No. 17-915

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

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents Friends of the Eel River and Californians for Alternatives to Toxics state that they are non-profit organizations with no parent corporations.

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INTRODUCTION

This matter is particularly ill-suited for a grant of certiorari. It comes to the Court on a limited decision by the California Supreme Court reversing a state trial court's dismissal and remanding the matter for trial of a state statutory claim. The California Supreme Court held that the Interstate Commerce Commission Termination Act (ICCTA) does not preempt a state's decision to conduct environmental review before spending funds appropriated by its legislature to repair and reopen its own rail line. The California Supreme Court reasoned that California—as owner of the railroad—had as much right to determine how it makes decisions as would the owner of a private railroad.

This holding does not contradict federal policy or any federal requirement, conflict with other court decisions, or implicate the regulation of interstate rail transportation. The case has now returned to the trial court on remand, where it will proceed to a decision on the merits, first through pre-trial motions to dismiss, which Petitioner North Coast Railroad Authority (NCRA) and its contractor have represented they will file, and then to substantive hearing on an administrative record created years ago. In the current posture, therefore, this case does not involve a final judgment under 28 U.S.C. section 1257, nor does it present a pressing federal issue that warrants the Court's premature intervention.

STATEMENT OF THE CASE

A. Legal Framework

Like its predecessor statutes, the ICCTA is concerned with the regulation of interstate railroad rates, classifications, schedules, practices, routes, and the like. It is the culmination of a long history of state and federal economic regulation and subsequent deregulation of the rail industry. That history bears directly on the scope and extent of federal preemption of state laws of general applicability, like the California Environmental Quality Act (CEQA) at issue here, that do not directly regulate rail transportation.

1. The American rail system developed originally through "state initiative and almost exclusively under state control." Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017, 1034 (1988). To protect shippers from perceived market manipulation and rate discrimination on interstate lines, Congress stepped into the arena for the first time in 1887 with adoption of the Interstate Commerce Act. S. Rep. No. 104-176, at 2 (1995). That modest law, which created the Interstate Commerce Commission (ICC) and gave it limited authority to ensure that interstate rail fees were "just and reasonable," was subsequently expanded in incremental ways over the next few decades. Hovenkamp at 1035-44.

Following World War I, however, congressional policy shifted from one of protecting the public from market abuses by the rail industry to one of protecting the

industry from unconstrained competition. *See* Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 Marq. L. Rev. 1151, 1152 (2012). To guard against the overbuilding of infrastructure, the Transportation Act of 1920 augmented the ICC's authority, allowing it to regulate intrastate rates that affected interstate commerce, in particular by prohibiting the expansion or construction of new lines unless and until the ICC certified that "public convenience" required such action. *See R.R. Comm'n of Cal. v. So. Pacific Co.*, 264 U.S. 331, 344 (1924); James W. Ely, Jr., *"The Railroad System Has Burst Through State Lines": Railroads and Interstate Commerce, 1830-1920*, 55 Ark. L. Rev. 933, 974-76 (2003).

2. As newer forms of transportation like trucking gained market share, Congress returned to the subject again with the Staggers Rail Act of 1980, which "began the substantial economic deregulation of the surface transportation industry and the whittling away of the size and scope of the ICC." H.R. Rep. No. 104-311, at 82 (1995). It did so by effectively "deregulat[ing] most railroad rates, legaliz[ing] railroad shipping contracts, simplif[ying] abandonments, and stimulat[ing] an explosion of service and marketing alternatives." *Id.* at 91. For the first time, Congress also expressly preempted state economic regulation of railroads (*e.g.*, rates, schedules, classifications, etc.) unless the ICC first certified such state rules. Pub. L. No. 96-448, § 214(b), 94 Stat. 1895 (Oct. 4, 1980) (formerly 49

U.S.C. § 10501(b)); H.R. Rep. No. 96-1430, at 106 (1980) (explaining that this requirement was "to ensure that the price and service flexibility and revenue adequacy goals of the [Staggers] Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals").

With passage of the ICCTA in 1995, Congress completed the economic deregulation of the rail industry that began with the Staggers Act. The ICCTA repealed many of the ICC's historic economic regulatory functions, including tariff filing, rail fare regulation, financial assistance programs, and minimum rate regulation, leaving only the authority "necessary to maintain a 'safety net' or 'backstop' of remedies to address problems of rates, access to facilities, and industry restructuring." H.R. Rep. No. 104-311, at 82-83, 93. To effectuate this deregulation, the ICCTA dissolved the ICC and replaced it with the much more constrained Surface Transportation Board (STB).

Under the statute, the STB has two functions: (1) to prescribe reasonable rates, classifications, rules, and practices for common carriers connected to the interstate rail system and to adjudicate disputes over common carrier obligations, 49 U.S.C. §§ 10701-10747 (rates), 11101-11164 (operations); and (2) to grant or deny applications for certifications of "public convenience and necessity," authorizing construction of new rail lines and extensions into new markets, abandonment or acquisition of existing lines, and changes in operator status. 49 U.S.C. §§ 10901-10910 (licensing). Today, the STB only "has regulatory jurisdiction over

railroad rate reasonableness, mergers, line acquisitions, new rail-line construction, abandonments of existing rail lines, and the conversion of rail rights-of-way into hiking and biking trails." S. Rep. No. 114-52, at 2-3 (2015) (describing STB's responsibilities and programs).

