Case No. S222472

IN THE SUPREME COURT OF CALIFORNIA

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

v.

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

Northwestern Pacific Railroad Company
Real Party in Interest and Respondent

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

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

PLAINTIFFS' REPLY BRIEF

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INTRODUCTION

The ICCTA does not preclude a state from managing its own internal affairs merely because they involve rail transportation. As the U.S. Supreme Court has explained, to hold otherwise would impermissibly intrude on how the state constitutes itself and conducts its business:

> [W]hen a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government [are often] indistinguishable from choices that express what the government wishes to do with the authority and resources it can command. . . . [P]reempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that we think it highly unlikely that Congress intended to set off on such uncertain adventures.

(*Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 134.)

California has the sovereign right to determine the process for deciding whether and how the State spends funds to rehabilitate and reopen a public railroad. Here, California entered the rail market but decided not to exempt its subsidiary rail agency (NCRA) from complying with CEQA and other state laws before reopening the public rail line. Defendants identify no provision in the ICCTA or its legislative history that shows an intent to preempt such fundamental state processes. In fact, Congress enacted the ICCTA to facilitate unconstrained decisionmaking by entities in the rail market. NCRA's compliance with CEQA is no more regulation of rail

transportation than NWPCo.'s own internal rules for deciding to bid on a contract to provide freight service on the line.

Because many relevant facts do not fit their preferred legal framework, Defendants change or ignore them. Most notably, Defendants portray the rail project as a private one, rather than one conceived of, owned, and managed by NCRA. Defendants pretend that NCRA mistakenly imposed CEQA compliance on NWPCo. as an act of unauthorized regulation. But NWPCo. is a mere vendor that NCRA hired to provide rail service. The vehicle for this principal-agent relationship is a lease agreement, which NWPCo. and NCRA explicitly conditioned upon NCRA's compliance with CEQA before reopening the line. The Court should reject Defendants' transparent ruse to turn NWPCo. into a regulated party.

Importantly, CEQA is a key element of how California governs the decisionmaking of its subdivisions, which is a fundamental aspect of a state's sovereignty. For that reason, U.S. Supreme Court precedent dictates that California may govern NCRA as it sees fit absent an unmistakably clear and specific congressional statement to the contrary. There is no such clear statement in the ICCTA or its legislative history. Although they do their best to ignore it, this precedent defeats Defendants' preemption defense.

Similarly, the U.S. Supreme Court has long held that where federal law preempts only state regulation, a state may impose restrictions on its proprietary actions when it acts as a market participant. Because reopening the public rail line was an ownership and management decision, the State was entitled to condition NCRA's actions on compliance with CEQA. Likewise, Defendants' voluntary commitment to CEQA compliance as a condition of funding the repair and reopening of the rail line was not a regulatory action within the ICCTA's purview.

Contrary to Defendants' assertions, Plaintiffs' suits do not convert these internal-governance and proprietary actions into preempted regulation. Citizen enforcement is one of the State's chosen mechanisms for ensuring compliance with CEQA. The State can choose its enforcement methods just as it can choose to require CEQA compliance in the first place.

For all of these reasons, the Court should hold that NCRA's obligation to comply with CEQA is not preempted.

ARGUMENT

I. The ICCTA Does Not Preempt NCRA's Obligation to Comply with CEQA.

A. The States Have Historically Retained Their Police Powers Over Railroads.

Defendants' preemption defense relies heavily on the assertion that the federal government has long occupied the field of rail regulation and

that the presumption against preemption does not apply. (Answer Brief at page 32 ("AB:32").) The history of federal regulation of rail contradicts Defendants' claims. Before 1887, railroads were chartered under state law and regulated under historic state police powers to protect health, safety and welfare. (Smith, *Tailor-Made: State Regulation at the Periphery of Federal Law* (2009) 36 Transp. L.J. 335, 338 [citing Ely, Jr. (2001) Railroads and American Law].) Congress enacted the Interstate Commerce Act in 1887 to address the growing patchwork of state *economic* regulation (e.g., making rebates and pooling unlawful, requiring railroads to publish fares, and requiring fees to be "reasonable and just"). (*Id.* at 339.) Over time, Congress gradually expanded the economic regulatory powers of the Interstate Commerce Commission ("ICC") in response to perceived industry corruption and rate-fixing. (*Id.* at 339-40; Sen. Rep. No. 104-176, 1st Sess., p. 2 (1995).) Nonetheless, for nearly a century after the passage of the Interstate Commerce Act, states still retained significant jurisdiction over specific rates and tariffs. (See *Indianapolis Power & Light Co. v. ICC* (7th Cir. 1982) 687 F.2d 1098, 1100.) In addition to sharing economic regulation with the states, the federal statute did nothing to impinge on state laws that applied generally to all entities, including railroads.

It was not until the passage of the ICCTA in 1995 that Congress eliminated the states' role in economic regulation altogether and further curtailed federal regulatory authority. (Plaintiffs' Opening Brief at pages

18-19 ("OB:18-19").) Like its predecessor statutes, however, the ICCTA does not oust or mention traditional state police powers, even when those powers touch or concern rail. (*Florida East Coast Ry. Co. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324, 1328-29 [holding that the ICCTA does not preempt zoning, and noting no history of federal dominance over local land use and health and safety decisions].) To the contrary, Congress intended that the "exclusivity [of federal jurisdiction] is related to remedies with respect to rail regulation—not State and Federal law generally." (H.R. Conf. Rep. No. 104-422, 1st Sess. p. 167 (1995).) As Plaintiffs explained, the ICCTA's statutory scheme demonstrates that Congress was concerned with uniform *economic* regulation and deregulation of the rail industry. (OB:17-21; see also H.R. Rep. No. 104-311, 1st Sess., pp. 95-96 (1995) [ICCTA establishes "complete pre-emption of State *economic* regulation of railroads," but the "States retain the police powers reserved by the Constitution" (emphasis added)].) The legislative history cited by Defendants supports this position. (See AB:21 [citing H.R. Conf. Rep. No. 104-311, pp. 95-96] [ICCTA's "Federal scheme of *economic regulation and deregulation* is intended to encompass all *such* regulation" (emphasis added)].)

