IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE THIRD APPELLATE DISTRICT

Civil No. C070877

TOWN OF ATHERTON, *et al.*

Plaintiffs/Appellants

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY,

Defendant/Respondent

On Appeal from the Superior Court of the State of California
in and for the County of Sacramento
The Honorable Michael P. Kenny

Sacramento County Superior Court Case Numbers
34-2008-80000022CUWMGDS and 34-2010-80000679CUWMGDS

APPLICATION AND SUPPLEMENTAL BRIEF OF AMICUS CURIAE PRESERVE OUR HERITAGE

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INTRODUCTION

The High Speed Rail Authority (the "Authority") argues CEQA is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), based on the erroneous premise that a federal preemption statute excuses a California state agency's compliance with the State's own environmental laws. The Authority contends it is itself a regulated entity, and the ICCTA preempts the State from burdening it with CEQA compliance.

This is not an accurate depiction of the Authority's character as a state agency, nor of CEQA's applicability. The Authority is a political subdivision of the State, subject to the State's sovereign control. The Authority's duty to comply with CEQA is a function of its organization and existence as a state agency. State law prohibits the Authority from making discretionary decisions without giving due consideration to resulting environmental effects. Any discretionary decision the Authority makes without CEQA compliance exceeds California's limitations on the Authority's powers, as the California Legislature has expressly required the Authority to comply with state environmental laws, such as CEQA. The public has been vested with specific remedies to redress such violations. Those remedies are not preempted by the ICCTA.

Unlike cases such as *City of Auburn*[1] and *Association of American Railroads*,[2] regulatory control is not being imposed upon the Authority by some outside government entity. Rather, under CEQA, the Authority is responsible for reviewing the environmental effects of *its own*

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[1] *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025.

[2] *Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094.

discretionary decisions. Because the California Legislature has required the Authority to comply with state environmental laws, the Authority's obligation to comply with CEQA is merely an internal control not subject to preemption (as opposed to external state or local regulatory controls burdening a private carrier's ability to develop interstate commerce). Express preemption cannot apply to excuse the Authority from complying with its own and state-mandated rules compelling it to evaluate the environmental consequences of its actions.

This is because States are vested with expansive sovereign powers to limit and control the authority of their political subdivisions. The United States Supreme Court has long held that a State has absolute and sovereign control over the powers entrusted to its agencies. (See, e.g., *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 140; *Claiborne v. Brooks* (1884) 111 U.S. 400, 410.) "It is purely a question of local policy with[in] each state what shall be the extent and character of the powers which its various political organizations shall possess." (*Platt v. City and County of San Francisco* (1910) 158 Cal. 74, 82.)

Under these principles, a federal express preemption statute, such as in the ICCTA, cannot "interpos[e] federal authority between a State and its municipal subdivisions" absent an "unmistakably clear" congressional intent to do so in the language of the statute. (*Nixon*, *supra*, 541 U.S. at 140-141 [citing *Gregory v. Ashcroft* (1991) 501 U.S. 452, 460].) The ICCTA contains no such clear and unmistakable language. Rather, the well-settled purpose of the ICCTA is to abrogate burdens on interstate commerce imposed on *private* rail carriers by state and local regulation. The statute contains no notion of modifying the balance of state and federal sovereign authority.

This is not a hypothetical exercise. It is undisputed that high speed rail will permanently alter the Central California landscape, including thousands of acres of irreplaceable prime farmlands. If only NEPA applies to the high speed rail project, the Authority will be under no legal obligation to adopt feasible mitigation measures, as required by state law, to compensate for the significant environmental impacts of high speed rail. This would significantly invade state sovereignty, as the well-settled public policy of this State weighs heavily against permitting a state agency to radically alter the environment, absent CEQA's requirement that all feasible mitigation measures be adopted.

