No. 18-499

In the Supreme Court of the United States

MARK GRIFFIOEN, ET AL.,
Petitioners,

v.

CEDAR RAPIDS AND IOWA CITY RAILWAYS COMPANY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF IN OPPOSITION FOR RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND UNION PACIFIC CORPORATION

J. SCOTT BALLENGER
Counsel of Record
CHERISH A. DRAIN*
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004
(202) 637-2200
scott.ballenger@lw.com

*Admitted to practice in Pennsylvania only. All work supervised by a member of the DC Bar.

Counsel for Respondents Union Pacific Railroad Company and Union Pacific Corporation

QUESTION PRESENTED

Whether the Iowa Supreme Court properly applied the established test for preemption under the ICC Termination Act of 1995 to state tort claims premised on a railroad's efforts to secure its facilities and maintain open rail lines.

RULE 29.6 STATEMENT

Respondent Union Pacific Railroad Company is a wholly owned subsidiary of respondent Union Pacific Corporation, a publicly traded company. No publicly traded corporation is known to own 10% of the stock of Union Pacific Corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

FEDERAL STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

Page(s)

STATE STATUTES

OTHER AUTHORITIES

INTRODUCTION

In a lengthy and thoughtful opinion, the Iowa Supreme Court held that petitioners' claims are expressly preempted by the ICC (Interstate Commerce Commission) Termination Act ("ICCTA"), 49 U.S.C. § 10101 *et seq.* That conclusion is correct, and presents no conflict of authority or other issue meriting this Court's review.

The gravamen of petitioners' claims was that respondents Union Pacific Railroad Company and Union Pacific Corporation ("Union Pacific") should have moved and parked their trains in different places—and in particular should have made less of an effort to safeguard their railroad—during a historic 2008 flood that threatened significant damage to the railroad's transportation facilities. ICCTA expressly preempts state law remedies with "respect to regulation of rail transportation," and defines rail transportation broadly to include trains, tracks, bridges, and other facilities. *Id.* §§ 10501(b), 10102(6), 10102(9). The Iowa Supreme Court correctly stated the principle, applied by courts nationwide, that "[i]f a state-law tort claim requires second-guessing of a railroad's operation and management of its own rail lines . . . it is preempted by the ICCTA." Pet.App.5a. The court then concluded, unsurprisingly, that petitioners' claims plainly do seek to second-guess Union Pacific's operation and management of core railroad facilities.

The petition argues that the decision below somehow conflicts with "the *Franks* test" articulated in some of the leading federal precedents. *See, e.g., Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404 (5th Cir. 2010) (en banc); *Fla. E. Coast Ry. Co. v. City of W.*

Palm Beach, 266 F.3d 1324 (11th Cir. 2001). But the Iowa Supreme Court applied precisely that test, at petitioners' urging. Pet.App.21a. It concluded that, "[c]ontrary to the plaintiffs, we believe that the *Franks* test supports preemption here" and that preemption is fully "consistent with the federal authorities examining this question of federal law." Pet.App.3a, 25a. Even if the Iowa Supreme Court had misapplied the *Franks* test, its decision would not merit review. "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. But there was no misapplication. The Iowa Supreme Court discussed all of the cases petitioners rely on, and explained why they are all factually inapposite. It similarly considered, and persuasively rejected, petitioners' suggestion that this case falls into the narrow category of state law *rail safety* claims that arguably might be preserved from ICCTA preemption by the savings clause in a different statute, the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 *et seq*. Again, the Iowa Supreme Court accepted and applied the federal case law urged by petitioners—and correctly recognized that it did not support their position.

Petitioners' arguments for a conflict depend on mistaking the actual reasoning of the leading cases, and ignoring contrary precedent directly on point. For example, it is far too late in the day to argue, as the petition does, that express preemption of state law regulation or requirements in a field does not include state tort law or other laws "of general application." This Court has held over and over again that a tort case for damages functionally creates and enforces state regulatory requirements no less than a statute

would. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) ("[R]eference to a State's 'requirements' includes its common-law duties."); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 515, 521-22 (1992) (same). Courts nationwide uniformly apply that settled law in ICCTA cases. Petitioners' suggestion that ICCTA preempts only "economic regulation" of railroads is inconsistent with the plain language of the statute and unsupported by any authority. And there is no reason for this Court to grant review to reconsider its clear and repeated holdings that when a statute "'contains an express pre-emption clause,' [courts] do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 594 (2011)). No Justice objected to that principle in *Puerto Rico*, only two years ago, and there is no conflict in the lower courts about its application on these facts.

Petitioners received thorough and respectful consideration of these issues from the highest court of their state. The Iowa Supreme Court's decision properly states the nationwide consensus about the governing legal standard, and is correct. Petitioners identify no genuine conflict about any legal principle. The petition should be denied.

STATEMENT OF THE CASE

A. Regulatory Background

1. ICCTA was enacted in 1995 to eliminate the former Interstate Commerce Commission, constitute the new Surface Transportation Board ("STB" or

"Board"), and grant the Board "exclusive" federal jurisdiction over "transportation by rail carriers . . . practices, routes, services, and facilities of such carriers," and the "construction . . . [and] operation . . . of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b)(1), (2).

That grant of jurisdiction was coupled with a broad express preemption clause. ICCTA specifies that "[e]xcept 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." *Id.* § 10501(b) (emphasis added). ICCTA defines "transportation" to encompass "a locomotive, car, . . . property, facility, instrumentality or equipment of any kind related to the movement of passengers or property, or both, by rail," and "services related to that movement." *Id.* § 10102(9). "[R]ailroad" is also expansively defined to include both "a bridge . . . used by or in connection with a railroad," and "track . . . used or necessary for transportation." *Id.* § 10102(6)(A), (C).

