No. 19-35415

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LIGHTHOUSE RESOURCES INC., ET AL.,

Plaintiffs-Appellants,

BNSF RAILWAY COMPANY,

Intervenor-Plaintiff-Appellants

V.

JAY ROBERT INSLEE, ET AL.,

Defendants-Appellees,

WASHINGTON ENVIRONMENTAL COUNCIL, ET AL.,

Intervenors-Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:18-cv-05005
Honorable Robert J. Bryan

AMICUS BRIEF OF THE STATES OF CALIFORNIA, MARYLAND, NEW JERSEY, NEW YORK, AND OREGON, AND THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF APPELLEES-DEFENDANTS

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Amici, the States of California, Maryland, New Jersey, New York, and Oregon, and the Commonwealth of Massachusetts (Amici States) submit this amicus curiae brief in support of Defendants Jay Inslee, in his official capacity as Governor of the State of Washington; Maia Bellon, in her official capacity as Director of the Washington Department of Ecology; and Hilary S. Franz, in her official capacity as Commissioner of Public Lands (collectively, Washington).

AMICI STATES' INTEREST

Amici States address one issue in this brief: whether the district court correctly determined that the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §§ 10101-11908, does not preempt Washington's decision to deny Lighthouse's permits to construct the Millennium Bulk Terminal based on its significant environmental impacts. This issue is of fundamental importance to Amici States. A holding that federal law preempts Washington from considering all potential environmental impacts resulting from a project subject to state environmental and public health-protection regulations, including those impacts related to the delivery of products by rail, would impair the ability of states to carry out their police-power responsibilities over a wide array of industries, such as manufacturing, energy, and agriculture. Appellants' radical reformulation of

historic police-power authority, if accepted by the Court, would cripple Amici States' ability to perform discretionary land use functions and thus to fulfill their "important responsibilities" to "protect[] the health, safety, and welfare of [their] citizens." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007).[1]

Amici States, together with their political subdivisions, exercise a broad range of regulatory police powers within their respective jurisdictions to protect the public health and safety of their residents and their natural environments. Amici States are charged with balancing demands for economic growth and development, health and safety concerns, and the need to responsibly manage finite natural resources located within their borders. To this end, "[t]he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" living within their jurisdictions. *Met. Life*

[1] Amici States agree with the district court's determination that Appellants lack standing. Washington denied Lighthouse's permits based on several anticipated environmental impacts, only some of which were related to rail transportation. ER 031. Even were the Court to agree that Washington is prohibited from considering rail-related environmental impacts in making its discretionary decisions over Lighthouse's Terminal, the permits would still be denied on the basis of the Terminal's other, non-rail-related, significant environmental impacts. Nonetheless, Amici States submit this brief in the event that the Court reaches the merits of the ICCTA preemption claim.

Ins. Co. v. Mass., 471 U.S. 724, 756 (1985) (internal quotation marks omitted). Amici States' regulatory responsibilities are diverse, varying from ensuring water quality to preventing the sale of contaminated foods or drugs. They are charged with the stewardship of a broad range of environments, from wilderness areas to urban centers, coastal wetlands to rural farmlands.

In the land use context, proposed development projects that Amici States and their local governments routinely review include residential subdivisions, commercial centers, recreational developments and—as here—large-scale industrial facilities. A vast number of these projects are served by rail transportation in some fashion. The power of state, regional, and local governments to consider not only these projects' benefits, but also their potential adverse impacts on the environment or the public health of their residents, and to mitigate such impacts when necessary, has been recognized for generations. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Mugler v. Kansas*, 123 U.S. 623 (1887); *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1181 (9th Cir. 2011) ("The protection of our environment has repeatedly been recognized as a legitimate and important state interest.").

To guide such local land use and other permitting decisions, many states have enacted laws that require public agencies to consider the

potential direct and indirect environmental impacts of their proposed actions—including discretionary permitting decisions like the ones at issue in this case[2]—before they take those actions. Broadly speaking, the purpose of these and other laws of general applicability (e.g., zoning ordinances) is to protect public health and safety and the states' environment and natural resources for the benefit of present and future generations. It is Washington's sovereign prerogative to take these measures pursuant to its well-established police powers. *See, e.g*., *Euclid*, 272 U.S. at 386; *Mugler*, 123 U.S. at 666, quoting *Patterson v. Kentucky*, 97 U.S. 501, 504 (1878) ("By the settled doctrines of this court, the police power extends, at least, to

