No. 23-

IN THE

Supreme Court of the United States

MASSACHUSETTS COASTAL RAILROAD LLC
AND P. CHRISTOPHER PODGURSKI,

Petitioners,

v.

CHAD MARSH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Massachusetts Supreme Judicial Court ("SJC"), in an issue of first impression and upon a *sua sponte* transfer from the Massachusetts Appeals Court, held that the Massachusetts Prevailing Wage Law, Mass.Gen.Law ch. 149, §§ 26-27H, was not preempted by the ICC Termination Act of 1995, as amended, 49 U.S.C. § 10501 *et seq.* ("ICCTA"). In rendering its decision, the SJC ignored the plain and expansive preemption language of the ICCTA that "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). The SJC's decision also ignored a long line of federal cases that held that the ICCTA expressly preempts state statutes regulating a railroad's economic decisions. The doctrine of implied preemption also applies here in the form of both "field" and "conflict" preemption, and the SJC was required to apply such preemption as it pertains to the Massachusetts Prevailing Wage Law.

The question presented is:

1. Whether the ICCTA preempts Massachusetts' prevailing wage act for railroad maintenance workers.

CORPORATE DISCLOSURE STATEMENT

Massachusetts Coastal Railroad ("MCR") has no parent corporation or affiliates that are publicly traded, and no publicly traded company owns 10% or more of MCR's equity.

RELATED PROCEEDINGS

- *Marsh v. Massachusetts Coastal Railroad LLC et al.,* No. 2183-cv-00597, Brockton Div. Superior Court of the Commonwealth of Massachusetts. Motion for Reconsideration of Order denying Petitioners' Motion to Dismiss Amended Complaint entered May 4, 2022.

- *Marsh v. Massachusetts Coastal Railroad, LLC et al.,* No. 2022-P-0541, Massachusetts Appeals Court. Order: Case transferred to Supreme Judicial Court sua sponte on December 12, 2022.

- *Marsh v. Massachusetts Coastal Railroad LLC et al.*, No. SJC-13366, Supreme Judicial Court for the Commonwealth of Massachusetts. Order affirming the denial of the Motion to Dismiss entered August 25, 2023; denial of motion for reconsideration entered on September 18, 2023.

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PETITION FOR A WRIT OF CERTIORARI

P. Christoper Podgurski ("Podgurski") and MCR (collectively, "Petitioners") respectfully petition for a *writ of certiorari* to review the judgment of the SJC.

OPINIONS BELOW

The SJC Opinion (App., *infra*, 1a-40a) is reported at 492 Mass. 641, 214 N.E.3d 388 (2023). The denial of the motion for reconsideration (App., *infra*, 58a) is unreported.

The Memorandum of Decision and Order of the Brockton Division Superior Court of The Commonwealth of Massachusetts denying Petitioners' Motion for Reconsideration Under Superior Court Rule 9D As To Denial of Their Motion to Dismiss[1] (App., *infra*, 41a-43a) and the Memorandum Opinion and Order of the Massachusetts Superior Court Department of the Trial Court of The Commonwealth of Massachusetts denying Petitioners' Motion to Dismiss Amended Complaint (App., *infra*, 45a-57a) are unreported.

[1] Review of a motion to dismiss on a purely legal question is appropriate for review by the Supreme Court. *See Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1721 (2020) (Thomas, J., dissenting) (a record is of little or any benefit on review of a purely legal question).

JURISDICTION

The SJC entered Judgment on August 14, 2023 (App., *infra*, 1a-40a) and Petitioners' Motion for Reconsideration was denied on September 18, 2023 (App., *infra*, 57a). The jurisdiction of this Court is thereby invoked under 28 U.S.C. § 1257(a) as it directly addresses the scope of federal preemption under the ICCTA.

The SJC's decision is "final" within the meaning of 28 U.S.C. § 1257(a). A decision is final under Section 1257(a) when "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus "rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-483 (1975). "In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue." *Id.* at 483; *e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984).

Those conditions are satisfied here, because the federal issue of categorical preemption has been finally decided. *See Cox*, 420 U.S. at 482. The SJC held that the ICCTA does not categorically preempt the

Massachusetts Prevailing Wage Act. "[R]eversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox*, 420 U.S. at 482-483.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the ICCTA, 49 U.S.C. § 10501 *et seq.,* are reproduced in the appendix (App., *infra,* 59a-64a). The relevant provisions of Massachusetts Prevailing Wage Act, Mass.Gen.Law. ch. 149, §§ 26, 27, 27C, 27D and 27F, are reproduced in the appendix to this petition (App., *infra,* 65a-79a).

STATEMENT OF THE CASE

The SJC's decision rejecting federal preemption of Massachusetts' prevailing wage laws in the railroad context, has far-ranging consequences nationwide. There are about seven hundred short line and regional railroads (including the Petitioners') that operate throughout the country and play a vital role in the United States transportation system—connecting rural America to the larger freight transportation network. Roughly half of all U.S. states, as well as various cities, have enacted prevailing wage laws. Failure to universally recognize federal preemption of state and local prevailing wage acts in the railroad

economic context[2] improperly interferes with interstate commerce because it will: (i) subject railroads to a patchwork of local regulation; (ii) prod railroads to sustain a substantial compliance burden to calculate employee wages in each jurisdiction that the company operates—often multiple states and certainly municipalities in a single day; (iii) impose an arbitrary and paternalistic wage structure interfering with free market economic forces; and (iv) allow non-railroad experts to determine prevailing wages for railroad workers based on an indiscrete set of factors that are subject to bias and inexactitude.

The SJC decided an issue of first impression regarding the scope of federal preemption under the ICCTA as it applies to a state prevailing wage act in the railroad Force Account context. The SJC held that the ICCTA, despite its broad explicit and implicit preemption, did not preempt Massachusetts's prevailing wage law statute as it applies to railroad

[2] For example, Pennsylvania properly recognizes exemptions to its state prevailing wage act for railroad workers on Railroad Force Account projects (i.e., emergency track maintenance work), the same type of work Marsh performed in this case. The Pennsylvania prevailing wage act (Act of 1961, P.L. 987 No. 442) includes exemptions for work performed by Railroad Force Account Projects. *See* https://www.penndot.pa.gov/Doing-Business/RailFreightAndPorts/Documents/Additional%20Resource%20-%20Prevailing%20Wage.pdf (last accessed December 10, 2023) ("Exemptions to the Pennsylvania Prevailing Wage Act have been passed by the legislature since the passage of the Act. These exemptions apply only to certain Work Performed by Railroad Force Account Projects.")

employees performing Force Account work.[3] The SJC upheld the decision of the trial court and refused to dismiss, based on federal preemption, a claim for substantial additional wages (an increase of nearly 250%) made by a local railroad worker, Chad Marsh ("Marsh"), who was performing emergency maintenance work as an employee of MCR on a rail line in Massachusetts.

The SJC decision ignored the plain and expansive preemption language of the ICCTA, 49 U.S.C. § 10501(a) *et seq*. The decision disregarded the significant economic burden that would be placed on rail carriers by applying the Massachusetts Prevailing Wage Act – a burden under the facts expressly alleged in the Amended Complaint, which would have increased the Plaintiff's hourly wage around 250%. To hold that a wage statute that could increase hourly wages of rail workers by 250% would have only an *incidental* effect on the rail carrier is disingenuous.

[3] Since the passage of the ICCTA during the Great Depression of the 1930s, Congress has enacted several other laws to protect the wages of workers, including laws requiring that minimum and overtime rates be paid and laws prohibiting contractors from requesting kickbacks of wages. Inconsistency in the Massachusetts Department of Labor Standards ("DLS")'s determination of prevailing wages provides no assurance that the rates stipulated actually prevail for corresponding classes of workers on similar private construction projects in Massachusetts. Incorrect rates are inflationary on the local Massachusetts and national economy. Inflated wage costs may have the most adverse effect on local Massachusetts contractors and their workers—those the Act was intended to protect—by promoting the use of nonlocal contractors on rail projects.

The SJC decision also ignores the long line of federal cases that held that the ICCTA preempted state statutes regulating a railroad's economic decisions.[4] That same ICCTA preemption should be found here. This current case neither involves safety nor environmental issues, nor minimum wage standards.

A. Background Facts and Procedural History

MCR is a rail freight carrier and logistics services operator in Massachusetts and Southern New England and is authorized by and registered with the Surface Transportation Board ("STB") to operate as a railroad subject to the STB's jurisdiction under Title 49 of the United States Code. MCR employees perform track and related railroad maintenance work under 49

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[4] The Supreme Court overturned its 1879 decision, *Munn v. Illinois*, 94 US 113 (1877), allowing states to regulate railroads in *Wabash*: "It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the states might choose to impose upon it, that the commerce clause was intended to secure." *Wabash, St. Louis & Pac. Railway Company v. Illinois*, 118 U.S. 557, 572-73 (1886). The Court then said "We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law. . . ." *Id.* at 575.

Lastly, "… if it be a regulation of commerce ... it must be of…national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution." *Id.* at 577.

C.F.R. § 1150.21 and MCR is registered with the U.S. Department of Transportation ("USDOT") License #2173558. Petitioners were defendants in the Superior Court Department of the Trial Court of The Commonwealth of Massachusetts and appellants in the SJC. App., *infra*, 2a.

Respondent Marsh was employed by MCR as a laborer operating equipment performing Force Account Work (*i.e.*, emergency railway track maintenance) pursuant to a written contract between MCR and the Massachusetts Department of Transportation ("MassDOT") that expressly identifies federal law as its choice of law, and has a term of thirty years. *See* fn. 8 *infra*. Respondent was the plaintiff in the trial court of Massachusetts and appellee in the SJC.

MCR classifies as a common carrier railroad company subject to regulation by the STB under 49 U.S.C. Title 49 and specializes in integrated freight, logistics, and emergency track maintenance services. MCR hired Marsh in 2019 as an equipment operator. Marsh's responsibilities included operating boom trucks, backhoes, loaders, and tampers at MCR job sites for work performed under private contracts and emergency track maintenance purposes under MCR's MassDOT Contract. Marsh voluntarily resigned from his employment at MCR on June 28, 2021.

MCR initially paid Marsh $15/hour, but later increased the rate to $23/hour and then $24.80/hour. Marsh claimed in his Amended Complaint that the prevailing wage for this work was $63/hour, but at no

time did the DLS actually "determine the prevailing wage", under the Massachusetts Prevailing Wage Act.[5] Failure of DLS to set the prevailing wage is fatal. *See McGrath v. Act., Inc.*, No. 08-ADMS-40018, 2008 WL 5115057, at *2 (Mass. App. Div. Nov. 25, 2008) (Williams, P.J.) (Summary judgment was affirmed on this basis); accord *Andrews v. Weatherproofing Techs., Inc.*, 277 F. Supp. 3d 141, 153 (D. Mass. 2017) (Hillman, J.)(*citing McGrath*, and granting employer summary judgment on Prevailing Wage Act claim, because "where there has been no request by the public body/municipality to set a prevailing wage rate for contracted work, the [Law] does not apply.")

Under the Massachusetts Prevailing Wage Act, a minimum wage rate for workers is established only for *public construction projects*. *See Mullally v. Waste Mgt. of Mass., Inc.,* 895 N.E.2d 1277, 1282 (Mass. 2008) (emphasis added). Before soliciting bids for any public construction project, an awarding authority must obtain a prevailing wage rate sheet from DLS. DLS has standardized forms that awarding authorities must use to request prevailing wage rates. For the avoidance of doubt, the Massachusetts Prevailing Wage Act applies only to construction work

[5] There is no evidence that the DLS actually determined a "prevailing wage" here, and the SJC should have dismissed the case on that basis alone for failure to follow administrative procedures under the statute. However, because this case comes up on a Motion to Dismiss, for purposes of this appeal, the facts as alleged by Plaintiff are taken as true. Issues related to the proper application of the prevailing wage act under Massachusetts state law will continue to be litigated in the state courts and are not the subject of this Petition.

on public projects (but not to maintenance work). Marsh only performed work under the MassDOT contract that was entered into with MCR in 2010 ("MassDOT Contract"). MCR also has private contracts to perform work on rail property over which it maintains easement rights, but said work is not public work and thus expressly is not covered by the Massachusetts Prevailing Wage Act. Because the MassDOT Contract is a maintenance-only contract (*i.e.*, Force Account Work), the Massachusetts Prevailing Wage Act does not apply. This reasoning is buttressed by MassDOT's Answer to the Amended Complaint, in which MassDOT states that the Massachusetts Prevailing Wage Act does not apply to the work performed by Marsh. Any ancillary work performed by Marsh was performed under private contracts between MCR as easement/license holder on track owned by different entities, including, but not limited to CSX and Amtrak, which are not public works projects.

Marsh commenced litigation on July 23, 2021 alleging, among other things, violation of the Massachusetts Prevailing Wage Act. Petitioners moved to dismiss, alleging that the Massachusetts Prevailing Wage Act was preempted under federal law, the ICCTA. MCR's motion to dismiss was denied, which denial was appealed to the Massachusetts Appeals Court under the present execution doctrine. The SJC removed the case on its own motion.

REASONS FOR GRANTING THE PETITION

The SJC's decision – *i.e.*, a decision by a state Supreme Court, rejecting federal preemption of state prevailing wage laws in the railroad context, has far-ranging consequences nationwide.[6] Roughly half of all U.S. states, as well as various cities, have enacted prevailing wage laws.[7] The question presented is one of exceptional public importance. Marsh cannot minimize the importance of this case and cannot deny that across Massachusetts, and the United States for that matter, state, and local agencies own and operate ICCTA-regulated railroads that serve a vital role in

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[6] *See, e.g.*, *Massachusetts v. Env't Prot. Agency*, 549 U.S. 497, 505-06 (2007) ("Notwithstanding … the absence of any conflicting decisions …, the unusual importance of the underlying issue persuaded us to grant the writ."); *Florida v. Nixon*, 543 U.S. 175, 186 (2004) ("We granted certiorari … to resolve an important question of constitutional law.")

[7] *See* U.S. Department of Labor, "Dollar Threshold Amount for Contract Coverage," available at https://www.dol.gov/agencies/whd/state/prevailing-wages. These states are Alabama Arizona, California (last accessed November 27, 2023). At least fifteen states have repealed prevailing wage laws and at least another seven states never enacted state prevailing wage acts: Alabama (repealed in 1980); Arizona (invalidated by 1980 court decision; repealed in referendum in 1984); Arkansas (repealed in 2017); Florida (repealed in 1979); Idaho (repealed in 1985); Indiana (repealed in 2015); Kansas (repealed in 1987); Kentucky (repealed in 2017); Louisiana (repealed in 1988); Michigan (repealed in 2018); New Hampshire (repealed in 1985); Oklahoma (invalidated by 1995 court decision); Utah (repealed in 1981); Wisconsin (repealed in 2017); and West Virginia (repealed in 2016). Moreover, Georgia, Iowa, Mississippi, North Carolina, North Dakota, South Carolina, and South Dakota never enacted state prevailing wage acts.

the nation's interstate rail network and should not be burdened by state economic regulation.

I. The SJC's decision was wrong in that it failed to properly acknowledge the significant economic burden that the Massachusetts Prevailing Wage Act would have on railroads and did not properly defer to ICCTA's broad federal preemption in economic regulation of railroads.

Preemption arises under the Constitution's Supremacy Clause, which says federal law "shall be the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Since state law may not contradict federal law, sometimes the latter will render the former unenforceable. Preemption "may be either express or implied". *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982). Congress and our courts have long recognized the need to regulate railroad operations at the *federal* level since just after the Civil War. *See City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998). "Without doubt, Congress has undertaken the regulation of almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions." *Logan v. Union Pac. R.R. Co.*, No. 2:17-cv-0394-TOR, 2018 WL 2976099, at *3 (E.D. Wash. 2018). State regulatory authority over railroads is circumscribed.

If a railroad performs transportation-related activities, including emergency track maintenance work (*i.e.,* Force Account Work), federal law preempts state attempts to regulate those activities. *See Fayard v. N.E. Vehicle Servs., LLC*, No. cv 07-40006-FDS, 2007 WL 9805540, at *2 (D. Mass. July 30, 2007), *aff'd*, 533 F.3d 42 (1st Cir. 2008) ("It is clear from the face of the statute that, in enacting the ICCTA, Congress intended the remedies set forth therein to be exclusive, and further intended those remedies to preempt state law claims touching on the subject of railroad regulation."). *See also Cedarapids, Inc. v. Chi., Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005, 1013 (N.D. Iowa 2003) ("[I]n enacting the ICCTA, Congress intended to occupy completely the field of state economic regulation of railroads.").

Railroads comprise an instrumentality of interstate commerce over which Congress can regulate even purely intrastate matters. *See City of Auburn,* 154 F.3d 1025; *CSX Transp., Inc. v. Ga. Pub. Serv. Com'n*, 944 F. Supp. 1573 (N.D. Ga. 1996). State regulation of intrastate segments of interstate railroads can violate the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, because national uniformity is indispensable to the efficient and economical operation of America's comprehensive rail network. A railroad that takes any part in interstate traffic is an instrumentality of interstate commerce subject to the preemptive effect of the ICCTA. *See Chicago & N. W. Ry. Co. v. Davenport*, 205 F.2d 589 (5th Cir. 1953). A single state's regulation can place a *substantial* burden on the interstate movement of goods. *See*

Legato Vapors, LLC v. Cook, 847 F.3d 825 (7th Cir. 2017). A substantial increase in labor costs borne by a railroad employer as a result of the imposition of a prevailing wage act for Force Account Work would be passed on to customers and suppliers in the form of higher ticket prices for passengers or increased shipping rates for freight. This in turn may influence how often passengers travel on said railroad or the particular method of transportation used to ship goods interstate.[8]

[8] None of the work performed by Marsh under MCR's MassDOT Contract is amenable to public bidding. This is due to several factors: (i) uncertain timing of the bid process—it takes at least 3-6 months to complete; (ii) the urgency of the railroad work to be performed; (iii) the fact that bidders require all information with no guess work; (iv) inability to provide specifications for MCR MassDOT railroad work to be performed, because there are so many components and what requires maintenance cannot be anticipated; (v) under the MassDOT Contract, MCR is compensated on a time and materials basis, whereas competitive bidding requires a fixed price—once again, because of the uncertainty of the work to be performed, it is impossible to provide a fixed price; and (vi) the MassDOT Contract is for thirty years and it would be illogical and uneconomic to fix the labor price for thirty years. In fact, the MassDOT contract was entered into to ensure MassDOT's compliance with 49 C.F.R. § 213.7, requiring track owners to designate qualified persons (*i.e.*, MCR) to supervise restorations and renewals of track, to inspect tracks for defects, and perform other Force Account Work. The purpose of MassDOT's entering into the contract with MCR was to comply with a federal statute pertaining to railroads. Thus, MCR's compliance with the federal statute requires a finding of preemption of the Massachusetts Prevailing Wage Act.

