IN THE SUPREME COURT OF IOWA

Case No. 16-1462

MARK GRIFFIOEN, et al.,
Plaintiff-Appellants

v.

CEDAR RAPIDS and IOWA CITY, et al.
Defendants-Appellee's

Appeal from Judgment in the Iowa District Court for Linn County
Case No. LACV078694

APPELLANT'S FINAL BRIEF

Sam Sheronick,
SAM SHERONICK LAW FIRM, P.C.
4125 Glass Road NE
Cedar Rapids, Iowa 52402
Telephone:(319) 366-8193
Email: sam@samlawpc.com

C. Brooks Cutter, Pro Hac Vice
John R. Parker, Jr., Pro Hac Vice
CUTTER LAW P.C.
401 Watt Avenue
Sacramento, CA 95864
Telephone:(916)290-9400
Email: bcutter@cutterlaw.com
jparker@cutterlaw.com

Russell G. Petti, Pro Hac Vice
LAW OFFICES OF RUSSELL G. PETTI
466 Foothill Blvd., # 389
La Canada, CA 91011
Telephone:(818) 952-2168
Email: rpetti@petti-legal.com

Edward A. Wallace, Pro Hac Vice
Amy E. Keller, Pro Hac Vice
WEXLER WALLACE LLP
55 W. Monroe St., Suite 3300 Chicago, IL 60603
Telephone:(312) 346-2222
Email: EAW@wexlerwallace.com

Eric J. Ratinoff, Pro Hac Vice
ERIC RATINOFF LAW CORP.
401 Watt Avenue
Sacramento, CA 95864
Telephone: (916)473-1529
Email: eric@ericratinoff.com

Counsels for Plaintiff-Appellants

PROOF OF SERVICE

On February 15, 2017, I, the undersigned, do hereby certify that I or someone acting on my behalf did serve the Appellees Final Brief and Request for Oral Argument electronically on all respective parties.

/s/ Amy E. Keller
Amy E. Keller

CERTIFICATE OF SERVICE

On February 15, 2017, I, the undersigned, do hereby certify that I or someone acting on my behalf did electronically file the Appellees Final Brief and Request for Oral Argument electronically on all respective parties.

/s/ Amy E. Keller
Amy E. Keller

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

In June 2008, Defendants'[1] actions caused a nearly biennial, minor flood to turn into a major catastrophic flood, destroying over ten square miles and causing Cedar Rapids property owners to suffer over six billion dollars of property damage. Defendants caused this damage because they sought to protect their railroad bridges spanning the Cedar River at the expense of property owners in Cedar Rapids. Immediately before the June 2008 flood, Defendants parked railcars loaded with heavy rock on these bridges in an effort to keep the bridges from washing out during what would have been a minor flood. Two of the bridges, weighed down with Defendants' rock-filled railcars, collapsed, creating an artificial dam, and causing the river to rise the same exact height of the rail cars and the second collapsed, solid-sided rail bridge. The railcars parked on the two bridges that did not collapse also acted like a dam when the bridges were over-topped by the rising waters, diverting additional waters over the banks of the river. As a result, storm sewers were blocked from emptying into the river, which

[1] Defendant-Appellees Union Pacific Railroad Company, Union Pacific Corporation (collectively referred to as "UP"), Alliant Energy Corporation, and Cedar Rapids and Iowa City Railway Company (collectively referred to as "CRANDIC").

exacerbated the effects of the two collapsed rail bridges. The injured Plaintiffs[2] filed a Class Action Petition ("CAP"), seeking damages based on Iowa state law claims for the property damage caused by Defendants' negligence and malfeasance.

Since this case was filed—over three years ago—Defendants have avoided discovery and adjudication on the merits by asserting various preemption defenses. First, Defendants removed the suit to federal court claiming the Federal Railroad Safety Act (hereinafter "FRSA") preempted state law. Then, realizing they would not win that argument, Defendants switched their removal/preemption theory by claiming that the Interstate Commerce Commission Termination Act ("ICCTA") completely preempted the Plaintiffs' claims. Defendants took this position despite acknowledging that the ICCTA did not supply a federal remedy, a requirement for complete preemption (as opposed to conflict preemption, which is their current argument). Unfortunately, the federal District Court agreed with Defendants, dismissing the suit without leave to amend. An appeal to the Eighth Circuit Court of Appeals followed, and the Eighth Circuit ruled that, because the ICCTA did not supply a federal claim for relief to substitute for the Plaintiffs' claims, there was no complete preemption. The case was remanded to Iowa state court.

[2] Plaintiff-Appellants Mark Griffioen, Joyce Ludvicek, Mike Ludvicek, Sandra Skelton, and Brian Vanous and All Others Similarly Situated (hereinafter collectively referenced as "Plaintiffs").

Since arriving back to the Linn County District Court, Defendants have concocted yet a third preemption theory, that Plaintiffs' state law claims are preempted because they conflict with the ICCTA (i.e. claiming conflict preemption). In other words, Defendants argue that, even if every word of the CAP were true and that their negligence and wrongful conduct caused immense damage to nearly 20,000 people, Defendants are immunized by federal law from any possible liability. But this completely misstates the applicable law of preemption, and there is nothing in either the language of the ICCTA or its legislative history that supports the notion that Congress intended such an extraordinary result.

Plaintiffs respectfully submit that the District Court erred when it dismissed this case. With conflict preemption, state laws are preempted only when they *actually* conflict with or attempt to directly regulate the federally-regulated industry in question (here, the railroad industry). However, conflict preemption does not apply to state laws of general applicability with only an *incidental* effect upon the federally-regulated industry. Here, the Plaintiffs' claims for property damage are founded upon generally-applicable Iowa state laws of negligence and strict liability. Because the effect of these Iowa laws on rail transportation is only incidental, there is no preemption.

Moreover, the ICCTA attempted to deregulate the rail industry, not to

immunize it from tort liability—and this intent is clearly stated in the Act's legislative history. Similarly, the ICCTA vests certain powers in the agency it created, the Surface Transportation Board ("STB"), and only preempts state laws that purport to duplicate remedies created by the ICCTA. The Eighth Circuit has already held, *in this very case*, that the Plaintiffs' claims do not implicate any remedies created by the ICCTA and are therefore not generally preempted by the ICCTA.

Moreover, the scope of ICCTA preemption is well established, with a test which has been adopted by every federal appeals court to examine the issue (seven U.S. Courts of Appeal, at last count) as well as numerous state courts. This test is simple—under the ICCTA:

1. Direct state regulation of rail transportation is preempted; but

2. State laws of general application with an *incidental or remote* impact on rail transportation are *not* preempted.

Under this straight-forward test, ICCTA preemption is narrowly limited to state laws that attempt to directly regulate railroad economic functions, such as location of rail lines, rail rates, competition, rail operations and the like. State laws of general application—like the Iowa common law of negligence and strict liability applicable here—are not preempted, as their impact on railroads and rail transportation are only incidental.

Consistent with the prevailing test, many federal and state courts have

agreed that ICCTA preemption does not apply just because the defendant is a railroad and the subject of the suit might involve or impact rail transportation. Instead, courts limit ICCTA preemption to a State's attempts to directly regulate transportation. Accordingly, under this prevailing test, the ICCTA does not preempt the claims of plaintiffs who sue under state law to recover for property damage or personal injury caused by a railroad's acts or negligence. Similarly, many courts have held that railroads are not exempt from state laws of general application, even where the state law might have some incidental impact on rail transportation. The general rule, for the ICCTA and all federal regulation, is that the imposition of a federal regulatory scheme does not preempt state tort laws of general application, barring an expressed intent by Congress specifically to preempt garden-variety state law remedies for economic damages.

But beyond Plaintiffs' common law claims for economic loss, Plaintiffs have also brought safety-related claims in this lawsuit (such as claims for strict liability), which are more appropriately analyzed under the FRSA. The FRSA is explicit that state law claims for property damage like the ones asserted by the Plaintiffs here are not preempted by federal law.[3] And Plaintiffs' statutory claims (brought under

[3] Plaintiffs note that the City of Cedar Rapids exercised common-sense police powers in recent high water events that occurred in 2016 to protect against potential flooding, where the City blocked the entrances to the rail bridges with barriers as a precaution. If allowed to amend, Plaintiffs would include these allegations to argue that broad exemptions from state and local regulations—the

an Iowa statute which requires railroads be kept in good repair) are likewise not preempted: in *Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557 (8th Cir. 2004), the Eighth Circuit held that *this very statute* was not preempted by the ICCTA.

The District Court erred below because it did not apply the correct, majority test for preemption. Instead, the District Court relied on a little-cited decision by a Texas State appellate court, and expressly rejected the test for ICCTA preemption that has been accepted by every federal circuit to consider the question. Moreover, in addition to applying the wrong test, the District Court decided on the pleadings, without any evidentiary proceeding that could assess the truth of Defendants' argument, that the claims here would impermissibly burden Defendants' obligations to comply with the ICCTA and federal regulations. The District Court accordingly immunized Defendants' from any possibility of liability "on faith"—simply assuming that the Defendants' version of the facts is correct without actually weighing or considering any facts at all.