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[2] Washington's State Environmental Policy Act (SEPA, Wash. Rev. Code § 43.21C) requires that public agencies study a project's anticipated environmental impacts to inform the decision-makers and the public of both the short-term and long-term effects of authorizing it. Several states require similar analyses of a project's environmental impacts before taking discretionary actions, including California, under the California Environmental Quality Act (CEQA, Pub. Res. Code §§ 21000, *et seq*.); Massachusetts, under the Massachusetts Environmental Policy Act (MEPA, Mass. Gen. Laws ch. 30, §§ 61-62H); and New York, under the State Environmental Quality Review Act (SEQRA, Environmental Conservation Law Art. 8 and 6 NYCRR Part 617). The goal of laws like these is to "to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Cleveland Nat'l Forest Found. v. San Diego Assn. of Govts.*, 3 Cal. 5th 497, 503 (2017) (internal quotations and citations omitted). Even absent such laws, however, state and local authorities retain the authority to review a project's impacts and exercise their discretionary land use authority to approve or deny required state and local permits for a proposed project.

the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights."); *see also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.").

INTRODUCTION

The district court's ICCTA preemption analysis was correct, and this Court should reject Appellants' request to inject uncertainty where there is none. Lighthouse, the permit applicant and future owner and operator of the proposed Terminal, is not a rail *carrier* engaged in federally-authorized rail transportation, but rather a rail *customer* receiving a product delivered by rail. Therefore, ICCTA's preemption provision by its terms does not apply to Washington's permitting of Lighthouse's proposed Terminal. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 309 (3d Cir. 2004) (a facility's receipt of goods by rail does not "morph" non-rail carrier's activities into rail transportation subject to preemption under ICCTA). As this Court has determined, "[i]n order for federal preemption to apply under the ICCTA, the activity in question must first fall within the statutory grant of jurisdiction to the Surface Transportation Board [STB]." *Oregon Coast*

Scenic R.R., LLC v. Oregon Dep't of State Lands, 841 F.3d 1069, 1072 (9th Cir. 2016). Here, the STB has no jurisdiction over Lighthouse's Terminal, which is not part of STB-regulated "rail transportation," and preemption under ICCTA therefore does not apply to permits for Lighthouse's Terminal.

Appellants attempt to avoid this straightforward conclusion by asserting that Washington's denial of Lighthouse's permits to construct its Terminal impermissibly regulates BNSF, the rail carrier that would deliver Lighthouse's coal.[3] At its core, Appellants' theory is that, because Lighthouse's Terminal would significantly boost BNSF's profitability, by increasing the number of rail customers and thus the number of trains BNSF operates to meet that demand, Washington's decision to deny the permits "unreasonably burdens" rail transportation. Appellants' argument misconstrues the nature of the burden at issue for purposes of ICCTA preemption. That BNSF may decide to alter its business operations based on whether or not Lighthouse is a future customer does not equate to regulation of BNSF's rail operations preempted by ICCTA. Appellants' sweeping view of federal preemption over states' commonly-exercised discretionary

[3] It bears emphasis that Intervenor BNSF, the rail carrier that will purportedly deliver Lighthouse's coal to the proposed Terminal, is neither the project proponent nor the applicant for any of the permits at issue here. It would not own, operate, or manage the Terminal.

authority is inconsistent with federalism's respect for states' historic police power and land use authority within their sovereign domain and must be rejected.

BACKGROUND

Lighthouse is a coal company that owns coal mines, extracts coal, sells coal, and transports coal directly to customers. ER 019. For the transport aspect of its operation, Lighthouse contracts with various rail carriers, including BNSF. *See* Opening Br. 10. Unlike BNSF, Lighthouse is not a rail carrier subject to STB jurisdiction or federal laws governing rail transportation, nor does it claim to be.

Lighthouse proposes to construct a coal export facility, the Millennium Bulk Terminal, on the edge of the Columbia River in Longview, Washington. ER 019. To build the Terminal, Lighthouse is required to obtain a number of land use and environmental quality permits from local and state agencies, including a sublease for access to aquatic lands from the Washington Department of Natural Resources and a Clean Water Act section 401 water quality certificate from the Washington State Department of Ecology. ER 019-20. Lighthouse is required by a combination of federal, state, and local law to obtain such permits, and each of these respective state

and local agencies has the discretion to deny Lighthouse's permits based on the Terminal's environmental impacts.

