No. _____

# In The
# Supreme Court of the United States

MARK GRIFFIOEN, JOYCE LUDVICEK, MIKE LUDVICEK, SANDRA SKELTON, BRIAN VANOUS, Individually and on Behalf of All Others Similarly Situated,

*Petitioners,*

v.

CEDAR RAPIDS AND IOWA CITY RAILWAY COMPANY, ALLIANT ENERGY CORPORATION, UNION PACIFIC RAILROAD COMPANY, and UNION PACIFIC CORPORATION,

*Respondents.*

**On Petition For Writ Of Certiorari To The Iowa Supreme Court**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Petitioners are property owners in Cedar Rapids, Iowa, who asserted a number of Iowa statutory and common law claims against Respondent railroad companies. The railroad companies parked laden rail cars on low level bridges spanning the Cedar River in advance of a flood, effectively damming up the river and diverting flood waters into downtown Cedar Rapids and the surrounding areas. The Iowa Supreme Court, in a four to three ruling, held that the Petitioners' state law claims were preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), in spite of the fact that the ICCTA provided no alternative remedies for the property owners.

The following question is presented:

> Whether the Iowa Supreme Court erred in holding that state laws of general application addressing primarily public safety issues and with only an incidental impact on rail transportation are preempted by the ICCTA, especially given the ICCTA's failure to supply any alternative remedy.

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14(1)(b), all the parties appearing and before the Iowa Supreme Court are contained in the caption.

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## OPINIONS BELOW

The opinion of the Supreme Court of the State of Iowa is reported at 914 N.W.2d 273, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1. The decision of the Iowa District Court for Linn County is not reported, but is reprinted at Pet. App. 41.

## JURISDICTION

The Iowa Supreme Court issued its opinion on June 22, 2018. The Court entered its order denying rehearing on July 18, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## STATUTES AND REGULATIONS INVOLVED

This case turns on the interpretation of a provision of the ICCTA, specifically 49 U.S.C. § 10501(b). This statute is reproduced at Pet. App. 68.

## STATEMENT OF THE CASE

### A. Statement of Facts

Petitioners Mark Griffioen, Joyce Ludvicek, Mike Ludvicek, Sandra Skelton, and Brian Vanous ("Property Owners") all own property in Cedar Rapids, Iowa, which was damaged when the Cedar River flooded in June of 2008. Prior to the flood, Respondents Cedar

Rapids and Iowa City Railway Company, Alliant Energy Corporation, Union Pacific Railroad Company, and Union Pacific Corporation ("Rail Group") parked railcars loaded with rock on dilapidated, over-century-old bridges they owned which spanned the Cedar River in an effort to save the bridges from being washed out. (CAP 24-31). Because the bridges were weighed down with heavy, rock-filled railcars, some of them collapsed, effectively damming the river. (CAP 36-38). The railcars on the bridges that did not collapse also caused damage: when the bridges were overtopped by the river water they acted like a dam, diverting enormous amounts of water into low-lying areas rather than letting the water flow through the "skeletal" bridges and down the river. (CAP 32-35). All of these actions by the Rail Group combined to cause – or at least substantially exacerbate – the 2008 Flood. (CAP 41).

The Property Owners sued to recover the damage caused to their property by the Rail Group. Their claims included negligence (CAP 65-68), engagement in abnormally dangerous activity (CAP 52-55), violations of Iowa Code § 468.148, which imposes liability for damage caused through obstruction of the free flow of waters (CAP 57), and Iowa Code § 327F.2, which imposes liability on railroads if their failure to maintain and keep their rail bridges in good repair causes property damage. (CAP 62-64).

### B. Lower Court Proceedings

The Property Owners filed their suit in the Iowa District Court for Linn County. The Rail Group removed this lawsuit to the federal district court, contending that the Property Owners' state law claims were completely preempted by the Federal Railway Safety Act ("FRSA"). The Rail Group soon abandoned their arguments under the FRSA, arguing instead that removal was proper under the ICCTA. *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1186 (8th Cir. 2015).

The federal district court held that the Property Owners' claims were completely preempted by the ICCTA, denied their motion to remand, and transferred their claims to the Surface Transportation Board, the agency created to administer the ICCTA. *Griffioen*, 785 F.3d at 1186.

The Eighth Circuit reversed. Not surprisingly, given the clarity of the law on this point, the Eighth Circuit agreed with the Property Owners that complete preemption cannot exist without a federal cause of action:

> The scope of complete preemption turns primarily on the provision creating the federal cause of action – not on an express preemption provision. It is the federal cause of action that ultimately supplants the state-law cause of action and effectuates complete preemption.

*Griffioen*, 785 F.3d at 1190. The Eighth Circuit examined the ICCTA and determined that it did not provide

an alternative federal remedy for the Property Owners' state law claims:

> Although the Rail Group claims that the ICCTA provides a substitute cause of action for the Griffioen Group's claims, they have not pointed to any substantive provision of the ICCTA or its accompanying regulations that protects interests or redresses wrongs similar to those asserted by the Griffioen Group. Our review of the statute and regulations has not revealed such a provision.

*Griffioen*, 785 F.3d at 1191.

Upon arriving back at the Linn County District Court, the Rail Group moved to dismiss, arguing that when Congress enacted the ICCTA it intended to immunize railroads from state tort claims with only an incidental impact on rail transportation. The Iowa trial court agreed. Significantly, the trial court dismissed the Property Owners' case at the pleading stage, so there was no factual analysis done to ascertain whether the Property Owners' claims actually burdened rail transportation in some fashion. (Pet. App. 8, 3).