As this history demonstrates, Defendants are incorrect when they contend that the presumption against preemption is not triggered when the states regulate in the rail field. (AB:16, 31-32 [relying on *Norfolk Southern*

Ry. Co. v. City of Alexandria (4th Cir. 2010) 608 F.3d 150].) Defendants' argument stems from *United States v. Locke* (2000) 529 U.S. 89, 108, where the Supreme Court applied no presumption against preemption because the federal government has regulated *maritime commerce* "from the earliest days of the Republic." However, courts have declined to extend *Locke*'s holding to areas where there is no similar longstanding and primary history of federal regulation. (See *Union Pacific Railroad Co. v. Cal. Public Utilities Com.* (9th Cir. 2003) 346 F.3d 851, 864, fn. 17 [observing that rail safety was primarily regulated by the states before 1970]; *Florida East Coast Ry. Co.*, 266 F.3d at 1329 [distinguishing *Locke* for ICCTA preemption].)[1] And Defendants overlook numerous federal circuit and sister state cases that continue to read 49 U.S.C. section 10501, subdivision (b) with the presumption that generally applicable state laws will withstand ICCTA preemption. (See *New Orleans & Gulf Coast Ry. Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 334; *Florida East Coast*, *supra*, 266 F.3d at p. 1329; *Tyrrell v. Norfolk Southern Ry. Co.* (6th Cir. 2001) 248 F.3d 517, 522; *Girard v. Youngstown Belt Ry. Co.* (2012) 134 Ohio St.3d 79, 83; *In re*

[1] Nor does *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 318-19 (AB:12), support the notion that Congress displaced state police power affecting railroads. *Kalo* discusses the long history of federal *economic* regulation over interstate common carrier rates and services and explains that state efforts to regulate such commerce may not conflict with federal authority over the same activity.

Vermont Railway (2000) 171 Vt. 496, 499-500; but see *Scheiding v. General Motors Corp.* (2000) 22 Cal.4th 471, 481 [no presumption against preemption under the Boiler Inspection Act where Congress had occupied the field of locomotive equipment safety].)

B. The ICCTA's Preemption Clause Does Not Apply to a State Agency's Internal Decisionmaking Process.

Regardless of the whether the Court applies the presumption against preemption, Defendants' claims fail for a more fundamental reason. The ICCTA does not preempt a state's internal decisionmaking regarding the expenditure of public funds and use of public property. To avoid this inescapable fact, Defendants resort to fiction: "[a]t issue is California's ability to regulate the *rail operations of a private entity*, NWPCo." (AB:31.) That fiction permeates every corner of Defendants' brief (see AB:1-2, 10, 14, 26, 35), but the undisputed facts show that this case is not about the regulation of a private rail operator.

State law charges NCRA with ownership and management of the line, which the Federal Railroad Administration had closed for safety reasons. (AR:9:4592-95.)[2] In reopening a portion of that line, NCRA could have acted either as the rail operator (as it had previously) or contracted for private rail services. (Gov. Code §§ 93001, 93010.) Under either scenario,

[2] Citations to the Administrative Record appear as "AR:[volume]:[page]."

however, NCRA was responsible for the cleanup, repair, and reopening of the line. (AR:13:6734, 6738-40; App:8:77b:2027-51.)[3]

Before it carries out this project, NCRA must comply with CEQA, which generally governs all public-agency decisionmaking in California. (Pub. Resources Code §§ 21001.1; 21080(a); Cal. Code Regs., tit. 14 (CEQA "Guidelines"), § 15004, subd. (b)(2).) As Defendants freely admit, there was no private application here. (AB:8; see also App:9:83:2335 [NCRA acted "on its own behalf" to fund its "mission to deliver freight service"].) NWPCo. is merely NCRA's vendor, nothing more. (See, e.g., AB:4; App:8:2195-97 [NWPCo. is "franchisee" for operations "for so long as it [is] in contract with the NCRA"].) As NCRA explained in response to questions about NWPCo.'s role in the project's CEQA compliance, "NCRA is legally responsible for execution and enforcement of all mitigation measures proposed in the [Final EIR]." (AR:1:522-25.) NWPCo.'s obligation to comply with those mitigation measures could only arise from a contract with NCRA. (*Ibid.*) NCRA did not *regulate* NWPCo. through CEQA and cannot now evade its public obligations by hiding behind its contracted private operator.

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[3] Citations to Plaintiffs' Consolidated Appendix appear as "App:[volume]:[tab]:[page]."

For this reason, Defendants' reliance on numerous cases for the proposition that the ICCTA broadly preempts all environmental laws, including CEQA, is misplaced. All of these cases involving local *permitting* requirements being imposed on rail entities. (AB:22-24 [citing, *inter alia*, *City of Auburn v. United States* (9th Cir. 1998) 154 F.3d 1025, 1028-30 [involving "state and local permit requirements"]; *Green Mountain Railroad Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 643 ["railroad [was] restrained from development until a permit is issued"]; *Norfolk*, *supra*, 608 F.3d at p. 160 [city "requir[ed] a rail carrier to obtain a locally issued permit before conducting rail operations"].)[4]

In contrast to *Auburn* and its progeny, CEQA review here was not part of a local pre-construction permit process; it was part of a public agency's internal process for deciding whether, how and with whom to proceed with reopening the rail line. The California Legislature enacted CEQA to place environmental considerations at the forefront of agency

[4] Moreover, *Auburn* was a case of first impression, decided shortly after passage of the ICCTA. It contains an incomplete discussion of the ICCTA's language, structure and purpose. Subsequent courts have been more careful in their reasoning and have in many cases come to a different conclusion. (See *Town of Atherton v. Cal. High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 333 ["federal cases subsequent to *City of Auburn* have found that ICCTA does not preempt all state and local environmental laws"]; *Fayus Enterprises v. BNSF Ry. Co.* (D.C. Cir. 2010) 602 F.3d 444, 451 [*Auburn* seemingly "appl[ied] a broader preemption rule" than subsequent cases].)

decisionmaking. The statute's purpose is not to regulate rail, but rather, to inform agency actions by keeping environmental considerations in mind. (Pub. Resources Code §§ 21001(d); 21001.1.) Contrary to Defendants' assertions, CEQA cannot be "used to deny NCRA" the ability to proceed with a lawful decision to conduct rail operations (AB:18), but only guides that decision in the first instance. (See, e.g., *California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 982 [agency may proceed with any project, despite environmental consequences, so long as it has considered relevant issues and made requisite CEQA findings].) Because NCRA is an arm of the state, this process is self-imposed, not regulation of rail transportation preempted by the ICCTA.[5]

The unpublished district court opinion in *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D. Cal. 2002) 2002 WL 34681621, does not yield a different result. There, the court never considered a public rail carrier's independent obligation to comply with CEQA. Instead, it held that permitting and environmental review

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[5] Defendants' discussion of *Hilton v. South Carolina Public Rys. Com.* (1991) 502 U.S. 197, and *State of California v. Taylor* (1957) 353 U.S. 553, is irrelevant. (AB:25-26.) Those cases stand for the unremarkable and uncontested proposition that both public and private railroads must comply with federal law. Plaintiffs agree that public railroads are subject to federal requirements. The central question here is whether the ICCTA preempts additional requirements that a state places on a public railroad. In particular, state rules governing internal agency decisionmaking are outside of the ICCTA's scope.

requirements could not be imposed on the rail carrier by another agency. To the extent that *City of Encinitas* holds that the ICCTA preempts a California agency's obligation to comply with CEQA before embarking on a public rail project, it is wrongly decided and does not bind this Court.