The Linn County District Court also principally relied on cases where the plaintiffs had demanded that the defendant railroad operate differently or reconstruct its track to certain specifications—actions which would have some

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type of exemptions for which the railroads argue—would prevent local governments from preventing large-scale destruction such as that which occurred in 2008.

impact on rail operations. However, the Plaintiffs here seek no such remedy. Plaintiffs make no demands on how Defendants should operate in the future, whether they should be able to park railcars on their remaining bridges (which are now over a century old), or how they should reconstruct any destroyed bridges (or whether they reconstruct them at all). Rather, Plaintiffs seek money damages because past wrongful conduct has damaged their property. And the United States Supreme Court has consistently held, in cases like *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442 (2005), discussed below, that a jury award for damages that could have the incidental effect of altering a federally-regulated entity's conduct in the future does not constitute a "conflict" with federal regulation that would require preemption.

Put simply, Plaintiffs are seeking property damages under state laws of general application because Defendants' actions caused that property damage. Their case is not preempted.

II. STATEMENT OF ISSUES OF APPEAL.

1. Whether the Linn District Court erred in holding that state laws of general application with only an incidental impact on rail transportation were preempted by the ICCTA;

Authority: *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001); *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010); *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 807, 813 (5th Cir. 2011)

2. Whether the Linn District Court erred when it failed to consider that, because Plaintiffs' primary concerns involved rail safety issues, the federal preemption question should be addressed under the FRSA, which expressly holds that state claims are not preempted; and

Authority: *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517, 522-23 (6th Cir. 2001); *Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557, 560 (8th Cir. 2004)

3. Whether the Linn District Court erred in dismissing the Plaintiffs' claims on the pleadings, without a showing by Defendants that the claims actually had an impact on rail transportation;

Authority: *Orud v. Groth*, 652 N.W.2d 447, 450-511 (Iowa, 2002); *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 813 (5th Cir. 2011); *People v. Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th 1513, 1528, 148 Cal. Rptr. 3d 243, 254 (2012)

4. Whether the Linn District Court erred in finding that Iowa Code § 327F.2 is preempted by the ICCTA, a determination directly contrary to the Eighth Circuit's *Washington County* Case.

Authority: *Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557, 560 (8th Cir. 2004)

III. ROUTING STATEMENT: THIS CASE SHOULD BE RETAINED BY THE IOWA SUPREME COURT.

The factors set out in Iowa R. App. Proc. 6.1101 mitigate in favor of the Iowa Supreme Court retaining this case:

1. This case involves a substantial question as to the validity of a statute;

2. The issue of whether Iowa law is preempted by the ICCTA is an issue of first impression in the Iowa courts; and

3. The case involves an issue of broad public importance, which is whether the Plaintiffs (and the nearly 20,000 property owners they hope to represent) in Cedar Rapids will be compensated for damages allegedly caused by Defendants during the 2008 Cedar Rapids flood.

IV. STATEMENT OF FACTS, STATEMENT OF THE CASE, AND THE DISTRICT COURT'S DECISION.

A. Statement of facts as pleaded in the CAP.

The Plaintiffs and putative class members all own property in Cedar Rapids, Iowa, which was damaged when the Cedar River flooded in June of 2008 (June 7, 2013 Class Action Petition (App. 4-5). Prior to the June 2008 flood, Defendants parked railcars loaded with rock on dilapidated, over-century-old bridges they owned which spanned the Cedar River in an effort to save the bridges from being washed out. (App. 7-8). Because the bridges were weighed down with heavy, rock-filled railcars, some of them collapsed, effectively damming the river. (App. 9). The railcars on the bridges that did not collapse also caused damage: when the bridges were overtopped by the river water, they acted like a dam, diverting enormous amounts of water into low-lying areas rather than letting the water flow through the "skeletal" bridges and down the river. (App. 8). All of these actions by Defendants combined to cause—or at least substantially exacerbate—the 2008 Flood. (App 9).

The Plaintiffs filed the CAP to recover damage caused to their property based upon strict liability law for Defendants' negligence (App. 23), engagement in abnormally dangerous activity (App. 16-18), and for violations of Iowa Code § 468.148 (App. 19), which imposes liability under state law upon persons who cause damage through obstruction of the free flow of waters, and Iowa Code § 327F.2, which requires that railroads, among other things, maintain, and keep in good repair all bridges (App. 21-22).

B. Statement of the case.

The June 7, 2013 CAP alleged only state law claims against Defendants. On July 2, 2013 the Union Pacific Defendants filed a Notice of Removal contending that the Plaintiffs' claims were completely preempted by Federal law. (App. 104-209). This Notice made no mention of the ICCTA, rather, UP contended that the Plaintiffs' state law claims were preempted by an entirely different body of law, the Federal Railroad Safety Act ("FRSA") (49 U.S.C. § 20101 *et seq.*). (App. 109-111).

Shortly thereafter, Plaintiffs filed a Motion to Remand for improper removal and lack of subject matter jurisdiction noting that in *Lundeen v. Canadian Pacific R. Co.* 532 F.3d 682, 688 (8th Cir. 2008), the Eighth Circuit held that the 2007 "clarifying amendment" to the FRSA's preemption provision (49 U.S.C. § 20106)

expressly stated that the FRSA did not preempt state law claims such as those brought by the Plaintiffs.

In response, Defendants abandoned the argument that the FRSA completely preempted the Plaintiffs' claims. Instead, Defendants argued for the first time that it was the ICCTA which formed the basis for removal. (App. 216). But this new argument was also wrong. The ICCTA provides no remedy for a property owner damaged by a railroad's negligent use of its property, and numerous decisions by the United States Supreme Court and various federal circuit courts of appeal have uniformly held that complete preemption giving rise to federal jurisdiction can *only* exist where the federal scheme supplies an *alternative cause of action*.[4] Defendants failed to identify a federal scheme replacing the state laws which it contended were subject to federal preemption, and to the contrary, UP explicitly stated that the Plaintiffs could assert no possible claim against it. (App. 213).

The federal district court accepted Defendants' flawed argument, agreeing that there was complete preemption even though no alternative cause of action

[4] *E.g. King v. Marriott Intern. Inc.*, 337 F.3d 421, 425 (4th Cir. 2003) ("Thus, a vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted state cause of action."); *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788 (7th Cir. 2002) ("Logically, complete preemption would not be appropriate if a federal remedy did not exist in the alternative."); *Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 252 (8th Cir. 2012) ("We conclude that without a federal cause of action which in effect replaces a state law claim, there is an exceptionally strong presumption against complete preemption.").

existed. Plaintiffs were compelled to appeal the court's decision to the Eighth Circuit. Not surprisingly, given the clarity of the law on this point, the Eighth Circuit agreed with the Plaintiffs holding complete preemption cannot exist without a federal cause of action:

> The scope of complete preemption turns primarily on the provision creating the federal cause of action—not on an express preemption provision. It is the federal cause of action that ultimately supplants the state-law cause of action and effectuates complete preemption.

Griffioen v. Cedar Rapids & Iowa City Ry. Co., 785 F.3d 1182, 1190 (8th Cir. 2015).

Upon remand to the Linn County District Court, Defendants advanced the equally-flawed argument that Congress essentially immunized railroads from state law tort and statutory liability when it enacted the ICCTA, while further contending that Congress intended victims of railroad negligence to have no remedies at all. Unfortunately, the Linn County District Court accepted this new argument, dismissing the Plaintiffs' claims on the pleadings, without leave to amend. The District Court's decision is in error.

C. The District Court's decision was flawed on numerous grounds.

The District Court made three fundamental errors when it determined that the ICCTA preempted Plaintiffs' claims. Initially, the District Court failed to follow the test for ICCTA preemption generally accepted by the courts, which is that ICCTA preemption is "narrow," and preempts state attempts to directly

regulate rail transportation, but not state laws of general application which have only *an incidental or remote impact* on rail transportation. Instead, citing to cases such as *A&W Properties, Inc. v. Kansas City Southern Ry. Co.*, 200 S.W.3d 342 (Tex. App. 2006), the District Court followed a minority view, holding that state law claims are preempted by the ICCTA if the remedies they seek would have any impact *at all* on rail transportation. (App. 338).

Second, even using this erroneous standard, the District Court should not have decided this case on the pleadings. Whether a state law burdens rail transportation is—for the most part—a fact-based inquiry, yet at the pleading stage, Defendants had not presented a single fact showing that the relief sought by the Plaintiffs (monetary compensation for damages caused by Defendants' negligence) would have any impact at all on rail transportation.