1. The ICCTA Expressly Preempts the Massachusetts Prevailing Wage Act.

The ICCTA represents an effort by Congress to *broadly* preempt state interference with the national system of rail transportation—an industry critical to interstate commerce and the economic national security interests of the United States.[9] *See PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009); *Freight Rail Transportation: Long-Term Issues*, Cong. Budget Office 3-4 (2006). The intended effect of the Act was to implement deregulatory policies and promote growth and stability in the surface transportation sector by bringing regulation of rail transportation under the purview of a single regulatory body. *See Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 804-06 (2011) (core

[9] Freight railroads are significant contributors to the national economy in terms of tax revenues, job creation and helping businesses across the nation, particularly in remote areas, transport goods and materials efficiently to help improve production. *See e.g.*, "Economic and Fiscal Impact Analysis of Class I Railroads in 2017, October 22, 2018, Towson University Regional Economic Studies Institute ("RESI"). In that study RESI found that Class I railroads have a wide footprint in the economy. Just in 2017, Class I railroads' capital expenditures for road work and equipment reached $13.0 billion, and maintenance expenditures were nearly $11.9 billion. Class I railroad operations supported over 1.1 million jobs (1.1. percent of total U.S. output) and $71.3 billion in wages (0.9 percent of total wages in the U.S. Federal, state, and local taxes exceeded $25.9 billion in 2017. *See* RESI Executive Summary at pp. 4-5. https://www.aar.org/wp-content/uploads/2018/11/AAR-Class-I-Railroad-Towson-Economic-Impact-October-2018.pdf (last accessed December 12, 2023).

purpose of 49 U.S.C. § 10501(b) is to prevent state regulation of rail transportation "in the economic realm"). To accomplish this purpose, ICCTA grants sweeping regulatory authority over railroad operations to the STB. ICCTA's express preemption provision grants the STB "exclusive jurisdiction over 'a wide range of state and local regulation of rail activity.'" *BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 760 (9th Cir. 2018) (emphasis omitted) (*internal citation omitted*).

ICCTA expressly provides that:

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

> **transportation are exclusive and preempt the remedies provided under Federal or State law.**

49 U.S.C. § 10501(b) (emphasis added). The concluding sentence of § 10501(b) is an unmistakable statement of Congressional intent to preempt state laws touching on the *substantive* and *economic aspects* of rail transportation. *See CSX Transp., Inc.*, 944 F. Supp. at 1581 ("it is difficult to imagine a broader statement of Congressional intent to preempt state regulatory authority over railroad operations.") Indeed, the preemptory intent of Congress by enacting the ICCTA appears facially to be so all-encompassing, that shortly after the Act's passage, one federal Circuit Court echoed the Northern District of Georgia's statement that it would be "difficult to imagine a broader statement of Congress' intent to preempt State regulatory authority over railroad operations[10]" and applied a broad preemptive scope. *City of Auburn, supra,* 154 F.3d at 1030, *citing CSX Transp., supra.* "The last sentence of § 10501(b) plainly preempts state law…and [t]he thrust of the [ICCTA] is to federalize these disputes . . .". *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R.,* 215 F.3d 195, 202, 204-205 (1st Cir. 2000).

Federal courts and the STB have generally recognized two manners in which state or local actions or regulations may be preempted under the ICCTA:

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[10] As to preemptive authority of the STB generally, see 49 U.S.C. § 10502 (STB has the right to grant exemptions) and 49 U.S.C. § 11321 (STB has exclusive jurisdiction over transactions between rail carriers).

(1) express, categorical, or facial preemption, and (2) implied or "as applied" preemption. *See PCS Phosphate Co.*, 559 F.3d at 220-21. *See also City of Ozark, v. Union Pac. R.R. Co.*, 843 F.3d 1167, 1171 (8th Cir. 2016); *Chi. Transit Auth.*, 647 F.3d at 679; *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008); *CSX Transp., Inc.—Petition for Declaratory Ord.,* No. FIN 34662, 2005 WL 1024490, at *2–3 (May 3, 2005).

Contrary to Marsh's contention in his Amended Complaint and the SJC's determination that the ICCTA's express preemption provision is narrowly tailored (App., *infra*, 17a), federal courts of appeals have consistently recognized that the ICCTA is quite broadly written. *See Cal. Dep't of Tax & Fee Admin.*, 904 F.3d at 760, (*quoting City of Auburn*, 154 F.3d at 1030). *See also Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1190 (8th Cir. 2015) (recognizing that "the broad language of the ICCTA's preemption provision" governs the question of ordinary preemption); *Chi. Transit Auth.*, 647 F.3d at 678 ("Congress's intent in the Act to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping."); *City of Auburn*, 154 F.3d at 1030 (observing that the case law supports "broad reading of Congress' preemption intent, not a narrow one"); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005) (same).

There is well established law that the economic regulation governed by the ICCTA includes the many activities constituting rail operations. The ICCTA's definition of "railroad" expressly includes the "track"

and "bridge[s] . . . used by or in connection with a railroad." 49 U.S.C. § 10102(6). Likewise, the ICCTA's definition of "transportation" includes, among other things, any "property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail" and all "services related to that movement." *Id.* § 10102(9)(A)–(B). The conduct and instrumentalities at issue indisputably fall within those definitions under the ICCTA. Since exclusive jurisdiction over "construction", "employment" and "other provisions related in dealings between employees and employers" vis-à-vis railroad operations rests solely with the STB, it is explicit that Congress intended such dealings, which include wages and wage rates in the railroad context, to be preempted by federal law. Otherwise, railroads would be subject to a patchwork of laws[11] applied to wages, resulting in each state enacting individual wage rates, and hindering interstate commerce of railroads. This leads to chaos, confusion, and burdensome operational interference.

[11] *See Busker v. Wabtec Corp.*, 11 Cal.5th 1147, 1167, 282 Cal.Rptr.3d 333, 348 (2021) (Corrigan, J.) ("[There are] significant administrative concerns [with respect to California's prevailing wage law]. Does the law apply to someone working on a high-speed rail car in a different state? If so, what is the relevant locality for purposes of calculating the prevailing wage, including those rates in the bidding, and contracting process? (*See* §§ 1724, 1773, 1773.2.) At least for purposes of the prevailing wage law [in California], the distinction between labor performed on fixed works and that done on rolling stock is not an arbitrary one...").

"Notably, when a statute contains an express preemption clause, the Supreme Court has highlighted that 'we do not invoke any presumption against preemption.'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) ("And because the statute 'contains an express pre-emption clause,' we do not invoke any presumption against preemption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" (*quoting Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011)) (*citing Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 325 (2016)).

ICCTA's legislative history makes clear the Congressional intent to shield railroads from the paternalistic whims of legislative bodies. *See* Legislative History, H.R. Rep. No. 104-311, at 96 (1995), U.S. Code Cong. & Admin. News 1996, p. 793. "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of federal standards and risk the balkanization and subversion of the federal scheme of minimal regulation for this intrinsically interstate form of transportation." *Pejepscot Indus. Park, supra,* 215 F.3d at 202 .

The central analysis is "…the degree to which the challenged regulation burdens rail transportation…" *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-1098 (9th Cir. 2010). If prevailing

wages were required in Massachusetts for railroad workers, that would permit a state official (the Massachusetts DLS) to determine wage rates for railroad workers for all railroads using or involved with tracks located in Massachusetts, increasing employee expenses and consequently impacting railroad rates, charges, services, and operations. This is the very state economic regulation of railroads that the ICCTA sought to preempt. Failing to find preemption of a state prevailing wage statute would result in significant economic burden on the rail industry both in terms of what could be significant wage increases (here it would have been a 250% increase per hour) as well as the expensive administrative burden on railroads performing construction or maintenance in multiple states who would be required to navigate different prevailing wage rates across the county.[12]

ICCTA preempts all state laws that may reasonably be held to manage or govern rail transportation. *See Delaware v. Surface Transp. Bd.*, 859 F.3d 16 (D.C. Cir. 2017). ICCTA also preempts any state regulation that interferes with or frustrates railroad operations, transportation-related activities, or interstate commerce. *See Ass'n of Am. R.R.*, 622 F.3d 1094.

This case is similar to *Bay Colony R.R. Corp. v. Town of Yarmouth*, 23 N.E. 3d 908 (Mass. 2015) ("*Bay*

[12] Amtrak is a railroad whose stock is owned by the federal government. It is inconceivable that Congress would have allowed individual states to impose labor rates on Amtrak or any other major railroad.

Colony R.R. Corp."), where the SJC held that enforcement of a state statute as to transportation of waste was preempted by the Federal Aviation Administration Authorization Act ("FAAA"), which the Court held was "purposefully expansive" and preempted state laws having a connection to "carrier rates, routes or services" even if the effects were "only indirect" and no matter if the law was consistent or inconsistent with federal regulation. The SJC's statement that Petitioners' reliance on *Bay Colony R.R. Corp*. was "misplaced" (App., *supra*, 18a), is incorrect because the ICCTA is equally expansive as the FAAA. *See Alpine Fresh, Inc. v. Jala Trucking Corp*., 181 F. Supp. 3d 250 (D.N.J. 2016) (both ICCTA and FAAA contain similar express preemptive language relating to the intrastate services of a freight forwarder or broker; preempting certain negligence and breach of bailment claims against truck transport company).

Like the express preemption of § 10501(b) of ICCTA, the *Bay Colony R.R. Corp.* Court found similar language in the FAAA to be "purposefully expansive" with words "having a connection with, or reference to carrier rates, routes or services" even if the law's "effect on rates, routes, or services 'is only indirect.'" 23 N.E. 3d at 911. As recognized by the SJC, "Congress' purpose was to avoid a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Id*.

While the SJC in *Bay Colony R.R. Corp.* acknowledged that regulation of local waste was a traditional exercise of the state's police powers, the SJC held that the FAAA "regulates the operation of motor vehicles by railroad companies" that Congress did intend to regulate and preempt "because the restriction is an economic regulation relating to railroads and motor carrier services rather than a public health regulation relating to the transport of waste." *Id.* at 913.

The purported regulation of wages by Massachusetts under the prevailing wage act is an economic regulation relating to railroads that affects transportation by rail carriers. In turn, this regulation increasing railroad employee expenses would impact rates, classifications, rules, interchange, operating procedures, practices, routes, services, and facilities of rail carriers, a result which Congress expressly preempted from state regulatory control under the ICCTA.

2. The Massachusetts Prevailing Wage Act is also Impliedly Preempted by the ICCTA due to the Pervasive Nature of the ICCTA and the Prevailing Wage Act Having the Effect of Unreasonably Burdening or Interfering with Rail Transportation.

Even if this Court is not persuaded that the ICCTA expressly preempts the Massachusetts Prevailing Wage Act, Marsh's claims are still barred by the

doctrine of "field" or "implied" preemption. Field preemption does not require a conflict between federal and state law; rather, it is implied when the scope of a statute indicates that Congress intended federal law to exclusively occupy a field. *See Wisconsin Cent. Ltd. v. Shannon*, 539 F.3d 751, 762 (7th Cir. 2008); *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2010) (ICCTA establishes exclusive federal scheme of economic regulation and deregulation for railroad transportation).

In *Murphy v. Nat'l Collegiate Athletic Ass'n*, the Supreme Court explained that all forms of federal preemption "work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." 138 S. Ct. 1461, 1480 (2018). "Field preemption" occurs "when federal law occupies a 'field' of regulation 'so comprehensively that it has left no room for supplementary state legislation.'" *Id.* (*quoting R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 140 (1986)). Federal statutes that preempt a field "reflect[] a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Murphy*, 138 S. Ct. at 1481(*quoting Arizona v. United States*, 567 U.S. 387, 401 (2012)).

At least two Circuits – the Sixth and Seventh - have concluded that field preemption precludes states from enforcing wage and hour laws where railroads are concerned. *See R. J. Corman R.R. Co. v. Palmore*,

999 F.2d 149, 151 (6th Cir. 1993); *Wisconsin Cent. Ltd.*, 539 F.3d at 764-65 (both concluding that field preemption bars claims for violating state overtime act). Though not exclusively focused on the ICCTA, these Circuits highlighted the undeniable history of pervasive congressional regulation over the railway industry, with federal laws (including ICCTA) governing property rights, shipping, labor relations, hours of work, safety, security, retirement, and unemployment. *See R.J. Corman R.R. Co.*, 999 F.2d at 151-152 ("This lasting history of pervasive and uniquely tailored congressional action indicates Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law"); *Wisconsin Cent. Ltd.*, 539 F.3d at 762 (Congress has so occupied the field of railway regulation that Illinois' overtime law is preempted as applied to railways).

In *R.J. Corman R.R. Co.*, the Sixth Circuit recognized there was no federal statute that expressly preempted state regulation of overtime for railroad employees but "we hold that the congressional purpose behind the Adamson Act and Congress's longstanding decision to regulate railroad on a national level make it reasonable to infer that Congress has impliedly preempted the area of overtime regulation for railroad employees." 999 F.2d at 154.

Similarly, the Seventh Circuit focused on Congress's expansive and pervasive regulation of the railways to preempt state wage laws. "…Congress's intent to leave the matter of wages subject to private

negotiations, particularly when placed against the backdrop of Congress's pervasive regulation of the railways and its clear intent that much of this regulation allow for no state supplement, leads us to conclude that Illinois's overtime regulations, as applied to interstate railways, are preempted." *Wisconsin Cent., Ltd.*, 539 F.3d at 765. The Seventh Circuit held that Congress had occupied the field of *railway regulation* and the state overtime wage laws were, therefore, preempted (although not under the ICCTA, but under the Railway Labor Act), even though minimum wage laws typically fell within the state's police powers. *Id.* at 765. The Court reasoned that "Congress's expansive regulation of the railways and the preemptive force of particular laws" demonstrated the intent to preempt state overtime laws. *Id.* at 763.

The SJC erred in relying on *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), as a basis to deny preemption in this case. In *Hawaiian Airlines*, a case that predates the ICCTA, the Supreme Court analyzed the Federal Railway Labor Act ("FRLA") in the context of a retaliatory discharge claim because of whistleblower activities. The Court concluded that the FRLA did not preempt a state discharge claim independent of a collective bargaining agreement but could only preempt claims involving the interpretation of rights under collective bargaining agreements. That case is wholly inapposite.

Since enactment of the ICCTA, the Supreme Court has applied field preemption in a host of similar cases interpreting the Railway Labor Act, which has a

similar intent to the ICCTA of preventing state interference in railroad economic operations. The resulting body of law reflects many individual applications of the preemption principles, and labor-law preemption cases provide the most reliable guidance here. Preemption applies, to put it broadly, when a State acts "as regulator of private conduct" with an "interest in setting policy" that is different from the policy of the federal government. *See Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U.S. 218, 229 (1993) (*Boston Harbor*). That is what Massachusetts has attempted to do in making the state's prevailing wage act applicable to MCR in its employment of Marsh.

Preemption forbids states from regulating conduct that Congress intended "be unregulated because [it was] left 'to be controlled by the free play of economic forces.'" *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't. Relations Comm'n*, 427 U.S. 132, 140 (1976) (*quoting NLRB v. Nash–Finch Co.*, 404 U.S. 138, 144 (1971)). *Machinists* is quite broad and presumes that "'Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.'" 427 U.S. 132 at 140, n.4 (*quoting* [Archibald] Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1352 (1972)). It recognizes that the Federal Railway Labor Act "specifically conferred on employers and employees" a right to determine certain questions through bargaining and the use of other "permissible economic tactics," and to be free

from government fiat in finding solutions. *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 112–13 (1989) (*Golden State II*). Even state laws with indirect effects can be preempted under *Machinists*. Though *Machinists* itself was directed at a union's "refusal to work overtime" and the *economic pressure* that the refusal placed on the employer (*see* 427 U.S. at 154, 155), it bars state regulation in any "zone protected and reserved for market freedom" by federal law. *Boston Harbor*, 507 U.S. at 226–27 (city governments are "preempted from conditioning renewal of a taxicab operating license upon the settlement of a labor dispute").

The Supreme Court has long recognized that state law can be preempted when the scope of the federal statute indicates that Congress intended to occupy a field exclusively. *See Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625 (2012) (state law claims of defective design and failure to warn relating to manufacturer of asbestos brake pads were preempted by Locomotive Inspection Act) (*citing Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926) (applying field preemption under Locomotive Inspection Act for railroad safety equipment)). *Kurns* was clear that *Napier* had established the preemptive force of that statute decades earlier and *Congress had not acted to change that law*. 565 U.S. at 633 (majority); *id.* at 638 (Kagan, J., concurring). As in *Kurns*, the Supreme Court has often observed that principles of *stare decisis* take on "special force" on issues of statutory interpretation. They do so precisely because Congress

can legislate to correct an erroneous decision by the Court.