The STB's declaratory order regarding California's high-speed-rail project (see AB:26) also does not alter the legal landscape or bind this Court. (Opinion at pp. 18-19.) Further, the order warrants no deference for numerous reasons. First, the order is not final—the STB is reconsidering and two federal Circuits are reviewing it.[6] (*Utility Air Regulatory Group v. EPA* (D.C. Cir. 2014) 744 F.3d 741, 746 ["a pending petition for [agency] rehearing . . . render[s] the underlying agency action nonfinal" (quotation omitted)]; *Assn. of Internat. Automobile Manufacturers, Inc. v. Comr., Mass. Dept. of Environmental Protection* (1st Cir. 2000) 208 F.3d 1, 6 [as a non-final agency action, EPA opinion letter deserves no deference].) Even if it were final, without a clear preemptive statement from Congress, federal agencies cannot interpret federal law to preempt a state's internal governmental actions. (OB:34 [citing *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) 531 U.S. 159, 172-74]; see

[6] (See STB Docket No. FD 35861, available at http://www.stb.dot.gov/Decisions/readingroom.nsf/(search-75.149.43.241-30986)?OpenView&Count=5000.)

also *City of Joliet, Ill. v. New West, L.P.* (7th Cir. 2009) 562 F.3d 830, 836.) Moreover, as the STB recognized, the order did not resolve a key issue in this case: "[w]hether CEQA compliance is required before the Authority is allowed to obtain or use [State] funding is a question of state law for a state court to decide." (*Cal. High-Speed Rail Authority – Petition for Declaratory Order* (Dec. 12, 2014) STB Docket No. FD 35861, 2014 WL 7149612 at *11 ("*CHSRA*").)

And finally, the order predominantly regurgitates the Opinion's analysis, which this Court is reviewing. Because the STB has no special expertise regarding either California's internal decisionmaking process or the legal doctrines at play here, this Court should exercise its independent judgment over these issues. (See *Wyeth v. Levine* (2009) 555 U.S. 555, 577 [declining to defer to FDA position on preemption of state law failure-to-warn claims].)

C. CEQA Compliance Here Does Not Interfere with STB Jurisdiction or Frustrate the ICCTA's Purpose.

Defendants also claim that once the STB approved a Notice for Exemption for NWPCo.'s operator status, NWPCo. was authorized to operate the rail line, and that any further conditions would contravene the Board's exclusive jurisdiction. (AB:5-6, 18.) However, Defendants acknowledge that the line could not reopen until NCRA repaired the damaged and dilapidated rail infrastructure. (AB:6.) Such repair required

State funds, which were also conditioned on CEQA review. (See, e.g., AR:9:4638, 13:6739-40, 6801-05; App:8:77b:2055, 2068 [NWPCo. Business Plan for CTC stating operations contingent upon "environmental clearance" and TCRP-authorized funding for repairs].) NCRA had used CEQA categorical exemptions for some routine maintenance work, but devoted large sections of its EIR to evaluate impacts from major repair and rehabilitation projects and other improvements to the line. (See, e.g., AR 5:1959-60, 2063-83, 2091-94, 2185-2201, 2267-75, 2317-22; see also AR:16:7997-8001 [describing difference between work covered by NCRA's exemptions and the EIR].)

Contrary to Defendants' assertions (AB:24), courts have held the STB has *no jurisdiction* over track improvements and rehabilitation within existing rail right-of-ways like NCRA's line. (*Lee's Summit, MO v. Surface Transportation Bd.* (D.C. Cir. 2000) 231 F.3d 39, 42, fn. 3 [STB lacks jurisdiction over line rehabilitation]; *Detroit/Wayne County Port Authority v. ICC* (D.C. Cir. 1995) 59 F.3d 1314, 1317-18 [jurisdiction does not extend to improvements of existing track]; see 49 U.S.C. § 10901 [describing the STB's jurisdiction over construction activities].) Instead, the Board has jurisdiction over construction of *new track in new service territory*, an issue not implicated by this case. (*Detroit/Wayne County*, 59 F.3d at 1317.) This authority undermines Defendants' consistent attempt to transform the Board's jurisdiction over new track construction into

jurisdiction over improvements to existing track, like the repairs considered in NCRA's EIR. (See AB:31.)

The facts of this case also demonstrate that CEQA compliance here would not interfere with the STB's jurisdiction over rail transportation.[7] Contrary to Defendants' claim, Plaintiffs' suit is not aimed at "controlling NWPCo's operations." (AB:29.) Plaintiffs seek only standard CEQA remedies, which include a complete evaluation of significant environmental impacts and ways to reduce or avoid such impacts and may, at the court's discretion, include an injunction if needed to ensure full CEQA compliance. (Pub. Resources Code § 21168.9.) CEQA remedies can never be used to deny a project or mandate any particular outcome. (*Ibid.*) Moreover, as Defendants previously admitted, CEQA's obligations fall on NCRA. (AR:1:522-25; AB:4.)

While CEQA remedies could potentially delay NWPCo.'s operations, any such delay was accepted as part of the timetable that NWPCo. agreed to as a condition of its operator status.[8] When NWPCo. submitted its Notice of Exemption to the STB, it acknowledged that it

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[7] As Plaintiffs explained (OB:52), the Court need not reach Defendants' "as applied" preemption argument should it find for Plaintiffs under *Nixon* or the market participant doctrine.

[8] Defendants "were proceeding at their own risk when they relied on the contested project approvals during the pendency of this litigation" to start operations. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1203.)

would not become a rail carrier until it reached agreement with NCRA and SMART regarding NWPCo's operating rights. (AR:16:8106, 8117.) STB accepted that NWPCo. could not become the operator until the terms were satisfied. (AR:16:8206-07.) NWPCo.'s Lease agreement with NCRA was conditioned upon CEQA compliance and SMART's approval. (AR:13:6731.) And SMART—the owner of the only currently operable portion of the line—would not agree to NWPCo.'s operations until NCRA satisfied the CEQA compliance term by preparing an EIR. (AR:1:306, 4:1356, 8:4473, 4498, 20:10695-96, 21:10969; App:13:3690, App:14:3830.) Thus, NWPCo. has no STB-sanctioned operations unless and until NCRA has completed a legally adequate EIR.

