

No. 04-0366

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

GREEN MOUNTAIN RAILROAD CORPORATION,

Plaintiff-Appellee,

v.

STATE OF VERMONT, VERMONT AGENCY OF NATURAL RESOURCES,
WILLIAM H. SORRELL, as Attorney General of the State of Vermont,

Defendants-Appellants.

On Appeal From the United States
District Court for the District of Vermont

**BRIEF *AMICUS CURIAE* OF THE
ASSOCIATION OF AMERICAN RAILROADS
IN SUPPORT OF APPELLEES**

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RULE 26.1 CERTIFICATE

Pursuant to Fed. R. App. P. 26.1, the Association of American Railroads states that it has no parent company, subsidiary, or affiliate that has issued shares to the public.

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The Association of American Railroads (“AAR”) respectfully submits this *amicus* brief , which is being filed with the consent of the parties.

INTEREST OF THE *AMICUS CURIAE*

The AAR is a non-profit trade association representing the major freight railroads in North America, as well as Amtrak. AAR’s members account for more than 96% of intercity rail freight service in this country. They operate in most rail-served communities in the United States, and they have a vital interest in the federal preemption issues presented by this case. Absent preemption of the kind of pre-construction local and state licensing process that the State of Vermont seeks to impose here, railroad projects that are critical to the development and continued health of the industry would be severely impeded or stymied altogether.

The hundreds of railroads operating across the United States form an intricate, largely fixed network of rail lines with critical intersecting points where traffic can be interchanged, rerouted, loaded, or transferred to another transportation mode. When most of the original lines and yards were constructed, the country was relatively sparsely populated, roads were bad or nonexistent, and, absent a waterway, no other long-distance transportation option was economical. Towns and cities naturally sprung up along railroad tracks, and they particularly concentrated at the places where goods and people could be loaded, unloaded, rerouted, or transferred to a boat or ship. When highways were built, including those that eventually

formed the interstate highway system, they often paralleled rail lines and connected the same population and industrial centers that had grown up around the railroads.

Rail lines cannot be picked up and moved from the communities, streets, and highways that have sprung up around them. Nor can they be moved from the rivers that historically provided the most natural location — both from an engineering standpoint and from a commercial standpoint — for many of those lines. Most existing rail yards and intermodal facilities are located in urban or suburban areas of the country, and the most advantageous locations for new, expanded, or renovated facilities are usually in the same urban or suburban areas. Rarely are such locations far from a residential or retail community. Typically, they are hemmed in both by homes and businesses that have built up around them and by waterways and highways that often hug the existing facilities. Still, railroads sometimes have sufficient land within their existing rights of way to construct new facilities or to expand existing facilities, and sometimes they can purchase additional nearby property for a needed expansion or new construction project.

Such projects are often vigorously opposed. It is not uncommon for an area to be zoned “residential” or “light commercial” even though an “industrial railroad” runs right through the middle of it. It is also not uncommon for “rail operations” to be omitted from the “permitted uses” prescribed by local land-use regula-

tions for the very area in which a railroad operates. And even where local zoning or land-use regulations allow a particular rail construction project, state and local authorities can use permitting requirements for site plans, buildings, excavations, and other ostensible health and safety concerns to hold up almost indefinitely the construction, expansion, or renovation of a facility. Railroads are not averse to working cooperatively with local authorities to resolve critical local concerns. Indeed, voluntary notification of potential projects is the norm, and discussions between railroads and local authorities resolve most local conflicts. But such voluntary discussions would often be fruitless without the recognition by local authorities that the national interest in an efficient and economically robust interstate rail system takes precedence over their parochial interests.

This case presents a classic example of the type of situation in which federal preemption is key to the development and continued health of the national rail system. No one disputes that the 66-acre “Riverside” site owned by Green Mountain Railroad in Rockingham, Vermont, is the only location at which Green Mountain can effectively build and operate the spur tracks and transload facilities it needs to serve its customers, or that such facilities are an integral part of Green Mountain’s rail service. But, as in many other cases, local authorities wish to subject the railroad’s rail construction activities and operations to a quintessentially regulatory lo-

cal and state licensing process that has already tied up the railroad in years of litigation and that threatens to stymie its projects altogether.

