NORTH COUNTY TRANSIT DISTRICT

810 Mission Avenue
Oceanside, CA 92054

(760) 966-6500
(760) 967-2001 (fax)
www.GoNCTD.com

September 22, 2014

Chief Justice Tani Gorre 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
Joinder in Request for Depublication filed by California Department of Transportation (Cal. Rules of Court, Rule 8.1125(a))

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

The North County Transit District ("NCTD"), operating pursuant to Public Utilities Code section 125000, et. seq., joins in the request made by the California Department of Transportation to depublish the decision of the Third Appellate District in *Town of Atherton v. California High-Speed Rail Authority* ("*Atherton*"), 228 Cal.App.4th 314 (2014).

NCTD is both a commuter rail operator and a "rail carrier" owning and operating an interstate rail line subject to the jurisdiction of the Surface Transportation Board. *City of Encinitas v. North San Diego County Transit Development Board, et. al.*, 2002 U.S. Dist. Lexis 28531 at *11 (S.D. Cal. 2002). As such, NCTD has a vested interest in the Court's decision in *Atherton*, that calls into question or complicates well-settled precedent that the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101, et seq. ("*ICCTA*"), preempts state law, as well as local regulation that seeks to impose permit requirements on projects under the Surface Transportation Board's jurisdiction. See *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1029-1031 (9th Cir. 1998); *People v. Burlington Northern Santa Fe Railroad,* 209 Cal.App.4th 1513, 1528 (2012); *Public Utilities Commission v. Superior Court*, 181 Cal.App.4th 364, 368 (2010).

The *Atherton* decision injects uncertainty regarding the preemptive reach of *ICCTA* based on an unprecedented, affirmative use of the "market participant" defense doctrine against the government. In 1996, Congress changed the federal regulatory scheme of railroads with the passage of the ICCTA in an effort to "significantly reduce regulation of surface transportation industries." *Flynn v. Burlington Northern Santa Fe Corporation*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000); see also, *City of Encinitas,* 2002 U.S. Dist. Lexis 28531 at *7; *Wisconsin Central Ltd. v. The City of Marshfield*, 160 F. Supp.2d 1009, 1015 (W.D. Wis. 2000) ("freeing railroads from state and federal regulatory authority was the principal purpose of Congress.").

In *City of Auburn v. U.S.*, 154 F.3d 1025, 1031 (9th Cir. 1998), the Ninth Circuit found that "congressional intent to preempt this kind of state and local regulation [local

environmental regulations] of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it." (emphasis added). To find otherwise would "amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *City of Encinitas*, 2002 U.S. Dist. Lexis 28531 at *9-10; quoting *City of Auburn*, 154 F. 3d at 1031.

As noted by the California Department of Transportation in its request for depublication, the unique factual circumstances in *Atherton* do not require a change in rules of general application and there is no need to expand the reach of the "market participant" doctrine as a matter of general application to every public agency involved in surface transportation. To do so, only serves to introduce substantial ambiguity into well-settled precedent.

For the foregoing reasons, NCTD respectfully joins the California Department of Transportation in its request that the Court depublish *Town of Atherton v. California High-Speed Rail Authority*.

Sincerely,

Lori A. Winfree
General Counsel, North County Transit District