No. 18-35704

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SWINOMISH INDIAN TRIBAL COMMUNITY,
a federally recognized Indian Tribe,

Plaintiff-Appellee,

v.

BNSF RAILWAY COMPANY, a Delaware corporation,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Washington

BRIEF FOR THE AMERICAN CHEMISTRY COUNCIL, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL MINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The American Chemistry Council represents the leading companies engaged in the business of chemistry. It has no parent corporation, and no publicly held company has a ten percent or greater ownership interest in it.

The American Fuel & Petrochemical Manufacturers is a national trade association. It has no parent corporation, and no publicly held company has a ten percent or greater ownership interest in it.

The American Petroleum Institute is a not-for-profit trade association based in Washington, D.C. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

The National Association of Manufacturers is a nonprofit trade association. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

The National Mining Association is a non-profit, incorporated national trade association. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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Comments of the U.S. Department of Agriculture, Common Carrier
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GAO, Hazardous Materials Rail Shipments: A Review of
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IDENTITY & INTEREST OF *AMICI CURIAE*[1]

Amici are trade associations whose members have a significant interest in protecting the open flow of goods and raw materials through the channels of interstate commerce. The commercial freight rail system is indispensable to *amici*'s members, as it allows them to efficiently send and receive cargo throughout their supply chains. Indeed, many manufacturing and refining facilities were built in direct reliance on their unfettered access to the freight rail network and could not feasibly move to a different location if they lost such access. *Amici* thus have a significant interest in ensuring a stable, predictable, and nationally uniform regulatory regime that guarantees open access to the freight rail network and prohibits efforts to impede such access.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®; common sense advocacy designed to

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party contributed money intended to fund its preparation or submission. No person other than *amici*, their members, and their counsel contributed money intended to fund the preparation or submission of this brief. All parties consented to the filing of this brief.

address major public policy issues; and health and environmental research and product testing. The business of chemistry is a $526 billion enterprise and a key element of the nation's economy. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.

The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association representing approximately 400 companies that comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM's members supply consumers with a wide variety of products that are used daily in homes and businesses. They rely on a secure, uninterrupted, and plentiful supply of raw materials to produce products that are consumed both here and abroad.

The American Petroleum Institute ("API") is a national trade association that represents all aspects of America's oil and natural gas industry. API's approximately 640 members include oil producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as supporting service and supply companies. API's mission is to promote safety across the industry globally and to support a strong U.S. oil and natural gas industry.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly

represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the Nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Mining Association ("NMA") is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. The mining industry has a broad impact on the national economy, generating nearly 1.9 million jobs and contributing $225 billion to the U.S. GDP and $45 billion in federal, state and local taxes each year. A core mission

of NMA is to work with Congress and regulatory officials to promote practices that foster the environmentally sound development and use of mineral resources. NMA also participates in litigation, raising issues of concern to the mining community.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to underscore that the Court's decision will have significant implications for non-parties to the case: namely, the countless businesses that rely on the freight rail network for the efficient movement of raw materials, commodities, and finished goods through interstate and foreign commerce. Plaintiff seeks an unprecedented injunction restricting the type and quantity of goods that can be shipped over an interstate railway. Such an injunction would disregard the exclusive federal regulatory scheme governing interstate rail transportation, would undermine shippers' common-carriage rights, and would obstruct interstate commerce in economically critical products.

Since the Founding, one of the federal government's paramount obligations has been to prevent the balkanization of the national economy by ensuring open and unimpeded access to the *channels* of interstate commerce such as the transportation network. Pursuant to its authority under the Commerce Clause, Congress has enacted a comprehensive national regulatory regime governing the commercial rail network; under the ICC Termination Act of 1995 ("ICCTA"), the Surface Transportation Board ("STB") has *exclusive* jurisdiction over the economic aspects of interstate rail

transportation, such as rail mergers, line sales, line construction, and line discontinuation or abandonment.