In upholding the trial court's decision that the Property Owners' claims were preempted, the Iowa Supreme Court made a number of significant errors. First, it refused to apply the presumption against preemption. Second, although it cited to the accepted test for ICCTA preemption – disallowing direct regulation of rail transportation by state law while

permitting laws of general application with only incidental impact on rail transportation – it failed to follow that test. Instead, it held the Property Owners' claims were preempted in spite of the fact that they were – for the most part – laws of general application that, on their face, did not seek to regulate rail transportation in any fashion.

The Iowa court also failed to properly examine the interplay between the ICCTA and the FRSA. Previous federal decisions have noted the confusion created by these two statutory schemes, both containing broad grants of authority over rail operations, but with the FRSA generally permitting parallel state regulation. These previous federal decisions have held that preemption of state laws addressing issues of rail safety should be examined under the FRSA and the Iowa court failed to do this here.

These flaws, combined, led to the Iowa Supreme Court holding that when Congress enacted the ICCTA, a law designed primarily to economically deregulate the railroads, it intended in some fashion to essentially immunize railroads from tort liability that is related in virtually any fashion to their rail operations.

The Property Owners sought rehearing at the Iowa Supreme Court which was denied. (Pet. App. 65). They now seek a hearing with this Court, to decide this important issue regarding the interplay between federal and state law.

## REASONS FOR GRANTING THE PETITION

### I. Summary of argument.

Due to heavy rains in June 2008 the Cedar River crested. In advance of the rising waters, the Rail Group attempted to protect their bridges spanning the river by parking rail cars on them, which impeded the water flow, damming the river and diverting millions of gallons of water into Cedar Rapids' communities, destroying over ten square miles of the City.

Remarkably, the Iowa Supreme Court held there is no possible right of recovery for the damages caused by the Rail Group's thoughtless actions to protect their property at Cedar Rapids' expense. While acknowledging the lack of any federal remedy, the Iowa Court held that the ICCTA preempted the Property Owners' state law claims, in spite of the fact that there is no suggestion in either the statutory language or legislative history that Congress intended that act to extinguish garden variety state law tort claims.

As such, the decision below, holding that federal law effectively immunizes railroads from tort liability, constitutes a significant intrusion into the states' power to protect the health and safety of their citizens. As noted by Justice Appel's dissent, joined by two other justices, the Court's decision "imports into the ICCTA a hostility to state tort law and its underlying compensatory policies at the expense of fidelity to the actual language of the ICCTA, its purpose of providing economic deregulation, and the previously generally accepted preemption principles embraced by the United

States Supreme Court." (Pet. App. 39). The three-justice dissent specifically called for review by this Court, or further action by Congress, to restore the state/federal balance so badly skewed by the Iowa Court's decision:

> Whether the United States Supreme Court wishes to more closely align the caselaw with congressional intent and the court's traditional approach to preemption remains to be seen. In the absence of Supreme Court action, this case now sends a clear message to Congress, namely, that if Congress wishes to prevent preemption of nonregulatory state tort law and statutory law claims when it enacts economic deregulation, it had better state so expressly. The limitations of ordinary language in economic deregulation legislation are no longer a reliable barrier to expansive approaches to implied preemption.

(Pet. App. 39).

There are compelling reasons for this Court to grant certiorari. First, the scope of ICCTA preemption has never been addressed by this Court, which should accept review of this decision by the Iowa Court because of its broad impact on states' power to protect the health and safety of their citizens. (Sup. Ct. R. 10(c)).

Moreover, review is appropriate as the Iowa Court's approach to ICCTA preemption directly conflicts in numerous ways with the various circuit courts of appeals that have examined that law. (Sup. Ct. R.

10(b)). Specifically, the Iowa Court's ruling that the presumption against preemption does not apply to express preemption provisions like the ICCTA's directly conflicts with decisions of this Court, as well as decisions of numerous circuit courts of appeals that the presumption applies in spite of the ICCTA's express preemption language.

In addition, the Iowa Court failed to properly apply the balance between the ICCTA and a federal law dealing with rail safety, the FRSA. Unlike the ICCTA, the FRSA expressly saves state law claims seeking recovery for property damage or personal injury, leading to a situation where federal law requires that a state law is simultaneously preempted and saved from preemption. Circuit courts of appeals have harmonized the two bodies of law, holding that state economic regulation of rail transportation is preempted under the ICCTA, while state laws regulating rail safety are saved under the FRSA. Instead of following this straightforward analysis, the Iowa Court essentially wrote the FRSA's savings clause out of existence.

The Iowa Court also badly misapplied the established test for ICCTA preemption adopted by the lower federal courts. Under this test, the ICCTA preempts state laws that directly regulate rail transportation but not laws of general application whose impact is only incidental, unless the law unreasonably burdens rail transportation. Here, the Property Owners' claims are largely based on laws of general application and would not regulate rail transportation in any fashion, as they seek only money damages for a past wrong.

And there was no showing that the Property Owners' claims unreasonably burdened rail transportation; there could not have been, as this case was decided on the pleadings.

Moreover, while Congress likely has the power to strip away an injured party's state law right to recovery without providing the party a federal remedy, this should not happen in the absence of express statutory language showing this was Congress's intent. The statute here contains no such language.

