

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

—◆—  
BRENDA R. BLALOCK,

*Petitioner,*

v.

UNION PACIFIC RAILROAD COMPANY,

*Respondent.*

—◆—  
**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

—◆—  
**PETITION FOR WRIT OF CERTIORARI**

—◆—  
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## QUESTIONS PRESENTED

There are various questions being presented to this Court in this Petition for Writ of Certiorari.

The first question:

The ICCTA Preemption, found in 49 USC § 10501, provides that the Surface Transportation Board is granted exclusive jurisdiction over all matters tending to regulate the movement of trains. *Rollins v. Home Depot USA* provides that jurisdictional arguments are not forfeited when not raised at the District Court level.<sup>1</sup> As such, the first question posed to this Court is as follows:

Whether the Interstate Commerce Commission Termination Act's granting of exclusive jurisdiction to the Surface Transportation Board is a jurisdictional issue, thereby permitting the exception in *Rollins* to the traditional rule that issues not raised at the District Court level are forfeited.

The second question:

The Fifth Circuit's ruling in *Rollins* also states that issues that are purely legal in nature are not forfeited when the correlating legal argument is not raised at the District Court level.<sup>2</sup> Traditionally, matters pertaining to jurisdiction are purely legal, as they are decided by the Courts prior to any presentation of evidence to a judge or jury in a hearing on the merits

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<sup>1</sup> 8 F.4th 393, 398 (5th Cir. 2021).

<sup>2</sup> 8 F.4th 393, 398 (5th Cir. 2021).

**QUESTIONS PRESENTED** – Continued

of a case. Additionally, summary judgment rulings are reviewed *de novo*, meaning that the decision is a legal decision, as opposed to a manifest error review which infers that the decision was factual in nature. As such, the second question posed to this Court is as follows:

Whether a jurisdictional function of the United States Code reviewed *de novo* after summary judgment constitutes an issue that is purely legal, thereby permitting the second exception in *Rollins* to the traditional rule that issues not raised at the District Court level are forfeited.

The third question:

This Court in *Lujan v. Defenders of Wildlife* stated that a person has legal standing when they have suffered an injury in fact.<sup>3</sup> Given that defendants have the procedural tool of filing exceptions based on prematurity or lack of procedural capacity, it would follow that petitioner would not be forced to either choose to defend an exception of prematurity or defend a claim that her argument has been forfeited. As such, the third question posed to this Court is as follows:

Whether an argument is not raised at the District Court level is deemed forfeited when the plaintiff had no legal standing to bring the subject claim and raise the subject argument until the District Court ruled adversely to plaintiff's interests.

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<sup>3</sup> 504 U.S. 555, 560 (1992).

**QUESTIONS PRESENTED** – ContinuedThe fourth question:

Summary Judgment procedure according to Louisiana Law provides that the Court must interpret the evidence in a light most favorable to the non-movant and determine whether a genuine issue of material fact exists.<sup>4</sup> Conversely, it is the duty of the judge or jury during a trial of the merits to assess the credibility of testimony and evidence and determine the weight to be given to said testimony or evidence. As such, the fourth question posed to this Court is as follows:

Whether it is proper for the District Courts and Appellate Courts to assess the credibility of witnesses and determine the weight of evidence in a summary judgment proceeding, rather than assessing whether an issue of fact exists.

The fifth question:

Appellate Courts conduct review of summary judgment proceedings using the *de novo* review process. Meaning, the Appellate Court looks at the entire presentation of facts, evidence, and law presented to the District Court, and determines the outcome based on that evidence. Options available to the Appellate Court when ruling are to affirm or reverse the decision of the District Court or remand the matter for further

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<sup>4</sup> *Barnett v. Watkins*, 970 So.2d 1028, 1033 (La. Ct. App. 1st Cir. 2007).

**QUESTIONS PRESENTED** – Continued

proceedings. As such, the fifth question posed to this Court is as follows:

Whether it is proper for the Court of Appeals to “affirm a ruling” that never existed.

The sixth question:

Appellate Courts conduct review of summary judgment proceedings using the *de novo* review process. Meaning, the Appellate Court looks at the entire presentation of facts, evidence, and law presented to the District Court, and determines the outcome based on that evidence. That said, simply because an argument was unopposed does not mean that the issue should be disregarded. As such, the sixth question to this Court is as follows:

Whether it is proper for an Appellate Court to disregard a legal issue when conducting a *de novo* review simply because no argument was made at the District Court level.