Congress also eliminated former provisions which had reserved power to the states to regulate purely *intrastate* transportation, 49 U.S.C. § 10501(c) (1988) (repealed 1995), and had provided that federal remedies were "in addition to remedies existing under another law or at common law," 49 U.S.C. § 10103 (1988) (repealed 1995).

Courts and the Board have consistently recognized two kinds of preemption under ICCTA: "categorical"

or "express" preemption,[1] and "as applied" preemption. ICCTA expressly or categorically preempts "'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 (alterations in original) (quoting *Fla. E. Coast Ry. Co.*, 266 F.3d at 1331). "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).

2. The FRSA was enacted in 1970 and declares Congress's intent that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). It directed the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety" to supplement existing federal rail safety regulations. *Id.* § 20103(a). Pursuant to that authority, the Secretary has promulgated a comprehensive regulatory scheme

---

[1] Courts use the terms "categorical" and "express" preemption interchangeably in this context, to refer to laws or requirements that are preempted regardless of their practical effects in the particular case. *Compare Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 19 (D.C. Cir. 2017) (using "categorical preemption" and citing *Franks*), *with Franks*, 593 F.3d at 413 (referring to "express[] preempt[ion]"). In fact both the "categorical" and "as applied" ICCTA standards enforce *express*, not *implied*, preemption in this Court's usual taxonomy.

governing issues such as speed, track grade and curvature, crossing markings, and other issues that may contribute to derailments and other safety failures. 49 C.F.R. ch. II, pts. 200-272.

Existing state laws and regulations could remain in force "until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). Once federal rules "cover[] the subject matter," however, the FRSA expressly preempts state law unless three prerequisites are met. *Id.* To survive preemption, the state rule (1) must be "necessary to eliminate or reduce an essentially local safety hazard"; (2) must not be "incompatible with a law, regulation, or order of the United States Government"; and (3) must not "unreasonably burden interstate commerce." *Id.* §§ 20106(a)(2)(A)-(C).

In 2007, Congress clarified the foregoing provisions, stating "[n]othing in [the FRSA] shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage" in certain delineated situations. *Id.* § 20106(b)(1). Those situations are limited to circumstances where a party has failed to comply with "the Federal standard of care established by a regulation or order issued by" the Secretaries of Transportation or Homeland Security, "its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries," or "a State law, regulation, or order that is not incompatible with subsection (a)(2)." *Id.* § 20106(b)(1)(A)–(C).

B. The 2008 Iowa Flooding

In 2008, Cedar Rapids, Iowa and surrounding areas experienced catastrophic flooding. Pet.App.6a. Petitioners are five individuals who sustained property damages as a result of that flooding. Pet.App.73a–74a (Class Action Petition at Law ¶¶ 1–5 ("CAP")).

Union Pacific owns two bridges, Quaker Plant Railroad Bridge and Prairie Creek Power Plant Railroad Bridge, which cross the Cedar River in Cedar Rapids, Iowa. *Id.* at 77a–78a (CAP ¶¶ 25, 27). In June 2008, rail cars weighted with rock ballast were positioned on those rail bridges in preparation for flooding. *Id.* at 78a–79a (CAP ¶¶ 28, 31–32). Those bridges withstood the flooding, but petitioners allege that the "bridge and railcars" impeded water from flowing downstream. *Id.* at 79a–80a (CAP ¶¶ 32, 35). Petitioners also claim that they are "informed and believe" that respondents, including Union Pacific, either similarly reinforced the Cargill Plant Bridge over the Cedar River with weighted rail cars "or in the alternative, . . . did not fill the railcars with rock for weight and did not position the railcars" on the bridge. *Id.* at 77a–78a (CAP ¶¶ 26, 30). During the flooding, the Cargill Plant Bridge partially collapsed, allegedly impeding water flow. *Id.* at 80a (CAP ¶ 38). In addition to challenging the method by which respondents sought to secure their rail bridges and maintain open rail lines, petitioners allege the rail bridges were not built, maintained, inspected, or kept in good repair. *Id.* at 81a (CAP ¶¶ 39–40).

Petitioners filed a class action petition at law in the Linn County District Court on June 7, 2013, raising negligence and strict liability theories of

liability. *Id.* at 6a–7a, 104a–28a (CAP ¶¶ 81–123). Two of petitioners' strict liability claims were premised on violations of Iowa Code §§ 468.148 and 327F.2. Petitioners sought compensatory damages of $6 billion plus punitive and treble damages "to punish" the respondents, "while deterring and discouraging [them] from taking similar action in the future." *Id.* at 7a, 114a.

C. Proceedings Below

Union Pacific removed the case to federal court, on the "complete preemption" theory that federal law so completely occupies this field that petitioners' claims, if any, necessarily arose under federal law. The district court concluded that petitioners' suit was expressly preempted by ICCTA and dismissed the case. *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 977 F. Supp. 2d 903 (N.D. Iowa 2013). On appeal, the Eighth Circuit held that this is not one of the "rare" circumstances where "[c]omplete preemption" justifies removal to federal court, and that therefore the district court had lacked jurisdiction. *See Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1189, 1192 (8th Cir. 2015). The Eighth Circuit carefully distinguished between the jurisdictional "complete preemption" question and the distinct *merits* issue ("ordinary preemption") of whether petitioners' claims arising under state law are preempted—stressing that it "offer[ed] no views regarding any preemption defense that may be raised in state court." *Id.* at 1188, 1192.

Following remand to state court, Union Pacific moved for judgment on the pleadings based on ICCTA's express preemption clause. The trial court granted the motion and dismissed respondents from

the case. Pet.App.58a ("[I]f a railroad is acting to protect its tracks and bridges from floodwaters and to keep the interstate shipment of goods moving, those actions are protected by federal law."); *id.* at 62a ("Plaintiffs, having made complaints about how the railroad Defendants loaded and positioned their rail cars; as to where and when they parked their rail cars; and as to the design, construction and maintenance of the bridges, have stated claims that go directly to rail transport regulation.").

