No. 18-499

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

PETITIONERS' REPLY

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ARGUMENT

I. The Iowa Court acknowledged the *Franks* test, but failed to apply it.

A. The Iowa Court failed to follow the *Franks* distinction between state laws that regulate rail transportation and laws of general application with only an incidental effect.

The central focus of the briefs by Union Pacific Railroad Company's ("UP") and Cedar Rapids and Iowa City Railway Company ("CRANDIC") (collectively "the Railroads") is that the Iowa Court properly applied the applicable test from *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404 (5th Cir. 2010) (*en banc*). However, while the Iowa Court announced that *Franks* stated the applicable test, it failed to apply that test.

In arguing otherwise the Railroads begin with a misstatement, or at least a significant overstatement, that it is "difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." (UP 13). UP cited to *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005) but, *Franks*, which the Railroads acknowledge is the prevailing test, stated that "'Congress narrowly tailored the ICCTA pre-emption provision. . . .'" *Franks*, 593 F.3d at 410 (quoting from *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001)).

In *Friends of the Eel River v. N. Coast R.R. Auth.*, 3 Cal. 5th 677, 716 (2017) the California Supreme

Court pointed out the varying standards among the circuits regarding the scope of ICCTA preemption, noting that "[s]ome decisions refer to the preemption provision as 'sweeping,' 'pervasive' and 'comprehensive,'" while other decisions "characterize the preemption clause of the ICCTA as relatively narrow." The *Eel River* Court stated it was "unnecessary to address disputes among federal courts concerning whether to designate the preemption provision as broad or narrow" to resolve the dispute. *Eel River*, 3 Cal. 5th at 716. This confusion among the circuits regarding the scope of ICCTA preemption is an additional reason for review by this Court.

Beyond misjudging the scope of ICCTA preemption, the Iowa Court failed to apply the key distinction in *Franks* between "state laws that may reasonably be said to have the effect of managing or governing rail transportation," which are preempted, and "laws having a more remote or incidental effect on rail transportation," which are not. *Franks*, 593 F.3d at 410 (attribution omitted). The distinction is not difficult to understand and is illustrated by *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011), which involved a collision between a train parked at a crossing and an automobile.

Elam held a claim based on a state statute prohibiting a railroad from blocking a rail crossing beyond a designated period was preempted as a direct attempt by the state to direct the railroad operations. But the motorist's negligence claim was allowed because it was a law of *general application* whose impact on rail

operations was only *incidental*. *Elam*, 635 F.3d at 813. In other words, the common law of negligence was not created to regulate railroads, it applies to all citizens who injure others through foreseeable acts, in spite of the fact that occasionally the tort might involve a train positioned on a rail line.

Ignoring this distinction, the Iowa Court held that only a tort claim "that challenges a railroad's activities other than the maintenance and operation of its rail lines" could survive preemption. (App. 4). This notion, that a tort claim based on a railroad's "maintenance and operation of its rail lines" will always be preempted, even if the law is one of general application with only an "incidental effect on rail transportation" is contrary to *Franks*. And, it conflicts with *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332-33 (5th Cir. 2008), which held that just because the subjects of the claim "touch the tracks in some literal sense" does not mean they are categorically preempted.

B. The Railroads misstate the Property Owners' position with respect to the scope of categorical preemption.

To justify the Iowa Court's decision UP attributes a strawman argument to the Property Owners, that laws of general application cannot be subject to categorical preemption under the ICCTA. (UP 17). This is not the Property Owners' position, rather they agree with the result in *Friberg v. Kan. City S. Ry.*, 267 F.3d

439, 444 (5th Cir. 2001), where the Court held that a tort damage claim based on a railroads' excessive use of a side track was categorically preempted.

Shortly thereafter UP offers up another strawman, claiming the Property Owners argue that categorical preemption is limited to "direct economic regulation of railroads." (UP 22). Not so. While the Property Owners argued that preventing state regulation of railroad economic activities was "[t]he primary focus" of ICCTA preemption, the Property Owners believe they were clear that ICCTA categorical preemption goes beyond pure economic regulation.

To clarify, the Property Owners agree with *Barrois*, which stated two types of state actions are "facially preempted" or "categorically preempted." "The first is 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." *Barrois* continued that "[s]econd, there can be no state or local regulation of matters directly regulated by [the Surface Transportation Board] – such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service." *Barrois*, 533 F.3d at 332 (citations and attributions omitted). *Accord*, *Eel River*, 3 Cal. 5th at 716 (same).

