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

REPLY BRIEF FOR PETITIONER

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California is not the plaintiff in this case. Indeed, although they purport to champion the principle of "state self-governance," Plaintiffs are private organizations *suing a California agency* to prevent it from repairing and operating a state-owned rail line.

Plaintiffs admit that "ICCTA extends to state-owned railroads" like NCRA. Opp. 16 n.3. They admit that their CEQA lawsuits "challeng[e]" NCRA's project for "the resumption of freight service," including "repairs necessary to reopen the line," and that they seek an injunction "suspending project activity." Opp. 8, 13, 17. They admit that the California Supreme Court held that their suits "would be preempted" if filed against "a private railroad's transportation" and therefore "cannot be the basis for an injunctive order directed specifically at" privately owned Northwestern Pacific to "halt [its] freight operations." Opp. 15, 18. And Plaintiffs admit that the decision below held that ICCTA "does not preempt" Plaintiffs' suits *against NCRA* precisely because NCRA is publicly owned. Opp. 1.

As Plaintiffs' brief indicates, NCRA's petition presents a pure question of federal law: Does ICCTA categorically preempt Plaintiffs' citizen suits that seek to impose CEQA's preclearance requirements against a state-owned railroad by enjoining its needed repairs and operations? A divided California Supreme Court answered "no." The STB, Justice Corrigan, the California Court of Appeal, and both trial judges answered "yes."

The question presented satisfies every criterion for Supreme Court review and cries out for immediate resolution. None of Plaintiffs' arguments to the contrary pass muster.

I. THIS COURT HAS JURISDICTION.

Plaintiffs argue that the California Supreme Court's decision is not "final" within the meaning of 28 U.S.C. § 1257(a). Opp. 16–20. They are wrong.

A decision is "final" under Section 1257 when "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court," and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482–483 (1975). "In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue." *Id.* at 483; *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1, 6–8 (1984); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497 n.5 (1983).

Those conditions are satisfied here.

The "federal issue" of categorical preemption has been "finally decided." *Cox*, 420 U.S. at 482. "The California Supreme Court held" that ICCTA does not categorically "preempt" Plaintiffs' suits against NCRA. Opp. 1.[1]

There are "further proceedings pending" in which NCRA "might prevail on the merits on nonfederal grounds." *Cox*, 420 U.S. at 482. For example, "the

[1] There is neither need nor good cause to wait years to determine whether Plaintiffs' suits are preempted "as-applied." Opp. 18 n.4. Plaintiffs' suits are preempted *categorically* and should be dismissed now. See Pet. 21–28; *infra* 6–10.

state court could find that the EIR was adequate and issue final judgment in NCRA's favor." Opp. 17. Such a judgment would "render[] unnecessary review of the federal issue by this Court." *Cox*, 420 U.S. at 482.

"[R]eversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* at 482–483. Reversing on categorical preemption would require "denying [Plaintiffs' CEQA] petitions" and entering judgment for NCRA, as the trial court and Court of Appeal held. Opp. 15.

Finally, "refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 483. "[T]he entire federal scheme of railroad regulation applies to state-owned railroads." *Hilton* v. *S. Car. Pub. Rys. Comm'n*, 502 U.S. 197, 203 (1991). And ICCTA expressly "preempt[s]" "State" "regulation of rail transportation." 49 U.S.C. § 10501(b). Subjecting NCRA to years of CEQA litigation when ICCTA "categorically preempts" state environmental permitting requirements that "could be used to deny a railroad the ability to conduct some part of its operations" (*Adrian & Blissfield R.R.* v. *Vill. of Blissfield*, 550 F.3d 533, 540 (6th Cir. 2008)) "would both interfere with the federal licensing program and unreasonably burden interstate commerce." *Cities of Auburn & Kent, Wa.-Pet. for Declaratory Order-Burlington N. R.R. Stampede Pass Line*, 2 S.T.B. 330, 1997 WL 362017, at *5 (1997), *aff'd*, 154 F.3d 1025 (9th Cir. 1998). Thus, the California Supreme Court's decision "undermine[s] the uniformity of Federal standards and risk[s] the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate

form of transportation." H.R. Rep. 104-311, at 96 (1995).

The parties have already spent seven years litigating federal preemption. Without this Court's immediate intervention, it will be years before NCRA could again seek this Court's review of the California Supreme Court's misreading of federal law. In the meantime, private parties will be free to file CEQA actions to enjoin federally authorized rail operations. Federal policy demands putting an end to Plaintiffs' suits now.