Ultimately, the Authority is not a regulated entity, but is rather a political subdivision of the State. As such, the Authority draws all of its powers from the State, and its subject to state-mandated limitations on the exercise of its powers. Because the State Legislature has expressly required the Authority to comply with CEQA, federal preemption would directly interfere with the State's own internal control over the Authority by removing state-mandated limitations on the Authority's jurisdiction, contrary to the limitations of federal authority under the Supremacy Clause.

As such, this Court should find that the Authority's obligation to perform under CEQA is not preempted by the ICCTA.

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ARGUMENT

A. Unlike Private Rail Carriers, the Authority Retains Discretionary Approval Authority Over the High Speed Rail Project, and the Laws and Procedures Governing the Exercise of that Discretion, Like CEQA, Are Not Preempted By the ICCTA

In its supplemental brief, the Authority argues that as a rail carrier, any state or local regulatory burden placed upon it is preempted by federal law, including any obligation to comply with CEQA. The flaw in this reasoning is that although the Authority is a developer and owner of a rail system, it is not a private entity subject to the exercise of discretion by another state or local agency. Rather, the Authority *is* the State, and will continue to exercise discretionary approval authority over the High Speed Rail Project. The Authority cannot make these discretionary decisions in a vacuum; rather, the case law makes plain that the Authority's exercise of discretion regarding the High Speed Rail Project continues to be subject to the Authority's own internal decision-making practices and procedures, including CEQA.

The State of California has sovereign and absolute authority to establish the extent and character of the powers vested in its state agencies. (See, e.g., *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 140-141.) As a result, the Supreme Court has found that a federal express preemption statute, such as in the ICCTA, cannot "interpos[e] federal authority between a State and its municipal subdivisions" absent an "unmistakably clear" congressional intent to do so in the language of the statute, which the ICCTA does not provide. (*Ibid.*; see 49 U.S.C. § 10501(b).)

Here, the California legislature has expressly required the Authority to comply with state environmental laws for the protection of the

public. (Sts. & Hy. Code § 2704.08, subd. (c)(2)(K); see Senate Daily Journal, 2011-2012 Reg. Sess., pp. 4447-4448 [letter from Sen. Mark Leno stating the legislature's intent that Section 2704.08 refer to both CEQA and NEPA].) If this Court finds that the ICCTA preempts CEQA review by the Authority here, it would directly interpose federal authority between the State and its agency – *i.e.*, the Authority – by allowing the Authority to continue to have discretionary approval authority over the High Speed Rail Project, while at the same time excusing the Authority from complying with state environmental laws and regulations governing the exercise of that discretion.

Such a result would be flatly inconsistent with federal law. Both the United States and California Supreme Courts have long held that a State has absolute power over its internal affairs, including "the extent and character of the powers which its various political organizations shall possess." (*Platt v. San Francisco* (1910) 158 Cal. 74, 82; see also *Claiborne v. Brooks* (1884) 111 U.S. 400, 410 ["the extent and character of the powers (of a State's) various political and municipal organizations . . . is a question that relates to the internal constitution of the body politic of the State"].) The California Supreme Court recently reiterated this rule in *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, holding the state has plenary power to both create and abolish its political subdivisions, as well as to determine the nature of the powers held by those entities. (*Matosantos, supra*, 53 Cal.4th at 255 [citing *Hunter v. Pittsburgh* (1907) 207 U.S. 161, 178-179; *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 914-915].)

Any federal preemption statute that would "threaten[] to trench on the States' arrangements for conducting their own governments

should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power . . . ." (*Nixon*, *supra*, 541 U.S. at p. 140.) "'If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'" (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 460 [quoting *Atascadero State Hospital v. Scanlon* (1985) 473 U.S. 234, 242]; see *Nixon*, *supra*, at pp. 140-141; see also *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [presumption that Congress did not intend to preempt state law is hard to overcome].)