Before deciding whether to issue the required permits, Washington analyzed the Terminal's anticipated impacts on public health and the environment. ER 019. The resulting Environmental Impact Statement (EIS) determined that Lighthouse's Terminal would create nine different categories of significant adverse environmental impacts that Lighthouse could not mitigate, including impacts related to onsite Terminal construction and operation as well as impacts occurring offsite due to the substantial increase in train and ship traffic. Answering Br. 4-5. All nine of the significant and adverse environmental impacts identified in the EIS directly affect Washington's environment and the public health and safety of its residents. Such effects include a reduction in air quality that will increase cancer risks caused by the anticipated rail-related diesel exhaust emissions, disproportionately burdening low-income, minority communities surrounding the Terminal. SER 203. Washington also found that the Terminal would pose a significant risk to water quality by increasing existing shipping traffic by nearly 28 percent, creating higher risk of vessel collisions and resulting spills and fires. SER 205-06. Based on the adverse impacts to Washington's environment identified in the EIS, in addition to

findings that Lighthouse's Terminal would not meet applicable water quality standards, state and local officials exercised their discretionary authority and denied the permits for the Terminal.

ARGUMENT

Appellants ask this Court to hold that ICCTA preempts Washington's decision to deny permits to build Lighthouse's Terminal on the basis of the full scope of its public health and environmental impacts. Appellants argue that even though Washington is not requiring BNSF to take any action or alter its rail operations, Washington's decision to deny permits necessary for Lighthouse to construct the proposed Terminal nonetheless "unreasonably burdens" BNSF by depriving BNSF of a potential future customer for its rail service. But, as explained below, ICCTA does not apply to Washington's actions here, despite Appellants' efforts to muddy the relevant preemption analysis. The states' historic police powers, like the ones at issue in this case over a rail *customer's* permits, are "not to be superseded by [a federal law] . . . unless that [is] the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotations omitted). Here, there are no indicia that Congress "clearly" intended ICCTA to preclude a state, in exercising its discretionary authority to permit a project within its regulatory jurisdiction, from considering all of the public health and environmental

impacts from a rail customer's project, and from denying that customer a permit based on those adverse impacts.

I. ICCTA Applies To Preempt State and Local Regulation Only Where a Rail Carrier Undertakes the Subjected Activity.

ICCTA does not apply to Lighthouse's proposed coal export Terminal because Lighthouse is not a rail carrier regulated exclusively by the STB. ICCTA establishes a federal scheme to regulate "rail carriers," 49 U.S.C. §§ 10101, 10102(5), and tasks the STB with responsibility for executing that scheme, *id*. at § 10501(a). ICCTA defines the term "rail carrier" to "mean[] a person providing common carrier railroad transportation for compensation." *Id*. at § 10102(5). It then limits the STB's jurisdiction to, among other things, "transportation by rail carrier that is ... only by railroad," *id.* at § 10501(a)(1)(A) (jurisdictional provision), and preempts state and local authority to regulate matters that fall within the STB's "exclusive" jurisdiction, *id.* at § 10501(b) (preemption provision). As this structure makes clear, ICCTA's preemption provision does not itself constitute an "independent grant of jurisdiction." *New York & Atlantic Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 71-72 (2d Cir. 2011). Instead, as this Court has determined, ICCTA's preemption provision does not apply unless it is first found that the "activity in question ... fall[s] within the

statutory grant of jurisdiction to the" STB. *Oregon Coast Scenic R.R. v. Oregon Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016).

Lighthouse's proposed Terminal would be owned and operated by subsidiaries of its coal company and would not provide common carrier rail service. In other words, Lighthouse is not itself a "rail carrier" as that term is defined by ICCTA. ER 030. The fact that BNSF is a rail carrier subject to the STB's jurisdiction is of no consequence in this case, where BNSF would not own or operate Lighthouse's proposed Terminal, and Washington has placed no conditions on BNSF. For those reasons, the district court correctly determined that the preemption analysis ends there. *Id*. Indeed, the STB has made clear that "the activities at issue must be" both "'transportation' *and* ... performed by, or under the auspices of, a 'rail carrier.'" *Valero Ref. Co.*, STB FD 36036, 2016 WL 5904757, at *4 (Sept. 20, 2016) (emphasis added) (no ICCTA preemption where permit applicant and terminal operator is not a rail carrier, even where agency analyzed and considered rail-related impacts in its decision to deny project); *see also Tri-State Brick & Stone, Inc. and Tri-State Transp., Inc.*, STB FD 34824, 2006 WL 2329702, at *2 (Aug. 11, 2006) ("The broad Federal preemption of 49 U.S.C. § 10501(b) does not apply to activities over which the Board does not have jurisdiction."); *Hi Tech Trans, LLC*, STB FD 34192, 2003 WL

21952136, at *4 (Aug. 14, 2003) (transloading facility operated by non-rail carrier is "not part of 'transportation by rail carrier' as defined under 49 U.S.C. 10501(a)… Thus, the Board does not have jurisdiction over those activities, and section 10501(b) preemption does not apply to the state and local regulations at issue here.").