Even if NWPCo.'s current operations had been authorized by the STB (which they were not), the STB has exempted those operations from its oversight, finding that the operation's limited scope does not implicate "rail transportation policy." (AR:16:8540-41; see also AR:1:1 (limited start-up operations), 13:6787, 20:10695-96 [only 62-mile portion of 316-mile rail line is operable].) Thus, any delay of these operations would not frustrate Congress' purpose of establishing uniform regulation of rail transportation.

While the ICCTA confers jurisdiction to the STB, nothing in that statute suggests that California loses *its* jurisdiction over public spending and NCRA. California retains authority to require that its public agencies

comply with California's bedrock environmental law before spending taxpayer funds or using public property. Moreover, Defendants and the STB fully understood that CEQA compliance was necessary to reopen the line. If following that environmental review, NCRA decided not to proceed with the project, the STB would have jurisdiction over abandonment of the line. (49 U.S.C. § 10501, subd. (b)(2).) Until then, however, a CEQA suit enforcing state law does not contravene federal jurisdiction or frustrate Congressional objectives. Indeed, in the present case, without such compliance, there could be no rail operations at all.

II. Defendants Cannot Avoid *Nixon*, Which Disposes of Their Preemption Claim.

Federal legislation "threatening to trench on the States' arrangements for conducting their own governments should be . . . read in a way that preserves a State's chosen disposition of its own power" unless there is an "unmistakably clear" statement that Congress intended to preempt state self-governance. (*Nixon*, *supra*, 541 U.S. at pp. 140-41 [citing *Gregory v. Ashcroft* (1991) 501 U.S. 452, 460].) Yet Defendants do not even attempt to find a clear statement in the ICCTA that Congress intended to preempt how states govern the internal processes of public rail agencies. Without the required clear statement, Defendants' attempts to avoid the *Gregory-Nixon* line of cases fail.

A. Even When Public Agencies Carry Out Rail Activities, California Retains Its Sovereign Interest in Governing Its Agencies and Resources.

Defendants try to distinguish *Nixon* and *Gregory* by arguing that the issue here is not California's governance of its publicly-run rail authority, but rather the use of CEQA to "regulate rail," a power "not held by the states." (AB:31.) This argument is unsound for two reasons. First, Defendants' premise is flawed. The federal government has never held exclusive authority over all matters touching interstate rail. (See Part I.A, *supra*.) Second, even if such exclusive federal authority did exist, under the *Nixon-Gregory* inquiry, courts must consider the state functions affected by federal preemption rather than focusing "exclusively on the actual conduct proscribed by Congress." (*U.S. ex rel. Long v. SCS Business & Technical Institute, Inc.* (D.C. Cir. 1999) 173 F.3d 870, 888.) Because NCRA is pursuing a public rail project, preemption would interfere with California's sovereign self-governance and the State's control of its own resources.

As previously explained, Defendants' attempt to transform this case into one of private regulation is unavailing. (See Part I.B, *supra*.) Under *Nixon*, this distinction is critical. Preempting a state's control of inferior subdivisions is fundamentally different from preempting state regulation of private parties. (*Nixon*, *supra*, 541 U.S. at p. 134; see also *Gregory*, *supra*, 501 U.S. at p. 460.) States have absolute authority to determine their subdivisions' powers "and *the manner of their exercise*." (*In re Pfahler*

(1906) 150 Cal. 71, 79 [emphasis added]; see also *In re Sanitary Bd. of East Fruitvale Sanitary Dist.* (1910) 158 Cal. 453, 457 [California "has absolute power over . . . the powers, and the liabilities of municipal and other public corporations."].) *Nixon* correctly recognizes that constraints placed on a subdivision's authority are often "indistinguishable from [a state's] choices" about how to exercise "the authority and resources it can command." (*Nixon, supra*, 541 U.S. at p. 134.) Consequently, "[w]hether and how" a state exercises its discretion in allocating resources and responsibilities to subdivisions "is a question central to state self-government." (*City of Columbus v. Ours Garage and Wrecker Service, Inc.* (2002) 536 U.S. 424, 437; see also *Antilles Cement Corp. v. Fortuno* (1st Cir. 2012) 670 F.3d 310, 324 [a government's "ability to spend . . . money as it chooses is a basic aspect of its autonomy"].) As in *Nixon* and *Gregory*, this "goes beyond an area traditionally *regulated* by the States," and reaches the core of state sovereignty. (*Gregory, supra*, 501 U.S. at p. 460 [emphasis added]; see *Nixon, supra*, 541 U.S. at pp. 133-141; Gov. Code § 54950.)

California has exercised this absolute authority over NCRA in many respects, including requiring compliance with CEQA and other public laws. (See OB:31, 36; Pub. Resources Code § 21080(a).) Thus, even with Congress's historic (though non-exclusive) regulation of rail, the ICCTA cannot preempt this suit unless Congress clearly established its intent to

supplant NCRA's obligation to comply with California law, including CEQA. Rather, to alter this balance of powers between the federal government and states through preemption, Congress "must make its intention to do so 'unmistakably clear' in the language of the statute." (*Gregory, supra*, 501 U.S. at p. 460 [quotation omitted]; see *INS v. St. Cyr* (2001) 533 U.S. 289, 299, fn. 10 [the Supreme Court's "strongest clear statement rules . . . confine Congress's power in areas in which Congress has the constitutional power to do virtually anything" (quotation omitted)]; *John v. United States* (9th Cir. 2001) 247 F.3d 1032, 1042 [conc. opn. of Tallman, J.] [observing that a "super-strong clear statement" applies to cases involving state self-governance].)

B. The ICCTA Does Not Clearly Preempt California's Sovereign Control Over Its Subdivision, NCRA.

The ICCTA lacks any clear statement preempting a state's control of its resources or governance of rail agencies like NCRA. (OB:34-37; see *Nixon, supra*, 541 U.S. at pp. 140-41.) Without the necessary clear statement, Defendants advance an unsupportable position—the mere existence of an express preemption clause indicates "Congress's 'unmistakably clear' intent" to preempt state law. (AB:32-33.) As Defendants recognize elsewhere, however, courts analyze an express preemption clause to determine the *scope* of preemption (AB:15-16); the *existence* of an express preemption clause alone is not sufficient to

demonstrate that state action is preempted. Thus, numerous cases analyze express preemption clauses yet determine that Congress *lacked* unmistakably-clear intent to displace state laws. (See *Nixon*, *supra*, 541 U.S. at pp. 129, 141 [no unmistakably clear statement despite Telecommunications Act's express preemption clause]; *City of Columbus*, *supra*, 536 U.S. at pp. 429-40 [no clear intent to preempt delegation of state regulatory power to a municipal subdivision despite FAAAA's express preemption clause]; *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 474, 485 [no sufficiently clear preemptive statement despite express preemption clause in Medical Device Act].)

