No.

In the Supreme Court of the United States

NORTH COAST RAILROAD AUTHORITY,

Petitioner,

v.

FRIENDS OF THE EEL RIVER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The ICC Termination Act of 1995 (ICCTA) expressly "preempt[s]" state law "with respect to regulation of rail transportation." 49 U.S.C. § 10501(b). The Surface Transportation Board (STB), which the statute vests with "exclusive" jurisdiction over rail transportation, has long ruled that ICCTA categorically preempts state laws that require the permitting or preclearance of activities that are authorized by the STB. The federal courts of appeals have uniformly agreed.

In this case, two environmental groups have sued two railroads—one state-owned, the other privately owned—under the California Environmental Quality Act (CEQA). Alleging a failure to comply with the statute's project-approval requirements, their consolidated citizen suits seek to enjoin the railroads' track repairs and STB-authorized freight service. A unanimous California Supreme Court correctly held that ICCTA categorically preempts application of CEQA's pre-approval requirements to the private railroad. But—in acknowledged conflict with the STB—a divided court reached the opposite conclusion as to the state-owned railroad, holding that the imposition of CEQA's pre-approval requirements on the state-owned railroad through citizen suits is an act of self-governance implicating the Tenth Amendment rather than an act of state regulation preempted by ICCTA.

The question presented is:

Whether citizen suits that seek to enforce state environmental approval requirements against a state-owned railroad by enjoining activities subject to the STB's exclusive jurisdiction are categorically preempted by ICCTA.

PARTIES TO THE PROCEEDING BELOW

Petitioners/appellants below, and respondents here, are Friends of the Eel River and Californians for Alternatives to Toxics.

Respondent/appellee below, and petitioner here, is the North Coast Railroad Authority.

Real party in interest/appellee below, and respondent here, is the Northwestern Pacific Railroad Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner North Coast Railroad Authority respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of California in this case.

OPINIONS BELOW

The decision of the Supreme Court of California (App., *infra*, 1a–91a) is reported at 3 Cal. 5th 677. The decision of the California Court of Appeal (App., *infra*, 92a–147a) is reported at 230 Cal. App. 4th 85. The orders of the California Superior Court (App., *infra*, 148a–168a, 169a–185a) are unreported.

JURISDICTION

The judgment of the Supreme Court of California was entered on July 27, 2017. Justice Kennedy extended the time to petition for certiorari to December 22, 2017. No. 17A373 (Oct. 5, 2017). Jurisdiction rests on 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the ICC Termination Act of 1995, 49 U.S.C. §§ 10101 *et seq.*, are reproduced at App., *infra*, 186a-188a. Relevant portions of the California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000 *et seq.*, are reproduced at App., *infra*, 189a-190a. Relevant portions of the North Coast Railroad Authority Act are reproduced at App., *infra*, 191a-193a.

STATEMENT

Ever since the Interstate Commerce Act of 1887, "federal statutes regulating interstate railroads * * * have consistently been held to apply to publicly owned or operated railroads." *California* v. *Taylor*,

353 U.S. 553, 562 (1957). Indeed, "the entire federal scheme of railroad regulation applies to state-owned railroads." *Hilton* v. *S. Car. Pub. Railways Comm'n*, 502 U.S. 197, 203 (1991). This Court has even stressed that "California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal" rail law. *Taylor*, 353 U.S. at 568. The decision below flouts these well-established principles.

Although this Court had long applied principles of conflict preemption in holding that federal rail transportation law preempted state law, *e.g.*, *Chi. & Nw. Transp. Co.* v. *Kalo Brick & Title Co.*, 450 U.S. 311, 317, 327 (1981), twenty years ago Congress went a step further, adopting an express-preemption clause when it enacted the ICC Termination Act of 1995 (ICCTA). That provision states that "the remedies provided under [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) (emphases added).

The U.S. Surface Transportation Board (STB), which Congress vested with "exclusive" "jurisdiction" over "transportation by rail carriers" (*ibid.*), has repeatedly ruled that ICCTA *categorically* preempts state law that requires permitting or preclearance of activities that are authorized by the STB. Indeed, applying this principle, the STB has specifically held that ICCTA categorically preempts application of the California Environmental Quality Act (CEQA) to a state-owned railroad governed by ICCTA and thus subject to the STB's exclusive jurisdiction.

In this case, a divided California Supreme Court reached the opposite conclusion, holding that ICCTA

does *not* categorically preempt citizen suits under CEQA that seek to enjoin freight service and track repairs over which the STB has exclusive jurisdiction. Despite correctly holding that identical claims against a private railroad are categorically preempted, the court ruled that the claims against a state-owned railroad are not categorically preempted *precisely because* the railroad is state-owned. The court reasoned that citizen suits against a division of the state are acts of self-governance by the state. It further held that Congress did not intend to preempt such citizen suits despite their potential impact on interstate rail activities.

The California Supreme Court's distinction between publicly and privately owned railroads for purposes of ICCTA preemption flies in the face of the statutory text, 130 years of precedent, and the acknowledged views of the federal agency with exclusive jurisdiction over interstate rail transportation. It also conflicts with decisions of other state courts, including a state court of last resort, which have held that similar citizen suits are regulatory in nature, not acts of self-governance, and therefore preempted by federal law. Further, the decision threatens the operations of many other California-owned and ICCTA-regulated railroads, and, if adopted in other states, could inject chaos into the interstate rail system. The Court should grant certiorari to review and reverse the California Supreme Court's misreading of federal law.

A. Legal Background

1. Federal regulation of rail transportation is "among the most pervasive and comprehensive of federal regulatory schemes." *Chi. & Nw. Transp.*, 450 U.S. at 318. Enacted in 1995, ICCTA abolished

the Interstate Commerce Commission, transferred that agency's powers to the STB, and expressly preempted state regulation of rail transportation.

ICCTA vests the STB with "exclusive" "jurisdiction" over "transportation by rail carriers" and expressly "preempt[s]" state law "with respect to regulation of rail transportation." 49 U.S.C. § 10501(b). In full, this sweeping preemption provision states:

> 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 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.