When, as is the case here, ICCTA does not preempt a state or local agency's permitting authority over a project, the agency has authority to exercise its police powers over the project, including consideration of *all* of its anticipated environmental impacts, even indirect impacts associated with federally-regulated activities such as rail transportation. *Valero*, 2016 WL 5904757, at *4.

II. WASHINGTON'S ACTIONS DO NOT REGULATE OR UNREASONABLY BURDEN BNSF'S RAIL OPERATIONS.

Notwithstanding the fact that Lighthouse's operation of the Terminal is not subject to the STB's jurisdiction, Appellants argue that the district court overlooked alternative theories to support their argument that ICCTA preemption applies here. Specifically, they allege that Washington's actions deny BNSF the right to provide common carrier service to a coal company's as-yet-to-be-authorized facility. *See* Opening Br. 49. Appellants also allege that Washington's consideration of rail-related environmental impacts as

part of the basis for denying a permit necessary to construct Lighthouse's proposed Terminal "unreasonably burdens" BNSF's operations by regulating the amount of rail traffic that would otherwise occur. *Id*. But state and local land use decisions commonly impact the demand for rail service and the corresponding number of trains in service. Those traditional exercises of state and local police power authority over non-rail carriers, while they may indirectly affect rail carriers in the marketplace, do not regulate at all, let alone "unreasonably burden" STB-authorized rail transportation as relevant for ICCTA preemption. For reasons discussed by Washington, *see* Answering Br. 63-65, and for the additional reasons set forth below, BNSF's arguments to the contrary are unavailing.

A. ICCTA Does Not Protect a Rail Customer's Right to Construct a Facility That Would Enable It to Demand and Receive Rail Service.

Appellants claim Washington's decision not to approve permits needed to construct and operate Lighthouse's proposed Terminal denies "BNSF the ability to provide interstate rail service… to the Terminal." Opening Br. 49 (Washington's denial "in effect… determines how much rail traffic will be permitted."). But Lighthouse's Terminal to which Washington is allegedly interfering with BNSF's rail service does not exist. Rather, as the district court determined, "BNSF stands to lose profits if any potential customers are

denied permits to start or expand businesses which utilize rail." ER 032. Appellants ask this Court to fundamentally curtail the states' historic police powers by holding that ICCTA preempts a state from interfering with the land use siting preferences of a facility or business that may seek common carrier rail service.

Neither ICCTA's text nor its purpose support a claim that Congress intended to preclude state or local regulation of any facility or business activity merely because that facility or business will rely on service provided by a rail carrier. ICCTA's primary concern is a rail carrier's ability to conduct STB-authorized operations, including its ability to meet shippers' *existing* demand for rail services, as well as its obligation to provide those services upon reasonable request. 49 U.S.C. § 11101(a). But ICCTA is not concerned with *creating* demand for such rail carrier services in the marketplace, and it certainly does not give rise to or protect any right to profit from such new or expanded potential customer demand, as Appellants suggest. Opening Br. 49-50. And to the extent ICCTA is concerned with a non-carrier shipper's ability to demand and receive rail services from those rail carriers, it in no way extends to a right for any rail customer to construct infrastructure to receive additional rail service without first complying with state or local regulations, including obtaining all necessary permits.

There is a well-established distinction between: (1) ICCTA's preemption of state and local regulation of STB-authorized rail transportation, provided by rail carriers; and (2) the *not*-preempted police power-authority state and local jurisdictions retain over the thousands of rail customers simply receiving goods delivered by rail. Indeed, "express pre-emption applies only to state laws 'with respect to *regulation* of rail transportation.' 49 U.S.C. § 10501(b). … This necessarily means something qualitatively different from laws 'with respect to rail transportation.'" *E.g.*, *Fla. E. Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001) (citing *Bennett v. Spear,* 520 U.S. 154, 173 (1997)). Under Appellants' logic, ICCTA would preempt state and local discretionary permitting authority over *any* project undertaken by a non-rail carrier entity that intends to have goods delivered to it by rail. It does not. *See, e.g., Valero*, 2016 WL 5904757, at *3 (facility proposed by non-rail carrier was not subject to STB jurisdiction, so ICCTA preemption did not apply, despite the fact that the facility would rely on rail to secure delivery of product integral to proposed business).