3. The Massachusetts Prevailing Wage Act is Preempted to the Extent That it Conflicts with Federal Law.

Conflict preemption arises when: (1) it is impossible to comply with both federal and state law; or (2) state law stands as an obstacle to achieving the objectives of federal law. *See Telecomms. Regul. Bd. of P.R. v. CTIA-Wireless Ass'n*, 752 F.3d 60 (1st Cir. 2014). The federal government has already determined that federal prevailing wages do not apply to railroads; should state prevailing wage laws like the one here be allowed to stand, it would be an economic burden on railroads that would thwart the objectives of the ICCTA.

Under the Federal Prevailing Wage Act, 21 U.S.C. § 113, known as the Davis-Bacon Act, all laborers, and mechanics employed on construction work for federally aided public projects must be paid rates not less than those prevailing wage rates as determined by the United States Secretary of Labor. However, the federal government determined that railroads are not subject to federal prevailing wage rates, which determination conflicts with any state prevailing wage statute. A memorandum dated June 26, 2008 from the U.S. Department of Transportation, Federal Highway Administration, Director, Office of Program Administration, expressly provides that, for railroad and utility relocation or adjustment projects, "23 U.S.C. 113 requirements do not apply to work

performed by railroads, utility companies or work performed by a contractor engaged by a railroad or utility company." *Id*. Thus, by federal law, a railroad performing such work is exempt from Davis-Bacon Act requirements and does not have to pay federal prevailing wages.

It follows that if railroads, which are subject to federal regulation, are exempt from federal prevailing wage rates, then railroads for the same reasons ought to be exempt from state prevailing wage laws, because any such state requirements would conflict with the scope of federal regulation. Any contrary position destroys the national uniformity of regulation of railroads and would subject railroads to potentially fifty different wage rates and open the door to fifty rules and regulations involving prevailing wage rates. It is inconceivable that the federal government would expressly exempt railroads from federal prevailing wage rates only to permit individual states to impose prevailing wage rate requirements.

II. Failing to Overturn the Massachusetts Supreme Court's Decision in this Case Would Open the Floodgates of Litigation.

The Supreme Court has invoked litigation control as a normative basis for overturning lower court decisions ever since *Ex parte Young*, 209 U.S. 123, 166-67 (1908).[13] While "[t]he very essence of civil

[13] The earliest use of the phrase "the floodgates of litigation" in United States decisions comes from *Whitbeck v. Cook*, 15 Johnson Cas. 483, 491 (NY Sup. Ct. 1818). *See, e.g.*, Ellie

liberty…consists in the right of every individual to claim the protection of the laws, whenever he receives an injury", this Court must evaluate how many others intend to claim that same protection. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Here, judges should rightfully be dispossessed of the obligation to determine prevailing wages in the railroad context. Allowing the decision of the SJC to stand would open the door to a surge in state and local regulations relating to railroad track construction, employment, and other aspects of transportation by rail carrier. This imposition would impede interstate commerce and hurt the national economy which relies on the efficient interstate railroad network. Typically, railway employees at MCR traverse multiple cities and states between origin and destination (often in the same day), and it is imperative that the rules and regulations applicable to these movements be uniform.

"[Judges] are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders." In a free-market environment, the market will determine rates. *See*, *e.g.*, *Nat'l Fedn' of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538(2012). The SJC's paternalistic decision will open the floodgates to potential claimants like Marsh who seek to usurp federal law

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Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 Mont L. Rev. 59, 73 (2001) (defining a "floodgates of litigation' argument" as one that "asserts that a proposed rule, if adopted, will inundate the court with lawsuits").

and exploit a progressive State's labor policies even in the preempted domain of Railroad Force Account work.

III. Applying State Prevailing Wage Statutes to Railroads Would Abridge a Citizen's Right to Freely Contract Labor and Violates Due Process.

Freedom of contract is protected by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution—and are synonymous with prohibiting unreasonable governmental regulation of labor. If railroads are exempt under the Davis-Bacon Act (Federal Prevailing Wage law) then *a fortiori* state prevailing wage acts must exempt railroads.[14] From *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) to *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court invalidated nearly two hundred progressive laws on the economy and workforce believed to violate economic due process. In *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), the Supreme Court ruled that a minimum wage law for women violated the Due Process Clause of the Fifth Amendment because it abridged a citizen's right to freely contract labor. The Court cited *Lochner v. New* York, 198 U.S. 45 (1905) in maintaining that the clause gives citizens equal rights "to obtain from each

[14] *See Pennsylvania Fed'n of the Bhd. of Maint. of Way Empls. v. Nat'l R.R. Passenger Corp.*, 989 F.2d 112 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 85 (1993) (compensation scheme in violation of state minimum wage law preempted by Railway Labor Act).

other the best terms they can as the result of private bargaining." *Adkins*, 261 U.S. at 545

Adkins was effectively overturned by *W. Coast Hotel*, 300 U.S. 379, which held that states could impose minimum wage regulations on private employers without violating the Due Process Clause. If they are rational and procedurally fair, minimum wage laws were deemed to constitute a legitimate exercise of a state's police power. Politics and public opinion should not impact the Court's understanding of the Constitution. According to Justice Sutherland, the D.C. minimum wage law, by contrast, was "an arbitrary interference with the liberty of contract which no government can legally justify in a free land." *Id*. at 406. The law was especially "arbitrary," argued the Court, because it imposed uniform minimum wages on all women regardless of their individual needs or occupations. Paternalistic laws mandating prevailing wages have no place in railroad operations.

Justice Sutherland lamented in his dissent in *West Coast Hotel*:

> "We are concerned only with the question of constitutionality. That the clause of the Fourteenth Amendment which forbids a state to deprive any person of life, liberty or property without due process of law includes freedom of contract is so well settled as to be no longer open to question. Nor reasonably can it be disputed that contracts of employment of labor are included in the rule. *Adair v. United States*, 208 U.S. 161, 208

U. S. 174-175 (1908); *Coppage v. Kansas*, 236 U.S. 1, 10, 14 (1915).

In the first of these cases, Mr. Justice Harlan, speaking for the court, said,

'The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . In all such particulars, the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.'"

W. Coast Hotel Co., 300 U.S. at 406.

Justice Sutherland further dissents:

"What we said further in that case (pp. 261 U. S. 557-559), is equally applicable here:

'The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss.…The law is not confined to the great and powerful employers, but embraces those whose bargaining power may be as weak as that of the

> employee. It takes no account of periods of stress and business depression, of crippling losses which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.'
>
> 'The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract, or the work the employee engages to do…"

Id. at 409-10.

The Supreme Court should heed the warning of Justice Sutherland and ensure that no state prevailing wage act can be used as a cudgel against unwitting railroad employers.

IV. Allowing the SJC Decision to Stand Would Upend the Rail Industry's Service Capability By Subjecting It to a Patchwork of Conflicting State Laws, Which the ICCTA Was Designed to Prevent.

Given the inherently interstate nature of the railroad business and the important role railroads play in national commerce, the overarching policy of extensive federal preemption of railroad operations is to ensure that railroads are governed by uniform federal standards and not subjected to varying standards of regulation from state to state.

State Prevailing Wage Acts are the very variable state-to-state law that the ICCTA's preemption provision is intended to prevent. *See* S. Rep. No. 104-176, at 6 (1995) ("Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the 'seamless' service that is essential to its shippers and would w[e]aken the industry's efficiency and competitive viability.")[15]. Massachusetts has decided that the Petitioner's railroad violated Massachusetts law here by failing to pay prevailing wage, but another court in a different state might determine that the Petitioner railroad did not violate its state's prevailing wage act by not paying prevailing wages. The ICCTA is not silent on preemption; it contains an express

[15] State legislatures require clarity from the Supreme Court on the scope of their authority vis-à-vis railroads. The SJC's decision creates uncertainty over the entire scope of ICCTA preemption.

preemption provision that plainly "preempt[s] the remedies provided under . . . State law" "with respect to regulation of rail transportation." 49 U.S.C. § 10501(b).

State prevailing wage acts are rooted in discriminatory intent—they were passed intending to favor white workers (who belonged to white-only unions) over non-unionized black workers. *See* David E. Bernstein, Prevailing Wage Legislation and The Continuing Significance of Race, 44 Journal of Legislation 154 (2017). Prevailing wage acts restrict the economic opportunities of low-income individuals in several ways. Minority contracting firms are often small and non-unionized, and cannot afford to pay the prevailing wage. *Id*. Unskilled laborers are required to be paid prevailing wages for any job they perform, essentially forcing contractors to hire skilled tradesmen, selecting workers from a pool dominated by white workers. Prevailing wage acts constitute a formidable barrier to entry into the construction industry for unskilled or low-skilled workers. This is especially harmful to minority workers because construction industry jobs pay extraordinarily well compared to other entry-level positions.

It is incumbent on this Supreme Court to erase the scourge of state prevailing wage acts, especially in the railroad Force Account context, which seek to flout Federal law.

CONCLUSION

The petition for a writ of certiorari should be granted to return the supremacy of federal law in the

railroad context, because Congress reserved no role for the states to impose prevailing wage acts, just as Congress exempted railroads from the Davis-Bacon Act (i.e., the federal prevailing wage law).

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS, DATED AUGUST 14, 2023

SUPREME JUDICIAL COURT OF MASSACHUSETTS

SJC-13366.

CHAD MARSH

VS.

MASSACHUSETTS COASTAL RAILROAD LLC & ANOTHER.[1]

April 5, 2023, Argued
August 14, 2023, Decided

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

WENDLANDT, J. The Prevailing Wage Act, G. L. c. 149, §§ 26-27H (Prevailing Wage Act, or Act), evinces the Legislature's intent that laborers performing work in the Commonwealth on the Commonwealth's public works projects are paid a fair wage as determined by the Commonwealth based on prevailing market conditions (prevailing wage). The Act is designed to avoid rewarding a contractor that submits an artificially low bid on public works projects by paying its employees less than

1. P. Chris Podgurski.

the prevailing wage. It embodies the Commonwealth's policy to dedicate public funds to the payment of wages consistent with market conditions to employees on public works projects.

In the present case, the plaintiff, Chad Marsh, alleges that the defendant Massachusetts Coastal Railroad LLC (MCR) paid him less than the prevailing wage on State public works projects, including a project to restore commuter rail service between Boston and southeastern Massachusetts (South Coast Rail project). On appeal from the denial of their motion to dismiss, MCR, a railroad company, and its managing officer, the defendant P. Chris Podgurski, contend that the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501 (ICCTA), which provides that the remedies set forth in the ICCTA "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), preempts the Prevailing Wage Act. As a result, they assert that the Commonwealth is precluded from enforcing the Act to ensure that laborers engaged in public works projects are paid a prevailing wage by the Commonwealth's contractors where the contractor that wins the bid for a contract is a railroad company.

Because the defendants' argument is unsupported by the plain language of the ICCTA, and because the argument runs counter to the long-established principle that, in the absence of a clear expression otherwise, we must presume that Congress did not intend to preempt a State's exercise of its historic police powers, we conclude

that the defendants have failed to show that the Prevailing Wage Act is preempted. Further concluding that the defendants also have not shown that the Act is preempted under either the field or conflict preemption doctrines and that, at this stage of the litigation, Marsh's allegation that he performed qualifying work on a public works project covered by the Prevailing Wage Act plausibly suggests a right to relief under the Act, we affirm.[2]

1. *Background*. "We recite the facts asserted in the amended complaint, taking them as true for purposes of evaluating the motion to dismiss." *Edwards* v. *Commonwealth*, 477 Mass. 254, 255, 76 N.E.3d 248 (2017).

a. *Complaint's allegations*. MCR is "a railroad company specializing in integrated rail freight and logistics services that completes public works projects throughout Massachusetts." Podgurski is "an officer or agent having the management of MCR," who "participated to a substantial [degree] in formulating the policies of the company." In June 2019, MCR hired Marsh as an equipment operator.

During Marsh's employment, MCR entered into contracts with the Commonwealth to complete "integrated rail freight and logistics projects," including the South Coast Rail project, the purpose of which was to "restore commuter rail service between Boston and southeastern Massachusetts"; Marsh alleges that "these projects

2. We acknowledge the amicus brief submitted by the American Short Line and Regional Railroad Association.

constituted public works projects and/or public works to be constructed within the meaning of … G. L. c. 149, §§ 27, 27F." In connection with these projects, Marsh operated certain construction vehicles and equipment.[3] He was paid an hourly rate that was less than the applicable prevailing wage rate for his work. In June 2021, Marsh resigned.

b. *Procedural history.* Marsh commenced the present action against the defendants, seeking relief related to MCR's failure to pay him the prevailing wage for his work on public works projects. In particular, he alleges that he was entitled to a prevailing wage as an operator of vehicles and equipment engaged in public works projects, under G. L. c. 149, § 27F,[4] and as a laborer performing a

3. Marsh operated boom trucks, backhoes, and loaders to unload materials on site. He also used a backhoe to dig, and he used a tamper to tamp stone to lift and level railway tracks. In operating the equipment, Marsh made "additions and/or alterations to public property and/or public works."

4. General Laws c. 149, § 27F, provides that

> "[n]o agreement of lease, rental or other arrangement, and *no* order or *requisition under which* a truck or *any* automotive or other *vehicle or equipment is to be engaged in public works by the [C]ommonwealth … shall be entered into* or given by any public official or public body *unless said* agreement, order or *requisition contains a stipulation requiring prescribed rates of wages*, as determined by the commissioner [of the Department of Labor Standards (DLS), see G. L. c. 149, § 1], *to be paid to the operators of said* trucks, *vehicles or equipment*" (emphasis added).

The § 27F claim was brought only against MCR.

construction job on public works projects, under G. L. c. 149, § 27.[5] He contends that the defendants violated these provisions of the Prevailing Wage Act by failing to pay him the prevailing wage for his work,[6] and further violated the Fair Minimum Wage Act, G. L. c. 151, §§ 1A, 1B,[7] by failing

5. General Laws c. 149, § 27, provides that

> "[p]rior to awarding a contract for the construction of public works, [a] public official or public body shall submit to the commissioner [of DLS] a list of the jobs upon which … laborers are to be employed, and shall request the commissioner to determine the rate of wages to be paid on each job."

Contractors engaged by the Commonwealth to perform work on public works construction projects must "annually obtain updated rates from the public official or public body[,] and *no contractor* or subcontractor *shall pay less than the rates so established*" (emphasis added). *Id.* "Whoever shall pay less than said rate or rates of wages … on said works … shall have violated this section and shall be punished or shall be subject to a civil citation or order." *Id.*

6. General Laws c. 149, § 27F, provides a private right of action for "for any damages incurred, and for any lost wages and other benefits" to operators of "equipment … engaged in public works by the [C]ommonwealth" who "claim[ ] to be aggrieved" by violations of the Prevailing Wage Act; G. L. c. 149, § 27, affords the same private right of action to laborers on public works.

7. General Laws c. 151, § 1A, provides that, aside from certain exceptions,

> "no employer in the [C]ommonwealth shall employ any of his employees in any occupation … for a work week longer than forty hours, unless such employee receives compensation for his employment in excess of forty hours *at a rate not less than one and one*

to use the prevailing wage as the basis for calculating his overtime wages. He also alleges that, because he was not paid the full amount due for each pay period during which he should have been paid the prevailing wage, the defendants violated the requirement of the Wage Act, G. L. c. 149, § 148,[8] that he receive earned wages timely.[9]

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half times the regular rate at which he is employed" (emphasis added).

General Laws c. 151, § 1B, provides a private right of action for employees who are paid less than the overtime rate of compensation.

8. The Wage Act provides, in relevant part, that

> "*[e]very person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned* if employed for five or six days in a calendar week … *but any employee leaving his employment shall be paid in full on the following regular pay day*, and, in the absence of a regular pay day, on the following Saturday" (emphasis added).

G. L. c. 149, § 148, first par. It further provides that "[t]he word 'wages' shall include any holiday or vacation payments due an employee under an oral or written agreement." *Id.*

9. The defendants do not address, nor do we reach, the issue whether recovery under the Wage Act is permissible under the circumstances alleged in the complaint. See *Donis* v. *American Waste Servs., LLC*, 485 Mass. 257, 269, 149 N.E.3d 361 (2020) ("Where … the sole basis for [the employees'] claim is a violation of the Prevailing Wage Act, the [employees] may not restate their claims under the Wage Act to evade the limitations of the Prevailing Wage Act on the scope of potentially liable defendants").

Finally, Marsh alleges that, following his resignation, MCR failed to pay him timely for his accrued paid time off and approximately eight hours of work. When he received both payments, he was not compensated fully by the tardy payments.[10]

The defendants filed a motion to dismiss on the basis that Marsh's claims, which depend on the applicability of the Prevailing Wage Act, failed because the Prevailing Wage Act was preempted. Alternatively, the defendants maintained that dismissal was warranted because MCR's contracts with the Commonwealth did not involve "public works" projects governed by the Prevailing Wage Act. In a thorough and thoughtful decision, the Superior Court judge denied the motion, as well as the defendants' subsequent motion for reconsideration. The defendants filed a notice of appeal from the denial of both motions, and we transferred the case to this court on our own motion.

2. *Discussion*. a. *Standard of review*. "We review the denial of a motion to dismiss under Mass. R. Civ. P. 12 (b) (6)[, 365 Mass. 754 (1974),] de novo." *Dunn* v. *Genzyme Corp.*, 486 Mass. 713, 717, 161 N.E.3d 390 (2021). [11] In doing

10. See *Reuter* v. *Methuen*, 489 Mass. 465, 466, 184 N.E.3d 772 (2022) (employer is responsible for trebled amount of late wages under Wage Act).