Third, one of the Plaintiffs' claims is based on Iowa Code section 327F.2, which requires railroads to keep rail bridges in good repair. In *Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, the Eighth Circuit held section 327F.2, this precise statute, which creates a state law cause of action for negligence arising out the maintenance of railroad bridges, was not preempted by the ICCTA, in spite of the fact that it constituted direct regulation of rail transportation. 384 F.3d 557, 561 (8th Cir. 2004). In finding that *Washington County* was not controlling here, the District Court misread that decision and improperly narrowed it to its facts.

V. ARGUMENT.

A. The Court should analyze the trial court's flawed preemption analysis under the correction of error standard, and the issue was preserved for appeal.

Given that Plaintiffs appeal the District Court's grant of Defendants' Motion to Dismiss on the pleadings, review here is for correction of error. Under this standard, the District Court's decision should be upheld "only if we can conclude that no state of facts is conceivable under which a plaintiff might show a right of recovery." *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994).

The issue of the proper construction of the ICCTA's preemption provision was raised at the District Court and therefore was preserved for appeal. (*E.g.* App. 70-84).

B. The ICCTA does not preempt state laws of general application with an incidental effect on rail transportation.

1. Defendants must overcome the presumption that state law is not preempted, and bear the burden of proof to show that the Plaintiffs' claims are preempted by the ICCTA.

In conducting its preemption analysis, this Court should "start with the assumption 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." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The United States Supreme Court has held that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that

disfavors pre-emption." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (attribution omitted). In determining whether the ICCTA preempts state laws of general application,

> [w]here the State acts in a field which the States have traditionally occupied, however, we retain the assumption 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*. Principles of federalism, including the recognition that the States are independent sovereigns in our federal system, dictate that in the absence of such clarity of intent, Congress cannot be deemed to have significantly changed the federal-state balance.

Florida E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1328 (11th Cir. 2001) (citations and attributions omitted, emphasis added). Therefore, "if the statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred." *Fla E. Coast R.*, 266 F.3d at 1328. This presumption against pre-emption "is relevant even when there is an express pre-emption clause." *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010).

Here, Plaintiffs sued Defendants under Iowa common law negligence principles of general application, strict liability, and the long-standing Iowa law requiring that bridges be maintained in good repair. These are traditional areas of state regulation and the Court should presume they are not preempted unless Defendants overcome this presumption with specific facts.

In order to overcome this presumption, Defendants bear the burden of proof

in showing that application of state law to their activities is subject to preemption by the ICCTA:

> As we noted above, Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted. Thus, it is Kerr-McGee's burden to show that Congress intended to preclude such awards.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984). *Also, Access Mediquip L.L.C. v. UnitedHealthcare Ins. Co.*, 662 F.3d 376, 378 (5th Cir. 2011) ("ERISA preemption is an affirmative defense which must be proven by the defendant at trial.").

In other words, in order to successfully contend that the Plaintiffs' claims are preempted, Defendants must present *actual facts* showing that allowing the claims to proceed will be a real burden on their rail operations. Of course, this is impossible on a motion to dismiss on the pleadings, which is why the District Court erred in granting it. *See Orud v. Groth*, 652 N.W.2d 447 (Iowa, 2002); LaMarca, George A., 1 Iowa Pleading and Causes of Action 449-451 (1994).

2. The ICCTA's statutory language, as generally interpreted, limits preemption to direct attempts by states to regulate rail transportation.

a) The ICCTA's actual preemption provision is narrow, limited to state law remedies that conflict with those provided by the statute.

The District Court erred in adopting Defendants' vision of the ICCTA, where all state law suits against railroads are preempted if they have an impact on

rail transportation. Plaintiffs submit this is wrong; some state laws that impact rail transportation are preempted, and some are not, and the key issue is discovering the line between what is preempted and what is not. As noted by the First Circuit in *Fayard v. Northeast Vehicle Services, LLC*, 533 F.3d 42 (1st Cir. 2008):

> But even where a federal statute can completely preempt some state law claims, the question remains *which* claims are so preempted. No one supposes that a railroad sued under state law for unpaid bills by a supplier of diesel fuel or ticket forms can remove the case based on complete preemption simply because the railroad is subject to the ICCTA.

Fayard, 533 F.3d at 47 (holding that state law nuisance claims against railroad were not preempted by the ICCTA).

The question of what ICCTA preempts, and what it does not, begins with the statute itself. "In determining the existence and reach of preemption, Congress' purpose is 'the ultimate touchstone' to use. *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010) (*en banc*). Here, the ICCTA's preemption language reads as follows:

> (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.

49 U.S.C. § 10501(b) (emphasis added).

There are two sentences here, the first grants jurisdiction to the STB, and the actual preemption language is in the last sentence of 49 U.S.C. § 10501(b)(2). The preemption language itself is narrow; it does not, for example, expressly preempt "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," as ERISA does. 29 U.S.C. § 1144(a). Rather, the actual preemption language here only preempts *remedies* duplicative of those provided by the ICCTA, stating that "the remedies provided under this part are exclusive."

In reading this statute the District Court, at UP's urging, focused on the first section of the ICCTA preemption statute, noting that "[i]t also grants the STB exclusive jurisdiction, using language that is even more powerful than that found in other jurisdictions that the Supreme Court has held support complete preemption." (App. 335). As shown below, in putting its focus on the STB's grant of jurisdiction rather than the actual preemption provision, the District Court both erred in understanding the language and departed from the numerous federal courts that have interpreted this statute.

b) The ICCTA preempts state laws that directly regulate rail operations while preserving state laws of general application with an incidental impact on rail transportation.

The ICCTA's section 10501(b) only preempts state law remedies that directly conflict with the remedies available under the ICCTA. Accordingly, courts in several different circuits have construed this section of the ICCTA narrowly: under the operative test, ICCTA only preempts potentially *conflicting* state law remedies that *directly* regulate rail operations but does not preempt that state laws that have only an *incidental* impact on rail operations.

For example, in *Florida E. Coast Ry. Co.*, the Court noted the ICCTA's preemptive scope is specifically limited:

> The ICCTA pre-emption provision does not preclude the application of "all other law." *Cf.* 49 U.S.C. § 11341(a) (with regard to mergers and acquisitions, railroad companies exempt from "antitrust laws and from all other law, including State and municipal law"). Rather, express pre-emption applies only to state laws "with respect to *regulation* of rail transportation." 49 U.S.C. § 10501(b) (emphasis added). This necessarily means something qualitatively different from laws "with respect to rail transportation."

266 F.3d at 1331. The *Florida E. Coast Ry.* Court held that, in this manner, Congress narrowly tailored the ICCTA only to preempt laws that purport to "manage" or "govern" rail transportation:

> In this manner, Congress narrowly tailored the ICCTA pre-emption provision to displace only "regulation," i.e., those state laws that may reasonably be said to have the effect of "manag[ing]" or "govern[ing]" rail transportation, Black's Law Dictionary 1286 (6th ed.1990), while permitting the continued application of laws having a more remote or incidental effect on rail transportation.

Id. The Court continued that "[a]llowing localities to enforce their ordinances with the possible incidental effects such laws may have on railroads would not result in the feared 'balkanization' of the railroad industry as companies sought to comply with those laws." *Florida E. Coast Ry.*, 266 F.3d at 1339.

Drawing support from *Florida E. Coast Ry.*, in *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404 (5th Cir. 2010), the Fifth Circuit, sitting *en banc*, engaged in a detailed analysis of the scope of conflict preemption presented by the ICCTA. *Franks* involved whether a landowner's state law claims regarding UP's intention to close some rail crossings were preempted by the ICCTA.

In determining the scope of ICCTA preemption, the *Franks* Court noted that section 10501(b)(2) was comprised of two sentences. UP argued "that what controls is the section's first sentence, namely, that jurisdiction of the STB over "transportation by rail carriers" is exclusive." *Franks*, 593 F.3d at 408. The *Franks* Court disagreed, finding that the second sentence of section 10501(b), which preempted alternative remedies to those provided by the ICCTA, determined the scope of ICCTA's preemption:

> We conclude that the relevant part of Section 10501(b) is its second sentence. The first, and longer one, is defining the authority of the STB in dealing with the fundamental aspects of railroad regulation, and barring others from interfering with those decisions by making the jurisdiction exclusive.

Franks, 593 F.3d at 410.

As noted above, the operative sentence on which the *Franks* Court focused read:

> 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)(2). The *Franks* Court broke this sentence into two parts, noting that the first part stated it was only the "remedies" which were exclusive:

> We break the second sentence down into its component parts. What is declared to be exclusive are "the remedies provided under this part," which we have to some extent already discussed. There are proceedings before the STB that can be held on such matters as rates, rules, practices, and routes. Complaints about such matters can be brought to the STB. Remedies through administrative action are the exclusive ones.

