In the Supreme Court of the State 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.

Case No. S222472

First Appellate District, Division One Case Nos. A139222, A139235
Marin County Superior Court, Case Nos. CIV11-3605, CIV11-03591
Honorable Roy Chernus, Judge

APPLICATION OF CALIFORNIA HIGH-SPEED RAIL AUTHORITY FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.520(f), the California High-Speed Rail Authority (Authority) respectfully requests permission to file the attached amicus curiae brief. The Authority is filing this brief in support of Respondents to address why federal law preempts the state-law remedies at issue in this case and why that issue is important to public agencies that construct, own, and operate interstate railroads.

HOW THIS BRIEF WILL ASSIST THE COURT

This proposed amicus curiae brief, which presents the views of the Authority, will assist the Court by explaining how the express preemption clause in 49 U.S.C. section 10501(b) of the Interstate Commerce Commission Termination Act (ICCTA) applies to a California public agency railroad, that, absent preemption, would be subject to remedies under the California Environmental Quality Act, as sought here. The Authority acknowledges that it is unusual for a state agency to concede that one of its laws is preempted. However, when a state voluntarily decides to build, acquire, or operate an interstate rail line and establishes a public agency for this express purpose, it does so knowing that this particular activity, even when undertaken by a public agency, has long been subject to pervasive and exclusive federal regulation. Like a private railroad, the public agency railroad is under the regulatory jurisdiction of the federal Surface Transportation Board (STB) and must obtain a license to operate on an existing rail line or to construct a new rail line. Section 10501(b) preempts state-law remedies against a public agency railroad that would

prevent or unreasonably interfere with its actions that are under STB jurisdiction, including the CEQA remedies Petitioners seek in this case.

This amicus curiae brief will elaborate on the federal judicial and STB decisions applying ICCTA's express preemption provision, as well as the statutory framework and history of federal regulation of public agency railroads. The Authority will explain why those authorities mandate a conclusion that the CEQA remedies sought in this case are preempted, and why Tenth Amendment considerations and the "market participant doctrine" do not create an exception to preemption here. Finally, the Authority's brief will explain both the importance of voluntary agreements between railroads and public agencies and why they typically escape preemption under section 10501(b), but also their limits.

In the case of this specific federal statute and how it applies to the high-speed rail project, it is in the State's interest to support federal preemption of state-law remedies. To be successful in an integrated interstate rail system, a public agency railroad must be subject to the same regulatory scheme as other railroads. Preemption in this narrow context furthers the Authority's ability to achieve the transportation, environmental, and economic benefits the high-speed rail system has to offer.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Authority, established in 1996, is building the nation's first high-speed rail system. (Pub. Util. Code, § 185000 et seq.) The system will initially connect San Francisco to Los Angeles via electrically-powered high-speed trains travelling in excess of 200 miles per hour. Upon completion, the system will provide Californians with a safe, reliable mode of intercity transportation that will reduce congestion on freeways and at

airports and will help meet growing transportation demands. High-speed rail is also an important component of the State's strategy for addressing climate change because electrified high-speed rail service will significantly reduce greenhouse gas emissions from the transportation sector.

This case, while seemingly limited to the rail line owned by the North Coast Railroad Authority (NCRA) and operated under its direction, has potentially important ramifications for the high-speed rail project. The issues presented here are similar to those currently facing the Authority. Just as the State established the NCRA as an independent agency to acquire, own, and operate a railroad, the State established the Authority as an independent agency to plan, construct, and operate a high-speed rail line. The high-speed rail system and the rail line at issue in this case are both subject to STB jurisdiction and regulation under the ICCTA. (49 U.S.C. § 10101 et seq.) The public agency railroad in this case obtained an STB license to operate over a rail line pursuant to 49 U.S.C. section 10901, the same statute under which the Authority has obtained two licenses to construct two of nine planned segments of its new railroad line. And like the NCRA, the Authority is facing multiple CEQA lawsuits in state court that seek to prevent and unreasonably interfere with its STB-authorized actions pending further CEQA compliance.

At the same time, this case has important differences from the Authority's situation because the Authority's STB licenses are for mainline track construction, were preceded by multi-thousand page environmental impact statements under the National Environmental Policy Act, and were conditioned on the Authority implementing hundreds of environmental mitigation measures. Applying its exemption authority under 49 U.S.C. section 10502, the STB authorized the construction. Furthermore, once the

STB determined in 2013 that it had jurisdiction over the high-speed rail system, the Authority has consistently stated in its subsequent CEQA documents that it was not waiving its right to raise ICCTA preemption.

In light of the foregoing, the Authority's interests here are two-fold. First, the Authority has an interest in addressing how the ICCTA's exclusive regulation of rail transportation and its express preemption provision apply to a public agency railroad under STB jurisdiction. Second, the Authority has an interest in ensuring that, as the Court considers the express preemption in section 10501(b), it is cognizant of how a decision in this case may have consequences for the high-speed rail system.

STATEMENT REGARDING PREPARATION OF THE BRIEF

No party or counsel for any party in the pending case authored any portion of the proposed amicus curiae brief, and no party or counsel for any party contributed financially to the preparation of the brief in any way. No person or entity other than the proposed amicus curiae made any monetary contribution intended to fund the preparation or submission of this brief.

Dated: July 1, 2015

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INTRODUCTION

This case poses the narrow question of whether the Interstate Commerce Commission Termination Act (ICCTA) (49 U.S.C. § 10101 et seq.) preempts judicial remedies under the California Environmental Quality Act (CEQA) against a public agency that owns and operates a railroad line under STB jurisdiction. The Environmental Agencies in their concurrently filed brief agree this is the issue. This inquiry, while limited, is vitally important to the California High-Speed Rail Authority (Authority), which is charged with building a statewide high-speed rail system. Under the ICCTA, the STB has exclusive jurisdiction over the construction and operation of rail lines, and state-law remedies that would interfere with or prevent these federally authorized actions are expressly preempted. The Authority respectfully submits that the ICCTA preempts CEQA remedies under the circumstances of this case, i.e., where a public agency railroad's project is subject to STB jurisdiction and regulation under the ICCTA. It offers this brief to provide a more comprehensive discussion of how the ICCTA and its predecessor statutes govern public agencies operating railroads in interstate commerce, why the Tenth Amendment and the "market participant doctrine" do not eliminate preemption here, and how a railroad's voluntary agreements are analyzed under the ICCTA.

The Authority faces similar core legal conflicts between federal and state law as the NCRA faces in this case, but on a different scale. Construction of the high-speed rail project is subject to STB approval under the same provision of ICCTA that covers NCRA's railroad operations. In 2013, the Authority sought a jurisdictional determination, contending the STB lacked jurisdiction over its project, but the STB disagreed and has required the Authority to comply with ICCTA requirements. Since then,

the Authority has obtained two STB authorizations to build portions of its project, submitting thousands of pages of environmental analysis required by federal law, leading to hundreds of mitigation measures as conditions of the federal approval.[1] At the same time, however, the Authority is facing multiple CEQA lawsuits seeking remedies that could interfere with the project's construction, federal funding, and the STB's exclusive jurisdiction.

Absent preemption, a public agency charged with building or operating a railroad, and subject to exclusive federal regulation in the ICCTA for these activities, would nevertheless be subject to an additional state-imposed scheme under CEQA. The public agency railroad would therefore be subject to state-law remedies under CEQA that conflict with the federal regulatory scheme by interfering with and even preventing the agency from engaging in the actions the State has charged it with doing, and which the STB has authorized. This result is the opposite of the uniformity Congress intended in section 10501(b).[2]

Preemption in this case does not unconstitutionally impinge on state control over its subdivisions under the Tenth Amendment. For nearly one hundred years, regulation of the type of railroad operations at issue in this case has been exclusively federal and has applied uniformly to publicly and

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[1] *California High-Speed Rail Authority – Construction Exemption – in Merced, Madera and Fresno Counties, Cal.*, Fin. Docket No. 35724 (S.T.B. served June 13, 2013), 2013 WL 3053064; *California High-Speed Rail Authority – Construction Exemption – in Fresno, Kings, Tulare, and Kern Counties, Cal.*, Fin. Docket No. 35724 (Sub.-No. 1) (S.T.B. served August 12, 2014), 2014 WL 3973120.

[2] A private rail carrier, on the other hand, is not subject to CEQA. CEQA applies only to public agencies as they approve a private project or carry out their own project. (Pub. Resources Code, § 21080, subd.(a).)

privately owned railroads (referred to herein for convenience as "public" and "private" railroads). When the STB has jurisdiction over a railroad project, be it construction or operations, federal law sets out the exclusive regulations and remedies, even for public agency railroads.

Nor does the market participant doctrine eliminate preemption here. The doctrine simply does not apply where, as here, applying it would be contrary to congressional intent for uniform and exclusive federal regulation by treating public railroads differently than private railroads. And when NCRA complied with CEQA it was not participating in a market, it was simply carrying out a traditional state regulatory responsibility.

Finally, while the Authority takes no position on whether, under the facts of this case, NCRA voluntarily agreed to comply with CEQA, the Authority will elaborate on the legal structure for analyzing those contentions. The federal courts and STB have recognized that railroads can enter into voluntary agreements with local jurisdictions and such contracts are presumptively not "regulation" that the ICCTA would preempt. Preemption may, however, limit certain agreements that conflict with exclusive federal regulation of interstate railroad operations.

ARGUMENT

I. SECTION 10501(b) EXPRESSES CONGRESSIONAL INTENT TO HAVE UNIFORM AND EXCLUSIVE FEDERAL REGULATION AND EXCLUSIVE FEDERAL REMEDIES FOR RAILROAD LINE CONSTRUCTION AND OPERATIONS.

A. The Touchstone of Every Preemption Analysis Involves Discerning Congressional Intent.

The parties have recited the basic tenets of preemption analysis, so the Authority reiterates them here only briefly. Congress can preempt state

law in matters that lie within its authority. (U.S. Const., art. VI, cl. 2; *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955.) "The doctrine of preemption gives force to the Supremacy Clause." (*People v. Burlington Northern Santa Fe Railroad* (2012) 209 Cal.App.4th 1513, 1521.) "Where a state statute conflicts with, or frustrates, federal law, the former must give way." (*CSX Transp., Inc. v. Easterwood* (1993) 507 U.S. 658, 663.)

Essential to this case, and meriting emphasis, is that federal preemption "fundamentally is a question of congressional intent." (*Carillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1162, quotation omitted; *Viva! Intern. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 939.) When a federal statute contains express preemption language, a reviewing court establishes the scope of preemption in the first instance by interpreting the plain wording of the statute as the best evidence of congressional intent. (*People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 778; *CSX Transp., Inc. v. Easterwood, supra*, 507 U.S. at p. 664.)

