Case No. A165104

In the Court of Appeal of the State of California
First Appellate District

MENDOCINO RAILWAY,
Petitioner and Defendant,

v.

MENDOCINO COUNTY SUPERIOR COURT,
Respondent,

CITY OF FORT BRAGG,
Real Party in Interest and Plaintiff.

SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF PETITION

From an April 28, 2022, Order Overruling Demurrer and Allowing Action To Proceed Absent Subject Matter Jurisdiction

Mendocino County Superior Court No. 21CV00850
The Hon. Clayton L. Brennan, Dept: "Ten Mile," (707) 964-3192

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I. INTRODUCTION

Petitioner Mendocino Railway ("MR") has established that it is entitled to writ review of the Superior Court's demurrer ruling. Under relevant precedents of the California Supreme Court and Courts of Appeal, writ review is appropriate in a limited circumstances, including when (1) the petition raises an important question of subject matter jurisdiction, or (2) when writ review will result in a final disposition of the litigation. Both factors are present here and militate strongly in favor of review.

Real Party City of Fort Bragg ("City") spends the majority of its brief expounding upon the unremarkable proposition that an appeal from a final judgment is presumed to be an adequate remedy, making writ review rare. It cites case after case to that effect. But the City notably fails to cite a *single* decision denying writ review in a case—like this one—in which the petitioner challenged the Superior Court's subject matter jurisdiction

On the merits of MR's petition, state law clearly precludes a Superior Court action that would interfere with the ongoing jurisdiction and decisions of the California Public Utilities Commission ("CPUC"). (Pub. Util. Code § 1759(a)). By the City's own admission, its lawsuit seeks to strip MR of its current status as a CPUC-regulated public utility and subject the railroad to all City authority, jurisdiction, and regulation. (Exh. 1, pp. 4, 9.) Under section 1759(a) of the Public Utilities Code, the Superior

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Court has no subject matter jurisdiction over that kind of direct challenge to CPUC authority, and nothing in the City's opposition brief establishes otherwise.

Finally, on the question of whether the CPUC should be named as a "real party in interest" to this writ proceeding, the parties agree: the CPUC is not a real party in interest. But, if this Court deems that it is, the parties also agree the CPUC may be added.

For these reasons, and those stated in MR's Petition and Supplemental Opening Brief, the Court should issue a peremptory writ commanding the Superior Court to vacate its order overruling MR's demurrer and dismiss the City's case with prejudice.

II. ARGUMENT

A. The CPUC Is Not a "Real Party in Interest" to This Writ Proceeding

The CPUC is not a real party in interest to this writ proceeding; even if it were, it could be added to the proceeding. The City agrees. (City Opp. at 11.) Nevertheless, the City takes issue with MR's reasoning, which it erroneously describes as "internally [in]consistent." (Opp. at 11.)

The City contends that, if the CPUC is not a real party to this writ proceeding, then the CPUC cannot be (as MR argues) an indispensable party in the underlying Superior Court action. But

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that is incorrect. The Superior Court action directly challenges MR's current status as a CPUC-regulated public utility. The Complaint repeatedly concedes as much. (Exh 1., p. 4 (MR "is no longer entitled to status as a public utility."); *id.*, p. 5 ("MR "is currently listed as a class III railroad by [the CPUC], and as such is subject to CPUC jurisdiction and has all legal rights of a public utility.").)[1] Therefore, the City's challenge "*directly* affect[s]" the CPUC's ongoing rights and obligations vis-à-vis a presently regulated public utility, making it an indispensable party if said challenge proceeds in the Superior Court. (*Sonoma County Nuclear Free Zone v. Superior Court* (1987) 189 Cal.App.3d 167, 173 (emphasis added).)

By contrast, this writ proceeding presents the far narrower question of whether the Superior Court erred in overruling MR's demurrer—and who must participate in such proceeding is similarly cabined. Section 1107 of the Code of Civil Procedure indicates that the parties to an emergency writ proceeding are (1) the petitioner, (2) the respondent Superior Court, and (3) the real party whose interests are affected by *issuance* of the writ and who therefore has standing to *oppose* the petition. (Code of Civ.

