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September 22, 2014

Chief Justice Tani Cantil-Sakauye
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Town of Atherton, et al., v California High-Speed Rail Authority*
Third Appellate District, Case No. C070877
Request for Depublication (Cal. Rules of Court, rule 8.1125(a))

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

The California Department of Transportation (Department) respectfully requests this Court to depublish the opinion of the Third Appellate District in *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314 issued on July 24, 2014. Respondent California High Speed Rail Authority (CHSRA) prevailed in that decision and no party petitioned for review.

The *Atherton* decision injects uncertainty into previously-settled law governing certain public transportation projects that are subject to heavy federal regulation, including aviation and conventional passenger and freight service on federally-regulated rail lines. The opinion announces a novel and incorrect use of the "market participant" doctrine that could subject public officials to lawsuits by project opponents under state law remedies to which a similarly-situated private actor would be immune. All prior judicial decisions involved the defensive invocation of the "market participant" doctrine by a state or local government. They allowed the state, as a market participant, to impose restrictions that a private party could require, but that would be preempted by federal law if that public agency is acting as a regulator. *Atherton* turned that well-established doctrine on its head, allowing a project opponent to offensively assert the

doctrine and prevent the ordinary operation of preemption principles after a federal agency assumed jurisdiction over the high speed rail project.

Invoking *Atherton,* project opponents will now argue that the planning and operation of various types of transportation projects remain subject to state law remedies, and that the public agencies providing them (as purported "market participants") can no longer rely on settled legal authorities that particular claims are supplanted by federal law. Important public transportation projects could be impeded by the application of this novel and incorrect holding. Moreover, the *Atherton* decision is unsuitable precedent to resolve these new legal attacks, or indeed any future legal disputes over federal preemption of state law challenges. Although the Court of Appeal purported to limit its ruling to the specific preemption claims presented in that case, *Atherton* arms opponents of federally-regulated transportation projects with a novel legal theory for delay. At the same time, the opinion provides little guidance on how its startling expansion of the market participant doctrine applies to aspects of conventional public agency transportation efforts that, until now, were subject only to federal regulation.

For the foregoing reasons, and as explained below, the Department respectfully requests that the Court order the opinion in *Atherton* to be depublished.

I. The Department of Transportation's Interest

The Department has important roles in the provision of transportation facilities by various public agencies in California in two areas that are heavily regulated by the federal government: aviation and interstate railroads.

The State Aeronautics Act grants the Departments authority and imposes duties so that the state may properly perform its functions relative to aeronautics, assist in the development of a statewide system of airports, and cooperate with and assist political subdivisions and others engaged in aeronautics in the development and encouragement of aeronautics. (Pub. Util. Code, §§ 21002, subd. (d), 21006.5, 21007.) Those authorities and duties are extensive (see *id.* §§ 21204-21258), including financial and substantive assistance to political subdivisions for municipal airports. (*Id.* § 21601-21605; see http://www.dot.ca.gov/hq/planning/aeronaut/documents/maps/index.htm, Lists, "California Public Use Airports" [listing California

municipal airports].) The Department permits the construction, establishment, or expansion of these airports (Pub. Util. Code, §§ 21664-21669.2) and lead agencies complying with the California Environmental Quality Act (CEQA) for any project in the planning area around an airport must utilize the Department's reference materials when assessing relevant impacts. (Pub. Resources Code, § 21096.)

The pervasive and often exclusive federal authority over aspects of aviation is beyond dispute. (*Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 383-85 [county complied with CEQA by referring aviation safety determinations to Federal Aviation Administration]; *Bethman v. City of Ukiah* (1989) 216 Cal.App.3d 1395 [Federal Aviation Act preempted state claims alleging dangerous condition of public property at airport].)

The Department has similar interests in promoting railroads. Its powers and duties include "coordinating and assisting, upon request of the various public and private transportation entities in strengthening their development and operation of balanced integrated mass transportation . . . railroad, and other transportation facilities and services in support of statewide and regional goals." (Gov. Code, § 14030). The Department is responsible for developing the State Rail Plan, which covers both passenger and freight rail (*id.* § 14036), is involved in the California Freight Mobility Plan (*id.* § 13978.8), and has various other duties regarding commuter and inter-city rail service. (*Id.* §§ 14034-14035.7.) Caltrans also oversees freight rail projects funded by state and federal sources such as the Trade Corridors Improvement Fund and Transportation Investment Generating Economic Recovery (TIGER) grants. (http://www.dot.ca.gov/Recovery/tiger_grants.html.)

II. *Atherton* Acknowledges the Extensive Federal Preemption of Railroads Regulated by the Federal Government, But Declined to Decide the Issue

Atherton involved a challenge by a city and others to an environmental impact report prepared by the CHSRA for the high speed rail project. While the appeal was pending, the federal Surface Transportation Board (STB) assumed jurisdiction over the project, determining that the intrastate project connected to Amtrak and therefore was part of the interstate rail

network. (228 Cal.App.4th at p. 328.) STB jurisdiction is based on the Interstate Commerce Commission Termination Act (ICCTA), which "creates exclusive federal regulatory jurisdiction and exclusive federal remedies," and expressly provides that "the remedies provided . . . with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." (*Id.* at pp. 329-330, internal citations omitted.) "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." (*Id.* at p. 330, quoting *CSX Transp., Inc. v. Georgia Public Serv. Com'n* (N.D.Ga.1996) 944 F.Supp. 1573, 1581; See also *People v. Burlington Northern Santa Fe R.R.* (2012) 209 Cal.App.4th 1513, 1528.) Based on the STB's assertion of jurisdiction, the CHSRA requested supplemental briefing to address whether CEQA remedies were preempted. (228 Cal.App. 4th at p. 328.)