The issue raised by this petition is important because incidents involving railroads harming people or property are commonplace. These incidents have traditionally been handled under state tort law without in any way impinging on the economic activity of railroads. The Iowa Supreme Court's decision muddies the waters and creates a new and unreasonable preemption doctrine. The Court should grant certiorari to clarify the scope of ICCTA preemption and resolve the conflicts on this issue between the Iowa Supreme Court and the various courts of appeals.

## II. The Iowa Court erred in failing to apply a presumption that state law is not preempted by the ICCTA.

### A. There is a presumption against preemption and in favor of application of state law.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the

States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Therefore, preemption analysis should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Moreover, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (attribution omitted). *See also Friends of the Eel River v. N. Coast R.R. Auth.*, 3 Cal. 5th 677, 705 (2017) (the Supreme Court's "case law posits a presumption that Congress would not alter the balance between state and federal powers without doing so in unmistakably clear language.").

This reluctance to find state laws preempted extends to cases deciding the scope of ICCTA preemption:

> Where the State acts in a field which the States have traditionally occupied, however, we retain the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Principles of federalism, including the recognition that the States are independent sovereigns in our federal system, dictate that in the absence of such clarity of intent, Congress cannot be

> deemed to have significantly changed the federal-state balance.

*Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1328 (11th Cir. 2001) (citations and attributions omitted. Therefore, "if the statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred." *Fla. E. Coast Ry. Co.*, 266 F.3d at 1328.

Here, Property Owners alleged common law negligence, violation of an Iowa law imposing liability for impeding flowing water, and the long-standing Iowa statute imposing liability on railroads who cause damage by failing to maintain their bridges in good repair. These are traditional areas of state regulation and the Court should presume they are not preempted unless the Rail Group overcomes this presumption with specific facts.

### B. The Iowa Court erred when it failed to apply the presumption against preemption of state law.

The Iowa Court refused to apply this presumption against preemption. First, it stated that the presumption does not apply to express preemption clauses like that contained in the ICCTA. Second, it held that rail transportation has traditionally been an area of exclusive federal regulation, not "an area of primarily state concern." (Pet. App. 12).

This, respectfully, is error, as the presumption against preemption continues to apply even where an express preemption provision is involved. According to *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), a case involving express preemption, "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action." The *Medtronic* Court held that this presumption required the express preemption provision at issue there to be interpreted as narrowly as possible:

> Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any preemption at all, as opposed to questions concerning the scope of its intended invalidation of state law, see *Cipollone*, 505 U.S. at 545-546 (SCALIA, J., concurring in judgment in part and dissenting in part), we used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in *Cipollone*. *Id.*, at 518, 523.

*Medtronic*, 518 U.S. at 485 (quoting from *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)). The *Medtronic* Court held that applying the presumption against preemption when interpreting the scope of an express preemption provision "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id.* Similarly, in *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008), this Court stated that, "[w]hen addressing questions of *express or*

*implied pre-emption*, we begin our analysis with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Grp.*, 555 U.S. at 77 (attribution omitted, emphasis added).[1]

The Iowa Court also refused to apply the presumption because, it stated, interstate rail transportation has traditionally been subject to pervasive federal regulation. However, rail safety and the safety of railroad bridges is also a traditional subject of state regulation. *Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557, 561 (8th Cir. 2004) ("Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvement in general, and the repair and replacement of deteriorated or obsolete railway-highway bridges in particular."). And certainly the states have always had an interest in protecting their

[1] The Iowa Court cited to *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016) for the proposition that the presumption does not apply to express preemption clauses. But *Puerto Rico* was a bankruptcy case, an area of special federal concern, and as noted in *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018), *Puerto Rico* "did not address preemption of claims invoking historic state regulation of matters of health and safety. . . ." (attribution omitted). As such, *Puerto Rico* surely does not apply to state tort claims attempting to seek redress for property damage due to a defendant's negligence. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014) ("In our federal system, there is no question that States possess the traditional authority to provide tort remedies to their citizens as they see fit.").

citizens from dangers caused by rail operations. *E.g.*, *Atchison, T. & S. F. R. Co. v. Pub. Utils. Com.*, 346 U.S. 346, 352-353 (1953) (upholding state requirement that railroad share in the cost of improving railroad overpasses as a valid exercise of its police power to protect the public safety).

Moreover, assuming that the Property Owners' claims involve rail transportation begs the question that is under dispute. The Property Owners submit their claims do not concern regulation of rail transportation. The Property Owners do not seek to tell the Rail Group where and when they may operate their trains, or redesign any of their rail facilities. Rather, the Property Owners' claim seeks only compensation under traditional Iowa tort and statutory law for property damage caused by the Rail Group, which have only an incidental effect on rail transportation.

Finally, the Iowa Court's holding that the presumption against preemption does not apply to the ICCTA is in direct conflict with federal courts that specifically held otherwise, such as *Fla. E. Coast Ry.* as cited above. As stated in *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010) (*en banc*), which held the ICCTA does not preempt a state law allowing maintenance of a private crossing over a rail line, the presumption against preemption "is relevant even when there is an express pre-emption clause."

Similarly, in *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011), the Court held that, in analyzing preemption under the ICCTA, the court must start

"with the assumption that Congress did not intend to supersede the historic police powers of the states 'to protect the health and safety of their citizens.'" *Elam*, 635 F.3d at 813 (citing to *Medtronic*, 518 U.S. at 475).

## III. The ICCTA was intended to deregulate rail transportation, with narrowly focused preemption language touching upon alternative remedies.