However, interpretation of an express preemption provision does not take place "in a contextual vacuum." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 484-485.) A reviewing court must consider "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." (*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1060, internal quotations and citations omitted.) Furthermore, every preemption analysis, and particularly where Congress legislates in a field states have traditionally occupied, "start[s] with the assumption that the historic police powers of the States were not to be

superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Ibid.*, internal citation omitted.) The presumption ensures that neither Congress nor the courts will disturb the federal-state balance unintentionally. (*Ibid.*)

The plain language of section 10501(b) and its larger statutory framework and history demonstrate congressional intent to preempt CEQA remedies against a public agency railroad where such remedies would conflict with railroad actions under STB jurisdiction.[3]

B. Section 10501(b) Gives the STB Exclusive Jurisdiction to Regulate Rail Line Construction and Operations and Preempts State Regulation and Remedies in These Areas.

1. Section 10501(b) preempts state laws that regulate in areas reserved exclusively to the STB or that would prevent or unreasonably interfere with railroad operations.

Section 10501(b) provides:

The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side

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[3] This case involves a railroad invoking preemption as a defense to a CEQA lawsuit. Whether section 10501(b) preempts CEQA in general, rather than CEQA judicial remedies, is not at issue because NCRA prepared an EIR. The Authority therefore focuses this brief only on the question of whether section 10501(b) preempts the CEQA remedies being sought in this case.

> tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*

(49 U.S.C. § 10501(b), emphasis added.) In cases involving rail line construction and operations, federal courts recognize this language is broad. (*City of Auburn v. U.S. Government* (9th Cir. 1998) 154 F.3d 1025, 1031 [endorsing broad interpretation of express preemption language]; *CSX Transp., Inc. v. George Public Service Comm'n* (N.D. Ga. 1996) 944 F.Supp. 1573, 1581 ["It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations."]; see also *Island Park, LLC v. CSX Transp.* (2d Cir. 2009) 559 F.3d 96, 104 [acknowledging language is "unquestionably broad," although not without limits].)

Of course, acknowledging the breadth of the express preemption language does not fully answer the preemption question in this case. The Court must consider whether the scope of the express preemption provision includes the CEQA remedies sought here, where the public rail agency is subject to STB jurisdiction and is operating a railroad in interstate commerce pursuant to a license from the STB. While this Court is addressing section 10501(b) for the first time, federal court precedent has extensively addressed the scope of this statute.

Several federal courts of appeals have adopted or followed the STB's comprehensive test for determining whether section 10501(b) preempts a state action or remedy against a railroad. (*New Orleans & Gulf Coast Ry. Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 332 (*Barrois*) citing *CSX Transp., Inc. – Petition for Declaratory Order*, Fin. Docket No. 34662

(S.T.B. served May 3, 2005), 2005 WL 1024490 at *2-3; accord *Adrian & Blissfield R. Co. v. Village of Blissfield* (6th Cir. 2008) 550 F.3d 533, 540; *Union Pacific R. Co. v. Chicago Transit Authority* (7th Cir. 2011) 647 F.3d 675, 679; *Emerson v. Kansas City Southern Ry. Co.* (10th Cir. 2007) 503 F.3d 1126, 1130.) That test distinguishes between two types of state regulations or actions: those that section 10501(b) preempts categorically, and those that may be preempted *as applied.* (*Barrois*, *supra*, 533 F.3d at p. 332.)

Categorically preempted state actions or regulations, are those that "would directly conflict with exclusive federal regulation of railroads" including:

> (1) "any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with *activities that the Board has authorized*" and
>
> (2) "state or local regulation of *matters directly regulated by the Board* such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service."

(*Barrois*, *supra*, 533 F.3d at p. 332, emphasis added, citations omitted.) The STB based these two classes of categorically preempted state actions or regulations on holdings in prior cases under both the ICCTA and the Interstate Commerce Act. (*CSX Transp., Inc. – Petition for Declaratory Order*, *supra*, 2005 WL 1024490 at *2 citing e, g., *City of Auburn*, *supra*, 154 F.3d at pp. 1030-1031; *Green Mountain R.R. Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 642; *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 318.) Because the categorically preempted actions are deemed to "directly conflict with exclusive federal regulation," the preemption analysis is directed at the act of state regulation itself, not to

the reasonableness of the particular action. (*Barrois, supra*, 533 F.3d at p. 332.)

State actions or regulations may also be preempted by section 10501(b) *as applied*. (*Barrois, supra*, 533 F.3d at p. 332.) "Section 10501(b) of the ICCTA may preempt state regulations, actions, or remedies as applied, based on the degree of interference the particular state action has on railroad operations." (*Ibid.*) If a particular state action or regulation is not facially preempted, the analysis under section 10501(b) "requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation." (*Ibid.* citing *CSX Transp., Inc., supra*, 2005 WL 1024490 at *3.)[4]

While section 10501(b) is broad, its plain language does not "sweep up" all state laws that happen to merely touch upon railroads in interstate commerce. (*Island Park, LLC, supra,* 559 F.3d at p. 104.) "[I]nterference with rail transportation must always be demonstrated." (*Ibid.*) In section 10501, Congress "narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or govern[ing]' rail transportation" while allowing continued application of state laws that have "a more remote or incidental effect on rail transportation." (*Florida East Coast Ry. Co. v. City*

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[4] Those instances in which a public or private entity has an STB license to construct, operate, acquire, or abandon a rail line are clearly within the larger definition of "rail transportation" under STB jurisdiction. (49 U.S.C. §§ 10102(9), 10501(b).) However, an action by a railroad may fall within the definition of "rail transportation" and preemption may attach even though it does not require a license. (See, e.g., 49 U.S.C. § 10906; *Port City Properties v. Union Pacific R. Co.* (10th Cir. 2008) 518 F.3d 1186, 1188-1189.) This case involves licensed operations, so this brief focuses on this situation.

of West Palm Beach (11th Cir. 2001) 266 F.3d 1324, 1331, internal citation omitted.) For activities with only a remote effect on railroad transportation, Congress intended to retain for the states "the police powers reserved by the Constitution." (*City of Auburn, supra*, 154 F.3d at p. 1029 [quoting H.R.Rep. No. 104-311, 104th Cong., 1st Sess., at pp. 95-96 (1995) *reprinted in* 1995 U.S.C.C.A.N. 793, 807-808].)

Lower federal court authorities are not binding, even as to questions of federal law. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58 discussing *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320-321.) Nevertheless, the cited decisions are persuasive and entitled to great weight as to the scope of preemption in section 10501(b). (*Ibid.*; see also *People v. Burlington Northern Santa Fe R.R., supra*, 209 Cal.App.4th at p. 1531 [reasoning of federal decisions on section 10501(b) preemption was "highly persuasive"].) The Court should "hesitate to reject" their test for identifying whether section 10501(b) preempts a particular state action or remedy. (*Barrett, supra*, 40 Cal.4th at p. 58.)

Finally, the issues in this case are important, but narrowly focused. The analytical framework in this case is focused on the limited situation in which a public agency engages in actions the STB directly regulates. As shown below, CEQA remedies in this situation directly interfere with congressional intent because they conflict with exclusive federal regulation of railroads and interfere with federally authorized railroad operations.

2. Section 10501(b) preempts CEQA remedies in this case under either a categorical or as-applied preemption analysis.

a. CEQA remedies here could prevent STB-authorized railroad operations.[5]

At the outset, CEQA remedies in this case fall under the first type of categorically preempted state laws because they can prevent a public railroad from proceeding with an STB-authorized project pending compliance with CEQA. It is beyond dispute that the Legislature established the NCRA as a public agency to own, manage, and operate a railroad in interstate commerce. (Gov. Code, §§ 93001, 93003, subd. (a).) The STB regulates the NCRA like any other railroad, authorizing it to acquire and operate over the railroad line in dispute and has recognized NCRA's status as a rail carrier, independent of the current private operator, Northwestern Pacific Railroad Co.[6]

In the context of this case, because a public agency must comply with CEQA before it can make a final decision to proceed with its own project, the law and its remedies as applied to NCRA's rail project is a "preclearance requirement" that "could be used to deny a railroad the

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[5] The Authority refers in this brief only to railroad "operations" the STB regulates pursuant to 49 U.S.C. section 10901. The STB also regulates new railroad line construction and a similar preemption analysis would apply because the STB has exclusive jurisdiction over both actions.

[6] See, e.g., *North Coast Railroad Authority – Acquisition and Operation Exemption – Eureka Southern Railroad*, Fin. Docket No. 32052 (S.T.B. served April 20, 1992), 1992 WL 80295; *North Coast Railroad Authority – Purchase Exemption – Southern Pacific Transportation Company*, Fin. Docket No. 32788 (S.T.B. served March 20, 1996), 1996 WL 120522; *North Coast Railroad Authority - Lease and Operating Exemption – California Northern Railroad Company, etc.*, Fin. Docket No. 33115 (S.T.B. served Sept. 27, 1996), 1996 WL 548249.

ability to conduct some part of its operations or to proceed with activities that the Board has authorized." (*Adrian & Blissfield Railroad Co., supra*, 550 F.3d at p. 540, citing *CSX Transp., Inc., supra*, 2005 WL 1024490 at *3.)[7] Under CEQA, public agencies must follow specific steps to review and consider environmental information before approving their own projects. (Pub. Resources Code, §§ 21000, subd. (g), 21001, 21065, subd. (a); *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393.) When a public agency is proposing a project itself, the agency must undertake the same environmental review as it would to approve or permit a private project, and make a decision informed by CEQA's information gathering and public input processes. (Pub. Resources Code, § 21001.1.)

However, contrary to Petitioners' suggestions, CEQA's directives are not limited to public disclosure and procedural requirements before a public agency decides whether to approve its own project. (Petitioners' Reply Brief, pp. 22-34.) The statute includes mandatory requirements to change a proposed project by adopting feasible mitigations measures or feasible alternatives. (Pub. Resources Code, § 21002.) CEQA also includes remedial provisions authorizing a court to compel a public agency to rescind its decision to approve the project, enjoin project implementation pending compliance with CEQA, and undertake further environmental review steps before deciding to re-approve (or alter or abandon) its own project. (*Id.*, § 21168.9; see, e.g., *County of Orange v. Superior Court*

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[7] Where an agency is not directly undertaking a public rail project but rather has a permitting role over a private rail project, the relevant "preclearance" requirement that may subject to preemption is the act of permitting. Where permitting is preempted, CEQA is not triggered.