The Iowa Supreme Court affirmed. At petitioners' urging, the court applied the *Franks* test for ICCTA preemption used by several federal circuit courts, *id.* at 21a, 25a, and surveyed the relevant case law. Distinguishing the cases cited by petitioners, the court concluded that petitioners' tort claims here—addressed to "where and when railroads placed their railcars on their transportation lines," and "how they constructed those lines"—would have the effect of managing or governing rail transportation itself, and therefore were preempted, *id.* at 5a, 25a–26a. The court stressed that its "decision is consistent with the federal authorities examining this issue of federal law," and that "[c]ontrary to the plaintiffs, we believe that the *Franks* test supports preemption here." *Id.* at 3a, 25a. The court further explained that "the present case is not a garden-variety tort" but "arise[s] out of allegations that the defendants . . . took a series of actions to prioritize keeping their bridges and rail lines open in lieu of preserving the city as a whole." *Id.* at 29a. Plaintiffs' preferred resolution of that dilemma "may be a desirable social policy, assuming the plaintiffs' allegations are true, but it is a policy that under the ICCTA must come from the federal government." *Id.*

The Iowa Supreme Court also rejected petitioners' distinct argument that their suit is saved from preemption under ICCTA by the savings clause in the FRSA. As a textual matter, the court pointed out, the FRSA savings clause "does not preserve *all* state-law property-damage claims against a railroad" but "merely clarifies that *the FRSA* does not preempt them." *Id.* at 31a. The court explained that "courts have uniformly held that the FRSA deals with rail safety," and that while there may be difficult cases at the boundary between the two statutes "[t]his is not such a borderline case." *Id.* at 31a-32a.

Three justices dissented, arguing that "there is no express language in the ICCTA suggesting that Congress sought to preempt traditional state tort law of general application." *Id.* at 35a.

REASONS FOR DENYING THE WRIT

The petition alleges a factbound misapplication of the properly stated and well-established test for preemption under ICCTA. *See* Pet. 4 (acknowledging that the Iowa Supreme Court "cited to the accepted test for ICCTA preemption"). The petition would not satisfy this Court's criteria for certiorari even if it had any merit, and it does not. As the Iowa Supreme Court correctly recognized, this is not a "borderline case" but a straightforward, heartland application of ICCTA's express preemption clause under existing precedent. Petitioners seek to impose billions of dollars in liability on Union Pacific because of how its bridges were constructed and maintained, and because of operating decisions the railroad made in order to preserve its railroad infrastructure and to keep its rail lines open and functional. The gravamen of their claim is that Union Pacific should have

sacrificed those transportation facilities, jeopardizing national rail service, in order to minimize property damage to Iowa landowners. The Iowa Supreme Court carefully considered all the precedent cited in the petition and concluded, correctly, that on these facts the case law supports a holding of preemption.

Petitioners claim that the Iowa Supreme Court's decision conflicts with a variety of principles allegedly reflected in other decisions. Those arguments rest on fundamentally unsound foundations.

— There is no support for any proposition that state tort law (or other state law "of general application") is immune from categorical preemption analysis under ICCTA. Any such holding would be inconsistent with this Court's precedent going back decades.

— ICCTA preemption is not limited to pure "economic" regulation under state law. Many of the cases petitioners cite would be inconsistent with that proposed limitation, and the plain language of the statute preempts state law remedies "with respect to regulation of rail transportation" generally, not just state laws attempting to regulate railroad rates. 49 U.S.C. § 10501(b).

— This Court's recent precedent is crystal clear that talk of a "presumption against preemption" is more distracting than helpful in express preemption cases, where a reviewing court should remain focused squarely on Congress's preemptive intent as demonstrated by the statutory language that it chose. Of course the petition can cite older cases, from this Court and others, that framed the express preemption inquiry somewhat differently. But there is no conflict in *present* law that merits this Court's review.

— The Iowa Supreme Court also broke no new ground in concluding that even if there is some category of "rail safety" cases in which ICCTA preemption analysis is implicitly displaced by the FRSA's savings clause, this is not one of the "borderline" cases that would genuinely present such questions. Petitioners are not, as in most of the cases they cite, suing for personal injuries or a violation of FRSA safety regulations. They are seeking to impose liability for massive economic losses, on the theory that Union Pacific should have operated the railroad differently. A reading of the FRSA savings clause broad enough to encompass this case would threaten to swallow ICCTA whole.

Finally, even if the Iowa Supreme Court's express preemption holding were questionable, petitioners' $6B+ lawsuit would have the effect of unreasonably burdening or interfering with rail transportation, and be preempted as applied.

The petition identifies no conflict of authority or other issue meriting this Court's review. It should be denied.

I. THE IOWA SUPREME COURT CORRECTLY STATED AND APPLIED THE ESTABLISHED TEST FOR PREEMPTION UNDER ICCTA

A. Petitioners' Concession That The Iowa Supreme Court Properly Stated The Legal Standard Demonstrates That The Petition Should Be Denied

Petitioners repeatedly concede that the Iowa Supreme Court properly stated the widely established "*Franks*" test for ICCTA preemption, but contend that the court subsequently misapplied that test. *See, e.g.,*

Pet. 8 (claiming the court "badly misapplied the established test" (heading format altered)); *id.* at 31 (stating the court "failed to properly apply" the test). This Court rarely reviews claims that a properly stated legal rule has been misapplied to particular facts, *see* Sup. Ct. R. 10, and the petition identifies nothing about this case warranting a deviation from that sound practice.

The petition's failure to identify any conflict of authority over the governing legal standard, or even to take issue with the standard as articulated by the Iowa Supreme Court, warrants denial of review.

B. The Iowa Supreme Court Correctly Understood And Applied The ICCTA Preemption Standard

The Iowa Supreme Court did not misunderstand or misapply the plain language of ICCTA or the *Franks* test. The decision below is a straightforward application of existing law and clearly correct.