To effectuate full deregulation and ensure that states did not engage in economic reregulation, the ICCTA clarified that: (1) the STB has exclusive jurisdiction over "transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules . . . practices, routes, services, and facilities of such carriers; and the construction acquisition, operation, abandonment, or discontinuance" of rail lines; and (2) "the remedies provided under [the ICCTA] *with respect to the regulation of rail transportation* are exclusive and *preempt the remedies* provided under Federal or State law." 49 U.S.C. § 10501(b) (emphasis added). The revised statute retains "the exclusivity of Federal remedies with respect to the regulation of rail transportation," previously adopted in the Staggers Act to assure uniform administration, "while clarifying that the exclusivity is related to remedies with respect to rail regulation—not State and Federal law generally." H.R. Conf. Rep. No. 104-422, at 167 (1995). The ICCTA thus preempts only those regulations which "collide with the *scheme of economic regulation (and deregulation) of rail transportation*," reflecting "the direct preemption of *State economic regulation* of railroads." *Id.* (emphasis added).

The ICCTA preemption clause applies, by its own terms, only to state and local law remedies related to the *regulation* of rail transportation.[1] The courts have consistently affirmed this plain text interpretation, holding that the ICCTA's "express pre-emption applies only to state laws 'with respect to *regulation* of rail transportation,'" and "[t]his necessarily means something qualitatively different from laws 'with respect to rail transportation.'" *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). Simply put, "Congress narrowly tailored the ICCTA preemption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009); *see also Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 18 (D.C. Cir. 2017); *Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010); *Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 410 (5th Cir. 2010); *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 104 (2d Cir. 2009); *Adrian & Blissfield R.R. Co. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008); *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007).

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[1] The term "transportation" is defined by the ICCTA as the "movement of passengers or property, or both, by rail." 49 U.S.C. § 10102(9).

3. CEQA does not regulate (*i.e.*, manage or govern) rail transportation or implicate the STB's limited oversight of common carriers. It is a law of general applicability by which the State of California ensures "that the long-term protection of the environment shall be the guiding criterion in public decisions." *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 74 (1974). To achieve this goal, California agencies must conform their decision-making processes to the statute's procedures and to its substantive mandate to "give prime consideration to preventing environmental damage when carrying out their duties." *Mountain Lion Found. v. Fish & Game Comm'n*, 16 Cal. 4th 105, 112 (1997). Agencies cannot make spending decisions or use public property in a manner that may affect the environment without first complying with CEQA. Cal. Pub. Res. Code § 21080(a).

The California Supreme Court has emphasized CEQA's function in the exercise of self-governance. App. 38a (citing cases). CEQA requires that a public agency carrying out a project which may have a significant effect on the environment prepare an environmental impact report (EIR) to evaluate the environmental effects of the project, as well as feasible mitigation measures and alternatives to minimize or avoid those impacts. *See* Cal. Pub. Res. Code §§ 21001.1, 21002.1, 21100; *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 564-65 (1990). The EIR, whose purpose "is to inform the public and responsible officials of the environmental consequences of their decision *before* they are made," is considered

the "heart of CEQA." *Citizens of Goleta Valley*, 52 Cal. 3d at 564.

In enacting CEQA, the California Legislature thus enshrined informed environmental decision-making and political accountability into the State's governmental structure. Environmental review both "alert[s] the public and its responsible officials to environmental changes before they have reached ecological points of no return," and "demonstrate[s] to an apprehensive citizenry that the agency has . . . considered the ecological implications of its action." *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 379, 392 (1988). The CEQA process thereby allows an informed public to "respond accordingly to action with which it disagrees." *Id.*

B. Factual and Procedural Background

At issue here are two parallel state court lawsuits challenging the adequacy of the CEQA environmental review prepared by a California railroad agency for its public project to repair and reopen a section of its poorly maintained rail line that had long been shuttered for safety reasons. In allocating appropriations from the Legislature for the repairs necessary to reopen the line, California adhered to applicable state law by requiring CEQA compliance before its subsidiary public railroad proceeded with this public project. The State even allocated money for the CEQA review.

The California Supreme Court concluded that the State's pre-decisional environmental review falls

within the deregulated space that the ICCTA provides to all railroad owners—public and private—to plan, finance, and conduct repairs on their rail lines, and that California's requirement that its subdivision conduct CEQA review of its own project is an act of self-governance fundamental to how California constitutes itself as a sovereign political entity within the federalist scheme provided by the U.S. Constitution.

1. This case concerns an old rail line running from Napa County to Humboldt County through the environmentally sensitive Eel River Canyon. App. 4a. After private railroad companies operating the railroad failed economically, the California Legislature appropriated funds to buy the line. App. 5a; Cal. Gov't Code § 93001 *et seq*. In 1989, California adopted the North Coast Railroad Authority Act, creating NCRA, a public agency authorized to acquire, own, and operate property necessary for rail service and to select a public or private entity to provide transportation services on the line. App. 5a; Cal. Gov't Code §§ 93001, 93010-93011, 93020-93023. The legislation also specified NCRA's governance structure—a board of directors appointed by the counties and cities within the entity's service area. Cal. Gov't Code § 93011. Between 1990 and 1996, NCRA used state funds to acquire various ownership and easement interests for the North Coast rail line. App. 5a.

