Case No. S222472

IN THE SUPREME COURT OF CALIFORNIA

Friends of the Eel River and Californians for Alternatives to Toxics

Plaintiffs/Appellants

v.

North Coast Railroad Authorities and Board of Directors of North Coast Railroad Authority

Defendants/Respondents

Northwestern Pacific Railroad Company

Real Party in Interest/Respondent

After a Decision of the Court of Appeal
First Appellate District, Division One
Cases Number A139222 and A139235
Marin County Superior Court Case Numbers CIV11-3605 and CIV11-03591
Hon. Roy Chernus, Judge.

APPLICATION FOR LEAVE TO SUBMIT AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF AMICI CURIAE TOWN OF ATHERTON, CALIFORNIA RAIL FOUNDATION, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, COMMUNITY COALITION ON HIGH-SPEED RAIL, AND PATRICIA HOGAN-GIORNI IN SUPPORT OF APPELLANTS FRIENDS OF EEL RIVER AND CALIFORNIANS FOR ALTERNATIVES TO TOXICS

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE TOWN OF ATHERTON, CALIFORNIA RAIL FOUNDATION, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, COMMUNITY COALITION ON HIGH-SPEED RAIL, AND PATRICIA HOGAN-GIORNI IN SUPPORT OF PLAINTIFFS AND APPELLANTS FRIENDS OF THE EEL RIVER AND CALIFORNIANS FOR ALTERNATIVES TO TOXICS

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

Pursuant to Rule of Court 8.520(f), the Town of Atherton ("Atherton"), California Rail Foundation ("CRF"), Transportation Solutions Defense and Education Fund ("TRANSDEF"), Community Coalition on High-Speed Rail ("CC-HSR") and Patricia Hogan Giorni ("Giorni", and the aforementioned, collectively, "Amici") apply to the Court for permission to file the accompanying amicus curiae brief in support of plaintiffs and appellants Friends of the Eel River and Californians for Alternatives to Toxics ("Plaintiffs").

INTRODUCTION

Amici Curiae Atherton, CRF, TRANSDEF, CC-HSR, and Giorni file this brief to assist the Court in sorting through the many thorny issues associated with this important case. As laid out below, Amici have been involved extensively with this issue as plaintiffs in litigation against the California High-Speed Rail Authority ("CHSRA")[1], and as intervenors

[1] CHSRA, through the California Attorney General, has applied to the Court for a one month extension on the time to file an amicus brief, as have its sister agencies the California Environmental Protection Agency and the

before the Surface Transportation Board ("STB") in California High Speed Rail Authority – Petition for Declaratory Order ("CHSRA-STB2") (Dec. 12, 2014) STB Finance Docket No. 35861, 2014 WL 7149612, and are currently seeking judicial review of that STB ruling in the Ninth Circuit Court of Appeal. Counsel for Amici has, in the process, gained considerable insight into the issues involved. Amici believe that those insights would be helpful to the Court in its consideration of this case.

AMICI CURIAE AND THEIR INTERESTS

The nature of each amicus curiae and their interest in this cases are described briefly below.

Atherton is a California municipality located on the San Francisco Peninsula ("Peninsula") approximately thirty miles south of San Francisco. It is located directly astride the right of way for Caltrain, which will also be the right of way for the proposed high-speed rail line between San

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California Resources Agency. Presumably, all three agencies intend to represent the position of the State's executive branch (presumably in support of Defendants herein). As in its litigation against Amici, CHSRA has waited until the eleventh hour to submit its request. Here, whatever CHSRA's motivation, there is a clear risk that CHSRA will seek to "game the system" by using its brief to respond to points made in earlier-filed amicus briefs and answers thereto, in essence serving as a surreply on behalf of Defendants herein. Not only would this subvert the intent of the Rules of Court in identifying a uniform deadline for amicus brief applications, but it would also be highly inequitable. Amici therefore respectfully request that if the Court is inclined to grant CHSRA's application, it limit the amicus brief to not allow reference to briefs filed after the close of the party briefing.

Francisco and Los Angeles being planned by the California High-Speed Rail Authority ("CHSRA").

Beginning in 2007, Atherton has participated intensively in the environmental review of that proposed high-speed rail line under the California Environmental Quality Act[2] ("CEQA"), has initiated several rounds of litigation against CHSRA under CEQA for the inadequacy of the program-level Environmental Impact Report ("EIR") for the Merced to San Francisco segment of the high-speed rail line, and was the lead plaintiff in the published appellate case, *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314. That case held that, as applied to the California High-Speed Rail Authority's statewide high-speed rail project, CEQA was not preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§10101 *et seq*. ("ICCTA")

Because project-level environmental review of the San Jose to San Francisco segment of the high-speed rail route has yet to occur, the question of whether CEQA is preempted under the ICCTA remains of great concern to Atherton. Consequently, Atherton submits this amicus brief to protect what it believes is a well-reasoned and correct decision by the Third District Court of Appeal in *Town of Atherton*.

CRF is a California public benefit tax-exempt foundation created to advocate for efficient and cost-effective passenger rail service within

[2] Public Resources Code §§21000 *et seq.*

California. CRF has a long-standing interest in promoting properly-run high-speed rail passenger service in California was and one of the original proponents of establishing high-speed rail service in 1992, when study of the question was initiated by then-Governor Pete Wilson.

CRF has remained very involved in the planning of CHSRA's proposed high-speed rail system, and, like Atherton, participated in the environmental review of the Merced to San Francisco segment of the system and was a co-plaintiff with Atherton in the litigation stemming from that review. CRF remains highly interested and involved in the planning of California's high-speed rail system, as well as other California public rail project, and is extremely concerned about the potential negative environmental consequences that could ensure if this Court found that CEQA was preempted by the ICCTA. CRF therefore has joined with Atherton in submitting this amicus brief.

TRANSDEF is a California public benefit corporation and is a tax-exempt charitable organization. TRANSDEF seeks to promote sustainable, efficient, cost-effective, and environmentally friendly transportation policy in California, and has engaged in many public policy debates over California transportation policy, including that over CHSRA's high-speed rail system. Like CRF, TRANSDEF is a conceptual supporter of high-speed rail, but believes that, as implemented by CHSRA, the project will be inefficient, ineffective, and unnecessarily environmentally damaging.

Consequently, TRANSDEF joined with Atherton and CRF in the litigation over the Merced to San Francisco program EIR. Like Atherton and CRF, TRANSDEF seeks to protect the Third District Court of Appeal's astute holding that CEQA was not preempted by the ICCTA, and believes that conclusion should be generalized to all state-instituted public rail projects in California.