ICCTA's plain language provides that the STB's powers "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). "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005) (quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)). ICCTA expressly defines "transportation" to include "a locomotive, car . . . property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both by rail" as well as "services related to that movement."

49 U.S.C. § 10102(9). Courts consistently recognize that rail bridges are "facilities" within the meaning of ICCTA,[2] that state regulation of track usage is preempted,[3] and that challenges to where and when a railroad parks its trains are preempted.[4]

Petitioners allege that Union Pacific failed to adequately construct and maintain its rail bridges. Those allegations attempt to regulate both facilities and instrumentalities related to the movement of passengers or property by rail. Petitioners' allegations regarding the parking of loaded rail cars on rail bridges attempt to regulate those same facilities and also rail cars and their movement. Furthermore, that action was allegedly taken to prevent damage to rail lines and keep tracks open, which constitutes the operations of a railroad. On the plain language of the statute, petitioners' claims are preempted.

In the case that petitioners hold up as the paragon of ICCTA preemption analysis, *Franks Investment Company v. Union Pacific Railroad Co.*, the Fifth

---

[2] *See, e.g., City of Siloam Springs v. Kan. City S. Ry. Co.*, Civil No. 12-5140, 2012 WL 3961346, at *3 (W.D. Ark. Sept. 10, 2012); *City of Cayce v. Norfolk S. Ry. Co.*, 706 S.E.2d 6, 11 (S.C. 2011) ("Bridges are expressly considered part of the railroad's operations under the definitional section of the ICCTA . . . .").

[3] *See, e.g., Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1076–77 (9th Cir. 2016); *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012) (holding that exclusive jurisdiction of rail tracks is granted to the Board "leaving no room for local regulation"); *City of Auburn v. United States*, 154 F.3d 1025, 1028–30 (9th Cir. 1998).

[4] *See Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 806–08 (5th Cir. 2011); *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 443-44 (5th Cir. 2001).

Circuit held that ICCTA did not categorically preempt Louisiana real property law governing the closing of private railroad crossings. Following the Eleventh Circuit's earlier decision in *Florida East Coast Railway*, the Fifth Circuit explained that "laws that have the effect of managing or governing rail transportation will be expressly preempted." 593 F.3d 404, 410 (5th Cir. 2010). The court of appeals concluded that, on the record before it, the private crossings were not railroad "facilities" and did not fall within ICCTA's definition of "transportation." *Id.* at 411. But the Fifth Circuit's analysis makes clear that it would find categorical ICCTA preemption in this case.

First and foremost, the tracks, bridges, and rail cars that petitioners' claims seek to regulate *are* railroad facilities and encompassed within the statutory definition of "transportation." The Fifth Circuit's holding that *private crossings* are not is irrelevant here. Indeed the Fifth Circuit expressly noted that it would not consider Union Pacific's argument that Louisiana's regulation of crossings was, in a way, a regulation of the tracks themselves—holding that the railroad had waived that argument by not presenting it below. *Id.* at 409.

In distinguishing prior precedent, the Fifth Circuit also explained that "a tort suit that attempts to mandate when trains can use tracks and stop on them is attempting to manage or govern rail transportation in a direct way, unlike a state law property action regarding railroad crossings." *Id.* at 411 (discussing *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001)). This case parallels *Friberg*, in which the Fifth Circuit held that state tort claims premised on the blocking of a rail crossing by a parked train were

preempted. *Friberg*, 267 F.3d at 443. The Fifth Circuit explained that "[r]egulating the time a train can occupy a rail crossing impacts, in such areas as train speed, length, and scheduling, the way a railroad operates its trains, with concomitant economic ramifications." *Id.* Petitioners' attempted regulation of "the way a railroad operates its trains" and where it parks them is categorically preempted for the same reasons. In a similar vein, the *Franks* court cited with approval prior Fifth Circuit precedent endorsing the STB's view that "any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized" is categorically preempted. 593 F.3d at 410 (quoting *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008)).

The Iowa Supreme Court surveyed the federal precedent most on point, and concluded that the cases stand for the proposition that "laws, ordinances, and common-law damage actions challenging where and when railroads placed their railcars on their transportation lines or how they constructed those lines are generally preempted." Pet.App.25a (collecting cases). This case calls for nothing more than a straightforward application of that settled law.

In a similar case involving flooding allegedly caused by railroad bridges more than a century ago, this Court held that such bridges "are a necessary part of lines of commerce by rail among the States . . . under the exclusive control of Congress," that attempted state regulation of such bridges was preempted by the dormant Commerce Clause even without any action by Congress, and that the

preemption "is not confined to a simple prohibition of laws impairing [Congress's authority], but extends to interference by any ultimate organ" of the state. *Kan. City S. Ry. Co. v. Kaw Valley Drainage Dist.*, 233 U.S. 75, 78 (1914) (Holmes, J.). Surely Congress's subsequent exercise of that dormant power in ICCTA (and its express preemption clause) does not *improve* the case for state interference with the physical instrumentalities of interstate commerce.

II. THE IOWA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY LEGAL PRINCIPLE EMBEDDED IN THE CASES CITED BY PETITIONERS

The petition's effort to manufacture a conflict depends on extracting from the case law several incorrect propositions. The cited cases do not support those propositions, and indeed directly refute them.

A. Tort Law, And Other State Law "Of General Application," Is Not Immune From ICCTA Preemption

Like the dissenting justices below, the petition argues that state laws "of general application," such as the general state law of negligence, are exempted from categorical preemption analysis under ICCTA. *See, e.g.,* Pet. 8, 22, 27. Another version of the same argument suggests that petitioners' tort claims "would not regulate rail transportation in any fashion, as they seek only money damages for a past wrong." *Id.* at 8.