### **RELATED CASES**

Upon information and belief, there are no cases directly related to this matter.

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**PETITION FOR WRIT OF CERTIORARI**

Petitioner Brenda R. Blalock, as plaintiff in an action against Union Pacific Railroad Company for negligent acts which caused or contributed to the death of Petitioner's deceased husband, Leo H. Blalock, respectfully petition for Writ of Certiorari to review the judgment of the Fifth Circuit Court of Appeals for the United States.

**OPINIONS BELOW**

The opinion of the Fifth Circuit Court of Appeals for the United States is an unpublished opinion, bearing Case No. 22-30100. The opinion of the United States District Court for the Western District of Louisiana is unpublished, bearing Case No. 19-cv-1160.

**STATEMENT OF JURISDICTION**

The judgment of the Court of Appeals was entered on October 10, 2022. A Petition for Writ of Certiorari must be submitted ninety (90) days from the entry of judgment by the Appellate Court. Therefore, this submission is timely.

This Court has jurisdiction pursuant to Article III, Section II of the United States Constitution.



## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **U.S. Constitution, Amendment 7**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

### **49 U.S.C. § 10501**

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is –

- (A) only by railroad; or
- (B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in –

. . .

(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 sidetracks, 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.

28 U.S.C. § 1447(c)

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

## Louisiana Civil Code Article 2323

A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.

C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.



### **STATEMENT OF THE CASE**

This claim arises from the interference of a Union Pacific Railroad Co. (hereinafter “UPRR”) train-car in the transportation of Leo Blalock, deceased husband of petitioner, to an emergency medical provider, which resulted in or contributed to his death and/or a lost chance of survival.

Plaintiff-appellant, Brenda R. Blalock – wife of the decedent, filed her Petition on August 16, 2019, in the 12th Judicial District Court of Louisiana, Parish of Avoyelles.

The petition alleges that decedent, Leo Horace Blalock, had a medical emergency and was being transported via ambulance from his home to a nearby hospital, Bunkie General Hospital. At some point, the decision was made that plaintiff needed to be transported to a different hospital, Rapides Regional Medical. The ambulance was to continue to Bunkie Hospital so that the decedent could be airlifted to Rapides. That said, while plaintiff was being transported to Bunkie Hospital, the ambulance came upon the UPRR train that had stopped in an intersection thereby preventing the ambulance from continuing along its path. Contact was made with the operators of the train that a medical emergency existed, and, therefore, the train needed to be broken to allow the ambulance to pass and transport the decedent to the hospital. However, upon contact, employees of UPRR, defendant-appellee, advised that they were “resting” and, therefore, would not split the train and allow the ambulance to pass

through. UPRR's failure to "recognize the obvious need of an individual in an ambulance traveling to a hospital for emergency medical treatment" and "callous indifference to the suffering of another human being by failing to move the train and/or make a break in the train to allow passage to obtain critical emergency medical treatment" resulted in the untimely and unfortunate death of the decedent. It should be noted that the train blocked all road crossings in Bunkie for approximately seven (7) hours, which is absurd and negligent in its own right.

Defendants contend that the UPRR employees took swift action to break the train and allow passage and that had they timely split the train and allowed passage, decedent would have suffered the same unfortunate fate. While that question of fact is not squarely before this Court on appeal, it is relevant to support plaintiff's contention that further proceedings are required at the district court level.

In the District Court, defendant, UPRR, filed a motion for summary judgment arguing two points: 1) plaintiff's claims were preempted under the ICCTA and 2) no genuine issue of material fact regarding causation of death existed. Both parties submitted memorandums for a summary judgment hearing, however, on February 1, 2022, the district court ruled, absent a hearing, that all of plaintiff's claims were preempted according to the preemptive power of the ICCTA.

On February 25, 2022, plaintiff filed her notice of appeal in the Western District of Louisiana, and subsequently filed the necessary briefs.

On Appeal, the Fifth Circuit declined to review the issues pertaining to ICCTA preemption and constitutional violations, citing *Rollins* in their ruling that these arguments were not raised in the District Court and are, therefore, forfeited. However, the Appellate Court, instead of simply affirming the District Court's ruling of ICCTA preemption, decided to also rule that there was no genuine issue of material fact regarding causation and "affirmed" the District Court's granting of the summary judgment.