Franks, 593 F.3d at 410. The *Franks* Court, drawing support from *Fla. E. Coast Ry.* held that under the plain language of the statute, the only "remedies" that were preempted were "remedies . . . with respect to rail transportation." After conducting this analysis, the *Franks* Court adopted the test for ICCTA preemption formulated from the *Fla. E. Coast* case:

> Those remedies are exclusive "with respect to regulation," that last word being the one fought over in this case and in the precedents. The Eleventh Circuit has held that "Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation, ... while permitting the continued application of laws having a more remote or incidental effect on rail transportation."

Franks, 593 F.3d at 410 (quoting from *Fla. E. Coast*, 236 F.3d at 1331). As such, the *en banc Franks* Court concluded that ICCTA preemption is limited to state remedies that constitute regulation of rail transportation. "The text of Section 10501(b), with its emphasis on the word *regulation*, establishes that only laws that have the effect of managing or governing rail transportation will be expressly preempted." *Franks*, 593 F.3d at 410.

In other words, *Franks* held that state laws that directly regulate rail transportation are preempted, while laws of general application with "a more remote or incidental effect on rail transportation" are not preempted. The test for ICCTA preemption formulated by *Fla E. Coast* and *Franks* is in wide use; many state and federal courts agree that the ICCTA only preempts state laws which purport to directly regulate or interfere with rail transportation, and does not preempt laws with only an incidental impact on rail transportation. *E.g. Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 102 (2d Cir. 2009) ("ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.") (citations omitted); *People v. Burlington Northern Santa Fe R.R.*, 209 Cal. App.4th 1513, 1527 (2012) ("The ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued

application of laws [of general application] having a more remote or incidental effect on rail transportation."); *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010) ("As stated by our sister circuits, ICCTA preempts all 'state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.'"); *PCS Phosphate Co., Inc. v. Norfolk Southern Corp.*, 559 F.3d 212, 218 (4th Cir. 2009) (same); *Adrian & Blissfield R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008) (same); *New York Susquehanna and Western Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (same); *Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79, 85, 979 N.E.2d 1273, 1281 (2012) (same).

Under this test, (1) state laws that attempt to directly regulate rail transportation are preempted, but (2) state laws of general application with only an "incidental" impact on rail transportation are permitted. The key word in this test describing what is preempted is the word "*incidental*." An "incidental" impact on rail transportation does not mean a minor impact. Rather, it means that it is permissible for the state law to regulate rail transportation, so long as regulation of rail transportation was not the primary or intended purpose of the law:

> While "incidental" can mean "minor," the context in *McBurney*[5] suggests that the Supreme Court used the word to mean something

[5] *McBurney v. Young*, 133 S. Ct. 1709, 1716, 185 L. Ed. 2d 758 (2013).

> occurring "by chance or without intention or calculation." *Webster's Third New International Dictionary* 1142 (1986). Indeed, the Court has used the word in this manner in other discrimination cases. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 682, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (rejecting equal protection challenge for failure plausibly to plead discriminatory intent, observing that it was "no surprise" that policy "produce[d] a disparate, *incidental* impact on Arab Muslims, even though *the purpose* of the policy was to target neither Arabs nor Muslims" (emphasis added)).

Schoenefeld v. Schneiderman, 821 F.3d 273, 280 (2d Cir. 2016).

c) The District Court erred when it rejected the widely accepted test for ICCTA preemption, in favor of a minority test.

The District Court's most significant error is that it rejected this well-established test in favor of a minority test utilized by the Texas State Court of Appeals in *A & W Properties, Inc. v. Kansas City S. Ry. Co.*, 200 S.W.3d 342, 346 (Tex. App. 2006), which, in turn, relied principally on the trial court opinion in *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F.Supp. 1573, 1581 (N.D.Ga.1996).

Significantly, the District Court in this case quoted favorably the following language in the *A&W Properties* case:

> A & W attempts to draw what it calls a preemption "rule" for courts to employ in making preemption determinations under the ICCTA. A & W's proposed "rule" would provide:

> [O]nly those state laws that either directly regulate rail operations or that have a significant economic impact on railroads [are] preempted, and that the ICCTA does not preempt state laws enacted under the state's police power that do not directly regulate rail operations and that do not have a significant economic impact on railroads.
>
> We reject A & W's attempt to qualify the directive of the ICCTA in this proposed "rule." The preemption provision of the ICCTA—in all its breadth—is the rule we must employ.

(App. 338, quoting from *A & W Properties*, 200 S.W.3d at 350–51). Significantly, the "rule" that the *A&W Properties* court—and hence the District Court here—refused to apply is the precise test adopted by the Fifth Circuit in *Franks* and the Eleventh Circuit in *Fla. E. Coast*, as well as the Second, Third, Fourth, Sixth, and Ninth Circuits, and state courts in California and Ohio. Plaintiffs submit that the District Court erred in rejecting the well-established test used by every federal circuit to consider the issue in favor of a minority test taken from a Texas state appellate court.

d) Consistent with the established test, *Elam* points out the distinction between direct and incidental regulation of rail transportation.

As noted above, the majority test for ICCTA preemption is narrow, preempting state laws that directly regulate rail operations while allowing state laws that have only an incidental impact on rail operations.

Elam v. Kansas City S. Ry. Co., 635 F.3d 796 (5th Cir. 2011), helpfully illustrates the line between what the ICCTA preempts and what it does not.

Consistent with the prevailing test, the *Elam* court held that a state law that attempted to directly regulate rail transportation, was preempted. The *Elam* court further held that a state law claim brought as a tort of general application with only an incidental impact on rail transportation was not preempted. *Id.* at 805.

Elam involved a collision between a train operated by Kansas City Southern Railway Company ("KCSR"), and an automobile at a rail crossing. The *Elam* Plaintiffs alleged two negligence claims; a negligence *per se* claim for violating the state's "antiblocking" statute, and a simple common law negligence claim based on the railroad's failure to properly warn that the train was at the crossing. *Id*. at 801-802.

A state "antiblocking" statute limits the amount of time that a train can sit at a rail crossing and block car traffic. Such laws are uniformly held preempted by the ICCTA, as they purport to directly regulate issues like train length and switching operations:

> Mississippi's antiblocking statute directly attempts to manage KCSR's switching operations, including KCSR's decisions as to train speed, length, and scheduling. The statute thus reaches into the area of economic regulation.

Elam, 635 F.3d at 807 (internal quotations and citations omitted).

However, the *Elam* Court also held that the simple negligence claim, for injuries at the rail crossing arising out of the railroad's alleged failure to warn, did not directly attempt to regulate rail transportation and, as such, was not preempted

by the ICCTA. Initially, the Court noted that the state law of general negligence was not directed at railroads and its effect in the case was merely incidental to rail transportation:

> A typical negligence claim seeking damages for a typical crossing accident (such as the Elams' simple negligence claim) does not directly attempt to manage or govern a railroad's decisions in the economic realm. Like state property laws and rules of civil procedure that generally "have nothing to do with railroad crossings," the effects of state negligence law on rail operations are merely incidental.

Elam, 635 F.3d at 813. Accordingly, the *Elam* Court held that the conflict preemption issue was fact-based, and the railroad had to come forward with evidence showing the impact on rail operations if the state law were given effect. "Because the ICCTA does not completely preempt the Elams' simple negligence claim, our inquiry is whether Mississippi's negligence law, as applied to the facts of this case, would have the effect of unreasonably burdening or interfering with KCSR's operations." *Elam*, 635 F.3d at 813 (citations and attributions omitted). The *Elam* Court held that, in conducting this fact-based analysis, the trial court should start "with the assumption that Congress did not intend to supersede the historic police powers of the states 'to protect the health and safety of their citizens.'" *Elam*, 635 F.3d at 813 (citing to *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

e) Consistent with the established test, most courts have construed ICCTA preemption narrowly, to reach only state attempts to directly regulate rail transportation.

Consistent with the *Franks* and *Fla. E. Coast Ry.* test, courts in myriad other cases across various circuits and jurisdictions have held that the ICCTA does not preempt state laws of general application that have an impact on rail transportation, where that impact is only remote or incidental. For example, in *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007), the property owner plaintiffs brought state tort claims against the railroad, claiming it improperly disposed of railroad ties on its property which, in turn, had caused flooding on their property. As here, the railroad claimed that plaintiffs' claims of property damage were preempted under the ICCTA.

The *Emerson* Court disagreed, holding that "transportation" as defined in the act was limited to the movement of property and passengers:

> While certainly expansive, this definition of "transportation" does not encompass everything touching on railroads. Subsection (A) focuses on physical instrumentalities "related to the movement of passengers or property," and subsection (B) on "services related to that movement."

