No. _____

In the
Supreme Court of the United States

CITY OF PALESTINE, TEXAS AND
COUNTY OF ANDERSON, TEXAS,
Petitioners,

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

Whether the Fifth Circuit erred in retroactively applying the preemption provisions of the Interstate Commerce Commission Termination Act (ICCTA) to a railroad's voluntarily assumed contractual obligations to a city and county, in conflict with precedent from other circuits.

Specifically:

Question 1: In upholding the District Court's grant of summary judgment *de novo*, did the Fifth Circuit err in retroactively applying the preemption provisions of the ICCTA in conflict with Eighth and Ninth Circuit precedent?

Question 2: Did the Fifth Circuit err in its analysis of Union Pacific's voluntary decision to assume the obligations contained in the 1954 agreement, in conflict with Fourth Circuit precedent?

PARTIES TO THE PROCEEDING

Petitioners City of Palestine, Texas and County of Anderson, Texas were the Defendants in the District Court and the Defendants – Appellants in the Court of Appeals.

Respondent Union Pacific Railroad Company was the Plaintiff – Appellee in the Court of Appeals.

The style of the case, listed above, correctly reflects the parties to this proceeding.

STATEMENT OF RELATED CASES

- *Union Pacific Railroad Company v. City of Palestine, Texas; County of Anderson, Texas,* No. 21-40445 (5th Cir.) (opinion issued and judgment entered July 22, 2022).
- *Union Pacific Railroad Company v. City of Palestine, et al.*, No. 6:19-cv-574-JDK (E.D. Tex.) (opinion issued and final judgment entered March 26, 2021).

Apart from the proceedings directly on review in this case, there are no other directly related proceedings in any court.

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PETITION FOR WRIT OF CERTIORARI

The City of Palestine, Texas, and the County of Anderson, Texas, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at and reproduced at App. A. The Fifth Circuit's denial of petitioner's motion for panel rehearing and motion for en banc consideration is reproduced at App. B. The opinions of the District Court for the Eastern District of Texas – Tyler Division are reproduced at App. E and F.

JURISDICTION

The Court of Appeals entered judgment on July 22, 2022. App. A. The court denied a timely petition for rehearing en banc on August 19, 2022. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

49 U.S. Code § 10102(9) provides in relevant part:

(9) "transportation" includes—

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property; and

49 U.S. Code § 10501(b) provides in relevant part:

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

INTRODUCTION AND STATEMENT OF THE CASE

Over a century ago, a small Texas town staked its fortune on the promises of a railroad. In exchange, the town and its citizens pledged money and land to the railroad. For over a century, these vested contractual

rights have weathered legal scrutiny in the highest courts in the land[1]. Union Pacific voluntarily assumed the Palestine assets and obligations decades ago.

The Fifth Circuit's decision nullifying the agreement and a century of legal precedent is significant and substantially important, and, if upheld, will establish a genuine and current split of authority clouding the issue of retroactive application of federal preemption. The Fifth Circuit's error, if left uncorrected, will have widespread and immediate impact on freely negotiated agreements with rail carriers and other entities subject to preemptive enactments under ICCTA and other federal statutes. ICCTA created the Surface Transportation Board and established the current regulatory system for rail transportation, a vital national industry. The incorrect construction of ICCTA by the Fifth Circuit, retroactively applying the preemption provisions of ICCTA and incorrectly interpreting the exception for the voluntary assumption of contracts in direct conflict with other circuits, will create confusion and uncertainty among participants in contracts within the transportation sector.

Factual Background

This contractual relationship arose in 1872 when the Houston & Great Northern Railroad Company (H&GN) contracted and agreed with the citizens of the City of Palestine, Texas, to extend its rail line from

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[1] The 1954 Agreement was upheld by the Supreme Court in *Missouri Pac. R. Co. v. City of Palestine, Tex.*, 435 U.S. 950, 98 S. Ct. 1576, 55 L. Ed. 2d 800 (1978)(pet. denied).