The district court's decision impermissibly circumvents that carefully crafted regulatory regime by recognizing an unprecedented "federal common law" claim under which an Indian tribe can seek to restrict the quantity and type of goods being shipped over an interstate rail line. As BNSF explains, the district court's holding is contrary to the unambiguous text of ICCTA. But that holding also has serious practical consequences for shippers such as *amici*. When the STB considers a request to limit or discontinue service on a rail line, it applies uniform national standards, allows for the participation of all interested parties, and considers how the requested relief would impact other businesses and the public at large. By contrast, the "federal common law" action contemplated by the district court would entail an ad hoc adjudication that necessarily focuses only on the two parties before the court without adequately considering the broader economic and regulatory concerns that are implicated when a party seeks to cut off or restrict access to a rail line. Businesses in all sectors of the economy make massive investments in direct reliance on access to freight rail service, and ICCTA is clear that any disputes over such services must be resolved in a uniform manner before an expert federal agency, not on a patchwork basis through ad hoc litigation.

The district court's decision also threatens to undermine shippers' longstanding common-carriage rights. There are countless materials and products that are indispensable to the economy but dangerous if mishandled or spilled. For example, chlorine and anhydrous ammonia can be toxic if inhaled but are critical to the agricultural sector (anhydrous ammonia is a key ingredient in fertilizer) and public utilities (chlorine is widely used for water treatment). Recognizing the economic importance of such materials, federal law has long held that rail carriers must transport all lawful goods—*including hazardous materials*—subject to stringent federal safety standards. Here, however, the plaintiff seeks to block shipments of crude oil across its reservation, apparently based on its disagreement with the relevant federal standards. The decree plaintiff seeks flouts federal law regarding the carriage and handling of hazardous materials, and would allow landowners and railroads to evade common-carriage obligations merely by signing contracts that prohibit hazardous materials from being shipped across a rail line.

In sum, allowing the decision below to stand would result in the obstruction of commerce in lawful products by giving *landowners* an unprecedented ability to veto the quantity or types of cargo being shipped through interstate commerce. Any such rule is anathema to the functioning of a national economy and an efficient and effective interstate transportation network. The decision below should be reversed.

ARGUMENT

I. The Decision Below Undermines The Comprehensive, Nationally Uniform Regulatory Regime Governing Freight Rail.

A. The Constitution grants Congress authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. 1, § 8. One of the federal government's paramount obligations is to ensure open and unimpeded access to the *channels* of interstate commerce such as the transportation network. As Alexander Hamilton noted in the Federalist Papers, "[t]he interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy." The Federalist No. 22, at 137 (Jacob E. Cooke ed. 1961). Since *Gibbons v. Ogden*, 22 U.S. 1 (1824), the Supreme Court has recognized that the federal government has authority to "prescribe the rule by which commerce is to be governed," even if such regulations displace the policies of other government entities that seek to restrict commerce. *Id.* at 196.

Congress has "exercised its Commerce Clause authority to regulate rail transportation for over a century," beginning with the Interstate Commerce Act of

1887. *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989). Since the beginning of that regulatory regime, the Supreme Court has recognized that railroads are "instruments of interstate commerce," and that Congress may regulate even intrastate rates and routes in light of their "close and substantial relation to interstate traffic." *Houston, E. & W. Tex. Railway v. United States*, 234 U.S. 342, 350-52 (1914). The Interstate Commerce Act was "one of the most comprehensive regulatory plans that Congress has ever undertaken," *United States v. Baltimore & Ohio R.R. Co.*, 333 U.S. 169, 175 (1948), and Congress's regulation of railroads has been "among the most pervasive and comprehensive of federal regulatory schemes," *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). And the Transportation Act of 1920, 41 Stat. 456, further consolidated regulatory power in the federal government, based on congressional findings that "[m]ultiple control in respect of matters affecting such transportation had been found detrimental to the public interest as well as to the carriers," and that "[d]ominant federal action was imperatively called for." *Transit Comm'n v. United States*, 289 U.S. 121, 127 (1933).

Even when Congress deregulated many aspects of the rail industry in the 1970s, it "sought to federalize many aspects of railway regulation that previously had been reserved for the states in an effort to ensure the success of Congress' attempt to deregulate and thereby revitalize the industry." *Cedarapids, Inc. v.*

Chicago, Central & Pacific R. Co., 265 F. Supp. 2d 1005, 1011 (N.D. Iowa 2003). For example, the Staggers Rail Act of 1980 provided that "a state commission may regulate intrastate transportation provided by a rail carrier, but only to the extent that it conforms with the federal Act and only if the ICC determines that the State's proposed regulatory standards and procedures are consistent with federal standards and procedures." *ICC v. Texas*, 479 U.S. 450, 453-54 (1987).