(2003) 113 Cal.App.4th 1, 12-13 [discussing CEQA remedial provisions]; *Lincoln Place Tenants Ass'n v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 453; *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 415-416.)

Indeed, this is precisely what Petitioners seek with their CEQA lawsuit: to require NCRA to rescind its decision to proceed with its project and enjoin NCRA from engaging in railroad operations the STB has authorized pending further CEQA procedures and a court determination that the NCRA has fully complied with CEQA. This application of CEQA remedies to a public agency railroad flies in the face of the uniform and exclusive federal scheme for licensing railroad operations under 49 U.S.C. section 10901 because it can be used to deny the public railroad the right to engage in activities the STB has authorized. (*City of Auburn, supra*, 154 F.3d at p. 1033; *Chicago and N.W. Transp. Co., supra*, 450 U.S. at pp. 324-327.)

b. CEQA remedies here have the effect of regulating railroad operations, an area within the STB's exclusive licensing authority.

CEQA and its remedies also fall under the second type of categorically preempted state laws in this case because the statute as applied to an interstate rail project undertaken by a public railroad has the effect of regulating "matters directly regulated by the Board – such as the construction, operation, and abandonment of rail lines . . . ." (*Adrian & Blissfield R. Co., supra*, 550 F.3d at p. 540.) The STB regulates construction and operation of rail lines pursuant to 49 U.S.C. section 10901. (49 U.S.C. §§ 10501(b)(2), 10901.) A railroad obtains the

authority to operate over a line through an application for a certificate of public convenience and necessity or through an exemption. (49 U.S.C. §§ 10901, 10502.) The STB's jurisdiction in this area is plenary and exclusive. "[T]he ICC Termination Act evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations." (*CSX Transp., Inc. v. George Public Service Comm'n.*, *supra*, 944 F.Supp. at p. 1584; *Pace v. CSX Transp., Inc.* (11th Cir. 2010) 613 F.3d 1066, 1069 ["section 10501(b) plainly conveys Congress's intent to preempt all state law claims pertaining to the operation or construction of a side track"].)

The STB must also comply with NEPA (42 U.S.C. § 4321 et seq.) in making its licensing decisions. In some cases, such as STB authorization for construction of new railroad lines, federal approval comes with exhaustive federal environmental review and results in approval conditioned on extensive mitigation measures. (See, e.g., *California High-Speed Rail Authority – Construction Exemption – in Merced, Madera and Fresno Counties, Cal., supra*, 2013 WL 3053064, *19, *36-37 [mandatory compliance with mitigation measures]; *California High-Speed Rail Authority – Construction Exemption – in Fresno, Kings, Tulare, and Kern Counties, Cal., supra*, 2014 WL 3973120, *16, *44-45 [same].) In the case at hand, the STB considered the NCRA's proposed operations under its NEPA regulations and determined the proposed operations were categorically excluded from environmental review. (See 49 C.F.R. §§ 1105.6(b)(4), (c), 1105.7(e)(5)(i)(C).) The type of action, be it construction or operations, will determine the level of federal environmental review.

The result of the STB's regulatory process is a decision to permit or deny proposed rail construction or operations. (49 U.S.C. §§ 10901,

10502.) If the STB permits the proposed action, federal law provides avenues to challenge the decision and federal remedies. (*Id.*, § 10502(d) [request to revoke exemption]; 28 U.S.C. §§ 2321(a), 2342(5), 2344 [judicial review in federal court of appeals for action to enjoin or suspend STB order].)[8] Applying CEQA to a public railroad undertaking an interstate rail project would trigger a largely parallel state process that could lead to lawsuits and judicial intervention that could have the effect of second-guessing fully considered decisions already made by the STB. This constitutes substantial interference in an area that the STB directly and exclusively regulates, and is therefore preempted. (*Chicago and N.W. Transp. Co.*, *supra*, 450 U.S. at p. 321 [in analogous rail abandonment context, ICC's plenary and exclusive authority suggests congressional intent "to limit judicial interference with the agency's work" and state law regulating abandonment therefore preempted]; *People v. Burlington Northern Santa Fe R.R.*, *supra*, 209 Cal.App.4th at p. 1529 [ICCTA preempted state anti-blocking regulation].)

c. CEQA remedies here would prevent or unreasonably interfere with rail transportation.

CEQA remedies here also satisfy an *as applied* test for preemption under section 10501(b) because they "would have the effect of preventing or unreasonably interfering with railroad transportation." (*Barrois*, *supra*,

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[8] Petitioner Friends of Eel River unsuccessfully challenged the August 2007 change in operator exemption. (*Northwestern Pacific Railroad Company – Change in Operators Exemption – North Coast Railroad Authority, Sonoma-Marin Area Rail Transit District and Northwestern Pacific Railway Co., LLC*, Fin. Docket No. 35073 (S.T.B. served Feb. 1, 2008), 2008 WL 275698.)

533 F.3d at p. 332 citing *CSX Transp., Inc. – Petition for Declaratory Order*, *supra*, 2005 WL 1024490 at *3.) For example, the ICCTA preempted a state condemnation law under the *as applied* test because the facts showed that the proposed condemnation of actively used railroad property in that case was unreasonable interference with rail transportation. (*Union Pacific R. Co.*, *supra*, 647 F.3d at pp. 679-680; see also *Association of American Railroads v. South Coast Air Quality Man. Dist.* (9th Cir. 2010) 622 F.3d 1094, 1098.) The CEQA remedies Petitioners seek in this case include a writ of mandate and injunctive relief that could prevent or unreasonably interfere with the NCRA's and its private operator's railroad operations that they have a federal license to perform. (Pub. Resources Code, § 21168.9 [describing CEQA remedies].) This is not a situation involving a remote or incidental effect on rail transportation, but rather direct, unreasonable interference with federally authorized railroad operations. (*Florida East Coast Ry. Co.*, *supra*, 266 F.3d at p. 1331; *Barrois*, *supra*, 533 F.3d at p. 332.)

3. The STB has determined that section 10501(b) preempts CEQA remedies in the context of a public agency railroad engaging in STB-authorized actions.

Finally, the STB has addressed a similar preemption question in *California High-Speed Rail Authority – Petition for Declaratory Order*, Fin. Docket No. 35861, 2014 WL 7149612 (S.T.B. served December 12, 1014).[9] In the context of a public railroad under its jurisdiction,

[9] Parties to this STB proceeding have petitioned for review to the Ninth Circuit Court of Appeals. (*Kings County, et al. v. Surface Transportation Board*, No. 15-71780, filed June 11, 2015.)

undertaking its own rail project, the STB held, "CEQA is a state preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity's right to construct a line that the Board has specifically authorized, thus impinging upon the Board's exclusive jurisdiction over rail transportation." (*Id.* at *7.) CEQA lawsuits and remedies in this context attempt to regulate a project the STB directly regulates. (*Id.* at *7.) The STB's decision merits careful consideration because the agency administers the ICCTA and is "uniquely qualified" to determine whether state law would stand as an obstacle to congressional intent in the ICCTA. (*Green Mountain R.R. Corp.*, *supra*, 404 F.3d at p. 642-643; accord *Emerson*, *supra*, 503 F.3d at p. 1130; *Adrian & Blissfield R. Co.*, *supra*, 550 F.3d at p. 539; see also *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 332, fn. 4.)

C. The Statutory Framework and History Reinforces Congressional Intent to Preempt State Laws That Have the Effect of Interfering with Uniform Federal Regulation of Railroad Operations.

Not only does the plain language in section 10501(b) indicate congressional intent to preempt the CEQA remedies here, so does the ICCTA's statutory framework and history. Neither Petitioners nor Respondents provide a comprehensive discussion of the statutory framework or history surrounding federal regulation of railroad operations. That history establishes Congress's long-standing emphasis on national uniformity for regulating railroads operating in interstate commerce by establishing an exclusive federal licensing scheme and preempting state laws that regulate in the same areas.

1. The Transportation Act of 1920 amended the Interstate Commerce Act to establish uniform and exclusive federal regulation over construction, operations, and abandonments of track in interstate commerce.

"Railroads have been subject to comprehensive federal regulation for [well over] a century." (*United Transp. Union v. Long Island R. Co.* (1982) 455 U.S. 678, 687, overruled in part by *Garcia v. San Antonio Metropolitan Transit Auth.* (1985) 469 U.S. 528.) In 1887, Congress enacted the Interstate Commerce Act, which created the Interstate Commerce Commission, the nation's first independent regulatory agency. (Sen.Rep. No. 104-176, 1st Sess., p. 2 (1995), 1995 WL 701522 at *2.) "The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes . . . ." (*Chicago and N.W. Transp. Co.*, *supra*, 450 U.S. at p. 318.)

The Interstate Commerce Act originally focused on regulating railroad rates, not specifically on matters affecting railroad construction or operations. (Sen.Rep. No. 104-176, *supra*, 1995 WL 701522 at *2; see also James W. Ely, Jr., *The Railroad System Has Burst Through State Limits: Railroads and Interstate Commerce, 1830-1920* (2003) 55 Ark. L. Rev. 933, 966 (Ely).) "Prior to the Transportation Act of 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened, and destroyed interstate commerce." (*Transit Commission v. United States* (1933) 289 U.S. 121, 127.) "Dominant federal action was imperatively called for." (*Ibid.*) In response, Congress passed the Transportation Act of 1920, amending the Interstate Commerce Act and establishing uniform and exclusive federal regulation over rail line

construction, operations, and abandonment. (*Id.* at pp. 126-127; see generally *Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. Co.* (1922) 257 U.S. 563, 582-586 [1920 Act placed construction of new lines and abandonment of old lines under ICC jurisdiction].)

The Transportation Act of 1920 serves as a critical foundation for understanding the statutory framework in the ICCTA and how it affects the preemption analysis in this case. Section 1 (18) of the Act imposed a specific framework mandating federal approval prior to any railroad line construction (new lines or extensions of existing lines), operations over the lines, or abandonment of the lines if the lines were operated as part of interstate commerce. (Transportation Act of 1920, § 402, 41 Stat. 477-478, previously codified at 49 U.S.C. § (1)(18).) The Act reserved two areas for state regulation: wholly intrastate rail transportation, including intrastate spur and side tracks (¶ 2); and states' ability to exercise their police powers "to require just and reasonable [rail] service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of the Act." (*Id.*, § 402, 41 Stat. 474, 476, previously codified at 49 U.S.C. §(1)(2), § (1)(17).)