### A. Congress's purpose in enacting the ICCTA was for federal regulation of *economic* aspects of rail transportation.

Congress's stated purpose in passing the ICCTA was primarily to abolish the Interstate Commerce Commission ("ICC") and to deregulate Railway Companies. According to the Act's preamble:

> An Act – To abolish the Interstate Commerce Commission, to amend subtitle IV of title 49, United States Code, to reform economic regulation of transportation, and for other purposes.

(ICC Termination Act of 1995, 1995 Enacted H.R. 2539, 104 Enacted H.R. 2539, 109 Stat. 803).

The Vermont Supreme Court held, when it enacted the ICCTA, that the congressional intent was to deregulate the economic activity of the rail industry and establish the Surface Transportation Board ("STB"):

> In 1995, Congress enacted the ICCTA, which abolished the Interstate Commerce Commission,

> established the Surface Transportation Board (STB) and granted the STB jurisdiction over certain aspects of interstate rail activity. Its purpose was to deregulate the economic activity of surface transportation industries.

*In re Vermont Ry.*, 171 Vt. 496, 498 (2000). And, as noted by the Eighth Circuit in *Griffioen*, the ICCTA dealt primarily with economic regulation of railroads. "The primary focus of the ICCTA's substantive provisions is regulation of competition, rates, licensing, finance, and the economic relationships between shippers and carriers." *Griffioen*, 785 F.3d at 1191.

Congress was obviously concerned that the void it was leaving in the federal regulation of the economic activities of railroads should not be filled by state attempts to economically regulate railroads. "[G]iven the deregulatory purpose of the ICCTA, what is deregulated under the ICCTA cannot be reregulated by the states." *Eel River*, 3 Cal. 5th at 715. As such – as explained below – it expressly preempted state regulation that purported to duplicate remedies created by the ICCTA.

However, the bill's legislative history shows that Congress intended that the states retain their historic police powers:

> Nevertheless, *it retained the traditional police powers reserved to the states by the Constitution*. H.R.Rep. No. 104-311, at 95-96, reprinted in 1995 U.S.C.C.A.N. at 807-08 (noting with respect to jurisdictional provision of bill that explicit disclaimer regarding states retaining

> their residual police powers was unnecessary; although Congress intended to preempt all state regulation of economic activity, including state securities regulation, the states nevertheless "retain the police powers reserved by the Constitution" under the bill).

*Vermont Ry.*, 171 Vt. at 498-499. *See also Eel River*, 3 Cal. 5th at 711 ("outside the regulated field, states retain the police powers reserved by the Constitution.").

In *Fla. E. Coast Ry.,* the Court came to a similar conclusion, namely, that the ICCTA intended to untangle the ICC's regulatory control over railroads and rate-setting, and, outside of that sphere, was intended to have no impact on state laws of general applicability. The Court quoted from the House Conference Report which noted that, while the remedies provided by the ICCTA were intended to be exclusive, state laws of general application "'remain fully applicable unless specifically displaced, *because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation*.'" *Florida E. Coast Ry. Co.*, 266 F.3d at 1339, quoting from H.R. Conf. Rep. 104-422 (1995), at 167, reprinted in 1995 U.S.C.C.A.N. 850, 852 (emphases in *Florida E. Coast Ry.*). *See also Home of Econ. v. Burlington N. Santa Fe R.R.*, 94 N.W.2d 840, 845 (Mont. 2005) ("Congress clearly intended to preempt only the states' previous authority to economically regulate rail transportation within states' borders with respect to such matters as the operation, rates, rules, routes, services, drops, facilities, and equipment."); *Girard v. Youngstown Belt Ry. Co.*, 979 N.E.2d 1273, 1281 (Ohio 2012) ("[T]he ICCTA's

legislative history indicates that Congress did not intend to preempt any and all state laws that might touch upon or indirectly affect railway property.").

### B. The ICCTA's actual preemption provision is narrow, limited to state law remedies that conflict with those provided by the statute.

The question of what ICCTA preempts, and what it does not, begins with the statute itself. "In determining the existence and reach of preemption, Congress' purpose is 'the ultimate touchstone' to use." *Franks*, 593 F.3d at 407. Here, the ICCTA's preemption language reads as follows:

> (b) The jurisdiction of the Board over –
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*

49 U.S.C. § 10501(b) (emphasis added). There are two sentences here, the first one in § 10501(b)(1) and continuing into § 10501(b)(2), controls the scope of the STB's jurisdiction. As held by *Franks* and numerous other courts, the actual preemptive force of the statute is contained in the last sentence of § 10501(b)(2):

> We conclude that the relevant part of Section 10501(b) is its second sentence. The first, and longer one, is defining the authority of the STB in dealing with the fundamental aspects of railroad regulation, and barring others from interfering with those decisions by making the jurisdiction exclusive.

*Franks*, 593 F.3d at 410.

*Franks'* conclusion that the statute's preemptive language is found in its second sentence is widely accepted. The *Elam* Court agreed that the second sentence of § 10501(b) contained its preemptive force:

> We refer to these two sentences as the exclusive-jurisdiction provision and the exclusive-remedies provision, respectively. The exclusive-remedies provision is the relevant part of Section 10501(b) for determining the scope of the ICCTA's preemption of state law.

