UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI AND MICHAEL R. MILANOSKI, AS TRUSTEES OF ONE HUNDRED FORTY REALTY TRUST, Plaintiffs, v. TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI, Defendants.	Civil Action No. 4:22-cv-40080-ADB

MOTION TO DISMISS PLAINTIFFS' VERIFIED COMPLAINT

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the Defendants Town of Hopedale (the "Town"), the Hopedale Select Board (the "Board") by and through its members, Glenda Hazard, Bernard Stock, and Brian Keyes, and the Hopedale Conservation Commission (the "Con. Comm.") by and through its members Becca Solomon, Marcia Matthews, and David Guglielmi (collectively, "Hopedale"), through their undersigned counsel, respectfully request that this Court dismiss the Verified Complaint filed by the Plaintiffs Grafton & Upton Railroad Company, Jon Delli Priscoli and Michael R. Milanoski, as Trustees of One Hundred Forty Realty Trust (the "Trust") (collectively, "GURR"). For the reasons stated in the accompanying memorandum of law, GURR fails to establish subject matter jurisdiction and fails to state a claim against Hopedale.

WHEREFORE, Hopedale requests that the Court: (1) grant this Motion, (2) dismiss Counts I-VI, and (3) grant any other further relief as the Court deems fair and just.

REQUEST FOR ORAL ARGUMENT

Hopedale respectfully requests a hearing on this Motion at the Court's earliest convenience.

CERTIFICATION PURSUANT TO L.R. 7.1(a)(1)

I, Sean Grammel, counsel for the Defendants, hereby certify that, in accordance with Local Rule 7.1(a)(2), I conferred with counsel for GURR on August 10, 2022, and have attempted in good faith to resolve or narrow the issues subject to this Motion. GURR's counsel stated that they oppose this Motion.

TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI,

By their attorneys,

/s/ Sean Grammel

David S. Mackey (BBO #542277)
dmackey@andersonkreiger.com
Mina S. Makarious (BBO #675779)
mmakarious@andersonkreiger.com
Sean Grammel (BBO #688388)
sgrammel@andersonkreiger.com
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
617.621.6523

Dated: August 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system was sent electronically to counsel of record for all parties on this 12th day of August, 2022.

/s/ Sean Grammel
Sean Grammel

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI AND MICHAEL R. MILANOSKI, AS TRUSTEES OF ONE HUNDRED FORTY REALTY TRUST, Plaintiffs, v. TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI, Defendants.	Civil Action No. 4:22-cv-40080-ADB

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' VERIFIED COMPLAINT

The Plaintiffs Grafton & Upton Railroad Company *et al.* (collectively, "GURR") ask this Court to issue declaratory and injunctive relief against the exercise of eminent domain and environmental protection authority by the Defendants Town of Hopedale *et al.* (collectively, the "Town" or "Hopedale"). But GURR asserts these claims under a federal statute that expressly forecloses subject matter jurisdiction and that does not provide a cause of action. *See* 49 U.S.C. § 10501(b) (providing "exclusive" jurisdiction in the Surface Transportation Board ("STB")); *Bd. of Selectman of Town of Grafton v. Grafton & Upton R.R. Co.*, Case No. 12-cv-40164-TSH, 2013 WL 2285913, at *9-10 (D. Mass. May 22, 2013) (finding that § 10501 does not create an affirmative cause of action). GURR argues that it can base its claims in preemption and somehow avoid Congress's explicit language, but the Supreme Court has repeatedly rejected that

legal theory. GURR's other claims, under § 1983 and various state statutes, similarly fail under Rules 12(b)(1) and 12(b)(6). Without any jurisdictional basis or claim available to GURR, the Court should dismiss the Verified Complaint ("VC").