Importantly, the 1920 amendments to the ICA defined the Commission's federal jurisdiction over railroad construction, operations, and abandonment, "to the exclusion of state regulation . . . ." (*Transit Commission, supra*, 289 U.S. at p. 128; see also *Alabama Public Service Commission v. S. Ry. Co.* (1951) 341 U.S. 341, 346 fn. 7 [describing Commission authority under section (1)(18-20) as exclusive].) Out of concern for uniformity of regulation over railroads, the 1920 Act "puts the railroad systems of the country more completely than ever under the

fostering guardianship and control of the Commission . . . ." (*Dayton-Goose Creek Ry. Co. v. United States* (1924) 263 U.S. 456, 478; see also *Texas & P. Ry. Co. v. Gulf, C. & S.F. Ry. Co.* (1926) 270 U.S. 266, 277 ["Congress undertook to develop and maintain, for the people of the United States, an adequate railway system."]; Ely, *supra*, 55 Ark. L. Rev. at pp. 960-961.)[10]

Thus, as far back as 1920, Congress had expressed its clear intent to have exclusive federal regulatory jurisdiction over rail lines in interstate commerce. The 1920 amendments drew a clear distinction between the types of railroad facilities over which a state could exercise authority (e.g., intrastate spurs, side tracks) and the types of facilities over which it had no authority (e.g., railroad main lines). (*Railroad Commission of California v. Southern Pacific Co.* (1924) 264 U.S. 331, 344-346.) Further, state laws that interfered with interstate rail operations were subordinate to the federal interest. (*Kansas City Southern Ry. Co. v. Kaw Valley Drainage Dist. of Wyandotte Cnty., Kan.* (1914) 233 U.S. 75, 79 ["direct interference with commerce among the states could not be justified"].)

2. The Staggers Act continued and the ICCTA strongly reinforced exclusive federal jurisdiction over rail construction, operations, and abandonments.

Uniformity through exclusive federal jurisdiction over rail line construction, operations and abandonment remained in place in the

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[10] Decisions following the 1920 amendments made clear that vesting exclusive jurisdiction in the Commission specifically excluded the states from regulating the same areas. (See, e.g., *Colorado v. United States* (1926) 271 U.S. 153, 163-166; *Atchison, T. & S.F. Ry. Co. v. R.R. Commission* (1922) 190 Cal. 214, 221-222, *aff'd sub nom. Railroad Commission of California v. Southern Pac. Co.* (1924) 264 U.S. 331.)

intervening decades. (See, e.g., *Palmer v. Com. of Mass.* (1939) 308 U.S. 79, 84-85; *City of Yonkers v. United States* (1944) 320 U.S. 685, 690-691.)[11] The Supreme Court continued to describe this jurisdiction as "exclusive and plenary." (*Chicago and N.W. Transp. Co.*, *supra*, 450 U.S. at p. 321 [discussing section 1(20) of Transportation Act related to rail line abandonment].)

This exclusive jurisdiction over rail line construction, operations, and abandonments continued essentially unchanged in the Staggers Rail Act of 1980, as did state jurisdiction over spur, industrial, team, switching, and side tracks located wholly in one state. (Staggers Rail Act of 1980, Pub.L. No. 96-448 (Oct. 14, 1980) § 221, 94 Stat. 1895; see generally *Illinois Commerce Com'n v. I.C.C.* (D.C. Cir. 1989) 879 F.2d 917, 921-925 [discussing treatment of intrastate tracks under 1920 Act and Staggers Act].) Under the Staggers Act, states could apply to the Interstate Commerce Commission for certification to regulate intrastate rates, classifications, rules, and practices pursuant to federal standards. (See generally *Southern Pacific Transp. Co. v. Public Utilities Com'n* (9th Cir. 1993) 716 F.2d 1285, 1287.)

In 1995, Congress enacted the ICCTA, amending the Interstate Commerce Act again. The ICCTA abolished the Interstate Commerce Commission and replaced it with the STB, substantially deregulated the railroad industry, and broadly preempted state regulation of railroads. (*Florida East Coast Ry. Co.*, *supra*, 110 F.Supp.2d at p. 1373.) The

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[11] Congress codified provisions of the Interstate Commerce Act in 1978 as subtitle IV of title 49 of the U.S. Code. (Act of Oct. 1978, Pub.L. No. 95-473, 92 Stat. 1337.) Section (1)(18) was codified at section 10901 (construction and operations of main line track). Section 1(20) on abandonments was codified at section 10903.

ICCTA maintained the exclusive federal jurisdiction over railroad construction, operation, and abandonment dating back to the Transportation Act of 1920, but then extended that exclusive jurisdiction to include the more general term "rail transportation" and, specifically, wholly intrastate tracks. (49 U.S.C., §§ 10901, 10903, 10501(b)(1), 10501(b)(2).) In addition, the ICCTA included section 10501(b), with the express preemption language at issue here.

The collective impact of these amendments was to establish in the ICCTA, "an incredibly wide grant of exclusive jurisdiction to the STB to regulate railroad operations . . . ." (*CSX Transp., Inc. v. Georgia Public Service Comm'n*, *supra*, 944 F.Supp. at p. 1582.) Congress's intent is manifest in the Act's legislative history:

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

(H.R.Rep. 104–311, *supra*, at p. 808.) The ICCTA thus strengthened the comprehensive scheme of uniform federal regulation of railroad construction, operations, and abandonments put in place nearly a century ago. (See, e.g., *Florida East Coast Ry. Co.*, *supra*, 266 F.3d at p. 1373 ["In 1995, Congress eliminated what little remained of state and local regulatory authority over railroad operations . . ."]; *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, *supra*, 944 F.Supp. at p. 1582 [". . . Congress intended the preemptive net of the ICC Termination Act to be broad by extending exclusive jurisdiction to the STB over anything included within

the general and all inclusive terms "transportation by rail carriers."]; see also *Elam v. Kansas City Southern Ry. Co.* (5th Cir. 2011) 635 F.3d 796, 805 citing H.R. Rep. No. 104-311 [section 10501(b) establishes "'the direct and complete pre-emption of State economic regulation of railroads.'"].)

The statutory framework around section 10501(b), with its emphasis on nationally uniform regulation of railroad line construction and operations, reinforces Congress's intent to preempt the type of dual federal/state regulation inherent in the CEQA remedies sought in this case. This goal of national uniformity, made express in the statute, would be impossible if a different set of rules applied in every state.

D. The Presumption Against Preemption Does Not Overcome the Congressional Intent in the Plain Language of the Statute and the Statutory Framework.

Every preemption analysis must consider the presumption against preemption. (*Brown, supra*, 51 Cal.4th at p. 1060.) The purpose of the presumption against preemption is to ensure that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts. (*Ibid.*) Applying it in this case, however, does not change the result in light of the express preemption language in section 10501(b) and the statutory framework. (*People ex rel. Harris v. Pac Anchor Transp., Inc., supra*, 59 Cal.4th at p. 778 [interpretation of express preemption provision requires consideration of plain language and statutory framework].) Section 10501(b)'s plain language and the larger statutory framework for exclusive STB regulation of railroad operations demonstrate Congress's intent to preempt the state-law remedies in this case. The presumption against preemption does not overcome this evidence of congressional intent. (*City of Auburn, supra*, 154 F.3d at pp. 1029-1031.)

II. INTERPRETING SECTION 10501(b) TO PREEMPT CEQA REMEDIES AGAINST A PUBLIC AGENCY RAILROAD'S FEDERALLY-AUTHORIZED RAIL TRANSPORTATION PROJECT DOES NOT UNCONSTITUTIONALLY INFRINGE ON STATE SOVEREIGNTY.

Despite the express preemption language and statutory framework, Petitioners claim preemption of CEQA remedies here would impermissibly infringe on state sovereignty. (See, e.g., Petitioners' Reply Brief, pp. 16-22.) The U.S. Supreme Court, however, has rejected nearly identical claims based in the Tenth Amendment, holding that when a state exercises its sovereign prerogative to build and operate a railroad, uniform application of federal law to the public railroad does not improperly infringe on state sovereignty. Petitioners' reliance on *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, which involved fundamentally different circumstances, is misplaced.

A. Uniform Application of Section 10501(b) Preemption To A Public Agency Railroad Is Consistent With The Tenth Amendment.

In the context of railroads in interstate commerce, the Supreme Court has repeatedly rejected Tenth Amendment challenges to interpreting various federal laws that apply uniformly to public and private railroads. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." (U.S. Const., 10th Amend.) When a state voluntarily directs one of its agencies to enter into the business of interstate railroading, the Tenth Amendment does not prevent Congress from requiring uniform application of federal law to that railroad, even if it impedes to some degree the state's governance of its agency.

The Supreme Court first addressed Tenth Amendment considerations in the context of a public agency railroad in *United States v. California* (1936) 297 U.S. 175, overruled in part in *Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528. The underlying issue was whether the State-Belt Railroad was a "common carrier engaged in interstate commerce by railroad" within the meaning of the federal Safety Appliance Act and subject to its requirements, even though the statute did not specifically state that it applied to state-owned railroads. (*Id.* at pp. 180-181.) The Supreme Court held the state-owned railroad was a common carrier and that the federal law applied. (*Id.* at pp. 185-186.) The Court rejected the argument that the statute was insufficiently clear to bind the sovereign based on the presumption that a sovereign is not bound by a statute unless named. (*Id.* at pp. 185-186.) The Court explained:

> We can perceive no reason for extending [the presumption] so as to exempt a business carried on by a state from otherwise applicable provisions of an act of Congress, all-embracing in scope and national in purpose, which is as capable of being obstructed by state as by individual action.

(*Id.* at p. 186.) The presumption was intended only to resolve doubts, not contradict the plain meaning of the statute. (*Id.* at p. 187.)

Two decades later, in *California v. Taylor* (1957) 353 U.S. 553, the Supreme Court rejected a Tenth Amendment challenge to the federal Railway Labor Act analogous to the one Petitioners make in this case to the ICCTA:

> If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships.

(*Id.* at p. 568.) That is, the Tenth Amendment did not bar a federal statute from supplanting state civil service laws governing employees of a state-owned railroad. (*Id.* at pp. 560, 568.) The fact that the state laws had to "give way" was consistent with the Tenth Amendment.