CC-HSR is a California public benefit nonprofit corporation organized primarily by concerned citizens on the San Francisco Peninsula who live or work in the vicinity of the proposed high-speed rail line. It is concerned with ensuring that a high-speed rail line, if built, is done in a manner that does not damage the communities through which it will pass. As such, it was extensively involved in the program-level environmental review of the Merced to San Francisco high-speed rail segment and was a co-plaintiff in later portions of the litigation on that segment, including the appeal that led to the published *Town of Atherton* decision.

Like Atherton, it seeks to support the conclusion reached by the Third District Court of Appeal in *Town of Atherton,* that the ICCTA does not preempt CEQA on CHSRA's high-speed rail project, so that it can participate in the project-level CEQA review of the high-speed rail segment through the Peninsula.

Giorni is a resident of the City of San Mateo in San Mateo County and an avid bicyclist and public transit advocate. She is particularly

concerned to assure that Caltrain's ability to provide effective public transit service for the communities and citizens of the Peninsula not be compromised by high-speed rail service through the Peninsula. Ms. Giorni participated in program-level environmental review of the Merced – San Francisco high-speed rail segment and was a co-plaintiff in the CEQA litigation leading to the *Town of Atherton* decision. She joins in this amicus brief to protect that decision and her right to participate in project-level environmental review of the high-speed rail project under CEQA, as the Legislature intended.

NEED FOR PARTICIPATION BY AMICI CURIAE

Amici were all plaintiffs/appellants in *Town of Atherton*. As such, Amici and their legal counsel gained insights into the complexities of how preemption applies under the ICCTA, and more specifically on the application of the market participant exception under the ICCTA. As noted, the latter is an issue of first impression before this Court. Amici believe it will be helpful to the Court in its consideration of this case to have the benefit of that knowledge and experience.

It is obviously also important to Amici to protect *Town of Atherton*'s holding that the market participant exception applies under the ICCTA for California's high-speed rail project. That project's circumstances are in many ways similar to those presented in this case.

Amici continue to be involved in commenting on that project. They believe that given the projectís size and potentially impactful nature, CEQAís application is, as a practical matter, extremely important if the project is to achieve its goal of providing an environmentally superior alternative to the expansion of automotive and airline transport modes in addressing Californiaís future travel needs.

FINANCIAL INTEREST

None of the Amici represented in this brief, nor their legal counsel, have received any financial assistance or contributions, financial or otherwise, from any party to this case, or from any outside parties, nor have any of the parties to this case or their attorneys assisted in preparing this brief.

Dated: May 29, 2015

Stuart M. Flashman

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INTRODUCTION

This is an important case of first impression. The Court must determine whether the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §10101 et seq. ("ICCTA") preempts the direction given by the California Legislature to a public rail agency that the Legislature itself created: that before making discretionary decisions about its own rail project, decisions that may cause significant environmental impacts, the agency must first conduct an environmental review under the California Environmental Quality Act[3] ("CEQA").

The trial court and court of appeal ruled in this case that CEQA was preempted, regardless of the fact that the Legislature was directing the conduct of a public rail project that it had itself established. In *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, the Third District Court of Appeal came to the opposite conclusion, holding that the market participant exception allowed California to direct the operation of its own rail project, even if an attempt to regulate a third-party private rail project would have been preempted.[4]

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[3] Public Resources Code §21000 *et seq.*

[4] Subsequent to the *Town of Atherton* decision, the California High-Speed Rail Authority petitioned the Surface Transportation Board for a declaratory order that injunctive relief under CEQA was preempted by the ICCTA. The STB, in a 2-1 ruling, held that CEQA was entirely preempted. (CHSRA-STB2, *supra*, motion for rehearing denied May 5, 2015, judicial review pending in 9th Cir Ct. of Appeal as *Kings County et al. v. Surface Transportation Bd*. (9th Cir. 2015) Case No. 15-70386.)

The Court's determination in this case has implications well beyond the specific project at issue here. Not the least of those is whether California's high-speed rail system, the subject of the *Town of Atherton* litigation, will continue to undergo CEQA review, as the Legislature had intended and mandated. However, there are also many other public rail projects, both in California and elsewhere, where the question will arise whether a state, unlike a private entity, gives up its autonomy when it enters the arena of running a rail enterprise. The answer to that question may determine the willingness of states to undertake major public rail projects. Amici believe that fairness, constitutional principles, and respect for a state's responsibility to look out for the welfare of its residents all indicate that a state is not precluded from controlling its own rail project, and, in this case, requiring CEQA compliance.

ARGUMENT

I. AS A PUBLIC RAIL PROJECT, THE NORTH COAST RAIL AUTHORITY'S PROJECT IS PROTECTED FROM PREEMPTION UNDER THE ICCTA BY THE MARKET PARTICIPANT EXCEPTION.

In *Town of Atherton, supra,* the Third District Court of Appeal concluded that application of CEQA to the California high-speed rail project was not preempted under the ICCTA because the CHSRA was acting, not as a regulator, but as the proprietor of a proposed rail line, and as such was exempt from preemption under the market participant exception. (*Town of Atherton, supra*, 228 Cal.App.4th at p. 323.)

The situation in this case is, in many ways, highly analogous. In both cases, the State of California legislatively created a public entity to carry out a publicly owned rail project to benefit the people of California. In both cases, part of what came along with that legislative mandate was a duty, as a state-sponsored public entity, to conduct a CEQA analysis prior to making discretionary decisions to carry out a project that might significantly and adversely affect the environment. (Public Resources Code §§21001.1, 21002.) In each case, the Legislature had the option, which it did not exercise, of exempting the involved rail agency and/or project from the application of CEQA. (See, e.g., Public Resources Code §21080.13 [statutory exemption for railroad grade separation projects].) In both cases, the state-sponsored public rail agency initiated CEQA review and prepared at least one EIR for a proposed rail project. In both cases, the adequacy of the EIR was challenged by citizens' groups seeking to enforce CEQA's mandates. Finally, in both cases, the public agency attempted to repudiate its duty to comply with CEQA by asserting that CEQA review was preempted by the ICCTA[5]. Here, however, the stories diverge.

In the case of the CHSRA, the Third District Court of Appeal held that CEQA was not preempted because, as a state-run proprietary project, CHSRA's responsibility to comply with CEQA fell under the market

[5] In this case, the challenge was made by demurrer in the trial court. In *Town of Atherton*, it did not occur until very late in that case's appeal. (*See, Town of Atherton, supra*, 228 Cal.App.4th at p. 328.)

participant exception. (*Town of Atherton, supra,* 228 Cal.App.4th at 323.) In this case, by contrast, both the trial court and the Court of Appeal (First Appellate District) held that preemption applied, rejecting application of the market participant exception and all other arguments against preemption. As will be shown, the decision in *Town of Atherton* was correct.