2. NCRA is one component of the State's overall transportation system and, as such, it is subject to the process by which California evaluates, plans for, and funds the transportation needs of every region in the

state. The California Transportation Commission ("Commission") plays a coordinating role in this process by funding, planning, and administering the state transportation system, including the state highway system, its railroads, mass transit systems, bridges, ports, and airports. Cal. Gov't Code § 14520 *et seq.* The Commission advises the Legislature on expected available funding from all sources, *id.* § 14524, and recommends allocations of state funds for meeting all of the State's highway and transportation needs. *Id.* § 14537. It also guides regional transportation plans and assists the Legislature with state policies and plans for the maintenance and improvement of the State's transportation programs. *Id.* §§ 14520, 14522-14523.

NCRA's ability to repair, reopen, and operate the North Coast rail line depends on state funding. The Federal Railroad Administration, which had already closed portions of the line due to safety concerns, shut down service along the entire line in 1998 due to decaying tracks that were not maintained or repaired. App. 12a. NCRA was unable to make the repairs and restore service absent state funding. Accordingly, in 2000, the Legislature appropriated funds for allocation by the Commission, including $60 million for NCRA to "repair and upgrade" the line, of which approximately $4 million was allocated for environmental cleanup. App. 6a.

The Commission is responsible for disbursement of these state-allocated funds, acting as the State's fiduciary agent to ensure that state-funded projects serve public purposes and comply with state laws. Cal.

Gov't Code § 14556.40(a)(32). To receive state funding, NCRA entered into a Master Agreement with the Commission, which imposed environmental obligations, public contracting requirements, and nondiscrimination and disability access requirements on NCRA's receipt of state funding. App. 6a. Among other things, the Master Agreement required environmental review before a funding request was made and specified that "an environmental impact report [as] mandated by CEQA" accompany funding requests for any project-related effort which may have a significant effect on the environment. App. 6a-7a.

3. In a 2006 application for $31 million to bring the North Coast line up to safety standards, NCRA asserted that "appropriate CEQA . . . documentation will be prepared" and repeatedly acknowledged this condition in other funding requests. App. 7a. A 2006 supplement to the Master Agreement reiterated that work to be financed by the State included various CEQA obligations, such as preliminary scoping, a draft EIR, and a final EIR. NCRA's policy manual acknowledges that, as a public agency, NCRA adheres to the "CEQA Guidelines" in their entirety. App. 8a (citing binding CEQA regulations at Cal. Code Regs. tit. 14, §§ 15000-15387). The state funding that NCRA received included over $2 million to prepare an EIR for the project, separate from the $4 million for environmental cleanup.

The same year, NCRA also contracted with Northwestern Pacific Railroad Company (NWPCo), a private company, to provide freight service on the line. Under

this agreement, NCRA agreed to lease portions of, or assign easements along, the line to NWPCo. The agreement was conditioned on "NCRA having complied with the California Environmental Quality Act . . . as it may apply to this transaction." App. 8a-9a. NCRA was also responsible for using "its best efforts to obtain public funding to reopen, rehabilitate, restore, and continue" a certain level of "utility" of the line. NCRA and NWPCo agreed that service would not be provided until they had satisfied all agreement terms. App. 9a. The agreement also gave NWPCo the ability to seek relevant federal agency permission to suspend or discontinue service if operation of the line became uneconomical. App. 9a-10a.

4. To comply with federal law, in 1996 NCRA secured an exemption from the STB that allowed NCRA's acquisition and operation of the line without the ordinary regulatory certification proceeding to establish "public convenience and necessity." App. 10a. NWPCo obtained a similar exemption from STB in 2007, permitting it to be the future contract operator of the line in place of the previous operator without an ICCTA certification proceeding. App. 11a. STB has never asserted jurisdiction over the repair work that NCRA contemplated for its publicly-owned line; STB's only role has been granting these procedural exemptions for changes in owner and operator status for an existing line, consistent with the agency's and the courts' longstanding interpretation that the ICCTA does not confer STB jurisdiction over rail repair efforts. *See Lee's Summit v. Surface Transp. Bd.*, 231 F.3d 39,

42 n.3 (D.C. Cir. 2000); *Flynn v. Burlington N. Santa Fe Corp.*, 98 F. Supp. 2d 1186, 1190 (E.D. Wash. 2000); *Detroit/Wayne Cty. Port Auth. v. ICC*, 59 F.3d 1314, 1317 (D.C. Cir. 1995); *Cities of Auburn & Kent, WA—Petition for Declaratory Order—Burlington Northern Railroad Co.—Stampede Pass Line*, 2 S.T.B. 330, 1997 WL 362017, *3 n.11 (July 1, 1997) (explaining that STB's analysis and decision "did not address the potential effects of upgrading, maintaining, or rehabilitating the line because those actions were within the railroad's management discretion and did not require [STB] approval").

Other state and federal agencies have taken action with respect to the line. In May 2011, with completion of some repairs and operational improvements, the Federal Railroad Administration permitted resumption of traffic on a part of the southern portion of the line. App. 12a. In addition, California state agencies investigated poor environmental conditions on the line and documented that, in undertaking repairs, NCRA failed to comply with state environmental statutes and regulations; these problems resulted in a 1999 consent decree binding NCRA to undertake necessary remediation. *Id.*

5. Pursuant to CEQA's requirements, NCRA issued a "notice of preparation" of an EIR in July 2007 for a project described as the resumption of freight service along the southern portion of the line. App. 13a. The subsequent "initial study" indicated that some of the repair work necessary to rehabilitate tracks, signals, embankments, and bridges may cause a

significant impact on the environment and, therefore, would be analyzed in a full EIR. *Id.* In 2009, NCRA issued a draft EIR for public review and comment; that document both acknowledged NCRA's legal duty under CEQA to disclose and mitigate significant environmental impacts and recognized that NCRA and NWPCo were bound by the 1999 consent decree to implement cleanup plans. App. 13a-14a.