Even at the height of the Supreme Court's expansive interpretation of the Tenth Amendment in *National League of Cities v. Usery* (1976) 426 U.S. 833, overruled in *Garcia, supra*, 469 U.S. 528, the Supreme Court preserved the holdings in *United States v. California* and *California v. Taylor* that operating a railroad in interstate commerce was not an integral part of a State's sovereign activity and thus was not immune from federal regulation. (426 U.S. at p. 854, fn. 18; accord, *United Transp. Union v. Long Island R.R. Co.* (1982) 455 U.S. 678, 685, overruled in part by *Garcia, supra*, 469 U.S. 528 ["operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities generally immune from federal regulation under *National League of Cities*"]; see also *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Comm.* (E.D.Penn. 1993) 826 F.Supp. 1506, 1521-1522 [discussing how *National League of Cities* did not disturb *United States v. California* and *California v. Taylor*].)

Finally, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court considered whether a local transit agency was immune under the Tenth Amendment from application of employee overtime and minimum wage requirements under the Fair Labor Standards Act. (*Garcia, supra*, 469 U.S. at p. 530.) The Supreme Court rejected the holding in *National League of Cities* that the federal government could not enforce legislation against the States in "areas of traditional government functions." (*Id.* at pp. 545-547.) The Court adopted an expansive view of Congress's

power under the Commerce Clause and concluded that there was no destruction of state sovereignty in Congress applying the federal act's wage and hour provisions to the local transit agency. (*Id.* at pp. 554, 557.) *Garcia* reinforces the earlier holdings that that when a state voluntarily enters the field of interstate commerce by rail, federal laws can, consistent with the federal Constitution, expressly mandate the state to conform to the uniform regulatory scheme.

B. Petitioners' Reliance on *Nixon v. Missouri Municipal League* is Misplaced.

The basis for the holdings in the foregoing cases was that in the various railroad laws at issue, Congress intended to treat public and private railroads uniformly, in order to create and maintain a uniform nationwide rail system. For example, the Supreme Court held the federal Railway Labor Act applied to the publicly-owned State Belt Railroad in the same fashion it applied to a private railroad, and preempted state civil service laws even though the Act did not specify that state-owned railroads were covered. (*California v. Taylor*, *supra*, 353 U.S. at pp. 567-568.) In so holding, the Court emphasized that, "the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included." (*Id.* at p. 564.) The Court explained without qualification, "Congress intended it to apply to any common carrier by railroad engaged in interstate transportation, whether or not owned or operated by a State." (*Id.* at p. 567.)

California v. Taylor was founded on extensive authorities holding federal railroad laws apply uniformly to railroads in interstate commerce, regardless of the public or private nature of their ownership. (See generally

California v. Taylor, *supra*, 353 U.S. at pp. 561-564.) The Interstate Commerce Commission treated the State Belt Railroad and "other state-owned rail carriers" as common carriers and subject to its jurisdiction under the Interstate Commerce Act. (*Id.* at pp. 561-562 citing *California Canneries Co. v. Southern Pacific Co.*, 51 I.C.C. 500, 502-503 (1918), *United States v. Belt Line Railroad Co.*, 56 I.C.C. 121 (1919), and *Texas State Railroad*, 34 I.C.C. Val.R. 276 (1930).) Other federal statutes regulating railroads, "have consistently been held to apply to publicly owned or operated railroads." (*California v. Taylor*, *supra*, 353 U.S. at pp. 562-563 citing cases involving the Safety Appliance Act, Federal Employers' Liability Act, and Carrier's Taxing Act.)[12] In light of the federal scheme, there was no basis to treat a state-owned railroad differently than a private railroad. (*Id.* at pp. 563-564.)

The holding and reasoning of *California v. Taylor* with respect to the Railway Labor Act applies with equal force in the context of the ICCTA and public railroads. Courts and the Interstate Commerce Commission consistently treated public railroads the same as private railroads under the Interstate Commerce Act, the ICCTA's predecessor statute. (*City of New Orleans v. Texas & Pa. Ry. Co.* (5th Cir. 1952) 195 F.2d 887, 889 [New Orleans Public Belt Railroad was common carrier subject to Interstate Commerce Act]; *City of New Orleans by and Through Public Belt R.R. Comm. v. Southern Scrap Material Co., Ltd.* (E.D.La. 1980) 491 F.Supp. 46, 48 [same]; *International Longshoremen's Ass'n, AFL-CIO v. North*

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[12] The California Attorney General also recognized the Railway Labor Act applied to the State Belt Railroad and superseded conflicting provisions of state civil service laws. (*California v. Taylor*, *supra*, 353 U.S. at p. 561, fn. 9 citing 4 Ops.Cal.Atty.Gen. 300-306 (1944).)

Carolina Ports Authority (4th Cir. 1972) 463 F.2d 1, 3-4 [North Carolina Ports Authority was common carrier subject to Interstate Commerce Act, and Railway Labor Act for operation of terminal railroad]; *Staten Island Rapid Transit Operating Authority v. I.C.C.* (2d Cir. 1983) 718 F.2d 533, 539-540 [local public agency qualified as carrier under Interstate Commerce Act].)

As the Fifth Circuit Court of Appeals explained in discussing the New Orleans Public Belt Railroad, "[s]o long as it engages in interstate and foreign commerce it is subject to the federal law and the Interstate Commerce Commission, *like any other railroad.*" (*City of New Orleans v. Texas & Pa. Ry. Co., supra*, 195 F.2d. at p. 889, emphasis added; cf. *Los Angeles Met. Transit Authority v. Public Utils. Comm.* (1963) 59 Cal.2d 863, 868-870 [term "common carrier" in state statute inclusive of both public and private transportation utilities].)

Moreover, the STB continues to regulate public agency railroads under the ICCTA on par with private railroads. (See, e.g., *Alaska Railroad Corporation – Construction and Operation Exemption – Rail Line Between North Pole and Delta Junction, AK*, Fin. Docket No. 34658 (S.T.B. served Jan. 6, 2010), 2010 WL 24954 at * 1 [STB authorized state-owned Alaska railroad to construct and operate new rail line]; *California High-Speed Rail Authority – Construction Exemption – In Merced, Madera, and Fresno Counties, Cal., supra*, 2013 WL 3053064 [STB authorized state rail authority to construct new rail line]; *South Carolina Division of Public Railways, D/B/A Palmetto Railways – Intra-Corporate Family Transaction Exemption etc.*, Fin. Docket No. 35762 (S.T. B. Served Sept. 13, 2013), 2013 WL 4879234 [applying exemption procedures to state-owned rail carrier]; *State of North Carolina – Intracorporate Family Exemption –*

Merger of Beaufort and Morehead Railroad Company into North Carolina Railroad Company, Fin. Docket No. 33573 (S.T.B. served April 23, 1998), 1998 WL 191270 [same].)

Nixon therefore does not govern this case because the federal statute there was ambiguous about treating public and private entities uniformly and involved a state opting out of an industry, not a state affirmatively opting in. In *Nixon*, the federal statute preempted state or local laws expressly or effectively "prohibiting the ability of any entity" to provide telecommunications services and the state statute prohibited its political subdivisions from doing so. (*Nixon, supra*, 541 U.S. at p. 128 citing 47 U.S.C. § 253.) The Court interpreted the term "any entity" to be ambiguous, and not intended to include political subdivisions of the state, emphasizing the rule from *Gregory v. Ashcroft* (1991) 501 U.S. 452, that congressional intent to impinge on a State's arrangement for conducting its own government must be through a "plain statement." (*Nixon, supra*, 541 U.S. at pp. 132-134, 140-141.) "[N]either statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms." (*Id.* at p. 141.) In other words, there was no suggestion in *Nixon* that the particular provision challenged was designed to ensure nationwide uniformity in the area of telecommunications, or that there was a danger that a state, by passing a law removing its subdivision from the pool of entities that could provide telecommunications services, would undermine the federal scheme.

In contrast to the statute in *Nixon*, the ICCTA, its statutory framework and history, and similarly comprehensive federal railroad laws are replete with indications of congressional intent to treat public agency

and private railroads "on par" in order to create and maintain a uniform national interstate rail system. (*California v. Taylor*, *supra*, 353 U.S. at pp. 566-568; *United Transp. Union*, *supra*, 455 U.S. at p. 687; see also *Southeastern Pennsylvania Transportation Authority*, *supra*, 826 F.Supp. at pp. 1521-1522.) Moreover, this case does not involve a state decision to keep a political subdivision from undertaking rail transportation, but an express decision to enter this area. When a state voluntarily chooses to enter the business of interstate commerce by rail, it does so in light of the extensive, comprehensive regulation in the field and with the knowledge that it must conform to that regulation in order to ensure uniformity. If the "clear statement" rule of *Nixon* applies to this case, it is met here in the context of section 10501(b).

III. THE MARKET PARTICIPANT DOCTRINE DOES NOT APPLY IN THE CIRCUMSTANCES OF THIS CASE.

Just as the Tenth Amendment does not eliminate preemption in this case, neither does the market participant doctrine. The market participant doctrine allows a public agency to engage in markets in the same manner as a similarly-situated private party, without fear that federal law will preempt its true market interactions. In the typical case, a public agency invokes the doctrine to shield its market interactions from preemption. Petitioners, however, seek to use the market participant doctrine in an unprecedented way to subject a public agency to judicial proceedings and further compliance with a generally applicable state law that is specifically preempted under the posture and facts of this case. In this specific context of a public agency created by the State for the purpose of constructing or acquiring and operating a railroad that is subject to exclusive federal

regulation under the ICCTA, which treats public and private railroads uniformly, the doctrine does not apply to eliminate preemption.

As with the issue of preemption more generally, the Authority recognizes that the position it is taking in this brief is different from the typical public agency assertion of the market participant doctrine. But that is because the doctrine, as raised in *Atherton* and the appellate Opinion here, is addressed to a situation in which a public railroad must grapple with an exclusive federal regulatory scheme and a state law that, under the circumstances, conflict. The arguments here are limited to the issues in these cases, addressing the unique area of a public agency charged with operating a railroad under a pervasive and comprehensive federal regulatory scheme. In this context, applying the market participant doctrine would interfere with the State's own purpose in creating the agency to accomplish that task.

A. The Market Participant Doctrine Protects a Public Agency's Market Interactions From Preemption.

"[S]tate action in the nature of 'market participation' is not subject to the restrictions placed on state regulatory power by the Commerce Clause." (*Wisconsin Dept. of Industry, etc. v. Gould Inc.* (1986) 475 U.S. 282, 289 (*Gould*).) The market participant doctrine recognizes that when a state acts in a proprietary capacity, it has the same freedom to pursue its proprietary interests as would a similarly-situated private entity. (*Bldg. & Const. Trades Council of Metro Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* (1993) 507 U.S. 218, 231-232 (*Boston Harbor*).) "To the extent that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business, and

its business goals – just as if it were a private party." (*SSC Corp. v. Town of Smithtown* (2d Cir. 1995) 66 F.3d 502, 510.)