Those arguments are inconsistent with this Court's foundational preemption precedents going back several decades. This Court has consistently held that "state 'regulation can be . . . effectively exerted through an award of damages,' and '[t]he

obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (alterations in original) (quoting *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959)). Most of those cases have arisen under statutory language preempting state law "requirements" in addition to or different than those imposed by federal law, and hold that "[a]bsent other indication, reference to a State's 'requirements' includes its common-law duties." *Riegel*, 552 U.S. at 324. But as the Iowa Supreme Court recognized, "[i]f a common-law damages action can impose a 'requirement,' it can also 'regulate.'" Pet.App.19a.

The petition labors (at 20-24) to wrap its argument in the existing ICCTA case law. That effort does not succeed. The ICCTA cases—including, as noted, *Franks* and *Friberg*—hold explicitly and repeatedly that common law cases brought under generally applicable tort law *are* preempted by ICCTA if liability would be premised on something a railroad did (or did not do) with its transportation facilities in the course of actual railroad operations. *See also, e.g., Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 806 (5th Cir. 2011) ("We have already held the ICCTA completely preempts state law tort actions that 'fall squarely' under § 10501(b)." (citations omitted)); *Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1070 (11th Cir. 2010) ("The ICCTA expressly preempts state remedies involving the operation of the side track. Therefore, we will not permit landowners to circumvent that Congressional decision through state law nuisance claims.").

The petition points to *Emerson v. Kansas City Southern Railway Co.*, 503 F.3d 1126 (10th Cir. 2007), and *Guild v. Kansas City Southern Railway Co.*, 541 F. App'x 362 (5th Cir. 2013). *Emerson* merely speaks to preemption in the context of a railroad's activities unrelated to rail transportation. The Tenth Circuit held that tort claims were not categorically preempted when they were directed at a railroad's failure to maintain a wastewater drainage ditch and improper discarding of used railroad ties into the ditch, because "[tho]se acts (or failures to act) [we]re not instrumentalities 'of any kind related to the movement of passengers or property' or 'services related to that movement.'" 503 F.3d at 1130. The Tenth Circuit did not rest its holding on the fact that plaintiffs' claims rested on state common law. Indeed the Tenth Circuit discussed with approval two cases that applied categorical preemption to state tort claims. *Id.* at 1131–32 (citing *Rushing v. Kan. City S. Ry. Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001), and *Friberg*). As the Iowa Supreme Court correctly observed in distinguishing *Emerson*, that suit "arose out of the railroad's rubbish disposal activities, not its efforts to move freight or passengers." Pet.App.17a n.3.

The Fifth Circuit's unpublished decision in *Guild* is inapposite for similar reasons. The court of appeals there held that plaintiffs' negligence claim for damage to their privately-owned spur track was not categorically preempted. 541 F. App'x at 367. Plaintiffs, who used the private spur track for their caboose museum business, agreed to allow the railroad to park rail cars on it while the company upgraded its own main track, and the damage allegedly resulted from the weight of the cars. *Id.* at

364–65. The Fifth Circuit concluded that those claims did not "have the effect of managing or governing rail transportation" because they were not challenging anything the railroad did with its own transportation facilities. *Id.* at 367 (citation omitted).

In the same action, however, plaintiffs also attempted to compel the railroad to upgrade the switch that connected the main track to plaintiffs' spur track. *Id.* at 366. The Fifth Circuit held *that* claim was "expressly preempted by the plain wording of the statute" because it sought "'to regulate the operations of rail transportation.'" *Id.* (citation omitted); *cf. City of Girard v. Youngstown Belt Ry. Co.*, 979 N.E.2d 1273, 1282 (Ohio 2012) ("Courts also generally recognize that eminent-domain actions that seek to take property containing active rail lines are categorically preempted by the ICCTA."). *Guild* certainly does not support the proposition that state law of general application is immune from preemption—nor could it, in light of the Fifth Circuit's published decisions in *Friberg*, *Franks*, and (subsequently) *Ezell v. Kansas City Southern Railway Co.*, 866 F.3d 294, 299–300 (5th Cir. 2017) (holding that a negligence claim based on the amount of time a railroad blocked a crossing was categorically preempted).

The petition also tries to bolster its argument by pointing to cases applying preemption to state laws that were not "of general application," but instead targeted specifically at railroads. *See* Pet. 26–27 (discussing *Delaware* and *BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755 (9th Cir. 2018)). Those arguments confuse easy applications of the rule for the rule itself.

Petitioners read far too much, for example, into the D.C. Circuit's statements in *Delaware*. That case involved legislation targeted only at locomotives, which barred nonessential idling during specified hours in residential neighborhoods. 859 F.3d at 17–18. The D.C. Circuit easily concluded the legislation was categorically preempted because it "directly regulates rail transportation." *Id.* at 21. The petition quotes the D.C. Circuit's statement that "'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.'" Pet. 25–26 (alteration in original) (quoting *Delaware*, 859 F.3d at 18)). The petition then attempts to extrapolate a rule that categorical preemption analysis is "focus[ed]" on "the act of regulation itself, not the effect of the state regulation in a specific factual situation." *See id.* at 27 (quoting *Delaware*, 859 F.3d at 19). But the quoted portion of the D.C. Circuit's opinion is discussing categorical preemption of "state or local statutes or regulations" and must be understood in that context. Nothing in the D.C. Circuit's opinion suggests that it would break with the nationwide precedent (including this Court's most relevant decisions) and hold that *tort claims* are never preempted simply because the general state law of negligence was not adopted with railroads in mind. To the contrary, the D.C. Circuit cited *Franks*, *Florida East Coast Railway Co.*, and many of the other leading precedents with approval. *See Delaware*, 859 F.3d at 19.

The petition's reliance on the Ninth Circuit's decision in *BNSF* is unavailing for all the same reasons. The fact that a fee imposed on railroads shipping hazardous materials is expressly preempted, *see* 904 F.3d at 767–68 does not imply that a tort claim attempting to impose liability for the exact same conduct would not be.