B. Washington's Actions Are a Permissible Exercise of Its Police Power That Does Not Manage or Govern BNSF's Operations.

It is also well established that Congress nonetheless "narrowly tailored ICCTA preemption provision to displace only [state] 'regulation[]' [of transportation by rail carriers,] i.e., those state laws that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation." *Norfolk S. Ry Co. v. City of Alexandria*, 608 F.3d 150, 157–58 (4th Cir. 2010) (quoting *Fla. E. Coast Ry. Co. v. City of W. Palm Beach,* 266 F.3d 1324, 1331 (11th Cir. 2009); *accord Association of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010). State or local laws with "a more remote or incidental impact on rail transportation" are thus not preempted by the ICCTA. *Id.*

As the district court correctly held, Washington's decision not to authorize Lighthouse's proposed Terminal has only such an incidental impact on BNSF. ER 032. Washington's actions are well within the scope of its police powers and do not manage or govern rail transportation. Washington's decision neither regulates BNSF's operations nor requires BNSF to do anything. *Cf. Association of Am. Railroads*, 622 F.3d 1094 at 1098 (ICCTA preempts local air district's rules limiting emissions from idling trains and imposing various reporting requirements, backed by

penalties, on rail carriers). In fact, today, years after Washington denied Lighthouse's applications to construct and operate the proposed Terminal, BNSF continues to provide STB-authorized common carrier rail service throughout Washington.

That Washington's actions may have an adverse impact on some prospective economic advantage that might result from increased demand for BNSF's rail carrier services does not transmute Washington's actions to "regulation" or "management" of rail operations. *See Fla. E. Coast Ry. Co.*, 266 F.3d at 1331 (no "regulation" where statute "alters the incentives, but does not dictate the choices" of the federally regulated entity) (citing *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr. N.A.*, 519 U.S. 316, 334 (1997)); *see also Town of Milford, Mass.*, STB FD 34444, 2004 WL 1802301, at *3 (Aug. 11, 2004) (where rail carrier's involvement ended when it delivered loaded rail cars to the offloading facility, the facility's "planned activities would not be considered integrally related to … rail carrier service.") Appellants' allegations are thus insufficient to establish that Washington's decision not to authorize Lighthouse's proposed coal export facility has the effect of "managing or governing" BNSF's STB-authorized rail operations.

Appellants nonetheless claim the district court failed to properly consider expert testimony regarding the scope of the impact to BNSF if Lighthouse's proposed Terminal is not constructed and Lighthouse thus does not become a bigger BNSF customer. While the degree to which a challenged action burdens rail transportation may be relevant in cases where the regulation concerns an activity subject to STB jurisdiction, that is not the case here. *Association of Am. Railroads*, 622 F.3d at 1097. That BNSF would have another customer and improve its financial viability but for Washington's denial of the permits for Lighthouse's Terminal does not "unreasonably burden" rail transportation.

BNSF's expert testimony that shipping coal is highly profitable for the railroad does not change the preemption analysis under ICCTA. Indeed, it is completely irrelevant given the facts of this case. Appellants assert that, "[c]oal shipping is an excellent operational business for railroads," and Lighthouse's Terminal "provides an excellent coal export opportunity for BNSF." ER 074 ¶ 47; ER 076 ¶ 56. BNSF's expert estimates that Lighthouse's Terminal would generate annual revenue for BNSF totaling $771 million, and BNSF would be a "different, less efficient" company absent Lighthouse's business. ER 076-077 ¶¶ 56-57. In plain language, BNSF testifies that because coal shipping is highly profitable, and

Lighthouse's Terminal would allow BNSF to ship more coal, Washington's decision to deny Lighthouse's permits unreasonably burdens rail transportation. See ER 064 at ¶ 22 ("Actions by local government officials that impede the ability of railroads to achieve economies of scale, scope, and density undermine railroads' ability to remain financially viable and have an adverse regulatory effect on them.") But, even if true, BNSF's averments are beside the point. Nothing in ICCTA indicates that Congress intended to tilt the playing field in favor of rail transportation by prohibiting state and local jurisdictions from considering the full scope of the environmental impacts from a business that uses rail to transport goods, as opposed to other methods of delivery. This Court should reject Appellants' effort to boost BNSF's profitability on the backs of the public health and safety of Washington's residents and its environment.