It is of significant note that the District Court refused to address the issues pertaining to causation and simply dismissed plaintiff's claims as preempted under the ICCTA. On appeal, the appellate court refused to address the issues relating to ICCTA preemption stating that said claims were forfeited and decided to rule that no genuine issue of material fact existed regarding causation, and "affirmed" the District Court's ruling in that regard.

It is unclear to undersigned counsel how the Appellate Court can affirm the District Court's finding of no genuine issue of material fact when the District Court made no such finding in their reasons for judgment.

Now, petitioners request that this Court reverse the decision of the Appellate Court and remand this case to the District Court for further proceedings, as

the ruling affirmed by the Appellate Court was never made by the District Court. Further, the arguments made by Brenda Blalock pertaining to ICCTA preemption and constitutional violations on appeal were not forfeited according to *Rollins* and *Lujan*.



### **REASONS FOR GRANTING THE WRIT**

This case presents the Court the opportunity to confirm and protect various rights of the citizens of the United States of America. First and foremost, the right granted and protected by the 7th Amendment – the right to a jury trial – is at stake in these proceedings. Second, this Court has the opportunity to protect the rights of the American citizen in that jurisdictional questions are never forfeited, and, in addition, that Courts are under a continuing duty to address jurisdictional questions regardless of the stage of the proceeding and regardless of whether said jurisdictional question has been raised by any party at any time.

Lastly, the issue of ICCTA preemption is of significant importance to this Court and this Country for multiple reasons. The issue of ICCTA preemption is not only relevant to the rights of the individual citizen but also relevant to the foundation of the United States – the protection of each State’s rights. The issue of ICCTA preemption is of such importance that the Attorney Generals of 18 states and the District of Columbia recently petitioned this Court seeking to restore the rights of state and local governments



pertaining to the regulation of trains and their blocking roadways.

Considering the vast network of railroads and integration of the railway system through this Country, this Court must take up the issues presented herein and correct the Appellate Court's error.

### **I. ICCTA preemption is a jurisdictional issue.**

The Appellate Court stated that it is “well-settled that ‘the scope of appellate review on a summary judgment order is limited to matters presented to the district court. *Kellan v. Majesco Software, Inc.*, 407 F.3d 332, 339 (5th Cir. 2005).’”<sup>5</sup> The appellate court goes on to state, “[a]s a result, we hold that Brenda forfeited these arguments. *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021).”<sup>6</sup>

The allegedly forfeited arguments of Brenda Blalock are: (1) her negligence claims are not preempted under the ICCTA, (2) she was entitled to an evidentiary hearing prior to summary judgment, and (3) that the ICCTA violates her Seventh Amendment right to a trial by jury.

While the Appellate Court's ruling appears to suggest that any argument not made at the district court level is forfeited, the same Court's opinion in *Rollins* upholds multiple exceptions to the general rule that

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<sup>5</sup> See App. 1.

<sup>6</sup> See App. 1.

arguments not raised at the district court level are forfeited.

The Fifth Circuit in *Rollins* stated, “[j]urisdictional arguments are one obvious exception. ‘[S]ubject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived.’”<sup>7</sup>

The issue of Interstate Commerce Commission Termination Act (hereinafter “ICCTA”) preemption is an issue of jurisdiction.

49 U.S.C. § 10501(a)(1) reads as follows, “Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is . . . ” and so on. 49 U.S.C. § 10501(b) states:

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 sidetracks, 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

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<sup>7</sup> *Rollins v. Home Depot USA*, 8 F.4th 393, 398 (5th Cir. 2021).

part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

As defined in *Rollins*, subject-matter jurisdiction involves a court's power to hear a case. The ICCTA preemption – granting exclusive jurisdiction of rail car regulation to the Surface Transportation Board (hereinafter “STB”) – is an issue of whether a traditional state or federal trial or appellate court has the power to hear a case. Furthermore, 28 U.S.C. § 1447(c) provides guidance in this case and in providing that subject matter jurisdiction may be challenged at any point prior to final judgment. Additionally, the aforementioned section places the burden on the court to remand any case in which it appears subject matter jurisdiction does not exist. As such, it is irrelevant whether petitioner herein raised the issue of ICCTA preemption – “jurisdiction” – or not, as the courts also share the burden to properly enforce the jurisdictional statutes and rules of the United States.