Emerson, 503 F.3d 1126 at 1129 (quoting from 49 U.S.C. § 10102(9)). The Court held that this definition of "transportation" was not broad enough to reach claims that a railroad's mismanagement of its property caused flooding on adjacent property:

> We do not think that the plain language of this statute can be read to include the conduct that the Landowners complain of here-discarding old railroad ties into a wastewater drainage ditch adjacent to the tracks and otherwise failing to maintain that ditch. These acts (or failures to act) are not instrumentalities "of any kind related to the movement of passengers or property" or "services related to that movement." *Id.* Rather, *they are possibly tortious acts committed by a landowner who happens to be a railroad company*.

Emerson, 503 F.3d 1126 at 1129-1130 (emphasis added).

In *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321 (5th Cir. 2008), the Fifth Circuit reached a similar result. In *Barrois*, the issue was whether the ICCTA preempted a state law permitting a landowner whose property is blocked by a rail line to construct a private crossing over the line. The *Barrois* Court held that issues regarding rail crossing, although having peripheral involvement to rail operations, are typically resolved in state court and not preempted:

> Routine crossing disputes are *not* typically preempted. Crossing disputes, despite the fact that they touch the tracks in some literal sense, thus do not fall into the category of "categorically preempted" or "facially preempted" state actions.

Barrois, 533 F.3d at 332-333 (emphasis in original)

In *Guild v. Kansas City S. Ry. Co.*, 541 F. App'x 362, 367 (5th Cir. 2013), a case with some similarity to the present matter, the railroad damaged a privately owned spur track by parking heavily laden railcars on it. The owner of the track

sued in tort, seeking recovery against the railroad for the damage to the track. The railroad claimed that the state law negligence action was preempted.

The *Guild* court held that the ICCTA only preempted attempts to regulate rail *transportation*, which was not the purpose of this state law tort claim to recover for damage to property:

> As we previously have explained in cases analogous to this one, "only laws that have the effect of managing or governing rail transportation will be expressly preempted." Here, the Guilds' claim pertaining to their damaged spur track sounds in tort. Consequently, the law to be applied to that claim, absent preemption, is that which Mississippi applies to negligence actions. *The purpose of Mississippi's negligence law is not to manage or govern rail transportation. Rather, the effects of state negligence law on rail operations are merely incidental*. Accordingly, we conclude that the ICCTA does not expressly preempt the Guilds' negligence claim.

Guild, 541 F. App'x at 367 (citations and attributions omitted, emphasis added).

As Defendants do here, in *Guild* the railroad argued that holding it liable for its negligence would impact its future operations, and that "if it were 'subject to ordinary state law negligence claims for the weight of its railcars, [it] would be forced to make adjustments to that weight to avoid liability, as best it could.'" The court disagreed, noting that in seeking compensation for their injuries "the Guilds are not attempting in any way to undertake economic regulation of railroads." *Guild*, 541 F. App'x at 368.

Even where a tort action involves actual rail operations, it is not preempted by the ICCTA where the railroad's negligent activity involves a one-time event. In

Battley v. Great W. Cas. Ins. Co., No. 14-494-JJB, 2015 WL 1258147 (M.D. La. Jan. 12, 2015), the plaintiffs claimed that the railroad, KCSR, acted negligently by refusing to move a train blocking a crossing to allow emergency responders access to the scene of a traffic accident. KCSR, in turn, argued that the negligence claim was preempted by the ICCTA. The court held the claim was not attempting to manage rail operations due to the unique nature of the circumstances involved:

> However, in the present case, the plaintiffs' negligence claim is not based upon a violation of any state law, nor does their claim challenge KCSR's general operating procedures. The issue here is whether, under the specific circumstances alleged in the Petition and Supplemental Petition, the KCSR defendants' refusal or failure to move the train from the crossing was unreasonable, i.e. negligent. Although the KCSR defendants allegedly blocked the roadway, a decision in this action will not create a general policy prohibiting railroad companies from blocking roadways.

Battley, 2015 WL 1258147 at *4.

Similarly, in *Staley v. BNSF Ry. Co.*, No. CV14-136-BLG-SPW, 2015 WL 860802 (D. Mont. Feb. 27, 2015) the Court held that a negligence claim directly challenging the manner in which a railroad managed its trains was not preempted. In *Staley* a town was divided by two parallel BNSF tracks, a mainline track and a siding track. There were two crossings over the tracks, one (the West Crossing) was protected by warning lights and an automatic gate and the other (the East Crossing) was not. BNSF had developed the practice of leaving trains parked on the siding track so as to block the protected West Crossing, which had the effect of

also blocking visibility at the East Crossing. Town officials had repeatedly complained about this practice, but BNSF did nothing. Mr. Staley was injured when, forced to use the East Crossing and his visibility obstructed by a train parked at the siding, his truck was struck by a train. He sued BNSF for negligence, and BNSF contended the negligence claim was preempted by the ICCTA.

As in *Battley*, the *Staley* Court held that negligent operation of a railroad is not preempted by the ICCTA:

> The Court agrees that as alleged in Staley's Complaint, the situation was unique and not likely to be frequently replicated. Therefore, by looking at Staley's Complaint, his action would not unreasonably burden BNSF's operations.

Staley, 2015 WL 860802 at *7.

In *Anderson v. Union Pacific R. Co.*, No. 10-193-DLD, 2011 WL 4352254 (M.D. La. Sept. 16, 2011) the court determined that a state law negligence claim for personal injury was not preempted by the ICCTA. The court held that a claim against a railroad for its negligent failure to properly maintain a railroad bridge crossing was not preempted:

> Plaintiffs have pled a simple suit for personal injury damages based on state law negligence. One of the allegations makes a very general claim of failure to maintain and construct the railroad bridge crossing, which was denied by defendant in its answer. There is nothing in the petition or answer that directly or impliedly has "the effect of managing or governing rail transportation."

Anderson, 2011 WL 4352254 at * 4

And in *Franks*, the Court addressed whether state property law was preempted in a dispute between UP and a property owner as to whether he had a right to an easement over a rail line so as to access his property. The Court held that the state-law claims had only an incidental effect on rail transportation and therefore were not preempted:

> Resolving the typical disputes regarding rail crossings is not in the nature of regulation governed by the exclusive jurisdiction of the STB. The relevant question under the ICCTA is whether Franks's railroad crossing dispute invokes laws that have the effect of managing or governing, and not merely incidentally affecting, rail transportation. It does not. Franks brought a possessory action, claiming that it had a servitude of passage similar to an easement over the crossings. This suit is governed by Louisiana property laws and rules of civil procedure that have nothing to do with railroad crossings. Railroads are only affected when the servitude happens to cross a railroad. These property laws are not meant to regulate railroad transportation, though at times they may have an incidental effect on railroad transportation.

Franks, 593 F.3d at 411.

Similarly, in *Adrian & Blissfield R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 541 (6th Cir. 2008) the Court held that a state law that required railroads to pay for pedestrian crossings spanning the tracks was not preempted by the ICCTA. Even though the state law in *Adrian & Blissfield* was specifically directed at railroads, the Court held that it was not preempted because it involved traditional state law concerns about public safety and created no obligations different from those imposed on state laws generally on non-railroad entities:

> The fact that Mich. Comp. Laws § 462.309 applies specifically to railroads does not make it discriminatory. This is not an instance in which the state has chosen to require something of the Railroad that it does not require of similarly situated entities. The concerns that animated the Village's sidewalk construction apply only to the Railroad because the railroad bisects the town and pedestrian walkways are needed for public safety.

Adrian & Blissfield, 550 F.3d at 541-42.

Numerous other courts have reached similar results, holding that state law claims that do not attempt to directly regulate rail operations are not preempted by the ICCTA. For example, in *Works v. Landstar Ranger, Inc.*, No. CV 10-1383 DSF (OPx), 2011 WL 9206170 (C.D. Cal. 2011), the court held that the ICCTA did not preempt a plaintiff's state law claims alleging that its goods had been damaged during rail transport. "Plaintiff's negligence and fraud claims merely seek to enforce a normal duty of care and a duty not to defraud one's customers. This has nothing to do with the service offerings-*i.e.*, its schedules, origins, or destinations-by Landstar or the carriers with which it contracts." *E.g. Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79, 90, 979 N.E.2d 1273, 1286 (2012) ("The city's eminent-domain action would therefore not be preempted by the ICCTA under the as-applied analysis."); *Wolf v. Cent. Oregon & Pac. R.R.*, 230 Or. App. 269, 278, 216 P.3d 316, 321 (2009) ("Here, the summary judgment record in this case provides no basis for us to conclude that the grade crossing sought by plaintiffs would impose an unreasonable burden on rail transportation

such that the matter would be preempted."); *JGB Properties, LLC v. Ironwood, LLC*, No. 14-cv-1542 (GTS/ATB), 2015 WL 1399997, at *8 (N.D.N.Y. 2015) ("However, the New York State court exercised jurisdiction over Defendants' claims of Plaintiff's unlawful interference with their easement, not a claim regarding "the construction, acquisition, operation, abandonment or discontinuance" of any type of "tracks[ ] or facilities" under the ICCTA.").