Here, nothing in the Property Owners' lawsuit requires the Railroads to obtain a preclearance to operate, or attempts to govern operations of the Railroads'

rail lines or the manner of its rates and service. And, unlike *Friberg*, the Property Owners do not seek to use state tort law to challenge "a railroad's economic decisions such as those pertaining to train length, speed or scheduling." *Friberg*, 267 F.3d at 444. The Property Owners do not seek to have the Railroads rebuild their bridges to any specifications, or exercise any control at all over the time and manner in which they operate their trains in the future. The Property Owners only seek money damages for injury caused by the Railroads past negligent conduct.[1]

C. The Railroads argue the presumption against preemption no longer exists in express preemption cases, a position at odds both with *Franks* and this Court's case law.

1. In order to save the Iowa Court's decision, UP is forced to argue that a single sentence in the *Puerto Rico* decision significantly limited the presumption against preemption.

The Iowa Court disregarded *Franks* by failing to apply the presumption against preemption that

[1] CRANDIC attempts to introduce evidence in its brief, that the flood was "historic," its actions were reasonable, and it did not cause the flood. (CRANDIC 7-8). This is improper, this case is still at the pleading stage and the Property Owners have not had a chance to present their case, or even amend their complaint. The Property Owners would not have brought this case in the absence of compelling scientific evidence of the Railroads' fault.

Franks, as well as *Florida E. Coast Ry.*, held was a crucial part of the ICCTA preemption analysis.[2] Instead, the Iowa Court relied on *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016), which contains a sentence that where "the statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption. . . . " As stated in the Petition, this is contrary to the well-established principal, as stated in *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008), that the presumption applied even in express presumption cases. The Petition noted that *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018) had limited *Puerto Rico*'s reach as a bankruptcy case that did not address areas of health and safety, traditionally regulated by the state.

In response, UP contends that the Property Owners' cases, such as *Altria Grp.* and *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) were older cases, and *Puerto Rico* changed the law with respect to the presumption against preemption in express preemption cases. In support of this notion UP cited to four cases – all of them involving aviation, another field traditionally occupied by the federal government – which cited *Puerto Rico*'s statement that the presumption did not apply to express preemption cases.

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[2] CRANDIC incorrectly states that *Franks* did not apply the presumption against preemption (CRANDIC 22), a point which not even UP agrees. (UP 25).

2. *Puerto Rico* did not change this Court's preemption analysis, but it did cause some confusion which justifies review by this Court.

Shuker has the correct understanding of the *Puerto Rico* decision. It is doubtful that a single sentence in this decision, delivered without explanation or reference to previous cases, was intended to change or limit the well-established presumption against preemption in express preemption cases. *Also*, *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 n.5 (3d Cir. 2018) (following *Shuker* in limiting *Puerto Rico*'s reach to areas of exclusive federal concern). And numerous post *Puerto Rico* circuit cases continue to apply this Court's traditional presumption against preemption even where an express preemption clause is at issue. *E.g.*, *Durnford v. MusclePharm Corp.*, 907 F.3d 595, 601 (9th Cir. 2018) ("a presumption against preemption applies to the extent the FDCA is used to displace state law in an area of traditional state police power."); *Bedoya v. Am. Eagle Express*, ___ F.3d ___ (3d Cir. Jan. 29, 2019) ("Thus, we presume claims based on laws embodying state police powers are not preempted.").

Moreover, some of the courts UP cites to show that *Puerto Rico* represented a sea change are less than convinced of this. For example, *Atay v. Cty. of Maui*, 842 F.3d 688, 699 (9th Cir. 2016) cited to *Puerto Rico*'s statement that the presumption did not apply to express preemption clauses. But, in the very next paragraph, it cited to *Wyeth v. Levine*, 555 U.S. 555, 565

n.3 (2009) that "where a statute regulates a field traditionally occupied by states, such as health, safety, and land use, a 'presumption against preemption' adheres." *Atay*, 842 F.3d at 699.

Another of UP's cases, *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018), cited to *Puerto Rico* but also noted that "[t]he court has made somewhat varying pronouncements on presumptions in express preemption cases," and "[t]he circuits also may not be in full accord." And, while *Air Evac* held it "need not enter the great preemption presumption wars" to decide this case, this confusion among the circuits creates yet another reason for Supreme Court review.

UP recognizes the confusion sowed by the misunderstanding of the *Puerto Rico* decision justifies review by this Court, although it believes this Court must wait for a Third Circuit decision. (UP 27). The Property Owners do not understand why, given that the present case squarely presents the issue of whether the presumption against preemption continues to exist in express preemption cases.

3. The Railroads' remaining arguments regarding the Iowa Court's failure to apply the presumption are badly flawed.

The Railroads present two fall-back arguments. First, they argue the Iowa Court "placed no weight on the absence of any presumption" and "would have

reached the same result if the presumption had applied." (UP 24). It is a mystery how the Railroads know this; typically if resolving the correct legal standard is not necessary to a court's decision it says so in the decision. *E.g.*, *Air Evac*, 910 F.3d at 762, n.1; *Eel River*, 3 Cal. 5th at 716. And, the Railroads' conclusion that the presumption does not matter conflicts with this Court's repeated statements that the presumption is one of the "two cornerstones of our pre-emption jurisprudence." *Wyeth*, 555 U.S. at 565.