B. Most recently, Congress enacted ICCTA in 1995 to reconfigure federal oversight of the rail, motor carrier, and pipeline industries, and further inject market forces into those sectors. ICCTA created the STB and granted it exclusive authority over railroad rate and service disputes. A core purpose of ICCTA was to ensure the "uniformity" of federal standards and prevent the "balkanization" that would result from a patchwork of overlapping and conflicting state and local regulations. H.R. Rep. No. 104-311, at 95-96 (1995).

Although the STB does not directly regulate rates, it has jurisdiction over rail mergers, line sales, line construction, and line discontinuation or abandonment. *See generally* About STB, https://www.stb.gov/stb/about/overview.html. A railroad may not "construct an extension to any of its railroad lines," "construct an additional railroad line," or "acquire a railroad line," unless the STB issues a certificate

authorizing such activity. 49 U.S.C. § 10901(a), (c).[2] And, as relevant here, a rail carrier may not "abandon any part of its railroad lines" or "discontinue the operation of all rail transportation over any part of its railroad lines" unless the STB "finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance." *Id.* § 10903. Given the critical importance of access to the interstate rail network, ICCTA also provides a mechanism for subsidizing or selling soon-to-be abandoned or discontinued lines to prevent disruptions of service. *Id.* § 10904.

Federal law is clear that the STB has *exclusive* jurisdiction over the economic aspects of rail service. ICCTA states in no uncertain terms that the STB's jurisdiction over "transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules, … practices, routes, services, and facilities of such carriers … *is exclusive*." 49 U.S.C. § 10501(b) (emphasis added); *see also id.* (providing for exclusive STB jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located … entirely in one state"). The

[2] In making such determinations, the STB considers the economic effects of expansion as well as environmental and historic-preservation concerns. *See*, *e.g.*, 49 C.F.R. § 1105.6 (requiring Environmental Impact Statement for rail construction proposals); *id.* § 1105.8 (requiring preparation of a Historic Report).

STB's remedies "with respect to regulation of rail transportation *are exclusive* and preempt the remedies provided under *Federal or State law*." *Id.* (emphasis added).

C. The decision below disregards this clear statutory text and impermissibly grafts "federal common law" claims onto the comprehensive federal regulatory regime. BNSF ably explains why that holding was an erroneous interpretation of the statute. *See* BNSF Br. 26-45. As the district court conceded, issues pertaining to Indian tribes are "the exclusive province of federal law." Doc. 85 at 2. A federal common law claim by a tribe seeking to enjoin rail service across its reservation is thus a paradigmatic "remed[y] provided under Federal or State law" that is barred by the plain text of ICCTA.

Amici will not repeat those statutory arguments here but instead wish to underscore the practical importance of a proper interpretation of ICCTA's exclusive jurisdiction provisions. Given that the rail network is an indispensable channel of interstate commerce, it made sense for Congress to vest regulation of the economic aspects of rail service in a single federal agency. The STB applies clear and uniform standards throughout the country, and takes an appropriately *national* perspective in determining whether rail service should be expanded, modified, or discontinued. Under the federal regulatory regime, disputes over rail service are not seen just as private matters; instead, "public needs must shape the boundaries of [a rail carrier's] duties." *Akron, Canton & Youngstown R.R. Co. v. ICC*, 611 F.2d 1162, 1168 (6th

Cir. 1979). And the STB's administrative proceedings provide for the participation of all interested parties, including the shippers whose businesses depend on reliable access to the rail network. *See*, *e.g.*, 49 C.F.R. § 1152.21 (in an abandonment or discontinuation proceeding, "[i]nterested persons may file a written comment or protest with the Board to become a party" to the proceeding).

By contrast, the "federal common law" adjudication process envisioned by the decision below is not appropriate in this context. Unlike the nationwide, uniform regulatory process before the STB, common law adjudication of rail carriers' duties would be an inherently patchwork, ad hoc system. There would be no clear standards and no ex ante guidance about each party's obligations under federal law. And the adjudication process—as well as any resulting injunctive relief—would unsurprisingly focus on the two parties to the dispute without adequately accounting for the broader economic and regulatory concerns that are implicated when a party seeks to cut off or restrict access to a rail line. *See, e.g.*, *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 144-45 (1946) (requiring railroad to obtain permission from ICC before discontinuing service on a line even though discontinuation was required by a reorganization agreement in a bankruptcy proceeding).