Considering that ICCTA preemption is a jurisdictional function of the US Code, an argument pertaining to the validity of ICCTA preemption – i.e., whether the District Court has jurisdiction versus the Surface Transportation Board – is an argument that is not forfeited when not raised at the District Court level according to the Fifth Circuits explanation in *Rollins*. Therefore, the ruling of the Fifth Circuit that petitioner's arguments pertaining to ICCTA preemption were forfeited should be reversed and this matter

should be remanded for further proceedings regarding ICCTA preemption and jurisdictional authority.

## **II. ICCTA preemption is a purely legal issue.**

The Fifth Circuit in *Rollins* also provided that an issue may be raised for the first time on appeal if the issue “is a purely legal matter and failure to consider the issue will result in a miscarriage of justice.”<sup>8</sup>

The Fifth Circuit’s refusal to address the arguments of Brenda Blalock arising under the ICCTA’s jurisdictional preemption have resulted in a miscarriage of justice, as Brenda Blalock will have been prevented from properly utilizing the judicial process. Furthermore, the court in *Rollins* stated, “nothing prevented Rollins from alleging a fact dispute in the district court.”<sup>9</sup> The court in *Rollins* is contemplating a party’s failure to present a fact already known or possibly known, not a purely legal argument rooted in jurisdiction and relying on a party to point out specific facts to the Court.

Here, there is no fact that petitioner failed to mention that is necessary for a ruling on ICCTA preemption. As such, the Appellate Court and District Court had only a legal question to answer – whether ICCTA preemption applied or not.

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<sup>8</sup> *Rollins v. Home Depot USA*, 8 F.4th 393, 398 (5th Cir. 2021).

<sup>9</sup> *Rollins v. Home Depot USA*, 8 F.4th 393, 399 (5th Cir. 2021).

Perhaps most importantly, the legal review process provides guidance on this topic as well. Summary judgment rulings are reviewed *de novo*, meaning that the question before the court is purely legal in nature, as opposed to *manifest error* which means that the question before the court is that rooted in a fact-based analysis.

Therefore, the ruling of the Fifth Circuit that petitioner's arguments under the ICCTA were forfeited should be reversed and this matter should be remanded so that the Appellate Court can make a ruling as to the effect of ICCTA preemption in this matter.

### **III. Petitioners cannot forfeit arguments when they had no standing to bring the allegedly forfeited argument.**

The ICCTA preemption is a violation of Brenda Blalock's 7th Amendment Right to a jury trial. The Appellate Court ruled that this argument was forfeited because it was not raised at the District Court level. However, the Supreme Court's ruling in *Lujan v. Defenders of Wildlife* suggests that Brenda Blalock did not have legal standing to bring a claim for the violation of her 7th Amendment Right until the District Court ruled that her claim was preempted.<sup>10</sup>

In *Lujan*, the Supreme Court stated that the plaintiff must have suffered an injury in fact, there must be a causal connection between the injury and

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<sup>10</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

the conduct brought before the court, and it must be likely that a favorable decision by the court will redress the injury.

Here, plaintiff suffered no “injury in fact” until the district court ruled that her claims were preempted by the ICCTA. As such, would plaintiff have raised the issue of her 7th Amendment right being violated to the District Court, said issue would have been premature and improper, as plaintiff would not have had legal standing at that time to make such a claim.

Therefore, the ruling of the Fifth Circuit that petitioner forfeited her argument that her 7th Amendment right was violated should be reversed, and this case should be remanded for an actual ruling on this matter.

#### **IV. The Fifth Circuit incorrectly applied Louisiana summary judgment standards.**

It is not the duty of the Court, in summary judgment proceedings, to determine the credibility and weight of evidence.<sup>11</sup>

Here, the District Court and the Appellate Court have simply disregarded the testimony of medical expert, Dr. L.J. Mayeux, regarding the care that would have and could have been provided to Mr. Leo Blalock, deceased husband of petitioner Brenda Blalock.

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<sup>11</sup> *Barnett v. Watkins*, 970 So.2d 1028, 1033 (La. Ct. App. 1st Cir. 2007).