The claims asserted by Plaintiffs are of the same nature as those upheld in *Emerson*, *Barrois*, *Guild*, *Franks*, and the other cases cited above. Plaintiffs' claims are based on laws of general application, which have only an incidental impact on railroad operations. Plaintiffs do not seek to instruct Defendants as to how to operate their transportation businesses on a day-to-day basis; they are merely seeking to hold Defendants liable for their negligent conduct which caused damage to Plaintiffs in this particular instance. As such, Plaintiffs' claims are not preempted by the ICCTA, because they do not attempt to regulate rail transportation at all, much less "directly regulate" it. Plaintiffs' claims are based on laws of general application with only minimal and incidental impact on rail transportation and, as such, are not preempted by the ICCTA.

3. **Analysis of other preemption statutes shows that congressional imposition of a uniform regulatory scheme does not—without more—extinguish garden-variety tort claims against the regulated entity.**

Absent express congressional intent to the contrary, federal laws and regulatory schemes do not extinguish garden-variety state law tort claims. The Supreme Court held that tort claims that may have an incidental effect on a company's federally-regulated labelling practices are not preempted in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442 (2005). In *Bates*, a group of farmers sued a pesticide manufacturer, claiming that a product was negligently and misleadingly labelled under state law. The manufacturer responded that federal law governed labeling of pesticides, at 7 U.S.C. § 136v, preempted states from imposing other requirements. According to § 136v, "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."

The Supreme Court held that, just because the state law claims might have the impact of causing the manufacturer to change its label, this does not mean that the state law "required" such a change:

> An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might "induce" a pesticide manufacturer to change its label should be viewed as a requirement.

Bates, 544 U.S. at 443. In other words, while states were prohibited from regulating pesticide labels, a tort claim that a label was misleading did not constitute regulation, even though it might have result in a manufacturer seeking to

change its label. *Sleath v. W. Mont Home Health Servs., Inc.*, 16 P.3d 1042, 1051 (Mont. 2000) ("While a damage award may prompt a pesticide manufacturer to seek the EPA's approval for a change in labeling, it does not directly command such a change.").

Similarly, in the Airline Deregulation Act (49 U.S.C. § 1301 *et seq.*) ("ADA"), Congress preempted any state law "relating to rates, routes or services of any air carrier having authority under Title IV of this Act to provide air transportation." 49 U.S.C. App. § 1305(a)(1). In *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995), the Fifth Circuit, sitting *en banc*, decided that this did not preempt a tort claim for someone injured while flying on a commercial aircraft. The *Hodge* Court held that federal preemption of state regulation of airlines did not displace garden variety tort claims, even when they were incurred while the air carrier was providing "services." "Thus, federal preemption of state laws, even certain common law actions 'related to services' of an air carrier, does not displace state tort actions for personal physical injuries or property damage caused by the operation and maintenance of aircraft." *Hodges*, 44 F.3d at 336.

The above preemption analysis is also true with respect to federal regulation of nuclear energy. Federal law generally preempts state regulation of that industry, but, again, tort liability and other state law claims of general applicability that may have an incidental effect on the regulated industry are not preempted. In *Silkwood*

v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984), the Court held "that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." The *Silkwood* Court noted that Congress showed a willingness to accept a tension between uniform federal regulation of nuclear safety issues with continued application of state tort law:

> No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them.

Silkwood, 464 U.S. at 256. Plaintiffs here submit that there is nothing that suggests that a different rule should apply with respect to federally-regulated railroads, and certainly there is nothing in either the statutory language or the legislative history of the ICCTA that suggests that Congress intended to extinguish all state law tort liability as it applied to railroads.

4. **While it is possible for Congress to eliminate all state tort remedies against an industry without creating a substitute remedy, this is extremely rare and the ICCTA was not intended to accomplish this.**

   a) The language and Legislative History of the ICCTA shows Congress intended the scope of its preemption to be narrow and focused on state economic regulation of rail transportation.

"The purpose of Congress is the ultimate touchstone in every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (attribution omitted). While Congressional intent is primarily discerned "from the language of the pre-emption statute and the statutory framework surrounding it," the "structure and purpose of the statute as a whole" is "also relevant." *Medtronic*, 518 U.S. at 486 (citations and attribution omitted).

Here, the Congressional purpose in passing the ICCTA was primarily to abolish the ICC and to deregulate Railway Companies. The bill makes its purpose clear in its preamble:

> An Act – To abolish the Interstate Commerce Commission, to amend subtitle IV of title 49, United States Code,[6] to reform economic regulation of transportation, and for other purposes.

(App. 229). The ICCTA was primarily passed to end the practice of government rate-setting by the ICC. Significantly, this says nothing about totally immunizing railroads from tort liability in all 50 states. It hardly seems likely that Congress intended that such a profound change in the law would reasonably fit within the "other purposes" set out in the statute's statement of purpose.

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[6] A section titled "Miscellaneous Provisions" and addressing such matters as "commercial space launch activities," "fiber drum packaging," and a "domestic trade study." (App. 230).

The Vermont Supreme Court examined the ICCTA and its legislative history, and concluded that the congressional intent in enacting the bill was—besides abolishing the ICC—to deregulate the rail industry and establish the STB with jurisdiction over some aspects of interstate rail activity:

> In 1995, Congress enacted the ICCTA, which abolished the Interstate Commerce Commission, established the Surface Transportation Board (STB) and granted the STB jurisdiction over certain aspects of interstate rail activity. Its purpose was to deregulate the economic activity of surface transportation industries.

In re Vermont Ry., 171 Vt. 496, 498 (2000) (internal citations omitted). The *Vermont Ry.* Court explained that the bill's legislative history shows that Congress intended that the states retain their historic police powers:

> Nevertheless, *it retained the traditional police powers reserved to the states by the Constitution*. H.R.Rep. No. 104–311, at 95–96, reprinted in 1995 U.S.C.C.A.N. at 807–08 (noting with respect to jurisdictional provision of bill that explicit disclaimer regarding states retaining their residual police powers was unnecessary; although Congress intended to preempt all state regulation of economic activity, including state securities regulation, the states nevertheless "retain the police powers reserved by the Constitution" under the bill).

Vermont Ry., 171 Vt. at 498-99.

In *Fla. E. Coast Ry.* the Court came to a similar conclusion, namely, that the ICCTA intended to untangle the ICC's regulatory control over railroads and rate-setting, and, outside of that sphere, was intended to have no impact on state laws of general applicability. The Court quoted from the House Conference Report which noted that, while the remedies provided by the ICCTA were intended to be

exclusive, state laws of general application "'remain fully applicable unless specifically displaced, *because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation.*'" *Florida E. Coast Ry.*, 266 F.3d at 1339 (quoting from H.R. Conf. Rep. 104–422 (1995), at 167, *reprinted in* 1995 U.S.C.C.A.N. 850, 852 (emphases in *Florida E. Coast*). A commentator's review of the ICCTA's legislative history reached a similar result; that the Act focused on economic deregulation with no intent to deprive the states of their historic police powers:

> A detailed analysis of the legislative history if the ICCTA reveals that Congress had no intention of allowing the ICCTA to foreclose the application of local police powers. As noted in Part II, the main congressional intent behind the ICCTA was to free the railroad industry from economic impediments . . . The [House report] never mentioned a need for eliminating state and local zoning or environmental protection, nor did it find that local laws impeded a railroad's economic success.

Eldredge, M., *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. Colo. L. Rev. 549, 587 (2004). *See also Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79, 85, 979 N.E.2d 1273, 1281 (2012) ("the ICCTA's legislative history indicates that Congress did not intend to preempt any and all state laws that might touch upon or indirectly affect railway property.").

In 1997, two years after it enacted the ICCTA, Congress enacted another bill which limited a portion of the rail industry's tort liability—further evidencing that Congress did not intend the ICCTA to absolve the railroad industry from liability

for its torts. Congress passed 49 U.S.C. § 28103, which limited a railroad's liability "in a claim for personal injury to a passenger, death of a passenger, or damage to property of a passenger arising from on in connection with the provision of rail passenger transportation . . ." 49 U.S.C. § 28103 (a)(1). This statute limited the railroad's liability for punitive damages when the passenger could show the railroad acted "with a conscious, flagrant indifference to the rights or safety of others," 49 U.S.C. § 28103 (a)(1) and limited passenger liability "arising from a single accident" to $200,000,000. 49 U.S.C. § 28103 (a)(2). If Congress had absolved Defendants from all tort liability related to their rail operations in 1995, it would have been wholly unnecessary for it to pass restrictions on tort liability for passengers injured in rail transportation in 1997.

b) While it is theoretically possible for Congress to extinguish state tort remedies without providing a federal remedy, no intent to do so is shown here.