In particular, the "common law" adjudication envisioned by the decision below is unlikely to adequately protect the rights of third parties, including consumers. Any disputes over access to a rail line "involve not only the interests of

the two parties to the … agreement but phases of the public interest as well." *Id.* at 143-44. Countless businesses across all sectors of the economy make investments and choose locations for their facilities in direct reliance on access to freight rail service; a company cannot simply pick up and move its factory or refinery if that rail service is later restricted or discontinued.

Here, for example, the rail line at issue supplies crude oil to two refineries that collectively process more than 250,000 barrels of oil per day and are some of the largest employers and taxpayers in the region. One recent study found that these two refineries support 10-14% of all jobs in Skagit County. *See* Shell Puget Sound Refinery, About Us, https://bit.ly/2OBctrm. And, of course, the resolution of this case will also affect the companies and employees in North Dakota who produce the crude oil processed in the refineries. In any administrative proceeding before the STB, the interests of shippers and other third parties who rely on the interstate rail network would be front and center in determining whether to restrict access to a rail line. But such concerns likely would be absent in the adjudication of a "federal common law" contract or easement action where the only two parties are a railroad and a landowner.

In short, this dispute falls within the core of the STB's exclusive jurisdiction, as the relief sought here would expressly limit both the quantity and the nature of cargo that can be shipped across an interstate rail line. If the Swinomish Tribe has a

complaint about BNSF's service, it can seek relief before the STB through a well-established administrative process that will be open to all affected parties and will take the broader public interest into account in determining whether to restrict service on the line at issue. But what the Tribe cannot do is obtain an unprecedented order from a federal court dictating the quantity and nature of goods that can be shipped through a critical channel of interstate commerce.

II. The Decision Below Threatens Shippers' Common-Carriage Rights.

In addition to disrupting the exclusive federal regulatory scheme regarding the economic aspects of rail service, the decision below also threatens to undermine longstanding federal policies regarding common carriage and the transportation of hazardous materials.

A. Federal law governing rail transportation has long incorporated the common-law principle of common carriage. In short, rail carriers may not pick and choose their customers or cargo. Instead, "a rail carrier providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board … shall provide the transportation or service on reasonable request." 49 U.S.C. § 11101(a); *see also Pa. R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 133 (1914) ("The common law of old, in requiring the carrier to receive all goods and passengers, ... is applicable to those who transport freight in cars drawn by steam locomotives."). "If a line of rail track has not been abandoned or embargoed, there

is 'an absolute duty to provide rates and service over the [l]ine upon reasonable request,' and a 'failure to perform that duty [is] a violation of section 11101.'" *Riffin v. STB*, 733 F.3d 340, 347 (D.C. Cir. 2013).

Railroads' common-carriage obligations apply with full force to transportation of hazardous materials. Hazardous materials are essential to the U.S. economy, and are integral to the agriculture, energy, manufacturing, mining, and public utility sectors. For example, chemicals such as chlorine gas or anhydrous ammonia can be toxic when inhaled but are critical to a wide array of economic activity. Anhydrous ammonia is the most cost-effective and widely used fertilizer source in the agricultural sector; a single rail car of anhydrous ammonia can provide fertilizer for 128,000 bushels of corn. *See* Anhydrous Ammonia Faces Challenges in Rail Transport, *Corn+Soybean Digest* (Mar. 25, 2010), https://bit.ly/2OBj5Gf. Similarly, chlorine is indispensable to municipal water systems, which use this chemical to kill bacteria in both wastewater and drinking water. *See* Wastewater Chlorination: An Enduring Public Health Practice, American Chemistry Council, https://bit.ly/2AYTseN. And, with the rise of highly efficient hydraulic fracturing techniques for extracting oil, the interstate rail network is increasingly used to transport crude oil from wells in North Dakota and Montana to refineries elsewhere in the United States.