In a statutory preemption case, a reviewing court addressing the market participant doctrine must first consider whether, in a particular case, the market participant doctrine is even available, or whether there is clear congressional intent to preclude this exception to preemption. The doctrine is not free-standing, but a presumption about congressional intent in a particular federal statute. (*Engine Mfrs. Ass'n. v. South Coast Air Quality Management. Dist.* (9th Cir. 2007) 498 F.3d 1031, 1042.) The doctrine therefore does not apply if the federal statute "contains 'any express or implied indication by Congress' that the presumption embodied by the market participant doctrine should not apply to preemption under the Act." (*Ibid.*, citing *Boston Harbor*, *supra*, 507 U.S. at p. 231.) If a court concludes the doctrine is not available in light of the federal law and facts at issue in a particular case, the doctrine will not serve as an exception to preemption and that is the end of the inquiry. (*City of Charleston, South Carolina v. A Fisherman's Best, Inc.* (2002) 310 F.3d 155, 178-179 [no indication in Magnuson Act of proprietary exception to preemption].)

Only if a reviewing court concludes the federal statute is amenable to the market participant doctrine under the facts presented will the court engage in a second inquiry to consider whether the doctrine applies to the specific public agency action in dispute. The court must carefully define what the challenged action is, who is taking the challenged action, and what the market is, if any. (See *South Central Timber Development v. Wunnicke* (1984) 467 U.S. 82, 96-98 [defining action and market in dormant commerce clause challenge].)

Market participant doctrine questions may arise in a number of different ways. However, it is helpful here to describe two distinct procedural contexts reflected in cases involving federal statutes. The first is a lawsuit by a plaintiff claiming a public agency defendant's action is preempted under a particular federal statute. The public agency defendant invokes the market participant doctrine to shield its actions (i.e., allow the actions to continue) from claims of preemption. (See, e.g., *Boston Harbor*, *supra*, 507 U.S. at pp. 220-222, 232-233.) A second procedural context is a lawsuit by a plaintiff seeking to require compliance with a state law, the defendant raises preemption as a defense to the state-law enforcement suit, and the plaintiff invokes the market participant doctrine to defeat the federal preemption defense. (See, e.g., *State of New York ex rel. Grupp v. DHL Express* (N.Y. 2012) 19 N.Y. 3d 278, 286.)

To determine whether the market participant doctrine applies in either of these two contexts (and only after determining that the doctrine is available in a particular case), a reviewing court considers two questions:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

(*Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.* (5th Cir. 1999) 180 F.3d 686, 693.) A state action need satisfy only one of the two questions to qualify the action as market participation rather

than preempted regulation. (*Johnson v. Rancho Santiago Community College Dist.* (9th Cir. 2010) 623 F.3d 1011, 1024.)

In this case involving section 10501(b) and actions subject to the STB's exclusive jurisdiction and regulation, the market participant doctrine is not available to overcome preemption because applying the doctrine here would conflict with congressional intent. Even if, however, the Court considers the doctrine available and proceeds to further analysis, the doctrine still does not apply because the challenged action in this case is not market participation.

B. The Market Participant Doctrine Does Not Apply Here Because it Would Undermine Congressional Intent to Have Uniform and Exclusive Federal Regulation of Railroads in Interstate Commerce.

The Court's first inquiry must consider whether the market participant doctrine is even available in this case as an exception to the preemption in section 10501(b). The doctrine is not available here to eliminate preemption for two reasons. First, the market participant doctrine would contradict the basis for applying section 10501(b) preemption in the first place. And second, the doctrine here would be contrary to congressional intent. Moreover, in this particular situation, applying the doctrine would be contrary to the State's intent in creating an agency to operate a railroad subject to a federal regulatory scheme.

In analyzing the availability of the market participant doctrine in a particular case, it is necessary to consider whether the doctrine is consistent with general preemption principles under the federal law at issue. (*Boston Harbor*, *supra*, 507 U.S. at p. 230 [explaining that market participant doctrine was consistent with preemption principles under National Labor

Relations Act].) As discussed above, preemption in section 10501(b) is intended to give the STB exclusive jurisdiction over the regulation of rail transportation, including the STB-licensed railroad operations at issue in this case. Allowing a state law of general applicability to govern the same area is contrary to preemption principles under the ICCTA. (*Chicago and N.W. Transp. Co., Inc.*, *supra*, 450 U.S. at pp. 324-326 [preempting state law that sought to regulate abandonments, an area under exclusive federal jurisdiction under Interstate Commerce Act]; *City of Auburn*, *supra*, 154 F.3d at p. 1031 [preempting state law that sought to regulate rail line construction and operations].)

The market participant doctrine here would also be contrary to congressional intent. Congressional intent is manifest in section 10501(b) that STB's jurisdiction over the railroad operations in this case is "exclusive" and that "the remedies provided under [the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." (49 U.S.C. §§ 10501(b), 10901; *City of Auburn*, *supra*, 154 F.3d at pp. 1029-1030.) Congress intended to not only promote uniformity of regulation by giving the STB exclusive and plenary jurisdiction over railroad operations, but also to preempt state law remedies related to a railroad's federally licensed operations that would impose differing standards by states. (See *Chicago and Northwest Transp. Co.*, *supra*, 450 U.S. at pp. 320-321; *CSX Transp.*, *supra*, 944 F.Supp. at p. 1581.)

Moreover, Congress enacted section 10501(b) in the context of a regulatory framework that has applied uniformly to public and private railroads for decades. (See section I.C, *supra*.) In light of this long-standing history, the ICCTA indicates no congressional intent to allow for a

separate, non-uniform regulation or remedial scheme for public agency railroads as to their federally licensed activities. (Cf. *California v. Taylor*, *supra*, 353 U.S. at p. 567 [recognizing uniform application of federal railroad labor law, and preempting state civil service laws from applying to public railroad]; see also *Southeastern Pennsylvania Transportation Authority*, *supra*, 826 F.Supp. at p. 1521 [rejecting Tenth Amendment argument that federal statute could not preempt state tax law from applying to public railroad]; *City of New Orleans*, *supra*, 195 F.2d at p. 889.) Congress intended to have uniform and exclusive federal regulation, not separate, additional state-specific requirements and remedies in states with public agencies building or operating railroad in interstate commerce. (*City of Auburn*, *supra*, 154 F.3d at p. 1030; cf. *City of Charleston, South Carolina v. A Fisherman's Best, Inc.*, *supra*, 310 F.3d at p. 179 [no indication in Magnuson Act that Congress intended to allow market participant exception].) Under the circumstances of this case, to allow the Petitioners here to use the market participant doctrine to nullify preemption would be contrary to both congressional and state intent.

As indicated in the first question on review here, the only two published decisions to address the market participant doctrine in the context of section 10501(b) are the appellate Opinion in this case and *Atherton*. (Opinion, pp. 28-34; *Atherton*, *supra*, 228 Cal.App.4th at pp. 334-341.) Both cases involved California public agencies engaged in interstate commerce by railroad and under the STB's exclusive jurisdiction, and facing CEQA lawsuits. The two decisions reached the opposite result on the market participant doctrine and section 10501(b), albeit on different facts. The Authority submits that under the facts of this case, and in light of the analysis above, the market participant doctrine does not apply.

Atherton's market participant doctrine analysis fell short because the court there assumed that the market participant doctrine was available under section 10501(b) and then proceeded to consider whether the action at issue was proprietary. (*Atherton, supra*, 228 Cal.App.4th at pp. 334-336.) The court never analyzed whether the application of section 10501(b) in that case was even amenable to the market participant doctrine. (*Id.* at pp. 334-341.) The court therefore never reconciled the market participant doctrine with congressional intent in the ICCTA. (*Ibid.*) A proper focus on congressional intent in section 10501(b) and the long history of uniform treatment of public and private railroads demonstrates that the doctrine is not available in this case. The *Atherton* court omitted an essential step in market participant doctrine analysis.

Moreover, the *Atherton* court did not have before it a case where the CEQA challenge was directly targeting actions over which the STB not only had jurisdiction, but had specifically authorized. (*Atherton, supra*, 228 Cal.App.4th at p. 322 [challenge in case was to program EIR]; *id.*, p. 332, fn. 4 [acknowledging that agency could make request to STB for declaratory order on issue of preemption].) *Atherton* recognized that the challenged program EIR would be followed by further project-level environmental review and thus the possibility of interfering with rail transportation was more remote than was the case in *City of Auburn*. (*Id.* at p. 333 [contrasting *Atherton* facts with *City of Auburn* because less clear CEQA could deny railroad ability to conduct its operations or activities].) Yet, this case presents the exact situation where *Atherton* recognized preemption would apply to prevent a state law from interfering with STB authorized rail operations. *Atherton* thus not only applied an incorrect analytical framework for the market participant doctrine, it is

distinguishable from this case, where the CEQA suit challenges rail operations the STB has authorized.

The STB has recently assessed the market participant doctrine, section 10501(b), and CEQA remedies, considering the appellate decisions in both this case and in *Atherton*. (*California High-Speed Rail Authority, Petition for Declaratory Order*, *supra*, 2014 WL 7149612, at *9-10.) For a public railroad project under its jurisdiction and for which it had issued a federal license, the STB held CEQA was preempted and the market participant doctrine did not apply. (*Id.* at *10.) While Petitioners claim the STB has no special expertise about the market participant doctrine and that its decision can be disregarded, the Authority respectfully suggests that the STB's decision merits weight regarding the application of CEQA in the context of a particular railroad under its jurisdiction. (Petitioners' Reply Brief, p. 31; *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1488; *Atherton*, *supra*, 228 Cal.App.4th at p. 332, fn. 4.)

The Authority submits that by applying the initial market participant doctrine inquiry and considering the doctrine in conjunction with congressional intent in the ICCTA, and recognizing that the CEQA remedies in this case are directed at STB authorized actions by a public agency, the Court should affirm the holding of the appellate court below and find the doctrine does not operate in this case to eliminate preemption.

C. In the Circumstances of This Case, NCRA's Compliance with CEQA and Being Subject to CEQA Lawsuits is not Market Participation.

The Court need go no further with its market participant doctrine analysis than conclude, as explained above, the doctrine simply does not apply in this case as an exception to preemption. However, if the Court

undertakes the second inquiry and considers whether the disputed action at issue is proprietary, the doctrine still does not apply. The challenged "action," when properly defined and in light of the procedural posture of the case, is not market participation by NCRA that leads to an exception to preemption.