The federal courts and the Surface Transportation Board (“STB”) have uniformly held that the kind of pre-construction state or local permitting process with which the State of Vermont seeks to require Green Mountain to comply is expressly preempted by 49 U.S.C. § 10501(b). The State of Vermont is asking this Court to reject this settled law and instead to require Green Mountain to proceed through Vermont’s regulatory gauntlet before it may develop its rail facilities. If adopted, Vermont’s position would seriously impede not only Green Mountain’s plans, but also the projects of many other AAR members. This would damage the economic health of these railroads, as well as the nation’s economy more generally, which depends on the efficacy of the interstate railroad system. Accordingly, the AAR has a substantial interest in having this Court reject Vermont’s arguments.

BACKGROUND

1. Congress has extensively regulated the nation’s railroad system for over a century. *See City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998) (“Congress and the courts long have recognized a need to regulate railroad operations at the federal level. Congress’ authority under the Commerce Clause to regulate the railroads is well established, and the Supreme Court repeatedly has

recognized the preclusive effect of federal legislation in this area.”) (citations omitted). In fact, “[t]he Interstate Commerce Act, * * * which, as amended, still governs federal regulation of railroads, has been recognized as ‘among the most pervasive and comprehensive of federal regulatory schemes.’” *Id.* (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)).

Starting with the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 194, Congress “began the substantial economic deregulation of the surface transportation industry.” H.R. REP. NO. 104-311, at 82 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 793-94. As Congress has explained, “[t]he combination of * * * onerous Federal regulations and stiff competition from the motor carrier industry proved lethal for the railroads; by the 1970s, the railroad industry was on the brink of financial collapse.” *Id.* at 90, 1995 U.S.C.C.A.N. at 802.

Congress continued this process of deregulation in the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), Pub. L. No. 104-88, 109 Stat. 803 (1995), *codified in relevant part at* 49 U.S.C. §§ 10101-11908. The ICCTA “builds on the deregulatory policies that have promoted growth and stability in the surface transportation sector. For the rail industry, only regulations are retained that are necessary to maintain a ‘safety net’ or ‘backstop’ of remedies to address problems of rates, access to facilities, and industry restructuring. The [Act] **keeps bureaucracy and regulatory costs at the lowest possible level**, consistent with af-

fording remedies only where they are necessary and appropriate.” H.R. REP. NO. 104-311, at 93, 1995 U.S.C.C.A.N. at 805 (emphasis added).

2. It has long been understood that *state* regulation of the railroad system would, in many instances, undermine the *federal* regulatory scheme. Thus, because state statutes and regulations often “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in regulating the railroad system, courts “have frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the [federal regulators] or with congressional policy as reflected in the [ICA].” *Kalo Brick*, 450 U.S. at 318 (internal quotation marks and citations omitted).

Prior to 1980, although the federal government had the responsibility under the ICA to regulate the railroad system, the states were heavily involved in *intra-state* rail regulation. In the Staggers Act, Congress provided that, in general, state regulatory commissions could continue to regulate only if they applied federal standards. *See ICC v. Texas (“ICC”)*, 479 U.S. 450, 452-54 (1987). The states, however, still at that time retained the right to regulate the “construction, acquisition, operation, abandonment, or discontinuance of [intrastate] spur, industrial, team, switching, or side tracks,” over which the Interstate Commerce Commission

(“ICC”) had no licensing authority. 49 U.S.C. § 10907(b)(1) (1982); *Ill. Commerce Comm’n v. ICC*, 879 F.2d 917, 922-23 (D.C. Cir. 1989).

As part of the ICCTA, Congress terminated the regulatory authority of state and local governments over rail operations. As the Senate Report on the ICCTA explained,

[t]he railroad system in the United States is a nationwide network. The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry’s ability to provide the “seamless” service that is essential to its shippers and would waken [sic] the industry’s efficient and competitive viability.”

S. REP. NO. 104-176, at 6 (1995).¹

Thus, former Section 10501(c), which had expressly reserved the power in the states to regulate intrastate transportation, was eliminated. Also eliminated was former Section 10103, which had stated that the federal remedies provided in the

¹ The history of railroad regulation since the passage of the Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379 (1887), has been one of steady erosion of state regulatory authority. The original ICA gave the ICC significant powers that supplanted some state regulation. *See Texas & P. Ky. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 416 (1907). The Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456 (1920), further enlarged the ICC’s powers and diminished the regulatory sphere of the states. With the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976), and the Staggers Act, Congress further limited the regulatory authority of the states, while also substantially reducing the amount of federal regulation. *See ICC*, 479 U.S. at 460-61. Thus, Congress’s termination of state regulation, and additional reduction of federal regulation, in the ICCTA in 1995 was the culmination of a long and deliberate process.

ICA were “in addition to remedies existing under another law or at common law.”