Federal regulatory agencies and the courts have repeatedly rejected efforts by railroads to limit their carriage of hazardous materials. *See, e.g.*, *Actiesselskabet Ingrid v. Central R. Co. of N.J.*, 216 F. 72, 78 (2d Cir. 1914) (noting railroad's common-carrier obligation to transport dynamite). For example, in the 1970s, several railroads refused to publish tariffs for the carriage of spent nuclear reactor fuel. The ICC found that this refusal violated the railroads' common-carriage obligations, and the courts affirmed. *See, e.g.*, *Akron, Canton & Youngstown R.R. Co. v. ICC*, 611 F.2d 1162 (6th Cir. 1979); *Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1981). American railroads currently transport more than 2 million carloads of hazardous materials per year. *See* GAO, Hazardous Materials Rail Shipments: A Review of Emergency Response Information in Selected Train Documents, at 1 (Dec. 2016), https://bit.ly/2QzxmFd.

Federal law bookends railroads' common-carriage obligation with exhaustive safety regulations regarding the transportation of hazardous materials. The Pipeline and Hazardous Materials Safety Administration ("PHMSA") within the Department of Transportation develops and enforces regulations for the safe, reliable, and environmentally sound transportation of hazardous materials by land, sea, and air. *See* 49 C.F.R. Parts 105-180. As long as "these regulations have been met," a rail

carrier may not decline carriage on the ground that "a commodity is absolutely too dangerous to transport." *Akron, Canton & Youngstown R.R. Co.*, 611 F.2d at 1169.[3]

B. These longstanding principles of common carriage are directly relevant here, for several reasons. First, plaintiff's complaint seeks relief that would upend the balance struck by federal law with regard to the transportation of hazardous materials. Whereas federal law *mandates* that rail carriers accept shipments of hazardous materials subject to stringent safety standards, plaintiff seeks to *prohibit* such shipments altogether. The complaint expressly states that it is seeking an injunction barring BNSF "from shipping Bakken Crude [oil] over the Reservation." Doc. 1 at 13. And the complaint does not mince words about its rationale for seeking to ban such shipments: the Tribe simply disagrees with the current federal safety standards for crude oil shipments and believes they should be more stringent. *See id.* at ¶¶ 3.19-3.26 (arguing that existing safety standards for rail cars are "not as robust as is needed").

That is *precisely* the type of argument that courts and federal agencies have repeatedly rejected. In *Akron, Canton & Youngstown*, for example, the Sixth Circuit

[3] Recognizing that many common carriers transport hazardous materials only because they are required by law to do so, most states recognize a "common carrier defense" to tort liability, under which a carrier will not be held liable for damage resulting from the transportation of hazardous materials as long as it did not act negligently. *See*, *e.g.*, Stephen J. Foland, *Common Carriage and Liability in the Rail Transportation of Toxic Inhalation Hazard Materials*, 8 Ave Maria L. Rev. 197, 207-08 & nn. 61-63 (2009) (collecting sources).

affirmed an Interstate Commerce Commission ("ICC") order finding that any "inquiry into the risks involved in the transport of nuclear materials must be limited to determining if the shipments meet the requirements of the Department of Transportation and the Nuclear Regulatory Commission." 611 F.2d at 1169. As the court explained, a "carrier's general assertion that shipments meeting DOT and NRC safety standards might be too hazardous to transport" was an "impermissible 'collateral attack' on the regulations of DOT and NRC." *Id.* If a carrier is unhappy with the safety regulations, its remedy is "'to seek approval of a stricter practice'" before the federal agency, not to "refuse to haul any materials which meet [the] standards." *Id.* Allowing a *landowner* to block shipments of specific products based on its own second-guessing of federal safety standards would directly conflict with the clear federal policy of ensuring that the channels of interstate commerce remain open to all lawful products, including hazardous materials.[4]

Indeed, plaintiff's complaint provides a road map for *railroads* to skirt their common-carrier obligations and refuse to carry hazardous materials. Many rail

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[4] Federal regulators may also conclude that the risks of transporting hazardous materials by rail are less than the risks of using alternative means of transportation such as long-haul trucking. Both industry groups and regulators have acknowledged that rail transportation is generally safer than other means of transporting hazardous materials. *See, e.g.*, Comments of the U.S. Department of Agriculture, Common Carrier Obligation of Railroads—Transportation of Hazardous Materials: Hearing Before the Surface Transp. Bd., STB Ex Parte No. 677 (Sub. No. 1), at 8-9 (July 22, 2008), *available at* https://bit.ly/2R5L4j2.

carriers would likely decline to transport certain types of hazardous materials if the law did not require them to do so. If the decision below is upheld, a railroad could simply sign a contract with a tribe that prohibits transporting hazardous materials across the reservation, then invoke that agreement to decline carriage of the materials. But the whole purpose of the longstanding common-carriage regime is to ensure that railroads *cannot* pick and choose which products may be shipped over a rail line.