1. A public agency railroad's compliance with CEQA, standing alone, is not market participation.

Market participant doctrine cases focus on the "action" for purposes of analysis as the action being disputed as preempted in a particular case. (See, e.g., *Boston Harbor*, *supra*, 507 U.S. at pp. 222-223 [action for market participant doctrine analysis was public agency's approval of a project labor agreement that litigants claimed was preempted by federal law]; *Gould*, *supra*, 475 U.S. at p. 285 [action for market participant doctrine analysis was state debarment scheme that litigants claimed was preempted by federal law]; *State of New York ex rel. Grupp*, *supra*, 19 N.Y.3d at pp. 286-287 [action for market participant doctrine was state law that litigant was trying to enforce]; *DHL Express (USA) Inc. v. State, ex rel. Grupp* (Fl.Dist.Ct.App. 2011) 60 So.3d 426, 429 [same]; *Whitten v. Vehicle Removal Corp.* (Tx.Ct.App. 2001) 56 S.W.3d 293, 309-310 [same].) The focus of each of these types of cases is whether the particular challenged action or state law is itself market participation, rather than whether the public agency is engaging in some form of market participation more generally.

This case is fundamentally different from these types of market participant cases. The specific "action" at issue that is said to be the market participation is the NCRA's compliance with CEQA, and the resulting

CEQA enforcement lawsuits. (Pub. Resources Code, §§ 21002, 21081; 21167.) This is the case because Petitioners' lawsuit is grounded in NCRA's alleged failure to fully comply with CEQA, and it seeks remedies under Public Resources Code section 21168.9. But a public agency's actions to comply with CEQA, standing alone, are not market participation. When a public agency complies with a state law that is itself not proprietary, it "is not participating in an open market but simply carrying out a traditional state regulatory responsibility." (*Children's Hospital and Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 768.)

Inherent in market participation is an underlying *voluntary* action by a public agency making choices in a specific free market. (*Boston Harbor*, *supra*, 507 U.S. at pp. 230, 231 [describing doctrine as "permitting the States to participate freely in the marketplace"]; *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority* (2d Cir. 2006) 438 F.3d 150, 158 [Commerce Clause does not restrict a public agency's "choices" about how to dispose of trash].) Following generally applicable legal requirements here is not "participation" in any "market" because a public agency preparing an EIR under CEQA, and then being sued by a third party, involves neither a voluntary action nor any market interaction. (*State of New York ex rel. Grupp*, *supra*, 19 N.Y.3d at pp. 286-287; *Children's Hospital and Medical Center*, *supra*, 97 Cal.App.4th at p. 768 [discharging regulatory responsibilities under state and federal law not responsive to market forces and not engaging in any market].) Fundamental aspects of market participation are simply lacking in this case. (See, e.g., *Gould*, *supra*, 475 U.S. at p. 291 [rejecting market participant doctrine where challenged statute not related to "state procurement constraints or to local economic needs . . . ."].)

The cases cited by Petitioners, which address a state or a local government agency's specific proprietary and procurement-related actions, are distinguishable. (E.g., *Engine Mfrs.*, *supra*, 498 F.3d at pp. 1035-1036 [rules for procuring clean vehicles when adding to a fleet]; *Boston Harbor*, *supra*, 507 U.S. at pp. 220-223 [contract bid specifications applicable to specific construction project]; *Johnson*, *supra*, 623 F.3d at p. 1016 [project labor agreement to govern labor relations for multiple agency construction projects]; *White v. Massachusetts Council of Const. Employers, Inc.* (1983) 460 U.S. 204, 205-206 [city executive order requiring percentage of workforce on construction projects paid for with city funds to be performed by workforce comprised of at least half city residents].) Characterizing compliance with CEQA as market participation here, simply because the overall mission of the NCRA is to own and operate a railroad, would be an unwarranted extension of the doctrine.

Atherton, admittedly, did conclude that the Authority engaged in market participation when it prepared its programmatic environmental report. (*Atherton*, *supra*, 228 Cal.App.4th at p. 337.) The court reached this result principally because the Legislature did not affirmatively exempt the high-speed rail project from complying with CEQA, a state law that pre-dated the Authority's enabling and funding legislation. (*Id.* at p. 337.) By this logic, however, a railroad's compliance with generally applicable state laws would always be market participation and would mean there would never be preemption. For example, under this reasoning the federal labor law at issue in *California v. Taylor* would not preempt state civil service laws, the opposite of the result the Supreme Court reached. This

analytical approach is flawed because it results in the market participant doctrine swallowing the rule of preemption.[13]

Finally, the *Cardinal Towing* test further demonstrates that the present circumstances of complying with CEQA and being subject to CEQA lawsuits is not market participation in the context of a public agency engaging in interstate rail operations and viewed in light of the ICCTA's purposes. Only public agencies must comply with CEQA's procedural and substantive mandates prior to approving and implementing a project. (Pub. Resources Code, § 21002.) A similarly-situated private railroad has no similar legal obligation to prepare an EIR or adopt feasible mitigation if it wishes to construct, repair, or operate a railroad line, nor will it typically be required to obtain permits or pre-approvals that would trigger CEQA review by a public agency. (*City of Auburn, supra*, 154 F.3d at p. 1031; see also *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, Fin. Docket No. 34914 (S.T.B. served June 27, 2007), 2007 WL 1833521, at *3-4.) Accordingly, the NCRA's legal duties under CEQA are unlike "*the typical behavior of private parties in similar circumstances.*" (*Cardinal Towing, supra*, 180 F.3d at p. 693, emphasis added.) This is particularly the case here because even though a private railroad may be able to freely choose to consider environmental information and to share information with the public as it pursues its business goals (Petitioners' Reply Brief, pp.

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[13] Petitioners cite *Electrical Contractors v. Department of Education* (Conn. 2012) 303 Conn. 402 as rejecting the argument that only state actors may assert the market participant doctrine. That court did not decide this issue, but instead relied on *Boston Harbor* to find that the plaintiffs' state law challenge to the labor agreement at issue were not preempted in the first instance. (*Id.* at pp. 446-455.)

26-27), the private railroad is not subject to being sued in state court for alleged inadequacies in its internal procedures or substantive decisions.

And CEQA does not merely guide internal decisionmaking as Petitioners suggest, but it includes a series of mandatory procedures that precede agency decision making. (Petitioners' Reply Brief, pp. 23-24.) CEQA's substantive mandate requires that public agencies not approve projects as proposed if there are feasible mitigation measures or alternatives that would substantially lessen the significant environmental effects of the project. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134.) Standing alone, CEQA is a law of general application, not a law addressing a specific proprietary problem. (*Cardinal Towing, supra*, 180 F.3d at p. 693.) And the ICCTA does not contemplate that public railroads must be subject to an additional set of regulations and remedies. In this context, complying with CEQA constitutes implementing generally applicable state regulations, not engaging in narrow market interaction. (*Cardinal Towing, supra*, 180 F.3d at p. 693.)

2. That a public rail agency's operation of a rail line might be described as proprietary does not transform CEQA compliance into market participation.

Petitioners argue, nevertheless, that CEQA compliance in this case is "proprietary" and escapes preemption because it is a required part of NCRA's underlying decision to lease, restore, and reopen its railroad line. (Petitioners' Reply, p. 23.) "Here, by requiring CEQA compliance before reopening of the rail line, the State was acting within its capacity as a proprietor of the line." (*Id.* at p. 25.) According to Petitioners, it is not simply NCRA, but "the State" that is engaging in proprietary conduct by

making proprietary decisions. (*Id.* at pp. 27-30.) These arguments are unpersuasive for two reasons.

First, Petitioners incorrectly attempt to merge NCRA's CEQA compliance with its railroad operations in order to characterize the entirety of these two discrete activities as collectively constituting market participation. (Petitioners' Reply Brief, pp. 23-27.) This contention ignores that a state may act as a market participant with respect to one portion of a program while operating as a market regulator in implementing another." (*United Haulers Ass'n, supra*, 438 F.3d at p. 158.) Thus, "[c]ourts must evaluate separately each challenged activity of the state to determine whether it constitutes participation or regulation." (*USA Recycling, Inc. v. Town of Babylon* (2nd Cir. 1995) 66 F.3d 1272, 1283.) The fact that the NCRA's decision about railroad operations may have been participation in the railroad services market does not convert NCRA's CEQA compliance, let alone it being subject to CEQA enforcement lawsuits, into market participation. (See *State of New York ex rel. Grupp, supra*, 19 N.Y.3d at pp. 286-287 [state False Claims Act suit not part of market participant action of contracting for shipping services]; *DHL Exp. (USA) v. State ex rel. Grupp, supra*, 60 So.3d at p. 429 [same].)

Second, Petitioners' arguments improperly merge "the State" and NCRA in terms of who was allegedly acting in a proprietary capacity in requiring or complying with CEQA. NCRA is the public agency respondent in this lawsuit, and as discussed above, when it prepared its EIR, it was simply complying with state law, not engaging in market interactions with other parties. There is no challenge here to any state legislative enactment or state agency funding decision, and this case involves no state defendants. This case is therefore unlike cases Petitioners

cite involving state statutes imposing funding conditions on public construction projects that private parties alleged were preempted on their face. (Petitioners' Reply Brief, p. 25.) To the extent Petitioners argue "the State" as a whole is engaging in the proprietary activity by either entering the railroad business or requiring CEQA compliance, there can be no doubt that the Legislature enacted CEQA to establish general state environmental policy. As applied to public rail agencies constructing or operating rail lines under STB jurisdiction, CEQA is effectively regulatory. (Pub. Resources Code, §§ 21000, 21001, 21001.1, 21002; cf. *Chamber of Commerce v. Brown* (2008) 554 U.S. 60, 71 [California statute establishing labor policy, and not addressing procurement of goods and services, was not market participation].)

3. CEQA remedies as applied to a public agency railroad undertaking an STB-regulated project reinforce that complying with the statute is not market participation by the NCRA.

Finally, being subject to a CEQA enforcement lawsuit is not market participation by NCRA, it is preempted state regulation of NCRA's railroad actions in the specific context of this case. Petitioners' case is based solely on CEQA. When a public agency prepares an environmental impact report to consider in conjunction with its own proposed project, CEQA provides for citizen enforcement of CEQA's procedural and substantive requirements by a private right of action against the public agency. (Pub. Resources Code, §§ 21167, 21177.) A CEQA lawsuit may result in remedies in the form of writs of mandate and injunctive relief. (*Id.* at § 21168.9; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 422-424 [discussing CEQA remedies].)

CEQA's remedy provisions both encourage initial compliance with CEQA's procedural and substantive mandates, and force corrective action where appropriate. (Pub. Resources Code, § 21168.9.)