In 2011, the NCRA board of directors certified a final EIR, acknowledging NCRA's responsibility to comply with all federal, state and local laws, rules, and regulations, as well as with the requirements of the 2006 lease agreement and other operating agreements.[2] App. 15a. The NCRA board's resolution certifying the final EIR and approving the project disclosed that the project would have significant adverse impacts that would not be eliminated or mitigated to below a level of significance. Once the project was approved, NWPCo commenced operations along some portion of the line, although the status of current operations is unknown.

6. Friends of the Eel River and Californians for Alternatives to Toxics timely filed separate petitions for writ of mandate in July 2011, challenging the adequacy of NCRA's CEQA compliance and naming

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[2] For example, the Sonoma Marin Area Rail Transit (SMART)—a public regional mass transit agency—owns some of the track that NCRA uses. NCRA's access to and operation on SMART's rail line is subject to an operating agreement between the two entities, which required SMART's consent to a private operator.

NWPCo as a real party in interest. App. 16a-17a. After NCRA's unsuccessful attempt to remove the cases to federal court on the basis of complete preemption by the ICCTA, App. 18a-19a, the cases were remanded to state court. Following briefing of the merits, the state trial court entered an order denying the writ petitions on the grounds of ICCTA preemption. The Court of Appeal affirmed, concluding that the ICCTA is broadly preemptive of CEQA.

The California Supreme Court accepted review and reversed the Court of Appeal. The decision acknowledged that state environmental requirements would be preempted if they regulated a private railroad's transportation, but held that when the State establishes general law that governs how the State's own subdivisions (including public railroads) are to use state-granted funds and powers, those general laws are "not regulation but instead *self-governance* as part of the state"—that is, "the control exercised by the state over its own subdivision." App. 24a; *see also* 56a-75a (explaining that "[i]f a private owner has the freedom to adopt guidelines to make decisions in a deregulated field, we see no indication the ICCTA preemption clause was intended to deny the same freedom to the state as owner," an interpretation of the ICCTA that was bolstered by this Court's "clear statement" rule in the *Gregory-Nixon* line of cases). Further, the court held that in connection with proprietary market activities that are not regulatory, "the state ordinarily has the same freedom of action as a private entity" in making decisions about whether and how to

proceed. App. 24a; *see also* 80a-81a (noting that "[w]e see little reason to suppose that when Congress forbade states to regulate rail transportation, it meant to prevent states, as owners of railroad lines, to have the freedom of action we believe would be retained by private businesses under the ICCTA").[3]

The Court of Appeal remanded the case to the state trial court for further proceedings, and on February 28, 2018, that court scheduled a May 7, 2018 case management conference, at which time it will set the schedule to hear anticipated NWPCo and NCRA motions to dismiss. Assuming those motions are denied, the case will proceed to trial on the merits. No final judgment has been entered in the case.

REASONS FOR DENYING THE WRIT

I. Because the Case Has Been Remanded for Trial, There Is No Final Judgment for Review.

The Court's review of state court decisions is limited to "final judgments or decrees" by the state's highest court. 28 U.S.C. § 1257(a). A state court judgment "must be final 'in two senses: it must be subject to no

[3] In so holding, the California Supreme Court fully recognized that the ICCTA extends to state-owned railroads: "We by no means posit that the ICCTA does not *govern* state-owned rail lines. It appears undisputed that state-owned rail lines, like private ones, must comply with the ICCTA's provisions and with STB regulation." App. 70a-71a (citing *California v. Taylor*, 353 U.S. 553, 567 (1953)).

further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (quoting *Mkt. St. Ry. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945)). Thus, where a case has been remanded by a state supreme court for trial, its decision is not final. *Id.* (dismissing petition for want of jurisdiction because case remanded for proceedings on remaining state law claims); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (same); *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (same). The finality requirement avoids "piecemeal review" of state court decisions and "serve[s] the goal of judicial efficiency." *Nike, Inc. v. Kasky*, 539 U.S. 654, 660 (2003) (citing *Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (per curiam)).

There is no "final judgment" under 28 U.S.C. section 1257(a) in this case because the matter has been remanded for further proceedings—*i.e.*, a trial on the merits of the CEQA claims—and the outcome of those proceedings remains uncertain. App. 87a. NCRA and NWPCo have already signaled their intent to move for dismissal in the trial court. Assuming the case proceeds on the merits, the state court could find that the EIR was adequate and issue final judgment in NCRA's favor. Or, if the trial court finds that the EIR is legally flawed in some way, it has discretion to direct one or more of the statutory remedies—vacating NCRA's certification of the EIR and project, suspending project activity, or imposing specific actions to correct the defect.