Houston, north to Palestine intersecting with a line owned by the International Railroad Company, to establish a depot in Palestine, and thereafter keep and maintain, the general offices, machine shops and round houses of H&GN at the City of Palestine in consideration of the promise and agreement by Anderson County to issue interest bearing bonds and transfer the proceeds to the railroad upon the completion of the rail line, construction of the depot and commencement of regular running of cars to the depot. *Int'l & G.N. Ry. Co. v. Anderson County*, 150 S.W. 239, 241 (Tex. Civ. App.—Galveston 1912), *aff'd*, 106 Tex. 60, 156 S.W. 499 (1913).

Then in 1954, after the railroad's successive bankruptcies, reorganizations, and legal attacks on the agreement, International and Great Northern Railroad (I&GN), the City of Palestine, Anderson County, and the committee representing the class of citizens of Palestine and Anderson County executed an Agreement ("The 1954 Agreement") that replaced the prior agreements, relieved the railroad from its obligation to maintain its corporate headquarters in Palestine and substituted a requirement that the railroad employ a percentage of employees within certain classifications at Palestine. *Id.*

Petitioners rely particularly on facts concisely stated in district court opinion as follows:

> Nearly thirty years passed, and then several key events occurred. In 1982, Union Pacific acquired MoPac. Id., Ex. 10 at 1 ¶ 4. In 1995, Congress passed the ICCTA, establishing the Surface Transportation Board to regulate rail carriers

> and preempting state and local laws that come within the Board's jurisdiction. Pub. L.No. 104-88, 109 Stat. 803 (1995); *Tex. Cent. Bus. Lines Corp. v. Midlothian*, 669 F.3d 525, 530 (5th Cir. 2012). In 1997, Union Pacific merged into MoPac. Docket No. 39, Ex. 10 at 1 ¶ 4.

App. G, pp.91-92.

Course of Proceedings

In November 2019, Union Pacific filed suit seeking declaratory relief that the ICCTA preempts its assumed obligations under the 1954 Agreement between the International & Great Northern Railroad and the City of Palestine, Anderson County, and a citizens committee. Union Pacific also sought an injunction preventing Palestine and Anderson County from enforcing the Agreement.

Palestine and Anderson County filed a motion to dismiss and a motion for judgment on the pleadings. The district court denied these motions.

Union Pacific and Palestine and Anderson County filed motions for summary judgment. The district court granted the Union Pacific motion, holding that the 1954 Agreement was expressly and impliedly preempted. It also concluded that the 1954 Agreement did not meet the voluntary contract exception to preemption. The district court enjoined Palestine and Anderson County from enforcing the 1954 Agreement against Union Pacific.

Palestine and Anderson County appealed the district court's grant of summary judgment for Union

Pacific and the denials of their motion to dismiss, motion for judgment on the pleadings, and cross-motion for summary judgment.

On July 22, 2022, in a *de novo* published opinion, the Court of Appeals for the Fifth Circuit denied relief on these issues, affirming the decision of the U.S. District Court for the Eastern District of Texas. On August 19, 2022, the court denied Petitioners' request for rehearing and for en banc consideration. Thus, this Petition is timely if filed by November 17, 2022.

REASONS FOR GRANTING THE PETITION

If upheld, the Fifth Circuit opinion decided two important questions of first impression within the Fifth Circuit: First, whether Congress intended for an agreement entered decades before the enactment of the Interstate Commerce Commission Termination Act ("ICCTA") to be retroactively preempted. Other Circuits have considered and rejected the retroactive application of ICCTA to contracts executed before the enactment of the statute. With no evidence or analysis to support that Congress intended a retroactive application of ICCTA to prior contracts, the Fifth Circuit decision will impermissibly obviate the substantial rights bargained for and agreed to by the railroad and the City, County, and citizens decades prior to contemplation of the ICCTA, and create a substantial conflict with direct precedent in the Eighth and Ninth Circuits[2].

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[2] *See* discussions of *New Prime* (Eighth Cir.), and *Rivas* (Ninth Cir.), *infra,* Arg. 1.

Second, the Fifth Circuit decision also determines whether the ICCTA may be applied to relieve a railroad of contractual obligations that it assumed knowingly and voluntarily through a merger and under which the parties thereto have substantially performed to the present. The Fifth Circuit has not previously applied federal preemption under the ICCTA to business and economic development contracts between rail carriers and other entities including local governments. The decision by the Fifth Circuit in this case would allow railroads to freely assume and then avoid their voluntary contractual obligations, solely upon the basis that more profitable opportunities have developed. Although the sole authority cited by the Fifth Circuit decision is a Fourth Circuit case[3], the Fifth Circuit reaches a contrary result. Such an extreme departure from the established precedent in other circuits merits the consideration of this Court to secure and maintain uniformity of the Courts' decisions and resolve a direct conflict with the decisions of other circuits.