Ibid. ICCTA thus grants the STB significant powers, including the exclusive power to authorize railroads to operate, to discontinue operations, and to construct, acquire, or abandon their rail lines. *Ibid.*; see *id.* §§ 10901–10903.

ICCTA "substantially deregulated the rail * * * industr[y]." *Pejepscot Indus. Park, Inc.* v. *Maine Cent. R.*, 215 F.3d 195, 197 (1st Cir. 2000). It requires the STB to "exempt" carriers from ICCTA's provisions "to the maximum extent consistent with" ICCTA if "the [STB] finds" that application of those provisions is "not necessary to carry out" Congress's "transportation policy" and that the "transaction or service is of limited scope." 49 U.S.C. § 10502(a). The STB has promulgated many regulations and exemptions, including those that govern carriers' obligations under federal environmental laws. See 49 C.F.R. parts 1105, 1121, 1150.

Applying Section 10501(b)'s express-preemption provision, the STB has ruled that ICCTA categorically preempts "state and local permitting or preclearance requirements (including environmental requirements)" because "by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations." *Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer, MA*, 5 S.T.B. 500, 2001 WL 458685, at *5 (S.T.B. served May 1, 2001), aff'd, *Boston & Maine Corp.* v. *Town of Ayer*, 206 F. Supp.2d 128 (D. Mass. 2002), rev'd solely on attys' fee issue, 330 F.3d 12 (1st Cir. 2003); see also, *e.g.*, *Cities of Auburn and Kent, WA—Petition for Declaratory Order—Burlington N. R.R.—Stampede Pass Line*, 2 S.T.B. 330, 1997 WL 362017 (S.T.B. served July 2, 1997), aff'd sub nom. *City of Auburn* v. *U.S. Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998); *CSX Transp., Inc.—Petition for Declaratory Order*, 2005 WL 1024490, at *2-3 (S.T.B. served May 3, 2005).

Federal courts likewise have "consistently struck down" state and local environmental regulations that impose permitting or preclearance requirements on rail carriers. *Green Mountain R.R.* v. *Vermont*, 404 F.3d 638, 642–643 (2d Cir. 2005) (citing cases). That is because "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 [STB] has authorized" is "categorically preempted" by ICCTA. *New Orleans & Gulf Coast Ry.* v. *Barrois*, 533 F.3d 321, 332 (5th Cir. 2008) (internal quotation marks omitted). As the D.C. Circuit recently explained, "[c]ategorical preemption under the ICCTA precludes such regulation regardless of its practical effect because 'the focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation.'" *Delaware* v. *Surface Transp. Bd.*, 859 F.3d 16, 19 (D.C. Cir. 2017) (quoting *Green Mountain R.R.*, 404 F.3d at 644). Emphasizing the scope and clarity of Section 10501(b), courts have observed that "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *City of Auburn*, 154 F.3d at 1030 (quoting *CSX Transp., Inc.* v. *Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

2. The California Environmental Quality Act requires state and local agencies to prepare and certify an "environmental impact report" (EIR) for any publicly or privately owned "project which they propose to carry out or approve that may have a significant effect on the environment." Cal. Pub. Res. Code §§ 21100(a), 21151(a); *Friends of Mammoth* v. *Bd. of Supervisors*, 8 Cal. 3d 247, 259 (1972). An EIR is a "detailed statement" that addresses "[a]ll

significant effects on the environment of the proposed project," as well as "[m]itigation measures" and "[a]lternatives." Cal. Pub. Res. Code §§ 21061, 21100(b).

Private citizens may file suit under CEQA to challenge an agency's decisions to certify an EIR and to approve a project. Cal. Pub. Res. Code § 21168; see *Save the Plastic Bag Coal.* v. *City of Manhattan Beach*, 52 Cal. 4th 155, 170 (2011). The reviewing court may "void[]" the EIR, order the agency to "take specific action as may be necessary" to comply with CEQA, and order the "agency and any real parties in interest [to] suspend any and all specific project activity or activities." Cal. Pub. Res. Code § 21168.9(a).

The STB consistently has ruled that ICCTA categorically preempts CEQA's citizen-suit provisions and injunctive remedies as applied to activities that are governed by ICCTA. See *Cal. High-Speed Rail Auth.—Pet. for Declaratory Order*, 2014 WL 7149612, at *3–12 (S.T.B. served Dec. 12, 2014); *DesertXpress Enters. LLC—Pet. for Declaratory Order*, 2007 WL 1833521, at *3 (S.T.B. served June 27, 2007); *N. San Diego Cty. Trans. Dev. Bd.—Pet. for Declaratory Order*, 2002 WL 192465, at *3–6 (S.T.B. served Aug. 21, 2002).

B. Factual Background

Petitioner North Coast Railroad Authority (NCRA) is a California agency "created * * * to provide rail passenger and freight service within" the "Counties of Humboldt, Mendocino, Sonoma, and Trinity." Cal. Gov. Code § 93010. It was created in 1989 when private railroads servicing those counties teetered on bankruptcy (and later went bankrupt).

See *id.* § 93001. The state sought to "[e]nsure continuing passenger and freight railroad service to the north coast area" and the "economic benefits" that the rail service brings. *Id.* § 93003. NCRA may acquire, own, and operate rail lines, and it may lease its lines to a private operator. *Id.* § 93020(a).

Based on notices of exemption that it filed with the STB, NCRA has the right under federal law to own and operate the Northwest Pacific Railroad Line (Line), which runs from Arcata, California to Lombard, California, where it connects to interstate rail. App., *infra*, 4a, 10a. At issue in this case is the southern portion of the Line, known as the Russian River Division, which runs 142 miles from Willits to Lombard. App., *infra*, 154a. NCRA owns or has easement rights over all relevant portions of the Line. App., *infra*, 10a. As an authorized rail carrier, NCRA is subject to ICCTA and the STB's exclusive jurisdiction. 49 U.S.C. § 10501(b). And as owner of the Line, NCRA is subject to a statutory duty to ensure that common-carrier services are provided upon a customer's reasonable request. *Id.* § 11101(a); see *Groome & Assocs, Inc.* v. *Greenville Cty. Econ. Dev. Corp.*, 2005 WL 1767443, at *8 (S.T.B. served July 27, 2005).