The only seeming difference between Lighthouse's Terminal and any other business that might become a future BNSF customer is that Lighthouse would be a *really big* customer. BNSF's expert estimates that the Terminal would generate 48.5 million tons of coal shipments, increasing BNSF's existing coal traffic by over 20 percent and allowing the railroad to improve its financial viability. ER 076-077 ¶¶ 56-57. But Washington's alleged "adverse regulatory effect" here is merely denial of a BNSF customer's

permit application, albeit a potentially big customer, and does not regulate—let alone unreasonably burden—rail transportation any more so for the purposes of ICCTA preemption than it would for any other future rail customer also denied a state or local permit. The Court must reject Appellants' novel "Too Big to Deny" theory of ICCTA preemption. The Court's preservation of state and local police power over industrial facilities, particularly over large-scale ones *most* likely to create adverse environmental impacts, is essential to Amici States' ability to protect the public health and safety of its residents. For example, under Appellants' theory, ICCTA would preempt state and local authorities from denying Lighthouse a permit to construct its massive coal facility next door to an elementary school, based on the significant air quality impacts on children from railroads' diesel exhaust emissions or the corresponding rail-related noise and vibrations on the school's environment. Had Congress intended ICCTA jurisdiction and related preemption to extend as broadly to rail customers as Appellants advocate here, it would have said so.

C. Appellants' Concession that Washington Can Impose the Exact Same Burden on BNSF Without Being Preempted Undermines Their Central Argument.

Appellants' argument that ICCTA preempts Washington's ability to deny permits for Lighthouse's Terminal, but only because Washington

considered rail-related environmental impacts, again mistakes the nature of the alleged "burden" on rail transportation at issue in ICCTA. Appellants acknowledge that ICCTA does not preempt Washington's discretionary permitting authority over the Terminal altogether, Opening Br. 7, and once it has been established that Washington is not preempted from denying permits necessary for the Terminal's construction, there is no basis for arguing that denying the permits for one reason has any greater "burden" on rail transportation than denying it for another. *Fla. E. Coast Ry. Co.*, 266 F.3d at 1331 (no preemption where a local ordinance of general applicability was "not sufficiently linked to rules governing the operation of the railroad").

Had Washington denied Lighthouse's permits exclusively based on a finding that the Terminal failed to meet the necessary water quality standards, something indisputably within Washington's authority under 33 U.S.C. § 1341, the alleged unreasonable burden on BNSF would be no different: BNSF would be unable to provide rail service to Lighthouse's non-existent Terminal, and Washington's decision would, as alleged, "undermine railroads' ability to remain financially viable" in precisely the

same way. ER 064 ¶ 22.[4] Appellants' customer-focused theory of ICCTA preemption, if accepted, would bar *any* attempt by Washington to deny Lighthouse's permits because such a denial would unreasonably burden rail transportation, regardless of whether Washington considers rail-related impacts in its permitting decision. ICCTA, however, does not sweep away state and local police power and land use authority so broadly.

CONCLUSION

Amici States ask this Court to affirm the district court's determination that ICCTA does not preempt Washington's decision to deny Lighthouse's permits based on the full scope of the project's environmental impacts.

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[4] That Washington did in fact deny Lighthouse's permits based on a failure to meet applicable water quality standards entirely unrelated to rail, in addition to the rail-related impacts at issue here, ER 023-024, only underscores Appellants' failure to demonstrate standing. Washington has sufficient grounds to deny Lighthouse's permits based on environmental impacts entirely unrelated to rail. A holding by this Court that ICCTA prevents Washington from considering rail-related impacts when permitting Lighthouse's Terminal would simply not redress Appellants' alleged injury.

Dated: January 6, 2020

Respectfully Submitted,

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No. 19-35415

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIGHTHOUSE RESOURCES INC., ET AL.,

Plaintiffs-Appellants,

BNSF RAILWAY COMPANY,

Intervenor-Plaintiff-Appellants

V.

JAY ROBERT INSLEE, ET AL.,

Defendants-Appellees,

WASHINGTON ENVIRONMENTAL COUNCIL, ET AL.,

Intervenors-Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:18-cv-05005
Honorable Robert J. Bryan

STATEMENT OF RELATED CASES

Amici States are not aware of any related cases, as defined by Ninth Circuit Rule 28-2.6, that are currently pending in this Court.

Dated: January 6, 2020

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-35415

I am the attorney or self-represented party.

This brief contains 4,255 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature _s/ Scott J. Lichtig_______ **Date:** January 6, 2020