11. Orders denying a motion to dismiss "generally are not appealable until the ultimate disposition of the case because they are not 'final orders.'" *Brum* v. *Dartmouth*, 428 Mass. 684, 687, 704 N.E.2d 1147 (1999). The present appeal raises "a significant issue" concerning the Prevailing Wage Act, which "has been briefed fully by the parties," and "addressing it would be in the public interest."

so, we accept "as true all well-pleaded facts alleged in the complaint, drawing all reasonable inferences therefrom in the plaintiff's favor, and determining whether the allegations plausibly suggest that the plaintiff is entitled to relief." *Lanier* v. *President & Fellows of Harvard College*, 490 Mass. 37, 43, 191 N.E.3d 1063 (2022).

b. *Prevailing Wage Act framework.* The Prevailing Wage Act is a general law [12] "that concerns a subject of traditional State regulation." *Felix A. Marino Co.* v. *Commissioner of Labor & Indus.*, 426 Mass. 458, 463, 689 N.E.2d 495 (1998). It "govern[s] the setting and payment of wages on [certain] public works projects." *Donis* v. *American Waste Servs., LLC*, 485 Mass. 257, 263, 149 N.E.3d 361 (2020), quoting *McCarty's Case*, 445 Mass. 361, 370, 837 N.E.2d 669 (2005) (Sosman, J., concurring). It was enacted "to achieve parity between the wages of workers engaged in public construction projects and workers in the rest of the construction industry." *Donis*, *supra*, quoting *Mullally* v. *Waste Mgt. of Mass., Inc.*, 452 Mass. 526, 532, 895 N.E.2d 1277 (2008).

Marcus v. *Newton*, 462 Mass. 148, 153, 967 N.E.2d 140 (2012). Cf. *Witty* v. *Delta Air Lines, Inc.*, 366 F.3d 380, 382 (5th Cir. 2004) (allowing interlocutory review of preemption issue). The defendants maintain that interlocutory review is appropriate, and Marsh does not disagree. Accordingly, we exercise our discretion to reach the merits of the parties' arguments. See, e.g., *Dunn*, 486 Mass. at 717 (granting application for interlocutory review of denied motion to dismiss raising preemption issue).

12. See Black's Law Dictionary 1057 (11th ed. 2019) (defining "general law" as a "[l]aw that is neither local nor confined in application to particular persons" that "purports to apply to all persons or places of a specified class throughout the jurisdiction").

Appendix A

The prevailing wage schedule, which lists the prevailing wage for each job category on a public works project, is determined by the commissioner of the Department of Labor Standards (DLS), based on wages paid for similar work on the market. *McCarty's Case*, 445 Mass. at 370 (Sosman, J., concurring), citing G. L. c. 149, § 26 (in determining schedule, "the commissioner must take into account, and may not set rates of wages that are less than, wage rates paid to laborers who work in the same municipality, wage rates paid pursuant to collective bargaining agreements in the construction industry, and wage rates paid to employees working in the private construction industry"). The commissioner's "goal is to make [the prevailing] wage rates comparable to what is being earned by employees performing similar jobs in other parts of the construction industry." [13] *McCarty's Case*, *supra*.

13. "To achieve that parity, [the Act] further provides that in calculating the rates of wages for a public works project, the commissioner must include [not only the hourly wages, but also] '[p]ayments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans under collective bargaining agreements or understandings between organized labor and employers.'" *McCarty's Case*, 445 Mass. at 371 (Sosman, J., concurring), quoting G. L. c. 149, § 26. "In other words, to establish comparable rates, the commissioner is to consider the entire compensation package, which, under collective bargaining agreements, often includes valuable fringe benefits in addition to hourly cash wages. Failure to consider those other components in the total package would produce obvious disparity, and merely making the hourly pay rates identical would not provide the comparable level of compensation that § 26 seeks to achieve." *McCarty's Case*, *supra*.

Pursuant to the Act, a contractor bidding on a public works project is expected to use the prevailing wage rates set forth in the Commonwealth's prevailing wage schedule to calculate the labor costs included in its proposed bid. G. L. c. 149, § 27 (requiring public officials to incorporate schedule of prevailing wage rates in each request for proposals for each public works project). If selected to perform work on a public works project, the contractor must pay, at the least, the prevailing wage to its laborers on the project for the duration of the contract with the Commonwealth. *Id.* (requiring that prevailing wage schedule "be made a part of the contract for said [public] works [projects] and shall continue to be the minimum rate or rates of wages for said employees during the life of the contract").[14]

The Prevailing Wage Act "prevents a contractor from 'offer[ing] its services [to the Commonwealth] for less than what is customarily charged by its competitors for nonpublic works contracts,'" *Donis*, 485 Mass. at 263-264, quoting *Mullally*, 452 Mass. at 533, and further "protects an employee's interest in receiving a wage commensurate with his or her labor," *Donis*, *supra* at 263. It "has the

14. "Where th[e prevailing wage] rates have included amounts paid for benefit packages, an employer may satisfy that part of the required 'rate' either by making payment to and providing the employee with the benefit plan *or* by 'pay[ing] the amount of said payments directly to each employee.'" *McCarty's Case*, 445 Mass. at 371 (Sosman, J., concurring), quoting G. L. c. 149, § 27. Thus, the "benefits component of the [prevailing wage] rate may be provided either in the form of benefits or in the form of cash." *McCarty's Case*, *supra*.

effect of providing all workers with comparable total compensation [to that which laborers receive on nonpublic works projects], whatever form it takes, and, in particular, ensures that employers have no financial incentive to hire nonunion labor as opposed to union workers." *McCarty's Case*, 445 Mass. at 372 (Sosman, J., concurring).[15]

The Act embodies the Legislature's policy to govern how the Commonwealth itself will exercise its responsibility to ensure that employees working on a public works project are not underpaid as a result of the competitive forces present in public bidding contests. See *Donis*, 485 Mass. at 263-264. In other words, it represents the Commonwealth's decision, through its contracts, to dedicate public funds to the payment of wages consistent with market conditions to employees on public works projects. [16] See *id.* at 262 ("For each kind of project to which it applies, the Prevailing Wage Act provides a mechanism for setting and enforcing minimum wage rates").

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15. "The fringe benefit packages required by collective bargaining agreements are not an expense that can be avoided by hiring nonunion employees, as the exact same amount of money will have to be paid — it will simply be paid directly in cash to the employee instead of being paid to include the employee in a benefit program." *McCarty's Case*, 445 Mass. at 372 (Sosman, J., concurring).

16. Accord *Friends of the Eel River* v. *North Coast R.R. Auth.*, 3 Cal. 5th 677, 723, 220 Cal. Rptr. 3d 812, 399 P.3d 37 (2017) (environmental standards for State projects, including rail transportation projects, "embod[y] a [S]tate policy adopted by the Legislature to govern how the [S]tate itself and the [S]tate's own subdivisions will exercise their responsibilities").

c. *Preemption*. With this background in mind, we turn to consider the defendants' preemption arguments. State law is preempted [17] by Federal law when (1) the preemptive intent is stated explicitly in the Federal law's language or implicitly contained in its structure and purpose (express preemption), (2) the Federal law so thoroughly occupies a legislative field such that it is reasonable to infer that Congress left no room for the State to supplement it (field preemption), or (3) the State law actually conflicts with the Federal law (conflict preemption). [18] See *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992); *Patel* v. *7-Eleven, Inc.*, 489 Mass. 356, 366 n.15, 183 N.E.3d 398 (2022), citing *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). The "ultimate touchstone" of preemption analysis is congressional intent, which is discerned primarily from the language of the preemption statute and its framework. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485-486, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).

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17. The doctrine of preemption is rooted in the supremacy clause of the United States Constitution, which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof … , shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2.

18. Conflict preemption occurs when "it is 'impossible for a private party to comply with both [S]tate and [F]ederal requirements,' … or where [S]tate law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 64-65, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002), quoting *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995).

Importantly, our preemption analysis is rooted in "the assumption that the historic police powers of the States [are] not to be superseded by … Federal Act unless that [is] the clear and manifest purpose of Congress." *Dunn*, 486 Mass. at 718, quoting *Cipollone*, 505 U.S. at 516. The assumption is "particularly strong [in the present context] given [S]tates' lengthy history of regulating employees' wages and hours" (citation omitted). *Devaney* v. *Zucchini Gold, LLC*, 489 Mass. 514, 519, 184 N.E.3d 1248 (2022). See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985), quoting *DeCanas* v. *Bica*, 424 U.S. 351, 356, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976), superseded by statute as recognized in *Kansas* v. *Garcia*, 140 S. Ct. 791, 206 L. Ed. 2d 146 (2020) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," including through State laws related to minimum and other wages).

Recognizing that prevailing wage laws are a powerful mechanism for States, as market participants, to direct public policy on their own public works projects by controlling how to spend public funds to achieve the States' policy objectives, see, e.g., *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 332, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (State prevailing wage law provided incentive to utilize employee apprenticeship programs on public works projects), and that such laws fall within the "historic police powers of the States," *id.* at 331, quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947), the United

States Supreme Court has expressed reluctance to find a congressional intent to preempt such laws even where Federal legislation includes a broad preemption provision, see, e.g., *Dillingham Constr., N.A., Inc.*, *supra* at 334 (rejecting argument that State's prevailing wage law was preempted by broad preemption clause of Federal Employee Retirement Income Security Act [ERISA], which expansively preempted all State laws that have "connection with" or "relate to" employee benefit plans, absent clearer indication of congressional intent to usurp State's public works policy). Instead, the Supreme Court has viewed with skepticism any argument that Congress intended "to trench on the States' arrangements for conducting their own governments," construing Federal legislation "in a way that preserves a State's chosen disposition of its own power, in the absence of [a] plain statement [indicating that Congress intended to preempt the State law]." *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 140, 124 S. Ct. 1555, 158 L. Ed. 2d 291 (2004). See, e.g., *id.* at 128-129 (Federal Telecommunications Act "preempt[ing] … [S]tate and local laws and regulations expressly or effectively 'prohibiting the ability of any entity' to provide telecommunications services" did not preempt State's power to restrict its own delivery of such services [citation omitted]).

Notably, the Prevailing Wage Act is not targeted at the railroad industry or rail transportation, an "area where there has been a history of significant [F]ederal presence." [19] *Florida E. Coast Ry.* v. *West Palm Beach*,

19. For a fuller account of the history of Federal railroad legislation, see *R.J. Corman R.R./Memphis Line* v. *Palmore*, 999 F.2d 149, 151-152 (6th Cir. 1993).

266 F.3d 1324, 1328 (11th Cir. 2001), quoting *United States* v. *Locke*, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000). The Act is a general law that falls within the State's traditional police powers of wage regulation. See *Felix A. Marino Co.*, 426 Mass. at 463. More particularly, it falls within the State's power to direct how it will spend public funds to promote its policy to pay laborers wages that are consistent with market conditions.[20]

Accordingly, "'[t]he principles of federalism and respect for [S]tate sovereignty that underlie the [Supreme] Court's reluctance to find pre-emption,' *Cipollone[*, 505 U.S. at 533] (Blackmun, J., concurring), place a 'considerable burden' on" the defendants here. *Florida E. Coast Ry.*, 266 F.3d at 1329, quoting *De Buono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814, 117 S. Ct. 1747, 138 L. Ed. 2d 21 (1997). See, e.g., *New York Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 658-664, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) (concluding that preemption clause, which preempted State laws that "relate to" employee benefits plans under ERISA, did not preempt State's law imposing surcharges on commercial insurance providers despite indirect economic effect on such plans absent clearer expression of congressional intent).

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20. By contrast, where a State legislates in an area that traditionally has been governed by Federal law and regulations, the presumption against preemption does not apply. See *Locke*, 529 U.S. at 108 (State regulation of oil tanker design and operation not entitled to presumption against preemption because State purported to regulate maritime commerce, "where there has been a history of significant [F]ederal presence").

i. *Express preemption*. We turn now to the defendants' argument that the Prevailing Wage Act is preempted expressly by the ICCTA. Where, as here, a Federal statute "contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993). See *Williams* v. *Taylor*, 529 U.S. 420, 431, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) (construction "start[s] … with the language of the statute").

The ICCTA vests the Surface Transportation Board (STB) with "exclusive" jurisdiction "over (1) transportation by rail carri- ers … and (2) the *construction*, acquisition, operation, abandonment, or discontinuance *of … tracks[ ]* or facilities" (emphasis added).[21] 49 U.S.C. § 10501(b). The statute's express preemption clause provides that "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" (emphasis added). *Id.*

21. "[T]ransportation" is expansively defined to include, in relevant part, "(A) a … vehicle, … warehouse, … 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." 49 U.S.C. § 10102(9).

In view of the plain language of the ICCTA's preemption clause, Federal courts and the STB[22] have concluded that "Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e., those [S]tate laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation." *Florida E. Coast Ry.*, 266 F.3d at 1331, quoting Black's Law Dictionary 1286 (6th ed. 1990). See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 50, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) ("common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry"); *New York Susquehanna & W. Ry.* v. *Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) ("Because the [ICCTA's] subject matter is limited to deregulation of the railroad industry, … courts and the [STB] have rightly held that it does not preempt *all* [S]tate regulation affecting transportation by rail carrier"). Accord H.R. Rep. No. 104-422, 104th Cong., 1st Sess., at 167 (1995) (ICCTA preemption provision "is

22. "As the agency authorized by Congress to administer the [ICCTA], the [STB] is 'uniquely qualified to determine whether [S]tate law … should be preempted' by the [ICCTA]." *Green Mountain R.R.* v. *Vermont*, 404 F.3d 638, 642-643 (2d Cir. 2005), quoting *CSX Transp., Inc.* v. *Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1584 (N.D. Ga. 1996). See *Wyeth* v. *Levin*, 555 U.S. 555, 576-577, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009) ("While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how [S]tate requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" [quotation and citation omitted]).

limited to remedies with respect to rail regulation — not State and Federal law generally"); Riverdale — Petition for Declaratory Order — New York Susquehanna & W. Ry., 4 S.T.B. 380, 386 (1999) (Riverdale) (Congress did not preempt all State laws that "affect railroads" in any manner whatsoever). Cf. Horton *vs.* Kansas City S. Ry., Tex. Sup. Ct., No. 21-0769, slip op. at 10-11 (June 30, 2023) (negligence claim in wrongful death action not preempted by ICCTA even when applied to railroad).

The ICCTA does not preclude State laws that may have a "remote or incidental effect on rail transportation." *Florida E. Coast Ry.*, 266 F.3d at 1331 (ICCTA's preemption clause tailored toward "regulation of rail transportation," which "necessarily means something qualitatively different from laws '*with respect to rail transportation*'" [emphasis added; citation omitted]).[23] Specifically, State laws that fall within the State's "general police powers" are not preempted by the ICCTA even when they affect "railroad activity." *Norfolk S. Ry.* v. *Alexandria*, 608 F.3d 150, 158 (4th Cir. 2010).[24]

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23. See *Bennett* v. *Spear*, 520 U.S. 154, 173, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (under "cardinal principle of statutory construction … [courts must] give effect, if possible, to every clause and word of a statute" [quotations and citation omitted]).

24. The defendants' reliance on *Bay Colony R.R.* v. *Yarmouth*, 470 Mass. 515, 518-519, 23 N.E.3d 908 (2015), which concerned the broader preemption provision of the Federal Aviation Administration Authorization Act (FAAAA), is misplaced. See *id.* at 518, quoting *Massachusetts Delivery Ass'n* v. *Coakley*, 769 F.3d 11, 18 (1st Cir. 2014), and *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008) (preemptive scope

Thus, although the defendants correctly note that Marsh performed "construction" work on railroad tracks — an area of work that falls within the ICCTA's exclusive jurisdiction, see 49 U.S.C. § 10501(b) — it is less clear whether application of the Prevailing Wage Act to define the wages paid to construction workers on public works projects is a preempted "regulation" of rail transportation, on the one hand, or a permissible State law with an incidental effect on railroad activities, on the other.[25]

In drawing the line between a local law that is a preempted "regulation" of rail transportation and a State law that is a permissible exercise of a State's authority that incidentally affects railroad activities, Federal courts have concluded that "[w]hat matters is the degree to which the challenged [State law] burdens rail transportation." *New York Susquehanna & W. Ry.*, 500 F.3d at 252. State laws are permissible if they do not "interfere with or unreasonably burden railroading." *Id.* See King County, Wash. — Petition for Declaratory Order — Burlington N. R.R. — Stampede Pass Line, 1 S.T.B. 731, 735-736 (1996) (ICCTA's preemption clause "does not usurp the right of [S]tate and local entities to impose appropriate public

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of FAAAA was "purposefully expansive," preempting State laws "*having a connection with, or reference to*, carrier rates, routes, or services, even if the law's effect on rates, routes, or services [was] only indirect, and irrespective of whether [the] law [was] consistent or inconsistent with [F]ederal regulation" [quotations omitted]).

25. "[C]onstruction," for example, is commonly understood as "[t]he act of building by combining or arranging parts or elements," Black's Law Dictionary 391 (11th ed. 2019), not the wages paid for the labor involved in building.

health and safety regulation on interstate railroads," so long as those regulations do not "'conflict with' [F]ederal regulation, 'interfere with' [F]ederal authority, or 'unreasonably burden' interstate commerce").