Nixon v. Missouri Municipal League (2004) 541 U.S. 125, is closely on point. In *Nixon*, a Missouri statute barred state political subdivisions from providing or offering for sale telecommunications services. (*Nixon*, *supra*, 541 U.S. at p. 129.) A group of Missouri municipalities sought relief under the federal Telecommunications Act of 1996, 47 U.S.C. § 253, which preempted "state and local laws and regulations expressly or effectively 'prohibiting the ability of any entity' to provide telecommunications services." (*Id.* at p. 128.) The Court noted, "[i]n familiar instances of regulatory preemption under the Supremacy Clause, a federal measure preempting state regulation in some precinct of economic conduct carried on by a private person or corporation simply leaves the private party free to do anything it chooses consistent with the prevailing federal law." (*Id.* at p. 133.) "But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations." (*Ibid.*) The problem with freeing a state political subdivision from the State's own limiting authorities is that "the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach,

'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them *in its absolute discretion*.'" (*Id.* at p. 140 [emphasis added] [quoting *Wisconsin Public Intervenor v. Mortier* (1991) 501 U.S. 597, 607-608].)

As in *Nixon*, where State law prohibited state political subdivisions from providing or offering for sale telecommunications services, the California legislature has made plain here that the Authority's decision-making process is subject to numerous state laws dictating its form, function, and powers, (see, e.g., Pub. Util. Code § 185020, *et seq.*), including state environmental laws such as CEQA. (Sts. & Hy. Code § 2704.08, subd. (c)(2)(K); see Senate Daily Journal, 2011-2012 Reg. Sess., pp. 4447-4448 [letter from Sen. Mark Leno stating the legislature's intent that Section 2704.08 refer to both CEQA and NEPA].) A finding that the Authority's state-mandated environmental review process is preempted by ICCTA would directly "interpos[e] federal authority" between the State and the Authority by directly overriding the State's express limitation on the Authority's discretion. (*Nixon*, *supra*, 541 U.S. at 140.)

Here, there is no express language in the ICCTA providing that a state, such as California, may not limit the discretionary authority of a state agency to evaluate the environmental consequences of its actions. Indeed, the STB record of proceedings confirms that the STB did not intend its decision to preempt the Authority's ability to conduct further review under CEQA. Indeed, the STB's June 13 Decision discussed at length the joint CEQA and NEPA environmental review conducted by the Authority. The Decision refers to ongoing CEQA review for further high speed rail segments under the programmatic EIR/EIS process, and references further review under another state regulatory agency, the State Historic

Preservation Office ("SHPO"), which is at risk for further preemption under the Authority's line of reasoning. The Decision contains no suggestion that California CEQA and SHPO review will cease under its jurisdiction. (See *California High-Speed Rail Authority – Construction Exemption – In Merced, Madera and Fresno Counties, Cal.* (S.T.B. Jun. 13, 2013) No. FD 35724, 2013 WL 3053064, slip op. at pp. 8, 27.) Yet now, contrary to the STB's own Decision, the Authority seeks to avoid review of its decisions under CEQA, including the imposition of mitigation measures.

CEQA is among the state laws that determine the extent and character of those powers, and imposes certain procedural and substantive limitations on any discretionary approval undertaken by the Authority, particularly those which may impact the environment. (See, e.g., Pub. Resources Code § 21080; 1 Kostka & Zischke, *supra*, § 1.19, pp. 17-18.) Here, there is no question that Authority retains discretionary approval authority over the High Speed Rail Project. This discretionary approval authority remains subject to the State's own directive to comply with state environmental laws for the protection of the public. (See Sts. & Hy. Code § 2704.08, subd. (c)(2)(K).) Because preemption here would directly interfere with the State's internal control of its own agency's exercise of discretion, the ICCTA does not preempt the Authority's environmental review obligations under CEQA.