The remarkable nature of the District Court's Order must be stressed here: in dismissing Plaintiffs' claims without leave to amend, the Court necessarily found that there were no possible facts Plaintiffs could allege that would permit their damage claims to escape ICCTA preemption. Yet, as the Eighth Circuit acknowledged in *Griffioen,* federal law supplies no remedies for the Plaintiffs. *Griffioen*, 785 F.3d at 1191. As such the District Court, presuming as it must the truth of the allegations contained in the CAP that Defendants' negligent conduct

caused immense property damage to nearly 20,000 people, found that Congress intended to extinguish any possible state law remedy for those people while providing no federal remedy in its place. Plaintiffs submit that the District Court should have declined to reach this result, given the absence of any showing that, when it passed the ICCTA, Congress intended to immunize railroads from tort liability in all fifty states.

In fact, the federal courts have repeatedly held that imposition of a federal regulatory scheme does not extinguish state tort law remedies against the regulated entities, at least in the absence of an express congressional intent to do so. This was, for example, the holding of the *Silkwood* Court, which held that the extensive federal regulation of the nuclear industry did not extinguish state tort law claims:

> Indeed, there is no indication that Congress even seriously considered precluding the use of such remedies either when it enacted the Atomic Energy Act in 1954 and or when it amended it in 1959. This silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.

Silkwood, 464 U.S. at 251. The courts reached similar conclusions about the Airline Deregulation Act (ADA), for similar reasons:

> Significantly, too, neither the ADA nor its legislative history indicates that Congress intended to displace the application of state tort law to personal physical injury inflicted by aircraft operations, or that Congress even considered such preemption. This silence takes on added significance in light of Congress's failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe

> that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.

Hodges, 44 F.3d at 338 (footnotes, citation and attribution omitted).

The Court can take judicial notice of the fact that on occasion railroads damage property and injury or kill persons through their own negligence. For example, last year an Amtrak commuter train derailed, killing 8 persons and injuring more than 200. Preliminary reports indicate that the cause of the crash was that the train was travelling at an unsafe speed through a curved portion of the track. (App. 232-239).

Presuming that the crash was due to the railroad's negligence, the District Court's apparent position is that the persons injured and the families of the persons killed have no remedy at all against the railroad. The train was clearly engaged in rail "operations" at the time of the crash, and imposing liability on Amtrak would clearly involve after-the-fact regulations of the speeds at which Amtrak can operate its trains. This would be an absurd result, and the Plaintiffs submit that depriving these persons of a remedy was not what Congress believed it was doing when it enacted the ICCTA.

C. The Plaintiffs' claims involve rail safety rather than economic issues, and as such preemption should be examined under the FRSA rather than the ICCTA.

1. The standard of review is for correction of error, and the issue was preserved for appeal.

Given that Property Owners appeal the District Court's grant of Defendants' Motion to Dismiss on the pleadings, review is for correction of error. *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994).

The issue of the impact of the FRSA rather than the ICCTA on the Plaintiffs' claims was raised at the District Court and therefore was preserved for appeal. (*E.g.* App. 78-79).

2. Under the FRSA, state law claims addressing railroad safety issues are not preempted.

The Federal Railroad Safety Act ("FRSA") is a comprehensive federal scheme governing the safety of railroad operations. 49 U.S.C. § 20101. While the ICCTA preempts state laws that intrude within its sphere—*i.e.*, state laws that purport to directly economically regulate railroads—the FRSA has an express provision stating that state laws that govern rail safety are not preempted. Specifically, the FRSA provides that "[n]othing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage" on the grounds that a party "failed to comply with a State law . . ." 49 U.S.C. § 20106(b). On its face this statute clearly applies, as the Plaintiffs are bringing an "action under State law seeking damages for . . . property damage" alleging Defendants "failed to comply with a State law." As such, under the FRSA the Plaintiffs' state law claims for relief are affirmatively *not* preempted.

3. Claims involving rail safety, like the Plaintiffs', are governed by the FRSA rather than the ICCTA.

The line between what claims are preempted by the ICCTA and what claims are expressly not preempted by the FRSA was explored in *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (6th Cir. 2001). *Tyrrell* involved a claim by a railroad worker injured due to the railroad's violation of a state law mandating certain clearances between tracks. *Tyrrell*, 248 F.3d at 520. Because this state law

mandated certain requirements for track location, it could arguably constitute direct regulation of rail transportation, and be subject to preemption by the ICCTA under the *Franks* test discussed above.

In *Tyrrell*, the district court had ruled that the ICCTA preempted plaintiff's claim. The Sixth Circuit reversed, holding that in giving such broad scope to the ICCTA the district court effectively repealed the FRSA's savings clause:

> Rather, the district court's decision erroneously preempts state rail safety law that is saved under FRSA if it tangentially touches upon an economic area regulated under the ICCTA. As a result, this interpretation of the ICCTA implicitly repeals FRSA's first saving clause.

Tyrrell, 248 F.3d at 522-523.

The *Tyrrell* Court resolved the issue by narrowing the scope of ICCTA preemption, interpreting it "*in pari materia*"[7] with the FRSA. *Tyrrell* held that, so modified, the ICCTA's scope involved "encouraging safe and suitable working conditions in the railroad industry," and "economic regulation and environmental impact assessment." *Tyrrell*, 248 F.3d at 523. The FRSA, on the other hand, governed issues involving rail safety, and so governed whether a state law requiring certain rail clearances was preempted.

[7] In other words, given that there were two statutes which purported to cover railroad operations, they had to be construed in light of each other.

This position was adopted by the Eighth Circuit in *Washington County*, when it determined that Iowa Code section 327F.2, which requires railroad companies to keep railroad bridges in good repair, was not preempted by the ICCTA:

> Adopting the position urged by the United States and the STB as amici, the court held that ICCTA and the FRSA must be construed *in pari materia;* that the Federal Railroad Administration under the FRSA exercises primary authority over rail safety; and therefore [] the FRSA, not ICCTA, determines whether a state law relating to rail safety is preempted.

Washington County, 384 F.3d at 560.

Numerous cases agree that state law claims alleging that railroads caused property damage or personal injury are subject to a review for preemption in light of the FRSA and its saving clause, accordingly are not preempted by the ICCTA. For example, in *Sigman v. CSX Corp*, No. 15-13328, 2016 WL 2622007 (S.D.W. Va. 2016) a rail tanker derailment caused "release and migration of toxic substances into the area waterways." *Sigman*, 2016 WL 2622007, at *3. The Court held that the scope of preemption was governed by the FRSA, rather than the ICCTA. "Plaintiffs' claims all relate to rail safety, while the preemption scope of the ICCTA envelops the economic regulations of railroads." *Id.* at *6. As such, the *Sigman* Court held that the plaintiffs' state law tort claims were not preempted.

Similarly, in *Smith v. CSX Transp.*, No. 13 CV 2649, 2014 WL 3732622 (N.D. Ohio 2014), a class of plaintiffs alleged that a derailment caused a chemical

spill and, as a result, "approximately 400 homes and 'hundreds to thousands of residents within a half-mile to mile radius' of the spill were forced to evacuate." *Id.* at *1. The *Smith* Court held that plaintiffs' claims, which involved allegations that the railroad's failure to conduct proper safety inspections of the tracks, involved safety issues rather than economic regulation, and were governed by the FRSA rather than the ICCTA. "Because those claims relate to rail safety, and do not amount to the economic regulation of railroads, the ICCTA does not preempt Plaintiffs' claims." *Id.* at *2.

Plaintiffs submit that their tort law claims for recovery of property damage against Defendants involve rail safety subject to the FRSA and are not impressible economic regulation subject to the ICCTA. Plaintiffs do not seek to change the rates that railroads charge, the routes that they maintain, or any other aspect of the railroads' operation. Instead, Plaintiffs seek compensation for losses due to Defendants' safety-related, negligent conduct. Accordingly, the injuries at the heart of Plaintiffs' claims are more like the chemical spills in *Smith* and *Sigman* than they are like the rates, routes, and services regulated by the ICC and then de-regulated by the ICCTA. At any rate, it was clearly erroneous for the District Court to decide this matter *on the pleadings*, without the benefit of an evidentiary record.

D. The District Court erred by dismissing the Plaintiff Class' claims on the pleadings, without a factual showing by Defendants that the state laws at issue actually burdened rail transportation.

1. The standard of review is for correction of error, and the issue was preserved for appeal.

Given that Plaintiffs appeal the District Court's grant of Defendants' Motion to Dismiss on the pleadings, review is for correction of error. *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994).

The issue of the propriety of the District Court dismissing the Plaintiffs' claims on the pleadings was raised at the District Court and therefore was preserved for appeal. (*E.g.* App. 84-86).

2. The District Court erred in Finding Plaintiffs' claims burdened rail transportation, in the absence of facts establishing such a burden.