Finally, the express preemption provision of the Act, Section 10501(b), was strengthened. As amended by the ICCTA, it now provides:

The jurisdiction of the Board over —

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). Thus, Section 10501(b) makes the STB’s “jurisdiction” over *all* rail transportation facilities — including entirely intrastate facilities over which the states formerly had regulatory authority — “*exclusive*.” *Id.* (emphasis added).

As the courts have repeatedly observed, “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations” than this statutory provision. *City of Auburn*, 154 F.3d at 1030 (quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n* (“*CSX*”), 944 F. Supp.

1573, 1581 (N.D. Ga. 1996)). Congress, too, has recognized the breadth of Section 10501(b). As it stressed in the House Report accompanying the ICCTA,

[Revised Section 10501] reflect[s] the ***direct and complete preemption*** of State economic regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, ***the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive***. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

H.R. REP. NO. 104-311, at 95-96, 1995 U.S.C.C.A.N. at 807-08 (emphasis added).²

3. Although the states no longer have the authority to regulate “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State” (49 U.S.C. § 10501(b)(2)), Congress also chose not to give the STB licensing authority over these rail facilities. *See* 49

² The House Report addresses a slightly earlier version of the statute than the one that was eventually enacted as the ICCTA. In that version, the language that became Section 10501(b) was split into two sections, 10103 & 10301(b). However, the text of Section 10501(b) in the enacted version contains exactly the same language as these earlier provisions, and therefore the House Report is directly applicable.

U.S.C. § 10906 (“The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.”). Instead, as part of its deregulatory scheme, Congress expressly chose to leave these projects *unregulated*. As Congress explained in the House Report accompanying the ICCTA, “[t]he bill is intended to standardize all economic regulation (*and deregulation*) of rail transportation *under Federal law*.” H.R. REP. NO. 104-311, at 95, 1995 U.S.C.C.A.N. at 807 (emphasis added).

4. Defendants/Appellants (hereinafter “Vermont” or “the State”) admit that Act 250, Vermont’s “environmental land use statute, * * * mandates a pre-construction permitting process.” Vermont Br. 3. The State argues that, despite the broad preemptive scope of Section 10501(b), it can require railroads to obtain permits pursuant to Act 250 prior to commencing the construction or modification of railroad facilities. According to the State, railroads may bring court actions challenging the denial of a permit under Act 250 or specific requirements imposed on a project through its permitting process. *See* Vermont Br. 63-65. It argues, however, that railroads must *subject themselves to that permitting process* before seeking such relief. The District Court disagreed, prompting this appeal.

ARGUMENT

A. Act 250, Which Requires The Pre-Approval Of Local Authorities For Construction Projects, Is Expressly Preempted By 49 U.S.C. § 10501(b) With Respect To Railroad Facilities.

At heart this is a very simple case. Under Section 10501(b), the STB’s jurisdiction over rail “transportation” is “exclusive,” and “the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” For purposes of Section 10501(b), “transportation” is defined broadly, and includes “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9). There is no question that Green Mountain’s construction projects are “transportation” as that term is defined in Section 10102(9). Therefore, because the STB’s jurisdiction over these projects is “exclusive” (49 U.S.C. § 10501(b)), the State’s “local district environmental commissions” and its “Environmental Board” (Vermont Br. 9) cannot *also* have jurisdiction over them. Rather, the Act 250 permitting process is expressly preempted by Section 10501(b).

In fact, courts consistently have read Section 10501(b) expansively to preempt any state or local action that would put state or local authorities in a position

to deny a railroad the right to construct or operate rail facilities as it sees fit.³ Thus, courts repeatedly have held that state and local zoning, environmental, noise, nuisance, land use, building permit, and demolition laws and regulations are preempted insofar as they could interfere with railroad construction projects or operations. In particular, as the District Court explained, “courts have noted that pre-clearance requirements, including environmental requirements, are preempted because they *necessarily* interfere with a rail carrier’s ability to construct facilities and conduct economic activities.” Op. at 11 (citing *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 656 (E.D. Mich. 2000), *aff’d*, 234 F.3d 812 (6th Cir. 2002)). See also, e.g., *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001) (state criminal anti-blocking statute and derivative negligence actions preempted); *City of Auburn*, 154 F.3d 1025 (state and local environmental and land use regulation preempted); *Flynn v. BNSF Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000) (STB has exclusive jurisdiction over construction and operation of fueling facility, and local permitting requirements are preempted, even if STB does not regulate such construction or operations); *Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wisc. 2000) (ICCTA reflects express, field, and conflict