SUMMARY OF THE ARGUMENTS MERITING REVIEW

Issue 1: In Its *de novo* decision upholding the U.S. District Court's grant of summary judgment, the Fifth Circuit erred in applying the ICCTA to retroactively preempt agreements executed prior to its enactment.

Issue 2: The Fifth Circuit erred in its analysis of the voluntary decision by Union Pacific to assume the obligations contained in the 1954 agreement.

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[3] *See* discussion regarding *PCS Phosphate*, *infra,* Arg. 2

ARGUMENT

Issue 1: In its *de novo* decision upholding the District Court's grant of summary judgment, the Fifth Circuit erred in applying the ICCTA to retroactively preempt agreements executed prior to its enactment.

The Fifth Circuit decision holds that the ICCTA retroactively preempted a pre-existing contract. This holding is fundamental to federal jurisdiction in this matter. The Court has an independent obligation to examine its own jurisdiction and the district court's jurisdiction. *See* Fed.R.Civ.P. 12(h)(3); *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it.") (internal quotation marks omitted). Courts of Appeal review questions of standing *de novo. NAACP v. City of Kyle, Tex.,* 626 F.3d 233, 236 (5th Cir.2010).

The decisions by the Fifth Circuit and the District Court divest the Petitioners and the citizens of established contractual rights by imposing a retroactive application of the ICCTA which is unsupported by Fifth Circuit precedent and contrary to other precedent. Absent the retroactive application of ICCTA, Respondent Union Pacific has no federal cause of action and therefore lacks standing. Because standing is an essential component of federal subject-matter jurisdiction, the lack of standing can be raised at any time by a party or by the court. *See Sample v.*

Morrison, 406 F.3d 310, 312 (5th Cir. 2005) (citing *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989)).

When reviewing a claim of federal preemption, a court begins with the plain language of the ICCTA, "which necessarily contains the best evidence of Congress' pre-emptive intent." *Franks Investment Co. LLC v. Union Pacific Railroad,* 593 F.3d 404, 408 (5th Cir. 2010) (*citing CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). There is a presumption against pre-emption in "areas of law traditionally reserved to the states, like police powers and property law…" *Id.* (*quoting Altria Group, Inc. v. Good,* 555 U.S. 70, 129 S.Ct. 538, 543, 172 L.Ed.2d 398 (2008)).

The Fifth Circuit opinion provides no analysis or basis justifying the retroactive application of the ICCTA, and the record clearly reflects that the 1954 Agreement was executed long before the contemplation of the ICCTA *and* Union Pacific's acquisition of the Palestine assets and obligations. "The Supreme Court has frequently noted that there is a 'presumption against retroactive legislation [that] is deeply rooted in our jurisprudence.'" *Lieberman v. Cambridge Partners, LLC,* 432 F.3d 482, 488 (3d Cir. 2005) (quoting *Landgraf v. USI Film Productions*, 511 U.S. at 265). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct according ... ." *Landgraf,* 511 U.S. at 265. "Consequently, 'congressional enactments will not be construed to have retroactive effect unless their language requires this

result.'" *Lieberman,* 432 F.3d at 488 (quoting *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988)).

Courts should be reluctant to disrupt settled expectations or alter the legal consequences of past actions. *Landgraf,* 511 U.S. at 265-66. Cases involving contract and property rights require predictability and stability and are particularly inappropriate candidates for statutory retroactivity. *Id.* at 270-72. Consequently, the presumption against statutory retroactivity has special force in the area of legislative interference with property and contract rights. *Id.* at 272.