Cal. Pub. Res. Code § 21168.9(a). The California Supreme Court has already instructed, however, that "CEQA causes of action cannot be the basis for an injunctive order directed specifically at NWPCo to halt NWPCo's freight operations." App. 82a.[4]

Beyond this legal uncertainty, there also is significant practical uncertainty concerning NCRA's funding and operational future. Following the Commission's recent review of NCRA's precarious financial status, the California Legislature is contemplating abolishing the agency. *See* S.B. 1029, 2018 Leg., Reg. Sess. (Cal. 2018) (as referred to S. Comm. on Rules, Mar. 15, 2018) (requiring NCRA to transfer its rights, privileges, and responsibilities to a successor entity); Guy Kovner, *Proposed Rail Envisions "World Class" North Coast Hiking Trail*, The Press Democrat (Mar. 15, 2018, 5:09 PM), http://www.pressdemocrat.com/news/8114152-181/proposed-rail-plan-envisions-world (detailing newly introduced legislation by State Senator

[4] Justice Kruger's concurring opinion highlights the importance of a final remedy and judgment here. App. 87a-88a. As that concurrence suggests, the as-applied question of remedy preemption is a fact-based inquiry. *Id.*, *Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 414-15 (5th Cir. 2010); *see also* App. 84a (noting that the question of future services on the line is beyond the scope of the issue before the court). Should plaintiffs prevail here, the relevant fact-based remedy inquiry would be whether "it is impossible for a private party to comply with both state and federal requirements." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (articulating standard for implied federal conflict preemption); *see also Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (noting that on the question of implied preemption, courts must perform their own conflict determination, rather than relying on "agency proclamations" of preemption).

Mike McGuire to dissolve NCRA); Memorandum from Susan Bransen on the NCRA 2018 Strategic Plan to Chair and Comm'rs (Jan. 31, 2018), http://www.catc.ca.gov/meetings/2018/2018-01/pinks/Tab_24_4.20.pdf (explaining the inadequacies of NCRA's Strategic Plan and the "uncertain future direction" of management). Such uncertainty counsels against review at this time.

Especially given the legal, financial, and organizational uncertainties at play here, there are no grounds for carving out an exception to the finality requirement. The plain language of section 1257(a) admits of no exceptions and the Court has held that "[c]ompliance with the provisions of § 1257 is an essential prerequisite to . . . deciding the merits of a case brought here under that section." *Johnson v. California*, 541 U.S. 428, 431 (2004). "[T]he finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Jefferson*, 522 U.S. at 81 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). The Court has thus interpreted the final judgment requirement "to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Flynt*, 451 U.S. at 620 (quoting *Radio Station WOW, Inc.*, 326 U.S. at 124). For this reason alone, the Court should decline review. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (holding that lack of finality "alone furnishe[s] sufficient ground for the denial of the application"). NCRA offers no basis

for departing from the plain text of section 1257(a) here.[5]

II. This Case Does Not "Erode Federal Policy" or Present a Pressing Legal Issue Worthy of the Court's Review.

Contrary to NCRA's suggestion, the intermediary ruling in this case will not "erode federal policy" and does not raise any issue worthy of the Court's review. The California Supreme Court's decision is a narrow fact-bound one, based on California's role as owner in managing the State's railroad subsidiary and on the State's sovereign act of governing itself and its political subdivision: "[T]he application of CEQA to NCRA would not be inconsistent with the ICCTA and its preemption clause. This is both because we presume Congress does not intend to disrupt state self-governance without clear language to that effect, and because the ICCTA leaves a relevant zone of freedom

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[5] In a footnote buried at the end of its petition, NCRA grudgingly recognizes this threshold finality problem, but suggests that an exception is warranted here because "refusal immediately to review the state court decision might seriously erode federal policy." Pet. 31 n.7 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 483 (1975)). As discussed below, however, the California Supreme Court decision is unexceptional and entirely consistent with both case law and federal policy. *See Flynt*, 451 U.S. at 622 (dismissing writ for want of jurisdiction where Ohio's highest court reversed dismissal on grounds of Equal Protection defense and allowed trial to go forward because "delaying review until petitioners are convicted, if they are," would not seriously erode federal policy).

of action for owners that the state, as owner, can elect to act in through CEQA." App. 85a.

NCRA's claim that the decision will have a "profound impact on the management of railroads in California and potentially nationwide," Pet. 28, fails to identify any actual impacts and is belied by the facts. Under the California Supreme Court's ruling, NCRA is treated like any private railroad. California, as owner, is free to manage NCRA's affairs within the deregulated space mandated by the ICCTA. The California Supreme Court merely confirmed that the ICCTA provides such a deregulated sphere in which all railroads—private and public—are free to act. The more drastic impact on railroad management would be a holding that public railroads—simply by virtue of their being public—are deprived of the deregulatory benefits of the ICCTA.

NCRA's attempt to conjure a parade of horribles for California public railroads flowing from the decision is utterly unfounded. For instance, NCRA identifies the Alameda Rail Corridor as a potentially impacted railroad, but says no more. Pet. 28-29. In fact, the Alameda Rail Corridor Transportation Authority, a public entity whose governing board, like NCRA's, is composed of affected local government representatives, completed an EIR under CEQA in January 1993 and an Environmental Impact Statement (EIS) under the federal National Environmental Protection Act (NEPA) in 1996, apparently without any "profound" impacts on the interstate railroad system or on the project that is currently operating. *See Alameda*

Corridor Construction Application, 1996 WL 297102, at *2 (S.T.B. June 6, 1996); Alameda Corridor Transp. Auth., *Alameda Corridor Timeline*, http://www.acta.org/projects/projects_completed_alameda_timeline.asp. There is no reason to suppose that the North Coast decision will have any negative impact on the Alameda Rail Corridor, let alone a profound one.