Finally, petitioners contend that Congress could not have intended to displace state tort law without giving them a federal damages remedy. Pet. 37. But Congress can reasonably conclude that vesting regulatory jurisdiction exclusively in an expert agency is preferable to private lawsuits. The cases cited by petitioners are inapposite. There was no express preemption clause at issue in *Silkwood v. Kerr McGee Corp.,* 464 U.S. 238, 241 (1984). And in *Hodges v. Delta Airlines* another provision in the statute clearly limited the preemption provision's scope. *See* 44 F.3d 334, 338 (5th Cir. 1995) (en banc) (citing 49 U.S.C. § 1371(q) (1994) (recodified as 49 U.S.C. § 41112(a)). ICCTA's preemption clause is clear and expansive.

B. Categorical Preemption Under ICCTA Is Not Limited Only To Economic Regulation

The petition hypothesizes a category of actions that it terms "direct economic regulation of railroads," and suggests that categorical preemption is confined to those cases. Pet. 26–27, 15–17. Petitioners' construct is murky, and it is not clear why a claim directed at the railroad's decision to prevent, rather than suffer, extensive damage to its operating facilities would not be "economic" regulation.

Regardless, the case law simply does not support the distinction petitioners try to draw.

Certainly one of Congress's major purposes in ICCTA was to end state economic rate regulation of intrastate rail transport. But the statutory language clearly sweeps much broader, and the case law rejects any suggestion that ICCTA is concerned *only* with economic regulation. *See Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010) ("Both we and our sister circuits have rejected the argument—as advanced by the District here—that ICCTA preempts only economic regulation."); *see also Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016) (stating ICCTA was passed "with the purpose of expanding federal jurisdiction and preemption of railroad regulation).

For their position, petitioners are just citing cases that involved economic disputes on the facts presented, and inventing a distinction that actually played no part in the courts' holdings. Petitioners point to *Ezell*, for example, as case holding that "direct economic regulation" is properly subject to categorical preemption. Pet. 26. But the Iowa Supreme Court relied on *Ezell* and it is perfectly consistent with the decision below. *See* Pet.App.25a. *Ezell* involved negligence claims based "on the allegation that [the railroad]'s train blocked the three crossings for an impermissible amount of time." 866 F.3d at 298. The Fifth Circuit concluded that those claims were categorically preempted because they were premised "solely on the amount of time that [the railroad]'s train blocked a crossing, and 'the effect of [such a] claim is to economically regulate [the railroad]'s

switching operations.'" *Id.* at 299 (second alteration in original) (quoting *Elam*, 635 F.3d at 807).

But the *Ezell* opinion did not say that blocked-crossing claims are preempted only when the damages claimed are limited to economic loss. The actual law of the Fifth Circuit, confirmed in *Franks*, is that "[i]t is clear that a tort suit that attempts to mandate when trains can use tracks and stop on them is attempting to manage or govern rail transportation in a direct way," period. 593 F.3d at 411. "The relevant question under the ICCTA," the *Franks* court explained, "is whether Franks's railroad crossing dispute invokes laws that have the effect of managing or governing, and not merely incidentally affecting, rail transportation." *Id.* The Fifth Circuit did not say that the relevant question is whether the state law has the effect of managing or governing rail transportation *for economic reasons* as opposed to some other reasons.

C. Review Is Not Warranted To Reconsider This Court's Plain Language Approach To Interpreting Preemption Clauses

The petition invents a conflict over whether a presumption against preemption should play a strong role in the interpretation of express preemption clauses. It is far from clear that this issue is even presented, since the Iowa Supreme Court placed no weight on the absence of any presumption and almost certainly would have reached the same result if a presumption had applied. The statutory language is quite clear as applied to these circumstances. *See City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1031 n.7 (9th Cir. 1998) ("When a court finds the terms of a statute unambiguous, judicial inquiry is complete.").

Regardless, the Iowa Supreme Court quoted and faithfully applied this Court's most recent explication of how courts should approach the interpretation of an express preemption clause. Pet.App.12a. When a statute "'contains an express pre-emption clause,' [courts] do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (citation omitted). The dissenting Justices in *Puerto Rico* disagreed with the majority about the best way to understand the statutory language in its full context, but did not argue that the Court erred by failing to apply a presumption against preemption. So the Iowa Supreme Court can hardly be faulted for relying on a point that a majority of this Court, and apparently every Justice participating in the decision, agreed on only two years ago.

In support of its argument to the contrary, the petition cites a number of cases. Pet. 12–15. But *all* the cited cases predate this Court's decision in *Puerto Rico*. And in addressing the ICCTA cases that recited the existence of a presumption, the petition conspicuously fails to explain how that presumption made any difference to the decisions. The petition cites *Florida East Coast Railway*, *Franks*, and *Elam* as examples of cases applying the presumption. *Id.* at 14–15. But as discussed, *supra*, all of those cases reach conclusions fully consistent with the Iowa Supreme Court's analysis.

Nor is there any broader conflict in the lower courts about the interpretation of express preemption clauses generally. Following this Court's explanation in *Puerto Rico*, circuit courts have consistently

focused on the "plain wording" of express preemption clauses, as the Iowa Supreme Court did here. The Fourth, Eighth, Tenth, and Ninth Circuits have all disclaimed any reliance on presumptions in favor of a faithful reading of the express preemption clauses at issue. *See, e.g.*, *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 761–62 & n.1 (4th Cir. 2018); *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017); *EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017); *Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016). When interpreting an express preemption clause, the Fourth Circuit explained, the court's "task is simply to interpret the words as they are written." *Air Evac*, 910 F.3d at 762.