This issue of the potential retroactive effect of ICCTA on contracts was explicitly decided soon after its enactment in both the Eighth and Ninth Circuits, which specifically held that there is no evidence that Congress intended for the ICCTA to apply to pre–1996 contracts, and that this lack of standing deprived the district courts of jurisdiction. First, the Eighth Circuit ruled against retroactive application to pre-existing contracts in *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, holding that:

> [A] presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (citation omitted). The rationale for this presumption is that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* As such, the Supreme Court has provided a framework for determining when a federal statute applies to conduct

predating the statute's enactment. First, a court must determine if Congress has expressly prescribed the statute's proper reach. *Id.* at 280, 114 S.Ct. 1483. If Congress has prescribed the reach, "there is no need to resort to judicial default rules." *Id.* If not, a court must examine whether the statute would have a retroactive effect; i.e., "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute would do any of these things, the presumption is that the statute does not govern, absent clear congressional intent otherwise. *Id.*

With regard to the ICCTA, Congress has not expressly prescribed the statute's reach. Therefore, we must proceed to the second step: whether application of the statute in this case would have a retroactive effect. We agree with the district court that private rights of action for damages based on the ICCTA are limited to actions involving agreements executed after the ICCTA's effective date; otherwise, the statute has a retroactive effect.

Prior to the ICCTA, only the ICC could bring claims against motor carriers for failure to comply with the applicable regulations. The ICCTA shifts this power and permits individual Owner–Operators to bring defendants directly into court. We find that this creates an impermissible retroactive effect.

> This issue is analogous to the issue presented in *Hughes Aircraft Co. v. United States,* 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), in which the Supreme Court held that when a statute expanded the class of plaintiffs who could bring claims, the statute altered the defendant's substantive rights and therefore had a retroactive effect. *Id.* at 950, 117 S.Ct. 1871 ("In permitting actions by an expanded universe of plaintiffs with different incentives, the [new statute] essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.") (citation omitted). Here, by permitting Owner–Operators to bring their own actions against motor carriers, the ICCTA expands the class of plaintiffs who could bring claims, thereby altering the motor carriers' substantive rights. *But see Owner–Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.,* No. 97–CV–750, 2003 WL 21645754 (S.D.Ohio July 11, 2003).

339 F.3d 1001, 1006–07 (8th Cir. 2003). Consequently, the *New Prime* Petitioners' Petition for writ of certiorari to the United States Supreme Court was denied. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 541 U.S. 973, 124 S. Ct. 1878, 158 L. Ed. 2d 467 (2004).

The Ninth Circuit then quickly followed this precedent, also holding that the ICCTA could only preempt contracts executed *after* its enactment, reasoning that,

> We find persuasive *New Prime's* conclusion that in this case, as in *Hughes,* retroactively expanding the universe of potential plaintiffs would have an impermissible retroactive effect. Because application of the ICCTA to pre–1996 agreements would increase Defendants' potential liability, the statute has a retroactive effect. *See New Prime,* 339 F.3d at 1007. In the absence of evidence of congressional intent to create such an effect, we apply a presumption that the statute does not operate retroactively. *See Landgraf,* 511 U.S. at 280, 114 S.Ct. 1483. Because there is no evidence that Congress intended for the ICCTA to apply to pre–1996 contracts, we hold that ICCTA's private right of action for damages applies only to contracts executed after its enactment.

Rivas v. Rail Delivery Serv., Inc., 423 F.3d 1079, 1084–85 (9th Cir. 2005).

The Fifth Circuit has held that, "[t]he standard for finding a statute expressly retroactive is demanding ... the Supreme Court has suggested that retroactivity has only been found in "statutory language that was so clear that it could sustain only one interpretation." (Internal citations omitted). *Garrido-Morato v. Gonzales*, 485 F.3d 319, 322 (5th Cir. 2007). Thus, the dispositive question is whether Congress has expressed its clear intent that the ICCTA apply retroactively to contracts formed before its enactment.

Though it fails to identify *any* statutory language suggesting Congress' intent, the Fifth Circuit decision grants preemption of a 1954 Agreement executed over

40 years prior to the existence of the ICCTA. The 1954 Agreement was valid and enforceable at the time of its execution, and the Fifth Circuit upheld it in *City of Palestine, Tex. v. United States*. 559 F.2d 408, 415 (1977). For many years, the parties have relied upon the terms of the agreement and had the full opportunity to know the law and conform their conduct accordingly. A retroactive application of the ICCTA to the 1954 Agreement will alter Petitioners' substantive rights, relieve the railroad of its assumed obligations, and create a new cause of action that did not exist prior to enactment. The Fifth Circuit's decision in this case to retroactively apply the preemption provisions of the ICCTA to preempt the 1954 Agreement, if upheld by this Court, would undoubtedly create a split of authority between the circuits. Thus, this Court should grant review to examine this issue and correct this improper construction of the law.