[1] The City now shies away from the admissions in its Complaint, claiming they are (presumably mistaken) "legal conclusions." (Opp. Br., p. 33 n.2.) But whether an entity is currently being regulated by a state agency—through routine safety and operational inspections and otherwise—is clearly a question of fact, not of law. As such, the City has made judicial admissions to which it is bound.

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Proc. § 1107 (referring to "real party *in respondent's interest*" and the right of "the real party in interest" to "file with the court points and authorities in *opposition to the granting of the writ*" (emphasis added)); *see also* Cal. R. Ct., Rule 8.487 (describing "real party" as a party who, like respondent, would be in the position of *opposing* the petition).). As one California treatise put it, the "real party in interest" in a writ proceeding is the "party having interests that will be directly or adversely affected *if the writ is issued* and therefore has standing to appear in the proceeding and *oppose* the petition." (31 California Forms of Pleading and Practice—Annotated § 358.14 (2022) (citing Code of Civ. Proc. § 1107).)

Here, MR has named the only real party whose interests would be affected by issuance of the writ: the City. On the other hand, issuance of the writ would result simply in dismissal of the City's challenge and restoration of the *status quo ex ante* (i.e., before the City filed its action in Superior Court); therefore, issuance of the writ would not directly, let alone adversely, affect the CPUC's interests so as to render it an opponent of MR's petition. The CPUC need not be joined.

Further, even if a real party *in petitioner's* interest were required to join this proceeding, the CPUC still would not meet the "real party" definition. For the reasons described above, issuance of the writ would not directly affect the CPUC's

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interests in any way. Nor would the denial of the writ—whether summarily[2] or on the merits. (*Sonoma*, 189 Cal.App.3d at 173.) The City raises the specter that this Court may deny the writ on the same ground as the Superior Court's—i.e., that MR is not currently a CPUC-regulated public utility. (Opp. Br. at 13.) Of course, such a conclusion would run counter to the City's own admissions and the CPUC's official documents. (*E.g.*, Exh. 1, pp. 4, 5; Exh. 5, pp. 41, 48, 51, 61-62.) But even in that case, writ denial would—at most—only *indirectly* affect the CPUC's interests by allowing a Superior Court challenge to MR's "public utility" status to resume in that forum. (*Gutierrez v. Guam Election Comm'n*, 2011 Guam 3, *24 (2011) (holding that writ proceeding did not "*directly* affect[]" third parties so as to render them "real parties in interest," because of "the limited scope of the relief requested") (emphasis in original)).) Unlike the Superior Court declaration and injunction that the City seeks below (Exh. 1, p. 9), writ denial is not an order to the MR or the CPUC to do (or refrain from doing) anything, or to otherwise alter their regulatory relationship.

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[2] Summary denials are not even law of the case. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 895-898.)

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B. This Case Calls Out for Writ Review

1. The Petition Raises an Important Question of Subject Matter Jurisdiction Whose Resolution Will Result in a Final Disposition, Making Writ Review Appropriate

The City spills much ink discussing the general rule that an appeal from a final judgment is presumed adequate, and writ review is rare. (*See, e.g.*, Opp. Br., pp. 16-27.) It cites a litany of precedents to that effect, none of which preclude writ review here. (*Id.*) Notably, in none of those cited cases did the Court of Appeal or Supreme Court *deny* review in a challenge to the Superior Court's subject matter jurisdiction.

The reason is simple: Although writ review may be rare, a well-established exception exists for petitions based on the absence of a lower court's subject matter jurisdiction. (*San Diego Gas & Electric Co. v. Superior Court ("Covalt")* (1996) 13 Cal.4th 893, 913 (favorably describing "the exception to this rule [against extraordinary writ review] that has been recognized when the demurrer raises an important question of subject-matter jurisdiction"); *Harden v. Superior Court of Alameda County* (1955) 44 Cal.2d 630, 635 ("It is the general rule that the remedy in the ordinary course of law by an appeal from the judgment at the end of the trial is not adequate when the court has no jurisdiction to proceed with the action and no appeal is available before final judgment."); *Providence Baptist Church v. Superior*

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Court (1952) 40 Cal.2d 55, 60 (same); *see also City & County of San Francisco v. Superior Court* (1951) 38 Cal.2d 156, 160 ("[T]his court may act in a proper case when it appears that otherwise a failure of justice will occur in a matter of public importance by a wrongful or excessive exercise of jurisdiction.").)