On the record before us, the defendants in this case have not shown that the Prevailing Wage Act interferes with or unreasonably burdens railroading. Notably, the Prevailing Wage Act has little, if any, "adverse economic effect on aspects of the railroads' operations." *Emerson* v. *Kansas City S. Ry.*, 503 F.3d 1126, 1132 (10th Cir. 2007). The economic impact of the Prevailing Wage Act is, by design, absorbed by the Commonwealth. See, e.g., *Friends of the Eel River* v. *North Coast R.R. Auth.*, 3 Cal. 5th 677, 723, 220 Cal. Rptr. 3d 812, 399 P.3d 37 (2017), cert. denied, 138 S. Ct. 1696, 200 L. Ed. 2d 952 (2018) (Congress did not intend with ICCTA to "preempt a [S]tate's adoption and use of the tools of self-governance" with its own freight rail transportation projects "or to leave the [S]tate, as owner, without any means of establishing the basic principles under which it will undertake significant capital expenditures"). Specifically, a contractor is expected to calculate its labor costs using the prevailing wage schedule published by the DLS in its bid. The prevailing wage schedule becomes part of the winning bidder's contract with the Commonwealth; and the contractor must pay its laborers the relevant prevailing wage, presumably using the revenues it receives from the State. See Anzivino, Are the States' "Prevailing Wage Laws" Constitutional?, https://www.scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1407&context=facpub [https://perma.cc/3HM5-XSG5] (under State prevailing

wage laws, State "pays a premium for construction work done on public projects and, in consideration of such premium, requires all contractors working on these projects to pay their employees 'prevailing wages' in the construction industry").[26]

Indeed, no railroad is required to bid on a public works project; when a railroad voluntarily chooses to submit a bid, it is some evidence that the railroad has determined that compliance with the Prevailing Wage Act does not unreasonably burden its railroading activities. The decision of the United States Court of Appeals for the Fourth Circuit in *PCS Phosphate Co.* v. *Norfolk S. Corp.*, 559 F.3d 212, 221 (4th Cir. 2009), is instructive. In *PCS Phosphate Co.*, a railroad entered a contract with a mine owner, agreeing to pay to relocate rail lines that served the mine. *Id.* at 215. The railroad failed to pay and, in response to the owner's subsequent claim for breach of contract, argued that the contract claim was preempted by the ICCTA. *Id.* at 216-217. The Fourth Circuit disagreed, concluding that enforcement of the railroad's voluntary agreements with the owners was not "regulation" expressly preempted by the ICCTA. *Id.* at

26. Contrary to the defendants' argument that the increased cost of paying prevailing wages to MCR's laborers burdens MCR's operations, nothing in the present record suggests payment of a prevailing wage would pose an undue burden. Cf. *Holland* v. *Delray Connecting R.R.*, 311 F. Supp. 2d 744, 755, 757 (N.D. Ind. 2004) (denying motion to dismiss on ICCTA preemption question where "devastating degree of [Federal Coal Industry Retiree Health Benefit Act's] impact poses a factual question on which [the railroad] must offer proof").

218. The court rejected the railroad's contention that the ICCTA expressly preempted all voluntary agreements concerning rail transportation, determining that the argument was unsupported by the purpose of the ICCTA to deregulate the railroad industry. *Id.* at 219.

Enforcement of the parties' agreements, the Fourth Circuit concluded, would not "unreasonably interfer[e] with rail transportation" (quotation and citation omitted) because the agreements "were freely negotiated between sophisticated business parties" and "reflect[ed] a market calculation that the benefits of operating the rail line for many years would be worth the cost of paying to relocate the line in the future."[27] *PCS Phosphate Co.*, 559 F.3d at 220-221. "In the context of voluntary agreements, [courts] let the market do much of the work of the benefit-burden calculation." *Id.* at 221. The court also noted that, "[a]s the STB has recognized, 'voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce.'" *Id.*, quoting Woodbridge *vs.* Consolidated Rail Corp., 5 S.T.B. 336, 340 (2000). Thus, the court concluded that enforcement of valid voluntary agreements between private parties did not "fall into the core of economic regulation that the ICCTA was intended to preempt" and was therefore not preempted by the ICCTA. *PCS Phosphate Co.*, *supra* at 219. Accord *Friends of the Eel River*, 3 Cal. 5th at 723 (enforcement of State environmental standards on State public works projects was not "regulation" preempted by ICCTA).

27. For this reason, the Fourth Circuit also rejected the argument that enforcement of the agreements was impliedly preempted by the ICCTA. *PCS Phosphate Co.*, 559 F.3d at 220-221.

Like the terms of the contracts held to be enforceable despite the ICCTA's express preemption clause in *PCS Phosphate Co.*, 559 F.3d at 221, the Prevailing Wage Act sets forth contractual terms governing public works projects voluntarily agreed to by the contractor, here, a railroad. Each contract reflects the railroad's determination, based on market conditions, that agreeing to pay its laborers the prevailing wage in exchange for the revenues it will receive from the Commonwealth for the public works project is "worth" it. *Id.*[28] Contrary to the defendants' argument, where a railroad voluntarily bids on a public works contract, and then freely agrees to public works project contractual provisions with prevailing wage rate schedules incorporated therein, that choice supports the contention that the railroad has determined that the benefits of completing the project outweigh the cost, including the cost of paying prevailing wages to its workers.[29]

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28. The fact that, as here, one party to the contract is a subdivision of a State does not alter our conclusion. See *Building & Constr. Trades Council of the Metro. Dist.* v. *Associated Bldrs. & Contrs. of Mass./R.I., Inc.*, 507 U.S. 218, 231-232, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993) ("In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, [the United States Supreme Court] will not infer such a restriction").

29. Nor does "[t]he fact that the statute may prevent the [r]ailroad from maximizing its profits … render the statute *unreasonably* burdensome" and thus preempted. *Adrian & Blissfield R.R.* v. *Blissfield*, 550 F.3d 533, 541 (6th Cir. 2008). See *Florida E. Coast Ry.*, 266 F.3d at 1338 n.11 ("No statement of purpose for the ICCTA, whether in the statute itself or in the major legislative

Moreover, the Prevailing Wage Act is akin to the type of State law that other Federal courts and the STB have concluded are not preempted by the ICCTA. Specifically, the Prevailing Wage Act "concerns a subject of traditional State regulation." *Felix A. Marino Co.*, 426 Mass. at 463. Accord *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014) ("generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide"); *People* v. *Pac Anchor Transp., Inc.*, 59 Cal. 4th 772, 786-787, 174 Cal. Rptr. 3d 626, 329 P.3d 180 (2014), cert. denied, 574 U.S. 1153, 135 S. Ct. 1400, 191 L. ed. 2d 360 (2015) (identifying State prevailing wage law as generally applicable law).

The Prevailing Wage Act is "settled and defined," *Green Mountain R.R.* v. *Vermont*, 404 F.3d 638, 643 (2d Cir.), cert. denied, 546 U.S. 977, 126 S. Ct. 547, 163 L. Ed. 2d 460 (2005); it sets forth the process by which a prevailing wage schedule for labor performed on public

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history, suggests that any action which prevents an individual firm from maximizing its profits is to be pre-empted"). "Although the 'costs of compliance' with a [S]tate law could be high, 'they are "incidental" when they are subordinate outlays that all firms build into the cost of doing business.'" *Adrian & Blissfield R.R. supra*, quoting *New York Susquehanna & W. Ry.*, 500 F.3d at 254. In fact, the Prevailing Wage Act furthers the ICCTA's statement that "[i]n regulating the railroad industry, it is the policy of the United States Government … to encourage fair wages and safe and suitable working conditions in the railroad industry." 49 U.S.C. § 10101(11).

works is created and incorporated into public works contracts between the Commonwealth and its contractors, see G. L. c. 149, § 27 (commissioner of DLS determines prevailing wage schedule for public works, which is incorporated into call for bids, and then "[s]aid [prevailing wage] schedule shall be made a part of the contract for said works"). It "can be obeyed with reasonable certainty," *Green Mountain R.R.*, *supra*, by paying laborers according to the prevailing wage schedule, see G. L. c. 149, § 27 ("schedule … shall continue to be the minimum rate or rates of wages for said employees during the life of the contract").

Compliance with the Act does not "entail … extended or open-ended delays." *Green Mountain R.R.*, 404 F.3d at 643. Pursuant to the Prevailing Wage Act, contractors bidding on public works projects are aware of the schedule of prevailing wages, and if they choose to bid on the project, they are expected to use the schedule in computing labor costs to include in their bids. G. L. c. 149, § 27.

The Prevailing Wage Act involves no "discretion on subjective questions." *Green Mountain R.R.*, 404 F.3d at 643. Contrast *id.* (ICCTA preempted environmental land use law because "railroad [would be] restrained from development until a permit [was] issued; the requirements for the permit [were] not set forth in any schedule or regulation that the railroad [could] consult in order to assure compliance; and the issuance of the permit await[ed] and depend[ed] upon the discretionary rulings of a [S]tate or local agency").

Furthermore, unlike State laws that Federal courts and the STB have determined to be preempted, the Prevailing Wage Act is not a permitting or preclearance process that could prevent, interfere with, or delay rail operations. [30] See Riverdale, 4 S.T.B. at 386-389 (contrasting uniform building, plumbing, and electric codes, which generally are not preempted because they do

30. The STB and Federal courts have determined that, where a State permitting or preclearance process "could be used to frustrate or defeat an activity that is regulated at the Federal level, the [S]tate … process is preempted." *New York Susquehanna & W. Ry.*, 500 F.3d at 253, quoting Auburn & Kent, Wash. — Petition for Declaratory Order — Burlington N. R.R. — Stampede Pass Line, 2 S.T.B. 330, 339 (1997). See, e.g., *Green Mountain R.R.*, 404 F.3d at 643 (ICCTA preempted preconstruction permitting requirement of State environmental land use law as applied to railroad transloading facility because it gave "the local body the ability to deny the carrier the right to construct facilities or conduct operations," activities falling within plain language of STB's jurisdictional grant [citation omitted]); *Auburn* v. *United States*, 154 F.3d 1025, 1031 (9th Cir. 1998), cert. denied, 527 U.S. 1022, 119 S. Ct. 2367, 144 L. Ed. 2d 771 (1999) (ICCTA preempted city environmental impact permitting requirements because they could be applied so as to prevent railroad "from constructing, acquiring, operating, abandoning, or discontinuing a line"); *Soo Line R.R.* v. *Minneapolis*, 38 F. Supp. 2d 1096, 1101 (D. Minn. 1998) (ICCTA preempted city's authority to withhold demolition permits sought by railroad to redevelop rail yard); *Burlington N. Santa Fe Corp.* v. *Anderson*, 959 F. Supp. 1288, 1292, 1296 (D. Mont. 1997) (ICCTA preempted Montana law giving State commission control over "maintenance, closure, consolidation[,] or centralization of railroad shipping facilities, stations[,] and station agencies" within State); *CSX Transp., Inc.*, 944 F. Supp. at 1581-1582 (State statute requiring preapproval for closing of railroad agencies, which, inter alia, provided "services" concerning the movement of property and passengers via rail, preempted by ICCTA).

not interfere with railroad operations, with local zoning ordinances, land use regulations, and environmental permitting requirements, which are preempted because they unreasonably prevent, delay, or interfere with activities protected by ICCTA).

Nor does the Act regulate the operational aspects of rail transportation, affecting the movement of property or passengers over the rail lines.[31] See *Emerson*, 503

31. Federal courts also have determined that State laws that interfere with the actual operational aspects by which railroad carriers move passengers or property are preempted. See *Emerson*, 503 F.3d at 1132 (ICCTA preempts State laws that "would have an adverse economic effect on aspects of the railroads' *operations* that are within the STB's exclusive jurisdiction" [emphasis added]). See, e.g., *Friberg* v. *Kansas City S. Ry.*, 267 F.3d 439, 440, 443 (5th Cir. 2001) (State statute prohibiting train from blocking street for more than five minutes, as well as common-law negligence claim, each seeking to prescribe railroad's operation and its construction and operation of side track, were preempted because "[r]egulating the time a train can occupy a rail crossing impacts … the way a railroad operates its trains, with concomitant economic ramifications"); Association of Am. R.R. *vs.* South Coast Air Quality Mgt. Dist., U.S. Dist. Ct., No. CV 06-01416-JFW (PLAx), 2007 U.S. Dist. LEXIS 65685 (C.D. Cal. Apr. 30, 2007), aff'd, 622 F.3d 1094 (9th Cir. 2010) (regulation limiting idling time of unattended locomotives to thirty minutes or less was preempted because it "directly regulate[d] rail operations"); *Engelhard Corp.* v. *Springfield Terminal Ry.*, 193 F. Supp. 2d 385, 389-390 (D. Mass. 2002) (claims for unpaid freight car mileage allowances were preempted because STB has statutory authority to establish third-party freight car rates of compensation); *Rushing* v. *Kansas City S. Ry.*, 194 F. Supp. 2d 493, 500-501 (S.D. Miss. 2001) (ICCTA preempted State nuisance and negligence claims brought to quell noise and vibrations emanating from railroad's switching yard because they sought "to enjoin the

F.3d at 1131 (railroad's discarding of old railroad ties and vegetation into drainage ditch was not "transportation" and, thus, ICCTA's preemption clause did not preclude State tortious claims by landowners whose property was flooded by railroad's tortious conduct). Accordingly, the Prevailing Wage Act is not expressly preempted by the ICCTA. [32] See *PCS Phosphate Co.*, 559 F.3d at 221.

ii. *Field preemption.* We next consider the defendants' contention that Congress has impliedly preempted the Prevailing Wage Act, [33] turning first to field preemption.

[railroad] from operating its switch yard in the manner it currently employs"); *CSX Transp., Inc.* v. *Plymouth*, 92 F. Supp. 2d 643, 659 (E.D. Mich. 2000) (State law limiting time railroad blocks traffic, and requiring railroad to incur capital improvements on tracks to avoid same, preempted by ICCTA).

32. Marsh alleges that he worked on projects, such as the South Coast Rail project, which he contends expressly fall outside the STB's jurisdiction. In particular, the ICCTA provides that the STB does not have jurisdiction over "public transportation provided by a local government authority." 49 U.S.C. § 10501(c)(2). A "local government authority" includes contractors, like MCR, who contract with a political subdivision or a State "to provide transportation services." 49 U.S.C. § 10501(c)(1)(A). In light of the foregoing, we need not reach whether application of the Prevailing Wage Act is permitted, at least with regard to Marsh's work on the South Coast Rail project, for this additional reason.

33. "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to [S]tate authority,'" *Cipollone*, 505 U.S. at 517, quoting *Malone* v. *White Motor Corp.*, 435 U.S. 497, 505, 98 S. Ct. 1185, 55 L. Ed. 2d 443 (1978), "'there is no

See *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 289, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995) (express preemption clause supports inference against, but does not necessarily foreclose, implied preemption). See, e.g., *Florida E. Coast Ry.*, 266 F.3d at 1329 n.3 (evaluating implied preemption claim despite concluding ICCTA preemption clause did not expressly preempt city's zoning and licensing ordinances).[34]

Field preemption occurs where "[F]ederal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it" (quotation and citation omitted). *Cipollone*, 505 U.S. at 516. "Where … the field which Congress is said to have pre-empted includes areas that have been traditionally occupied by the States, congressional intent to supersede [S]tate laws must be

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need to infer congressional intent to pre-empt [S]tate laws from the substantive provisions' of the legislation," *Cipollone*, *supra*, quoting *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 282, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987). "Such reasoning is a variant of the familiar principle of expression unius est exclusio alterius: Congress'[s] enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, *supra*.

34. Federal cases considering implied preemption despite the existence of an express preemption provision understandably have focused on conflict preemption. See, e.g., *Freightliner Corp.*, 514 U.S. at 288-289; *Florida E. Coast Ry.*, 266 F.3d at 1329 n.3. We nonetheless consider the defendants' argument that the Prevailing Wage Act is preempted under the doctrine of field preemption, as the defendants' arguments in this regard apparently do not rely on the ICCTA or its statutory framework.

clear and manifest" (quotations and citation omitted). *English*, 496 U.S. at 79. See, e.g., *Terminal R.R. Ass'n of St. Louis* v. *Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6, 63 S. Ct. 420, 87 L. Ed. 571 (1943) (Railway Labor Act did not occupy field of railroad working conditions where it did not "undertake governmental regulation of wages, hours, or working conditions," but instead sought to "provide a means by which agreement may be reached with respect to them").

"In order to determine whether Congress has implicitly ousted the States from regulating in a particular field, we must first identify the field in which this is said to have occurred." *Garcia*, 140 S. Ct. at 804. Even assuming arguendo that, here, the field is the wages of railroad employees, as opposed to wages paid on public works projects, see, e.g., *Wisconsin Cent., Ltd.* v. *Shannon*, 539 F.3d 751, 761, 765 (7th Cir. 2008) (identifying field as "overtime wages for railroad employees"); *R.J. Corman R.R./Memphis Line* v. *Palmore*, 999 F.2d 149, 151 (6th Cir. 1993) (identifying field as "overtime regulation of interstate railroads"); Alvarez *vs.* Anacostia Rail Holdings Co., N.Y. Sup. Ct., No. 157154/2021, 2022 N.Y. Misc. LEXIS 6671 (noting parties' "agree[ment] that the field at issue is the wages and hours of railroad employees"), the defendants have not demonstrated that the field is preempted by Federal law.