South-Central Timber Development, Inc. v. Wunnicke (1984) 467 U.S. 82, the only case Defendants rely on to equate an express preemption clause with a required clear-statement, further reveals the feebleness of their argument. Defendants misstate *South-Central*. The Supreme Court had no opportunity to determine the scope of an "'expressly stated' preemption clause" (AB:33) because *preemption was never raised in that case*. Instead, the Supreme Court applied a distinct clear-statement rule that only arises in dormant commerce clause jurisprudence. (*South-Central*, 467 U.S. at 90-91.) That rule has no relevance here. (*People v. Jennings* (2010) 50 Cal.4th 616, 684 ["It is axiomatic that cases are not authority for propositions not considered." (quotation omitted)].)

Finally, the historic role the federal government has played in regulating aspects of the rail industry does not provide a basis for distinguishing this case from *Nixon*. (Contra AB:32.) Defendants overlook the similarities between *Nixon* and this case. As with interstate rail, the federal government has long held extensive regulatory authority over telecommunications. (See *Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, 700 [Congress gave the FCC "broad responsibilities to regulate all aspects of interstate communication"]; *Freeman v. Burlington Broadcasters, Inc.* (2d Cir. 2000) 204 F.3d 311, 320 [recognizing "the FCC's broad authority" over telecommunications].) Yet even against this backdrop of comprehensive federal regulation and the Telecommunications Act's express preemption of state interference with that regulation, *Nixon* held that the statute lacked sufficiently clear language to displace Missouri's sovereign control over its subdivisions desiring to enter the telecommunications market. (*Nixon, supra*, 541 U.S. at pp. 140-41.)

Despite *Nixon*'s dispositive holding, Defendants make little effort to distinguish it. In their *only* reference to *Nixon*, Defendants acknowledge its holding: a "state's ability to restrict its own delivery of telecommunications services [is] not preempted." (AB:32.) They offer no persuasive reason why California's "ability to restrict its own delivery of" rail services is any different. Like the Telecommunications Act, the ICCTA lacks any clear

statement that preempts California's ability to require NCRA to comply with CEQA. For that reason alone, CEQA is not preempted here.

III. CEQA Review Here Was a Self-Imposed Condition for a Proprietary Project, Not Regulation Subject to ICCTA Preemption.

The ICCTA also does not preempt NCRA's CEQA compliance because that conduct is part of proprietary decisionmaking for the rail line. Defendants acknowledge that absent "any express or implied indication" to the contrary, Congress does not mean to restrict a state's ability to manage its own property. (AB:33-34.) Without citation, however, Defendants proclaim that Congress intended the ICCTA to preempt state proprietary action. (AB:34.) This contention is belied by the language of the statute (49 U.S.C. section 10501(b)), as well as Defendants' repeated recognition (*e.g.*, AB:11-12, 16-17, 20-24) and voluminous case law (OB:22) stating that the ICCTA preempts only state regulation of rail transportation.[9]

In reopening the rail line, the State (through NCRA) was managing its property, including funding repairs and procuring an operator. (OB:42-

[9] Defendants attempt to distinguish *Engine Manufacturers* on the ground that no one there disputed that the market participant doctrine applies. (AB:37.) However, *Engine Manufacturers* recognized that while the Clean Air Act prevents a state "from imposing emissions standards more stringent than or otherwise different from the federal standards," such standards were not preempted where they involved state proprietary action. (*Engine Manufacturers Assn. v. South Coast Air Quality Management Dist.* (9th Cir. 2007) 498 F.3d 1031, 1043.)

47.) These proprietary State actions are not subject to ICCTA preemption. Further, CEQA compliance was a condition of voluntary agreements by both NCRA and NWPCo. Obligations in those agreements are likewise non-regulatory and not preempted.

A. The State Actions in Reopening the Rail Line, Including CEQA Compliance, Were Proprietary.

1. When Triggered by Governmental Participation in the Marketplace, CEQA Review Is Proprietary.

Defendants selectively cite CEQA provisions to argue the statute is broad and "not narrowly focused on market-oriented actions."[10] (AB:35.) But the central issue here is not whether the ICCTA preempts CEQA as a whole, but rather whether the ICCTA preempts the State's decision to require CEQA compliance as part of NCRA's procedure in leasing, restoring, and reopening the State's rail line. It does not.

Here, CEQA review was conducted under statutory provisions applicable to government-owned and financed projects and was inextricably linked to NCRA's reentry into the rail market in an environmentally sound manner. (See, e.g., Pub. Resources Code §§ 21001.1, 21102; Guidelines § 15378.) Such rules do not regulate private entities, but guide an agency's decisionmaking process in a manner that

[10] For example, Defendants cite provisions related to permits for private projects. (AB:35.) There is no permit application here. (See Part I.B, *supra*.)

serves the State's interests. It is undisputed that the ICCTA does not control such internal decisionmaking in the private sector. U.S. Supreme Court precedent dictates that, under the market participant doctrine, comparable government conduct is not preempted. (See, e.g., *Building & Constr. Trades Council v. Associated Builders & Contractors* (1993) 507 U.S. 218, 227, 231-32 ("*Boston Harbor*").)

This result does not change because CEQA is a "legislatively-imposed obligation" setting environmental policy. (AB:35; 37.) Courts have clarified that when a state is a market participant, it can impose mandatory conditions on its own proprietary activity. In *Engine Manufacturers*, *supra*, the Air District exercised quasi-legislative power to adopt rules that *mandated* public agencies and their private-contractors to purchase lower emission vehicles for their fleets. (498 F.3d at pp. 1045-46.) The court found no intent in the Clean Air Act to prohibit a state from directing its agencies to spend money in a manner that fulfilled the state's interests in reducing air pollution. (*Id.* at pp. 1046-47.) "That a state or local governmental entity may have policy goals that it seeks to further through its participation in the market does not preclude the doctrine's application." (*Id.* at p. 1046.)

Similarly here, the ICCTA evinces no Congressional purpose to prohibit California from directing NCRA to consider environmental impacts before expending State resources on the rail line. And just as the

private fleet operators with public contracts in *Engine Manufacturers* were not regulated entities (*id.* at pp. 1036, 1045), NWPCo. is simply a State "franchisee" (AB:4), given a right to operate only after NCRA's CEQA compliance.