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a core and routine exercise of municipal authority: a town's exercise of its eminent domain powers under G.L. c. 79 to acquire land for conservation purposes. This dispute poses a wrinkle, in that the property to be acquired is purportedly *owned* by a railroad, though not yet *used* by it for railroad purposes. Located at 364 West Street in Hopedale, MA, that property was classified as forestland under G.L. c. 61 (the "Forestland"). GURR argues that the Interstate Commerce Commission Termination Act ("ICCTA") preempts Hopedale's ability to take any of the Forestland for conservation purposes. VC ¶ 96. GURR purports to hold title to the Forestland, but that ownership is currently the subject of ongoing litigation in state courts. *Town of Hopedale v. Trustees of 140 Realty Trust*, Case No. 2022-P-0433 (Mass. App. Ct.); *Reilly v. Arcudi*, Case No. 2022-P-0314 (Mass. App. Ct.); *see also* Complaint ¶¶ 37-54. GURR acquired nominal title to the Forestland through what Superior Court Judge Karen Goodwin described as a "flagrant violation" of state law. *See* Memorandum and Order on Motion to Preserve Status Quo, *Reilly v. Town of Hopedale*, Case No. 2185-cv-00238, ECF 32, Ex. A, at p. 4.

On June 21, 2022, Hopedale's Select Board met, voted to call a Special Town Meeting, and signed a warrant with one article: to seek authorization to use eminent domain to acquire the Forestland. VC ¶ 94. Specifically, the warrant sought authority for a taking of "up to 130.18 acres, more or less, located at 364 West Street," for the purpose of "land conservation," such that the acquisition was being made "to maintain and preserve said property and the forest, water, air,

and other natural resources thereon for the use of the public for conservation and recreation purposes to be managed under the control of the Hopedale Parks Commission." *See* Town of Hopedale Special Town Meeting Warrant, ECF 1-4, at p. 1; VC ¶ 65. The article explicitly limited the Board from taking title "to any portions of the Property that are currently in use by the Railroad for railroad operations purposes or transloading facilities." *Id.*

Special Town Meeting met on July 11, 2022 and overwhelmingly voted, with several hundred citizens in favor and only two against,[1] to authorize the Select Board to spend up to $3.9 million to acquire land at 364 West Street through eminent domain. VC ¶ 70. On July 14, 2022, the Select Board noticed a meeting for July 19, to consider and vote on the proposed order of taking as authorized by Special Town Meeting. *See* ECF 1-6; VC ¶ 72. Also on July 14, Hopedale's Conservation Commission ("Con. Comm."), through its Chair, sent GURR an Enforcement Order, which included a cease-and-desist order for violating state and local wetlands laws in an attempt to limit, by whatever means possible, the further destruction of the Forestland. VC ¶ 125; ECF 1-4.

On July 18, GURR filed its Verified Complaint and Emergency Motions for Temporary Restraining Order and Preliminary Injunction. ECF 1, 2, 4. On July 19, the Court (Saylor, J.) held a hearing on the Motions for Temporary Restraining Order, and granted the motion to restrain the taking but denied the motion to restrain the enforcement of the Con. Comm. Order. ECF 18. Judge Saylor did not hear argument about the Court's jurisdiction to grant this relief, or whether GURR stated a claim, which Hopedale now argues below. On August 10, the Court (Burroughs, J.) held a hearing on the Motions for Preliminary Injunction. Hopedale advanced a

[1] *See* https://townhallstreams.com/stream.php?location_id=56&id=46514.

jurisdictional argument in its Consolidated Opposition and Sur-Reply to GURR's Motions and now files a Motion to Dismiss on those same grounds.

ARGUMENT

GURR does not establish jurisdiction or state a claim for any of its six causes of action. GURR asserts in Counts I and VI that § 10501 of ICCTA preempts Hopedale's powers of eminent domain and environmental protection authority, but GURR cannot use this Court's equitable powers to establish subject matter jurisdiction or state a claim when § 10501 expressly precludes it. *See Town of Grafton*, 2013 WL 2285913, at *9-10 (finding that § 10501 vests exclusive jurisdiction in the STB and does not create an affirmative cause of action). GURR has mechanisms to assert ICCTA against the taking, either affirmatively as part of an STB proceeding under § 10501 or defensively as part of a c. 79 proceeding in state court. *See Abuzahra v. City of Cambridge*, 486 Mass. 818, 823 (2021). GURR has chosen not to avail itself of those options, but that does not mean it can create its own jurisdiction or cause of action here.