This "subject matter jurisdiction" exception is part of a broader category of cases in which reviewing courts will grant emergency review if "resolution of the issue would result in a final disposition as to the petitioner." (*Boy Scouts of America National Foundation v. Superior Court* (2012) 206 Cal.App.4th 428, 438; *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185 (same).) In such cases, "the unreasonableness of the delay and expense" of being "compelled to go through a trial and appeal from a final judgment" is "apparent." (*Fogarty v. Superior Court* (1981) 117 Cal.App.3d 316, 320.[3])

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[3] The City mischaracterizes *Fogarty* as holding that a necessary predicate for writ review is that the petition implicate the public interest. (Opp. Br., p. 22.) That decidedly is not what *Fogarty* says. The "public interest" may be a sufficient, but not a *necessary*, condition of writ review. (*Fogarty*, 117 Cal.App.3d at 320-21 ("Where there is no direct appeal from a court's adverse ruling, and the aggrieved party would be compelled to go through a trial and appeal from a final judgment, the unreasonableness of the delay and expense is apparent. As in prohibition, the remedy by appeal is usually deemed inadequate in these situations, and mandamus is allowed. In the instant case, another factor is present which has influenced courts to proceed by extraordinary writ; that is the factor of public interest.").)

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That is precisely the case here. A writ directing the Superior Court to sustain MR's demurrer for lack of subject matter jurisdiction would result in a final disposition—namely, dismissal of the City's challenge to MR's "public utility" status. And a writ would avert "the unreasonableness of the delay and expense" of MR's having to "go through a trial" over which the Superior Court has no power to preside in the first place, and then to appeal from a final judgment.[4] (*Fogarty*, 117 Cal.App.3d at 320.) Precedents such as *Covalt*, *Boy Scout*, and *Fogarty* govern this petition, and militate strongly in favor of writ review.

The City seeks to avoid writ review by significantly downplaying the nature and legal effect of the Superior Court's demurrer ruling. (Opp. Br., pp. 27-28.) The ruling is based unequivocally on the Superior Court's (incorrect) factual conclusion that MR is not currently a CPUC-regulated public utility; that conclusion was, in turn, based on an (incorrect) legal interpretation of a 1998 CPUC decision. (Exh. 13, 173-74). Specifically, the Superior Court found, contrary to the City's

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[4] The City argues that writ review of "all non-appealable orders" could be justified on the basis of avoiding the unnecessary delay and expense of a trial. (Opp. Br., p. 22.) That is patently untrue. Writ review of most non-appealable orders, including most discovery rulings, cannot be justified on the grounds that it averts the undue delay and expense of a trial. Few are the writ petitions that, if granted, would result in the final disposition of a case without the delay and expense of a trial. Those based on the absence of a Superior Court's subject matter jurisdiction, like MR's petition, are among the few.

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admissions and the CPUC's own list of regulated railroads that includes MR, that MR is not presently functioning as a public utility and is not subject to CPUC regulation in that capacity." (Exh. 13, p. 173.) The court grounded its conclusion in a January 21, 1998 CPUC decision, wherein (according to the court) "the CPUC has already found that [MR] should not be subject to its regulation." (Exh. 13, p. 174.)

Contrary to the City's denials, the demurrer ruling necessarily sows confusion and uncertainty. As the City's Complaint and CPUC documents establish, the CPUC *has* long regulated MR as a public-utility railroad.[5] Yet the Superior Court's ruling calls into question MR's status as a CPUC-regulated public utility. If, as the Superior Court erroneously ruled, "MR is not presently functioning as a public utility and is not subject to CPUC regulation in that capacity," then on what legal basis has the CPUC been regulating MR all this time? How does the ruling affect "all [the] legal rights of a public utility" that (as the Complaint admits) MR has enjoyed until now, including

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[5] Exh. 1, p. 4 ("Mendocino Railway is no longer entitled to status as a public utility."); *id.*, p. 5 ("Mendocino Railway . . . is subject to CPUC jurisdiction and has all legal rights of a public utility."); Exh. 5, p. 41 (CPUC list including MR as a CPUC-regulated railroad); *id.*, p. 48 (1/21/98 CPUC Decision holding that "commuter service" and "safety of operation of all services . . . shall remain subject to regulation by the Commission"); *id.*, pp. 61-62 (5/21/98 CPUC Decision assuming jurisdiction over line now owned by MR that predecessor used to "transport[] passengers and freight").