³ As the Supreme Court has explained, “an assumption of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.” *United States v. Locke*, 529 U.S. 89, 108 (2000). Therefore, given the lengthy history of federal regulation of the railroad system (see pages 4-8, *supra*), there is no presumption against preemption in this case.

preemption; state attempt to use condemnation law to condemn railroad property preempted); *Soo Line R.R. v. City of Minneapolis*, 38 F. Supp. 2d 1096 (D. Minn. 1998) (local demolition permitting and historical preservation requirements preempted); *Norfolk S. Ry. Co. v. City of Austell*, 1997 WL 1113647 (N.D. Ga. Aug. 18, 1997) (local zoning and land use regulations preempted); *CSX*, 944 F. Supp. at 1581 (state regulation of closing of railroad station agencies preempted); *Village of Ridgefield Park v. N.Y., Susquehanna & W. Ry.*, 750 A.2d 57 (N.J. 2000) (complaints under local “nuisance” law preempted).

The STB, too, has read Section 10501(b) broadly to preempt any kind of local permitting or regulatory requirement that could stymie a railroad’s construction or operating plans. *See, e.g., N. San Diego County Transit Dev. Bd. — Petition for Declaratory Order*, STB Fin. Dkt. No. 34111, 2002 WL 1924265 (served Aug. 21, 2002) (California Coastal Commission regulation of construction of rail siding preempted); *Joint Petition for Declaratory Order — Boston & Maine Corp. and Town of Ayer, MA*, STB Fin. Dkt. No. 33971, 2001 WL 1174385 (served Oct. 5, 2001) (state and local permitting and environmental review of construction and operation of railroad intermodal facility preempted); *Borough of Riverdale — Petition for Declaratory Order — The New York, Susquehanna, & W. Ry.*, STB Fin. Dkt. No. 33466, 1999 WL 715272 (served Sept. 10, 1999) (local zoning and land use

use constraints concerning railroad's construction and operation of transload facility preempted).

For purposes of preemption under Section 10501(b), it does not matter whether the STB has regulatory “authority” under 49 U.S.C. § 10906 over the particular operation at issue. Deferring to the plain text of the statute, the courts and the STB have held that even where the STB has no *authority* to regulate a railroad transportation project, it still has exclusive “*jurisdiction*” over such project under Section 10501(b), which preempts any state or local effort to interfere with a railroad’s decisions about where and how to structure its operations. *See, e.g., Flynn*, 98 F. Supp 2d at 1189-90 (where construction of Hauser Fueling Facility in Kootenai County, Idaho, and rationalization of BNSF’s locomotive fueling operations in the Pacific Northwest were not subject to STB approval, the STB’s exclusive jurisdiction over railroad transportation still preempted any state or local regulation of the construction of that facility that could significantly interfere with BNSF’s plans); *Village of Ridgefield Park*, 750 A.2d at 67 (enforcement of local “nuisance” regulations and land use requirements preempted by Section 10501(b), despite STB’s lack of authority over construction or operation of railroad facilities at issue); *Joint Petition for Declaratory Order — Boston & Maine Corp. & Town of Ayer, MA (“Town of Ayer”)*, STB Fin. Dkt. No. 33971, 2001 WL 458685 (served May 1, 2001) (same).

Of course, the states' police powers are not *entirely* preempted by Section 10501(b). *See* H.R. REP. NO. 104-311, at 95-96, 1995 U.S.C.C.A.N. at 807-08; Green Mountain Br. 42-43. For example, the states sometimes can require railroad facilities to comply with certain types of specific local rules — including, for example, some health and safety rules and building codes — *so long as* those rules are applied in a nondiscriminatory fashion and do not unduly interfere with the railroad's ability to do business. However, as we have explained, the states cannot require railroads to undergo any form of permitting or pre-clearance process, such as Act 250. And because the state cannot require a railroad to submit to the Act 250 process, it also cannot require a railroad to comply with a specific requirement imposed *through* that process.