GURR next seeks relief under § 1983 either under ICCTA or the dormant Commerce Clause, but the First Circuit has already decided that ICCTA does not create rights enforceable under § 1983 and GURR has failed to allege facts that show the dormant Commerce Clause applies here. Finally, this Court should decline to exercise supplemental jurisdiction over GURR's various state law claims, and even if this Court did exercise supplemental jurisdiction, the state law claims are meritless. Without any jurisdictional basis or claim stated, this Court should dismiss the Verified Complaint.

I. Standards of Review

In evaluating a motion to dismiss under Rule 12(b)(1), the court must determine whether the facts alleged, taken at face value, support subject matter jurisdiction. *Gordo-Gonzalez v.*

United States, 873 F.3d 32, 35 (1st Cir. 2017). The plaintiff bears the burden of establishing subject matter jurisdiction over each individual claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Godin v. Schencks*, 629 F.3d 79, 83 (1st Cir. 2010). If the plaintiff fails to do so, the complaint must be dismissed. *Kersey v. Prudential Ins. Agency, LLC*, Case No. 15-14186-GAO, 2017 WL 5162006, at *6 (D. Mass. Feb. 3, 2017).

In deciding a motion to dismiss under Rule 12(b)(6), the court must accept as true all "well-pleaded facts and draw all reasonable inferences therefrom in the pleader's favor." *Keach v. Wheeling & Lake Erie Ry. Co.*, 888 F.3d 1, 6 (1st Cir. 2018). The complaint must allege more than "labels and conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Where there is no private cause of action to seek redress for the misconduct alleged in the complaint, the court should dismiss the complaint. *Arroyo-Torres v. Ponce Fed. Bank, F.B.S.*, 918 F.2d 276, 280 (1st Cir. 1990).

When faced with motions to dismiss under both Rule 12(b)(1) and 12(b)(6), the court should, absent good reason to do otherwise, decide the 12(b)(1) motion first. *Ne. Erectors Ass'n of the BTEA v. Sec'y of Labor, Occup'l Safety & Health Admin.*, 62 F.3d 37, 39 (1st Cir. 1995). Hopedale advances arguments under both Rules for all six claims.

II. GURR fails to establish jurisdiction over, or state a claim for, declaratory or injunctive relief in Counts I and VI.

GURR brings Counts I and VI as preemption-based causes of action under the Declaratory Judgment Act. *See* VC ¶¶ 82-104 (Count I), 123-139 (Count VI), 14-15 (jurisdictional bases, namely the Supremacy Clause and ICCTA). GURR later clarified that it was actually bringing these as preemption-based claims under the doctrine of *Ex Parte Young*. *See* ECF 40 at 1-2; *Ex Parte Young*, 209 U.S. 123 (1908). Hopedale responds to that sole

jurisdictional theory, which is unavailable to GURR because of the express language of § 10501.[2]

The Supreme Court explained the doctrine of *Ex Parte Young* in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015). Federal courts "may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Id.* at 326. This remedy does not come from the Supremacy Clause. *Id.* at 327. Instead, the "ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity" and is "a judge-made remedy." *Id.* Invoking this equitable doctrine creates subject matter jurisdiction under § 1331 because it involves the alleged ongoing or imminent violation of a federal statute. *See Verizon Md. Inc. v. Publ. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (allowing a preemption-based claim because the complaint alleged a violation of federal law and the statute did not "display any intent to foreclose jurisdiction under *Ex Parte Young*"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing *Ex Parte Young* to allow for preemption-based suits for injunctive relief, where the underlying statute did not limit jurisdiction or remedies in any way).