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the power of eminent domain? (Exh. 1, p. 5; *see also* Pub. Util. Code § 311 (giving public-utility railroads power of eminent domain).) The City provides no answers.

The City also contends that "all" the demurrer ruling does is "permit the City's action to proceed." (Opp. Br., at 28.) It is true that the Superior Court had no authority on a demurrer to grant the ultimate relief sought by the City—namely, a declaration and injunction stripping the CPUC of jurisdiction over the MR and substituting the City for the CPUC as the railroad's regulator-in-chief. But, in its brief, the City ignores the *practical* effects of the Superior Court's misguided statements and flawed reasoning underpinning its ruling, as described in the Supplemental Opening Brief (pp. 20-21) and above.

Next, the City denies that the ruling "involve[] important issues." (Opp. Br., p. 28.) It certainly does. Similar to *Covalt*, 13 Cal.4th 893, the demurrer ruling implicates the rights and obligations of three public and quasi-public entities: the City, MR (a public utility that is "akin to a government entity"[6]), and the

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[6] Contrary to the City's mischaracterization, MR never claimed to be a "governmental entity," but rather a "*quasi-public entit[y]*" (Supp. Op. Br., p. 14 (emphasis in original).) "In California a public utility is in many respects more akin to a government entity." (*Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 469.) Indeed, public utilities have many of the same powers as governments, including the power of eminent domain. (*See, e.g.*, Pub. Util. Code § 311 ("A railroad corporation may condemn any property necessary for the construction and maintenance of its railroad.").)

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CPUC (a government entity). The ruling answered an important question—i.e., whether the City's action threatens to interfere with the CPUC's jurisdiction, thereby divesting the Superior Court of subject matter jurisdiction.

Finally, the City takes issue with the plain meaning of section 1086 of the Code of Civil Procedure and the case law interpretating it. Section 1086 provides that a writ "must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (Code of Civ. Proc. § 1086.) Put differently, a legal remedy must be "plain, speedy, *and* adequate" for it to preclude writ relief. (*Id.* (emphasis added).) For example, if the legal remedy is plain and adequate, but not speedy, the writ must issue. (*Id.*; s*ee also Kawasaki Motors Corp. v. Superior Court* (2000) 85 Cal.App.4th 200, 206 ("The alternative remedy must not only be 'adequate,' it must also be 'plain' and 'speedy.'").) The City complains that applying section 1086's plain meaning would somehow "supplant" all the authorities it cites in its opposition brief. But that does not follow. In the vast majority of cases, a normal appeal from a final judgment will be deemed *sufficiently* plain, speedy, and adequate to preclude writ relief.

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2. The City's Authorities Do Not Bar Writ Review, As Compelled by *Covalt*

The City liberally block-quotes from one case in particular—*Omaha Indemn. Co. v. Super. Court* (1989) 209 Cal.App.3d 1266. (*See, e.g.*, Opp. Br., pp. 23-24.) But *Omaha* offers little guidance here. In *Omaha*, the Court of Appeal initially denied a writ ordering the Superior Court to sever certain claims. (*Omaha*, 209 Cal.App.3d at 1269.) The Supreme Court reversed, directing the Court of Appeal to issue an alternative writ requiring severance. (*Id.*) The Court of Appeal reluctantly complied, but not before discussing—in *dictum*—the circumstances under which writ review might be appropriate. (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 287 ("Dictum is the 'statement of a principle not necessary to the decision." (internal citation and quotation marks omitted)).)