In light of the foregoing, the cases cited by the Authority are inapplicable here. Specifically, in the Authority's supplemental brief, nearly every case cited, including *City of Auburn* and *Association of American Railroads*,[3] involves a *private* rail carrier, seeking relief against

[3] In addition to *City of Auburn* and *Association of American Railroads*, the Authority cites *Adrian & Blissfield R. Co. v. Village of*

external regulation by state and local governments. The Authority cites only one STB decision involving a publicly owned rail carrier. (See *North San Diego County Transit Development Board – Petition for Declaratory Order* (S.T.B. Aug. 19, 2002) No. FD 34111, 2002 WL 1924265.) However, that case is inapplicable here because that public agency was not seeking relief from its own internal CEQA obligations, but rather those sought to be imposed by another public entity, the City of Encinitas. (*Id.* at pp. *1-2; see also *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D.Cal. 2002) 2002 WL 34681621, *4.)

Those cases are plainly distinguishable. Unlike the above cases, the State has imposed limitations on its own agency – the Authority – requiring the Authority to comply with state environmental laws, including CEQA. Thus, rather than being an external regulatory barrier to development, CEQA in this case serves as an *internal* control, compelled by the state legislature, governing the procedures under which the Authority may take discretionary action that affects the environment. (See Sts. & Hy. Code § 2704.08, subd. (c)(2)(K); Senate Daily Journal, 2011-2012 Reg. Sess., pp. 4447-4448. See also Pub. Resources Code § 21080, subd. (a).) In its brief, the Authority invokes federal preemption as grounds

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Blissfield (6th Cir. 2008) 550 F.3d 533, 535; *New Orleans & Gulf Coast Ry. Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 325-326; *Green Mountain R.R. Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 640; *CSX Transp., Inc. v. Georgia Public Service Com'n* (N.D.Ga. 1996) 944 F.Supp. 1573, 1575; *People v. Burlington Northern Santa Fe R.R.* (2012) 209 Cal.App.4th 1513, 1516; *Jones v. Union Pacific Railroad* (2000) 79 Cal.App.4th 1053, 1056; *DesertXpress Enterprises, LLC – Petition for Declaratory Order* (S.T.B. June 25, 2007) No. FD 34914, 2007 WL 1833521; and *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA* (S.T.B. Apr. 30, 2001) No. FD 33971, 2001 WL 458685; all of which involve private rail carriers seeking relief from state and local regulation.

to avoid state law that limits the exercise of its discretion. No such relief is available here, because the Authority cannot escape the fact it is a political subdivision of the State, subject to the State's self-imposed internal controls, and not a private rail carrier.

In short, Nothing in the ICCTA purports to intrude upon California's sovereignty, and even the STB itself contemplates further state regulatory activity and application of CEQA to the Authority's future decisions and approvals. While the ICCTA may provide for STB jurisdiction over certain aspects relating to the construction and operation of the high speed rail project, any such preemptive authority does not permit the STB to intrude upon the internal controls and limitations the State has placed upon the Authority, its own agency, requiring the Authority to comply with state environmental laws, including CEQA, without unconstitutionally interfering with the State of California's sovereign authority. Accordingly, the Authority's environmental review obligations under CEQA are not preempted by the ICCTA.

B. The Federal Invasion Of State Sovereignty Implicated In Excusing State Agency Compliance With CEQA Would Permit The Authority To Radically Alter California's Environment Without Requiring Feasible Mitigation Measures

The Authority argues the public and the environment will be adequately protected under federal environmental laws, such as NEPA. (See High Speed Rail Authority Supplemental Brief, at p. 13.) This ignores one of the key differentiating features between CEQA and NEPA. Under CEQA, the Authority will be obligated to implement all feasible mitigation measures, whereas under NEPA, it must merely engage in "a reasonably complete *discussion* of possible mitigation measures." (See Pub. Resources

Code § 21002.1, subd. (b); *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 937 [CEQA]; cf. *N. Alaska Envtl. Ctr. v. Kempthorne* (9th Cir. 2006) 457 F.3d 969, 979 [emphasis added] [NEPA].) Under NEPA, the public has no assurance that the drastic alteration of the environment imposed by high speed rail will be mitigated to the extent feasible.