*Elam*, 635 F.3d at 805 (attribution omitted). *See also Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 840 (E.D. Ky. 2004) ("The preemptive effect of the last sentence of section 10501(b) has been examined by several federal circuit and district courts which have consistently held that the ICCTA preempts state common

law claims with respect to railroad operations."); *San Luis Cent. R.R. Co. v. Springfield Terminal Ry. Co.*, 369 F. Supp. 2d 172, 176 (D. Mass. 2005) ("The last sentence of § 10501(b) plainly preempts state law."); *Engelhard Corp. v. Springfield Terminal Ry. Co.*, 193 F. Supp. 2d 385, 389 (D. Mass. 2002) ("The concluding sentence of section 10501(b) is an unmistakable statement of Congress's intent to preempt state laws touching on the substantive aspects of rail transportation.").

## IV. The widely accepted *Franks* test preempts state laws that attempt to directly regulate rail transportation, not state laws of general application with only an incidental impact.

### A. The *Franks* test only preempts laws that purport to directly regulate or have a substantial impact on rail transportation.

The current test for ICCTA preemption was articulated in *Florida E. Coast Ry.*, which held that Congress narrowly tailored the ICCTA only to preempt laws that purport to "manage" or "govern" rail transportation:

> In this manner, Congress narrowly tailored the ICCTA pre-emption provision to displace only "regulation," i.e., those state laws that may reasonably be said to have the effect of "manag[ing]" or "govern[ing]" rail transportation, Black's Law Dictionary 1286 (6th ed.1990), while permitting the continued application of

> laws having a more remote or incidental effect on rail transportation.

*Florida E. Coast Ry.*, 266 F.3d at 1331. The Court continued that "[a]llowing localities to enforce their ordinances with the possible incidental effects such laws may have on railroads would not result in the feared 'balkanization' of the railroad industry as companies sought to comply with those laws." *Florida E. Coast Ry.*, 266 F.3d at 1339.

Drawing support from *Florida E. Coast Ry.*, in *Franks* the Fifth Circuit, sitting *en banc*, addressed whether a landowner's state law claims challenging the railroad's intention to close some rail crossings were preempted by the ICCTA.

As noted above, the operative sentence on which the *Franks* Court focused read:

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

49 U.S.C. § 10501(b)(2). The *Franks* Court broke this sentence into two parts, noting that the first part stated it was only the "remedies" which were exclusive:

> We break the second sentence down into its component parts. What is declared to be exclusive are "the remedies provided under this part," which we have to some extent already discussed. There are proceedings before the STB that can be held on such matters as rates,

> rules, practices, and routes. Complaints about such matters can be brought to the STB. Remedies through administrative action are the exclusive ones.

*Franks*, 593 F.3d at 410. The *Franks* Court held that under the plain language of the statute, the only "remedies" that were preempted were "remedies . . . with respect to rail transportation." After conducting this analysis, the *Franks* Court adopted *Fla. E. Coast*'s test for ICCTA preemption:

> Those remedies are exclusive "with respect to regulation," that last word being the one fought over in this case and in the precedents. The Eleventh Circuit has held that "Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation, . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation."

*Franks*, 593 F.3d at 410 (quoting from *Fla. E. Coast*, 236 F.3d at 1331). The *en banc Franks* Court concluded that "[t]he text of Section 10501(b), with its emphasis on the word regulation, establishes that only laws that have the effect of managing or governing rail transportation will be expressly preempted." *Id.*

In other words, *Franks* held that state laws that directly regulate rail transportation are preempted, while laws of general application with "a more remote

or incidental effect on rail transportation" are not preempted. The test for ICCTA preemption formulated by *Fla E. Coast* and *Franks* is in wide use; many state and federal courts agree that the ICCTA only preempts state laws which purport to directly regulate or interfere with rail transportation, and does not preempt laws with only an incidental impact on rail transportation. *E.g. Island Park, LLC v. CSX Transp., Inc.*, 559 F.3d 96, 104 (2d Cir. 2009) ("ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation."); *People v. Burlington Northern Santa Fe R.R.*, 209 Cal. App. 4th 1513, 1528 (2012) ("The ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws of general application having a more remote or incidental effect on rail transportation."); *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-1098 (9th Cir. 2010) ("As stated by our sister circuits, ICCTA preempts all 'state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.'"); *PCS Phosphate Co., Inc. v. Norfolk Southern Corp.*, 559 F.3d 212, 218 (4th Cir. 2009) (same); *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 18 (D.C. Cir. 2017) (same); *Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008) (same); *New York Susquehanna and*

*Western Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (same); *Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79, 85, 979 N.E.2d 1273, 1281 (2012) (same).

### B. ICCTA preemption focuses on economic issues like routes, rates, and rail operations, as well as whether the state regulation is direct or the incidental impact by laws of general applicability.

Under the *Franks* test, (1) state laws that attempt to directly regulate rail transportation are preempted, but (2) state laws of general application with only an "incidental" impact on rail transportation are permitted. The key issue is where the line should be drawn between those claims which are preempted and which are not. The Property Owners do not dispute that some state laws are preempted by the ICCTA, "the question remains *which* claims are so preempted." *Fayard v. Northeast Vehicle Services, LLC*, 533 F.3d 42, 47 (1st Cir. 2008). *Fayard* noted that "[n]o one supposes that a railroad sued under state law for unpaid bills by a supplier of diesel fuel or ticket forms can remove the case based on complete preemption simply because the railroad is subject to the ICCTA." *Fayard*, 533 F.3d at 47 (holding that state law nuisance claims against railroad were not preempted by the ICCTA).