A. AS IN *TOWN OF ATHERTON*, THE NCRA'S PROJECT IS A PROPRIETARY PROJECT OF THE STATE OF CALIFORNIA.

Both here and in the California high-speed rail project, the California Legislature established a state entity to develop and run a publicly sponsored rail operation. In doing so, it essentially made the State of California the proprietor of a rail enterprise.

The fact that the Legislature specified an environmental review process that must be followed by its newly-created public enterprises places these two cases in an entirely different category than, for example, *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025 or *Green Mountain Railroad Corp. v. State of Vermont ("Green Mountain")* (2d Cir. 2005) 404 F.3d 638, cases where a government entity was attempting to control a private railroad company's operations. In this case, as in *Town of Atherton*, the application of the market participant exception must be considered.

B. AS THE PROPRIETOR OF A STATE-CREATED PUBLIC RAIL ENTERPRISE, CALIFORNIA HAD THE AUTHORITY TO DICTATE PROCEDURES FOR THAT ENTERPRISE'S OPERATIONS, REGARDLESS OF THE ICCTA.

1. The market participant exception allows a state, acting as a market participant, to escape federal preemption.

The market participant exception to preemption under the U.S. Constitution's Commerce Clause was formulated to recognize that government agencies do not always act in a regulatory capacity. "The basic distinction drawn in *Alexandria Scrap* [*Hughes v. Alexandria Scrap* (1976) 426 U.S. 794, 810] between States as market participants and State as market regulators makes good sense and sound law." (*Reeves v. Stake* (1980) 447 U.S. 429, 436.) The cases since that time have agreed that when a state is acting as a participant in the market, rather than as a regulator, federal preemption of state action does not generally apply.

For example, in *Building & Constr. Trades Council v. Assoc. Builders & Contractors ("Boston Harbor Cases")* (1993) 507 U.S. 218, the Massachusetts Water Resources Agency ("MWRA") negotiated an agreement with the Building & Construction Trades Council to govern construction of sewage treatment facilities that MWRA owned. The agreement required that all contractors bidding on the project abide by the agreement. Associated Builders & Contractors, representing nonunion contractors, sued, claiming the agreement was preempted under the National Labor Relations Act. The Supreme Court rejected that claim. It

held that a state authority, when acting as the owner of a construction project and absent specific indication by Congress of a prohibitory intent, was free to take action as the owner, rather than as regulator.

> When the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them. (*Id*. at 233 [quoting from dissent in Court of Appeal's decision].)

Likewise, in *Tocher v. City of Santa Ana* (9th Cir. 1999) 219 F.3d 1040, the Ninth Circuit Court of Appeal held that a city's use of a rotational list to determine which company to employ to tow illegally parked and abandoned vehicles was not preempted by the express preemption provision of the Federal Aviation Administration Authorization Act ("FAAAA"), which generally preempts local or state regulations affecting motor vehicle carriers such as trucking companies. (49 U.S.C. §14501.)

The rationale for the law's preemption clause, parallel with that of the ICCTA, which was passed at approximately the same time, was to promote deregulation of the trucking industry. (*Id.* at 1049.) However, the court held that in this case the City of Santa Ana's "regulation" was not preempted. That was because the city was only establishing rules and regulations for *its own* contracts with tow companies, not those of the public in general.

2. The ICCTA's preemption clause, while broad, did not show the required intent to disallow the market participant exception.

Respondents have argued that because the ICCTA has an explicit preemption clause, and that exemption clause is broad, it shows Congress' intent to prohibit application of the market participant exception. (Answer Brief at p. 34.) This argument was considered and rejected, as applied to the Clean Air Act, in *Engine Manufacturers Assn. v. South Coast Air Quality Management Dist*. (9th Cir. 2007) 498 F.3d 1031, 1044. Similar considerations call for its rejection here as well.

Respondents also claim that:

> [T]he ICCTA contains language indicating that Congress intended to preempt all state interference with rail transportation, whether regulatory or proprietary, including that from CEQA." (Answer Brief at pp. 37-38.)

Respondents do not, however, identify any such language, either within the ICCTA's preemption clause or elsewhere in the statute. Indeed, neither the ICCTA nor the Congressional committee reports prepared during its adoption make any mention of CEQA or, indeed, of the market participant exception. A bald assertion such as Respondents', unsupported by any authority, carries absolutely no weight. (*In re Champion* (2014) 58 Cal.4th 965, 985-986.)

In general, the scope of preemption depends on the intent of Congress in enacting the legislation in question. As applied to the market participant exception in particular:

> In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction. (*Boston Harbor Cases, supra,* 507 U.S. at 231-232.)

As with the Clean Air Act and the FAAAA, nothing within the ICCTA, including its preemption clause, or Congress' consideration of that statute, indicates that Congress specifically intended to prevent a state, acting in its proprietary role as the owner of a rail line, from making decisions about how to conduct that rail business.

While it may be true that there are no published cases addressing the market participant exception as applied to §10501 of the ICCTA and specifically to a government-operated railroad enterprise making decisions about its own project[6], the market participant exception has been applied

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[6] Respondents cite to *City of Encinitas v. North San Diego County Transit Development Bd*. (S.D. Cal. Jan 14, 2002) 2002 WL 34681621 as showing that §10501 preempted environmental review of a publicly-owned rail line. (Respondents' Answer at p. 23.) Respondents fail to note that in *City of Encinitas*, it was the City, a separate public entity, that sought to require a coastal permit and associated CEQA review of the Transit Development Board's project. That is quite different from the situation here, where Respondent carried out CEQA review before approving its own project.

City of Encinitas was also cited by the Attorney General in *Town of Atherton*. As the Third District Court of Appeal noted in rejecting that argument, *City of Encinitas* makes no mention of the market participant exception's applicability, and, "It is axiomatic that cases are not authority for propositions not considered." (*Town of Atherton, supra,* 228 Cal.App.4th at 336 [quoting *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626].) The same is true of *California v. Taylor* (1957) 353 U.S. 553 [continued on following page]

repeatedly to federal regulation of trucks, a subject also addressed in the ICCTA. (*See, e.g., Cardinal Towing v. City of Bedford, Texas ("Cardinal Towing")* (5th Cir. 1999) 180 F.3d 686*; Tocher v. City of Santa Ana* (9th Cir. 1999) 219 F.3d 1040[7].)

