRA's alleged voluntary agreement with the public (made through Proposition 1A) to be regulated by CEQA when determining the alignment for a brand new, state-run rail system. (228 Cal.App.4th at pp. 339–340.) Accordingly, the public, as a party to the agreement, may have the right to enforce it. NCRA made no similar agreement with the public.

Even assuming Petitioners had standing to enforce the NCRA's alleged voluntary agreements to comply with CEQA, those agreements would remain preempted by the ICCTA under the facts of this case. As discussed above, the outcome of CEQA review or litigation would be the regulation of NWPCo's rail operations, which would unreasonably interfere with the STB's jurisdiction. Where voluntary commitments interfere with STB's jurisdiction, they are preempted by the ICCTA. (See, e.g., *HSRA*, 2014 WL 7149612, at *8 [CEQA's remedies would unreasonably interference with STB's jurisdiction]; see *Blanchard Sec. Co. v. Rahway Valley R.R. Co.* (3d Cir. 2006) 191 Fed. Appx. 98, 100 [holding enforcement of voluntary agreement giving plaintiff an easement over rail

right-of-way "unquestionably would interfere with interstate commerce" and thus was preempted]; cf. *Atherton, supra*, 228 Cal.App.4th at p. 333 [acknowledging that while CEQA could unreasonably interfere with existing rail operations, it is "less clear and certainly subject to dispute whether requiring review under CEQA before deciding on the alignment of [a new rail line] has a comparable potential effect to deny the railroad the ability to conduct its operations and activities"].)

Because this litigation seeks to interfere with NWPCo's rail operations, it is distinguishable from a rail carrier's contracts to pay for the relocation of its line serving a mine if the mine owner determines that alignment interferes with mining operations. (*PCS Phosphate Co., Inc. v. Norfolk Southern Corp.* (4th Cir. 2009) 559 F.3d 212, 215.) There, the ICCTA did not preempt the rail carrier's contracts because "any interference" it caused was "not unreasonable," as the rail carrier "received the benefit of the agreements for over 40 years, and the agreements explicitly stated that the 'relocation will not affect the ability of [the rail carrier] to comply with its legal obligation to serve any existing customer on its line.'" (*Id.* at pp. 221–222.)

Unlike the facts in *PCS Phosphate*, the facts here present more than an imagined interference with the STB's jurisdiction. Although the STB authorized NCRA's and NWPCo's repair, maintenance, and operations of the Line (AR 8206–8207), the Line has been embroiled in CEQA litigation for several years, and will not be clear of litigation until this Court decides the case. If Petitioners were successful, they could then seek to permanently or temporarily halt NWPCo's STB-authorized operations, creating a direct conflict with federal regulation and interfering with interstate commerce.

## V.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court find the ICCTA preempts CEQA in this case.

Dated: April 10, 2015

Cox, Castle & Nicholson LLP

By: _____
Andrew B. Sabey
Attorneys for Northwestern Pacific Railroad Company

Neary and O'Brien

By: _____
Christopher Neary
Attorneys for North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority

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

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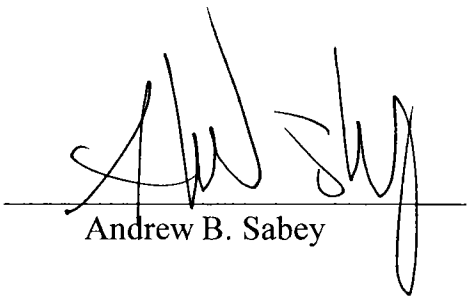

Andrew B. Sabey

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

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**ANSWER BRIEF**

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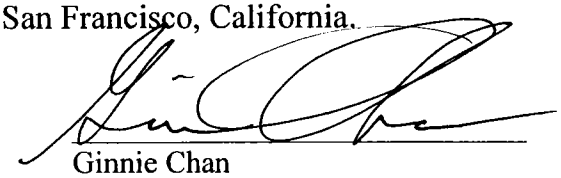

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| **Attorneys for Petitioners & Appellants**<br>**Friends of the Eel River**<br>Ellison Folk / Amy J. Bricker<br>Edward T. Schexnayder<br>Shute, Mihaly & Weinberger LLP<br>396 Hayes Street<br>San Francisco, California 94102<br>*Telephone: 415-552-7272*<br>*Facsimile: 415-552-5816*<br>*E-mail:* folk@smwlaw.com<br>bricker@smwlaw.com<br>schexnayder@smwlaw.com | **Attorneys for Petitioners & Appellants**<br>**Californians for Alternatives to Toxics**<br>Sharon E. Duggan / Shanna Foley<br>Law Offices of Sharon E. Duggan<br>336 Adeline Street<br>Oakland, California 94607<br>*Telephone: 510-271-0825*<br>*Facsimile: 510-271-0829*<br>*E-mail:* foxsduggan@aol.com |
| **Attorneys for Petitioners & Appellants**<br>**Californians for Alternatives to Toxics**<br>Helen H. Kang<br>Environment Law & Justice Clinic<br>Golden Gate University School of Law<br>536 Mission Street<br>San Francisco, California 94105<br>*Telephone: 415-442-6647*<br>*Facsimile: 415-896-2450*<br>*E-mail:* hkang@ggu.edu | **Attorneys for Petitioners & Appellants**<br>**Californians for Alternatives to Toxics**<br>William Leonard Verick<br>424 First Street<br>Eureka, California 95501<br>*Telephone: 707-268-8900*<br>*Facsimile: 707-268-8901*<br>*E-mail:* wverick@igc.org |
| **Attorneys for Petitioners & Appellants**<br>**Californians for Alternatives to Toxics**<br>Deborah A. Sivas<br>Environment Law Clinic<br>Mills Legal Clinic at Stanford Law School<br>559 Nathan Abbott Way<br>Stanford, California 94305<br>*Telephone: 650-723-0325*<br>*Facsimile: 650-723-4426*<br>*E-mail:* dsivas@stanford.edu | **Attorneys for Real Party in Interest**<br>**Northwestern Pacific Railroad Company**<br>Douglas H. Bosco<br>Law Office of Douglas H. Bosco<br>37 Old Courthouse Square, Suite 200<br>Santa Rosa, California 95404<br>*E-mail:* dbosco@boscolaw.com |