California voters approved the high speed rail project under Proposition 1A on the condition and expectation that the environmentally destructive effects of this wholly *intrastate* project would be mitigated to the extent feasible. (See Sts. & Hy. Code § 2704.08, subd. (c)(2)(K); Pub. Resources Code § 21002.1, subd. (b).) Despite this clear mandate, the Authority now invokes a federal preemption doctrine, intended only to reduce burdens on interstate commerce, to violate the express will of California voters, who placed specific environmental preconditions upon the powers granted to the Authority to drastically alter the State's environment. It is difficult to imagine a circumstance where federal preemption will exact a more egregious and destructive invasion of state sovereignty.

C. Federal Preemption Is Further Limited By The Market Participant Doctrine

Ultimately, the Authority is not a regulated entity. It is a political subdivision of the State, subject to the State's sovereign control. The Authority is itself a regulator, with jurisdiction vested in it by the State over the development of the high speed rail system. (See Pub. Util. Code § 185020, *et seq.*) The Authority's regulatory control over the portions of the high speed rail system at issue in this case is exempted from the preemptive effects of federal law under the "market participant" doctrine.[4]

[4] A further extensive discussion of the market participant doctrine as applied here is provided in the brief of amicus curiae Citizens for California

The market participant doctrine provides that "even where a federal statute pre-empts state regulation in an area, state action in that area is not preempted so long as it is proprietary rather than regulatory." (*Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.* (9th Cir. 2007) 498 F.3d 1031, 1041 [citing *Building & Constr. Trades Council v. Associated Builders & Contractors* (1993) 507 U.S. 218, 226-227].) It is undisputed that the California high speed rail project is a proprietary project owned and developed by the State, and under the control of the Authority. (See Sts. & Hy. Code § 2704.04; Pub. Util. Code § 185030, *et seq.*)

The availability of the market participant doctrine resolves an apparent paradox the Authority's argument presents. If federal preemption abrogates the Authority's internal decision-making procedures and responsibilities required by, then it would be logical to conclude that any State-imposed limitation on the Authority's power would likewise be preempted. Further, the Authority itself is a state regulatory agency, and will continue to regulate the California high speed rail system for the foreseeable future. Under the Authority's reasoning with regard to ICCTA preemption, the Authority's own regulatory power would be preempted. This produces an illogical result, as it would either paralyze the Authority's ability to construct and operate the project, or require its complete federalization under the auspices of the STB, which is not a builder or operator of railroads. However, the fact that the Authority regulates the high speed rail system in a proprietary capacity provides an exception to the preemptive power of federal law.

In short, whether the Authority characterizes itself as a regulated entity or as a regulator, federal preemption is not available as to

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High-Speed Rail Accountability, filed September 24, 2013, at pp. 34-49. These arguments will not be repeated here.

the Authority's own internal and proprietary decision-making practices and procedures to enable it to avoid its duty to protect the public under CEQA.

CONCLUSION

The State of California has sovereign and absolute control over the extent and character of the powers vested in its state agencies, including the Authority. With CEQA, the California legislature set express procedural and substantive limitations on the Authority's powers. The State's sovereign ability to set such limitations is entitled to great deference, as the federal government may interpose itself between the State and its agencies only with an express, unmistakable congressional statement of intent to do so, which is not found in the ICCTA's preemption clause.

For these, and all the foregoing reasons, amicus curiae Preserve Our Heritage respectfully requests this Court defer to the sovereignty of the State of California, and decline the Authority's invitation to apply federal preemption in a manner that expands the character and extent of the Authority's powers beyond those granted by the State to the detriment and devastation of thousands of acres of California farmland and environmentally sensitive areas.

DATED: October 1, 2013. WANGER JONES HELSLEY, PC

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