In 1998, after severe weather damaged the Line, the Federal Railroad Administration (FRA), which regulates railroad safety, prohibited operation on the Line until the tracks were repaired. App., *infra*, 12a.

In 2006, NCRA entered an operating agreement with privately owned Northwestern Pacific Railroad Company (Northwestern Pacific). The agreement authorized Northwestern Pacific to provide exclusive freight service on the Line once Northwestern Pacific obtained STB approval and NCRA repaired the

tracks. App., *infra*, 8a–9a. Northwestern Pacific obtained STB approval for its operations by filing a notice of exemption with the STB in 2007. Respondent Friends of the Eel River (Friends) petitioned the STB to revoke the exemption, arguing that environmental review was necessary before Northwestern Pacific could lawfully operate. The STB denied Friends' petition, ruling that Northwestern Pacific's planned operations fell below the regulatory threshold for environmental review. *Nw. Pac. R.R.—Change in Operators Exemption—Northcoast R.R. Auth., Sonoma-Marin Area R. Transit Dist. & Nw. Pac. Ry.*, 2008 WL 275698, at *2 (STB served Feb. 1, 2008). Friends did not appeal that ruling to the Ninth or D.C. Circuits. See 28 U.S.C. §§ 2321(a), 2343.[1]

From 2007 to 2011, NCRA performed environmental reviews under CEQA in anticipation

[1] As a result of the operating agreement and the STB's authorization, Northwestern Pacific assumed the primary statutory duty to provide common-carrier services. 49 U.S.C. § 11101(a). NCRA nevertheless retains a residual common-carrier obligation, requiring NCRA to provide common-carrier services if Northwestern Pacific halts operations. As the STB has explained, "if the trackage rights grantee"—here, Northwestern Pacific—"ceases its service (with [STB] approval or otherwise)," then the owner of the Line—here, NCRA—"would violate section 11101(a) of the Act if it did not provide freight service upon a shipper's reasonable request." *Mass. Dep't of Transp.—Acquisition Exemption—Certain Assets of CSX Transp., Inc.*, 2009 WL 6408804, at *6 n.18 (S.T.B. served May 3, 2010), aff'd sub nom. *Bhd. Of R.R. Signalmen* v. *Surface Transp. Bd.*, 638 F.3d 807 (D.C. Cir. 2011); see also *id.* at *8 (public entity that owns a rail line has "a residual common carrier obligation * * * if the primary freight carrier fails to perform").

of restoring freight service on the Russian River Division. App., *infra*, 12a–16a. Repairs were substantially completed by 2010, and in May 2011, the FRA authorized resumption of freight service on the Russian River Division. App., *infra*, 11a–12a. In June 2011, NCRA certified a final EIR under CEQA. App., *infra*, 15a-16a. That same month, Northwestern Pacific began operating on the Russian River Division. App., *infra*, 16a. Its operations continue to this day.

C. Proceedings Below

1. In July 2011, respondents Friends and Californians for Alternatives to Toxics (together, "Plaintiffs") filed these consolidated, state-court citizen suits under CEQA against NCRA as defendant and Northwestern Pacific as real party in interest (together, "Defendants"). Alleging CEQA violations, Plaintiffs sought injunctions prohibiting continued freight service on, and repairs to, the Line. App., *infra*, 16a–18a.

Defendants filed demurrers seeking dismissal of Plaintiffs' suits as preempted by ICCTA. In a 2012 order, the trial court held that ICCTA preempted Plaintiffs' suits. App., *infra*, 170a–178a. The court ruled that "the STB has already given its approval" to Defendants' operations, that "CEQA mandates a time-consuming review which may result in indefinite delays," and that Plaintiffs' suits "unduly interfere[] with STB's exclusive jurisdiction to regulate rail transportation." *Id.* at 177a–178a. The court further rejected Plaintiffs' argument that Defendants were collaterally estopped from asserting preemption and held that Plaintiffs could not raise third-party-beneficiary claims based on funding contracts that purportedly required CEQA review.

Id. at 178a–180a. Nevertheless, the court ruled that NCRA was judicially estopped from raising a preemption defense based on a consent decree in litigation not involving Plaintiffs. *Id.* at 180a–182a. The trial court thus denied Defendants' demurrers.

In April 2013, NCRA rescinded its certification of the EIR to clarify that the EIR was not required as a condition to repair the tracks or operate the Line. App., *infra*, 18a–19a. NCRA explained that it and Northwestern Pacific had the right to operate by virtue of their unchallenged operating agreement, the STB's authorization of Northwestern Pacific's operations (which Friends had unsuccessfully challenged), and the FRA's unchallenged order allowing resumption of freight service. *Ibid.*

Defendants moved to dismiss once again, and this time the trial court granted the motion. The court ruled that NCRA's rescission of the EIR did not moot the case. App., *infra*, 149a–152a. Reconsidering its prior ruling, the court held that NCRA was not judicially estopped from asserting preemption. *Id.* at 155a–161a. It further held that ICCTA "expressly preempts the application of CEQA to [Defendants'] activities in repairing the tracks and operating along the Russian River Division." *Id.* at 168a.

2. Plaintiffs appealed, and the California Court of Appeal affirmed. It agreed with the trial court that the case was not moot and that Defendants were not estopped from asserting preemption. App., *infra*, 111a–112a, 136a–137a, 139a–147a.