The Third Circuit's opinion in *Shuker v. Smith & Nephew, PLC*, is not to the contrary, at least not as presented here. 885 F.3d 760 (3d Cir. 2018). *Shuker* stated that the presumption still had a role to play because the products liability claim before it involved "state regulation of matters of health and safety," a matter at the core of traditionally local concerns. *Id.* at 771 n.9 (citation omitted). The Third Circuit distinguished *Puerto Rico* by noting that it involved bankruptcy law, *id.*, which is an area of historic federal concern, *see Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 n.5 (3d Cir. 2018) (noting that *Puerto Rico* involved an area not "historically regulated by states"). By contrast, and as the Iowa Supreme Court observed in its decision, "interstate rail operations have traditionally been subject to 'among the most pervasive and comprehensive of federal regulatory schemes.'" Pet.App.12a (quoting *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)).

In any event, *Shuker* also recognized that "the statute's plain wording 'necessarily contains the best evidence of Congress' preemptive intent.'" 885 F.3d at 770 n.8 (quoting *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 594 (2011)); *see also id.* at 771 ("Congress's intent is our 'ultimate touchstone,' and 'we look to the language, structure, and purpose of the relevant statutory and regulatory scheme . . . .'" (quoting *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 687 (3d Cir. 2016))). In a subsequent decision, the Third Circuit emphasized that the court's focus is properly on the "plain language" of the preemption provision. *See Lupian*, 905 F.3d at 131 ("To discern Congress's purpose, we look first to the plain language employed in the statutory provision at issue, and if necessary, the statutory structure as a whole . . . ." (footnote omitted)). If Third Circuit law is at all out of step with this Court's precedents and the law of other circuits (which is far from clear), that issue must await a case from that circuit, where the potential disagreement is actually presented.

D. The FRSA's Savings Clauses Do Not Apply To Claims Unrelated To Rail Safety

Petitioners argue that their claims should have been allowed to proceed under various precedents applying the savings clauses in the FRSA. *At most*, the FRSA savings clauses might inform an interpretation of ICCTA's preemption clause, to some extent, in cases directly focused on rail safety. As the Iowa Supreme Court correctly recognized, this is not such a case—and it is not even close.

As explained *supra*, the FRSA vests the Secretary of Transportation with authority to promulgate

federal regulations of rail safety issues. The statute provides that state laws, regulations, or orders "related to railroad safety or security" are saved from preemption until the Secretary prescribes a regulation covering the subject matter, 49 U.S.C. § 20106(a)(2), or afterward if the state law "is necessary to eliminate or reduce an essentially local safety or security hazard," "is not incompatible with a law, regulation, or order of the United States Government," and "does not unreasonably burden interstate commerce," *id.* § 20106(a)(2)(A)–(C). A recent clarification explains that "[n]othing in [the FRSA] shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party . . . has failed to comply with a State law, regulation, or order that is not incompatible with subsection a(2)." *Id.* § 20106(b)(1)(C).[5]

A number of lower courts have pointed out that ICCTA might be understood to preempt a significant proportion of the state regulation that is saved from preemption under the FRSA's savings clauses. That is not necessarily problematic. *See* Pet.App.31a (noting that "by its terms, the savings clause in the FRSA does not preserve *all* state-law property damage claims against a railroad" but "merely clarifies that *the FRSA* does not preempt them"). But

---

[5] The provision also specifies that state causes of action premised on two additional grounds are not barred by the FRSA: (1) failure "to comply with the Federal standard of care established by a regulation or order issued by the" Transportation or Homeland Security Secretaries " covering rail safety or (2) a rail carrier's failure "to comply with its own plan, rule, or standard that it created pursuant to a regulation issued by either of the Secretaries." 49 U.S.C. § 20106(b)(1)(A), (B).

in an effort to reconcile the intended scope of the two statutes, the lower courts have drawn a distinction between state regulation (and lawsuits) principally directed at rail safety issues within the FRSA's scope, and regulation (and lawsuits) addressed instead at issues committed to the jurisdiction of the STB under ICCTA.

The problem for petitioners is that the distinction drawn in the most favorable cases (for them) just does not apply on these facts. *See* Pet. 33–35. The unpublished district court cases cited in the petition expressly concerned violations of Federal Railroad Administration safety regulations. *See Sigman v. CSX Corp.*, No. 3:15-133328, 2016 WL 2622007 (S.D.W. Va. May 5, 2016); *Smith v. CSX Transp.*, No. 13 CV 2649, 2014 WL 3732622 (N.D. Ohio July 25, 2014). Since the FRSA was the basis of those actions, it is hardly surprising that the courts concluded that the FRSA preemption provisions supplied the surest guide to Congress's preemptive intent. *Smith*, 2014 WL 3732622, at *2; *Sigman*, 2016 WL 2622007, at *6 ("For reasons identical to those in *Smith*, the Court does not find that Plaintiffs' claims here are preempted by the ICCTA."). Petitioners are not basing their claims in this case on violations of regulations promulgated by the Secretary under the FRSA.

In *Tyrrell v. Norfolk Southern Railway Co.*, plaintiff's negligence per se claim was based on a violation of a state statute mandating that newly constructed main lines and other tracks must have at least 14 feet of clearance between parallel tracks. 248 F.3d 517, 520–21 (6th Cir. 2001). To determine whether the statute "ha[d] a 'connection with' rail safety" sufficient to be analyzed entirely under the

FRSA, the Sixth Circuit engaged in a more broad-ranging evaluation of the statute's terms "and what the ordinance require[d] in terms of compliance." *Id.* at 523 (quoting *CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626, 629 (6th Cir. 1996)). Noting that the state statute "yield[ed] safety benefits for employees" and that "federal and state case law recognize[d] that state track clearance provisions are designed to protect railroad workers," the court concluded such claims should be evaluated under the FRSA's preemption scheme. *Id.* at 523–24.[6]