The *Boston Harbor Cases* decision issued in March 1993. The ICCTA was passed by Congress in December 1995, almost three years later. Congress is presumed to be aware of the decisions of the U.S. Supreme Court and to take those decisions into account in formulating legislation. For example, in 1986, in *Exxon Corp. v. Hunt* (1986) 475 U.S. 355, the Supreme Court determined that §114(c) of the Comprehensive Environmental Response, Compensation, and Liability act of 1980 (42 U.S.C. §9614(c)) preempted state taxes to fund clean-up of superfund sites. That same year, Congress repealed §9614(c). (*See, Manor Care, Inc. v. Yaskin* (3rd Cir. 1991) 950 F.2d 122, 125-126.)

If Congress had intended, in light of the *Boston Harbor Cases*, to prevent application of the market participant exception under the ICCTA, it would have been a simple matter for it to have added language to §10501 to

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(Federal Employment Liability Act – 45 U.S.C. §51 et seq. – applicable to state-owned railroad) which was decided many years before the Market Participant Exception was first established in *Hughes v Alexandria Scrap* (1976) 426 U.S. 794**.**

[7] *Tocher* recognized that the city's rotational tow list provision was exempt from preemption under the market participant exception, but that the city's attempts to regulate towing more generally were preempted.

do so. While §10501 of the ICCTA expressly preempts any state or local remedies with respect to the regulation of rail transportation, it is silent about a state's ability to manage its own projects or direct the actions of its own subsidiary enterprises when it pursues its purely proprietary interests.

Further, the ICCTA certainly does not preempt private parties from using any particular criteria, including environmental concerns, in making internal decisions about their projects. In short, Congress, in writing the ICCTA, did not show the intent to prohibit or limit application of the market participant exception under the circumstances presented by this case. The court should therefore not infer that the ICCTA would prohibit the state of California, acting through the agency of NCRA, from using CEQA to guide its decisions about its own project.[8]

Further, even by its own terms, Respondents' argument does not exclude application of the market participant exception. Respondents point to the ICCTA preemption clause language providing that the jurisdiction of the STB over "transportation *by rail carriers*, and the remedies provided in this part … … is exclusive." (49 U.S.C. §10501(b)[emphasis added].) Yet the language used indicates that Congress' effort to preempt state or federal law or regulation was intended to apply to rail carriers – i.e., to the rail

[8] In such cases, the limited application of CEQA to a state's proprietary railroad is self-limiting geographically. It does not create the situation often used to justify preemption: a checkerboard of varying state regulations applicable to a railroad operating across state lines. Thus, it does not create an unreasonable burden on interstate commerce. See infra at pp. 32 *et seq.*

industry; not to a single, specific, state-operated rail carrier. Congress' intent in formulating the preemption clause was to prevent conflicting attempts at state or federal regulation of the rail industry – not to prohibit a state from controlling the activity of its own proprietary rail carrier.[9] As in *Tocher*, California's control of its own proprietary rail carrier cannot be considered an attempt to regulate the rail industry, or even just the rail industry within California.

3. Cardinal Towing defines the test for application of the market participant exception under an express preemption clause.

In *Cardinal Towing & Auto Repair v. City of Bedford, Texas ("Cardinal Towing")* (5th Cir.) 1999 180 F.3d 686, analyzing preemption under the similar FAAAA's preemption clause, the court applied a two-part test to determine whether state or local governmental actions were preempted by the federal statute's express preemption clause:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed 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? (*Id.* at 693.)

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[9] It has been argued that Congress intended the ICCTA to only preempt economic regulation. (See, Strickland, Jr., Revítalizing the Presumption agaínst preemptíon to prevent regulatory gaps: Raìlroad deregulation and waste transfer stations (2007) 34 Ecology L.Q. 1147, 1160.) Amici are agnostic on this, but submit it is irrelevant to the issues raised in this brief.

The court concluded that the city, which was contracting with a private towing company for towing services for nonconsensual towing of vehicles, was acting in its own proprietary interest in procuring services, and the narrow scope of the action (contracting with a single private towing company) did not have a primary goal of encouraging a general policy.

Most recently, in *Johnson v. Rancho Santiago Community College Dist*. (9th Cir. 2010) 623 F. 3d 1011, the 9th Circuit applied the *Cardinal Towing* two-part test for federal preemption under two federal statutes, the National Labor Relations Act and the Employment Retirement Income Security Act, the latter of which, like the ICCTA, contains an express preemption clause. In doing so, it analyzed whether the test required satisfying both, or only one prong to qualify for the market participant exception. (*Id*. at 1024.) The court concluded that:

> The Cardinal Towing test thus offers two alternative ways to show that a state action constitutes non-regulatory market participation: (1) a state can affirmatively show that its action is proprietary by showing that the challenged conduct reflects its interest in efficiently procuring goods or services, or (2) it can prove a negative—that the action is not regulatory—by pointing to the narrow scope of the challenged action. We see no reason to require a state to show both that its action is proprietary and that the action is not regulatory. (*Id*.)

4. Under both prongs of the Johnson/Cardinal Towing test, NCRA's CEQA review of its own rail project is not subject to preemption under the ICCTA.

Respondents recognize the *Cardinal Towing* test (Respondents' Answer at pp.34-35), but fail to apply it properly. Respondents fail to

distinguish between the general application of CEQA to a public agency's approval of a private project and its application to a publicly-owned enterprise evaluating its own project. Applying the two-part *Johnson/Cardinal Towing* test properly to NCRA's approval of its rail project, the result is similar to that found in *Johnson, supra*. Neither the decision nor its accompanying CEQA compliance is preempted by the ICCTA.

On the first prong, California, in requiring application of CEQA, is seeking solely to make efficient market-based decisions on the nature of NCRA's rail operation. Respondents may argue that concern for environmental impacts falls outside of the reach of "efficient procurement of goods and services" and falls instead in the prohibited realm of attempting to influence rail transportation policy. However, a proprietary interest in one's own project, whether public or private, need not be limited to purely pecuniary considerations. Especially when the proprietor is an agency of the state government, the state's legitimate proprietary reach extends to how its enterprise will affect the welfare of its customers/citizens. Further, unmitigated impacts on the environment can entail much greater future costs.[10] It is appropriate for a proprietor to be concerned about avoiding such future costs.