The Court of Appeal held that ICCTA categorically preempted Plaintiffs' claims against both privately owned Northwestern Pacific and state-owned NCRA. Citing Section 10501(b)'s

"'broadly worded'" and "expansive language," the court explained that ICCTA "categorically preempt[s]" "any form of permitting or preclearance that, by its nature, could be used to deny a railroad the opportunity to conduct operations or proceed with other activities the STB has authorized." App., *infra*, 114a–115a. It further noted that ICCTA categorically preempts "state or local regulation of matters directly regulated by the STB, such as the construction and operation of railroad lines." *Id.* at 115a. The court cited several "persuasive and fully applicable" "decisions of lower federal courts" and "decisions of the STB" that "conclude a state statute requiring environmental review as a condition to railroad operations is preempted by the ICCTA." *Id.* at 115a–118a. The court determined that, "in the context of railroad operations, CEQA is not simply a health and safety regulation imposing an incidental burden on interstate commerce." *Id.* at 119a. It thus held that Plaintiffs' "CEQA claims fall within the preemption clause of the ICCTA." *Id.* at 120a.

The Court of Appeal rejected Plaintiffs' assertion that "application of CEQA in this case is a matter of self-governance by a political subdivision of the state, meaning federal preemption would run afoul of the Tenth Amendment." App., *infra*, 137a. The court held that ICCTA plainly preempted Plaintiffs' suit and that application of ICCTA to NCRA did not violate the Tenth Amendment. *Id.* at 137a–139a.

The Court of Appeal further held that the "market participant" exception to federal preemption "may not be used to avoid federal preemption by the ICCTA in this case." App., *infra*, 134a. It ruled that a "proceeding by a private citizen's group challenging the adequacy of [an agency's] review under CEQA" is

not a "proprietary action" by the state. *Id.* at 131a. It further explained that Plaintiffs "s[ought] to stand the market participation doctrine on its head and use it to avoid the preemptive effect of a federal statute the state entity is seeking to invoke," which is "antithetical to the purpose underlying the doctrine." *Id.* at 132a.

3. Plaintiffs appealed only the preemption ruling to the California Supreme Court.[2] A divided court affirmed as to privately owned Northwestern Pacific but reversed as to state-owned NCRA, viewing "the two entities as distinct for the purposes of preemption." App., *infra*, 85a.

The majority held that ICCTA does not categorically preempt Plaintiffs' claims against NCRA. The court ruled that, because NCRA is a state-owned railroad, subjecting it to the CEQA environmental-review process is not "classic *regulatory* behavior" but rather "a form of self-government." App., *infra*, 56a. Analogizing the statute to a privately owned railroad's "internal corporate rules," the court characterized CEQA as "an internal guideline governing the processes by which state agencies may develop or approve projects that may affect the environment." *Id.* at 57a–58a. It is irrelevant, the court concluded, that in this case CEQA is being enforced by outside environmental groups rather than by the state itself. According to the court, the "CEQA actions in this case do not become regulatory simply because they are brought by citizens." *Id.* at 69a.

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[2] Plaintiffs did "not preserve[]" the issues of "mootness and judicial estoppel" for review. App., *infra*, 22a.

Having concluded that the enforcement of CEQA's environmental-review process through citizen suits against a state-owned railroad constitutes "self-government" rather than "regulation," the majority read *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), and *Nixon* v. *Missouri Municipal League*, 541 U.S. 125 (2004), as requiring "a particularly clear statement" of congressional intent to preempt such suits before ICCTA could be construed to preempt them. App., *infra*, 60a. Finding no such clear statement, the court held that application of CEQA to NCRA is not categorically "preempted regulation of rail transportation within the meaning of [ICCTA's] preemption clause." *Id.* at 72a.

With respect to Plaintiffs' claims against Northwestern Pacific, the majority reached the opposite conclusion, "agree[ing] with the Court of Appeal that CEQA causes of action cannot be the basis for an injunctive order directed specifically at [Northwestern Pacific] to halt [its] freight operations." App., *infra*, 82. "Such an application of state law," the court found, "would be tantamount to the operation of state environmental preclearance rules that the *Auburn* court and others have agreed cannot be used to halt railroad operations pending compliance." *Id.* at 82a. Thus, as to Northwestern Pacific, CEQA operates as "a classic example of state regulation" prohibited by ICCTA. *Id.* at 83a.

While stating that "[w]hether [Northwestern Pacific] would be able to carry on with [rail] service despite the application of CEQA to NCRA is a question that is beyond the scope of this case," the majority acknowledged that application of CEQA to NCRA "may have some impact" on Northwestern

Pacific's ability to conduct STB-authorized activities. App., *infra*, 84a–85a. According to the court, however, any such impact was permissible because it "is merely derivative of the state's efforts at self-governance in this marketplace." *Id.* at 85a.

The court reversed and remanded for further proceedings against NCRA. App., *infra*, 85a. Justice Kruger concurred in a separate opinion. *Id.* at 87a–88a.

Justice Corrigan dissented. She criticized as "unsupported by precedent" the majority's holding "that a law of general application may be considered a 'regulation' of private activity, but not of public activity in the same sphere." App., *infra*, 89a–90a. She explained that the "majority's approach forces the state to undertake a burden that no private railroad must bear." *Id.* at 90a. Justice Corrigan warned that the majority's "holding will displace the longstanding supremacy of federal regulation in the area of railroad operations by allowing third party plaintiffs to thwart or delay public railroad projects with CEQA suits," an outcome that is "both unfair to public entities and inimical to the deregulatory purpose of ICCTA." *Id.* at 91a. Finally, Justice Corrigan explained that the majority's "novel theory construing regulation as a form of 'self-governance'" created a "direct conflict with the stated views of the STB." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH RULINGS OF THE SURFACE TRANSPORTATION BOARD AND A STATE COURT OF LAST RESORT.

A. The Surface Transportation Board Has Ruled That ICCTA Categorically Preempts CEQA As Applied To State-Owned Railroads.

The California Supreme Court "acknowledge[d]" that its decision conflicts with the views of the STB. App., *infra*, 73a. The court explained that the STB has ruled that ICCTA preempts "state and local environmental rules even when the rail carrier is publicly owned." *Ibid.* In fact, the court admitted that the STB has "concluded specifically that the ICCTA preempts any application of CEQA to what appears to be a publicly owned high-speed rail project in California." *Id.* at 74a (citing *Cal. High-Speed Rail Auth.—Pet. for Declaratory Order*, 2014 WL 7149612 (S.T.B. Dec. 12, 2014)).