Because this doctrine is equitable in nature, it is "subject to express and implied statutory limitations." *Armstrong*, 575 U.S. at 327 (citations omitted). In other words, Congress can limit a federal court's ability to fashion equitable remedies for an alleged violation of a federal statute. Courts of equity "can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Id.* at 327-28 (citation omitted); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) ("Where Congress has created a remedial scheme for the enforcement of a

[2] Hopedale explained in its Consolidated Opposition why GURR fails to establish jurisdiction under any of the theories cited in the Verified Complaint. ECF at 7-9.

particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary."). Congress decides how its laws may be enforced and parties cannot avoid that congressional decision by invoking equity. *Armstrong*, 575 U.S. at 327-28; *see Crimson Galeria Ltd. P'Ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20, 33 (D. Mass. 2018) (dismissing, under *Armstrong*, preemption-based claims because the federal statute precluded the availability of equitable relief).

In *Seminole Tribe*, the Supreme Court encountered a scenario similar to here, where a plaintiff sought to enforce a federal statute after a state actor had allegedly violated federal law. At issue in that case was the Indian Gaming Regulatory Act, which required a state to negotiate in good faith with a tribe that wanted to operate a casino on tribal land. 517 U.S. at 49. The statute contained an "elaborate remedial scheme designed to ensure the formation of a Tribal-State compact." *Id.* at 51. The Seminole Tribe sued Florida for failure to negotiate in good faith, but the Tribe did not follow the statutory remedial scheme and instead brought suit directly in federal court. *Id.* The Seminole Tribe argued that it asserted a "continuing violation of federal law," which was sufficient to establish jurisdiction under *Ex Parte Young*, a theory that the Supreme Court easily rejected. *Id.* at 74-75. The Supreme Court found that the federal statute implicitly precluded equitable relief and therefore affirmed the dismissal of the Tribe's suit for lack of jurisdiction. *Id.* The Court reasoned that if parties could sidestep the enforcement mechanism required by statute, then Congress's directions about who can enforce its laws (and where) would be "superfluous." *Id.* at 75. A plaintiff would simply file in federal court where "more complete and more immediate relief would be available under *Ex Parte Young*." *Id.*; *see Armstrong*, 575 U.S. at 327 (citing *Seminole Tribe* to find that a plaintiff could not seek injunctive relief for a state's alleged violation of Medicaid Act, when the federal statute

implicitly foreclosed equitable relief by creating a remedy through the statute and vesting enforcement discretion in an administrative agency).

Here, § 10501 of ICCTA is even clearer than the statutes in *Seminole Tribe* or *Armstrong*, because it *explicitly* forecloses equity jurisdiction. The statute is clear that the STB has "exclusive" jurisdiction over "transportation by rail carriers," which is precisely the kind of claim being made by GURR. *See* VC ¶¶ 87-95. Yet GURR did not bring this claim to the STB. Instead, it seeks to avoid the "exclusive" jurisdiction of the STB and has filed in federal court, which is the exact sidestep rejected by the Supreme Court in *Seminole Tribe*.

Section 10501 continues: "Except as otherwise provided in this part [i.e., ICCTA], 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) (emphasis added). Congress could hardly make a more explicit statutory limitation. If GURR wants to enforce § 10501, then it must follow the process required by § 10501. Congress explicitly directed parties to pursue their claims in the STB, thereby limiting federal courts' ability to fashion supplemental equitable remedies. *See Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."); *Mich. Corrs. Org. v. Mich. Dep't of Corrs.*, 774 F.3d95, 905 (6th Cir. 2014) (requiring courts to "determine whether Congress intended private parties to enforce the statute by private injunction or for that matter by a declaratory judgment. *Ex Parte Young* by itself does not create such a private right of action.").