Despite the plethora of Federal statutes governing railroads, see *R.J. Corman R.R./Memphis Line*, 999 F.2d at 151-152, the only Federal law specifically relied on by the defendants that addresses railroad workers' wages

is the Adamson Act of 1916, Pub. L. No. 64-252, 64th Cong., 1st Sess., c. 436, § 3, 39 Stat. 721 (Adamson Act), which temporarily "forb[ade] any lowering of wages" to avert a nationwide railroad union strike. [35] *Wilson* v. *New*, 243 U.S. 332, 345, 37 S. Ct. 298, 61 L. Ed. 755 (1917). At the time, railroads had rejected the unions' demanded reduction in railroad employees' work hours from ten hours to eight, and an increase in overtime pay, *id.* at 340-341; Federal mediation efforts had failed, *id.* at 342. Facing a national crisis, the President of the United States requested that Congress enact legislation to prevent a strike. *Id.* Congress responded by enacting the Adamson Act, which, inter alia, (1) established an eight-hour work day for railroad workers; (2) authorized the creation of a commission to study the effects of the eight-hour standard work day and report its findings; and (3) pending the release of the report, and for a period of thirty days thereafter, temporarily prohibited the lowering of wages. *Id.* at 343-344, citing Pub. L. No. 64-252, c. 436, §§ 1-3, 39 Stat. 721. In sum, the Adamson Act's regulation of railroad wages was limited to an eleven-month period between 1916 and 1917, until such time as a report could be issued that considered whether the eight-hour workday would affect

35. We note that the defendants' sole reference to the Adamson Act appears in a quotation from Sumlin *vs.* BNSF Ry., U.S. Dist. Ct., No. EDCV 17-2364-JFW (KKx), 2018 U.S. Dist. LEXIS 177781 (C.D. Cal. Apr. 10, 2018). Although that case discusses the Adamson Act, the State laws at issue there fell within a field — "regulation of working hours and rest for train employees" — that was occupied by Federal law where the Federal Hours of Service Act, Pub. L. No. 59-274, 59th Cong., c. 2939, 34 Stat. 1415 (1907), required that train employees be provided with rest periods of at least ten consecutive hours prior to working. Sumlin, *supra*.

railroads' profitability and whether Federal regulations on rates charged by the railroads should be adjusted to compensate the railroads for any additional labor costs. See *Wilson*, *supra* at 345-346.

Relying principally on the Adamson Act, the United States Courts of Appeals for the Sixth and Seventh Circuits have determined that State overtime wage laws as applied to railroad workers were preempted under the doctrine of field preemption. See *Wisconsin Cent., Ltd.*, 539 F.3d at 765 (Illinois overtime wages statute as applied to railroad workers preempted); *R.J. Corman R.R./Memphis Line*, 999 F.2d at 152 & n.3, 153 (Kentucky overtime wages statute preempted as to railroad workers). Specifically, the courts read the Supreme Court's decision in *Wilson* to conclude that the Adamson Act evinced Congress's intent to leave wages to the free market negotiations between railroads and their employees, preempting State overtime statutes. See *Wisconsin Cent., Ltd.*, *supra* (stating that Supreme Court in *Wilson* indicated that Congress intended to leave railroad workers' wages "free" from any regulation following temporary restriction on lowering of wages); *R.J. Corman R.R./Memphis Line*, *supra* (relying on *Wilson* for proposition that Congress intended with Adamson Act to leave railroad worker compensation to labor agreements).

But a closer review of the Supreme Court's decision in *Wilson* shows that the Court did not determine that the Adamson Act mandated a laissez faire approach to wage negotiations between railroads and employees. The Court addressed only the question whether the mandatory eight-

hour day and the temporary restriction on the lowering of wages were constitutional as a permissible exercise of Congress's authority to regulate interstate commerce. *Wilson*, 243 U.S. at 340, 345-346. The Court's statement that the Adamson Act's restriction on the lowering of railroad employees' wages was "not permanent but temporary, leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time," *id.* at 345-346, was relevant to the Court's analysis of whether Congress had exceeded its commerce clause authority. Contrary to the conclusion of the Sixth and Seventh Circuits, the Supreme Court's statement was not a determination of Congress's intent to occupy the field of railroad workers' wages; indeed, the prevailing view at the time was that "allowing the parties to freely bargain the price of labor was a more enlightened theory when compared with price caps and maximum wage limits that previously existed in English statutes." Alvarez, N.Y. Sup. Ct., No. 157154/2021.

More importantly, as discussed *supra*, the Adamson Act prohibited the lowering of railroad employee wages temporarily in an effort to avert a strike, which would have been catastrophic. The temporary restriction on the lowering of wages was accompanied by a mandate to study the effects on the railroad industry of an eight-hour workday. See *Wilson*, 243 U.S. at 344. Nothing in the legislation or its surrounding circumstances supports the conclusion that Congress intended by the statute to forever ban State laws regarding minimum wages as applied to railroad workers, much less a ban on State prevailing wage laws. See Alvarez, N.Y. Sup. Ct., No. 157154/2021.

Moreover, the Supreme Court consistently has held that although Congress can create a "federally mandated free-market control" scheme, it cannot do so "subtly." *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 500, 108 S. Ct. 1350, 99 L. Ed. 2d 582 (1988). See *id.* at 502-503 (local gasoline price regulation was not preempted by field preemption despite Congress's passage and subsequent repeal of Federal legislation providing for price controls on petroleum products because congressional action did not evince intent for federally mandated free market). Rather, the Supreme Court has instructed "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (citation omitted). *Id.* at 500. See *Hawaiian Airlines, Inc.* v. *Norris*, 512 U.S. 246, 252, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994), quoting *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 21, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987) (employee's wrongful discharge action not preempted by mandatory arbitration provision of Federal Railway Labor Act because "[p]re-emption of employment standards 'within the traditional police power of the State' 'should not be lightly inferred'").

The same conclusion portends here. Nothing in the temporary wage reduction restriction in 1916 evinces a congressional intent to occupy the field of railroad employee wages or to preempt any State laws securing wage protections for railroad employees on public works projects.[36]

36. This conclusion in no way suggests that we have canvassed the entirety of Federal railroad regulation; we have reviewed only the arguments and Federal statutes presented to us in the defendants' briefs.

iii. *Conflict preemption*. We turn next to the defendants' argument that the Prevailing Wage Act is preempted under the doctrine of conflict preemption. Conflict preemption occurs if "compliance with both [S]tate and [F]ederal law is impossible … or when the [S]tate law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (quotation and citation omitted). *Michigan Canners & Freezers Ass'n* v. *Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469, 104 S. Ct. 2518, 81 L. Ed. 2d 399 (1984).

The defendants maintain that the Prevailing Wage Act conflicts with the Davis-Bacon Act, 23 U.S.C. § 113, which requires that contractors on federally funded construction projects pay certain employees the prevailing wage rate, at a minimum, for their job classification as determined by the Federal Secretary of Labor. See 40 U.S.C. §§ 3141-3148. The defendants assert that requiring State prevailing wages to be paid on State public works projects would conflict with the Federal Department of Transportation's determination that the Davis-Bacon Act's prevailing wage requirements for federally funded projects do not apply to federally funded railroad projects. See United States Department of Transportation, Federal Highway Administration, Memorandum on Utility and Railwork — Wage Rate and EEO Requirements (May 15, 1985).

We are persuaded by the Seventh Circuit's analysis in *Frank Bros.* v. *Wisconsin Dep't of Transp.*, 409 F.3d 880, 895-897 (7th Cir. 2005), which rejected a similar

argument. In particular, the Seventh Circuit addressed the contractor's contention that its compliance with the State's prevailing wage act in connection with wages paid to truck drivers on State public works projects conflicted with the determination that truck drivers were excluded from those employees to whom contractors must pay, at a minimum, the federally determined prevailing wage on federally funded projects under the Davis-Bacon Act. *Id.* at 894. Declining to adopt the contractor's argument, the court explained that the purpose of the Davis-Bacon Act was to protect workers by setting a "floor" for the wage to be paid to workers on federally funded public works. *Id.* at 897. "[N]othing in the Davis-Bacon Act … specifically or expressly *prohibit[ed]* paying truck drivers a prevailing wage." *Id.* "Were this court to hold that Wisconsin was precluded from requiring that truck drivers are paid a minimum wage, we would not be advancing the goals of Congress in any meaningful way; indeed, we may even be doing damage to those objectives." *Id.* at 896. The State's "prevailing wage legislative scheme is supplemental in nature and thus there is nothing barring [the contractor] from complying with both [F]ederal and [S]tate law," the court reasoned. *Id.* at 897. The same is true for railroad workers working on the Commonwealth's public works projects.[37]

37. The defendants also maintain that Marsh's claims violate the dormant commerce clause. See *Northeast Patients Group* v. *United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 545 (1st Cir. 2022), quoting *South-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984) (commerce clause is also "a negative, 'self-executing limitation on the power of the States to enact laws [that place] substantial burdens on [interstate] commerce'"). See also *National Pork Producers Council* v. *Ross*, 143

d. *Public works projects*. Finally, the defendants assert that Marsh's Prevailing Wage Act claims must be dismissed because the projects on which Marsh worked were not public works; in particular, they maintain that MCR's agreement with the Commonwealth was not the result of a competitively advertised and bidding process, that the project was not awarded to the lowest bidder, that the Massachusetts Department of Transportation (MassDOT) did not incorporate a prevailing wage schedule into the agreement, and that the work was not a "utility" under G. L. c. 6C, § 44. [38] Support for these assertions, however, does not appear on the face of the complaint.[39]

S. Ct. 1142, 215 L. Ed. 2d 336 (2023), quoting *Department of Revenue of Ky.* v. *Davis*, 553 U.S. 328, 337-338, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008) ("the [c]ommerce [c]lause prohibits the enforcement of [S]tate laws 'driven by … "economic protectionism — that is, regulatory measures designed to benefit in-[S]tate economic interests by burdening out-of-[S]tate competitors"'"). Nothing in the defendants' cursory arguments in this regard establishes that requiring workers on State public works projects be paid, at a minimum, a prevailing wage burdens interstate commerce or, in any manner, discriminates against out-of-State vendors. See *Pascazi* v. *Gardner*, 106 A.D.3d 1143, 1145, 966 N.Y.S.2d 528 (N.Y. 2013) ("Petitioner's claim that the prevailing wage law violates the dormant [c]ommerce [c]lause is … unavailing as the law applies equally to in-[S]tate and out-of-[S]tate contractors that choose to engage in public works projects"). See also note 29, *supra*.

38. For this last proposition, the defendants cite a MassDOT highway division opinion letter from May 1, 2015, which is not controlling. See *Mullally*, 452 Mass. at 533 (deferring to DLS's interpretation of Prevailing Wage Act).

39. Accordingly, we do not reach the issue whether this evidence, if ultimately shown by the defendants on summary judgment or at trial, would require judgment in favor of the defendants.

At this point in the litigation, Marsh need not *prove* that he performed work on "public works" projects. See *Lanier*, 490 Mass. at 43 (at pleading stage, plaintiff need only set forth "allegations plausibly [that] suggest that the plaintiff is entitled to relief"). See also Mass. R. Civ. P. 8 (a), 365 Mass. 749 (1974) ("A pleading which sets forth a claim for relief … shall contain [1] a short and plain statement of the claim showing that the pleader is entitled to relief, and [2] a demand for judgment for the relief to which he deems himself entitled").[40]

In his complaint, Marsh alleges that MCR contracted with the Commonwealth on public works projects, [41] including, inter alia, the South Coast Rail project to restore commuter rail access, [42] that he was employed by MCR and

40. For at least this reason, the defendants' alternative argument, that Marsh's G. L. c. 149, § 27F, claim should be dismissed because Marsh was not an operator of rented equipment, is unsupportable at the motion to dismiss stage. Indeed, § 27F's application is not limited to operators of rental equipment. See G. L. c. 149, § 27F.

41. The defendants do not suggest that, in certifying the complaint, including the statement that the projects on which Marsh worked were on "information and belief" public works projects under G. L. c. 149, § 27, Marsh's counsel failed to comply with their ethical responsibilities to verify the grounds for such pleading. See Mass. R. Civ. P. 11 (a) (1), as appearing in 488 Mass. 1403 (2021) ("The signature of any attorney to a pleading constitutes a certificate that … to the best of the attorney's knowledge, information, and belief there is a good ground to support it").

42. As alleged, the South Coast Rail project was undertaken pursuant to a contract with MassDOT to serve a public purpose of providing commuter transportation and included alterations to land.

worked on such projects as a laborer operating equipment such as backhoes, tampers, boom trucks, and loaders, [43] and that he was not paid the applicable prevailing wage when he performed work on these projects. The factual allegations "'plausibly suggest[ ]…' an entitlement to relief." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636, 888 N.E.2d 879 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). See, e.g., *O'Leary* v. *New Hampshire Boring, Inc.*, 176 F. Supp. 3d 4, 9-11 (D. Mass. 2016) (declining to dismiss claim alleging violation of Prevailing Wage Act where complaint averred employee did boring and drilling construction work for employer, which had contract with MassDOT to extend Massachusetts Bay Transportation Authority's green line, and rejecting contention that complaint also

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See *Perlera* v. *Vining Disposal Serv., Inc.*, 47 Mass. App. Ct. 491, 493-494, 713 N.E.2d 1017 (1999) ("The core concept of 'public works,' in Massachusetts and elsewhere, is commonly expressed as involving the creation of public improvements having a nexus to land"); Black's Law Dictionary 1606 (6th ed. 1990) (defining "[p]ublic works" as "[w]orks, whether of construction or adaptation, undertaken and carried out by the national, [S]tate, or municipal authorities, and designed to subserve some purpose of public necessity, use, or convenience; such as public buildings, roads, aqueducts, parks, etc."). See, e.g., *O'Leary* v. *New Hampshire Boring, Inc.*, 176 F. Supp. 3d 4, 9-11 (D. Mass. 2016) (declining to dismiss complaint alleging construction laborer on commuter transportation project was not paid prevailing wage).

43. "[C]onstruction" is broadly defined under the Prevailing Wage Act to include "additions to and alterations of public works." G. L. c. 149, § 27D. Marsh alleges that "[s]ome of the work [he] performed at Public Works Projects, such as operating a backhoe to dig and/or tampers to tamp, required additions and/or alterations to public property and/or public works."

had to allege that MassDOT designated project as public works project, DLS issued prevailing wage schedule, and contract was publicly bid and advertised alongside wage schedule).[44]

3. *Conclusion*. For the foregoing reasons, we affirm the order denying the defendants' motion to dismiss.

So ordered.

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44. The defendants urge us to dismiss Marsh's claims because railroads are not an enumerated public work in G. L. c. 30, § 39G. See *id.* (listing "public ways, including bridges and other highway structures, sewers and[ ] water mains, airports[,] and other public works"). But the enumerated categories include "other public works," and as explained, see note 42, *supra*, commuter transportation construction projects can fall within the meaning of "public works."

APPENDIX B — MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR RECONSIDERATION UNDER SUPERIOR COURT RULE 9D AS TO DENIAL OF THEIR MOTION TO DISMISS BY THE SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS, DATED MAY 4, 2022

COMMONWEALTH OF MASSACHUSETTS

BROCKTON DIV. SUPERIOR COURT
CIVIL ACTION NO. 2183CV00597

PLYMOUTH, SS.

CHAD MARSH,

v.

MASSACHUSETTS COASTAL RAILROAD LLC & ANOTHER.[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR RECONSIDERATION UNDER SUPERIOR COURT RULE 9D AS TO DENIAL OF THEIR MOTION TO DISMISS

A motion to reconsider pursuant to Superior Court Rule 9D calls upon the broad discretion of the motion judge. *Commonwealth* v. *Charles,* 466 Mass. 63, 84 (2013);

1. P. Chris Podgurski

Audubon Hill S. Condo. Ass'n v. *Community Ass 'n Underwriters of Amer., Inc.,* 82 Mass. App. Ct. 461, 470 (2012). If there is no material change in circumstances, such as newly discovered evidence or a development of relevant law, a judge is not obliged to reconsider a case, issue, or question of law after it has been decided, absent a particular and demonstrable error in the original decision. *Charles,* 466 Mass. 83-84; *Littles* v. *Commissioner of Corr.,* 444 Mass. 871, 878 (2005).

With respect to the issue of preemption, defendants' motion for reconsideration cites the same case law and reiterates the arguments asserted in their initial motion to dismiss. The Court (Sullivan, J.) has stayed this case while the defendants pursue an interlocutory appeal; therefore, any error in the analysis will be remedied by the Appeals Court. Accordingly, the Court, in its discretion, declines the defendants' invitation to alter its original decision.

With respect to the prevailing wage claim, the defendants cite the recent case *Rego* v. *Allied Waste Serv. of Mass., LLC,* 100 Mass. App. Ct. 750, 753 (2022), for the proposition: "Like § 27, § 27F provides hat '[s]aid rates of wages shall be requested of said commissioner by said public official or pubic body, and shall be furnished by the commissioner in a schedule.' G.L. c. 149, § 27F."[2] The defendants argue that Marsh's prevailing wage claim should be dismissed because MassDOT never requested the Commissioner to set prevailing wage rates for the contracts at issue, citing

2. Notably, the *Rego* case does not represent any change in the substantive law applicable to this matter.

McGrath v. *ACT, Inc.*, 2008 Mass. App. Div. 257,258 (private employer had no duty with respect to prevailing wage under § 27 where municipality did not request that prevailing rate be established for contract work).

However, § 7F of the prevailing wage act voids a contract that is in violation of the statute, and there is authority for the proposition that under§ 27F, an employer must ensure that its employees receive the prevailing wage even if the contract does not incorporate that wage. See *Periera* v. *Vining Disposal Serv., Inc.*, 47 Mass. App. Ct. 491, 492-493, rev. den., 729 N.E.2d 469 (1999); *McGrath* v. *ACT, Inc.*, 2008 Mass. App. Div. at 259-260. See also *Andrews* v. *Weatherproofing Tech., Inc.*, 277 F.Supp.3d 141, 153 n.6 (D. Mass. 2017) (§ 27F requires payment of prevailing wage even if rate was not properly set). Because Marsh alleges that he is an equipment operator covered by § 27F, the defendants have not established clear error in the court's refusal to dismiss Count III. The prevailing wage claim is more appropriately resolved at a later stage of the proceedings. See *O'Leary* v. *New Hampshire Boring, Inc.*, 176 F.Supp.3d 4, 10-11 (D. Mass. 201) (to survive motion to dismiss, prevailing wage complaint need not allege that public official designated project as prevailing wage project, commissioner issued wage rate schedule, or schedule was included in bid solicitation; whether prevailing wage act applies may be resolved on summary judgment).