The Iowa Supreme Court carefully considered this case within that framework and concluded that petitioners' claims concerned "economic issues relating to railroad operations and facilities" that were premised on "decisions made by the railroads regarding the construction of their bridges and the placement of trains on those bridges." Pet.App.31a–32a. Petitioners did not sue the railroads "because they caused a personal injury, but because they allegedly had the foreseeable effect of causing flood-related property losses." *Id.* at 32a. The court's conclusion that such claims should be evaluated

---

[6] *Iowa, Chicago & Eastern Railroad Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004), presented a more complex legal question. The portion of *Washington County*, 384 F.3d at 560, quoted in the petition is the circuit court's characterization of the district court's holding. Pet. 34. Contrary to the petition's assertion, the circuit court did not base its ICCTA preemption holding on the FRSA. *See Washington County*, 384 F.3d at 561 (holding that ICCTA preemption did not apply because a contrary determination "would require [the court] to conclude that Congress impliedly repealed, at a minimum, [provisions of the Highway Bridge Replacement and Rehabilitation Program] and [implementing regulations of the Federal Highway Administration]").

under ICCTA rather than the FRSA is fully consistent with *Tyrrell* and the other cited precedent.

The Iowa Supreme Court's holding also accords with the STB's decision in a case involving similar claims. *See Thomas Tubbs—Petition for Declaratory Order* ("*Tubbs Order*"), Docket No. FD 35792, 2014 WL 5508153 (S.T.B. Oct. 29, 2014). In *Tubbs*, the Board evaluated state tort claims, including trespass and negligence, related to a railroad's efforts to shore up its track in advance of flooding. *Id.* at *1–2. The petitioners claimed that their land was flooded as a result of those efforts. *Id.* at *1. Despite petitioners' reference to the FRSA, the Board determined their claims were preempted under ICCTA because "[the claims] would have the effect of managing or governing rail transportation." *Id.* at *4 (citing *Franks,* 593 F.3d at 410). Specifically, the claims were based on harms "stemming directly from the actions of a rail carrier, BNSF, in designing, constructing, and maintaining an active rail line—actions that clearly are part of 'transportation by rail carriers'" and therefore squarely within ICCTA's scope. *Id.* (quoting 49 U.S.C. § 10501(b)).

There may be hard cases in drawing the boundary between ICCTA and the FRSA. This Court will have ample opportunity to review any conflict, if one arises. As the Iowa Supreme Court noted, "[t]his is not such a borderline case." Pet.App.32a.

III. THE "AS APPLIED" PREEMPTION ANALYSIS URGED BY PETITIONERS WOULD LEAD TO THE SAME RESULT

Finally, review would serve no useful purpose even as a matter of (purported) error correction here, because petitioners' proposed alternative—an "as

applied" preemption analysis—would lead inevitably to the same outcome. *See* Pet. 29, 32.

A claim will be preempted under an as-applied analysis if "it has 'the effect of unreasonably burdening or interfering with rail transportation.'" *Elam*, 635 F.3d at 805 (quoting *Franks*, 593 F.3d at 414). In the *Tubbs* matter discussed *supra*, for example, the STB held that the flooding-related claims were "federally preempted, whether they are viewed as 'categorical' or 'as applied,' because they have the effect of regulating and interfering with rail transportation." *Tubbs Order*, 2014 WL 5508153, at *4. As the Board stated, those claims "interfer[e] with the railroad's ability to uniformly . . . maintain, and repair its railroad line." *Id.* at *5. Allowing them to proceed would undermine the core purpose of ICCTA—providing uniform standards for rail transportation. *See id.* ("The interstate rail network could not function properly if states and localities could impose their own potentially differing standards for these important activities, which are an integral part of, and directly affect, rail transportation."). The Eighth Circuit agreed and denied a petition for review challenging the Board's decision. *See Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141, 1146 (8th Cir. 2015).

The petition's own example of as-applied preemption analysis demonstrates that their claims cannot escape preemption. *See* Pet. 29 (identifying *Elam* as an example of "how all this should work in practice"). The petition discusses the Eighth Circuit's holding in *Elam* regarding the plaintiffs' "simple negligence claim" for the railroad's alleged failure to warn, but conspicuously ignores the Eighth Circuit's treatment of the claims going *beyond* simple failure to

warn. *See* Pet. 30–31. The Eighth Circuit specifically held that "[t]o the extent the [plaintiffs] allege [the railroad] was negligent *solely* because it blocked the [rail] crossing, that claim is impliedly preempted." *Elam*, 635 F.3d at 814 n.13. The claim "would 'have the effect of unreasonably burdening or interfering with' [the railroad]'s decisions in the economic realm." *Id.* (quoting *Franks*, 593 F.3d at 414). The court reached that determination based solely on the allegations as the railroad had not yet even filed a motion to dismiss. *Id.* at 814–15.

Petitioners seek damages of $6 billion plus punitive and treble damages for alleged property damage. Pet.App.7a. Their allegations relate to Union Pacific's construction and maintenance of rail bridges, its operations to maintain the bridges as in *Tubbs*, and its efforts to keep rail lines open for use. It is difficult to imagine a suit more likely to unreasonably burden and interfere with rail transportation. And, as in *Elam*, that determination is clear from a plain reading of petitioners' allegations. Thus, even under petitioners' proposed framework, their claims were properly preempted.

CONCLUSION

The petition complains of factbound misapplication of a legal rule that it concedes is properly stated, and identifies no genuine conflict of authority. The Iowa Supreme Court's decision was both correct and inevitable. The petition for certiorari should be denied.

Respectfully submitted,

J. SCOTT BALLENGER
Counsel of Record
CHERISH A. DRAIN*
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004
(202) 637-2200
scott.ballenger@lw.com

*Admitted to practice in Pennsylvania only. All work supervised by a member of the DC Bar.

Counsel for Respondents Union Pacific Railroad Company and Union Pacific Corporation

February 4, 2019