NCRA's discussion of the California High-Speed Rail Authority (CHSRA) is equally unavailing. NCRA claims that "the STB's ruling in *California High-Speed Rail Authority* that the ICCTA preempts CEQA citizen suits . . . allowed the CHSRA to begin construction despite the pendency of seven state-court CEQA lawsuits." Pet. 29 (citing *Kings County v. Surface Transp. Bd.*, Case Nos. 15-71780, 15-72570 (9th Cir. May 6, 2016), ECF No. 63-1). The current trajectory of the high-speed rail project, however, has virtually nothing to do with that STB advisory order; indeed, the high-speed rail project illustrates precisely why the California Supreme Court's fact-specific ruling here will not interfere with the interstate rail system and does not present a pressing legal issue.

In 2008, California voters approved a ballot measure to fund a high-speed rail system that would connect the San Francisco Bay Area and Southern California. Cal. Sts. & High. Code § 2704.04; *Town of Atherton v. Cal. High-Speed Rail Auth.*, 228 Cal. App. 4th 314, 322 (2014) (challenging adequacy of CEQA compliance for the high-speed rail project). The ballot measure "included compliance with CEQA as a feature of the [project]." *Atherton*, 228 Cal. App. 4th at 334.

Because the high-speed rail project received funding from the Federal Railroad Administration (FRA), compliance with NEPA was also required, and the CHSRA and FRA therefore issued a joint programmatic EIR/EIS. *California High-Speed Rail Authority—Construction Exemption—In Merced, Madera, & Fresno Counties, Cal.*, 2013 WL 3053064, at *2, *4 (S.T.B. June 13, 2013).

Similar to the decision at issue here, the appellate court in *Atherton* held that the ICCTA does not preempt compliance with CEQA for the high-speed rail project. 228 Cal. App. 4th at 327 (finding that State was acting as a market participant, not a regulator). But the court then entered judgment *in the rail authority's favor*, finding on the merits that the CEQA analysis was adequate. *Id.* at 333-34. Following *Atherton*, the high-speed rail project continues to roll forward with construction of a new line, as well as additional planning and continued public meetings in various regions of the state. *See Build HSR*, https://buildhsr.com/; *California High Speed Rail Authority*, http://www.hsr.ca.gov/; Natalie Tarangioli, 23ABC News, *High Speed Rail Open House in Wasco*, https://www.turnto23.com/news/local-news/high-speed-rail-open-house-in-wasco.[6]

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[6] Because the high-speed project involves construction of a new line, the STB properly asserted licensing jurisdiction over it pursuant to 49 U.S.C. section 10901 (requiring certification for construction of new lines). In contrast here, the STB has not asserted, and does not have, licensing jurisdiction over the rehabilitation of the existing North Coast line. Thus, unlike the high-speed rail project, there will be no federal environmental review of the NCRA repair project.

The CHSRA did not appeal the *Atherton* decision, but instead petitioned the STB, requesting that it "issue a declaratory order regarding the availability of injunctive remedies under the California Environmental Quality Act (CEQA) to prevent or delay construction of an approximately 114-mile high-speed passenger rail line between Fresno and Bakersfield." *California High-Speed Rail Authority—Petition for Declaratory Order*, 2014 WL 7149612, at *1 (S.T.B. Dec. 12, 2014). Despite conceding that the CHSRA "does not seek preemption of other injunctive remedies such as a court order requiring revised environmental analyses or additional environmental mitigation under CEQA, so long as there is no work stoppage," *id.* at *7, the STB disregarded the request's narrow scope and the court's decision in *Atherton* and instead offered its sweeping "view" that CEQA, California's foundational environmental law, is "categorically preempted" under the ICCTA. *Id.*; *see also id.* at *13 (Begeman, Comm'r, dissenting) (stating that "the majority has decided to go even further than the Authority requested").

In a subsequent appeal of that STB decision, the Ninth Circuit Court of Appeals concluded—and the STB itself conceded—that the order was merely an "advisory opinion." For this reason, and because of "the unique circumstances here," the STB admitted that the Court could find that its advisory declaratory order "has no legal effect on the parties." Joint Brief of Respondents, *Kings County v. Surface Transp. Bd.*, 694 F. App'x 472 (9th Cir. 2017) (No. 15-71780), 2016 WL 1271927, at *20. The Ninth Circuit agreed, dismissing

the case for lack of jurisdiction due to the order's "purely advisory" nature, which rendered it "not final." *Kings County v. Surface Transp. Bd.*, 694 F. App'x at 473 (noting that "[t]he Declaratory Order itself bound no one, not even the Board, and was merely an expression of views which the California Supreme Court and others 'had absolute discretion to accept or reject' ") (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

Notably, the STB majority's expansive advisory opinion in the high-speed rail case does not reflect the STB's decisions in its prior and subsequent rulings, which examined preemption with a more discerning, fact-specific approach. *See, e.g.*, *Cities of Auburn & Kent, WA—Petition for Declaratory Order*, 1997 WL 362017, at *6 (S.T.B. July 1, 1997) (recognizing that "there are areas with respect to railroad activity that are reasonably within the local authorities' jurisdiction under the Constitution," such as "a local law prohibiting the railroad from dumping excavated earth into local waterways"). As the STB has stated, "whether a particular . . . local regulation . . . is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be

preempted." *Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer, MA*, 5 S.T.B. 500, 2001 WL 458685, at *6-7 (Apr. 30, 2001) (reasoning that certain conditions imposed by a local government on a project may not be preempted because they "might be reasonable in individual circumstances" and "not all state and local regulation that affects railroads is preempted").