Judge Hillman recognized that § 10501 does not provide either jurisdiction or an affirmative cause of action. *Town of Grafton*, 2013 WL 2285913, at *10; *see Pejepscot Indus.*

Park v. Maine Cent. R. Co., 215 F.3d 195, 199 (1st Cir. 2000) (reading § 10501, by itself, "to grant the STB exclusive jurisdiction over any claim involving 'transportation by rail carriers'"). Specifically, he rejected an argument that § 10501 allows for concurrent jurisdiction in both federal court and the STB. *See Town of Grafton*, 2013 WL 2285913, at *10 n.7 (citing *Pejepscot*, 215 F.3d at 198). He analyzed another section of ICCTA, § 11704(c)(1), which allows a party to file a claim in either the STB or a federal court.[3] 49 U.S.C. § 11704(c)(1). Congress's explicit language in § 11704 allowed for concurrent jurisdiction and so, Judge Hillman reasoned, the "contrapositive" must equally be true: § 10501 vests "exclusive" jurisdiction in the STB and so there cannot be concurrent jurisdiction. 2013 WL 2285913, at *10 n.7. While a party can indeed establish federal jurisdiction under § 1331 if it invokes a court's equity jurisdiction under *Ex Parte Young*, GURR fails at the first step: it cannot invoke equity jurisdiction because of the express statutory limitation in § 10501. *See Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493, 499 (S.D. Miss. 2001) ("Accordingly, the Court finds that Congress, under the ICCTA, explicitly granted the STB exclusive jurisdiction over claims involving railroad operations, except as otherwise provided under the ICCTA.").

GURR must pursue its statutory remedies, and it even has a choice: federal or state. If GURR want to use § 10501 as a sword to state an affirmative claim, it must do so in the STB. The STB has issued extensive regulations to govern any such proceedings. *See* 49 CFR § 1117.1 ("A party seeking relief [from the STB] not provided for in any other rule may file a petition for such relief."); 49 CFR § 1119.1 ("A defendant or respondent directed by the Board to do or

[3] ICCTA includes several different enforcement mechanisms, not including the complex and intricate STB process. *See, e.g.*, 49 U.S.C. § 11703 (enforcement by the Attorney General); 49 U.S.C. § 11706(d)(1) (creating federal subject matter jurisdiction for disputes over bills of lading); 49 U.S.C. § 10709(c)(2) (limiting remedies for breach of contract to a lawsuit in either state or federal court, while simultaneously limiting federal question jurisdiction).

desist from doing a particular thing must notify the Board on or before the compliance date…"); 49 CFR §§ 1114.1-1114.31 (describing the evidentiary and discovery rules available under STB proceedings). GURR could seek a declaration in the STB that ICCTA preempts the Town's taking and then seek to enforce that order in federal court, if the Town refused to comply with the STB's decision. *See* 28 U.S.C. § 1336 ("Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Surface Transportation Board…"); 5 U.S.C. § 554(e) (allowing the STB to "issue a declaratory order to terminate a controversy or remove uncertainty").

If GURR want to use § 10501 as a shield against the taking, it must do so in state court under G.L. c. 79, § 18.[4] *See Abuzahra*, 486 Mass. at 823. GURR could assert ICCTA in state court through "ordinary preemption," which is a defense to the application of state law and does not create original jurisdiction in federal court. *See Fayard*, 533 F.3d at 45; *Town of Grafton*, 2013 WL 2285916, at *5. The STB has regularly found that state courts are the proper forum for deciding issues about preemption and state property law. *See, e.g.*, *Eastside Community Rail, LLC*, Acquisition and Operation Exemption, Docket No. FD 35692, 2022 WL 696819, at *3 (STB Mar. 7, 2022) (holding that a railroad was "clearly incorrect" when it argued that state courts cannot decide preemption issues, when the STB has "consistently held that disputes concerning state contract and property law should be decided by the appropriate courts with expertise in those matters, rather than" the STB); *Grafton & Upton R.R. Co.*, Petition for Declaratory Order, Docket No. FD 36518, 2021 WL 5122255, at *2 (STB Nov. 3, 2021) ("As the Board has explained, a court is typically the more appropriate forum for interpreting

[4] GURR could request that its case be "heard and determined with as little delay as possible." *See* G.L. c. 79, § 34.

contracts and resolving state property law disputes.").