Further, *Omaha*'s concerns about writ review occurring absent a "complete record" and "more time for deliberation," in spite of the possibility of the issues "diminish[ing] in importance," don't apply here. The fact that MR is presently a CPUC-regulated public utility has been conceded by the City and is reflected in CPUC documents. (Exh. 1, pp. 4, 5; Exh. 5, pp. 41, 48, 51, 61-62.) Given that indisputable fact, the only question for the Court is legal: Is the Superior Court precluded from adjudicating a dispute over MR's status and issuing a declaration that MR is "no longer" a public utility that the CPUC may regulate (Exh. 1, p.

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4)? In these circumstances, writ review is not barred by the prospect of an expanded record or the need for more time to deliberate, and the issue before this Court (the lower court's power to hear the City's challenge) will not diminish over time.

Finally, it must be noted that the City has taken great liberties in describing the holdings of cases cited in its brief. For example, the City describes *American International Group, Inc. v. Superior Court* (1991) 234 Cal.App.3d 749 as standing for the proposition that "***[o]nly*** when 'the issue raised is one of significant legal import,' might it be appropriate for consideration of writ relief." (Opp. Br. , p. 26 (emphasis added) (quoting *American International*, 234 Cal.App.3d at 755).) But *American International* says no such thing. The case does not in any way limit writ review "only" to issues of "significant legal import." Rather, the petition in that case happened to raise an issue of significant legal import, which the Court deemed to be a proper ground—but certainly not the *only* proper ground—justifying writ review. (*American International*, 234 Cal.App.3d at 755.)

Consider, too, the City's misleading characterization of *Interinsurance Exchange of the Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218. (Opp. Br., p. 26.) The City suggests that *Interinsurance* stands for the proposition that a review-worthy petition must "'raise[] a novel issue of law' or be of 'widespread interest.'" (*Id.* (quoting *Interinsurance*, 148

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Cal.App.4th at 1225).) But the City deliberately omits language from *Interinsurance* reaffirming that those are just two factors justifying writ review and that other considerations—like whether "resolution of the issue would result in a final disposition"—also justify writ review. (*Interinsurance*, 148 Cal.App.4th at 1225 (quoting *Casteron*, 101 Cal.App.4th at 182).)

3. This Case Is Not Amenable to a Speedy Resolution, Further Making an Ordinary Appeal Inadequate, and Denial of a Writ Will Cause Irreparable Harm

In its Supplemental Opening Brief, MR explains why the case is not amenable to a speedy resolution in the normal course, and why the denial of a writ would cause it irreparable harm. (Supp. Op. Br., p. 16-21.) The City barely addresses these issues, and when it does, it falls short.

For example, the City does not dispute that its allegations that MR is no longer a public-utility railroad are hotly contested. In response to MR's point that such allegations will be subject to discovery and ultimately a trial on the merits, the City offers a non-sequitur: The Superior Court's *final judgment* may rest, not on disputed issues of fact, but on its legal interpretation of a January 1998 decision of the CPUC (purportedly) holding that MR is not a public-utility railroad. (Opp. Br., p. 22 n.1.) Of course, as explained below, the CPUC's decision says no such thing; quite the contrary, the decision, if anything, upholds the

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public-utility status of the railroad line currently owned by MR. (Exh. 5, 44, 48.) In any event, a final judgment won't come until *after* discovery, *after* pre-trial motions, and *after* a trial on the merits. "[T]he unreasonableness of the delay and expense" of being "compelled to go through a trial and appeal from a final judgment" is "apparent." (*Fogarty*, 117 Cal.App.3d at 320.)

On the question of harm from the denial of a writ, the City's response is similarly underwhelming. It doesn't appear to deny any of the harms identified, but objects that they concern matters outside the record. Naturally, they do. The question of irreparable harm did not arise until this writ proceeding; there was no occasion to consider such harm in the context of the demurrer before the Superior Court.

C. The Petition Is Meritorious

The Petition and Supplemental Opening Brief explain at great length why the Superior Court lacks subject matter jurisdiction under section 1759 of the Public Utilities Code to adjudicate the City's challenge. None of the City's arguments to the contrary have merit. This reply brief addresses the City's main arguments.

First, the City argues that its Superior Court action and the demurrer ruling do not interfere with the CPUC's rights and obligations, but only "further[] . . . the CPUC's decision about MR." (Opp. Br., at 30.) The City means the January 21, 1998,

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decision of the CPUC—which was not "about MR," but about the rail line's prior owner, California Western Railroad, Inc. ("CWR").