In this regard, the 100-foot buffer requirement that Vermont seeks to apply to Green Mountain's construction projects is unsound on two grounds. First, Vermont has no *generally applicable* rule precluding any development within 100 feet of a river. Instead, it seeks to apply a 100-foot-buffer rule *that it created in the context of the Act 250 permitting process* and that is specific to the Riverside facility. Because the Act 250 permitting process itself is expressly preempted, however, the State cannot use that process to create a site-specific rule that it thereafter seeks to apply to a railroad. Second, the District Court in any event correctly found that the application of the 100-foot requirement would be preempted because

of its “economic impact on Green Mountain’s ability to expand its business” (Op. at 19).⁴

The State has crafted several creative arguments for why the Act 250 permitting process should somehow escape preemption. Green Mountain has refuted all of these, and we also discuss several of these arguments below. It is important, however, not to lose the forest for the trees: Section 10501(b) is perhaps the broadest grant of federal preemption in the U.S. Code. *See CSX*, 944 F. Supp. at 1581. Although Vermont may not *like* that statute, in our federal system Congress’s will trumps that of the states. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (“the act of Congress * * * is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”)

B. Because Section 10501(b) Expressly Preempts Act 250, There Is No Need To Determine Whether There Are Any Conditions That The Permitting Authority Might Impose That Would Not Conflict With Federal Law.

Vermont’s primary argument for reversing the District Court’s decision (Vermont Br. 27-33) is based on a fundamental misunderstanding of the nature of preemption under Section 10501(b). According to the State, the district court erred because it found Act 250 facially preempted without first determining that “there

⁴ Although it may have been unnecessary for the District Court independently to analyze whether the state could apply the 100-foot-buffer permit condition to the Riverside site (*see* Op. at 18-19), the court can hardly be faulted for taking a “belt-and-suspenders” approach to the issue.

[are] ‘no set of conditions that [the permitting authority] could place on its permit that would not conflict with federal law.’” Vermont Br. 27 (quoting *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987)) (second alteration in Vermont Br.). But *Granite Rock* addresses **conflict** preemption, not **express** or **field** preemption, and is therefore irrelevant to this case. Furthermore, it is not merely the specific conditions imposed by the state that are preempted by Section 10501(b); the **process itself** is preempted. Thus, even under an analysis similar to that prescribed in *Granite Rock*, the district court was correct in finding Act 250 to be facially preempted in all circumstances.

In *Granite Rock*, a company owning a mining claim on federal land challenged the right of a state coastal commission, acting pursuant to the federal Coastal Zone Management Act (“CZMA”), to require a permit from the company to mine in a coastal region. 480 U.S. at 575-77. The Court ruled that “Congress specifically disclaimed any intention to pre-empt pre-existing state authority in the CZMA,” and thus held that the CZMA “does not automatically preempt all state regulation of activities on federal lands.” *Id.* at 593. The Court also considered whether federal land-use statutes demonstrate a legislative intent to limit states to a purely advisory role in federal land management decisions. *Id.* at 584-85. The Court found that, unlike this case, these statutes did not include any language preempting state regulation of mining or vesting exclusive jurisdiction in a federal

agency. To the contrary, these statutes specifically acknowledged that the federal agency's land-use plans should provide for compliance with existing state and federal environmental laws. *See id.* at 587-88. In other words, the federal statutes at issue did not preclude state regulation of mining uses. Thus, the Court had little trouble dismissing a *facial* challenge to the state commission's permitting process. As long as the state commission could identify a set of permit conditions that were not preempted by federal law, the permitting process could stand. *Id.* at 589.

The Supreme Court's analysis in *Granite Rock* does not apply here, however, because state regulation of the entire field of rail transportation is *expressly* preempted, and jurisdiction over rail transportation is vested exclusively in the STB. Where there is an express preemption provision, "[p]reemption of state law is compelled if Congress' command is explicitly stated in the federal statute's language." *City of Auburn*, 154 F.3d at 1031 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983)). That is the case here; the statute says that the STB's jurisdiction is *exclusive*; in other words, no state regulation is allowed. *See, e.g., CSX*, 944 F. Supp. at 1584 (ICCTA "evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations"); *BNSF Corp. v. Anderson*, 959 F. Supp. 1288, 1295 (D. Mont. 1997) ("The Act reserves no area of regulation for the individual states — agency regulation or otherwise."). Under these circumstances, *any* exercise of power by a state

or locality to impede or deny rail activities that they cannot regulate is preempted — not merely the denial of a permit entirely or the attachment of overly harsh conditions on a granted permit.

But even if *Granite Rock* were to apply here, the State’s argument would be meritless. Congress intended for the field of railroad regulation to be exclusively federal. *See, e.g., Friberg*, 267 F.3d at 443; *City of Marshfield*, 160 F. Supp. 2d at 1014. Therefore, it is the requirement of ***participating in the Act 250 permitting process*** that is preempted, not merely the specific requirements imposed pursuant to that process. As we discussed above (at 15), the states may require railroads to comply with certain generally applicable rules, so long as those rules do not unduly interfere with the railroads’ ability to operate. But it is well established that the states cannot require railroads to participate in a regulatory pre-clearance or permitting process. *See* pages 12-13, *supra*. Thus, Act 250 is facially preempted even under *Granite Rock*.

