SUPREME COURT COPY

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

SUPREME COURT
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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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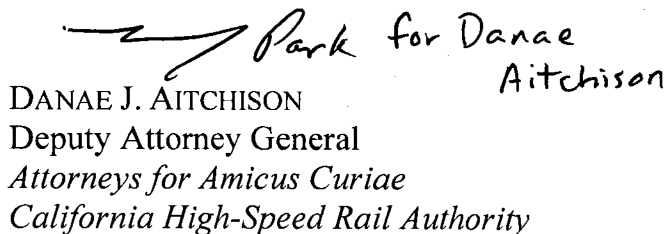

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INTRODUCTION

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

[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.