CWR had applied to the CPUC for deregulation of the "scheduling and fares" of CWR's "excursion passenger service." (Exh. 5, p. 44.) The CPUC granted the application. But it expressly retained jurisdiction over the entire line, holding: "The safety of the operation of all services, including excursion passenger service, shall remain subject to regulation by the Commission." (*Id.*, p. 48.) In addition, the CPUC retained jurisdiction over the scheduling and fares associated with the line's "commuter service." (*Id.*, pp. 48, 61-63.)

Even if the January 1998 decision were about MR (which it clearly was not), the decision—if anything—*supports* the fact that CPUC has retained jurisdiction over the rail line now owned by MR. The CPUC regulates the scheduling and fares of the line's freight and passenger service, and the operational safety of the entire railroad. (Exh. 5, pp. 41, 48.) A judicial declaration that MR "is no longer entitled to status as a public utility," and an injunction subjecting MR to "all City ordinances, regulations, and lawfully adopted codes, jurisdiction and authority" (Exh. 1, pp. 4, 9), necessarily would "enjoin, restrain, or interfere with the [CPUC] in the performance of its official duties"—namely, its regulation and periodic inspection of MR.

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Second, the City claims that section 1759(a) does not bar Superior Court jurisdiction over its challenge, because the CPUC has not exercised any authority "in a rule, decision or order." (Opp. Br., p. 36.) Relatedly, the City claims that MR "has cited no specific regulation or authority of the CPUC that would preclude judicial jurisdiction in this matter." (*Id.*, p. 37.) The City misses the forest for the trees.

The Complaint admits that MR is a CPUC-regulated railroad, with all the rights of a public utility. (Exh. 1, pp. 4-5.) The CPUC itself lists MR as a regulated railroad. (Exh. 5, p. 41.) And even the January 1998 CPUC decision the City heavily relies upon *reaffirms* the CPUC's continued jurisdiction over the rail line now owned by MR. (Exh. 5, p. 48.) Contrary to the City's claim, the Supplemental Opening Brief cites *specific regulations* and *authority* that the CPUC implements vis-à-vis MR, as a public-utility railroad. (Supp. Op. Br., p. 11.)

The Complaint specifically seeks a "judicial declaration regarding the *validity* of the Mendocino Railway's status as a public utility." (Exh. 1, p. 4.) It wants a declaration that MR "is no longer entitled to status as a public utility." (*Id.*) On these undisputed facts, section 1759(a) bars the Superior Court from taking jurisdiction over the City's action, which purports to "enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules

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of court." (Pub. Util. Code § 1759(a).) "[O]nce assumed," the CPUC's jurisdiction "cannot be hampered or second-guessed by a superior court action addressing the same issue." *Anchor Lighting v. Southern California Edison Co.* (2006) 142 Cal.App.4th 541, 548.

Third, the City appears to concede that the CPUC has jurisdiction over Mendocino Railway, but not as a "public utility." (Opp. Br., pp. 46-47.) The City argues that the CPUC regulates railroads whether or not they are public utilities. As an example, it cites to the CPUC's collaboration with the Federal Railroad Administration ("FRA") to ensure railroad safety. (Opp. Br., p. 41.) But the City misunderstands the legal framework governing the CPUC's regulation of railroads, including for rail safety.

Under the Public Utilities Code, all "railroads" are "public utilities." The Code defines "railroad" as a "railway" operated "for public use in the transportation of persons or property." (Pub. Util. Code § 229.) The Code, in turn, labels a "railroad" meeting that definition as a "common carrier." (Id. § 211.) A "common carrier" is a kind of "public utility." (*Id.* § 216.) Thus, if an entity is a "railroad," it is a public utility under state law. And, when the CPUC assumes jurisdiction over and regulates a "railroad"—like Mendocino Railway—it is regulating a public utility. (Exh. 5, p. 41.)