This application of *Granite Rock* is uncontroversial. As the Ninth Circuit recently explained in a case involving preemption under the National Labor Relations Act, in some circumstances federal law preempts “the ***act of regulation itself***, not the ***effect*** of the state regulation in a specific factual situation.” *Chamber of Commerce of the U.S. v. Lockyer*, 364 F.3d 1154, 1169 (9th Cir. 2004) (emphasis added). “The facial/as-applied distinction [from *Granite Rock*] would be relevant

only if we might find some applications of the statute preempted and other not.” Sometimes, however, “the question is not whether the application of a state statute to a single set of facts is permissible, but whether the state has acted to regulate generally in an area that Congress intended to be a zone free from all regulations, whether state or federal.” *Id.* (citations and internal quotation marks omitted). Thus, in *Chamber of Commerce* the Ninth Circuit found a state regulation addressing the financing of union elections to be preempted because Congress intended such elections to be entirely unregulated. *Id.* Similarly, here Congress intended the regulation of railroads, if any, to be entirely federal. State laws requiring railroads to participate in a state permitting process directly conflict with that congressional mandate, and therefore are facially preempted.

C. Section 10501(b) Preempts State Regulation Of Railroads Regardless Whether The Regulation Is Described As “Economic” Or As “Environmental.”

Vermont’s next argument — that only “economic” regulation is preempted by the ICCTA — should not detain this Court for long; it has repeatedly been rejected by courts around the country, would be unworkable in practice, and even if true would not save Act 250 from preemption.

Although the State asserts that “[t]he ICCTA gives the STB exclusive jurisdiction over *economic* regulation of rail transportation” (Vermont Br. 35) (emphasis in original), the statute does not say that; rather, it specifies that “[t]he *jurisdic-*

tion of the [STB] over [rail transportation and facilities] is **exclusive**.” 49 U.S.C. § 10501(b). The word “economic” is not included in the statute. Thus, as the Ninth Circuit recently explained in rejecting this precise argument, “there is nothing in the case law that supports [the] argument that, through the ICCTA, Congress only intended preemption of economic regulation of the railroads. All the cases cited by the parties find a broad reading of Congress’ preemption intent, not a narrow one.” *City of Auburn*, 154 F.3d at 1030.

The fact that the “remedies” available to the STB are limited to those provided for in the ICA, as revised (Vermont Br. 36), does nothing to limit the jurisdiction of the STB. That **jurisdiction** is exclusive, regardless what remedies are available to the Board. *See* page 14, *supra*; *BNSF*, 959 F. Supp. at 1293, 1295-96 (rejecting “argument that the Act preempts state remedies only where federal remedies are provided under the [ICCTA]”).

Similarly, Vermont’s reliance on the ICCTA House Report for the proposition that only “economic” regulations are preempted is misplaced. As numerous courts have explained, the plain text of Section 10501(b) is unambiguous, and therefore controls. *See, e.g., Friberg*, 267 F.3d at 443 (“the plain language of the statute itself, and in particular its preemption provision, is so certain and unambiguous as to preclude any need to look beyond that language for congressional intent”); *City of Auburn*, 154 F.3d at 1029-30 (rejecting reliance on word “eco-

nomic” in House Report because ““the language of the statute itself must ordinarily be regarded as conclusive.””) (quoting *Burlington N. R.R. v. Okla. Tax Comm’n*, 481 U.S. 454, 461 (1987)); *City of Marshfield*, 160 F. Supp. 2d at 1014 (same).

In any event — as numerous courts have also held — the distinction between “economic” regulation and other forms of regulation is unworkable in practice; the *effects* of “environmental” regulations, criminal laws, or exercises of the states’ police powers are often indistinguishable from those of expressly “economic” regulations. For example, the Fifth Circuit recently explained:

We cannot accept the trial court’s reasoning that the Texas Anti-Blocking Statute is a criminal provision that does not reach into the area of economic regulation of railroads. Regulating the time a train can occupy a rail crossing impacts, in such areas as train speed, length and scheduling, the way a railroad operates its trains, ***with concomitant economic ramifications that are not obviated or lessened merely because the provision carries a criminal penalty.***

Friberg, 267 F.3d at 443 (emphasis added); *see also, e.g., City of Marshfield*, 160 F. Supp. 2d at 1013 (rejecting argument that condemnation action against railroad is exercise of police power rather than economic regulation).