Petitioners' lawsuit seeks to block NCRA from engaging in federally-authorized railroad operations. This form of third party CEQA lawsuit *against* NCRA is not NCRA's market participation. (*California High-Speed Rail Authority – Petition for Declaratory Order*, *supra*, at *12-13; *Whitten*, *supra*, 56 S.W.3d at p. 310 ["The State may not escape the preemptive effect of federal statutes by using private litigation as a means of enforcement . . . ."]; see generally *Ball v. GTE Mobilnet of California* (2000) 81 Cal.App.4th 529, 537 [state court enforcement is form of state regulation]; cf. *Chamber of Commerce v. Brown*, *supra*, 554 U.S. at p. 72 [rejecting market participant argument where state statute included citizen suit provision and provided for injunctive relief, damages, and penalties].)

Petitioners cite *Engine Manufacturers* for the premise that an enforcement mechanism does not convert an otherwise proprietary action into a regulatory action. (*Engine Mfrs.*, *supra*, 498 F.3d at p. 1048.) This holding was grounded, however, in the fact that the enforcement action was embedded as part of an inherently proprietary action – clean vehicle procurement rules. (*Ibid.*) CEQA's enforcement mechanisms, in contrast, are in the Public Resources Code and are entirely separate from NCRA's market participation. *Engine Manufacturers* is therefore not applicable in this case, where an entirely separate state statute prescribes procedural and substantive requirements a public agency must follow and includes a separate enforcement mechanism as part of that statute. (*State of New York ex rel. Grupp*, *supra,* 19 N.Y.3d at p. 286; *Whitten*, *supra*, 56 S.W.3d at pp. 309-310.)

The holding in *Engine Manufacturers* was also based in part on the fact that the federal statute at issue expressly recognized state authority and roles in regulating air pollution to meet federal standards and indicated no congressional intent to bar states from choosing to use their own funds to acquire or use vehicles cleaner than the federal standards. (*Engine Mfrs.*, *supra*, 498 F.3d at p. 1043.) Enforcement of the procurement rules through penalty provisions presented no conflict with federal law. The ICCTA, by contrast, establishes uniform and exclusive federal regulation of the railroad operations at issue in this case. (Compare *id.* at p. 1042 ["The "Clean Air Act largely preserves the traditional role of the states in preventing air pollution."] and *City of Auburn*, *supra*, 154 F.3d at p. 1030 [plain language in the ICCTA grants the STB "exclusive authority" over railway projects like Stampede Pass"].) The market participant doctrine has no place here, where applying it would undermine rather than carry out congressional intent. (*Engine Mfrs.*, *supra*, 498 F.3d. at p. 1042.)

IV. SECTION 10501(B) WILL NOT PREEMPT A RAILROAD'S VOLUNTARY AGREEMENTS THAT DO NOT UNREASONABLY INTERFERE WITH RAILROAD OPERATIONS.

The second question before the Court is whether section 10501(b) preempts the CEQA claims in this case if the NCRA voluntarily agreed to prepare an EIR in return for receiving state funds. The Authority will not weigh in on the specific facts of this case and whether a voluntary agreement exists. The Court of Appeal thoroughly addressed the facts in its Opinion and the parties have briefed whether an agreement to prepare an EIR exists, whether the agreement covered an EIR on federally-licensed railroad operations, and whether the Petitioners have standing to enforce the agreement if it exists. Rather, the Authority addresses this question

solely to ensure full consideration of the relationship between voluntary agreements and preemption under 10501(b), including two important STB decisions on this issue the parties do not address.

Section 10501(b) preempts only state or local *regulation* of rail transportation. (49 U.S.C. § 10501(b)(2).) Thus, section 10501(b) generally will not preempt a railroad's voluntary choice to undertake an "activity or restriction" that reflects the railroad's own determination that the condition is reasonable. (*Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, Fin. Docket No. 33971 (S.T.B. served May 1, 2001), 2001 WL 458685 at *67 and fn. 38 (*Boston and Maine*).) This is the case because, in general, voluntary agreements between private parties are not presumptively regulatory acts. (*PCS Phosphate Co., Inc. v. Norfolk Southern Corp.* (4th Cir. 2009) 559 F.3d 212, 218-219.)

The STB first articulated the distinction between preempted regulation under section 10501(b) and non-regulatory voluntary agreements in *Township of Woodbridge, N.J. et al., v. Consolidated Rail Corp., Inc.*, No. 42053 (S.T.B. served Dec. 1, 2000), 2000 WL 1771044 (*Township of Woodbridge*). There, a freight railroad entered into a settlement agreement to resolve a town's litigation against it over noise from locomotive engine idling by agreeing to curtail idling between 10:00 pm and 6:00 am. (*Id.* at *1.) The railroad later argued before the STB that the settlement agreement, both in its original form and as subsequently clarified in a consent decree, was preempted and not enforceable. (*Id.* at *2.) The STB rejected that argument, concluding that when a railroad enters into a contractual settlement agreement to resolve litigation, the railroad cannot shield itself from the contractual bargain it struck by resorting to

preemption. (*Id.* at *3-*4.) The voluntary agreement reflected the railroad's own determination and admission that the agreement would not unreasonably interfere with interstate commerce. (*Id.* at *3.) There were no facts suggesting that complying with the disputed settlement agreement would unreasonably interfere with railroad operations. (*Ibid.*)

Enforceable voluntary agreements can be an important tool for railroads to address environmental issues. (See, e.g., *Boston and Maine, supra*, 2001 WL 458685 at *6, fn. 38 [encouraging railroads and communities "to work together to reach mutually acceptable solutions to localized environmental concerns."].) Voluntary agreements provide a mechanism to resolve community concerns short of litigation, or resolve litigation it if it occurs. (See, e.g., *Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp.* (2000) 163 N.J. 446, 462 [describing voluntary efforts to address community issues in manner consistent with congressional intent in the ICCTA]; *Township of Woodbridge, supra*, 2000 WL 1771044 at *3-4.) Railroads gain an important degree of flexibility through voluntary agreements to address local concerns while preserving their ability to engage in federally licensed railroad operations.

However, while a voluntary agreement is presumptively non-regulatory, that presumption can be rebutted based on the specific facts of the case. (*Township of Woodbridge v. Consolidated Rail Corp., Inc.*, No. 42053 (S.T.B. served March 23, 2001), 2001 WL 283507, at *2-3 [railroad could raise facts to show unreasonable interference with main line operations as part of contract enforcement case].) Section 10501(b) may preempt, for example, a contract enforcement remedy "so onerous as to unreasonably interfere with railroad operations." (*Township of Woodbridge, supra*, 2000 WL 1771044 at *4; see also *Wichita Terminal*

Association, BNSF Railway Company and Union Pacific Railroad Company – Petition for Declaratory Order, Fin. Docket No. 35765 (S.T.B. served June 23, 2015), 2015 WL 3875937.)

In *California High-Speed Rail Authority – Petition for Declaratory Order*, the STB held that third party enforcement of judicial remedies would not escape preemption, even if a public agency's actions in preparing an EIR qualified as an implied voluntary agreement to comply with CEQA. (*California High-Speed Rail Authority - Petition for Declaratory Order*, *supra*, 2014 WL 7149612 at *7.) The STB explained:

> In particular, we conclude that any implied agreement to comply with CEQA that potentially could have the effect, through the mechanism of a third-party enforcement suit, of prohibiting the construction of a rail line authorized by the Board unreasonably interferes with interstate commerce by conflicting with our exclusive jurisdiction and by preventing the Authority from exercising the authority we have granted it.

(*Id.* at *7.) Therefore, if judicial enforcement of a voluntary agreement between a railroad and a governmental entity would unreasonably interfere with STB-regulated railroad operations, then section 10501(b) may preempt that component of an agreement.

CONCLUSION

The Authority has provided the foregoing discussion to ensure a comprehensive consideration of how the express preemption in section 10501(b) applies to public agency railroads. The Authority respectfully suggests that while the Court of Appeal's opinion may not have considered all of the points raised here, that its ultimate holding was correct.

Dated: July 1, 2015

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CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Brief uses a 13 point Times New Roman font and contains 13927 words, exclusive of the application, table of contents, table of authorities, and signature block, based on the word count feature in Microsoft Word.

Dated: July 1, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Friends of the Eel River and Californians for Alternatives to Toxics v. North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority***

Case No.: **S222472**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On **July 1, 2015**, I served the attached:

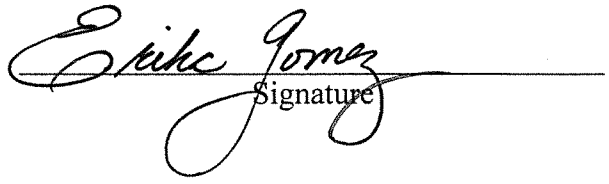
APPLICATION OF THE CALIFORNIA HIGH SPEED RAIL AUTHORITY FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 1, 2015**, at San Francisco, California.

Erika Y. Gomez
Declarant


Signature

SA2015300475

SERVICE LIST

Case Name: ***Friends of the Eel River and Californians for Alternatives to Toxics v. North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority***

Case No.: **S222472**

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Center for Biological Diversity: Amicus Curiae	Clare Lakewood Center for Biological Diversity 351 California Street San Francisco, CA 94612
South Coast Air Quality Management District: Amicus Curiae	Barbara Baird South Coast Air Quality Management District 21865 Copley Drive Diamond Bar, CA 91765
Bay Area Air Quality Management District: Amicus Curiae	Brian Charles Bunger Bay Area Air Quality Management District 939 Ellis Street San Francisco, CA 94109
Madera County Farm Bureau and Merced County Farm Bureau: Amici Curiae	Jason William Holder Holder Law Group 339 15th Street, Suite 202 Oakland, CA 94612
Town of Atherton, California Rail Foundation, Transportation Solutions Defense and Education Fund, Community Coalition on High-Speed Rail, and Patricia Hogan-Giorni: Amici Curiae	Stuart M. Flashman Attorney at Law 5626 Ocean View Drive Oakland, CA 94618
Sierra Club, Coalition for Clean Air, Natural Resources Defense Counsel, Planning and Conservation League, and Communities for a Better Environment: Amici Curiae	David Pettit Natural Resources Defense Council 1314 Second Street Santa Monica, CA 90401
(Case Nos. A139222 and A139235)	Clerk of the Court California First District Court of Appeal, Division Five 350 McAllister Street San Francisco, CA 94102

(Case Nos. CIV11-03605 and CIV11-03591)	Clerk of the Superior Court Superior Court of California, County of Marin P.O. Box 4988 San Rafael, CA 94913