Appendix B

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendants' Motion For Reconsideration Under Superior Court Rule 9D As To The Denial Of Their Motion to Dismiss be **DENIED.**

/s/Brian S. Glenny
Brian S. Glenny
Justice of the Superior Court

DATED: May 4, 2022

APPENDIX C — OPINION OF THE SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS: MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT, FILED JANUARY 11, 2022

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT
2183CV00597

CHAD MARSH

VS.

MASSACHUSETTS COASTAL RAILROAD LLC
& ANOTHER.[1]

January 11, 2022, Filed

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Plaintiff Chad Marsh filed this lawsuit against his former employer, Massachusetts Coastal Railroad LLC ("MCR"), alleging violations of the Wage Act, G.L. c. 149, § 148, the Overtime Act, G.L. c. 151, § 1A, and the Prevailing Wage Act, G.L. c. 149, § 27F. For the reasons discussed below, Defendants' Motion to Dismiss Amended Complaint is **DENIED.**

1. P. Chris Podgurski.

Appendix C

BACKGROUND

The following facts are taken from the Amended Complaint and are assumed to be true for purposes of this motion. MCR is a railroad company specializing in integrated freight and logistics services that completes public works projects throughout Massachusetts. MCR hired Marsh in 2019 as an equipment operator. His responsibilities included operating boom trucks, backhoes, loaders, and tampers at MCR job sites. Marsh resigned from his employment with MCR on June 28, 2021.

During Marsh's employment, MCR entered into numerous public works projects within the meaning of G.L. c. 149, § 27F and Marsh worked on these projects. One such project was the South Coast Rail project to restore commuter rail service between Boston and Southeastern Massachusetts by the end of 2023. MCR entered into a Standard Contract with the Massachusetts Department of Transportation for 2020-2021 Capital Repairs and Improvements and Limited Services Support for the Southeastern Massachusetts Rail Lines.

MCR initially paid Marsh $15 per hour but later increased the rate to $23 and then $24.80 per hour. At the relevant times, the prevailing wage for this work was $63 per hour. Marsh performed more than 40 hours of work in multiple workweeks. MCR miscalculated Marsh's overtime pay by using his regular hourly rate rather than the prevailing wage rate.

MCR agreed to pay Marsh paid time off ("PTO") each year, accruing at a rate of 3.44 hours per weekly pay period. When Marsh resigned on June 28, 2021, he had 125.77 of accrued but unused PTO worth $3,119.10. Marsh also performed eight hours of work that day for which he was not compensated, or $198.40 in wages. MCR failed to pay Marsh these amounts on the next regular pay date. MCR paid Marsh $3,119.10 on July 8, 2021.

Marsh filed this action on July 23, 2021. Count I of the Amended Complaint alleges violation of the Wage Act, G.L. c. 149, § 148. Count II alleges violation of the Overtime Act, G.L. c. 151, § 1A. Counts III and IV allege violation of the Prevailing Wage Act, G.L. c., 149, § 27F.

DISCUSSION

To survive a Rule 12(b)(6) motion to dismiss, a Complaint must contain factual allegations which, if true, state a recognized cause of action or claim and plausibly suggest, not merely are consistent with, an entitlement to relief. *Dunn* v. *Genyme Corp.*, 486 713, 717 (2021). MCR contends that all counts of Marsh's Amended Complaint fail to state claims for relief because they are preempted by the Interstate Commerce Commission Termination Ac of relief because they are preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 et. seq. ICCTA abolished the Interstate Commerce Commission and gave the Surface Transportation Board ("Board") exclusive jurisdiction over transportation by rail carrier. 49 U.S.C.§ 10501(c). See *Emerson* v. *Kansas City S. Ry. Co.*, 503 F.3d

1126, 1132 (10th Cir. 2007) (ICCTA establishes exclusive federal scheme of economic regulation and deregulation for railroad transportation).

The court starts with the assumption that a federal statute does not supersede the historic police power of the States unless that is the clear and manifest intent of Congress. *Wyeth* v. *Levine,* 555 U.S. 555, 565 (2009); *Emerson* v. *Kansas City S. Ry. Co.*, 503 F.3d at 1129. See also *Bay Colony R.R. Com.* v. *Yarmouth,* 470 Mass. 515, 518 (2015) (critical question in preemption analysis is Congressional intent).

Express Preemption

Express preemption occurs when Congress explicitly defines the extent to which its enactments preempt state law. *Emerson* v. *Kansas City S. Ry. Co.*, 503 F.3d at 1129. The court focuses on the plain wording of ICCTA's preemption clause, which states in relevant part:

> The jurisdiction of the Board over (1) transportation[2] by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car

2. Transportation is defined as "services related to [the] movement [of passengers or property by rail], including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." 49 U.S.C. § 10102(9). Although expansive, this definition does not encompass everything relating to railroads. *Emerson* v. *Kansas City S. Ry. Co.*, 503 F.3d at 1129.

> service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers . . . is exclusive. Except as otherwise provided in this part, the remedies provided in this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). This provision is an unmistakable statement of intent to preempt state laws touching on the substantive aspects of rail transportation. *Engelhard Corp.* v. *Springfield Terminal Ry. Co.,* 193 F.Supp.2d 385, 389 (D. Mass. 2002). ICCTA preempts those state laws that have the effect of managing or governing rail transportation but not those laws that have only a remote or incidental impact on rail transportation. *Norfolk S. Ry. Co.* v. *Alexandria*, 608, F.3d 150, 158 (4th Cir. 2010). ICCTA has been found to preempt zoning, environmental, and other permitting laws, as well as nuisance and negligence claims arising from key aspects of railroad operation. See *Norfolk S. Ry. Co.* v. *Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010) (ICCTA preempts local hauling permit ordinance); *Green Mountain R.R. Corp.* v. *Vermont,* 404 F.3d 638, 643-644 (2d Cir.), cert. den., 546 U.S. 977 (2005) (ICCA preempts application of state environmental and land use laws); *Friberg* v. *Kansas City Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001) (ICCTA preempts negligence claim based on train's blocking of road); *CSX Transp. Inc.* v. *Georgia Pub. Serv. Comm'n,* 944 F.Supp. 1573, 1585 (N.D. Ga. 1996) (ICCTA preempts scheme requiring approval for railroad agency closing); *Grafton & Upton R.R. Co.* v. *Milford*, 337 F.Supp.2d 233, 238-239 (D. Mass. 2004)

(ICCTA preempts application of Wetlands Protection Act and town zoning bylaws to proposed railroad interchange). In the view of this Court, MCR has not demonstrated as a matter of law that Marsh's wage and hour-related claim's have the effect of managing or governing transportation so as to be expressly preempted under § 10501(b) of the ICCTA.

MCR also argues that there is express preemption under § 10501(c). That section states in relevant part:

> (2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over –
>
> > (A)Mass transportation provided by a local government authority; or
> >
> > (B)A solid waste rail transfer facility . . .
>
> (3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority . . . is subject to applicable laws of the United States related to-
>
> > (i) safety;
> >
> > (ii) the representation for collective bargaining; and
> >
> > (iii) *employment, retirement, annuity, and unemployment systems or other provisions*

> *related to dealings between employees and employers.*

49 U.S.C. § 10501(c) (emphasis added). Each part of § 10501 has a clear purpose: section (a) defines the scope of the Board's jurisdiction, section (b) explains when that jurisdiction is exclusive and preempts other law, and section (c) carves out exceptions to the jurisdictional grant in section (a). *New York & Atlantic Ry. Co.* v. *Surface Transp. Bd.*, 635 F.3d 66, 72 (2d Cir. 2011). Thus, subsection (c) is not a preemption provision but rather, simply states that the Board does not have exclusive federal jurisdiction over the employment dealings of local governmental authorities. This Court does not construe § 10501(c) to establish the express preemption of state laws regulating the employment relationship. Accordingly, MCR is not entitled to dismissal of Marsh's Complaint based on express preemption under ICCTA.

Exemption From ICCTA

Marsh contends that his claims are exempt from ICCTA under § 1050l(c)(2), which states: "Except as provided in paragraph (3), the Board does not have jurisdiction under this part over (A) mass transportation provided by a local government authority." Mass transportation means "transportation by a conveyance that provides regular and continuing general or special transportation to the public." 49 U.S.C. § 5302(a)(7). In relevant part, a local government authority means a political subdivision of a state, an authority of at least one state or political subdivision of a state, or a person or

entity that contracts with the local governmental authority to provide transportation services. 49 U.S.C. § 5302(10); 49 U.S.C. § 1050l(c)(1). The MBTA and DOT arguably fall within this definition, as does MCR by entering into the Standard Contract for 2020-2021 Capital Repairs and Improvements and Limited Services Support for the Southeastern Massachusetts Rail Lines.

Marsh cites a declaratory judgment opinion in which the Board concluded that commuter rail services provided by the Massachusetts Bay Commuter Railroad Company for the MBTA constitutes mass transportation that is excepted from the Board's jurisdiction under 49 U.S C. § 10501(c)(2). See *Massachusetts Bay Commuter R.R. Co., LLC*, 2003 WL 21359920 at *2 (Surface Transp. Bd. June 4, 2003). He argues that because MCR worked on the repair and improvement contract for the commuter rail, that work falls outside the Board's jurisdiction and there can be no preemption under ICCTA. See *Grosso* v. *Surface Transp. Bd.*, 804 F.3d 110, 117 (1st Cir. 2015) (Board's determination on issue of ICCTA preemption is entitled to deference to extent its interpretation is persuasive). Cf. *Emerson* v. *Kansas City S. Ry. Co.*, 503 F.3d at 1130 (court looks to Board's interpretation of ICCTA's preemptive scope; as Board is uniquely qualified to determine whether state law is preempted).

However, the Board's conclusion in the cited opinion appears to rest on the determination that the MBCRC was a "rail carrier" as defined by 49 U.S.C. § 10102(5), "a person providing common carrier railroad transportation for compensation," because it contracted to operate

the commuter rail for the MBTA. See *Massachusetts Bay Commuter R.R. Co.. LLC,* 2003 WL 21359920 at *2 (Surface Transp. Bd. June 4, 2003). Although MCR performed repair and improvement work on the commuter rail project, it does not itself provide common carrier railroad transportation or mass transportation as a local government authority. Thus, Marsh has not demonstrated that his wage and hour claims are exempt from the Board's jurisdiction and potential ICCTA preemption.

Field Preemption

MCR contends that even if the enactment of ICCTA does not expressly preempt Marsh's claims, they are barred by the doctrine of field preemption. Field preemption does not require conflict between federal and state law; rather, it is implied when the scope of a statute indicates that Congress intended federal law to exclusively occupy a field. *Wisconsin Central Ltd.* v. *Shannon*, 539 F3d 731, 762 (7th Cir. 2008); *Emerson* v. *Kansas City S. Railway Co.,* 503 F.3d at 1129. Although preemption is not to be lightly presumed, state law must give way to federal law where Congress has created a regulatory system so pervasive and complex that it leaves no room for the states to regulate. *Boston Hous. Auth.* v. *Garcia*, 449 Mass. 727, 733 (2007); *Roberts* v. *Southwestern Bell Mobile Sys., Inc.*, 429 Mass. 478, 486 (1999).

Wages, including the prevailing wage and overtime, are an area traditionally left to state regulation. *Wisconsin Central Ltd.* v. *Shannon*, 539 F.3d at 763; *Frank Bros., Inc.* v. *Wisconsin Dept. of Transp.*, 409 F.3d 880, 886 (7th

Cir. 2005). However, two circuits have concluded that field preemption precludes the states from enforcing wage and hour laws where railroads are concerned. See *J. Corman R.R. Co.* v. *Palmore,* 999 F.2d 149, 151 (6th Cir. 1993); *Wisconsin Central Ltd.* v. *Shannon*, 539 F.3d at 764-765 (both concluding that field preemption bars claims for violation of state overtime act). Those courts noted the undeniable long history of pervasive congressional regulation over the railway industry, with federal laws governing property rights, shipping, labor relations, hours of work, safety, security, retirement, and unemployment. See *J. Corman R.R. Co.* v. *Palmore*, 999 F.2d at 151; *Wisconsin Central Ltd.* v. *Shannon,* 539 F11.3d at 762. Those courts then inferred from the Adamson Act, a federal enactment which established an eight-hour day for railroad employees but left wages to private negotiation after a temporary freeze, that Congress intended for railroads and their employees to negotiate overtime free from state regulation. *Wisconsin Central Ltd.* v. *Shannon,* 539 F.3d at 765.

However, the Sixth and Seventh Circuit decisions appear to be inconsistent with the holding of the U.S. Supreme Court in *Hawaiian Airlines, Inc.* v. *Norris*, 512 U.S. 246 (1994). In that case, the Supreme Court analyzed the Federal Railway Labor Act ("FRLA"), which provides a comprehensive framework for resolving labor disputes involving railroads. *Id.* at 252. The Court concluded that the FRLA governs only disputes over contractually-defined rights and does not preempt state law rights that exist independent of a collective bargaining agreement. *Id.* at 260 (concluding that FRLA did not preempt retaliatory discharge claim under state whistleblower act). MCR

correctly notes that this case does not involve a collective bargaining agreement. Nonetheless, in analyzing FRLA, the Supreme Court emphasized that preemption of employment standards within the traditional police power of the state should not be lightly inferred, and found no clear and manifest congressional purpose to broadly preempt the employment protections extended by States independent of a negotiated labor agreement. *Id.* at 252, 255-256. See also *Terminal R.R. Ass'n of St. Louis* v. *Brotherhood of R.R. Trainmen* 318 U.S. 1, 6-8 (1942) (concluding that FRLA does not regulate wages, hours, or working conditions but rather, simply provides a means for bargaining over those issues).

Notwithstanding the pervasive federal regulation of railroads, it does not clearly appear that Congress intended to foreclose the enforcement of State wage and hour requirements "[T]he Supreme Court does not consider the aggregate federal labor regulation for railroad and airline workers to rise to a level that suggests congressional intent to occupy the field." *Payne* v. *Tri-State Careflight LLC,* 2016 WL 6396214 at *19 (D.N.M. 2016) (finding no field preemption of state claims for overtime and other unpaid compensation). MCR has failed to persuade this Court that Marsh's claims for violation of the Wage Act, Overtime Act, and Prevailing Wage Act[3]

3. There is no merit to MCR's argument that Marsh's prevailing wage claim is barred because the Federal prevailing wage statute does not include railroads. See *Frank Bros., Inc.* v. *Wisconsin Dept. of Transp.*, 409 F.3d 880, 895-897 (7th Cir. 2005) (concluding that state's decision to require prevailing wage for category of workers excluded by Congress from Davis-Bacon Act does not create conflict preemption).

are impliedly preempted by the federal government's pervasive regulation over the railway industry.

State Law Grounds

MCR further contends that Counts III and IV fail to state plausible claims for relief because this case does not involve a public works project under G.L. c. 149, § 27F. The Prevailing Wage Act does not define "public works" and the meaning of the phrase is elastic, depending on the particular statute at issue. *Perlera* v. *Vining Disposal Serv. Inc.,* 47 Mass. App. Ct. 491, 493-494, rev. den., 430 Mass. 1108 (1999). However, the core concept involves the creation, maintenance, or repair of public improvements having a nexus to land, such as buildings, roads, sewerage or waterworks facilities, bridges, or parks. *Id*. at 494. MCR cites a May 1, 2015 Department of Transportation, Highway Division opinion letter stating that a prevailing wage is not required when a railroad or railroad contractor is relocating property for a construction project. However, the Department of Labor administers the Prevailing Wage Act and that is the agency whose interpretation of the statute is entitled to deference. *Teamsters Joint Council No. 10* v. *Director of Dept. of Labor and Workforce Develop.*, 447 Mass. 100, 109 (2006); *Niles* v. *Huntington Controls, Inc.,* 92 Mass. App. Ct. 15, 21 (2017). The Department of Transportation's opinion does not establish as a matter of law that Marsh cannot prevail on Counts III and IIV of the Amended Complaint.[4]

4. Moreover, the substance of the DOT opinion letter concerns whether a railroad is a "utility" under G.L c. 6C, § 44, which requires utility owners to pay the prevailing wage for utility relocation.

Finally, there is no merit to MCR's argument that Count I fails to state a claim for violation of the Wage Act because a plaintiff may not recover under that statute for failure to pay the prevailing wage in violation of G.L. c. 149, § 27F. See *Donis v. American Waste Serv., LLO*, 485 Mass. 257, 269 (2000). A careful reading of Count I reveals that it alleges Wage Act violations based on failure to pay Marsh for certain hours of work, failure to pay overtime, and failure to pay for accrued but unused PTO. Marsh's claims for prevailing wages properly are pled as separate counts. Accordingly, MCR has not established its entitlement to dismissal of the Amended Complaint.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendants' Motion to Dismiss be **DENIED.**

/s/_____
Brian S. Glenny
Justice of the Superior Court

DATED: January 11, 2022

APPENDIX D — DOCKET ENTRY ORDER OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS DENIAL OF MOTION FOR RECONSIDERATION, DATED SEPTEMBER 18, 2023

RELEVANT DOCKET ENTRY FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

CASE DOCKET

CHAD MARSH VS. MASSACHUSETTS COASTAL RAILROAD LLC & ANOTHER
CASE #: SJC-13366

AC/SJ Number	2022-P-0541
Citation	492 Mass. 641
DAR/FAR Number	
Lower Ct Number	2183CV00597
Lower Court	Plymouth Superior Court
Lower Ct Judge	Brian S. Glenny, J.
Route to SJC	Sua Sponte Transfer from Appeals Court

Date Entry	#	Entry Text
09/18/2023	19	DENIAL of Motion for Reconsideration.