Here, Act 250 plainly has the *effect* of being an economic regulation. Pursuant to the Act, the State can impose numerous expensive conditions on a railroad construction project, can limit the ways in which a railroad may use its property, and can delay or even block projects entirely. The “economic” effects of such ac-

tions are self-evident, even if those actions are taken for purportedly “environmental” reasons.

D. Vermont’s Policy Arguments Against Finding Preemption Should Be Rejected.

Vermont also argues that the District Court’s decision should be “reversed on policy grounds because it leads to illogical results.” Vermont Br. 40. As we have discussed, the District Court’s decision was grounded on settled law under Section 10501(b). Even were there any basis for concluding that the express preemption mandated by Section 10501(b) could produce illogical results, neither this Court nor any other court could lawfully substitute its own policy preference for Congress’s express command. *See, e.g., INS v. Hector*, 479 U.S. 85, 89 (1986) (courts have “no judicial authority to substitute [their] political judgment for that of the Congress.”).

In any event, Vermont’s “policy” arguments are without merit. Its single-minded focus on local concerns ignores the fact that Congress’s whole purpose in Section 10501(b) was to ensure that the *national* interest in an efficient and financially healthy rail system take precedence over parochial local concerns. In passing the Staggers Act in 1980, Congress specifically found that the pre-existing patchwork of local regulation was one of the contributing factors in the severe financial crisis that gripped the rail industry in the 1970s and early 1980s. *See* H.R. REP. NO. 96-1035, at 38, 61, 128-30 (1980); H.R. CONF. REP. NO. 96-1430, at 79

(1980). Thus, Congress provided that state regulatory commissions could only continue to regulate if they applied federal standards. *See ICC*, 479 U.S. at 453-54. Since most of the railroads in the 1980's were substantially paring their rail assets in an effort to shed unprofitable operations, there was relatively little occasion for conflict between the railroads and the states or localities over the expansion of rail facilities, the reactivation of facilities, or the construction of new facilities. Most states and localities were more concerned with avoiding the abandonment of significant rail lines that were important to local businesses than with constraining rail improvement projects.

By the 1990's, circumstances had changed. Having rationalized their rail systems, the railroads found that in many instances they needed to renovate or expand their existing facilities, or to build new facilities, to meet the surging traffic demands of the nation's growing economy. There was "an increasing emphasis on intermodalism and providing seamless transportation via rail, motor, and water modes." S. REP. NO. 104-176, at 5 (1995). Intermodal hand-offs between trucks and railroads were particularly favored on environmental grounds because diesel emissions per ton of freight are much lower via train than via truck, and shifting freight to the railroads for all or part of a movement can significantly reduce highway congestion, improve safety, and help alleviate the need for new highway con-

struction.⁵ Thus, Congress passed extensive legislation providing funding for the development of transportation infrastructure. *See, e.g.*, Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), § 1003 (allocating funds for intermodal and surface transportation programs and congestion mitigation); Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998), §§ 501-04, *codified at* 45 U.S.C. §§ 821-24 (allocating \$3.5 billion to finance railroad rehabilitation and improvement). The railroads responded with billions of dollars in new investment. *See* Ass'n of Am. R.Rs., *The Importance of Adequate Rail Investment* (January 2004) (available at http://www.aar.org/GetFile.asp?File_ID=150).

It was against this backdrop that Congress determined in the ICCTA to eliminate the residual regulatory authority of state and local governments over rail transportation and facilities. Vermont claims that this is “illogical” because it means that there is no regulation of such facilities. *See* Vermont Br. 41-43. But there is nothing even novel, much less illogical, about the idea that when Congress expressly decides to completely or partially deregulate something, it means it. It does not intend state or local governments to attempt to fill the “void,” however much they may wish to do so. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504

⁵ *See* Am. Ass'n of State Highway & Transp. Officials, *Transportation — Invest in America: Freight-Rail Bottom Line Report*, at 2, 7, 27-28 (available at <http://freight.transportation.org/doc/FreightRailReport.pdf>).

U.S. 374 (1992) (regulation of airline advertising); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (regulation of corporate financial structures); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409 (1986) (regulation of natural gas prices); *see also G&T Terminal Packaging Co. v. Consol. Rail Corp.*, 830 F.2d 1230 (3d Cir. 1987) (ICC’s exemption from regulation of traffic in fresh fruits and vegetables does not enable shipper to bring court action asserting common-law claims for unreasonable or discriminatory rates).