Issue 2: The Fifth Circuit erred in its analysis of Union Pacific's voluntary decision to assume the obligations contained in the 1954 agreement.

The Fifth Circuit's analysis of Union Pacific's voluntary decision[4] to assume the 1954 Agreement erroneously focused solely on the decisions of Union Pacific's many predecessors in the years preceding its 1954 execution, rather than on Union Pacific's decision—much later—to assume these obligations from Missouri Pacific. In holding that the Agreement was not voluntary, the Fifth Circuit briefly summarized a timeline pertaining to these predecessor

[4] *See* Memorandum Opinion, III.(C), pp. 14-16.

companies with little mention of Union Pacific's wholly voluntary assumption of these contractual obligations:

> Approximately three decades passed, and in 1982, Union Pacific acquired MoPac. Congress passed the Interstate Commerce Commission Termination Act ("ICCTA") which established the Surface Transportation Board ("STB") to regulate rail carriers and preempted various state and local laws that were within the STB's jurisdiction. 49 U.S.C. § 10501(b). In 1997, Union Pacific merged with MoPac.

App. A, p. 7. The Fifth Circuit erroneously relies on the repealed Texas Office Shops Act as being the state regulation meriting preemption. Without any analysis of the actions by Union Pacific, the Opinion concludes that "[t]he voluntary contract exception does not apply because Union Pacific was prohibited from using its own "determination and admission." *Id*, p.16.

This reasoning is flawed because any regulatory scheme in place when International & Great Northern (I&GN) signed this agreement and when it was assumed by Missouri Pacific cannot negate Union Pacific's later voluntary decision to assume it. In other words, though state law may have influenced its predecessors' business decisions to continue Palestine operations through the decades, Union Pacific cannot escape the fact that it freely and voluntarily merged with MoPac, knowingly acquiring the assets at Palestine and assuming the obligations of the 1954 Agreement in the process.

The Fifth Circuit cites no regulation or statute compelling this acquisition and the assumption of the assets and obligations of MoPac by Union Pacific. The merger took place over several years between large, sophisticated corporations acutely aware of the Palestine obligations, the issue having been litigated multiple times at various forums.[5] Nevertheless, Union Pacific elected to consummate the merger, assume the obligations of the 1954 Agreement and substantially comply with the agreement until the present litigation. Thus, there is no evidence that state law thrust these obligations upon Union Pacific.[6]

In fact, at the time of their merger in 1997, both railroads had the same right before the Surface Transportation Board as MoPac had before the ICC in 1977, which was that if the 1954 Agreement interfered with the merger, either could have requested an exemption from its legal obligations under the 1954 Agreement. Instead, Union Pacific, as the successor in the merger, elected *not* to seek relief from the STB[7] and voluntarily assumed MoPac's obligations to third

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[5] *See City of Palestine, Tex. v. United States,* 559 F.2d at 415 (1977), FN 1. (Overturning ICC's ruling that the contractual obligations in Palestine were preempted, finding that the "[a]greement provides for a downward adjustment of the percentage of people employed in Palestine in the case of merger").

[6] Significantly, the impetus for the negotiation of the 1954 Agreement was a provision in the federal bankruptcy statute, not the Texas Shops Act. *Id.*

[7] Presumably due to UP's calculation that a favorable ruling from the STB would be similarly struck down by the Fifth Circuit based on its then-recent precedent in *City of Palestine.*

parties including its obligations to the City, County and the citizens. It is undisputed that Union Pacific freely and voluntarily accepted the obligations of the 1954 Agreement to obtain the benefit of the assets held by MoPac, including the lucrative line through Palestine.