That conflicting STB decision involved CEQA challenges to the California High-Speed Train System, which is administered by the state-owned California High-Speed Railroad Authority. See Cal. Pub. Util. Code §§ 185000 *et seq*. The train system will "provide high-speed intercity passenger rail service over more than 800 miles of new rail line throughout California." *Cal. High-Speed Rail Auth.*, 2014 WL 7149612, at *1. Facing seven citizen suits seeking to block construction of the portion of the line running from Fresno to Bakersfield, the California High-Speed Rail Authority petitioned the

STB for a declaratory order that ICCTA preempted CEQA's injunctive remedies. *Ibid.* Opponents responded that a finding of preemption "would intrude" upon "California's sovereignty." *Id.* at *2.

After "careful consideration," and explaining that it "is uniquely qualified to determine the preemption question," the STB "conclude[d] that CEQA is categorically preempted by [ICCTA] in connection with the Line." *Cal. High-Speed Rail Auth.*, 2014 WL 7149612, at *3, *5, *7 (internal quotation marks omitted). The STB ruled that "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.

The STB rejected the opponents' invocations of state sovereignty. It "agree[d]" with the Court of Appeal's decision in this case that a "'proceeding by a private citizen's group challenging the adequacy of the review under CEQA is not part of [a] propriety action'" by the state. *Cal. High-Speed Rail Auth.*, 2014 WL 7149612, at *10. It further ruled that its order did "not infringe upon California's state sovereignty because the CEQA enforcement actions are not being brought by the state," but rather "by third parties against a state agency under the guise of state law." *Id.* at *11.[3]

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[3] The Ninth Circuit dismissed the ensuing petitions for review for lack of appellate jurisdiction, concluding that the Board's order was not reviewable under 28 U.S.C. § 2342(5). *Kings Cnty.* v. *Surface Transp. Bd.*, 694 F. App'x 472 (9th Cir. 2017).

The STB has made clear that its ruling in *California High-Speed Railroad Authority* applies equally to the citizen suits at issue here. When asked by respondent and real-party-in-interest Northwestern Pacific to issue a ruling declaring these citizen suits to be preempted, the STB declined to do so, explaining that "because the [STB] has recently provided its views on the preemption issues presented by [Northwestern Pacific], an additional declaratory order addressing the same issues is not necessary." *Nw. Pac. R.R.–Pet. for Declaratory Order*, 2016 WL 1639525, at *1 (S.T.B. served Apr. 25, 2016) (citing *Cal. High-Speed Rail Auth.*, 2014 WL 7149612). Indeed, the STB noted that its decision in *California High-Speed Railroad Authority* "was issued specifically to advise the California Supreme Court of the [STB's] views on preemption of CEQA to assist that court in deciding the *Friends of the Eel River* appeal" in this very case. *Id.* at *2 (citing *Cal. High-Speed Rail Auth.*, 2014 WL 7149612, at *5, *7). Having "already ruled on preemption in the context of this precise matter," the STB found that "an additional declaratory order addressing the same issues is not warranted." *Ibid.* Still, lest there be any confusion, the STB reiterated that, in its view, "CEQA is categorically preempted by § 10501(b) in connection with rail lines regulated by the [STB], including state-operated or owned rail lines." *Ibid.*

In this case, the California Supreme Court explicitly disagreed with the STB, holding that it was "not bound to follow" the STB's interpretation of ICCTA's preemptive effect. App., *infra*, 73a. Federal courts of appeals, by contrast, have stressed that the STB "is uniquely qualified to determine whether state law ... should be preempted" by ICCTA. *Green Mountain*, 404 F.3d at 642 (ellipses in original;

internal quotation marks omitted). Consequently, many courts, including the Ninth Circuit, which of course includes California, have granted *Chevron* deference to the STB's rulings on preemption. *E.g.*, *Tubbs* v. *STB*, 812 F.3d 1141, 1144 (8th Cir. 2015); *Ass'n of Am. R.R.* v. *S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010). Refusing to defer to the agency's determination that ICCTA categorically preempts citizen suits under CEQA even when they target a state-owned railroad, the California Supreme Court created an acknowledged, irreconcilable conflict with an order of the federal agency entrusted with "exclusive" "jurisdiction" over interstate rail transportation. 49 U.S.C. § 10501(b).[4]

Certiorari is warranted to resolve this dispositive conflict on an important issue of federal rail law. See *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 235 (2004) (granting certiorari because of a conflict between the views of the Sixth Circuit and the federal agency "delegated expansive authority" to administer an act); *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 41 & n.15 (1989) (granting

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[4] Although some circuits—see, *e.g.*, *Delaware*, 859 F.3d at 20–21—have recently pondered whether agency preemption determinations are entitled to the degree of deference articulated in *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), or instead only that described in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), the outcome of this case does not turn on the resolution of that debate. The STB's ruling in *California High-Speed Railroad Authority* is not itself under review. Neither the decision below nor any of the prior state court decisions in this case depend on the degree of deference, if any, that ought to be paid to the STB's ruling in *California High-Speed Railroad Authority*. Finally, even if the STB's determination is not entitled to any deference, the determination is correct for the reasons articulated herein.

certiorari to review state court decision affecting the "exclusive * * * jurisdiction provision" of a federal statute); *Miss. Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 368 n.10 (1988) (granting certiorari to review state court's decision that federal agency's orders did not preempt state proceedings).

B. The California Supreme Court's Decision Creates A Conflict Between State Courts Of Last Resort.

The California Supreme Court's decision also conflicts with a decision of a state court of last resort. Both the STB in *California High-Speed Rail Authority* and the California Court of Appeal in this case recognized that this case "is akin to the so-called *Grupp* cases." App., *infra*, 133a; accord *Cal. High-Speed Rail Auth.*, 2014 WL 7149612, at *10 n.23.