Defendants' reliance on *South-Central* is unavailing. That case concerned regulation in a market independent from the one in which Alaska participated. (AB:38-39; *South-Central, supra*, 467 U.S. at 97-99].) The court invalidated Alaska's "downstream" restrictions, not on the sale of its timber, but on private timber processing *after* the timber was sold and removed from state control. (*Ibid.*) *South-Central* and other cases have held that a state may place restrictions *within* the market it enters, including restrictions on those in contract privity and on those doing business with the state contractor. (See, e.g., *ibid.*; *White v. Massachusetts Council of Construction Employers* (1983) 460 U.S. 204, 211, fn. 7; *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.* (2d Cir. 1998) 155 F.3d 59, 79; *Johnson v. Rancho Santiago Community College Dist.* (9th Cir. 2010) 623 F.3d 1011, 1028-29 ("*Rancho Santiago*").)

Here, by requiring CEQA compliance before reopening of the rail line, the State was acting within its capacity as a proprietor of the line. NCRA's CEQA compliance is "simply part of the consideration that [the operator] provided in exchange for the benefits [it] received under the

[Lease] Agreement." (*Rancho Santiago, supra*, 623 F.3d at 1028-29.)[11] NCRA's internal CEQA review could not restrain activities beyond the State's property. (See, e.g., *Sierra Club v. Cal. Coastal Com.* (2005) 35 Cal.4th 839, 859; Pub. Resources Code § 21004; Guidelines § 15040(b) [CEQA does not give agencies authority to require mitigation outside of their jurisdiction].)

In an effort to distinguish controlling precedent, Defendants also claim that "private parties in similar circumstances cannot choose to comply" with CEQA. (AB:35-36.) Defendants admit that "environmental concerns are a legitimate business factor considered by private parties" (AB:37), but apparently take issue with the *form* of California's chosen method for reviewing environmental concerns. But only the effect, not the form, of governmental action matters. (OB:40.) Private entities cannot adopt ordinances or statutes, but courts have upheld such actions as proprietary governmental conduct. (*Tocher v. City of Santa Ana* (9th Cir. 2000) 219 F.3d 1040, 1048-50, abrogated on other grounds in *City of*

[11] This quote appears within *Rancho Santiago*'s discussion of the second *Cardinal Towing* test for actions that are "narrow in scope," but it applies with equal force here. (*Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tx.* (5th Cir. 1999) 180 F.3d 686, 693.) Defendants improperly claim state action *must* be narrow in scope to qualify for the market participant doctrine. (AB:38.) In fact, the test is in the alternative. (OB:39-40.)

Columbus, *supra*, 536 U.S. at p. 432; *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794, 797-98, 809-10 .) Moreover, private rail entities can adopt internal operating rules and enforcement mechanisms or voluntarily subject themselves to state law. (See, e.g., *Services Employees International Union, Local 99 v. Options—A Child Care and Human Services Agency* (2011) 200 Cal.App.4th 869, 873, 877 [private childcare provider agreed to Brown Act compliance in exchange for public funding].) Nothing in the market participant doctrine requires identical private and public conduct. (See *Rancho Santiago, supra,* 623 F.3d at pp. 1026-28.)

2. CEQA Compliance Here Is Critical to the State's Ongoing Participation in the North Coast Rail Market.

Defendants' next tactic is to claim—incorrectly—that the State has already made all the proprietary decisions regarding the rail line and there is nothing left to challenge. (AB:36, 38.) The State's proprietary conduct did not cease to exist, as Defendants claim, after it made the initial decision to form NCRA. (AB:36.) As the owner of the rail line (through NCRA), the State's proprietary decisions about how to manage that line are ongoing and include the leasing, repair, and reopening of the line at issue here.

Moreover, contrary to Defendants' contention, CEQA compliance here could do far more than inform "only" NWPCo.'s operation of the line. (AB:36.) The line is in a serious state of disrepair, and NCRA recognized that environmental analysis was necessary before it could be restored.

(AR:9:4742, 13:6315.) Therefore, in addition to operations, the EIR's project description included repair and rehabilitation, noise-reduction work within Novato, and maintenance. (AR:5:2026, 2035-51.)

The CTC specifically allocated funds for the EIR, as well as repair projects analyzed in the EIR. (See, e.g., AR:13:6796, 16:8080, 8572 [CTC funding allocated to repair Black Point Bridge]; 2:574, 658-59, 728 [EIR considering impacts from repairing Black Point Bridge]; 5:2007, 16:8583; App:16:133:4376-77.) The State has a proprietary interest in "getting what [it] paid for"—here a legally adequate EIR. (*Rancho Santiago*, *supra*, 623 F.3d at p. 1025 [citation omitted]; *Atherton*, 228 Cal.App.4th at p. 338 [bond fund payment for rail project environmental studies relevant to applicability of market participant doctrine].) Although Defendants claim that "NCRA's EIR . . . has nothing to do with state funding" (AB:38), Caltrans itself warned NCRA that rescinding the EIR would violate the CTC funding agreement (App:15:108b:4034).[12]

Defendants also contend that NCRA has no discretion under the Lease to place conditions on NWPCo.'s operations (AB:39-40) because the Lease was only conditioned on CEQA review as it "applie[d] to this

[12] The trial court improperly denied judicial notice of this official state document (App:16:133:4377), which is subject to judicial notice under Evidence Code section 452(c).

transaction," and the "transaction" was an unchallenged Lease execution (AB:4 [citing AR:13:6731].)[13] In fact, Novato challenged NCRA's execution of the Lease. (App:5:48a:1240-42.) In response, NCRA clarified that the EIR would "review the potential environmental impacts of the lease as defined by the agreement." (App:5:1414.) NCRA's Project approval Resolution confirms that it prepared the EIR "in compliance with the agreement with the operator."[14] (AR:1:19; see also AR:21:10965 [Lease addendum, approved in conjunction with EIR, stating that the "condition relating to compliance with the California Environmental Quality Act (CEQA) is deemed satisfied as to the Russian River Division" and providing that CEQA mitigation be implemented].) Indeed, Defendants previously represented that "[u]ntil the [EIR] is certified and the condition of compliance with [CEQA] is satisfied, the agreement entered into between NCRA and NWPCo. does not authorize NWPCo. to take possession of the property or to commence operations." (App:13:100:3645, ¶50; see also App:13:100:3581.) Thus, as NWPCo. previously recognized,

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[13] This contention is merely an attempt to relitigate their claim that Plaintiffs' case is moot. Defendants lost that argument below, and have not requested review of that issue. (Opinion at 14-15; App:16:133:4373-77; Cal. Rule of Court 8.500(c)(2).)