GURR cannot mix and match its rights and remedies; it seeks to enforce a legal right through equity, despite having a legal remedy available to it. *Infusaid Corp. v. Intermedis Infusaid, Inc.*, 738 F.3d 661, 668 (1st Cir. 1984) ("Of course, the general rule is that if there is an adequate remedy at law, equitable relief is unavailable."). When Congress has made its statutory intent clear, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (requiring courts to "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy"). Fashioning an equitable remedy "may be a proper function for common-law courts, but not for federal tribunals." *Alexander*, 532 U.S. at 287 (quotation and citation omitted). This Court simply does not have the ability to enter the relief that GURR seeks and so Counts I and VI should be dismissed.

III. GURR cannot use § 1983 to enforce ICCTA.

The Court should dismiss GURR's claim under § 1983 (Count II), because it fails under Rules 12(b)(1) and 12(b)(6). Section 1983, by itself, does not create federal jurisdiction. *See Cervoni v. Sec'y of Health, Educ. and Welfare*, 581 F.2d 1010, 1029 (1st Cir. 1978). The underlying statute, § 10501, also does not create subject matter jurisdiction. *See Town of Grafton*, 2013 WL 2285913, at *10 n.7. Count II fails under Rule 12(b)(1).

This claim also fails under Rule 12(b)(6). Section 1983 does not create a substantive cause of action by itself and so GURR must show the ICCTA "creates an individually enforceable right." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). The First Circuit has already decided that ICCTA does no such thing: "nothing suggests that Congress

intended to create rights for railroads apart from the Surface Transportation Board statutory scheme." *Boston and Me. Corp. v. Town of Ayer*, 330 F.3d 12, 18 (1st Cir. 2003) (rejecting the enforcement of rights created by ICCTA through § 1983). Moreover, Congress has, through § 10501, explicitly precluded other remedies available under federal law. This alone precludes enforcement of ICCTA through § 1983. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009) ("If Congress intended a statute's remedial scheme to be the exclusive avenue through which a plaintiff may assert the claims, the § 1983 claims are precluded."); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981) (cautioning that when a statute expressly provides for a particular remedy, "a court must be chary of readings others into it").

The Verified Complaint is unclear, but GURR may be asserting a claim under the dormant Commerce Clause through § 1983. The Verified Complaint is devoid of any specific factual allegations about how the taking would affect the interstate rail transportation network. *See* VC ¶¶ 99-104. And, in fact, GURR would maintain its tracks and any portions of the Forestland that are currently in use for railroad operations and transloading facilities. VC ¶ 65. Without sufficient factual allegations, this claim would fail under Rule 12(b)(6).

"The core purpose of the dormant Commerce Clause is to prevent states and their political subdivisions from promulgating protectionist policies," which means that "if local legislation leaves all comers with equal access to the local market, it does not offend the dormant Commerce Clause." *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999). Where, like here, the local regulation has only an indirect effect on interstate commerce, the regulation "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The plaintiff cannot just allege that it alone will suffer "devastating economic consequences" from some regulation, but instead must allege facts that the interstate market at large will suffer. *See Pharm. Research and Mfrs. of America v. Concannon*, 249 F.3d 66, 84 (1st Cir. 2001). GURR fails to make any specific factual allegations that connect Hopedale's planned taking to the nation's rail transportation system. GURR simply alleges that it has a right to participate in interstate commerce and that the taking would unreasonably interfere with that right. VC ¶¶ 100-104. Any business subject to a taking (or any other regulation) could make this claim, underscoring that these allegations are simply insufficient to state a claim under the dormant Commerce Clause. GURR's claim under § 1983 (Count II) fails under Rules 12(b)(1) and 12(b)(6), and must be dismissed.

IV. This Court should decline to exercise supplemental jurisdiction over GURR's state law claims, which fail under Rules 12(b)(1) and 12(b)(6) in any event.

The Court "may decline to exercise supplemental jurisdiction" over any remaining state law claims once the federal claims are dismissed. 28 U.S.C. § 1367(c)(3). In deciding whether to decline supplemental jurisdiction, courts consider several factors, including fairness, judicial economy, convenience, and comity. *Desjardins v. Willard*, 777 F.3d 43, 45 (1st Cir. 2015). At this stage of a case, the balance of those factors typically "will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *McInnis-Misenor v. Me. Med'l Ctr.*, 319 F.3d 63, 73-74 (1st Cir. 2003) ("When federal claims are dismissed before trial, state claims are normally dismissed as well.")