In *New York ex rel. Grupp* v. *DHL Express (USA), Inc.*, 19 N.Y.3d 278 (2012), New York's highest court held that the federal Airline Deregulation Act preempted a private *qui tam* action under the New York False Claims Act. Much as ICCTA expressly preempts state regulation of rail transportation, the Airline Deregulation Act expressly preempts state regulation of air-carrier services. See *id.* at 283. Resisting the defendant's motion to dismiss the overbilling claims brought "on behalf of the State of New York" (*id.* at 281), the *Grupp* plaintiffs argued that the Act's preemption provision did not bar their suit under New York law because the defendant had entered into an air-services contract with the state and therefore the plaintiffs were vindicating a "proprietary" state interest. *Id.* at 286. The court rejected that argument, holding that, while the state entered into the contract "in its proprietary capacity," plaintiffs'

invocation of the New York False Claims Act nevertheless was "regulatory in nature" and thus preempted. *Id.* at 286–287.

Florida courts reached the same conclusion when the same plaintiffs pressed their claims under the Florida False Claims Act. See *DHL Express (USA), Inc.* v. *Florida ex rel. Grupp*, 60 So. 3d 426, 429 (Fla. Dist. Ct. App. 2011) (holding that, although Florida "was a market participant when it contracted with [the defendant], it acts as a regulator in authorizing suits under the False Claims Act"), review denied, 81 So. 3d 415 (Fla. 2012), cert. denied, 567 U.S. 906 (2012).

As the California Court of Appeal explained in the decision that was reversed below, the *Grupp* cases "are significant because they recognize that when," as here, "a party relies on a state law of general application to challenge a state proprietary action, that challenge operates as a regulation, rather than a part of the proprietary action being challenged." App., *infra*, 133a–134a. The California Supreme Court did not even acknowledge the *Grupp* cases, let alone attempt to explain how its decision could be reconciled with them. In fact, the California Supreme Court's decision conflicts with the *Grupp* cases, which make clear that Plaintiffs' claims are preempted because, in contravention of 49 U.S.C. § 10501(b), they seek to use a state law of general application to regulate rail transportation.

II. THE CALIFORNIA SUPREME COURT'S DECISION IS ERRONEOUS.

A. Beyond these conflicts, certiorari is warranted because the California Supreme Court decided an important question of federal law incorrectly. As the

court acknowledged, the question presented here "is fundamentally one of statutory construction." App., *infra*, 22a. And ICCTA could not be clearer in preempting Plaintiffs' suits.

ICCTA's express-preemption clause draws no distinction between state-owned and privately owned railroads. It states categorically that "the remedies provided under [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). By its plain terms, that clause applies equally to all railroads governed by ICCTA. The California Supreme Court recognized that ICCTA preempts Plaintiffs' claims against Northwestern Pacific because they seek to "use * * * state law to restrict operations by a private rail carrier." App., *infra*, 83a. The court should have reached the same conclusion as to Plaintiffs' claims against NCRA. Plaintiffs are seeking "remedies provided under * * * State law" and are doing so "with respect to regulation of rail transportation." 49 U.S.C. § 10501(b). Their claims are therefore "preempt[ed]." *Ibid.*

The court's suggestion that CEQA constitutes "regulation" with respect to Northwestern Pacific but not with respect to NCRA is—as Justice Corrigan noted in her dissent—"unsupported by precedent." App., *infra*, 89a–90a. Indeed, although the majority treats "the two entities as distinct for the purposes of preemption" (*id.* at 85a), it cites no authority drawing such a distinction. See *id.* at 57a–60a. In fact, the distinction between state-owned and privately owned railroads flies in the face of 130 years of precedent holding that federal rail law preempts state law as applied to state-owned

railroads to the same extent it preempts state law as applied to privately owned railroads. See *supra* at pp. 16-20; see also App., *infra*, 70a–72a, 70a n.7 (citing cases holding that federal law preempts state law as applied to state-owned railroads and that such preemption does not violate the Tenth Amendment).[5]

The court's decision to read an *implicit* distinction between public and private railroads into Section 10501(b) also conflicts with the remainder of Section 10501, which addresses public railroads *explicitly*. Section 10501(c) provides that the STB "does not have jurisdiction" over "public transportation provided by a local government authority." 49 U.S.C. § 10501(c)(2)(A). That clause does not apply here because NCRA does not provide "public transportation"; it owns a freight line. See *id.* §§ 5302(14), 10501(c)(1)(B); *Mass. Dep't of Transp.—Acquisition Exemption—Certain Assets of Pan Am S. LLC*, 2014 WL 7330104, at *3 (S.T.B. served Dec. 24, 2014). Yet Congress's decision to remove *certain* publicly owned railroads from the STB's otherwise exclusive jurisdiction, and thus from ICCTA's preemptive ambit, makes clear Congress's intention that all *other* publicly owned railroads, including NCRA, be fully subject to STB jurisdiction and protected against state regulation of rail

[5] In addition to lacking a textual basis in the statute, the California Supreme Court's distinction between Northwestern Pacific and NCRA for purposes of ICCTA preemption is impractical, for, as the court itself recognized, application of CEQA to NCRA "may have some impact" on Northwestern Pacific's ability to continue rail transportation. App., *infra*, 85a.

transportation to the same extent as any other railroad within the agency's exclusive jurisdiction.[6]

It is irrelevant that the STB merely *authorized* NCRA's activities within ICCTA's "deregulated sphere" (App., *infra*, 60a), rather than *required* them. That spurious distinction overlooks the fact that NCRA has a federal duty to ensure that the Line's customers receive common-carrier services. See *supra* at p. 9 n.1. As the trial court found, Plaintiffs' suits threaten "indefinite delays" and "time-consuming review" that "unduly interfere" with NCRA's federal obligations under ICCTA. App., *infra*, 167a. Indeed, Plaintiffs' complaints expressly seek injunctions against STB-authorized freight services and the track repairs necessary to ensure that those services are provided. *Id.* at 16a–18a. The California Supreme Court's decision allowing Plaintiffs' suits to proceed places NCRA in an untenable position in which it is whipsawed between competing federal- and state-law demands.