Although the Court of Appeal acknowledged the federal appellate authorities uniformly holding that environmental review and permitting laws were preempted by ICCTA (228 Cal.App.4th, at pp. 329-333), it declined to decide the issue. (*Id.* at p. 329.) Instead, it avoided a preemption analysis by holding that the market participant exception to preemption applied. (224 Cal.App.4th, at pp. 333-34.) In doing so, it ignored precedent, including a district court decision holding that a CEQA challenge to proposed construction on a local government's federally-regulated railroad was preempted by ICCTA. (*Id.* at p. 336 [discussing *City of Encinitas v. N.San Diego County Transit* (S.D.Cal. Jan. 14, 2002) 2002 WL 34681621].) The court did so simply by noting that the decision did not address the market participant issue and that the public agency railroad, unlike the CHSRA, had never accepted that CEQA would apply.[1] (*Ibid.*)

III. The Decision Incorrectly Applies the Market Participant Doctrine to Preclude the State from Asserting Preemption Arguments Available to Private Railroads.

The market participant doctrine recognizes that a state sometimes acts as other than a regulator when determining whether state action is preempted by federal law. (*Engine Mfrs.*

[1] The Court of Appeal also did not address how CHSRA could have refused to comply with CEQA before the STB assumed jurisdiction over its project

Ass'n v. South Coast Air Quality Management Dist. (9th Cir. 2007) 498 F.3d 1031, 1040.) It protects the right of states "'to operate freely in the free market'" in the same manner as private parties. (*Reeves, Inc. v. Stake* (1980) 447 U.S. 429, 437.) The doctrine has been consistently analyzed as a defense, allowing a state or public agency to show that its action, such as imposing conditions on procurement of goods or services, was not preempted by federal law, as regulation would be. Until *Atherton,* there was no other case applying the doctrine against a state's wishes to prevent the normal operation of federal preemption. The market participant doctrine is not a wholly freestanding doctrine, but rather a presumption about congressional intent. (*Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, *supra*, 498 F.3d at p. 1042.) Rather than placing the state in the same position as a private party, as intended by the market participant doctrine, the Court of Appeal's decision thwarts the Congressional intent behind ICCTA to place federal rail projects under a uniform regulatory scheme. The *Atherton* decision fails to explain why ICCTA would permit state regulation of only public authority (but not private) railroads in contravention of uniform, federal control over interstate rail lines.

IV. *Atherton*'s Determination That the CHSRA Was Acting as Market Participant Has No Analytical Value in Other Cases and is Likely to be Misused as Precedent

The Court of Appeal's reasoning why the CHSRA was acting as a "market participant" in planning and constructing its project provides no guidance for when other public agencies might be determined to fall into that category and therefore be unable to invoke previously-settled law that their federally-regulated transportation project is not subject to certain types of state court actions or remedies. Instead, the *Atherton* court appears to rely on number of combined factors: (a) before the STB took jurisdiction, the CHSRA had complied with CEQA, (b) the court's interpretation of a voter-approved bond act, and (c) legislative history on an appropriation for that project. (228 Cal.App.4th at pp. 337-39.) There is no explanation of how these factors fit into the traditional market participant test, nor of the relative importance of each factor.

Opponents of future rail and aeronautics projects now may argue that *Atherton* announced an *ad hoc* rule for determining market participant status, thereby compounding the confusion and potential for needless litigation.

V. The *Atherton* Decision's Harmful and Unworkable Exception to Well-Settled Preemption Jurisprudence Will Harm Delivery of Important Public Projects

If this decision remains published, a single determined litigant could attempt to derail transportation projects by virtue of the procedural delay caused by lower courts having to contend with the incorrect and confusing *Atherton* market participant rule. Until *Atherton*, a municipality expanding or modifying its airport could rely on unquestionable authority that it was immune from particular state law claims that conflicted with regulation by the federal government. A public agency passenger railroad subject to STB regulation could avoid specific state law court actions and claims seeking to slow down or halt a project on a federally-regulated railway. (See 228 Cal.App.4th at p. 336 [discussing *City of Encinitas v. N. San Diego County Transit, supra*, and ICCTA preemption of certain state law challenges to the project].) The Department could fulfill its statutory duty to assist those important undertakings, both financially and substantively, without fear of undue litigation delay over state law challenges that conflict with federal regulation.

In the wake of *Atherton,* project opponents now have a platform to argue that a court can disregard well-established law that certain state regulations are preempted in defined situations and, instead, apply an ill-defined test to determine whether the public agency is acting as a market participant in planning and constructing its transportation project. This is particularly harmful because financing for transportation infrastructure projects is often time-sensitive. Legal uncertainty delays the issuance of bond financing, and once issued, the public agency must pay interest. Federal grants for rail and other projects are typically time-limited and must be returned if not used by a deadline. Delay due to needless litigation can, in some cases, prevent construction of important public projects.

Conclusion

For the foregoing reasons, the California Department of Transportation respectfully requests that the Court depublish the *Atherton* decision.

Sincerely,

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