Dr. Mayeux is a medical doctor, coroner, and has been qualified as a medical expert in the State of Louisiana for purposes of giving trial testimony regarding injury, death, and cause of death. Dr. Mayeux furnished a report which, at minimum, contested various assertions made by UPRR. Mayeux formed the expert opinion that the delay in treatment from the stopped train decreased Leo Blalock's chance at survival and the re-routing necessitated by the stopped train prevented Leo Blalock from reaching Bunkie General, where Mayeux, in his expert opinion, stated that Blalock would have, at least, been afforded a greater chance of survival due to medical stabilization and, at best, would have been given life-saving medical stabilization prior to beginning his air-transport to Rapides Regional for more intensive care.

To the contrary, employees of Acadian Ambulance, testified that Leo Blalock would not have received any care at Bunkie General and the re-route only cost him mere minutes.

Regardless of which interpretation of the facts is taken, there still exists a triable issue of fact in this matter. If it is true that the re-route necessitated by UPRR's blocking of the roadway only cost Blalock a few minutes and he would not have received any care at Bunkie General, then a jury is still entitled to examine the facts and determine to what extent those few minutes of delay harmed Mr. Blalock's chance at survival, which, in Louisiana, is a compensable injury. Furthermore, the issue of minutes versus hours in delay of treatment and cause of death is an issue under

which a jury can place comparative fault on UPRR under Louisiana Civil Code Article 2323.

However, the Fifth Circuit, despite the District Court's refusal to analyze the causation issues presented to them in the Motion for Summary Judgment, decided to rule that no genuine issue of material fact existed and "affirmed" the District Court's granting of the summary judgment and dismissal of petitioner's claim.

Therefore, the Fifth Circuit's ruling which "affirmed" the District Court's granting of summary judgment by finding no genuine issue of material fact should be reversed, and this matter should be remanded to the District Court for further proceedings on whether a genuine issue of material fact exists.

#### **V. The Fifth Circuit cannot affirm a ruling that never existed.**

As previously stated, the District Court ruled that the ICCTA preemptive power applied in this matter and granted respondent's Motion for Summary Judgment on the grounds that petitioner's claims were preempted and did not analyze the issues on summary judgment related to causation.

On appeal, the Fifth Circuit refused to address petitioner's claims related to ICCTA preemption as "forfeited," then proceeded to rule that summary judgment was warranted due to no genuine issue of material fact regarding causation.



Now, petitioner is left in the unenviable position of filing this Petition for Writ of Certiorari to this Court and seeking the reversal of dismissal based on ICCTA preemption by the Fifth Circuit without any reason for the Fifth Circuit's ruling other than that the claims were allegedly forfeited.

The Fifth Circuit "affirmed" the granting of summary judgment based on causation, yet the District Court never ruled on causation.

It is unclear how an appellate court can affirm a ruling which never existed in the first place.

**VI. The Fifth Circuit cannot rule adverse to a party simply because an argument may have been forfeited.**

To piggyback off of petitioner's argument that summary judgment is reviewed *de novo* therefore this ruling is purely legal, the fact that summary judgment is reviewed *de novo* inherently provides that simply because an argument is not raised the court must not automatically rule adverse to the party who may have not raised an argument.

*De novo* review requires the Appellate Court to review all facts, evidence, and law presented to the District Court. Here, despite petitioner not making a counterargument regarding ICCTA preemption at the District Court level, respondents herein, UPRR as movers in summary judgment, did raise arguments under ICCTA preemption. Therefore, despite any failure to raise a counterargument to ICCTA preemption

in the District Court, the District Court and then the Appellate Court were charged with ruling on ICCTA preemption.

As such, it is improper for the Appellate Court to refuse to rule on ICCTA preemption during a *de novo* review since the District Court was presented with the argument and ruled on said argument.

Therefore, the Fifth Circuit's "affirmation" of the District Court's dismissal on ICCTA preemption grounds based on an alleged forfeiture of ICCTA preemption arguments from petitioners should be reversed, and this matter should be remanded to the Fifth Circuit for a ruling on the effect of ICCTA preemption on this matter.

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## CONCLUSION

Considering the above and foregoing law and facts, petitioner herein, Brenda Blalock, respectfully requests that this Court *grant* this *Petition for Writ of Certiorari*.

Respectfully submitted,

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