Moreover, other STB decisions explicitly recognize a rail line owner's freedom to make decisions on whether to proceed with a new project. In an earlier decision on the California high-speed rail project, for example, the STB acknowledged the railroad's protected domain of internal self-governance relative to the ultimate decision to move forward with opening or reopening a line. There, the STB explained:

> [The] grant of authority to construct a line (whether under § 10901 or by exemption under § 10502) is permissive, not mandatory—that is, the [STB] does not require that an approved line be built. As a result, the [STB] has repeatedly recognized that the decision to go forward with an approved project ultimately is in the hands of the applicant and its potential investors (whether public or private) and not this agency. Accordingly, the [STB] may grant authority to construct a line even if all outstanding issues related to the proposed construction have not yet been resolved or if factors beyond the [STB's] control . . . might ultimately prevent consummation of the proposed construction.

California High-Speed Rail Authority—Construction Exemption in Fresno, Kings, Tulare, & Kern Counties, Cal., 2014 WL 3973120, at *8 (S.T.B. Aug. 11, 2014).

Subsequent STB decisions have similarly recognized both the fact-specific nature of the preemption analysis and a railroad owner's freedom to make investment decisions in the deregulated space created by the ICCTA. For instance, the STB concluded that application of a state competitive bidding requirement for operation of a state-chartered, municipally-owned railroad was not preempted by the ICCTA because, like CEQA, the Pennsylvania competitive bidding law "does not attempt to regulate matters that are directly regulated by the [STB], such as railroad rates, services, construction, or abandonments. Although the [STB] licenses carriers to operate rail lines, it does not regulate the process by which a rail line owner selects a prospective operator for its line." *Reading, Blue Mountain & Northern Railroad Co.—Petition for Declaratory Order*, 2016 WL 3167482, at *6-7 (S.T.B. June 3, 2016). There, the STB left the preemption issue about a separate non-compete provision of Pennsylvania law to Pennsylvania courts because the "determination requires findings of fact, as well as interpretation of state law, that should be left to the state courts." *Id.* (acknowledging potential differences between private and public railroads regarding competition).

For all of these reasons, the STB's quite unusual and ultimately advisory opinion in the high-speed rail matter does not deserve judicial deference. *See Del Grosso v. Surface Transp. Bd.*, 811 F.3d 83, 84 (1st Cir.

2016) (holding that no deference should be given to an agency's interpretation of a statute if it does not "relate to the agency's congressionally delegated administration of the statute"); *Wyeth*, 555 U.S. at 576 (noting, as here, that "[w]e are faced with no such regulation in this case, but rather with an agency's mere assertion that state law is an obstacle to achieving its statutory objectives"); App. 58a-59a. As the STB itself acknowledges, the ICCTA does not confer any authority to override a railroad's internal decision-making process. And "nothing in [the ICCTA] or governing precedent requires that publicly funded projects be subjected to a greater degree of scrutiny than privately funded projects." *California High-Speed Rail Authority—Construction Exemption in Fresno, Kings, Tulare, & Kern Counties, Cal.*, 2014 WL 3973120, at *9. Indeed, in the very same STB order on which NCRA relies here, the STB disclaimed any authority to determine whether the CHSRA was required "to comply with [the California Environmental Quality Act] as a condition of its funding" from the State. *Kings County v. Surface Transp. Bd.*, 694 F. App'x at 473.[7]

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[7] NCRA's assertion that "[t]he 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" mischaracterizes prior STB decisions. Pet. 7. For instance, *DesertXpress Enterprises LLC—Petition for Declaratory Order*, 2007 WL 1833521, at *1 n.1, *3 (S.T.B. June 25, 2007), involved construction of a new *private* railroad line over which the STB had jurisdiction and for which it was preparing an EIS pursuant to NEPA to provide "the environmental information it needs to take the requisite hard look at any environmental concerns related to the proposal" and "to give state and local agencies

Unable to point to a single California public railroad that would be affected by the decision, NCRA tries to generate alarm concerning other states' public railroad systems. Here again, the petition lacks any substance. Pet. 30 (merely reciting statistics for the miles of public rail track in three other states). This case concerns California's interpretation of its own environmental law in the context of self-governance requirements. The resulting state court decision is tailored to state law and the specific charter and history of this particular public railroad. *See* App. 38a (holding that "[t]he Legislature, in enacting CEQA, imposed certain principles of self-government on public entities"). Accordingly, it has no bearing on the application of various other states' laws or their application to public railroads in other states.[8]

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and concerned citizens . . . ample opportunity to participate in the ongoing EIS process under NEPA and related laws." Likewise, *North San Diego County Transporation Development Board—Petition for Declaratory Order*, 2002 WL 1924265 (S.T.B. Aug. 21, 2002), involved construction of a new "passing" track for an existing rail line. The STB asserted jurisdiction over the new line and took responsibility for completing environmental review under NEPA. Moreover, that matter involved a regulatory permit requirement by a local agency, not a state imposed pre-decisional process to be completed by a state subsidiary railroad.