[14] Defendants' reference to NCRA's later rescission of Resolution 2011-02 (AB:9-10) is misleading. NCRA only partially rescinded the Resolution; notably, it did not rescind the EIR certification or the language quoted above. (App:13:93:3454, 14:108a:3929.)

the Lease's CEQA compliance term was "unconditional, broad, and completely at the discretion of the public entity." (App:13:100:3582.)

Finally, Defendants' new contention that the Lease "explicitly recognizes ICCTA preemption" is unavailing. (AB:39.) Even assuming this to be true, such recognition in the same agreement that is explicitly conditioned upon CEQA review only underscores that Defendants understood that the ICCTA did not preempt CEQA review. Indeed, the ICCTA reference is in the Lease section concerning maintenance and operations, which Defendants recognized could not take place until the line was repaired with State funds conditioned upon CEQA compliance. (AB:6-7; AR:13:6738, 6744, 16:8580.) Nor can a lease term eviscerate the State's proprietary interest in requiring that NCRA comply with CEQA when it leases public property. (See *Sprint Spectrum L.P. v. Mills* (2d Cir. 2002) 283 F.3d 404, 420-21 [lease conditions are not preempted because they are proprietary].) For example, if state agencies and private operators subject to the fleet rules could simply agree to argue preemption to avoid such rules, the *Engine Manufacturers* holding would be meaningless.

B. Plaintiffs' Lawsuit Does Not Convert a State Proprietary Action into a Regulatory One.

Relying heavily on the STB's *CHSRA* decision, Defendants argue that Plaintiffs' lawsuit is an independent regulatory action that does not qualify for the market participant doctrine. (AB:40-44.) But the STB

decision relies solely on the Opinion to reach this holding and deserves no deference. (*CHSRA*, *supra*, 2014 WL 7149612 at *10; Part I.B, *supra*.) The STB has no special expertise regarding the market participant doctrine, and Defendants' rationale for relying on these decisions is unsupportable.

1. Third Party Challenges May Rely on the Market Participant Doctrine.

First, Defendants cling to the STB's and the Opinion's bald assertions that only an agency may invoke the doctrine. (AB:40 [quoting Opinion at p. 31].) *Atherton* correctly rejected this argument because whether the market participant doctrine applies is purely a *legal* question for a court to decide—no single party holds the power to argue the doctrine's applicability. (OB:47 [citing *Atherton*, *supra*, 228 Cal.App.4th at pp. 339-40].) The proper inquiry is only whether the state action is proprietary rather than preempted regulation. (*Boston Harbor, supra,* 507 U.S. at p. 227.) While it is "unusual to say the least" that a public entity would "inexplicably argu[e] for federal preemption instead of defending the application of state law," this scenario does not alter the required legal analysis. (*Atherton*, *supra*, 228 Cal.App.4th at p. 339.) As in *Atherton*, here Plaintiffs properly rely on the doctrine to defeat Defendants' preemption defense. (*Id.* at p. 340 ["invoking the market participation doctrine is part of petitioners' challenge"].)

The Connecticut Supreme Court reached a similar result. In *Electrical Contractors, Inc. v. Dept. of Education*, unsuccessful bidders for state-financed construction projects argued that a city's imposition of a project labor agreement ("PLA") on the successful bidder violated state law. ((2012) 303 Conn. 402, 405-06.) The defendants contended that (1) plaintiffs lacked standing to sue, and (2) plaintiffs' claims were preempted by the National Labor Relations Act because the National Labor Relations Board has primary jurisdiction over PLAs. (*Id.* at p. 406, 447.) The court held a plaintiff had public interest standing to sue (*id.* at pp. 412-13, 436-37, 445) and that the state action (the city's procedure for procuring construction services) was not preempted because it was proprietary (*id.* at pp. 449-54 [citing *Boston Harbor*]).

The court rejected the argument that only state actors may use the market participant doctrine, holding that the doctrine equally "applies to the plaintiffs' state law claims." (*Id.* at p. 451.) The court also rejected a claim that plaintiffs' lawsuit amounted to a "regulatory effort" that improperly "places restrictions on Congress' intended free play of economic forces." (*Id.* at p. 453.) The court recognized that the lawsuit's purpose was not to prohibit the city from ever entering a PLA, but only to ensure that it did so in accordance with state law. (*Id.* at pp. 453-54.) Similarly here, Plaintiffs' lawsuit does not seek to prohibit NCRA from ever reopening the rail line; it simply seeks to ensure that NCRA complies with CEQA before doing so.

Defendants rely on the *Grupp* cases to claim that Plaintiffs "lack[] standing to invoke the market participant doctrine." (AB:43.) But as *Atherton* noted, "in none of the *Grupp* cases did the court rule that only the state could invoke the market participant doctrine." (*Atherton, supra*, 228 Cal.App.4th at p. 341.) Rather, those cases found that the state actions at issue did not qualify as market participation because they had a regulatory purpose to deter future fraudulent behavior, which was independent from the states' earlier proprietary actions to procure DHL services. (See *id.* at pp. 340-41.) Nor did the states' contracts with DHL incorporate the False Claims Act, unlike here where contracts incorporate CEQA compliance. (See, e.g., *State ex rel. Grupp v. DHL Exp. (USA), Inc.* (2012) 19 N.Y.3d 278, 281; AR:13:6731; App:8:77b:2068, 2093, 14:104:3768-69.)

Unlike the *Grupp* cases, Plaintiffs' CEQA claims clearly stem from, and were contemplated by, the state proprietary action. (OB:48-49; see also *Atherton, supra*, 228 Cal.App.4th at pp. 339-41 [third party claims challenging state proprietary action were not preempted]; *Electrical Contractors, supra*, 303 Conn. at pp. 451-54 [same].) Plaintiffs' claims do not seek to regulate future, unrelated third-party behavior; they only seek to ensure that current State proprietary action is conducted in accordance with State law.

2. CEQA's Enforcement Mechanism Does Not Diminish the Proprietary Nature of the State's Actions in Reopening the Line.

Defendants also claim that CEQA enforcement is preempted regulation because public interest lawsuits involve implementing public duties and protecting public rights. (AB:40-42.) However, an action that confers a significant public benefit or meets a policy objective can also serve a proprietary purpose. (See, e.g., *Engine Manufacturers*, *supra*, 498 F.3d at pp. 1045-46.)