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That the CPUC regulates for railroad safety in cooperation with the Federal Railroad Administration does not alter this conclusion. For a state agency like the CPUC to partner with the FRA, the agency must have "jurisdiction under State law to participate in investigative and surveillance activities concerning Federal railroad safety laws and regulations," as well as "the safety practices of the facilities, equipment, rolling stock, and operations of railroads in that State." (49 C.F.R. §§ 212.103(a)-(b), 212.105(e).) Of course, the Code confers plenary regulatory authority on the CPUC to ensure the safety of "railroads" in the State; on that statutory basis, the CPUC is able to and does collaborate with the FRA. For example, section 309.7 of the Public Utilities Codes states:

> The division of the commission responsible for railroad safety shall be responsible for inspection, surveillance, and investigation of the rights-of-way, facilities, equipment, and operations of railroads and public mass transit guideways, and for enforcing state and federal laws, regulations, orders, and directives relating to transportation of persons or commodities, or both, of any nature or description by rail.

(Pub. Util. Code § 309.7(a).)

Similarly, in Chapter 4 of the Code—appropriately entitled "Regulation of Public Utilities"—the CPUC is charged with "tak[ing] all appropriate action necessary to ensure the safe operation of railroads in this state." (*Id.* § 765.5). Again, "railroads"—as used and defined in the Code—are "public

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utilities." Thus, when the CPUC regulates for railroad safety, either alone or in cooperation with the FRA, it is regulating the railroad *as a public utility*. And, when the CPUC expressly affirmed railroad-safety jurisdiction over all operations of the rail line now owned by MR, it did so on the basis of the railroad's status as a public utility subject to the agency's jurisdiction. (Exh. 5, p. 48.)

Citing section 216(a)(1) of the Code, the City observes that the Code's definition of "public utility" specifically identifies a number of corporations—such as toll, water, sewer system, telephone, and other corporations—but not "railroad corporation." (Opp. Br., p. 47.) The City overlooks the fact that section 216(a)(1) identifies—*as the first kind of public utility*—"every common carrier," which by definition includes "[e]very railroad corporation." (Pub. Util. Code § 211(a).) Again, railroads are public utilities.

The City also finds no support in *City of St. Helena v. Pub. Util. Comm'n* (2004) 119 Cal.App.4th 793. There, the City of St. Helena successfully challenged the Napa Valley Wine Train's status as a public utility subject to the CPUC's jurisdiction. (*Id.* at 803.) The Court of Appeal did not say, as the City claims, that "the CPUC could retain certain authority over *non-public utility* trains." (Opp. Br., p. 46.) To the contrary, the Court of Appeal

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declined to decide that issue.)*City of St. Helena*, 119 Cal.App.4th at 801 n.4.)

It is worth noting to additional points in regard to *City of St. Helena*. First, the city in that case challenged a rail line's "public utility" status before the CPUC, then appealed directly to the Court of Appeal; the city did not improperly initiate its challenge in Superior Court. Second, the CPUC has honored the *City of St. Helena* decision. It does not list Napa Valley Wine Train as a CPUC-regulated railroad. (Exh. 5, p. 41.) If *City of St. Helena* stood for the proposition that the CPUC has jurisdiction over "non-public utility railroads" (a contradiction in terms), then why would the CPUC disavow jurisdiction over the Wine Train as a regulated railroad? The City has no answer.

III. CONCLUSION

The Court should issue a peremptory writ commanding the Superior Court to vacate its order overruling MR's demurrer and dismiss the City's case with prejudice.

DATED: May 31, 2022. FISHERBROYLES LLP

s/ Paul J. Beard II

Attorneys for Defendant and Petitioner

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Certificate of Compliance

I hereby certify that the foregoing SUPPLEMENTAL REPLY BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 4993 words.

DATED: May 31, 2022

PAUL J. BEARD II

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Declaration of Service

I, Paul Beard II, declare as follows:

I am over the age of 18 years and am not a party to the above-entitled action. My business address is 4470 W. Sunset Blvd., Suite 93165, Los Angeles, CA 90027.

On May 31, 2022, a true copy of SUPPLEMENTAL REPLY BRIEF was electronically served on the following counsel for Real Party in Interest City of Fort Bragg via Truefiling.com using counsel's known email address as indicated below:

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Date: May 31, 2022

PAUL BEARD II

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