Moreover, enacting ICCTA was a "*de* regulatory move," not "an invitation to states to fill the regulatory void created by federal deregulation." *Fayus Enters.* v. *BNSF Ry.*, 602 F.3d 444, 450 (D.C. Cir. 2010). On the contrary, Congress's enactment of ICCTA moved federal rail law "entirely in a deregulatory direction, making it most improbable that Congress intended to invite state regulatory authority into the picture." *Ibid.* Indeed, Congress explained that "nothing in [ICCTA] should be

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[6] Under 49 U.S.C. § 10501(c)(1)(A), "the term 'local governmental authority' has the same meaning given that term by [49 U.S.C. §] 5302," which defines the term to include "an authority of [a] state." 49 U.S.C. § 5302(10)(B).

construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill." S. Rep. No. 104-176, at 6 (1995). The California Supreme Court's conclusion to the contrary ignores this Court's longstanding recognition that when Congress determines that certain conduct should not be regulated, allowing "'a state to impinge on the area * * * designed to be free'" of regulation "'is quite as much an obstruction of federal policy as if the state were to'" permit conduct explicitly prohibited by federal law. *N.L.R.B.* v. *Nash-Finch Co.*, 404 U.S. 138, 143 (1971) (quoting *Garner* v. *Teamsters, Chauffers and Helpers Local Union No. 776*, 346 U.S. 485, 500 (1953)).

Finally, the California Supreme Court's decision upends "the plain purpose of the ICCTA and its predecessors," which, the court acknowledged, is "to ensure a uniform national system of rail service." App., *infra*, 70a n.7. Subjecting only some rail carriers to state environmental permitting and preclearance requirements frustrates national uniformity. The court's ruling also undermines national uniformity by rejecting the views of the STB, which has "exclusive" "jurisdiction" over "transportation by rail carriers." 49 U.S.C. § 10501(b).

In short, the California Supreme Court's decision runs contrary to the text, structure, history, and purpose of ICCTA.

B. Against this great weight of authority, the California Supreme Court erroneously invoked *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), and *Nixon* v. *Missouri Municipal League*, 541 U.S. 125 (2004). App., *infra*, 60a–75a. Neither case concerns railroad law nor supports the decision below.

In *Gregory*, this Court held that state judges were "policymaking" officials exempt from regulation under the federal Age Discrimination in Employment Act, and therefore the Court declined to invalidate a provision of the Missouri Constitution requiring mandatory retirement of state judges at the age of 70. The Court stressed that the qualification of judges concerned "a decision of the most fundamental sort for a sovereign entity" and that federal regulation "would upset the usual constitutional balance of federal and state powers." 501 U.S. at 460. Because the federal statute was "ambiguous" and Congress did not "ma[k]e it clear that judges are *included*," the Court read the statute not to apply. *Id.* at 467.

In *Nixon*, this Court held that the provision of the Telecommunications Act preempting state law that "prohibit[s] the ability of any entity to provide any interstate or intrastate telecommunications service" did not apply to municipal-owned entities. 541 U.S. at 129. The Court ruled that the statutory text "fails to answer the question," noted "the strange and indeterminate results" that preemption would have in the telecommunications context, and cited *Gregory*'s "complementary principle" that "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism." *Id.* at 132–133, 140.

Gregory and *Nixon* do not support the California Supreme Court's decision. Federal preemption of the requirements a state has established for those who wield *its* judicial power threatens the state's "sovereign powers," *Gregory*, 501 U.S. at 461, in a way that federal preemption of citizen suits *against*

an arm of the state does not. Nor would a finding of preemption here lead to "strange and indeterminate results." *Nixon*, 541 U.S. at 132. To the contrary, the California Supreme Court's decision that ICCTA categorically preempts Plaintiffs' claims against only one of two railroads that *together* provide freight service is exceedingly strange and potentially indeterminate. See App., *infra*, 84a ("Whether [Northwestern Pacific] would be able to carry on with service despite the application of CEQA to NCRA is a question that is beyond the scope of this case."). By contrast, holding that citizen suits under CEQA are categorically preempted as to *all* railroad operations authorized by the STB is straightforward and administrable.

Moreover, *Gregory* and *Nixon* held that the purportedly preemptive federal statutes at issue in those cases simply did not apply to the state actors in question. Here, by contrast, the California Supreme Court acknowledged, as it had to, that ICCTA governs NCRA. See App., *infra*, 70a ("We by no means posit that the ICCTA does not *govern* state-owned rail lines."). The California Supreme Court interpreted ICCTA's preemption clause in a way that has no textual basis and draws no support from *Gregory* and *Nixon*.

Even if *Gregory*'s clear-statement rule applied, moreover, ICCTA would overcome it. As noted (see *supra* at p. 22), ICCTA's express-preemption clause unambiguously covers Plaintiffs' suits. And while *Gregory*'s clear-statement rule "does not mean that the Act must mention [state-owned railroads] explicitly" for federal law to govern (*Gregory*, 501 U.S. at 467), ICCTA in fact does mention state-owned railroads explicitly: it exempts a narrow,

inapplicable category of them from STB jurisdiction, showing that Congress intended that ICCTA would fully govern non-exempted public railroads such as NCRA. See 49 U.S.C. § 10501(c)(2)(A). Simply put, the California Supreme Court misread federal law.

III. THE QUESTION PRESENTED IS ONE OF EXCEPTIONAL PUBLIC IMPORTANCE.

The decision below will have a profound impact on the management of railroads in California and potentially nationwide.