[8] NCRA's additional attempt to manufacture a conflict with other state courts of last resort is similarly off-point. Pet. 20-21 (discussing the "so-called *Grupp* cases"). The *Grupp* cases have no relevance here; they all involve the application of a *different* federal regulatory scheme to *private* airline carriers, not the exercise of self-governance by a public railroad. In the most recent *Grupp* case, which was actually decided *in California* and echoes decisions by New York and Florida courts, a California appellate court

III. This Case Was Correctly Decided.

The California Supreme Court decision is entirely in keeping with this Court's rule of statutory construction recognizing and protecting state sovereignty over core governmental functions. Under the federalist system created by the U.S. Constitution, judicial interpretation begins with the axiom that "States possess sovereignty concurrent with that of the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). To avoid intruding on such state sovereignty, courts read federal preemption provisions in a way that avoids "trench[ing] on States' arrangements for conducting their own governments" or "interposing federal authority between a State and its . . . subdivisions." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140-41 (2004); *see also Parker v. Brown*, 317 U.S. 341, 351 (1943).

In practice, "[w]hen 'Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."'" *Raygor v. Regents of Univ. of Minn.* 534 U.S. 533, 543 (2002) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). "This plain statement

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held that a state False Claims Act suit, brought by a contractor against the private carrier DHL for levying surcharges, was preempted by the Federal Aviation Administration Authorization Act (FAAAA) because it constitutes state regulation of "prices, routes and services in connection with the transportation of property"—the very kind of economic regulation that the FAAAA expressly preempts. *Grupp v. DHL Express, Inc.*, 240 Cal. App. 4th 420, 430, 435 (2015).

rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461 (declining to interpret federal law to intrude upon state process for appointing judges absent clear statement by Congress); *see also Nixon*, 541 U.S. at 140 (applying the "working assumption" that federal preemption provisions must be "read in a way that preserves a State's chosen disposition of its own power"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("Congress does not cavalierly preempt state-law causes of action.").

The decision at issue here hews closely to this line of authority. Reading the plain text of the ICCTA preemption provision, which expressly preempts "remedies . . . with respect to regulation of rail transportation," 49 U.S.C. § 10501(b), the California Supreme Court held that California's sovereign decision-making with respect to a publicly-funded repair project by a state-created public railroad did not constitute preempted "regulation of rail transportation." Rather, the application of the State's core environmental review statute to the project was an "expression of state governmental decisions about the disposition of state authority and resources." App. 68a. In particular, the California court concluded that "preempting the state's ability to dictate how its own subdivisions will handle environmental concerns caused by the state's own railroad business would operate so entirely differently from the usual regulatory scenario involving the

private marketplace that we do not believe this was what Congress intended." App. 67a.

This conclusion follows the Court's reasoning in *Nixon* that "[l]egal limits on what may be done by the government itself (including its subdivisions) will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command. That is why preempting state and local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that we think it highly unlikely that Congress intended to set off on such uncertain adventures." *Nixon*, 541 U.S. at 134. The California Supreme Court's holding is undoubtedly correct under this Court's jurisprudence because the text of the ICCTA "fails to indicate" that Congress intended to preempt core state sovereign functions, and the *Gregory-Nixon* rule directs courts, absent such an indication, "not [to] construe the statute to reach so far." *City of Abilene v. FCC*, 164 F.3d 49, 53 (D.C. Cir. 1999) (interpreting the same Telecommunications Act preemption clause as *Nixon*); *see also Sheriff v. Gille*, 136 S.Ct. 1594 (2016) (holding that without a clear statement from Congress, a federal act did not bar debt-collecting procedures by private attorneys under contract to the state because they were acting under the state's core sovereign functions); *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016) (holding that the same Telecommunications Act in *Nixon* lacked a clear statement authorizing the

Federal Communications Commission to preempt states' control of subsidiary agencies).

The decision, moreover, closely tracks the ICCTA's deregulatory purpose. As described above and as the California Supreme Court recognized, the purpose of the ICCTA was to "minimize[] regulatory control and barriers." App. 57a (citing 49 U.S.C. § 10101(2), (7)). Under the ICCTA, private railroads are free to carry out their activities in accordance with corporate goals and in response to market forces—that is, based on their own internal guidelines—and there is "no indication that the ICCTA preemption clause was intended to deny the same freedom to the state as owner." App. 58a. In short, the ICCTA does not tell private or public railroad owners and operators *how to evaluate* choices or *how to decide* what projects to undertake, as these are "owner decisions in a deregulated sphere." App. 60a.

Likewise, the California decision is consistent with this Court's market participant jurisprudence, which presumes that statutory preemption clauses displacing regulatory action by states do *not* also displace proprietary conduct by states. *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 231-32 (1993). The courts, therefore, will not infer a restriction on states acting as market participants "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues purely propriety interests, and where analogous private conduct would be permitted." *Id.* at 231. The California Supreme Court properly

recognized that elements of the market participant case law are instructive on the facts of this case, where the State is acting in its proprietary decision-making capacity. App. 80a.

In sum, this case was correctly decided on the law and as a matter of public policy. Unlike the high-speed rail matter, the STB has no jurisdiction over NCRA's decision to rehabilitate and reopen the North Coast line, and thus no federal agency will conduct environmental review to inform that decision. Decisions on how and whether to move forward with taxpayer funding were, accordingly, entirely within the State's core sovereign function of self-governance, and here, California concluded that the project should not proceed absent a fully informed environmental evaluation. Requiring California to move forward with its project without the environmental review that the State has mandated for itself, on the ground that such review constitutes "regulation of rail transportation" preempted by the ICCTA, would amount to improper commandeering of state resources. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *Purcell v. United States*, 315 U.S. 381 (1942) (upholding ICC decision that neither railroad nor government can be forced to construct new unprofitable rail line).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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