Even if this Court did exercise supplemental jurisdiction, no claim survives Rule 12(b)(6). First, Massachusetts law is clear that G.L. c. 79 provides an "exclusive statutory remedy for takings made thereunder." *Whitehouse v. Town of Sherborn*, 11 Mass. App. Ct. 668, 673 (1981) (quoting *Wine v. Commonwealth*, 301 Mass. 451, 455-56 (1938)); *see Abuzahra*, 486

Mass. at 823. Any state-law challenge to the validity of the taking must be part of a c. 79 proceeding and so none of these claims states a cause of action available under Massachusetts law.

Second, each claim fails on its own merits. For Count III, GURR misreads c. 160, § 7, and argues that it "authorizes only the Commonwealth to take a railroad corporation's property by eminent domain." VC ¶ 106. Not so. Section 7 of c. 160 provides that the Commonwealth may, after one year's notice to a railroad, "take its railroad, franchise and other property by eminent domain" under c. 79. Nowhere does this statute limit any other party's ability to exercise eminent domain rights, including property of a railroad. Instead, it allows the Commonwealth to take the railroad itself, among other property, after sufficient notice. That grant of discretionary power to the Commonwealth does not somehow implicitly overrule other entities' eminent domain authority.

For Count IV, GURR again ignores the requirement to bring challenges about validity under Chapter 79 and instead tries to make these arguments through a Declaratory Judgment action. GURR asserts that Hopedale has not complied with certain technical requirements before voting to acquire the Site. VC ¶¶ 110-117. Notably, GURR does not allege that non-compliance with any of these statutes would invalidate the taking. In any event, GURR must pursue such a challenge under G.L. c. 79, not a federal Declaratory Judgment action. *See* G.L. c. 79, § 18; *Whitehouse*, 11 Mass. App. Ct. at 673.

Finally, Count V asserts that Hopedale cannot take the Forestland for a public purpose (conservation) because GURR already uses it for a public purpose (rail transportation). VC ¶¶ 119-122. One of the elements for a claim under the prior public use doctrine is that the property has been devoted "to only one public use." *See Town of Sudbury v. Mass. Bay Transp. Auth.*,

485 Mass. 774, 783 (2020) (citation omitted). GURR must have acquired the Forestland for a "particular use or purpose" and have limited the property to that particular use. *See Muir v. City of Leominster*, 2 Mass. App. Ct. 587, 591-92 (1974) (rejecting application of doctrine to property that the city had used as a playground because the deed did not limit its purpose to that one particular use). GURR does not, and cannot, allege that it had acquired the property for just "one public use." When the prior owner of the property held title to the land, these same 130.18 acres were preserved as forestland under c. 61 and left undeveloped. VC ¶¶ 25-27. GURR later bought the beneficial interest of the Trust and thereby purportedly acquired title. *Id.* ¶ 27. Under GURR's own version of events, the Forestland was not (and still is not) solely dedicated to railroad operations and so the prior public use doctrine does not apply. GURR may allege that it uses the land for a public purpose now, VC ¶ 120, but the Appeals Court rejected exactly this argument in *Muir*. 2 Mass. App. Ct. at 591-92. GURR does not, and cannot, allege facts that would support a claim for Count V.

All of GURR's state law claims fail under Rules 12(b)(1) and 12(b)(6), and must be dismissed.

CONCLUSION

GURR has failed to establish jurisdiction or state a claim, so this Court should dismiss the Verified Complaint.

TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI,

By their attorneys,

/s/ Sean Grammel

David S. Mackey (BBO #542277)
dmackey@andersonkreiger.com
Mina S. Makarious (BBO #675779)
mmakarious@andersonkreiger.com
Sean Grammel (BBO #688388)
sgrammel@andersonkreiger.com
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
617.621.6523

Dated: August 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system was sent electronically to counsel of record for all parties on this 12th day of August, 2022.