Although the majority of STB-regulated railroads are privately owned, the modern rail industry is—as illustrated by the facts of this case—a web of federal, state, local, and private interests. See Congressional Research Service, R42523, *Passenger Train Access to Freight Railroad Track* (2012). Under the California Supreme Court's decision, numerous railroads could face increased exposure to "state and local permitting or preclearance requirements (including environmental requirements)" that "by their nature * * * unduly interfere with interstate commerce." *Bos. & Me. Corp. & Town of Ayer, MA*, 2001 WL 458685, at *5. According to the California State Department of Transportation (Caltrans), public entities own approximately 700 miles of STB-regulated rail lines in California alone. Caltrans, *2018 California State Rail Plan: Connecting California* 80 (2017).

Like NCRA, various California public entities own STB-regulated freight rail lines but do not themselves operate STB-regulated rail service. For instance, the Alameda Corridor Transportation Authority (ACTA) is a public authority formed by the Cities of Los Angeles and Long Beach. ACTA

financed and constructed the Alameda Rail Corridor, a critical 20-mile rail-cargo expressway that is used by privately owned railroads to link the ports of Los Angeles and Long Beach to the transcontinental rail network near downtown Los Angeles. See *Alameda Corridor Construction Application*, 1996 WL 297102 (S.T.B. served June 6, 1996). Other examples include the Peninsula Corridor Joint Powers Board (Caltrain), the Sonoma-Marin Area Rail Transit District, the Los Angeles County Metropolitan Transportation Authority, the Orange County Transportation Authority, the Riverside County Transportation Commission, the San Bernardino Associated Governments, the San Diego Metropolitan Transit Development Board, and the North San Diego County Transit Development Board.

In addition to these already existing rail lines, the California High-Speed Rail Authority (CHSRA) is currently constructing a high-speed rail system that will connect San Francisco and Los Angeles. See Ralph Vartabedian, *High-Speed Rail Authority Says Environmental Reviews Won't Be Completed Until 2020*, L.A. Times (Nov. 15, 2017). CHSRA has stated that it was the STB's ruling in *California High-Speed Rail Authority* that ICCTA preempts CEQA citizen suits that allowed CHSRA to begin construction despite the pendency of seven state-court CEQA lawsuits. Intervenor's Brief at 11, *King's Cnty.* v. *Surface Transp. Bd.*, Case Nos. 15-71780, 15-72570 (9th Cir. May 6, 2016), ECF No. 63-1.

Because of the California Supreme Court's decision, NCRA, CHSRA, and California's many other publicly owned railroads may now face additional lawsuits invoking CEQA or other state

statutes that, under a proper interpretation of the law, are categorically preempted by ICCTA.

If other state courts adopt the California Supreme Court's self-governance logic, numerous other public entities across the country could suddenly become subject to state or local laws that impose permitting or preclearance requirements on interstate rail operations. See, *e.g.*, Michigan Dep't of Transp., *State-Owned Rail Lines* (Michigan Department of Transportation manages 665 miles of state-owned rail lines); Vermont Agency of Transp., *Vermont State Rail Plan 2015*, at I (Vermont owns 305 miles of track, out of 578 total track miles in Vermont); Wisconsin Dep't of Transp., *Wisconsin Rail Plan 2030* at 3-3 (public sector owns 530 miles of track, out of 3600 total track miles in Wisconsin). This would upend longstanding precedent that ICCTA preempts such laws and could discourage public entities from providing these important transportation services.

In short, the California Supreme Court's decision opens the door to a shift from Congress's vision of a "national rail system operating with minimal regulation" to "an industry subject to a patchwork of state regulation." App., *infra*, 42a-43a.

IV. IMMEDIATE REVIEW IS WARRANTED.

Because the question presented concerns whether state-law remedies are preempted by ICCTA, the posture of this case counsels in favor of—not against—immediate review. Categorical preemption is "a pure question of law," App., *infra*, 112a, and no further factual or legal developments on remand will impact that inquiry. And if, as we have argued, ICCTA categorically preempts

Plaintiffs' CEQA claims, further litigation should be foreclosed and the case against NCRA dismissed. It would therefore be an immense waste of resources and time for the parties to brief and argue the remaining issues in this case—and for the California courts to resolve those issues—if CEQA's citizen-suit provision is indeed categorically preempted by ICCTA.[7]

The potential for a delayed resolution of this important issue cannot be overstated. Plaintiffs initiated this litigation in July 2011, and it has taken more than six years for the case to reach this Court

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[7] For similar reasons, jurisdiction is proper under 28 U.S.C. § 1257(a), which authorizes this Court to review "final judgments or decrees rendered by the highest court of a State" where "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution * * * or laws of the United States." This Court has identified several categories of sufficiently final state-court judgments that are reviewable under Section 1257, including cases in which "the federal issue would be mooted if the petitioner * * * seeking to bring the action here prevailed on the merits in the later state-court proceedings, but there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts" and cases in which a "refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 478–479, 483 (1975); see also *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497 n.5 (1983). This case satisfies those criteria. The question whether ICCTA categorically preempts citizen suits seeking to enforce state environmental-review requirements against a state-owned railroad would be mooted were NCRA to prevail on the merits of Plaintiffs' CEQA claims on remand from the California Supreme Court. Similarly, the case implicates the important federal policy of national uniformity in the railroad industry, and the California Supreme Court's decision rejecting ICCTA's preemptive effect undermines that federal policy.

after dismissal on purely legal grounds. It could take several additional years before final judgment is entered and this issue can again be raised in a petition for a writ of certiorari. During that time, the specter of this litigation will hang over not only the particular project at issue here but also all other California railroad projects that involve a publicly owned railroad. See *supra* Section III.

This Court, moreover, routinely grants immediate review when state and federal courts decide issues concerning preemption. *E.g.*, *Belknap*, 463 U.S. at 497 n.5 (review of state-court decision); *Arizona* v. *United States*, 567 U.S. 387 (2012); see also *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100 (2009) (collateral-order doctrine); *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 557–558 (1963) (review of state decision concerning venue).

Regardless of how this Court ultimately resolves the question whether ICCTA categorically preempts state-law environmental-review requirements as to all railroads, publicly owned railroads are entitled to an authoritative determination by this Court as to whether they are subject to state-law citizen suits for actions taken in compliance with the STB's authorization.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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