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[10] E.g., the costs to clean up groundwater contamination by perchlorate far exceeded the costs that would have entailed from its proper disposal in the

Further, both private and public enterprises share an interest in maintaining the goodwill of the public and presenting themselves as corporate "good citizens." Thus, for example, many private corporations, including such major companies as Chevron, Shell Oil Company, and Pacific Gas & Electric Company, have established programs to promote energy efficiency, alternative fuel development, and sustainability, even though they may not, in the short run, be the most effective generators of corporate profits.

In *Engine Manufacturers Assn., supra*, 498 F.3d at 1046-1047, the Ninth Circuit held that a state agency's requirement that public agencies' proprietary projects be conducted in an environmentally benign manner fell within the market participant exception to preemption under the Clean Air Act. Similarly here, the State of California's requirement that Respondent comply with the environmental disclosure requirements of CEQA, and, indeed, that Respondent's proprietary project seek to avoid harmful environmental impacts, is within the ambit of "efficient" procurement by a genuine market participant.

As to the second prong, NCRA's action here merely approved its own project. NCRA's application of CEQA compliance to that project was mandated both by California statute and by NCRA's contractual agreement

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first place. (*See, e.g., US v. Aerojet General Corp.* (9th Cir. 2010) 606 F. 3d 1142 [CERCLA clean-up of contaminated groundwater].)

with the California Transportation Commission ("CTC") to obtain grant funding for its project. However, neither NCRA's approval of the project nor its CEQA analysis was primarily intended to encourage a general policy; not even as environmentally benign a policy as making the railroad industry "environmentally friendly." California's mandate only required that NCRA study the environmental effects of its project, and, if they proved potentially significant, consider whether feasible mitigation measures or alternatives could reduce or eliminate significant environmental damage. (See Section III infra.)

NCRA's actual decision on whether to move the project forward was, like the Air Quality Management District's decision on applying an air quality regulation to the state's own fleet of vehicles in *Engine Manufacturers Assn.*, restricted to the state's proprietary interest in its own rail agency. Indeed, it was considerably narrower than the Air District's decision. That decision applied to all of the state's vehicles. NCRA's decision applied only to the state's proposed rail line.

Thus just based on the narrow nature of NCRA's decision, which affected only a single state-created public agency's rail project, it is not subject to preemption. Comparison of the decision here with, for example, the air district's decision in *Assn. of Am. Railroads, supra*, 622 F.3d 1094 only fortifies this conclusion. In that case, the adoption of the regulation was intended to affect not the enacting air quality management district, but

the many private commercial railroad lines using the rail yard in question. (*Id*. at 1096.) The air board's action was intended to influence and regulate not itself, but a host of external entities involved in rail transport, thereby directly impinging on STB's plenary jurisdiction over those matters. (*Id.* at 1098.) Here, NCRA's CEQA-guided decision on moving its own project forward could only potentially affect one private rail carrier, Northwest Pacific Railroad Company, and even there, only the one line it would operate if it chose to accept the role of operating NCRA's rail line.

Having satisfied both prongs of the *Johnson/Cardinal Towing* test, NCRA's decision-making on its rail project, as well as the CEQA environmental review associated with that decision, fell well within the market participant exception to federal preemption. Therefore, neither NCRA's decision to approve its own project, nor the associated CEQA review, is subject to preemption under the ICCTA.

C. EVEN IF THE COURT DETERMINES THAT PETITIONERS' CLAIMS ARE MOOT, IT SHOULD ADDRESS THE CONFLICT BETWEEN THE APPELLATE DISTRICTS.

Respondents argue that by the time the EIR was completed, all decisions that might have required environmental review had already been made, and thus the EIR's discussion of those issues were moot. (Respondents' Opposition at p.36.) According to Respondents, all that were left were operational decisions that did not require CEQA review and

were not relevant to the issues Petitioners raised in their lawsuit. Essentially, Respondents argue that by the time the EIR was certified, any issues that Plaintiffs raised in their lawsuit were already moot.

Plaintiffs, by contrast, argue that the project under consideration includes not only operations but also additional repairs that still remain to be done, and require CEQA review. (Plaintiffs' Reply Brief at pp. 27-28.)

Even if the Court were to decide that Respondents were correct and Plaintiffs claims had become moot, the Court should still retain review and decide the preemption question raised by the conflict in appellate decisions. The case law is well established that even if the specific issues raised by a case are mooted, the courts retain the discretion to retain jurisdiction and decide the issues involved if those issues are likely to recur and need resolution. (*Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1106.)

D. APPELLANTS' CHALLENGE TO NCRA'S CEQA REVIEW OF ITS RAIL PROJECT FALLS WITHIN CALIFORNIA'S INTENDED ENFORCEMENT SCHEME FOR CEQA, AND HENCE WITHIN THE MARKET PARTICIPANT EXCEPTION.

Respondents erroneously attempt to analogize NCRA's situation to that involved in *DHL Express (USA), Inc. v. State of Florida ex rel. Grupp ("Grupp")* (Fla. 2011) 60 So.3d 426, reh'g den. (Apr. 26, 2011), rev. den. (Fla. 2012) 81 So.3d 415, cert. den. (U.S. 2012) 132 S.Ct. 2753. That case

involved an attempt by private individuals to assert Florida's false claims statute against a private shipping company's rate surcharges.

As *Grupp* explained, Florida's purpose in enacting its false claims statute went far beyond merely enforcing proper conduct in contracts with the state, a type of action that would be permissible under the market participant exception. (*See, e.g*., *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219 [plaintiffs' objections to retroactive change in terms of contract made with airline, while within the scope of matters subject to preemption, was not preempted because it merely involved enforcing contract terms entered into between the company and the individuals involved].) If the action in *Grupp* had similarly been limited to enforcing the contract between the state and DHL, it would not have been preempted, because Florida would have been acting as a market participant. (*Grupp, supra,* 60 So.3d at 429.) The court concluded, however, that the false claims statute, by invoking the potential for treble damages, went far beyond a market participant's interest in contract enforcement and attempted (by the veiled threat of imposing treble damages) to use Florida's regulatory power to influence DHL's, and other potential defendants', future behavior in the market. (*Id.*) Under the test established in *Cardinal*

Towing, supra, 180 F3d at p. 693, Florida's law was therefore subject to preemption.[11]

Here, by contrast, NCRA's application of CEQA to its own conduct and its own project would have no effect on the overall rail transportation market. Respondent's reliance on *Grupp* is therefore misplaced.

Further, when the Legislature enacted CEQA, it explicitly provided for citizen enforcement of its provisions. (Public Resources Code §§21167 *et seq*.; *Rich v. City of Benicia* (1979) 98 Cal.App.3d 428, 437.) Indeed, citizen enforcement is the primary method by which CEQA is enforced. (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505, 517.)