Allowing this suit to go forward would also be contrary to longstanding precedent holding that railroads and landowners may not enter into contracts that limit the types of traffic that may pass over a rail line. *See Akron, Canton & Youngstown R. Co.*, 611 F.2d at 1167 ("[E]ven at common law, a carrier could not put off its common-carrier status by mere contractual provision."). For example, in *United States v. Baltimore & Ohio R.R. Co.*, 333 U.S. 169, 171-72 (1948), Swift & Company had a meatpacking plant in Cleveland that accessed the main line rail network via a sidetrack. But that sidetrack could be reached only via a spur track that was owned by the Cleveland Union Stock Yards Company, one of Swift's competitors. The Stock Yards sought to use its ownership of this track to impose additional fees on deliveries of livestock to Swift.

The ICC readily rejected that maneuver and the Supreme Court affirmed. The railroads sought to justify their actions on the ground that "an owner has a right to

let others use his land subject to whatsoever conditions the owner chooses to impose," and the owner of the track "required them to do the prohibited things." *Id.* at 176-77. But the Court found that the railroads' common-carrier obligations under federal law "cannot be subordinated to the command of a track owner that a railroad using the track practice discrimination." *Id.* at 177. The "noncarrier owner of a segment of railroad track … [cannot] reserve a right to regulate the type of commodities that the railroad may transport over the segment." *Id.* at 175. In short, "Stock Yards' ownership of Track 1619 does not vest it with power to compel the railroads to operate in a way which violates the Interstate Commerce Act." *Id.* at 177-78.

Just so here. Even if the agreement between BNSF and the Swinomish Tribe could be construed to limit the shipment of certain types of goods across the reservation, *but see* BNSF Br. 56-64, any such contract would be contrary to longstanding federal policy and BNSF's obligations as a common carrier. Federal law squarely prohibits agreements to limit the types of cargo that may be shipped across an interstate rail line regardless of whether a railroad or landowner deems that cargo to be hazardous or disagrees with the federal safety standards for handling and transporting such materials.

Allowing the decision below to stand would have broad implications beyond the litigants in this case, as there are numerous rail lines that pass through the

nation's 326 Indian reservations (which collectively include more than 50 million acres of land). As noted, one of the express goals of the complaint is to obtain a permanent injunction barring BNSF "from shipping Bakken Crude [oil] over the Reservation." Doc. 1 at 13. Although the Swinomish Tribe objects to crude oil shipments, the next tribe may object to shipments across its property of anhydrous ammonia or chlorine. Another tribe may object to shipments of genetically modified foods or seeds based on its own assessment of the safety of such products. And others may refuse to allow shipments that originate or terminate at a facility such as a nuclear reactor or coal-fired power plant. If the courts open the door to unprecedented claims seeking to limit the goods that can be shipped across an interstate rail line, the effects will inevitably reach beyond the four corners of this case.

CONCLUSION

One of the paramount obligations of the federal government is to protect the *national* economy by ensuring open access to the channels of interstate commerce. Congress has done just that through ICCTA, by establishing a uniform, exclusive federal process to oversee disputes over rail service. Allowing the decision below to stand would impermissibly supplement and circumvent that national regulatory regime with a patchwork of ad hoc common law suits seeking to dictate the quantity and nature of goods that can be shipped over rail lines. The decision below is deeply

flawed as a matter of law and poses serious risks to the countless businesses that rely on the interstate rail network to reach their customers and suppliers. This Court should reverse the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits because it contains 5,023 words, excluding the parts exempted by Rule 32(f). This brief complies with the typeface and type-style requirements because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

November 21, 2018 /s/ *Jeffrey M. Harris* .

CERTIFICATE OF SERVICE

I certify that on November 21, 2018, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

November 21, 2018 /s/ *Jeffrey M. Harris* .