There may be cases where preemption of state law claims by the ICCTA is obvious from the face of the pleadings. For example, state law claims that a railroad's rates were too high or demanding that it relocate one of its rail lines would be preempted on their face. However—in *this* case, like in most cases—the extent to which a state claim intrudes on rail operations is a fact based-issue, which cannot be decided on the pleadings.

In *Elam*, the Fifth Circuit held that whether their common law negligence claim based on the railroad's failure to properly warn that the train was at the crossing required a factual analysis to determine whether it was preempted:

> Because the ICCTA does not completely preempt the Elams' simple negligence claim, our inquiry is whether Mississippi's negligence law, as applied to the facts of this case, would have the effect of unreasonably burdening or interfering with KCSR's operations. Our inquiry is fact-based, and KCSR must come forward with evidence of the specific burdens imposed. General evidence that rail crossings affect rail transportation is insufficient.

Elam, 635 F.3d at 813 (citations and attributions omitted). *See also Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 47 (1st Cir. 2008) ("Finally whether a particular state or local regulation is being applied so as to not restrict unduly the railroad from conducting its operations, or unreasonably burden interstate commerce, *is a fact-specific determination*.").

The fact-specific nature of most ICCTA preemption issues was also noted in *People v. Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th 1513, 1528, 148 Cal. Rptr. 3d 243, 254 (2012). There the Court noted that "[f]or state or local actions that are not facially preempted, the ICCTA preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation." (citations and attributions omitted).

Similarly, in the *Franks* case the Court determined that whether the railroad crossings sought by the plaintiff would significantly burden rail operations was necessarily factual in nature:

> We conclude that the district court decided only that all railroad crossings affect rail transportation. Certainly at one level that is true.

> We have held, though, that more is required before preemption applies.

Franks, 593 F.3d at 415. The *Franks* Court rejected "Union Pacific's argument that general testimony regarding railroad crossings satisfies the burden of proving preemption under the as-applied test" holding that what was required was evidence that the specific crossings at issue would substantially impact rail operations:

> By definition, an as-applied challenge would need to address specific crossings. Otherwise, a finding of as-applied preemption in this case would be nothing more than a finding that private crossing disputes are always preempted, at least in low-lying areas. We have rejected that view of ICCTA preemption.

Franks, 593 F.3d at 415.

Respectfully, Plaintiffs submit that the District Court's conclusory and proclamation that the Plaintiffs are "complaining about actions taken by the railroad Defendants that are an essential part of Railway Companies' operations" (App. 342) is not sufficient evidentiary support for Defendants' contention that Plaintiffs' claims place a significant burden on railroad transportation.

E. The District Court erred in holding that Iowa law requiring rail bridges to be kept in good repair was preempted by the ICCTA.

1. The standard of review is for correction of error, and the issue was preserved for appeal.

Given that Property Owners appeal the District Court's grant of Defendants' Motion to Dismiss on the pleadings, review is for correction of error. *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994).

The issue of the whether Iowa Code section 372F.2 was preempted was raised at the District Court and therefore was preserved for appeal. (*E.g.* App. 65-67).

2. In *Washington County* the Eighth Circuit held that *the very statute* under which Plaintiffs are proceeding, requiring railroads to keep rail bridges in good repair, was not preempted by the ICCTA.

As noted above, in *Washington County* the Eighth Circuit looked to the FRSA to hold that a state law which directly regulated the manner in which railroads maintained their rail bridges was not preempted by the ICCTA. This case has particular significance because one of the state statutes under which Plaintiffs are proceeding here was the same one that the *Washington County* Court held was saved from preemption.

Specifically, some of the Plaintiffs' claims are based on Iowa Code section 372F.2, a law which requires railroads to "maintain, and keep in good repair all bridges . . . necessary to enable it to cross over or under any canal, watercourse, other railway, public highway, or other way . . ." The statute further provides that railroads violating their responsibilities under this statute "shall be liable for all damages sustained" by reason of that violation. Iowa Code § 327F.2.

The District Court found that Plaintiffs' claims under this Iowa statute were preempted by the ICCTA. Plaintiffs submit that this is error. In fact, in *Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557 (8th Cir. 2004) the

Eighth Circuit specifically held that Iowa Code section 327F.2 was not preempted by the ICCTA.

In *Washington County* the County sought to have a railroad ("IC&E") replace four aging bridges. Two of the bridges were railroad bridges over highways, and two were bridges for road traffic that spanned IC&E rail lines. IC&E declined to pay for the new bridges so "the County petitioned the Iowa Department of Transportation ('IDOT') for a ruling that IC&E must pay for replacement bridges to comply with Iowa Code § 327F.2." *Washington County*, 384 F.3d at 558.

Before that ruling could be issued, IC&E filed a federal lawsuit raising the precise issue here, whether Iowa Code section 327F.2 was preempted by the ICCTA:

> Before that hearing was completed, the parties obtained a stay, and IC & E commenced this action against the County and the Director of IDOT, seeking a declaratory judgment that § 327F.2 is preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA").

Washington County, 384 F.3d at 558.

However, in deciding that section 327F.2 was not preempted, the Eighth Circuit noted that it was not written in a vacuum. Drawing support from the Sixth Circuit's *Terrell* decision, the *Washington County* Court noted that Congress had created two sets of statutes governing rail transportation; the ICCTA which

addressed economic regulation of railroads and the FRSA, which dealt with rail safety. As noted above, the FRSA expressly states that state laws addressing rail safety are *not* preempted. The *Washington County* agreed with *Terrell* that the scope of ICCTA preemption had to be examined in light of the FRSA, and the two statutes had to be "construed *in pari materia*. *Washington County*, 384 F.3d at 560.

The *Washington County* Court then held that, in issues dealing with rail safety, the more limited preemption provisions of the FRSA governed, rather than the ICCTA. "[T]he Federal Railroad Administration under the FRSA exercises primary authority over rail *safety*; and therefore that the *FRSA, not ICCTA,* determines whether a state law relating to rail safety is preempted." *Washington County*, 384 F.3d at 560. And, while IC&E argued that the reason the County wanted the bridges replaced was "for reasons of 'highway improvement,' not rail safety," the *Washington County* Court held this argument was "unpersuasive" because replacing the bridges was clearly motivated by safety concerns. *Id.*

The *Washington County* Court had a second reason for finding the statute was not preempted, which was the interplay between federal and state transportation laws. Pointing to statutes that existed at the time of the ICCTA's passage, the Court noted that "Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway

safety and highway improvement in general . . . ." *Washington County*, 384 F.3d at 561. The Eighth Circuit held that given this, and given the ICCTA's silence on the issue of railroad safety, there was no indication that Congress intended the ICCTA to completely occupy the field of railroad bridge regulation:

> ICCTA did not address these problems. Its silence cannot reflect the requisite clear and manifest purpose of Congress to preempt traditional state regulation of public roads and bridges that Congress has encouraged in numerous other statutes.

Washington County, 384 F.3d at 561 (attribution omitted).[8]

In determining that § 327.F2 was preempted in spite of *Washington County*, the District Court concluded as follows:

> As to Plaintiffs' reliance on the *Washington County* case, the Court finds *Washington County* is distinguishable because it involved bridges that intersected with highways, which is a highway safety issue that incorporates state regulations. In the case at bar, the bridges serve railroad purposes only and do not support a highway crossing for motor vehicles.

(App. 342). This ruling ignores a central holding of *Washington County*, which is that proper construction of bridges is a rail safety issue and, as such, preemption is governed by the *FRSA* rather than the *ICCTA*. 384 F.3d at 560.

[8] If Washington County had the police power to make sure rail bridges did not harm citizens driving on highways traveling under and over crumbling rail bridges, then certainly the state has the police power pursuant to section 327F.2 to hold railroads liable for property damage due to flooding caused by Defendants' failure keep their rail bridges in good repair.

VI. CONCLUSION.

Plaintiffs' CAP has been on file for over three years and, for this entire period, Defendants have repeatedly used questionable procedural mechanisms to avoid discovery or determination of the merits. Defendants argued, first, that Plaintiffs' claims are preempted by the FRSA, then that they were completely preempted by the ICCTA, and now, when both of their previous arguments failed, that the claims are subject to ICCTA conflict preemption. Plaintiffs submit that Defendants continue to get it wrong, and respectfully ask this Court to overturn the decision of the District Court and remand this case for a trial on the merits.

VII. REQUEST FOR ORAL ARGUMENT

Appellants respectfully request to be heard in oral argument.

CERTIFICATE OF COMPLIANCE.

I certify that pursuant to Circuit Rule 32(a)(7)(C)(i) this brief is reproduced using Times New Roman 14 point type, a proportionately spaced typeface. The lines are double-spaced and the word count is approximately 13,881 words.

/s/ *Sam Sheronick*
Sam Sheronick