In enacting the citizen enforcement provisions of CEQA, the Legislature was cognizant of the limitations of the Attorney General's ability to bring enforcement actions for CEQA violations. (*See, Serrano v. Priest* (1977) 20 Cal.3d 25, 44 [although the executive branch includes offices such as the Attorney General intended to represent the public interest, those offices are often not adequate, necessitating the ability for private parties to enforce].) CEQA's citizen enforcement provisions were therefore a reasonable, cost-effective alternative to limiting enforcement to the attorney General or other public agency. A private party who steps into

[11] The same result was reached for the same reasons in *State of New York ex rel Grupp v. DHL Express (USA), Inc*. ("Grupp II") (N.Y. 2012) 970 N.E.2d 391, 397.

the shoes of the Attorney General to enforce California's requirements on its own agency is just as much an essential part of California's governance of its own proprietary business as would be an enforcement action by the Attorney General[12] or an investigation by the State Auditor or the Joint Legislative Audit Committee.

II. EVEN IF CEQA IS PREEMPTED IN THE CURRENT CASE, THE SITUATION OF THE HIGH-SPEED RAIL AUTHORITY IS DISTINGUISHABLE ON ITS FACTS, SUCH THAT CEQA STILL APPLIES TO CALIFORNIA'S HIGH-SPEED RAIL PROJECT.

In its decision in this case, the Court of Appeal held that *Town of Atherton* was wrongly decided, and that CEQA was preempted for all public rail projects. The Court of Appeal, however, failed to consider the significantly different facts involved in the two cases. Even if this Court were to find that CEQA is preempted under the ICCTA in the current case, the circumstances presented by California's proprietary high-speed rail project are significantly different, such that preemption would not apply.

A. THE MARKET PARTICIPANT EXCEPTION APPLIES TO CHSRA IN ITS STRONGEST TERMS.

One obvious difference between this case and *Town of Atherton* is the nature of the public agency involved. In this case, the agency, while created by the Legislature, is not explicitly a part of the state government.

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[12] Such an enforcement action could not have occurred for the high-speed rail project, as the Attorney General represented CHSRA in defense against successive CEQA challenges to the Merced to San Francisco Program EIR. (*See, Town of Atherton, supra*, 228 Cal.App.4th at 324-327.)

While Amici still believe that the market participant exception applies to such a subsidiary agency, just as the Union Pacific Railroad Company would retain the right to control a wholly-owned subsidiary corporation, CHSRA, by contrast, is an integral part of the executive branch of the California state government. As such, the market participant exception applies to CHSRA in its strongest terms[13].

B. THE PLAINTIFFS IN *TOWN OF ATHERTON* UNQUESTIONABLY HAD STANDING TO ENFORCE CHSRA'S VOLUNTARILY ASSUMED DUTY TO ABIDE BY CEQA.

In addition to the market participant exceptions, Plaintiffs assert that preemption is improper because NCRA voluntarily obligated itself to CEQA compliance through accepting grant assistance from the CTC. (Plaintiffs' Opening Brief at pp. 49-52; *see, Fayard v. Northeast Vehicle Services* (1st Cir. 2008) 533 F.3d 42, 49 [railroad's voluntary commitment to an action is not preempted by ICCTA].) Both the trial court and the Court of Appeal held that Plaintiffs could not enforce NCRA's contractual obligation to comply with CEQA because they were not parties to the contract.

The situation of the plaintiffs in *Town of Atherton*, however, is different. As was pointed out in *Town of Atherton, supra,* 228 Cal.App.4th

[13] Other parts of California's executive branch, notably Caltrans' rail division, also routinely use CEQA to review proprietary rail projects. See Motion for Judicial Notice submitted herewith.

at 337-338, Proposition 1A, the bond measure that provided almost ten billion dollars for the high-speed rail project, as well as setting standards for that project, was approved by the voters with the expectation that CEQA would be complied with. (See, e.g., Streets & highways Code §2704.04 [it is Legislature's and voters' intent that project be consistent with CHSRA's 2005 and 2008 EIRs for the project].) Not only did this mean that the availability of the bond funds depended on CEQA compliance, (*see, California High-Speed Rail Authority et al. v. Superior Court* (2014) 228 Cal.App.4th 676, 717), but because, based on the ballot language, the voters who approved the measure expected CEQA compliance, that compliance requirement became an implicit provision of the measure.

As has been often noted, a bond measure is, if not an actual contract with the voters, an agreement with similar effect. (*O'Farrell v. County of Sonoma* (1922) 189 Cal. 343, 348-349; *Mills v. S.F. Bay Area Rapid Transit Dist.* (1968) 261 Cal.App.2d 666, 668.) As a consequence, any taxpayer has the right to seek enforcement of a bond measure's provisions. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist. ("Taxpayers")* (2013) 215 Cal.App.4th 1013.) Because Proposition 1A promised the voters that California's high-speed rail project would comply with CEQA, that provision of the bond measure is enforceable by anyone with standing to enforce the measure, including

taxpayers; who have the right to enforce based on the constitutional provisions governing bond measures. (*See, Taxpayers, supra*.)

Thus, even if the Court were to find that the market participant exception did not preclude preemption by the ICCTA, and that, in addition, Plaintiffs did not have standing to enforce NCRA's voluntary commitment to CEQA compliance through its contract with the CTC, the plaintiffs in *Town of Atherton*, and any other similarly situated plaintiffs, would have standing to enforce California's, and CHSRA's, voluntary commitment to CEQA compliance for the high-speed rail project through placing Proposition 1A on the ballot.

III. EVEN IF THE COURT DETERMINES THAT THE MARKET PARTICIPANT EXCEPTION DOES NOT APPLY TO ICCTA PREEMPTION, CEQA IS NOT PREEMPTED.

A. FEDERAL PREEMPTION UNDER THE ICCTA ONLY OCCURS IF THE FEDERAL, STATE, OR LOCAL LAW OR REGULATION INTERFERES WITH THE STB'S REGULATION OF RAIL TRANSPORTATION

While the ICCTA's preemption clause (49 U.S.C. §10501**Error! Bookmark not defined.**(b)) appears very broad, preempting remedies provided under Federal or State law with respect to regulation of rail transportation, nevertheless it is limited to regulations that would arguably conflict with the STB's plenary jurisdiction over the subjects included in subsections (1) and (2) of that clause. In *Assn. of Am. Railroads, supra*, the Ninth Circuit Court of Appeal held that such preemption only applies when the challenged law or regulation imposes an unreasonable burden on

interstate commerce. (*Id.* at 1097, 1098.) This narrows the question to whether CEQA compliance, in and of itself, creates such a burden.