APPENDIX E — RELEVANT STATUTORY AND REGULATORY PROVISIONS

49 U.S.C.A. § 10101

§ 10101. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition

and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while

minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

Appendix E

49 U.S.C.A. § 10501(a) (West):

§ 10501. General jurisdiction

(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—

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country;

(F) the United States and a place in a foreign country.

Appendix E

49 U.S.C.A. § 10501(b) (West):

(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.

Appendix E

Mass. Gen. Laws Ann. ch. 149, § 27 (West)

§ 27. List of jobs; classification; schedule of wages; penalty; civil action

The commissioner shall prepare, for the use of such public officials or public bodies whose duty it shall be to cause public works to be constructed, a list of the several jobs usually performed on various types of public works upon which mechanics and apprentices, teamsters, chauffeurs and laborers are employed, including the transportation of gravel or fill to the site of said public works or the removal of surplus gravel or fill from such site. The commissioner shall classify said jobs, and he may revise such classification from time to time, as he may deem advisable. Prior to awarding a contract for the construction of public works, said public official or public body shall submit to the commissioner a list of the jobs upon which mechanics and apprentices, teamsters, chauffeurs and laborers are to be employed, and shall request the commissioner to determine the rate of wages to be paid on each job. Each year after the awarding of the contract, the public official or public body shall submit to the commissioner a list of the jobs upon which mechanics and apprentices and laborers are to be employed and shall request that the commissioner update the determination of the rate of wages to be paid on each job. The general contractor shall annually obtain updated rates from the public official or public body and no contactor[1] or subcontractor shall pay less than the rates so established. Said rates shall apply to all persons engaged in transporting gravel or fill to the site of said public works

or removing gravel or fill from such site, regardless of whether such persons are employed by a contractor or subcontractor or are independent contractors or owner-operators. The commissioner, subject to the provisions of section twenty-six, shall proceed forthwith to determine the same, and shall furnish said official or public body with a schedule of such rate or rates of wages as soon as said determination shall have been made. In advertising or calling for bids for said works, the awarding official or public body shall incorporate said schedule in the advertisement or call for bids by an appropriate reference thereto, and shall furnish a copy of said schedule, without cost, to any person requesting the same. Said schedule shall be made a part of the contract for said works and shall continue to be the minimum rate or rates of wages for said employees during the life of the contract. Any person engaged in the construction of said works shall cause a legible copy of said schedule and subsequent updates to be kept posted in a conspicuous place at the site of said works during the life of the contract. An apprentice performing work on a project subject to this section shall maintain in his possession an apprentice identification card issued pursuant to section 11W of chapter 23. The aforesaid rates of wages in the schedule of wage rates shall include payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans as provided in said section twenty-six, and such payments shall be considered as payments to persons under this section performing work as herein provided. Any employer engaged in the construction of such works who does not make payments to a health and welfare plan, a pension plan and a supplementary unemployment benefit

plan, where such payments are included in said rates of wages, shall pay the amount of said payments directly to each employee engaged in said construction. Whoever shall pay less than said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said works to any person performing work within classifications as determined by the commissioner, and whoever, for himself, or as representative, agent or officer of another, shall take or receive for his own use or the use of any other person, as a rebate, refund or gratuity, or in any other guise, any part or portion of the wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, paid to any such person for work done or service rendered on said public works, shall have violated this section and shall be punished or shall be subject to a civil citation or order as provided in section 27C. The president and treasurer of a corporation and any officers or agents having the management of such corporation shall also be deemed to be employers of the employees of any corporation within the meaning of sections 26 to 27B, inclusive.

Offers of restitution or payment of restitution shall not be considered in imposing such punishment.

When an investigation by the attorney general's office reveals that a contractor or subcontractor has violated this section by failing to pay said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said works to any person performing work within classifications

as determined by the commissioner, or that a contractor or subcontractor has, for himself, or as representative, agent or officer of another, taken or received for his own use or the use of any other person, as a rebate, refund or gratuity, or in any other guise, any portion of the wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, paid to any such person for work done or service rendered on said public works, the attorney general may, upon written notice to the contractor or subcontractor and the sureties of the contractor or subcontractor, and after a hearing thereon, order work halted on the part of the contract on which such wage violations occurred, until the defaulting contractor or subcontractor has filed with the attorney general's office a bond in the amount of such penal sum as the attorney general shall determine, conditioned upon payment of said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said works to any person performing work within classifications as determined by the commissioner.

An employee claiming to be aggrieved by a violation of this section may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees.

Appendix E

Mass. Gen. Laws Ann. Ch. 149, § 27C (West)

§ 27C. PENALTIES FOR VIOLATIONS OF CERTAIN SECTIONS BY EMPLOYERS, CONTRACTORS, SUBCONTRACTORS OR THEIR EMPLOYEES

(a)(1) Any employer, contractor or subcontractor, or any officer, agent, superintendent, foreman, or employee thereof, or staffing agency or work site employer who willfully violates any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H, 148, 148A, 148B or 159C or section 1A, 1B or 19 of chapter 151, shall be punished by a fine of not more than $25,000 or by imprisonment for not more than one year for a first offense, or by both such fine and imprisonment and for a subsequent willful offense a fine of not more than $50,000, or by imprisonment for not more than two years, or by both such fine and such imprisonment.

(2) Any employer, contractor or subcontractor, or any officer, agent, superintendent, foreman or employee thereof, or staffing agency or work site employer who without a willful intent to do so, violates any provision of section 26, 27, 27A, 27B 27F, 27G, 27H, 148, 148A, 148B or 159C or section 1A, 1B or 19 of chapter 151, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than six months for a first offense, and for a subsequent offense by a fine of not more than $25,000 or by imprisonment for not more than one year, or by both such fine and such imprisonment.

A complaint or indictment hereunder or under the provisions of the first paragraph may be sought either in the county where the work was performed or in the county where the employer, contractor, or subcontractor has a principal place of business. In the case of an employer, contractor, or subcontractor who has his principal place of business outside the commonwealth, a complaint or indictment may be sought either in the county where the work was performed or in Suffolk county.

(3) Any contractor or subcontractor convicted of willfully violating any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H or 148B shall, in addition to any criminal penalty imposed, be prohibited from contracting, directly or indirectly, with the commonwealth or any of its agencies or political subdivisions for the construction of any public building or other public works, or from performing any work on the same as a contractor or subcontractor, for a period of five years from the date of such conviction. Any contractor or subcontractor convicted of violating any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H or 148B shall, in addition to any criminal penalty imposed, be prohibited from contracting, directly or indirectly, with the commonwealth or any of its agencies, authorities or political subdivisions for the construction of any public building or other public works or from performing any work on the same as a contractor or subcontractor, for a period

not to exceed six months from the date of such conviction for a first offense and up to three years from the date of conviction for subsequent offense. After final conviction and disposition of a violation pursuant to this paragraph in any court, the clerk of said court shall send a notice of such conviction to the attorney general, who shall publish written notice to all departments and agencies of the commonwealth which contract for public construction and to the appropriate authorities of counties, authorities, cities and towns that such person is prohibited from contracting, directly or indirectly, with the commonwealth or any of its authorities or political subdivisions for the period of time required under this paragraph. The attorney general may take such action as may be necessary to enforce the provisions of this paragraph, and the superior court shall have jurisdiction to enjoin or invalidate any contract award made in violation of this paragraph.

(b)(1) As an alternative to initiating criminal proceedings pursuant to subsection (a), the attorney general may issue a written warning or a civil citation. For each violation, a separate citation may be issued requiring any or all of the following: that the infraction be rectified, that restitution be made to the aggrieved party, or that a civil penalty of not more than $25,000 for each violation be paid to the commonwealth, within 21 days of the date of issuance of such citation. For the purposes of this paragraph, each failure to pay an employee the appropriate rate or prevailing rate

of pay for any pay period may be deemed a separate violation, and the pay period shall be a minimum of 40 hours unless such employee has worked fewer than 40 hours during that week.

(2) Notwithstanding the foregoing, the maximum civil penalty that may be imposed upon any employer, contractor or subcontractor, who has not previously been either criminally convicted of a violation of the provisions of this chapter or chapter 151 or issued a citation hereunder, shall be no more than $15,000, except that in instances in which the attorney general determines that the employer, contractor or subcontractor lacked specific intent to violate the provisions of this chapter or said chapter 151, the maximum civil penalty for such an employer, contractor or subcontractor who has not previously been either criminally convicted of a violation of the provisions of this chapter or said chapter 151 or issued a citation hereunder shall be not more than $7,500. In determining the amount of any civil penalty to be assessed hereunder, said attorney general shall take into consideration previous violations of this chapter or said chapter 151 by the employer, the intent by such employer to violate the provisions of this chapter or said chapter 151, the number of employees affected by the present violation or violations, the monetary extent of the alleged violations, and the total monetary amount of the public contract or payroll involved.

(3) In the case of a citation for violating any provision of section 26, 27, 27A, 27B, 27F, 27G, 27H or 148B, the attorney general may also order that a bond in an amount necessary to rectify the infraction and to ensure compliance with sections 26 to 27H, inclusive, and with other provisions of law, be filed with said attorney general, conditioned upon payment of said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said public works to any person performing work within classifications as determined by the commissioner. Upon any failure to comply with the requirements set forth in a citation, said attorney general may order the cessation of all or the relevant portion of the work on the project site. In addition, any contractor or subcontractor failing to comply with the requirements set forth in a citation or order, shall be prohibited from contracting, directly or indirectly, with the commonwealth or any of its agencies or political subdivisions for the construction of any public building or other public works, or from performing any work on the same as a contractor or subcontractor, for a period of one year from the date of issuance of such citation or order. Any contractor or subcontractor who receives three citations or orders occurring on three different occasions, each of which includes a finding of intent, within a three year period shall automatically be debarred for a period of two years from the date of issuance of the third such citation or order or a final court order,

whichever is later. Any debarment hereunder shall also apply to all affiliates of the contractor or subcontractor, as well as any successor company or corporation that said attorney general, upon investigation, determines to not have a true independent existence apart from that of the violating contractor or subcontractor.

(4) Any person aggrieved by any citation or order issued pursuant to this subsection may appeal said citation or order by filing a notice of appeal with the attorney general and the division of administrative law appeals within ten days of the receipt of the citation or order. Any such appellant shall be granted a hearing before the division of administrative law appeals in accordance with chapter 30A. The hearing officer may affirm or if the aggrieved person demonstrates by a preponderance of evidence that the citation or order was erroneously issued, vacate, or modify the citation or order. Any person aggrieved by a decision of the hearing officer may file an appeal in the superior court pursuant to the provisions of said chapter 30A.

(5) In cases when the decision of the hearing officer of the division of administrative law appeals is to debar or suspend the employer, said suspension or debarment shall not take effect until 30 days after the issuance of such order; provided, however, that the employer shall not bid on the construction of any public work or building during

the aforementioned 30 day period unless the superior court temporarily enjoins the order of debarment or suspension.

(6) If any person shall fail to comply with the requirements set forth in any order or citation issued by the attorney general hereunder, or shall fail to pay any civil penalty or restitution imposed thereby within 21 days of the date of issuance of such citation or order or within 30 days following the decision of the hearing officer if such citation or order has been appealed, excluding any time during which judicial review of the hearing officer's decision remains pending, said attorney general may apply for a criminal complaint or seek indictment for the violation of the appropriate section of this chapter.

(7) Notwithstanding the provisions of paragraph (6), if any civil penalty imposed by a citation or order issued by the attorney general remains unpaid beyond the time period specified for payment in said paragraph (6), such penalty amount and any restitution order, together with interest thereon at the rate of 18 per cent per annum, shall be a lien upon the real estate and personal property of the person who has failed to pay such penalty. Such lien shall take effect by operation of law on the day immediately following the due date for payment of such fine, and, unless dissolved by payment, shall as of said date be considered a tax due and owing to the commonwealth, which may be collected through the procedures provided for

by chapter 62C. In addition to the foregoing, no officer of any corporation which has failed to pay any such penalty may incorporate or serve as an officer in any corporation which did not have a legal existence as of the date said fine became due and owing to the commonwealth.

(c) Civil and criminal penalties pursuant to this section shall apply to employers solely with respect to their wage and benefit obligations to their own employees.

Appendix E

Mass. Gen. Laws Ann. Ch. 149, § 27D (West)

§ 27D. "CONSTRUCTION" AND "CONSTRUCTED" DEFINED

Wherever used in sections twenty-six to twenty-seven C, inclusive, the words "construction" and "constructed" as applied to public buildings and public works shall include additions to and alterations of public works, the installation of resilient flooring in, and the painting of, public buildings and public works; certain work done preliminary to the construction of public works, namely, soil explorations, test borings and demolition of structures incidental to site clearance and right of way clearance; and the demolition of any building or other structure ordered by a public authority for the preservation of public health or public safety.

Appendix E

Mass. Gen. Laws Ann. ch. 149, § 27F (West)

§ 27F. Wages of operators of rented equipment; agreements; penalty; civil action

No agreement of lease, rental or other arrangement, and no order or requisition under which a truck or any automotive or other vehicle or equipment is to be engaged in public works by the commonwealth or by a county, city, town or district, shall be entered into or given by any public official or public body unless said agreement, order or requisition contains a stipulation requiring prescribed rates of wages, as determined by the commissioner, to be paid to the operators of said trucks, vehicles or equipment. Any such agreement, order or requisition which does not contain said stipulation shall be invalid, and no payment shall be made thereunder. Said rates of wages shall be requested of said commissioner by said public official or public body, and shall be furnished by the commissioner in a schedule containing the classifications of jobs, and the rate of wages to be paid for each job. Said rates of wages shall include payments to health and welfare plans, or, if no such plan is in effect between employers and employees, the amount of such payments shall be paid directly to said operators.

Whoever pays less than said rates of wages, including payments to health and welfare funds, or the equivalent in wages, on said works, and whoever accepts for his own use, or for the use of any other person, as a rebate, gratuity or in any other guise, any part or portion of said wages or health and welfare funds, shall have violated this section

and shall be punished or shall be subject to a civil citation or order as provided in section 27C.

An employee claiming to be aggrieved by a violation of this section may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees.

Appendix E

49 C.F.R. § 213.7

§ 213.7 Designation of qualified persons to supervise certain renewals and inspect track.

(a) Each track owner to which this part applies shall designate qualified persons to supervise restorations and renewals of track under traffic conditions. Each person designated shall have —

(1) At least —

(i) 1 year of experience in railroad track maintenance under traffic conditions; or

(ii) A combination of experience in track maintenance and training from a course in track maintenance or from a college level educational program related to track maintenance.

(2) Demonstrated to the owner that he or she —

(i) Knows and understands the requirements of this part that apply to the restoration and renewal of the track for which he or she is responsible;

(ii) Can detect deviations from those requirements; and

(iii) Can prescribe appropriate remedial action to correct or safely compensate for those deviations; and

(3) Authorization from the track owner to prescribe remedial actions to correct or safely compensate for deviations from the requirements of this part.

(b) Each track owner to which this part applies shall designate qualified persons to inspect track for defects. Each person designated shall have —

(1) At least —

(i) 1 year of experience in railroad track inspection; or

(ii) A combination of experience in track inspection and training from a course in track inspection or from a college level educational program related to track inspection;

(2) Demonstrated to the owner that he or she —

(i) Knows and understands the requirements of this part that apply to the inspection of the track for which he or she is responsible;

(ii) Can detect deviations from those requirements; and

(iii) Can prescribe appropriate remedial action to correct or safely compensate for those deviations; and

(3) Authorization from the track owner to prescribe remedial actions to correct or safely compensate for deviations from the requirements of this part, pending review by a qualified person designated under paragraph (a) of this section.

(c) Individuals designated under paragraphs (a) or (b) of this section that inspect continuous welded rail (CWR) track or supervise the installation, adjustment, and maintenance of CWR track in accordance with the written procedures of the track owner shall have:

(1) Current qualifications under either paragraph (a) or (b) of this section;

(2) Successfully completed a comprehensive training course specifically developed for the application of written CWR procedures issued by the track owner;

(3) Demonstrated to the track owner that the individual:

(i) Knows and understands the requirements of those written CWR procedures;

(ii) Can detect deviations from those requirements; and

(iii) Can prescribe appropriate remedial action to correct or safely compensate for those deviations; and

(4) Authorization from the track owner to prescribe remedial actions to correct or safely compensate from deviation from the requirements in these procedures and successfully completed a recorded examination on those procedures as part of the qualification process.

(d) Persons not fully qualified to supervise certain renewals and inspect track as required in paragraphs (a) through (c) of this section, but with at least one year of maintenance-of-way or signal experience, may pass trains over broken rails and pull aparts provided that—

(1) The track owner determines the person to be qualified and, as part of doing so, trains, examines, and re-examines the person periodically within two years after each prior examination on the following topics as they relate to the safe passage of trains over broken rails or pull aparts: rail defect identification, crosstie condition, track surface and alinement, gage restraint, rail end mismatch, joint bars, and maximum distance between rail ends over which trains may be allowed to pass. The sole purpose of the examination is to ascertain the person's ability to effectively apply these requirements and the examination may not be used to disqualify the person from other duties.

A minimum of four hours training is required for initial training;

(2) The person deems it safe and train speeds are limited to a maximum of 10 m.p.h. over the broken rail or pull apart;

(3) The person shall watch all movements over the broken rail or pull apart and be prepared to stop the train if necessary; and

(4) Person(s) fully qualified under § 213.7 are notified and dispatched to the location promptly for the purpose of authorizing movements and effecting temporary or permanent repairs.

(e) With respect to designations under paragraph (a) through (d) of this section, each track owner shall maintain records of—

(1) Each designation in effect;

(2) The date each designation was made; and

(3) The basis for each designation, including the method used to determine that the designated person is qualified.

(f) Each track owner shall keep designation records required under paragraph (e) of this section readily available for inspection or copying by the Federal Railroad Administration during regular business hours, following reasonable notice.