Two factors come into play here; whether the state law deals with economic issues that are core to the ICCTA, and whether its impact on rail transportation is direct or incidental. As for the subject of the law, it is

certainly true that "nothing in the case law that supports [the] argument that, through the ICCTA, Congress *only* intended preemption of economic regulation of the railroads." *City of Auburn v. U.S. Gov't.*, 154 F.3d 1025, 1030 (9th Cir. 1998). But, while "[t]he preemptive effect of § 10501(b) may not be limited to state economic regulation, [] economic regulation is at the core of ICCTA preemption." *Elam*, 635 F.3d at 806. *See also Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 451 (5th Cir. 2011) ("the core of ICCTA preemption is economic regulation"). Economic regulation at the core of ICCTA preemption involves matters such as the "regulation of the relationship . . . of shippers and carriers," *Fayus*, 602 F.3d at 451, "switching rates and services," *Elam*, 635 F.3d at 807, and regulations "pertaining to train length, speed or scheduling." *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001).

The other factor, besides whether the state law regulates economic issues at the ICCTA's core, is whether the state law at issue – either by design or by application – constitutes a direct attempt to manage rail operations or whether its impact on rail operations is incidental. "The statutory changes brought about by the ICCTA reflect the focus of legislative attention on removing *direct* economic regulation by the States, as opposed to the incidental effects that inhere in the exercise of traditionally local police powers such as zoning." *Fla. E. Coast Ry.*, 266 F.3d at 1337. As stated by the D.C. Circuit, "states retain certain traditional police powers over public health and safety concerns" and "[t]his power to impose rules of general applicability,

includes authority to issue and enforce regulations whose effect on railroads is incidental, and which address state concerns generally, without targeting the railroad industry." *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 18 (D.C. Cir. 2017) (citations and attributions omitted).

So, for example, in *BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, ___ F.3d ___ (2018 U.S. App. LEXIS 25953) (9th Cir. 2018), the Ninth Circuit held that a fee imposed on railroads shipping hazardous materials, but not other transporters, was preempted. "SB 84 imposes fees on shippers of hazardous materials in California, but only if they ship by rail. It thus 'targets' the railroad industry." *Id.*, at 9.

So, direct economic regulation of railroads by the state, such as state laws managing the length of time a railroad can park rail cars on a rail crossing[2] or idle locomotive engines,[3] or attempts to control the railroad's hours of operation[4] are typically held to be preempted. These state laws are "categorically preempted," with no need for a showing as to the extent to which they actually burden rail transportation.

> [S]tate or local statutes or regulations are preempted categorically if they have the effect

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[2] *Ezell v. Kan. City S. Ry. Co.*, 866 F.3d 294, 299-300 (5th Cir. 2017).

[3] *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 21 (D.C. Cir. 2017).

[4] *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493, 496 (S.D. Miss. 2001).

> of managing or governing rail transportation. Categorical preemption under the ICCTA precludes such regulation regardless of its practical effect because the focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation.

*Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 19 (D.C. Cir. 2017) (citations and attributions omitted).

On the other hand, state laws escape this categorical preemption where their impact on rail transportation is incidental, rather than direct. In other words, it is permissible for the state law to regulate rail transportation, so long as regulation of rail transportation was not the primary or intended purpose of the law, but happens "by chance or without intention or calculation." *Schoenefeld v. Schneiderman*, 821 F.3d 273, 280 (2d Cir. 2016).

And so, in *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007), where the railroad flooded an adjoining landowner's property due to its improper disposal of railroad ties, the Court held that state law claims for damages were not preempted; the railroad was not being sued because it was a railroad, but because it was a property owner – who just happened to be a railroad – whose negligence damaged an adjoining property owner:

> These acts (or failures to act) are not instrumentalities "of any kind related to the movement of passengers or property" or "services related to that movement." *Id.* Rather, they are possibly tortious acts committed by a

> landowner who happens to be a railroad company.

*Emerson*, 503 F.3d at 1129-1130.

Similarly, in *Guild v. Kansas City S. Ry. Co.*, 541 F. App'x 362, 367 (5th Cir. 2013), the owner of a privately-owned spur track sued a railroad when it was damaged by the railroad's overloaded rail cars. The *Guild* Court held the impact of the state negligence law on rail transportation was only incidental:

> *The purpose of Mississippi's negligence law is not to manage or govern rail transportation. Rather, the effects of state negligence law on rail operations are merely incidental.* Accordingly, we conclude that the ICCTA does not expressly preempt the Guilds' negligence claim.

*Guild*, 541 F. App'x at 367 (citations and attributions omitted, emphasis added).

*See also New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332-333 (5th Cir. 2008) ("Routine crossing disputes are *not* typically preempted . . . despite the fact that they touch the tracks in some literal sense"); *Girard*, 979 N.E.2d at 1286 ("The city's eminent-domain action would therefore not be preempted by the ICCTA under the as-applied analysis."); *Wolf v. Cent. Oregon & Pac. R.R.*, 216 P.3d 316, 321 (Or. App. 2009) ("Here, the summary judgment record in this case provides no basis for us to conclude that the grade crossing sought by plaintiffs would impose an unreasonable burden on rail transportation such that the matter would be preempted.").

### C. If the state law does not directly regulate a railroad's economic activities, it can only be preempted where the facts show it has a significant impact on rail transportation.

Determining whether the impact of state law on rail transportation is direct or incidental, however, is not the end of the issue. There are cases where even direct state regulation of rail transportation will escape preemption, most notably where the state is exercising its police power to protect its citizens' safety and property.[5] And, even where the impact of the state law on rail transportation is purely incidental, it could still be preempted if that impact creates a significant burden on rail transportation. "State statutes or regulations that are not categorically preempted may still be impermissible if, as applied, they would have the effect of unreasonably burdening or interfering with rail transportation." *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 19 (D.C. Cir. 2017) (citations and attributions omitted).