B. CEQA DOES NOT INTERFERE WITH THE STB'S REGULATION OF RAIL TRANSPORTATION, AND HENCE IS NOT PREEMPTED.

Respondents point to case law that holds that the ICCTA preempts state and local permitting laws for establishing rail service, and specifically to *City of Auburn*. (Answer Brief at p. 20.) However, *City of Auburn* and the other cases cited by Respondents make clear that what the ICCTA preempts are state or local statutes or regulations that attempt to regulate, and thus could interfere with, rail transportation. In particular, *City of Auburn* states that even an environmental statute *may* trespass on the exclusive jurisdiction of the STB:

> For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line. (Id. at 1031.)

In *City of Auburn*, local authorities had attempted to impose permit requirements on the Burlington Northern Railway's proposed reopening of Stampede Pass. (*Id*. at 1027-1028.) While these permits were apparently primarily environmental in nature, they nevertheless would have been requirements for the project to proceed, and their denial would have defeated the project. The court therefore properly found that they were preempted by the ICCTA. Similarly, in *Green Mountain , supra*,

Vermont's Act 250, a state environmental land use statute, required the railroad to obtain preconstruction permits for land development. (*Id*. at 639.) The court ruled that such permit requirements were likewise preempted by the ICCTA.

In *Assn. of Am. Railroads* , regulations approved by the South Coast Regional Air Quality District similarly were preempted under the ICCTA because they attempted to regulate air quality in connection with railroad yard operations[14] and, in doing so, attempted to manage or govern rail transportation.

In each of these cases, a public agency other than the STB was attempting to regulate, by way of issuing a permit or enacting regulations – and thereby potentially delay or reject – a rail project over which the STB had jurisdiction. Thus, for example, in *City of Auburn*, the city required the Burlington Northern Santa Fe Railroad to obtain a local land use permit. In *Green Mountain Railroad*, the State of Vermont required that private railroad company to obtain a state permit to build a train barn. In *Assn. of Am. Railroads*, the South Coast Air Quality District attempted to issue regulations to control operations at a private rail yard. In Boston and Maine

[14] Subsequently, the Air District submitted the same rules to the California Air Resources Board for approval by U.S. E.P.A. and incorporation in the California's State Implementation Plan under the Clean Air Act. The District Court concluded that this action was not preempted. (*Assn. of Am. Railways v. South Coast Air Quality Mgmt. Dist ("Assn. of Am. Railways II")* (C.D. CA, 2012) Case 2:06-cv-01416-JFW-PLA, Document 269, filed 2/24/2012.

Corp. and Town of Ayer, MA – Joint Petition for Declaratory Order, No. FD 33971, 2001 WL 458685, a town conservation commission sought to require conditions on approving a railroad project.

CEQA, by contrast, provides information and direction, but not necessarily coercion. It serves as an "environmental alarm bell" to alert governmental officials, and the public, to a project's potential environmental impacts and to inform public officials and the public of ways in which significant impacts might be mitigated or avoided. (*Sierra Club v. State Bd. of Forestry ("Sierra Club I")* (1994) 7 Cal.4th 1215, 1229.)

CEQA also, and not just incidentally, provides the opportunity for the public to participate and be involved in the project approval process. Indeed, a central tenet of CEQA is that California citizens have not just the right, but the *responsibility* to contribute to the preservation and enhancement of the environment. (Public Resources Code §21000 subd. (e).) Through its comment and response process, CEQA provides California citizens the opportunity to have their voices heard by the California public agency that will make decisions about whether and how a project moves forward to approval. Because CEQA requires the public agency to go on record not only about its approval decision, but also about the reasons underlying that decision, CEQA is a statute of accountability. (*Sierra Club I, supra,* 7 Cal.4th, at 1229.)

> If CEQA is scrupulously followed, the public will know *the basis* on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees.... The EIR process protects not only the environment but also informed self-government. (*Id.* [emphasis added])

Further, CEQA does not, in itself, either approve or reject a project. Rather, analysis of a project under CEQA provides the public agency's decision makers with information that informs their decisions on the merits.[15]

> The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations. (*Laurel Heights I, supra*, 47 Cal.3d at 393 [quoting from *Bozung v. Local Agency Formation Com*. (1975) 13 Cal.3d 263, 283].)

Indeed, CEQA allows an agency to approve a project in spite of its having significant and unavoidable environmental impacts. The only requirement on granting such an approval is that the agency, in approving

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[15] Respondent, at p.13 of its brief, cites to the STB's order in DesertXpress Enterprises, LLC – Petition for Declaratory Order, No. FD34914, 2007 WL 1833521 (STB June 25, 2007) as indicating that CEQA compliance is generally preempted for rail project. Not so. That ruling is distinguishable in that DesertXpress was a private rail carrier seeking regulatory approval for its application. CEQA compliance was an adjunct to that regulatory approval, and was therefore subsumed within the more general preemption of that state regulatory control of a private railroad. Similarly, in Interstate Commerce Commission Termination Act of 1995– Petition for Declaratory Order, No. FD 34111, 2002 WL 1924265 (STB August 19, 2002), CEQA compliance would have been in the context of the agency's applying for a state Coastal Act permit from the City of Encinitas. Since the permit requirement was preempted under the ICCTA, so was CEQA compliance.

the project, adopt a statement of overriding considerations ("SOC") which explains to the public the agency's rationale for approving the project in spite of its impacts.[16] (Public Resources Code §21081(b); *Sierra Club v. Contra Costa County ("Sierra Club II")* (1992) 10 Cal.App.4th 1212, 1222.)

Respondents may argue that CEQA contains "action-forcing" provisions that prohibit an agency from approving a project with significant environmental impacts if there are feasible mitigation measures or alternatives that would reduce or avoid the impacts. (Public Resources Code §§ 21002, 21002.1(b).) That is, indeed, an important feature of CEQA, and one that is not part of NEPA. However, CEQA and its case law clarify that "feasible," as used in determining whether to approve a project, can includes legal or public policy considerations. More specifically, an alternative or mitigation measure can be found infeasible not only for technologic or economic grounds (*see, e.g., Sequoyah Hills Homeowners Assn. v. City of Oakland* (1994) 23 Cal.App.4th 704, 715), but also for legal or public policy reasons. (Public Resources Code §21081 subd. (a)(3); *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 198; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 948; *California*

[16] Of course, the SOC must be supported by substantial evidence. (*Sierra Club II, supra,* .)