The Railroads also argue that the presumption should not apply because railroads are heavily regulated at the federal level. As pointed out in the Petition, railroads have also been subjected to traditional state regulation.

More significantly, the Railroads are wrong that this Court should look at the history of federal versus state railroad regulation to determine the level of the state's interest. Rather, courts look to whether the state had a traditional interest in the area it was attempting to regulate, such as health and safety issues, rather than to the subject matter of the federal preemption provision.

So, for example, *Medtronic* involved a failed pacemaker, and whether a state negligence claim was preempted by the Medical Device Amendments of 1976. This Court did not examine whether the state had a traditional interest in medical devices, but whether it had a traditional interest in protecting the well being of its citizens. "States traditionally have had

great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Medtronic*, 518 U.S. at 475 (attribution omitted).

Similarly, Iowa negligence law is not intended to regulate railroads, rather it protects the safety of persons and their property, an area of traditional state interest. *E.g. Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1872) (state police power extends "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State").

II. Express and explicit language is required before a court can find that Congress eliminated a remedy without providing a replacement.

In responding to the Property Owners' complaint that the Iowa Court's ICCTA preemption analysis deprived them of any remedy at all, UP argues that "Congress can reasonably conclude that vesting regulatory jurisdiction exclusively in an expert agency is preferable to private lawsuits." (UP 22). But, as held by *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1191 (8th Cir. 2015), this "expert agency" is not empowered to provide the Property Owners with *any* alternative remedy.

This argument also misses the point. The Property Owners do not dispute that Congress *could* strip a party of its state law remedy without providing an alternative remedy. However, as noted in *Silkwood v.*

Kerr-McGee Corp., 464 U.S. 238, 255 (1984), Congress has to be more explicit that this is what it is doing than it is here.

In response, the Railroads state *Silkwood* is "inapposite" because "[t]here was no express preemption clause at issue" there. (UP 22). There was, however, an express preemption clause in *Medtronic*, where this Court followed *Silkwood* in holding that the extraordinary step of depriving a party of all remedies requires explicit language from Congress:

> It is, to say the least, "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], and it would take language much plainer than the text of § 360k [21 U.S.C. § 360k] to convince us that Congress intended that result.

Medtronic, 518 U.S. at 487.

III. The FRSA savings clause applies to state law claims, as well as claims of property damage due to flooding.

With respect to the Federal Railway Safety Act ("FRSA"), the Iowa Court attempted to write its savings clause at 49 U.S.C. § 20106(b) out of existence by holding, contrary to *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (6th Cir. 2001), that a state claim addressing rail safety issues can be within the savings clause and still be preempted. The Railroads do not appear to defend this, instead arguing that § 20106(b) only

applies to claims based on FRSA regulations. This is contrary to the FRSA's language, as its savings clause includes claims based on state laws, so long as they are "not incompatible" with federal regulation. 49 U.S.C. § 20106(b)(1)(C). Consistent with this, *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 492 (3d Cir. 2013) held that "[l]ongstanding state tort and property laws exist for a reason, and the FRSA's laudatory safety purpose should not be used as a cover to casually cast them aside."

The Railroads also argue that the FRSA is only concerned with rail safety rather than property damage caused by floods. Again this is contrary to the FRSA, whose savings clause includes "an action under State law seeking damages for . . . property damage. . . . " 49 U.S.C. § 20106(b)(1). The argument that the FRSA is not concerned with flood damage is also belied by an FRSA regulation, 49 C.F.R. § 213.33, requiring railroads to maintain their tracks so as to ensure proper drainage and allow free flows of water. Finally, if the FRSA has no relation to flood cases, why did the Railroads initially remove this case to federal court entirely based on the FRSA?

Moreover, courts have no difficulty evaluating preemption of flood claims under the FRSA. For example, in *MD Mall*, a mall owner alleged state law negligence claims, charging that a railroad's improperly constructed berm allowed water runoff. *MD Mall* evaluated the mall owner's claims solely under the FRSA, concluding that the claims were not categorically preempted by that law.

The *MD Mall* Court recognized FRSA preemption could apply if the railroad experienced a significant burden in complying with the state law. However, it could not evaluate this on the current record because, as is the case here, "the District Court made no findings of fact" whether complying with state law would impermissibly burden the FRSA's goals. *MD Mall*, 715 F.3d at 496.

Finally, the notion that preventing a flood does not involve safety issues is contrary to common sense. Floods can kill or injure people, contaminate water supplies resulting in public health concerns, and disrupt ambulance, fire, and police response. Preventing floods is obviously a public safety issue, and just as obviously is within the scope of the FRSA.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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