The Fifth Circuit's finding regarding the voluntariness of International & Great Northern's decision to modify and vacate the 1914 Judgment and enter into the 1954 Agreement allowing I&GN to move its headquarters from Palestine and relieving it of all obligations to maintain any facilities in Palestine is not controlling or relevant on the issue of voluntary assumption by Union Pacific. The gravamen of the analysis lies in Union Pacific's later decision to voluntarily consummate the merger with MoPac (the successor to I&GN) and their subsequent election not to request relief from the STB. In failing to consider the voluntary nature of Union Pacific's 1997 assumption of the obligations in the 1954 Agreement, the Fifth Circuit erred and deviated from the proper determination of a voluntary agreement under the ICCTA.

Union Pacific's assumption of the agreement and later course of performance undoubtedly reflects the carrier's "own determination and admission that the agreement would not unreasonably interfere with interstate commerce", as even the STB *itself* has recognized on similar facts. *See PCS Phosphate Co. v. Norfolk S. Corp.* 559 F.3d 212, 221 (4th Cir. 2009). In upholding the STB's ruling, the Fourth Court of Appeals held that,

> [t]his is not to say that a voluntary agreement could never constitute an "unreasonable interference" with rail transportation, but the facts of this case indicate that any interference is not unreasonable—the parties contemplated delayed enforcement of the agreements, Norfolk Southern received the benefit of the agreements for over 40 years, and the agreements explicitly stated that the "relocation will not affect the ability of [Old NS] to comply with its legal obligation to serve any existing customer then on its line." In this instance, therefore, Norfolk Southern cannot use the ICCTA to "shield[] it from its own commitments." *See Township of Woodbridge*, 2000 WL 1771044, at *3.

Id. at 221-22. It is difficult to imagine a clearer representation of a carrier's "determination and admission" than Union Pacific's pattern of unilateral voluntary decisions before *and* after its acquisition of the assets and obligations at Palestine.

Thus, the Fifth Circuit has misapplied its only cited authority, *PCS Phosphate* (involving a perpetual covenant of easement that, so long as "used for railroad purposes…shall not be abandoned". *Id.*). In finding against preemption, the Fourth Circuit Court provided the proper analysis:

> Voluntary agreements between private parties, however, are not presumptively regulatory acts, and we are doubtful that most private contracts constitute the sort of "regulation" expressly preempted by the statute. If contracts were by definition "regulation," then enforcement of

> every contract with "rail transportation" as its subject would be preempted as a state law remedy "with respect to regulation of rail transportation." 49 U.S.C. § 10501(b). Given the statutory definition of "transportation," this would include all voluntary agreements about "equipment of any kind related to the movement of passengers or property, or both, by rail." *See* 49 U.S.C. § 10102(9) (defining "transportation"). If enforcement of these agreements were preempted, the contracting parties' only recourse would be the "exclusive" ICCTA remedies. But the ICCTA does not include a general contract remedy [footnote omitted]. Such a broad reading of the preemption clause would make it virtually impossible to conduct business, and Congress surely would have spoken more clearly, and not used the word "regulation," if it intended that result.

Id. 218–19. Here, because Union Pacific voluntarily assumed the obligations of the 1954 Agreement, the undisputed facts weigh even stronger against preemption. The erroneous construction of voluntary assumption applied by the Fifth Circuit will enable contractual parties, such as Union Pacific, to unilaterally renege on voluntary commitments following decades of reliance and performance.

Preemption under the ICCTA is designed to provide a shield from local interference with railroad transportation. Congress did not intend for preemption to act as a sword to release carriers from their own

voluntarily-acquired contractual obligations, especially in economic development agreements. The Fifth Circuit has not previously applied federal preemption under the ICCTA to business and economic development contracts between rail carriers and other entities including local governments. The decision by the Fifth Circuit in this case would establish a precedent to allow railroads to assume and then freely avoid their voluntary contractual obligations, solely upon the basis that more profitable opportunities may have developed.

At least for purposes of summary judgment, uncontradicted evidence of the voluntary nature of the assumption of such obligations by Union Pacific presents an issue of material fact and warrants a full evidentiary hearing. The Fifth Circuit decision affirming summary judgment on the issue of the voluntary assumption of the obligations of the 1954 Agreement is a significant error in the proper construction of the ICCTA and merits the consideration of this Court.

The Supreme Court should therefore grant this petition for writ of certiorari, resolve the conflict between the circuits on these issues, correct the Fifth Circuit's erroneous holding in this case and remand for a proper construction of the federal statutes.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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November 17, 2022