As to how all this should work in practice, the Property Owners submit that *Elam* correctly illustrates the line between what the ICCTA preempts and what it does not. *Elam* involved a collision between a

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[5] *E.g. Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557 (8th Cir. 2004) (state statute mandating railroad bridges be kept in good repair held not preempted); *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (6th Cir. 2001) (state statute mandating clearance between railroad tracks not preempted). Both cases are discussed further at Section V, below.

train operated by KCSR and an automobile at a rail crossing. The *Elam* Plaintiffs alleged two negligence claims; a negligence per se claim for violating the state's "antiblocking" statute, and a simple common law negligence claim based on the railroad's failure to properly warn that the train was at the crossing. *Id.* at 801-802.

A state "antiblocking" statute limits the amount of time that a train can sit at a rail crossing and block car traffic. Such laws are uniformly held preempted by the ICCTA, as they purport to directly regulate issues like train length and switching operations:

> Mississippi's antiblocking statute directly attempts to manage KCSR's switching operations, including KCSR's decisions as to train speed, length, and scheduling. The statute thus reaches into the area of economic regulation.

*Elam*, 635 F.3d at 807.

However, the *Elam* Court also held that the simple negligence claim, for injuries at the rail crossing arising out of the railroad's alleged failure to warn, did not directly attempt to regulate rail transportation and, as such, was not preempted by the ICCTA. Initially, the Court noted that the state law of general negligence was not directed at railroads and its effect in the case was merely incidental to rail transportation:

> A typical negligence claim seeking damages for a typical crossing accident (such as the Elams' simple negligence claim) does not

> directly attempt to manage or govern a railroad's decisions in the economic realm. Like state property laws and rules of civil procedure that generally "have nothing to do with railroad crossings," the effects of state negligence law on rail operations are merely incidental.

*Elam*, 635 F.3d at 813.

Accordingly, the *Elam* Court held that the conflict preemption issue was fact-based, and the railroad had to come forward with evidence showing the impact on rail operations if the state law were given effect. "Because the ICCTA does not completely preempt the Elams' simple negligence claim, our inquiry is whether Mississippi's negligence law, as applied to the facts of this case, would have the effect of unreasonably burdening or interfering with KCSR's operations." *Elam*, 635 F.3d at 813 (citations and attributions omitted). Of course, given that this case was decided on the pleadings, no such fact-based evaluation occurred here.

### D. The Iowa Court failed to properly apply *Franks*.

While the Iowa Court purported to apply the *Franks* test (Pet. App. 21), the Property Owners submit it failed to do so properly. For example, the Property Owners' negligence claim is a law of general application which sought only money damages and did not seek in any way to change the manner in which the Rail Group conducted their rail operations. At most,

then, the claims would have only an incidental impact on rail transportation and were not within the scope of categorical preemption. Therefore, they could not have been preempted without a factual showing the claims unreasonably burdened rail transportation. But there was no such factual showing in this case, which was decided on the pleadings.

## V. Even direct regulation of a railroad's operations will escape preemption when it addresses rail safety rather than economic issues.

### A. Preemption under the FRSA applies where the state law regulates rail safety rather than economic issues.

The Federal Railroad Safety Act ("FRSA") is a comprehensive federal scheme governing the safety of railroad operations. 49 U.S.C. § 20101. While the ICCTA preempts state laws that intrude within its sphere – *i.e.*, state laws that purport to directly economically regulate railroads – the FRSA has an express provision stating that state laws that govern rail safety are not preempted. Specifically, the FRSA provides that "[n]othing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or *property damage*" on the grounds that a party "failed to comply with a State law. . . ." 49 U.S.C. § 20106(b) (emphasis added). By its plain language this statute clearly applies, as the Plaintiffs are bringing an "action under State law seeking damages for . . . property damage" alleging Defendants

"failed to comply with a State law." As such, under the FRSA the Plaintiffs' state law claims for relief are affirmatively not preempted.

The line between what claims are preempted by the ICCTA and what claims are expressly not preempted by the FRSA was explored in *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (6th Cir. 2001). *Tyrrell* involved a claim by a railroad worker injured due to the railroad's violation of a state law mandating certain clearances between tracks. *Tyrrell*, 248 F.3d at 520. Because this state law mandated certain requirements for track location, it would normally be subject to categorical preemption by the ICCTA under the *Franks* test discussed above. But the *Tyrrell* Court held applying the ICCTA here would effectively repeal the FRSA's savings clause:

> Rather, the district court's decision erroneously preempts state rail safety law that is saved under FRSA if it tangentially touches upon an economic area regulated under the ICCTA. As a result, this interpretation of the ICCTA implicitly repeals FRSA's first savings clause.

*Tyrrell*, 248 F.3d at 522-523.

The *Tyrrell* Court narrowed the scope of ICCTA preemption by interpreting it "*in pari materia*" with the FRSA. As so modified, the ICCTA's scope involved "encouraging safe and suitable working conditions in the railroad industry," and "economic regulation and environmental impact assessment," while the FRSA

governed issues involving rail safety. Clearance between tracks was a rail safety issue so the FRSA applied. *Tyrrell*, 248 F.3d at 523.