II. THE DECISION BELOW CONFLICTS WITH RULINGS OF THE SURFACE TRANSPORTATION BOARD AND ANOTHER STATE COURT OF LAST RESORT.

A. Plaintiffs do not deny the irreconcilable conflict between the California Supreme Court's decision and STB orders. Plaintiffs in fact admit that the STB has expressed "its sweeping 'view' that CEQA" is "'categorically preempted' under the ICCTA." Opp. 24 (citing *Cal. High-Speed Rail Auth.—Pet. for Declaratory Order*, 2014 WL 7149612 (S.T.B. served Dec. 12, 2014) (*CHSRA*)).

Plaintiffs try to minimize that conflict by calling that STB order an "advisory opinion." Opp. 24. But Congress empowered the STB to "carry out" ICCTA (49 U.S.C. § 1321(a) (previously codified at 49 U.S.C. § 721(a))) and gave it "discretion" to "issue a declaratory order" to "remove uncertainty." 5 U.S.C. § 554(e). The STB invoked both statutory provisions when it ruled that ICCTA categorically preempts CEQA citizen suits against state-owned railroads. *CHSRA*, 2014 WL 7149612, at *3. Plaintiffs do not and cannot suggest that this order was *ultra vires*.

And while Plaintiffs cite (Opp. 24) the STB's and Department of Justice's brief stating that the *Ninth Circuit* lacked *appellate* jurisdiction to review that order, they ignore the government's declaration that the *STB* had *statutory* jurisdiction to issue the order (and *correctly* determined that ICCTA categorically preempts CEQA claims against state-owned railroads). Joint Br. of Resps. at 17–20, 24–41, *Kings Cty.* v. *STB*, No. 15-71780 (9th Cir. Mar. 23, 2016).

Plaintiffs say that the STB's order "does not reflect the STB's decisions in prior or subsequent rulings." Opp. 25. That is incorrect. The STB has consistently held that ICCTA categorically preempts CEQA suits that would impose preclearance or permitting requirements on private and public railroads. *E.g.*, *CHSRA*, 2014 WL 7149612, at *7; *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 1924265, at *3–6 (S.T.B. served Aug. 21, 2002).

In fact, when Northwestern Pacific petitioned for a declaratory order about *this case*, the STB responded that it "has already ruled on preemption in the context of this precise matter," citing the "[*California High-Speed Rail Authority*] *Declaratory Order*" holding "that CEQA is categorically preempted by § 10501(b) in connection with rail lines regulated by the [STB], including state-operated or owned rail lines." *Nw. Pac. R.R.—Pet. for Declaratory Order*, 2016 WL 1639525, at *2 (S.T.B. served Apr. 25, 2016). Although it was discussed in the petition (at 18), Plaintiffs ignore the STB order addressing this very case.

Plaintiffs' remaining arguments boil down to their belief that the STB misinterpreted ICCTA. Opp. 25–28. They are wrong. See Pet. 21–28; *infra* 6–10. But even if they were right, it would not erase the square conflict between the views of the California Supreme Court and the federal agency entrusted with "exclusive" "jurisdiction" over interstate rail transportation. 49 U.S.C. § 10501(b). This Court should grant review to resolve those conflicting interpretations of federal law.

B. Plaintiffs do not explain away the conflict with the *Grupp* decisions. See Pet. 20–21. Plaintiffs argue that those decisions, including one by New York's highest court, addressed a "*different*" statute. Opp. 29 n.8. But as the STB and the California Court of Appeal both recognized, "this case is analogous to the * * * *Grupp* cases," which rejected the reasoning advanced by Plaintiffs and adopted by the California Supreme Court. *CHSRA*, 2014 WL 7149612, at *12 n.23; accord Pet. App. 133a. That *another* California court had previously followed the *Grupp* cases (see Opp. 29–30 n.8) highlights the California Supreme Court's error in this case. The conflict between the *Grupp* cases and the California Supreme Court's ruling warrants review.

III. THE DECISION BELOW IS ERRONEOUS.

Plaintiffs advance several theories to prop up the California Supreme Court's erroneous holding that their suits against NCRA "d[o] not constitute preempted 'regulation of rail transportation.'" Opp. 31. None has merit.