Native Plant Society v. City of Santa Cruz (2009) 177 Cal.App.4th 957, 998, 1000 *et seq.*; *see also, City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 353, 368 [CSU Trustees asserted that legal considerations made contributing to offsite mitigation measures infeasible – Supreme Court reversed, concluding that such contribution, if voluntary, was not legally prohibited].) Legal considerations could, and indeed almost inevitably would, include if a mitigation measure or alternative would contradict or significantly delay implementation of a project as approved by the STB.

In short, CEQA, unlike federal, state, or local statutes or regulations that could be used to defeat a rail project, does not stand in the way of approving a project consistent with the STB's plenary jurisdiction.[17] All it requires is that, before granting such an approval, the agency considering the approval have adequate information about the project, its potential environmental impacts, and how those impacts might be avoided or mitigated. The agency, upon consideration of the restrictions on feasible mitigation measures and alternatives related to STB's plenary jurisdiction over the project and upon issuance of an appropriate SOC, could then

[17] Depending on the complexity of a project, there may be a certain amount of delay involved in doing the necessary environmental review. However, CEQA review is usually coterminous with NEPA review, which is not preempted by the ICCTA. The delay often complained about under CEQA, like that under NEPA, is most often due to claims that the review was not done properly. A rigorous review will generally eliminate or greatly reduce the risk and associated delay of litigation.

approve the project regardless of the severity of the legally unavoidable impacts it might cause. In this respect, it differs fundamentally from the statutes at issue in, for example, *City of Auburn* and *Green Mountain*, and the regulation involved in *Assn. of Am. Railroads*. Consequently, CEQA compliance is not preempted by ICCTA's §10501.[18]

Concern may be expressed that allowing STB rulings to override what might otherwise be considered feasible mitigation measures or alternatives would "gut" CEQA and reduce it to a meaningless statute. Such is not the case. As explained earlier, CEQA has multiple purposes, including providing a voice for Californians in the project approval process – a voice that must be heard and responded to – and making public agencies responsible to the public they claim to serve. Even if STB jurisdiction can override some of CEQA's identified mitigation measures or alternatives, those benefits remain. Further, it is certainly not a given that all mitigation measures or alternatives arising from the CEQA process will be inconsistent with STB jurisdiction. If a mitigation measure or alternative does not conflict with STB's jurisdictional authority, the requirement to

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[18] It should be noted that NEPA, like CEQA, is an informational, rather than an action-forcing, statute. Thus NEPA is likewise not preempted by the ICCTA. This is expressly shown by the fact that the STB relied upon the NEPA analysis done by the Federal Railroad Administration in making its determinations on the high-speed train application before it. (*See*, California High-Speed Rail Authority--Construction Exemption--in Merced, Madera and Fresno Counties, Cal. ("CHSRA-STB1) (STB, June 13, 2013, No. FD35724) 2013 STB Lexis 180.

implement feasible mitigation measures or alternatives that will reduce or avoid a project's significant impacts remains a mandate that public rail agencies must obey.

CONCLUSION

CEQA is the State of California's premier environmental law, and the Legislature thus had good reason to insist that it apply to the state's own rail projects. The Legislature also had good reason to allow private parties to enforce its dictates if the specific decision makers involved failed to heed its direction. For these reasons, as well as strong reasons of public policy, the market participant exception should apply, and the ICCTA provides no indication that Congress intended otherwise.

Further, even if the Court were to find that there is insufficient basis to avoid preemption in the case of NCRA, the reasons to reject preemption in the case of CHSRA are significantly stronger, and therefore preemption should not apply to it.

Finally, the case law indicates that CEQA, unlike laws that have been held inimical with STB jurisdiction, does not interfere with the STB's ability to regulate the operation of public rail projects. For that reason as well, CEQA's application to public rail projects should not be preempted.

Dated: May 29, 2015

Respectfully submitted,

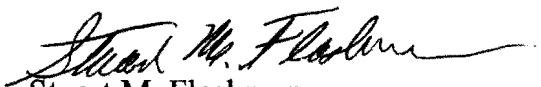
Stuart M. Flashman

Attorney for Amici Curiae Town of Atherton, California Rail Foundation, Transportation Solutions Defense and Education Fund, Community Coalition on High-Speed Rail, and Patricia Hogan-Giorni

CERTIFICATE OF COMPLIANCE
[CRC 8.504(d)(1)]

Pursuant to California Rules of Court, rule 8.504(d)(1), I, Stuart M. Flashman, certify that this PROPOSED BRIEF OF AMICI CURIAE TOWN OF ATHERTON, CALIFORNIA RAIL FOUNDATION, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, COMMUNITY COALITION ON HIGH-SPEED RAIL, AND PATRICIA HOGAN-GIORNI IN SUPPORT OF APPELLANTS FRIENDS OF EEL RIVER AND CALIFORNIANS FOR ALTERNATIVES TO TOXICS contains 7571 words, including footnotes, as determined by the word count function of my word processor, Microsoft Word for Mac 2011, and is printed in a 13-point typeface.

Dated: May 29, 2015



Stuart M. Flashman

PROOF OF SERVICE BY MAIL AND ELECTRONIC MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above-titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On May 29, 2015, I served the within APPLICATION FOR LEAVE TO SUBMIT AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF AMICI CURIAE TOWN OF ATHERTON, CALIFORNIA RAIL FOUNDATION, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, COMMUNITY COALITION ON HIGH-SPEED RAIL, AND PATRICIA HOGAN-GIORNI IN SUPPORT OF APPELLANTS FRIENDS OF EEL RIVER AND CALIFORNIANS FOR ALTERNATIVES TO TOXICS; MOTION FOR JUDICIAL NOTICE OF AMICI CURIAE TOWN OF ATHERTON, CALIFORNIA RAIL FOUNDATION, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, COMMUNITY COALITION ON HIGH-SPEED RAIL, AND PATRICIA HOGAN-GIORNI IN SUPPORT OF APPELLANTS FRIENDS OF EEL RIVER AND CALIFORNIANS FOR ALTERNATIVES TO TOXICS on the parties listed below by depositing true copies thereof enclosed in sealed envelopes with first class postage thereon fully prepaid, in a United State Post Office mailbox in Oakland, California addressed as follows:

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In addition, on the above-same day, I also sent electronic copies of the above-same documents, converted to "pdf" format, as e-mail attachments, to the above-same parties at the e-mail addresses shown above.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on May 29, 2015.

Stuart M. Flashman