Vermont also suggests that there is something illogical about railroads being subject to regulatory authority (by the STB) over their “core” railroad projects, including environmental review under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370e, but not being subject to any regulatory authority over “ancillary” railroad projects. Vermont Br. 41-43. But Vermont misapprehends the basis for the STB’s NEPA review in situations in which it has licensing authority. It is *not* based on a distinction between “core” assets and other railroad assets. Railroads have long been permitted to engage in major construction projects involving their main line tracks — including doubling or tripling the number of tracks on a line or relocating the line altogether — without any STB (or state or local) environmental review. *See, e.g., City of Stafford v. S. Pac. Transp. Co.*, ICC Fin. Dkt. No. 32395, 1994 WL 613381 (served Nov. 8, 1994), *aff’d sub nom. City of Stafford v. ICC*, 69 F.3d 535 (5th Cir. 1995); *City of Detroit v. Cana-*

dian Nat'l Ry. Co., 9 I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Authority v. ICC*, 59 F.3d 1314 (D.C. Cir. 1995). STB environmental review of construction projects attaches only to the STB's licensing of a new or extended line or connection that gives the railroad new market access. *Id.*; *see also Union Pac. R.R. — Petition for Declaratory Order — Rehabilitation of Mo.-Ks.-Tx. R.R. Between Jude and Ogden Junc., TX*, STB Fin. Dkt. No. 33611, 1998 WL 525587, at *5 (served Aug. 21, 1998) (“Because we do not have jurisdiction over UP’s [major relocation] project, NEPA does not apply.”) The railroads have always had the freedom to improve their existing main line facilities without any STB review.

What was anomalous under the law prior to the enactment of the ICCTA was that although a railroad could improve its mainline facilities in markets it already served, without environmental review either by the STB or by state and local authorities, if it made an improvement in a rail yard, added a side track, or otherwise sought to improve the ancillary facilities that are vital to rail service, state or local authorities could tie up the railroad's project with their own “intrastate” licensing review. That was what Congress ended with Section 10501(b)(2). Far from being “illogical,” Congress's action made eminent sense in light of the national goal of encouraging the development of rail facilities.⁶

⁶ Vermont's suggestion that a railroad could use preemption under Section 10501(b) to avoid state or local review of any “peripheral” project undertaken by a

Vermont also asserts that there is illogic in the suggestion of the District Court below, and of the STB in *Town of Ayer*, that state or local authorities may not employ a prior permitting process to regulate railroads but may seek to enforce nondiscriminatory health and safety rules independent of such a process. Vermont Br. 44-46. The flaw in Vermont’s reasoning, as we discussed earlier (at 14), is that it assumes that state or local authorities may only seek to restrict a railroad’s activities through a regulatory permitting process. Rather, the state may seek to enforce nondiscriminatory state and local requirements that do not depend on a preclearance or permitting process. As the STB underscored in *Town of Ayer*, some nondiscriminatory restrictions “might be reasonable measures in and of themselves.” 2001 WL 458685, at *7. If those measures do not unreasonably interfere with interstate commerce, they lawfully may be applied to railroads; if they thwart a railroad’s ability to expand its business, they will be preempted.

Finally, Vermont argues that the District Court “mistakenly concluded that its ruling did not deprive Vermont of remedies for environmental protection be-

railroad — including, in Vermont’s example, construction of a ski resort at the terminus of a rail line (Vermont Br. 42-43) — is a red herring. In order to qualify for preemption under Section 10501(b), the railroad activity in question must involve rail “transportation,” as defined in Section 10102(9). A ski resort would certainly not qualify as a facility involved in rail transportation. In contrast, there is no debate that the spur track, storage buildings, and other facilities that Green Mountain is attempting to develop in this case qualify as transportation facilities under Section 10102(9).

cause the State may ‘have standing to seek compliance with applicable federal laws, such as the Clear Air Act and Clean Water Act.’” Vermont Br. 46. Here, Vermont misrepresents the District Court’s holding. The District Court simply noted that federal environmental statutes continue to apply to railroads and that its decision did not deprive Vermont of whatever remedies it might have under those statutes. There was no mistake.

* * *

Under Section 10501(b), the STB’s jurisdiction over rail facilities such as Green Mountain’s is “exclusive.” As numerous courts have held, that term is unambiguous, and precludes the states from regulating such facilities. Therefore, the District Court was plainly correct in holding that Vermont’s environmental boards had no jurisdiction over Green Mountain’s facilities, and could not require Green Mountain to obtain Act 250 permits for the rail construction and improvement activities at issue in this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's order.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I hereby certify that — according to the word-count facility in Microsoft Word 2000 — this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 6,989 words, which is fewer than the number specified in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i).

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