Plaintiffs argue that CEQA "does not regulate * * * rail transportation" because it "is a law of general applicability." Opp. 7. This argument has

been *universally* rejected. Although it distinguished claims asserted against a publicly owned railroad, the majority below held, notwithstanding CEQA's general applicability, that Plaintiffs' CEQA claims against Northwestern Pacific are "a classic example of state regulation" preempted by ICCTA because they impose "state environmental preclearance rules" that "cannot be used to halt railroad operations." Pet. App. 82a–83a. All other California courts held that Plaintiffs' CEQA suits were preempted in full. Pet. 10–13. The STB agreed. Pet. 18. And federal courts of appeals have consistently held that state permitting and preclearance requirements, although generally applicable, are preempted "regulation of rail transportation" when they prohibit or frustrate rail transportation. *E.g.*, *Green Mountain R.R.* v. *Vermont*, 404 F.3d 638, 642–643 (2d Cir. 2005); *City of Auburn* v. *U.S. Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998).

Disregarding Congress's explicit intent to preempt state regulation of rail transportation (Pet. 24–25) and a century of precedent holding that federal law preempts state law as applied to state-owned railroads to the same extent it preempts state law as applied to private railroads (*id.* 22–23), Plaintiffs invoke ICCTA's "plain text" to defend the California Supreme Court's conclusion that their suits for injunctive relief against NCRA do not constitute "regulation of rail transportation." Opp. 31. Yet Plaintiffs have remarkably little to say about ICCTA's text or structure. They ignore the fact that ICCTA's express-preemption provision, Section 10501(b), does not distinguish between private and public railroads while the statute's very next provision, Section 10501(c), makes that distinction in a way that undermines Plaintiffs' arguments. See

Pet. 23–24. Plaintiffs' failure to confront ICCTA's text and structure is telling.

Plaintiffs draw no support from *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), or *Nixon* v. *Missouri Municipal League*, 541 U.S. 125 (2004). Unlike those cases, Plaintiffs' suits do not implicate "core state sovereign functions." Opp. 32. This Court long ago rejected Plaintiffs' Tenth Amendment arguments when raised by California. See *California* v. *Taylor*, 353 U.S. 553, 568 (1957); *United States* v. *California*, 297 U.S. 175, 185 (1936). The Court explained that "federal statutes regulating interstate railroads" have "consistently been held to apply to publicly owned or operated railroads," and "California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal" law. *Taylor*, 353 U.S. at 562, 568. Decades after those decisions, California created NCRA to acquire an existing interstate rail line. There is no unfairness or violation of state sovereignty in subjecting NCRA to the same standards as private railroads and affording NCRA the same protections.

Moreover, even if *Gregory*'s plain-statement rule applied, ICCTA would overcome it. Under *Gregory*, ICCTA need not "mention" public railroads "explicitly"; it simply must make "clear" that it governs them. *Gregory*, 501 U.S. at 467. ICCTA makes that clear. Using broad language that makes no distinction between public and private railroads, ICCTA's preemption provision declares that federal "remedies" regarding the "regulation of rail transportation are exclusive and preempt the remedies provided" under "State law." 49 U.S.C. § 10501(b). *The very next subsection* then explicitly

exempts *some* "local government authorit[ies]," but not NCRA, from ICCTA's provisions. *Id.* § 10501(c). Thus, the text and structure of the statute unambiguously demonstrate that ICCTA governs NCRA.

Congress enacted ICCTA after a century of federal regulation of public railroads without the slightest indication that it intended to overturn that settled practice. Plaintiffs' contention that ICCTA's express preemption provision treats public railroads differently from private railroads is "unsupported by precedent." Pet. App. 89a–90a (Corrigan, J.).

Plaintiffs' suggestion that they are advancing "ICCTA's deregulatory purpose" is nonsense. Opp. 33. They are "third party plaintiffs" seeking "to thwart or delay public railroad projects" by imposing state "regulation" on NCRA. Pet. App. 91a (Corrigan, J.). There is nothing "deregulatory" about their suits.