Defendants strain to distinguish *Engine Manufacturers* by claiming that the provisions at issue there "could only be enforced by a party in the applicable market," whereas citizen suits "are enforceable against the government and can be brought by any person." (AB:44.) The Ninth Circuit did not rely on this reasoning. Rather, it stated "we do not see how action by a state or local government that is proprietary when enforced by one mechanism loses its proprietary character when enforced by some other mechanism." (*Engine Manufacturers*, *supra*, 498 F.3d at p. 1048; see also *Antilles Cement Corp., supra,* 670 F.3d at pp. 330-31[codification of enforcement mechanism "does not divest [the state] of market participant status"].)

In any event, Plaintiffs *are* participants in the applicable market. "[P]ublic agencies in this State exist to aid in the conduct of the people's business. . . . The people of this State do not yield their sovereignty to the

agencies which serve them." (Gov. Code § 54950.) In enforcing CEQA, Plaintiffs here serve the State's and the public's purpose in ensuring that their agency only reopens the rail line after a complete consideration of potentially significant environmental impacts. (See, e.g., AB:41; Gov. Code § 54950; *Schwartz v. City of Rosemead* (1984) 155 Cal.App.3d 547, 561 ["If the Attorney General is properly served and elects not to intervene, then a plaintiff's pursuit of a [CEQA] lawsuit becomes presumptively 'necessary.'"]; *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 381 [a lawsuit under Private Attorney General Act "functions as a substitute for an action by the government itself" (quotation omitted)].)

In sum, the existence of a third party enforcement mechanism does not transform the State's requirements for reopening the rail line into preempted regulation. To hold otherwise would deprive the State of its chosen method of effectively implementing its internal decisionmaking process in the management of its rail line. (See, e.g., Pub. Resources Code §§ 21167, 21168.5, 21168.9.) Protecting a state's requirements placed on agencies acting in the marketplace from preemption, but then prohibiting enforcement of such requirements, would substantially undercut the State's proprietary decision. (See *City of Columbus*, *supra,* 536 U.S. at p. 436.)

C. Defendants' Post Hoc Rationale Regarding Their Voluntary Agreements to Comply with CEQA Is Unavailing.

Even assuming the market participant doctrine did not apply, Plaintiffs have alternatively demonstrated that the ICCTA does not preempt NCRA and NWPCo.'s voluntarily agreements to comply with CEQA. (OB:49-52.) Contrary to Defendants' assertions, this doctrine and the market participant doctrine are not mutually exclusive. While NCRA may not choose whether to comply with State law, it did choose the Lease terms and to seek CTC funding. These arms-length transactions were conditioned on CEQA compliance. NWPCo. likewise chose to enter the Lease premised upon NCRA's CEQA compliance.

Defendants try to reframe the issue by arguing that they "did not voluntarily agree to *waive* ICCTA preemption for rail operations." (AB:44 [emphasis added].) But the required inquiry is whether Defendants voluntarily agreed to CEQA compliance before rail operations. They absolutely did. (See Part III.A(2), *supra*; OB:50-52.) This commitment was made for valuable consideration (Lease terms and State funding) and was not regulatory. (See *Friends of East Willits Valley v. County of Mendocino* (2002) 101 Cal.App.4th 191, 201.) Courts have held that parties may not later use preemption to avoid such commitments. (See, e.g., *PCS Phosphate Co., Inc. v. Norfolk Southern. Corp.* (4th Cir. 2009) 559 F.3d 212, 219-20, 222.)

Defendants again argue Plaintiffs lack standing to enforce these agreements, and attempt to distinguish *Atherton* on the grounds that, there, the public did have standing as voters of Proposition 1A. (AB:45.) But neither *Atherton* nor this case involves a contract enforcement action. (*Atherton, supra*, 228 Cal.App.4th at p. 324; see also Plaintiffs' Supplemental Letter Brief (August 8, 2014) at p. 19 & fn. 3.) In any event, Plaintiffs would have similar standing here because TCRP funded projects (including the rail line) were ratified by the voters in Proposition 42.[15] (App:13:100:3641.)

Defendants also claim that despite their agreements, the ICCTA preempts CEQA compliance because, as applied here, it would create an unreasonable burden on rail transportation. (AB:45-46.) Defendants rely on the STB's *CHSRA* decision, but as explained that decision is not controlling. (Part I.B, *supra*.) Defendants also cite an unpublished Third Circuit opinion, which likewise does not help them. (*Id.* [citing *Blanchard Securities Co. v. Rahway Valley R.R. Co.* (3d Cir. 2006) 191 Fed. Appx. 98,

[15] Further, Plaintiffs would have third-party beneficiary standing because the public is the intended beneficiary of an agreement to comply with CEQA. (See *Services Employees, supra,* 200 Cal.App.4th at pp. 873, 877, 880 [public was intended beneficiary of agreement to comply with Brown Act given the act's purpose to "facilitate public participation in the decisionmaking process"]; *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 391-92 [CEQA has similar purpose].)

100].) That case involved a prior agreement regarding a rail line in which the current operator did not participate. (*Blanchard, supra*, at p. 100.) Here, by contrast, both NCRA and NWPCo. agreed to CEQA compliance. Later NWPCo. also agreed to be bound by the mitigation conditions from the CEQA review process. (AR:21:10965.) Their "willingness to enter into the private agreement[s]" demonstrates such compliance "would not 'unreasonably interfere' with interstate rail operations." (*Blanchard, supra,* at p. 100.)

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the Court of Appeal and remand the case with directions to rule on the merits of Plaintiffs' CEQA claims.

DATED: April 30, 2015

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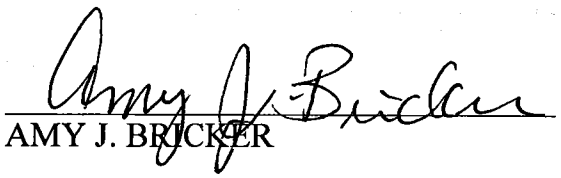
CERTIFICATE OF WORD COUNT
(California Rules of Court 8.504(d)(1))

The text of this Plaintiffs' Reply Brief consists of 8,400 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to prepare this brief.



AMY J. BRICKER

PROOF OF SERVICE

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

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

On April 30, 2015, I served true copies of the following document(s) described as:

PLAINTIFFS' REPLY BRIEF

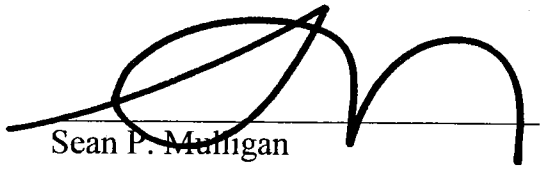
on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

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

Executed on April 30, 2015, at San Francisco, California.



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