*Tyrrell* was followed by *Washington County*, a case holding that one of the state law claims brought by the Property Owners here was not preempted by the ICCTA. *Washington County* held that, due to the impact of the FRSA, Iowa Code § 327F.2 requiring railroad companies to keep railroad bridges in good repair was not preempted by the ICCTA:

> Adopting the position urged by the United States and the STB as amici, the court held that ICCTA and the FRSA must be construed *in pari materia*; that the Federal Railroad Administration under the FRSA exercises primary authority over rail safety; and therefore that the FRSA, not ICCTA, determines whether a state law relating to rail safety is preempted.

*Washington County*, 384 F.3d at 560.[6]

Numerous cases agree that state law claims alleging that railroads caused property damage or personal

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[6] According to an August 2007 GAO report on *Railroad Bridges and Tunnels – Federal Rule in Providing Safety Oversight and Freight Infrastructure Investment Could Be Better Targeted*, there are over 76,000 railroad bridges in this country, most of which are over 100 years old and the federal regulators at the Federal Railroad Administration have only limited resources for inspecting the bridges and ensuring their safety. The Property Owners submit that a ruling that states should have no role at all in ensuring the safety of the bridges within their borders would be poor public policy.

injury are subject to a review for preemption in light of the FRSA and its savings clause rather than the ICCTA's preemption clause. *E.g. Sigman v. CSX Corp.*, No. 15-13328, 2016 WL 2622007 (S.D. W. Va. 2016) (derailment causing release of toxic substances into the area waterways governed by FRSA rather than ICCTA); *Smith v. CSX Transp.*, No. 13 CV 2649, 2014 WL 3732622 (N.D. Ohio 2014) (derailment causing chemical spill requiring evacuation of 400 homes involved safety issues rather than economic regulation, and were governed by the FRSA rather than the ICCTA).

The Property Owners submit that their tort law claims for recovery of property damage against the Rail Group involve rail safety subject to the FRSA and are not economic regulation subject to the ICCTA. The Property Owners do not seek to change the rates that railroads charge, the routes that they maintain, or any other aspect of the railroads' operation. Rather, they seek compensation for losses due to the Rail Group's safety-related, negligent conduct and its violation of Iowa statutory law. As such, they seek recovery for "property damage" due to the fact that the Rail Group "failed to comply with a State law . . . " 49 U.S.C. § 20106(b), making their claims plainly subject to the FRSA.

### B. The Iowa Court failed to properly examine the FRSA's impact on its preemption analysis, writing that law's savings clause out of existence.

The Iowa Court also erred in its analysis of the relationship of the FRSA and the ICCTA to this case. As noted above, in *Tyrrell* and *Washington County* the courts held that the ICCTA implicitly repeals the FRSA's savings clause and the two statutes had to be read together, with ICCTA preemption standards applying when the state law involved regulation of rail transportation, and the FRSA governing when rail safety or injury to persons or property was involved. The Iowa Court did not apply this analysis, rather it held that when a state law was arguably within the scope of ICCTA preemption the FRSA's savings clause simply did not apply:

> Thus, by its terms, the savings clause in the FRSA does not preserve all state-law property-damage claims against a railroad. It merely clarifies that the FRSA does not preempt them. See *id.* Section 20106(b) of the FRSA therefore does not alter the preemptive force of the ICCTA.

(Pet. App. 31).

In other words, the Iowa Court held the ICCTA "implicitly repeals FRSA's first savings clause" by writing it out of existence for laws within its scope. This not only directly conflicts with the holdings of *Tyrrell* and *Washington County*, but directly conflicts with the congressional intent, in passing the FRSA, that

state law should apply when issues involving rail safety are concerned.

## VI. While it is theoretically possible for Congress to extinguish state tort remedies without providing a federal remedy, no intent to do so is shown here.

The remarkable nature of the Iowa Court's decision must be stressed here: In upholding the dismissal of the Property Owners' claims without leave to amend, the Court necessarily found that there were no possible facts they could allege that would permit their damage claims to escape ICCTA preemption. Yet, as the Eighth Circuit acknowledged in *Griffioen*, federal law supplies no remedies for the Plaintiffs. *Griffioen*, 785 F.3d at 1191. As such the Iowa Court, presuming as it must the truth of the allegations contained in the CAP that the Rail Group's negligent conduct caused immense property damage to nearly 20,000 people, found that Congress intended to extinguish any possible state law remedy for those people while providing no federal remedy in its place. The Property Owners submit this is in error, given the absence of any showing that, when it passed the ICCTA, Congress intended to immunize railroads from tort liability in all fifty states.

In fact, the federal courts have repeatedly held, in other contexts, that imposition of a federal regulatory scheme does not extinguish state tort law remedies against the regulated entities, at least in the absence

of an express congressional intent to do so. This was, for example, the holding of *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), which held that the extensive federal regulation of the nuclear industry did not extinguish state tort law claims. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood*, 464 U.S. at 251.

The courts reached similar conclusions about the Airline Deregulation Act ("ADA"), for similar reasons. In *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995), the Court held that the lack of any indication either in the ADA or its legislative history that "Congress intended to displace the application of state tort law to personal physical injury inflicted by aircraft operations," coupled with the "failure to provide any federal remedy for persons injured by such conduct," made it clear that these claims survived preemption under the Act. The same analysis should apply here.

## CONCLUSION

This case presents an important decision by the Iowa Supreme Court addressing the relationship between state and federal law which conflicts with prior opinions of the federal circuit courts and which has not been settled by this Court. The Property Owners

respectfully request that their petition for certiorari be granted.

Respectfully submitted,

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