Finally, the fact that "the STB has no jurisdiction over NCRA's decision to rehabilitate and reopen" the Line and that NCRA's track repair is in a "deregulated space" does not help Plaintiffs. Opp. 21, 34. ICCTA gives railroads the "right to maintain and improve" their lines "to keep [them] in operable condition," and "state and local authorities may not regulate those activities." *Cities of Auburn & Kent,* 1997 WL 362017, at *5, *7. Moreover, ICCTA imposes a common-carrier duty on carriers to provide "transportation or service on reasonable request." 49 U.S.C. § 11101(a); see Pet. 8, 9 n.1, 24. Plaintiffs' suits interfere with NCRA's right to maintain the

Line and duty to ensure that the Line's customers are served. ICCTA preempts these suits.[2]

In short, the California Supreme Court's decision is wrong as a matter of federal law. It should be reviewed and reversed.[3]

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

Plaintiffs cannot minimize the importance of this case. They do not deny that, across California, state and local agencies own and operate ICCTA-regulated railroads that serve a vital role in the nation's interstate rail network. See Pet. 28–30. These railroads' "continued operation is important to the national flow of commerce." *Taylor*, 353 U.S. at 566.

Plaintiffs' suggestion that the petition does not "point to a single California public railroad that would be affected by the decision [below]" is absurd.

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[2] Plaintiffs complain about the STB's exemptions and the lack of "federal environmental review of the NCRA repair project." Opp. 9, 23 n.6. But exemptions are a critical part of ICCTA's deregulatory objectives. See 49 U.S.C. § 10502(a) (STB "shall exempt" services "to the maximum extent consistent" with ICCTA). NCRA is exempt from federal environmental review because operations on the Line fall below regulatory thresholds. Indeed, respondent Friends unsuccessfully challenged those exemptions. See Pet. 8–9. Plaintiffs' CEQA suits remain preempted by ICCTA despite any exemptions. See, *e.g.*, *G. & T. Terminal Packaging Co.* v. *Consol. Rail Corp.*, 830 F.2d 1230, 1234–1235 (3d Cir. 1987).

[3] Plaintiffs imply that NCRA breached its funding contracts that required CEQA compliance. Opp. 9–11. They lost that argument in the trial court and in the Court of Appeal and did not raise it in the California Supreme Court. Pet. App. 22a, 121a–127a, 167a–168a, 178a–179a. Their argument is thus not only meritless, but waived.

Opp. 29. The petition (at 29) cited the California High-Speed Rail Authority's brief explaining that the STB's preemption order affected its operations. The California Supreme Court's ruling in this case threatens to overturn the protections that the STB's order afforded to CHSRA. See Maura Dolan et al., *California's Bullet Train Is Likely To Face More Environmental Hurdles After A High Court Ruling*, L.A. TIMES, July 31, 2017 (the California Supreme Court's decision "has broad significance" for CHSRA and "clears the way for opponents of the $64-billion bullet train to file more lawsuits," which are now "expected"). That CHSRA prevailed on state-law grounds in one suit is no answer. Cf. Opp. 23. The suit never should have gotten that far because it is preempted by ICCTA.

Plaintiffs' argument (Opp. 21–22) that the California Supreme Court's interpretation of ICCTA cannot affect the Alameda Corridor Transportation Authority and other California public entities that own or operate ICCTA-regulated lines is likewise incorrect. The California Supreme Court's decision opens the floodgates for CEQA suits against future repair or reconstruction activities that these public entities may undertake with respect to their existing rail lines, just like NCRA's project here. The decision below threatens to ensnare any California public entity that owns or proposes to construct ICCTA-regulated rail lines with years of CEQA litigation brought by private parties.

Plaintiffs' argument that the California Supreme Court's decision "has no bearing" outside California is equally meritless. Opp. 29. Plaintiffs do not deny that many states own ICCTA-regulated railroads. See Pet. 30. The California Supreme Court's decision

sets dangerous precedent that private plaintiffs in other states can use to impose state-law restrictions on public entities that own or operate ICCTA-regulated rail lines. The result would be the "balkanization and subversion" of federal rail law that ICCTA prohibits. H.R. Rep. 104-311, at 96 (1995).

Finally, Plaintiffs' suggestion that NCRA may be "abolish[ed]" is pure speculation. Opp. 18. Furthermore, even if the bill currently pending in a California Senate committee passed, it would merely "[t]ransfer" NCRA's rights "to an unspecified successor agency" that would "continu[e] to run freight along the active rail line." S.B. 1029, § 2(c), 2018 Leg., Reg. Sess. (Cal. 2018). Thus, even if NCRA were "requir[ed]" to "transfer its rights" and "responsibilities to a successor entity" (Opp. 18), that successor entity would owe a common-carrier duty under ICCTA to serve the Line's customers and have the right and obligation to maintain the Line. Regardless of that bill, the controversy in this case will remain live, important, and in need of this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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